

December 27, 2004: Authority to Take Disciplinary Action under the Parental Responsibility Act

Mr. Arturo L. Jaramillo, Superintendent
New Mexico Regulation & Licensing Department
P.O. Box 24409
Santa Fe, New Mexico 87502-9409

Mr. Bruce F. Malott, Chairman
New Mexico Public Accountancy Board
5200 Oakland NE, Suite D
Albuquerque, New Mexico 87113

Re: **Opinion Request – Authority to Take Disciplinary Action under the Parental Responsibility Act**

Dear Messrs. Jaramillo and Malott:

You have requested Attorney General Patricia Madrid's advice concerning which entity – the Compliance Section of the New Mexico Regulation & Licensing Department ("RLD") or the New Mexico Public Accountancy Board (the "Board") – has the authority to issue notices of contemplated action ("NCA") in cases involving the violation of the Parental Responsibility Act, NMSA 1978, §§ 40-5A-1 through 40-5A-13, as amended ("PRA"). As discussed in more detail below, absent a joint powers agreement between RLD and the Board, the Board has exclusive authority to initiate disciplinary proceedings against one of its licensees for violations of PRA.

One of the stated purposes of PRA is to require parents to eliminate child support arrearages in order to be issued, maintain or renew a license.¹ NMSA 1978, § 40-5A-2. Under PRA, an applicant for a license or licensee is not eligible for the issuance or renewal of a license if s/he is not in compliance with a judgment and order for support or subpoenas or warrants relating to paternity or child support proceedings. NMSA 1978, §§ 40-5A-4 and 40-5A-5. Moreover, the failure of a licensee to be in compliance with PRA alone is grounds for the suspension or revocation of a license. NMSA 1978, § 40-5A-6. In each instance, PRA makes it incumbent upon a board, and not RLD, to notify an applicant or licensee of its intent to take action in accordance with the Uniform Licensing Act. §§ 40-5A-4, -5, and -6. PRA includes among its definition of "board," (1) a board, agency, or commission [such as the Board] that administers a profession or occupation pursuant to Chapter 61 NMSA 1978, (2) any other state agency to which the Uniform Licensing Act is applied by law, (3) a licensing board or other authority that issues a license, certificate, registration or permit to engage in a profession or occupation regulated in New Mexico, and (4) the alcohol and gaming division of RLD. See NMSA 1978, § 40-5A-3. It is noteworthy that while the PRA's definition of "board" may include some divisions of RLD, it does not include RLD itself.

In 1983, the Legislature enacted the Regulation and Licensing Department Act to “create a single unified department to administer all laws and exercise all functions formerly administered and exercised by the financial institutions division, the construction industries division and the mobile housing division of the commerce and industry department.”² NMSA 1978, § 9-16-2. At its inception, RLD consisted of six divisions – the administrative services division, the construction industries division, the financial institutions division, the securities division, the manufactured housing division and the alcohol and gaming division. NMSA 1978, § 9-16-4. Thereafter, the superintendent was authorized to establish within each division such bureaus as he deems necessary to carry out the provisions of the RLD Act. NMSA 1978, § 9-16-8.

Under the RLD Act, the superintendent of RLD is vested with “every power expressly enumerated in the laws, whether granted to the superintendent or the department or any division of the department, except where authority conferred on any division is explicitly exempted from the superintendent’s authority by statute.”³ NMSA 1978, § 9-16-6(B). The RLD Act further mandates that the superintendent take administrative action by issuing orders and instructions, not inconsistent with the law, to insure implementation of and compliance with the provisions of law he is responsible for administering or executing. NMSA 1978, § 9-16-6(B)(5).

The Board is a not bureau, division, or other organizational unit of RLD and the 1999 Public Accountancy Act, NMSA 1978, §§ 61-28B-1 through 61-28B-29, as amended (the “Accountancy Act”), is not a provision of law for which the superintendent is responsible. While the Board is administratively attached to RLD, NMSA 1978, § 61-28B-4, this only means that RLD shall “provide, if mutually agreed, the budgeting, record-keeping and related administrative and clerical assistance to the agency” and “include the agency’s budgetary request, as submitted and without changes, in the department budget,” NMSA 1978, § 9-1-7. Otherwise, the Board exercises its functions independently of RLD and without approval or control of RLD.” *Id.*

With respect to the practice of accountancy, only the Board is authorized to regulate the practice of accountancy by carrying out the provisions of the Accountancy Act. The Board is authorized to grant or renew certificates for those individuals whose qualifications it finds are in accordance with the Accountancy Act. NMSA 1978, § 61-28B-9. The Board also is empowered to take disciplinary action against a certificate holder or applicant for violations of the Accountancy Act and/or the Board’s rules. See, e.g. NMSA 1978, §§ 61-28B-17 and 61-28B-20. Pursuant to the rules of conduct promulgated by the Board, if an applicant or certificate holder is not in compliance with PRA, the Board shall “deny an application for a license; deny the renewal of a license; have grounds for suspension or revocation of a license; and shall initiate a notice of contemplated action under provision of the Uniform Licensing Act.” NMAC 16.60.5.11.D (2002).

In lieu of the Board taking action against an applicant or certificate holder for noncompliance with PRA, however, the Legislature expressly authorizes the Board to enter into a joint powers agreement with RLD to administer the provisions of PRA for

the Board. NMSA 1978, § 40-5A-11. The necessary terms and conditions of joint powers agreements are set forth in the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 through 11-1-7. Thus, if the Board chooses to enter into a joint powers agreement with RLD to administer the provisions of PRA on the Board's behalf and upon the execution of a valid joint powers agreement between the Board and RLD, RLD may issue NCAs to applicants for certificates issued by the Board and Board certificate holders for violations of PRA.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,

Sally Malavé

Assistant Attorney General

Cc: Stuart M. Bluestone, Deputy Attorney General

Donald Trigg, Civil Division Director

Kathleen O'Dea, RLD Board and Commissions Director

1 PRA defines "license" as a liquor license, or other license, certificate, registration or permit that a person is required to have to engage in a profession or occupation in New Mexico, and also includes driver's and recreational licenses. § 40-5A-3(G).

2 At about the same time, the Legislature abolished the commerce and industry department. Laws 1983, ch. 297, § 33.

3 NMSA 1978, § 9-16-11 explicitly exempts from the superintendent's authority certain responsibilities of the directors of the financial institutions division, the securities division, the chief of the savings and loan bureau. NMSA 1978, §§ 9-16-12 and 9-16-13 explicitly exempt from the superintendent's authority certain responsibilities of the construction industries commission and the manufactured housing committee, respectively.