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ATTORNEY GENERAL OF TEXAS

February 7, 2023

Mr. Darrel D. Spinks  
Executive Director  
Texas Behavioral Health Executive Council  
333 Guadalupe, Suite 3-900  
Austin, Texas 78701

**Opinion No. KP-0426**

Re: Authority of the Behavioral Health Executive Council to repeal rules under Occupations Code subsection 507.153(a) (RQ-0445-KP)

Dear Mr. Spinks:

You ask about the authority of the Texas Behavioral Health Executive Council (“Council”) to repeal rules under Occupations Code subsection 507.153(a).<sup>1</sup>

**Background**

In 2019, the Legislature created the Council to consolidate the regulation and administration of four behavioral health professions: the Marriage and Family Therapists, Professional Counselors, Social Worker Examiners, and Psychologists. *See generally* Act of May 22, 2019, 86th Leg., R.S., ch. 768, §§ 1.001–4.008, 2019 Tex. Gen. Laws 2125, 2125–188 (codified at TEX. OCC. CODE chapter 507). The Legislature created the Council as an “umbrella licensing agency [to] handle licensing, investigative, and enforcement matters for the behavioral health occupations in a more efficient, functional approach.” Senate Comm. on Health & Human Servs., Bill Analysis, Tex. C.S.H.B. 1501, 86th Leg., R.S. (2019) at 1. Yet, the Legislature maintained the examining boards of the respective professions, leaving with each the “responsibility to establish all standards relating to licensing and regulating its profession, including originating all rules related to standards of care and practice.” *Id.*

You tell us that while the Council possesses general rulemaking authority regarding the four professions, Occupations Code subsection 507.153(a) limits its authority. *See* Request Letter at 2. Subsection 507.153(a) requires an examining board for one of the professions to propose certain rules before the Council may adopt them. TEX. OCC. CODE § 507.153(a); *see also id.* § 507.152 (authorizing the Council to “adopt rules as necessary to perform its duties and

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<sup>1</sup>*See* Letter from Darrel D. Spinks, Exec. Dir., Tex. Behav. Health Exec. Council, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Feb. 1, 2022), <https://texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2022/pdf/RQ0445KP.pdf> (“Request Letter”).

implement” chapter 507). You ask how to reconcile the limitations on the Council’s rulemaking authority in subsection 507.153(a) with its authority as a state agency to “review and consider for readoption” its rules every four years under the Administrative Procedure Act. *See* Request Letter at 1–2; *see also* TEX. GOV’T CODE § 2001.039.

You describe a scenario where the Council determines it may not legally readopt a rule when the rule relates to one of the subjects requiring proposal by one of the examining boards. *See* Request Letter at 2. You assert that the Council can recommend changes to a particular examining board, but if the board chooses not to amend the rule, the “Council [is] left with no other option but repealing the entire rule[.]” *Id.* You explain that a “complete repeal of a rule may have severe consequences” and question whether the Council may repeal parts of a rule on its own proposal and still comply with Occupations Code section 507.153. *Id.*

### **The Relevant Provisions from the Occupations Code and the Government Code**

Occupations Code subsection 507.153(a) provides:

(a) Unless the rule has been proposed by the applicable board for the profession, the executive council may not adopt under this chapter or Chapter 501, 502, 503, or 505:

(1) a rule regarding:

(A) the qualifications necessary to obtain a license, including limiting an applicant’s eligibility for a license based on the applicant’s criminal history;

(B) the scope of practice of and standards of care and ethical practice for the profession; or

(C) continuing education requirements for license holders;  
or

(2) a schedule of sanctions for violations of the laws and rules applicable to the profession.

TEX. OCC. CODE § 507.153(a). By its terms, subsection 507.153(a) limits the Council’s authority to adopt a rule that relates to one of the subjects listed therein unless an examining board proposes the rule first. *See id.* (titled “Limitation Regarding Certain Rules”). At the same time, under Government Code section 2001.039 the council must “review and consider for readoption each of its rules” every four years. TEX. GOV’T CODE § 2001.039(a), (b). Section 2001.039 provides that the state agency’s review must include “an assessment of whether the reasons for initially adopting the rule continue to exist.” *Id.* § 2001.039(e). As a result of the review, the state agency “shall readopt, readopt with amendments, or repeal a rule . . .” *Id.* § 2001.039(c).

