



## REGULATORY AGENCY ACTION

nia, accountants regulated by the state or federal government, and those authorized to practice before the Internal Revenue Service are exempt from registration.

An Administrator, appointed by the Governor and confirmed by the Senate, enforces the provisions of the Tax Preparer Act. He/she is assisted by a nine-member State Preparer Advisory Committee which consists of three registrants, three persons exempt from registration, and three public members. All members are appointed to four-year terms.

### LEGISLATION:

*AB 861 (Jones).* Existing law provides that registrations of tax preparers and tax interviewers are to be renewed on an annual basis. This bill provides for a staggered birthdate renewal program on a two-year basis for those persons and would make related changes. AB 861 requires the payment of applicable delinquency fees for a person who renews a delinquent registration for the 1989-90 registration year. This bill was signed by the Governor on September 25 (Chapter 839, Statutes of 1989).

### FUTURE MEETINGS:

To be announced.

### BOARD OF EXAMINERS IN VETERINARY MEDICINE

*Executive Officer: Gary K. Hill  
(916) 920-7662*

The Board of Examiners in Veterinary Medicine (BEVM) licenses all veterinarians, veterinary hospitals, animal health facilities, and animal health technicians (AHTs). All applicants for veterinary licenses are evaluated through a written and practical examination. The Board determines through its regulatory power the degree of discretion that veterinarians, animal health technicians, and unregistered assistants have in administering animal health care. 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 Animal Health Technician Examining Committee consists of two licensed veterinarians, three AHTs, and two public members.

In June, Governor Deukmejian reappointed Arthur Hazarabedian, DVM, to a second term on the Board, and Senator Roberti reappointed public member Jean Guyer to her second term on BEVM.

### MAJOR PROJECTS:

*Teeth Cleaning Controversy.* As reported in CRLR Vol. 9, No. 3 (Summer 1989) at page 73, Department of Consumer Affairs (DCA) Director Michael Kelley rejected BEVM's proposed section 2037, Chapter 20, Title 16 of the California Code of Regulations (CCR), which would have clarified the term "dental operation" to include the use or application of any instruments or devices to any portion of an animal's teeth or gums for specified purposes, including preventive dental procedures such as the removal of tartar or plaque. This section would have allowed dental operations to be performed only by a licensed veterinarian or veterinarian-supervised AHT. It would not prevent dog groomers from providing the cosmetic service of cleaning an animal's teeth with a toothbrush, dental floss, gauze, or similar items. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 66; Vol. 8, No. 4 (Fall 1988) pp. 75-76; Vol. 8, No. 3 (Summer 1988) pp. 81-82; and Vol. 8, No. 2 (Spring 1988) p. 79 for detailed background information.)

BEVM provided several arguments in support of the proposed regulation change. According to BEVM, manual removal of tartar above the gumline can cause severe bleeding and infection. Also, periodontal disease is on all surfaces of the teeth. The cleaning of the tongue side of an animal's teeth, the Board maintains, is virtually impossible without chemical restraint in about 90% of animals. Further, most animals will not allow the deep probing required to find periodontal disease while awake. BEVM also stated that the use of manual scaling instruments by untrained individuals can cause etching and pitting of the dental enamel, which can speed up redistribution of plaque. Finally, BEVM maintains that while the removal of tartar from exposed surfaces of an animal's teeth leaves the animal with the appearance of clean, healthy teeth, the teeth can harbor periodontal disease which is undetectable without a professional examination.

BEVM scheduled an October 12 public hearing in Santa Clara to consider readoption of section 2037. If readopted, the Board will resubmit section 2037 to DCA for review and approval. In light of the DCA Director's previous statement that the Board's motivation in

adopting section 2037 is primarily economic in nature, the Board plans to present more information and testimony on both sides of this issue to further aid Mr. Kelley in his decision.

As also reported in CRLR Vol. 9, No. 3 (Summer 1989) at page 73, Senator Cecil Green requested the Attorney General's Office to prepare a formal opinion on this issue. However, this issue is the subject of a pending lawsuit involving a pet groomer and BEVM. Therefore, the Attorney General will not render an opinion at this time.

*OAL Rules BEVM's Teeth Cleaning Policy is Regulation.* In the recent past, the BEVM has made a public policy statement that the practice of veterinary medicine, surgery, and dentistry includes the cleaning of animals' teeth. It has sought to enforce this policy by sending cease and desist letters to nonveterinarians who perform teeth cleaning. (See CRLR Vol. 9, No. 3 (Summer 1989) p. 73 for background information.) On July 25, in response to a request for determination by Stephen Arian of Larkspur, the Office of Administrative Law (OAL) concluded that the policy statement is a regulation and is subject to the requirements of the Administrative Procedure Act (APA); therefore, it is void and unenforceable until promulgated pursuant to the APA and approved by OAL.

