

OKLAHOMA STATE BOARD OF EXAMINERS OF PERFUSIONISTS

Minutes

The Oklahoma State Board of Examiners of Perfusionists met on September 1, 2015, at 7:00 p.m. in accordance with the Open Meeting Act. The meeting was held at the office of the Board, 101 NE 51st Street, Oklahoma City, Oklahoma. Advance notice of this regularly scheduled meeting was transmitted to the Oklahoma Secretary of State on December 15, 2014, and posted on the Board's website on August 31, 2015. The notice and agenda were posted in prominent public view on the front doors of the Oklahoma Board of Medical Licensure and Supervision building located at 101 NE 51st St., Oklahoma City, OK on August 31, 2015 at 10:15 a.m.

Members Present were:

Donald G. Hamilton, II, LP, Chairman
Hayden Miller, LP, Vice-Chairman
Gary Isbell, Public Member, Secretary-Treasurer
Marvin D. Peyton, MD
Harold Wardlow
Leah Davidson, LP
Samuel Friedrichsen, LP

Members Absent were:

R. Darryl Fisher, MD
(Public member position vacant)

Others present:

Lyle Kelsey, Executive Director
Barbara J. Smith, Executive Secretary
Teresa Mitchell, Licensing Director
Tiffany Wythe, AAG, Board Advisor

Having noted a quorum, Mr. Hamilton called the meeting to order at 7:00 pm. Following Board review, Dr. Peyton moved to approve the Minutes of June 15, 2015, as written. Mr. Isbell seconded the motion and the vote was unanimous in the affirmative.

The Board then reviewed the complete application for licensure of **RUSSELL JAMES BUCK, III**. Mr. Miller moved to approve the application for licensure. Mr. Friedrichsen seconded the motion and the vote was unanimous in the affirmative.

Next, Tiffany Wythe, AAG, Board Advisor, reported to the Board on Executive Order 2015-33 and the role of the Oklahoma Attorney General's office in conjunction with the Order. Ms. Wythe explained that the Order was made pursuant to the Federal Anti-trust laws which are meant to protect the public from anti-competitive behavior. The penalty for violation of an anti-

trust law is treble (triple) damages. Because licensing boards limit people working in the same profession as the majority of the board members by denying licensure and/or disciplining licensees, it could be considered anti-competitive in some circumstances. Boards have had immunity, but the Supreme Court recently ruled (*North Carolina State Board of Dental Examiners v. Federal Trade Commission*) that the NC Dental Board had no immunity because the Board was controlled by practicing dentists and, therefore, the Supreme Court did not assume the Board had “good motives” unless they could show their decision was actively reviewed by the State. What this means for Oklahoma is, since the “majority of a quorum” are controlled by members who are licensees of the profession they are licensing, all decisions to deny licensure or discipline a licensee now require a review by the Oklahoma Attorney General’s office. Going forward, when a Board makes a decision that could be considered anti-competitive, the motion should be stated as follows: “I move to (action) on the basis of (facts, law, rule, violation) **which shall be effective upon review of the Oklahoma Attorney General’s office.**” A one-page letter will then be drafted and sent to the Attorney General’s office which states the facts, law, and prevailing policy upon which the decision was based. After review, the AG will issue a formal AG opinion to the Board upholding or overturning the decision. The Board questioned Ms. Wythe on issues of immunity and recusal. Ms. Wythe advised the Board that if it appears a member is working in the same geographical area as a licensee who is coming before the Board, that member may want to consider recusing from the matter. Finally, she advised the Board that the AG review process has been put in place as a benefit to the Board and will offer great protection against the members regarding any anti-trust matters. (*Executive Order 2015-33 and OAG Letter dated August 17, 2016 attached*)

Next the Board discussed the status of rescheduling the *Blood Conservation in the Cardiac Patient Symposium*. Mr. Miller reported that he would like to have the symposium rescheduled for some time in November of 2015 since all the CEU/CME credits have already been approved through the University of Oklahoma. The Board was agreeable to obtaining an alternate keynote speaker if Dr. Spiess is unavailable. The Board requested that Barbara Smith email Dr. Spiess again regarding his availability and to also touch base with Myrna Page, OU Office of Continuing Professional Development, regarding the expiration, if any, of the CEU/CME credits previously approved.

After Board review, Mr. Isbell moved to approve the dates of **January 26, 2016; June 14, 2016; August 9, 2016; and November 8, 2016** as 2016 Board Meeting Dates. Mr. Miller seconded the motion and the vote was unanimous in the affirmative.

There being no further business, Mr. Hamilton adjourned the meeting at 7:31 p.m.



Mary Fallin
Governor

FILED

JUL 17 2015

OKLAHOMA SECRETARY
OF STATE

EXECUTIVE DEPARTMENT
EXECUTIVE ORDER 2015-33

I, Mary Fallin, Governor of the State of Oklahoma, pursuant to the power and authority vested in me by Section 2 of Article VI of the Oklahoma Constitution, hereby order all state boards who have a majority of members who are participants of markets that are directly or indirectly controlled by the board, to immediately implement and adopt the following procedures.

Attorney General Guidance

Attorney General Scott Pruitt issued a letter to this office on July 6, 2015, recommending reform of certain current practices by Oklahoma licensing boards, in light of the recent opinion of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. The Attorney General advised that any state board that has a majority of its members who are participants of markets that are directly or indirectly controlled by the board would be subject to possible suit for violations of antitrust law. The Attorney General opined that Oklahoma must implement procedures for those boards with a majority of such members that demonstrate active supervision by the State by a politically accountable state actor who has the power to review, veto and modify board decisions.

