

BACKGROUND PAPER REGARDING ISSUES TO BE ADDRESSED BY THE DEPARTMENT OF CONSUMER AFFAIRS

**(Oversight Hearing, March 14, 2011, Senate Committee on
Business, Professions & Economic Development)**

Overview of the Department of Consumer Affairs

The Department of Consumer Affairs (DCA) consists of more than 40 boards, bureaus, committees, one commission, and other programs, all of which regulate more than 100 business and 200 professional categories, including doctors, contractors, private security companies, and beauty salons. DCA entities regulate more than 2.5 million individuals and businesses. In Fiscal Year 2010-11 the Department's budget was over \$500 million, with more than 2,900 authorized staff positions.

Consumer protection is the primary purpose for all of the regulatory programs located within DCA. The Department's mission statement is "to protect and serve the interests of California consumers."

Members of the boards and commission are appointed by the Governor and the Legislature. The boards and commission within DCA are "semi-autonomous" regulatory bodies with the authority to set their own priorities and policies. While somewhat limited, DCA also has influence and control over certain functions of the boards. For example, DCA provides administrative support and guidance to the boards and commission. Additionally, DCA's approval is required for budget change proposals, regulatory changes, and contracts. DCA is also in charge of the Division of Investigation (DOI), which offers investigative services to many of the boards. DCA has direct authority and control over the programs and bureaus.

Consumer Protection Enforcement Initiative

The Consumer Protection Enforcement Initiative (CPEI) is a comprehensive plan to address long-standing enforcement backlogs, including an intense review of pending cases at the Division of Investigation, numerous suggested regulatory changes, and an enhanced tracking of pending cases. CPEI was created in direct response to a series of articles that ran in the *Los Angeles Times*, beginning in July 2009, which highlighted extreme delays in investigating and prosecuting enforcement cases at the Board of Registered Nursing (BRN). When

developing CPEI, DCA conducted a review of existing enforcement processes which identified systemic problems for all of the DCA boards, not just BRN, that limits the boards' abilities to investigate and act on cases in a timely manner. These problems range from legal and procedural challenges to inadequate resources. The CPEI is designed to overhaul the enforcement process at the healing arts boards and to address the following three specific areas, which are discussed below:

- Administrative Improvements
- Staffing and Information Technology (IT) Resources
- Legislative Changes

Although there is no target date for completion, once CPEI is fully implemented, DCA has stated that they expect the healing arts boards to reduce the average time it takes to close enforcement cases from 36 months to between 12 and 18 months.

Administrative Improvements

DCA has made numerous internal changes that were designed to remove barriers and decrease processing time for complaint intake and investigations. Some of those administrative improvements are listed below:

- ***Division of Investigation*** - In 2009, DCA's Division of Investigation (DOI) focused resources on cases that were one year or older. That year, DOI closed 50% more cases than the comparable period in 2008. In the past, DOI has seen increased caseloads but a decrease in staffing levels. DOI also had problems with lack of management and prioritization of cases and communication with client boards regarding the status of their case. Although the circumstances for DOI have improved somewhat, due to the efforts of the CPEI, the DOI took an average of 20 months to investigate BRN cases in 2010. DCA has a stated goal for DOI to reduce an investigative timeline to 6 months by December 31, 2010. It appears this target has not been met.
- ***Subpoena Authority*** - DCA has delegated subpoena authority to the executive officers at each of the boards. This is a new tool for boards to use in order to gather evidence and interview witnesses. DCA states that they expect to see increased use of subpoenas, and that boards will be able to pursue cases that they otherwise would not have pursued.
- ***Enforcement Academy*** - A brand new enforcement academy was developed to teach investigators and other enforcement staff key skills used in complaint intake, investigation procedures, case management, database use, and other areas. An initial training was offered in November 2009, and the enforcement academy began its regular cycle in April 2010.
- ***Performance Expectations with Other Agencies*** - DCA reports that it has been working with the Office of the Attorney General (OAG) and the Office of Administrative

Hearings (OAH) to adopt performance agreements that would establish expectations and timelines for key enforcement milestones at the OAG and OAH.

