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State of Texas

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March 17, 1995

David R. Smith, M.D.
Commissioner of Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Letter Opinion No. 95-009

Re: Whether the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments may promulgate rules establishing criteria for the licensure of nonindividual persons to fit and dispense hearing instruments (ID# 28385)

Dear Dr. Smith:

You have requested our opinion regarding the authority of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (the "committee") to promulgate rules establishing criteria for the licensure of nonindividual persons¹ to fit and dispense hearing instruments.² Title 71, chapter 10A (hereinafter referred to as "the act"), V.T.C.S., pertains to the regulation of fitters and dispensers of hearing instruments. The legislature has declared the policy underlying the act to:

- (1) safeguard the health and welfare of the communicatively handicapped people of this state from the dispensing of hearing instruments by unskilled or unprincipled practitioners;
- (2) establish and enforce standards of practitioner competency;
- (3) provide regulatory authority over practitioners offering hearing instrument dispensing services to the public; and
- (4) ensure professional ethical conduct in the dispensing of hearing aid devices or instruments.

V.T.C.S. art. 4566-1.01A.

¹We understand you to use the term "individual" to indicate a human being. By "nonindividual" or "nonindividual person," we understand you to mean an entity other than a human being, for example, a corporation or partnership. Generally, the word "individual" is used "to distinguish the single (noncorporate) person from the group or crowd." See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 291 (1987) (defining "individual").

²Article 4566-1.01(4), V.T.C.S., defines "hearing instrument" as "any wearable instrument or device designed for, or represented as, aiding, improving or correcting defective human hearing . . ." The term includes the instrument's parts, attachments, and accessories, but the term does not include batteries or cords.

To achieve the articulated policy, the legislature has created the committee, *see id.* art. 4566-1.02(a), and provided the committee with certain powers and duties. Specifically, the committee is authorized, with the approval of the Texas Board of Health, to make procedural rules consistent with the act. *Id.* art. 4566-1.04(a). With the assistance of the Texas Department of Health, the committee is, among other things, to administer, coordinate, and enforce the act. *Id.* art. 4566-1.04(c). The committee must adopt continuing education requirements with which licensees must comply. *Id.* art. 4566-1.04(g). For purposes of this letter, we will assume the committee is authorized to promulgate substantive rules such as those you suggest.

The committee's licensing authority is found in article 4566-1.06. Under article 4566-1.06(a), (h), each "person" who wishes to engage in the fitting and dispensing of hearing instruments and who is not licensed as an audiologist or audiology intern under V.T.C.S. article 4512j must pass an examination that the committee administers. To apply for a license, an "applicant" must provide sworn evidence that he or she has attained the age of majority and has graduated from an accredited high school or equivalent. *Id.* art. 4566-1.06(b). A licensed "fitter and dispenser" generally must complete twenty hours of continuing education each year. *Id.* art. 4566-1.14A.

The committee may grant a temporary training permit to fit and dispense hearing instruments to a "person" who, among other things, submits the affidavit of a "person" licensed to fit and dispense hearing instruments in this state declaring that the "affiant" will supervise the "applicant." *Id.* art. 4566-1.09(a)(1), (b). The "temporary permit holder" must complete 150 hours of directly supervised practicum. *Id.* art. 4566-1.09(e). The committee must issue an apprentice permit to a "temporary permit holder" who successfully has completed the one-year training program and has passed all parts of the examination with a score of seventy percent or greater. *Id.* art. 4566-1.09A(a). Article 4566-1.01(10) defines "person" as, "unless the context requires a different definition," "an individual, corporation, partnership, or other legal entity."

You aver that each of the statutory requirements for licensure logically cannot be applied to nonindividuals; you point out that a corporation, partnership, or other legal entity physically cannot take an examination, show attainment of the age of majority or graduation from high school, or work under a licensed hearing instrument fitter and dispenser. However, you have located another provision of the act that you believe requires nonindividuals engaged in the fitting and dispensing of hearing instruments to receive a license from the committee: V.T.C.S. article 4566-1.16B, which stipulates that "[a] person who owns, maintains, or operates an office or place of business where the person employs or engages under contract a person who practices the fitting and dispensing of hearing instruments" must be licensed by the committee. You therefore believe that the committee has the implied authority to adopt rules relating to the licensing of nonindividuals as fitters and dispensers of hearing instruments. You state that the committee believes it may not regulate nonindividuals because the legislature has failed to provide sufficient standards for the licensure of nonindividuals.

