S T A T E O F T E N N E S S E E
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Opinion No. 01-055

Use of Screening Panels and Investigative Subpoenas by the Health Related Boards

QUESTIONS

1. Does the Division of Health Related Boards of the Tennessee Department of Health have the authority, absent specific legislation, to use screening panels for the various boards to assist with the processing and disposition of disciplinary cases?

2. Does the Emergency Services Board or any of the Health Related Boards attached to the Division of Health Related Boards have the authority to develop and use screening panels to assist with the processing and disposition of disciplinary cases?

3. Does the Emergency Services Board, the Division of Health Related Boards or any of the specific boards administratively attached to the Division have the authority to issue administrative subpoenas to compel the attendance of witnesses or the production of documents prior to the commencement of an administrative action?

4. If authority to issue such administrative subpoenas exists, is a member of the board who makes a preliminary determination of probable cause for the issuance of a subpoena required to recuse himself or herself from a contested case hearing on the same matter?

5. Is the information obtained pursuant to an administrative/investigative subpoena confidential pending the introduction of the information at the administrative hearing?

OPINIONS

1. No.

2. Currently, only the Board of Chiropractic Examiners, Board of Medical Examiners and Board of Nursing are authorized by statute to use screening panels in their investigative and disciplinary processes. The Emergency Services Board is not authorized by statute to use screening panels.

3. Neither the Emergency Services Board nor the Division of Health Related Boards has statutory authorization to issue such investigative subpoenas. However, recently the Legislature has enacted

a number of statutes authorizing many of the health related boards which are attached to the Division to issue such subpoenas. These boards include the Board of Registration in Podiatry, Board of Chiropractic Examiners, Board of Dentistry, Board of Medical Examiners, Board of Nursing, Board of Optometry, Board of Veterinary Medical Examiners, Board of Examiners for Nursing Home Administrators, Board of Communications Disorders and Sciences and its Council for Hearing Instrument Specialists, Board of Dietitian/Nutritionist Examiners, Board of Respiratory Care and the Medical Laboratory Board.

4. Yes, pursuant to rules and regulations promulgated by each health related board that has authority to issue investigative subpoenas.

5. Yes, to the extent that such information is obtained during an investigation by the Division of Health Related Boards or the Board of Medical Examiners.

ANALYSIS

Your request for an opinion includes several questions about current law governing use of screening panels and investigative subpoenas by the Division of Health Related Boards, its attached health related boards and the Emergency Services Board. We understand that legislation is being proposed which would address these issues. Therefore, this opinion will also discuss the proposed legislation, where such discussion is warranted.

1. The statutes establishing the powers and duties of the Division of Health Related Boards of the Tennessee Department of Health are found at Chapter 1 of Title 63 of the Tennessee Code Annotated. These statutes convey upon the Division, by and through its director, concurrent authority with the various health related boards to enforce compliance with the laws regulating the practice of the healing arts within the State. *See* Tenn. Code Ann. §§ 63-1-120, 63-1-122, 63-1-132. They vest the director, *inter alia*, with the power, duty and responsibility to employ staff assigned to or performing duties for the agencies attached to the Division,[1] and to assign personnel to staff the health related boards in order to assure the most efficient use of personnel. Tenn. Code Ann. § 63-1-132. However, the statutes include no provision for use of screening panels in the processing and disposition of disciplinary cases.

Administrative agencies derive their authority from the General Assembly; thus, their power must be based expressly upon a statutory grant of authority or must arise therefrom by necessary implication. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. App. 1988)(citations omitted). We conclude that, absent specific statutory authority, which does not currently exist, the Division of Health Related Boards lacks the authority to use screening panels for the various boards to assist with the processing and disposition of disciplinary cases.

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[1]The various health related boards are attached to the Department of Health through the Division of Health Related Boards. Tenn. Code Ann. § 68-1-101(8).

Proposed legislation would convey authority to use screening panels to the Division, each respective board, committee or council established in Title 63, and the Emergency Services Board. House Bill 1383/Senate Bill 1660 (filed for introduction on 2/14/01).

2. Currently, more than twenty health-related regulatory boards are attached to the Division of Health Related Boards. Tenn. Code Ann. § 68-1-101(8). Of these, only the Board of Chiropractic Examiners (Tenn. Code Ann. § 63-4-115(e)(2000 Supp.)), the Board of Medical Examiners (Tenn. Code Ann. § 63-6-214(i)(2000 Supp.)), and the Board of Nursing (Tenn. Code Ann. § 63-7-115(c)(2000 Supp.)) are authorized by statute to use screening panels in their investigative and disciplinary processes. The Emergency Services Board is not authorized by statute to use screening panels. *See generally*, Tenn. Code Ann. §§ 68-140-501 through 68-140-522 (2000 Supp.).[2]

3. Neither the Emergency Services Board nor the Division of Health Related Boards has statutory authorization to issue administrative subpoenas to compel the attendance of witnesses or the production of documents prior to the commencement of an administrative action. *See generally*, Tenn. Code Ann. §§ 63-1-101 through 63-1-143 (1997 Repl.; 2000 Supp.); 68-140-501 through 68-140-522 (1996 Repl.; 2000 Supp.). However, recently the Legislature has enacted a number of statutes authorizing many of the health related boards which are attached to the Division to issue such subpoenas. *See, e.g.*, Tenn. Code Ann. §§ 63-3-126(b)(2000 Supp.)(Board of Registration in Podiatry); 63-4-115(j)(2000 Supp.)(Board of Chiropractic Examiners); 63-5-124(f)(2000 Supp.)(Board of Dentistry); 63-6-214(l)(2000 Supp.)(Board of Medical Examiners); 63-7-115(e)(2000 Supp.)(Board of Nursing); 63-8-120(e)(2000 Supp.)(Board of Optometry); 63-16-115(b)(2000 Supp.)(Board of Examiners for Nursing Home Administrators); 63-17-219(b)(2), (c)(2) (2000 Supp.)(Board of Communications Disorders and Sciences and its Council for Hearing Instrument Specialists); 63-25-110(d)(2000 Supp.)(Board of Dietitian/Nutritionist Examiners); 63-27-112(d)(2000 Supp.)(Board of Respiratory Care); 68-29-136(b)(2000 Supp.)(Medical Laboratory Board).

