

LETTER OPINION
98-L-43

April 15, 1998

Mr. James S. Abbott
Executive Director
North Dakota State Board of Accountancy
2701 S Columbia Rd
Grand Forks, ND 58201-6029

Dear Mr. Abbott:

Thank you for your letter asking whether the North Dakota State Board of Accountancy (Board) has the authority, by administrative rule, to grant a certificate of "certified public accountant" after December 31, 1999, to an applicant who did not meet the 150 hour education requirement but who was on "conditioned status" on or before December 31, 1999. By "conditioned status", you mean that the applicant has passed at least two sections of the exam, with adequate scores in the failed parts, and as a result has the opportunity to pass the remaining sections within the next six consecutive examinations. You also ask whether a certificate can be issued to an applicant who did not meet the 150-hour requirement if the applicant took the examination in November 1999 and simply did not receive his or her exam grades until early in 2000.

The qualifications and requirements for issuance of a certificate of "certified public accountant" are set forth in N.D.C.C. § 43-02.2-04(5):

The education requirement for a certificate is as follows:

- a. Through December 31, 1999, a baccalaureate degree or its equivalent conferred by a college or university acceptable to the board, with an accounting concentration or equivalent as determined by board rule to be appropriate, or four years of public accounting experience on one's own account or in the office of a public accountant in active practice, or in an accounting or auditing position with the government of the United States or a state.

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- b. After December 31, 1999, at least one hundred fifty semester hours of college education including a baccalaureate or higher degree conferred by a college or university acceptable to the board, the total educational program to include an accounting concentration or equivalent as determined by board rule to be appropriate.

The requirements of this section apply to when a certificate is issued rather than when an applicant takes the exam or applies for a certificate.

Subsections six through ten of N.D.C.C. § 43-02.2-04 describe the procedures for examination of applicants and the circumstances under which an applicant can be given credit for one or more parts of the examination at subsequent sittings. If an applicant passes two or more sections of the exam and receives a grade of at least forty percent on the sections that were not passed, the applicant is on "conditioned status" and only has to retake the examination on the failed sections. Id. The applicant must pass the remaining sections of the exam within the next six consecutive exams to receive a certificate. Id.

The Board has proposed the following rule for candidates without 150 semester hours of education who may have passed two or more but not all sections of the examination on or before December 31, 1999:

Section 3-02-01-02. 150 Hour Education Requirement - Transition.

A candidate who as of March 1, 2000 holds credit for two or more parts of the examination, but not all parts, may become certified without having completed the 150 hour education requirement, provided the candidate passes the remaining parts of the exam in accordance with N.D.C.C. § 43-02.2-04(7)(c), (d) and (e).

This proposed rule prevents an applicant on "conditioned status" from being required to return to college for an additional year, and gives sufficient time for applicants to receive their grades from the November 1999 exam.

Administrative agencies have only those powers delegated by the legislature or those that may be reasonably inferred from the powers expressly granted. First Bank of Buffalo v. Conrad, 350 N.W.2d 580,

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584-85 (N.D. 1984). The Board is given broad powers to conduct investigations and examinations and issue certificates and licenses to properly qualified accountants, to determine the qualifications of applicants, and to adopt rules governing its administration and enforcement of the Accountancy Act, including rules specifying the educational qualifications required for the issuance of certificates under the Act. N.D.C.C. §§ 43-02.2-03, 43-02.2-04. However, those rules must not exceed the limits set forth by the Legislature.

When a general provision in a statute conflicts with a special provision of the same or another statute, the two statutes must be construed, if possible, to give effect to both provisions. N.D.C.C. § 1-02-07 provides that if the conflict between the two is irreconcilable, the particular statute controls over the general statute unless the legislature intends the general statute to prevail. By enacting N.D.C.C. § 43-02.2-04(5)(b), the Legislature specifically provided that the education requirement for a certificate issued after December 31, 1999, is at least 150 semester hours of college education. Because the legislative history of the 150 hour requirement is silent, this specific statutory requirement cannot be overruled by the general powers granted the Board under N.D.C.C. § 43-02.2-03(5). Therefore, in my opinion, the proposed rule exceeds the Board's rulemaking authority. An amendment to the statute would seem appropriate and necessary to implement the transition in the Board's proposed rule.

This opinion is consistent with statutes in other jurisdictions where the 150 hour education requirement is being implemented. For example, in Iowa, § 542C.5(2)(b) of the Iowa Code imposes the following education requirement:

After December 31, 2000, [the applicant] has completed at least one hundred fifty semester hours, or the trimester or quarter equivalent of one hundred fifty semester hours, of college education including a baccalaureate or higher degree conferred by a college or university recognized by the board, the total educational program to include an accounting concentration or equivalent as determined by rule to be appropriate. Subject to the other provisions of this section relating to reexaminations, a person who has partially passed the examination required by subsection 3 by passing one or more subjects prior to December 31, 2000, has until December 31, 2003, to successfully complete the examination process and qualify for a certificate under the educational requirements in effect prior to December 31, 2000.

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(Emphasis added). As the underlined language indicates, the Iowa legislature has specifically granted a window of opportunity to a person who has partially passed the exam prior to December 31, 2000, to successfully complete the exam by December 31, 2003, and qualify for a certificate under the earlier educational requirements. Hawaii law has a similar provision. Haw. Rev. Stat. Ann. § 466-5.5 (Michie 1997) (copy attached).

In addition, Wyoming and the District of Columbia apply the 150 hour requirement to the date an applicant receives his or her college degree rather than the date a certificate is issued. D.C. Code Ann. § 2-107 (1997); Wyo. Stat. Ann. § 33-3-109 (Michie 1997) (copies attached). At least ten other states (Alabama, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, and Nebraska) implement a transition period by applying the 150 hour requirement to the date an applicant first sits for the examination. Copies of these statutes are enclosed for your review. The remaining states that have adopted the 150 hour requirement generally use similar statutory language to N.D.C.C. § 43-02.2-04(5) and do not address a transition period.

Your letter asks for other ways the Board might authorize a transition period under its current statutory and rulemaking authority without seeking a legislative amendment. One way the Board might have been able to implement a transition period in effect would be to issue a certificate to an applicant who is on "conditioned status" as of December 31, 1999, but has not completed 150 hours of education, subject to the requirement that the applicant complete the remaining portions of the test within the next six consecutive testings as continuing education. However, N.D.C.C. § 43-02.2-04(6) currently prohibits the Board from issuing a certificate unless the applicant has passed all parts of the test. This option also has a drawback because of the potential for the public to mistakenly believe a person granted a certificate of public accountancy subject to further examination requirements has passed all parts of the examination.

This office has reviewed the Board's statutory authority and has been unable to find any basis in current law for a transition period in light of the clear statutory language in N.D.C.C. § 43-02.2-04(5). The authorities cited in this opinion demonstrate some of the options available to the Board, but they all exceed the Board's current authority and require further legislative action.

Sincerely,

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ATTORNEY GENERAL

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