Sunset Evaluation Update: Medicine and Surgery

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

Report No. 94-13
September 1994

THE AUDITOR
STATE OF HAWAII

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Submitted by

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OVERVIEW

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Summary

We evaluated the regulation of physicians, physician assistants, and emergency medical service personnel under Chapter 453, Hawaii Revised Statutes, and conclude that the public interest is best served by continuance of the chapter.

We found that continued regulation of physicians, physician assistants, and emergency medical service personnel is needed. If practiced incompetently, these occupations have a significant potential for harm to consumers.

This evaluation and repeal of the chapter had been scheduled under the Sunset Law. Subsequently, Act 279 of 1994 removed the repeal date and with it the evaluation requirement. Nevertheless, since the work had already been done, we are issuing the report to help decision makers in assessing the regulatory program.

Physicians are independent practitioners who diagnose and treat injury, illness, or disease. Physician assistants practice medicine under the supervision of a licensed physician; their functions include taking medical histories, performing physical examinations, and treating minor injuries. Emergency medical service personnel—who may be emergency medical technicians (EMTs) or mobile intensive care technicians (MICTs)—work from ambulances to provide prehospital care for medical emergencies due to an accident or sudden illness. They serve under the direction and control of a physician.

In Hawaii, a nine-member Board of Medical Examiners regulates these occupations. The board is administratively attached to the Department of Commerce and Consumer Affairs. The department's Professional and Vocational Licensing Division provides administrative services to the board and the Regulated Industries Complaints Office handles consumer complaints and pursues legal action when appropriate.

Since our last sunset evaluation in 1992, improvements have been initiated but implementation has been slow. Specifically, the board's rule relating to the supervision of physician assistants, which places physician assistants in impractical situations, still needs correcting. Also, discrimination continues against mainland-trained EMTs and MICTs because they are still required to pass an "equivalency examination." We also found that policies are still needed to address relicensure requirements following an automatic termination of a physician license.

Additional improvements are also needed in several areas. Tracking of disciplinary actions is needed for physician assistants and emergency medical service personnel similar to the tracking done for physicians. The board's executive meeting minutes lack sufficient detail and do not comply with the law.

The board still needs clarification about information it gets from RICO for settlement agreements.

Some improvements have been made. The informed consent guidelines for breast cancer have been updated. Implementation of amendments to the physician licensing statute and rules to address a national development in examinations for physicians is on schedule. DCCA's examination administration has improved.

Recommendations and Response

We recommend that the Legislature maintain Chapter 453, Hawaii Revised Statutes, to continue the regulation of physicians, physician assistants, and emergency medical service personnel.

We further recommend that the board place priority on clarifying the requirements for the supervision of physician assistants and expedite rule amendments for the certification of EMTs and MICTs to avoid further discrimination against mainland-trained applicants. It should also reevaluate the equivalency exam; develop tracking procedures for disciplinary actions against physician assistants and emergency medical service personnel; participate in reporting disciplinary actions to national organizations; and develop policies for relicensing after a physician license has been automatically terminated. The board should work with DCCA to ensure that executive meeting minutes comply with the law. It should request a written opinion from the Attorney General as to what information the board is entitled to receive in reviewing settlement agreements.

The Board of Medical Examiners responded that it concurs that Chapter 453 should be continued and agrees with most of the other recommendations. It disputes that its rules are discriminatory toward mainland-trained emergency medical service personnel and says our recommendation to reevaluate the equivalency exam would be moot under the proposed rule amendments that eliminate the exam. It deferred responding to our recommendation concerning executive session minutes to the department and will take under advisement our recommendation to request an attorney general opinion on settlement agreements. The board disagrees that there is a need to develop policies for exceptions to relicensure requirements after an automatic termination of a physician license. We continue to believe that exceptions to the law should not be made inconsistently on a case-by-case basis.

The department responded that it believes that all parties involved in the executive meeting minutes of the board have followed and will continue to follow all provisions of Chapter 92, HRS, to ensure compliance with the law. Our review of the minutes indicate, however, that they lack sufficent detail to be in compliance with the law.

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Foreword

This report evaluates the regulation of physicians, physician assistants, and emergency medical service personnel under Chapter 453, Hawaii Revised Statutes. This evaluation and repeal of the chapter had been scheduled under the Sunset Law. Subsequently, Act 279 of 1994 removed the repeal date and with it the evaluation requirement. Nevertheless, since the work had already been done, we are issuing the report to help decision makers in assessing the regulatory program.

