

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

April 15, 2009

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

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

MEMBERS PRESENT:

- Sharon L. Pang
- Dorvin Leis
- Richard Schnitzler
- Charles Au
- Donald Dymond
- Bruce Bucky
- David S. De Luz, Jr.

ABSENT MEMBERS:

- Lynne Woods
- Michael Yee
- Peter Yukimura

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

WORKING LUNCH AS THE MEETING PROGRESSED

II. APPROVAL OF MINUTES

Mr. Schnitzler recommended that the March 18, 2009 minutes be approved as presented, Mr. Au seconded, and the Board unanimously agreed.

III. DISCUSSION AND RECOMMENDATION TO NOMINATE BOARD MEMBER

The members reviewed Ms. Gloria Cohen's resume' and application to become a member of this Board. After deliberation, Mr. Leis recommended that Ms. Cohen's name be submitted through the proper channels for nomination as a member of this Board, Mr. De Luz, Jr., seconded and the Board unanimously agreed.

IV. NEW BUSINESS

- A. Review and discussion of amendments to HAR Chapter 16-169, "Actuarial Opinion and Memorandum"** (DCCA) – Mr. Mark Morita, Staff Attorney at DCCA's Insurance Division, indicated that the proposed rule amendments create reporting requirements and accountability standards for insurance companies when undertaking actuarial studies. The amendments will bring Hawaii's rules into conformity with the national standards for actuarial opinions as established by the National Association of Insurance Commissioners (NAIC). The amendments include more requirements than currently in the State rules, however, they are not more stringent than the rules currently in force in other states or those advocated by NAIC. The amendments are necessary to apply equivalent standards to insurance companies that are accepted throughout most of the United States; it was noted that a group of actuarials were involved in the drafting of the amended rules. Mr. De Luz, Jr., recommended that the proposed amendments proceed to public hearing, Mr. Au seconded, and the Board unanimously agreed.
- B. Review and discussion of amendments to HAR Chapter 17-1711, "Application Processing Requirements"** (DHS) – Ms. Aileen Befitel, Health Supervisor from DHS's Med-QUEST Division, explained that the rule amendments reflect a change in the length of the medical assistance retroactive coverage period to thirty days, effective January 31, 2009. This change was precipitated by the provisions of the American Recovery and Reinvestment Act (ARRA) of 2009, also known as the Economic Stimulus Act, which provide additional Medicaid funds through an increase in the Federal Medicaid Assistance Percentage (FMAP). These funds are available on the condition that DHS does not implement more restrictive requirements on and after July 1, 2009. The change in the retroactive period is considered a restrictive

action, so DHS must reinstate the retroactive coverage period to what was in effect prior to July 1, 2008, in order to qualify for the increased FMAP under ARRA, retroactive to October 1, 2008. Thus, the restoration of the eligibility requirement will result in receiving approximately \$320 million in additional federal funds for the period from October 1, 2008 through December 31, 2010. Overall, Ms. Befitel indicated the amendments will have a positive impact on health care providers. After a series of questions, Mr. Schnitzler recommended that the proposed rule changes proceed to public hearing, Mr. Dymond seconded, and the Board unanimously agreed.

