



REGULATORY AGENCY ACTION

interviewers. [A. CPGE&ED]

BOARD OF EXAMINERS IN VETERINARY MEDICINE

Executive Officer: Gary K. Hill
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Pursuant to Business and Professions Code section 4800 *et seq.*, the Board of Examiners in Veterinary Medicine (BEVM) licenses all veterinarians, veterinary hospitals, animal health facilities, and animal health technicians (AHTs). The Board evaluates applicants for veterinary licenses through three written examinations: the National Board Examination, the Clinical Competency Test, and the California State Board Examination.

The Board determines through its regulatory power the degree of discretion that veterinarians, AHTs, and unregistered assistants have in administering animal health care. BEVM's regulations are codified in Division 20, Title 16 of the California Code of Regulations (CCR). All veterinary medical, surgical, and dental facilities must be registered with the Board and must conform to minimum standards. These facilities may be inspected at any time, and their registration is subject to revocation or suspension if, following a proper hearing, a facility is deemed to have fallen short of these standards.

The Board is comprised of six members, including two public members. The Board has eleven committees which focus on the following BEVM functions: continuing education, citations and fines, inspection program, legend drugs, minimum standards, examinations, administration, enforcement review, peer review, public relations, and legislation. The Board's Animal Health Technician Examining Committee (AHTEC) consists of the following political appointees: three licensed veterinarians, three AHTs, and two public members. BEVM is currently operating with only five members, due to the recent resignation of Alice Suet Yee Barkley.

MAJOR PROJECTS:

Board Goals and Objectives for 1992-93. In response to the Department of Consumer Affairs' Annual Planning Questionnaire, BEVM identified its goals and objectives for 1992-93, strategies to achieve its goals and objectives, and timetables for the accomplishment of those goals and objectives. BEVM's goals for 1992-93 include the following:

—establish and maintain an equitable, job-related licensing examination that

tests competency to practice veterinary medicine;

—ensure that licensees provide safe and effective veterinary services in accordance with the practice of veterinary medicine;

—develop and administer regulations and legislation to clarify and establish the current minimum standards of professional performance and qualification; and

—enhance professional and consumer knowledge of acceptable standards of professional practice and the Board's functions and activities.

Proposed Legislation and Rulemaking to Include Fee Increases. On March 20, BEVM conducted a public hearing on its proposal to amend sections 2014, 2015, 2015.1, 2024, 2031(a), 2070, and 2071, Title 16 of the CCR, to effect a number of regulatory revisions relating to the practice of veterinary medicine. Specifically, the Board proposes to amend section 2014, regarding the veterinary licensing examination, to change an existing reference to the "written portion and practical portion" of the exam to the "national examination and California state board exam," reflecting more accurate terminology for both exams. The proposed amendments would also change an exam score reference from "75%" to "a passing score determined by the Angoff criterion-referenced method of establishing the pass point."

The Board's amendment to section 2015 would eliminate a provision that requires an applicant to take and pass the California written examination before being admitted to the California practical exam.

Proposed amendments to section 2015.1 would delete an existing reference to particular sections of the licensing examination for which an applicant may receive conditional credit if he/she has taken a similar exam in another state.

Proposed amendments to section 2024 would specify that a graduate of an unrecognized veterinary school shall be eligible to take the state board examination when he/she takes and passes both parts of the national examination and possesses a certificate of successful completion of the Educational Commission for Foreign Veterinary Graduates program.

Section 2031(a) provides that a veterinarian performing any act requiring a license upon any animal or group of animals in his/her custody or in the custody of an animal hospital shall prepare a written record concerning the animal(s). The Board's proposed amendment to section 2031(a) would delete the phrase "in his custody or in the custody of an animal

hospital." [12:1 CRLR 103]

BEVM's proposed amendments to section 2070 would increase the practical examination application fee from \$100 to \$180 and the initial and renewal fees for veterinary premises from \$30 to \$50. [12:1 CRLR 102-03] Section 2071 provides that the fee for application for the AHT and radiology and radiation safety examinations is \$35; the Board's proposed amendments would raise this fee to \$50 and delete the reference to the radiology and radiation safety examination. Also, section 2071 sets the application fee for retaking the AHT and radiology and radiation safety examination at \$35 and the application fee for retaking the radiology and radiation safety examination at \$20. The Board proposes to delete the application fees for retaking the above-mentioned examinations.

