



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

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Louise Waddill, R.N., Ph.D
Executive Director
Board of Nurse Examiners
P. O. Box 140466
Austin, Texas 78714

Letter Opinion No. 93-4

Re: Whether a state agency may contract with a private vendor to solicit advertisements for an agency newsletter (RQ-113)

Dear Dr. Waddill:

You inform us that the Board of Nurse Examiners (the "board") is proposing to contract with a private vendor for services in connection with the production of a board newsletter. According to the requisition form prepared by the agency, the newsletter will be delivered free of charge to all registered nurses and employers of registered nurses in Texas. Board of Nurse Examiners Requisition No. 507-2-01. You state that the intent of the board is to produce the newsletter at no cost to the agency. To accomplish this, the requisition stipulates that the vendor would be authorized under the contract to solicit advertising. *Id.* pt. VII, at 2.¹ The requisition also provides that if the contract is terminated for any reason,

the vendor will continue to sell advertising for the remainder of the fiscal year or six months, whichever is longer, and further agrees to transfer advertising revenues to the Board.

Id. pt. VII.H, at 3.

You ask two questions. First, you ask whether a state agency may contract with a private vendor to secure advertisements to cover the cost of producing and mailing an agency newsletter. You then ask whether, in the event of default by the vendor, the agency may itself solicit advertisements until another vendor is selected to replace the defaulting vendor. We conclude that the board is not currently authorized to contract for the solicitation of advertising to be placed in a newsletter produced by or on behalf of the board.

An administrative agency may exercise only those powers expressly conferred by law and those powers necessarily implied from the express grants of power. *See City of*

¹The requisition states that the board reserves the right to reject any advertisement that in the opinion of the board might prove offensive or controversial. Requisition No. 507-2-01, pt. VII.A. Advertisements for alcoholic beverages and tobacco products and political endorsements would be forbidden. *Id.* Also, the newsletter must contain a disclaimer advising readers that the board does not endorse any advertisement contained therein. *Id.* pt. VII.D.

Sherman v. Public Utility Comm'n, 643 S.W.2d 681 (Tex. 1983). The board is granted extensive powers to regulate the practice of professional nursing. V.T.C.S. art. 4514, § 1.² No statute expressly authorizes the board to produce a newsletter. However, section 16 of article 4525a, V.T.C.S., which imposes on registered nurses and others the duty to report certain conduct that exposes patients and others to unnecessary risk, requires the board to "disseminate . . . information that is of significant interest to professional nurses and employers of professional nurses in Texas."

Article 4413(33), V.T.C.S., authorizes, but does not require, an agency in the executive branch of state government to set and collect a sales charge for publications and other printed matter when such charges are deemed to be in the public interest, unless otherwise provided by law. In addition, the general appropriations act generally forbids the use of appropriated funds for the preparation and distribution of publications (except *Texas Highways* magazine, *Texas Parks and Wildlife* magazine, and Texas Commission on Alcoholism publications) "whose cost is not totally reimbursed through revenue attributable to its publication or sale. . . ." Acts 1991, 72d Leg., 1st C.S., ch. 19, art. V, § 63, at 1034.³ Newsletters are specifically excepted from this prohibition. *Id.*⁴ Thus, state agency newsletters may be produced and distributed with appropriated funds, but there is no requirement that they be so produced and distributed. Moreover, the language of this provision indicates that agencies that are authorized by law to produce and distribute publications may generate revenue through sales of the publication.

Recent legislative initiatives suggest state agencies do not have general, implied authority to solicit and include advertising in official publications. The 72d Legislature amended article 6144e, V.T.C.S., to allow the Department of Highways and Public Transportation (now the Department of Transportation) to contract with private entities for the production, marketing, and distribution of pamphlets, bulletins, and other materials that promote the state highway system and scenic and recreational attractions in the state.

