

filing regarding such rulemaking.

LITIGATION:

In *California Chapter of the American Physical Therapy Association (APTA), et al. v. California State Board of Chiropractic Examiners, et al.* (consolidated case nos. 35-44-85 and 35-24-14), a Sacramento County Superior Court judge has overruled defendants' demurrers and denied defendants' motions to strike as to various causes of action and allegations pleaded therein. As a result, defendant OAL is appealing the lower court rulings to the Third District Court of Appeal.

Plaintiffs allege, *inter alia*, that OAL "did arbitrarily, capriciously and unlawfully approve" section 302, Title 16 of the California Code of Regulations, which was adopted by the Board of Chiropractic Examiners (BCE) to define the scope of chiropractic practice. Among other things, plaintiffs APTA and the California Medical Association, and intervenors, which include the Board of Medical Quality Assurance and its Physical Therapy Examining Committee, allege the following with regard to OAL's approval of the challenged provision:

-That OAL "failed to apply the standards for review which are set forth in Government Code section 11349.1" and "failed to require the proper giving of notice and opportunity for hearing as required [by specified sections of the Government Code] when...substantive provisions of the regulation were being significantly changed upon resubmission of the regulation by [defendant BCE]."

-That "[n]either Government Code section 11349.3...[n]or any other provision of law empowers OAL to approve a regulation in part and disapprove the same regulation in part [as was done upon resubmission of section 302] and such regulatory review procedure is the product of an illegally adopted regulatory procedure."

-That OAL acted in excess of its lawful authority when it "[a]pproved the resubmitted version of section 302 although it possessed substantially all of the defects previously identified by OAL in its written opinion [initially disapproving the regulation] of March 16, 1987."

The Court of Appeal was expected to rule on defendants' various petitions on or after May 25. (For additional information, see CRLR Vol. 8, No. 2 (Spring 1988) p. 30; Vol. 8, No. 1 (Winter 1988) p. 36; and Vol. 7, No. 4 (Fall 1987) pp. 30 and 100.)

OFFICE OF THE AUDITOR GENERAL

Auditor General: Thomas W. Hayes (916) 445-0255

The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly and Senate. JLAC has the authority to "determine the policies of the Auditor General, ascertain facts, review reports and take action thereon...and make recommendations to the Legislature...concerning the state audit...revenues and expenditures...." (Government Code section 10501.) OAG may "only conduct audits and investigations approved by" JLAC.

Government Code section 10527 authorizes OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property of any agency of the state...and any public entity, including any city, county, and special district which receives state funds...and the records and property of any public or private entity or person subject to review or regulation by the agency or public entity being audited or investigated to the same extent that employees of that agency or public entity have access."

OAG has three divisions: the Financial Audit Division, which performs the traditional CPA fiscal audit; the Investigative Audit Division, which investigates allegations of fraud, waste and abuse in state government received under the Reporting of Improper Governmental Activities Act (Government Code sections 10540 *et seq.*); and the Performance Audit Division, which reviews programs funded by the state to determine if they are efficient and cost effective.

RECENT AUDITS:

Report No. P-730 (February 1988) concerns a review of allegations of racial discrimination, favoritism, and other irregularities by the California Horse Racing Board (CHRB) in the licensing and selection of stewards who officiate at horse races. The audit revealed several questionable, and in one area unlawful, practices.

OAG staff found that the CHRB does not always record questions asked, answers given, and scores received during the oral portion of the steward's licens-

ing examination. Therefore, staff members were unable to dismiss or substantiate allegations regarding this portion of the licensing process.

The Board was also found to have bypassed statutory licensing requirements by issuing permanent identification cards instead of licenses to successful applicants, although state law requires the Board to contract only with licensed stewards. This CHRB practice has resulted in the forfeiture of at least \$5,800 in license fees since 1980. It also means that the Board has bypassed the statutorily-mandated fingerprinting procedure, which has resulted in the appointment of at least one steward with an undiscovered misdemeanor criminal record.