The report presents our findings as to whether the program complies with policies in the Sunset Law and whether there is a reasonable need to regulate these occupations to protect the health, safety, and welfare of the public. It includes our recommendation on whether the program should be continued, modified, or repealed.

We acknowledge the cooperation of the Department of Commerce and Consumer Affairs, the Board of Medical Examiners, and others whom we contacted during the course of our evaluation.

Marion M. Higa
State Auditor

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Chapter 1
Introduction

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act, Chapter 26H, Hawaii Revised Statutes, establishes policies for occupational licensing. The law directs the State Auditor to evaluate licensing statutes scheduled for repeal to determine whether the health, safety, and welfare of the public are best served by reenactment, modification, or repeal.

This report evaluates whether the regulation of medicine and surgery under Chapter 453, HRS, complies with policies for occupational licensing in the Sunset Law. After our work was substantially completed, Act 279 of 1994 removed the December 31, 1995, repeal date for Chapter 453 and made the chapter permanent. However, we are still issuing the report to assist decision makers in assessing the regulatory program.

Background on the Regulatory Program

Chapter 453 places the responsibility for administering the regulatory program with the Board of Medical Examiners. The nine members of the board—seven physicians and two lay persons—are appointed by the governor and serve without compensation. The board is attached to the Department of Commerce and Consumer Affairs (DCCA) for administrative purposes. The department's Professional and Vocational Licensing Division provides an executive officer to serve as staff to the board and to administer its day-to-day operations.

The department's Regulated Industries Complaints Office (RICO) mediates and resolves consumer complaints, pursues disciplinary action against licensees, and seeks court injunctions and fines against unlicensed persons. In cases of disciplinary action pursued by RICO, the department's Office of Administrative Hearings makes recommendations to the board when warranted. The board issues final disciplinary decisions. Settlement agreements reached without a hearing must be approved by the board.

Under Chapter 453, the board regulates three different health care occupations: physicians, physician assistants, and emergency medical service personnel.

Physicians

Physicians (M.D.'s) are independent practitioners who perform medical examinations and diagnose and treat injury, illness, or disease. They also advise patients on dieting, hygiene, and preventive health care. Most

physicians specialize in specific fields such as obstetrics-gynecology, psychiatry, cardiology, or orthopedics.

The education and training of physicians begin with undergraduate education. After college, the prospective physician goes through four years of medical school. Upon completion of medical school, the physician completes a residency (graduate medical education) which lasts from one to six years (depending on whether the physician specializes). Physicians may be certified by national boards in 24 different specialties.

Chapter 453 of the statutes and Chapter 85 of the Hawaii Administrative Rules contain the licensing, disciplinary, reporting, and continuing education provisions for the practice of medicine. The grounds for discipline are set forth in detail.

About 5,500 physicians are licensed in Hawaii. Of these, 2,900 reside in Hawaii.[1]

Physician assistants

Physician assistants practice medicine under the supervision of a licensed physician. Their functions include taking medical histories, performing physical examinations, making preliminary diagnoses, ordering laboratory tests and x-rays, giving inoculations, treating minor injuries, and even assisting in surgery. Thirty other states allow physician assistants to prescribe medicine; however, Hawaii does not allow physician assistants prescriptive privileges.

Chapter 453 and the rules of Chapter 85, Hawaii Administrative Rules, set forth certification and other requirements for physician assistants. Physician assistants may be disciplined on the same grounds as physicians.

Hawaii has about 70 certified physician assistants. Of these, 67 live in Hawaii.[2]

Emergency medical service personnel

Emergency medical service personnel serve under the direction and supervision of a physician. Working away from medical facilities, primarily from ambulances, they provide care wherever a medical emergency exists due to an accident or sudden illness. Their responsibilities include restoring breathing, controlling or stopping bleeding, immobilizing fractures, and assisting in childbirth. They also manage emotionally disturbed patients, resuscitate heart attack victims, and provide poison and burn care.

Emergency medical technicians (EMTs) and mobile intensive care technicians (MICTs) are two categories of emergency medical service personnel certified in Hawaii. EMTs provide basic life support while

MICTs provide basic and advanced life support and supervise EMTs. MICTs conduct advanced life support by following "standing orders" or receiving instructions from emergency care physicians through radio communication. Emergency medical personnel are disciplined on the same grounds as physicians.

