



TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

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November 9, 2006

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Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

OPINION COMMITTEE

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RQ-0553-GA

Re: Request for Attorney General's Opinion

Dear General Abbott:

The Texas Board of Veterinary Medical Examiners (the Board) is charged with implementing the Veterinary Licensing Act, Chapter 801, Texas Occupations Code. The Board may adopt rules as necessary to administer the chapter and to protect the public. Occ. Code §801.151. Since veterinarians (licensees) dispense drugs and controlled substances, the Board requires by rule that veterinarians possess a Department of Public Safety (DPS) controlled substances certificate. The rule, 22 TAC §573.43, states, in part:

(a) ...a licensee may not prescribe, dispense, deliver, or order delivered, any controlled substance unless the licensee is currently registered with...the Texas Department of Public Safety (DPS) to dispense controlled substances...

There are no exceptions under the rule. If you are a Texas licensee prescribing or dispensing controlled substances, you must possess a current DPS certificate or registration.

Chapter 481, Health & Safety Code, is the Texas Controlled Substances Act (the Act). The director of the DPS may adopt rules to administer and enforce the chapter (Health & Safety Code §481.003), and has done so in Title 37, Part 1, Chapter 13 of the Texas Administrative Code. A person must possess a DPS registration in order to dispense, prescribe, or possess a controlled substance. Health & Safety Code §481.061. The Act exempts certain individuals from the requirement of registering with the DPS. The exemptions include "...an agent or employee of a dispenser of the controlled substance acting in the usual course of business or employment..." Health & Safety Code §481.062. The DPS and our Board interpret an "agent or employee" to be a non-licensed person, such as a technician or assistant working under the direction of a licensed practitioner.

We respectfully request your opinion on the following questions:

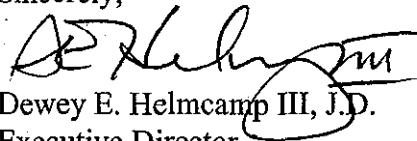
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1. Is the Board's Rule 573.43 a lawful exercise by the Board of the legislature's grant of authority to adopt rules necessary to administer the Veterinary Licensing Act and protect the public?
2. If Question 1 is answered in the affirmative, does the state's Controlled Substances Act, Chapter 481 of the Health & Safety Code, nevertheless confer exclusive rulemaking authority on the DPS with regard to controlled substances and thereby preempt or preclude rulemaking on controlled substances by the Board?

One attorney has expressed the opinion that the Board's Rule 573.43 exceeds the Board's rulemaking authority and is fatally inconsistent with the Controlled Substances Act, which gives the DPS exclusive authority to administer the Act. The Board contends that Rule 573.43 is a valid expression of its rulemaking powers and is consistent with the regulatory scheme of the Veterinary Licensing Act and that adoption of a rule on controlled substances registration is not precluded by or inconsistent with the Controlled Substances Act. Attached to this letter are a letter brief from the attorney and a memorandum brief from the Board.

Your consideration of these questions is appreciated. If additional information is needed, please contact me or my General Counsel, Lee Mathews.

Sincerely,



Dewey E. Helmcamp III, J.D.
Executive Director
cc: Donald Ferrill, Esq.
encl.

MEMORANDUM BRIEF
RE: RULEMAKING AUTHORITY

TO: Opinions Committee, Office of the Attorney General

FROM: *DM* Dee H. Mathews, General Counsel, Texas Board of Veterinary Medical
Examiners

RE: Request for Opinion Dated November 2, 2006

DATE: November 9, 2006

By letter dated November 9, 2006, the Texas Board of Veterinary Medical Examiners (the "Board") has requested an opinion from the Office of the Attorney General concerning certain issues related to the Board's rulemaking powers. The Board has asked (1) whether Board Rule 573.43 is a lawful exercise of the Board's rulemaking powers conferred by statute; and (2) whether another statute, the Controlled Substances Act, preempts or precludes rulemaking on controlled substances by the Board.

