

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

January 21, 2009

Conference Room 410 - No. 1 Capitol Building, Honolulu, HI

- I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:30 a.m., with a quorum present.

MEMBERS PRESENT:

- Lynne Woods
- Sharon L. Pang
- Michael Yee
- Dorvin Leis
- Donald Dymond
- Richard Schnitzler
- Charles Au
- Peter Yukimura
- Bruce Bucky
- David S. De Luz, Jr.

ABSENT MEMBERS:

- None

STAFF: DBEDT Office of the Attorney General
 Dori Palcovich Margaret Ahn
 Steve Bretschneider

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES**

Mr. Bucky recommended that the November 19, 2008 minutes be approved as presented; the Board unanimously agreed.

III. **OLD BUSINESS**

- A. Review and discussion of post public hearing statement to Subtitle 12, Med-QUEST for HAR Chapter 17-1721.1, "QUEST Expanded Access," and Subtitle 12, Med-QUEST for HAR Chapters 17-1700 through 17-1735 (DHS) – Chair Woods explained that these rules have gone to public hearing after they were approved by this Board pre-public hearing. Dr. Kenny Fink, Administrator at DHS's Med-QUEST Division, stated that the public hearing was held on December 8, 2008, with one person attending but no verbal or written testimony provided. Thus, the rules remained unchanged from when they were previously reviewed by this Board. He noted that implementation of the proposed Expanded Access Program is progressing and has received verification of the health plan's networks by the Federal Medicare/Medicaid services that it is on track to implement the program on February 1st. By doing so, he further noted that DHS is looking forward to the improvement of care to the population of sixty-five year olds, the blind, and the disabled. A series of questions ensued by the Board members.

Chair Woods explained that although this Board accepts testimony it will only hear from those testifiers that have concerns based on the rules and not on the rewarding of the contract, as this is not within this Board's purview; she encouraged the testifiers to have discussions regarding the contract with DHS after the board meeting. Ms. Jo Anne Nishigaya, Administrator of Hawaiian Eye Center, Inc. testified both orally and in writing that her business deals with a great number of clients that are within the targeted demographics and who will be impacted by the rules. She testified as to when she first heard of the proposed rules and explained that with the new Medicaid program, Hawaii healthcare providers (i.e., small businesses) are being asked to accept contractual obligations requiring small businesses to accept markedly increased administrative work and reduced reimbursement. She requested that this Board recommend adjusting the State's Medicaid Program reimbursement fees closer to the current year's

rates, and to require the new managed-care networks under the State Medicaid Program to ensure that contractual administrative rules relate to reports, and filing billing and payment procedures that are not significantly different between Medicare and the managed-care networks under the State Medicaid Program.

Dr. Arlene Meyers, a pediatrician practicing in Wahiawa since 1979, testified both orally and in writing that she is concerned with the levels of reimbursement and the impact it will have on many small medical practices in Hawaii, including her practice; thus, because she handles numerous Medicaid patients, she believes she will be unable to handle the lower reimbursement rates. She explained that the patient population comprises of 25,000 dual-eligible Medicare/Medicaid recipients and approximately 12,000 Medicaid-only recipients. She noted that, historically, reimbursements for services provided to the dual-eligible recipients have been at one-hundred percent of current Medicare rates. She further noted that DHS is requiring Evercare and Ohana Health Plan to pay at least what providers are currently being paid in the Medicaid Fee-For-Service (FFS) system. Thus, reimbursements are substantially lower than the current one-hundred percent rates. For the other 12,000 Medicaid-only recipients DHS is permitting the health plans to pay the Medicaid FFS rates that were in effect when the contracts were awarded in February 2008. In summary, Dr. Meyers stated that she will likely not participate in the proposed new program and will struggle within her ethical duty to try to find her patients alternate medical services.