*Other Regulatory Action.* On July 5, BEVM submitted proposed new section 2025.2 and amendments to sections 2024 and 2025, Chapter 20, Title 16 of the CCR, to OAL. (See CRLR Vol. 9, No. 3 (Summer 1989) pp. 73-74 and Vol. 9, No. 2 (Spring 1989) p. 77 for background information.) Sections 2024 (remedial training for graduates of foreign veterinary schools) and 2025 (requiring foreign veterinary graduates to obtain, among other things, a passing score on a test of written English and to successfully complete either a twelve-month internship at an accredited veterinary college or pass a clinical proficiency examination) were approved by OAL on August 3.

However, OAL rejected new section 2025.2, which would have provided a transitional licensure program for foreign graduates who entered, prior to May 1, 1987, a twelve-month evaluated clinical experience at an approved site. OAL disapproved this section on grounds it failed to comply with the necessity and clarity standards of Government Code section 11349.1. The Board has decided not to revise and resubmit this section, stating that the purpose of the section is now moot.

On July 3, BEVM submitted new



section 2015.2 and amendments to sections 2014, 2015, and 2070 to OAL for review. (See CRLR Vol. 9, No. 3 (Summer 1989) pp. 73-74 for background information.) On August 2, OAL disapproved this amendment package. OAL found that the submitted amendment to section 2014 failed the public notice and clarity requirements. As originally noticed, the amendment to section 2014 would have added a second section to the written examination and required a grade of 75% to pass. On the day of the public hearing, the Board removed all reference to "75%" and specified only that candidates must obtain a "passing grade" on each section of the exam. BEVM made this proposed change available for an additional fifteen-day comment period. However, OAL found that the change was not sufficiently related to the original proposal; therefore, a 45-day public comment period was required pursuant to Government Code section 11346.4(c). Further, OAL found that the amendment failed to satisfy the clarity requirement in Government Code section 11349(c) because BEVM did not provide enough information on what constitutes a passing grade.

OAL also found that this amendment violated Government Code section 11347.3(a)(7), which states that the rule-making record shall include all factual information, reports, and studies upon which an agency relies in a regulatory action. BEVM specified that the California practical exam would be graded using a criterion-reference method, but failed to provide adequate background information on this method to OAL.

Regarding sections 2015 and 2015.2, OAL found that the submitted amendments failed to meet the necessity standard specified in Government Code section 11349.1, because BEVM did not establish the necessity for the specified time periods in which an applicant for licensure must successfully complete the exam process.

On September 7, the Board resubmitted the entire package (sections 2014, 2015, 2015.2, and 2070) with modifications which addressed the deficiencies OAL had identified on August 2. OAL determined that the Board's modifications were nonsubstantial and thus did not require rehearing. OAL approved the changes and the package was filed with the Secretary of State on September 18.

The Board made the following modifications to the package. The Board divided section 2015 into sections 2015 and 2015.1. Section 2015 now addresses

only the requirements which must be satisfied before an applicant shall be deemed eligible to take the California practical exam beginning with the June 1990 exam. More specifically, as of the June 1990 exam, an applicant must take and pass a clinical competency test (CCT) as well as the national board exam before being eligible to take the California practical exam. This section also addresses the number of times an applicant can fail the practical exam before being required to retake the national board exam and the CCT.

Section 2015.1 now addresses exams taken out-of-state by applicants for the California practical exam. The issue of out-of-state exams was previously addressed in section 2015. The Board will accept CCT exams from other states that are substantially similar to the California-administered exam in satisfaction of the eligibility requirement for the California practical exam. The section also specifies the number of attempts and amount of time an applicant is allowed in which to pass the California practical exam before being required to retake both the national board exam and the CCT.

Section 2015.2 is a transition section which addresses the eligibility requirements for the February 1990 California practical exam. Section 2070 provides that the application fees for sections one and two of the written exam are \$100 and \$80, respectively.

The Board resubmitted section 2014 as originally proposed (requiring a 75% score for passage of the California practical exam). The Board subsequently noticed a new amendment to section 2014, and was scheduled to conduct a public hearing on the criterion-reference scoring method on December 1 in Monterey. The Board has revised its statement of reasons regarding the criterion-reference method to include the factual information required by Government Code section 11347.3(a)(7). Following the hearing, the Board plans to resubmit section 2014, which would institute a criterion-reference scoring method for the California practical exam, to OAL in a separate rulemaking package.

