

OCCUPATIONAL AND PROFESSIONAL BOARDS OF LESS THAN 100 LICENSEES - BACKGROUND MEMORANDUM

INTRODUCTION

Section 2 of House Bill No. 1377 (2001), a copy of which is attached as an appendix, directs the Legislative Council to study the ability of occupational and professional boards with fewer than 100 licensees to process disciplinary complaints and carry out other statutory responsibilities. The study should address procedures used by boards to respond to disciplinary complaints and initiate disciplinary actions, the boards' ability to pay for the cost of disciplinary actions, and the legal services and staff services available to assist boards with the processing of disciplinary complaints and the performance of other statutory responsibilities.

PREVIOUS STUDIES

Section 5 of House Bill No. 1001 (1995) directed the Legislative Council to study the membership, duties, and responsibilities of all boards, councils, committees, and commissions of state government, including consideration of whether any of those entities have overlapping powers and duties; whether any of those entities should be eliminated or consolidated; whether each entity performs the functions for which it was originally created; and whether the membership of each entity is responsive to the people of the state.

When the Legislative Council prioritized the study and assigned the study to the interim Government Organization Committee, the Council indicated that the committee should base its study on the findings of the Governor's Task Force that reviewed boards and commissions in 1994. The task force recommendations included establishing a board to oversee the activities of all boards and commissions that have a licensing function, submission of financial statements by boards and commissions with a certified audit by an outside independent accounting firm, and establishing requirements to address excess funding of entities that collect fees.

The interim Government Organization Committee considered but did not recommend bill drafts that would have prohibited occupational and professional licensing boards from using any funds derived from registration, certification, license, or examination fees or any income resulting from those funds for lobbying or political purposes; consolidated the Board of Massage, State Examining Committee for Physical Therapists, State Board of Psychologist Examiners, State Board of Examiners on Audiology and Speech-Language Pathology, Board of Athletic Trainers, Board of Occupational Therapy Practice, Board of Social Work Examiners,

Respiratory Care Examining Board, Board of Dietetic Practice, Board of Addiction Counseling Examiners, Board of Counselor Examiners, Board of Clinical Laboratory Practice, and Board of Reflexology into a Board of Health Services; consolidated the Abstracters' Board of Examiners, Board of Barber Examiners, Board of Cosmetology, Board of Architecture, Board of Funeral Service, Board of Hearing Instrument Dispensers, Board of Public Accountancy, State Board of Registration for Professional Engineers and Land Surveyors, Private Investigation and Security Board, Real Estate Appraiser Qualifications and Ethics Board, Real Estate Commission, Board of Examiners for Nursing Home Administrators, and the State Board of Registration for Professional Soil Classifiers into a Board of Business Practices; and limited the authority of the newly created boards to that of issuing licenses and disciplining licensees if the licensees did not maintain the qualifications to practice required by the boards.

OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS

An informal survey performed in the Attorney General's office indicates that the following four occupational and professional boards report that they have fewer than 100 licensees or registrants:

1. Board of Hearing Instrument Dispensers;
2. Board of Podiatric Medicine;
3. State Board of Reflexology; and
4. State Board of Registration for Professional Soil Classifiers.

Each of the four boards is created by and governed by its own unique body of law. The board membership, the board powers and duties, the fee structure, and the particulars of the disciplinary procedures for each board are unique to each board. However, there are commonalities between the boards which include the application of the North Dakota Administrative Agencies Practices Act, which is codified at North Dakota Century Code (NDCC) Chapter 28-32. Areas addressed by Chapter 28-32 include administrative rulemaking procedures, administrative hearing procedures and requirements, and administrative hearing appeal procedures and requirements.

In addition to these four boards, the survey indicates that the Attorney General licenses approximately 16 detection of deception examiners under NDCC Chapter 43-31; the State Health Council licenses a total of approximately 22 electrologists and electronic hair removal technicians under Chapter 43-38; and the

State Health Officer, with the assistance of an advisory board, licenses approximately 44 environmental health practitioners under Chapter 43-43. This memorandum does not address professionals licensed by the Attorney General or under the State Department of Health because the study directive refers to occupational or professional boards.

