

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
William P. Hobby Building
333 Guadalupe, Suite 3-825
Austin, Texas 78701

Committee Meetings: 8:30 a.m. – Noon
(See Committee Agendas for Times and Room Numbers)
Board Meeting: 1:00 p.m. – Adjournment
Hobby Building, Tower 2, Room 225

MINUTES FROM THE
February 23, 2012
BOARD MEETING

The Texas Board of Chiropractic Examiners will consider and act, if necessary, on matters within the jurisdiction of the Board which are listed on this agenda. The Board may meet from time-to-time in executive session with respect to the agenda items as authorized by the Texas Open Meetings Act, Chapter 551 of the Government Code.

1. CALL TO ORDER, ROLL CALL & ESTABLISHMENT OF A QUORUM

Cynthia Tays, D.C., President

Call to Order, Roll Call and Establishment of a Quorum. Vote as necessary on excusing any absent board members.

Action Taken: Board President Dr. Cynthia Tays called the meeting to order at 1:00 PM. All members were present with the exception of Dr. Patrick Thomas, DC and Ms. Kenya Woodruff. Dr. McCullough **MOVED** and Dr. Kurban **SECONDED** that Dr. Thomas' absence be approved. After consideration, the Board **APPROVED** the motion. Dr. Kurban **MOVED** and Dr. Campion **SECONDED** that Ms. Woodruff's absence be excused. After consideration, the Board **APPROVED** the motion.

Others present were:

1. Yvette Yarbrough, Executive Director
2. Hal ten Brink, General Counsel
3. Jennifer Hertsenberg, Director of Licensure
4. Sarah Matthews, Licensing Admin Assistant
5. Scott Parker, Director of Enforcement
6. Mary Feys, Legal/Enforcement Admin Assistant
7. Joe Thrash, Assistant Attorney General

2. APPROVAL OF MINUTES

Cynthia Tays, D.C.

- 2.1 Approval of Minutes from November 17, 2011 Board Meeting

Action Taken: Mr. Elizarde **MOVED** and Dr. Kurban **SECONDED** the motion to approve the minutes from the November 17, 2011 Board Meeting. After consideration, the Board **APPROVED** without changes the minutes from the November 17, 2011 meeting.

2.2 Approval of Minutes from January 6, 2012 Board Meeting

Action Taken: Dr. McCullough **MOVED** and Dr. Kurban **SECONDED** the motion to approve the minutes from the January 6, 2012 Board Meeting. After consideration, the Board **APPROVED** without changes the minutes from the January 6, 2012 meeting.

3. PUBLIC COMMENTS

Cynthia Tays, D.C.

Forum for licensees, the general public or other interested stakeholders to address the Board

Action Taken: Dr. Tays opened the floor to public comments. There were multiple comments made by members of the public:

- *Lance Durrett, D.C. – regarding the proposed amendment to Rule 77.5 (Agenda Item #6.1.1) and specifically disagreeing with the portion of that rule reading “not within the realm of scientific proof”*
- *Gary Brettmann, D.C. – regarding scope of practice in Texas*
- *Devin Pettiet, D.C. (representing Texas Chiropractic Association) – regarding the proposed amendment to Rule 77.5 and specifically the timing of adoption*

4. EXECUTIVE COMMITTEE BUSINESS

Cynthia Tays, D.C.

4.1 President’s Report (*Cynthia Tays, D.C.*)

Dr. Cynthia Tays may make a brief oral report to the Board on matters of current interest.

Action Taken: None. This item was for informational purposes only.

4.2 Executive Director’s Report (*Yvette Yarbrough*)

Executive Director Yvette Yarbrough will present written and oral reports to the Board concerning recent agency activities, statistical reports, audit outcomes, revenues and expenditures, licensing information, enforcement information and issues from the past legislative session. Mrs. Yarbrough will answer questions from the board members concerning any agency operations, legislative issues and other matters of concern to the Board.

Action Taken: None. This item was for informational purposes only.

4.3 NBCE Delegate and Alternate Delegate Selection (*Cynthia Tays, D.C.*)

The NBCE Annual Business Meeting of NBCE State Delegates will be held on Friday, May 4, 2012, in San Antonio. The NBCE requires the Board to select a delegate and an alternate by March 5, 2012, to serve a one-year term.

Action Taken: Dr. Kurban **MOVED** and Dr. Campion **SECONDED** that Dr. Tays be the primary delegate and Dr. Thomas be the alternate delegate. After consideration, the Board **APPROVED** the motion.

4.4 NBCE Part IV Examiners and Part IV Test Committee Representative Selection (*Cynthia Tays, D.C.*)

The NBCE will administer a Part IV Practical Examination at Parker University May 18-20, 2012, and November 9-11, 2012. Two Board members (licensed DCs) are requested to participate as examiners at each testing administration. Therefore, the Board must select two members for May and two members for November to act as examiners. Additionally, the NBCE will hold the Part IV Test Committee meeting June 8-9, 2012. Traditionally, the President of the Board has attended this meeting.