When interpreting a statute, a court must attempt diligently to ascertain legislative intent. Gov't Code § 312.005; *see* 67 TEX. JUR. 3D *Statutes* § 91, at 651-52 (1989) (and sources cited therein). A court must interpret words used in a statute in accordance with the sense in which the legislature obviously used them. 67 TEX. JUR. 3D *Statutes* § 98, at 670-71 (and sources cited therein). A court may ascertain the legislature's intention by considering other law and the history of the legislation. *Id.* § 94, at 667-68 (and sources cited therein).

The legislature amended the act in 1993 by the enactment of Senate Bill 953, an omnibus bill resulting from the Sunset Commission's review of the article. *See* Acts 1993, 73d Leg., ch. 441, at, 1774-91. Several of the amendments merit our attention as we consider your question. First, among other things, Senate Bill 953 added to the act its statement of policy, article 4566-1.01A, quoted above. *See id.* § 2, at 1774-75. Second, the legislature added the definition of "person," article 4566-1.01(10). *See id.* § 1. Finally, the legislature added article 4566-1.16B, which you have cited, *see id.* § 23, and coincidentally repealed article 4566-1.18, *see id.* § 25.³

The statement of policy, article 4566-1.01A, refers to practitioners. The word "practitioner" denotes an individual who practices a profession. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 923 (1990) (defining "practitioner"); BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 426 (1987) (same); *see also* Gov't Code § 312.002(a) (declaring, with certain exceptions, that word in statute shall be given ordinary meaning). The legislative policy statement thus expresses no legislative concern about the need to regulate corporations or other nonindividuals that employ individuals to fit and dispense hearing instruments.

³For our purposes, the legislature did not substantively amend article 4566-1.06, pertaining to the examination and application process. *See* Acts 1993, 73d Leg., ch. 441, § 8, at 1779. By the enactment of Senate Bill 953, the legislature added to article 4566-1.06 subsection (h), which exempts from the licensing examination "[a] person who is licensed . . . as an audiologist or an audiology intern." *Id.* The House Research Organization noted that the proposed bill "would newly require all owners or operators of businesses that engage in the practice of fitting and dispensing of hearing instruments to be licensed, either under" the act or V.T.C.S. article 4512j, regulating the practice of audiologists. House Research Organization, Bill Analysis, S.B. 953, 73d Leg. (1993). One might read this statement to suggest that owners or operators of businesses that engage in the practice of fitting and dispensing of hearing instruments previously had not been required to be licensed or that the phrase "owners . . . of businesses" might include nonindividuals. However, the legislative history suggests that the legislature intended merely to permit an audiologist or audiology intern to fit and dispense hearing instruments without a license from the committee, but only if the audiologist or audiology intern is licensed under article 4512j, V.T.C.S. Prior to the 1993 amendments, the act did not exempt from its licensure requirements an individual licensed as an audiologist or audiology intern. *See also* House Research Organization, Bill Analysis, S.B. 953, 73d Leg. (1993) (summarizing argument of opponents of S.B. 953 that exempting audiologists from article 4566's licensure requirements allows audiologists to reap economic benefits of fitting and dispensing hearing instruments without proving competence or paying fees article 4566 requires of licensed fitters and dispensers).

Furthermore, the newly added definition of "person" in article 4566-1.01(10) does not persuade us that the legislature intended to enlarge the committee's licensing authority to include nonindividuals. Initially, we note that construing articles 4566-1.06, -1.09, and -1.09A, pertaining to licenses, temporary training permits, and apprentice permits, to apply only to individuals is consistent with the legislature's expression of policy in article 4566-1.01A. In addition, the history of the act with respect to the word "person" and the text of the act suggest that the legislature may not have intended to require nonindividuals to obtain licenses for the fitting and dispensing of hearing instruments.