## Analysis

An administrative agency such as the Council possesses only those powers expressly granted by statute or necessarily implied therefrom. *See Tex. Student Hous. Auth. v. Brazos Cnty. App. Dist.*, 460 S.W.3d 137, 143 (Tex. 2015). While the Occupations Code gives the Council specific authority to adopt certain types of rules, subsection 507.153(a) prohibits the Council from adopting a rule on its own proposal if the rule concerns one of the listed subject matters. *Compare* TEX. OCC. CODE § 507.153(a) (authorizing the Council to adopt rules contingent on proposal by one of the examining boards), *with id.* §§ 507.156 (authorizing the Council to adopt rules on the consequences of a criminal conviction), 507.204 (authorizing the Council to adopt rules concerning the investigation of complaints). And Government Code chapter 2001 does not generally grant additional authority to any agency to adopt rules, but instead presumes the respective state agency's rulemaking authority arises from other law. *See generally* TEX. GOV'T CODE §§ 2001.024(a)(3) (requiring agency's notice of proposed rule to demonstrate its authority to adopt the rule), 2001.033(a)(2) (requiring agency's order adopting the rule to demonstrate its authority to adopt the rule). Accordingly, if the rule under review pursuant to Government Code section 2001.039 relates to one of the subjects listed in Occupations Code subsection 507.153(a), the Council lacks authority to act unless one of the examining boards first proposes action. *See* TEX. OCC. CODE § 507.153(a).

You ask whether the Council could repeal parts of rules that are subject to subsection 507.153(a) on its own proposal as part of its rule review under Government Code section 2001.039. *See* Request Letter at 2. Although Occupations Code subsection 507.153(a) uses the term "adopt," it applies to more than the initial adoption of a rule by virtue of what constitutes a "rule." Chapter 507 does not define "rule," but Government Code chapter 2001 defines the term to include the "amendment or repeal of a prior rule." *Compare* TEX. OCC. CODE § 507.001 ("Definitions"), *with* TEX. GOV'T CODE § 2001.003(6)(B). When the "legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, its meaning in the subsequent statute will ordinarily be the same." *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 647 (Tex. 2020) (quotation mark omitted); *see also* TEX. GOV'T CODE § 311.011(b) (providing that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly"); 22 TEX. ADMIN. CODE § 881.20(a) (Tex. Behav. Health Exec. Council, Rulemaking by the Executive Council) ("When carrying out its rulemaking functions, the Council shall abide by the requirements of the Administrative Procedure Act found in Chapter 2001 of the Government Code."). Accordingly, a court would likely conclude the limitation in Occupations Code subsection 507.153(a) applies to any amendment or repeal of a prior rule. Absent a proposal from an examining board, subsection 507.153(a) deprives the Council of authority to repeal a rule described therein on the Council's own proposal.

You express concern about the possibility that an examining board could choose not to amend its rules, contrary to the Council's wishes. *See* Request Letter at 2. Yet each examining board has its own duty to propose rules to the Council on the subject matters listed in Occupations Code subsection 507.153(a). *See* TEX. OCC. CODE §§ 501.1515 (requiring the examining board for psychologists to propose rules to the Council), 502.1515 (requiring the examining board for marriage and family therapists to propose rules to the Council), 503.2015 (requiring the examining

board for licensed professional counselors to propose rules to the Council), 505.2015 (requiring the examining board for social workers to propose rules to the Council). This statutory framework reflects the Legislature's intent that the Council and the examining boards cooperate and share responsibility to provide for standards of practice for the professions. *See generally id.* §§ 507.001–404.

Moreover, to the extent Occupations Code subsection 507.153(a) conflicts with Government Code section 2001.039, subsection 507.153(a) prevails under the legal principles for resolving conflicts in statutes. The Government Code resolves conflicting statutes by favoring a specific statute over a general one and a more recent enacted statute over an earlier enacted one. *See generally* TEX. GOV'T CODE §§ 311.025(a) (providing that the latest-enacted statute ordinarily prevails), 311.026(b) (providing method for resolution of conflict between a general provision and a special provision). Occupations Code subsection 507.153(a) is both the more specific provision and the later-enacted provision. *See* Act of May 22, 2019, 86th Leg., R.S., ch. 768, § 1.001, 2019 Tex. Gen. Laws 2125, 2129 (codified at TEX. OCC. CODE § 507.153); Act of May 25, 1999, 76th Leg., R.S., ch. 1499, § 1.11(a), 1999 Tex. Gen. Laws 5164, 5166 (codified at TEX. GOV'T CODE § 2001.039).

### **Conclusion**

For these reasons, a court would likely conclude that the Council may not readopt, modify, or repeal a rule that concerns one of the subjects in Occupations Code subsection 507.153(a) unless the examining board for the profession first proposes readoption, modification, or repeal. Accordingly, the Council may not repeal part of a rule that concerns one of the subjects in Occupations Code subsection 507.153(a) on its own proposal.

**S U M M A R Y**

Occupations Code chapter 507 creates the Texas Behavioral Health Executive Council to consolidate regulation and administration of four behavioral health professions. Subsection 507.153(a) authorizes the Council to adopt rules on certain subjects related to the practice for the four professions but only if the rule is first proposed by the examining board for the particular profession. To the extent subsection 507.153(a) may conflict with the Council's responsibility as a state agency to review and adopt, readopt, or modify its rules under Government Code section 2001.039, subsection 507.153(a) prevails. A court would likely conclude that the Council may not repeal part of a rule that concerns one of the subjects in Occupations Code subsection 507.153(a) on its own proposal.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, slightly slanted style.

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