

# HILL GILSTRAP ADAMS & GRAHAM, L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP  
ATTORNEYS AND COUNSELORS

1005 CONGRESS AVENUE, SUITE 880  
AUSTIN, TEXAS 78701  
TEL 512-457-9808  
FAX 512-457-8066

**AFFILIATED OFFICES**  
CHICAGO  
DALLAS/FORT WORTH  
LITTLE ROCK  
RIO GRANDE VALLEY

JENNIFER S. RIGGS

December 30, 1999

**FACSIMILE**  
**(512) 424-5739**

Mr. Frank DiTucci  
Executive Officer  
Texas Polygraph Examiners Board  
5058 North Lamar Blvd.  
Austin, Texas 78752

Re: Ms. Marla Williams

Dear Mr. DiTucci:

This firm has been retained by Ms. Marla Williams to represent her interests in her application for licensing by the Texas Polygraph Examiners Board (TPEB) under section 1703.202 of the Texas Occupations Code. TEX. GOV'T CODE ANN. §1703.202 (Vernon 1999).

### BACKGROUND

Ms. Williams applied for her license pursuant to section 1703.203(a). She has completed a one-year internship under section 1703.208, and is currently within a six month extension to that internship. The extension expires at the end of January, 2000.

Ms. Williams has taken and passed phase one of the TPEB's written examination. At that time, she was advised orally that she had not passed phase two, the written scenarios, or the oral portion of the examination. She learned that the TPEB examiners had problems with one of the test scenarios presented to her, in specific her failure to complete the EPPA scenario. The TPEB did not indicate any problems with the 10 sample charts that she presented.

The second time Ms. Williams took the examination, apparently, the TPEB was satisfied with the test scenarios, but not with her sample charts.<sup>1</sup> The TPEB, however, did not go over the charts with her; as a result, she was not afforded the opportunity to respond to the examiners' questions about those charts. We understand that one entire chart was not considered because the examiners determined that it was missing a question list. All 10 charts, however, had

<sup>1</sup> The second time she took phase two, the EPPA scenario was not included. In light of her experience with the first test, she questioned why. She was advised that the EPPA scenario had been removed because it was no longer allowed and that it should not have been on the earlier test.

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question lists: 9 charts had a hand written question list *and* a computer print-out question list, one had only the computer print-out question list. In addition, we understand that the examiners objected to the use of the question "Have you committed a sin?" in one or more of the charts. That question was one Ms. Williams used upon review of *Forensic Psychophysiology Using the Polygraph*, by James Allen Matte, PhD, pp. 471, 476 (JAM Publications, 1996). Board member Tiegen subsequently admitted to Ms. Williams' Sponsor (Mr. Wingo) that Matte was a reliable authority.

Because the examiners did not discuss the charts with Ms. Williams, she had no opportunity to explain these matters or other concerns the examiners may have had. We understand that other applicants who took the examination at that time, however, were afforded the opportunity to discuss their charts with examiners. Apparently, the TPEB decided at its December meeting to review charts with some applicants and not with others.

There are no published TPEB rules to guide the examiners in whether to review charts with applicants at the time of the examination. Nor are there published rules to guide examiners in reviewing the content of charts, other than TPEB Rules 395.1—395.11, which govern generally proper procedures for giving polygraph tests. Those rules require a written question list, but do not require that it be handwritten. It is apparent that the TPEB applied some standard of what should be covered. If there is a fixed standard, we are concerned that it is not published. If there is no published rule, we are concerned that the examination may have been based on subjective rather than objective factors.

In addition, we understand that some applicants are not required to take all parts of the examination at their first attempt — in specific, students at the school run by the Texas Department of Public Safety have the opportunity on their first attempt at the examination to take only the written portion. In addition, despite the language of TPEB Rule 391.3, 17(a), graduates of this school are apparently permitted to take the examination immediately following graduation, i.e. before they have completed their six-month internship. This preferential treatment is not only at odds with the TPEB rules, but gives those graduates a tremendous advantage. Ms. Williams was not afforded those benefits.

#### **MS. WILLIAMS PASSED ALL PARTS OF THE EXAMINATION**

Ms. Williams has passed all parts of the examination and the TPEB should issue her license. As indicated, Ms. Williams has taken and passed the TPEB's written examination during the first test session, the presentation of 10 of her charts during the first test session, and the presentation of the examiners' scenarios during the second test session. Ms. Williams has received no written notice that she has failed the examination, but has learned that the TPEB was concerned during the second test session about her charts. Because the TPEB expressed no



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problems with Ms. Williams' charts in the first test session, it was inappropriate to require retesting of this portion of the examination.