Hawaii has about 670 certified EMTs and MICTs. Of these, 650 live in Hawaii.[3]

Previous Sunset Evaluations

Our office conducted the first sunset evaluation of Chapter 453 in 1984.[4] Most of our recommendations were subsequently adopted by rule making or by legislation.

Our last sunset evaluation was conducted in 1992.[5] We found that the board had not developed policies addressing a change in the national examinations for physicians. The board was also inconsistent in relicensing physicians whose licenses had automatically terminated. We recommended that the board propose legislation to implement the new national examination and establish a relicensing policy to ensure consistent treatment.

We also found that the board's policy for supervising physician assistants may be impractical and in need of revision. We recommended that the board require that all EMT and MICT applicants take the equivalency exam; reevaluate the passing score of the equivalency exam; remove the limitation on the number of exam attempts; and provide for the temporary certification of mainland-trained EMT and MICT certification applicants.

In general, we found that physician assistants and emergency medical service personnel received insufficient attention from the board. As a remedy, we recommended that the board be reconstituted by adding a representative from each profession. The board disagreed. As an alternative, it proposed forming advisory committees for physician assistants and emergency medical service personnel. The Legislature decided to establish a physician assistant advisory committee. Under existing law, the board already had the authority to form a committee to deal with emergency ambulance personnel issues.

We also recommended that the board work with RICO to improve the amount of disciplinary information reaching the board. We recommended that the board review the guidelines on informed consent for breast cancer. We further recommended that the DCCA review its examination administration.

Objectives of the Evaluation

This evaluation sought to determine whether the regulation of physicians, physician assistants, and emergency medical service personnel complies with policies in the Sunset Law. Specifically, the objectives were to:

1. Determine whether there is a reasonable need to regulate these occupations to protect the health, safety, and welfare of the public;

2. Determine whether current regulatory requirements are appropriate for protecting the public;

3. Establish whether the regulatory program is being implemented effectively and efficiently; and

4. Make recommendations based on findings in these areas.

Scope and Methodology

To accomplish these objectives, we reviewed the literature on physicians, physician assistants, emergency medical service personnel, and their regulation. We reviewed statutes and rules on these occupations in Hawaii and any changes since our last sunset evaluation in December 1992. We also reviewed complaints and other evidence of harm to consumers.

We interviewed members of the Board of Medical Examiners, members of the physician assistant and emergency medical personnel advisory committees, personnel from the DCCA, and healthcare practitioners. We obtained information from state and national groups including the American Medical Association, the Hawaii Medical Association, the American Academy of Physician Assistants, and the Hawaii Academy of Physician Assistants. We also obtained information from national testing and certifying agencies including the Federation of State Medical Boards, the National Board of Medical Examiners, the National Commission on Certification of Physician Assistants, and the National Registry of Emergency Medical Technicians.

At the DCCA, we reviewed files on board operations, licensing, enforcement, and correspondence. To observe testing procedures, we attended a licensing examination for emergency medical service personnel.

Our work was performed from January through June 1994 in accordance with generally accepted government auditing standards.

Chapter 2
Findings and Recommendations

We recommend that physicians, physician assistants, and emergency medical service personnel continue to be regulated. Most of the recommendations made in our 1992 sunset evaluation have been accepted by the board; we make a few more in this evaluation.

Summary of Findings

1. The State should continue regulating physicians, physician assistants, and emergency medical service personnel to protect the public's health, safety, and welfare.

2. The board has been slow in implementing our previous sunset recommendations to: clarify its rule on supervision of physician assistants; require the equivalency exam for all emergency medical service certification applicants; and provide for temporary certification for all emergency medical service applicants.

3. The board needs to improve its tracking of physician assistants and emergency medical service personnel who have been the subject of disciplinary action in another state.

4. The board's executive meeting minutes are not in compliance with the law.

5. The board needs further clarification of the type of information it can request from RICO in reviewing settlement agreements.

6. There has been mixed progress on prior recommendations:

   (a) Guidelines regarding informed consent for breast cancer have been updated;

   (b) Amendments to the physician licensing statute and rules are on schedule;

   (c) The department's examination administration has improved; and

   (d) The board still needs policies for exceptions to physician relicensure requirements after an automatic termination of licensure.

State Should Continue to Regulate Physicians, Physician Assistants, and Emergency Medical Service Personnel

Chapter 453, Hawaii Revised Statutes, should be maintained to continue the regulation of physicians, physician assistants, and emergency medical service personnel. The practices of these occupations have significant potential for harm to the public's health, safety, and welfare.

