

SUNSET EVALUATION REPORT
NURSING HOME ADMINISTRATORS
Chapter 457B, Hawaii Revised Statutes

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by the
Legislative Auditor of the State of Hawaii

Report No. 81-4
January 1981

FOREWORD

Under the "sunset law," licensing boards and commissions and regulated programs are terminated at specified times unless they are reestablished by the Legislature. Nationally, the first sunset law was passed in 1976. Within three years, 30 more states had enacted similar legislation. The rapid spread of sunset legislation reflects increasing public concern with what it sees as unwarranted government interference in everyday activities.

Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, terminated 38 occupational licensing programs over a six-year period. These programs are repealed unless they are specifically reestablished by the Legislature. In 1979, the Legislature assigned the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.

This report evaluates the regulation of nursing home administrators under Chapter 457B, Hawaii Revised Statutes. It presents our findings as to whether the program complies with the Sunset Law and whether there is a reasonable need to regulate nursing home administrators to protect public health, safety, or welfare. It includes our recommendation on whether the program should be continued, modified, or repealed.

Our approach to the evaluation of the regulation of nursing home administrators is described in Chapter 1 of this report under "Framework for Evaluation." That framework will also serve as the framework for conducting subsequent evaluations. We used the policies enunciated by the Legislature in the Sunset Law to develop our framework for evaluation. The first and basic test we applied was whether there existed an identifiable potential danger to public health, safety, or welfare arising from the conduct of the occupation or profession being regulated. Then the other criteria for evaluation were applied.

We acknowledge the cooperation and assistance extended to our staff by the Department of Regulatory Agencies and other officials contacted during the course of our examination.

Clinton T. Tanimura
Legislative Auditor
State of Hawaii

January 1981

TABLE OF CONTENTS

<i>Chapter</i>		<i>Page</i>
1	INTRODUCTION	
	Objective of the Evaluation	1
	Scope of the Evaluation	1
	Organization of the Report	1
	Framework for Evaluation	2
2	BACKGROUND	
	Federal Mandate	7
	Federal Requirements on Licensing of Nursing Home Administrators	9
	Model Law for State Licensing	10
	Hawaii Legislative History	10
	Provisions of Chapter 457B, HRS	11
	Role of Other Agencies	13
3	EVALUATION OF THE REGULATION OF NURSING HOME ADMINISTRATORS, CHAPTER 457B, HAWAII REVISED STATUTES	
	Summary of Findings	15
	Need for Regulation	15
	Disparate Treatment of Applicants	16
	Monitoring of Program	20
	Recommendations	21
	Appendix – Responses of Affected Agencies	23

Chapter 1

INTRODUCTION

The Hawaii Regulatory Licensing Reform Act of 1977, or Sunset Law, repeals statutes concerning 38 state licensing boards and commissions over a six-year period. Each year, six to eight licensing statutes are scheduled to be repealed unless specifically reenacted by the Legislature.

In 1979, the Legislature amended the law to make the Legislative Auditor responsible for evaluating each licensing program prior to its repeal and to recommend to the Legislature whether the statute should be reenacted, modified, or permitted to expire as scheduled. In 1980, the Legislature further amended the law to require the Legislative Auditor to evaluate the effectiveness and efficiency of the licensing program, even if he determines that the program should not be reenacted.

Objective of the Evaluation

The objective of the evaluation is: To determine whether, in light of the policies set forth in the Sunset Law, the public interest is best served by reenactment, modification, or repeal of Chapter 457B.

Scope of the Evaluation

This report examines the history of the statute on licensing of nursing home administrators and the public health, safety, or welfare that the statute was designed to protect. It then assesses the effectiveness of the statute in preventing public injury and the continuing need for the statute.

Organization of the Report

This report consists of three chapters: Chapter 1, this introduction and the framework developed for evaluating the licensing program; Chapter 2, background information on the regulated industry and the enabling legislation; and Chapter 3, our evaluation and recommendation.

Framework for Evaluation

Hawaii's Regulatory Licensing Reform Act of 1977, or Sunset Law, reflects rising public antipathy toward what is seen as unwarranted government interference in citizens' lives. The Sunset Law sets up a timetable terminating various occupational licensing boards. Unless reestablished, the boards disappear or "sunset" at a prescribed moment in time.

In the Sunset Law, the Legislature established policies on the regulation of professions and vocations. The law requires that each occupational licensing program be assessed against these policies in determining whether the program should be reestablished or permitted to expire as scheduled. These policies, as amended in 1980, are:

1. The regulation and licensing of professions and vocations by the State shall be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation shall be the protection of the public welfare and not that of the regulated profession or vocation.

2. Where regulation of professions and vocations is reasonably necessary to protect consumers, government regulation in the form of full licensure or other restrictions on the professions or vocations should be retained or adopted.

3. Professional and vocational regulation shall be imposed where necessary to protect consumers who, because of a variety of circumstances, may be at a disadvantage in choosing or relying on the provider of the services.

4. Evidence of abuses by providers of the services shall be accorded great weight in determining whether government regulation is desirable.

5. Professional and vocational regulation which artificially increases the costs of goods and services to the consumer should be avoided.

6. Professional and vocational regulation should be eliminated where its benefits to consumers are outweighed by its costs to taxpayers.

7. Regulation shall not unreasonably restrict entry into professions and vocations by all qualified persons.

We translated these policy statements into the following framework for evaluating the continuing need for the various occupational licensing statutes.

Licensing of an occupation or profession is warranted if:

1. There exists an identifiable potential danger to public health, safety, or welfare arising from the operation or conduct of the occupation or profession.
2. The public that is likely to be harmed is the consuming public.
3. The potential harm is not one against which the public can reasonably be expected to protect itself.
4. There is a reasonable relationship between licensing and protection of the public from potential harm.
5. Licensing is superior to other optional ways of restricting the profession or vocation to protect the public from the potential harm.
6. The benefits of licensing outweigh its costs.

The potential harm. For each regulatory program under review, the initial task is to identify the purpose of regulation and the dangers from which the public is intended to be protected.

