



of another state if that other state had the same general requirements as required in California at the time the license was issued, and if the other state similarly grants reciprocal registration to California licensees. Deputy Attorney General Joel Primes opined that a strict interpretation of section 1000-9 would preclude the Board from granting reciprocity to a licensee from a state with licensure, examination, and/or reciprocity laws different from those in California; however, the Board's current interpretation of that section grants reciprocity to chiropractors if they would meet the prior practice requirement were they applying for reciprocity in their state of licensure. Accordingly, the Board discussed the possibility of introducing legislation which would add a prior practice provision to its statutes, to statutorily allow BCE to grant reciprocity to chiropractors with a minimum number of years of practical clinical experience. The Board asked its legal counsel to review the proposal, and—at this writing—is expected to continue its discussion at its January meeting.

RECENT MEETINGS

At its October 20 meeting, BCE discussed the use by chiropractors of hyperbaric oxygen—oxygen under pressure or in a chamber which is used to promote the healing process for the body's tissues. The Board noted that hyperbaric chambers are normally found only in hospitals; however, manufacturers have now developed portable chambers which can be used in a chiropractor's office. BCE Chair Louis Newman, DC, questioned whether hyperbaric oxygen has a purpose in a chiropractic setting, and expressed doubt whether BCE should form a position until it receives a complaint regarding its use. The Board took no action on this matter.

At its December 15 meeting, BCE discussed a California State Automotive Association proposal which would limit or eliminate insurance payments for chiropractic treatment. The Board took no official action on this matter, but noted that individual Board members could respond to the proposal if they wished.

FUTURE MEETINGS

January 19 in San Diego.
February 23 in Sacramento.
March 30 in Los Angeles.
May 4 in Sacramento.
July 27 in Los Angeles.

CALIFORNIA HORSE RACING BOARD

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The California Horse Racing Board (CHRB) is an independent regulatory board consisting of seven members. The Board is established pursuant to the Horse Racing Law, Business and Professions Code section 19400 *et seq.* Its regulations appear in Division 4, Title 4 of the California Code of Regulations (CCR).

The Board has jurisdiction and power to supervise all things and people having to do with horse racing upon which wagering takes place. The Board licenses horse racing tracks and allocates racing dates. It also has regulatory power over wagering and horse care. The purpose of the Board is to allow parimutuel wagering on horse races while assuring protection of the public, encouraging agriculture and the breeding of horses in this state, generating public revenue, providing for maximum expansion of horse racing opportunities in the public interest, and providing for uniformity of regulation for each type of horse racing. (In parimutuel betting, all the bets for a race are pooled and paid out on that race based on the horses' finishing position, absent the state's percentage and the track's percentage.)

Each Board member serves a four-year term and receives no compensation other than expenses incurred for Board activities. If an individual, his/her spouse, or dependent holds a financial interest or management position in a horse racing track, he/she cannot qualify for Board membership. An individual is also excluded if he/she has an interest in a business which conducts parimutuel horse racing or a management or concession contract with any business entity which conducts parimutuel horse racing. Horse owners and breeders are not barred from Board membership. In fact, the legislature has declared that Board representation by these groups is in the public interest.

MAJOR PROJECTS

CHRB Approves CHBPA/TOC Split. AB 991 (Tucker) (Chapter 62, Statutes of 1994) allows for separate owner and trainer organizations to represent thoroughbred horsemen. [14:2&3 CRLR 207-08] Accordingly, the California Horsemen's Benevolent and Protective Association (CHBPA), which formerly represented both

owners and trainers, will now represent only trainers, and the Thoroughbred Owners of California (TOC) will represent the owners. CHRB's main oversight responsibility regarding the split is the division of assets from CHBPA's reserve funds between CHBPA and TOC. According to AB 3287 (Tucker) (Chapter 1213, Statutes of 1994), CHRB is required, upon recognition by the Board of a successor horsemen's organization or organizations, to apportion specified assets for the benefit of the horsemen and the successor organizations. [14:4 CRLR 190-91]