At the public hearing, California Veterinary Medical Association (CVMA) Executive Director Richard Schumacher voiced CVMA's support for the proposed amendments; there were no other public comments. Following the hearing, BEVM unanimously adopted the proposed amendments. At this writing, the regulatory package awaits review and approval by the Office of Administrative Law (OAL).

The Board also intends to pursue its November 1991 decision to seek legislation to raise the statutory ceiling on its licensure fees. [12:1 CRLR 102-03] At its May meeting, BEVM noted that Senator Ken Maddy has agreed to its request to amend SB 663 (Maddy) to raise licensing and examination fees (*see infra* LEGISLATION).

Budget Overview Report. To offset an anticipated budget deficit, the Board has proposed rulemaking and legislation to increase examination, licensing, and premise permit fees (*see supra*). In a February budget overview report, the Board analyzed its areas of operation, reviewed modifications implemented to reduce operating costs, and proposed a contingency plan should its efforts to raise fees fail. As part of its review, the Board analyzed its Alcohol/Drug Diversion Program; veterinary premise and inspection program; complaint review and investigation program; citation and fine program; computerized enforcement tracking; examinations; and office administration. The Board concluded that various modifications implemented in these areas would produce an estimated \$76,105 in savings during fiscal year 1992-93.

If sufficient savings do not materialize, the Board's contingency plan would call for the elimination of the California State



Board Exam, seasonal and student assistant positions, and the Alcohol/Drug Diversion Program; a reduction in the number of annual Board and committee meetings and annual examinations; and the combination of BEVM and AHTEC into one agency. The Board predicts that its contingency plan, if implemented, could cause adverse effects such as curtailing the Board's ability to determine the knowledge and skills of licensure candidates, restricting the number of candidates able to take the annual exam, causing backlogs and excessive overtime for existing staff, and reducing the number of annual administrative and disciplinary decisions. However, the Board acknowledged that—because of its mandate to enforce minimum standards of practice and protect California consumers—the Board's enforcement program would be the last program targeted for budget cut-backs.

Medical Board to Administer BEVM's Alcohol/Drug Diversion Program. At its March and May meetings, the Board continued its discussion regarding the inadequacy of its Alcohol/Drug Diversion Program for substance-abusing licensees; according to a staff report, from 1985 to 1991, the number of participants in the program has decreased, while the cost per participant has increased. [12:1 CRLR 103] At the March meeting, BEVM Executive Officer Gary Hill reported that the Program would be more cost-effective if the price were based on a per-participant cost factor. Accordingly, the Board revised its request for proposals for the 1992-93 administration of BEVM's Alcohol/Drug Diversion Program to require bidders to prepare their bids on a cost-per-participant basis, allowing for a maximum of fifteen participants. The deadline for submitting bids was May 1.

As a further cost-saving measure, BEVM decided to ask the Medical Board of California (MBC) whether its in-house Diversion Program could accept veterinarians. At MBC's May 8 meeting, MBC Diversion Program Manager Chet Pelton and BEVM Executive Officer Gary Hill made a presentation to MBC's Division of Medical Quality, which unanimously agreed to accept the eleven veterinarians currently participating in BEVM's program into its own Diversion Program at the cost of \$2,200 per participant. (See *supra* agency report on MBC for related discussion.)

