

Texas Board of Chiropractic Examiners

Thursday, January 31, 2019
BOARD MEETING: 9:00 a.m. – Final Adjournment

William P. Hobby Building
333 Guadalupe St., Tower II, Room 400A
Austin, Texas 78701

BOARD MEETING MINUTES

The Texas Board of Chiropractic Examiners (Board) met on January 31, 2019, to consider and act as necessary on matters within the jurisdiction of the Board, which are listed on the agenda established for this meeting.

1. Call to Order, Roll Call, & Vote On Absences:

Action Taken: Board President Mark Bronson, D.C., called the meeting to order at **9:04 A.M.** and called the roll. Seven Board Members were present.

Present Members:

Nicholas Baucum, D.C.
Mark Bronson, D.C.
Michael Henry, D.C.
Mindy Neal, D.C.
John Steinberg, Public Member
Scott Wofford, D.C.
Debra White, D.C.

Absent Member:

Gus Ramirez, Public Member

New Appointee:

Ebony Todd, Public Member

(Ms. Todd was not present during the roll call. She arrived at the meeting while the Board was in closed session to consider the performance evaluation of the Executive Director at some time between 10:26 A.M. and 11:24 A.M. She was present for the rest of the meeting and observed as a member of the general public. Ms. Todd had not yet taken her oath of office and did not participate in any Board discussion and actions and was not present during any closed sessions.)

Board Staff Present:

Patrick Fortner, Executive Director
Christopher Burnett, General Counsel
Jennifer Hertsberg, Operations Manager
Sarah Matthews, Director of Licensing
Norma Rodriguez, Director of Enforcement

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Joseph McLaughlin, Staff Attorney
James Elliot, Field Investigator, Dallas
Lisa Agarwal, Office Manager

Dr. Bronson announced that Gus Ramirez had informed Dr. Bronson he would be unable to attend the Board meeting for health reasons and had requested an excusal from the Board meeting.

Action Taken: WOFFORD MOVED and NEAL SECONDED to excuse Mr. Ramirez from the Board meeting. The Board **APPROVED** the motion unanimously.

A quorum was announced by Dr. Bronson with 7 members of the 9 person Board present.

2. Discussion and Approval of the Minutes for the Board Meeting Held on November 8, 2018:

Action Taken: WOFFORD MOVED and HENRY SECONDED to approve of the minutes from the November 8, 2018, Board meeting. The Board **APPROVED** the motion unanimously.

3. President's Report:

Dr. Bronson offered brief remarks thanking staff for their service and recognized Drs. Neal, White, and Wofford for attending the Governor's Training Seminar. Dr. Bronson reminded Board Members of the procedures regarding attendance of Board meetings, communications on Board matters, and parliamentary procedure. He also challenged the Board to think about what the public needs from the chiropractic community in the new year.

4. Officer Elections Pursuant to Texas Occupations Code §201.055(b):

Dr. Bronson began by opening nominations for the Vice President.

Action Taken: STEINBERG MOVED and WOFFORD SECONDED to nominate Dr. Henry for Vice President. No other nominations for Vice President were put forward. Dr. Bronson entertained motions to close nominations for Vice President.

Action Taken: NEAL MOVED and STEINBERG SECONDED to close nominations for Vice President. The Board **APPROVED** the motion unanimously. Dr. Bronson then instructed the Board to vote on the nomination of Dr. Henry for Vice President.

Action Taken: STEINBERG MOVED and WOFFORD SECONDED to approve the election of Dr. Henry for Vice President by acclamation. The Board **APPROVED** the motion unanimously. Dr. Bronson then opened the floor for nominations for the Secretary-Treasurer.

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Action Taken: STEINBERG MOVED and BAUCUM SECONDED to nominate Dr. Wofford for Secretary-Treasurer. No other nominations for Secretary-Treasurer were put forward. Dr. Bronson entertained motions to close nominations for Secretary-Treasurer.