- **Performance measures** –Performance measures for the enforcement programs are now posted on the DCA website on a quarterly basis.
- **Department-wide guidelines have been developed and issued for:**
 - Complaint intake
 - Complaint prioritization
 - Anonymous complaints
 - Mail ballots
- **Retro-Active Fingerprinting** – Most of the healing arts boards already implemented retro-active fingerprinting for all of their licensees. The boards that haven't implemented it are in the process of doing so.
- **Accusations Posted Online** – Accusations are the formal charging documents generated by the Attorney General's Office after an investigation is complete and it has been determined that charges are warranted. Pending accusations for all of DCAs licensees are now posted online.

Staffing and Information Technology Resources

- **Enforcement Staff** - A budget change proposal (BCP) for approximately 100 new permanent full-time enforcement positions in Fiscal Year 2010-11 and 30 more positions in Fiscal Year 2011-12 was approved. These positions are distributed across 18 healing arts boards and DCA administrative support unit. The vast majority of these positions are investigators and investigative supervisors, and the remainder are complaint intake or administrative support staff. In addition to increasing staffing, DCA has pledged that staff will be properly trained, monitored, and assessed so that cases are expedited as quickly as possible.

However, while the BCP for additional enforcement staff was approved, hiring to fill these positions has been hampered by Executive Orders mandating a statewide hiring freeze. Adequate staffing is an essential component to the success of the CPEI and, more importantly, to the improved services to the consumer public and the DCA licensees. The impact of the hiring freeze on the CPEI is unknown at this time.

- **Information Technology Resources – BreEZe** - The boards and bureaus within DCA do not have the IT systems needed to run efficiently. Instead, they perform their licensing and enforcement operations with outdated, cumbersome, inflexible IT systems that are not integrated. Due to limitations of the current information system, boards have created duplicative systems that do not interact with the DCA system. Therefore, staff are required to make multiple entries or forced to track some information manually

or with additional small databases. To further complicate matters, information sharing between boards is almost non-existent.

After three failed attempts to update its antiquated programs and databases, DCA has a new plan to implement a comprehensive IT system that will connect licensing and enforcement activity, which DCA is calling BreEZe. According to DCA, BreEZe is an automated enterprise online licensing and enforcement system that will transition the department's critical business system to a modern, integrated licensing and enforcement solution. The goal of the system is to handle online licensing applications and renewals, electronic document handling, enforcement data, cashiering, and a variety of other department-wide processes.

The department has obtained budgetary approval to develop BreEZe with an outside vendor. The vendor selection process is currently underway and projected to be completed in July 2011. BreEZe will be implemented in five phases, the first phase will start in Fiscal Year 2012-13 and the final phase is projected to be complete in Fiscal Year 2014.

Legislative and Regulatory Changes

After the *Los Angeles Times* uncovered extreme delays in the BRN enforcement program, this Committee began its own investigation and found that it was not only the BRN, but other health care boards that had serious deficiencies. Moreover, aside from the boards, the Department and the Attorney General's Office (AG's Office), upon which these boards rely, was not prosecuting disciplinary cases in a timely manner. Additionally, the Legislature and previous Governors had not committed the resources and staffing necessary for the boards to effectively do their jobs of protecting consumers. The specific problems identified by the Committee included the following:

- Serious delays in the disciplinary process of up to three years.
- Protracted process to immediately suspend the license of a health care practitioner who poses an immediate threat to patients or committed a crime.
- Lax reporting of crimes committed by health care practitioners and of civil judgments or settlements.
- No reporting by health care facilities of practitioners with serious deficiencies or who are a potential danger to patients.
- Questionable effectiveness of drug diversion programs.
- Lack of staffing and funding resources for the boards and the DCA.
- Inability to track disciplinary cases and lack of information sharing.
- Inconsistent Reporting of information to the public regarding licensees.

After the investigation and an informational hearing conducted by this Committee on August 17, 2009, this Committee began working with DCA to identify legislative solutions that would address the delays in the disciplinary process and to give the boards the enforcement tools they need to deal with the aforementioned problems. Many of the changes were put into a bill, SB 294 (Negrete McLeod of 2009), which was referred to the Assembly Business and

Professions Committee. However, because of the complexity of the proposed changes and concerns raised by the health professions that more time was needed to review this proposal, agreement was reached to abandon SB 294 and introduce another bill the following legislative session.