Administrative Rules

The Attorney General has reviewed the rulemaking powers of such boards and concluded that sufficient statutory safeguards are currently in place to prevent exposure to possible suit for violations of antitrust or other anti-competitive laws. The *Oklahoma Administrative Procedures Act* and *Executive Order 2013-34* clearly establish procedures that demonstrate active supervision by the Governor and Legislature who are compromised of politically accountable actors. Both the Governor and the Legislature have the power to review, veto and modify board administrative rules.

Other Board Licensure or Prohibition Actions

The Attorney General has concluded that licensure or prohibition actions (other than rulemaking) have insufficient procedures to demonstrate active supervision of boards with a majority of members who are participants of markets that are directly or indirectly controlled by

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the board. The Attorney General recommended that a single state agency be clearly established as the politically accountable actor with the power to review, veto and modify board licensure or prohibition actions.

The agency best equipped to assume these duties is the Office of the Attorney General. It is the Office of the Attorney General that has the ultimate responsibility for review of violations of antitrust statutes. It is the Office of the Attorney General that is charged with the responsibility to enjoin and enforce the *Oklahoma Antitrust Reform Act* (79 O.S. §§ 201 et seq.) and the *Oklahoma Consumer Protection Act* (15 O.S. §§ 751 et seq.). The Office of the Attorney General is also the entity that provides legal advice to most boards and agencies. See 74 O.S. § 18c.

Therefore, I hereby order that all non-rulemaking actions proposed by any state board on which, a majority of its members are participants in the same market that the board regulates:

1. All proposed licensure or prohibition actions shall be submitted to the Office of the Attorney General for review and written analysis of possible violation of law;
2. Upon receipt of the written analysis provided by the Office of the Attorney General, the board shall defer to any recommended modification, including rescinding the proposed action; and
3. Failure to follow the written analysis provided by the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.

This Executive Order shall be distributed to all members of the Governor's Executive Cabinet and the chief executives of all state agencies, who shall cause the provisions of this Order to be implemented.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 17th day of July, 2015.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA



MARY FALLIN

ATTEST:



Acting Assistant SECRETARY OF STATE



E. SCOTT PRUITT
ATTORNEY GENERAL

August 17, 2015

To All Boards and Commissions with Active Market Participant Majorities:

The United States Supreme Court recently decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015). Under the law established by the Court's opinion, a state agency and its board members may be the subject of federal antitrust liability when active market participants make up a majority on the board or commission in charge of the agency and the agency engages in anticompetitive conduct. The Court held that the only way to protect state agencies and their board members in these circumstances and to ensure they have immunity from suit is to see that they operate consistently with state policies through supervision by a politically accountable arm of the state. Absent that supervision, federal antitrust liability—including treble monetary damages—may apply. The possibility that a state agency could become the focus of a federal antitrust suit for ordinary government is a significant risk that the State must avoid.

Several weeks ago I raised these concerns in a letter to the Governor. In that letter, I described with more detail the legal issues raised by *North Carolina Dental Examiners* and suggested that Oklahoma remedy the problem by changing the composition of boards and commissions or by designating a state agency or officer to supervise actions taken by boards and commissions that implicate antitrust concerns.

The Governor responded with an executive order choosing the latter option, designating my office as the supervisory entity, and directing you to seek a written analysis from my office of all proposed agency actions that may trigger antitrust concerns. The issuance of a written analysis or legal opinion by my Office accords with the traditional power this Office has to issue written attorney general opinions at the request of an agency. 74 O.S.2011 § 18b(A)(5). As you are aware, attorney general opinions are legally binding on state officials unless set aside by a court of competent jurisdiction. *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765. Under the terms of the Governor's executive order, agency officials who fail to seek to this advice from my office, or who fail to follow my advice, will be subject to removal for misconduct. Additionally, my office can seek a writ of mandamus or prohibition from a court directing agency officials to abide by their duty to abide by the terms of an opinion issued by my office.

According to the Supreme Court, the review my office conducts must constitute "active supervision" over agency action, which means that my office must actually review each decision

and have the authority to veto or modify them. In performing this “active supervision,” my office must ensure that actions taken by agencies are not “anticompetitive.” Actions are “anticompetitive” when they could lessen competition by discouraging, deterring, or removing a participant from a market. Anticompetitive actions thus include actions such as revoking a license or permit; denying a license or permit; disciplining a licensee, permittee, professional, or other market participant through written reprimand, fines, or other means; preparing guidance documents, position letters, or other informal documents stating an interpretation of law that could deter market participation by increasing costs for market participants; or any informal enforcement action such as a cease and desist letter. Action that could reduce the number of market participants and thus reduce competition in a particular market might also be anticompetitive and should also be forwarded for review.

When your agency intends to take actions that are arguably anticompetitive action as described above, it must forward the proposed action to my office for review. In doing so, you should send a description of the proposed action, a short recital of the relevant statutes or other legal authorities supporting the action, a short description of the facts supporting the action, and a short description of the policy justification for the action. The request should also describe any exigent circumstances that require an immediate response. The request for a written analysis for a single action should be no more than a page in length and should be emailed to both jared.haines@oag.ok.gov and karen.bray@oag.ok.gov, with “Request for Review of Agency Action” in the subject line. You may consult directly with Jared Haines by phone prior to developing your request at 405-522-2994.

Preparing these written legal opinions will be a separate function from the ordinary legal counsel provided by attorneys in my Office. An agency whose board or commission has a majority composed of active market participants should submit these requests regardless of whether the agency has counsel from my Office, internal counsel, or private counsel.

Those willing to serve on the State’s boards and commissions should not have to defend against antitrust lawsuits on top of the other responsibilities they have assumed. After taking the steps I have outlined, we can ensure that the antitrust immunity of your agency and board members is preserved.

Sincerely,



E. Scott Pruitt
Attorney General of Oklahoma