



## REGULATORY AGENCY ACTION

member Jerry Springer stated that if the major increase in operational costs is caused by the conservatorship program, the Board should examine alternative ways for regulating that aspect of the program.

At PSAB's July 12 meeting, Board member Stephen Geil reported on the progress of the Private Security Training Committee, a task force established to address training needs of the security guard industry. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 68; Vol. 11, No. 2 (Spring 1991) p. 63; and Vol. 11, No. 1 (Winter 1991) p. 54 for background information.) Mr. Geil stated that the Committee's composition reflects a balanced representation of all groups concerned, and noted that the Committee agreed that there must be unanimous agreement for all decisions. The Committee is seeking input from licensed training facilities regarding subjects to be included in a training outline. Mr. Geil reported that only three facilities had responded, but that other facilities still had time to provide input.

Also at its July 12 meeting, PSAB discussed the extent of BCIS' jurisdiction over armored car operators, focusing on whether such carriers, who are regulated by the California Highway Patrol and the Public Utilities Commission, may carry a firearm without obtaining a permit from the Bureau. The Board discussed the conflict between Business and Professions Code section 7521(d), which includes armored contract carriers among the classes of businesses subject to BCIS jurisdiction, and Penal Code section 12027(e), which exempts guards or messengers of common carriers, banks, and other financial institutions, while actually employed in and about the shipment, transportation, or delivery of money, among other things, from Penal Code prohibitions against carrying concealed firearms. The Board noted that pending legislation was aimed at clarifying this ambiguity (see *supra* AB 882 (Murray) in LEGISLATION).

At CAB's September 13 meeting, Chief James Diaz reported that the Bureau is in the process of revamping its conservatorship program. He reported that agencies which appear to be in a questionable status will be monitored; conservatorships will be utilized only in extreme cases. As of September 13, CAB had fifteen agencies under conservatorship, compared to 21 open conservatorships in March.

Also at the September meeting, CAB discussed a possible licensing fee increase. The Board reviewed the licensing/registration costs charged by other

states for the licensing of collection agencies, noting that California's fees exceed those of the other states. The Bureau will meet with industry representatives to discuss this issue further.

### FUTURE MEETINGS:

CAB: January 1992 in Sacramento.

PSAB: January 17 in Fresno.

### CONTRACTORS STATE LICENSE BOARD

Registrar: David Phillips

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Toll-Free Information Number:

1-800-321-2752

The Contractors State License Board (CSLB) licenses contractors to work in California, handles consumer complaints, and enforces existing laws pertaining to contractors. The Board is authorized pursuant to the Contractors State License Law (CSLL), Business and Professions Code section 7000 *et seq.*; CSLB's regulations are codified in Division 8, Title 16 of the California Code of Regulations (CCR).

The thirteen-member Board, consisting of seven public members, five contractors and one labor member, generally meets every other month. The Board maintains six committees: legislative, enforcement, licensing, public information, strategic planning, and budget/administration. In addition, the Board maintains a Fire Protections Systems Ad Hoc Committee. Committees meet every one to three months, and present recommendations for requested action at the full Board meetings.

### MAJOR PROJECTS:

**CSLB Amends Its Complaint Disclosure Policy.** At its July 19 meeting, CSLB held a public hearing on the Enforcement Committee's proposal to amend the Board's complaint disclosure policy, codified at section 863, Division 8, Title 16 of the CCR ("Rule 863"). The proposed amendments would prohibit disclosure of pending complaints against a contractor to an inquiring consumer until such complaints are fully investigated and referred for legal action. "Legal action" means referral of the complaint for the issuance of a citation, accusation, statement of issues, or the initiation of criminal action or injunctive proceedings. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 69; Vol. 11, No. 2 (Spring 1991) pp. 65-66; and Vol. 11, No. 1 (Winter 1991) p. 55 for extensive background information.)