Not all potential dangers warrant the exercise of the State's licensing powers. The exercise of such powers is justified only when the potential harm is to public health, safety, or welfare. "Health" and "safety" are fairly well understood. "Welfare" means well-being in any respect and includes physical, social, and economic well-being.

This policy that the potential danger be to the public health, safety, or welfare is a restatement of general case law. As a general rule, a state may exercise its police power and impose occupational licensing requirements only if such requirements tend to promote the public health, safety, or welfare. Under particular fact situations and statutory enactments, courts have held that licensing requirements for paperhangers, housepainters, operators of public dancing schools, florists, and private land surveyors could not be justified.¹ In Hawaii, the State Supreme Court in 1935 ruled that legislation requiring photographers to be licensed bore no reasonable relationship to public health, safety, or welfare and constituted an unconstitutional encroachment on the right of individuals to pursue an innocent profession.² The court held that mere interest in

1. See discussion in 51 *American Jurisprudence*, 2d., "Licenses and Permits", Sec. 14.

2. *Terr. v. Fritz Kraft*, 33 Haw. 397.

maintaining honesty in the practice of photography or in ensuring quality in professional photography did not justify the use of the State's licensing powers.

The public. The Sunset Law states that for the exercise of the State's licensing powers to be justified, not only must there be some potential harm to public health, safety, or welfare, but also the potential harm must be to the health, safety, or welfare of that segment of the public consisting mainly of consumers of the services rendered by the regulated occupation or profession. The law makes it clear that the focus of protection should be the consuming public and not the regulated occupation or profession itself.

Consumers are all those who may be affected by the services rendered by the regulated occupation or profession. Consumers are not restricted to those who purchase the services directly. The provider of services may have a direct contractual relationship with a third party and not with the consumer, but the criterion set forth here may be met if the provider's services ultimately flow to and adversely affect the consumer. For example, the services of an automobile mechanic working for a garage or for a U-drive establishment flow directly to his employer, but his workmanship ultimately affects the consumer who brings a car in to his employer for repairs or who rents a car from his employer. If all other criteria set forth in the framework are met, the potential danger of poor workmanship to the consuming public *may* qualify an auto mechanic licensing statute for reenactment or continuance.

Consumer disadvantage. The consuming public does not require the protection afforded by the exercise of the State's licensing powers if the potential harm is one from which the consumers can reasonably be expected adequately to protect themselves. Consumers are expected to be able to protect themselves unless they are at a disadvantage in selecting or dealing with the provider of services.

Consumer disadvantage can arise from a variety of circumstances. It may result from a characteristic of the consumer or from the nature of the occupation or profession being regulated. Age is an example of consumer characteristic which may cause the consumer to be at a disadvantage. Highly technical and complex nature of the occupation is an illustration of occupational character that may result in the consumer being at a disadvantage. Medicine and law fit into the latter illustration. Medicine and law were the first occupations to be licensed on the theory that the general public lacked sufficient knowledge about medicine and law to enable them to make judgments about the relative competencies of doctors and lawyers and about the quality of services provided them by the doctors and lawyers of their choice.

However, unless otherwise indicated, consumers are generally assumed to be knowledgeable and able to make rational choices and to assess the quality of services being provided them.

Relationship between licensing and protection. Occupational licensing cannot be justified unless it reasonably protects the consumers from the identified potential harm. If the potential harm to the consumer is physical injury arising from possible lack of competence on the part of the provider of service, the licensing requirement must ensure the competence of the provider. If, on the other hand, the potential harm is the likelihood of fraud, the licensing requirements must be such as to minimize the opportunities for fraud.

Alternatives. Depending on the harm to be protected against, licensing may not be the most suitable form of protection for the consumers. Rather than licensing, the prohibition of certain business practices, governmental inspection, or the inclusion of the occupation within some other existing business regulatory statute may be preferable, appropriate, or more effective in providing protection to the consumers. Increasing the powers, duties, or role of the consumer protector is another possibility. For some programs, a nonregulatory approach may be appropriate, such as consumer education.

Benefit-costs. Even when all other criteria set forth in this framework are met, the exercise of the State's licensing powers may not be justified if the costs of doing so outweigh the benefits to be gained from such exercise of power. The term, "costs," in this regard means more than direct money outlays or expenditure for a licensing program; "Costs" includes opportunity costs or all real resources used up by the licensing program; it includes indirect, spillover, and secondary costs. Thus, the Sunset Law asserts that regulation which artificially increases the costs of goods and services to the consumer should be avoided; and regulation should not unreasonably restrict entry into professions and vocations by all qualified persons.

Chapter 2

BACKGROUND

Chapter 457B, HRS, regulates nursing home administrators. A nursing home administrator is statutorily defined as "the individual responsible for the planning, organizing, directing, and controlling of the operation of a nursing home." The statute does not define what a nursing home is, but the rules and regulations promulgated to implement Chapter 457B define a nursing home as "a place authorized as such by the appropriate licensing authority of this State for the care of patients requiring continued nursing and/or health care such as a skilled nursing facility or an intermediate care facility." For reasons stated below, Chapter 457B does not apply to an administrator of a nursing home which is a distinct part of a hospital.

In 1980 there were 44 nursing home administrators licensed to practice in the State. In the same year, there were 16 nursing homes, not connected with any hospital (freestanding nursing homes), and 18 nursing homes connected with hospitals. In addition, there was one intermediate care facility for the mentally retarded which enjoyed the status of a hospital.

Federal Mandate

Hawaii's licensing statute for nursing home administrators was enacted to comply with federal requirements for state participation in the Medicaid program.

Both Title XVIII (Medicare) and Title XIX (Medicaid) of the Social Security Act provide financing for the medical and health care of the elderly and the poor, including care in nursing homes. However, Medicare provides payments only for a limited duration. It provides payments only for nursing home care which is an extension of inpatient hospital care. On the other hand, Medicaid provides payment for the nursing home care of those eligible for as long as necessary. Thus, of the two, Medicaid has a substantially greater financial impact insofar as the nursing home care of the elderly and the poor is concerned.