Prior to the split between CHBPA and TOC, however, CHRB was concerned that the previous CHBPA Board was mishandling its funds and perhaps depleting the Association's reserve funds; among other things, CHRB was concerned that CHBPA's lobbying expenditures were excessive and perhaps inappropriate. This concern led to its November 1993 mandate prohibiting CHBPA from making any expenditures relative to political contributions or lobbying of any nature, until further ordered by CHRB or by a court. In December 1993, CHBPA filed a lawsuit challenging CHRB's authority to issue such a directive; in February 1994, Los Angeles County Superior Court Judge Robert H. O'Brien ruled that CHRB's imposition of any limit on CHBPA's legislative lobbying activities exceeds its statutory authority, and vacated CHRB's order. [14:4 CRLR 187, 192-93]

At CHRB's October 28 meeting, TOC representative Ed Friendly estimated that CHBPA's total assets would be between \$300,000 and \$500,000 as of the end of 1994; TOC proposed to leave CHBPA with assets worth \$182,000, and to move the remaining funds over to TOC. Following discussion at its November 18 meeting, CHRB approved the proposed allocation of funds.

Primary and Complementary Drug Testing Contracts. At its May 1994 meeting, CHRB staff recommended that the Board award its primary drug testing contract to Pennsylvania Equine Toxicology Laboratory; following discussion, the Board unanimously approved staff's recommendation. At its August 1994 meeting, however, the Board announced that staff had determined that Pennsylvania Equine Toxicology Laboratory is not able to comply with the Board's contract for primary drug testing. Accordingly, CHRB had released a new RFP, to which it received responses from Harris Laboratories in Arizona, and Truesdail Laboratories, its existing primary drug testing contractor located in California; Harris' bid was \$85,000 lower than Truesdail's bid. Following discussion, the Board



awarded the contract to Harris Laboratories. Later on at the same meeting, certain Board members expressed discomfort about awarding the contract to an out-of-state laboratory, and discussed the possibility of changing its RFP method to award preference points to California-based bidders. After some discussion, the Board reversed its earlier decision to award the primary drug testing contract to Harris and instead voted to award it to Truesdail. Still later at the same meeting, Deputy Attorney General Martin Milas advised the Board to reconsider its actions in light of applicable state contracting law; the Board took the matter under submission and postponed action until its September meeting. [14:4 CRLR 187]

At its September 23 meeting, CHRB agreed to ask the Department of General Services to approve a sole-source contract, under which the Board would give the contract to Truesdail; the Board also agreed to allow Truesdail to continue providing drug testing services on a month-to-month basis while the request was being considered. Lew Harris of Harris Laboratories reminded the Board that Harris had provided the lowest bid, and that it stands ready and capable of undertaking the testing work for the Board; Harris also commented that if the contract is not awarded to Harris Laboratories, it may consider legal action.

At the Board's December 16 meeting, staff reported that the Department of General Services had denied CHRB's request for a sole-source contract; further, staff had appealed the decision to the Department Director, who denied the appeal. Following discussion, the Board granted the primary testing contract to Harris Laboratories by a 4-2 vote.

Parlay Betting Regulations. On October 28, CHRB published notice of its intent to adopt new section 1954.1, Title 4 of the CCR, which would set the parameters for placing a parlay wager on a win, place, or show pool. Section 1954.1 would enable a patron to wager on a minimum of two races and a maximum of six races on the win, place, or show pools on a given program at one time; winnings from the first leg of the parlay wager will automatically be reinvested into the next leg of the parlay wager. According to CHRB, the parlay betting method allows patrons who have a winning ticket at the conclusion of the parlay wager to cash in one time rather than after each race is run.

On December 16, CHRB held a public hearing on the proposed adoption of section 1954.1; following the hearing, the Board unanimously adopted the section, which awaits review and approval by the

Office of Administrative Law (OAL).

