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OPINION COMMITTEE



Texas Medical Board

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FILE # ML-47203-13
I.D. # 47203

January 7, 2013

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

RQ-1104-GA

Re: Request for Opinion as to whether the Texas Medical Board (TMB) may adopt a resolution allowing its investigators to carry concealed handguns as private citizens while on duty with the Board without subjecting TMB to liability for allowing such activity. Further, does Tex. Gov't Code §411.208 grant immunity from liability and suit to TMB and its officers and employees who allow employees to carry concealed handguns if the employees are licensed to do so?

Dear General Abbott:

Background:

Because of the surge in pill mill activity, TMB investigators are being sent into areas and facilities where guns are kept. Representatives from the federal Drug Enforcement Agency and the Harris County District Attorney's Office appeared at the June 2012 Board meeting, and told of finding weapons in pill mill clinics, including handguns and a shotgun mounted behind the reception counter at one facility. The potential for violence against TMB investigators is also present because many "patients" are buying drugs to re-sell them on the street, a criminal activity that increases the likelihood these people will be carrying cash, contraband, and weapons.

One or more TMB investigators are presently licensed by the Department of Public Safety under Tex. Gov't Code §411.171 *et seq.* (Subchapter H). No TMB investigator is commissioned as a peace officer, as authorized by Tex. Code Crim. Proc. §2.12(17) and Tex. Occ. Code §154.057(c). Tex. Code Crim. Proc. §2.12(17) contains no restrictions on TMB investigators who are commissioned peace officers; however, Tex. Occ. Code §154.057(c) provides in full:

The board may commission investigators as peace officers to enforce this subtitle. [Subtitle B Physicians] An investigator commissioned as a peace officer under this subsection may **not carry a firearm or exercise the powers of arrest.** (Emphasis added).

Although TMB does not intend to commission its investigators as peace officers and, thus, its proposed adoption of a Board Resolution (Appendix A) permitting such activity would not directly conflict with Tex. Occ. Code §154.057(c), nevertheless, the Board is concerned that its

proposed action be might be construed to violate Tex. Occ. Code §154.057(c) by allowing its investigators to carry concealed handguns while on duty.

Questions Presented:

1. May TMB allow, but not require or request, its investigators to carry concealed handguns authorized under Subchapter H as private citizens while on duty with the Board?
2. Can the Board legally adopt a resolution to allow its investigators to carry concealed handguns but at the same time indicate that such action is not required by the Board or the employees' job descriptions?
3. Would TMB's adoption of a resolution allowing such action be protected by sovereign immunity from suit and liability?
4. Does Tex. Gov't Code §411.208 protect TMB and its officers and employees from liability and suit when they allow investigators to carry concealed handguns if the employees are licensed to do so?

Discussion:

TMB's investigators are not commissioned as peace officers. They carry no indicia of authority other than badges that identify them as TMB employees. As Texas citizens, TMB investigators who choose to complete all the pertinent requirements of Subchapter H of Gov't Code Chapter 411, and who have received a license to carry a concealed handgun and keep such license current may carry a concealed handgun wherever it is not otherwise prohibited to do so. Thus, it is lawful for those investigators who are licensed under Subchapter H to carry concealed handguns into premises other than those described by §§ 411.203 and 411.204 of the Government Code.

Accordingly, the proposed Board Resolution neither approves nor prohibits TMB investigators who have active Concealed Handgun Licenses from carrying a concealed handgun while on duty. The Resolution states the Board's policy that it will not prohibit investigators from exercising their right to carry a concealed handgun while on duty.

Tex. Gov't Code §411.208¹ grants immunity from liability to agencies, their officers and employees who take an action authorized by Subchapter H from damages caused by that

¹ Sec. 411.208. LIMITATION OF LIABILITY. (a) A court may not hold the state, an agency or subdivision of the state, an officer or employee of the state, a peace officer, or a qualified handgun instructor liable for damages caused by:

(1) an action authorized under this subchapter or a failure to perform a duty imposed by this subchapter [Subchapter H];

or

(2) the actions of an applicant or license holder that occur after the applicant has received a license or been denied a license under this subchapter.

(b) A cause of action in damages may not be brought against the state, an agency or subdivision of the state, an officer or employee of the state, a peace officer, or a qualified handgun instructor for any damage caused by the actions of an applicant or license holder under this subchapter.

(c) The department is not responsible for any injury or damage inflicted on any person by an applicant or license holder arising or alleged to have arisen from an action taken by the department under this subchapter.

(d) The immunities granted under Subsections (a), (b), and (c) do not apply to an act or a failure to act by the state, an agency or subdivision of the state, an officer of the state, or a peace officer if the act or failure to act was capricious or arbitrary.

action or the action of a person licensed to carry a handgun under that subchapter. Subchapter H creates a right for Texas citizens and the Board Resolution only adopts a policy of non-interference with that right for its investigators while they are on duty.

In adopting the proposed Resolution, the Board would be acting under Subchapter H by clarifying its investigators' right to carry concealed handguns while on duty if they are duly licensed under Subchapter H. Therefore, the Resolution is "an action authorized under this subchapter" [Subchapter H] as provided by Tex. Gov't Code §411.208(1). The immunity from liability and suit that Tex. Gov't Code §411.028 grants to state agencies, their officers and employees applies to TMB and the Board Resolution.

Conclusion:

Respectfully, TMB believes that the Attorney General should conclude that:

1. TMB may elect not to prohibit its investigators from carrying concealed handguns while on duty.
2. TMB may legally adopt a resolution to allow its investigators to carry concealed handguns but at the same time indicate that such action is not required by the Board or the employees' job descriptions.
3. TMB's adoption of such a resolution falls outside the waiver of sovereign immunity granted by Tex. Civ. Prac. and Rem. Code §101.021(2), so that TMB would be immune from liability for adopting the resolution.
4. Tex. Gov't Code §411.208 grants immunity from liability and suit to TMB and its officers and employees who allow employees to carry concealed handguns if the employees are licensed to do so.

Sincerely,



Mari Robinson, J.D.
Executive Director