



INTERNAL GOVERNMENT REVIEW OF AGENCIES

and OAL within ten days of receipt of the decision which is being appealed.

Within ten days of its receipt of the request for review, OAL must submit a written response to the Governor's Office and the agency appealing the decision. The Governor's Office then has fifteen days in which to provide a written determination concerning the challenged OAL decision.

On December 3, 1987, OAL disapproved simulcast wagering regulations adopted by the California Horse Racing Board (CHRB). (See *infra* agency report on CHRB; see also CRLR Vol. 7, No. 3 (Summer 1987) pp. 127-28 and Vol. 7, No. 2 (Spring 1987) p. 101 for background information.) In its written decision, OAL noted that in adopting the rejected provisions, which would have been contained in new Article 24, Title 4 of the California Code of Regulations, CHRB failed to satisfy APA notice and clarity requirements; failed to adequately substantiate fiscal impact in its accompanying rulemaking file; and "establishe[d] prescriptive standards without the necessary consideration of performance standards as alternatives."

The focal point of the CHRB's subsequent appeal, as well as OAL's response to that appeal, appeared to be OAL's finding that the CHRB's Notice of Proposed Regulatory Action "was invalidated by a legislative modification of the regulatory authority upon which the proposal was based." Specifically, OAL found that "the Board took public testimony on and adopted the simulcast wagering regulations, but before the regulations could become effective, the Legislature significantly changed the statutory authorization in the Horse Racing Law for simulcast wagering, through the enactment of Chapter 1273 of the statutes of 1987, an urgency statute which became effective September 28, 1987."

In its response to this finding, the CHRB noted, *inter alia*, that "[OAL did] not assert any actual conflict between the adopted regulations and the statutes as amended by Chapter 1273." OAL countered that "failure of the Board to renounce the simulcast wagering regulations after the Legislature changed the statutes upon which the regulations were based deprived interested members of the public of a meaningful opportunity to participate in the rulemaking process for the regulations. An approval of the Board's simulcast wagering regulations under these circumstances would be akin to an approval of a change in the rules of a game after the game is over...."

In addition to appealing OAL's decision to the Governor's Office, which extended the deadline for completion of its review until March 22, the CHRB recently announced in its 1987 Annual Report that it intends to seek an exemption from adherence to the APA rulemaking requirements (including OAL approval) when it is promulgating procedural regulations to establish or revise a form of parimutuel wagering.

LEGISLATION:

SB 1754 (Morgan), OAL-sponsored legislation which was introduced on January 13, would have established a procedure for OAL repeal of existing regulations for which the statutory authority has been repealed or sunsetted. On March 7, an aide to Senator Morgan indicated that the bill will be dropped.

AB 2732 (Felando) represents an alternative approach to addressing problems created by the repeal or sunset of statutory authority for existing regulations. This bill, which has passed out of policy committee and is pending before the Assembly Ways and Means Committee as of this writing, would provide that "whenever a statute is repealed or, by its own terms, becomes ineffective or inoperative, any regulation adopted to implement, interpret, make specific, or otherwise carry out the provisions of the statute shall also be deemed, by operation of law, repealed, ineffective, or inoperative, as the case may be."

The measure, which may be amended in the Ways and Means Committee to accommodate concerns of the Franchise Tax Board, would also provide for the temporary repeal of any regulation for which the statutory authority has been temporarily repealed or rendered ineffective or inoperative by a provision of law which is effective only for a limited period.

LITIGATION:

A recently-consolidated lawsuit (see CRLR Vol. 8, No. 1 (Winter 1988) p. 36) challenging the validity of an OAL-approved regulation defining the scope of chiropractic practice remains in its pleading stage in Sacramento Superior Court. Rulings on defendant OAL's motions to strike and demurrers were anticipated by the end of March in *California Chapter of the American Physical Therapy Association (APTA) v. California, et al.* (See also CRLR Vol. 7, No. 4 (Fall 1987) at pp. 30 and 100.)

Plaintiffs in the actions, which identify a number of substantive and procedural issues concerning section 302 of

the regulations administered by the Board of Chiropractic Examiners, include APTA, the California Medical Association, the Physical Therapy Examining Committee, and the Board of Medical Quality Assurance.

