



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1995

Mr. Ron Allen
Executive Director
Texas State Board of Veterinary
Medical Examiners
1946 South IH-35, Suite 306
Austin, Texas 78704-3644

Letter Opinion No. 95-044

Re: Whether the Texas State Board of Veterinary Medical Examiners is authorized to collect a \$200.00 "professional fee" in addition to examination and licensing fees, and related questions (ID# 29960)

Dear Mr. Allen:

On behalf of the Texas State Board of Veterinary Medical Examiners (the "board"), you ask whether the board is authorized to collect a \$200 "professional fee." Prior to September 1, 1993, the board collected a \$200 fee increase added to examination and licensing fees set by the board, for example, a \$100 examination fee and a \$116 license renewal fee. It did so pursuant to section 22 of the Veterinary Licensing Act, V.T.C.S. art. 8890 (the "act"), which provided as follows:

(a) Each of the following fees imposed by or under another section of this Act is increased by \$200;

- (1) any examination fee established by the Board; and
- (2) any license renewal fee established by the Board.

(b) Of each fee increase collected, \$50 shall be deposited to the credit of the foundation school fund and \$150 shall be deposited to the credit of the general revenue fund. This subsection applies to the disposition of each fee increase regardless of any other provision of law providing for a different disposition of funds.

The Seventy-third Legislature deleted the foregoing language from section 22 and replaced it with new language not relevant to the imposition of fees. See Act of May 6, 1993, 73d Leg., R.S., ch. 287, § 32, 1993 Tex. Sess. Law Serv. 1339, 1352-53. With respect to fees, the Seventy-third Legislature amended section 19 of the act to provide as follows:

(a) The Board by rule shall establish reasonable and necessary fees so that the fees, in the aggregate, produce sufficient revenue to cover the costs of administering this Act.

(b) The fee amounts set by the Board may be adjusted so that the total fees collected are sufficient to cover the costs of administering this Act.

(c) The Board may not set a fee for an amount less than the amount of that fee on September 1, 1993.

See id. § 30, 1993 Tex. Sess. Law Serv. at 1352. These changes took effect on September 1, 1993. *See id.* § 36, 1993 Tex. Sess. Law Serv. at 1354.

In light of these legislative amendments, you ask whether section 19 provides a sufficient basis for the board to impose the \$200 fee increase which it was required to impose under section 22 prior to September 1, 1993. We understand that after September 1, 1993, the board adopted a rule establishing a fee schedule that adds a \$200 "professional fee" to board examination and licensing fees. *See* 22 T.A.C. § 577.15 (effective November 17, 1993).¹ You ask, in essence, whether the board has the authority to collect the \$200 "professional fee." We conclude that the board does not have the authority to collect the \$200 "professional fee" imposed by former section 22 for the following reasons.

First, we note that the \$200 fee increase imposed by former section 22 on examination and license renewal fees was an occupation tax, not a licensing fee (or "professional fee"). Letter Opinion No. 88-135 (1988) determined that a similar assessment added to fees paid by professional engineers under the Texas Engineering Practice Act, was an occupation tax, and Attorney General Opinion JM-1063 (1989) stated that such "fee" increases imposed on members of other professions also appeared to be occupation taxes. Attorney General Opinion JM-1063 (1989) at 1-2, n.1; *see* Attorney General Opinion JM-913 (1988) (discussing occupation tax imposed on attorneys). The primary purpose of an occupation tax is to raise revenue for the general purposes of government, while the primary purpose of a license fee is to regulate. *Conlen Grain & Mercantile, Inc. v. Texas Grain Sorghum Producers Bd.*, 519 S.W.2d 620 (Tex. 1975), *Taylor v. State*, 513 S.W.2d 549 (Tex. Crim. App. 1974). Former section 22 of the act provided that \$50 of the \$200 increase would be allocated to the foundation school fund and \$150 would be allocated to the general revenue fund. *See* Tex. Const. art. VII, § 3 (one-fourth of revenue derived from state occupation taxes shall be set apart for benefit of public free schools). Thus, the primary purpose of the \$200 fee increase was to raise money for the general purposes of government, and not to regulate veterinarians.

The revenues that pay the costs of regulating veterinarians are raised pursuant to section 19 of the act, which has governed the fees payable to be licensed and regulated as

¹Although the rule purports to take effect on September 1, 1993, the Texas Administrative Code indicates that it was effective on November 17, 1993. We do not address whether the board was authorized to collect these or any other fees between September 1, 1993, and November 17, 1993.

a veterinarian ever since the act was adopted in 1953. Act of May 26, 1953, 53d Leg., R.S., ch. 342, 1953 Tex. Gen. Laws 844 (codified as former V.T.C.S. art. 7465a). In 1987, during the regular session of the Seventieth Legislature, section 19 was amended to provide that "[t]he board shall establish reasonable and necessary fees for the administration of this Act." Act of May 30, 1987, 70th Leg., R.S., ch. 1122, § 21, 1987 Tex. Gen. Laws 3854, 3851. During its second called session, the Seventieth Legislature adopted a lengthy bill enacting various revenue-raising provisions, including temporary fee increases to be paid by veterinarians as well as licensees of other state regulatory agencies. Act of July 20, 1987, 70th Leg., 2d C.S., ch. 5, art. 9, § 11, 1987 Tex. Gen. Laws 9, 35; *see* Attorney General Opinion JM-913 (1988) (discussing temporary occupation tax imposed on attorneys by same bill). This bill adopted section 21 of the act, which provided that any examination fee or license renewal fee established by the board under another section of the act was increased by \$110, one-fourth of which would go to the Foundation School Fund and three-fourths to the General Revenue Fund. Thus, each examination fee and license renewal fee established by the board under section 19 of the act was increased by \$110, which would go for the general support of the government. In a 1991 revenue-raising bill, the legislature set the occupation tax as a \$200 increase to each examination fee and license renewal fee established by the board. Act of August 12, 1991, 72d Leg., 1st C.S., ch. 5, § 10.11, 1991 Tex. Sess. Law Serv. 134, 181 (codified as section 22 of the act); *see* Attorney General Opinion DM-237 (1993) (addressing constitutionality of imposing additional \$200 fee on licensed accountant employed by federal government).