- C. Review and discussion of the repeal of HAR Chapter 11-94, "Skilled Nursing/Intermediate Care Facilities, and adoption of HAR Chapter 11-94.1, "Nursing Facilities" (DOH) – Mr. Keith Ridley, Chief of DOH's Office of Health Care Assurances Division (OHCA), stated that he is requesting to go to public hearing with the rule proposals. He explained that OHCA licenses all the medical care facilities (hospital, nursing, residential, clinical laboratories, etc.), and also handles Medicare certification. HAR Chapter 11-94 is twenty years old and over the course of conducting "unannounced surveys," many of the facilities have been cited based on violations within the existing rules that are virtually outdated. As a result of this, OHCA has worked closely with the community, nursing facilities and health care associations to re-draft the rules into its present proposed format; this has taken years. Mr. Ridley noted that the key differences in the existing Chapter 11-94 and the proposed Chapter 11-94.1, are a change in the formatting, the addition of definitions, and the clarification of the language and rule requirements. One major change to the rules clarifies how quickly a nursing facility can turn over a bed to another person when an emergency occurs. He explained that the rules are for state licensing and the facilities also have to comply with Medicare certification; however, the rules do not go beyond the federal government's requirements. After a series of questions and answers, Vice Chair Pang stated that all the stakeholders should be aware of the proposed rules; to that, Mr. Ridley explained that OHCA will plan to approach and work with all of the professional association providers. Mr. Au recommended that the proposed rules proceed to public hearing with the request that the Agency directly contact all the impacted licensed facilities regarding the rule proposals and to notify those facilities of the public hearing date, Mr. Schnitzler seconded, and the Board unanimously agreed,
- D. Review and discussion of amendments to HAR Chapter 11-106, "Criminal History Record Checks" (DOH) – Vice Chair Pang explained that the Governor's office via Ms. Linda Smith has requested that this Board review these proposed rules. She noted that she is very aware of this Chapter and believes it is more of a formality; businesses are amenable to performing criminal checks as it has a positive effect on a facilities' overall business. Mr. Keith Ridley, Chief of DOH's Office of Health Care Assurances Division (OHCA), explained that these are new rules promulgated pursuant to Statutes that require the Agency to ensure the reputable and responsible character of all prospective applicants, operators, direct patient access employees, and adult volunteers of a health care facility; criminal checks are particularly important when patients are frail and vulnerable to undue influence. Vice Chair Pang added that although there is a cost to obtain a criminal abstract, this has not been a problem because owners and workers of such facilities are glad that this practice is in place as a preventative measure; it is also a positive instrument for a facility's marketing efforts to disclose that it has passed a criminal clearance. After much discussion, Mr. Au recommended that the proposed rules proceed to public hearing, Mr. Schnitzler seconded, and the Board unanimously concurred.
- E. Review and discussion of proposed new rule, Title 15, "Renewable Energy Facility Siting Process Rules" (DBEDT) – Mr. Joshua Strickler, Facilitator at DBEDT's Strategic Industries Division, explained that these rules are in draft form and not yet ready to take to public hearing; upon review from this Board, the draft rules will be provided to the departments of Land and Natural Resources and Health, the Counties, and the Public Utilities Commission. He explained that the rules were created by statute, Chapter 201N, HRS, and its purpose is to establish a renewable energy facility siting process for permits required for the siting, construction, operation and retirement of renewable energy facilities. He further explained that the energy resources coordinator will use the rules to determine whether to grant or deny a permit plan. If a coordinated permitting plan is granted, the rules allow the coordinator to implement the permitting process and to oversee the construction, operation and retirement of the renewable energy facility. He noted that the coordinator is the director of the DBEDT. The rules also allow the agency to collect fees from the processing permits.

In summary, Mr. Strickler explained that because the previous process for implementing a renewable energy process proved to be very frustrating to most individuals and businesses, Mr. Strickler's position

was created to help coordinate the process in a reasonable, streamlining fashion; he explained, as an example, the wind farm in Maui took seven years to complete. He stated that the agency is attempting to make the permitting process as fair and as open as possible; if there is any concern or grievance, judicial review is available. After a series of questions and answers, Mr. Schnitzler recommended that the new rule proposal move forward to the departments of Land and Natural Resources and Health for further review, Mr. Bucky seconded, and the Board unanimously agreed.

- F. Review and discussion of proposed amendments to HAR Chapter 16-88, "Naturopaths" (DCCA) – Ms. Candace Ito, Executive Officer at DCCA's Professional and Vocational Licensing Division, stated that the rule changes include a new section that clarifies appropriate titles that a naturopathic physician may use as well as prohibit the use of any title that would induce the belief that a naturopathic physician is a medical doctor. Thus, the rule specifically prohibits the use of the title, "naturopathic medical doctor," or the acronym "N.M.D.," if such a person is not in fact a medical doctor as it tends to lead the public to believe that a person using this title is a medical doctor. Another change in the rule deletes the requirement for applicants to apply to the Board to take the licensing examination and incorporates the professional testing agency's procedure of applicants applying directly to them to take the examination. She noted that there are currently eighty licensed naturopaths in the State of Hawaii. Ms. Ito stated that the Hawaii Society of Naturopathic Physicians was notified of the proposed changes, and it is her understanding that no objections to the amendments were made. Upon review, Mr. Leis recommended that the proposed amended rules proceed to public hearing, Mr. Dymond seconded, and the Board unanimously agreed.
- G. Review and discussion of amendments to HAR Chapter 17-1721, "Medical Assistance to the Aged, Blind, and Disabled," and HAR Chapter 17-1725, "Assets" (DHS) – Mr. Paul Higa, Supervisor of DHS's Med-QUEST Division, explained that the changes to Chapter 17-1721 include a new Subchapter 8, which incorporates the Medicaid regulations regarding the transfer of assets for individuals requesting coverage of long-term care services from the repealed Section 17-1721-45, with new provisions required by the Deficit Reduction Act (DRA) of 2005. The Medicaid program provides coverage of medical services for impoverished individuals who do not have sufficient income and assets to pay for required medical services. Medicaid has evolved to be the primary payer of long-term care services; this is because individuals who require long-term care services will eventually become impoverished due to the high cost of continual need of long-term care services. Therefore, Medicaid regulations impose penalty periods when individuals artificially impoverish themselves to qualify for Medicaid by making non-exempt transfers of their assets.

