

TEXAS DEPARTMENT OF LICENSING AND REGULATION



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Opinion Committee

November 1, 1999

The Honorable John Cornyn
Texas Attorney General
ATTN: Opinions Committee
Open Government Section
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-41085-99
I.D. # 41085

RQ-0137-JC

Re: Opinion request on HIV testing for boxing participants

Dear General Cornyn:

The Texas Department of Licensing and Regulation Commission and I, Commissioner William H. Kuntz, Jr., respectfully requests your opinion on whether rules may be promulgated to require HIV testing on boxers.

The Texas Department of Licensing and Regulation (TDLR) is the regulatory authority in Texas for Combative Sports under Title 13, Subtitle B, Chapter 2052 of the Occupations Code. The Commissioner may adopt rules to establish reasonable qualifications for an applicant seeking a license from the department. TEX.OCC.CODE ANN. §2052.052(b)(2).

I am considering the proposal and adoption of a rule that would require contestants in a boxing event to submit to Human Immunodeficiency Virus (HIV) testing prior to licensure. Additionally, the rule would provide for disqualifying an applicant if he/she tests positive for HIV or HIV anti-bodies.

The legislative purpose, as stated in the Boxing and Wrestling Act is to improve the general welfare and safety of the citizens and to protect the best interest of contestants and the public.¹

The Center for Disease Control (CDC) has not certified a case where Acquired Immune Deficiency Syndrome (AIDS) is transmitted through participation in a sporting event; the CDC does state that transmission can occur in sports with direct body contact in which bleeding might be expected to occur.² The CDC has also reported cases of health care workers contracting

¹ The legislative purpose stated herein is from TEX.REV.CIV.STAT.ANN art 8501-1 Art. § 2 (Vernon 1995). The non-substantive codification of art. 8501-1 to the Occupations Code effective September 1, 1999 states in section 2052.002 the Legislative Declaration as, "This chapter shall be liberally construed and applied to promote its underlying purposes."

² "Should I be Concerned about getting infected with HIV while playing sports?" CDC Update web page, November 30, 1998. <http://www.cdc.gov/nchst/hiv-aids/pubs/faq/faq30.htm>.

AIDS from patients when infected blood has contact with a worker's open cut, eyes or inside the nasal passage.³ The Texas Department of Health recognizes that health care personnel are at risk for exposure to HIV if the workers have come into contact with infected blood and an open wound or skin or mucous membranes.⁴

Boxing is a blood sport. There's a possibility, however remote, that HIV can be transmitted from an infected boxer to another boxer in the same manner as documented by the CDC for healthcare workers and patients.

We polled other jurisdictions with statewide authority over professional boxing contests, and 18 out of 43 states responding, require HIV testing. In those jurisdictions requiring HIV testing, a positive test result medically disqualifies boxers from fighting.

Other medical testing requirements are present in the Texas regulatory scheme. The Code requires female Elimination Tournament⁵ contestants to provide a negative pregnancy test prior to participating in an Elimination Tournament.⁶ By Rule, all female boxing contestants must provide negative pregnancy test results prior to boxing.⁷ Other medical requirements for boxers include a negative Hepatitis B Virus (HBV) test.⁸ The Rules stated herein were promulgated as reasonable qualifications to protect the health safety and welfare of both participants.

We are aware of TEX. HEALTH & SAFETY CODE ANN. § 81.102 (Vernon 1992), *Tests for the Acquired Immune Deficiency Syndrome & Related Disorders* (the Health & Safety Code) which prohibits any person from requiring another person to undergo a test designed to determine if a person has AIDS or HIV infection. A violation of § 81.102 is a class A misdemeanor. Section 81.104 of the Health & Safety Code authorizes a private cause of action against any person who violates § 81.102. At least one case has determined that a state agency

³ "How is HIV passed from one person to another?" CDC Update Web page, November 30, 1998. <http://www.cdc.gov/nchst/hiv-aids/pubs/faq/faq16.htm>.

⁴ 25 TAC 97, § 97.137

⁵ A series of boxing matches in which boxers compete until only one contestant remains in each weight category. § 2052.002 (6).

⁶ A female elimination tournament contestant may not participate in an elimination tournament unless the contestant provides the ringside physician with proof of a negative pregnancy test result. § 2052.205.

⁷ A negative pregnancy test shall be obtained the day before or the day of the fight. Results shall be submitted to the Department before the weigh-in. 16 TAC 61, § 61.79(a).

⁸ All boxers applying for a license shall pass a comprehensive medical examination before they can be licensed. The examination consists of a medical history, boxing history, a physical examination, and a report of a *negative HBV test*. 16 TAC 61, § 61.109(a).

is a person under these sections of the Health & Safety Code, and that the statutory scheme is specifically designed to waive governmental immunity.⁹

In the event the proposed rule is adopted, test results will remain confidential as required by Government Code § 552.101, the Medical Practice Act art. 4495 (b) and Health & Safety Code § 81.103.¹⁰

In our analysis of the proposed rule proposals, we are also aware that the initial grant of a license is generally construed as a privilege, which may turn into a property right, once a license is issued.

