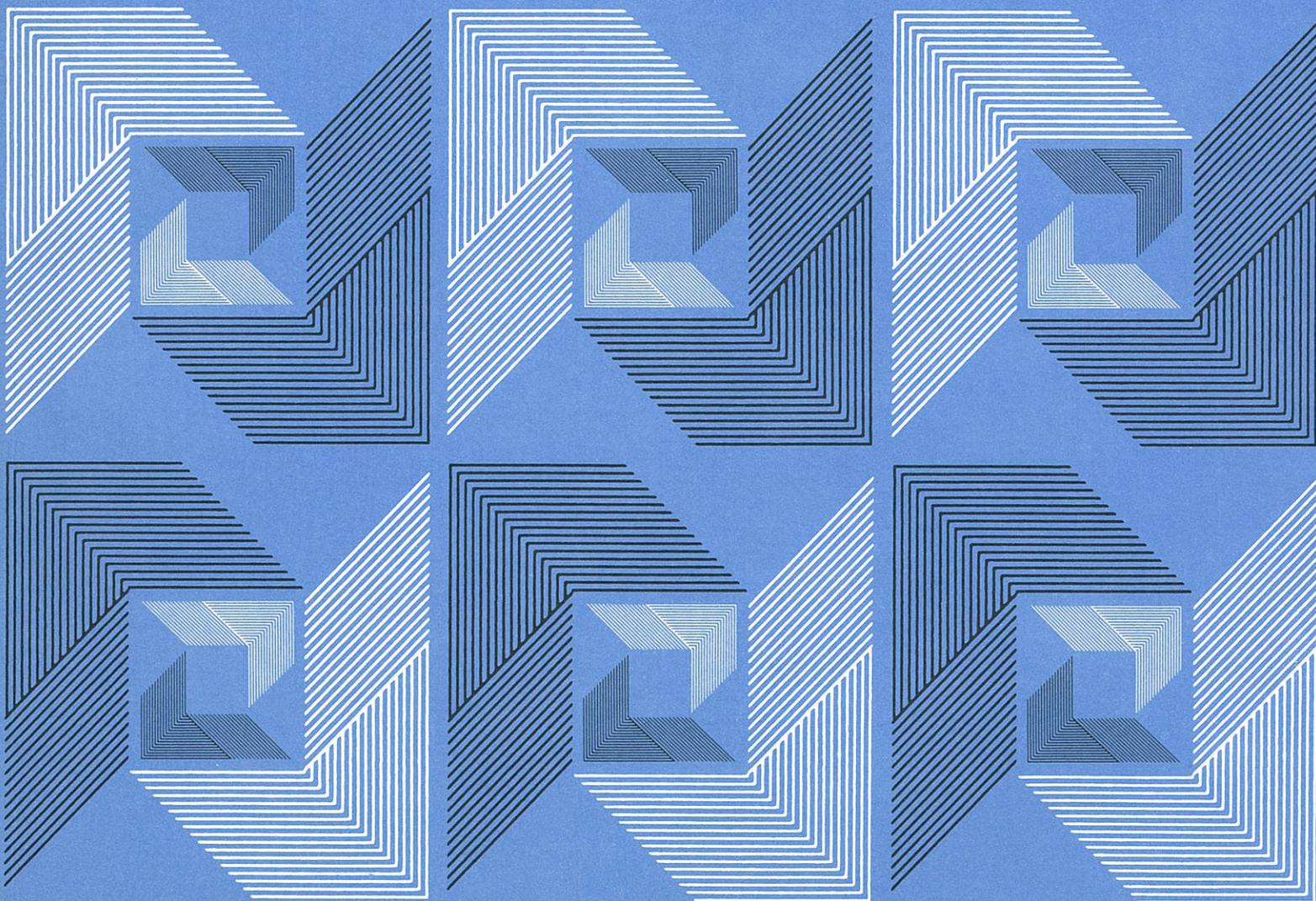


REPORT NO. 82-1  
JANUARY 1982

# EVALUATION OF THE PROFESSIONAL AND VOCATIONAL LICENSING PROGRAM OF THE DEPARTMENT OF REGULATORY AGENCIES

A REPORT TO THE LEGISLATURE OF THE STATE OF HAWAII



SUBMITTED BY THE LEGISLATIVE AUDITOR OF THE STATE OF HAWAII

## THE OFFICE OF THE LEGISLATIVE AUDITOR

The office of the legislative auditor is a public agency attached to the Hawaii State legislature. It is established by Article VII, Section 10, of the Constitution of the State of Hawaii. The expenses of the office are financed through appropriations made by the legislature.

The primary function of this office is to strengthen the legislature's capabilities in making rational decisions with respect to authorizing public programs, setting program levels, and establishing fiscal policies and in conducting an effective review and appraisal of the performance of public agencies.

The office of the legislative auditor endeavors to fulfill this responsibility by carrying on the following activities.

1. Conducting examinations and tests of state agencies' planning, programming, and budgeting processes to determine the quality of these processes and thus the pertinence of the actions requested of the legislature by these agencies.
2. Conducting examinations and tests of state agencies' implementation processes to determine whether the laws, policies, and programs of the State are being carried out in an effective, efficient, and economical manner.
3. Conducting systematic and periodic examinations of all financial statements prepared by and for all state and county agencies to attest to their substantial accuracy and reliability.
4. Conducting tests of all internal control systems of state and local agencies to ensure that such systems are properly designed to safeguard the agencies' assets against loss from waste, fraud, error, etc.; to ensure the legality, accuracy, and reliability of the agencies' financial transaction records and statements; to promote efficient operations; and to encourage adherence to prescribed management policies.

5. Conducting special studies and investigations as may be directed by the legislature.

Hawaii's laws provide the legislative auditor with broad powers to examine and inspect all books, records, statements, documents, and all financial affairs of every state and local agency. However, the office exercises no control functions and is restricted to reviewing, evaluating, and reporting its findings and recommendations to the legislature and the governor. The independent, objective, and impartial manner in which the legislative auditor is required to conduct his examinations provides the basis for placing reliance on his findings and recommendations.



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**EVALUATION OF THE  
PROFESSIONAL AND VOCATIONAL LICENSING PROGRAM  
OF THE DEPARTMENT OF REGULATORY AGENCIES**

**A Report to the Legislature  
of the State of Hawaii**

**Submitted by the  
Legislative Auditor of the State of Hawaii**

**Report No. 82-1  
January 1982**

## FOREWORD

Hawaii's "sunset law" calls for the periodic evaluation of the various professional and vocational licensing programs placed within the Department of Regulatory Agencies. The purpose of sunset evaluation is to provide the Legislature with information whether a regulatory program should be terminated, continued, or modified.

Sunset evaluation reports, submitted by the Legislative Auditor to the Legislature in 1980 and 1981, noted, among other problems, delays in handling consumer complaints, improper structuring of licensing examinations, imposition of invalid requirements, and disparate treatment of license applicants by various licensing boards.

At the legislative hearings on these reports, the response of some boards was that these problems were in whole or in part attributable to the staff of the Department of Regulatory Agencies assigned to service the boards. Subsequently, the Legislature amended the "sunset law" in the 1981 Regular Session and delayed for one year the normal schedule of sunset evaluations and directed the Legislative Auditor to evaluate instead the overall regulated industries program. The Legislature also directed that particular attention be given to the relationship between the boards and the Department of Regulatory Agencies and the role of the Office of Consumer Protection. This report is in response to that direction.

We wish to acknowledge the cooperation and assistance of the various boards and the staffs of the Department of Regulatory Agencies, the Office of Consumer Protection, and the Department of the Attorney General.

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January 1982

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Chapter 1

INTRODUCTION

is a report on a review and evaluation of the Department of Regulatory Agencies' professional and vocational licensing program. The Department of Regulatory Agencies' (DRA) is responsible for the regulation of various professions and occupations. In the context of the continuing need for the regulatory framework, the Legislative Auditor submits this report to the Legislature in 1980 as a first step in the process of reviewing and evaluating the DRA's professional and vocational licensing program.

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PART I

INTRODUCTION AND BACKGROUND

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## Chapter 1

### INTRODUCTION

This is a report on a review and evaluation of the Department of Regulatory Agencies' professional and vocational licensing program. The review and evaluation were made in conformance with Section 4 of Act 87, 1981, an act which amended the Hawaii's "Sunset Law," Chapter 26H, Hawaii Revised Statutes, in certain respects.

#### Legislative Requirement

Hawaii's "sunset law" calls for the periodic assessment by the Legislative Auditor of the need to continue in force the various statutes providing for the licensing and regulation of professions and vocations. Under this law, a statute regulating a profession or vocation expires at a specified time unless the Legislature takes positive action to extend such regulation. The assessment by the Legislative Auditor is designed to provide the Legislature with an adequate basis for determining whether or not such regulatory statute should be continued. To accommodate the workload involved, the more than 30 specific statutes regulating professions and vocations have been divided into groups with varying expiration dates. The statutes in each group expire on December 31 of the year specified for the group, unless extended by the Legislature.

The "sunset law" was first enacted in 1977, but it was not until 1979 that the Legislature required the Legislative Auditor to make assess-

ments of the continuing need for the regulatory statutes. The Legislative Auditor submitted to the Legislature in 1980 his first set of assessments—assessments of those statutes specified to expire on December 31, 1980. In 1981, the Legislative Auditor submitted his assessments of the statutes due to expire on December 31, 1981.

In the sunset reports submitted in 1980 and 1981, the auditor noted that the State's licensing program under the various statutes has experienced, among other things, delays in handling consumer complaints, improper structuring of licensing examinations, imposition of invalid licensing requirements, and disparate treatment of license applicants. At the hearings on the auditor's reports, the various licensing boards alleged that the difficulties noted in the sunset reports are attributable in whole or in part to the staff of the Department of Regulatory Agencies who service the boards. As a result, in 1981, the Legislature enacted Act 87 which among other things delayed for one year the normal operation of the "sunset law" and in Section 4 of the Act directed the Legislative Auditor to evaluate during the hiatus created by the Act the Department of Regulatory Agencies' regulated industries program and related functions, with particular attention directed to the relationship between the boards and the staff of the Department of Regulatory Agencies assigned to service the boards. The auditor was asked to include in the evaluation the role of the Office of Consumer Protection in the licensing program.

## Objectives of Review and Evaluation

The following were the objectives in the review and evaluation of the licensing program:

1. To determine the relationships between the boards, the staff, the Office of Consumer Protection and others in the licensing and regulation of professions and vocations and to recommend such changes in the relationships as would lead to an improved and more efficient and effective administration of the program.

2. To assess the efficacy, fairness, and propriety with which the various duties, functions, and activities involved in the licensing and regulation of professions and vocations are being performed and discharged and to make appropriate recommendations for improvement.

## Organization of the Report

This report is divided into four parts:

Part I includes this introduction and some background on the DRA's licensing program and occupational licensing.

Part II deals with the overall relationships of the entities involved in licensing and regulating professions and vocations.

Part III is concerned with procedures and practices. It focuses on the principal activities of licensing and regulation and makes specific findings concerning the performance of these activities.

Part IV contains the responses of the agencies affected by this report, and our comments on their responses.

## Definitions

Key terms and abbreviations used in this report are defined here.

*Department* or *DRA* means the Department of Regulatory Agencies.

*Attorney General* or *ATG* means the Department of the Attorney General or its authorized representatives, such as the attorney general and deputy attorneys general.

*Consumer Protector* or *OCP* means the Hawaii State Office of Consumer Protection which is administratively attached to the Department of Regulatory Agencies.

*Boards* mean the professional and vocational licensing boards and commissions attached administratively to the Department of Regulatory Agencies.

*PVL* means the professional and vocational licensing division of the Department of Regulatory Agencies.

*RICO* means the Regulated Industries Complaints Office of the Department of Regulatory Agencies.

## Chapter 2

### THE FUNCTIONS AND STRUCTURAL ORGANIZATION OF THE OCCUPATIONAL LICENSING PROGRAM

This chapter describes the functions and activities of the occupational licensing program and the organizational entities involved in the administration of the program.

#### The Functions

There are two major functional components in the occupational licensing program: licensing and complaint handling. "Licensing" encompasses the issuance of licenses and the revocation or suspension of licenses. Acts associated with licensing include, among other things: devising license application forms, establishing standards for licensing, receiving applications for licenses, reviewing applicant qualifications, developing tests to determine applicant competence, administering tests, grading tests, issuing licenses, and revoking or suspending licenses.

"Complaint handling" includes the receipt, investigation, and disposition of complaints of license applicants (particularly those denied a license), of consumers suffering loss or injury as a result of an activity which is subject to licensing, and of others. An important activity in complaint handling is the holding of hearings. The purpose of a hearing is to provide for a fair and equitable resolution and disposition of complaints.

#### The Department of Regulatory Agencies (DRA)

The occupational licensing program is administered within the DRA. Some 30 occupational licensing boards and commissions are in the department for administrative purposes.

The DRA is headed by a single executive "to protect the interests of consumers, depositors and investors throughout the state."<sup>1</sup> It is mandated to "set standards and enforce all laws, rules and regulations governing the licensing and operation of, and register and supervise the conduct of trades, businesses and professions, including banks, insurance companies, brokerage firms and other financial institutions."<sup>2</sup>

**Programs of the DRA.** The department has regulatory responsibilities for a wide range of activities: banks and other financial institutions, insurance, corporations and partnerships, agricultural and cooperative associations, the sale of securities, trademarks and trade names, cable television industry, the Hawaii Public Broadcasting Authority, various professions, vocations, and businesses. The department

1. Section 26-9, HRS.

2. *Ibid.*

also serves as consumer advocate on matters relating to public utilities,<sup>3</sup> and it houses the Office of Consumer Protection.<sup>4</sup>

**Organization of the DRA.** The department is organized into nine major divisions according to the industry being regulated (e.g., banks, insurance). The head of each division reports to the office of the director. Two of these divisions, the Office of Consumer Protection and the motor vehicle insurance division (with a board of governors) are in fact semi-independent agencies placed in the DRA for “administrative purposes.” Although not accorded divisional status, 30 professional and vocational licensing boards, the medical claim conciliation panel program, and the board of public broadcasting are also within the DRA for “administrative purposes.” Three offices provide services of a general nature to the department as a whole (administrative services office) or to a portion of the department (Regulated Industries Complaints Office and hearings office). Figure 2.1 shows the organization chart of the department.

### **The Organization for the Licensing Program**

The components of the DRA principally involved in the professional and vocational licensing program are the 30 licensing boards and commissions, the director of DRA, the professional and vocational licensing division (PVL), the Regulated Industries Complaints Office (RICO), and the hearings office. In addition, however, the Office of Consumer Protection (OCP) plays an important role in the handling of consumer complaints, and the Office of the Attorney General (ATG) and the county prosecutors are from time to time involved in various aspects of the licensing program.

**The licensing boards and commissions.** The 30 regulatory boards and commissions placed within DRA for “administrative purposes” include boards and commissions for such diverse

professions, occupations, and vocations as accountancy, acupuncture, barbering, boxing, chiropractic, contracting, dentistry, plumbing, engineering, architecture, hearing aid, massage, medicine, motor vehicle sales, motor vehicle repair, nursing, optical dispensing, optometry, pest control, pharmacy, detective, real estate, speech pathology, audiology, and veterinary.

Each of the boards is created by a separate statute, and each is generally empowered to establish standards for licensing; develop and administer licensing examinations; grant and deny licenses; direct investigations; hold hearings; suspend or revoke licenses; make, amend, and repeal rules and regulations to effectuate the purposes of their respective laws; enforce the laws and rules; and recommend changes in law.

The boards vary in size from 3 to 14 members. In most cases, a majority of the board members are from the regulated occupation. Lay members were added to 15 boards in 1978 through Act 208 “to assure public representation on all regulatory boards and commissions with the Department of Regulatory Agencies,”<sup>5</sup> but the majority of the members of most boards, nevertheless, continue to consist of those from the regulated occupation.

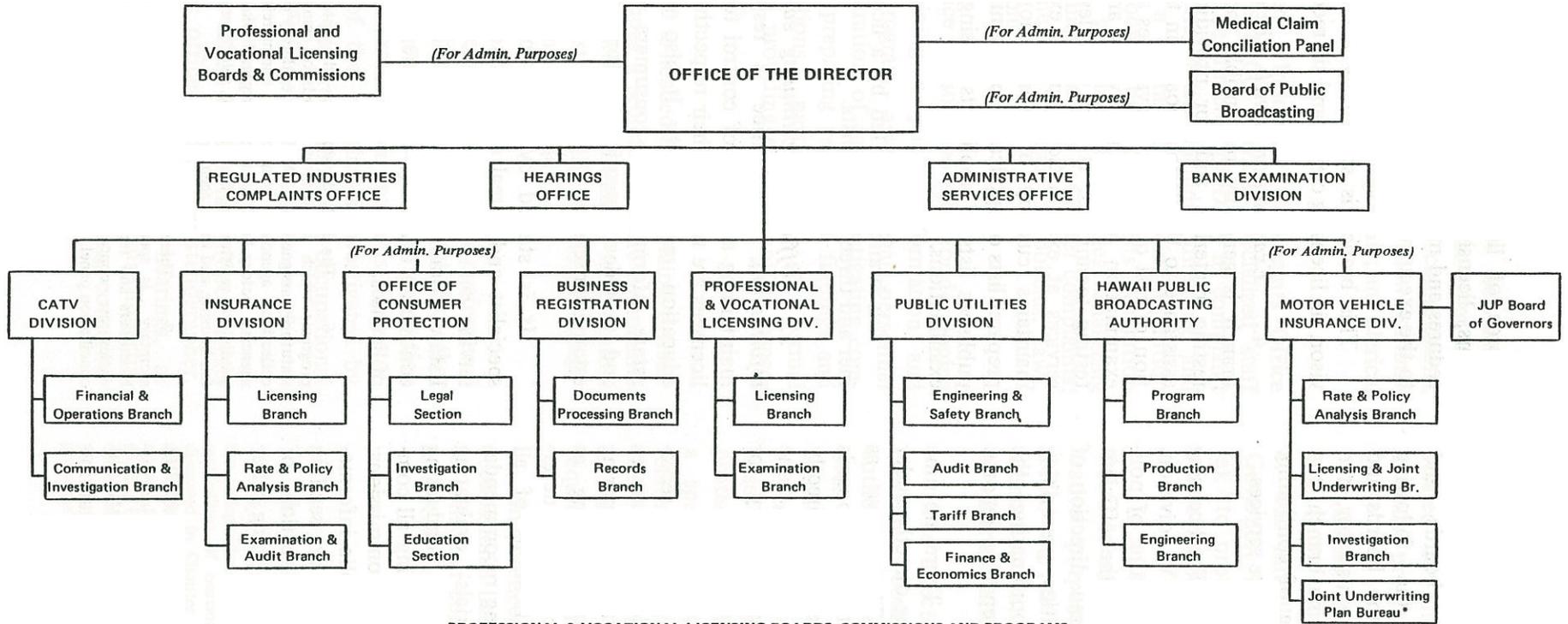
**The director.** The director is responsible for planning, directing, and coordinating the activities of the department. The director represents the boards and commissions placed within the DRA for administrative purposes in communications with the Governor and the Legislature, and the director has full power over all personnel servicing the various boards and commissions. The budgets of the boards must be submitted through the director and included in the budget of the DRA.