He also explained that Medicaid will not pay for long-term care services during a penalty period. The intent of the penalty period is to have individuals use personal assets to pay for their long-term care services before accessing Medicaid funding. The length of the penalty period is based on the period the transferred asset could have paid for the individual's long-term care services. Mr. Higa stated that loopholes in the Medicaid regulations have surfaced whereby individuals or their representatives have made non-exempt transfers without incurring or serving a penalty period. The DRA amendments address many of these loopholes; this will ensure that individuals will use personal assets to pay for long-term care services before accessing Medicaid. Transfers made to the individual's spouse and dependent children (who are blind or disabled) are exempt from the application of a penalty period. The penalty provisions also do not apply to the transfer of the home property to a non-dependent caretaker adult child who resided with the individual for two years prior to the need for long-term care service payments. Thus, a penalty period is generally applied to transfers made to non-dependent relatives who were not caregivers, and to other non-related individuals.

The changes to Chapter 17-1725 include definition amendments and additions, add a new paragraph to specify that exempt assets would include an annuity that was irrevocable and not assignable, and add new paragraphs to specify conditions to annuities, promissory notes and entrance fees for an individual residing in a continuing care retirement community as available assets. Upon review, Mr. Dymond recommended that the proposed rule amendments proceed to public hearing, Mr. De Luz, Jr., seconded, and the Board unanimously agreed.

V. OLD BUSINESS

- A. Update on legislature – Vice Chair Pang provided the members with an updated status on the following bills:
- i. HB200 HD1 “Relating to the State Budget”
 - This bill appropriates funds for the executive branch for fiscal years 2009, 2010, and 2011. It is moving forward and proposes to transfer this Board to the Department of Commerce and Consumer Affairs.
 - ii. GM268 “Consideration for Confirmation of Sharon Pang to sit on the SBRRB”
 - This bill has been passed for confirmation.
 - iii. GM280 “Consideration for Confirmation of Peter Yukimura to sit on the SBRRB”
 - This bill has been passed for confirmation.
 - iv. GM422 “Consideration for Confirmation of Charles Au to sit on the SBRRB”
 - This bill is deferred pending the receipt of the responses to the Senate’s questions. Ms. Ahn stated that Mr. Au is still on the Board as a “holdover” member, and that the Legislature has two more sessions after the expiration of Mr. Au’s present term to reconfirm him as a member to this Board. Ms. Palcovich noted that Mr. Au needs to provide a response to the Senate’s questionnaire.
 - v. HB1428 HD1 and SB1276, SD2 “Relating to Small Business”
 - These two bills have died.
 - vi. HB1622 HD1 “Relating to the Small business Regulatory Review Board”
 - This bill, which was introduced by Representative Kyle Yamashita, is dead.
 - vii. HB952 HD1 “Relating to Labor”
 - This Board was opposed to this bill; it is moving forward.
 - viii. HB1728 HD1 “Relating to Fees”
 - This Board was opposed to this bill; it is moving forward.
 - ix. HB814 HD2 “Relating to Nurse Aides”
 - This bill is moving forward.
 - x. HB1148 HD1 “Relating to Public Agency Meetings”
 - This bill is moving forward.
 - xi. HB999 HD1 “Relating to Meetings of Public Agencies”
 - This bill is dead.
 - xii. HB949 HD1 “Relating to the Hawaiian Homes Commission Act”
 - This bill is dead.
 - xiii. SB1621 SD2 “Relating to Collective Bargaining”
 - This Board was opposed to this bill; it is moving forward.
 - xiv. SB56, “Relating to Enforcement of Smoking Prohibition”
 - This Board was opposed to this bill; it is dead.

VI. DISCUSSION AND UPDATE OF BOARD’S 2009 GOALS:

- A. RegAlert Project
- i. Honolulu Japanese Chamber of Commerce – Vice Chair Pang noted that this agency was referred by Mr. Yukimura and is now a RegAlert partner.
 - ii. Realtors Association of Maui, Inc. – Vice Chair Pang noted that this agency was referred by Chair Woods, and is now a RegAlert partner.
- B. Chapter 201M, HRS, Amendments – This was discussed above in Section V. 8. under HB1428, HD1 and SB1276 SD2 “Relating to Small Business.”
- C. Public Outreach – Nothing was discussed.

VII. REPORT FROM CHAIR AND BOARD MEMBERS:

- VIII. **ANNOUNCEMENTS:** Vice Chair Pang stated that President and Chief Executive Officer, Sam Slom, recently announced that Small Business Hawaii has officially changed its name to SmartBusiness.

- IX. NEXT MEETING** – Wednesday, May 20, 2009, 250 South Hotel Street, Honolulu, HI, Conference Room 410, 10:30 a.m.
- X. ADJOURNMENT** – Vice Chair Pang adjourned the meeting at 1:16 p.m.