Prior to the effective date of the 1993 amendments, section 312.011(10) of the Government Code defined "person" to include a corporation. Section 312.011 provides definitions for words used throughout the Civil Statutes, "unless a different meaning is apparent from the context of the statute in which the word appears." In 1982, the committee's predecessor, the Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids, promulgated requirements for the licensure of *individuals*. 22 T.A.C. § 141.36; *see* Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids, 7 Tex. Reg. 900 (1982) (adopting new 22 T.A.C. § 141.36); Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids, 6 Tex. Reg. 4710 (1981) (proposing new 22 T.A.C. § 141.36). Evidently, the committee's predecessor construed the term "person" in the pre-1993 version of article 4566-1.06 to mean individuals only, even though the provisions for construction of laws defined "person" to include corporations.⁴

In addition, article 4566-1.01 provides that the definitions it lists apply throughout the article "*unless the context requires a different definition*" (emphasis added). As you have pointed out, a nonindividual cannot complete an examination, attest to his or her majority or the fact that he or she has graduated from high school, or work under a licensed hearing instrument fitter and dispenser. Because article 4566-1.06, pertaining to the committee's licensing authority, appears to use the word "person" to denote an individual, one might conclude that the definition of "person" provided in article 4566-1.01(10) is inapplicable to article 4566-1.06.

Likewise, one might construe articles 4566-1.09 and -1.09A, pertaining to the committee's authority to issue temporary training permits and apprentice permits, to use the word "person" or to otherwise refer to individuals, not corporations or other nonindividuals. *See* V.T.C.S. arts. 4566-1.09, -1.09A. We note, for example, that an applicant for a temporary training permit must submit sworn evidence that he or she has reached the age of majority and has graduated from an accredited high school or equivalent. *See id.* art. 4566-1.09(a)(1). An applicant for an apprentice permit must have successfully passed all parts of the examination given by the committee, *see id.* art. 4566-1.09A(a), and during the apprentice year, complete eighteen hours of classroom continuing education, *see id.* art. 4566-1.09A(b).

⁴The definition of "person" in section 312.011(10) originated at least as early as 1925. *See* V.T.C.S. art. 23(2) historical note (1969).

Our inquiry cannot end so neatly, however. As we have suggested above, the legislature in 1993 added to the act section 16B, which provides as follows:

A person who owns, maintains, or operates an office or place of business where the person employs or engages under contract a person who practices the fitting and dispensing of hearing instruments shall be considered also to be engaged in the practice of fitting and dispensing of hearing instruments under this Act. A person who is considered to be practicing the fitting and dispensing of hearing instruments under this section shall be required to be licensed under this Act or licensed under Chapter 381, Acts of the 68th Legislature, Regular Session, 1983 (Article 4512j, Vernon's Texas Civil Statutes) and its subsequent amendments, as an audiologist.

See Acts 1993, 73d Leg., ch. 441, § 23, at 1774, 1790 (codified as V.T.C.S. art. 4566-1.16B). The seventy-third session of the legislature also repealed section 18, which provided in pertinent part as follows:

(a) Nothing in this Act shall prohibit a corporation, partnership, trust, association or other like organization maintaining an established business in this state from engaging in the practice of fitting and dispensing hearing aids at retail or selling or offering for sale hearing aids at retail without a license, provided that it employs only persons licensed under this Act in the direct fitting and dispensing of such products, instruments or devices.

V.T.C.S. art. 4566-1.18, *repealed* by Acts 1993, 73d Leg., ch. 441, § 25. Prior to 1993, therefore, a corporation, partnership, trust, association, or other similar organization might engage in the practice of fitting and dispensing hearing aids or sell hearing aids without having first obtained a license under the act, so long as the entity employed only individuals who had obtained such a license. On the other hand, article 4566-1.16B now appears to require such a corporation, partnership, trust, association, or other similar organization to be licensed as either a fitter and dispenser of hearing instruments under the act or an audiologist under V.T.C.S. article 4512j.

Consequently, the act juxtaposes a legislative statement of policy that does not envision the regulation of nonindividuals, together with licensure and permit requirements in articles 4566-1.06, -1.09, and -1.09A that are inapplicable to nonindividuals, against an apparent requirement in article 4566-1.16B that a person, defined to include a nonindividual, who employs or contractually engages a fitter and dispenser of hearing instruments obtain a license under the act or article 4512j.⁵ Of course, the legislature may

⁵The requirements in article 4512j for licensure as an audiologist are similar to article 4566's requirements for licensure as a fitter and dispenser of hearing instruments. An applicant for a license to practice audiology must possess, as a minimum, a master's degree with a major in not less than one of the areas of communicative sciences or disorders, V.T.C.S. art. 4512j, § 10(1), and must have completed the

have used the term "person" in article 4566-1.16B to denote an individual; in that case, the context requires that we define the term as it is used in article 4566-1.16B differently than article 4566-1.01(10) defines the term, and we must conclude that article 4566 does not authorize the committee to license individuals.

