



TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

P. O. Box 13225 • Austin, Texas 78711 • office (512) 936-4400 • fax (512) 936-4409

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November 5, 2015 **OPINION COMMITTEE**

Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0066-KP

FILE # ML-47857-15
I.D. # 47857

RE: The implied authority of a state board to accept and place limits on the voluntary surrender of a license issued by the board.

Dear General Paxton:

The Texas Board of Professional Geoscientists ("TBPG" or "Board") requests your opinion concerning the voluntary surrender of an unexpired license issued by the Board. The Board issues licenses to individuals who wish to engage in the public practice of geoscience in Texas. The Board also registers firms who wish to engage in the public practice of geoscience in Texas and registers Geoscientists in Training.¹ The Board's enabling statute, the Texas Geoscience Practice Act ("the Act") is codified at Occupations Code, Chapter 1002. The Act expressly authorizes the Board to issue a license to an individual (§ 1002.261(a)); to register firms to engage in the public practice of geoscience (§ 1002.351(b)), and to register Geoscientists in Training (§ 1002.352). The Act also expressly authorizes the Board to renew a license (§ 1002.301); impose conditions on the renewal of a license (§ 1002.302); refuse to issue or renew a license, suspend, or revoke a license, impose limitations on the practice of a license holder, and impose a variety of other disciplinary actions regarding a license. Act § 1002.403.

Certain licensees have expressed a wish to surrender their respective licenses before the natural expiration date. However, the Act is silent regarding a licensee's authority to unilaterally terminate the license, before it is scheduled to expire, and accordingly does not provide a process for doing so. The Act also is silent regarding the scope of the Board's authority to accept a voluntary termination by surrender.

Although the Board generally is in favor of allowing a licensee to voluntarily surrender a license before the expiration date of the license, the Board may wish to adopt, by rule, timing and circumstance limitations, as may be necessary. A unilateral, voluntary surrender by a licensee during an investigation or disciplinary proceeding against the licensee could create confusion and misunderstanding amongst the public and the licensee about the license status of the person and about the nature and significance of the investigation and any resulting hearings and disciplinary action the Board may take against the licensee. Therefore, if the law authorizes the voluntary surrender of a license and the Board's acceptance of that surrender, the Board may deem it

¹ The Board issues various types of licenses related to the professional practice of geoscience and registers firms that practice professional geoscience. This letter refers to all of the Board's permitting methods as licenses and refers to the various entities subject to Board jurisdiction as licensees, for ease of reference.

necessary to limit unilateral voluntary surrender by a licensee when Board investigations or disciplinary proceedings are pending. Such considerations, however, raise the related issue of whether the Board *must* accept a voluntary surrender submitted by a licensee, or whether, instead, the Board may place restrictions on the licensee's ability to unilaterally terminate the license.

The Board, therefore, requests your opinion regarding these matters, and specifically asks, the following questions:

1. Does the Board's express authority to issue, renew, suspend, revoke, and take other disciplinary action against the Board-issued license, before expiration, include an implied authority to accept the licensee's voluntary termination by surrender of the license before it expires?
2. Does the Board's broad authority to regulate professional geoscience under the Act, as a whole, include the implied authority to accept a licensee's voluntary termination by surrender of a Board-issued license?
3. If the answer to both questions 1 and 2 is "no," is the Board authorized by other law to accept the voluntary termination by surrender of a license it issued previously?
4. If the Board is authorized to accept the voluntary termination by surrender of a license, *must* the Board accept a unilateral voluntary surrender of the license by a licensee, or may the Board impose limitations on a licensee's ability to voluntarily and unilaterally terminate a Board-issued license by surrender? For example may the Board adopt rules that would prohibit the licensee from voluntarily and unilaterally, without Board approval, terminating a license while the licensee is under Board investigation or is the subject of a pending disciplinary action by the Board?

The Law of Implied Authority Stated

A state agency like TBPG "is a creature of the Legislature and has only such powers as are expressly granted to it by statute, together with those necessarily implied from the authority conferred or duties imposed." See: Railroad Comm'n v. Atchison, T. & S.F. R.R., 609 S.W.2d 641, 643 (Tex.Civ.App.1980, writ ref'd n.r.e.). Lack of express authority for a particular act of an agency does not mean the agency has no authority for that act. An agency may have implied authority to take an action or promulgate a rule even though such authority might not be expressly enumerated in its enabling statute. Indeed, under a general grant of authority, an agency has all the implied authority *reasonably* necessary to accomplish a delegated purpose. Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129, 137 (Tex.App.1986, writ ref'd n.r.e.) (and cases cited therein). However, statutory authority, both express and implied, is limited to what is necessary and reasonable. See Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex.1982).

TBPG's Express and Broad Statutory Authority Leads to Certain Implied Authority

The Act expressly authorizes TBPG to license individuals and other legal entities; to adopt rules regulating the conduct of licensees and the practice of geoscience; and to discipline license holders who violate the Act, Board rules, or Board orders. Act §§ 1002.051; 151 - 160; .261(a); and .403. Section 1002.403(a) (10) of the Act authorizes TBPG to take certain administrative action against individuals who are not licensed but who are engaged in the practice of professional geoscience in violation of the Act. TBPG also may seek injunctive relief for

violations of the Act or TBPG rules. Act § 1002.501. A review of the Act, as a whole, illustrates the broad authority the legislature vested in TBPG to regulate the practice of professional geoscience. Act § 1002.001 - .501. In addition, the Act provides the Board with broad general rulemaking authority. Act § 1002.151 (“The board shall adopt and enforce rules consistent with this chapter and necessary for the performance of its duties.”).