The Board's executive secretary explained the nonlicensing to auditors as merely a preferred method of contracting with stewards, since the CHRB issues the identification cards only to candidates who successfully complete the examination process. Also, the CHRB believes that because stewards are contract employees of the CHRB, they could negotiate away the license fee even if the Board did issue licenses.

OAG staff were unable to substantiate any of the racial discrimination or favoritism allegations because the Board does not maintain age, race, or gender information on applicants for the steward examinations (nor is it required to by law). Further frustrating the audit was the lack of response from complainants. The only responding complainant was unable to provide sufficient evidence to prove or disprove the allegations.

Staff auditors discovered that the CHRB has not fully implemented recommendations contained in a 1982 audit entitled *The California Horse Racing Board Needs To Improve Its Regulatory Control of Horse Racing* (Report No. P-076, March 1982) (see CRLR Vol. 2, No. 3 (Summer 1982) p. 28), including recommendations to improve the monitoring of the distribution of proceeds from charity race days, along with procedural improvements for the licensing and auditing of parimutuel activities.

The present audit recommends that the Board:

-License stewards and contract only with the licensed stewards as required by state law;

-Charge fees for steward licenses as set by its own regulations and require renewal of licenses every three years; and

-Follow the same fingerprinting procedures in licensing stewards as are followed when issuing other CHRB licenses.

The report also includes additional suggestions designed to resolve the problems created by the Board's failure to implement the 1982 recommendations.

Report No. P-578.1 (April 1988) is a report to the legislature on the Department of Social Services' procedure to minimize the trauma of residents transferred from residential facilities and community care facilities for the elderly, upon the temporary suspension of a facility's license. The audit reviewed Department actions with regard to 34 facilities issued suspension orders during the period July 1, 1986, to September 30, 1987. In 33 of the 34 cases, the Department timely notified placement agencies or client advocacy groups whose representatives were able to aid in the relocation. The audit determined that this procedure minimized the transfer trauma for residents forced to change facilities.

The audit also focused on whether the Department consults with physicians and surgeons concerning immediate removal of residents as required by statute when the Department finds that residents are not receiving proper medical care. Auditors found that in five of the six cases reviewed, the Department did not consult with the proper medical professionals, nor did it order the removal of residents in need of medical attention. The Department responded to the allegations by stating that it interprets the statute as requiring consultation only when Department staff are concerned that a resident may be in a life-threatening situation. However, auditors found that the Department has not developed written procedures or guidelines which clearly outline this statutory interpretation. Therefore, the report recommends that the Department specify the circumstances under which staff members should request onsite consultation with appropriate medical professionals.

Report No. P-741 (April 1988) concerns the activities of state agencies in contracting with Positive Incident Control (PIC), a contractor for hazardous waste clean-up. The audit revealed that the Department of Transportation (CalTrans) and the Department of Fish and Game (DFG) overpaid PIC by nearly \$80,000.

The overpayments resulted primarily from the failure of state personnel to verify the accuracy of invoices submitted by PIC. In one instance, the contractor was paid approximately \$58,000 by DFG for services it did not render in the clean-up of a 1984 spill in Santa Bar-

bara. The overpayment included charges for the services of eight subcontractors performed at another site and for which DFG had already paid. The audit also discovered that both departments were billed twice for the services of a chemist.

Additionally, auditors found that CalTrans did not seek competitive bids or obtain the required approval from the Department of General Services for its clean-up contracts. And while DFG is the lead agency responsible for all off-highway spills, it has not procured contracts or interagency agreements for cleaning up these spills. It instead relies on its wildlife protection personnel to determine at the time of a particular spill which contractor is appropriate to do the clean-up. In the 1984 Santa Barbara spill, the wildlife protection representative directed PIC to clean up the spill without first formally contracting with PIC or even obtaining a written agreement regarding expected costs.