Pet Store Vaccinations. At its May 7 meeting in Sacramento, BEVM discussed potential problems concerning vaccination clinics which operate from inside pet stores. According to the Board, existing

law governs mobile clinics and specifies that all premises where veterinary medicine is practiced shall be registered, but does not specifically address this setting. Although the intent of the law is to ensure adequate sanitary conditions and minimum standards of practice, a veterinarian may not have exclusive control over the sanitary conditions or the administration of vaccinations in a pet store setting. The Board noted that while the public may have a need for this service, BEVM has an obligation to maintain the minimum standards of practice. The Board asked Deputy Attorney General Diana Woodward Hagle to research the issues involved and present recommendations to the Board at a future meeting.

BEVM Responds to Legislature's Request for Disciplinary Data. In response to a request from Senate Business and Professions Committee Chair Dan Boatwright, BEVM prepared a status summary of all BEVM and AHTEC disciplinary actions from July 1989 through April 1992. At BEVM's May 7 meeting, the Board discussed the data, noting that enforcement activities account for approximately 46% of BEVM's total budget. The report, which was forwarded to Senator Boatwright on April 21, contains detailed information regarding BEVM's total enforcement program, including complaint review; veterinary hospital inspections; citation and fines; probation compliance; legend drugs; and alcohol and drug diversion. According to the report, during the relevant time period, BEVM opened approximately 400 complaints and closed approximately 300 complaints per year. The report also noted that since January 1989, BEVM has had authority to cite and fine veterinarians, AHTs, and unlicensed individuals practicing veterinary medicine for minor statutory and regulatory violations; to date, BEVM has issued 36 citations and collected a total of \$14,652 in administrative fines.

Obsolete Regulations Repealed. On February 21, OAL approved BEVM's repeal of sections 2021 and 2021.1, Title 16 of the CCR, which facilitated the Board's conversion of its license renewal system to a birthdate renewal system. Because the conversion is now complete, the Board repealed the sections as being obsolete.

LEGISLATION:

SB 2044 (Boatwright), as amended April 2, would declare legislative findings regarding unlicensed activity and authorize all DCA boards, bureaus, and commissions, including BEVM, to estab-

lish by regulation a system for the issuance of an administrative citation to an unlicensed person who is acting in the capacity of a licensee or registrant under the jurisdiction of that board, bureau, or commission. This bill would also provide that the unlicensed performance of activities for which a BEVM license is required may be classified as an infraction punishable by a fine not less than \$250 and not more than \$1,000. SB 2044 would also provide that if, upon investigation, BEVM has probable cause to believe that a person is advertising in a telephone directory with respect to the offering or performance of services, without being properly licensed by the Board to offer or perform those services, the Board may issue a citation containing an order of correction which requires the violator to cease the unlawful advertising and notify the telephone company furnishing services to the violator to disconnect the telephone service furnished to any telephone number contained in the unlawful advertising. [A. CPGE&ED]

AB 3088 (O'Connell), as amended April 29, would enact the Pet Overpopulation Reduction Act of 1992 and require any person who acquires a dog or cat from a public pound, society for the prevention of cruelty to animals, humane society, or similar organization to have the animal spayed or neutered by a licensed veterinarian within sixty days of receipt of the animal if the animal is six months or older, or within six months of receipt of the animal if the animal is under six months old. The bill would also provide that violations constitute a misdemeanor punishable by a fine of no more than \$200. [S. Jud]

AB 3245 (Statham), as introduced February 20, would repeal existing law which generally regulates the importation into this state of horses, cattle, sheep, and goats for other than exhibition or theatrical purposes; requires that a certificate of health from the state of origin issued by an accredited veterinarian be mailed to the California Department of Food and Agriculture (CDFA) stating that a horse or other equidae to be imported into the state is free from evidence of any communicable disease; requires dairy cattle, breeding bulls, and dairy goats that are brought into this state to be accompanied by a certificate of health or a signed statement stating that the animals are free of communicable disease; and specifies that any person who desires to import any buck sheep, sheep, or goats into this state is required to notify CDFA of specified matters before the importation is made. [S. AWR]