In a July 15 letter to CSLB's Regulations Coordinator Robert Porter, the

Center for Public Interest Law (CPIL) again voiced its opposition to this proposed amendment. CPIL maintains that the proposed amendment is contrary to the public interest because it is not authorized by the Business and Professions Code; CSLB has shown no necessity for its proposed amendment to the rule; and the proposed amendment is contrary to CSLB's enabling statute.

Board member Steve Lazarian again expressed concern that the proposed amendment of Rule 863 does not address situations where multiple complaints are pending against a contractor, or where a pending complaint is serious and threatens public health and safety. Staff explained that this issue was addressed in a May 15 "Procedure Memo" from CSLB Registrar David Phillips. The memo requires CSLB supervisors to screen complaints to determine if "(a) there is a threat to health and safety and/or (b) there are multiple complaints against the same licensee." If either (a) or (b) is involved, the complaint is to be given "A" priority and assigned directly to the appropriate field office for investigation by a deputy. Immediately following preliminary investigation, staff is directed to determine the feasibility of issuing a prompt citation. According to CSLB, this referral—which qualifies as "legal action" under the proposed amendments to Rule 863—"will make complaints discloseable sooner for the protection of consumers."

The May 15 Procedure Memo also sets forth four priority classifications for consumer complaints, and suggests appropriate timeframes for processing each. Group "A" complaints, which should be processed within 60 days, include those alleging an "immediately dangerous health and safety condition that might endanger a person's physical being or property"; multiple complaints against the same contractor; and complaints involving fraudulent activities or known organized crime groups. Group "B" complaints, which may be processed within 90 days, include safety and building code violations and investigations of licensure applicants. Group "C" complaints, which should be resolved within 120 days, include large monetary injury complaints (typically commercial projects or real estate transactions) and interagency code violations. Group "D" complaints, which are all other complaints, should be resolved within 180 days.

Following the public hearing, CSLB adopted the proposed revisions, which must be approved by the Director of the Department of Consumer Affairs (DCA) and the Office of Administrative Law;



DCA and CSLB were scheduled to meet on October 3 to discuss the proposed amendment to Rule 863.

**Budget Change Proposals Still Pending.** At its June 6 meeting, CSLB again reviewed and approved nine budget change proposals (BCPs) for fiscal year 1992-93. Listed in order of priority, the BCPs would provide \$868,000 for support of its consumer complaint arbitration program; \$1,504,000 for statewide expansion of the Unlicensed Activity Unit (UAU); \$181,000 for the purchase of an integrated voice response system for CSLB's automated phone response system (APRS); \$367,000 for additional staff for CSLB's Support Services Unit; \$449,000 for ongoing support for APRS; \$675,000 for implementation of a public information plan; \$100,000 for field office relocation; \$168,000 for additional staff for licensing units; and \$56,000 for additional staff for the Board's information systems unit. The BCPs, which approximately total \$4.3 million, still await approval by the Department of Finance. (See CRLR Vol. 11, No. 3 (Summer 1991) p. 69 for background information.)

The Board is especially interested in maintaining and enhancing its complaint arbitration programs and expanding the UAU statewide. CSLB's Mandatory Arbitration (MARB) program for complaints under \$2,500 in value began as a pilot project in two district offices on January 1, 1990. By November 1990, the program was operational in all fourteen district offices. Because the funding for this program has been exhausted, MARB ceased to exist on May 1; staff is in the process of preparing an evaluation of the program for the legislature. CSLB's Voluntary Arbitration (VARB) program began in July 1988 and has been growing steadily in popularity. According to the Board, the increased demand for VARB and the increase in the number of district offices implementing MARB have proven the effectiveness of arbitration, which provides an alternative dispute resolution method, decreases the number of "aged complaints" pending at CSLB, and provides consumers and contractors with an equitable and expeditious resolution of disputes.

