

**VIRGINIA BOARD OF HEALTH PROFESSIONS  
DEPARTMENT OF HEALTH PROFESSIONS  
BOARD MEMBER ORIENTATION, FULL BOARD MEETING  
DECEMBER 11, 2002**

**TIME AND PLACE:** The meeting was called to order at 10:15 a.m. on Wednesday, December 11, 2002, Department of Health Professions, 6603 W. Broad St., 5<sup>th</sup> Floor, Room 2, Richmond, VA.

**PRESIDING OFFICER:** Charles M. Bristow, Jr., F.S.L., Chair

**MEMBERS PRESENT:** Linda M. Ault, M.S.N., R.N.  
Joe Gieck, P.T.  
Terone B. Green  
Jerry Hinn, DVM  
Jack Knapp  
Nadia B. Kuley, Ph.D.  
The Honorable Alan E. Mayer  
Dianne L. Reynolds-Crane, M.D.  
Michael W. Ridenhour, AU.D.  
William E. Russell, L.C.S.W.  
Richard Teske, Citizen Member

**MEMBERS NOT PRESENT:** Sony Currin, Jr., R.P.H.  
Darryl L. Lefcoe, D.D.S.  
Krishan D. Mathur, Ph.D.  
Samuel C. Smart, O.D.  
Mary M. Smith, L.N.H.A.  
Lucia A. Trigiani, Citizen Member

**STAFF PRESENT:** Robert A. Nebiker, Department Director  
Gail Jaspen, Deputy Director  
Elizabeth A. Carter, Ph.D., Executive Director for the Board  
Elaine Yeatts, Senior Regulatory Analyst  
Faye Lemon, Director, Enforcement  
Carol Stamey, Administrative Assistant

**OTHERS PRESENT:** Neal Kauder, Visual Research  
Pat Davis, Visual Research

**WELCOME TO NEW BOARD MEMBERS:** Mr. Bristow welcomed the new board members.

**BOARD MEMBER ORIENTATION:** Dr. Carter presented an overview of the Board of Health Professions' powers and duties, and its history, including a review of its major policy reviews and activities. The slide presentation is incorporated into the minutes as Attachment 1.

During Dr. Carter's review of the Board's 1999 study entitled, "Reporting

Infectious Disease Status of the Deceased,” Mr. Bristow requested, upon discussion with Mr. Nebiker, that the agency convey to the Department of Health the need to update their listing of reportable diseases upon the transfer of remains. More recently it has been determined that diseases such as Methicillin-Resistant Staphylococcus Aureus (MRSA) may be communicable from contact with the deceased but are not included in Virginia’s list. Mr. Nebiker offered to communicate Mr. Bristow’s concern to the Commissioner of Health.

**AGENDA:**

Because of inclement weather, the orientation session began later than originally scheduled. The order of the agenda for the full Board meeting was revised to accommodate inclusion of the orientation overview of the Sanction Reference Study as well the scheduled update on activities since the Board’s last meeting on June 4, 2002.

**SANCTION  
REFERENCE  
STUDY UPDATE:**

Neal Kauder, Visual Research, presented a slide presentation covering the history, progress and plan of the Sanction Reference Study that is incorporated into the minutes as Attachment 2.

A brief question and answer session followed the presentation. Dr. Reynolds-Cane stated that additional board member training in those facets of Administrative law and procedure that pertain to disciplinary proceedings is needed for new members, in particular. Mr. Green asked Mr. Kauder what other benefits could be obtained beyond those stated in the study’s reports thus far. Mr. Kauder and Ms. Lemon discussed the potential use of the study’s data in manpower planning, particularly with respect to compliance monitoring needs. Mr. Green opined that an examination of the efficacy of the sanctions could prove useful as well.

**INTRODUCTION  
OF NEW BOARD  
MEMBERS:**

Mr. Bristow again welcomed the new board members followed by their introduction.

**APPROVAL OF  
MINUTES:**

On properly seconded motion by Dr. Knapp, the minutes of the June 4, 2002 meeting were approved.

**PUBLIC  
COMMENT:  
COMMENTS OF  
DIRECTOR:  
BUDGET  
REPORT:**

No public comment was presented.

Mr. Nebiker apprised the Board of the current budget reduction plan for the agency and that future reduction specifics will be introduced by the Governor to the General Assembly in January 2003.