In Hawaii, the financial impact of the Medicaid program is illustrated by the following. An estimated 95 percent of the patients in intermediate care facilities and 90 percent of the patients in skilled nursing facilities are Medicaid-supported. (About 5 percent of the patients in skilled nursing facilities are Medicare-supported.) In 1977-78, Medicaid expenditures for nursing home care in Hawaii totaled \$37.7 million. Of this, the federal share was about 50 percent, or over \$18 million.

The substantial financial impact of the Medicare-Medicaid program, particularly the Medicaid program, stimulated a tremendous growth in the number of nursing homes. This growth, however, was not all praiseworthy. Investigations by congressional committees and other public bodies disclosed abuses in the operation of nursing homes.

Among the problems disclosed were the lack of meaningful programs and activities for the patients, untrained and inadequate staff, ineffective inspection of facilities and enforcement of regulations, unsanitary conditions, poor food, lack of protection from fire and other hazards, excessive charges, profiteering, lack of controls over drugs, poor and negligent care leading to deaths and injury, use of unnecessary force, theft, reprisals, and assaults on human dignity.

These abuses in nursing homes were not isolated instances. A congressional study estimated that 50 percent of the nursing homes were substandard with one or more life-threatening situations.

To reduce these problems and to assure quality care of public assistance recipients in nursing homes, Congress amended the Medicaid legislation in 1967. The amendments were broad in scope, touching on numerous aspects of nursing home care and operations. The amendments imposed standards and conditions which the states and nursing homes were required to meet in order to receive Medicaid funds. Among the standards and conditions were:

- . operational standards for nursing homes, including standards for recordkeeping, meal planning, supervision of patients, and patient rights;
- . requirements for periodic medical reviews of nursing homes;
- . mandatory state licensure of nursing homes; and
- . mandatory state licensing of nursing home administrators.

Chapter 457B, HRS, was enacted to comply with the last of the above-enumerated requirements.

Federal Requirements on Licensing of Nursing Home Administrators

Congress imposed the requirement that nursing home administrators be licensed by the states, because such administrators generally do the hiring and firing of staff, ordering of food, scheduling of visits by physicians, and setting of standards, and thus are an important determinant of the quality of care patients receive at nursing homes.

Federal regulations¹ promulgated to implement the requirement that states license the nursing home administrators provide as follows. The licensing body must be that agency designated under the "healing arts act" of the state or a state licensing board. If a board, the board must be composed of persons representing professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients. However, a majority of the members may not be representatives of a single profession or of a category of institutions. Members other than those representing institutions may not have a direct financial interest in any nursing home. Nursing home administrators are considered representatives of institutions.

The agency or board is required to develop, impose, and enforce standards that must be met by individuals to be licensed as nursing home administrators. The standards must be such as to insure that nursing home administrators will be those who are of good character and otherwise suitable, and who, by training or experience in institutional administration, are qualified to serve as nursing home administrators.

The licensing agency or board must also (1) develop procedures for determining if persons meet the licensing standards, (2) have power to revoke licenses for failure to meet standards, (3) develop guidelines for the issuance of provisional licenses, (4) establish procedures to insure that licensed nursing home administrators comply with prescribed standards when serving as nursing home administrators, (5) have authority to investigate and take action on all complaints or violations of standards, and (6) conduct a continuing study of nursing homes and of administrators within the State to improve licensing standards and the procedures and methods for enforcing the standards.

The federal law on licensing of nursing home administrators apply only to administrators of freestanding nursing homes. The law expressly exempts administrators of nursing homes connected with hospitals from any state licensing provisions.

1. 42 C.F.R., 431.700 to 431.715.

Model Law for State Licensing

The Medicaid amendments established a National Advisory Council for Nursing Home Administration (NAC-NHA). It was initially intended that this council would advise the U.S. Department of Health and Human Services (DHHS)² in developing licensing standards and establishing rules and regulations to implement the licensing requirement. However, as it turned out, the development of standards and procedures was left to the states, and the council, instead, simply developed a model state law. The model law essentially echoes the federal regulations regarding licensing of nursing home administrators.

Hawaii Legislative History

Hawaii first enacted its statute to comply with the federal requirements in 1969.³ This initial statute placed the responsibility for licensing nursing home administrators in the Department of Health (DOH) by appropriate amendments to Chapter 46, RLH.⁴ This was done because DOH already had licensing responsibilities for a number of paramedical occupations, including, among others, laboratory directors, laboratory technicians, physical therapists, and sanitarians.

In 1970, the Legislature took the responsibility away from DOH and placed it in a board of examiners of nursing home administrators, and it put the board within the Department of Regulatory Agencies (DRA) for administrative purposes. The law as enacted in 1970 is embodied in Chapter 457B, HRS. The Legislature took this action on the advice of the Governor's Office that the law passed in 1969 did not meet federal requirements.⁵

The federal regulations provide that licensing of nursing home administrators must be accomplished by the state agency "designated under the healing arts act of the state" or by a state licensing board. Since physicians, nurses, and other health care professionals are licensed in Hawaii by licensing boards situated in DRA, it was felt that the federal regulations required that nursing home administrators also be licensed by a board within DRA.

2. Formerly the Department of Health, Education and Welfare (HEW).

3. Act 160, SLH 1969.

4. Chapter 46, Revised Laws of Hawaii, is now Chapter 321, Hawaii Revised Statutes.

5. House Standing Committee Report 399--70 on H.B. 659, *Senate Journal, Regular Session of 1970*, p. 959.

Provisions of Chapter 457B, HRS

Chapter 457B is based on the model law developed by NAC-NHA. Although Chapter 457B does not so expressly provide, in practice, in accordance with the federal statute, administrators of nursing homes which are a part of hospitals have been exempted from the provisions of the chapter. The major features of the chapter and the rules and regulations thereunder are as follows.

