



proposal (BCP) for the 1993-94 fiscal year to redesign and augment the Board's enforcement unit. Specifically, the Board's BCP would request \$333,000 in order to add three pharmacy inspectors and one consumer services representative, and to make permanent a limited-term office technician position established on July 1.

■ FUTURE MEETINGS

January 20-21 in Sacramento.
April 28-29 in Sacramento.
July 28-29 in Sacramento.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Interim Executive Officer:
Curt Augustine
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The Board of Registration for Professional Engineers and Land Surveyors (PELS) regulates the practice of engineering and land surveying through its administration of the Professional Engineers Act, sections 6700 through 6799 of the Business and Professions Code, and the Professional Land Surveyors' Act, sections 8700 through 8805 of the Business and Professions Code. The Board's regulations are found in Division 5, Title 16 of the California Code of Regulations (CCR).

The basic functions of the Board are to conduct examinations, issue certificates, registrations, and/or licenses, and appropriately channel complaints against registrants/licensees. The Board is additionally empowered to suspend or revoke registrations/licenses. The Board considers the proposed decisions of administrative law judges who hear appeals of applicants who are denied a registration/license, and those who have had their registration/license suspended or revoked for violations.

The Board consists of thirteen members: seven public members, one licensed land surveyor, four registered Practice Act engineers and one Title Act engineer. Eleven of the members are appointed by the Governor for four-year terms which expire on a staggered basis. One public member is appointed by the Speaker of the Assembly and one by the Senate Rules Committee.

The Board has established four standing committees and appoints other special committees as needed. The four standing committees are Administration, Enforcement, Examination/Qualifications, and Legislation. The committees function in an advisory capacity unless specifically authorized to make binding decisions by the Board.

Professional engineers are registered through the three Practice Act categories of civil, electrical, and mechanical engineering under section 6730 of the Business and Professions Code. The Title Act categories of agricultural, chemical, control system, corrosion, fire protection, industrial, manufacturing, metallurgical, nuclear, petroleum, quality, safety, and traffic engineering are registered under section 6732 of the Business and Professions Code.

Structural engineering and geotechnical engineering are authorities linked to the civil Practice Act and require an additional examination after qualification as a civil engineer.

■ MAJOR PROJECTS

PELS Searches for New Executive Officer. In late August, PELS Executive Officer Darlene Stroup announced her decision to step down as EO but to continue working for the Board on a "special assignment" until October 31. Following that announcement, PELS President Larry Dolson appointed Curt Augustine to serve as PELS' Interim EO until the Board can find a permanent replacement for Stroup. At PELS' September 25 meeting, Dolson departed from the meeting agenda and failed to introduce Augustine until well into the meeting; furthermore, Dolson did not discuss the details of Stroup's "special assignment" nor how the Board intends to pay for the services of two executive officers until Stroup's resignation becomes effective.

At its September 25 meeting, the Board devoted substantial time to discussing the preferred qualifications for its new executive officer. Many Board members expressed interest in hiring a registered engineer; others focused on the need to hire an individual with substantial administrative experience. The Board decided to solicit applicants who demonstrate ability in either area.

Board Awards Professional Land Surveyor Consultant Contract. At PELS' June 5 meeting, Board members continued to debate whether PELS should use the bidding procedures specified in the "Little Brooks Act," Government Code section 4525 *et seq.*, in soliciting applicants for its professional land surveyor

consultant position. The Little Brooks Act provides a procedure for selecting private architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services for public projects on the basis of demonstrated competence and professional qualifications necessary for satisfactory performance of the job, as opposed to selection on the basis of minimum competence and competitive bidding. Although the Act does not indicate those situations when its bidding procedures must be used, Government Code section 4529 does provide that the Act "shall not apply where the state or local agency head determines that the services needed are more of a technical nature and involve little professional judgment and that requiring bids would be in the public interest." The alternative procedure for awarding contracts involves the release of a request for proposals (RFP). Under the RFP process, bids are evaluated to determine if they meet the minimum qualifications; thereafter, the contract is awarded to the lowest bidder who possesses the minimum qualifications.