The UAU began in October 1989 as a southern-California-only pilot project. At CSLB's July 19 meeting, Registrar David Phillips reported that the UAU has issued 791 non-licensee citations, 143 Notice to Appear citations, and 192 licensee citations; the unit has completed 28 stings and 17 sweeps since it became operational. (See CRLR Vol. 11, No. 1

(Winter 1991) pp. 55-56 and Vol. 10, No. 1 (Winter 1990) pp. 62-63 for background information.)

**CSLB Loses Significant Portion of Reserve Fund to General Fund.** On July 17, Governor Pete Wilson signed AB 222 (Vasconcellos), the 1991-92 budget bill which, among other things, will transfer reserve funds from special fund agencies, including CSLB, to the general fund. Section 14 of AB 222 provides that "excess fees incidentally produced" will be transferred to the general fund; the term "excess fees incidentally produced" is defined as those funds in excess of a three-month reserve for expenditures based on authorized expenditures for the 1991-92 fiscal year. CSLB's reserve fund is approximately \$33 million. Because the Board's 1991-92 budget is \$35.5 million, approximately \$9 million (three months' operating expenses) will be left in the Board's reserve fund. Therefore, on June 30, 1992, the Department of Finance is expected to transfer over \$20 million from the Contractors License Fund to the general fund.

**Proposal for Special License Classification for Fire Alarm Contractors.** At CSLB's July 19 meeting, the Board considered a proposal to create a separate license classification for fire alarm systems contractors. The C-7 classification currently occupied by fire alarm contractors also includes low-voltage lighting performed by landscape and communication systems contractors. Because of the health and safety issues related to their work, fire alarm system contractors feel they should be regulated separately. Representatives from the State Fire Marshal's Office, several fire departments, and the fire alarm system industry spoke in support of the proposal. The Licensing Committee recommended that CSLB support the request, and the Board agreed to pursue regulatory amendments to remove the installation of fire alarm systems from the scope of work of the C-7 contractor; this revision would mean that only C-10 contractors would be authorized to perform this work. Staff was directed to draft amendments to section 832.07, Title 16 of the CCR, to effectuate this proposal.

## LEGISLATION:

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 3 (Summer 1991) at pages 70-71:

**SB 618 (Mello)**, as amended June 27, provides that every contract (and any changes in a contract) between an owner and a contractor for the construction of a single-family dwelling to be

used by the owner shall be in writing and signed by both parties and shall contain specified information. The bill also requires the writing to contain, in specified form, a notice stating that the owner has the right to require the contractor to have a performance and payment bond and that the expense of the bond may be borne by the owner. This bill was signed by the Governor on August 5 (Chapter 337, Statutes of 1991).

**AB 425 (Mountjoy)**, as amended May 28, limits the number of firms a qualifying person may act as a qualifier for to three in any one-year period and provides that a qualifier who is acting as a qualifier for more than three firms on January 1, 1992, shall comply with this provision by January 1, 1993. This bill provides that failure to comply with this provision shall result in the disassociation of the qualifying individual and automatic suspension of the licensee's contractor's license. This bill was signed by the Governor on July 22 (Chapter 145, Statutes of 1991).

**AB 1071 (Mountjoy)**, as amended June 10, reinstates and revises prior law to provide that failure of a licensee to notify the Board within 90 days of any entered and unsatisfied judgment shall result in the automatic suspension of his/her license. This bill provides that the suspension shall not be removed until proof of satisfaction of the judgment is submitted to the Registrar. This bill was signed by the Governor on August 5 (Chapter 324, Statutes of 1991).

**AB 2190 (Frazee)**, as amended August 26, consolidates and rennumbers some of the CSLB's provisions; makes technical and related changes to the CSLB; and adds new crimes. AB 2190 also includes the provisions of AB 513 (Mountjoy), and defines "contractor" to include any person not otherwise exempt under the CSLB who performs tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 55 for background information.) This bill also excludes from the definition of contractor a person performing the activities of a nurseryman who performs incidental pruning of trees, or guying of planted trees, in the normal course of routine work, or a gardener who in the normal course of routine work performs incidental pruning of trees measuring less than fifteen feet in height after planting. This bill was signed by the Governor on October 14 (Chapter 1160, Statutes of 1991).