OFFICE OF THE AUDITOR GENERAL

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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-758 (January 1988) concerns the need for the California Public Utilities Commission (PUC) to more fully report the work statistics it

uses to support its annual budget requests. The PUC reports the results of its regulatory activities in the Governor's budget in the form of "performance measures." As examples of these performance measures, the PUC reports its ratesetting activities in part by the number of decisions the Commission has issued in rate cases. The Commission's safety monitoring activities are reported in part by the number of inspections performed for "gas safety."

The audit shows that the Commission reports 65 performance measures for the program elements of regulation of utility and transportation rates, and licensing of transportation. After comparing the staff hours summarized in the standard time-reporting system for fiscal year 1986-87 to the data for performance measures reported in the same fiscal year, OAG staff found that some of the performance measures only partially describe the Commission's work. One weak area was in the reporting of performance measures for the number of decisions issued by the Commission. The audit found that because the measures do not indicate that PUC staff worked on other cases which did not result in decisions, the performance measures are only partially descriptive of the Commission's work in this area. In fact, the audit found that the performance measures reported for fiscal year 1986-87 proceedings for three utility industries reflected only 28% of total staff hours charged for the proceedings.

The inaccuracy of the performance measures misleads the reader of the Commission's budget, in that the reader is unable to assess the amount and variation in staffing needed by the Commission to perform its work. The audit also found the budget misleading in that the PUC only reports the total number of decisions issued without submitting an analysis of the staff time required to process the individual decisions. Thus, proceedings resulting in decisions look the same on budget paper, when in fact one proceeding may have taken six times the usual number of staff hours to process.

Another significant problem discovered by the audit relates to the accuracy of the data used in performance measure reporting. The audit reviewed 47 performance measures for fiscal year 1986-87 for accuracy, and found that 21% of the measures contained error rates of 5% or greater.

The audit recommends that the performance measures be modified to ensure that the measures more fully describe the Commission's work and are accurate

in the data they report.

The legislature also requested OAG staff to review the Commission's compliance with twelve statutes passed between 1983 and 1986. Auditors found that the PUC completely fulfilled the requirements of nine statutes, but did not meet four requirements in three statutes, including the following:

- Conducting a study on the availability and cost of insurance required for certain segments of the transportation industry regulated by the Commission. The study was not completed because insurance companies did not provide necessary information requested by the PUC. The Commission has asked the statute's author to assist it in obtaining the information, and anticipates filing the final required report by June 1988.

- Reviewing all the computer operations programs used by public utilities to analyze the costs of operations and to justify proposed rate changes. As of December 1, 1987, the Commission had reviewed the programs of six large utilities but had not reviewed the operations programs of all the public utilities it regulates. The PUC reported to the legislature its plans to focus first on the six largest utilities and then on the smaller utilities when that would be a cost-effective use of funds and personnel. The PUC's executive director informed OAG staff that the legislature did not criticize or suggest changes to the Commission's plans.

- Section 739(c) of the Public Utilities Code requires that the rates for a basic level of service (baseline rates) be set at 15-25% below the average rate. The Commission has yet to set some baseline rates for residential gas usage, although its executive director and general counsel report that it is gradually phasing in the baseline rates. The slow response to the statutory mandate in this area is attributed to Commission concerns that the discount would raise the rates for other levels of service to cover the lower costs for the basic level of service. Also, a legislative resolution requested the Commission to limit rate increases to 5%.

The audit recommends that the Commission reassess its statutory responsibility to review computer operations programs of public utilities, and to report to the legislature within one year on its progress in implementing required baseline rates.

PUC's Executive Director Victor Weisser agreed with the audit's recommendations and will immediately begin to implement them.

Report No. P-750 (February 1988)
details OAG's review of the Department of Social Services' regulation of four group homes for children in Santa Barbara County. The review was prompted by allegations that the licensees operating the homes had committed fraud and forgery and had engaged in pornographic activities. The County's grand jury conducted an investigation and expressed concern that a "breakdown existed in the Department's monitoring of group homes."

The four group homes were all licensed to the same married couple. In April 1987, the licensees voluntarily surrendered their licenses for three of the homes after informal conferences with Department staff concerning violations. The Department then denied the licensees' application for renewal of their license on the fourth home, which would have expired in August 1987. The denial was based on the licensees' failure to provide proper care and supervision, failure to obtain and submit the fingerprints of new employees, failure to report unusual incidents, failure to employ competent staff, and failure to administer the homes in compliance with state requirements. The fourth home was closed on June 12, 1987.