Proposed legislation would convey authority to issue investigative subpoenas to all health related boards and to the Emergency Services Board. House Bill 1388/Senate Bill 1665 (filed for introduction on 2/14/01).

4. Under the Tennessee Administrative Procedures Act, a person who has participated in a determination of probable cause or other preliminary determination may nevertheless serve as an agency member in the subsequent contested case, where authorized by law and not subject to disqualification or other cause provided by the Act. Tenn. Code Ann. § 4-5-303(e). An agency member is subject to being disqualified from hearing a contested case for bias, prejudice, interest or any cause for which a judge may be disqualified. Tenn. Code Ann. § 4-5-302(a). Moreover, if before serving as an agency member in a

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[2]The Emergency Services Board is one of the few health-related regulatory boards that is not attached to the Division of Health Related Boards. Rather, it is located within the Division of Emergency Medical Services of the Department of Health.

contested case, a person receives an ex parte communication of a type that may not properly be received while serving, the person must disclose the communication, and may be disqualified if necessary to eliminate the effect of the communication. Tenn. Code Ann. § 4-5-304(d), (f).

The health related boards which have investigative subpoena authority have promulgated rules and regulations which establish a mechanism for avoiding the difficulties that could arise under the above statutes if a board member were required to determine whether probable cause existed to issue an investigative subpoena and to decide the subsequent related contested case. Under these rules and regulations, the presiding officer who hears and determines whether or not probable cause exists to issue an investigative subpoena may not participate in any way in any other proceeding, whether formal or informal, which involves the matters, items or person(s) which were the subject of the subpoena. *See, e.g.*, Tenn. Comp. Adm. R. & Regs. 0880-1-.01(3)(a)4(ii)(VII) (Board of Medical Examiners' Subpoenas Rule); 1000-1-.04(7)(c)l(iv)(II)VII (Board of Nursing's Subpoenas Rule); 1370-1-.15(4)(c)1(iv)(II)VII (Board of Communications Disorders and Sciences' Subpoenas Rule).[3]

5. Tenn. Code Ann. § 63-1-117(b) provides that allegations against a practitioner of the healing arts and the various branches thereof, compiled pursuant to an investigation conducted by the Division, are public information upon the filing of notice of charges. While it is not a model of clarity, we believe that this statutory provision exempts from the requirements of the Tennessee Public Records Act information concerning a health related practitioner that is obtained during an investigation by the Division. That is, such information is confidential. The information does not become a public record, if at all, until a notice of charges is filed thereupon by the Department of Health. Therefore, if a board attached to the Division issues an investigative subpoena in the course of an investigation conducted by the Division, information against a practitioner of the healing arts that is obtained pursuant to the subpoena is confidential pending the filing of a notice of charges.

However, Tenn. Code Ann. § 63-1-117(b) does not address the status, as confidential or public, of information compiled pursuant to an investigation conducted by any of the boards attached to the Division. We anticipate that a Court would find the language of Tenn. Code Ann. § 63-1-117(b) insufficiently broad to confer confidential status upon information obtained pursuant to an investigative subpoena which is issued by a board in the course of an investigation conducted by the board itself, rather than by the Division.[4]

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[3]We are informed that the Department of Health will continue to advise all its attached boards and agencies that have or obtain investigative subpoena authority to promulgate such regulatory restrictions.

[4]There is at least one, and possibly two, exceptions. First, Tenn. Code Ann. §§ 63-6-214(h)(1), pertaining to the Board of Medical Examiners, exempts from the Public Records Act all materials, documents and other matters relating to, compiled or created pursuant to an investigation conducted by the board's investigators against any health care practitioner under the board's jurisdiction. The exemption broadly applies until the filing of a notice of charges, and continues thereafter on a limited basis. *Id*. Second, if an investigative subpoena is issued by a screening panel, information obtained pursuant to the subpoena may be confidential. The statutes which establish

Proposed legislation would provide that any documents or records produced in accordance with a subpoena issued by a screening panel, by a health related board or by the Emergency Services Board would be exempt from the Public Records Act unless and until such documents or records form the basis of the filing of a notice of charges. House Bill 1383/Senate Bill 1660; House Bill 1388/Senate Bill 1665.

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the use of screening panels by the three (3) health related boards which currently have such authority (Board of Chiropractic Examiners, Board of Medical Examiners, and Board of Nursing) provide that:

> The activities of the screening panels . . . shall not be construed as meetings of an agency for purposes of the Open Meetings Act and shall remain confidential. The members of the screening panels . . . are not subject to deposition or subpoena to testify regarding any matter or issue raised in any contested case. . . which may result from or be incident to cases processed before them.

Tenn. Code Ann. §§ 63-4-115(g)(2000 Supp.); 63-6-214(i)(3)(2000 Supp.); 63-7-115(c)(3)(2000 Supp.). While the above statutes address the applicability of the Open Meetings Act rather than of the Public Records Act, it is certainly arguable that their provision of confidentiality for the "activities" of the screening panels necessarily extends confidentiality to the records and documents received by the screening panels in response to their issuance of investigative subpoenas.