TPEB Rule 391.4 (6) provides

*Failure to pass one portion of the examination shall require such person to retake that portion failed, but not that portion passed. No license shall be issued until the intern has passed all portions and phases of the examination.*

Under this rule, Ms. Williams is entitled to rely on all parts of the examination that she passed. This rule is not limited to splitting the written portions of the examination or the written from the oral examination and taking each of *those* "portions" separately.<sup>2</sup> The rule does not reference oral or written, it simply refers to any "portion" of the examination. If the TPEB intended otherwise, it should amend its rules. The rule does not authorize the TPEB to require that an applicant retake a portion of the oral or written examination that has been passed. As indicated, because the TPEB expressed no problems with Ms. Williams' charts in the first test session, it was inappropriate to require re-testing of this portion of the examination. Under this rule, as written, Ms. Williams is entitled to the issuance of her license without further delay.

#### REQUEST FOR ANALYSIS

Ms. Williams has not received any notices under section 1703.204(a). If her license is to be issued and has simply been delayed, please disregard this request. If, however, the TPEB intends to deny her application, without waiving the foregoing demand for the issuance of her license, in accordance with section 1703.204(c), Ms. Williams hereby requests a prompt analysis of her performance on the examinations, including copies of the score sheets and any and all guidelines followed by the examiners in grading examination responses for all applicants.

#### REQUEST FOR RECORDS

In addition, Ms. Williams, pursuant to the Public Information and Texas Open Meetings Acts, requests copies of all posted notices, agendas, minutes, and tape recordings for the TPEB's December meeting.

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<sup>2</sup> It does not make sense to include sample charts as part of the oral examination if no contemporaneous opportunity is afforded the applicant to discuss the charts with examiners. Without that opportunity, it would appear that the submission of sample charts is a third and distinct "portion" of the test. Ms. Williams previously passed that portion of the examination.

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## DUE PROCESS AND THE APA

We remain very concerned with what appear to be arbitrary and discriminatory procedures followed by the TPEB in testing applicants.

Applicants are entitled to know what standards govern obtaining a license. See *Madden v. Texas Board of Chiropractic Examiners*, 663 S.W.2d 622 (Tex. App. – Austin 1983, writ ref'd n.r.e.) The Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. §§2001.001 *et seq.*, and the due process clauses of the state and federal constitutions demand no less. Those who are regulated by government agencies should not have to guess at what education, training, skill level, or conduct is required to obtain a license.

Section 2001.035 of the APA provides that no rule is valid unless a state agency adopts the rule in substantial compliance with sections 2001.023 through 2001.034 of the APA. Section 2001.005 provides that rules are not valid or effective against person or party and may not be invoked by an agency until the agency has indexed the rule and made it available for public inspection. It appears here that the TPEB has a fixed idea of whether to discuss charts with applicants, what must be in (or not in) sample charts,<sup>3</sup> and whether an applicant must "retake" and pass the sample charts portion of the oral examination, but that the TPEB has not published those standards. That standard constitutes a rule that must be published to be enforceable.

Section 2001.003(6) of the APA defines a "rule" as

- (A) means a state agency statement of general applicability that:
  - (i) implements, interprets, or prescribes law or policy; or
  - (ii) describes the procedure or practice requirements of an state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

In *Madden v. Texas Board of Chiropractic Examiners*, 663 S.W.2d 622 (Tex. App. – Austin 1983, writ ref'd n.r.e.), the court of appeals did not accept the premise that what constitutes a "bona fide reputable chiropractic school" for purposes of qualifying to take the Chiropractic Board's licensing examination cannot be established by rule. Applying an unpublished standard was deemed to be a denial of due process.

<sup>3</sup> In light of the fact that the standard is also the standard that governs the conduct of licensees, the failure to publish that standard is troubling.