3. DRA, *Major Functions*, July 1, 1981, p.1.

4. Act 302, 1980 SLH, Section 487–2, HRS.

5. Senate Standing Committee Report No. 674–78 (Act 208, 1978 SLH).

Figure 2.1  
State of Hawaii  
Department of Regulatory Agencies  
Organization Chart



**PROFESSIONAL & VOCATIONAL LICENSING BOARDS, COMMISSIONS AND PROGRAMS**

Accountancy  
Acupuncture Practitioners  
Barbers  
Boxing  
Cemetery  
Chiropractic  
Collection Agencies\*\*  
Commercial Employment Agencies\*\*  
Contractors  
Cosmetology  
Dental  
Electricians and Plumbers  
Elevator Mechanics

Engineers, Architects, Surveyors & Architects  
Factory-Built Housing\*\*  
Fair Housing\*\*  
Hearing Aid Dealers & Fitters  
Massage  
Medical  
Mortgage Brokers and Solicitors\*\*  
Motor Vehicle Industry  
Motor Vehicle Repair Industry  
Naturopathy  
Nursing  
Nursing Home Administrators  
Optical Dispensers

Optometry  
Osteopathy  
Pest Control  
Pharmacy  
Pilotage  
Podiatry  
Private Detectives & Guards  
Psychology  
Real Estate  
Speech Pathologists & Audiologists  
Solar Energy Device Dealers\*\*  
Subdivision\*\*  
Time Sharing\*\*  
Travel Agencies\*\*  
Veterinary

\*Insurers appointed as Joint Underwriting Plan servicing carriers by the Motor Vehicle Insurance Commissioner.

\*\*Programs without boards or commissions.

**Professional and vocational licensing division (PVL).** The PVL provides administrative services to the regulatory boards and commissions.<sup>6</sup> Within PVL, the following organizational entities service the boards and commissions: the licensing administrator, the executive secretaries, the licensing branch, the examination branch, the office of continuing education and information, and office services.

1. **Licensing administrator.** The licensing administrator is the head of the PVL division. His responsibilities include the setting of policies, procedures, and plans for the efficient operation of the division; overall direction of the division's day-to-day activities; prescribing and evaluating activities; coordinating the gathering of statistics and preparing reports.

2. **Executive secretaries.** There are nine executive secretaries, all working directly under the licensing administrator. They serve as liaison between the department and the boards and commissions, and are the most directly involved with the boards. Generally, one person serves as the executive secretary for two or more boards and commissions.<sup>7</sup>

The responsibilities of the executive secretaries include: reviewing all licensing statutes and suggesting necessary legislation; preparing suggested rules and regulations; serving as resource personnel at legislative hearings; determining the preliminary qualifications of all applicants; reviewing and making recommendations on examination materials; evaluating and analyzing examination results; conducting special studies and research; preparing all communications for boards and commissions; assisting in the preparation of public information materials; serving citations or sending letters of reprimand at the direction of boards and commissions; and performing other administrative duties as assigned.

3. **Licensing branch.** The licensing branch is generally responsible for reviewing and processing applications for all occupational licenses and license renewals and for maintaining

records of licensees. It reviews application forms, licensing procedures, and appeals procedures and makes recommendations for change to the executive secretaries.

This branch is staffed by a clerical supervisor, six licensing clerks, and six record clerks.

4. **Examination branch.** The examination branch is generally responsible for developing testing materials and for providing technical assistance to the various boards in the construction of test questions. It evaluates and analyzes examination results and reviews and evaluates testing techniques. It also provides proctoring services at examinations, grades examinations, maintains custody of examination materials, prepares lists of applicants for examinations, and publishes lists of applicants passing and failing examinations.

This branch is staffed by a licensing examiner and three clerk-typists.

5. **Office of continuing education and information.** This office is responsible for maintaining a system of control to ensure that licensees are meeting their respective continuing education requirements. It also provides real estate information to consumers and licensees and provides educational information to real estate licensees.

It is staffed by a continuing education specialist and a real estate education specialist serving on a contractual basis with the Real Estate Commission. It serves five boards with continuing education requirements for renewals of licenses.

6. The PVL division also administers 10 regulatory programs which are without boards or commissions but are statutorily assigned to DRA. These regulatory programs concern collection agencies, cemeteries, commercial employment agencies, factory built housing, mortgage brokers and solicitors, subdivision registration, time-sharing, solar energy device dealers, fair housing, and travel agencies.

7. There is a tenth executive secretary, but this secretary is specifically assigned to the Board of Medical Examiners and reports directly to the director. His principal duties are concerned with the meetings of the medical conciliation panel.

6. **Office services.** Office services is staffed with one supervisor and six other secretaries. It provides all boards and commissions, executive secretaries, and the division administrator with secretarial, stenographic, and clerical support.

**Regulated Industries Complaints Office (RICO).** The RICO provides specialized staff support to the director of DRA in complaint resolution. Its duties include: directing and maintaining a centralized complaint resolution program; coordinating complaints resolution with other governmental agencies; analyzing and researching trends in consumer complaints; and recommending changes to policies, laws, and regulations.

This office is also responsible for developing and maintaining a public information and education program, assisting legal personnel in the preparation of cases, investigating complaints and preparing reports of findings and recommendations, participating in formal hearings, and providing enforcement or inspection services.

The RICO is headed by a complaints officer. Its staff includes a secretary to the complaints officer, 10 investigators on Oahu, 3 investigators and 1 clerk-typist on the Big Island, 2 investigators on Kauai, and 2 on Maui.

The RICO services not only the professional and vocational licensing program but also other DRA programs, such as the business registration and the bank examination programs. However, a majority of the complaints investigated by RICO are for the professional and occupational licensing program.

**Hearings office.** The hearings office consists of a hearings officer and a legal stenographer. The hearings officer conducts hearings, as required. His responsibility is to insure impartial and uniform treatment in resolving consumer complaints.

The hearings office serves all DRA programs, but about half of the hearings held are related to the professional and vocational licensing program.

**Office of Consumer Protection (OCP).** The OCP was created in 1969 by Act 175. It was initially placed in the Office of the Governor. Its specific mission was (and still is) "to protect the interests of both the consumer public and the legitimate businessman."<sup>8</sup>

In 1980, the OCP was transferred to the DRA. It was placed within DRA for "administrative purposes." Although placed in the DRA, the OCP is a relatively independent agency. Its statutory powers were not decreased or otherwise altered by its transfer to the DRA.<sup>9</sup>

The director of the OCP is designated the consumer counsel for the State, and the authority and responsibility of the OCP extends over a broad range of consumer protection activities. The involvement of the OCP in the professional and vocational licensing program arises not only from its general powers to protect the interests of consumers, but also from a specific provision in Chapter 487, HRS, relating to the recovery of civil penalties by the OCP where any unlicensed person provides commodities or services, for which a license is required from any board or commission.

In practice, the OCP's involvement in the occupational licensing program has been limited to consumer complaints alleging loss or damage as a result of activities by persons who engage

8. Section 487-1, HRS.

9. The independence of the OCP is much greater than the independence of the occupational licensing boards. The restrictions of Section 26-35, HRS, applicable to boards as discussed in Chapter 3, *infra*, are not applicable to the OCP, since the OCP is not headed by a board or commission. In this regard, the exact meaning of "administrative purposes" as it applies to the OCP or to any other agency, not a board or commission, placed within a department for such purposes is not clear. There is no statutory definition of "administrative purposes" as that term applies to the OCP and similar agencies.

in those activities without a license when a license is required to be obtained from a board or commission to so engage in the activities.

The OCP is staffed with its own group of attorneys, investigators, and clerical support.

**The Office of the Attorney General (ATG).** The involvement of the ATG in the occupational licensing program includes rendering of advice to the various boards and commissions and the handling of cases in administrative hearings against licensees and those required to be licensed. The office becomes involved generally only as questions and cases are referred to it by

the boards or staff. Three deputy attorneys general are assigned currently to the occupational licensing program.

**The prosecutors.** Many of the licensing statutes provide for criminal penalties where a person engages in an activity without a license when a license is required. All such criminal prosecutions are within the province of the county public prosecutors. In recent years, however, no cases have been referred to the county prosecutors, even though there have been numerous instances of unlicensed persons engaging in activities for which a license is required.

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**PART II**

**FINDINGS AND RECOMMENDATIONS:**

**ROLES AND RESPONSIBILITIES**

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## Chapter 3

### ROLES AND RESPONSIBILITIES

This chapter focuses on the issue specifically raised in Section 4 of Act 87, SLH 1981, namely, the roles of the various organizational entities involved in the occupational licensing program. It summarizes the findings set forth in other chapters of this report and attempts to provide some means of resolving the apparent difficulties that now exist in the administration of the licensing program.

#### The Nature of the Problems

In our previously issued sunset reports on various occupational licensing statutes, we noted that the State's occupational licensing program experiences, among other things, delays in the handling of consumer complaints, improper structuring of licensing examinations, and disparate treatment of license applicants. These findings were made with respect to both those statutes which we recommended repealing and those which we recommended retaining.

These problems and additional ones are further detailed in Chapters 4, 5, 6, and 7 of this report. Specifically, in these chapters, we conclude as follows:

1. Various boards impose unlawful, unreasonable, and vague standards for licensing. For instance, various boards continue to require applicants to be citizens of the United States and residents of Hawaii for a period of one or more years. These citizenship and residence requirements have long since been ruled unconstitutional by the courts.

2. Improper and irrelevant questions are being asked on license application forms and unnecessary documentations are being required to be submitted to qualify for licenses. For instance, arrest and criminal conviction data are being asked on the application forms in violation of Chapter 831, HRS, and documentation of no apparent value such as a photocopy of a high school diploma and letters attesting to the applicant's good character are being required to be submitted.

3. Vague standards are being used and there is considerable duplication of work in assessing the qualifications of applicants.

4. Written examinations of dubious validity and reliability and oral examinations which rely heavily on the subjective judgments of the graders are being administered by the various boards.

5. There are delays and duplication of efforts in the disposition of consumer complaints, and there are suggestions that consumers are not being treated fairly. There is further a lack of standard procedures and policies to govern complaint handling with the result that a number of procedures and methods are followed.

#### Source of the Problems

The enumerated difficulties arise mainly because the boards, in general, have sought to perform themselves the myriad of specific tasks

involved in occupational licensing. Although the assistance of staff has been sought by the boards from time to time, the boards have nevertheless reserved for themselves the actual doing of the various tasks. Thus, the boards themselves have set the standards for licensing; designed the application forms; assessed and weighed the qualifications of applicants; developed, administered, and graded examinations; and received, investigated, and made decisions on consumer complaints.

Clearly, many of the tasks performed by the boards are administrative (as contrasted with policymaking) tasks. Examples are designing application forms and assessing whether an applicant meets certain established, basic qualifications (education, training, age, etc.) necessary to qualify to take an examination for license. Certain other tasks performed by the boards require specialized skills and techniques. For instance, the development of valid and reliable tests demands skills in testing. Then, for certain other tasks, there exist within the Department of Regulatory Agencies (DRA) specialized offices to undertake such tasks. For example, the hearings office was created to conduct hearings on consumer and other complaints, and the Regulated Industries Complaints Office (RICO) was established, among other things, to investigate complaints. These considerations, however, have not deterred the boards from themselves performing the various tasks.

Moreover, having assumed the performance of the various tasks, the boards have been extremely reticent about making such changes as will contribute to the efficiency and effectiveness in the administration of the licensing program. Thus, for instance, as pointed out in Chapters 4 and 5, although they have been advised by staff some years ago of the invalidity and unreasonableness of some of the licensing requirements (e.g., citizenship and residence requirements), the boards have failed to act to correct the deficiencies.

It is true that some boards have delegated

some specific occupational licensing tasks to the staff, but instances of such delegation have not been numerous, and where such delegation has occurred it has been haphazard and not uniform from board to board. Some boards have delegated to staff the task of reviewing applications; others have delegated the task of designing application forms; still others have delegated the task of investigating complaints. This lack of uniformity has been a source of confusion to the staff.

### The Statutory Basis of the Problems

Under existing statutes, the boards have the right to perform all of the specific acts associated with licensing and handling consumer complaints. This is so notwithstanding the general authority of the DRA to protect the interests of consumers and to set standards and enforce all laws governing the licensing and operations of trades, businesses, and professions. Thus, when the boards insist on doing all the things they do, they are only exerting that authority which is vested in them by law.

**Boards' statutory authority.** The boards derive their power and authority from the 30 licensing chapters in the Hawaii Revised Statutes. Each chapter deals with a particular occupation and establishes a board to regulate the occupation. Typically, each statute authorizes the board to adopt rules; establish standards and qualifications for licensing; prepare and administer examinations; issue, suspend, revoke, and renew licenses; receive, investigate, and dispose of complaints; conduct hearings; prescribe forms; maintain records; etc. Table 3.1 enumerates the powers which the licensing statutes generally confer on boards. As noted in the table, the various licensing chapters are not uniform in detailing the specific powers of the boards, but in many cases, where a specific power is not expressly stated in the statutes, it can often be implied from the other powers that are expressly stated. The DRA's conception of the powers of the boards is set forth in Table 3.2. As indicated,

Table 3.1  
Frequency of Occurrence in Licensing Statutes  
Of Specific Powers and Duties

Powers and Duties	Number of Chapters In Which They Occur
Adopt rules	32
Issue and renew licenses	32
Revoke licenses	32
Develop qualifications	21
Register licenses	18
Prepare exams	27
Give exams	30
Receive complaints	14
Investigate complaints	19
Suspend licenses	31
Conduct hearings	29
Enforce statutes	18
Prescribe forms	16
Maintain records	20
Accept applications	31
Screen applications	24

the DRA itself acknowledges the broadness of the powers of the boards.

In addition to the licensing chapters, the boards also derive their powers and authority from two general statutes which apply to all boards and commissions. These are Sections 92-16 and 92-17, HRS. In Section 92-16, each board is empowered, whenever it is authorized or required by law to hold hearings, to subpoena witnesses, to administer oaths to witnesses, and to appoint a master or masters to hold the hearing, to take testimony upon the matter involved in the hearing, and to report his or their findings and recommendations to the board. The master or masters may be a member or members of the board or other persons. The board may adopt the master's or masters' findings and recommendations or hold further hearings and take further evidence and testimony before taking final action on the recommendations of the master or masters.

Section 92-17 requires all boards to receive complaints from consumers and others who claim to be aggrieved by business practices related to the boards' respective jurisdictions. It further requires each board, "Upon receipt of a

written complaint or upon receipt of an investigation report generated by the board on its own motion which establishes an alleged violation of any provision of law or rule that is within its jurisdiction," to notify the licensee or person regulated of the charge against him and to conduct a hearing, if the matter cannot be settled informally. Section 92-17 authorizes the

Table 3.2

### Functions of DRA's Regulatory Boards and Commissions

- Grants or denies the issuance of permit and license to individuals, corporations, partnerships, joint ventures, schools, etc.
- Directs investigations, holds hearings, and suspends, revokes or reinstates licenses. (The activities to perform the investigation and hearings functions are delegated to the Regulated Industries Complaints Office and Hearings Office).
- Makes, amends or repeals such rules and regulations deemed proper to fully effectuate the provisions of the laws within their scope and jurisdiction.
- Enforces the provisions of law and rules and regulations promulgated within their jurisdiction.
- Recommends changes in law.
- Sets standards for qualifying by examination or otherwise.
- Reviews and determines the sufficiency of equivalent education and training or experience in meeting the requirements for licensure by applicants.
- Determines frequency of examination to be conducted.
- Contracts for examination services.
- Prepares and grades examinations.
- Conducts practical examinations.
- Determines content and approves all examination material.
- Prescribes application forms.
- Renews licenses.
- Establishes standards for continuing education.
- Establishes standards for prelicensing educational requirements.
- Subpoenas records and witnesses.
- Brings injunctive actions, issues cease and desist orders.

Source: Department of Regulatory Agencies, *Major Functions*, p. 16.

board to invoke one or more of several specified remedies if it finds that the charge constitutes a violation. Included among the remedies are suspension of license, revocation of license, refunding money paid as fee for services, and correcting the work done in providing services.

It is clear from the specific and general statutes that the boards have a wide range of authority in regulating occupations.

**DRA's statutory authority.** As stated above, in general, the DRA's staff acknowledge the broad powers of the boards. The staff, therefore, have been hesitant about pushing the boards to take corrective actions in the problem areas described above, although the existence of the problems has been known to the staff for years.

Although the occupational licensing boards are within DRA, the authority of the department over the boards is limited. The boards are within the department "for administrative purposes" only, and Section 26-35, HRS, states that the following provisions shall apply whenever a board is placed within a principal department for administrative purposes:

- "(1) The head of the department shall represent the board or commission in communications with the governor and with the legislature.
- (2) The financial requirements from state funds of the board or commission shall be submitted through the head of the department and included in the budget for the department.
- (3) All rules and regulations adopted by the board or commission shall be subject to the approval of the governor.
- (4) The employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of all officers and employees of or under the jurisdiction of the board or commission shall be determined by the board or commission subject to the approval of the head of the department and to applicable personnel laws.
- (5) All purchases of supplies, equipment, or furniture by the board or commission shall be subject to the approval of the head of the department.

- (6) The head of the department shall have the power to allocate the space or spaces available to the department and which are to be occupied by the board or commission.
- (7) Any quasi-judicial functions of the board or commission shall not be subject to the approval, review, or control of the head of the department.
- (8) Except as set forth hereinabove, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers."

Paragraphs (7) and (8) make it explicit that the department does not have the power to control or supervise any board placed within the department for administrative purposes in the exercise by the board of its functions, duties, or powers, except as set forth in paragraphs (1) to (6).

Paragraphs (7) and (8) are delimiting factors on the exercise by DRA of the broad powers otherwise granted to it by Section 26-9, HRS, in protecting the interests of consumers and setting standards and enforcing all laws governing the licensing of trades, businesses, and professions. Thus, although Section 26-9 authorizes the director of DRA to appoint hearings officers "to hear and decide any case or controversy regarding licenses and the application and enforcement of rules and regulations involving any of the boards or commissions within the department," and although it also authorizes the director to appoint a complaints officer to "facilitate the investigation and hearing of complaints," the director of DRA cannot compel the boards to utilize such hearings officers and complaints officer as the director may appoint. The boards are free under Sections 92-16 and 92-17 and the specific licensing statutes to appoint their own masters to hear cases and to investigate complaints on their own.

The director of DRA does maintain control over the staff which provide services to the various occupational licensing boards. Section 26-9(e) states:

"Notwithstanding any provision to the contrary, the employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of all officers and employees under the administrative control of this department shall be determined by the director of regulatory agencies subject only to applicable personnel laws."

Control over staff, however, has not diminished the authority of the boards to act as they see fit. The staff only advise, counsel, and otherwise service the boards. In its statement of its role in occupational licensing, the DRA itself has limited the role of the staff to generally serving as liaison between the boards and the Legislature and the Governor; making proposals and recommendations for policies, rules and regulations, and revisions in the law; and carrying out the "administrative requirements" of the boards. "Administrative requirements" include clerical services; recording and reproducing minutes of board meetings; receiving and handling correspondence; handing out and receiving applications; answering questions of applicants, licensees, and the general public; arranging for reproduction of tests, examination locations, and schedules; etc.