The Board of Examiners. The Board of Examiners of Nursing Home Administrators consists of seven members. The statute requires that two members be nursing home administrators duly licensed to practice in the State. In compliance with the law, currently there are two licensed nursing home administrators on the board. The remaining five are public members.

The statute restates the requirements of federal regulation in enumerating the powers and duties of the board. Thus, the statute provides that the board shall:

- (1) develop, impose, and enforce standards which must be met by individuals in order to receive a license as a nursing home administrator, which standards shall be designed to insure that nursing home administrators will be individuals who are of good character and are otherwise suitable, and who, by training or experience in the field of institutional administration, are qualified to serve as nursing home administrators;
- (2) develop and apply techniques, including examinations and investigations, for determining whether an individual meets such standards;
- (3) issue licenses to individuals determined to meet such standards, and revoke or suspend licenses where a licensee substantially fails to conform to such standards;
- (4) establish and carry out procedures designed to insure that licensees comply with such standards;
- (5) receive, investigate, and take appropriate action on any charge filed with the board that a licensee has failed to comply with such standards;
- (6) conduct a continuing study and investigation of nursing homes and nursing home administrators with a view to the improvement of standards imposed for the licensing of administrators and of procedures and methods for the enforcement of such standards with respect to administrators of nursing homes who have been licensed as such;
- (7) adopt rules and regulations as may be necessary for the purposes of this chapter; and
- (8) maintain a record of all its proceedings.

Licensing requirements. The board by rules has established the requirements for licensing. The rules as amended in June 1980 provide as follows.

Each applicant for a license must pass a written examination with a score of 75 in every part of this examination. The examination must cover (but need not be limited to) the following subjects: (1) applicable standards of environmental health and safety; (2) local health and safety regulations; (3) general administration; (4) psychology of patient care; (5) principles of medical care; (6) personal and social care; (7) therapeutic and supportive care and services to patients confined in nursing homes; (8) departmental organization and management; and (9) community interrelationships. The examination itself is a national examination developed by the National Association of the Board of Examiners for Nursing Home Administrators. This national examination, which consists of five parts, was selected by the board to facilitate reciprocity.

To be eligible to take the examination, however, an applicant must show "in writing and through an oral interview with the board," that the applicant (1) is over 21 years of age; (2) has met the educational requirements prescribed in the rules; and (3) has successfully completed a year of practical experience in the administration of a skilled nursing facility or intermediate care facility or has completed a year of practical training and experience as an "administrator-in-training," a program established in the rules.

The educational requirements prescribed in the rules are (1) successful completion of a course of study in the arts and sciences at an accredited institution of higher learning and possession of a baccalaureate degree and (2) successful completion of a board-approved, regular course of study or program in an accredited institution of higher learning, or successful completion of a board-approved, specialized course of study in the area of administration of a skilled nursing facility or intermediate care facility, which course of study includes the mandatory subject areas of the licensing examination. The educational requirements provided in the rules are deemed to have been met if the applicant possesses a master's degree in hospital administration or a master's degree in public health in the specialized field of gerontology or in the specialized field of administration of health care facilities, including a board-approved, three-semester-hour credit course in administration of a skilled nursing facility or intermediate care facility.

In addition to the above, an applicant for examination must submit three letters attesting to the applicant's moral character and evidence of physical and mental fitness to perform the duties of a nursing home administrator. The applicant must also submit

statements from employers attesting to the ability of the applicant to perform as a nursing home administrator.

Every license on initial issue expires on the ensuing June 30 of an even-numbered year. Thereafter, it is renewable on a two-year basis, expiring on June 30 of even-numbered years. For renewal, a licensee must show proof of having completed a 60-hour continuing education program as prescribed in the rules.

Role of Other Agencies

Chapter 457B and the Board of Examiners of Nursing Home Administrators are, as stated above, concerned only with the licensing of nursing home administrators. The implementation and enforcement of the other requirements of the 1967 amendments to the Medicaid law are the responsibility of other state agencies. Among the state agencies involved are the Department of Social Services and Housing (DSSH), DOH, the Department of Attorney General, and the Executive Office on Aging. In addition, the Hawaii Medical Service Association (HMSA), a private organization, has a role in the enforcement of federal requirements.

Briefly, DSSH, through medical review teams, is responsible for determining whether services in the nursing homes are adequate to meet the health needs of each patient and to promote the most effective and appropriate use of available services and facilities. DOH is responsible for licensing nursing homes. In evaluating nursing homes for certification and licensing, DOH reviews staffing, personnel policies, patient care, medical direction, dietetic services, social services, and other aspects of the nursing homes. The Department of Attorney General is concerned with Medicaid fraud. Through a Medicaid fraud control unit, it ferrets out, investigates, and prosecutes fraud cases. The Executive Office on Aging acts as an advocate for residents of long-term care facilities and seeks to resolve residents' complaints on matters relating to their health, safety, and welfare. HMSA, under a contract with the state Medicaid agency, in addition to paying claims as the fiscal intermediary in the Medicaid program, ferrets out fraudulent and abusive practices by auditing institutional providers.

Chapter 3

EVALUATION OF THE REGULATION OF NURSING HOME ADMINISTRATORS CHAPTER 457B, HAWAII REVISED STATUTES

This chapter contains our evaluation of the need for regulating home administrators, and some observations concerning the operations of the licensing program.

Summary of Findings

Our findings are as follows:

1. Chapter 457B cannot be sunsetted and must remain in force, if the State is to continue to participate in the federal Medicaid program.
2. There has been a disparate treatment of similarly situated applicants for admission to the licensing examination.
3. The board is not monitoring the activities of nursing home administrators.

Need for Regulation

Chapter 457B, HRS, was enacted to comply with federal requirements for state participation in the Medicaid program. The State would lose federal funding of costs for nursing home care if it discontinues licensing of administrators. This loss, over \$18 million in 1978 alone, would have an adverse effect on the taxpayers of the State and on the aged, the blind, the permanently disabled, and the medically needy.

For this reason, the licensing of nursing home administrators must continue. Chapter 457B cannot be sunsetted.