Thus far, the agency had been asked to provide \$310,000 per year equating with a 15% reduction of its budget. He noted that this represents a relatively limited impact on the agency’s budget which is likely attributable to the agency’s role in protecting the public. He also reported that an additional \$150,000 will be transferred from DHP to the state’s general funds, as is routine. Further, he also anticipates at least an additional \$250,000 to be requested.

Mr. Nebiker noted that in previous years, the agency has been able to pay the general fund allocation entirely from earned interest on our deposits. This will not be the case this year. However, it has been

determined that there had been an over-funding of payments to the retirement system for employees. Rather than the savings accruing to the agency, the funds will be transferred to the general fund to meet the request. The figures described thus far are fully anticipated; however, he indicated that should the worse case scenario result, he believes there would only be a total transfer of \$1 million a year each year. He reported that he does not foresee a reduction in operating budget. However, he stated that the issue will be the total amount of actual cash the agency has available to absorb the impact of the transfers and to cover operating expenses.

Mr. Nebiker reported further on the disciplinary process and the budgeted resources to meet demands. He referred to Directive 4.6 that sets specific timeframes for the adjudication of cases within the department in response to some of the JLARC recommendations in its last study of the agency. The standards are based upon the ideal of 95% cases being completed within a year. However, he noted that for cases that go through the entire process, with an informal conference and a formal proceeding, the standard is 440 days. Currently, the agency is meeting the standards approximately 48% of the time.

To more adequately address the standards, Mr. Nebiker reported that a review had been conducted with Faye Lemon and board executives who looked at what the basic case load is, what the current manpower is, and what do we think we need in additional resources to more closely bring the performance up to the standards. From this was identified the need for 11 additional staff members. The analysis was presented to the Secretary of Health and Human Resources, two weeks ago. The eleven positions were authorized to be specifically targeted to investigation and adjudication of cases to improve our performance in this area. Mr. Nebiker indicated that he anticipates an amendment to the Governor's budget that will put this authorization on a permanent basis. In the process of identifying where the staff should be placed, there will be two going to the Board of Medicine, and the remaining staff to investigations and APD to work directly on disciplinary cases.

Mr. Nebiker discussed with the Board that the case standards reflect assessment of time spent, only, and do not include the dimension of the appropriateness of case outcome. He noted that the standards will not be used in a manner that may compromise the quality or due process of cases.

The addition to the maximum employee level (MEL) will cost the agency about \$700,000 a year. With this new cost, the general operating costs, and the general fund appropriation, all cash generated by the agency will be expended for the next 2 years. But, this does not mean that there is necessarily going to lead to fee increases. Historically, the agency has under-spent due to a cap on its MEL. Even with a higher MEL, other avenues such as acting ideas to allow for the disciplinary process itself to be done in a more cost-efficient manner are being explored. For example, Board member review of cases is a time consuming and costly process. It may be possible to delegate more to staff, such as cases

those which do not involve standard of care issues (e.g., continuing education compliance, facility compliance).

Mr. Nebiker reported that the *Virginian Pilot* had published a number of articles regarding the inability of the Board of Medicine to put a physician immediately out of practice years ago. As a result of that, interests were generated among a number of the members of the General Assembly. They went back to the JLARC report written 3 years ago on the agency, which received limited attention, at that time, in terms of policy recommendations. Mr. Nebiker specifically referred to HB1441, generated by Delegate Sears, which seeks to implement a number of JLARC's recommendations and others related to the *Virginian Pilot* articles.

Two weeks ago, Mr. Nebiker, along with Dr. Harp, was asked to appear before the Health, Welfare & Institutions Committee to discuss issues related to the disciplinary process. Mr. Nebiker stated that in his presentation he discussed things that contribute to problem performance in the disciplinary process. Among these is how quickly the Department receives information about problem practitioners after a misadventure. The Board of Medicine is particularly concerned with the lack and complete prompt reporting from health care institutions about problem practitioners. The delay in reporting appears to be due to concerns about litigation and due process at the health care institution's level (issues not discussed in the JLARC report).