On July 14, OAL approved BEVM's adoption of new sections 2017 and 2018, Chapter 20, Title 16 of the CCR. These sections establish licensure and examination application processing deadlines in compliance with the Permit Reform Act of 1981. (See CRLR Vol. 9, No. 3 (Summer 1989) p. 73 and Vol. 9, No. 1 (Winter 1989) p. 67 for background information.)

*Legend Drug Program.* The U.S.

Food and Drug Administration (FDA) has approved funding of a sizable program to control the illegal sale of veterinary prescription drugs in California. As part of this program, BEVM has begun contacting veterinary drug suppliers, food animal veterinarians, large animal veterinarians, and pet stores. At the same time, the California Department of Food and Agriculture is surveying livestock producers, mail order drug suppliers, feed manufacturers/dealers, and retail drug/feed stores. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 95 for background information.) The purpose of these audits is to determine how legend drugs are distributed in California. BEVM will draft a report based on the data it gathers over an eighteen-month period. This report is currently scheduled to be presented to the FDA in February 1990. However, due to a delay in awarding the contract, the presentation date will likely be moved forward eight months.

*Examinations.* On February 28, 325 candidates took BEVM's four-and-one-quarter-hour practical examination. Two hundred sixty-three (263) candidates attained the passing score of 75%, for an overall passing rate of 81%. In June, 184 candidates took the CCT; 144 passed the exam.

*Alcohol and Drug Diversion Program.* The current program manager of BEVM's substance abuse diversion program, Occupational Health Services (OHS), was recently awarded the Board's Alcohol and Drug Abuse Diversion contract for a three-year period (July 1, 1989-June 30, 1992). In this capacity, OHS is responsible for managing the program, monitoring participants, and submitting reports to the Board on a quarterly basis. (See CRLR Vol. 8, No. 4 (Fall 1988) p. 76 and Vol. 8, No. 2 (Spring 1988) p. 79 for background information.)

*Implementation of Citation and Fine Regulations.* Although OAL approved BEVM's citation and fine regulations in October 1988 (see CRLR Vol. 9, No. 2 (Spring 1989) p. 77 and Vol. 9, No. 1 (Winter 1989) p. 66 for background information), BEVM is waiting for the right case to actually implement this program. BEVM is still compiling a brochure outlining the procedures that will be followed when implementing these regulations, to provide its licensees with notice of these new procedures.

#### LEGISLATION:

*AB 2001 (Farr),* as amended June 8, would have enacted the Consumer Pet



## REGULATORY AGENCY ACTION

Protection Act, which would have prohibited the sale of puppies less than twelve weeks of age by a pet dealer, except under specified conditions. Further, this bill would have provided that if, within fourteen days following the sale and delivery of a dog to a consumer, a licensed veterinarian certifies that the dog was unfit for purchase, the consumer, under specified conditions, would have the right to either return the dog or retain the dog and receive reimbursement for veterinary fees up to \$2,000. This bill failed passage in the Assembly on June 28.

*AB 2461 (O'Connell)* would have provided that any person who administers the Draize Test or ocular test, the Skin Irritancy Test, or Lethal Dose Test to an animal is guilty of either a felony or misdemeanor, and is subject to imprisonment or fine, or both. These tests are used to test the irritancy and toxicity levels of cosmetics and household products. This bill failed passage in the Assembly on June 22.

The following is a status update on bills reported in detail in CRLR Vol. 9, No. 3 (Summer 1989) at page 74:

*AB 1842 (Speier)*, as amended August 24, authorizes a veterinarian who treats an injured dog or cat which recovers from its injuries to keep the animal for purposes of adoption, provided the responsible animal control agency has first been contacted and has refused to take possession of the animal. Additionally, whenever any animal is transferred to a veterinarian in a clinic, such as an emergency clinic which is not in continuous operation, the bill provides that the veterinarian may, in turn, transfer the animal to an appropriate facility.

The bill also specifies that an animal control agency which takes possession of an animal shall keep records of the whereabouts of the animal for a 72-hour period from the time of possession and these records are to be available on request. Finally, this bill makes it a misdemeanor for any person to possess, import into this state, sell, buy, give away, or accept either (1) any carcass or part thereof of any animal traditionally or commonly kept as a pet or companion with the sole intent of using or having another person use any part of the carcass for food, or (2) any animal traditionally or commonly kept as a pet or companion with the sole intent of killing or having another person kill that animal for the purpose of using or having another person use any part of the animal for food. This bill was signed by the Governor on September 15 (Chapter 490,

Statutes of 1989).

