

VOLUME NO. 37

OPINION NO. 174

LICENSES, PROFESSIONAL AND OCCUPATIONAL - License fees for emergency medical technician certification; RULES AND REGULATIONS - Authority of Board of Medical Examiners to establish fees; REVISED CODES OF MONTANA, 1947 - Section 69-7003, et seq.

HELD: The Board of Medical Examiners may charge a fee of applicants for certification as Emergency Medical Technicians. That fee may be an amount which is sufficient to defray the cost of administering the EMT certification program.

6 December 1978

Chester L. Jones, Esq.
Madison County Attorney
Madison County Courthouse
Virginia City, Montana 59755

Dear Mr. Jones:

You have requested my opinion concerning the following question:

May the Montana Board of Medical Examiners charge an application and processing fee of persons applying for certification as emergency medical technicians under section 69-7003, et seq., R.C.M. 1947?

In your letter of request you state that Madison County is considering reimbursing volunteer ambulance operators in the county for fees they incur in connection with certification as emergency medical technicians (EMT's). The Montana Board of Medical Examiners is responsible for EMT certification and at present charges applicants for basic EMT certification a testing and processing fee of \$35. However, you have been unable to find any statutory authority for the fee. The county will consider reimbursement of its EMT's only if the fee is a lawful one.

Emergency medical technician certification requirements were established by an act of the 1975 Montana Legislature, section 69-7003, et seq., R.C.M. 1947. See Laws of Montana (1975), ch. 84. The purpose of the act is to promote the qualified, safe and efficient delivery of emergency medical care. The act establishes two categories of EMT's - "basic" and "advanced." Sections 69-7004 to 69-7006. The Board of Medical Examiners is authorized to establish training and certification programs for both types, section 69-7008, R.C.M. 1947, and certified EMT's are permitted to perform specific emergency medical services, sections 69-7005 to 69-7007.

The board's rule making powers with respect to the EMT program are found in section 69-7008, which provides:

The board, after consultation with the department of health and environmental sciences, the department of intergovernmental relations [community affairs] shall adopt rules of the board implementing this act, including, but not limited to, training and certification of personnel, administration of drugs, and other acts as allowed herein. (Emphasis added.)

In 1976 the board adopted rules governing the training, qualifications and certification of EMT's. Those rules require successful completion of both written and practical examinations as a prerequisite to certification. ARM, §§ 40-3.54(18)-S54080 to S544120. The regulations further require that each applicant for certification pay a fee sufficient to cover the costs of the examination and application processing not to exceed fifty dollars for "basic" EMT certification and one hundred dollars for "advanced" EMT certification. ARM, §§ 40-3.54(18)-S54100(5)(d) and S54110(3)(c). At present, the fee for "basic" EMT certification is thirty-five dollars. Of that amount, fifteen dollars is forwarded to the National Registry of Emergency Medical Technicians, which supplies a written examination and instructions for administration of a practical examination. The Emergency Medical Service Bureau of the Department of Health and Environmental Sciences administers the written and practical tests and seventeen dollars and fifty cents is paid by the board to the bureau for its costs. (Ten dollars was initially allocated to the bureau, but that amount was insufficient to cover costs of administering the examination.) Two dollars and fifty cents is retained by the board for its own costs.

There is no express authority under the EMT act authorizing the board to charge fees in connection with certification. In contrast, other licensing statutes expressly provide for licensing fees. E.g., section 66-108 (architects); section 66-411 (barbers); section 66-505 (chiropractors); section 66-603 and 66-604 (podiatrists); section 66-815 (cosmetologists); sections 66-905 and 66-906 (dentists); section 66-1031 (physicians); sections 66-1228 and 66-1234 (nurses); sections 66-1305 and 66-1307 (optometrists); section 66-1403 (osteopaths); sections 66-1506 and 66-1507 (pharmacists); sections 66-1826 and 66-1833 (accountants); section 66-1934 (real estate brokers and salesmen); section 66-2108 (title abstractors); section 66-2204 (veterinarians); section 66-2358 (engineers and surveyors); section 66-2405 (plumbers); section 66-2503 (physical therapists); section

66-2606 (water well contractors); sections 66-2707, 66-2709, and 66-2711 (morticians and funeral directors); sections 66-2814 and 66-2815 (electricians); section 66-2906 (masseurs); sections 66-3014 and 66-3016 (hearing aid dispenser); section 66-3105 (nursing home administrators); section 66-3211 (psychologists); section 66-3330 (private investigators); sections 66-3406 and 66-3408 (acupuncture); section 66-3509 (heaters, ventilators and air conditioners); section 66-3608 (electrologists); sections 66-3706 and 66-3707 (radiology technologists); section 66-3807 (landscape architects); section 66-3910 (speech pathologists and audiologists). Many of these provisions specifically authorize fees in connection with examinations and the processing of applications.