**Legislative intent.** It is pertinent to note here that the placement of the occupational licensing boards within DRA was initially accomplished by Act 1 of the Second Special Session of the First State Legislature in 1959. The purpose of the Act was to reduce the number of principal departments of the state government to not more than 20 as prescribed by the Constitution of the then new State of Hawaii. Before the 1959 Reorganization Act, the various occupational licensing boards were independent agencies. They and other independent agencies numbered far in excess of the 20 prescribed by the Constitution.

The 1959 Reorganization Act was the result of the work of a Joint Legislative Committee on Reorganization which had been created to study the manner in which the constitutional mandate of not more than 20 principal departments should be implemented. It was this committee that proposed that all occupational licensing boards be grouped and

placed within a single regulatory department for administrative purposes.

In proposing the centralization of all occupational licensing boards within a single regulatory department, the Joint Committee expressed its intent that the licensing boards should be concerned with those functions requiring technical skills and knowledge and that functions not requiring technical skills and knowledge should be delegated to and be performed by the staff of the regulatory department. The Joint Committee identified as examples the enforcement of licensing standards, the administration of written examinations and others as the kinds of functions it felt should be delegated, and it opined that the boards should be concerned only with such functions as conducting practical examinations, making rules and regulations, preparing and grading examinations, suspending or revoking licenses, and other like functions.

Despite such expressions of intent, the various occupational boards from the very inception of the Reorganization Act tended toward a literal reading of the licensing statutes and to assert their rights to perform all such activities expressed or implied in the powers granted to them by the statutes.

#### An Alternative

Obviously, there is a need for improvement in the administration of the occupational licensing program. A statutory reordering of the functions and duties of the boards *vis-a-vis* the staff is necessary for improving the efficiency, effectiveness, and equitableness in the administration of the licensing program.

**Reordering of functions.** We believe that the following criteria should furnish the basis for such reordering of functions. A specific function or task may be assigned to the board if:

- (1) The function or task requires the

exercise of value judgment of such significant impact that consideration of diverse views and the benefits of a group deliberation are desirable; or

(2) The function or task is of such technical nature as to require its performance by the board which possesses the requisite technical skills and knowledge.

In all other cases, the function or task should be performed by staff.

Under the foregoing criteria, the functions of the boards would be limited to the following: (1) setting standards for licensure; (2) adopting rules and regulations; (3) making final administrative decisions in contested cases such as applicant appeals, license revocation or suspension, and consumer complaints; and (4) grading practical examinations which require the judgment of board members who are versed in the regulated occupations. Almost every other function is performable by staff. Among the functions the staff should be capable of performing are: (1) designing application forms; (2) reviewing applications for completeness and conformance to standards; (3) evaluating applicant qualifications; (4) developing and administering examinations and in the case of written, objective examinations, grading them; (5) issuing licenses; (6) conducting investigations into consumer complaints; and (7) preparing contested cases for hearings.

Requiring the boards to perform only those functions requiring judgmental decisions of a high value and the skills and knowledge possessed by the board, and allowing staff to perform all other functions should enable licensing tasks to be more expeditiously and efficiently handled. The staff as envisioned in this alternative is a central staff within DRA. With most of the administrative tasks placed in a central staff, a more uniform approach to occupational licensing is possible.

The suggestion here is in accord with the trends. The trend is toward centralization of

most of the functions of occupational licensing in a staff within the regulatory agency. Such centralization is being advocated to increase accountability to the public, reduce duplication of efforts, and achieve economy.<sup>1</sup>

**Office of Consumer Protection (OCP).** Any reordering of functions between the boards and the staff must take into account the role of the OCP in the area of consumer complaints. Currently under an agreement between the director of DRA and the director of OCP, the OCP handles consumer complaints arising from unlicensed activities when a license is required only where the complainants allege loss or damage as a result of such activities. All other complaints of or arising from unlicensed activities when a license is required are supposed to be investigated by the DRA staff and the licensing boards.

This agreement was made soon after the Legislature amended the statutes on the OCP to empower OCP to bring suits to recover civil penalties from any unlicensed person selling commodities or rendering services for which an occupational license is required. The agreement arose because of the differing interpretations OCP and the DRA staff ascribed to the amendment. The staff, particularly the staff of the professional and vocational licensing division (PVL) of DRA, believed that the amendment vested in OCP full responsibility to pursue all claims of unlicensed acts. The OCP, on the other hand, believed that the amendment was not so intended. It felt that the amendment simply furnished OCP with another tool to pursue unlicensed contractors whenever a complaint of unlicensed activity was lodged with OCP. The agreement was made necessary by the flood of cases involving unlicensed practices for which licenses are required, which were referred to OCP soon after the amendment was enacted.

1. *Occupational Licensing: Centralizing State Functions*, The Council of State Governments, Lexington, Kentucky, 1980.

In our earlier sunset reports, we observed that the amendment empowering OCP to maintain suits to collect civil penalties did not in any way diminish the responsibility of the various boards and the staff to pursue consumer complaints against persons selling commodities or providing services without a license when a license is required. Section 487-7, HRS, makes it clear that the OCP's authority and responsibility in the area of unlicensed activities, as in other areas, are intended to supplement, rather than supplant, those of the boards and the staff. The section provides that "[n]othing contained in this chapter shall be deemed to delegate or detract in any way from the functions, powers and duties prescribed by law for any other department or agency of the State, nor to interrupt or preclude the direct relationships of any such department or agency or units of county government in the performance of such functions, powers, and duties." By the same token, the jurisdiction of OCP in the area of consumer complaints arising from activities for which a license is required is not confined by statute to complaints involving unlicensed activities. The breadth of Chapter 487 authorizes OCP to act in all cases of consumer complaints, whether the consumers have or have not suffered any loss or damage. The thrust of the statute on the OCP is that OCP can and should act in all cases of consumer complaints that it deems appropriate, whatever the nature of the complaints.

To obviate the confusion (and opportunities for buck-passing) that the present state of affairs provides, an option to placing any portion of the complaint handling functions in the DRA staff is to centralize the handling of all consumer complaints of whatever nature in OCP. This would take completely out of the hands of both the DRA staff and the occupational licensing boards any responsibility for consumer complaints, except that the boards may still adjudicate consumer complaints for the purpose of suspending or revoking licenses and invoking such other remedies as provided by statute. Under this rearrangement of roles, OCP, and OCP alone, would investigate all consumer

complaints, institute civil suits for injunctive relief or to collect civil penalties, and prosecute all cases before the hearings officer and the various boards for the revocation or suspension of licenses and other statutorily provided reliefs (e.g., refunds of moneys paid). A procedure could be instituted whereby OCP informs the DRA and the respective boards of cases under investigation to minimize the possibility of licenses being granted or renewed while cases are still being investigated.

Taking away entirely from the DRA staff and the boards the complaint handling function should not be particularly upsetting. The function of investigating and resolving consumer complaints against licensed persons or businesses, now considered an integral part of the licensing program, was not firmly established in the licensing boards until 1974 when Section 92-17, HRS, which requires the boards to receive consumer complaints and authorizes the boards to investigate and dispose of them, was enacted. Before 1974, only a handful of boards were directed or authorized by statutes to do so and most did not focus on providing relief for consumers in the form of refunds or correction of work.<sup>2</sup>

In addition to eliminating confusion and opportunities for buck-passing, the centralization of the handling of all consumer complaints in the OCP has these benefits. It is consistent with the separation of investigatory and prosecutory functions from the adjudicatory functions advocated in Chapter 8 of this report. Centralization in the OCP also avoids duplication of efforts that now occurs among the DRA staff and between the staff and the various boards. Further, centralization in the OCP would facilitate the establishment of clear and uniform policies and procedures for the handling of consumer complaints that is urged in Chapter 7 of this report. Finally, centralization of the handling of consumer complaints in the

2. DRA, Statement on H.B. No. 41, H.D. 2, Relating to Consumer Complaints.

OCP forcefully demonstrates that the consumers' interests are paramount.

The views presented here coincide with the views of the Commission on Organization of Government which recommended in 1977 the establishment of "a single, central complaint and investigation office for the general public regarding products and services of the private sector, whether licensed or unlicensed." The office recommended by the Commission as the central complaint and investigations office was the OCP.<sup>3</sup>

**Need for additional staffing.** Whether or not the handling of complaints is centralized in the OCP or in the DRA staff, clearly there is a need for increasing staff to handle the multitude of consumer complaint cases. Over the years a backlog of cases has built up. The delays experienced in disposing of consumer complaints are in part due to the lack of sufficiently trained staff to investigate complaints and to prepare for and present cases at hearings.

In RICO, where the investigation of complaints is supposed to be done, there are 17 investigators (10 on Oahu, 3 on the Island of Hawaii, and 2 each on Maui and Kauai). The RICO, however, is responsible for investigating not only complaints concerning those occupations regulated by the various licensing boards, but also complaints arising in other DRA programs, such as business registration and bank examinations.

The OCP currently handles over 200 cases under its agreement with the DRA that OCP would handle complaints against unlicensed persons resulting in losses or damages to consumers. With its present staff, the OCP is barely able to keep up with this workload. The agreement with the DRA was indeed entered into because the OCP could not keep up with the caseload it otherwise would have had to cope with.

The Office of the Attorney General (ATG)

which prosecutes cases at hearings before the hearings officer and the boards had as of September 1981, some 180-190 consumer complaints cases awaiting hearings. Only three deputy attorneys general are assigned to provide legal assistance to the DRA staff and the 30 boards. The supervising attorney reports that the deputy attorneys general are simply understaffed to move the cases expeditiously.

Overall, then, there is not enough manpower to handle consumer complaints. Centralization of consumer complaint handling will not by itself resolve the problems of delays in the investigation and disposition of consumer complaints. Thus, wherever the function is centralized will require a boost in the number of staff. If the complaint handling function is transferred to OCP, the staffing pattern and complement should take into account those positions which can be transferred from RICO to OCP.

#### **Recommendations**

*We recommend that the Legislature enact appropriate legislation:*

1. *To limit the functions of occupational licensing boards to setting standards for licensure; adopting rules and regulations for licensing; making final administrative decisions in contested cases of applicant appeal, license revocation or suspension, and consumer complaints; and grading practical examinations which require the judgment of board members who possess the technical skills and knowledge to make such judgments.*

2. *To vest in the OCP the exclusive responsibility to handle consumer complaints, including investigation of complaints, the institution of civil suits for injunctive relief or to*

3. *Commission on Organization of Government, Report to the Ninth State Legislature, State of Hawaii, February 1977, pp. 97, 100.*

*collect civil penalties, and to prosecute all cases before the hearings officer and the various boards.*

3. *To vest all other functions related to the licensing of occupations to the DRA staff, including such administrative functions as designing application forms; receiving and*

*reviewing applications; evaluating the qualifications of applicants; developing, administering, and grading written examinations; and issuing licenses.*

*We further recommend that the Legislature provide for additional staffing for the handling of consumer complaints.*

#### PART III

#### RECOMMENDATIONS

#### IMPLEMENTATION

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**PART III**

**FINDINGS AND RECOMMENDATIONS:  
PROGRAM EXECUTION**

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## Chapter 4

### THE STANDARDS FOR LICENSING

Establishing the qualification standards for initial and continued licensure of an individual is the most significant function of the licensing program. These standards should be directed at ensuring safe, competent, and scrupulous practices of an occupation, and should not have the effect of reducing competition by restricting access to occupations or by prohibiting certain competitive practices, e.g. price advertising.

Standards must be sufficiently specific and rational. Specific means that the standards and guidelines used in granting, denying, suspending, renewing, or revoking a license are understandable and not ambiguous. Unduly vague standards subject to many interpretations and differing applications are unfair to persons who are or will be subject to the standards. These persons are entitled to know what is required of them. Vague standards invite arbitrary and discriminatory application.<sup>1</sup> Vague standards may also result in delays in processing applications.

Rational means that the standards bear a reasonable and substantial relationship to a minimal level of effective and safe practice of a regulated occupation.<sup>2</sup> Without rational standards the public has no assurance that licensed persons are competent. Moreover, if the standards are unreasonable, the right to pursue a chosen livelihood is unnecessarily infringed upon.

#### Summary of Findings

Our review of the standards shows that:

1. The use of improper and vague or unreasonable standards persists among the State's licensing boards.
2. The program lacks systematic and effective means to identify and revise standards which are vague or unreasonable.

#### Improper Standards

There are specific kinds of standards in use by various boards which are improper: U.S. citizenship status and durational residency requirements, for example, have been declared invalid by the courts; and certain restraints on advertising are generally considered unrelated to the effective performance of an occupation.

**U.S. citizenship.** In light of several U.S. Supreme Court decisions ruling that the use of alienage as a criterion for various jobs and licenses is invalid, the Attorney General (ATG) issued an official opinion on the matter in 1974, stating in part:

1. "Due Process Limitations on Occupational Licensing," *Virginia Law Review*, September 1973, vol. 59, no.6, pp. 1103-1105, 1110.

2. *Ibid.*, p. 1111.

"It is our opinion that any state statute which requires United States citizenship or a declaration of intention to become a citizen as a condition of licensure by a board, commission or department is unconstitutional as violative of the Equal Protection Clause of the 14th Amendment, and also, as an encroachment upon the exclusive federal power to regulate immigration and thus invalid by virtue of the Supremacy Clause of the United States Constitution."<sup>3</sup>

Four years later, in 1978, the ATG wrote again to the director of the Department of Regulatory Agencies (DRA) noting that eight boards and commissions still had statutory citizenship requirements and were enforcing these requirements. The ATG requested that the department inform all boards that such requirements may not be imposed.<sup>4</sup>

There were, as of 1981, still four boards and one licensing program with statutory requirements for U.S. citizenship. These were the boards of chiropractic examiners,<sup>5</sup> medical examiners,<sup>6</sup> examiners in optometry,<sup>7</sup> and private investigators and guards.<sup>8</sup> The licensing program for mortgage brokers and solicitors, which is not under a board but is under the director of DRA, still has a citizenship requirement also.<sup>9</sup>

**Durational residence.** In 1972 the director of the DRA requested an opinion on the constitutionality of the durational residence requirement used by numerous boards.<sup>10</sup> The ATG informed the DRA that the use of durational residence was indeed unconstitutional.<sup>11</sup>

In later communications, the ATG cited two Federal District Court decisions holding that the residency requirements for Hawaii's veterinary medicine, and medicine, surgery, and psychiatry licensing programs violate the U.S. Constitution<sup>12</sup> and U.S. Supreme Court decisions holding that durational residency requirements violate the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution.<sup>13</sup>

Subsequently durational residency requirements were removed from some—but not all—of the State's occupational licensing laws.

As of the summer of 1981, there were still five licensing boards with one year or more durational residency requirements in their respective statutes: Board of Chiropractic Examiners,<sup>14</sup> Contractors' License Board,<sup>15</sup> Board of Examiners in Naturopathy,<sup>16</sup> Board of Private Detectives and Guards,<sup>17</sup> and the Real Estate Commission.<sup>18</sup>

**Restrictions on business practices.** Restrictions on advertising imposed by licensing boards present the clearest example of unnecessary restrictions of licensed persons or businesses.

In 1973 the PVL division administrator requested a legal opinion regarding the constitutionality of a provision in the Board of Pharmacy's rules prohibiting advertising of prices.

3. Op. No. 74-18, to Edwin Honda, Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, November 18, 1974.

4. Letter to Wayne Minami, Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, June 8, 1978.

5. Section 442-2(1), HRS.

6. Section 453-4(1), HRS.

7. Section 459-7, HRS.

8. Section 463-6, HRS.

9. Section 454-3(b), HRS.

10. Letter to George Pai, Attorney General, State of Hawaii, from Edwin Honda, Director, Department of Regulatory Agencies, State of Hawaii, April 25, 1972.

11. Letter to Edwin Honda, Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, April 26, 1972.

12. Letter to Edwin H. Honda, Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, May 17, 1972.

13. Letter to Edwin H. Honda, Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, June 6, 1972.

14. Section 442-2(2), HRS.

15. Section 444-11(4), HRS.

16. Section 455-3, HRS.

17. Section 463-6, HRS.

18. Section 467-9.5(4), HRS.

The ATG stated that recent court decisions held that such prohibitions are unconstitutional and an unlawful exercise of the State's police powers since the "rules do not bear a reasonable relationship to public safety, health, morals and general welfare."<sup>19</sup>

In 1974 the board amended its rules to remove its complete ban on advertising but continued to impose some restrictions. In 1977, the board was advised by the ATG that a recent U.S. Supreme Court decision prohibiting such restrictions leads to "the inescapable conclusion . . . that the current regulations must be repealed."<sup>20</sup> Subsequently, those restrictions identified by the ATG were repealed.

Also in 1977, the ATG advised several other board chairpersons of the implications of court decisions regarding the unconstitutionality of certain advertising restrictions and advised the boards to rescind such prohibitions in their rules.

At least one board still indirectly prohibits the advertising of prices. The Board of Practicing Psychologists limits advertising in telephone books and announcements to name, highest degree, certification status, address, phone number, and identification of the psychologists' major areas of practice.

#### Vague and Unreasonable Standards

To determine whether other standards are sufficiently specific or rational usually requires an evaluation of the programs being regulated. While such in depth evaluations were not a part of this audit, our general review of the statutes revealed some ambiguities in the experience requirements imposed by the Board of Accountancy. In addition, sunset evaluation reports previously issued by this office on nursing home administrators and psychologists disclosed some vague entrance requirements.

Section 466-5, HRS, the accountancy licensing statute, states in part that a person applying for a certificate of certified public accountant shall be required, among other things, to "Complete two years of professional experience in public accounting practice or experience as an auditor or examiner in industry or government if, in the opinion of the board, such experience is *substantially as comprehensive and diversified as experience in public accounting practice.*" (Emphasis added) Exactly what constitutes qualifying experience is not specified and the rules do not clarify or amplify the experience requirement.

The Legislative Auditor's sunset evaluation of the Board of Nursing Home Administrators disclosed some vague standards for education and experience which permitted the apparent disparate treatment of applicants. The stringent education requirements were also questioned. Hawaii at the time of the study, was only one of seven states requiring a baccalaureate degree for entry into the field of nursing home administration, and Hawaii was the only state among the seven which did not allow some combination of education and experience to substitute for a baccalaureate degree.<sup>21</sup>

The sunset evaluation of the Board of Certification for Practicing Psychologists found that certain standards were of "doubtful validity and relevance in protecting the public. . ." This board, among other requirements, requires an applicant to hold a doctoral degree from an accredited institution of higher education with training and education in psychology or hold a diplomate certificate granted by the American

19. Letter to the Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, February 8, 1973.

20. Memorandum to the Executive Secretary, Board of Pharmacy, Department of Regulatory Agencies, State of Hawaii, from the Deputy Attorney General, State of Hawaii, Subject: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, May 23, 1977.

21. Legislative Auditor, State of Hawaii, *Sunset Evaluation Report, Nursing Home Administrators*, Report No. 81-4, January 1981, pp. 16-21.

Board of Examiners of Professional Psychology. Within the American Psychological Association itself there has been debate on the validity of these high standards and a push by some psychologists for the acceptance of master's degree in psychology for state licensing. A number of other studies have also shown that a college education is not necessary and that paraprofessional can be trained to provide satisfactory counseling services.<sup>22</sup>

### No System to Review Licensing Standards

There are no established procedures for the routine and critical review of proposals for changes in licensing standards to identify unduly vague or unreasonable standards, to regularly review the literature on licensing and court opinions on relevant licensing issues, and to systematically inform boards of questionable standards and to monitor board actions. Identification and action are now dependent on the inclination and aggressiveness of individual staff members.