**AB 800 (Frazee)**, as amended August 19, among other things, requires a public agency, prior to awarding a



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contract or issuing a purchase order, to verify that the contractor was properly licensed when the contractor submitted the bid, subject to specified exceptions. This bill was signed by the Governor of October 10 (Chapter 785, Statutes of 1991).

**AB 1382 (Lancaster)**, as amended July 18, provides that the judicial doctrine of substantial compliance may apply in court cases involving a contractor who has previously been properly licensed by CSLB during a portion of the 90 days preceding the performance for which compensation is sought, and if noncompliance with the licensure requirement was the result of inadvertent clerical error, or other error or delay not caused by the negligence of the licensee. Thus, this bill enables unlicensed contractors who meet these requirements to commence a court action for breach of contract and/or compensation for services rendered. This bill was signed by the Governor on October 6 (Chapter 632, Statutes of 1991).

**AB 506 (Mountjoy)**, as amended August 19, until January 1, 1996, exempts nonprofit organizations providing weatherization services at no cost to households under federally funded low-income programs administered by the Department of Economic Opportunity from the CSLB. This bill was signed by the Governor on October 7 (Chapter 691, Statutes of 1991).

**AB 1439 (Archie-Hudson)**, as introduced March 7, would require the Registrar to, on or before July 1, 1992, adopt regulations exempting bidders under the Target Area Contract Preference Act from bonding requirements, subject to specified conditions. This bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

**AB 497 (Bentley)**, as introduced February 13, would permit the Registrar to refer specified complaints to arbitration if there is evidence that the complainant has suffered or is likely to suffer damages in an amount greater than \$5,000 and less than \$25,000, and would provide for mandatory referral to arbitration when the contract price or the demand for damages is equal to or less than \$5,000. This bill is pending in the Assembly Consumer Protection Committee.

**AB 2192 (Frazee)**, as amended July 1, would require CSLB to provide for and collect \$3 from applicants for new or renewal licenses issued under the CSLB, to be deposited by the Controller into a Trust Account in the Special Deposit Fund for the exclusive support

of the California Uniform Construction Cost Accounting Commission. This bill is pending in the Senate Business and Professions Committee.

**AB 1969 (Areias)**, as amended June 26, is a CSLB-sponsored bill which would appropriate \$500,000 from the Contractors License Fund to CSLB, without regard to fiscal year, to be made available for expenditure in the event of a state of emergency declared by the Governor, to fund the programs and activities of CSLB related to the emergency. This bill is pending in Senate Appropriations Committee.

**SB 56 (Ayala)**. Existing law authorizes the Registrar to deny, suspend, or revoke the license of any contractor for a willful departure in any material respect from accepted trade standards for good and workmanlike construction, unless the departure is in accordance with plans and specifications prepared by or under the direct supervision of an architect. As amended May 21, this bill would define "willful," as applied to the intent with which an act is done or omitted, as a purpose or willingness to knowingly commit an act or make an omission. This bill is pending in the Assembly Consumer Protection Committee.

**AB 1746 (Eaves)**. Existing law requires every employer, at the time of each payment of wages, to furnish each employee with an itemized written statement showing specified information, and to keep those records for at least three years. As amended April 30, this bill would provide that any holder of a state contractor's license who violates the statement or records requirement twice within a five-year period shall, upon notice by the Labor Commissioner to CSLB, be ineligible for license renewal by CSLB. This bill is pending in the Senate Business and Professions Committee.