PELS determined that its land surveyor consultant would—among other things—review complaints to determine whether a violation of the Professional Land Surveyors' Act has occurred; serve as a witness for the Board in disciplinary hearings against land surveyors; respond to requests for information and interpretation of the Act; review and coordinate land surveyor examination appeals; act as in-house consultant for the Board staff relative to land surveying questions; and develop and monitor regulatory packages relating to land surveying. The job description prepared by the Board established as 50% of the evaluation criteria "land surveying experience and knowledge of professional methods, procedures, requirements, and standards." However, Department of Consumer Affairs (DCA) legal counsel Don Chang advised the Board that the services called for in the job description would be of a technical nature rather than the professional practice of land surveying, and that compliance with the RFP procedure, as opposed to the Little Brooks Act, was appropriate. Thus, PELS issued an RFP; however, the Board received only two proposals, only one of which scored above the minimum qualifying score. At its December 1991 meeting, PELS decided to reject the bids received pursuant to the RFP process and directed staff to rewrite the proposal to include consideration of the Little Brooks Act criteria. The Board took this action despite that fact that it has



failed to comply with Government Code section 4526, which states that, in order to implement the Little Brooks Act method of selection, state agency heads contracting for the specified services "shall adopt by regulation...procedures that assure that these services are engaged on the basis of demonstrated competence and qualifications for the types of services to be performed and at fair and reasonable prices to the public agencies." [12:1 CRLR 94]

At its June meeting, Board members continued to discuss whether the Little Brooks Act process should be used. One Board member opined that the consultant position requires the highest level of professional judgment, and that compliance with the Little Brooks Act is mandatory. However, another Board member acknowledged the Act's requirement that regulations be adopted prior to its use by a state agency, and noted that commencing the necessary rulemaking process in order to adopt such regulations would indefinitely delay the hiring process. DCA attorney Chang reiterated his opinion that use of the Little Brooks Act is inappropriate due to the nature of the consultant's work. Following a discussion, the Board agreed to award the consultant contract pursuant to the RFP process it had previously commenced; the Board also agreed to discuss the adoption of regulations implementing the Little Brooks Act at a future meeting.

At its September 25 meeting, PELS awarded its professional land surveyor consultant contract to Hurlbert Engineering.

Blue Ribbon Panel Controversy. Following PELS' October 1991 decision to stop contracting with CTB McMillan/McGraw Hill (CTB) for California's land surveyor examination, and to resume the use—as of April 1993—of the national examination prepared by the National Council of Examiners for Engineering and Surveying (NCEES) for purposes of licensing land surveyors, the Board formed a blue ribbon panel of land surveyors to review the national examination and develop a supplemental California-specific exam to be administered with the national exam. The panel subsequently recommended that PELS postpone the use of NCEES' professional land surveyor exam until 1994, and continue to use the current examination prepared by CTB until that time. At its April 17 meeting, PELS discussed the revelation that many of the blue ribbon panel members had worked as subject matter experts to develop and grade California's current examination sold to the Board by CTB, and had received reimbursement for travel,

lodging, and subsistence in excess of \$250 from CTB within the previous twelve months. Although PELS adopted the panel's recommendation to continue using CTB's exam until 1994, it also directed then-Executive Officer Darlene Stroup to obtain clarification from DCA's Legal Office regarding the requirements of the Fair Political Practices Commission as well as California common law regarding conflicts of interest. [12:2&3 CRLR 139]

Specifically, PELS requested clarification regarding whether members of the blue ribbon panel who received travel reimbursements in excess of \$250 within the past twelve months from the current exam vendor have a conflict of interest with respect to their recommendation; whether the Political Reform Act makes a distinction between reimbursements for in-state as opposed to out-of-state travel; whether Board members who participate in NCEES functions and have their travel expenses paid by NCEES have a conflict of interest regarding Board decisions affecting NCEES; the implications of past Board decisions which may have included the votes of Board members who may have had a conflict of interest on the issue pending before the Board; and how DCA will advise other boards which use a national examination that conflicts of interest may occur where their members serve on national examination committees and are reimbursed for their expenses by the national group.

On June 2, DCA legal counsel Don Chang responded to the Board's inquiry with the following conclusions:

—It does not appear that travel reimbursements to panel members constitute a conflict of interest under the Political Reform Act. However, such reimbursements could constitute a violation of the common law doctrine of conflicts of interest and, if so, those panel members would be precluded from making a recommendation to delay the implementation of the NCEES examination. According to DCA, the panel's recommendation regarding the proposed test plan for the supplemental examination to be used with the NCEES examination probably does not involve a conflict of interest.

—The Act distinguishes between interstate and intrastate travel reimbursements, in that intrastate travel reimbursements are not required to be reported as gifts.