Taking action to effect changes is a problem because the department sees itself as lacking the authority to take corrective action directly and because the department has chosen to defer to the boards in many cases rather than create conflicts between staff and board members.

To continue in the present manner would perpetuate the use of unclear and overly restrictive rules by licensing boards which not only fail to ensure competence among licensed persons, but deal unfairly with persons interested in entering these regulated occupations and businesses to the detriment of the general public.

### Recommendations

1. We recommend deletion of those standards in statutes or rules which have been found to be unlawful. These include requirements of U.S. citizenship, residency in Hawaii, and certain advertising prohibitions.

2. We recommend that the boards examine their qualification standards for licensure to determine whether the standards are sufficiently specific and rational.

3. We recommend that the department develop procedures to systematically identify improper, vague or unreasonable standards and make recommendations for change to the respective boards.

22. Legislative Auditor, State of Hawaii, *Sunset Evaluation Report, Psychologists*, Report No. 81-6, February 1981, p. 24.

## Chapter 5

### APPLICATIONS ADMINISTRATION

In this chapter we focus on the manner in which the qualifications of applicants are evaluated and the appropriateness of the information requested on the application forms.

The process of evaluating applicants is an important phase of the licensing program. It is the process of determining whether a person will be legally entitled to practice an occupation of his choice. It should be conducted to ensure fair treatment of applicants; i.e., persons with similar qualifications should be judged in the same way. The evaluation should also be completed and the applicant informed within a reasonable period of time to avoid any unnecessary delays in an individual's pursuit of a chosen livelihood.

### Summary of Findings

In general we find that the process of evaluating applicants incurs unnecessary delays in decisionmaking and that there is a lack of adequate policies and precedents to ensure fair treatment of applicants.

Specifically:

1. The methods used to ensure the proper design of application forms are unsystematic and ineffective. Application forms contain improper, irrelevant, and perhaps illegal questions.

2. The methods used to assess the qualifications of applicants are diverse, ineffective, and inefficient. The methods vary from

board to board, involve many different personnel, considerable routing of applications, delays in decisionmaking, and to a degree, contribute to arbitrary actions.

### Design of Application Forms

The application forms for candidates should be as clear and simple as possible, with instructions designed to solicit complete and pertinent information to facilitate fair and expeditious decisions on whether an applicant meets the requirements for licensure or is eligible to take a board's examination.

There is no one with the overall responsibility and sufficient authority to ensure that the application forms are properly designed, consistent with the legal qualification standards, comprehensible, and effective in soliciting appropriate information.

There are several staff positions with duties related to the design of application forms—the supervisor of the professional and vocational licensing division (PVL), the executive secretaries, and the supervisor of the licensing branch. But the boards have, according to the functional statements of the department, the primary duty and authority for the design of these forms. Some boards adopt staff recommendations or rely on staff to design their application forms. Others insist on designing or, at least, approving each change in the application forms.

The result of these arrangements is poorly designed application forms, with improper or illegal questions, extraneous or irrelevant questions and documentation, as well as unnecessary delays in making changes.

**Deficiencies in application forms.** Our review of the application forms of various boards revealed several kinds of deficiencies. *First*, the presence of improper, illegal, or irrelevant questions. *Second*, the solicitation of documents which are not necessary for the evaluation and some of which are unavailable to applicants.

1. **Improper questions.** a. *U.S. citizenship and durational residency requirements.* The Attorney General, in line with U.S. Supreme Court decisions, has counseled on several occasions the DRA's occupational licensing program to cease using U.S. citizenship status<sup>1</sup> and durational residency requirements<sup>2</sup> because they are invalid and unconstitutional.

However, some application forms still contain questions related to alien status and durational residency in Hawaii. We have been informed by the department's staff that the citizenship and durational residency requirements on the forms or in the laws, are not enforced. The presence of these questions, however, may still effectively deter applicants and they should be removed.

b. *Prior convictions, criminal records.* In 1974, Act 205 was enacted to prohibit the refusal or termination of employment or occupational licenses solely by reason of prior convictions. This Act, embodied in Chapter 831, HRS, *Uniform Act on Status of Convicted Persons*, severely restricts the use and distribution of certain criminal records and convictions in relation to employment or occupational licensing.

Numerous application forms violate the principle of this Act by asking a number of questions inconsistent with the provisions of the Act.

Act 205 expressly prohibits the use, distribution, and dissemination, in connection with an application for public employment or license, of records of: arrest not followed by a valid conviction, convictions which have been annulled or expunged, convictions of a penal offense for which no jail sentence may be imposed, and conviction of a misdemeanor in which a period of 20 years has elapsed since the date of conviction and during which elapsed time there has not been any subsequent arrest or conviction.

An agency may consider conviction of a penal offense directly relating to the applicant's possible performance in the job applied for or in the job he holds, or to the applicant's or holder's possible performance in the occupation for which a license or permit is applied for. But a refusal, suspension, or revocation may occur only after an investigation is conducted and it is concluded that the person so convicted has not been sufficiently rehabilitated to warrant the public trust. In this regard, discharge from probation or parole supervision, or the passing of two years from final discharge or release from any term of imprisonment without subsequent criminal conviction, is deemed rebuttable prima facie evidence of sufficient rehabilitation.

Despite these constraints, 15 boards still ask the extremely broad question, "Have you ever been convicted of a crime other than a traffic violation?" The Board of Private Detectives and Guards asks if the applicant has any criminal record and to specify the offense and disposition. The Motor Vehicle Industry

1. Letters to the Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, November 18, 1974 and June 8, 1978.

2. Letters to the Director, Department of Regulatory Agencies, State of Hawaii, from the Department of the Attorney General, State of Hawaii, April 26, 1972, May 17, 1972, and June 6, 1972.

Licensing Board asks each applicant whether the applicant has been arrested or found guilty of fraud and to attach a police abstract to the application. The Boxing Commission asks if a person has been convicted of a crime and whether that person is on parole from any penal institution.

The Board of Dental Examiners is perhaps the most blatant violator of the provisions of Chapter 831. Its application form requests information on convictions, including convictions which have been expunged from the records by court order; summonses; arrests; and participation in investigations.

The question is stated in this fashion:

"Have you ever been summoned, arrested, taken into custody, indicted, convicted or tried for, or charged with, or pleaded guilty to, the violation of any law or ordinance or the commission of any felony or misdemeanor (excluding traffic violations), or have you been requested to appear before any prosecuting attorney or investigative agency in any matter? (Include all such incidents no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged from the records by order of court, it nevertheless must be disclosed in your answer to this question.)"

Some of these requests are in direct conflict with the law. Arrest data, for example, if not followed by valid convictions, cannot be used. The statutory prohibitions against dissemination of such records also means that the applicant will not be able to obtain a police abstract.

The board asks for all or any convictions although the type and time of the conviction limit the convictions which may be considered. Even if a person has been convicted for an offense directly related to the occupation he seeks, there is a rebuttable presumption that under certain conditions, the person is rehabilitated, and the criminal conviction cannot be used to deny a license without a hearing in accordance with state administrative procedures for contested cases.

2. **Irrelevant questions.** Questions appear on the application forms of different boards

which are totally unrelated to qualification standards.

The Board of Dental Examiners, for reasons unknown to the present chairperson, asks detailed questions on an applicant's prior employment with governmental agencies: whether an applicant was a city, state, or federal civil service employee; whether the applicant served in the armed forces of the United States; and whether the applicant was employed by the U.S. Public Health Service.

The Board of Registration of Professional Engineers, Architects, Land Surveyors and Landscape Architects mandates that each applicant for the engineer's or architect's license submit "in writing the reasons for the desired certificate," and delays a decision until these essays are received.

3. **Unnecessary documents.** Some boards require the submission of documents which are not necessary for the proper evaluation of applicants, but which do result in additional paper shuffling by staff and inconvenience to applicants.

Many boards still require the submission of letters or forms attesting to the good character of the applicant or verifying work experience. One board chairman candidly said that the reason for requiring the character references is to uphold the image of the profession, a goal which is inappropriate for state licensing. That these letters do help "uphold the image" or effectively screen out persons of "bad character" is highly unlikely. *First*, an applicant will probably not submit negative letters about himself to the department. *Second*, some boards specify the persons from whom letters of reference must be obtained although such persons may not have known the applicant personally. The Board of Dental Examiners, for example, requires the dean of dental colleges to write letters. *Third*, the letters of reference are rarely, if ever, verified by staff or the boards and are of little or no value in assessing candidates' competence.

Several boards, with post-graduate or professional school requirements for licensure, still insist that applicants send in certified copies of high school diplomas in addition to copies of their professional school certificates as well as transcripts and diplomas of professional education.

The Board of Chiropractic Examiners, for example, requires applicants to submit a "copy of chiropractic college diploma and official chiropractic college transcripts," a "certified copy of college transcripts," and the applicant's "photocopy of high school diploma."

Similarly, the Board of Examiners in Naturopathy requires its applicants to submit a "photocopy of diploma/certificate and a certified transcript . . . of naturopathic medicine," a "certified transcript . . . of at least 2 years of liberal arts & sciences courses," and a photocopy of a high school diploma.

These kinds of requirements generate unnecessary paper work—receiving, sorting, filing, etc.—and are of no apparent value in evaluating applicants.

**Unnecessary diversity in applications.** Boards requesting similar information in their applications have chosen to impose their own unique forms and standards for submissions with applications without reasonable bases and without regard for the impact on operations. Diverse requirements, for character references or photographs, for example, create confusion and additional work.

The department proposed and the boards rejected the use of one format for the letters attesting to good character. Ordering and keeping an inventory of different forms and matching up different forms for the respective board's application when the use of one form for these letters would suffice seem very unreasonable.

Trying to remember or checking on the varying standards for photographs which must

be submitted with applications and making sure the photos meet the respective board's standards for photos border on the absurd.

Nonetheless, many boards prescribe standards for their photos. Twenty-two boards require a photograph measuring 2 1/2 inches by 2 1/2 inches. Two boards require photographs in the size of 2 inches by 2 inches, and two other boards require photographs of the passport type. The Board of Hearing Aid Dealers and Fitters specifically wants a black and white photograph and the Board of Osteopathic Examiners' photographs must be with a white background. The PVL administrator is said to have made an administrative decision to accept photographs of any size, but the application forms do not reflect this and some applicants, most certainly, are attempting to comply.

**Need for a system to handle changes to application forms.** The program is not designed to systematically identify and effect needed changes. For example, amendments to the licensing statutes may occur each year, but there is no systematic review of the statutes to identify what changes in the application forms are necessary and to make the changes.

During the course of our fieldwork, one particular incident occurred which illustrates the lack of and need for a systematic approach to implement changes.

The State Legislature in 1981 passed Act 65 which included a requirement for an apprenticeship period for massage therapist licenses. The licensing branch was unaware of this until September when its supervisor was directed by the executive secretary for the Board of Massage to stop issuing applications and was informed that the examinations for the latter part of this year and one for next year were being cancelled because of this new apprenticeship requirement. The licensing branch had been passing out and collecting applications on forms based on the old law and informing applicants of the examination schedule for months.

**Recommendation.** We recommend that the PVL be assigned the responsibility of: (1) developing and implementing a system to monitor actions which have a bearing on qualification requirements (such as court decisions, legislative acts); (2) informing the respective boards of such actions; and (3) preparing the necessary changes to the application forms.

#### Assessment of Qualifications

The process of determining whether an applicant qualifies for licensure or examination involves two basic steps: (1) making certain that an application is complete, with all required documents; and (2) determining whether an applicant's qualifications, as reflected in the application forms, meet a board's standards for education, experience, and other conditions for licensure. This assessment should be conducted in a timely way and in a manner which ensures that applicants are treated fairly.

The present methods tend to impede rather than facilitate timely and fair evaluations. The procedures are unnecessarily cumbersome and diverse and there is a lack of adequate policies and records of precedents to facilitate the application of vague licensing standards.

**Unnecessarily diverse and cumbersome procedures.** There are many—rather than one—general procedures for the processing of applications from receipt to issuance of a decision. With information from staff, minutes of board meetings, and board chairpersons, we were able to identify several general patterns for the processing of applications. In each pattern, someone, usually a licensing clerk in the licensing branch, checks the application for completeness; then, someone reviews the applications to determine whether the applicant's qualifications meet the standards set for licensure by the appropriate board; then the board takes official action to grant or deny a license or permission to take an examination. There are, however, variations in each of the patterns.

Brief descriptions of the different ways of processing the applications follow:

1. A clerk of the licensing branch (licensing clerk) reviews the applications to make certain they are complete, have all required documents, and fees are paid. This clerk also determines whether applicants are qualified under the standards of the respective boards. A list of the applicants to be granted or denied licenses is sent through an executive secretary to the appropriate board for its approval.

2. A licensing clerk reviews the applications for completeness, then sends the applications to the appropriate executive secretary. The executive secretary assesses the qualifications of applicants, makes a decision on each applicant, and then submits the list of qualifying and non-qualifying candidates to the board for its approval. The board returns the list to staff for its action.

3. A licensing clerk and an executive secretary review the applications for completeness, then the executive secretary submits the applications to the appropriate board for its evaluation and determination of eligibility. The board informs staff of its decisions.

4. The applications bypass the licensing clerks and go directly to the executive secretary for the secretary's review and evaluation or for the board's review and evaluation. The licensing branch is then informed of the decisions.

There is still another pattern for licensing programs without boards. The applications for these programs may go to a licensing clerk or the secretary of the PVL administrator or an executive secretary to check for completeness and to make recommendations for licensing. The division administrator reviews the applications and recommendations and makes decisions which are submitted to the director of the department for approval.

The variations in procedures appear to lack rational basis. Staff inform us that they have simply evolved in response to the expectations and directions of each board. Certain boards are so involved in this process that they give specific directions to individual staff members in the licensing branch directly or through the executive secretaries on numerous details of administration.

The variations are so great that there is no one person who knows the procedures for all of the boards. With some boards, only the licensing clerks assigned to the respective boards are knowledgeable of the boards' individual procedures and requirements. As a result when a clerk is absent, other clerks have difficulties processing the applications normally handled by that clerk.

The procedures involve, at a minimum, three different positions—licensing clerks, executive secretaries, and board members, performing overlapping or similar functions. These procedures entail the use of more staff time for transmitting applications, documents, and lists than if all activities were performed by one person. They incur delays in decisionmaking as materials are in transit from one to another and as an official decision is put off until a board's next meeting. They increase the possibility of lost documents and make it difficult for staff to respond to inquiries from applicants on the status of their applications.

**Lack of adequate policies and precedents.** If licensing standards are sufficiently clear or if there are appropriate policies and records of precedents to guide decisions where there are vague licensing standards, the chances of inequitable treatment of applicants are reduced and the possibility of prompter decisions is increased.

Several boards have vague or too flexible standards without adequate guidelines for evaluating applicants. The Board of Accountancy and the Board of Nursing Home Administrators are examples of such boards.

The Board of Accountancy, as discussed in the previous chapter, requires its applicants who are not in public accounting to have experience which is substantially as comprehensive and diversified as experience in public accounting practice. The statute and the rules and regulations, however, do not adequately describe or define the experience requirement.

The Board of Nursing Home Administrators is permitted by law to make substitutions for some of its requirements and has considerable flexibility in allowing or denying substitutions.

If standards are so vague as to require considerable value judgment to determine whether an applicant is qualified, it is very likely that the board's official standards are not sufficiently clear to give persons interested in the occupation fair warning of the board's requirements. It may also mean those skills, knowledge or experience essential for competent practice of an occupation have not been identified. The danger is that ambiguous or too flexible standards permit arbitrary decisions.

The executive secretaries of several boards mentioned that some board members do, at times, make decisions based on a desire to exclude persons without legitimate reasons. One executive secretary says he is generally unable to tell applicants the reasons for the denials of licensure because a board acts so arbitrarily and that this board tends to deny many applicants. Another says he has attempted unsuccessfully to dissuade a board from improperly denying a license and has had to advise the denied applicant to obtain assistance from an attorney to challenge a board.

**Need for changes.** The present procedures for processing applications are unduly diverse and cumbersome and, for some boards, lacking in sufficiently clear standards or guidelines. This lack of an overall uniform procedure with adequate guidelines for evaluating applications is a barrier to fair and expeditious evaluations of applications.

The reason for this situation is the present relationship between the boards and the PVL. The boards, by statute, are authorized to grant and deny licenses and many believe that they may choose how the applications will be processed and evaluated and some insist on reviewing all applications. The PVL, as a result, is operating in response to directions of 30 different boards and has not been able to effectively manage this process. If significant improvements are to be achieved in this process, this basic relationship must be modified.

If the PVL were granted full authority and responsibility for the administration of the licensing function, the division would be able to control the process and perhaps develop a more systematic approach to licensing.

If the division were given this authority, it should, first, carefully analyze the standards for licensing identifying those that are sufficiently clear and easy to implement and those that are not. Where the standards are not clear enough, the division's staff should assist the boards in revising them or developing more specific guidelines for applying the standards. Then, to the greatest extent possible, the job of evaluating applications should be assigned to the staff. Specifically, where the eligibility and qualifying standards are explicit, the staff would be responsible for evaluating the applications,

and as appropriate, for issuing the licenses. As suggested in Chapter 3, the boards would be involved in evaluating applications only where the evaluation is of such a technical nature as to require the requisite technical skills and knowledge of the board.

This procedure would reduce the number of positions and time required to reach decisions on applicants and the staff time and efforts involved in reviewing and passing around documents. It would increase accountability for proper performance and permit better management of this process.

### **Recommendations**

*We recommend that:*

1. *The staff identify those licensing standards which are unclear so that more definitive standards or guidelines can be adopted by the licensing boards.*

2. *The pertinent statutes and rules be amended to assign to the staff the responsibility for the evaluation of applications and the issuance of licenses where the eligibility and qualifying standards are explicit and where the evaluation does not require the expertise of the boards.*

## Chapter 6

### DEVELOPMENT AND ADMINISTRATION OF EXAMINATIONS

In this chapter we focus on the development and administration of examinations in the occupational licensing program.

All but a handful of boards use written examinations of candidates. Several also have personal interviews or oral examinations. Eleven boards use written examinations developed by national or regional testing services; four of these supplement the national examinations with examinations they develop; 15 other boards develop and use their own written examinations, generally referred to as "state board exams." Additionally, 11 boards develop and administer practical examinations to test the skills of applicants.<sup>1</sup> It is estimated that there are over 100 different tests in use by the licensing boards.

The significance of examinations has been noted by Benjamin Shimberg, a noted author on the subject of occupational licensing: "If protection of the public interest is the cornerstone on which the edifice of occupational licensing rests, the tests used to determine competence are clearly one of the main pillars that support the structure itself."<sup>2</sup> The potential value of the licensing examinations depends on their ability to distinguish between the competent and the incompetent to safeguard the public. To achieve this goal, licensing examinations must be valid and reliable and must be administered fairly.

#### Summary of Findings

We find that:

1. Present methods of developing state board licensing examinations provide little assurance that the examinations have the effect of discriminating between competence and incompetence.
2. The practical examinations administered by the boards do not ensure anonymity of the examinees and objectivity and are not uniformly being applied to all applicants.
3. There is a need for major changes in powers, duties, and staffing to ensure the development of valid and reliable state tests and proper administration of tests.

#### Deficiencies in Test Development

In this section we assess the performance of the test development function by the boards and by DRA staff.