Auditors also found that DFG representatives did not remain at the spill site throughout the clean-up process to fully document PIC's use of personnel and equipment as required by the state's Hazardous Material Incident Contingency Plan. In leaving the site, representatives failed in their responsibilities to ensure that the spills were effectively and economically cleaned up.

The report reveals that CalTrans and the Department of Health Services (DHS) have yet to recover from the responsible parties funds spent on the Santa Barbara spill clean-up. In 1986, CalTrans turned the matter over to a collection agency which has yet to recover any of the \$87,000 spent on clean-up. DHS did not file a complaint against the responsible parties until December 1987, although the complaint seeks recovery of approximately \$355,000 paid to PIC for the clean-up.

As the audit progressed, CalTrans took action to correct some of the problems identified, including the issuing of instructions to district directors to ensure that invoices are accurate before payment is approved. Also, the contract bid specifications for fiscal year 1988-89 will provide for competitive bidding.

The report's recommendations to the DFG include the following:

- DFG should require its onsite representative to document work performed throughout the clean-up process, and to use this documentation to verify each contractor's invoices;

- DFG should review its responsibilities under the state's Hazardous Material Incident Contingency Plan, and establish

procedures to either contract with clean-up contractors itself or enter into interagency agreements to use other agencies' contractors.

One DFG response to the audit was to revise its Oil and Hazardous Material Spill Contingency Plan to include provisions for training its regional personnel in the documentation of spill clean-ups and the verification of invoices. The Department also plans to examine the potential benefits which might be derived from interagency agreements with CalTrans and DHS.

Workers' Compensation Program. The Joint Legislative Audit Committee has instructed the Auditor General to conduct a comprehensive review of the state's Workers' Compensation Program. The audit will provide legislators with a picture of what happens to an injured worker from the time of injury to resolution of the claim.

The Commission on California State Government Organization and Economy (the Little Hoover Commission) recently completed its own review of the compensation system (see CRLR Vol. 8, No. 2 (Spring 1988) p. 33). The Commission concluded that the increase in the costs of the system may be "threatening the system's viability." The annual number of civil filings for workers' compensation claims is surpassed only by Los Angeles County Superior Court's civil division.

OAG staff will focus on discovering the most cost-effective means of handling the enormous quantity of compensation claims processed through the system annually. The audit will also examine the staffing needs at the 22 Workers' Compensation Appeals Board offices. A final report is due shortly.

Report No. P-761 (May 1988) reviews the DFG's Private Lands Wildlife Management (PLM) area program. The program's goal is to encourage the conservation, propagation, and use of wildlife resources on private lands by offering incentives to private landowners who improve wildlife habitats on their land. As of October 1987, the program consisted of 54 PLMs encompassing approximately 694,000 acres.

The audit found that DFG has no written criteria for measuring whether the program's objectives are being met in a PLM area. However, DFG told auditors that the effectiveness of the PLM program may be measured by the number of acres in preservation under the program and whether the wildlife habitat in those areas has been improved.

The audit concludes that these criteria are "limited." For example, the preser-



vation criterion only accounts for acreage currently protected. There is no guarantee that the habitats will continue to be protected in the future because program participants may (and do) voluntarily withdraw. Additionally, DFG does not always document its inspections of PLM areas, making it nearly impossible for auditors to ascertain whether all habitat improvements reported under the program were actually accomplished. However, auditors visited ten PLM areas and observed that the landowners had "generally made the planned improvements."

Auditors also discovered that since the inception of the program in 1984, fees for PLM licenses and hunting tags and seals have not covered the costs of administering the program as required by law. Additionally, not all DFG personnel costs incurred in administering the program were charged to the PLM account. If those costs had been correctly charged, it is estimated that the program deficit for fiscal year 1986-87 would have been \$76,000, rather than \$34,000 as reflected in DFG records.