—Board members who have participated in NCEES functions and have had their travel expenses paid by NCEES have a conflict of interest regarding Board decisions affecting NCEES. Specifically, a Board member who receives interstate travel reimbursements which exceed \$250

within twelve months preceding a Board decision regarding NCEES will be deemed to have a financial interest in NCEES such that he/she is precluded from voting or participating in the deliberations regarding NCEES.

—PELS should reconsider those decisions where Board members who had received travel reimbursements from NCEES were inadvertently allowed to vote. In reconsidering decisions related to NCEES, the Board should allow only those members who do not have a financial interest in NCEES to deliberate and vote on such matters. According to DCA, regarding Board decisions which are no longer in effect or have been completed, there is no action the Board can take to remedy such errors. Although acknowledging that Government Code section 91003 "could serve as a basis for an individual to seek injunctive relief to have a board decision which involved a board member who had a conflict of interest with the subject matter to be set aside as void," Chang noted that a court would be required to consider other factors in determining whether to apply a remedy and/or sanction for a violation of the Political Reform Act, including whether the violation was inadvertent, negligent, or deliberate. Chang opined that the receipt by PELS members of reimbursements for travel and lodging to participate in NCEES functions "would be attributable to inadvertence and naivete."

—DCA's Legal Office has recommended to DCA's Deputy Director for Legal Affairs that a memorandum concerning travel reimbursements and conflicts of interest be distributed to all boards within the Department.

Board Responds to Budget Cuts. At PELS' September 25 meeting, Interim Executive Officer Curt Augustine discussed the recent reductions in PELS' budget. The state's 1992-93 Budget Act requires PELS to reduce expenditures by 10% over 1991-92 levels; this amounts to an overall reduction of approximately \$537,000. In spite of such a reduction, PELS expects to preserve most Board operations, including currently scheduled examinations. Augustine also discussed the 50% cut in the Board's travel line item, which will result in a \$96,000 reduction from the Board's travel budget. This cut will have serious effects, as much of the Board's travel relates to the administration of examination and enforcement programs, two of the main functions of the Board.

Because the budget cuts were less severe than originally expected, the Board tabled a number of agendaed proposals intended to cut costs. These tabled



proposals include elimination of the California Special Four (Corrosion, Quality, Safety, and Traffic) engineering examinations; elimination of the October administration of the Engineer-in-Training and Land-Surveyor-in-Training examinations (such that they would be administered in April only); elimination of the April 1993 Special Civil examination; and postponement of the April 1993 NCEES Civil examination to October 1993. The most controversial proposal which was tabled recommended that the Board seek legislation enabling it to administer examinations only when there is a sufficient number of candidates to offset the cost of test administration. The effect of this proposal would eliminate some examinations completely because the administration costs of certain examinations amount to over four times what the Board collects in exam fees.

Rulemaking Update. The following is a status update on various PELS regulatory actions discussed in detail in previous issues of the *Reporter*.

• **Experience Amendments.** Following the Office of Administrative Law's (OAL) February 1992 rejection of PELS' proposed changes to sections 424 (experience requirements for professional engineer registration) and 425 (experience requirements for land surveyor registration) [12:2&3 CRLR 140], the Board decided to correct the deficiencies found by OAL and resubmit the rulemaking package for approval. However, the Board failed to resubmit the package within the statutory 120-day time period, and must renounce the package entirely.

• **Five-Year Delinquency Fines.** At its September 25 meeting, the Board referred back to the Administrative Committee its proposal to adopt new section 472, Title 16 of the CCR, which would establish fines for citations against a professional engineer or land surveyor who has applied for renewal of a registration or license which has not been renewed within five years after its expiration and who, without legal authorization, has practiced or offered to practice civil, electrical, or mechanical engineering or land surveying in this state or has used such titles without legal authorization. [12:2&3 CRLR 140]

• **Aiding/Abetting Regulations.** At its September 25 meeting, the Board decided to drop its proposed adoption of new sections 472 and 473, Title 16 of the CCR, which would define the term aiding and abetting as it relates to the practice of professional engineers and land surveyors. [12:2&3 CRLR 140] Staff commented that 37 out of 40 public comments received regarding the proposal were in

opposition to the regulations, contending that the proposal would increase operating costs for designers and engineers, it would put the building designers out of business, it constitutes overregulation on the part of government, and there is no proven necessity for such regulatory action. In light of such opposition, PELS approved staff's recommendation to drop the package and study the issue further to determine if there is a preferable solution.