1. These numbers are based on information gathered from different staff and board members. The DRA was unable to provide us with a comprehensive summary of the types and numbers of different examinations for the boards.
2. Benjamin Shimberg, Barbara F. Esser, and Daniel H. Kruger, *Occupational Licensing: Practices and Policies*, Public Affairs Press, Washington, D.C., 1973, p. 193.

**Criteria for examinations.** All licensing examinations should be of the highest quality and objectivity to separate the competent practitioners from the incompetent. The tests should not be unfair barriers to licensed occupations, either more restrictive than necessary or broader than necessary to assure reasonable competence.<sup>3</sup>

Proper test development requires the skills and knowledge of persons with technical training.

1. **Validity and reliability.** The licensing examinations should be valid and reliable, meeting professional testing standards. Valid tests are backed by evidence that the tests either predict competent and safe performance of a job or correlate with significant skills and knowledge of a job.

Reliable tests measure knowledge and skills in a consistent way, i.e., a person scoring high on one form of the examination would very likely score high on another form of the examination at a different time.

Tests should not unfairly discriminate against candidates on the basis of race, religion, sex, or national origin. Properly constructed examinations would lessen the possibility of such discrimination.

2. **Test development.** Proper test development involves some very specific steps: analyzing each occupation to isolate critical elements that need to be tested; developing specifications for the test to increase the likelihood that each form of the test will be consistent with a definite plan and include all significant topics; writing test questions which are not ambiguous or have more than one answer; writing clear directions for the tests; developing answer keys to facilitate accurate scoring and developing clear guidelines for judges of performance tests; setting appropriate passing scores to ensure safeguarding of the public health, welfare, and safety; analyzing test items to determine the ones which do or do

not discriminate the qualified candidate from the unqualified candidate; and finally, analyzing the reliability and validity of the tests.<sup>4</sup>

It has been reported as a general nationwide condition that licensing boards have not followed proper procedures for test development. Shimberg has commented on this state of test development by licensing boards:

"The quality of testing found in many occupational licensing programs is so low that one wonders how the revolution in testing – especially the advances in technology that have been made since World War II – could have managed to bypass so completely the field of occupational licensing.

"Few licensing boards appear to have made any use of consultants. This may have stemmed in part from the wording of the legislation establishing each program, since it was frequently stated explicitly that the board 'shall prepare and administer' the examination. Taken literally, this can be interpreted to mean that each board had to execute the testing function completely on its own, without involving outsiders."<sup>5</sup>

Boards are using generally outmoded procedures in developing their written and performance tests.

Some of the common problems found in state board written examinations nationally are: lack of planning of tests to ensure balanced and comprehensive coverage of the field to be tested; overreliance on essay tests with questions that are often ambiguous, with time limitations which limit the number of questions, and without adequate detailed grading criteria as to what constitutes an acceptable answer; poor quality multiple choice questions with phrasing of questions, lending themselves to more than one interpretation, with more than one correct

3. Jonathan Rose, "Occupational Licensing: A Framework for Analysis," *Arizona State Law Journal*, 1979, pp. 193–195.

4. The standards for proper test development are based on Shimberg, *Occupational Licensing: Practices and Policies*, pp. 212–216.

5. *Ibid.*, p. 194.

answer, or other shortcomings; and failure to analyze results of tests to identify defective questions, to improve questions, and to ensure that the test as a whole is reliable.

The results of performance tests may be unreliable or misleading because of: failure to identify and test the significant skills rather than the unique or any skills of a job; lack of standardized procedures for administering tests and evaluating the results; failure to inform candidates of what is expected of them and how they shall be graded; lack of adequate criteria or standards for evaluating performance with clear and specific directions on what to look for and what is acceptable.<sup>6</sup>

**Responsibility for examinations.** The boards have the statutory authority and responsibility for the development of examinations. Specific duties of the boards, relative to tests, include determining the frequency of the examinations, contracting for examination services if they desire, preparing and grading examinations, conducting practical examinations, determining the content of tests, and approving all examination materials.<sup>7</sup>

The supervisor of the examination branch has the duty to provide the boards with "technical advice . . . in the proper development of testing materials, types of examinations, techniques, scope and weights, rating scales and standards."<sup>8</sup>

The executive secretaries are directed to "review examination materials submitted by the examination branch and make recommendations to boards and commissions."<sup>9</sup>

With the exception of the supervisor of the examination branch, none of these positions require professional test development training or expertise. The boards may, and often do, design their respective tests.

**Boards' methods.** Many of the examinations were developed years ago by the boards themselves. Some boards revise their tests inter-

mittently while others are still using old examinations.

Boards revising their examinations use varying methods: some review and select questions from textbooks; some purchase questions from different sources and compile these into a test; and others discuss and decide on questions, testing, and grading methods among themselves.

1. **Developing a test: an example.** The test development efforts of the Board of Electricians and Plumbers illustrate a method not grounded in proper test development procedures.

In 1979 the Board of Electricians and Plumbers discussed the merits of testing applicants for the journeyman electrician and supervising electrician license on electrical wiring diagrams. "It was generally felt that such drawings would have the effect of determining whether a candidate had the 'practical' knowledge, in addition to the 'book' knowledge, to qualify as a competent journeyman or supervising electrician." Two members of the board were assigned "to work on drawings for the electrician's examination."<sup>10</sup>

In December 1979, the two board members submitted 12 wiring problems for the journeyman electrician test, 9 wiring problems for the supervising electrician test, and the answer sheets. After reviewing these, the board approved all questions and the respective examinations were revised. The rationale for the changes in the tests is reflected in these excerpts from board minutes:

6. *Ibid.*, pp. 194–199.

7. DRA's *Major Functions*, July 1, 1981, p. 16.

8. Position classification form, Licensing Examiner.

9. *Major Functions*, p. 18.

10. Board of Electricians and Plumbers, Minutes of Meeting, August 9, 1979.

"The basis for the requested early implementation of the Supervising Electrician problems into the exam, stems from 'industry talk' that the present supervising electrician test is 'too easy.'

The Board further recommended that three (3) problems be given per exam with no change in time limits. Correction of the problems will be done by a Board member.

The Executive Secretary was requested to begin implementation of the exam additions and Board recommendations with the Department's Examination Branch."<sup>11</sup>

The results of the new test for supervising electrician were reported to the Board in February 1980:

"It was noted that no supervising electrician candidates passed the exam.

It was further noted that the wiring problems had been included with the January 1980 Supervising Electrician's exam for the first time and that this new exam addition had proven to be the major reason for the failure.

The Board will monitor the future supervising electrician exams closely to insure that the exams are a fair and true test of the candidates' ability."<sup>12</sup>

The point, of course, is that the wiring diagram problems should have been validated before their inclusion and use in the examinations.

2. **Oral tests and interviews.** Several boards conduct oral examinations or interviews of applicants bearing little or no relationship to competency or safety in job performance and reflecting little concern for the validity or reliability of the tests. They are quite subjective.

For example:

The Board of Certification for Practicing Psychologists was found in 1980 to be conducting oral examinations of an hour's duration on general psychology and methodology, with an emphasis on the applicant's area of specialization. This examination was without standardization in questions and grading and relied on the subjective feelings of the members of the board.<sup>13</sup>

The podiatrists of the Board of Medical Examiners have an "oral-practical" examination which has the supervisor of the examination branch asking applicants questions on medical knowledge. The questions and responses are tape recorded, listened to and later graded by the podiatrists.<sup>14</sup> The need for orally questioning the applicants as opposed to having them write out responses to written examination questions is not clear.

The value and need for these oral tests and interviews are questionable. There is nothing to indicate that these are sound and fair techniques to discriminate between the competent and incompetent applicants; and these oral tests permit judgment on the basis of personal characteristics other than the knowledge or skills of applicants.

#### Reasons for problems in test development.

There are several conditions perpetuating the use of outdated techniques of test development by the state licensing boards: (1) failure of some board and staff members to recognize that test development requires specialized technical skills; (2) the insistence on the part of some boards that they control the development of their respective examinations although they lack the technical skills and knowledge for developing tests meeting professional testing standards; and (3) failure of the department to provide adequate technical assistance on test development to the boards.

The board members should not be expected to be test development specialists, but they should be able to rely on technical

11. Board of Electricians and Plumbers, Minutes of Meeting, December 13, 1979.

12. Board of Electricians and Plumbers, Minutes of Meeting, February 7, 1980.

13. Legislative Auditor, State of Hawaii, *Sunset Evaluation Report, Psychologists*, Report No. 81-6, February 1981, p. 25.

14. Interview with former licensing examiner, August 10, 1981.

assistance from the staff. However, the staff's technical assistance in test development has been extremely limited.

There is only one position, a licensing examiner, in the division which requires training, skills, and knowledge of test development as a condition of employment. The job qualification requirements for the executive secretaries do not call for training in the knowledge and skills of test development, but they are expected by the department to review and advise the boards of their tests. Some executive secretaries do, in fact, advise the board on questions in the examinations or grading methods.

The licensing examiner is also the supervisor of the examination branch which has three clerical positions. Most of staff time in this branch is devoted to informing candidates of examinations, arranging for the site of examinations, making changes in examinations as directed by boards, reproducing copies of the tests or ordering the tests, scheduling the examinations, making certain that all persons administering an examination are informed, administering the examinations, grading examinations, reporting to the boards, and reporting results to candidates. These administrative chores seriously reduce the time and attention available for proper test development.

In 1980, the licensing examiner did accomplish some "item analyses," analyzing the questions and patterns of responses, in 13 written tests of 3 boards which were experiencing high failure rates on their examinations. He identified those questions with high rates of error and calculated the distribution of responses to different answers. The analysis showed that applicants tended to answer other than the supposedly correct answers, indicating that something was wrong with the items.

The licensing examiner presented his findings to the respective boards and recommended that they correct these problems.

Two boards were in the process of making changes in their examinations at the time of our audit, but the third had no plans to make changes. These efforts, however, have been too limited and unsystematic.

#### Administration of Practical Examinations

**Anonymity of examinees.** The case of *Robert L. Pekarsky, et al., v. George Ariyoshi, et al.*<sup>15</sup> has great significance for occupational licensing examinations in this state. Because of its importance, the background, issues, and effects of this case on the DRA's examinations are discussed.

In December 1976, two dentists seeking licenses filed a suit against the State's Board of Dental Examiners, the Governor, the director of DRA, and the executive secretary of the board in U.S. District Court. The suit alleged "that the Dental Board utilized the dental licensing examination to discriminate against Plaintiffs on the basis of race and residency."<sup>16</sup>

The contested issue in the suit was the administration of the practical exam, not the contents of the board's practical examination.<sup>17</sup> Specifically, the plaintiffs argued that the exam was about 90 percent "subjective." The plaintiffs argued that bias was introduced when board members personally graded the candidates.<sup>18</sup>

Although no evidence supporting racial discrimination was found, the defendants agreed to modify the examination procedures by providing for anonymity, clarifying the appeals procedures for persons failing examinations, and

15. Civil No. 76-0455 (USDC).

16. *Ibid.*

17. Letter from the Department of the Attorney General, State of Hawaii, to Judge William Schwazer, December 18, 1976.

18. "2 Dentists Sue State for Bias," *Honolulu Advertiser*, December 18, 1976.

later, agreeing to the monitoring of the examinations by dental licensure experts.

A double-blind procedure<sup>19</sup> was implemented to ensure that graders did not see the examinees during the board's practical tests. One examination was monitored by two prominent dental licensure experts, Dr. A. Lewis Leo, Dean of the University of Florida Dental School, and Dr. W. C. Zimmerman, Chairman of the Oregon Dental Board. After the monitoring period was over, Dr. Leo suggested that the dental board draft a permanent examination procedure. The procedure was subsequently drafted and agreed upon by both parties.<sup>20</sup>

Needless to say, validation of examinations through litigation is a costly and inefficient mechanism. In the case of Pekarsky, litigation ensued for four years (1976 to 1980). Among the major costs involved were: \$325,000 in personal liability of the eight dental board members;<sup>21</sup> about \$152,732 in legal fees for the opposing attorneys paid by the State;<sup>22</sup> the costs of the State's attorneys and the two dental licensing experts.

Considering the high price paid by the State, both monetarily and in adverse publicity, it would be reasonable to expect that the PVL and the boards would have the fair administration—if not the validity—of all examinations as a high priority.

Staff has taken the initiative to encourage boards to apply greater anonymity in the administration of examinations and greater objectivity in the grading of practical examinations. However, staff efforts have not been completely successful or systematic, nor has the principle of valid and reliable examinations been extended to all state board examinations.

In September 1980, the supervisor of the examination branch, after consulting with various boards, issued a memorandum to all personnel and investigators of PVL which stated

that "all local examinations will be conducted with maximum anonymity."<sup>23</sup> The memo went on to stress the use of identification numbers for identifying examinees, rather than the use of names and addresses during the course of practical examinations. There are, however, still six boards with examinations permitting the grader to observe the candidates.

**Objectivity in practical examinations.** Staff, in recent years, has also taken steps to increase the objectivity of graders in practical examinations by establishing written criteria for evaluating performance and assigning scores. We have been informed that most boards now have such criteria.

In addition to its criteria for grading, the Board of Dental Examiners conducts "calibration sessions" before the practical examinations. All members of the board, and all panel graders must attend these sessions which are held to ensure that all graders are looking and judging the same things according to the same criteria to increase the fairness of the practical exam.

The boards of massage and optometrists will soon be conducting "calibration sessions," according to the supervisor of the examination branch. But these improvements in the administration and grading of practical examinations have not been instituted for all boards with practical examinations.

19. A double-blind procedure is one in which the grader does not see the examinee, and only identification numbers are used to record each candidate's performance. Only the patients rotate between the graders in one room and the examinees in another room.

20. Civil No. 76-0455, pp. 3-5.

21. "\$325,000 Payment Okd in Dental Exam Suit," *Honolulu Star Bulletin*, December 2, 1980, p. A-2.

22. "Lawyers in Dental Bias Case Get \$152,732," *Honolulu Star Bulletin*, December 25, 1980, p. A-8. These funds as of November 5, 1981 were in a trust fund pending an appeal on the issue of fees.

23. Memorandum to PVL personnel from the licensing examiner dated September 2, 1980, Subject: "Policy Regarding Testing With Maximum Anonymity."

**Non-uniform testing practices.** Some examinations are still not graded in a uniform manner and therefore do not assure a fair evaluation of the examinees' knowledge or competency. For example, the Board of Massage holds a practical examination for those candidates who have passed the board's written examination. At the practical examination, candidates perform their massage techniques on the board members who serve as graders of the candidates' performance. The board typically has each candidate graded by three board members, but when there are many candidates, only two board members may grade each applicant. The passing score is approval by a majority of the graders. If the candidate is graded by three graders, the candidate must pass two out of the three to pass the practical exam. If there are only two graders, the candidate must pass one of the two to pass the practical examination. This rather odd arrangement is unreasonable and unfair to applicants.

## Recommendations

We recommend that:

1. The department secure the assistance of persons with the technical skills and knowledge to develop examinations and to test their validity.
2. The boards ensure that the examinees in practical examinations are anonymous to the examiners.
3. The boards establish written criteria for evaluating performance and assigning scores in the practical examinations, and hold "calibration sessions" to ensure uniformity and consistency in grading.
4. The boards review their practical examination practices to ensure uniform administration of the examinations.

**Chapter 7**

**INVESTIGATION AND RESOLUTION  
OF CONSUMER COMPLAINTS**

In this chapter we review and assess the processing of consumer complaints in the professional and vocational licensing program.

The processing of a complaint includes: (1) determining whether or not the program has jurisdiction over the complaint; (2) investigating the complaint (including the gathering of relevant facts of the case) to assess whether the complaint is justified; (3) seeking to resolve on an informal basis the differences between the consumer and the person complained of; (4) deciding whether to pursue any action against the person complained of, and if so, what course of action; and (5) taking such appropriate action as necessary, such as preparing for and causing an administrative hearing to be held against a licensee and instituting a civil action to enjoin unlawful activities or to collect civil penalties.

Our discussion in Chapter 8 of hearings of contested cases is relevant to two interrelated issues addressed in this chapter, streamlining the procedures for processing complaints and defining an appropriate role for boards in the processing of complaints.

**Summary of Findings**

We find that:

1. The program is generally unresponsive to consumers—the investigation and resolution

of complaints are marked by unnecessary delays and probable bias by some boards.

2. The causes of such poor performance are the general make-up of the boards, the refusal of the boards to delegate the various complaint handling functions and tasks to staff, duplication of work, the lack of manpower, and the lack of uniform and meaningful standards, policies, duties, and practices in the handling of consumer complaints.

**Unresponsiveness of Program to Consumers**

Our sunset reports of 1980 and 1981, reported that delays and questionable resolutions mark the handling of consumer complaints in the various occupational licensing areas that we examined. A quick review of the entire occupational licensing program has revealed that delays and questionable resolutions are common throughout the program. Data attesting to this are set forth below.

**Backlog of cases.** The DRA administrative staff's own data developed in 1981 evidence the backlog of consumer complaint cases that has built up over the years.<sup>1</sup> The data show that as of July 24, 1981, there

1. Memorandum to the Director, Department of Regulatory Agencies, State of Hawaii, from the licensing administrator, September 16, 1981.

were 346 complaints at the Regulated Industries Complaints Office (RICO) and 157 cases awaiting hearings at the Office of the Attorney General (ATG). Of the complaints at RICO, 50 had been filed between 1976 and 1979 and the remainder had been filed in 1980 and 1981. Of those at ATG, 58 had been filed between 1977 and 1979, and the other 99 in 1980 and 1981. Complaints against contractors, real estate salesmen and brokers, automobile dealers, and motor vehicle mechanics constituted the bulk of the complaints pending at RICO and at ATG, to-wit:

**At RICO**

Contractors	107
Automobile dealers	36
Motor vehicle mechanics	28
Real estate salesmen and brokers	104

**At Attorney General**

Contractors	72
Motor vehicle mechanics	30
Real estate salesmen and brokers	38

That the bulk of the complaints pending at RICO and at ATG on July 24, 1981, were those against contractors, real estate salesmen and brokers, automobile dealers, and motor vehicle mechanics, is not surprising since over the years, the bulk of the complaints filed have been against these four categories of licensees. The data on the complaints filed against these four groups in the years 1979 and 1980 further illuminate the problem of the backlog of pending complaint cases. The data are displayed in Tables 7.1 and 7.2.

In 1979 and 1980, a total of 1,923 complaints were lodged against the four categories of licensees. A majority of the complaints were settled and disposed of within one year of filing, but over 300 were still unresolved in October 1981. Of the 300, one-fourth (or 80) cases had been filed back in 1979 and were at least 21 months old. Even of those complaints

settled and disposed of within one year of filing, only 32 percent were settled within 30 days. Sixty-four percent required 31 days to a year before settlement was negotiated.

Of the 1,923 complaints filed against the four groups in 1979 and 1980, 1,470 were referred for investigation. Investigations of 94 percent of them (or 1,377) had been completed by October 1981, but only 30 percent of the 1,377 complaints required no more than 30 days to complete investigation. Sixty-eight percent required 31 days to a year to complete. Some required even as long as 525 days to complete. Upon completion of an investigation report, an average of 55 days elapsed before a board reviewed the report, and another 67 days, on the average, passed before cases intended for administrative hearings were transmitted (with appropriate paper work) to the ATG.