Express provisions for fees in other licensing statutes gives credence to an argument that where the Legislature intended to authorize examination and processing fees, it did so expressly.

On the other hand, the Legislature has not expressly forbidden such fees and has given the Board of Medical Examiners broad rule-making powers to implement the act, providing that the Board "shall adopt rules *** implementing this Act, including, but not limited to ***." The lack of either express authority or prohibition regarding fees, raises difficult questions concerning the scope of the board's rule-making authority under section 69-7008 and the scope of implied administrative powers. Administrative agencies have, "by implication such powers as are necessary for the due and efficient exercise of those expressly granted or such as may be fairly implied therefrom. But no power will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred." Guillot v. State Highway Commission, 102 Mont. 149, 154, 56 P.2d 1072 (1936), and see also State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338, 62 P.2d 330 (1936).

Initially, it is obvious that any certification procedure involves costs and requires funding. In the case of the Board of Medical Examiners, funding derives solely from charges and fees received in connection with its licensing and certification functions. These fees are placed into an earmarked revenue fund from which the board then pays its operating expenses. See Laws of Montana (1977), H.B.145, sections 7 and 17. The board is expressly authorized to charge fees in connection with licensing of both physical therapists and physicians, and deposit such fees in the

earmarked revenue fund. Sections 66-1031, 66-1042, 66-1043, 66-2503, 66-2508 and 66-2510, R.C.M. 1947. Thus, the Legislature either intended fees and charges derived by the board in connection with the licensing of other professions to subsidize EMT certification, or it intended that the EMT program pay its own way through the extraction of fees from applicants.

Figures provided by the Department of Professional and Occupational Licensing create serious doubt that the Legislature intended fees derived from other professional licenses to underwrite the EMT program. A memo, prepared by the Emergency Medical Services Bureau projects that as many as one thousand nine hundred persons will take the EMT "basic" exam during the 1978 calendar year. Assuming that the thirty-five dollar fee accurately reflects the board's per person cost of administering the EMT exam, the total cost of the EMT program would be \$66,500.00 for the calendar year 1978. This approaches the total budget for the Board of Medical Examiners for all functions for the 1978 fiscal year (\$67,718.00), see H.B. 145, supra, and exceeds the entire budget of the board for fiscal 1977, see, Laws of Montana (1975), H.B. 264, a year in which the EMT program was beginning and in which only a handful of examinations were given. The actual cost of the EMT program for fiscal year 1978 is further evidence that the Legislature did not intend other license fees to underwrite the EMT program. During fiscal 1978, which was the first full year of EMT program operation, five hundred ninety-six (596) applicants took the EMT examination. At thirty-five dollars each, the fees paid to the board and the corresponding costs of giving the examination were approximately \$21,000.00.

The board has interpreted its powers under the Act to include authority to assess examination and processing fees. That interpretation, although not binding, is entitled to respectful consideration. Doe v. Colberg, ___ Mont. ___, 555 P.2d 753, 754 (1976), particularly where an ambiguous or uncertain provision is interpreted, see Miller Insurance Agency v. Porter, 93 Mont. 567, 575, 20 P.2d 643, 646 (1933). Under the present circumstances, I must defer to that interpretation. Two courts which have considered the authority of an administrative agency to charge for the reasonable costs of licensing in absence of express authorization to do so, declared that the power to charge reasonable costs of licensing is incidental to the power to license. Schmidt v. Indianapolis, 168 Ind. 631, 80 N.E. 632, 635 (1907); Welch v. Hotchkiss, 39 Conn. 140.

Moreover, the board acts only as an intermediary with respect to that part of the fee which is passed on to the National Registry of Emergency Medical Technicians; the board could require applicants to pay the fee directly.

Finally, the Montana Legislature has consistently required professional and occupational licensees to pay the costs of licensing. The board's interpretation accords with that policy.

Although it is my opinion that the Board of Medical Examiners has the power to charge an application and processing fee of applicants for EMT certification, I recommend that the board seek clarifying legislation. Express legislative provision for certification fees would eliminate the need for interpretive opinions.

THEREFORE, IT IS MY OPINION:

The Board of Medical Examiners may charge a fee of applicants for certification as Emergency Medical Technicians. That fee may be an amount which is sufficient to defray the cost of administering the EMT certification program.

Very truly yours,

MIKE GREELY
Attorney General