Board of Hearing Instrument Dispensers

The Board of Hearing Instrument Dispensers is created under NDCC Chapter 43-33. The 10-member board consists of four hearing instrument dispensers who are not audiologists or otolaryngologists, one otolaryngologist, three audiologists, and two consumers. The survey performed by the Attorney General's office indicates there are approximately 63 hearing instrument dispenser specialists licensed by this board.

North Dakota Century Code Section 43-33-14 provides the board's duties are as follows:

The board shall:

1. Authorize all disbursements and collect fees necessary to carry out this chapter.
2. Supervise issuance of licenses and prepare and administer qualifying examinations to test the knowledge and proficiency of applicants licensed by examination.
3. Register persons who apply to the board and who are qualified to engage in the fitting and sale of hearing instruments.
4. Issue and renew licenses.
5. Suspend or revoke licenses.
6. Designate the time and place for examining applicants.
7. Appoint representatives to conduct or supervise the examination.
8. Adopt rules not inconsistent with the laws of this state which are necessary to carry out this chapter.
9. Appoint or employ subordinate employees.

The board has adopted administrative rules at North Dakota Administrative Code (NDAC) Title 104. The amount of fees charged by the board to licensees and applicants is adopted by the board in administrative rule.

The procedure for revocation or suspension of a license and for appeals of revocations or suspensions are set by statute. North Dakota Century Code Section 43-33-12 provides:

1. Any person wishing to make a complaint against a licensee under this chapter shall file a written complaint with the board within one year from the date of the action upon which the complaint is based. If the board determines the charges made in the complaint are sufficient to warrant a hearing to determine whether the license

may be suspended or revoked, it shall establish a time and place for a hearing and order the licensee complained against to appear and defend against the complaint. The order must have annexed thereto a copy of the complaint, and the order and copy of the complaint must be served upon the licensee at least twenty days before the date set for hearing, either personally or by registered mail sent to licensee's last known address. Continuances or adjournments of a hearing date must be made for good cause. At the hearing the licensee complained against may be represented by counsel. The licensee complained against and the board may take depositions in advance of hearing and after service of the complaint and either may compel the attendance of witnesses by subpoenas issued by the board. Either party taking depositions shall give at least five days' written notice to the other party of the time and place of such depositions, and the other party may attend with counsel if desired and cross-examine.

2. The board may revoke or suspend a person's license for any of the following causes:
 - a. The conviction of an offense determined by the board to have a direct bearing upon a person's ability to serve the public as a hearing instrument dispenser, or the board determines, following conviction of any offense, that a person is not sufficiently rehabilitated under section 12.1-33-02.1.
 - b. Procuring of a license by fraud or deceit.
 - c. Unethical conduct. Unethical conduct means:
 - (1) Obtaining any fee or making any sale by fraud or misrepresentation.
 - (2) Knowingly employing, directly or indirectly, any suspended, or unregistered person to perform any work covered by this chapter.
 - (3) Using, or causing or promoting the use of, any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published,

- which is misleading, deceptive, or untruthful.
- (4) Advertising a particular model or type of hearing instrument for sale when purchasers or prospective purchasers responding to the advertisement cannot purchase the advertised model or type where it is established that the purpose of the advertisement is to obtain prospects for the sale of a different model or type than that advertised.
 - (5) Representing that the service or advice of a person licensed to practice medicine will be used or made available in the selection, fitting, adjustment, maintenance, or repair of hearing instruments when that is not true, or using the word "doctor", "clinic", "audiologist", or similar words, abbreviations, or symbols which tend to connote the medical or audiological profession when that is not accurate, or use of the titles "hearing instrument specialist" or "board-certified hearing instrument specialist" when the qualifying requirements have not been met through the national hearing aid society or national board for certification in hearing instrument sciences.
 - (6) Habitual intemperance.
 - (7) Gross immorality.
 - (8) Permitting another to use the person's license.
 - (9) Advertising a manufacturer's product or using a manufacturer's name or trademark that implies a relationship with the manufacturer which does not exist.
 - (10) To directly or indirectly give or offer to give, or permit or cause to be given money or anything of value to any person who advises another in a professional capacity as an inducement to influence them or have them influence others to purchase or contract to purchase products sold or offered for sale by a hearing instrument dispenser, or to influence persons to refrain from dealing in the products of competitors.
 - (11) Sale of a hearing instrument to a person without adequate and proper audiometric testing.
 - (12) Sale of a hearing instrument to a person where the need for a hearing instrument has not been established after adequate and proper audiometric testing.
- d. Conducting business while suffering from a contagious or infectious disease.
 - e. Engaging in the fitting and sale of hearing instruments under a false name or alias with fraudulent intent.
 - f. For any violation of this chapter.
 - g. The fitting and sale of a hearing instrument to any person under eighteen years of age unless within six months before the fitting the person to be fitted has been examined by a physician and audiologist to determine whether there exist any physical deficiencies that would prohibit the effective use of a hearing instrument.
3. Appeals from suspension or revocation may be made under chapter 28-32.