Apprentice Jockeys. On November 18, CHRB published notice of its intent to amend section 1500, Title 4 of the CCR, which sets forth guidelines regarding apprentice jockeys; among other things, the changes would define the term "apprentice jockey" to mean a race rider who has ridden less than 45 winners or less than three years since first having been licensed in any racing jurisdiction, and who otherwise meets the license requirements of a jockey. The amendments would also provide that an apprenticeship shall automatically terminate one year from the date of a jockey's fifth winning ride, or on the date of the jockey's 45th winning ride, whichever comes later. Finally, the changes would provide that any combination of thoroughbred, Appaloosa, Arabian, or paint races at authorized race meetings in the United States, Canada, or Mexico, which are reported in the *Daily Racing Form* or other recognized racing publications, shall be considered in determining eligibility for license as an apprentice jockey. At this writing, CHRB is scheduled to hold a public hearing on the proposed changes on January 27.

Track Safety Standards. On January 6, CHRB published notice of its intent to amend sections 1472, 1473, and 1474, Title 4 of the CCR, its track safety standards. The proposed amendments to section 1472 would add a provision requiring written certification that permanent track surface elevation grade marks have been installed on the racetrack. Section 1473 would be amended to include the designated horsemen's representative stabled at the location, along with the track maintenance supervisor, in the process of determining the number of morning breaks needed for track renovation for racing and training facilities with less than 300 racehorses and for facilities where standard-bred horses are stabled; the amendments would also clarify the renovation specifications for morning breaks and renovations between races. Finally, the changes to section 1474 would delete the requirement for written certification that permanent track surface elevation grade marks have been installed on the racetrack, as that provision would be included in section 1472. At this writing, CHRB is scheduled to hold a public hearing on this proposal on February 24.

Rulemaking Update. The following is a status update on other CHRB rulemaking proposals described in detail in previous issues of the *Reporter*:

• **Prohibited Drug Substances.** On October 7, OAL approved CHRB's adoption of new section 1843.1, Title 4 of the CCR,

which specifies the Board's definition of the term "prohibited drug substance" as any drug substance, medication, or chemical foreign to a horse, whether natural or synthetic, or a metabolite or analog thereof, whose use is not expressly authorized in CHRB's regulations. Section 1843.1 also clarifies that an authorized medication, found in a test sample in a level that exceeds the prescribed limits as authorized by the Board's regulations, is similarly prohibited. [14:4 CRLR 188]

CHRB's proposed adoption of new section 1843.3, Title 4 of the CCR, which would specify the appropriate disciplinary action for the finding of a prohibited drug substance(s) in a test sample taken from a horse participating in a race, awaits adoption by CHRB and review and approval by OAL. At this writing, CHRB's Medication Committee is working on the language of the proposed rule. [14:4 CRLR 188]

CHRB's proposed adoption of new section 1843.2, Title 4 of the CCR, which would categorize prohibited substances into seven classifications ranging from drug substances with high abuse potential to therapeutic medications [14:4 CRLR 188], is connected to new section 1843.3 (see above); CHRB will wait until the language of section 1843.3 is finalized and submit both sections to OAL together.

On October 25, OAL approved CHRB's proposed amendments to section 1859, Title 4 of the CCR, which identifies prohibited drugs as those which fall into the specific categories of stimulants, depressants, local anesthetics, and narcotics; the Board's amendments revise section 1859's definition of the term "prohibited drug substances" to correspond with the definition in proposed new section 1843.1 (see above), and delete the term "saliva" from the text as an example of a post-race test sample taken from a horse. [14:4 CRLR 188]