Of those cases referred to the ATG for preparation for administrative hearings (227), more than half (57 percent), as of October 1981, were not ready for hearings. Only 43 percent were either set for hearings or already heard. These, on the average, had taken 239 days to prepare for hearings and 113 days from the day the ATG requested a hearing date to the actual hearing.

The issuance of a final order by a board on a case, after board review of the hearings officer's findings of facts, conclusions of law, and recommendations, took another 75 days.

The above statistics portray delays and unresponsiveness to the consuming public. The State's Office of the Ombudsman has received inquiries and complaints from consumers about these delays; and several judges of the state courts, in appeals from administrative decisions of the licensing boards, have privately criticized DRA for its excessive

**Table 7.1**  
**Status and Age of Complaints Filed in 1979 and 1980**  
**With Four Licensing Boards<sup>1</sup>**  
**As of October 1981**

	<i>Four Boards</i>	<i>Real Estate</i>	<i>Contractors</i>	<i>Auto Dealers</i>	<i>Auto Repair</i>
Cases received	1923 (100%)	384 (100%)	798 (100%)	369 (100%)	372 (100%)
Cases closed <sup>2</sup>	1596 ( 83%)	289 ( 75%)	644 ( 81%)	333 ( 90%)	330 ( 89%)
Cases Pending	327 ( 17%)	95 ( 25%)	154 ( 19%)	36 ( 10%)	42 ( 11%)
From 1979	80	21	48	6	5
From 1980	247	74	106	30	37

1. Data from DRA's preliminary analysis of its complaints resolution process.

2. A case may be closed whether a complaint is substantiated or not, with or without remedy for consumers, with or without an administrative hearing, by executive secretaries, investigators, boards, attorney general, or after a formal hearing.

**Table 7.2**  
**Complaints Processing Time for Complaints**  
**Received in 1979 and 1980 by Four Boards<sup>1</sup>**  
**As of October 1981**

	<i>Four Boards</i>	<i>Real Estate</i>	<i>Contractors</i>	<i>Auto Dealers</i>	<i>Auto Repair</i>
Total cases received	1923	384	798	369	372
Settled without hearings <sup>2</sup> (total cases)	1553 <sup>3</sup> (100%)	289 (100%)	624 (100%)	333 (100%)	307 (100%)
Within 30 days	501 (32%)	75 (26%)	265 (42%)	58 (17%)	103 (34%)
31-90 days	430 (28%)	51 (18%)	130 (21%)	142 (43%)	107 (35%)
91-360 days	557 (36%)	148 (51%)	190 (30%)	130 (39%)	89 (29%)
361-888 days	63 (4%)	15 (5%)	38 (6%)	3 (1%)	7 (2%)
Cases referred for investigation <sup>4</sup>	1470 (100%)	235 (100%)	562 (100%)	344 (100%)	329 (100%)
Cases awaiting investigation <sup>5</sup>	93 (6%)	21 (9%)	33 (6%)	21 (6%)	18 (5%)
Cases investigated	1377 (94%)	214 (91%)	529 (94%)	323 (94%)	311 (95%)
Within 30 days	420 (30%)	49 (23%)	138 (26%)	134 (41%)	99 (32%)
31-90 days	476 (35%)	58 (27%)	173 (33%)	118 (37%)	127 (41%)
91-360 days	462 (33%) <sup>1</sup>	100 (47%)	211 (40%)	70 (22%)	81 (26%)
361-525 days	19 (1%)	7 (3%)	7 (1%)	1 (1%)	4 (1%)
Completed investigation reports to Boards' review (average days)	55 days (730 cases)	64 (191)	74 (245)	.29 (179)	39 (115)
Boards' review to ATG for hearing (average days)	67 days (225 cases)	154 (41)	53 (122)	9 (5)	40 (57)
Cases referred for hearings to ATG <sup>6</sup>	227 (100%)	48 (100%)	122 (100%)	N/A	57 (100%)
Cases not ready for hearing <sup>7</sup>	129 (57%)	38 (79%)	87 (71%)		4 (7%)
Cases heard or ready for hearing	98 (43%)	10 (21%)	35 (29%)		53 (93%)
ATG case preparation time (average days)	239 days (98 cases)	173 (10)	275 (35)		270 (53)
Period from request for hearing by ATG to hearing (average days)	113 days (70 cases)	98 (10)	120 (30)		111 (30)
Hearing to issuance of final order (average days)	75 days (53 cases)	61 (10)	112 (20)		48 (23)

1. Complaints received by Real Estate Commission, Contractors License Board, Motor Vehicle Industry Licensing Board, Motor Vehicle Repair Industry Board. Data derived from DRA's preliminary analysis of its complaints resolution process.

2. "Settled" may mean the closing of a case whether the complaint is substantiated or not, with or without remedy for the consumer, but without a formal administrative hearing.

3. Information on two cases is missing.

4. These may include cases subsequently settled informally or with a hearing.

5. Twenty-six cases are from 1979, 60 from 1980, remainder not specified.

6. This section excludes four cases of the Motor Vehicle Industry Licensing Board (Auto Dealers) for which processing data were not available.

7. Twenty-seven cases from 1979, 101 from 1980, one not specified.

delays in bringing cases to hearings.<sup>2</sup> The hearings officer on one occasion was compelled to recommend dismissal of a case for lack of timeliness in prosecution.<sup>3</sup>

**Inequitable treatment.** In our previous “sunset” reports of various licensing boards we found evidence of unfair treatment of consumers in the handling of consumer complaints. We found that the boards are often biased in favor of those in the regulated industry against whom complaints are brought. For instance, in the case of the Board of Veterinary Medicine, we found that the board had failed to insist on complete investigations of its complaints and that it often referred complaints to the Hawaii Veterinary Medical Association and then failed to follow up on the results.<sup>4</sup> We also found that the Board of Hearing Aid Dealers and Fitters was less than diligent in its handling of complaints; it failed to resolve the few complaints it received.<sup>5</sup> Then, in the case of the Board of Practicing Psychologists we found that there was “a clear absence of aggressive investigation and decisive resolution of complaints” involving serious allegations against practicing psychologists of illegal use of drugs in therapy, of neglect in treatment, and of sexual abuse.<sup>6</sup>

Our findings have been in accord with the findings of the State Ethics Commission which conducted a study in 1979 pursuant to a legislative request. The Legislature in 1978 requested the Commission to conduct a study to determine whether members of the various regulatory boards within DRA who are engaged in the regulated profession or occupation “act in a manner favoring positions indicative of a conflict of interest.” (S. R. No. 247, 1978) In its study, the commission focused on 13 boards and included within its scope of study the manner in which boards handled complaints.

Included within the study were four boards which generally receive most of the complaints: the Motor Vehicle Repair Industry Board, the Motor Vehicle Industry Licensing Board, the Contractors License Board, and the Real Estate Commission.

The study found that the Motor Vehicle Industry Repair Board, the majority of whose members are public members rather than members from the regulated industry, acted quite fairly and did not show a tendency to favor the industry. However, in the case of other boards, the majority of whose members are from the regulated industries, the findings of the study were otherwise.

The Motor Vehicle Industry (dealers) Licensing Board, was found to be inclined to favor the industry’s position. The board tended to refrain from proceeding to a hearing for administrative disciplinary action against licensees.

The Real Estate Commission was also found to be less inclined to proceed to hearings for disciplinary actions against licensees. The study found that the Real Estate Commission tended to hold conferences on cases with the licensees involved but not with the complainants, and it often dismissed cases with just a warning to the licensees about their conduct.<sup>7</sup> The study gave the Contractors Licensing Board mixed reviews. The study found that the Contractors Licensing Board appeared to be willing to pursue hearings for disciplinary action against licensees and generally to follow the recommendations of the hearings officer.

2. “Proposed Internal Procedures for the Resolution of Complaints,” Office of the Director, Department of Regulatory Agencies, State of Hawaii, undated, prepared in 1981, by the DRA’s hearings officer.

3. Real Estate Commission, minutes of meeting, September 28, 1979.

4. *Sunset Evaluation Report, Veterinary Medicine*, Legislative Auditor of the State of Hawaii, Report No. 80-9, February 1980, p. 19.

5. *Sunset Evaluation Report, Hearing Aid Dealers and Fitters*, Legislative Auditor of the State of Hawaii, Report No. 81-3, January 1981, p. 22.

6. *Sunset Evaluation Report, Psychologists*, Legislative Auditor of the State of Hawaii, Report No. 81-6, February 1981, pp. 25, 26.

7. *State Ethics Commission Report on the Professional and Vocational Licensing Boards in the Department of Regulatory Agencies*, 1979.

There was, however, an exception to this general rule.

### Reasons for Poor Performance

The reasons for the delays and the bias against consumers are various. Among them are: the general make-up of the boards, the refusal on the part of the boards to delegate complaint handling functions and tasks to staff, duplication of work, the lack of manpower, and the lack of uniform and meaningful standards, policies, duties, and practices in the handling of consumer complaints.

**Make-up of boards.** As already stated earlier in this report, the boards are generally comprised of members from the regulated occupation or industry. Only on a few boards do the public members outnumber the members from the regulated occupation. Given this composition, the inclination of the boards to favor those in the regulated occupation is understandable. The tendency on the part of the boards to be biased in favor of licensees is greater when the size of the regulated occupation or industry or the number of licensees within the regulated occupation is relatively small, such that the licensees are personally acquainted with one another.

**Boards' reluctance to delegate tasks.** We reported earlier that an average of 55 days (ranging from 29 to 74 days) elapse between completion of an investigation report until a board reviews a case. This average elapsed time is accounted for in part by the fact that board action must await a board meeting. Where a board meets once a month, it would seem that there should not be a delay of more than a month for board review of a case. However, some boards, even though they meet once a month, take more than two months before they review cases referred to them. The Real Estate Commission and the Contractors License Board take an average of 64 days and 74 days, respectively, even though they meet once a month. (See Table 7.2.)

Delays of more significant periods occur from the time of the boards' first step in reviewing cases referred to them. The review process can take an inordinately long period of time. The Real Estate Commission, for example, takes an average of 154 days to review a case. The reason for delays at the board review stage is the insistence on the part of some boards of doing investigative and settlement work which could well be left to the staff to accomplish. The Real Estate Commission, for example, literally directs a re-investigation of cases already investigated by staff. It requests the staff to obtain additional information or documents, obtain accountings of funds, or arrange for parties in a dispute to appear at a meeting, or it may interview parties in a case. This commission also tries to effect informal settlements of cases by directing staff at a meeting to make a specific offer of settlement conditions, then, having staff return at a later meeting with the results, sometimes a refusal or counteroffer, directing staff to take additional steps, and so forth until a matter is finally resolved or referred to ATG, several months later.<sup>8</sup>

The Real Estate Commission generally has refused to permit staff to effect settlements and its active investigation and mediation of complaints appear to be significantly related to the lengthy processing of complaints.

The Contractors License Board has been more willing to delegate to staff the authority to act on complaints. This explains in part the high rate of informal settlements of cases, 42 percent within 30 days of receipt. (See Table 7.2.) Like the Real Estate Commission, however, upon receipt of an investigation report, it frequently requests additional investigative work,<sup>9</sup> which largely accounts for the lengthy

8. Minutes of Real Estate Commission of January 1979 to July 1981. For examples see cases RE 78-131 in minutes of January 26, 1979, February 23, 1979, June 22, 1979; RE 77-11, in minutes of August 31, 1979, October 25, 1979; RE 76-144 in minutes of August 31, 1979, September 28, 1979; CON 77-17 in minutes of June 22, 1979, January 25, 1980.

9. RICO assignment logs, March 29, 1980 to August 31, 1981.

average of 53 days of elapsed time from receipt of a report to final disposition.

The active involvement of a board in investigations and mediations need not preclude prompt board action. The Motor Vehicle Industry Licensing (auto dealers) Board also engages in these activities,<sup>10</sup> but this board expeditiously reviews cases. However, in general, the more involved the boards are in investigating and settling cases, the longer they take to complete their review. Thus, when the staff is authorized to fully investigate and also to decide on courses of action—whether to settle a case or not and if so, on what terms, and whether to drop a case or not proceed to a hearing for lack of sufficient showing of “probable cause”—cases appear to move faster. But when the boards, like the Real Estate Commission, direct investigations and must give approval on any course of action, cases appear to take longer to process.

**Duplication of efforts.** Executive secretaries, investigators, boards, and the deputy attorneys general often perform similar tasks on a case as the case is transmitted from one to another in the complaint handling process. They each review the complaint, gather relevant information through interviews or documents, review and identify pertinent laws, determine whether or not a violation has probably occurred, decide whether to attempt a settlement, dismiss a case, or pursue disciplinary action, and attempt to effect settlements between disputing parties.

The various entities repeating tasks accomplished by others contributes to protracted delays in processing complaints.

**Lack of manpower.** Another reason for the delays in handling consumer complaints is the shortage of personnel to work on the rapidly increasing volume of complaints and hearings. Indeed, the DRA staff ascribe the lack of manpower as the principal reason for the delays. During the five-year period from fiscal year 1975-76 to fiscal year 1979-80, the total

number of complaints, increased by 57 percent (from 843 to 1,323), and the number of hearings held by the DRA's hearings officer increased from 38 to 105. While the number of complaints and hearings increased, the number of investigators and other staff members in general remained unchanged. In fact, it can be said that the number of investigators available to investigate consumer complaints in the occupational licensing program decreased when in 1979 the former investigative branch in the professional and vocational licensing division (PVL) was abolished and the investigators transferred to the newly created RICO. Upon such transfer the investigators were assigned the responsibility not only to investigate consumer complaints in the occupational licensing program, which they had previously been doing exclusively, but also to undertake investigations in matters related to business registration and banking. The increase in the number of complaints and hearings and the added duties imposed on the investigators have resulted in an increased workload for the 17 investigators in RICO. In RICO, there are 10 investigator positions for Oahu, 2 each for Kauai and Maui, and 3 for the Island of Hawaii.<sup>11</sup>

The investigators' increased workload problem is compounded by the lack of sufficient clerical support for the investigators. The investigators now spend an estimated 40 percent of their time on clerical chores, typing reports, filing cases, answering telephone calls, etc. In 1979, when the investigative staff was transferred out from the PVL into the new RICO, the secretaries and clerks who previously

10. Minutes of Motor Vehicle Industry Licensing Board, January 1979 to August 1980.

11. In 1981 the Legislature authorized an investigator and a clerk-typist positions for the Island of Hawaii. The investigator position, however, has not yet been filled by DRA. Funds for this position are being used to support a position in a program abolished by the Legislature three years ago. According to DRA, the State's “warm body” policy prohibits state departments from firing anyone even if a program is abolished and requires the employee to be paid his salary until he finds a comparable or other acceptable position.

supported the investigators in PVL were all left behind in PVL.<sup>12</sup> The investigators in RICO are now supported by one secretary on Oahu and one clerk-typist in Kona. The secretary on Oahu is the personal secretary of the complaints officer, who heads RICO, and does no work for the investigators. The investigators have had to rely on occasional help from Comprehensive Employment Training Act (CETA) funded clerks who are no longer available.

In addition, the investigators have been assigned tasks unrelated to investigations. On the neighbor islands, investigators actually function as the representatives of DRA. They answer inquiries, hand out applications and information, arrange for examinations, and proctor examinations. On Oahu, several investigators are used for assignments such as conducting investigations for ATG, giving pistol training to personnel of other departments, and training recruits for the sheriff's office.

Not only is there a lack of a sufficient number of investigators and clerical support for investigators, but there also appears to be a need for more hearings officers. Currently there is only one hearings officer. Our analysis of DRA's October 1981 data on delays in the processing of complaints, shows an average of four months' wait for a hearing date. (Table 7.2.) This appears to indicate a need for the addition of at least a part-time hearings officer.

Finally, there also appears to be an insufficient number of deputy attorneys general assigned to handle complaint cases. ATG in the spring of 1981 assigned a third deputy attorney general to DRA to help reduce the growing backlog of cases and speed up the preparation of cases for hearings, but additional responsibilities to service other departments and state programs were subsequently placed on these deputies, leaving a small net gain of time available for the cases related to occupational licensing.

**Lack of uniform and standard policies and procedure.** The manner in which consumer complaints are handled is determined pretty

much by the various boards, and the various boards do not all operate in the same way. There are as many different ways of handling consumer complaints as there are boards. As the boards' procedures and practices vary, so do the boards' expectations of staff. The staff perform differently from one board to another. They perform some tasks for some boards, but not for others. Further, the executive secretaries assigned to specific boards behave differently from one another, depending on their respective boards' method of operation.

This variety of methods causes confusion among the staff and all others involved in consumer complaint resolution. It leads to the duplication of efforts and repetition of tasks mentioned above by the various entities involved in complaint handling.

When the State Legislature in 1976 authorized the hiring of a complaints officer to help expedite the investigation and resolution of complaints, it had hoped that the complaints officer would furnish "legal guidance" to investigators and executive secretaries; assist in the presentation of contested cases before the adjudicative body; report on the complaints resolution procedures used by the various boards; and recommend possible changes in board rules, statutes or policies "to enhance consumer protection."<sup>13</sup>

Pursuant to these expectations, the first complaints officer in early 1976, analyzed the processing of complaints and proposed a procedure for handling complaints to be followed generally in all occupational fields. The complaints officer proposed that a 120-day schedule be followed in investigating, resolving, and conducting hearings on complaints.<sup>14</sup>

12. See Department of Regulatory Agencies memorandum to Department of Budget and Finance, September 19, 1980.

13. HSCR No. 714-76 on S.B. No. 1836 (Act 18, SLH 1976).

14. Memorandum to PVL Division Administrator, Executive Secretaries, Supervisor of Investigators from Complaints Officer, Subject: Complaints Resolution, January 26, 1976.

The director of the DRA immediately sought to institute a 90-day policy, leaving out 30 days for the final hearing, and prescribed the way complaints would be handled within the time period of 90 days. The steps and duties of the different organizational entities involved in complaint handling are outlined in these excerpts from the director's memorandum of 1976.

1. If the Executive Secretary (or his assistant) cannot informally resolve the complaint within 30 days of receiving it by satisfying the complainant, obtaining a *binding* commitment to resolve the complaint from the respondent, or otherwise closing the case, then the Executive Secretary should transmit the complaint and any information he has obtained to Investigation for a complete report, if such report is warranted. *NOTE:* in some cases, an extensive report is not necessary. The Executive Secretary should notify Investigation if this is the case. (For instance, in cases involving contractor's failure to pay bills, the report need only contain the bill owing and a statement from the complainant regarding the length of time it has been outstanding, any attempts to collect it and respondent's answer.) The same is true of many "leaking roof" cases.

2. Investigators should attempt to complete their reports within 30 days of opening the case file. During the 10-day period allowed for respondent to answer the complaint, investigators should be in contact with the complainant to get his statement and any documents he may have. If a site visit is required, schedule it as soon as possible.

If a telephone interview is not possible, or the witness cannot come to the office, schedule a time to go to his office. Keep the draft of the report simple. If more than 30 days is required, notify Fong Tom for an extension.

After receiving the report from Investigation, Executive Secretaries should review the file, including the report, and place the case on the agenda for board action at the next meeting.