*AB 1081 (Allen)*, as amended August 31, amends section 25503.5 of the Health and Safety Code, relating to hazardous material. Section 25503.5 requires businesses which handle hazardous material to adopt a business plan for response to the release of hazardous materials, and to annually submit an inventory to the local administering agency. This bill exempts from these business plan and inventory requirements oxygen and nitrous oxide ordinarily maintained by certain health care professionals (including veterinarians), at their offices or places of business, if these materials are stored in a specified quantity. This bill was signed by the Governor on September 26 (Chapter 874, Statutes of 1989).

*SB 428 (Torres)*, as amended August 24, provides for the regulation and licensing of potentially vicious and dangerous dogs and provides for the destruction of a vicious dog, as defined. (See CRLR Vol. 9, No. 2 (Spring 1989) pp. 77-78 for background information.) This bill was signed by the Governor on September 24 (Chapter 761, Statutes of 1989).

The following bills were made two-year bills, and may be pursued when the legislature reconvenes in January: *AB 786 (Polanco)*, which, as amended September 15, would require a pet dealer, as a condition of sale of a dog and at intervals of not less than fourteen days until the dog is sold, to provide for an examination of the dog by a licensed veterinarian, and which would provide remedies for purchasers if, within fourteen days of the sale of a dog by a pet dealer or breeder, the dog becomes ill or dies of any illness which existed in the dog at the time of the sale, or, within one year, a licensed veterinarian certifies a dog to be unfit for purchase due to specified conditions; and *AB 916 (Kelley)*, which would amend sections 4826 and 4830 of the Business and Professions Code to state that a person practices veterinary medicine if he/she provides consultant veterinary services to more than one privately held animal-owning client.

### LITIGATION:

In *Hall v. Kelley*, Dr. Linda Hall, who suffers from dyslexia, a reading disorder, has sued BEVM for its alleged failure to provide an adequate setting for her to take the practical exam. Dr. Hall claims that her disability 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 a California license, Dr. Hall took BEVM's practical exam six times. She failed on the first five attempts, but passed the sixth time she took the exam. The California practical exam is administered twice per year. Dr. Hall claims her failure to pass on each of the five attempts was due solely to the Board's refusal to provide reasonable accommodations for her handicapping condition. She claims that the Board's refusal violates both federal and state statutes and the due process and equal protection provisions of the federal constitution.

Prior to taking the practical exam for the third time, Dr. Hall alleges that the Board promised to change the exam format from multiple choice to short essay. The Board asserts it did not promise to change the exam, but instead provided a reader and allowed Dr. Hall twice the allotted time to complete the exam. The reader supplied by BEVM could not pronounce some of the technical terms, and Dr. Hall argues this action was not a reasonable accommodation.

On her fourth sitting, Dr. Hall claims the Board promised that 30-40% of exam questions would be accompanied by visual slides, and that she would again be given additional time to complete the exam. Again, the Board asserts it made no such promise. The Board maintains that it merely discussed the possibility of changing the exam to include visual slides in Dr. Hall's presence, and decided to investigate the possibility of changing the exam to include visual slides for all examinees. However, the Board asserts that changing the format and implementing the exam in a way that is fair to all examinees would take some time to achieve. For these reasons, the Board gave Dr. Hall additional time, but did not provide visual slides.

Dr. Hall makes no claims about her fifth sitting. Prior to her sixth sitting, Dr. Hall provided the Board with a report from an expert who recommended exam modifications to accommodate Dr. Hall's condition. The Board did not follow the recommendations. Instead, the Board gave Dr. Hall a personal proctor and 24 hours to complete the one-hour exam. Dr. Hall passed the exam on this attempt.

Dr. Hall is seeking wages she claims she could have earned if the Board had provided "reasonable accommodations". Dr. Hall bases this claim on the assumption that with these accommodations she would have passed the exam earlier. Dr. Hall also alleges that, as a result of the Board's actions, she was required to employ the services of hospitals, physi-



cians, surgeons, nurses, ambulances, medicines, and other medical supplies; she seeks reimbursement for these costs. Finally, Dr. Hall seeks punitive damages.

The Board contends that federal law does not impose a duty to undertake affirmative efforts to overcome Dr. Hall's condition; rather, it requires evenhanded treatment. In other words, the law prohibits an agency from basing a denial of an opportunity to participate in an exam situation on a handicap. Further, the Board claims that, as a matter of policy, the federal statute to which Dr. Hall refers is unsuited to an occupational licensing application. Whether a person should be required to read under time pressure in order to be licensed as a veterinarian is best determined by those who have expertise in the knowledge and qualities required to be an effective veterinarian. The Board claims it is recognized by California law as having that expertise.