Mr. Rafael del Castillo, President of Hawaii Congress of Physicians and other health care providers, explained that his testimony takes issue with the rule's small business impact. He believes that this Board has clearly not been provided a thorough assessment of the rule's impact on Hawaii small businesses such as pharmacies and physicians. He recently received information from a number of providers indicating that the reimbursements, which are governed by the rules, are not what were hoped they would be or better than they were being paid previously. It was noted that although the proposed rules address eligibility and coverage; they do not address the reimbursement numbers. It was clarified however that medical care has to be pre-approved in certain circumstances, and if so, the payment of reimbursement can actually be less. Mr. Kevin Thomas McGill, owner of Hawaiian Orthotics Prosthetics Enterprises (HOPE) from the Big Island, provided both written and oral testimony, and explained that his company will not participate with DHS's new program because he believes his business will be unable to sustain. He indicated that he has approximately 350 patients that are Medicare/Medicaid dual-eligible for the Medicaid FFS, and about 50 to 60 welfare patients.

Upon hearing from these testifiers, the Board members voiced their observations, opinions and questions. Dr. Fink explained that fees are not specified in the rules because there is no mandate that providers must be paid. The "floor" in the contracts references the Medicaid FFS rates and as these rates change, they become the "floor." He also clarified a few issues and concerns such as that the new contract calls for payment requirements and that patients of small businesses have far greater opportunity and promise under the new program than under the current program. DHS's role includes oversight of the new program's contracts to ensure that medically necessary services are delivered, that contractually these plans are fulfilling the requirements of the contract and are acting responsibly to provide appropriate care.

Prior to any recommendations by the Board members, Chair Woods summarized her observations by stating that initially it appeared that this Board was presented with a relatively simple set of rules. Managed-care is a total care program, however, by moving over to a managed-care program, it is shifting the providers' paradigm where ultimately their business model no longer works. She noted that small businesses, when forced to go through a paradigm shift, need to have the information ahead of time to allow their business to run appropriately and to plan accordingly. Further, she noted that while this Board does not know or understand the amount of communication that went out to the small businesses regarding the changes in these rules, she personally is disturbed about the lack of communication that went out to these businesses as evidenced by the testifiers. She stated that the next time she receives a set of rules that are as confined as these that this Board will request to review other rules that pertain to them. She also stated that this Board is uninformed and she feels extremely foolish as she cannot legally discuss some of the changes that are dictated by these rules. Further, she stated that this Board sat in front of DHS during the preliminary review of the rules and all the Board was told was that there was a new set of services that were offered. She encouraged any of the individuals attending the meeting that did not speak to this Board but had additional issues that stemmed from the rules or are governed by other rules, to take a careful look at them because there are processes afforded to small businesses to request those rules be reviewed. She added that if any of the small business owners/providers have not

kept themselves informed regarding information in their own industry, then that is their own fault because small business owners have to stay informed; it is their responsibility. She recognizes that Hawaii small businesses are currently running on very small profit margins, if at all, so virtually nothing can be done at this point in time.

Upon hearing from Chair Woods, the following recommendations were made. Mr. Au recommended that the rules proceed to the Governor for adoption; the recommendation was passed with seven members approving and two opposing. Mr. Au also recommended that the rules relating to the areas of reimbursement of the Med-QUEST program be brought forth to this Board for a formal review; the recommendation passed with eight members approving and one opposing. In addition, Mr. De Luz, Jr., requested that DHS report back to this Board with an update of the proposed program within the next ninety to one hundred-twenty days, with information to include major obstacles and/or problems that were encountered and financial data as it relates to actual payments. Chair Woods requested from Mr. McGill communication in the form a letter to this Board as his company moves through the process and transition to see how the program is working; information from Mr. Rafael del Castillo and Dr. Arlene Meyers was also requested.

Chair Woods added that there were other testifiers in the room with concerns regarding the procurement process that the Board had not heard. As a result, the members chose to hear from those testifiers for "informational purposes" only, as they were unable to formally provide commentary or recommendations. Ms. Tina McGill, Office Administrator from H.O.P.E., explained that Medicaid patients are generally the most difficult patients to administer medical care to because they tend to have the most health and social issues; for these reasons, she stated there should be even better reimbursement for that vulnerable population. She explained that with a new administration of this country's government, it could be unwise for the State of Hawaii to enter into a contract that depends on the "giant publicly traded mainland for-profit insurance conglomerates." She added that she was unable to see how it would be good for any Hawaii small business or physicians to be involved with companies where the aged, blind and disabled will suffer from the consequences.