Attorney Donald Ferrill ("Counsel") of Fort Worth, Texas, in representing a client veterinarian before the Board on a disciplinary matter, has raised the question of whether or not the Board has the authority to enact and enforce its Rule 573.43 (22 TAC 573.43) entitled "Misuse of DEA Narcotics Registration." Counsel is essentially alleging that the Board, in promulgating and enforcing Rule 573.43, has acted outside of its statutory authority. The Board disagrees with this position.

To begin with, the Board is charged with the licensing and regulation of veterinarians by Chapter 801 of the Occupations Code (the "Veterinary Licensing Act" or the "Act"). Rulemaking authority is granted by §801.151, which states in part:

- (a) The board may adopt rules as necessary to administer this chapter.
- (b) The board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medical profession.
- (c) The board shall adopt rules to :
 - (1) protect the public...

Rule 573.43 states, in part:

- (a)...a licensee may not prescribe, dispense, deliver or order delivered, any controlled substance unless the licensee is currently registered with...the Texas Department of Public Safety (DPS) to dispense controlled substances...

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General principals of agency rulemaking are well established. An agency's authority to promulgate rules and regulations may be expressly conferred on it by statute or implied from other powers and duties given or imposed by statute. *Texas Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W. 2nd 679 (Tex. 1992). The determining factor in whether an agency has exceeded its rulemaking powers is whether the rule's provisions are in harmony with the general objectives of the Act involved. *Gerst v. Oak Cliff Savings & Loan Ass'n*, 432 S.W. 2nd 702, 706 (Tex. 1968). To state the matter more precisely, a rule may be challenged on statutory grounds as either being outside of the scope of a statute or inconsistent with the legislative mandates of a statute. 1 RON BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE §4.8 (5th ed. 2002).

Counsel expressly argues that Rule 573.43: (1) contravenes specific statutory language; (2) is counter to the general objectives of the statute; and (3) imposes burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.

With regard to point (1), counsel opines that the rule is inconsistent with a provision in the Texas Controlled Substances Act, Chapter 481, Health & Safety Code. Under that chapter, the DPS has specific authority to adopt rules to implement the chapter. Health & Safety Code §481.003 (a). Under §481.061, registration is required of a person who dispenses controlled substances; the DPS director has implemented this requirement in 37 TAC §13.21. Section 481.062 provides for exemptions from registration. Counsel focuses on §481.062 (a) (1), which says in part:

The following persons are not required to register and may possess a controlled substance under this chapter:

- (1) an agent or employee of a registered...dispenser of the controlled substance acting in the usual course of business or employment...

First, counsel does not allege that Rule 573.43 contravenes any specific language of the Veterinary Licensing Act. He instead finds inconsistency with the Controlled Substances Act, which the Board does not administer, and asserts that the Texas Legislature, by adopting the Controlled Substances Act, put an agency other than the Board in charge of protecting the public from illegal diversion and use of controlled substances. However, nothing in the Controlled Substances Act indicates that regulation of controlled substances in the hands of professional persons is exclusively within the purview of the DPS.

Counsel's argument based on the Controlled Substances Act is that §481.062 (a) (1) exempts *veterinarians* who are employees or agents of registered *veterinarians* from the requirement of registration. This is a misreading of the section. The language of the section is clear and unambiguous. Section 481.062 (a) (1) is consistently interpreted by the DPS to exempt *technical staff, assistants and other non-practitioners who are employees of a practitioner, from the requirement of registration. It does not exempt licensed practitioners who work for other licensed practitioners.* To exempt from registration practitioners who are employees who handle controlled

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substances from registration and require the employers of those practitioners to possess a registration does not make sense and is not intended by the section. DPS interprets its statute and its rules to require all practitioners, including veterinarians, who dispense controlled substances, to be registered. (Telephonic interview with Jodie Patterson, DPS Controlled Substances Registration Program, October 25, 2006) That is the plain language of the statute. The Board's Rule 573.43 says the same thing: All veterinarians who prescribe, dispense, or deliver controlled substances must have a DPS registration. Violation of Rule 573.43 subjects a veterinarian to discipline by the Board. Violation of the Controlled Substances Act subjects a practitioner to criminal sanctions under Subchapter D of the Controlled Substances Act.