DCA and this Committee continued working with all health professions affected by SB 294 and SB 1111 (Negrete McLeod) was introduced on February 17, 2010 in an attempt to address many of the concerns raised regarding the enforcement programs to standardize the disciplinary process. This measure, which was sponsored by DCA, was unsuccessful because of concerns raised about some of the changes proposed by DCA. The Chair of this Committee is still considering moving forward with at least some of the changes proposed in SB 1111.

In the meantime, it was determined that numerous provisions of SB 1111 could be implemented with existing statutory authority, mostly via the rulemaking process. For example, the boards could do the following:

- Delegate authority to the Executive Officer to adopt stipulated settlements that revoke or surrender a license.
- Adopt regulations that would allow for revocation for sexual misconduct.
- Adopt regulations that would allow for automatic denial of an application for licensure from a registered sex offender.
- Adopt regulations that would make it unprofessional conduct to participate in confidentiality agreements regarding settlements.
- Define in regulation that failure to provide documents and noncompliance with a court order is unprofessional conduct.
- Amend regulations pertaining to applicant requirements that a psychological or medical evaluation may be required.
- Define in regulation that sexual misconduct is unprofessional conduct.
- Define in regulation that failure to provide information or cooperate in an investigation is unprofessional conduct.
- Define in regulation that failure to report an arrest, conviction, etc. is unprofessional conduct.

Committee staff has been informed that some boards have begun the process of implementing the above.

Diversion Programs and MAXIMUS

Seven of the health care boards within DCA (Board of Registered Nursing, Dental Board of California, Board of Pharmacy, Physical Therapy Board of California, Physician Assistant Committee, Veterinary Medical Board, and Osteopathic Medical Board) operate confidential diversion programs for licensees with substance abuse problems. Diversion program participants avoid license sanctions and are allowed to continue to practice under strict, specified conditions that include monitoring and screening for drug use or alcohol treatment, and rehabilitation. The boards listed above have all contracted with MAXIMUS to provide these treatment services. This is a \$7 million contract with a term beginning on January 1, 2010 and ending on December 31, 2012.

The success and effectiveness of these programs have been called into question numerous times. For example, after five audits and years of deliberation, the Medical Board of California voted to eliminate its own diversion program in 2008. Additionally, the *Los Angeles Times* ran a series of articles beginning in July 2009 that detailed how the diversion program for nurses with drug abuse problems was largely unsuccessful and had failed to quickly take action when nurses flunked out and were internally labeled “public safety threats.”

In 2010, MAXIMUS was audited by DCA and it was indicated that MAXIMUS was complying with all of the requirements of their contract. However, Committee staff had serious concerns about the completeness of this audit and the deficiencies identified in the audit, which may still exist with this program.

On September 14, 2010, the former Chair of this Committee, Senator Negrete McLeod, sent a letter to the DCA Director detailing the concerns regarding the audit and other issues regarding the administration of the diversion program. The letter pointed out that numerous audit findings reveal a lack of coordination between MAXIMUS and the boards; gaps in the system that are capable of being exploited; and inadequate monitoring of diversion program participants. In fact, the auditors found deficiencies in the most important and fundamental functions of MAXIMUS: 1) In more than one-half of the cases reviewed, MAXIMUS did not maintain documentation/recordkeeping that demonstrates participant compliance with all terms and conditions of the diversion program contract; and, 2) MAXIMUS does not always report positive drug tests to the boards in a timely manner

Concerns regarding MAXIMUS performance in the diversion programs were further exacerbated when it was found that MAXIMUS was using incorrect testing standards for diversion participants. On October 8, 2010, the *Los Angeles Times* ran a story exposing a troubling flaw in MAXIMUS’s testing for drug and alcohol screenings. According to the *Los Angeles Times*, more than 140 nurses, pharmacists and others in diversion programs tested positive for drugs or alcohol but the results were disregarded because the testing facility was using the wrong testing standard. The problem continued for ten months until the sub-contractor that runs the testing program alerted the state. For health care professionals with known substance-abuse problems, strict abstinence from drug or alcohol is required. Instead, the testing facility used a lesser standard that allows for use of alcohol or other substances when they are not working. DCA took immediate steps to rectify this problem but the event still raises questions of the effectiveness and efficiency of this program.