Ms. Bev Harbin, representative of FACE, explained that she was on the original task force that created this Board under the Cayetano administration, so she understood how difficult it is to review rules and support both the Administration and the small businesses concurrently. She supports the intent of the proposed program but has problems with the confirmation process. She explained that the process is going to repeat itself with another QUEST program, which is presently going out to procurement, so she asked this Board to extend a request to DHS for more outreach among the community. Mr. Larry Geller, President of Kokua Council, which is the oldest senior social advocacy group on Oahu, expressed concern with this Board's motion to recommend that the rules proceed to the Governor was a very simple one but the rules themselves pose difficulties such as lower disbursements and the lack of timely reimbursements, which were not considered by this Board. He encouraged the members to re-think their motion to support the rules in terms of the rule's adequacy to provide protection to patients.

- B. Review and discussion of post public hearing statement of HAR Chapter 16-170, "Disclosure of Material Transactions" (DCCA) – Chair Woods indicated that she spoke with a few insurance businesses on Maui regarding these rule changes. She was told that the businesses were already performing the amended changes and that the proposal was merely putting those changes into writing; therefore, there was no new impact. She conveyed that no written testimony was received prior to the public hearing and no one attended the hearing to present oral or written testimony. Mr. De Luz, Jr., recommended that the proposed rules proceed to the Governor for her signature; the Board unanimously agreed.
- C. Review and discussion of post public hearing statement of HAR Chapter 16-182, "No Rules Combat or Similar Contests" (DCCA) – It was indicated that the Governor previously signed off on these rules. Second Vice Chair Yee explained that DCCA changed the time period provided in the rules, which this Board had requested pre-public hearing. Subsequently, DCCA mailed out to fifty-three statewide promoters and one outside state promoter notice of the public hearing; only one testifier provided testimony in support of the proposed rule. Second Vice Chair Yee recommended that despite the rules having already been signed and adopted by the Governor, that a letter be sent acknowledging that DCCA did not follow protocol; the Board unanimously agreed.

- D. Review and discussion of post public hearing statement of HAR Chapter 16-114, "Relating to Real Estate Appraisers" (DCCA) – Chair Woods explained that she left messages for many of the real estate appraisers on Maui and did not receive one return telephone call; therefore, it was presumed that if there were major concerns the appraisers would have gotten back to her. She noted that public notice was published on all the islands; no written testimonies were received and no one testified at the public hearing. Further, she noted that the rules will have a positive impact on real estate appraisers. Mr. Au recommended that the proposed amendments proceed to the Governor for adoption; the Board unanimously agreed.
- E. Review and discussion of post public hearing statement of HAR Chapter 4-87, "Voluntary Registration of Service Persons" (DOA) – Mr. Schnitzler recommended that the proposed rules after public hearing proceed to the Governor for adoption; the Board unanimously agreed.
- F. Review and discussion of post public hearing statement of HAR Chapter 4-96, "Schedule and Fees for Licensing Devices Susceptible of Commercial Usage, and Measuring Devices and Measurement Standards for Testing or Certification" (DOA) - Mr. Schnitzler explained that the rule amendments are in regards to weights and measures and an increase in fees; this is a necessary service for commerce and consumers and the fees are reasonably adjusted. Based on these facts, Mr. Schnitzler recommended that the proposed rules after public hearing proceed to the Governor for adoption; the Board unanimously agreed.
- G. Update on the following proposed amendments to HAR Chapter 11-44, "Radiologic Technology Board – Radiologic Technology Rules" (DOH) – Vice Chair Pang indicated that this Board previously approved the proposed rules to proceed to public hearing, however, the proposal at that time included proposed fees. Subsequently, the Governor's Office did not approve the rules with the proposed fees in it and therefore the Agency eliminated that section of the rules. As a result, the information provided is for informational purposes only.
- H. Following-up on the recommendation of this Board regarding Ms. Dale Evans' "Request & Notice re: Taxicab Fuel Surcharge Implementation," dated November 1, 2008 – Chair Woods reminded the members of its discussion at the November board meeting when Ms. Evans' approached this Board with a request to implement an "emergency measure" to allow taxicab drivers the ability to assess up to a maximum of one dollar (\$1.00) per trip, to become effective immediately. As Mayor Mufi Hannemann replied to this request, Chair Woods asked Ms. Evans' to relay her opinion of his response. Ms. Evans explained that Mayor Hannemann confirmed what that County did not do, which is that it did not approach this Board with the proposed rules but made an arbitrary decision with no response to the taxi industry's concerns. She added that there was no administrative rule hearing or how and when they are going to determine the amount of a fuel rate charge. She added the City and County is ignoring the importance of making meter inspections and the metered seal process. The Weights and Measures Division at the Department of Agriculture went through a process where taxi operators were provided tags but the City and County determined that there will only be one inspection a year, whereas in the past, there were two inspections a year resulting in only one annual inspection. Therefore, she believes that the taxi cab drivers have been ignored.