HB1441 provides a mechanism for failures for hospitals to report. It also amends the Board of Medicine's threshold for action by allowing it to consider simple rather than only gross negligence. It also provides for confidential consent agreement with limited circumstances for lesser violations of the statute. It provides for the department to issue summons for unlicensed activity. It also requests another JLARC review. This bill applies to all boards and will significantly change the disciplinary process.

Mr. Nebiker said he thinks it will increase the number of valid reports requiring action by the department. The estimated price tag on the bill is an additional \$1.6 million. As described previously, there is no money currently to cover this additional expense. The expenditures would likely translate into an additional \$60 per bi-annual licensure renewals of doctors and \$10 to \$15 for licensure renewal of nurses. Mandatory reporting from hospitals will mainly drive the costs, so not all licensees' fees are effected.

Mr. Nebiker stated that the Department did not have a position on this bill at this time but suspects there will be an administration position on the legislation that will support a number of the objectives that are found in the bill.

Contributing to the reporting delay appears to be the issue of peer review problems. Often there is difficulty in obtaining case peer review resolution due to fear of lawsuits. Mr. Nebiker noted objection to the bill from the VA Hospital Healthcare Association. They noted concern that the bill, as it is currently written, will jeopardize peer review efforts that are occurring in

hospitals. The bill may be amended to facilitate provision of factual information concerning the case without peer review information. However, at this point, it remains a controversial issue because there is concern that provision of the facts may somehow jeopardize the peer review entity.

Another issue of concern is that of the requirement of individuals who might witness another provider violating some statute not reporting it and being. The bill was amended to limit the reporting requirement to mental health providers and sets a timeframe for reporting incidents and sets a specific fine for failure to report.

Mr. Nebiker advised the Board that if they had comments or a position on the bill for adoption that the comments be forwarded to him to be conveyed to the Governor.

Mr. Nebiker discussed a report from U. S. Department of Health and Human Services concerning its study last year on National Data Bank mandatory reporting. The study reported that 46% of the hospitals in Virginia had never made an adverse report to the National Practitioner Data Bank. He stated that under reporting is a real issue in Virginia.

Dr. Kuley, noted that the Board of Psychology had voiced its concern about the potential for harm for patients by disclosing confidential information.

Dr. Reynolds-Crane made note of a new tool for boards in the bill, a confidential consent agreement that could be used to discipline doctors for less serious problems. Mr. Nebiker further noted that the consent agreement could be an effective tool in managing caseloads. In cases of repeat violations, the confidential consent could be introduced as evidence in subsequent cases. Mr. Nebiker noted that the bill has a limited application for the confidential consent agreement. HB 1441 does not allow the confidential consent to be used in cases of negligence where there is serious patient harm.

To clarify for the new members, Mr. Green requested a legal explanation that clearly contrasts advisory authority with the authority of other types of boards (i.e., regulatory, policy). He stated he was aware of a document prepared by the Attorney General's office for Medicaid, and he believed it would be useful for the Board's members as a reference. Ms. Jaspén indicated that she would follow-up with the Attorney General's office on this.

**COMMENTS OF  
EXECUTIVE  
DIRECTOR:**

Dr. Carter asked that any name or address changes be submitted to board staff. Also, she requested e-mail addresses as a cost effective and rapid communication tool. Further, Dr. Carter informed the Board to review the committee structure and advise staff of any position in which they might wish to serve.

Ms. Jaspén informed the Board that the financial disclosure statements had been mailed and must be returned by December 27, 2002.

Dr. Carter made note of the expense vouchers and asked the Board to contact staff for questions in filling out the voucher.

**OVERVIEW OF  
LEGISLATIVE  
PROPOSALS  
REGULATORY  
REVIEW  
ACTIVITIES &  
IMPACT OF  
EXECUTIVE  
ORDER:**

Ms. Yeatts overviewed the Regulatory Review Status Report, and it is incorporated into the minutes as Attachment 3. Further, Ms. Yeatts noted that under new Executive Orders, there are some fairly stringent timelines for completion of reviews and submission of documents by agencies. She stated that the Code of VA and the Administrative Process Act require the Department of Planning and Budget to review all proposed regulations within 45 days. Due to budget constraints, however, there has been difficulty in meeting the time limit. She stated this will impact the agency's ability to replace emergency regulations and to submit regulations within a required timeframe. Nevertheless, she noted that both the Secretary's office and the Governor's office have performed very well in approving regulatory documents. Ms. Yeatts reported that the Department of Planning and Budget has the responsibility to review and issue and economic impact analysis and has adopted the responsibility for doing a policy analysis, as well. A number of regulations that have gone through a DPB policy analysis recently have been rejected.