²For example, the board is required to prescribe minimum standards and requirements governing courses of study in programs which prepare professional nurse practitioners. V.T.C.S. art. 4513, § 1; art. 4518, § 1. It administers an examination which candidates must successfully complete prior to certification as registered or professional nurses. V.T.C.S. art. 4518, § 3, art. 4519. The board may also implement continuing education programs for its licensees and require participation in continuing education as a condition of registration renewal. V.T.C.S. art. 4518, § 7. The board also is entitled to investigate and determine an individual's eligibility for licensing and conduct disciplinary proceedings. V.T.C.S. arts. 4519a, 4525; see also V.T.C.S. arts. 4525a, 4526 - 4527c.

³This limitation applies to publications whose content or format is (1) intended for use by the general public; (2) generally informational, educational, or promotional; and (3) not essential to achievement of the agency's primary objectives. Acts 1991, 72d Leg., 1st C.S., ch. 19, art. V, § 63, para. 1, at 1034.

⁴Also excepted are (1) annual reports and other materials required by statute whose contents deal only with topics set forth in the statute; (2) compilations of law, rules, or regulations; (3) attorney general opinions; and (4) comptroller of public accounts opinions, revenue forecasts, and fiscal analyses. Acts 1991, 72d Leg., 1st C.S., ch. 19, art. V, § 63, para. 1, at 1034.

Acts 1991, 72d Leg., ch. 837, at 2898. The department is granted express authority to solicit and include advertising in such publications. V.T.C.S. art. 6144a, § 3(c). The primary purpose of this enactment was, in the words of its sponsor, to give the department power which it previously did not possess. Hearings on S.B. 797 Before the Senate Comm. on State Affairs, 72d Leg. (Apr. 8, 1991) (statement from Senator Steve Carriker) (transcript available from Senate Staff Services).

In addition, the Texas Sunset Advisory Commission recently recommended that the Texas Department of Commerce be granted express statutory authority to generate additional revenue by selling advertising space in tourism publications. TEXAS SUNSET ADVISORY COMM'N, STAFF EVALUATION: TEXAS DEPARTMENT OF COMMERCE at 59-62 (April 1992). The appeal for express statutory authority was prompted by continuing uncertainty over an agency's implied authority to solicit advertising and use it as a source of revenue. *Id.* at 60-61.

In both of these examples, the agencies are expressly authorized to produce informational publications. The fact that explicit statutory authority to produce advertising was sought indicates a general belief that state agencies do not have implied authority to do so.

This policy is consistent with prior rulings of this office which conclude that state agencies and political subdivisions must have express authority to engage in what may be characterized as proprietary or commercial activities, if they are to engage in them at all. *See, e.g.*, Attorney General Opinions H-366 (1974) (Governor's Office of Traffic Safety has no authority to generate revenue by assigning promotional rights to "Drive Friendly" logo to private corporation or individual); WW-192 (1957) (without express authority, a county may not engage in the asphalt business); *see also* Attorney General Opinion H-444 (1974) (discussing authority of Texas Department of Corrections to sell surplus agricultural or livestock products); Open Records Decision No. 593 (1991) (discussing authority of Teacher Retirement System to engage in marketplace competition). The production of official agency publications pursuant to express statutory authorization is considered a governmental rather than a proprietary function. *See Hoffman v. Commonwealth, Pennsylvania Game Comm'n*, 455 A.2d 731 (Pa. Comm. Ct. 1983) (publication of *Pennsylvania Game News* magazine is a governmental function).

These recent enactments and recommendations persuade us that the legislature does not currently believe that state agencies have implied authority to solicit advertising for official publications. Accordingly, we conclude that the Board of Nurse Examiners may not contract with a private corporation to solicit and produce advertising for an agency newsletter. In light of this answer, we need not address your second question.⁵

⁵This opinion considers only whether state agencies which currently do not solicit advertising for official agency publications have implied authority to do so in the absence of express statutory authority. It does not address whether political subdivisions of the state have express or implied authority to solicit advertising for placement in official publications.

S U M M A R Y

The Board of Nurse Examiners does not possess sufficient authority to contract with a private vendor to solicit and secure advertising for a newsletter to be produced by the board.

Yours very truly,

Steve Aragón
Assistant Attorney General
Opinion Committee