Action Taken: Dr. McCullough **MOVED** and Dr. Campion **SECONDED** that the May examiners be Dr. Montgomery and Dr. Campion and that the November examiners be Dr. Kurban and Dr. Thomas. After consideration, the Board **APPROVED** the motion. Dr. Kurban **MOVED** and Dr. Campion **SECONDED** that Dr. Tays be the representative for the Part IV Test Committee. After consideration, the Board **APPROVED** the motion.

4.5 FCLB Delegate and Alternate Delegate Selection (*Cynthia Tays, D.C.*)

The FCLB Annual Business Meeting will be held on Thursday, May 3, 2012 (Session I), and Saturday, May 5, 2012 (Session II), in San Antonio. The FCLB requires the Board to select a delegate and an alternate by April 5, 2012, to serve a one-year term.

Action Taken: Dr. Kurban **MOVED** and Dr. Campion **SECONDED** that Dr. Tays be the primary delegate and Dr. Montgomery be the alternate delegate. After consideration, the Board **APPROVED** the motion.

4.6 FCLB Conference 2012 Attendee Selection (*Cynthia Tays, D.C.*)

The FCLB 2012 Convention will be held on May 3-6, 2012, in San Antonio. The Board will pay for members' conference registration and hotel to attend. Therefore, members attending must be selected so Staff can make arrangements for payment.

Action Taken: None. It was discussed that Dr. Tays, Dr. Campion, and Dr. Montgomery would attend the convention and that Dr. Kurban possibly may. Board members will let the Executive Director know whether they are definitely attending within the next few days.

5. LICENSURE AND EDUCATIONAL STANDARDS COMMITTEE BUSINESS

Patrick Thomas, D.C.

5.1 Request for Approval to Sit for the Jurisprudence Exam:

5.1.1 Jonathan Bittick, Re-Instatement Applicant

Action Taken: Dr. Kurban **MOVED**, Dr. Campion **SECONDED** and the Board **APPROVED** Mr. Bittick's request to sit for the jurisprudence exam, with the condition that upon issuance, Mr. Bittick's license will be suspended for two (2) years, fully probated, with the stipulation that he must undergo random drug testing one (1) time per month during the two (2) year suspension.

5.2 Request for Approval of Facility Application:

5.2.1 People First Health Service, Owner Lonnie Alexander

Action Taken: Dr. Kurban **MOVED**, Mr. Elizarde **SECONDED** and the Board **APPROVED** the denial of Mr. Alexander's application for facility registration. The bases for this denial are the following:

Violations of Board rules below, in violation of Tex. Admin. Code § 74.9: (a) The board may refuse to issue or renew, suspend, or revoke a facility registration and/or impose an administrative penalty against an owner of a registered facility for a violation, by an employee, agent, or other representative of the facility, including a licensee or CRT employed or otherwise engaged by the facility, of the following:

- (1) the rules or an order of the board;
- (2) the Chiropractic Act;
- (3) the HPCA;
- (4) the MRTCA;
- (5) the rules or an order of the TDH; or
- (6) any other rule or statute, for which the board may impose disciplinary action if violated;

Failure to disclose criminal convictions, in violation of Tex. Admin. Code § 75.3: (f) An applicant for a license or registration from the board including an owner with a 10% or more interest in a chiropractic facility shall disclose in writing to the board any conviction against him or her at the time of application. A current licensee or registrant, including an owner with a 10% or more interest in a chiropractic facility shall disclose in writing to the board any conviction against him or her at the time of renewal or no later

than 30 days after judgment in the trial court, whichever date is earlier.

Failure to disclose criminal convictions as required by the registration form, in violation of Tex. Admin. Code § 74.2: (c) The following information shall be included in the application and upon renewal: (5) any other information requested by the board that it deems necessary for processing the application or for other regulatory purposes.

- 5.3 Consideration to recommend changes to Rule 71.15, Recognized Specialties, to reflect requirements for Nutrition as a recognized Chiropractic Specialty as approved at the May 19, 2011 Board Meeting

Action Taken: Tabled.

- 5.4 Consideration to recommend changes to Rule 71.15, Recognized Specialties, to reflect requirements for Neurology as a recognized Chiropractic Specialty as approved at the February 10, 2011 Board Meeting.

Action Taken: Tabled.

- 5.5 Consideration of changes to Continuing Education course approval criteria

Action Taken: Tabled.

- 5.6 Comments from Committee Chair concerning Committee business, activities or issues.

- 5.6.1 Discussion of 4 hour mandated continuing education courses (including Online Jurisprudence Course)

Action Taken: Tabled.