With that conclusion, the remainder of this chapter is devoted to an examination of some aspects of the administration of the licensing program.

Disparate Treatment of Applicants

The records have disclosed disparity in the treatment of applicants for examination for nursing home administrator's license. Where applicants apparently possessed the same or nearly the same qualifications, some were permitted to take the examination and others were not. This is illustrated below.

The illustrations here are based on cases arising before June 1980. Before June 1980, the board rules specified the following as necessary qualifications to take the examination:

- (1) Completion of a regular course of study or program in an accredited institution of higher learning, which course of study or program has been approved by the board as being adequate academic preparation for nursing home administrators, *or* completion of a board-approved, specialized course of study in the area of nursing home administration; and
- (2) One year's practical experience in nursing home administration or in a related health administration area. The rules provided that a degree of Master in Public Health might be considered the equivalent of the required one-year experience.¹

The rules spelled out other qualifications, but they are not pertinent here, since all of the applicants in the illustrations below met these other qualifications; at least, none was refused admittance to the examination on the basis of a failure to meet any of them. The disparate treatment of applicants arose in the application of the two qualifications set forth above.

Illustrations. The disparity is best understood by viewing first the qualifications of two applicants who were denied admittance to the licensing examination.

Applicant 1. Applicant 1 had not completed a course of study in nursing home administration. The applicant was and had been for more than a year at the time of application a director of nursing at a state hospital. The applicant possessed a Master of Public Health degree in gerontology and administration. The applicant was denied admittance to the licensing examination on the grounds that the applicant had not completed a course of study in nursing home administration and did not have the necessary one-year experience in nursing home administration or in a related health administration area.

1. The rules, as amended in June 1980, now provide for the substitution of a Master of Public Health degree for the educational requirements, rather than the experience requirement specified in the rules.

Applicant 2. Applicant 2 had completed a course of study in nursing home administration at the University of Hawaii School of Public Health. The applicant was and had been for more than a year, at the time of application an epidemiological specialist at the Department of Health (DOH). The applicant possessed a Master of Public Health degree in health services administration and planning. The applicant was denied admittance to the licensing examination on the grounds that the applicant had not completed a course of study in nursing home administration and did not have the necessary one-year experience in nursing home administration or in a related health administration area.

In contrast, the following applicants were admitted to the licensing examination.

Applicant 3. Applicant 3 had not completed a course of study in nursing home administration. The applicant was, and had been for more than a year, at the time of application an assistant director of nursing at a convalescent center. The applicant possessed a Master of Public Health degree in health services administration. The Board of Examiners did not formally act on the application (i.e., formally accept or reject the application) as it had in the other cases, but the applicant was nonetheless allowed to take the examination.

Applicant 4. Applicant 4 had not completed a course of study in nursing home administration. The applicant was, and had been for more than a year, at the time of application a Medicare certification officer at DOH. The applicant possessed a Master of Public Health degree. The records do not disclose in what specific area the degree was earned. The Board of Examiners initially denied the applicant admission to the examination on the grounds that the applicant had not taken a course of study in nursing home administration and did not have the necessary one-year experience in nursing home administration or in a related health administration area. Two months later, the board decided that it would be willing to consider the application if the applicant completed a specialized course. The board also strongly recommended that the applicant explore possibilities of obtaining the one-year experience. A year later, the board noted that the applicant would not be able to obtain the necessary practical experience because of the applicant's position as Medicare certification officer, and voted to allow the applicant to take the exam after the applicant had completed a course in nursing home administration. The applicant took the exam four months later.

Applicant 5. Applicant 5 had not completed a course of study in nursing home administration. The applicant was, and had been for a little more than a year, at the time of the application an assistant administrator at a general hospital. Previously the applicant was an officer in charge of nursing services at a medical center. The applicant possessed a Master of Public Health degree in health services administration. The board admitted the applicant to the licensing examination with little discussion.

Applicant 6. Applicant 6 had not completed a course of study in nursing home administration. The applicant was, and had been for more than a year, at the time of application a hospital business manager/administrator of a small, rural general

hospital (a 14-bed hospital consisting of 8 medical–surgical beds and 6 skilled nursing and intermediate care beds). The applicant did not possess a Master of Public Health degree. The applicant possessed a Bachelor of Science degree in accounting. The board noted that the applicant was within a month of completing a course of study in nursing home administration and admitted the applicant to the licensing examination.

The disparity. The disparity in the treatment of Applicants 1 and 2, on the one hand, and Applicants 3, 4, 5, and 6, on the other, is obvious.

(1) Applicants 2, 3, and 5 each held a Master of Public Health degree in the same field—health services administration. Yet the degree was deemed sufficient at least in the case of Applicant 3, but not sufficient in the case of Applicant 2 as a substitute for the one-year practical experience requirement, even though Applicant 2 had completed a course of study in nursing home administration while Applicant 3 had not. Applicant 3's experience as an assistant director of nursing could not be given consideration any more than Applicant 2's experience as an epidemiological specialist. The experience of neither qualified as experience in nursing home administration, and the rules provided that experience where the major component was supervision of only one profession or discipline (e.g., nursing) did not qualify as "experience in a related health administration area."

(2) Applicant 1's qualifications differed little from the qualifications of Applicant 3. Neither had completed a course of study in nursing home administration, and the experience of both was in supervising nurses. They each held a Master of Public Health degree. They differed from one another only in that Applicant 3's Master of Public Health degree was in health services administration and Applicant 1's Master of Public Health degree was in gerontology and administration. However, a Master of Public Health degree in gerontology had been recognized earlier by the board in another case as being an acceptable substitute (just as a Master of Public Health degree in health services administration was an acceptable substitute) for the one-year practical experience requirement.² Yet, Applicant 1 was refused admittance to the examination, while Applicant 3 was permitted to take the examination.