Thus, the Board's regulation requiring *all* veterinarians who dispense controlled substances to possess a DPS registration is entirely consistent with the Controlled Substances Act requirements for registration as interpreted by the DPS. Even if Rule 573.43 were more inclusive in its requirements for DPS registration than the DPS's statute and regulations, there is nothing to prohibit the Board from adopting a more stringent rule.

Regarding point (2), counsel argues that Rule 573.43 is contrary to the general objectives of the Veterinary Licensing Act and is an unnecessary "burden" on veterinarians. Nothing could be further from the truth. The Board's requirement that a veterinarian dealing with controlled substances possess a DPS registration is clearly and directly related to protecting the public. In fact, the Veterinary Licensing Act *specifically requires* that veterinarians maintain a record keeping system for controlled substances "as required by Chapter 481 of the Health and Safety Code." Occ.Code §801.359. Far from a registration being simply an unnecessary \$25 paper piece of paper as characterized by counsel, a registration protects and benefits the public by authorizing only certain persons to dispense controlled substances. A veterinarian is one of the few health practitioners that is authorized to directly dispense drugs from on-site inventories. Physicians, for example, must write a prescription that is filled by a pharmacy. The Board's inherent interest in requiring DPS registration for its licensees is obvious. In addition, the DPS's list of current registrations can assist both agencies in notifying practitioners of vital information or regulatory changes concerning controlled substances. This also benefits the Board's regulation of veterinarians. The registration certificate does not simply record a veterinarian's address, as indicated by counsel; it also identifies those schedules of controlled substances that are authorized to be dispensed by the veterinarian. Finally, the DPS can deny an application for registration if the dispenser has knowingly failed to maintain effective security controls over the controlled substances, or has been convicted of a drug related felony, or for other enumerated reasons. The DPS can also revoke a registration. §§481.063, .066. This ability of DPS to deny an application for registration and to revoke a certificate in appropriate cases directly benefit the veterinary profession by assuring that only responsible practitioners are allowed to handle and dispense controlled substances.

In point (3), counsel simply summarizes his previous discussion that the Board's rule is inconsistent with the Controlled Substances Act and poses an undue "burden" on veterinarians without a corresponding benefit. I have argued this is not the case. Registration is not burdensome. See 37

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TAC §13.25. As stated above, registration is required by the DPS and confirmed by the Board by rule.

In summary, the Board believes that its Rule 573.43 is a legitimate exercise of its rulemaking authority. Use of controlled substances is closely linked to the veterinary profession and is subject to Board regulation. The Board processes a significant number of cases involving the improper possession and use of controlled substances, and the prescribing and dispensing of controlled substances are important elements of the practice of veterinary medicine. Counsel has misinterpreted the language of the DPS statutory provision exempting certain persons from registration. The Board's enabling statute and rule and the DPS statute and rules are consistent and complement each other. Both agencies are authorized to enforce its statute and rules. Rule 573.43 is a legitimate response to the Board's statutory directive to adopt rules that protect the public.

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September 29, 2006

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TEXAS STATE BOARD OF
VETERINARY MEDICAL EXAMINERS

Re: Richard Gaither, D.V.M.
Case No.: 06-124

Dear Mr. Mathews:

As you requested, the following is a brief regarding the question of whether or not the Texas State Board of Veterinary Medical Examiners ("Board") had the authority to enact Rule 573.43 Misuse of DEA Narcotics Registration ("Rule") specifically in regard to the requirement that licensees must register with the Texas Department of Public Safety ("DPS") who only dispense and administer controlled substances in the course and scope of their employment with persons registered with the DPS.

While the Texas legislature may delegate its powers to the Board, the legislature must establish reasonable standards to guide the Board. The separation of powers clause of the Texas Constitution requires that the standards given to the Board be reasonably clear in order to be acceptable as a standard of measurement. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740-41 (Tex. 1995); *TEX. CONST.*, art. 2, § 1. Administrative agencies only have the powers

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conferred on them by the legislature and any rules they adopt must be authorized by and consistent with their statutory authority. *Lambright v. Texas Parks and Wildlife Dep't*, 157 S.W.3d 499, 510 (Tex. App. – Austin 2005, no pet. h.). An agency rule is therefore invalid if the agency had no statutory authority to promulgate it.

