



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 19, 1998

Mr. Tommy V. Smith  
Executive Director/Commissioner  
Texas Department of Licensing and Regulation  
P.O. Box 12157  
Austin, Texas 78711

Letter Opinion No. 98-010

Re: Whether the Department of Licensing and Regulation may adopt a rule authorizing certain individuals to purchase refrigerant products (RQ-1011)

Dear Mr. Smith:

You ask whether the Department of Licensing and Regulation (the "department") may adopt a rule authorizing individuals exempted from the licensing requirements of the Air Conditioning and Refrigerator Contractor License Law, article 8861, V.T.C.S., by sections 6(a)(3), 6(a)(5), 6(a)(6), and 6(a)(7) thereof to purchase refrigerant products. In the light of sections 10(d), 10(e), 10(g), and 10(h) of the same act, which became effective on January 1, 1998, we conclude that the department may not.

Article 8861, V.T.C.S. which the department administers, requires *inter alia* the licensing of persons who engage in the business of air conditioning and refrigeration contracting. Specifically, section 3B of the act states: "Unless the person is exempted under Section 6 of this Act, a person may not perform air conditioning and refrigeration contracting without a license under this Act."

Section 6(a) of the act exempts seven enumerated classes of persons from the licensing requirement. Section 10(e) of the act, added by the 75th Legislature as part of House Bill 2025 and effective on January 1, 1998, provides that:

Except as provided by Subsection (g) of this section, a person may purchase refrigerants or equipment containing a refrigerant in this state only if that person:

- (1) is licensed under this Act or a municipal ordinance that complies with Section 9 of this Act; or
- (2) holds a certificate of registration issued by the department under this section.

Subsection (g) provides that "[a] purchaser may purchase refrigerants if that person's use is exempt under Section 6(a)(1) of this Act if the person is authorized to do so under other state or

federal law and is not required to provide to a seller evidence of the exemption.” The certificate of registration described in section 10(e)(2) is referenced in section 10(d):

To purchase a refrigerant, a person whose use is exempt under Section 6(a)(2) or 6(a)(4) of this Act must obtain a certificate of registration from the department and must present to the seller evidence of compliance with the registration requirement. The commissioner by rule shall adopt requirements governing the registration and the issuance of certificates of registration.

It is important to note that section 10 of the act does not refer at any point to the other licensure exemptions of section 6, those found in sections 6(a)(3), 6(a)(5), 6(a)(6), and 6(a)(7). Thus, the only specific exceptions to the rule of section 10(e) are those for licensed persons, for persons exempted by section 6(a)(1), and for persons exempted under sections 6(a)(2) and 6(a)(4) who have properly obtained certificates of registration and present evidence of compliance to the seller.

You ask whether the department, pursuant to the rule-making authority given the commissioner under section 10(d), may adopt regulations authorizing persons exempted under sections 6(a)(3), 6(a)(5), 6(a)(6), and 6(a)(7) from the licensing requirements of the act to purchase refrigerants. It may not.

The statute specifically enumerates those persons who may purchase refrigerants, as we have noted above. Applying the maxim, “Expressio unius est exclusio alterius,” it follows that those persons not specifically authorized to purchase refrigerants are forbidden to do so. *See also* article 8861, V.T.C.S., section 10(h) (purchase of refrigerant by unauthorized person is a Class B misdemeanor).

What the legislature forbids by statute the department may not authorize by rule. *See Railroad Comm'n of Texas v. ARCO Oil and Gas Co.*, 876 S.W.2d 473, 481 (Tex. App.--Austin 1994, writ denied). Accordingly the department does not have authority to promulgate rules permitting persons exempted from licensing under sections 6(a)(3), 6(a)(5), 6(a)(6), and 6(a)(7) of article 8861, V.T.C.S. to purchase refrigerant products.<sup>1</sup>

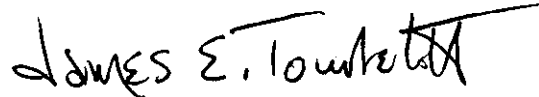
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<sup>1</sup>You do not ask, and we do not consider, whether anything in the statute would prohibit such persons from applying for or receiving licenses either from the department or a local municipality in accordance with section 9 of the act. In the event they were so licensed, of course, they would pursuant to section 10(e)(1) be authorized to purchase refrigerants.

S U M M A R Y

The Texas Department of Licensing and Regulation does not have authority to promulgate rules permitting persons exempted from licensing as air conditioning and refrigeration contractors under sections 6(a)(3), 6(a)(5), 6(a)(6), and 6(a)(7) of article 8861, V.T.C.S. to purchase refrigerant products.

Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive style with a long horizontal line extending from the top of the last letter.

James E. Tourtelott  
Assistant Attorney General  
Opinion Committee