Action Taken: NEAL MOVED and HENRY SECONDED to close nominations for Secretary-Treasurer. The Board **APPROVED** the motion unanimously. Dr. Bronson then instructed the Board to vote on the nomination of Dr. Wofford for Secretary-Treasurer by acclimation.

Action Taken: The Board **APPROVED** the election of Dr. Wofford unanimously.

5. Staff Reports:

a. Executive Director: Mr. Fortner spoke on the following topics-

- Legislative Update: Members of staff will go before the Senate Finance Committee on February 4, 2019. Staff members met with Senator Watson to discuss ongoing litigation, as well as Senator Fallon and the Lieutenant Governor.
- Database Update: Staff has had difficulties with the subcontractor and is unsatisfied with the work product.
- Staffing Update: A new administrative and compliance assistant will be starting on Monday February 4, 2019. The Board is interviewing for the Houston field investigator position.

b. Director of Licensing: Ms. Matthews spoke on the following topics-

- Compared the first quarter of Fiscal Year 2019 to Fiscal Year 2018 and presented to the Board statistical information regarding license renewals, active, inactive, probated, and suspended licenses, as well as continuing education applications.
- Dr. Henry requested staff create an FAQ for the website concerning radiological technologist certification changes.
- Dr. Bronson asked about projected changes in the number of licensees over the next couple of years. Ms. Matthews did not anticipate any noticeable changes.

c. Operations Manager: Ms. Hertsenberg spoke on the following topics-

- For salaries and other expenditures, the Board is within its budget for the remaining fiscal year and is on track to collect its targeted revenue for the remaining fiscal year.

d. Director of Enforcement: Ms. Rodriguez spoke on the following topics-

- Statistics regarding opened, closed, and active complaints. Specific information was provided regarding cases closed by Agreed Order and Statutory Revocation.
- Dr. Henry had a question about length of cases open that are to be set for hearings with the State Office of Administrative Hearings (SOAH). Staff responded that there does not appear to be a noticeable increase in the number of cases to be set for SOAH.
- Dr. Bronson had a question about whether the Board is meeting its targets for average number of days needed to get cases closed. The target average number of days is 250

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days. The Board is only slightly under that target due to staffing turnover and Legislative Budget Board reporting requirements.

6. Committee Reports:

a. Rules Committee: Dr. Henry spoke on the following topics-

- The Board's rules as they were originally written don't really contemplate the predominately corporate nature of modern practice. Dr. Henry would like to reflect technological changes in modern practice and the increasing prevalence of chiropractors in hospitals and integrated clinics.
- Dr. Henry requested the Board consider changes to 22 Texas Administrative Code §78.1 so it is updated to mirror statutory changes to the chiropractic scope of practice.
- He also requested the Board consider changes to the mandatory notice to the public contained in 22 Texas Administrative Code §75.6.
- Dr. Henry asked the Board consider changes to update 22 Texas Administrative Code §75.2 to reflect that the Board no longer registers chiropractic facilities. He noted that changing this rule might require stakeholder input meetings.
- Dr. Henry also requested staff consider changes to the enforcement procedures to differentiate between minor administrative violations and more serious disciplinary cases.

b. Licensing Committee: Mr. Steinberg had nothing to report.

c. Education Standards Committee: Dr. White spoke on the following topics-

- Dr. White noted that the committee had evaluated 6 Continuing Education (C.E.) classes since the last meeting. The committee awarded full credit to 4 classes and partial credit to 2.
- Dr. White explained that the committee would like to offer more classes on topics outside the scope of chiropractic to allow providers better understanding of when to refer patients to other practitioners.
- She also explained that the committee would like to examine the number of required C.E. hours.

d. Enforcement Committee: Dr. Baucum spoke on the following topics-

- Dr. Baucum explained that the Enforcement Committee would work on considering changes to enforcement procedures as previously discussed by Dr. Henry.
- Dr. Baucum explained that the Enforcement Committee members will no longer be participating in Informal Conferences, as settlement negotiations will be handled primarily by staff members, while the EC participates mainly as a "grand jury".
- He also emphasized that the EC will increase the use of standard of care doctor expert reports.