On October 11, OAL approved CHRB's amendments to section 1859.25, Title 4 of the CCR, which specifies the procedure to be used by an owner or trainer to request the testing of the split urine sample; the Board's changes clarify the identity of the test samples, by specifying which sample is the official test sample and which sample is the split sample; specify that all samples taken become and shall remain CHRB's property; define the role of the Board's Equine Medical Director in the notification process once a sample tests positive; clarify the documents needed to initiate the testing request; and specify the responsibilities of the CHRB Executive Secretary to notify the Board of results of a split sample test. [14:4 CRLR 188; 13:2&3 CRLR200-01; 12:4 CRLR219-20]



CHRB's proposed amendments to section 1859.5, Title 4 of the CCR, would revise the definition of the term "prohibited drug substance" to coincide with the definition contained in proposed section 1843.1 (*see above*); the proposed amendments would also specify that disqualification shall occur for prohibited drug substances found in a test sample that have been determined to be in Classes I-V, as established in proposed section 1843.2 (*see above*), unless the split sample fails to confirm the presence of the prohibited drug substance. CHRB adopted the amendments at its August 1994 meeting [14:4 CRLR 188] and submitted them to OAL; however, the Board withdrew the rulemaking file on October 25.

On October 25, OAL approved CHRB's amendments to section 1887, Title 4 of the CCR, which revise the definition of the term "prohibited drug substance" to coincide with the definition contained in proposed section 1843.1 (*see above*), and delete the term "saliva" from the text as an example of a post-race test sample taken from a horse. [14:4 CRLR 188]

• **Wagering Regulations.** On October 26, OAL approved CHRB's amendments to section 1971, Title 4 of the CCR, which prohibits jockeys from making or having wagers made on their behalf when they participate in a race except through the owner or trainer of the horse they ride, and requires owners and trainers to maintain records of wagers they make on behalf of jockeys. CHRB's amendments prohibit drivers, in addition to jockeys, from making or having wagers made on their behalf when they participate in a race except through the owner or trainer of the horse they drive, and require owners and trainers to maintain records of wagers they make on behalf of drivers. [14:4 CRLR 188]

On September 23, CHRB adopted its proposed amendment to section 1970, Title 4 of the CCR, which prohibits owners, authorized agents, or trainers having a horse entered in a race, or any employee or representative of such an owner, authorized agent or trainer, from wagering on a competing horse to finish first whether the wager is exotic or conventional; when these individuals cash a winning ticket, the burden of proving who made the wager is with the Board investigators. CHRB's amendment specifies that submission of a winning ticket for cash redemption shall be prima facie evidence the individual made the wager; this amendment shifts the burden of proving who made the wager from CHRB investigators to the individual who cashes the winning ticket. [14:4 CRLR 188] On November 21, OAL approved the Board's changes.

• **Security Personnel at Simulcast Wagering Facility.** CHRB's proposed amendments to section 2057, Title 4 of the CCR, would specify that it is the responsibility of a guest association operating a simulcast wagering facility to provide security personnel for the entire facility. These proposed amendments were the subject of a public hearing in August 1994, after which they were referred back to committee for redrafting. [14:4 CRLR 188-89] At this writing, the amendments await adoption by the Board and review and approval by OAL.

• **Jockeys' Reporting Requirements.** On October 13, OAL approved CHRB's amendment to section 1680, Title 4 of the CCR, which specifies that jockeys, unless excused, are to report one hour prior to post time of the first race, to weigh out at the appointed time, and after reporting not to leave except to ride in a race until all their engagements for the day have been fulfilled. CHRB's amendment clarifies that jockeys are not excused from weighing out, and includes specific reporting requirements that apply to drivers. [14:4 CRLR 189]

• **Rail Construction and Track Specifications.** On October 28, CHRB adopted its proposed amendments to section 1472, Title 4 of the CCR, one provision of the Board's track safety standards. CHRB's amendments specify that racing surfaces used for standardbred racing shall have an inner rail or pylons, and shall have an outer rail or shadow fence designed to meet the same impact standards as a permanent rail. The amendments also provide that if pylons are used, no obstacles shall be placed within an area extending 25 feet from the inner boundary of the racing surface. [14:4 CRLR 189] On January 11, OAL approved the amendments.