Regarding the due process claim, the Board argues that Hall did not have a vested property right, as the matter in dispute took place before Dr. Hall had a California license. Finally, BEVM claims that Dr. Hall's allegation of an equal protection violation is unfounded. The Board argues that Dr. Hall has failed to allege that the Board's conduct created or affected any suspect classification; that any such classification interfered with fundamental rights; or that any classification was made at all.

*Hall v. Kelley* was filed in Orange County Superior Court in 1988. (See CRLR Vol. 8, No. 4 (Fall 1989) p. 76 for background information.) Because of the presence of federal claims, the Board recently petitioned to have the action removed to federal court. At the same time, the Board moved for dismissal based on failure to state a claim upon which relief may be granted.

#### RECENT MEETINGS:

During the summer, BEVM awarded inspection contracts to five veterinarians. The contracts are for one year (July 1, 1989-June 30, 1990). Three of the inspectors have previously served in this capacity; the other two inspectors have completed training. The state of California consists of thirteen inspection districts; the inspectors bid on each district. The Board assigned districts based on the bidding, and the inspectors have begun making inspections in their districts.

The Board views the inspection program as an educational rather than punitive program. According to the Board,

the program has been enthusiastically received by veterinarian hospitals. Veterinarians are eager to know whether their hospitals meet standards, and if not, how the hospitals can be improved to meet standards. (See CRLR Vol. 8, No. 3 (Summer 1988) pp. 82-83 for background information.)

#### FUTURE MEETINGS:

January 11-12 in San Francisco.

#### BOARD OF VOCATIONAL NURSE AND PSYCHIATRIC TECHNICIAN EXAMINERS

*Executive Officer: Billie Haynes (916) 445-0793*

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 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 as an arm of the executive branch. It licenses prospective practitioners, conducts and sets standards for licensing examinations, and has the authority to grant adjudicatory hearings. Certain provisions allow the Board to revoke or reinstate licenses. The Board currently licenses approximately 68,000 LVNs and 14,000 psychiatric technicians.

Current Board members include Kathleen Fazzini Barr, LVN (President), Deloyce Arrington, LVN (Vice-President), Frances Junilla, LVN, Gwendolyn Hinchey, RN, Bruce Hines, PT, Kenneth G. Audibert, PT, and public members E. Charles Connor, Betty Fenton, Patricia A. Lang, Helen Lee, and Manuel Val. Frances Junilla, the Board's newest appointee, was sworn in during the Board's September 22 meeting. Her term will expire on June 1, 1992.

Effective June 20, the Board moved to new offices located at 1414 K Street, Suite 101 (Administrative Office), Suite 102 (PT Unit), Suite 103 (LVN Unit), Sacramento, CA 95814. The telephone number is unchanged.

#### MAJOR PROJECTS:

*Fee Increase Regulation.* On July 14, the Board held a public hearing in Monterey on its proposal to amend section 2537, Chapter 25, Title 16 of the California Code of Regulations (CCR). The amendment increases the Board's application fee, biennial renewal fee, and initial license fee to \$50. The Board approved the increase after the hearing; the Office of Administrative Law (OAL) approved the rulemaking file on September 27.

Debbie Ochoa, budget analyst for the Department of Consumer Affairs, presented alternative fee structures to the Board during its September 22 meeting. The Board prefers to retain lower fees for new graduates and increase the fees in subsequent renewal periods. At its November 17 meeting, the Board was scheduled to further discuss the fee structure, and plans to approach the legislature in January with a new proposed statutory maximum. The new fees would take effect in January 1991.

*Update on Computer Aided Testing.* The implementation of computer aided testing for PTs is proceeding. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 68 and Vol. 8, No. 4 (Fall 1988) p. 77 for background information.) Dr. Robert Sikes, Technical Coordinator of CTB McGraw Hill, has determined that proper validation of the proposed computerized PT testing will require 400 PT candidate participants in each validation testing session. Two hundred students should take the exam via the pen and pencil method, and the other 200 should take a computerized test. At the last testing session, only 368 candidates showed, which would skew the desired results. The Board will therefore administer a fifth validation study at a cost of \$5,000 in December 1989. This will postpone 1990 testing dates by one month. The regularly scheduled March exam will be in April 1990, which is the projected implementation date for PT computerized testing. Testing centers will be located in Sacramento and Los Angeles, and will enable the Board to provide year-round testing of PT candidates. PT schools will be notified of the new scheduling procedures.

*Registered Care Technologist Proposal.* The Board recently reiterated its official position of opposition to the American Medical Association's (AMA) proposal to create a Registered Care Technologist (RCT) position. The AMA states that this proposal will increase the availability of health care personnel in the face of the current and long-term