**BOARD  
REPORTS:**

The written Board reports are incorporated into the minutes as follows:

Dr. Knapp, Board of Counseling, Attachment 4  
Dr. Ridenhour, Board of Audiology and Speech Language Pathology, Attachment 5  
Mr. Gieck, Board of Physical Therapy, Attachment 6  
Dr. Hinn, Board of Veterinary Medicine, Attachment 7  
Mr. Bristow, Board of Funeral Directors and Embalmers, Attachment 8

Dr. Kuley, Board of Psychology, reported that the board had met yesterday and their regulatory committee had reviewed and discussed residency requirements for licensure for clinical psychology and school psychology. The committee is also studying the residency in terms of when an applicant can sit for licensure.

Ms. Ault, Board of Nursing, reported that Nancy Durrett, Executive Director for the Nursing Board, was retiring effective January 1, 2003. Further, Jay Douglas, current Deputy Executive Director for Discipline, will be assuming that position. Also, Grace Johnson, Deputy Director for Nurse Education, is retiring. Ms. Ault reported the Board had intended to promulgate new regulations increasing the educational requirements for educators who are teaching within certain levels of nursing training. Currently, the issue is being debated largely over the perceived costs to educational programs that would be attached to implementation.

**UPDATE ON  
BOARD OF  
PROFESSIONAL  
AND  
OCCUPATIONAL  
REGULATIONS  
STUDIES:**

Dr. Carter reported that she and Dr. Harp had been requested to assist in two studies conducted by the Department of Professional Occupational Regulations (DPOR) on the need to regulate estheticians and electrologists. They also assisted in the methodology development for DPOR's study into the need to regulate roller skate rinks.

Dr. Carter reported that some aspects of the current practices employed

by estheticians may pose a threat to the public, particularly those related to dermabrasion, chemical peel (especially with low pH products), and the use of lasers. Some features of the laser and light-based hair removal by electrologists and estheticians may pose a threat to the public. Also, she indicated that some form of state regulation may ameliorate the threat posed by these aspects of practice.

Dr. Carter further explained that even though there was some discussion by members of BPOR and the DPOR staff that electrology may best be regulated as a health profession because of some invasive aspects to the practices used, neither electrologists nor estheticians (who also sometime use electrolysis) have been explored in the context of considering the occupation as qualifying as a health profession by fully applying the methods described in the *Policies and Procedures for the Evaluation of the Need to Regulate Health Occupations and Professions, 1998*. It was further discussed that clients seek out these professions for cosmetic rather than health reasons, and it was brought up that invasive practices employed by body piercers and tattooists are currently regulated within DPOR.

BPOR concluded that licensure for both electrologists and for estheticians, under the Board for Barbers and Cosmetology was appropriate. Staff was instructed to develop legislative proposals to accompany the reports being referred to the General Assembly.

**CALENDAR FOR 2003:**

The Board's next meeting is scheduled for February 18, 2002.

For the subsequent meetings, the consensus of the members present was that staff should determine dates based upon the agency's calendar when it was most likely that most, if not all, members could attend.

**NEW BUSINESS:**

Dr. Hinn asked that the Board continue reviewing health regulatory case decisions from a broad perspective and to act in a consulting capacity for the health regulatory boards should they request a broader perspective on disciplinary issues. Dr. Carter said that BHP could not "second-guess" any of the health regulatory boards given that BHP is not privy to the evidence in each case. However, BHP can easily act as a forum for discussion.

Dr. Reynolds-Cane suggested that one way to facilitate communication among the boards and with BHP is for the health regulatory boards to share "best practice" – policies and procedures that work well for them in adjudicating the types of cases they encounter.

As a follow-up to Mr. Nebiker's budget status report, Mr. Green requested an update at the February 18, 2002 meeting.

**ADJOURNMENT:** On properly seconded motion by Mr. Green, the meeting adjourned at 3:30 p.m.

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Charles M. Bristow, Jr., F.S.L., Chair

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Elizabeth A. Carter, Ph.D., Executive Director for the Board