North Dakota Board of Podiatric Medicine

The North Dakota Board of Podiatric Medicine is created under NDCC Chapter 43-05. The five-member board consists of four members who hold doctor of podiatric medicine degrees and one member who holds a doctor of medicine degree. The survey performed by the Attorney General's office indicates there are approximately 24 podiatrists licensed by this board.

North Dakota Century Code Section 43-03-03 provides in part that the "board may employ and compensate attorneys, investigative staff, clerical assistants, or others to assist in the performance of the duties of the board." The board has adopted administrative rules at NDAC Title 63. The amount of fees charged by the board to licensees and applicants is adopted by the board in administrative rule, except for the fee of \$300 for reexamination set by NDCC Section 43-05-13.

North Dakota Century Code Section 43-05-16 provides the grounds for disciplinary action are as follows:

1. The board may refuse to grant a license or permit or may impose disciplinary action as described in this chapter against any podiatrist. The following conduct, whether occurring in this state or elsewhere, is prohibited and is a basis for disciplinary action:

- a. Failure to demonstrate the qualification or satisfy the requirements for a license or permit under this chapter or rules of the board.
- b. Obtaining a license or permit by fraud or cheating or attempting to subvert the licensing or permit examination process, the use of any false, fraudulent, or forged statement or document, or the use of any fraudulent, deceitful, dishonest, or immoral practice in connection with any of the license or permit requirements.
- c. Conviction, during the previous five years, of a misdemeanor or felony reasonably related to the practice of podiatric medicine, or determined by the board to have a direct bearing upon a person's ability to serve the public as a podiatrist. A license may not be withheld contrary to chapter 12.1-33.
- d. Revocation, suspension, restriction, limitation, or other disciplinary action against the person's podiatric medical license in another state or jurisdiction, failure to report to the board that charges regarding the person's license have been brought in another state or jurisdiction, or failure to report to the board that the person has been refused a license by another state or jurisdiction.
- e. Advertising that is false or misleading, or the making of any false or misleading statement about the podiatrist's skill, training, experience, or ability or the efficacy of any treatment or remedy.
- f. Violating a rule adopted by the board; an order of the board; any provision of this chapter; any action, stipulation, condition or agreement imposed by the board; a state or federal law that relates to the practice of podiatric medicine; or a state or federal narcotics or controlled substance law.
- g. Engaging in any unethical conduct; conduct likely to deceive, defraud, or harm the public; demonstrating a willful, careless, or negligent disregard for the health, welfare, or safety of a patient; or podiatric medical practice that is professionally incompetent, in that it may create unnecessary danger to any patient's life, health, or safety regardless of whether an actual injury is proved.
- h. Failure to supervise a preceptor or resident;
- i. Aiding or abetting an unlicensed, incompetent, or impaired person in the practice of podiatric medicine.
- j. Adjudication by a court of competent jurisdiction as mentally incompetent, mentally ill, chemically dependent, a person dangerous to the public, or a person who has a psychopathic personality.
- k. Engaging in unprofessional conduct that includes any departure from or the failure to conform to the minimal standards of acceptable and prevailing podiatric medical practice.
- l. Inability to practice podiatric medicine with reasonable skill and safety to patients because of physical or mental illness, chemical dependency, or as a result of any mental or physical condition or disability.
- m. Revealing a privileged communication from or relating to a patient except when otherwise required or permitted by law.
- n. Improper management of medical records.
- o. Accepting, paying, or promising to pay a part of a fee in exchange for patient referrals; obtaining any fee by fraud, deceit, or misrepresentation; or paying or receiving, directly or indirectly, any fee, commission, rebate, or other compensation for services not actually or personally rendered, except for the lawful distribution of compensation or fees within a professional partnership, corporation, or association.
- p. Engaging in abusive or fraudulent billing practices.
- q. Habitual use of, or becoming addicted or habituated to, alcohol or drugs.
- r. Prescribing, administering, or distributing a drug for other than medically accepted therapeutic purposes, experimental, or investigative purposes authorized by a state or federal agency.
- s. Engaging in sexual misconduct, sexual abuse, or exploitation with or of a patient; conduct that may reasonably be interpreted by the patient as sexual; or in verbal behavior