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AB 1660 (Speier), as amended August 29, would require the presence of a licensed veterinarian during any rodeo sanctioned by the Professional Rodeo Cowboy Association or the International Professional Rodeo Association; require that a veterinarian be on call at all other rodeos and available to respond as expeditiously as possible; authorize the CDFA Director to waive the requirement that a veterinarian be present at a rodeo under specified conditions; and require the immediate treatment of animals injured during the course of or as a result of any rodeo. [S. Appr]

SB 664 (Calderon). Existing law prohibits veterinarians, among others, from charging, billing, or otherwise soliciting payment from any patient, client, customer, or third-party payor for any clinical laboratory test or service if the test or service was not actually rendered by that person or under his/her direct supervision, unless the patient is apprised at the first solicitation for payment of the name, address, and charges of the clinical laboratory performing the service. As amended March 12, this bill would also make this prohibition applicable to any subsequent charge, bill, or solicitation. This bill would also make it unlawful for any veterinarian to assess additional charges for any clinical laboratory service that is not actually rendered by the veterinarian to the patient and itemized in the charge, bill, or other solicitation of payment. This bill passed both the Senate and Assembly, and is currently awaiting Senate concurrence in Assembly amendments.

SB 663 (Maddy), as amended March 16, would raise the statutory ceilings on AHT fees for filing an examination application, biennial renewal, delinquency, and initial registration; and authorize BEVM to adopt regulations for the waiver or refund of initial registration fees if the registration is issued less than 45 days before it will expire. Regarding veterinarians, this bill would raise the maximum application fees for the national examination, the California state board examination, initial licensing, and biennial renewal, as well as the initial and annual renewal fees for registration of veterinary premises. Under previous versions of this bill, veterinarians would have been required to complete 50 hours of continuing education during each two-year period as a condition of license renewal; that language was deleted (*see infra* RECENT MEETINGS). This bill was enrolled to the Governor on May 7.

LITIGATION:

In an unpublished decision in *Hall v.*

Kelley, No. G009476, the Fourth District Court of Appeal recently affirmed the trial court's dismissal of Dr. Linda Hall's lawsuit against BEVM for its alleged failure to provide her with an adequate setting to take its practical exam. Dr. Hall is dyslexic. However, she claims that her condition does not interfere with her ability to practice veterinary medicine; in fact, she is a licensed veterinarian in four states which require passage of a state-administered exam. Seeking California licensure, Dr. Hall took BEVM's practical exam six times. She failed on the first five attempts, but passed the sixth time she took the test. On most of the exam administrations, BEVM provided Hall with some sort of accommodation—such as a reader and/or extra time. On the sixth administration, the Board provided Hall with a personal proctor and 24 hours in which to complete the one-hour test. Dr. Hall originally filed suit against BEVM in February 1988; the trial court sustained the Board's demurrer in April 1990.

On appeal, Dr. Hall sought a ruling that she adequately alleged causes of action against BEVM for violation of her statutory rights under 42 U.S.C. section 1983, California Government Code sections 11135 and 12946, and her rights to due process and equal protection under the U.S. Constitution. Alternately, Dr. Hall sought leave to re-amend her amended complaint to correct any deficiencies the court found.

In its December 31 decision, the Fourth District held that Hall's state claims are barred by Government Code section 911.2, which in 1988 required that any claim against a governmental entity relating to a cause of action for injury to a person be presented not later than the 100th day after the accrual of the cause of action. The court noted that the Board's last possible failure to reasonably accommodate Hall—if such was the case—was at the June 1987 exam, more than 100 days before Hall presented her claim for damages arising out of the alleged failure.

The court noted that the statute of limitations for federal civil rights actions under 42 U.S.C. section 1983 is that of the state personal injury statute; in California, that is one year. The court found that because Hall first filed suit on February 22, 1988, the statute of limitations eliminates all civil rights claims except those arising out of the June 1987 exam and possibly the February 1987 exam. The court rejected the Attorney General's argument that because Hall first brought a federal action in August 1989, the statute of limitations expired on claims arising out of all exams, including those administered

in June and February 1987; the court explained that because Hall's federal civil rights claims are based on the same general set of facts alleged in the original complaint filed in February 1988, the claims must relate back to the initial filing.