• **Jurisdiction of Stewards to Suspend or Fine.** On November 29, OAL approved CHRB's amendment to section 1528, Title 4 of the CCR, which specifies that stewards have jurisdiction in any matter commencing at the time entries are taken for the first day of racing, and that their jurisdiction extends until thirty days after the close of such meeting. Occasionally, matters occurring at the racing meeting may have to be adjudicated thirty days after the close of the meeting. CHRB's amendment to this rule provides the stewards with continued jurisdiction by delegating the resolution of such matters to the Board of Stewards at any live racing meeting. [14:4 CRLR 189; 14:2&3 CRLR 203]

• **Use of Telephones Within the Racing Inclosure.** On September 19, OAL approved CHRB's amendments to section 1903, Title 4 of the CCR, which pertains

to the use and possession of various forms of communication equipment within a racetrack or simulcast wagering facility. The amendments allow the possession and personal use of communication equipment; allow racing associations, fairs, and simulcast facilities to maintain their right to permit or disallow cellular phones within their respective facilities; authorize CHRB enforcement staff to confiscate equipment that is used illegally or improperly; allow patrons the freedom to possess and use a cellular phone for personal use; and allow business entities, such as the press, to legitimately use cellular phones to transmit race results. [14:4 CRLR 189; 14:2&3 CRLR 203]

• **Exotic Parimutuel Wagering Regulations.** On September 21, OAL approved CHRB's amendments to section 1976.9, Title 4 of the CCR, which pertains to wagering on the outcomes of a series of from four to ten races designated by an association to be part of the Pick (n). Under the previous regulation, in the event a horse is scratched (does not participate) from any Pick (n) race, the actual favorite of that race was to be substituted in place of the scratched horse. The amendments allow patrons the opportunity to designate an alternate selection to be substituted for a scratched horse instead of the favorite. However, if the purchaser fails to designate an alternate selection, or if the designated alternate also is scratched, the actual race favorite will be substituted for the scratched selection. [14:4 CRLR 189; 14:2&3 CRLR 204]

• **Unlimited Place Sweepstakes.** CHRB is also proposing amendments to section 1976.8, Title 4 of the CCR, which pertains to wagering on the outcomes of a series of nine races designated by an association to be part of the Unlimited Place Sweepstakes. Under the current regulation, in the event a horse is scratched from any Unlimited Place Sweepstakes race, the actual favorite of that race is to be substituted in place of the scratched horse. The proposed amendments would allow patrons the opportunity to designate an alternate selection to be substituted for a scratched horse instead of the favorite. However, if the purchaser fails to designate an alternate selection, or if the designated alternate also is scratched, the actual race favorite will be substituted for the scratched selection. [14:4 CRLR 189-90; 14:2&3 CRLR 204] At this writing, the amendments await review and approval by OAL.

• **CHRB Approval of Concessionaires.** On September 19, OAL approved CHRB's amendments to section 1440, Title 4 of the CCR, which requires persons or entities who contract to act as a concessionaire at



a racetrack to submit to the Board specified forms and applications for purposes of CHRHB approval and licensure. The amendments remove totalizer companies, simulcast service suppliers, video production companies, timing companies, and photofinish companies from the rule, and also delete the existing licensure requirement for concessionaires, and codify the Board's current approval procedure. [14:4 CRLR 190; 14:2&3 CRLR 205; 14:1 CRLR 160; 13:4 CRLR 193]

LEGISLATION

AB 91 (Tucker). Existing law requires each licensed racing association, except fairs, to designate a certain number of racing days during a meeting to be conducted as charity days for the purpose of distributing the net proceeds therefrom to beneficiaries. As introduced January 4, this bill would repeal those provisions of existing law. [A. GO]