- which is seductive or sexually demeaning to a patient.
- t. The failure to furnish the board or representatives information legally requested by the board.
 - u. A continued pattern of inappropriate care as a podiatrist.
 - v. The practice of podiatric medicine under a false or assumed name other than a partnership name containing the names of one or more of the licensed partners.
 - w. Maintaining a professional office in conjunction or relation with any business not engaged in the practice of the medical sciences.
 - x. Treating any disease, sickness, illness, malady, or defect that is outside the scope of the practice of podiatric medicine.
2. In disciplinary actions alleging a violation of subdivision c or d of subsection 1, a copy of the judgment or proceeding under the seal of the clerk of court or of the administrative agency that entered the judgment or proceeding is admissible into evidence without further authentication and constitutes prima facie evidence of the contents of that judgment or proceeding.
 3. The board shall keep a record of all of its proceedings in the matter of suspending, revoking, or refusing licenses or permits together with the evidence offered.

North Dakota Century Code Section 43-05-16.1 provides the following forms of disciplinary action are available:

- When the board finds, pursuant to chapter 28-32, that a podiatrist has violated this chapter or a rule of the board, the board may do one or more of the following:
1. Revoke the license or permit.
 2. Suspend the license or permit.
 3. Institute probation with or without any of the following terms:
 - a. Impose limitations or conditions on the podiatrist's practice of podiatric medicine.
 - b. Impose retraining or rehabilitation requirements.
 - c. Require practice under supervision.
 - d. Condition the continued practice on demonstration of knowledge or skills by an appropriate examination or other review of skill and competence.
 4. Impose a civil penalty not exceeding ten thousand dollars for each violation, the amount of the civil penalty fixed so as to

deprive the podiatrist of any economic advantage gained by the violation or to reimburse the board for attorney's fees and the cost of the investigation and proceeding.

5. Order the podiatrist to provide unremunerated professional service under supervision at a designated public hospital, nursing home, clinic, or other health care facility or institution.
6. Reprimand the podiatrist.
7. Censure the podiatrist.
8. Send the podiatrist a letter of concern.

North Dakota Century Code Section 43-05-16.2 includes the procedural aspects of license revocation and suspension, providing:

1. In addition to any other remedy provided by law, the board may, without a hearing, temporarily suspend the license or permit of a podiatrist if the board finds as a matter of probable cause based on verified evidence that the podiatrist has violated this chapter or a rule of the board and that continued practice by the podiatrist would create or be likely to result in a serious and imminent risk of harm to the public. The ex parte temporary suspension order is effective upon written notice to the podiatrist, specifying the law or rule violated. The ex parte temporary suspension remains in effect until the board issues a final order in the matter after a hearing unless otherwise ordered by a district court. When the board issues the ex parte temporary suspension notice, the board shall schedule a disciplinary hearing to be held pursuant to chapter 28-32. The hearing must be scheduled to begin no later than sixty days after the issuance of the ex parte temporary suspension. Within three days after the issuance of the ex parte suspension order, the board shall serve the podiatrist with a copy of the order along with a copy of the complaint and notice of the date set for the full hearing. The podiatrist may appeal the ex parte temporary suspension order prior to the full hearing. For purposes of this appeal, the district court shall decide whether probable cause reasonably requires the temporary suspension to adequately protect the public interests. The court shall give priority to the appeal for prompt disposition thereof. Unless ordered by the district court, an appeal by the podiatrist of the ex parte temporary suspension order does not stay the

