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Dep't of Commerce and
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June 10, 1992

663-92-0591

465-3600

Assumption of licensing
functions of the Board of
Electrical Examiners

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You have asked whether the Department of Commerce and Economic Development (department) may lawfully assume the licensing functions assigned to the sunset Board of Electrical Examiners (board), under your department's existing statutory authority. If not, may the department continue to collect fees from existing licenses under this program, and does the department itself have the authority to revoke or suspend licenses issued before July 1, 1992 for violations of licensing requirements occurring after that date?

SHORT ANSWER

The department does not have the statutory authority to adopt regulations to assume the licensing functions assigned to the sunset Board of Electrical Examiners. If the department wishes to assume these functions, the department will need to obtain additional statutory authority from the legislature. If the department does not wish to assume these functions, we recommend that the department pursue legislation to remove obsolete references to the licensing program for electrical administrators. Also, the department should review occupational licensing regulations to make or recommend necessary changes in accordance with this advice.¹

As to the collection of fees, the department should not accept new license applications after July 1, 1992, and therefore, no new application fees should be accepted after that date.

Persons who submitted pending applications should be informed of the status of the board and be given an opportunity to receive a refund of fees paid. Because the electrical administrator license cannot be renewed without board involvement, renewal fees

¹ For example, we note that the Board of Mechanical Examiners has recently adopted regulations regarding controls and control wiring that appear to need revision due to the expiration of the Board of Electrical Examiners. 12 AAC 39.940.

should not be accepted after July 1, 1992. The valid licenses issued before July 1, 1992 continue in effect until their renewal date.

As to enforcement, the department can only enforce statutes and regulations not assigned to the board to enforce. Since most of the key licensing requirements involve board enforcement, the department may have to look to other statutes and other departments, discussed below, to enforce safety concerns.

OVERVIEW

In 1977, the Alaska State Legislature created the Board of Electrical Examiners. Ch. 53, SLA 1977. The purpose of the board was "to protect the safety of people and property in the state from the danger of improperly installed electrical wiring and equipment" AS 08.40.005. The board sets qualifications for licensure of electrical administrators. AS 08.40.045; 08.40.050.

The board is subject to routine "sunset" review by the legislature under AS 44.66.050. In the "sunset" review, the board carries "the burden of demonstrating a public need for its continued existence" AS 44.66.050(b). A board that is not continued in existence by the legislature is allowed one year after the date of termination to wind up licensing activities before ceasing all activities. AS 08.03.020(a).

The Board of Electrical Examiners has undergone "sunset" review by the legislature twice since 1985. On June 30, 1986, the legislature allowed the board to terminate. During the board's wind-up year of operations in 1987, the legislature transferred the board's functions to the department. Secs. 22-31, ch. 94, SLA 1987.

In 1988, the legislature recreated the Board of Electrical Examiners. Ch. 98, SLA 1988. In recreating the board, the legislature expressly removed the department's authority to adopt regulations "establishing categories of electrical administrators, establishing qualifications for those categories and the content of examinations for applicants for each category." Sec. 5, ch. 98, SLA 1988. Additionally, the legislature expressly removed and transferred to the board the department's authority to adopt regulations "relating to the examination and licensing of electrical administrators, the establishing of the continued competency of an applicant for

license renewal and reinstatement, and the suspension and revocation of licenses." Id. at sec. 6. The department retained certain ministerial functions related to this licensing activity, such as issuing licenses to applicants approved by the board or prescribing forms for applicants to apply for licensure. AS 08.40.090. Also, the department retained the authority to inspect or investigate the work of licensees. AS 08.40.070. Additionally, the department performed certain centralized licensing functions related to this board's activities under AS 08.01. Finally, the recreated Board of Electrical Examiners was again scheduled for sunset review to avoid termination on June 30, 1991. Sec. 3, ch. 98, SLA 1988.

In 1991, the governor requested that HB 159 be introduced to extend the board for four years, until June 30, 1995. Hearings were held on HB 159 before the House Labor and Commerce Committee. A committee substitute, CSHB 159(L&C), was adopted to extend the board only until June 30, 1992. That bill passed the House of Representatives on May 3, 1991. 1991 House Journal 1122. The bill was forwarded to the Senate and referred to the Senate Labor and Commerce Committee. 1991 Senate Journal 1112. The bill did not pass out of committee or the Senate during the 1991 and 1992 sessions.

As a result, the statutes were not amended to continue the board in existence. By operation of law, the board "shall cease all activities" effective July 1, 1992. AS 08.03.010(a)(11) and AS 08.03.020.

DISCUSSION

The Department of Commerce and Economic Development was created by statute and assigned certain duties by the legislature. AS 44.33. The department must look to its general and specific statutory authority to see if it has the authority to assume the duties of the sunset board. The department may not act beyond the scope of its statutorily assigned duties without, in essence, legislating new functions and running afoul of separation-of-powers principles. Also, the Alaska court has recognized that administrative agencies are creatures of statute deriving from the legislature the authority for the exercise of any power they claim. *Rutter v. State*, 668 P.2d 1343, 1349 (Alaska 1983).