The Texas legislature's grant of authority to the Board, commonly known as the Veterinary Licensing Act, reads in relevant part as follows:

- “(a) The Board may adopt rules as necessary to administer this chapter.
- “(b) The Board may adopt rules of Professional Conduct appropriate to establish and maintain a high standard of integrity, skills and practice in the veterinary medicine profession.
- “(c) The Board shall adopt rules to:
 - (1) protect the public . . .”

TEX. OCC. CODE ANN., § 801.151.

The only other provision of the Veterinary Licensing Act which could be construed to grant authority to the Board to make the Rule reads as follows:

“A person is subject to denial of a license or to disciplinary action under Section 801.401 if the person: . . .

- “(13) orders a prescription drug or controlled substance for the treatment of an animal without first establishing a veterinarian-client-patient relationship . . .”

TEX. OCC. CODE ANN., § 801.402(13).

The question presented is whether the Board exceeded its rulemaking authority as granted by the Veterinary Licensing Act or as limited by other statutory authority. In construing a statute a court must presume that every word, phrase and expression was deliberately chosen and that words excluded are done so purposefully. *Williams v. Texas State Bd. of Orthotics & Prosthetics*, 150 S.W.3d 563, 573 (Tex. App. – Austin 2004, no pet.). An administrative agency is a creation of the legislature and may only exercise the powers the legislature expressly conferred on it and those necessary to accomplish its duties and it has no additional implied authority. *State v. Exiga*, 715 S.W.3d 429, 433 (Tex. App. – Corpus Christi 2002, no pet.). The rulemaking power of the Board does not even extend to enactment of regulations which are inconsistent with the legislature's intent as expressed in statutes other than those under which the regulations are issued. *Id.* Because the

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Rule is penal in nature, the courts will strictly construe the Board's rulemaking authority when reviewing the Rule. *Id.* In order to establish the Rule's invalidity one of three things must be shown:

- 1) The Rule contravenes specific statutory language;
- 2) The Rule runs counter to the general objectives of the statute; or
- 3) The Rule imposes burdens, conditions or restrictions in excess of or inconsistent with the relevant statutory provisions.

Gulf Coast Coalition of Cities v. Public Util. Comm'n., 161 S.W.3d 706, 712 (Tex. App. – Austin 2005, no pet. h.).

The Rule contravenes specific statutory language of Texas Health and Safety Code Ann. section 481.062(a)(1).

The Rule requires all licensee's of the Board to register with the Texas Department of Public Safety ("DPS") if they dispense or deliver any controlled substances. 22 *TEX. ADMIN. CODE*, § 573.43 (Tex. Bd. Of Vet. Med. Exam'rs, Misuse of DEA Narcotics Registration). The Rule provides no exemption for a licensee acting in the course and scope of employment with a licensee registered with the DPS. *Id.*

The Texas legislature had in mind that an agency other than the Board would be in charge of protecting the public from the diversion of controlled substances from licit to illicit channels. See generally *TEX. HEALTH & SAFETY CODE ANN.*, Chapter 481, hereinafter the Texas Controlled Substances Act. The Director of the DPS was expressly given the legislature's authority to adopt rules to administer and enforce the Texas Controlled Substances Act. *TEX. HEALTH & SAFETY CODE ANN.*, § 481.003(a) and 481.002(13). The Texas legislature specifically exempted from registration with the DPS, agents and employee of dispensers of controlled substances acting in the usual course of business or employment. *TEX. HEALTH & SAFETY CODE ANN.*, § 481.062(a)(1). Dispenser means a practitioner. *TEX. HEALTH & SAFETY CODE ANN.*, § 481.002(13). A practitioner means a veterinarian. *TEX. HEALTH & SAFETY CODE ANN.*, § 481.002(39)(A). Therefore, the Texas legislature has exempted from registration with the DPS, agents or employees of registered veterinarians in the usual course of their business or employment. By failing to exempt from registration with the DPS those who are acting in the course and scope of their employment with a DPS registrant, the Rule runs counter to the general objectives of the Texas Controlled Substances Act and contravenes specific statutory language of that act.