- effectiveness or validity of the ex parte temporary suspension.
2. A suspension, revocation, condition, limitation, qualification, or restriction of a license or permit is in effect pending determination of an appeal unless the court, upon petition and for good cause shown, otherwise orders.
 3. A license or permit to practice podiatric medicine is automatically suspended if a guardian of the person of a licensee or permittee is appointed by order of a court under chapter 30.1-28 or other similar provisions in this state or elsewhere for reasons other than the minority of the licensee or permittee, or the licensee or permittee is committed by order of a court under chapter 25-03.1 or other similar provisions of law in this state or elsewhere. The license or permit remains suspended until the licensee or permittee is restored to capacity by a court and, upon petition by the licensee or permittee, the suspension is terminated by the board after a hearing.
 4. The board may restore and reissue a license or permit to practice podiatric medicine and may impose as a condition of the license or permit any disciplinary or corrective measure.
 5. The board may revoke the license of any podiatrist who fails to renew a license. A revocation may occur after six months from the date when all renewal fees and other conditions must be paid or completed and be in effect before any hearing upon written notice to the podiatrist of the revocation. A hearing must be held within sixty days of the service of the notice of revocation upon the podiatrist.

The 57th Legislative Assembly addressed the issue of the board incurring expenses that exceed the board's financial resources. House Bill No. 1377 (2001), effective August 1, 2001, provides:

Loan for litigation expenses. Subject to approval by the emergency commission, the board may borrow funds sufficient to pay for attorneys' fees and costs incurred in investigations, administrative proceedings, and litigation resulting from the board performing its duties. Notwithstanding section 43-05-15, the board may establish an annual renewal license fee for each year following the issuance of a loan under this section, and the fee must be maintained until the loan is fully repaid, including any accrued interest. The amount of the annual renewal license fee assessed under this section

may not exceed one thousand dollars. Once the loan is paid in full, the annual renewal license fee must revert to the amount established by the board before the issuance of the loan. The notice of a proposed rule to assess the fee in this section or revert to the previous license fee may be sent by certified mail to each individual licensed by the board in lieu of the publication requirements for the notice in chapter 28-32.

North Dakota Board of Reflexology

The North Dakota Board of Reflexology is created under NDCC Chapter 43-49. The three-member board consists of three licensed reflexologists. The survey performed by the Attorney General's office indicates there are approximately 18 reflexologists licensed by this board.

The board has not adopted administrative rules. North Dakota Century Code Chapter 43-49 provides the examination fee is \$50, the licensure fee is \$75, and the license renewal fee is \$25 unless otherwise set by the board. Section 43-49-12 provides the board's authority to take disciplinary actions, providing:

- The license of a licensed reflexologist may be revoked, suspended, or annulled by the board upon any one or more of the following grounds:
1. That the person is guilty of gross malpractice or incompetence.
 2. That the person's mental or physical health endangers public health or safety.
 3. That the person fails to comply with rules of the board.
 4. That the person is guilty of false or deceptive advertising.
 5. That the person engages in unprofessional conduct.

State Board of Registration for Professional Soil Classifiers

The State Board of Registration for Professional Soil Classifiers is created under NDCC Chapter 43-36. The five-member board consists of three professional soil classifiers and two members at large. The survey performed by the Attorney General's office indicates there are approximately 35 to 40 professional soil classifiers licensed by this board.