In 1993, the board was reviewed pursuant to the Texas Sunset Law, Gov't Code ch. 325, and was continued in existence by the legislature. *See* Act of May 6, 1993, 73d Leg., R.S., ch. 287, 1993 Tex. Sess. Law Serv. 1339 (adopting S.B. 623). The legislature amended section 19 of the act to provide that the board should, by rule, establish fees that provide sufficient revenue to cover the costs of administering the act and repealed the language of section 22 that had increased by \$200 the examination and license renewal fees imposed under section 19 and had allocated the increase between the foundation school fund and the general revenue fund. *Id.* §§ 30, 32, 1993 Tex. Sess. Law Serv. 1352, 1352-53. As a result of this repeal, the board no longer has authority to collect the \$200 fee increase. Its authority to establish and collect fees is limited to the "reasonable and necessary fees" that will "produce sufficient revenue to cover the costs of administering this Act." V.T.C.S. art. 8890, § 19. Section 19(c) provides that "[t]he Board may not set a fee for an amount less than the amount of that fee on September 1, 1993," but this refers to the fees set by the board, not the \$200 occupation tax added to the fees by former section 22. Subject to this minimum, the board may set the fees at a level to pay administrative costs, but it cannot then add a surcharge of \$200 or of any amount. All fees collected by the board under the act go to the State Treasury, to the credit of the "Veterinary Fund." *Id.* § 20(a).

You suggest that current section 19 "subsumes" the language deleted from former section 22. We disagree. As noted above, former section 22 did not authorize the board

to collect a fee but rather required the board to collect an occupation tax imposed by the legislature in the form of a fee increase. Any authority to collect that occupation tax has now been deleted from the act.²

Following the September 1, 1993 effective date of the amendments to the act, the board adopted a new fee structure by rule. See 22 T.A.C. § 577.15. The rule provides for a "board fee", a "professional fee", and a "total fee," which is the sum of the other two fees. The fees for the state board examination, for example, include a \$100 board fee and a \$200 professional fee, for a combined \$300 total fee. It is clear from the fee schedule that the "board fee" represents the amount the board has determined to be "reasonable and necessary" and adequate to "produce sufficient revenue to cover the costs of administering" the act. V.T.C.S. art. 8890, § 19. On the other hand, the \$200 "professional fee" appears to be a surcharge which exceeds that amount. To the extent that it is, we conclude that the \$200 "professional fee" portion of the fees set forth in the current fee schedule is invalid because it is contrary to the act and exceeds the board's statutory authority. See *State v. Jackson*, 376 S.W.2d 341 (Tex. 1964) (legislature may withdraw from an administrative agency powers previously delegated to it); *Hollywood Calling v. Public Util. Comm'n*, 805 S.W.2d 618, 620 (Tex. App.--Austin 1991, no writ) (an agency rule is presumed valid unless the agency was without statutory authority to promulgate the rule or exceeded its statutory authority in doing so). Because the "professional fee" portion of the fee schedule is invalid, all applicants and licensees who have paid a \$200 "professional fee" imposed by the board after September 1, 1993, may claim a refund.³ See generally Gov't Code § 403.076 (claims for tax refunds).

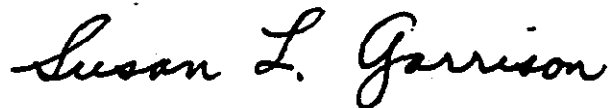
²The legislative history of Senate Bill 623 provides no clear indication that the legislature intended to retain the \$200 fee increase. A description of section 19 states that it "specifies that the fees may not be less than those in effect as of September 1, 1993." This essentially restates the language in section 19. The description of section 22 states that it "[d]eletes existing language relating to fee authority now established elsewhere in the bill." Bill Analysis, House Committee on Agriculture and Wildlife Management (May 4, 1993). Of course, the provision regarding the disposition of monies to the general revenue fund and the foundation school fund was not established elsewhere in the act. While the description of section 22 does suggest that the legislature mistakenly believed that the repealed language in section 22 was established elsewhere in amended article 8890, we do not believe that this is a sufficient basis to conclude that section 19, contrary to its plain language, somehow incorporates the repealed language in former section 22.

³A letter in the file indicates that some of the excess funds collected may have been placed in a suspense fund in the State Treasury.

S U M M A R Y

Section 19 of the Veterinary Licensing Act, V.T.C.S. art. 8890, gives the Texas Board of Veterinary Medical Examiners (the "board") broad discretion to promulgate a rule establishing fees provided that the fees are "reasonable and necessary," and "in aggregate, produce sufficient revenue to cover the costs of administering" the act. Section 19 does not authorize the board to impose the \$200 "professional fee" collected under a repealed version of section 22 of the act.

Yours very truly,

A handwritten signature in cursive script that reads "Susan L. Garrison".

Susan L. Garrison
Assistant Attorney General
Opinion Committee