



**Tennessee Board of Medical Examiners’
Committee on Acupuncturist
Special Board Meeting**

March 30, 2023

MINUTES

The regular meeting of the Tennessee Board of Medical Examiners’ Committee on Acupuncturist (hereinafter, “the Committee”) was called to order at 9:15 a.m. in the Poplar Room, Ground Floor, Metro Center Complex, 665 Mainstream Drive, Nashville, Tennessee 37243.

Members Present:

Mandy Colburn, ADS

Bruce Roff, Acupuncturist

Alexa Hulsey, Acupuncturist

Staff Present:

Stacy Tarr, Executive Director

Yvette Williams, Administrative Director

Dexter Hawkins, Board Administrator

John Heacock, Board Attorney

Consideration Of a Petition for a Declaratory Order filed by Todd and Rebecca Levin

Chairperson Hulsey first called the roll and found that there was a quorum, such that the Committee could convene to do business. After the roll call, Ms. Hulsey directs the meeting to Mr. Heacock, the board attorney, which prompts him to begin the conflict-of-interest statement, which reads as follow: “Each Committee member shall disclose to the Committee on a case-by-case basis any personal relationship, interest, or dealings that impairs or impedes or gives the appearance of impairing or impeding his or her ability to make full, unbiased decisions on a matter. Any Committee member who has a conflict of interest as defined above must recuse himself/herself from any matter and is prohibited from participating in any discussion or vote on the matter and shall leave the hearing room during the discussion or vote. It is improper for any Committee member having a conflict of interest to attempt to influence another Committee member at any time, including prior to the discussion on the matter for which the conflict exists.”

After the conflict of interest, Mr. Heacock explains to the Committee that this special board meeting was called to consider a Petition for a Declaratory Order filed by the Levins regarding injuries Ms. Levin alleges she suffered from the acts and omissions of a licensed acupuncturist. He explains that Tennessee’s Declaratory Order statute, T.C.A. § 4-5-223, allows an “affected person” to petition a state agency for an order declaring the validity or applicability of a statute, rule, or order that is within the agency’s primary jurisdiction. Once a petition is filed, the agency shall: (1) Convene a contested case hearing pursuant to this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or (2) Refuse to issue a declaratory order, in which event the Petitioner may apply for a declaratory judgment as provided in § 4-5-225. Pursuant to T.C.A. § 4-5-223(c), if an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order. Today’s meeting is for the Committee to decide whether or not to set the Levins’ petition for a contested hearing before the Committee.

Mr. Heacock proceeded to go over Department of Health rules governing declaratory orders, focusing on Rule 1200-10-01-.11 section 3(a), which defines an “Affected Person,” as these words are used in T.C.A. § 4-5-223. The statute makes clear that an affected person is a person upon whom a statute, rule, or order produces a specific and direct effect or result. Mr. Heacock goes on to explain under Section 6 of the Rules (Consideration of The Petition), the Committee has three options: grant the petition (agreeing to convene on some future date a contested case hearing after which a declaratory order will be issued), deny the petition, or take no action. 1. The Rules state that a petition must be denied if: (i) The only issue raised is the facial constitutionality of a statute; or (ii) The Petitioner is not an affected person; or (iii) The statute, rule, or Order which is the subject of the petition is not within the agency’s jurisdiction.

The petition must be addressed towards a statute, or rule in the agency’s practice act or a statute which authorizes the agency to take action, or an order issued by the agency, otherwise

the petition must be found deficient for failure to include all necessary information. Mr. Heacock explains the process of granting a petition, which is entirely at the discretion of the agency and only if the petition addresses the following: (I) The application of the statute; or (II) The validity of the statute; or (III) The constitutionality of the agency's application of the statute. (ii) A rule and the petition concern any one of the following: (I) The application of the rule; or (II) The validity of the rule; or (III) The constitutionality of the agency's application of the rule; or (VI) The facial constitutionality of the rule unless the rule is substantially repetitive of the statute on which it is based. (iii) An order and the petition concern any one of the following: (I) The application of the order; or (II) The validity of the order; or (III) The constitutionality of the agency's application of the order. (b) If the petition is denied, the Petitioner shall be notified of that action in writing. (c) If the petition is granted, the matter will be referred to the attorneys for the Department of Health for filing of a Notice of Hearing. Granting of the petition does not mean that the Petitioner's requested relief is granted, but merely that the agency grants a hearing on the request for the Declaratory Order.

Mr. Heacock noted that failure to provide the required above field would invalidate any petition. He explained to the Board about how a petition must specifically cite the statute, rule, or order and State how the statute, rule, and/or Order cited specifically and directly produces an effect or result upon an Affected Person (Petitioner). Mr. Heacock went through the statutes that the Levins listed in the petition: T.C.A. § 63-6-1003, § 63-6-1004 and T.C.A. § 63-6-1007, as well as the rules that were cited in the petition: 0880-12-.15 DISCIPLINARY ACTIONS AND CIVIL PENALTIES and 0880-12-.19 COMMITTEE OFFICERS, CONSULTANTS, RECORDS, DECLARATORY ORDERS, AND SCREENING PANELS.

Mr. Heacock directed the Committee members to look at the part of the petition (Section 7) which requires petitioners to "State how the statute, rule and/Order cited above specifically and directly produces an effect or result upon you. The Committee reviewed and discussed these sections of the petition to determine whether the allegations were the direct cause of the harm alleged by the Levins, focusing on 7.9, 7.10, and 7.11. The committee members discussed and considered the three cited sections in detail, and they found that the harm alleged by the Levins was not a direct and specific result of a rule, statute, or order, and thus the Declaratory Order process was not the proper vehicle for the relief sought by Petitioners. Mr. Roff made a motion to deny the petition, Ms. Colburn seconded the motion, and the motion passed.

Adjourn

The meeting adjourned at 10:19 a.m.