

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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November 4, 2002

Opinion No. 02-122

Cosmetology Board's authority to terminate contract

QUESTION

Does the Tennessee Board of Cosmetology (“the Board”) have the authority to terminate a contract between the Board and a contractor who performs testing of applicants for licensure?

OPINION

Yes. As a general principle, the Board has the authority to terminate a contract into which it has entered, assuming appropriate and sufficient circumstances.

ANALYSIS

Your opinion request indicates that the Board may be dissatisfied with the performance of a contractor that has contracted with the Board to provide examination services for applicants who seek licensure in cosmetology, manicuring, or aesthetics.¹ Tenn. Code Ann. § 62-4-105(d) states that “[t]he duties of the board shall be to conduct or cause to be conducted examinations of applicants, and to make and declare the policy of the board.” This provision confers upon the Board the authority to contract with a contractor for applicant examination services. Implicit in this provision is the corresponding authority to terminate such a contract in the event a contractor fails to provide examination services in a manner prescribed by the Board, by law, and/or by the terms of an existing contract.

In 2000, the Board entered into a five-year contract (“the contract”) with a firm for applicant examination services. The terms of this existing contract for examination services determine the circumstances under which termination is permitted. Paragraph D.3 of the contract provides as follows:

Termination for Convenience. The State may terminate this Contract without cause for any reason. Said termination shall not be deemed a Breach of Contract by the State. The State shall give the Contractor at least ninety (90) days written notice before the effective termination date. Upon such termination, the Contractor

¹See Tenn. Code Ann. § 62-4-108, *et seq.*

shall have no right to any actual, incidental, consequential, or any other damages whatsoever of any description or amount.

Paragraph D.4 of the contract addresses termination for cause:

Termination for Cause. If the Contractor fails to properly perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any terms of this Contract, the State shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services. Notwithstanding the above, the Contractor shall not be relieved of liability to the State for damages sustained by virtue of any breach of this Contract by the Contractor.²

It is important to note that, although Paragraph D. 3 permits termination for convenience, and without regard to specific causes, numerous factual and practical considerations that mitigate against termination under this provision may exist. In addition, prior to termination for cause under Paragraph D.4, many factual and legal factors should be considered. This opinion letter, therefore, addresses neither the specific merits of the Board's current dissatisfaction with the applicant examination contractor, nor the appropriate course of action that the Board should pursue.

In dealing with contractual matters, the Board should consult with the Director of the Division of Regulatory Boards of the Department of Commerce & Insurance, or the Director's designee. Pursuant to Tenn. Code Ann. § 62-4-105(c), the Director or the Director's designee serves as Secretary of the Board, and performs all administrative functions for the Board. In addition, this Office stands ready to consult with the Board on any and all legal matters, including contract matters.

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²This is not meant to suggest that these two contract provisions are the sole basis upon which such a contract may be terminated by the State.

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