2. In the earlier case, the board had refused to recognize a Master of Public Health degree in maternal child care as an appropriate substitute for experience. On inquiry by the Office of the Ombudsman, the board stated that a Master of Public Health degree in gerontology or in health services administration may be acceptable as a basis for exempting applicants from the one-year experience requirement, although a Master of Public Health degree in maternal child care is not. In the June 1980 amendments to the rules, the board has now expressly provided for a Master of Public Health degree in either gerontology or in administration of health care facilities as being an adequate substitute for all educational requirements specified in the rules.

(3) Applicant 4 possessed a Master of Public Health degree, but in a field undisclosed by the records. After some vacillation, the board permitted Applicant 4 to take the examination on the excuse that Applicant 4 could not gain the year's experience in his position as a state Medicare certification officer. In effect, the board waived the one-year experience requirement for Applicant 4. Then, Applicant 6, who possessed only a Bachelor of Science degree in accounting and whose experience was limited to being a business manager of a small, rural, 14-bed hospital, was admitted to the licensing examination. Yet, Applicants 1 and 2, who each possessed a Master of Public Health degree in a field deemed acceptable by the board as a substitute for the one-year experience requirement, were not allowed to take the examination.

(4) Finally, although in each case where the applicant was admitted to the licensing examination, the applicant had not completed a course of study in nursing home administration, the board made admission to the examination contingent on completion of such a course of study in some cases (Applicants 4 and 6) but not in others (Applicants 3 and 5). As to Applicants 1 and 2, of course, no consideration was ever given for admitting either of them to the examination on condition the applicant complete a course of study.

Vagueness in rules. Treating persons differently when they are otherwise similarly circumstanced undermines public confidence. The board's conduct in this respect is attributable in part to the vagueness of the rules then existing. For instance, the rules provided that "a degree of Master of Public Health may be considered the equivalent to the required one-year experience." The use of the term "may" coupled with the total absence of any specification of the area in which a Master of Public Health degree needed to be earned provided considerable flexibility to the board in administering this provision. The board adopted a case-by-case approach in applying this provision. Such case-by-case approach resulted in actions which bordered on being arbitrary in some instances.

The rules on admission to the licensing examination were revised in June 1980. The rules now make a Master of Public Health degree a substitute for the other educational requirements (rather than for the experience requirement) set forth in the rules, and they expressly require concentration in the field of gerontology or administration of health care facilities for the degree to be deemed an acceptable substitute.

The rules as revised, however, contain vagueness in other areas. For instance, the rules now provide that each applicant for admission to licensing examination must have successfully "completed a course of study in the arts and sciences at an accredited

institution of higher learning and have been awarded a baccalaureate degree." The rules are silent, however, as to what areas in the arts and sciences the course of study would need to be for the course of study and the baccalaureate degree to be acceptable to the board. Individual board members appear to disagree as to whether a baccalaureate degree in any area of the arts and sciences is acceptable or whether the degree would need to be in certain areas and not in others. It, thus, seems that the application of this provision would be made on a case-by-case basis with the attendant danger of arbitrary and disparate treatment of applicants for examination.

For the fair treatment of all applicants, the standards for admission to the licensing examination should be as clear and explicit as possible. To that end, the Board of Examiners of Nursing Home administrators ought to devote its attention.

Monitoring of Program

In addition to licensing, the Board of Examiners of Nursing Home Administrators has the responsibility to monitor the operations of nursing homes and the performance of duties by nursing home administrators for the purpose of (1) insuring that licensees are complying with the requirements set by the board and (2) setting standards for licensing and improving the procedures for enforcement of the standards. It also has the responsibility to receive and investigate complaints on licensees and to revoke or suspend licenses where the licensees are failing substantially to comply with board standards.

The board presently does little of the foregoing things. In part, this is because there are other state agencies which have the responsibility to insure that federal and state standards and regulations concerning nursing home management, operations, and conditions and patient care are being met.

While a large part of the responsibility to insure that nursing homes are properly operated and managed is in the Department of Social Services and Housing, DOH, and the Medicaid fraud unit of the Department of Attorney General, as well as in the Executive Office on Aging and the Hawaii Medical Service Association, it would seem that the Board of Examiners of Nursing Home Administrators should assume some responsibility in this area.

Without monitoring the operations of nursing homes and nursing home administrators, the board can hardly determine the degree to which its standards are being observed

and the appropriateness of the standards themselves. Over the years, the board has made the qualifications for licensing progressively more stringent. Hawaii's requirements today are among the strictest in the United States. Hawaii is only one of seven states that require a baccalaureate degree for entry into the field of nursing home administration, and Hawaii is the only state among the seven which does not allow some combination of education and experience to substitute for a baccalaureate degree. There is no way at present, however, for the board to substantiate the relevance of its strict requirements to competent, honest, professional and superior performance of duties by nursing home administrators. An examination in the field as to how nursing home administrators are actually performing their duties and running the nursing homes would assist in determining the connection between the board's standards and competent administration of nursing homes.

Recommendations

We recommend as follows:

1. *Chapter 457B be retained to insure continued federal Medicaid funding of the costs of nursing home care.*
2. *The Board of Examiners of Nursing Home Administrators establish clear standards for admission to the licensing examination and insure the equal treatment of all applicants.*
3. *The Board of Examiners of Nursing Home Administrators begin monitoring the operations of nursing homes by nursing home administrators to assist the board in establishing standards for licensing of nursing home administrators and for enforcing such standards.*

APPENDIX
RESPONSES OF AFFECTED AGENCIES

AGENCY RESPONSES

The Sunset Evaluation Report on Nursing Home Administrators was transmitted on January 15, 1981 to the Department of Regulatory Agencies, with copies under separate cover for the Board of Examiners of Nursing Home Administrators and copies under separate cover for the Director of Regulatory Agencies. We asked them for their comments on the recommendations contained in the report.

A copy of the transmittal letter to the Board of Examiners of Nursing Home Administrators is included as Attachment 1 of this appendix. A similar letter was sent to the Director of Regulatory Agencies.

On January 20, we notified the then chairperson of the board of our intention to submit the report to the Legislature on January 21 but that we were still interested in receiving the board's response and that such response would be transmitted by us to the Legislature. The letter to the chairperson is included as Attachment 2. The Director of Regulatory Agencies was similarly notified.