Uniform Standards for Substance-Abusing Healing Arts Licensees

Senate Bill 1441(Chapter 548, Statutes of 2008) required the Department to develop “Uniform Standards for Substance-Abusing Healing Arts Licensees” for 16 specified criteria. In doing so, DCA convened a Substance Abuse Coordination Committee, which consisted of

representatives from all of the health boards. A series of public meetings were held throughout 2009 to discuss and develop the standards, which were finally adopted in December 2009. The MAXIMUS contract went into effect prior to finalization of the Uniform Standards, therefore, it was necessary to amend the contract to ensure MAXIMUS was aware of, and in compliance with, the new standards. The Director previously advised this Committee that the MAXIMUS contract was expected to be amended before the end of 2010. However, Committee staff has been informed that the contract amendments are still being negotiated. Additionally, any amendments to the contract will require approval from the Department of General Services.

Some of the boards have begun the process of adopting the uniform standards via regulation. However, it appears that the boards may not be seeking to adopt all 16 standards. The most controversial standard addresses the frequency of testing, which currently calls for testing two times a week on average. The Substance Abuse Coordination Committee has reconvened a subcommittee to reconsider the frequency of testing. A meeting is scheduled to discuss the testing standards on March 9, 2011.

Audits of Enforcement Programs

In 2010, the DCA internal audit office began a series of audits on the enforcement programs at the following boards:

- Board of Professional Engineers, Land Surveyors and Geologists (PBELSG)
- Contractors State License Board (CSLB)
- Board of Vocational Nursing and Psychiatric Technicians (BVNPT)

The audit scope includes a review of the boards' enforcement program. Specifically, the auditors will review internal controls; review regulations; evaluate of the boards' processes for complaint intake, prioritization of cases, monitoring progress, following up appropriately, closing cases on a timely basis; and keeping the public informed.

The Department indicates that the final audit reports for the enforcement programs at the CSLB and BPELSG will be issued just prior to the March 14, 2010 Sunset Review hearing. The BVNPT report is projected to be issued sometime after the first two are issued. Audits of the enforcement programs at the Dental Board of California and the Board of Registered Nursing are scheduled to begin in early 2011.

Board Member Training

With over 300 board and committee members, it is difficult to assess the knowledge and comfort level of each board member with regard to their roles and responsibilities. However, concerns have been raised that members are insufficiently trained and do not have the resources readily available when they have legal or ethical questions.

Business and Professions Code Section 453 requires all newly appointed board members to complete a training and orientation program offered by the department regarding the functions, responsibilities and obligations of a board member. This training must be completed within a year of assuming office.

The Department conducts the mandatory training sessions multiple times each year in Northern and Southern California. The scope of the training includes an overview of the role of the board members and presentations on the disciplinary, regulatory and legislative processes, as well as review of the Bagely-Keene Open Meetings Act.

In addition to the above-mentioned orientation, board members are also required to attend ethics and sexual harassment prevention training within six months of assuming office and every two years thereafter. These training courses are offered in a number of formats, including DVDs and online. Attendance at the DCA-provided training does not constitute compliance with the ethics and sexual harassment prevention training.

In 2010, the Department offered additional training for board members, "Improving Enforcement and Board Governance," at which there were discussions on expectations of board staff and emerging policy issues. Attendees were provided copies of sample agendas, meeting minutes, staff reports, and bill analyses. At the same meeting a draft copy of the "Board Member Responsibilities" was disseminated. This document was purported to be a tool for potential board members in order to clarify responsibilities and time commitments prior to becoming a board member.

DCA has also issued memos on "Board Meeting Protocols" and "10 Principles for Highly Effective Board Members." Additionally, many DCA boards now include brief supplemental tutorials on a variety of legal mandates at every board meeting.

While there is a lot of reading material available to the board members, the information does not appear to be presented in a comprehensive fashion. New board members could benefit from a comprehensive briefing binder containing information about their respective programs as well as the procedural and legal requirements.

Governor's Proposal to Review Peace Officer Classifications

The Governor's proposed budget for Fiscal Year 2011-12 includes numerous proposals to improve efficiencies in state operations. It reads, in part, "While there have been a number of reductions in state operations costs in recent years, there continue to be opportunities for additional savings. The Governor's Budget includes \$200 million in savings associated with identification of efficiencies in state operations. For example, identification of agencies, departments and programs that can be reorganized to eliminate duplication and unnecessary functions; *review of state peace officer and safety classifications*; and reductions in other areas like contracting; fleet operations; and cell phone use."