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7. Public Comments:

Dr. William Lawson [Texas Chiropractic Association]:

- Dr. Lawson expressed concern about requesting so many legislative changes so soon after the Board's sunset review because of potential hostility from legislators.

Michele Quattlebaum, Esq. [Sprott Newsom Quattlebaum Messenger]:

- Ms. Quattlebaum commented on the Board's average enforcement action closure time and noted that it is often faster than other professional licensing boards.
- Ms. Quattlebaum noted a potential issue with scope of practice violations from increased provision of continuing education classes on topics outside the scope of chiropractic. She explained that a potential solution would be to require continuing education providers to explain the chiropractic scope of practice in Texas.
- Dr. White, Dr. Henry, and Dr. Bronson explained that the Board is considering potential solutions to mitigate this issue.

23. Closed Session:

Action Taken: The Board entered a closed session pursuant to Texas Government Code §551.071 to receive updates from Mr. Fortner, Mr. Burnett, and Mr. McLaughlin concerning litigation from **9:58 A.M.** until **10:26 A.M.** All others present left the meeting room.

22. Closed Session:

Action Taken: The Board continued in a closed session pursuant to Texas Government Code §551.074 to consider the performance evaluation of the Executive Director from **10:26 A.M.** until **11:24 A.M.** Mr. Fortner and Mr. McLaughlin left the meeting room.

24. Review of Items Discussed in Closed Session:

Action Taken: Dr. Bronson reconvened the open meeting at **11:26 A.M.**

Dr. Henry explained that the Board would request a 10% pay increase for all staff and request the Executive Director position be moved from Group 1 to Group 2 to get salary caps increased by drafting a letter for the Legislature.

8. Discussion on the Board's making Legislative and Policy Recommendations to the Texas Legislature Concerning Texas Occupations Code Chapter 201:

Dr. Bronson and Dr. Henry began by explaining that these agenda items are opportunities for the Board to clarify its opinions to staff in case the Legislature asks the Board about changing its statutes. Mr. Fortner then explained that the only major substantive change would involve changing the criminal penalty for practicing without a license. Dr. Henry clarified that this

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criminal penalty should only apply to unlicensed individuals posing as chiropractors rather than chiropractors whose license has expired.

Dr. Bronson briefly paused the discussion to recognize Ms. Ebony Todd as the newest Board member and introduce her to the other assembled Board members. Ms. Todd did not participate in any subsequent discussion or actions by the Board at the meeting and was not present during any closed sessions as she had not yet taken her oath of office.

a. §201.055 (Officers): The general consensus of the Board was that it would be easier to elect officers on an annual basis and that none of the officer positions should be eliminated.

b. §201.159 (Records): The general consensus of the Board was that the language of this statute should be modernized to reflect that information about licensees is stored in an electronic database.

c. §201.207 (Inspections): Dr. Henry clarified that inspections need to be tied to complaints and need to be limited to investigating the allegations in the complaint. The rest of the Board agreed.

d. §201.302 (Licensing Examination Application): The Board agreed with staff recommendations to remove archaic language from this statute.

e. §201.303 (Educational Requirements): The general consensus of the Board was that this statute should not be amended to require the Board to review transcripts of applicants for particular coursework.

f. §201.305 (Examination Procedure): The Board agreed with staff recommendations to remove archaic language from this statute.

g. §201.307 (Reexamination): The Board agreed with staff recommendations to remove the language about limiting the number of times an exam can be taken.

h. §201.311 (Inactive Status): The Board agreed with staff recommendations to remove archaic language from this statute.

i. §201.351 (Registration): The Board agreed with staff recommendations to remove inconsistent and confusing language regarding registration.

j. §201.352 (Application for Registration): The Board agreed with staff recommendations to remove inconsistent and confusing language regarding registration.

k. §201.506 (Enforcement Committee): The Board agreed with staff recommendations to remove confusing language regarding the role of the Enforcement Committee.