- 5.6.2 Discussion of CE hour tracking for licensees

Action Taken: Tabled.

- 5.6.3 Medicare Continuing Education Evaluation Summary

Action Taken: Tabled.

- 5.6.4 Approved Continuing Education Seminar Complaint – Follow-up

Action Taken: Tabled.

6. RULES COMMITTEE BUSINESS

Janette Kurban, D.C.

6.1 Consideration of Previously Proposed New Rules or Rule Amendments Eligible for Adoption

- 6.1.1 Consideration to adopt amendments to Rule 77.5 regarding Misleading Claims to make the rules regarding advertising more specific. The proposed amendment was published in the January 20, 2012, edition of the Texas Register. Two comments were received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Dr. Montgomery **SECONDED** that the proposed Rule 77.5 be adopted. After consideration, the Board **APPROVED** the motion.

- 6.1.2 Consideration to adopt amendments to Rule 80.1 regarding Delegation of Authority to clarify the definition of “on-call” in subsection (i). The proposed amendment was published in the January 20, 2012, edition of the Texas Register. One comment was received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Dr. Campion **SECONDED** that the proposed Rule 80.1 be adopted. After consideration, the Board **APPROVED** the motion.

6.2 Consideration of Proposals for New Rules or Amendments to Existing Rules

- 6.2.1 Consideration to propose amendments to Rule 71.15 regarding Recognized Specialties to outline the specialty requirements for Chiropractic Neurology and Nutrition

Action Taken: Tabled.

- 6.2.2 Consideration to propose new Rule 79.3 regarding General Requirements for Licensure of Certain Military Spouses. This proposed new rule is necessary to implement Senate Bill (SB) 1733, 82nd Legislature, Regular Session (2011). SB 1733 amended Texas Occupations Code, Chapter 55, to require state agencies that issue occupational licenses to adopt rules to provide for the issuance of a license to an applicant who is the spouse of a person serving on active duty as a member of the armed forces of the United States.

Action Taken: Dr. Kurban **MOVED** and Dr. Montgomery **SECONDED** that the proposed new rule be published for comment. After consideration, the Board **APPROVED** the motion.

- 6.2.3 Discussion of and consideration to propose amendments to Rule 75.17 Scope of Practice. The original proposed amendment was published in the June 24, 2011, edition of the Texas Register.

Multiple comments on the proposed amendment were received during the comment period. However, this original proposed amendment “died” due to non-action by the Board. Multiple “work sessions” have been held to discuss further amendments to the rule with the public, licensees, and stakeholders.

Action Taken: The Board directed staff to continue work on the proposed amendment.

6.3 Discussion Items

6.3.1 Discussion of possible requirements for facilities to operate under actual business name. Staff has received numerous inquiries regarding facilities registered with one name but operating under another d/b/a name. There are currently no rules dealing with this issue.

Action Taken: The Board directed staff to prepare a draft rule.

6.3.2 Discussion of out-of-facility practice requirement to hold a facility registration. Staff has received inquiries regarding whether a DC practicing at a facility owned by a non-DC or a corporation can do out-of-facility practice due to the fact that Rule 80.7(c) requires the DC to hold a facility registration.

Action Taken: The Board directed staff to prepare a draft amendment to Rule 80.7(c).

6.4 Update on other issues under consideration by the Committee

Comments from Committee chair Dr. Janette Kurban concerning Committee business, activities or issues.

Action Taken: None.

7. ENFORCEMENT COMMITTEE BUSINESS

Larry Montgomery, D.C.

7.1 Consideration of SOAH Proposals for Decision

7.1.1 Case #109-011 (SOAH Docket # 508-12-3378)

Action Taken: Dr. Montgomery **MOVED** and Dr. Kurban **SECONDED** that the Board Order assessing a \$500 administrative penalty be approved. After consideration, the Board **APPROVED** the motion.

7.1.2 Case #110-023 (SOAH Docket # 508-12-3380)

Action Taken: Tabled.

7.2 Consideration of Accepted Agreed Orders: The Board will consider approval of the following Agreed Orders that have been recommended by the Enforcement Committee and accepted by the Respondents.