Mr. De Luz, Jr., suggested that Ms. Evans contact Mr. David Rolf, Executive Director of the Hawaii Automobile Dealers Association as this organization deals with concerns regarding Mr. Dennis Kamimura's jurisdiction at the City and County of Honolulu; Mr. Kamimura is Licensing Administrator with Department of Motor Vehicles. Chair Woods noted that the statute governing this Board covers Counties and Mayor Hannemann needs to be reminded of this. It was recommended that an invitation to attend the next Board meeting be extended to Mayor Mufi Hannemann and/or Mr. Kamimura as well as to the Department of Agriculture in order for this Board to understand the impact on Ms. Evans' business as well as to discuss Ms. Evans' specific request which had apparently not been addressed. After much discussion, Mr. Au recommended that a letter be sent to Mayor Hannemann inviting him or another representative in his stead to attend the February 18, 2009 board meeting and to make reference to the Mayor's January 12, 2009 letter as well as this Board's November 21, 2008 letter relaying that it appears the process for a taxi fuel surcharge is ineffective because small businesses have still not benefitted from such a fuel surcharge, and to quote the Board's statute; the Board unanimously agreed.

IV. NEW BUSINESS

- A. Review and discussion of proposed amendments to HAR Chapter 13-122, "Rules Regulating Game Bird Hunting, Field Trails and Commercial Shooting Preserves," and HAR Chapter 13-123, "Rules Regulating Game Mammal Hunting" (DLNR) – Mr. Edwin Johnson, Wildlife Biologist from DLNR's Division of Forestry and Wildlife, indicated that there are twenty-five registered guides in the State that are allowed by these rules to guide hunters in Hawaii. He explained that a 2007 appellate court ruling has required DLNR to update its hunting program rules to reflect recent changes in seasons, bag limits and hunting areas. The court ruling invalidates the process DLNR previously used for hunting fees for the Wildlife Conservation Stamp, the Game Bird Stamp, and all fees for applications and tags. He also explained that the fees are particularly important to help fund the hunting program and are user-generated fees to benefit user groups. The proposed rules will entail the establishment of hunting fees that were in place at the time of the appellate court ruling, update conditions and seasons in existing agreements with landowners, such as those with the landowner on Lanai, confirm new hunting areas, larger safety zones and closed areas, establish special provisions for the issuance of disabled hunting permits to meet federal American Disabilities Act requirements, and add a new provision to allow the temporary closure of public hunting areas by the Board of Land and Natural Resources or its authorized representatives, to address imminent threats to public safety or natural resources or to comply with the requirements of lessees.

In addition, the amended rules will provide housekeeping measures and update the description of public hunting areas on each island, which reflect current conditions, if boundaries have changed, if new hunting areas are added or deleted, and to clarify old language. Upon discussion, Second Vice Chair Yee recommended that the rule amendments proceed to public hearing; the Board unanimously agreed.

- B. Review and discussion of November 28, 2008 memorandum from Mr. Ken Schmitt regarding, "Hike Maui and Maui Canyon Adventures" – Chair Woods introduced Mr. Ken Schmitt, a Maui business owner who has come before this Board regarding DLNR's HAR Chapter 12-221, "Land Management: Unencumbered Public Lands." The rules require that no commercial activities of any kind will be engaged in without a written permit from the Board of Land and Natural Resources (BLNR), or its authorized representative. Mr. Schmitt stated that the rules do not specify a permitting process so it appears that the divisions within DLNR have the latitude to establish their own permitting process for State lands. Thus, because he believes the processes by which the Land Division have established are extremely onerous, he is requesting assistance in receiving some relief from this Board. He stated that in order to complete the permitting process required by Chapter 343, HRS, which requires a complete environmental assessment for any parcel of State land his company is interested in using for commercial purposes, it may cost up to \$100,000. He added that this relates to land that is already permitted for grazing or for farming and believes that his company only needs a right of entry permit to conduct tours.