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l. §201.511 (Reissuance of License): The Board agreed with staff recommendations to remove what appeared to be a typographical error in the statute.

m. §201.553 (Enforcement Committee Recommendation): The Board agreed with staff recommendations to remove language requiring the Enforcement Committee to make violation reports to the Board and to clarify that Notice of Violation letters only state the potential penalty a respondent could be liable for, not what the Board is actually seeking from the respondent.

n. §201.556-201.560 (Pay to Appeal Provisions): The Board agreed with staff recommendations to remove language in order to clarify that a respondent who wishes to appeal a final Board Order can do so without posting a bond.

o. §201.605 (Criminal Penalty; Practice without License): Dr. Henry clarified that this criminal penalty should only apply to unlicensed individuals posing as chiropractors rather than chiropractors whose license has expired. The rest of the Board agreed.

p. §201.6015 (Cease and Desist Order): The Board agreed with staff recommendations to streamline the Cease and Desist Order process. Dr. Henry observed that this would be an appropriate remedy to use against respondents whose licenses are suspended or expired.

q. §201.501-201.503 (Subchapter K, Disciplinary Procedures): The Board agreed with general staff recommendations to combine the violations listed in these statutes in one place and update the language used.

Dr. Henry asked for a clarification of deferred adjudication. Dr. Henry and Dr. Wofford felt that receiving deferred adjudication for a crime involving moral turpitude or a felony should not be grounds for refusal, revocation, or suspension of a license. Dr. White, Dr. Baucum, Dr. Neal, and Mr. Steinberg felt that it should be.

Dr. Henry asked for clarification on what constitutes an “association” with someone who is practicing chiropractic without a license and recommended restraint in using that term.

Dr. Wofford and Dr. Neal asked for clarification on what constitutes advertising superiority.

Dr. Henry questioned how to clearly differentiate a chiropractic office or clinic from another business or enterprise and felt that the Board should not include such a violation as grounds for discipline. The rest of the Board agreed.

Dr. Henry and Dr. Baucum advised that the prohibition on “personally soliciting a patient or causing a patient to be solicited by the use of a case history of another patient of another chiropractor” was confusing as it would seem to preclude buying another chiropractor’s practice. They recommended removing that prohibition and the rest of the Board agreed.

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Dr. Henry questioned how to define the term “purely cosmetic”. After discussion, the Board concluded there was no need to recommend changes to the prohibition against prescribing or administering a nontherapeutic or purely cosmetic treatment.

9. Discussion on the Board’s Enforcement Procedures:

The Board found the memorandum from staff on the Board’s enforcement procedures informative and feel they have a better understanding of the enforcement procedures. Mr. Burnett explained that a focus for rulemaking going forward would be to create parameters for what would constitute acceptable settlement terms for the Board to expedite the closure of enforcement actions.

Lengthy discussion followed on how to best implement this and how to give respondents an opportunity to defend themselves short of requiring a SOAH Hearing. This included a discussion of the ex parte issues implicated when Enforcement Committee members are forced to judge the credibility of witnesses and evidence that might not later be admitted in an official record from SOAH. Advice from Mr. Burnett included emphasizing that Enforcement Committee members can request more information from the investigators before making a determination on whether a violation took place and giving respondents ample opportunity to respond to notices of investigation in writing.

Dr. Henry questioned how respondents would have enough notice of the allegations against them to mount an adequate defense.

Action Taken: Dr. Bronson adjourned the meeting for a short break at **12:56 P.M.**

Action Taken: Dr. Bronson reconvened the meeting at **1:05 P.M.**

10. Discussion on the Board’s Authority to Expunge Disciplinary Records:

Mr. Burnett and Mr. McLaughlin explained a memorandum to the Board in which they concluded that the Board does not have statutory authority under Texas Occupations Code Chapter 201 to expunge Board orders of disciplinary action against licensees. This led into a discussion about changing the Board’s disciplinary procedure by rule to differentiate administrative errors by licensees from serious disciplinary violations, particularly in regard to federal reporting requirements.

Mr. Burnett advised that the Board should still grant expunction requests that are eligible under the current rule until it is repealed through the normal rulemaking process.