### LITIGATION:

In *Pinney v. Registrar of Contractors*, No. C007052 (June 6, 1991), the Third District Court of Appeal held that fourth amendment protections attach to administrative inspection demands. Pinney, a licensed electrical contractor, was under investigation by CSLB for various reasons. The CSLB Registrar requested that Pinney produce his business records within ten days. Under advice of counsel, Pinney refused to produce the documents without a warrant or a subpoena; the Registrar responded by filing a disciplinary accusation against Pinney under Business and Professions Code section 7111, which provides that "refusal by a licensee to comply with a written request of the registrar

to make [his] records available for inspection constitutes a cause for disciplinary action." Upon the recommendation of an administrative law judge, CSLB subsequently revoked Pinney's license on the basis that he failed to comply with the document production demand. The trial court granted Pinney's petition for a writ of administrative mandamus, finding that the Registrar's order was "unduly burdensome and oppressive and directly impacted on Pinney's basic right to practice his business or profession, denying him due process of law."

On appeal, the Third District Court of Appeal affirmed. The court noted that although Business and Professions Code section 7111 provides that a licensee's refusal to comply with the Registrar's inspection request constitutes grounds for disciplinary action, section 7111 must be read in conjunction with the fourth amendment. Therefore, an administrative agency's request for documents from a licensee must be in the form of a subpoena or an administrative search warrant, and the subpoenaed party must be accorded an opportunity for judicial review before suffering any penalties for refusing to comply.

The Registrar unsuccessfully argued that "the electrical contracting industry falls within the closely regulated business exception to the Fourth Amendment's warrant requirement." In rejecting this contention, the Third District noted that a closely regulated business is one where the pervasiveness and regularity of the government's regulation reduces the owner's expectation of privacy in his business records. Businesses traditionally classified as "closely regulated" usually involve a high risk of illegal conduct or of serious danger to the public such that frequent, unannounced inspections are essential for the protection of the public or for the enforcement of the statutory purpose. According to the court, the Registrar failed to demonstrate that the requisite pervasiveness and regularity of the state's regulation are associated with the contracting industry.

On July 25 in *Gartrell Construction v. Aubry*, No. 90-15190, the U.S. Ninth Circuit Court of Appeals held that contractors for the federal government are exempt from state licensing laws. Gartrell Construction, a general contractor, worked exclusively for the U.S. Navy at the El Toro Marine Corps Air Station. As a contractor with the federal government, Gartrell had met the requirements of "responsibility" imposed on such contractors under the Federal



Acquisition Regulation, 48 C.F.R. Part 52.236-7. However, state authorities charged Gartrell with violation of Labor Code section 1021, which provides that any person who does not hold a valid state contractor's license, and who employs persons to perform services for which a contractor's license is required, shall be subject to specified civil penalties. State authorities therefore assessed \$57,600 in penalties against Gartrell for violation of section 1021. Gartrell filed for injunctive and declaratory relief in federal district court, which enjoined California from enforcing Labor Code section 1021 against Gartrell, ruling that federal law preempted state licensing requirements.

Citing *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956), a U.S. Supreme Court case decided on very similar facts, the Ninth Circuit held that California's contractor licensing laws conflict with federal "responsibility" determinations; both require consideration of the same or similar factors. Therefore, the Supremacy Clause of the U.S. Constitution precludes California from applying its licensing laws against Gartrell.

In addition, the Ninth Circuit held that requiring compliance with state licensing laws after a contractor has been selected by the federal government would improperly give the state a secondary review right over federal decisionmaking. Finally, the court rejected California's argument that revisions to the federal regulation (48 C.F.R. Part 52.236-7) requiring a federal contractor to be "responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work . . ." enacted after the *Leslie Miller* decision indicate an intent to subject federal contractors to state licensing laws. Noting that, under *Leslie Miller*, a state contractor's license is neither "necessary" nor "applicable," the court found "no legislative or regulatory history to support California's contention that Congress intended [this language] to overrule *Leslie Miller*."

## RECENT MEETINGS:

At CSLB's July 19 meeting, the Enforcement Committee reported on a staff proposal to change the manner in which CSLB tracks the pendency of consumer complaints. Rather than simply counting the number of complaints, subtracting 6,000 as the number routinely in "the pipeline" at all times, and reporting the excess as the Board's "backlog" or number of "aged complaints," staff pro-

poses to compute its backlog in a "time-sensitive" manner, as proposed by the Center for Public Interest Law at the Enforcement Committee's March meeting. (See CRLR Vol. 11, No. 2 (Spring 1991) p. 66 for background information.) In this manner, older complaints will be given priority attention. Complaints older than 180 days will be considered aged complaints and their investigation will be expedited.