The Department's Division of Investigations (DOI) and several boards are staffed with investigators who hold peace officer status. As such, they are required to complete a basic investigative training course as prescribed by the Commission on Peace Officer Standards and Training. They are also subject to background checks, and medical and psychological evaluations. Additionally, it has been alleged that the pay for DCA inspectors is not commensurate with that of other peace officer classifications. These circumstances often make it difficult to recruit and retain Investigators.

According to the job specifications, personnel in the Investigator classification may perform any of the following duties: conduct or supervise independent and diverse administrative, civil and criminal investigations; locate and interview suspects and witnesses and analyze and evaluate their testimony; examine a variety of records to secure or verify information concerning suspected violations and violators; contact and interview individuals and representatives of business and governmental organizations; gather, assemble, preserve and report facts, statements or affidavits and other evidence for use in legal actions; make felony arrests; investigate complaints; conduct undercover and surveillance operations; investigate the financial and moral character of applicants for licenses; develop and utilize confidential informants; issue misdemeanor citations; investigate suspected misuse of license privileges; monitor probationary licensees; appear as a witness and arrange for the appearance of witnesses to present testimony in criminal, administrative or civil actions; serve legal papers; interpret and explain the laws, rules and regulations of the boards and bureaus; cooperate, train and maintain liaison with Federal, State, and local law enforcement agencies; prepare correspondence, reports of investigations, affidavits and recommend action to be taken; prepare and serve search warrants, subpoenas, subpoena duces tecum, temporary restraining orders, civil injunctions, and asset forfeiture documents; conduct drug audits; issue administrative fines and citations; may develop program investigation policies and procedures which specifically require investigative or law enforcement expertise; act as technical advisors; and perform other related work.

In keeping with the Governor's proposal to seek efficiencies in state government and considering the lengthy timeframe of investigations and the difficulty with recruiting and retaining investigative staff, it may be appropriate for DCA to evaluate the actual work performed the DCA investigators to determine when and if peace officer status is warranted. For example, the Department could research how often Investigators make felony arrests, develop and utilize confidential informants and conduct undercover or surveillance operations? How often has the use of force been necessary in the course of their duties? Is it necessary for DCA Investigators to carry weapons and as a result receive extensive training on the use of force?

Contracts for Subject Matter Expert Consultants

DCA boards and bureaus regularly enlist the expertise of their own licensees to assist with evaluating investigative documents, applications, educational and examination materials. Rather than placing these "subject matter experts" on payroll, they are hired as consultants on an as-needed basis. Subject matter experts are paid an hourly fee for the services they provide, which typically include:

- Providing expert opinion in enforcement matter from the initial review through testifying at a hearing.
- Evaluating applications for applicant licensure.
- Evaluating curriculum content and other requirements for school or program approval.
- Developing professional licensing exams.

For years, these consultants were not required to enter into formal contract agreements, which can be laborious, cumbersome and time-consuming to execute. The boards and bureaus operated with customized agreements that did not require the review or approval of oversight entities. This process allowed the boards and bureaus to select a consultant and get them started on the services in a matter of days, rather than weeks or months. However, on November 10, 2010, DCA issued a memorandum instructing the boards and bureaus that they are now required to enter into formal consulting services contracts that follow all guidelines, procedures, and rules governed by the State Contracting Manual and the California Public Contract Code.

The memo states that DCA recognized the potential for delays in obtaining consulting services and indicated that a rollout plan will be developed to minimize the impact to licensing and enforcement units.

Difficulties in identifying, hiring and training subject matter experts were identified as a problem and a reason for delays by DCAs own CPEI Investigations Sub-Committee in June 2010. As described throughout this report, DCA and this Committee have spent considerable time and effort the past two years in a joint effort to reduce the time it takes to process complaints, investigation and to mead out discipline. There is a concern that this new contracting requirement is adding an unnecessary and superfluous level of paperwork that will further delay the closure of cases.

On January 28, 2011, the Medical Board of California voted unanimously to seek legislation that would exempt the MBC from the Public Contracting Code for purposes of hiring subject matter experts. Other boards are expected to seek similar exemption via legislation.