3. In the event the board decides to set the case for formal hearing, the hearing notice should be drafted by the Executive Secretary and the file prepared for transmittal to the Attorney General within 30 days after final board action.
4. Note that the Complaints Officer is available to assist in legal matters pertaining to investigations, reports, recommended decisions on complaints put before the board, draft hearing notices, etc. USE HIM.<sup>15</sup>

The procedure outlined in the director's 1976 memorandum does not appear to have been officially instituted within DRA. At least there is disagreement among staff members as to whether the memorandum constitutes the "official" policies and procedures for handling complaints. In any event, the procedure set out in the memorandum has not been followed in practice. The boards, executive secretaries to boards, and the investigators have continued to perform as in the past, thus perpetuating the variety of methods in handling consumer complaints.

In May 1981, another proposal was advanced for the establishment of a uniform system of handling complaints and for the improvement of the complaint handling process. The proposal was made by the hearings officer within DRA.<sup>16</sup> The hearings officer was concerned with both delays in the filing of complaints and with the commingling of the quasi-judicial function with the investigatory and prosecutory functions. He proposed the following procedure.

1. All complaints would be filed with RICO. Any complaint filed with any board or with the executive secretaries or with any other office or officer would be referred immediately to RICO.

2. RICO would investigate each complaint. In the course of investigating, RICO would attempt to resolve the dispute informally by settlement or to have the matter arbitrated.

3. If neither settlement nor arbitration is possible, and if it appears that a violation of a licensing law has occurred, RICO would prepare a report, prepare a draft petition for

15. Memorandum to the PVL Division Administrator, Executive Secretaries, Supervisor of Investigators from the Director of the DRA, January 27, 1976.

16. See Chapter 8, this report.

a hearing, and transmit the report and draft petition for a hearing directly to the Attorney General. If RICO concludes that no violation has occurred, it would notify both the complainant and the licensee of the nonviolation decision.

4. Upon receipt of the report and draft petition for a hearing from RICO, the Office of the Attorney General would consult with RICO, determine whether to proceed to a hearing and if a hearing is to be pursued, prepare for the hearing. The Attorney General could also attempt to settle the matter if warranted.

5. Hearings would be in accordance with the department's Uniform Rules of Administrative Procedure and the appropriate board, after the hearing, would issue a final order.

Under this proposal, all investigations would be centralized in RICO, all hearings conducted by the hearings officer, and the boards would not be involved in complaint handling except to make final decisions following administrative, quasi-judicial hearings.

The hearings officer saw the following benefits flowing from this proposed procedure. The procedure would eliminate the problem of commingling functions, increase accountability, eliminate duplication of functions, expedite processing of complaints, and reduce potential ethical problems. The hearings officer recognized that the statutory language empowering boards to investigate, prosecute and adjudicate complaints might need to be amended to effectuate the proposed procedure.

The staff within the DRA have disagreed among themselves about the efficacy of the hearings officer's proposal. Those speaking

against the proposal have argued that boards and commissions have historically performed administrative, legislative, and judicial functions, the real problem in complaint handling is the lack of manpower, and that, in any event, the law as it now stands empowers boards to receive, investigate, and resolve complaints as well as to hear them in their quasi-judicial capacity.

Because of this disagreement among staff and because of the need for legislative action to implement the hearings officer's proposal, the proposal lies dormant within DRA.

It is recognized elsewhere in this report and in the previous sections of this chapter that matters such as lack of manpower are contributing factors to the delays and other deficiencies encountered in the handling of consumer complaints. However, the lack of a uniform, standardized procedure for the handling of complaints is also a factor. A uniform, standardized procedure can clarify roles and reduce the duplication of efforts that now exist. It can also set standards for performance and establish reasonable time frames for the various tasks that need to be done.

### Recommendations

*We reiterate our recommendations contained in Chapter 3 and 8. In addition we recommend that upon appropriate amendments to the statutes as recommended in Chapters 3 and 8, the Office of Consumer Protection establish uniform procedures for the handling of consumer complaints as will expedite the entire process. If the statutory changes are not made, DRA should assume the responsibility for uniform procedures and a more expeditious complaint handling process.*

## Chapter 8

### ADMINISTRATIVE HEARINGS OF CONTESTED CASES

This chapter reports the results of our evaluation of administrative policies and procedures for hearings of contested cases involving actions by a licensing board (1) to deny a license or to suspend or revoke a license or impose other disciplinary sanctions (e.g., fines, orders of restitution) against a person or business whose activities fall within the scope of a regulated occupation or business and (2) to resolve and dispose of complaints by consumers and others against those engaged in the occupation or profession regulated by the board. Protection against unfairness and arbitrary action is the principal objective of every hearing.

### Summary of Findings

We find that:

1. The State has not had official administrative rules for hearing contested cases until 1981, although the State has had a policy of fair administrative hearings since 1961.

2. The Uniform Rules of Administrative Procedure, adopted in 1981, represents a significant step forward in implementing the state policy of fair administrative hearings, but there are important deficiencies in the rules which detract from ensuring achievement of the objective of a fair hearing. The rules are deficient particularly with respect to the separation of investigatory and prosecutive functions from the adjudicative function of the boards.

### The Concept of a Fair Hearing

The United States Supreme Court, in addressing the issue of fairness has stated as follows:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be the judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denied the latter due process of law.'"<sup>1</sup>

A fair hearing, then, requires a fair tribunal characterized by an absence of actual bias or even the "probability of unfairness." A fair tribunal means that a person may not be a judge in his own case or in a case where he has an interest in the outcome.

A fair hearing also requires, among other things, that a party to a dispute has timely and proper notice of the hearing and the issues involved; an opportunity to be heard and to present evidence on his behalf and cross-examine adverse witnesses; impartiality in the conduct of the hearing; unbiased judgment based on the facts presented; and access to judicial review of

1. In *Re Murchison*, 349 U.S. 136 (1955), quoting in part *Tumey v. Ohio*, 273 U.S. 510 (1927).

administrative decisions. These procedural requirements are, for the most part, provided for in Chapter 91, HRS, the State Administrative Procedure Act.

Chapter 91, at Section 91-13, further provides that:

"No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law."

The intent of this section is to separate the decisionmaking function from the investigatory and prosecutive functions. That is to say, an entity which investigates and prosecutes a contested case should not render the decision in the case. This intent was made clear in a legislative committee report on the bill which culminated in Chapter 91:

"Your Committee is in accord with this section as modified, thus setting forth an initial step towards the principle of separation of the decision making function of an agency from its investigatory and prosecuting function, a principle which may be further developed in the future depending on the experience of the agencies operating under this bill. It is the intent of your Committee that the officials of an agency would not be then consulting persons except when they are testifying in the proceeding."

### The Problems

Two interrelated problems are of concern here. First, Chapter 91 presents the framework for administrative hearings of contested cases. However, there has always been a need for the establishment of uniform rules detailing the manner in which contested cases are to be heard by the various regulatory agencies of the State. Despite this need, the State was without such rules until 1981.

The need for a uniform rule was heightened when in 1980, the Circuit Court of the First Judicial Circuit rendered its decision in *Tony Hawaii Corp., dba Tony Honda of Waipahu vs. Motor Vehicle Industry Licensing Board*.<sup>2</sup> In that case, the Circuit Court reversed the Motor

Vehicle Industry Licensing Board's decision directing Tony Honda to refund to the complaining consumer \$180 and suspending Tony Honda's license for a period of 60 days. The basic elements of the case were as follows.

On September 19, 1978, the Motor Vehicle Industry Licensing Board met to consider, among other things, a complaint lodged against Tony Honda. At the meeting, the complainant was present and allowed to present testimony concerning his complaint against Tony Honda. The board also discussed a report by the staff investigator on the complaint against Tony Honda. Following the testimony by the complainant and discussions of the investigator's report, the board deferred action on the complaint pending further investigation.

On November 21, 1978, the board met to consider again the complaint against Tony Honda. (Tony Honda alleged, but the board denied, the actual presence of the Department of Regulatory Agencies' [DRA] hearings officer at the meeting during the time the complaint was discussed.) Following the board's meeting, notices of hearing and pre-hearing conferences were issued to Tony Honda charging Tony Honda with violating several sections of Chapter 437, HRS, and Chapter 480-2, HRS.

On June 15, 1979, a hearing was conducted by the DRA's hearings officer and following the submission of memoranda of law by each party, on August 10, 1979, the hearings officer issued his decision against Tony Honda.

On August 27, 1979, Tony Honda filed exceptions to the hearings officer's decision and requested an opportunity for oral argument before the board. On September 18, 1979, the board granted Tony Honda an opportunity to present oral arguments to the board concerning the exceptions it had filed to the hearings officer's decision. Following the oral argument, the board, on October 16, 1979, issued its final

2. Civil No. 59645.

order adopting the hearings officer's decision and recommendation *in toto*.

On November 20, 1979, Tony Honda appealed the board's actions to the Circuit Court saying in part that "the entire administrative process before the Board has been without the benefit of duly adopted and promulgated rules and regulations covering the suspension of licenses granted by the Board pursuant to Chapter 437, HRS" and that "the actions of the Board against Tony Honda constitute an unlawful denial of due process of the law under Article 1, Section 4 of the State Constitution and the 14th Amendment of the U.S. Constitution, and is in violation of Chapter 91, HRS."

In reversing the board's decision, the Court said that the board is a governmental agency which is required to have current rules and regulations governing the procedures it and members of the general public must follow in contested cases. It found that the board had no such rules and regulations. It concluded that the board's failure to have current rules and regulations governing the procedures it and members of the general public must follow in contested cases before the board violated the accused's right to due process of law and the mere adherence to the requirements of Chapter 91, HRS, was not sufficient.

The second problem is that the various licensing boards currently perform administrative, legislative, and judicial functions. In terms of contested cases, this means that the boards carry out the investigatory and prosecutive as well as the decisionmaking functions. In Chapter 3 of this report, we detail the role that the boards play in the handling of consumer complaints. In summary, however, boards invariably investigate complaints that licensees have engaged in improprieties; if investigations reveal apparent wrongdoing, the boards file charges against the licensee and discuss the charges with the parties involved; and finally, after the hearing, the boards decide whether the charges have been sustained and,

if so, what action should be taken. It has been argued that the exercise by the boards of all these functions leads to unfairness, for the agency that levies charges and investigates a case renders the final decision in the case.

Notwithstanding the legislative intent expressed in Section 91-13, HRS, to separate the investigatory and prosecutive functions from the adjudicatory functions, the board's exercise of all three functions is authorized by the specific and general statutes covering boards and commissions. The exercise by administrative boards of all functions is historical. Governmental boards and commissions in America have traditionally been vested with administrative, legislative, and judicial functions.

There are strong arguments for vesting administrative, legislative, and judicial functions in a board or commission. A given area of regulation may be so complex that a combination of the various functions may be desirable in arriving at sound conclusions. But equally strong arguments have been advanced for the separation of functions—the most important one being fairness to litigants.

Debate over separation and combination of functions has characterized American administrative law for years. How to secure the benefits of the two approaches has been described as one of the most enduring problems of administrative procedure.

In recent times, emphasis towards separation of functions in cases of disciplinary actions against licensees and in the handling of consumer complaints has intensified. In Hawaii, the Hawaii Supreme Court in 1972 decided the case of *White v. Board of Education*, 54 Haw. 10, which has broad implications in this area.

In *White*, the superintendent of the Department of Education gave a teacher, White, notice of charges against her and of his intent to terminate her employment. A hearing was subsequently conducted by a hearings officer who presented his findings of fact, conclusions,

and recommendation to the Board of Education and the teacher.

There were several issues in the case. First, whether the teacher was given an opportunity to present exceptions and arguments to the board's "proposal for decision," and whether the board considered the teacher's exceptions and arguments to the proposed final decision. The Court answered yes to both these questions.

A second issue was whether the board was bound by the hearings officer's recommendation and the Court said no.

A third issue centered on the principle of separation of functions. The Court held that the deputy attorney general who had acted as counsel to the superintendent should not have been consulted by the board in its decisionmaking. The Court also held that the superintendent, although secretary to the board, because his actions were the subject matter of the hearing, should not have participated or attended sessions where decisions were reached by the board.

### Uniform Rules of Administrative Procedure

Spurred by the decision in the *Tony Honda* case, in the summer of 1981, the DRA adopted Uniform Rules of Administrative Procedure for hearings of contested cases. Subsequently each board has adopted these rules.<sup>3</sup>

The purpose of the Uniform Rules of Administrative Procedure is set forth in the rules as follows:

"§16-254-1 Purpose, scope, and construction. These rules are intended to provide uniform rules of administrative procedure to govern all proceedings, brought before any authority of the department of regulatory agencies, State of Hawaii, the purpose of which is to obtain:

- (1) A determination of any contested or controverted matter within the authority's jurisdiction, through an evidentiary hearing;
- (2) A declaration as to the applicability, with respect to a factual situation,

of any rule, or order of the authority or of any statute which the authority is required to administer or enforce;

- (3) The adoption, modification, or repeal of any rule of the authority.

These rules shall be construed to secure the just, equitable, speedy, and inexpensive resolution of matters brought before the authority."

The Uniform Rules of Administrative Procedure contains detailed procedures for the conduct of hearings, including provisions encouraging the separation of the investigatory, prosecutory, and hearing or judicial functions involved in the resolution of contested cases; minimizing more direct financial or familial conflicts, or the possible appearance of conflicts, by parties conducting hearings; requiring, in essence, that parties to the proceedings be fully informed as to the reasons upon which a board has made its decision; and specifically providing for appeal or judicial review of a board's decision to the courts.

The Uniform Rules represents a significant step toward uniformity and fairness in hearings by all boards. However, there are some difficulties with the rules.

**Separation of functions.** The rules regarding the separation of functions specify that a member of the board or a hearings officer who has participated in the investigation before the hearing or in the development of evidence to be used at the hearing *may* be disqualified from the hearing on his own motion or that of any party.

These rules permit but do not mandate disqualification of persons engaging in several functions (investigation, prosecution, and adjudication) and are therefore not in full accord with the Legislature's expressed intent that the principle of separation of functions be in effect in administrative hearings of contested cases nor are the rules in complete accord with

3. The Boxing Commission and the Board of Hearing Aid Dealers and Fitters, as of September 15, 1981, had not yet officially adopted these rules although they were in the process of doing so.

the decision of the Hawaii State Supreme Court, in *White v. Board of Education*.

*White* has had an impact on the Office of the Attorney General (ATG). It now assigns different lawyers to counsel the DRA's licensing boards and to present cases in a hearing. But the principle in *White* has significance to the duties of others—the boards, their staff, and the executive secretaries, in particular. Yet, the rules continue to permit licensing boards which act to deny applicants' licenses also to handle appeals from these denials and also continue to permit the licensing boards which decide to institute disciplinary actions against licensees to make the final decisions in these cases. The rules further permit executive secretaries participating in, advising boards, or effecting board decisions to continue to sit at board meetings at which final decisions are made. The extent to which the boards and the staff continue to perform investigatory, prosecutory, and adjudicatory functions in the consumer complaint area is set forth in Chapter 7. The practice differs little in the area of appeals from license denials.

Whatever the merits of the arguments for and against the separation of the investigatory and prosecutory functions from the adjudicative functions, it would appear that such a separation is desirable in Hawaii. The decision in the *White* case is one reason for separation. The other is that the boards today are composed predominantly of members from the regulated occupation and vocation. The predominance of industry representatives on the boards in and of itself presents appearance of bias and unfairness toward the regulated industry and those within it. The separation of functions would to a great extent ameliorate or reduce (although not eliminate) the impact of such appearance of bias.

**Need for simplification of language.** Administrative hearings are intended to provide an ordinary person with an inexpensive, less formal and stringent alternative to court hearings. The language and style of the Uniform

Rules, however, make it difficult for an average person to comprehend and use the rules. Indeed, the language and style appear to make the rules difficult to use even by board and administrative staff members.

The Uniform Rules for hearings appears to be written by and for lawyers. It is sprinkled throughout with legal terminology, including Latin terms such as "ex parte" and "sua sponte." The style of writing makes it difficult for an average individual to understand what his rights are in a hearing and what procedures are proper. It discourages self-representation, places an individual representing himself at a distinct disadvantage, and compels an individual to obtain a lawyer.

**Conflicting statutory provisions.** Although the department and most of the licensing boards have adopted the Uniform Rules, it needs to be noted that some of the rules conflict with provisions contained in different licensing statutes and with Sections 92-16 and 92-17, HRS.

For example, an obvious discrepancy between the Uniform Rules and some licensing chapters exist in the number of days notice required prior to a hearing. The Uniform Rules, in Section 16-33, says "all parties shall be given written notice of the hearing, fifteen days before the hearing." Section 91-9.5, HRS, for all state administrative hearings, sets 15 days for notice also. But some licensing statutes specify other periods, 5, 10, 20, 30 days.

Another example is the following. The denial, by a licensing board, of a license to an applicant is subject to appeal through the hearing process and ultimately to the circuit court under the Uniform Rules. Most of the licensing chapters do not describe the manner in which appeals to denial of an application or a license may be undertaken. The few that do so provide for appeals to the boards or to the circuit court and do not specify the applicant's rights to a fair administrative hearing. They also do not make it clear that hearings are available to appeal disqualifications for failure to meet

licensing standards as well as for failure to pass an examination.

Final example. Sections 92-16 and 92-17, HRS, are applicable to all boards and commissions of the State and counties. They prescribe conditions for the conduct of hearings, grant to boards subpoena and other powers for the conduct of hearings, and they require boards to receive consumer complaints and authorize them to investigate and resolve consumer complaints.

While these provisions are not necessarily inconsistent with the intent of the Uniform Rules, they present difficulties in attempting to separate the investigatory and prosecutory functions from the adjudicatory function even informally by the boards.

**Failure to implement rules.** The Uniform Rules for Administrative Procedure is intended to provide the opportunity for administrative hearings in contested cases and to ensure fair hearings. These objectives can only be achieved if all staff and board members are knowledgeable of the provisions of the Uniform Rules and follow them. The simple existence of the rules does not ensure fair hearings.

We found that the department has no plans or intention to systematically educate staff and board members on the new rules for hearings and revise its practices to conform to the rules. Several staff and board members believe that the rules have no implications for change in the way things are done. Some board chairpersons say they were specifically told by staff that these rules do not make any substantive changes in the program.

There are, however, significant changes called for by these rules. For example, the Uniform Rules provides that an applicant denied permission to engage in an occupation subject

to regulation by any of the licensing boards is entitled to a fair administrative hearing to contest the denial. This means that applicants denied licenses should be routinely informed of their right to fair administrative hearings conducted in accordance with the Uniform Rules, of their entitlement to notice of hearing and the reasons for the denials, of the procedures for filing appeals, and be given an opportunity to present evidence and arguments to challenge boards' decisions to deny licenses. A review of several letters of denial showed that, as in the past, before the adoption of the Uniform Rules, these letters do not routinely inform applicants of their right to appeal and the procedures for appealing or of the specific reasons for denial of a license.

#### **Recommendations**

*We believe that implementation of our recommendations contained in Chapter 3 will go a long way in alleviating the problem of separation of functions discussed in this chapter, and we reaffirm those recommendations.*

*In the event that statutory changes are not made to implement the recommendations of Chapter 3, or pending such changes, we recommend that the boards on their own motion internally cause a separation of the investigatory and prosecutory functions from the adjudicative function to occur. This means that the duties of investigation and of determining probable cause for administrative hearings, and for conducting hearings should be delegated to the staff.*

*We further recommend that the DRA institute steps to familiarize boards and staffs of the provisions and implications of the Uniform Rules of Administrative Procedure and seek to simplify the language of the rules.*

#### **COMMENTS ON AGENCY RESPONSES**

On December 17, 1981, we transmitted preliminary copies of this evaluation report to the director of the Department of Regulatory Agencies and to the acting director of the Office of Consumer Protection. Copies of the report were also reproduced on pages 54 and 55.