Registrar David Phillips also reported that the median age of a complaint at closure has decreased from 158 days to 61 days. The Enforcement Committee stated that its new goal is to process 90% of all complaints in less than 180 days and to reduce the median number of days to process a complaint to 40.

Finally, Roger Lighthart was elected CSLB Chair for the 1991-92; Jim Frayne was elected Vice-Chair.

## FUTURE MEETINGS:

January 16-17 in San Diego.

## BOARD OF COSMETOLOGY

Executive Officer: Denise Ostton  
(916) 445-7061

In 1927, the California legislature enacted the Cosmetology Act, establishing the Board of Cosmetology (BOC). The Board is empowered to require reasonably necessary precautions designed to protect public health and safety in establishments related to any branch of cosmetology. BOC's enabling legislation is found in Business and Professions Code section 7300 *et seq.*; the Board's regulations are codified in Division 9, Title 16 of the California Code of Regulations (CCR).

Pursuant to this legislative mandate, the Board regulates and issues separate licenses to salons, electrologists, manicurists, cosmetologists, and cosmeticians. It sets training requirements, examines applicants, issues certificates of registration and licenses, hires investigators from the Department of Consumer Affairs (DCA) to investigate complaints, and disciplines violators with licensing sanctions.

The Board is comprised of seven members—four public members and three from the industry. It is required to hold meetings at least four times per year.

On July 1, 1992, BOC and the Board of Barber Examiners (BBE) will merge, pursuant to AB 3008 (Eastin) (Chapter 1672, Statutes of 1990). The Business and Professions Code sections which establish BBE and BOC will be repealed

and replaced with an enabling act creating the Board of Barbering and Cosmetology (BBC), which will provide for the licensure and regulation of persons engaged in the practice of performing specified acts relating to barbering, cosmetology, and electrolysis.

On June 5, Richard Carpeneti was sworn into office as a new public member on the Board. Mr. Carpeneti, a San Francisco attorney, was appointed by Assembly Speaker Willie L. Brown, and previously served as a BOC public member from 1983-87.

## MAJOR PROJECTS:

**Goals and Objectives for the 1991-92 Fiscal Year.** At its July 28 meeting, BOC reviewed its accomplishments during fiscal year 1990-91, and set forth its goals for the upcoming year. These goals fall into the following categories: administration, legislation and regulations, public awareness, examinations, and enforcement.

BOC's basic administrative goal is to ensure the efficient and cost-effective operation of essential Board services to better meet its consumer protection mandate. During 1991-92, the Board will try to ensure its efficient operation primarily by focusing on an efficient merger of BOC with BBE. BOC has also installed a new phone system, meant to provide better access and more information to consumers and licensees. To enhance the Board's ability to protect consumers, BOC is developing a health and safety course on hazardous substances in the workplace to be taught in cosmetology schools. (See *infra*; see also CRLR Vol. 11, No. 3 (Summer 1991) p. 72 for more detailed information on this project.)

In the areas of legislation and regulation, BOC worked with Assemblymember Eastin's office on AB 1161, the "clean-up" bill to AB 3008 (Eastin), the merger bill. (See *infra* LEGISLATION.) BOC is also working with DCA program analyst Kirk Marston to finalize draft regulations for BBC. BOC also hopes to study the need for health and safety regulations in various areas such as the disposal of hazardous wastes and chemical skin peeling.

In the area of public awareness, BOC's goal is to increase consumer and industry awareness of the Board's role in promoting consumer protection. BOC hopes to increase the scope of its educational activities by creating and disseminating educational information, and maintaining interaction with consumer groups, industry groups, and the media. BOC staff has operated a booth at several trade shows throughout the state