• **Electrical Engineering Regulations.** At its September 25 meeting, the Board tabled its proposed adoption of amendments to sections 404(k) and 404(l) and the adoption of new section 426.70, Title 16 of the CCR, regarding the practice of electrical engineering. [12:2&3 CRLR 140] This action jeopardizes the regulatory package's possibility of future approval by OAL, as Government Code section 11346.4 requires that a rulemaking file be approved by a board and submitted to OAL for review and approval within one year of the proposed action's publication in the *California Regulatory Notice Register*. The rulemaking action was published on October 18, 1991, and PELS is not scheduled to meet next until November 20.

■ LEGISLATION

The following is a status update on bills reported in detail in CRLR Vol. 12, Nos. 2 & 3 (Spring/Summer 1992) at pages 140-41:

SB 1284 (Greene) provides that if a registered civil engineer is required to provide as built, as constructed, or record plans for improvements or grading, which plans show changes during the construction process, the plans shall be based on specified information depending on whether or not the registered civil engineer provided construction phase services on the project that include supervision of the construction of engineering structures. This bill also provides that a registered civil engineer shall not be required to include a certificate or statement on as built, as constructed, or record plans that is inconsistent or varies with the provisions of the bill. This bill was signed by the Governor on July 18 (Chapter 275, Statutes of 1992).

SB 2044 (Boatwright) declares legislative findings regarding unlicensed activity and authorizes all DCA boards, bureaus, and commissions, including PELS, to establish 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 also

provides that the unlicensed performance of activities for which a PELS 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 also provides that if, upon investigation, PELS 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. This bill was signed by the Governor on September 28 (Chapter 1135, Statutes of 1992).

AB 1268 (Mays)—among other things—revises the examination procedure for licensure as a land surveyor to require that an applicant for the second division of the examination be thoroughly familiar with the principles of real property relating to boundaries and conveyancing, in addition to the procedures and rules governing the survey of public lands. This bill was signed by the Governor on September 12 (Chapter 634, Statutes of 1992).

AB 3447 (Cortese) would have made numerous revisions to the Professional Land Surveyors' Act. For example, it would have repealed existing provisions stating that no record of survey of land shown on the county assessment roll as a unit or as contiguous units, which shows division of the land into additional parcels, shall be filed with the county surveyor or recorder without a certificate indicating compliance with the Subdivision Map Act and related local regulations. It would also have required the record of survey to specify the physical relationship as determined by survey ties to existing monuments used to support the location of common lines of the survey and those portions of adjacent tracts, streets, or senior conveyances. This bill died in committee.

AB 1354 (Tanner), which would have prohibited any person from engaging in the practice of chemical engineering unless he/she is registered by PELS, also died in committee.

■ LITIGATION

In *Center for Public Interest Law (CPIL) v. Board of Registration for Professional Engineers and Land Surveyors*, No. 3712217, filed in Sacramento County Superior Court on July 20, CPIL seeks a peremptory writ of mandate to force PELS to comply with the California



Public Records Act (PRA). In January 1991, CPIL requested agency records from PELS under the PRA; among other things, CPIL requested copies of documents relating to closed consumer complaint or enforcement files opened by PELS due to consumer complaints alleging billing disputes between professional engineers and consumers. PELS denied CPIL's request for the documents, claiming that the documents are exempt from disclosure under Government Code section 6254(f), the exemption for investigatory or security files compiled for law enforcement or licensing purposes, as well as the Information Practices Act (Civil Code section 1798 *et seq.*). CPIL contested the refusal on grounds that the Board can hardly open "investigatory files" on complaints over which it expressly and consistently refuses to take enforcement jurisdiction. [10:2&3 CRLR 119] Oral argument regarding CPIL's petition is scheduled for December 18.

RECENT MEETINGS

At its June 5 meeting, PELS elected Larry Dolson as President and Richard Johnson as Vice-President for one-year terms commencing July 1.

PELS cancelled its July 31 meeting due to budget constraints.

At its September 25 meeting, PELS announced that Board offices had relocated to 2535 Capitol Oaks Blvd., Suite 300, Sacramento, California 95833.

FUTURE MEETINGS

December 18 in Sacramento.