OAG reviewed the Department's files on the four group homes to determine whether the Department properly licensed and monitored the four homes, "properly responded to complaints filed against the group home, and took appropriate administrative action against the licensees for any confirmed violations of state licensing requirements." In response to the grand jury's recommendation that the licensees' eligibility for nonprofit tax treatment be investigated, OAG staff reviewed records at the Secretary of State's office to determine the status of the licensees' nonprofit corporation. OAG staff attempted to contact the licensees in order to audit the corporation's financial records, but were told that they have left the state.

The audit concluded that the Department properly licensed the four group homes, conducted all required annual inspections, conducted on-site inspections in response to all complaints filed, and took appropriate action against the homes for violations of licensing laws and regulations.

Report No. P-715 (February 1988)
follows OAG's March 1985 report (No. P-441) on the efficiency of the state Department of Mental Health's system for billing private health insurers. In the previous report, OAG staff found



that the Department did not ensure that counties comply with state requirements for collecting revenue from health insurers, with the result that counties were not billing insurers for the full cost of treatment. The 1985 report recommended that the Department take measures to ensure that counties obtain necessary billing information from clients at the time and place clients receive services, bill insurers, and follow up on unpaid claims.

Report No. P-715 involves an audit of the mental health programs of three counties for fiscal year 1985-86 to determine whether OAG recommendations have been implemented by the Department. The three counties included in the audit were Alameda, Los Angeles, and San Francisco.

OAG staff found that the Department has not implemented the recommendations. As a result of the Department's failure to enforce state requirements for billing health insurers for mental health treatment, OAG estimates that the state's mental health system lost \$653,000 in collectible revenue during fiscal year 1985-86 for the three audited counties alone.

Additionally, OAG staff report that in two of the three counties reviewed, the Department's information system, known as the Client Data System (CDS), contained inaccurate information about whether clients entering the mental health system have health insurance. For example, CDS reported that only 3.7% of clients entering mental health programs in Los Angeles County in fiscal year 1985-86 had health insurance. OAG staff estimate that 12.4% had insurance. Consequently, users of the CDS system, including the Governor and the legislature, base budget and other decisions on incorrect information.

The report concludes that the Department's information is inaccurate because of the lack of clear guidelines from the Department to the counties on reporting potential sources of payment for treatment. Staff also found no internal audit system to ensure that the information received by the Department accurately reflects the information in the counties' files.

Recommendations to the Department resulting from this most recent review include:

- Implementing OAG's March 1985 recommendations for monitoring the counties' billing practices;

- Monitoring counties to ensure compliance with established billing procedures for members of health maintenance organizations;

- Imposing administrative sanctions to enforce state requirements if counties do not comply with required billing procedures; and

- Ensuring that information in its Client Data System is correct.

In response to Report P-715, the Department states that it believes OAG failed to fully recognize the progress it has made in collecting revenue from sources other than private insurance. Additionally, the Department believes that its CDS is "still too new to play a major role in program management."

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 depart-

ments, 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:

Twenty-Fifth Year Anniversary Report. The Commission recently released its annual report celebrating the 25th anniversary of its creation. The commemorative issue summarizes the Commission's role, responsibilities, and activities, and describes how the Commission carries out its business operations. The major accomplishments of the Commission are also highlighted.

State Public Defender's Office. On March 16, the Commission held a public hearing on the organization and operation of the Office of the State Public Defender. Testimony was presented by current and former members of the Office, as well as private legal counsel and administrators of the state and federal judiciary. The Commission will soon issue a report on the subject.

Community Residential Care Facility. The Commission met in Santa Ana on February 26 to conduct a public hearing to review the state's role in community residential care. Testimony at the hearing focused on the adequacy of care provided by residential care facilities and the state's enforcement of licensing requirements. A report will follow.

Nursing Home Care. In its continuing look at the quality of care provided to residents of nursing homes (see CRLR Vol. 7, No. 3 (Summer 1987) p. 51 and Vol. 7, No. 1 (Winter 1987) p. 29 for background information), the Commission is now reviewing the quality of medical care provided at these facilities.

The study will focus on the quality of care, or lack of care of any quality, provided in the facilities by physicians, registered nurses, nurse practitioners, and other medical professionals. Requirements for oversight of the facilities