However, the court rejected Hall's civil rights claim, finding that neither states, state agencies, nor state officials acting in their official capacities are considered "persons" within the meaning of section 1983, which provides that every "person" who under color of any state law subjects an individual to the deprivation of any rights secured by the federal Constitution and laws shall be liable to that individual in an action at law. Because Hall sued the Director of the Department of Consumer Affairs, BEVM, BEVM members, and the BEVM executive officer in their official capacities, the court found that section 1983 affords no basis for Hall's claim for damages. The court also rejected Hall's request for leave to amend her complaint to allege violations of her civil rights by the defendants acting in their individual capacities, finding that "there are no facts alleged to demonstrate the defendants were doing anything other than carrying out their official functions."

The court similarly rejected Hall's claims based on violation of the due process and equal protection clauses of the U.S. Constitution. Regarding the due process claim, the court focused its attention on Hall's claim that the defendants deprived her of liberty. The court first noted that it is not unreasonable to say that the licensing examination required by the Board is an impediment to Hall's liberty to practice veterinary medicine, but also noted that Hall did not challenge the requirement of an examination *per se*. Instead, Hall claimed that she had a right to compel the defendants to change the nature of the examination to accommodate her dyslexia. According to the court, the concept of "liberty" does not encompass the right to coerce others to take a certain course of action and therefore Hall's right to reasonable accommodation—if such a right exists—cannot be considered a "liberty."

Finally, the court considered Hall's claim that the Board's failure to modify the examination deprived her of equal protection of the law. The Fourth District commented on the "oxymoronic" nature of Hall's claim: "In essence, she claims that by virtue of her dyslexia she was not treated equally as other candidates because she was treated equally with them" (emphasis original); the court noted that such an assertion rests on the premise that it is as unjust to treat unequals equally as



it is to treat equals unequally. Following a review of the nature of dyslexia and other language processing handicaps, and the inherently individualized nature of such conditions, the court noted that the equal protection clause can hardly be read to require that every state-administered examination be individually adjusted to account for the myriad of differences in the mental ability of the population. The court noted that Hall was treated the same as other similarly situated test takers and she was given the same opportunity to take the practical examination that any other test taker had; the fact that she processes visual information differently from the norm did not deprive her of that opportunity.

In a somewhat unusual conclusion, the Fourth District commented that twentieth century vocations increasingly demand an ability to rapidly process words and symbols into decisions which are critical to the well-being of others; "[s]ociety cannot tolerate surgeons with palsy, airline pilots with heart conditions, firemen with vertigo and vision-impaired SWAT teams rescuing hostages." Further, the court opined that this lawsuit should never have been filed, stating that it "is the type of case in our over litigious society which has led economists, sociologists and even presidents to conclude our legal system is out of control."

Justice Thomas F. Crosby dissented from the majority's dismissal of the civil rights claims, noting that in a pleading case such as this the complaint should be construed liberally. Justice Crosby also stated that "[t]he unstated theme of the lead opinion—and its only possible justification—is that dyslexia is a disqualifying condition for the practice of veterinary medicine." Noting that several states (including California) apparently disagree with the majority on this point, Justice Crosby stated that "[t]his is not a problem to be resolved on demurrer, ... and is one defendants would possibly, even probably, lose before a trier of fact.... Plaintiff should be permitted to prove her case in the proper forum [assisted by expert testimony], not before an uninformed jury of two appellate judges applying Nineteenth Century law."

