



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**CRAWFORD C. MARTIN
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March 19, 1971

Mr. Donald C. Klein, P. E.
Executive Director
Texas State Board of Registration
for Professional Engineers
Room 200, 1400 Congress
Austin, Texas 78701

Opinion No. M- 816

Re: Authority of Board
under Article 3271a,
V.C.S., to require
written examination
of all applicants
for license.

Dear Mr. Klein:

Your recent letter requested the opinion of this department on the authority of the Board under Article 3271a, Vernon's Civil Statutes, to require a written examination of all applicants for a license as a professional engineer.

You submitted a copy of a proposed rule which would require such an examination and also a very able brief on the question.

After a careful review of the pertinent sections of Article 3271a, Vernon's Civil Statutes, and of language found in recent Texas cases on the subject of authority of administrative agencies to make rules, we are of the opinion that the Texas State Board of Registration for Professional Engineers does not have the authority to require by administrative rule a written examination of all applicants for a license as a professional engineer.

Subsections (a) and (b) of Article 3271a, read as follows:

"Sec. 12. The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration as a professional engineer, to-wit:

(a) Graduation from an approved course in engineering of four (4) years or more in a recognized school or college approved by the Board as of satisfactory standing, and a specific record of an additional four (4) years or more of active practice in engineering work, of a character satisfactory to the Board, indicating that the applicant is competent to be placed in responsible charge of such work; or

(b) Successfully passing a written, or written and oral, examination designed to show knowledge and skill approximating that attained through graduation from an approved four (4) years engineering course; and a specific record of at least eight (8) years of active practice in engineering work of a character satisfactory to the Board and indicating that the applicant is competent to be placed in responsible charge of such work."

Subsection (g) of Article 3271a reads as follows:

"(g) Any person having the necessary qualifications prescribed in this Act to entitle him to registration shall be eligible for such registration though he may not be practicing at the time of making his application."

Section 8 of the article reads, in part, as follows:

"The Board shall have the authority and power to make and enforce all rules and regulations necessary for the performance of its duties, to establish standards of conduct and ethics for engineers in keeping with the purposes and intent of this Act or to insure strict compliance with and enforcement of this Act . . ."

The thrust of opinions we have examined appears to be (1) that authority to make a particular rule must be found in the statute governing the agency, (2) that the rule must not be inconsistent with the statute, and (3) that the rule must be referable to and consistent with one or more specific provisions of the statute.

In Gerst v. Oak Cliff Savings and Loan Association, 432 S.W.2d 703 (Tex.Sup. 1968) the court said:

"In exercising the powers and broad authority granted by the Legislature, the only requirement is that rules and regulations must be consistent with the Constitution and Statutes of this State. Kee v. Baber, 157 Tex. 387, 303 S.W. 2d 376 (1957). In Kee, we said:

' * * * * * The determining factor in this and other decisions of our courts dealing with the question of whether or not a particular administrative agency has exceeded its rule-making powers is that the rule's provisions must be in harmony with the general objectives of the Act involved. In Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (Tex.Sup. 1967), we held that the Rule's provision were in harmony with the general objectives of the Act and referable to and consistent with one or more of its specific proscriptions.' (Emphasis supplied.)

Section 8 of Article 3271a, Vernon's Civil Statutes, gives the Board the power to make rules necessary to, in substance, do only the following:

- (1) enable the Board to carry out its duties;
 - (2) establish standards of conduct and ethics,
- and

(3) insure strict compliance with and enforcement of the Act.

There is no provision in Article 3271a that would give the Board authority to enlarge on or make more restrictive the provisions of the statute governing requirements for a license.

In considering the rule now proposed by the Engineer's Board, we are of the opinion that the rule is inconsistent with the statute for the reason that it imposes a requirement on every applicant for a license that the Legislature did not choose to impose on every applicant. The Legislature in providing subsections (a) and (b) of Section 12 clearly wrote in the disjunctive. Subsection (b) applies only if the applicant does not qualify under (a). Further, the language of Subsection (g) clearly imposes on the Board a mandate to register an applicant who has the necessary qualifications prescribed in the Act, which of course includes Subsection 12(a), where no requirement of an examination is made.

We are also of the opinion that the rule proposed by the Board does not meet the test of being referable to and consistent with one or more specific provisions of Article 3271a. See Texas State Board v. Carp, 412 S.W.2d 307 (Tex. Sup. 1967).

Neither this department nor the State Board of Registration for Professional Engineers may enlarge or in any way modify the statutory requirements as laid down by the Legislature. Attorney General's Opinion No. M-30 (1967). This was discussed in Railroad Commission v. Ft. Worth & D.C.R.R.Co., 161 S.W.2d 560 (Tex.Civ.App. 1942, err. ref. w.o.m.), where the court held:

"It is also true that though such statutes and orders will be liberally construed to carry out the intent of the legislature, the Commission can exercise only the powers expressly delegated to it by law, or necessarily implied from those so delegated; and cannot enlarge such delegated powers by its own orders." (citing authorities)

Only under the licensing procedure provided in Sub-section 12(b) may the Board impose the requirement of a written examination, and then conditioned that the Board makes no requirement that is unreasonable, arbitrary, or capricious.

In Attorney General's Opinion No. M-609-A (1970), this office considered the rule-making power of the State Health Department under Article 4590b, and wrote as follows:

"However, the statute does not authorize the issuance of rules and regulations which are in excess of or inconsistent with the statutory provisions; nor may such an administrative body impose any additional burdens, conditions, or restrictions in that regard. Kelly v. Industrial Accident Board, 350 S.W.2d 874 (Tex.Civ.App. 1962, error ref.). Such regulations or rules cannot be used in construing the law so as to give it a higher mandate than that of the statute. Bailey v. Texas Indemnity Insurance Co., 14 S.W.2d 798, 802 (Tex.Civ.App. 1929)."

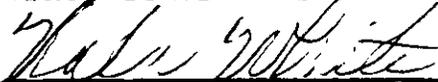
For the reasons discussed above, we are of the opinion that the State Board of Registration for Professional Engineers does not have the authority to make and enforce a rule requiring every applicant for a license as a professional engineer to take a written examination.

S U M M A R Y

Under the provisions of Article 3271a, V.C.S., the State Board of Registration for Professional Engineers does not have the authority to make and enforce a rule requiring every applicant for a license as a professional engineer to take a written examination.

Very truly yours,

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By 

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