In addition, the report reveals that some inconsistencies exist in the regulations governing the PLM program. For example, the California Code of Regulations requires DFG to issue licenses to program participants annually, whereas the California Fish and Game Code provides that the licenses are valid for three years. Other sections of both codes were found to contain ambiguous language regarding the descriptions of wildlife required to be included in PLM plans and the collection of fees for hunting tags and seals in PLM areas.

The following improvements were recommended in the audit:

- Development of written criteria for evaluating the success of the program;

- Documentation of PLM area inspection visits, to include whether each planned improvement has been accomplished;

- Reassessment of DFG's fee structure for PLM licenses and hunting tags and seals to ensure that the program pays for itself;

- Improvement in accounting procedures to include personnel costs incurred in administering the program in the PLM account; and

- Clarification of the regulations governing the PLM program to remove existing ambiguities.

OAG staff members were also asked to determine whether illegal hunting was occurring on wildlife refuges located in

PLM areas. No such violations were discovered.

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY (LITTLE HOOVER COMMISSION)

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The Little Hoover Commission was created by the legislature in 1961 and became operational in the spring of 1962. (Government Code sections 8501 *et seq.*) Although considered to be within the executive branch of state government for budgetary purposes, the law states that "the Commission shall not be subject to the control or direction of any officer or employee of the executive branch except in connection with the appropriation of funds approved by the Legislature." (Government Code section 8502.)

Statute provides that no more than seven of the thirteen members of the Commission may be from the same political party. The Governor appoints five citizen members, and the legislature appoints four citizen members. The balance of the membership is comprised of two Senators and two Assemblymembers.

This unique formulation enables the Commission to be California's only real, independent watchdog agency. However, in spite of its statutory independence, the Commission remains a purely advisory entity only empowered to make recommendations.

The purpose and duties of the Commission are set forth in Government Code section 8521. The Code states: "It is the purpose of the Legislature in creating the Commission, to secure assistance for the Governor and itself in promoting economy, efficiency and improved service in the transaction of the public business in the various departments, agencies, and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies, and instrumentalities and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives...."

The Commission seeks to achieve these ends by conducting studies and making recommendations as to the adoption of methods and procedures to

reduce government expenditures, the elimination of functional and service duplication, the abolition of unnecessary services, programs and functions, the definition or redefinition of public officials' duties and responsibilities, and the reorganization and or restructuring of state entities and programs.

MAJOR PROJECTS:

Workers' Compensation Program. Following issuance of the Commission's report on California's Workers' Compensation Program (see CRLR Vol. 8, No. 2 (Spring 1988) p. 33), the Joint Legislative Audit Committee announced in April that it has instructed the Auditor General to conduct a comprehensive audit of the program (see *supra* agency report on OFFICE OF THE AUDITOR GENERAL).

A Report on the Planning, Operation and Funding of California's Highway System (March 1988) examines the causes of the severe backlog in state transportation projects and the resultant impending transportation crisis. Commenting on the report's findings, Chairperson Shapell stated that "the crisis is the result of years of inadequate planning, unnecessary bureaucracy and missed opportunities to accelerate highway development."

The study revealed that although the shortfall in highway revenues is estimated to reach \$800 million to \$1.8 billion annually between 1988 and the year 2000, the crisis is more than financial. Twenty-five percent of state-funded highway projects and 60% of locally-funded projects are currently behind schedule primarily because of "CalTrans' inability to contract out project development work, the State's duplicative and overly burdensome environmental review processes, and the State's overcommitment of existing resources on highway projects."

The Commission estimates that between 1985 and the year 2000, the number of licensed drivers in the state will increase from 17.45 million to 22.10 million (26.6%). During the same time period, the number of vehicle miles travelled annually will increase by 30.5%. Yet the study revealed that CalTrans does not have an adequate long-term transportation plan because it expends "the bulk of its resources" on short-range and year-to-year planning.

Moreover, the study concludes that in its short-range planning, CalTrans "is not aggressively pursuing immediate options to reduce traffic congestion." While available now, transportation