- 7.2.1 Case #108-279
- 7.2.2 Case #110-231
- 7.2.3 Case #111-095
- 7.2.4 Case #111-118
- 7.2.5 Case #111-148
- 7.2.6 Case #111-183
- 7.2.7 Case #111-196
- 7.2.8 Case #111-228/111-246
- 7.2.9 Case #111-229
- 7.2.10 Case #111-235
- 7.2.11 Case #111-240
- 7.2.12 Case #111-249/111-255
- 7.2.13 Case #111-267
- 7.2.14 Case #111-270
- 7.2.15 Case #2012-073
- 7.2.16 Case #2012-073
- 7.2.17 Case #2012-101
- 7.2.18 Case #111-200
- 7.2.19 Case #111-125
- 7.2.20 Case #108-180
- 7.2.21 Case #110-182
- 7.2.22 Case #110-254
- 7.2.23 Case #111-234
- 7.2.24 Case #110-237
- 7.2.25 Case #2012-018

Action Taken: Dr. Montgomery **MOVED** and Dr. Kurban **SECONDED** that the Agreed Orders in Agenda Items 7.2.1-7.2.19 and 7.2.23 be approved. After consideration, the Board **APPROVED** the motion. (There were no agreed orders to be considered for Agenda Items 7.2.20, 7.2.21, 7.2.22, 7.2.24, or 7.2.25.)

7.3 Recommendations to Approve or Deny Requests to Expunge Records

- 7.3.1 Case #104-295

Action Taken: Dr. Montgomery **MOVED** and Dr. Kurban **SECONDED** that the above expungement request be approved. After consideration, the Board **APPROVED** the motion.

7.4 Statutory Suspensions or Revocations for Felony Convictions and/or Imprisonment

No cases for Statutory Suspensions or Revocations.

Action Taken: None.

- 7.5 Comments from Enforcement Chair Dr. Larry Montgomery on any Committee business, activities or issues.

Action Taken: None.

8. EXECUTIVE SESSION

Cynthia Tays, D.C.

The Board may meet in Executive Session for:

Consultation with counsel pursuant to Section 551.071, Government Code wherein the Board and essential staff will receive a briefing from assigned Assistant Attorney General and General Counsel concerning pending or contemplated litigation and settlement offers and personnel issues including but not limited to:

- 8.1 Texas Medical Association lawsuit against the Board, including Board's appeal, concerning MUA, Needle EMG and Diagnosis.
- 8.2 Texas Medical Association lawsuit against the Board, including possible appeal, regarding Rule 75.17 Scope allowing DCs to perform Vestibular-Ocular-Nystagmus testing.
- 8.3 TBCE vs. Abbott regarding disclosure of some contents of Board investigative files
- 8.4 Eric VanderWerff, DC vs. TBCE – Lawsuit brought by Dr. VanderWerff challenging a Board Order issued in an enforcement case

The Board will reconvene in open session after Executive Session to vote on items considered in Executive Session as necessary.

Action Taken: None. The Board went into Executive Session at 2:45 PM and reconvened in public session at 3:03 PM. The above listed agenda items were discussed in Executive Session. No action was taken on the agenda items while in Executive Session.

9. CONSIDERATION OF MOTIONS RELATED TO ITEMS DISCUSSED IN EXECUTIVE SESSION

Cynthia Tays, D.C.

Board members will have the opportunity to offer motions related to any items discussed in Executive Session.

- 9.1 Consideration of Motions Related to Executive Session

Action Taken: Dr. Campion **MOVED** and Dr. Montgomery **SECONDED** a motion to appeal regarding Agenda Item 8.2. The Board **APPROVED** this motion.

10. CALL FOR FUTURE ITEMS for discussion and/or consideration by the Board
Cynthia Tays, D.C.

Action Taken: None.

11. MEETING DATES & ADJOURNMENT

Cynthia Tays, D.C.

11.1 The planned Board meeting dates for the remainder of Calendar Years 2012 & 2013 are:

- | | |
|-----------------------|-----------------------|
| (1) May 24, 2012 | (4) February 21, 2013 |
| (2) August 16, 2012 | (5) May 23, 2013 |
| (3) November 15, 2012 | (6) August 15, 2013 |
| | (7) November 21, 2013 |

*Note: All planned board meeting dates through November 2015 may be found on the agency's website (under "Calendar") at: www.tbce.state.tx.us. All dates are tentative until posted in the Texas Register.

11.2 The next Enforcement Committee dates apart from the board meetings are scheduled for:

- (1) March 20, 2012
- (2) July 10, 2012
- (3) September 11, 2012

11.3 Adjournment at: _____ PM.

Note: Persons with disabilities who plan to attend this meeting and who may need auxiliary aids, services, or special accommodations should contact Ms. Mary Feys at 512-305-6901 a minimum of two (2) working days prior to the meeting so that appropriate accommodations can be made.

Action Taken: Dr. Tays reminded members of the next board meeting date and adjourned the meeting at approximately 3:07 PM.

Statement: I affirm that the above is a true and correct rendering of the minutes for the Texas Board of Chiropractic Examiners Board Meeting held on the above referenced date. These minutes from the board meeting held on February 23, 2012 were approved by the Texas Board of Chiropractic Examiners at its next regularly scheduled board meeting held on May 24, 2012.

//yty//signed//
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners

May 24, 2012
Date