TBPG's Implied Authority to Accept a Licensee's Voluntary Surrender of License is Reasonable and Necessary

The implied authority to accept a licensee's surrender of a license is necessary for the agency to adequately carry out its licensing function, to perform its regulatory duties under the Act, and to effectively and efficiently carry out its disciplinary duties. The inability of a licensee to surrender a license and of the Board to accept such a surrender would frustrate the legislature's intent for the Board to regulate the practice of professional geoscience, including its authority to make decisions regarding the issuance or termination of a license it issues. If a licensee could not surrender his unexpired license and the Board could not accept that surrender, a licensee who no longer was required to be licensed in Texas, no longer wished to practice professional geoscience in the state of Texas, or who simply wished to retire, would be obligated to comply with continuing education requirements for all licensees and to comply with other license requirements, or face disciplinary action. If the Board were not able to accept a licensee's voluntary surrender of license prior to expiration of the license, the Board would likely expend state resources to investigate non-compliance with the Act and Board rules only to find that the subject of the complaint no longer uses nor wishes to use the license in Texas. As a result licensees also would remain subject to disciplinary action, including monetary penalties even if they no longer sought to practice professional geoscience in Texas.

Other agencies have adopted rules related to surrender of license under implied authority. For example, although the Occupations Code does not expressly provide for voluntary surrender of a license by a licensed chemical dependency counselor, the statute provides the Department of State Health Services (DSHS) and the executive commissioner of Health and Human Services Commission (HHSC) with broad regulatory authority relating to chemical dependency counselors. See: Tex. Occup. Code § 504.001 - .351. From this broad authority, the authority to accept voluntary license surrender may be implied, as can the implied authority to place limitations on the ability of a licensed counselor to voluntarily surrender the license. As a result DSHS and HHSC have adopted rules which allow voluntary surrender of a Chapter 504 license, with limitations. See: 25 Tex. Admin. Code § 140.415(i).²

TBPG's Implied Authority to Adopt Rules Limiting the Ability to Surrender a License is Reasonable and Necessary

If the Board has the implied authority to accept a voluntary surrender of license, it would be reasonable and necessary to conclude that the Board also has the implied authority to limit the circumstances under which a licensee would be allowed to surrender a Board license prior to its expiration. The implied authority to place certain limitations on the ability of a licensee to

² 25 Tex. Admin. Code § 140.415(i) - A licensee may at any time voluntarily offer to relinquish his or her license for any reason, without compulsion.

(1) The original licensure certificate may be delivered to the department by hand or postal delivery.

(2) If there is no complaint pending against the licensee, the department may accept the relinquishment and void the applicable license.

(3) If a complaint is pending, the procedures for acceptance of a license surrender are set out in §140.429 of this title (relating to Voluntary Surrender of License, Certification, or Registration in Response to a Complaint).

(4) A license that has been surrendered and accepted may not be reinstated. However, a person may apply for a new license in accordance with the Act and this subchapter.

voluntarily surrender a license is necessary for the TBPG to adequately carry out its express statutory duty to discipline license holders and certain other practitioners of professional geoscience. To carry out its disciplinary duties, the agency must be able to start a disciplinary action and see it to its logical end, whether the end consist of disciplinary action, including license suspension, assessment of a monetary penalty, or, when appropriate, a dismissal of a complaint.

Were the Board to not have the authority to impose limits or conditions on the surrender of a license, a licensee could attempt to escape an agency investigation or action arising from the licensee's violation of the Act or Board rules by merely surrendering the license before the agency could take final action against the licensee. Thus, the licensee would be in a position to hamper, singlehandedly, Board efforts to efficiently handle disciplinary matters and, thereby, to frustrate the purpose of the Act, which includes Board action for violations of the Act and Board rules. The Act authorizes the Board to take administrative action against certain unlicensed entities, and a surrendered licensed would have no effect on the Board's authority to proceed against those entities. However, complications would arise in prosecuting certain cases against an entity who suddenly went from being licensed to not being licensed during the course of the same investigation or disciplinary proceeding. Also, a licensee's surrender of a license in mid-stream of a disciplinary action would cause confusion and misunderstanding in the licensee and the public regarding the status of the licensee and the Board's jurisdiction over the licensee.

Other occupational licensing agencies recognize the need to limit a licensee's ability to avoid Board action through a license surrender and have adopted rules which bar a licensee from unilaterally surrendering a Board-issued license while a Board investigation or disciplinary action against the licensee is pending. The Texas Medical Board does not permit relinquishment if a licensee is under investigation or subject to disciplinary action by the Board. 22 Tex. Admin. Code § 196.1.³ Although the Medical Board has express statutory authority to accept the surrender of a license under Tex. Occup. Code § Sec. 164.061, by adopting the rule, it presumably has exercised its implied authority to place limits on the ability of a licensee to voluntarily surrender such a license.

TBPG respectfully requests your opinion regarding this matter.

Sincerely,



Charles Horton
Executive Director
Texas Board of Professional Geoscientists
333 Guadalupe St, Tower 1, Suite 530
Austin, Texas 78701

³ 22 Tex. Admin. Code sec. 196.1 (Texas Medical Board, Relinquishment of License)

(a) Relinquishment by licensee.

(1) A licensee may at any time voluntarily relinquish or request cancellation of his or her license to practice medicine in Texas for any reason, without compulsion.

(2) Requests to relinquish or cancel a license must be submitted to the Board in writing.

(b) Acceptance by the board. The board shall accept all voluntary relinquishment requests except when a licensee is under investigation or subject to disciplinary action by the board.