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11. Discussion and Action on Requests to Expunge Disciplinary Records:

Mr. McLaughlin presented the following requests to the Board-

a. Richard B. Payne, License No. 9817, TBCE Case No. 2014-083:

Action Taken: WOFFORD **MOVED** and BAUCUM **SECONDED** to expunge disciplinary records for the licensee. The Board **APPROVED** the motion unanimously.

b. Bobbie T. Williams, License No. 10397, TBCE Case No. 2015-181:

Action Taken: HENRY **MOVED** and WOFFORD **SECONDED** to expunge disciplinary records for the licensee. The Board **APPROVED** the motion unanimously.

12. Discussion and Action on Requests to Sit for the Texas Jurisprudence Examination:

Ms. Matthews presented the following requests to the Board-

a. Michael J. Moses

Action Taken: HENRY **MOVED** and WHITE **SECONDED** to grant the applicant's request to take the Texas Jurisprudence Examination. The Board **APPROVED** the motion unanimously.

b. John R. Hines

Action Taken: BAUCUM **MOVED** and HENRY **SECONDED** to grant the applicant's request to take the Texas Jurisprudence Examination. The Board **APPROVED** the motion unanimously.

13. Discussion and Action on Proposed Cease and Desist Orders:

Mr. McLaughlin presented the following proposed orders to the Board-

a. Chi Dang, TBCE Case No. 2018-123

Action Taken: HENRY **MOVED** and BAUCUM **SECONDED** to approve the cease and desist order. The Board **APPROVED** the motion unanimously.

b. David J. Goodwin, License No. 11476, TBCE Case No. 2018-159

Action Taken: HENRY **MOVED** and WOFFORD **SECONDED** to approve the cease and desist order. The Board **APPROVED** the motion unanimously.

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15. Discussion and Action on Proposed Agreed Orders:

Mr. McLaughlin presented the following proposed order to the Board-

a. Loverous Whittaker II, License No. 9384, TBCE Case No. 2018-014

Action Taken: HENRY MOVED and NEAL SECONDED to approve the agreed order. The Board **APPROVED** the motion unanimously.

16. Discussion and Action on Required Suspension of License for Conviction of Certain Offenses:

Mr. McLaughlin and Mr. Burnett presented the following proposed order to the Board-

a. Charles D. Windsor, License No. 6507, TBCE Case No. 2018-117

Action Taken: HENRY MOVED and BAUCUM SECONDED to approve the revocation of the license. The Board **APPROVED** the motion unanimously.

17. Discussion and Action on Proposing Amendments to 22 Texas Administrative Code Section 78.14:

Dr. Henry proposed adding language to the rule to clarify that a licensee must have been practicing acupuncture in compliance with previous Board rules in order to be grandfathered in to the new acupuncture permit rule.

Action Taken: BAUCUM MOVED and WHITE SECONDED to propose the amendment discussed. The Board **APPROVED** the motion unanimously.

18. Discussion and Action on Proposing a New Board Rule, 22 Texas Administrative Code §75.1, Defining Unsafe and Unsanitary Conditions:

Dr. Henry explained that the 2017 Legislative Sunset Committee had recommended the Board define unsafe and unsanitary conditions. He introduced language recommended by staff and asked legal counsel to clarify the reasonableness standard used in the definition. Dr. Henry moved to adopt the language recommended by staff except for language concerning the presence of animals and a requirement that the Board develop a checklist of unsafe and unsanitary conditions.

Action Taken: HENRY MOVED and BAUCUM SECONDED to propose the new rule as discussed. The Board **APPROVED** the motion unanimously.

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At this time, Dr. Baucum left the meeting for personal reasons. Dr. Bronson announced that the six remaining Board members still constituted a quorum and that the meeting would continue according to the published agenda.

