STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 7, 2012	No. I12-002 (R12-011) Re: Powers of the Board of Technical Registration

To: Ronald Dalrymple,
Executive Director, Arizona Board of Technical Registration

Question Presented

You have asked whether the Board of Technical Registration ("the Board") is authorized to conduct investigations and file criminal complaints with prosecutors to determine whether crimes specified in A.R.S. § 12-1000 have occurred.

Summary Answer

No. Section 12-1000(G) provides the Board with limited authority to investigate and levy civil penalties against real property owners who permit the unauthorized removal of notices relating to former drug laboratories that have been posted on the owners' real property. The statute does not grant the Board broad authority to criminally enforce any other provisions of section 12-1000.

Background

The Board is a multimember administrative body charged with administering chapter 1 of title 32. *See* A.R.S. §§ 32-101(A); -102(A), -106. The statutory scheme, which covers professions such as architects and assayers, "provide[s] for the safety, health and welfare of the public through the promulgation and enforcement of standards of qualification" of registered or certified professionals. A.R.S. § 32-101(A). Relevant to your inquiry, the Legislature has charged the Board with regulating drug laboratory site remediation firms, which are defined as firms that "perform[] remediation of contamination from the manufacture of" illegal drugs such as methamphetamine. A.R.S. § 32-101(15).

The Board has certain responsibilities concerning remediation sites. For example, it is authorized to establish requirements and best practices for the remediation of contaminated sites. A.R.S. § 12-1000(E). It is also authorized to maintain public documents that are received from the remediating firm. A.R.S. § 12-1000(F). It also has responsibilities related to notices that are posted at remediation sites. A.R.S. § 12-1000(G).

Certain notices must be posted on sites that require remediation. A.R.S. § 12-1000(A)(4). The "notice of removal" states that a "clandestine drug laboratory was seized or a person was arrested on the real property for having chemicals or equipment used in the manufacturing of methamphetamine, ecstasy or LSD on the real property." A.R.S. § 12-1000(B)(2). The notice also includes the date of seizure or arrest, details of the property address and seizing agency, and other information. A.R.S. § 12-1000(B). The notice informs the reader that entry into the contaminated area is illegal until the site is remediated. *Id.* The notice also details the penalties for its unauthorized removal. *Id.* The Board is authorized to repost a notice that has been

removed, and if the real property owner "knowingly allows" the notice to be removed, the board may fine him not more than $2,000 per violation. A.R.S. § 12-1000(G).

The legislature recently made several changes to the regulatory scheme relating to site remediation. Among other things, that legislation, chapter 327 of Arizona Session Laws 2012, creates several new criminal penalties. For example, A.R.S. § 12-1000(L) makes it is a Class 5 felony to, among other things, (1) occupy real property that is not remediated except to perform necessary managerial duties or lawfully conduct remediation; (2) sell any items from residually contaminated real property, mobile homes, recreational vehicles, or dwelling units prior to remediation; or (3) disturb or remove posted notices of removal unless one is the real property's owner. Real property owners face Class 5 felony sanctions for allowing a posted notice of removal to be disturbed after the Board has already assessed a civil penalty against the person or for other listed acts. *Id.*

Finally, the Board administrates a technical registration fund. A.R.S. § 32-109. That fund includes revenue from court assessments on those convicted of drug charges. *See* A.R.S. § 13-3423. This money is available "[t]o pay the board's expenses associated with investigations and enforcement actions pursuant to Section 12-1000" and to pay "a county, city or town for remediation" of drug lab sites. A.R.S. § 32-109(C)(1)-(2). Monies in the fund "are not subject to legislative appropriation." A.R.S. § 32-109(C).

Analysis

As a general rule, an administrative agency requires statutory authorization to carry out enforcement actions. *Peeples, Inc. v. Ariz. State Land Dep't*, 204 Ariz. 66, 71, ¶ 18, 59 P.3d 830, 835 (App. 2002). The Board's authority, which chapter 327 did not alter, permits it to "[h]ear and pass upon complaints or charges or [to] direct an administrative law judge to hear and pass

upon complaints and charges" related to its enforcement authority. A.R.S. § 32-106(A)(5). The board may also "employ an executive director to conduct investigations and carry out the purposes of [chapter 1 of title 32]." A.R.S. § 32-107. Additionally, when taking enforcement actions, the Board may undertake investigations and employ investigators "to determine whether a disciplinary action should be taken against the holder of a certificate or registration under" chapter 1 of title 32. A.R.S. § 32-128(D).

Two provisions confirm that the board has authority to investigate violations of A.R.S. § 12-1000 regarding the unlawful removal of site remediation notices. Specifically, section 12-1000(G) provides that "[i]f the state board of technical registration conducts an investigation and determines that the posted notice of removal is missing," the Board may take steps that include reposting the notice and imposing a civil penalty of up to $2,000 on a real property owner who "knowingly" permits the notice to be disturbed. Second, A.R.S. § 32-109(C)(1) provides that monies from the assessment on criminal drug convictions "shall be used . . . [t]o pay the board's expenses associated with investigations and enforcement actions pursuant to section 12-1000." Taken together, these provisions grant the Board authority, in addition to its other duties involving regulating service providers, to investigate the removal of notices and to take civil enforcement actions against violators.

This authorization, however, does not extend to investigations and enforcement actions based on section 12-1000's provisions in general. *See Peeples*, 204 Ariz. at 71 ¶ 18, 59 P.3d at 835. Thus, the Board does not have criminal enforcement authority and cannot file criminal complaints with prosecutors to determine whether the crimes codified in section 12-1000 have been committed. It does not have authority to determine whether criminal conduct has occurred either. Rather, consistent with the Board's authority, it should forward evidence of criminal

conduct that it encounters in the course of conducting its statutory duties to the appropriate law enforcement agency.

Chapter 327's history confirms this conclusion. As introduced, Senate Bill 1438 provided for the creation of a criminal investigations unit of the Board to "investigate any criminal act prohibited by this chapter [chapter 1 of title 32] or any other criminal act in violation of Title 12 or 13 that is reasonably related to the practice of the professions or occupations regulated by the board." *See* Senate Bill 1438, 50th Leg., 2d Reg. Sess., § 5 (as introduced January 31, 2012). However, a conference committee of the Legislature removed this language before the bill's final passage. *See Ariz. State Senate Staff*, 50th Leg., 2d Reg. Sess., *Final Amended Fact Sheet for S.B. 1438* (May 24, 2012). The removal of this language confirms that the legislature did not intend to grant the Board further enforcement power.[1]

Conclusion

For the forgoing reasons, I conclude that the Board is authorized to investigate violations of section 12-1000 for disturbing posted notices of removal, but that the Board does not have broader authority to enforce the criminal penalties included in that section.

Thomas C. Horne
Attorney General

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[1] A summary prepared by the staff of the House of Representatives states that S.B.1438, after the conference committee amendment "[a]llows the Board to investigate a missing notice of removal and take actions such as reposting the notice, imposing a civil penalty, and pursuing criminal prosecution for disturbing the notice of removal," *Ariz. House of Representatives Staff* 50th Leg., 2d Reg. Sess., *House Summary for S.B. 1438*, (May 1, 2012)(post-conference committee). However, in light of the conference committee's action, this language does not support the conclusion that the Legislature intended the Board to become a criminal law-enforcement agency for purposes of enforcing A.R.S. § 12-1000.