Mr. Schmitt further indicated he began conducting commercial tours on State lands in 1985 and never had a permit although he has requested permits over the years. Ms. Ahn stated that Chapter 343, HRS, which involves environmental assessments, had a recent court decision that was very broadly drafted and involves environmental assessments for any actions using State land and State funds. It was noted that there is a process for requesting an environmental impact statement. Second Vice Chair Yee added that it is important to understand the differences in the environmental tests as there is an environmental assessment (EA) which is generally much cheaper than an environmental impact statement (EIS).

Mr. Steve Molmen, Supervising Land Agent from DLNR's Land Division, explained the process of requesting a permit which is to go in front of BLNR, although it is not set forth in the administrative rules; he referred the members to a January 14, 2009 letter to Mr. Schmitt from Mr. Morris M. Atta, DLNR Administrator. In regards to Chapter 343, HRS, Mr. Molmen indicated that he does not believe that the exemptions are applicable to Mr. Schmitt's activity, as it is believed that his commercial activity is along the lines of rock climbing which has never been done commercially by the State; thus, no precedent for the State to authorize a commercial rock climbing business exists. Therefore, DLNR, in attempting to work with Mr. Schmitt, has requested that he prepare a detailed business plan to submit to BLNR. Once received and DLNR agrees "in principle" to the issuance of a commercial permit, DLNR would then notify BLNR that Mr. Schmitt's proposed commercial activity triggers compliance with Chapter 343, HRS. As a result, Mr. Schmitt's request would not be exempt but would be required to prepare, at a minimum, an environmental assessment. He added that subsequent to Mr. Schmitt's compliance with Chapter 343,

HRS, DLNR will prepare a second submittal to BLNR with its recommendations regarding issuance of a permit.

Mr. Geoff Brown, General Manager of Latitudes & Adatudes d/b/a Maui Eco-Adventures, indicated that he has been in business for approximately ten years; he explained the application process for obtaining a permit for his company to use State land for his business. Mr. De Luz, Jr., stated that the process of obtaining a permit is currently tenuous and complicated because DLNR has many divisions with overlapping jurisdictions on the lands; he noted that there is also an appeals process that goes to BLNR. He suggested that Messrs. Schmitt and Brown approach the House representative from Maui to help them with the permitting process.

Upon hearing from the Board members as to their opinions and concern, Chair Woods informed Mr. Schmitt that there is a process to follow and it is up to him to either follow the process or not. She added that there are procedures in place by the State to protect State land and as long as there is a process to follow that is what this Board can provide. Mr. Schmitt responded that he will work with DLNR the best he can. Chair Woods noted that it is important for DLNR to "level the playing field" as it cannot allow some businesses to operate and some businesses to stop operating; Mr. Molmen concurred. Overall, the members expressed concern that a business may proceed through a formal process, spend a tremendous amount of money for environmental testing performed, and then have the process stopped by BLNR by refusing to hear from the small business. Second Vice Chair Yee suggested that this Board might want to send a letter to BLNR Chair Laura Thielen to request that she place Mr. Schmitt's item on BLNR's next meeting agenda; Chair Woods concurred and suggested that this Board might want to request Chair Thielen to attend this Board next meeting so that its members can understand the process. In response, Mr. Molmen reiterated that rather than allowing a small business to spend a substantial amount of money by having various environmental tests performed, that DLNR will first agree "in principle" that it is okay to issue a commercial permit. Chair Woods thanked all the attendees for coming to this meeting; she recommended that all parties involved communicating amongst themselves in order to come to an understanding of the process.