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By rule, the Director of the DPS has also specifically exempted from registration under the Texas Controlled Substances Act those who are exempted from federal registration under the *Code of Federal Regulations*, Title 21 Chapter II, §§ 1301.22-1301.25. 37 *TEX. ADMIN. CODE*, § 13.24(3) (Texas Department of Public Safety, Exemption from Registration). The *Code of Federal Regulations*, Title 21, Chapter II, § 1301.22 provides that "The requirement of registration is waived for any agent or employee of a person who is registered to engage in any group of independent activities, if such agent or employee is acting in the usual course of his/her business or employment." 21 *C.F.R.*, § 1301.22. Therefore, the Board's Rule also contravenes the rules promulgated by the Director of the DPS who is the one given the authority to administer and enforce the Texas Controlled Substances Act.

The Rule runs counter to the general objectives of the Veterinary Licensing Act

The only thing that is required of a veterinarian licensed by the Board in order to register with the DPS is to pay a \$25.00 fee and fill out an application providing address and other identifying information. With this in mind, it is clear that the Rule does not fall under the Board's authority which was granted by the legislature. The Board's rules already require veterinarians to keep their address information up-to-date with the Board, therefore the only thing that the registration requirement adds is a burden upon all licensees to pay the \$25.00 registration fee to the DPS.

The legislature gave the Board the authority to adopt rules as necessary to administer the Veterinary Licensing Act. *TEX. OCC. CODE ANN.*, § 801.151(a). A \$25.00 fee paid to the DPS does not aid the Board in administering the Veterinary Licensing Act.

The Board has the authority to adopt rules of Professional Conduct appropriate to establish and maintain a high standard of integrity, skills and practice in the veterinary medicine profession. *TEX. OCC. CODE ANN.*, § 801.151(b). The payment of a \$25.00 fee to the DPS by a veterinarian in no way maintains his or her integrity, skills or practice in the profession.

The Board also has authority to adopt rules to protect the public, however, the payment of the \$25.00 registration fee to the DPS does nothing to protect the public from veterinarians or from persons practicing veterinary medicine without a license. *TEX. OCC. CODE ANN.*, § 801.151(c)(1).

Further, the payment of a \$25.00 fee to the DPS does nothing to prevent veterinarians from prescribing controlled substances without first establishing a veterinarian-client-patient relationship. See *TEX. OCC. CODE ANN.*, § 801.402(13). In sum, the Rule is not compatible with the general objectives of the Veterinary Licensing Act which is where the Board receives its rulemaking authority.

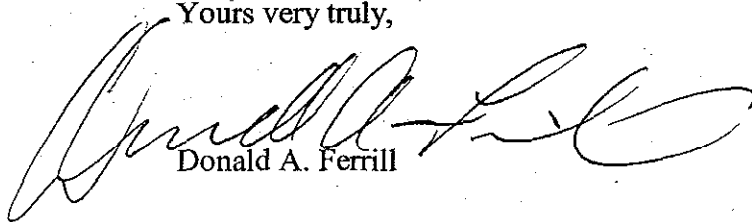
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The Rule imposes burdens conditions or restrictions in excess of or inconsistent with the Texas Controlled Substances Act and the Veterinary Licensing Act

The Rule also imposes burdens, conditions or restrictions in excess of and inconsistent with the relevant statutory provisions of the Texas Veterinary Licensing Act and the Texas Controlled Substances Act. As pointed out above, the Rule is inconsistent with the Texas Controlled Substances Act to the extent it requires licensees acting in the course and scope of their employment with DPS registrants to register with the DPS. Therefore the \$25.00 fee and the act of registration are burdens, conditions and restrictions in excess of and inconsistent with the two acts.

For the reasons stated, the Board should immediately cease enforcement of the Rule and should repeal the Rule at its earliest opportunity. Dr. Gaither and I request that the Board submit these issues to the Texas Attorney General in order to obtain his opinion regarding the validity of this Rule and the Board's authority to adopt and enforce the Rule.

Yours very truly,



Donald A. Ferrill

DAF/ddw

cc: Richard Gaither, DVM
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