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The TPEB cannot justify its actions here as "ad hoc rulemaking." The circumstances in which an agency may proceed by "ad hoc rulemaking" are limited. In *City of El Paso v. Public Utility Comm'n*, 883 S.W.2d 179 (Tex. 1994), the Texas Supreme Court held "ad hoc rulemaking" is appropriate only when (1) the agency lacks sufficient experience with a particular regulatory problem and (2) the problem is so specialized and varying in nature as to be impossible of capture within a general rule. In *Amarillo Indep. School Dist. v. Meno*, 854 S.W.2d 950 (Tex. App. -- Austin 1993, writ denied), the Third Court of Appeals held that the Commissioner of Education had abused his discretion by utilizing an "ad hoc" rule when there was no justification to do so based on criteria like the criteria described in the *City of El Paso* case. See *Amusement and Music Operators of Texas v. Texas Alcoholic Beverage Comm'n*, 997 S.W.2d 651 (Tex. App. Austin - 1999, pet. Pending)(agency statement that would be applied to enforcement actions against licensees was not purely internal management and should have been passed as a rule); see also *Railroad Comm'n of Texas v. ARCO Oil and Gas Co.*, 876 S.W.2d 473 (Tex. App. -- Austin 1994, no writ)(superseded by statute on other grounds).

The TPEB apparently is departing from the language of Rules 391.4(6) and 395.1 -- 395.11 to impose a greater burden on Ms. Williams. The TPEB is limited in denying Ms. Williams' application to the grounds set forth in the TPEB's enabling act and rules. Texas case law is well-established that an administrative agency cannot add to the burdens imposed already by the Texas Legislature for obtaining and maintaining a license. *Hollywood Calling v. Public Utility Comm'n*, 805 S.W.2d 618 (Tex. App. -- Austin 1991, no writ). The volumes of attorney general opinions are full of decisions indicating that agencies lack authority to *add requirements* to the agencies' licensing provisions. See, e.g., In Op. Tex. Att'y Gen. No. DM-105 (1992); Op. Tex. Att'y Gen. No. JM-1017 (1989); Op. Tex. Att'y Gen. No. JM-668 (1987); Op. Tex. Att'y Gen. No. JM-512 (1986); Op. Tex. Att'y Gen. No. JM-452 (1986); Op. Tex. Att'y Gen. No. MW-573 (1982); Op. Tex. Att'y Gen. No. H-1245 (1978); Op. Tex. Att'y Gen. No. H-1232 (1978).

Under the TPEB's enabling act and rules, Ms. Williams has met all of the requirements for the issuance of her license. If she is forced to seek a declaratory judgment and ancillary injunctive relief regarding TPEB Rules 391.4(6) and 395.1 -- 395.11 and the TPEB's unpublished rules, she will have no choice but to seek recovery of her attorneys fees.

### EQUAL PROTECTION

In addition, applicants must be treated equally. Ms. Williams is entitled to equal protection under Article I, §§3 and 3a, of the Texas Constitution. Even if Ms. Williams were not a member of a protected class, the TPEB would have to demonstrate a rational basis for imposing different requirements on different applicants for licensure. The test for an impermissible discrimination is whether a classification causes similarly situated individuals to

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be treated differently without rational justification. *Bullock v. Regular Veterans Ass'n of the United States, Post No. 76*, 806 S.W.2d 311, 313 (Tex. App. -- Austin, 1991, no writ). There must be a rational relationship between the classification and the goal to be accomplished by the government regulation. *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985); *Regular Veterans*, 806 S.W.2d at 313.

The TPEB actions in, among other things, failing to discuss Ms. Williams' sample charts with her when other applicants were afforded that opportunity and in allowing some applicants to take only the written examination at their first attempt do not comport with standards governing equal protection. Since there are no objective, published standards applicable to what is required in charts, we can only guess at what other disparities occurred in the grading process. These concerns are highly significant here because Ms. Williams is a member of a protected class (sex).

Because of the amount of time and money she has invested in her chosen profession to date and because of the one year waiting time to reapply, Ms. Williams will suffer substantial monetary damages if her license is not issued. In fact, she may effectively be prevented from continuing to seek a license. If her license is not issued, she will seriously consider seeking recovery of these damages from those responsible at the TPEB.

#### CONCLUSION

We present these concerns with the sincere intention of avoiding controversy. Ms. Williams has been involved with the polygraph industry for some time now and has always held the TPEB in the highest regard. It is not without distress that she has been forced to retain legal counsel to pursue these concerns. Under the TPEB's enabling act and rules, however, Ms. Williams has met all of the requirements for the issuance of her license. We request the issuance of Ms. Williams' license without delay, because it is the just *and* legally correct thing to do.

We will be glad to meet with you and your counsel once you have the opportunity to review the concerns set forth in this letter. Your patience and attention to this matter are appreciated. We hope you have a safe and happy New Years holiday.

Yours very truly,

HILL GILSTRAP ADAMS & GRAHAM, L.L.P.

  
Jennifer S. Riggs

cc: Ms. Marla Williams