SB 100 (Maddy). Existing law requires every horseracing association conducting a racing meeting, except as specified, to pay 1% of its exotic parimutuel pools, excluding wagering at a satellite wagering facility, to the state as an additional license fee. As introduced January 12, this bill would repeal that provision. [S. GO]

SCA 3 (Maddy), as introduced December 5, would create the California Gaming Control Commission, and would authorize the Commission to regulate legal gaming in this state, subject to legislative control. The measure would also create a Division of Gaming Control within the office of the Attorney General, and permit the legislature to impose licensing fees on all types of gaming regulated by the Commission to support the activities of the Commission and the Division. The measure would provide for the regulation of bingo by the Commission, and provide that the proceeds of those games shall be used exclusively to further the charitable, religious, or educational purposes of a nonprofit organization or institution that is exempt from state taxation.

This measure would also permit the legislature to provide for the regulation of parimutuel wagering on horseracing and the State Lottery by the Commission; exclude from the meaning of the term "gaming" merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations under specified conditions, and certain types of machines that award only additional play; prohibit the State Lottery from using any slot machine, whether mechanical, electromechanical, or electronic; require the legislature to provide for the recording

and reporting of financial transactions by commercial gaming establishments; and define the term "casino" for the purpose of the prohibition against casinos. [S. GO, Rls, CA]

AB 19 (Tucker). The Gaming Registration Act, among other things, prohibits the ownership or operation of a gaming club, as defined, without first obtaining a valid registration from the Attorney General; existing law subjects any person operating a gaming club without a license to punishment in the state prison or in a county jail for not more than one year. As introduced December 5, this bill would repeal the Gaming Registration Act, enact the Gaming Control Act, create the California Gaming Control Commission, and authorize the Commission to regulate legal gaming in this state, as specified. This bill would also create the Division of Gaming Control within the Department of Justice, and specify that the Division is responsible for investigation and enforcement of controlled gaming activity in the state.

Under existing law, CHRHB is the state entity responsible for negotiating with the Indian tribes for the purpose of entering into a tribal-state compact governing the conduct of horseracing activities on Indian lands of the tribe. This bill would repeal that provision. [A. GO]

SB 106 (Ayala). Under existing law, for the purposes of the California Horse Racing Law, the term "quarter horse" is defined as any horse that meets the requirements of, and is registered by, the American Quarter Horse Association. As introduced January 13, this bill would require any quarter horse racing on a quarter horse track in California or racing on the California Fair circuit to be registered with the American Quarter Horse Association. [S. GO]

LITIGATION

In *Cabazon Band of Mission Indians and Sycuan Band of Mission Indians v. Wilson*, No. 92-15751 (Oct. 6, 1994), the U.S. Court of Appeals for the Ninth Circuit reversed a 1992 decision of the U.S. District Court for the Eastern District of California [13:1 CRLR 132] and ruled that the state of California may not tax offtrack betting activities on Indian reservations; the court agreed with the Bands' contention that the state's imposition of a license fee is impermissible under the federal Indian Gaming Regulatory Act (IGRA).

In considering this issue, the Ninth Circuit analyzed the federal, tribal, and state interests affected by the state's licensing fee. The court noted that the IGRA was intended to promote tribal economic development, self-sufficiency, and strong tribal governments, and seeks to ensure

that the Indian tribe is the primary beneficiary of the gaming operation; the court found that the state's current licensing fee "threatens this federal objective," noting that as a result of the fee, the state benefits from the tribal gaming operation to a considerably greater extent than do the Bands. The court also found that the state's licensing scheme undermines tribal interests, as the Bands bear the actual burden of the license fee. Conversely, the court found that the state's interests are somewhat weaker than the federal and tribal interests; among other things, the court noted that the IGRA specifically recognizes the state's regulatory interests involved and establishes a mechanism to address them—the requirement of compacts by which Bands can reimburse the state for regulatory costs, outside of the state tax structure. Thus, the state's interest can be satisfied without the imposition of a license fee. Accordingly, the court concluded that the IGRA preempts the state of California from taxing offtrack betting activities on tribal lands.