Even if we conclude that the legislature, by adding article 4566-1.16B and repealing article 4566-1.18, intended to require the licensure of nonindividuals, we find no legislative guidance as to standards by which the committee is to license nonindividuals. In delegating its powers to an administrative agency, the legislature must "establish reasonable standards to guide the entity to which the powers are delegated." *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex 1992) (quoting *State v. Texas Mun. Power Agency*, 565 S.W.2d 258, 273 (Tex. Civ. App.--Houston [1st Dist.] 1978, writ dismissed)). While courts have upheld standards that are quite broad, *see id.*, we find nothing in article 4566 that we may construe to provide standards for the licensure of nonindividuals.

For purposes of comparison, we note that V.T.C.S. article 4512b, pertaining to the practice of chiropractic, explicitly provides in section 12a for the licensing of chiropractic facilities: "The [Texas Board of Chiropractic Examiners] shall adopt rules for the licensing and regulation of chiropractic facilities as necessary to protect the public health, safety, and welfare" (emphasis added). Section 12a further requires the Texas Board of Chiropractic Examiners to specify the licensing requirements for a chiropractic facility, to devise a structure for the facility licensing program, and to issue only one facility license to an owner of a chiropractic facility, regardless of the number of chiropractic facilities that person owns.

Likewise, we note that article 4542a, V.T.C.S., which authorizes the State Board of Pharmacy to regulate the practice of pharmacy, expressly requires each person, firm, joint stock company, partnership, or corporation desiring to operate a retail pharmacy to obtain from the State Board of Pharmacy a permit for each retail pharmacy the person wishes to operate. V.T.C.S. art. 4542a, § 17(a). If the applicant is a corporate entity, the State Board of Pharmacy is prohibited from issuing a license to the applicant if the applicant's managing officers are not of good moral character. *Id.* § 17(c)(1). Additionally, the State Board of Pharmacy may refuse to issue a license to a corporate applicant if a managing officer has been convicted of a felony or a misdemeanor involving moral turpitude. *Id.* § 17(d)(1); *see also id.* § 17(d)(2) - (5).

(footnote continued)

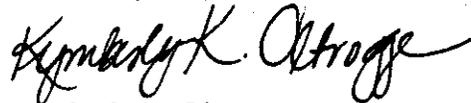
requisite number of hours of clinical experience, *id.* § 10(4), (5). Additionally, an applicant must pass an examination validated by the State Board of Examiners for Speech-Language Pathology and Audiology, covering various theoretical and applied fields of speech-language pathology or audiology. *Id.* § 12. Article 4512j does not expressly provide for the licensure of nonindividual persons. However, we do not consider in this opinion whether a nonindividual person may be licensed as an audiologist under article 4512j.

Articles 4512b and 4542a both provide the governmental body charged with administering the statute with standards guiding the governmental body as to the kind of corporate applicant it may or may not issue a license or permit. *See also* V.T.C.S. art. 4512k, §§ 2B, 7B, 11(b) (providing standards for registration of massage establishments). In contrast, the act is devoid of any standards the committee may rely upon to devise qualifications for the licensing or permitting of nonindividuals. Consequently, we must conclude that the committee is unauthorized to promulgate rules establishing criteria for the licensure of nonindividual persons to fit and dispense hearing instruments under the act. Likewise, we must conclude that the committee is unauthorized to promulgate rules establishing criteria for nonindividual persons to obtain temporary training permits and apprentice permits to fit and dispense hearing instruments under the act.

S U M M A R Y

Title 71, chapter 10A, V.T.C.S., does not authorize the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments to establish criteria for the issuance to a nonindividual of a temporary training permit, apprentice permit, or license to fit and dispense hearing instruments.

Yours very truly,



Kymberly K. Oltrogge
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Opinion Committee