- C. Review, discussion, and recommendation of proposed legislation for 2009, including Act 230, SLH 2008, and Act 137, SLH 2008 – Chair Woods reminded the Board members that the 2008 legislature required that this Board create a working group to review and make changes to 201M, HRS, the statute that governs this Board. As a result, the working group decided on several statute changes that were proposed in bill form. However, because the proposed bill missed the Administration's deadline, the Board must approach a legislator to introduce it. Thus, a meeting with Representative Angus McKelvey has been scheduled for this afternoon to request his assistance in introducing the bill. Mr. Au recommended that Ms. Palcovich be delegated the authority to testify on behalf of this Board for all legislative efforts that the Board takes for each issue; the Board unanimously agreed.

Chair Woods reminded the members that Act 137, SLH 2008, Relating to Mortgages," decimated the real estate industry as it restricts a real estate agent or tax accountant advisor to contact a lender or client about their distress property. If this is done, that person is placed in a "distress property consultant category," which changes that person's fiduciary responsibilities. From the real estate industry's perspective, it is devastating because a number of the agents are focused on short sales, and so Act 137, SLH 2008, has caused many real estate agents to refuse to speak with clients. On behalf of Chair Woods' industry, she has been meeting with legislators to discuss these issues; this was instrumental in proposing changes to the Act. She asked this Board to support any bills proposing amendments to the Act. During the discussion, Ms. Ahn questioned whether there was any potential or direct financial interest or gain within Chair Woods' business should changes occur within the Act. Chair Woods' responded that the original bill negatively and directly impacted her industry which ultimately hurts her business. After much discussion, Ms. Ahn recommended that this issue be deferred until next month so that it can be reviewed with the Hawaii Ethics Commission for guidance, and if there is found to be a conflict, this item will not be resubmitted on next month's agenda.

V. **DISCUSSION AND UPDATE ON THE BOARD'S 2009 GOALS:**

A. RegAlert Project

1. Update on utilizing the RegAlert process through its partners to nominate rules that give Hawaii companies their biggest financial impact – Deferred until the February Board meeting.

2. Review and discussion of correspondence dated December 1, 2008 from Mr. Tim Lyons, CAE, President, The Legislative Center - Chair Woods stated that this Board received a request from Mr. Tim Lyons, President of The Legislative Center, which represents many small industry-specific organizations. Mr. Lyons requested that this Board include additional RegAlert partners in order to notify them of proposed rules as there are many small businesses that are not associated with the larger chambers; these groups believe they are getting left out of important regulatory information. Board members concurred. Mr. Bretschneider suggested that an internal system be implemented where when a business association is notified of a regulation change via RegAlert, then the respective State agency will in turn be notified.

B. Chapter 201M, HRS, Amendments – Discussed in Section IV. C.

C. Public Outreach Project – Mr. Yukimura will be speaking at the Japanese Chamber of Commerce board meeting regarding this Board and the RegAlert project. Mr. Au spoke recently at the Small Business Hawaii (SBH) annual meeting and discussed this Board as a resource for assisting small businesses. Mr. Au spoke to SBH President Sam Slom about linking SBH and this Board's websites. Mr. Au added that this Board may benefit from partnership; Ms. Palcovich will look into its logistics.

VI. REPORT FROM CHAIR: Chair Woods noted that each member has received three Board reports, 2008 Annual Report, 201M Report, and 2008 "Working Group" Report.

VII. REPORT FROM BOARD MEMBERS: Nothing was discussed.

VIII. ANNOUNCEMENTS: Chair Woods announced that each member received a copy of the 2007–2008 Ombudsman Annual Report. She indicated that page 35 outlines an issue that dealt with this Board reviewing amended rules proposed by the Department of Transportation (DOT). In the Ombudsman's investigation, it was found that the proposed rules that were sent to this Board were revised several times during the Board's review. Upon review by DOT's deputy director, it was found that the proposed rules that were sent to the Governor were changed substantively from the version reviewed and recommended for public hearing by this Board. As a result, the decision not to proceed with the public hearing was made.

IX. NEXT MEETING – Wednesday, February 18, 2009, 250 South Hotel Street, Honolulu, HI, Conference Room 410, 10:30 a.m.

X. ADJOURNMENT – Chair Woods adjourned the meeting at 3:07 p.m.