My first question is:

Is the word "require" in § 81.102 of the Health and Safety Code applicable to the proposed rule for HIV testing given that a boxing contestant applicant is seeking a privilege from the State of Texas? In other words, if the TDLR mandates HIV testing as a condition of licensure, is the TDLR "requiring" that person to take the test since the applicant does not have a constitutionally protected interest in participating in a boxing contest?

Section 81.101(3) of the Health and Safety Code defines a bona fide occupational qualification as (1) one that is reasonably related to the satisfactory performance of the duties of the job and (2) for which there is a reasonable cause for believing that a person with the HIV antibodies would be unable to perform satisfactorily the duties of the job with safety. Section 81.102(b) clearly contemplates that employers would invoke this exception. We do not contend TDLR is an employer, however assert that an HIV negative status is a bona fide occupation qualification for boxers under § 81.101(3). There are no less discriminatory means of satisfying the occupation qualification without changing the sport of boxing.¹¹ We also believe that a boxer with HIV antibodies can not safely perform as a boxer in that the safety of the infected boxer's opponent, ringside officials and TDLR inspectors is at stake.

My second question is:

If you opine that the word "require" applies to the acquisition of a privilege, may the Commissioner invoke the exception in § 81.102(5)(A) which states a person may require another person to undergo a medical procedure to detect HIV infection if the

⁹ Texas Dept. of Health v. Doe No. 03-98-00677-CV, slip op. 1999 WL 372536 (Tex.App.-Austin June 10, 1999) (not released for publication, subject to withdrawal).

¹⁰ Your office determined previously in an informal letter ruling, that medical records held by the TDLR as part of a boxer's application are confidential, even if the license holder is deceased. OR97-0474 (March 4, 1997).

¹¹ Utilizing universal precautions such as the use of eye gear, stopping the fight when blood is spewed, and requiring masks would alter the sport of boxing into non-existence. The CDC recommends withdrawing a sports participant who is bleeding until the wound stops bleeding. "Should I be Concerned about getting infected with HIV while playing sports?" CDC Update web page, November 30, 1998 Divisions of HIV/AIDS Prevention. <http://www.cdc.gov/nchst/hiv-aids/pubs/faq/faq30.htm>.

test is necessary as a bona fide occupational qualification and there is not a less discriminatory means of satisfying the occupational qualification?

My third and fourth questions are:

If the TDLR may invoke the bona fide occupational qualification exception, must the TDLR carry the burden of proving that the qualification is necessary under § 81.102(b), given that the TDLR is not an employer of boxers?

If the TDLR may invoke the bona fide occupational qualification exception, to whom or what forum must the TDLR show that the test is reasonably related to the satisfactory performance of the duties of the job and there is reasonable cause to believe that a person with the HIV antibodies would be unable to perform satisfactorily the duties of the job with safety?

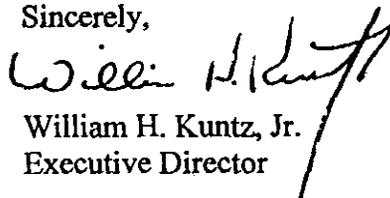
My last question regards federal preemption in the boxing field. The Professional Boxing Safety Act of 1996¹² requires states to adopt procedures that will give reciprocity to other states' license suspensions¹³ due to physician denial of certification. The Act goes further and states that a boxing commission may allow a boxer under suspension to participate in a match under limited circumstances.

My fifth question is:

In the event a boxer's license is suspended in another state due solely to a positive HIV test, may the TDLR uphold that suspension and not run afoul of any discrimination laws or the Health Code provisions previously cited herein?

I thank you for your attention to my questions. If you require additional information, please contact my General Counsel, Theda Lambert at 512/463-3306 or by e-mail at theda.lambert@license.state.tx.us or me at 512/463-3173 or by e-mail at william.kuntz@license.state.tx.us.

Sincerely,


William H. Kuntz, Jr.
Executive Director

/dm

¹² Public Law 104-272, 15 USC 6306 Section 7(a)(2)(B).

¹³ H.R. 1832, the Muhammad Ali Boxing Reform Act, Section 8, is presently pending before Congress and proposes an amendment to section 2 of the Professional Boxing Safety Act of 1996 to state, "The term 'suspension' includes within its meaning the revocation of a boxing license."

c: TDLR Commission w/out attachments
Dick Cole
Jimmy Martin

Attach: Exhibit I, Chart of other jurisdictions requiring HIV testing
Exhibit II, Boxing law and rules
Exhibit III, Federal boxing law
Exhibit IV, Proposed federal boxing legislation
Exhibit V, CDC Update Information
 Exhibit V-a, How is HIV passed form one person to another?
 Exhibit V-b, Are health care workers at risk of getting HIV on the job?
 Exhibit V-c, Should I be concerned about getting infected with HIV while playing
 sports?
Exhibit VI, Health & Safety Code provisions § 81.101- § 81.104
Exhibit VII, 25 TAC § 97.137
Exhibit VIII, Doe v. DHS