In November, CHRHB and CHBPA agreed to file a motion jointly dismissing CHRHB's appeal and CHBPA's cross-appeal in *California Horsemen's Benevolent and Protective Association v. California Horse Racing Board*, No. BS-0026323 (Los Angeles County Superior Court), in which CHBPA successfully challenged CHRHB's imposition of restrictions on CHBPA's ability to expend funds for legislative advocacy purposes (see MAJOR PROJECTS). CHRHB appealed Judge O'Brien's February 1994 ruling that the Board's imposition of any limit on CHBPA's legislative lobbying activities exceeds its statutory authority. Attorneys for both parties agreed to dismiss their appeals so long as Judge O'Brien's ruling is vacated; at this writing, the parties' stipulation has not yet been approved by the court.

RECENT MEETINGS

At its December 16 meeting, CHRHB reviewed amendments to the "new" CHBPA's bylaws (see MAJOR PROJECTS); pursuant to SB 118 (Maddy) (Chapter 575, Statutes of 1993), CHRHB is required to approve the bylaws of all horsemen's associations, as well as any changes to those bylaws. Among other things, the amendments provide that CHBPA is a mutual benefit entity. Following discussion, CHRHB approved the changes; additionally, CHRHB asked that the Association provide it with a copy of each quarterly budget summary which is prepared for the CHBPA Board of Directors.

Also at its December meeting, CHRHB unanimously reelected Ralph Scurfield to serve as Chair and Donald Valpredo to serve as Vice-Chair for 1995.



■ FUTURE MEETINGS

January 27 in Arcadia.
February 24 in Albany.
March 24 in Arcadia.
April 27 in Los Angeles.
May 19 in Cypress.
June 23 in Sacramento.
July 27 in Del Mar.

NEW MOTOR VEHICLE BOARD

Executive Secretary:
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Pursuant to Vehicle Code section 3000 *et seq.*, the New Motor Vehicle Board (NMVB) licenses new motor vehicle dealerships and regulates dealership relocations and manufacturer terminations of franchises. It reviews disciplinary action taken against dealers by the Department of Motor Vehicles (DMV). Most licensees deal in cars or motorcycles.

NMVB is authorized to adopt regulations to implement its enabling legislation; the Board's regulations are codified in Chapter 2, Division 1, Title 13 of the California Code of Regulations (CCR). The Board also handles disputes arising out of warranty reimbursement schedules. After servicing or replacing parts in a car under warranty, a dealer is reimbursed by the manufacturer. The manufacturer sets reimbursement rates which a dealer occasionally challenges as unreasonable. Infrequently, the manufacturer's failure to compensate the dealer for tests performed on vehicles is questioned.

■ MAJOR PROJECTS

Protest/Petition Actions. In *Rasic Investments, Inc., dba Harbor Mitsubishi, et al. v. Mitsubishi Motor Sales of America, Inc., et al.*, Petition No. P-270-93, and *Mitsubishi Motor Sales of America, Inc., v. Rasic Investments, et al.*, Petition No. P-280-94, NMVB considered, among other things, whether a petitioner could bring an action before the Board after it unsuccessfully litigated the matter in superior court, and whether the Board could make any ruling which would change a judgment entered by a court. On October 12, NMVB noted that the petitioners were seeking to raise a claim in the administrative petition which could have been raised in the superior court proceeding; the Board accordingly held that petitioners may not attempt to pursue an action before the Board after they lost in court. The Board also determined that it does not have jurisdiction to

make any ruling which would change a judgment entered by a superior court.