BOARD OF REGISTERED NURSING

Executive Officer: Catherine Puri (916) 324-2715

Pursuant to the Nursing Practice Act, Business and Professions Code section 2700 *et seq.*, the Board of Registered Nursing (BRN) licenses qualified RNs, certifies qualified nurse-midwifery applicants, establishes accreditation requirements for California nursing schools, and reviews nursing school curricula. A major Board responsibility involves taking disciplinary action against licensed RNs. BRN's regulations implementing the Nursing Practice Act are codified in Division 14, Title 16 of the California Code of Regulations (CCR).

The nine-member Board consists of three public members, three registered nurses actively engaged in patient care,

one licensed RN administrator of a nursing service, one nurse educator, and one licensed physician. All serve four-year terms.

The Board is financed by licensing fees, and receives no allocation from the general fund. The Board is currently staffed by 60 people.

MAJOR PROJECTS

Nurses Fail in Bid to Supersede Physician Assistants' Scope of Practice Regulations. As predicted, over the summer the California Nurses Association (CNA) convinced Assemblymember Tricia Hunter to amend AB 569 to supersede the Physician Assistant Examining Committee's (PAEC) new scope of practice regulations which became effective in February 1992.

Existing law and PAEC's scope of practice regulations provide that a physician assistant (PA) may perform medical services authorized in scope of practice regulations adopted by the Medical Board's Division of Allied Health Professions (1) under the supervision of a licensed supervising physician (SP), and (2) pursuant to protocols developed by the PA and his/her SP, or pursuant to a patient-specific order by the SP. As amended June 8, AB 569 would have added a new condition—the SP must be available by electronic means and within a 30-minute radius of the site where the PA is providing services. Additionally, AB 569 would have expressly precluded PAs from initiating orders for nursing services, admitting patients for inpatient hospital care, and performing surgical procedures under certain circumstances.

In sponsoring the amendments, CNA argued that PAEC's new scope of practice regulations, which (among other things) permit PAs to initiate patient care orders to RNs, violate the Nursing Practice Act. According to CNA, the Act prohibits an RN from accepting an order initiated by a PA. CNA conceded that, under the Act, an RN may implement a physician's order transmitted by a PA. CNA further argued that it has consistently opposed permitting PAs to intervene between the nurse and the physician, and that it believes the quality of patient care can be endangered by having a third party initiate orders. Although BRN never took a position on the amended legislation, it recently reaffirmed its long-held position that RNs may accept orders initiated only by those health care practitioners identified in Business and Professions Code section 2725(b), which states that RNs may take specified action necessary to implement a treatment, disease prevention, or

rehabilitative regimen ordered by and within the scope of licensure of a physician, dentist, podiatrist, or clinical psychologist. [12:2&3 CRLR 141-42]

PAEC and the California Academy of Physician Assistants (CAPA) immediately took an oppose position on the legislation, arguing that the bill would adversely affect the availability, timeliness, and quality of health care services provided to over three million Californians; increase service delivery costs and reduce the operational efficiency of hundreds of medical offices, clinics, and hospitals; and constrict the long-established scope of practice of California's 2,200 licensed PAs. Specifically, PAEC objected to the "30-minute radius" rule as being excessively rigid; the Committee noted that administrative law judges have used a "reasonable and prudent" rule to determine if the time and distance separating the physician from the PA is so great as to be potentially injurious to the health and well-being of a patient. PAEC also argued that PAs have been transmitting and initiating orders to nurses ever since 1975 when PAs were first licensed in California. Those orders are based on the SP's written and specific delegation of authority to the PA, and the SP is always held ultimately responsible for all care ordered or given to his/her patient by a PA.

Although both CNA and the California Medical Association supported the June 8 version of AB 569, the Senate Business and Professions Committee suggested several amendments to the bill at a hearing on June 29. As requested, Assemblymember Hunter amended AB 569 again on July 2. The July 2 version deleted the "30-minute radius" rule, but retained the provisions prohibiting a PA from initiating orders for nursing services and from "independently" admitting patients for inpatient hospital care.

PAEC and CAPA renewed their vigorous opposition, arguing that there have been no administrative disciplinary decisions against PAs for gross negligence, and none for issuing orders to RNs or others which could have or did lead to significant patient harm. PAEC Executive Officer Ray Dale stated that he could find no civil or criminal action in which the initiation of a physician's patient care order by a PA was at issue or found to be illegal, and no court case holding that it is illegal for a nurse to follow a physician's order which has been transmitted to the nurse by a PA. In response to CNA's argument regarding the authority of an RN to implement an order initiated by a PA, PAEC noted that the Office of Administrative Law reviewed its scope of