RECENT MEETINGS:

At the Board's January and March meetings, Dr. George Cardinet, Associate Dean of Instruction at the UC Davis (UCD) School of Veterinary Medicine, presented a report regarding alternative surgical courses at schools of veterinary medicine. [11:4 CRLR 115; 11:3 CRLR 111-12] At the request of its students, UCD conducted an eighteen-month study

on the viability of alternative surgical courses, and concluded that while live animal surgery may be necessary at some point in veterinary training, alternative surgical classes are feasible. With the cooperation of Washington State University, UCD developed an alternative surgical course program. UCD students may now take surgery courses without performing live animal surgery in the laboratory portion of the course, and substitute an alternative laboratory class taken at Washington State University. Students who take the alternative surgical class are required to take an additional eight weeks in small animal surgery and two weeks in anesthesia to ensure they have sufficient experience with live animals. Among the concerns voiced by various Board members about UCD's new program were whether alternative courses provide students with adequate surgical skills; whether UCD's new program is the result of pressure from animal rights groups; and whether UCD's use of public funds to defray students' cost of taking classes at Washington State University is improper. Associate Dean Cardinet defended the new program on grounds that it is a valid response to social and moral concerns regarding the use of pound animals, and alternative surgical classes may be necessary in the future because of the lack of availability of pound animals. He noted that these courses were adopted only after much research, study, discussion, and a vote of UCD faculty members. Dr. Cardinet pointed out that many veterinary colleges have similar alternative surgical course programs. Dr. Cardinet also stated that, since alternative surgical courses are a part of UCD's curriculum, UCD is obligated to provide funds to enable its students to take the courses. Various BEVM members commented that the Board should be concerned with the end results of alternative surgical methods as they affect the competency and quality of professional service to consumers and their pets.

At its January meeting, the Board discussed the results of a meeting between the Board's Continuing Education (CE) Committee and representatives of the California Veterinary Medical Association (CVMA). The CE Committee and CVMA reviewed the Department of Consumer Affairs' proposed CE program guidelines and found them valid, but costly. The CE Committee and CVMA decided to postpone the issue of CE indefinitely while further study is conducted; as a result of this decision, BEVM agreed to delete the CE requirements then pending in SB 663 (Maddy) (*see supra*

LEGISLATION). The Board proposed that it include in its next newsletter a report of the withdrawal of its CE proposal and a "recommendation" that veterinarians complete 50 hours of CE per license renewal period.

Also at its January meeting, the Board reviewed the Monthly Enforcement Statistical Report. Since July 1991, the Board opened 195 complaints and closed 296. During the month of December, the Board opened 31 complaints and closed 33.

At BEVM's May 7 meeting, Executive Officer Gary Hill reported on a discussion with representatives of the Board of Pharmacy regarding the growing problem of legend drug and extra-label over-the-counter drug use by non-veterinarians; due to a hole in the laws governing veterinarians and pharmacists, the unregulated use of these drugs results in excessive drug residues in the food animal chain. This problem has been of concern to the Board for some time and, at its May meeting, BEVM authorized Gary Hill to work with CVMA and the Pharmacy Board to develop a legislative solution. One of the options which may be discussed would require the Board of Pharmacy to create a specialty license for veterinary pharmacology; in the alternative, the use and control of all animal drugs could be placed under the jurisdiction of BEVM, which would issue special permits to sell veterinary drugs. [10:4 CRLR 108]

FUTURE MEETINGS:

September 10-11 in Sacramento.

BOARD OF VOCATIONAL NURSE AND PSYCHIATRIC TECHNICIAN EXAMINERS

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This agency regulates two professions: vocational nurses and psychiatric technicians. Its general purpose is to administer and enforce the provisions of Chapters 6.5 and 10, Division 2, of the Business and Professions Code. A licensed practitioner is referred to as either an "LVN" or a "psych tech."

The Board consists of five public members, three LVNs, two psych techs, and one LVN or RN with an administrative or teaching background. At least one of the Board's LVNs must have had at least three years' experience working in skilled nursing facilities.

The Board's authority vests under the Department of Consumer Affairs (DCA)