North Dakota Century Code Section 43-36-07 provides the board's powers are as follows:

- The board has the power to administer this chapter under chapter 28-32 and:
1. To adopt and amend all bylaws, rules of procedure, and regulations to administer and carry out the provisions of this chapter and for the conduct of its affairs and functions consistent with the constitution and laws of this state or this chapter which

- may be reasonably necessary for the proper performance of its duties and the regulation of its proceedings, meetings, records, examinations, and the conduct thereof, and to adopt and promulgate a code of ethics which is binding upon all persons registered under or subject to this chapter.
2. To employ such clerks, technical experts, and attorneys as it may deem necessary or desirable to carry out the provisions of this chapter.
 3. To apply in the name of the state for relief by injunction without bond, to enforce the provisions of this chapter, or to restrain any violation thereof. In such proceedings it is not necessary to allege or prove either that an adequate remedy at law does not exist or that substantial or irreparable damage would result from the continued violation thereof. The members of the board are not personally liable under this proceeding.
 4. To negotiate and enter reciprocal agreements with similar agencies in other states; provided that a reciprocal agreement may not limit the board's powers and duties regarding any application for registration as a professional soil classifier or for certification as a soil classifier-in-training or regarding the enforcement of this chapter or any rules adopted to implement this chapter.

The board has adopted administrative rules as NDAC Title 76. North Dakota Century Code Chapter 43-36 provides minimum and maximum parameters for fees and the board has set fees within these parameters by administrative rules.

North Dakota Century Code Section 43-36-21 authorizes the board to discipline registrants, providing:

The board has the power to suspend, refuse to renew or revoke the certificate of registration of, or reprimand any registrant who is guilty of any of the following:

1. The practice of fraud or deceit in obtaining a certificate of registration.
2. Any gross negligence, incompetence, or misconduct in the practice of soil classifying.
3. Any offense determined by the board to have a direct bearing upon a registrant's ability to serve the public as a professional soil classifier, or the board determines, following conviction of any offense, that a registrant is not sufficiently rehabilitated under section 12.1-33-02.1.

4. Violation of the code of ethics adopted and promulgated by the board.

North Dakota Century Code Section 43-36-22 provides the board's disciplinary procedures:

Any person may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct, or violation of the code of ethics against any individual registrant. Such charges must be in writing and must be sworn to by the person or persons making them and must be filed with the secretary of the board. All charges unless dismissed by the board as unfounded or trivial must be heard by the board within three months after the date on which they have been preferred. The time and place for said hearing must be fixed by the board and a copy of the charges together with a notice of the time and place of hearing must be served upon the accused either personally or sent by registered or certified mail to the last known address of such individual registrant at least thirty days before the date fixed for hearing. At any hearing the accused registrant has the right to appear in person or by counsel, or both, to cross-examine witnesses appearing against the accused, and to produce evidence and witnesses in defense of the accused. If the accused person fails or refuses to appear, the board may proceed to hear and determine the validity of the charges. If after such hearing a majority of the board votes in favor of sustaining the charges, the board shall make findings of fact, draw its conclusions and issue its order therein and serve the same upon the accused. In said order the board may reprimand, suspend, refuse to renew, or revoke the accused individual's certificate of registration. Any person who feels aggrieved by any action of the board in denying, suspending, refusing to renew, or revoking his certificate of registration may appeal therefrom to the district court under the procedures provided by chapter 28-32.

STUDY APPROACH

Possible study approaches to the study of occupational and professional licensing boards with fewer than 100 licensees may include:

- Reviewing the law governing each board and the administrative rules adopted by each board.
- Contacting each board and requesting information regarding the board's history regarding disciplinary proceedings, including the statutory authority to initiate disciplinary proceedings, the frequency of disciplinary proceedings, the expenses associated with disciplinary proceedings, and the legal and administrative services necessary to initiate and pursue disciplinary

proceedings and the availability of these services.

- Consulting with the Attorney General regarding the study.
- Contacting the Council for Licensure, Enforcement and Regulation (CLEAR), the purpose of which includes bringing "together government officials and agencies involved in or affected by professional and occupational regulation," providing "education and training to governmental officials and other interested parties concerned with professional and occupational regulation," and improving "the administrative regulatory practices of government officials and

agencies concerned with professional and occupational regulation." The CLEAR web site is at <http://clearhq.org>.

Upon receipt of this information, the committee may consider whether the current board structures are effective or whether it might be desirable to consolidate, disband, or otherwise modify the boards; whether a board's membership is appropriate or whether it might be desirable to change the membership compositions; and whether the state is adequately protected from liability for actions of the boards.

ATTACH:1