On January 27, we received comments from the Deputy Director of the Department of Regulatory Agencies who stated: "The Department of Regulatory Agencies is in general agreement with the observation and evaluation you have made of the Board of Examiners of Nursing Home Administrators." The response of the department is included as Attachment 3.

On January 28, we received a letter from Mr. V. Spencer Page, the newly elected chairman of the board. The letter is included as Attachment 4.

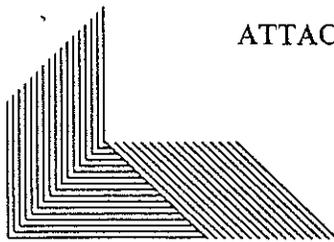
There is only one matter of substance in the chairman's response which requires comment on our part. In our evaluation, we found that there has been disparate treatment by the board of similarly situated applicants for admission to the nursing home administrator's licensing examination.

The chairman states: "Your auditor has contrived, apparently attributing the vagueness to Board members with whom he conferred, an anticipated arbitrary application of the requirement for a baccalaureate degree. He fears that we will decide on a case-by-case basis whether the field of study of the degree is acceptable. Identify these culprits and we shall root them out!"

Our report presents illustrations of unequal treatment of applicants. Moreover, we point out that even with the June 1980 rules revision, the rules are silent as to what areas in the arts and sciences would need to be completed in order for the course of the study and baccalaureate degree to be acceptable to the board. Thus, we believe, on the basis of what the board has done previously and the vagueness of the current rules, that there is a danger of arbitrary and disparate treatment of applicants for examination. The board should devote its attention to this matter.

ATTACHMENT 1

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813
(808) 548-2450



CLINTON T. TANIMURA
AUDITOR
RALPH W. KONDO
DEPUTY AUDITOR

January 15, 1981

Ms. Ann Kadoguchi, Chairman
Board of Examiners of Nursing Home Administrators
Department of Regulatory Agencies
State of Hawaii
Honolulu, Hawaii

COPY

Dear Ms. Kadoguchi:

Enclosed are seven preliminary copies, numbered 6 through 12, of our *Sunset Evaluation Report on Nursing Home Administrators*. These copies are for review by you and other members of the board. This preliminary report has also been transmitted to Mr. Tany S. Hong, Director, Department of Regulatory Agencies.

The report contains recommendations relating to the regulation of nursing home administrators. We would appreciate receiving your written comments on the recommendations by January 28, 1981. Your comments will be included as part of the final report which will be submitted to the Legislature.

Since the report is not in final form and changes may possibly be made to it, access to this report should be restricted solely to board members and those officials whom you might wish to call upon to assist you in your response. We request that you exercise controls over access to the report and ensure that the report will not be reproduced. Should you require additional copies, please contact our office. Public release of the report will be made solely by our office and only after the report is published in its final form.

We appreciate the assistance and cooperation extended to us.

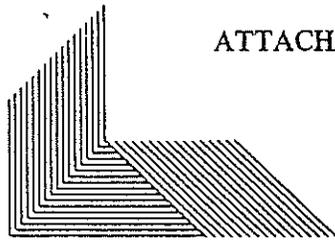
Sincerely,

Clinton T. Tanimura
Legislative Auditor

Enclosures

ATTACHMENT 2

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
465 S. KING STREET, RM. 500
HONOLULU, HAWAII 96813
(808) 548-2450



CLINTON T. TANIMURA
AUDITOR
RALPH W. KONDO
DEPUTY AUDITOR

January 20, 1981

COPY

Ms. Ann Kadoguchi, Chairman
Board of Examiners of Nursing Home Administrators
Department of Regulatory Agencies
State of Hawaii
Honolulu, Hawaii

Dear Ms. Kadoguchi:

This is to inform you that we will be submitting the Sunset Evaluation Report on Nursing Home Administrators to the Legislature on January 21.

Earlier, we had asked for your written response on our recommendations by January 28, 1981. We are still interested in receiving your response and we will submit it to the Legislature when we receive it, together with such comments as we might have.

Thank you for your cooperation.

Sincerely,

Clinton T. Tanimura
Legislative Auditor

ATTACHMENT 3

GEORGE R. ARIYOSHI
GOVERNOR



STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF REGULATORY AGENCIES
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

TANY S. HONG
DIRECTOR
BANK EXAMINER
COMMISSIONER OF SECURITIES
INSURANCE COMMISSIONER

DONALD D.H. CHING
DEPUTY DIRECTOR

January 26, 1981

RECEIVED

JAN 27 8 55 AM '81

OFC. OF THE AUDITOR
STATE OF HAWAII

Mr. Clinton T. Tanimura
Legislative Auditor
Office of the Auditor
465 S. King Street, Ste. 500
Honolulu, Hawaii 96813

Dear Mr. Tanimura:

Thank you for the opportunity to comment on your "Sunset Evaluation Report on Nursing Home Administrators."

The Department of Regulatory Agencies is in general agreement with the observation and evaluation you have made of the Board of Examiners of Nursing Home Administrators. The board should be permitted to continue so that it may continue to license and regulate nursing home administrators to satisfy the federal requirements, lest nursing homes would be prohibited from receiving Medicaid funds.

You and your staff should be commended for the accurate and thorough assessment of the board.

Very truly yours,

DONALD D. H. CHING
Deputy Director

cc: Tany S. Hong, Director

ATTACHMENT 4

January 27, 1981

HAND DELIVER

Mr. Clinton T. Tanimura
Legislative Auditor
Office of the Auditor
State of Hawaii
465 South King Street, Room 500
Honolulu, Hawaii 96813

RECEIVED

JAN 28 8 29 AM '81

OFFICE OF THE AUDITOR
STATE OF HAWAII

Dear Mr. Tanimura:

As the newly-elected Chairman of the Board of Examiners of Nursing Home Administrators, I have been requested by the Board members to respond to your letter of January 15, 1981, soliciting comments and recommendations to the "preliminary copies" of your Sunset Evaluation Report on Nursing Home Administrators.