Regulatory Agencies has expressed agreement with the recommendations made in the report. The director's response begins on page 66.

#### **PART IV**

The acting director of the Office of Consumer Protection, in his response dated January 15, 1982, disagrees with our recommendations to separate all consumer complaints from the Department of Regulatory Agencies. The acting director's response begins on page 72.

#### **RESPONSES OF THE AFFECTED AGENCIES**

COMMENTS ON AGENCY RESPONSES

December 17, 1981  
COPY

December 17, 1981

On December 17, 1981, we transmitted preliminary copies of this evaluation report to the director of the Department of Regulatory Agencies and to the acting director of the Office of Consumer Protection. Copies of the transmittal letters are reproduced on pages 64 and 65.

In her response dated January 15, 1982, the director of the Department of Regulatory Agencies has expressed agreement with the recommendations made in the report. The director's response begins on page 66.

The acting director of the Office of Consumer Protection, in his response dated January 15, 1982, disagrees with our recommendation to centralize all consumer complaint functions, whether for licensed or unlicensed activities, in the Office of Consumer Protection. The acting director's response begins on page 73.

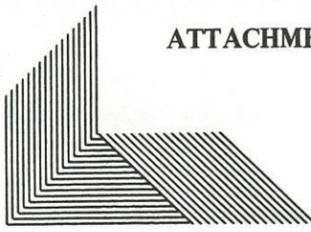
A copy of the report has also been sent to the Acting Director of the Office of Consumer Protection for his review. We appreciate the assistance and cooperation extended to us in the review of the report. Public release of the report will be made solely by our office and the report is published in its final form and submitted to the Legislature.

Director, T. Taminant  
Legislative Auditor

Sincerely,  
Clinton T. Taminant  
Legislative Auditor

ATTACHMENT 1

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



CLINTON T. TANIMURA  
AUDITOR  
RALPH W. KONDO  
DEPUTY AUDITOR

December 17, 1981

COPY

Dr. Mary G. F. Bitterman, Director  
Department of Regulatory Agencies  
1010 Richards Street  
Honolulu, Hawaii 96813

Dear Dr. Bitterman:

Enclosed are six preliminary copies, numbered 4 through 9, of our *Evaluation of the Professional and Vocational Licensing Program of the Department of Regulatory Agencies*. Section 4 of Act 88, Session Laws of Hawaii 1981, allows your department 30 days to review the report. Our office in turn, is required to submit the report to the Legislature prior to the convening of the 1982 Regular Session and to append to the report any written comments received from your department. Therefore, we ask that any comments that your department might prepare be submitted to our office by January 15, 1982.

A copy of the report has also been sent to Mr. Mark Nomura, Acting Director of the Office of Consumer Protection, for any comments he might have concerning the recommendations affecting his office.

Since the report is not in final form and changes may possibly be made to it, access to this report should be restricted to those officials whom you might wish to call upon to assist you in the review of the report. Public release of the report will be made solely by our office and only after the report is published in its final form and submitted to the Legislature.

We appreciate the assistance and cooperation extended to us.

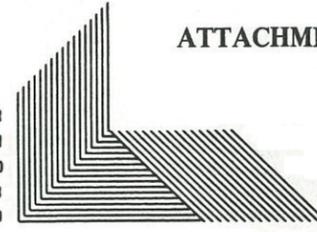
Sincerely,

Clinton T. Tanimura  
Legislative Auditor

Enclosures

ATTACHMENT 2

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



CLINTON T. TANIMURA  
AUDITOR  
RALPH W. KONDO  
DEPUTY AUDITOR

December 17, 1981

COPY

Mr. Mark Nomura, Acting Director  
Office of Consumer Protection  
250 S. King Street, Room 520  
Honolulu, Hawaii 96813

Dear Mr. Nomura:

Enclosed is a preliminary copy, No. 10, of our *Evaluation of the Professional and Vocational Licensing Program of the Department of Regulatory Agencies*. We call to your attention the recommendations affecting your office which are made in Chapters 3 and 7 of the report. If you have any comments on the recommendations, we ask that you submit them in writing to our office by January 15, 1982, so that we can append your comments to the final report which we are required to submit to the Legislature prior to the convening of the 1982 Regular Session.

Since the report is not in final form and changes may possibly be made to it, access to this report should be restricted to those officials whom you might wish to call upon to assist you in the review of the report. Public release of the report will be made solely by our office and only after the report is published in its final form and submitted to the Legislature.

We appreciate the assistance and cooperation extended to us.

Sincerely,

Clinton T. Tanimura  
Legislative Auditor

Enclosure

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

MARY G. F. BITTERMAN  
DIRECTOR  
BANK EXAMINER  
COMMISSIONER OF SECURITIES  
INSURANCE COMMISSIONER

DONALD D.H. CHING  
DEPUTY DIRECTOR

January 15, 1982

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OFC. OF THE AUDITOR  
STATE OF HAWAII

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

Dear Mr. Tanimura:

We welcome the opportunity to comment on the Legislative Auditor's evaluation of the Professional and Vocational Licensing Program of the Department of Regulatory Agencies. The report cogently describes problems that are well known to those of us who work at the department. We are eager to implement the auditor's recommendations, in order to afford consumers the full benefits of the greater efficiency the department can achieve. It is our objective to set forth in this letter the problems we foresee in complying with the recommendations and the action we intend to take with respect to each recommendation.

CHAPTER 3 RECOMMENDATIONS -- ROLES AND RESPONSIBILITIES;  
CHAPTER 7 RECOMMENDATIONS -- INVESTIGATION AND RESOLUTION  
OF COMPLAINTS

We strongly support the Auditor's recommendation that the Legislature enact legislation to:

1. Limit the functions of occupational licensing boards to setting standards for licensure; adopting rules and regulations for licensing; making final administrative decisions in contested cases of applicant appeal, license revocation or suspension, and consumer complaints; and grading practical examinations which require the judgment of board members who possess the technical skills and knowledge to make such judgments;

The Honorable Clinton T. Tanimura  
Legislative Auditor  
January 15, 1982  
Page 2

2. Vest all other functions related to the licensing of occupations in the department staff, including such administrative functions as designing application forms; receiving and reviewing applications; evaluating the qualifications of applicants; developing, administering, and grading written examinations; and issuing licenses;

3. Vest in the Office of Consumer Protection the exclusive responsibility to handle consumer complaints, including investigation of complaints, the institution of civil suits for injunctive relief or collection of civil penalties, and the prosecution of all cases before the hearings officer and the various boards; and

4. Provide for additional staffing for the handling of consumer complaints.

In supporting the recommendation to re-order the functions of the occupational licensing boards and department staff, we are mindful of the legislative history underlying the 1959 Reorganization Act, this department's deviation from that legislative intent, and the resultant procedural deficiencies which were highlighted in the Auditor's evaluation. It is clear, however, that compliance with the Auditor's recommendations regarding statutory revision will require a thorough and systematic review of numerous statutes and rules and regulations, in order to develop sound legislative proposals. Specifically, the review and revision would encompass the thirty occupational and vocational licensing statutes, Section 26-9 (Department of Regulatory Agencies), Chapter 92 (Public Proceedings and Records), Chapter 487 (Consumer Protection), the Uniform Rules of Administrative Procedure, and the rules and regulations of the licensing boards. Since this task would necessarily involve a considerable amount of time and expertise, the Department intends to request that the Legislature provide assistance from the Legislative Auditor's Office or the Legislative Reference Bureau.

In supporting the Auditor's proposal to centralize all consumer complaint resolution activities within the Office of Consumer Protection, we recognize the need to establish a single, highly visible complaint and investigation office for the general public regarding products and services of the private sector, whether licensed or unlicensed. It is only by centralizing all consumer complaint functions within

The Honorable Clinton T. Tanimura  
Legislative Auditor  
January 15, 1982  
Page 3

the Office of Consumer Protection that the department can maximize its resources and eliminate the opportunities for "passing the buck" among the Regulated Industries Complaints Office, the Office of Consumer Protection, and the Attorney General's Office.

The goals of the director of the department and the director of the Office of Consumer Protection are indistinguishable; both strive to enhance, protect, and promote the interests of individual consumers and groups of consumers, as well as those of legitimate businesses, against unfair, deceitful and unscrupulous practices. Unless the director of the Office of Consumer Protection is accountable to the director of the department, the latter's mandate to protect consumers may be dependent on the actions of the Office of Consumer Protection, an office attached for mere administrative purposes, over which the director of the department would have little control. Thus, in supporting this proposal, the Department shall request that Chapter 487-2, Hawaii Revised Statutes, be amended to provide that the Office of Consumer Protection become a regular division of the Department and that the Office of Consumer Protection director be appointed by the director of the Department, subject to the approval of the Governor.

We fully agree with the Auditor's recommendation that the Legislature provide for additional staff to handle consumer complaints. We estimate that a significant increase in staff of 23 positions is essential to staff an optimum complaints resolution clearinghouse within the Office of Consumer Protection. A detailed itemization is attached.

We are cognizant of the budgetary constraints facing the Legislature and the fact that in the past, the appropriations for enforcement personnel have been severely limited. In order to address this problem, the Department shall propose to the Legislature that a special complaints resolution fund be established to augment enforcement activities currently supported by the General Fund. The fund would draw its monies from charges deducted from license fees or special assessments made on licensees, and would be applied toward the hiring of additional investigators, hearings officers, attorneys, and clerical support staff, and funding of special training for staff to handle complex enforcement cases. In proposing this fund, we note the

The Honorable Clinton T. Tanimura  
Legislative Auditor  
January 15, 1982  
Page 4

importance of securing personnel of high caliber and the fact that, without additional staff, no amount of reorganization and streamlining will produce sound and efficient administration.

#### CHAPTER 4 RECOMMENDATIONS -- STANDARDS FOR LICENSING

We concur with the Auditor's recommendation for amendment of certain statutes which contain unlawful requirements as to citizenship, residency, and advertising. We shall propose these amendments, as part of the legislative revision package discussed earlier.

The Department also agrees with the Auditor's recommendation that procedures should be developed to systematically identify improper, vague, or unreasonable standards and inform boards of recommended changes. [However, we emphasize the fact that there is no staff person who has the time to oversee the development of such procedures.] We believe that the most efficient approach toward compliance with this recommendation would be to request assistance from the Legislative Auditor's Office. We shall therefore request that the Legislature "loan" to the department a staff person from the Legislative Auditor's Office -- preferably someone who worked on the audit and is familiar with department staff, as well as its existing procedures.

#### CHAPTER 5 RECOMMENDATIONS -- APPLICATIONS ADMINISTRATION

We agree with the Auditor's recommendation that the Professional and Vocational Licensing Division should be assigned the responsibility of (1) developing and implementing a system to monitor actions which have a bearing on qualification requirements (such as reviewing court decisions, legislative acts, and licensing literature); (2) informing the respective boards of such actions; and (3) preparing the necessary changes to the application forms.

#### CHAPTER 6 RECOMMENDATIONS -- DEVELOPMENT AND ADMINISTRATION OF EXAMINATIONS

In addition to securing the assistance of persons with expertise in the testing field, the department shall propose statutory amendments such that the boards and commissions shall contract with national testing services, to the extent

The Honorable Clinton T. Tanimura  
Legislative Auditor  
January 15, 1982  
Page 5

practicable, and eliminate practical examinations, except where essential. In those areas where practical examinations must be administered, the department shall adopt policies and procedures to ensure uniformity and consistency in grading, as well as anonymity of examiners. The department shall also develop working relationships with university personnel who have expertise in the testing field, and encourage the use of community resource persons to administer and grade examinations.

CHAPTER 8 RECOMMENDATIONS -- ADMINISTRATIVE HEARING OF  
CONTESTED CASES

We foresee no problems in complying with the recommendations set forth in this chapter. The department plans to hold training and information sessions for executive secretaries on a regular basis, as a step toward familiarizing boards and staff with the provisions and implications of the Uniform Rules of Administrative Procedures and new departmental policies and procedures. The department foresees that the person retained to revise the statutes and rules would also work on simplification of the Uniform Rules of Administrative Procedure.

Finally, the department wishes to commend you and your staff on the thoroughness of your review and analysis of the Professional and Vocational Licensing Division and your sensitivity to the issues facing this department. We appreciate the opportunity to comment on your recommendations and shall implement them as expeditiously as possible.

Sincerely yours,



Mary G. F. Bitterman  
Director

Attachment

DEPARTMENT OF REGULATORY AGENCIES  
STATE OF HAWAII

ADDITIONAL STAFF NECESSARY TO FULLY IMPLEMENT  
CENTRAL COMPLAINT RESOLUTION CLEARINGHOUSE CONCEPT

In order to properly staff a central complaint resolution clearinghouse located with the Office of Consumer Protection, a significant increase in staff is essential. On Oahu alone the following is a breakdown of the additional personnel required:

(3) Attorneys	-- \$102,000 (Salary & Fringes)
(Senior Attorney	-- \$35,000)
(Two Attorneys	-- \$50,000)
(1) Hearings Officer	-- \$ 36,000 (Salary & Fringes)
(11) Investigators	-- \$264,000 (Salary & Fringes)
(2) Legal-Stenos	-- \$ 36,000 (Salary & Fringes)
(2) Clerk-Stenos	-- \$ 28,000 (Salary & Fringes)
(1) Clerk-Typist	-- \$ 13,000 (Salary & Fringes)
-----	-----
(20) Positions	-- \$479,800 (Salary & Fringes)

With the twenty positions it would be possible for a consumer to have a final decision rendered by the appropriate board or commission no later than seven months from the time he files his initial complaint.



GEORGE R. ARIYOSHI  
GOVERNOR

MARY G. F. BITTERMAN  
DIRECTOR  
REGULATORY AGENCIES

STATE OF HAWAII  
CONSUMER PROTECTION  
DEPARTMENT OF REGULATORY AGENCIES  
520 KAMAMALU BUILDING — 250 SOUTH KING STREET  
P. O. BOX 3767  
HONOLULU, HAWAII 96812  
548-2560 ADMINISTRATION  
548-2540 INFORMATION & COMPLAINTS

MARK M. NOMURA  
SENIOR ATTORNEY  
MITSUO TAKAYAMA  
CHIEF INVESTIGATOR  
MARION P. DUNNING  
EDUCATION SPECIALIST

On the Neighbor Islands the breakdown is as follows:

- (1) Clerk-Typist for Kauai -- \$ 13,000 (Salary & Fringes)
- (1) Clerk-Typist for Maui -- \$ 13,000 (Salary & Fringes)
- (1) Clerk-Typist for Hilo -- \$ 13,000 (Salary & Fringes)

---

- (3) Positions -- \$ 39,000 (Salary & Fringes)

January 15, 1982

The total number of positions needed to fully staff a new office of Consumer Protection would be twenty-three at a total cost of \$518,000 per year.

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

RECEIVED  
JAN 15 4 04 PM '82  
OFC. OF THE AUDITOR  
STATE OF HAWAII

ATTENTION: Ms. Marian Merce

Dear Mr. Tanimura:

The following is the response of the Office of Consumer Protection (OCP) to the Evaluation of the Professional and Vocational Licensing Program, Department of Regulatory Agencies (DRA), by the Office of the Legislative Auditor. The response comments on the recommendation to transfer the complaint handling component of the Professional and Vocational Licensing Program to OCP.

I. SUMMARY OF PERTINENT FINDINGS AND RECOMMENDATION

The evaluation, in Chapter 3, identifies the basic problem in the complaint handling component of the professional and vocational licensing program as the unnecessary delay and duplication of effort in the disposition of consumer complaints.

The cause of the problem, as identified in the evaluation, may be summarized as follows: The lack of any definitive assignment or delegation of the investigative and prosecutorial functions in the complaint handling process, either by statute or departmental policy, to the staff of DRA. The evaluation further elaborates that the boards and commissions have reserved to themselves, to differing extents, the investigative and prosecutorial functions in



complaint handling. Consequently, delays occur in the hearing process since the boards have undertaken functions in addition to their quasi-judicial function. Furthermore, the lack of uniformity among the thirty-odd boards in delegating investigative and prosecutorial functions has caused confusion among the DRA staff and duplication of effort.

In order to eliminate the cause of the problem identified above, and to ultimately reduce delay and duplication of effort in the disposition of consumer complaints, the evaluation recommends the following: To vest in the OCP all responsibility for handling consumer complaints against licensees of the DRA, which includes the investigation of all complaints, the institution of civil suits for injunctive relief or to collect civil penalties, and the prosecution of all cases before the hearings officer and the various boards.

## II. COMMENTS ON RECOMMENDATION

1. The most direct method of attacking the above-identified cause of delay and duplication of effort in the complaint handling process is to implement uniform departmental procedures for complaint handling which clearly assign the investigative and prosecutorial functions to the staff of the DRA, as in the proposal set forth on Page 7-15 of the evaluation.

The above-mentioned proposal establishes uniform procedures for the receipt, investigation, mediation and prosecution of consumer complaints by the DRA staff. The proposal, as noted by the evaluation, would eliminate the commingling of investigatory, prosecutorial and quasi-judicial functions in the boards, increase accountability, and eliminate the duplication of effort and consequent delay in the present complaint handling process of the professional and vocational licensing program.

Unlike the above-mentioned proposal, the recommendation in Chapter 3 of the evaluation fails to directly confront the cause of the problem, but merely transfers the responsibility for handling complaints against licensees to the OCP.

2. The recommendation also appears to be in conflict with the broad mandate of the OCP as defined in Chapter 487,

HRS, which established the OCP in 1969. Under Section 487-5, HRS, the director of the OCP is designated consumer counsel for the State and, in that capacity, is charged with the responsibility of representing the general public as consumers. The OCP, in practice, is primarily responsible for enforcing Section 480-2, HRS, which broadly prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce.

The broad statutory scope and mandate of the OCP was intended by the Legislature to allow the OCP to investigate and to take appropriate enforcement action to stop any alleged unfair or deceptive practice which had an impact on the consumer public in general. Under the statutory scheme described above, it appears that the OCP was not intended to become involved in the regulation of specific professions and vocations through the enforcement of licensing requirements.

The responsibility for regulating specific professions and vocations instead is presently vested by statute in the boards and the DRA. Under existing licensing statutes, the regulation of specific occupations involves two inextricably related parts as noted in the evaluation: First, the requirement that practitioners obtain a license to assure their competence, integrity and financial responsibility. Second, a procedure for receiving consumer complaints and for taking appropriate enforcement action against licensees who violate the conditions of licensure.

The recommendation in Chapter 3 of the evaluation, in effect, suggests a transfer of this second component involved in the regulation of professions and vocations to the OCP. This transfer not only thrusts upon the OCP a responsibility which is in conflict with its broad statutory scope and mandate, as discussed above. It also separates two integrally related parts of the licensing scheme, and further divides the responsibility for regulating professions and vocations among three distinct entities--the boards, the DRA and the OCP.

## III. CONCLUSION

For the foregoing reasons, the Office of Consumer Protection disagrees with the recommendations in Chapter 3

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of the Evaluation of the Professional and Vocational Licensing Program and urges consideration of the proposal on Page 7-15 of the evaluation.

Respectfully yours,



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Acting Director

**Legislative Auditor's Note:** The reference to "Page 7-15" in this letter refers to pages in the preliminary report. The pages would correspond to pages 53-54 of this report.