19. Discussion and Action on Proposing the Repeal and Replacement of 22 Texas Administrative Code §80.4:

Mr. Burnett explained that the changes to Texas Occupations Code Chapter 201 after the 2017 Legislative Session and the reorganization of 22 Texas Administrative Code Chapters 71-82 necessitated an update to the Board's sanctions schedule. He also explained that Category IV violations would be included in the new table as Category III violations and that violations for failure to supervise staff resulting in harm to a patient would be moved to Category I.

Action Taken: HENRY MOVED and STEINBERG SECONDED to propose the repeal and replacement of 22 Texas Administrative Code §80.4 as discussed. The Board **APPROVED** the motion unanimously.

20. Discussion and Action on Adopting the Repeal and Replacement of 22 Texas Administrative Code §73.1:

Action Taken: HENRY MOVED and WOFFORD SECONDED to adopt the repeal and replacement of 22 Texas Administrative Code §73.1 as published in the Texas Register. The Board **APPROVED** the motion unanimously.

21. Discussion and Action on Proposing the Amendment of 22 Texas Administrative Code §77.4:

Dr. Henry explained that this rule would be expanded to prohibit misleading potential patients on the adverse consequences of not receiving chiropractic treatment.

Action Taken: HENRY MOVED and WOFFORD SECONDED to propose the amendment of 22 Texas Administrative Code §77.4 as proposed. The Board **APPROVED** the motion unanimously.

Mr. Burnett and Dr. Henry then briefly explained the rule making process to the new Board members, including submitting rules for review to the Governor's Office and publishing proposals in the Texas Register.

25. Requests from Board Members for Future Agenda Items:

Dr. White and Dr. Bronson briefly discussed including education committee items in the Education Committee report and how to include items in the next Board Meeting Agenda.

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26. Discussion and Possible Action on Electing a Delegate and Alternate from the Board to the Federation of Chiropractic Licensing Boards:

Dr. Bronson explained that the National Board of Chiropractic Examiners (NBCE) administers two Part 4 Practical Exams and hosts a Part 4 Committee Meeting. Dr. Bronson explained that he can recommend two D.C. Board Members to serve as examiners for both administrations. Dr. Baucum and Dr. Wofford volunteered to serve at the spring administration. Dr. Bronson volunteered to attend the Test Committee Meeting. Dr. White volunteered to serve at the fall administration.

Dr. Bronson explained that the Federation of Chiropractic Licensing Boards holds an annual meeting and volunteered himself to serve as the Texas delegate to the meeting.

Action Taken: WOFFORD MOVED and HENRY SECONDED to approve Dr. Bronson representing the Texas Board of Chiropractic Examiners at the meeting. The Board **APPROVED** the motion unanimously.

Dr. Bronson then explained that a delegate would also be needed to represent the National Board.

Action Taken: WOFFORD MOVED and Neal SECONDED to approve Dr. Bronson representing the National Board at the meeting. The Board **APPROVED** the motion unanimously.

At this time, Dr. Bronson and Mr. Burnett briefly stepped outside. When they returned, Dr. Bronson announced that the Board needed to reenter closed session to discuss staffing.

22. Closed Session:

Action Taken: The Board entered a closed session pursuant to Texas Government Code §551.074 to consider the performance evaluation of the Executive Director from **2:09 P.M.** until **2:11 P.M.** All others present except Mr. Burnett left the meeting room.

24. Discussion and Possible Action on any Remaining Matters Discussed in Closed Session:

Action Taken: Dr. Bronson reconvened the open meeting at **2:13 P.M.**

Action Taken: HENRY MOVED and WOFFORD SECONDED to increase the Executive Director's salary to the maximum budgeted amount allowed for that position. The Board **APPROVED** the motion unanimously.

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27. Adjournment:

Action Taken: HENRY MOVED and NEAL SECONDED to adjourn the meeting at **2:14 P.M.**
The Board **APPROVED** the motion unanimously.

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 date. The minutes from the Board Meeting held on November 8, 2018, were **APPROVED** by the Texas Board of Chiropractic Examiners at its regularly scheduled meeting held on January 31, 2019.



3/1/2019

Patrick Fortner
Executive Director
Texas Board of Chiropractic Examiners

Date