I have directed hand delivery of this letter to your office following our regularly scheduled meeting this date, hastening to comply with your January 28, 1981 deadline.

Although your transmittal letter is dated January 15, 1981, I am informed by our temporary executive secretary, Mr. Robert Shuford, that this report was received on or about January 20, 1981, in his offices. Board members received the report on January 23, 1981.

Board members serving at the time reported that your audit investigator initiated contact with the Board in summer, 1980. We of course are not aware of the time spent on whatever preliminary studies may have been done prior to his first contact with the Board. Your office therefore afforded the Board five days to prepare a response to a report which was at least six months in the making. We at least felt some relief in that the deadline of January 28 fell one day after, rather than before our regularly scheduled meeting on January 27.

Mr. Clinton T. Tanimura
January 27, 1981
Page Two

You cautioned the confidentiality of the "preliminary" report in your transmittal letter of January 15, 1981. Indeed, we were advised that numbered copies of the report were being transmitted to us apparently so that a prematurely - releasing culprit could be quickly traced. The letter says our comments would be included in the final report submitted to the legislature.¹ Restriction of access to the report is emphasized and stressed. You stated that release would be made only out of your office, and after publishing in its final form. We were surprised then, to receive the "final" report at our meeting on January 27.

I suppose we should have been alerted in that your letter of January 15 bears an "Attachment 1" stamp at its head, and on its reverse what at the time was a confusing statement regarding "Comments on Agency Responses". As it now develops, the final report was apparently transmitted to the legislature before agency responses were received, and your letter of January 15 was already earmarked as an attachment to the report. As two members of the Board noted at our January 27 meeting, your recommendations were published in the Honolulu Star Bulletin on Saturday, January 24, 1981, four days before the deadline for agency responses. So much for confidentiality.

As I am sure you are aware, one of the purposes of these boards is to gain community membership and input. Governor Ariyoshi in his address to the newly-appointed boards

1. § 26H-5(b), Hawaii Revised Statutes:
If the legislative auditor receives written comments from the board, commission, or department of regulatory agencies, the legislative auditor shall append the written comments to each copy of the evaluation report prior to submission to the legislature.

Mr. Clinton T. Tanimura
January 27, 1981
Page Three

members stresses this community participation as a foundation of the purpose of the boards. The board members take time out from regular occupations to attend and provide this input to their board positions, and are neither salaried nor provided expenses incurred in their service.

Your office's handling of, and what turned out to be largely cosmetic attention to solicited board responses which were to be included in the "final report" to the legislature was a lesson in bureaucratic insensitivity. We all learned an object lesson from the convoluted timetable you invoked in your report preparation and distribution.

As to the three recommendations of the auditor, the Board has the following comments:

1. Retention of Chapter 456B to ensure continued federal Medicaid funding of the costs of nursing home care. Unless the State is of course planning on dispensing with this federal funding, this reason for retention of the Board, as mandated by federal regulations to qualify for Medicaid, is reason enough for retention. Considering the extensive revision of the Board's Rules and Regulations in 1980, your auditor's subsequent historical search for grounds for further recommendations was largely unnecessary. You may want to disclose to the legislature how much of the taxpayers' money was expended in the additional review of the Board's continued existence, since this is a consideration of the sunset law. (Chapter 26H, Hawaii Revised Statutes)

2. Establishment of clear standards for admission to licensing examination. Your auditor has contrived, apparently attributing the vagueness to Board members with whom he conferred, an anticipated arbitrary application of the requirement for a baccalaureate degree. He fears that we will decide on a case-by-case basis whether the field of study of the degree is acceptable. Identify these culprits and we shall root them out! All discussions by the board as to examinee qualifications on this point during my tenure have been strictly limited to whether the candidate had a baccalaureate degree. There were no esoteric discussions as to the appropriate discipline or major study area reflected by any course transcript. We view your recommendation here as attempting to tie your historical research, now largely irrelevant, to a more detailed set of rules and regulations enacted in 1980. We consider the effort largely wasted.

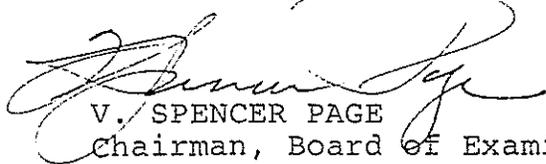
Mr. Clinton T. Tanimura
January 27, 1981
Page Four

3. Monitoring of operations of nursing home administrators. We couldn't agree with you more. Please refer to our budget request for the upcoming legislative session. We understand that this is the first attempt by the Board to obtain funding to pay members' expenses incurred in monitoring Oahu and neighbor island facilities' operations. Since the auditor considers this to be one of three areas meriting legislative attention, perhaps we should be permitted to amend our budget input to properly reflect an expanded system of monitoring operations, including administrative staffing. Please advise if you feel this is appropriate. We will try, if funded, to ensure that our monitoring visits are not restricted solely to the Kaanapali coast of Maui, or Keahou-Kona on the big island.

I trust that our recommendations are taken in the same spirit which the large part of your report reflects.

The next regularly scheduled meeting of the Board is Tuesday, February 24, 1981. We anticipate receiving your "final-final" report, with your comments to our comments appended thereto. Of course, if you would like us to comment on your comments to our comments, we will be happy to oblige. Please remember, however, that all of us have gainful employment in our regular, full-time occupations, and afford us at least the opportunity to respond before the release of your "final-final-final" report.

Sincerely yours,



V. SPENCER PAGE
Chairman, Board of Examiners of
Nursing Home Administrators

Copy to:
Mrs. Ann Kadoguchi (Copy 1 of 7)
Mr. Francis M. Okita (Copy 2 of 7)
Mr. Earl H. Baxendale (Copy 3 of 7)
Mr. Jerry J. Jardin (Copy 4 of 7)
Mrs. Anne T. Yamada (Copy 5 of 7)
Mrs. Hatsune Sekimura (Copy 6 of 7)
File (Copy 7 of 7)