In *JMC Motors, dba Alhambra Mazda/Pontiac/Oldsmobile/GMC Truck v. General Motors Corporation, Oldsmobile Motor Division*, Petition No. P-274-93, GMC notified JMC on May 24, 1993, that it intended to terminate JMC's Oldsmobile franchise, effective 90 days from receipt of the notice; however, on August 24, 1993, GMC agreed to continue the franchise relationship if JMC's retail sales averaged 29 new Oldsmobile automobiles per month during the period from August 24, 1993 to November 24, 1993. During the three-month period, JMC's Oldsmobile sales averaged 12.67 per month, and GMC terminated JMC's franchise. On December 10, 1993, JMC filed a petition with NMVB pursuant to Vehicle Code section 3050(c). GMC responded by contending that the proper procedural mechanism to challenge a termination of a franchise is a protest under section 3060, not a petition pursuant to section 3050(c), and that JMC's submission to the Board came after the statutory time period for filing a protest had elapsed.

A May 12, 1994 hearing was held before Administrative Law Judge (ALJ) Michael Sieving, who submitted his proposed decision to NMVB. On August 25, 1994, NMVB decided to remand that matter to the ALJ with specific instructions, including the instruction to take additional evidence on the sole issue of JMC's compliance with GMC's August 24, 1993 condition for the continuation of the franchise. On October 6, ALJ Sieving concluded that the documentary evidence established that JMC sold an average of 12.67 Oldsmobiles each month during the three-month period in question, and that JMC therefore failed to comply with GMC's condition. Accordingly, ALJ Sieving recommended that JMC's petition be dismissed and that there be no further proceedings in this matter before the Board; on October 12, NMVB adopted the ALJ's recommendation.

In *Ed-West Company dba Costa Mesa Honda v. American Honda Motor Company*, Protest No. PR-1417-94, NMVB considered whether in the criminal convictions of the two principals of Costa Mesa Honda, wherein they were convicted of defrauding Honda, are sufficient to substantiate a termination of a franchise. Vehicle Code section 3061 sets forth seven factors which NMVB must take into consideration when determining whether good cause has been established for terminating or refusing to continue a franchise; these factors are the amount of business transacted by the franchisee, as compared to the business available to the franchisee; the investment necessarily made and obligations incurred by the franchisee to

perform its part of the franchise; the permanency of the investment; whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted; whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public; whether the franchisee failed to fulfill its warranty obligations; and the extent of the franchisee's failure to comply with the terms of the franchise.

American Honda Motor Company (Honda) argued that the criminal convictions of the two Costa Mesa Honda principals are sufficient in and of themselves to substantiate a termination of the franchise. On October 11, ALJ Douglas Drake issued a proposed decision which agreed with Honda's position, stating that "[i]t is injurious to the public welfare to have felons convicted of defrauding their franchisor operating a Honda dealership," and that "it is a complete breach of the franchise agreement for the principals of the franchise to be convicted of the federal felony of defrauding their franchisor." On October 12, NMVB adopted the ALJ's decision, thus allowing Honda to terminate the franchise of Costa Mesa Honda.

Mathew Zaheri Corporation, dba Hayward Mitsubishi, v. Mitsubishi Motor Sales of America, et al., Petition No. P-233-92 and Protest No. PR-1254-92, is a complex matter which involves a number of issues stemming from Mathew Zaheri's claim that Mitsubishi unfairly charged back to Zaheri over \$137,000 in warranty claims over a two-year period. The dispute between Zaheri and Mitsubishi has been pending in both state and federal court for several years; in 1993, the First District Court of Appeal dismissed Zaheri's civil complaint against Mitsubishi on the basis that the plaintiffs failed to exhaust their administrative remedies before NMVB. [13:4 CRLR 201]

On October 12, NMVB adopted ALJ Douglas Drake's decision finding that Mitsubishi unfairly charged back over \$57,000 of those claims; according to the Board's decision, the error was made because Mitsubishi's auditors failed to take into consideration a modification made to Mitsubishi's Warranty Policy and Procedures Manual. However, NMVB also found that Zaheri had engaged in "massive warranty fraud," and that it claimed reimbursements for work not done and parts not used in somewhere between 50 and