AS 44.33.020 sets out the general power and duties of the department. Nowhere does that statute authorize the department to set qualifications for licensure of electrical

administrators. Likewise, in centralized licensing statutes in AS 08.01.050, the department is not assigned these duties.² Since the setting of qualifications was not transferred to the department at the end of the existence of the board, the legislature did not provide authority for the department to assume these duties.³

While AS 08.40.090 states that a "person may not act as an electrical administrator in the state without a license issued by the department," this language by itself does not give the department the authority to adopt regulations to set qualifications, offer examinations, and take other actions previously assigned to the board.⁴ AS 08.40.045; 08.40.060.

Finally, you have asked about the department's authority to collect fees for this licensing program. Since the department is without statutory authorization to conduct licensing examinations or evaluate qualifications of applicants, new applicant fees should not be accepted on or after July 1, 1992. Already pending applicants who are scheduled for examinations in June 1992 should be informed of the status of the board and given an opportunity to request a refund of application fees submitted.

As to renewal fees, the department can only renew licenses on dates set by the department "with the approval of the respective board." AS 08.01.100(a). Also, AS 08.40.135(a) provides that licenses may be renewed by the department "upon

² AS 08.01.050 does assign to the department the authority to authorize license "for acupuncturists, audiologists, contractors, naturopaths, or hearing aid dealers." AS 08.01.050(a)(9).

³ Since the legislature knows how to transfer functions of the board to the department, as it did in 1987, the legislature's failure to act supports this conclusion.

⁴ We interpret "license issued by the department" to merely reflect the ministerial role assigned to the department to issue licenses based on board approval.

Also, since no new or renewal license may be issued by the department after July 1, 1992, we believe that the court would interpret the requirement of AS 08.40.090 as a nullity; a court would likely not require a person to complete the impossible act of obtaining a license that must be authorized by a nonexistent board.

proof of continued competence," the standards which are established by the board, by regulation, under AS 08.40.050. Since the Board of Electrical Administrators will not exist after July 1, 1992, to approve license renewal dates or to address continued competency requirements, electrical administrator licenses cannot be renewed after that date. Therefore, no renewal fees should be collected after July 1, 1992. Fees received after that date to renew licenses after July 1, 1992, should be returned. A valid license issued before July 1, 1992, continues in existence until its expiration date.⁵

Finally, you have asked what authority the department may have to suspend or revoke a license issued before July 1, 1992, for a license violation occurring after July 1, 1992. Again, the function of disciplining licensees was assigned to the board under AS 08.40.170. The legislature did not transfer this function to the department. Therefore, the department may not discipline licensees⁶ under AS 08.40.170. The department may conduct limited investigations under AS 08.01.087(a). Since no board is available to act on the violations or for the commissioner to notify, the department would have to seek an action in the superior court to obtain compliance. We would alert the department that it may only attempt to obtain compliance with the statutes or regulations remaining that do not involve the board.⁷

Since most safety statutes in AS 08.40.005 -- 08.40.200, and regulations adopted under them, will no longer be effective after July 1, 1992, the remedy for safety violations would likely be based on other statutes.⁸

⁵ We understand that the valid licenses issued before July 1, 1992 are due to expire in 1993.

⁶ We assume that disciplinary actions would have relevance only for licensees who possess valid licenses on July 1, 1992, but have expiration dates after July 1, 1992. Since the licenses cannot be renewed, the problem should not exist after 1993.

⁷ For example, AS 08.40.140 requires a licensee to prominently display a certificate of license, while in effect, in the holder's principal place of business. If the department investigated and determined that a person validly licensed before July 1, 1992, is not displaying that certificate, the department apparently could attempt to seek compliance through court action.

⁸ For example, the commissioner of the Department of Labor issues a certificate of fitness for a person involved in the electrical wiring trade. AS 18.62.070. Also, the Department of Commerce and Economic Development generally issues certificates

CONCLUSION

For the reasons stated above, the department cannot adopt regulations to assume the licensing functions assigned to the Board of Electrical Examiners before its termination under "sunset" review.⁹ If the department wishes to assume these functions, it will need to obtain statutory authority from the legislature. If it does not wish to do so, the department should pursue legislation to clean up the statutes relating to licensing of electrical administrators. Additionally, the department should review occupational licensing regulations for appropriate amendment or repeal in accordance with this advice. Your staff should provide to me a list of all regulations adopted by the board, so that, as regulations attorney, I can instruct the publisher of the Alaska Administrative Code to delete them.

As to fees, the department should not be collecting fees from new applicants after July 1, 1992, because there is no legal means for these applicants to become licensed as electrical administrators. As to renewal fees, we believe that the department has no authority to renew licenses without board concurrence and therefore no renewal fees should be collected after July 1, 1992.

As to enforcement, the department can only pursue enforcement of very limited responsibilities not assigned to the board to enforce. As a practical matter, this will likely mean that complaints against persons holding licenses on July 1, 1992, until those licenses expire in 1993, will likely have to be pursued under other statutory authorities (and then perhaps by the Department of Labor).

If we may be of further assistance, please contact us.

DB:tg

cc: Hon. Glenn Olds, Commissioner
Department of Commerce & Economic Development

(..continued)
of registration for construction contractors. AS 08.18. These statutes, and regulations adopted under them, might provide some additional authority to enforce safety concerns.

⁹ We reached a similar conclusion regarding the Board of Welder Examiners, after it was sunset. See 1982 Inf. Op. Att'y Gen. at 1 (July 16; 366-756-82).

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Hon. Charles W. Mahlen, Commissioner
Department of Labor

Donald Parks, Chairperson
Board of Electrical Examiners