All states license physicians and regulate emergency medical personnel. Forty-nine states regulate physician assistants.[1]

Evidence of harm

Medical care providers, licensed under Chapter 453, either practice independently (physicians) or under supervision (physician assistants and emergency medical service personnel). Whether acting independently or under supervision, medical care providers can cause serious physical, emotional, and financial harm through inaccurate diagnosis or incompetent treatment. Furthermore, consumers often lack the necessary knowledge to adequately evaluate the competence of the provider and the quality of the services provided.

Evidence on harm caused by these providers has been found in the state. Our 1992 sunset evaluation reported that in a three-year span the Regulated Industries Complaints Office (RICO) opened 237 complaint cases against persons regulated under Chapter 453. Of these cases, 231 involved physicians. The remaining complaints involved 2 emergency medical technicians (EMTs), 2 mobile intensive care technicians (MICTs), and 2 physician assistants.

In the past year and a half, more than 150 additional complaint cases were opened. The majority of these cases involved physicians. There were a few complaints against physician assistants and MICTs. Almost half of the 150 cases alleged negligence or unprofessional conduct. Other complaints included a physician who allegedly used unlicensed persons to operate X-ray machines and a physician who allegedly examined female patients in an offensive manner.

Implementation of Improvements Is Slow

Our 1992 sunset evaluation found several problematic areas that the board agreed to correct by implementing rule changes. Specifically, we found that the rule relating to the supervision of physician assistants may be impractical and the rules on certifying emergency medical service personnel discriminated against mainland-trained applicants.

We also found that the board had not paid sufficient attention to issues involving physician assistants and emergency medical service personnel. We recommended adding a physician assistant and a MICT to the board. The board agreed to amend its rules, but preferred to have two advisory committees, one composed of physician assistants and the other composed of MICTs, instead of reconstituting the board.

Rule on physician assistants still needs correcting

Our 1992 evaluation recommended that the board amend and clarify Section 16-85-49 of its rules to avoid placing supervising physicians and physician assistants in impractical or undesirable situations.

The rule prohibits the supervising physician from permitting physician assistants to practice in any place apart and separate from the physician's primary places for meeting patients. In addition, the board has interpreted the rule to require that a physician-patient relationship first be established before the physician assistant can administer medical services to the patient. This means that the patient must first contact the physician either physically or by telephone. The interpretation is impractical because physician assistants are often the first to make contact with the patient in both clinical and remote settings. Physician assistants can treat many minor problems involving, for example, lacerations, abrasions, and burns without a physician being present.

The board has been unnecessarily slow in amending this rule. Several physicians had informed the board of their concerns over the rule and guidelines in August 1991. The board agreed to amend the rule at a meeting in October 1992. However, the board took no action until the formation of an official advisory committee of physician assistants. The board only recently delegated official duties to the advisory committee in January 1994.

The board could have requested the help of the Hawaii Academy of Physician Assistants to revise the rule before forming the committee. The academy has been active in apprising the board of its concerns, appearing at 16 of the last 17 board meetings. But instead of immediately working on the issue, the board waited until January 1994 when it officially delegated the responsibility for proposing rule amendments to its physician assistants advisory committee.

The formation of the physician assistants advisory committee does not guarantee that the board will pay attention to the concerns of physician assistants. The board remains ultimately responsible for adopting rules. It can still reject any proposal for rule amendments made by the committee. Therefore, the board needs to place priority on clarifying the requirements for the supervision of physician assistants.

Discrimination continues against mainland-trained emergency medical service personnel

The board's rules for certification are more restrictive for mainland-trained applicants than Hawaii-trained applicants. The rules allow Hawaii-trained applicants to be certified in Hawaii by graduating from a board-approved program and passing the National Registry of Emergency Medical Technicians (NREMT) exam. The rules require mainland-trained applicants, however, to pass an "equivalency examination" in addition to passing the NREMT exam. Mainland applicants pay an extra $120 in fees for the equivalency exam, contend with unclear application and instruction forms, submit verification of their NREMT certificate, and are allowed only three attempts at passing the equivalency exam. Furthermore, mainland-trained applicants are not given temporary certification as are Hawaii-trained applicants, so they are unable to work in their profession while waiting to take the NREMT exam.

The equivalency exam measures whether applicants have the knowledge to be an EMT or a MICT *in Hawaii*. The assumption by the board was that Hawaii has a higher standard of competency than other states and the exam was intended to bridge the gap between the knowledge required for the national examination and the minimum competencies specific to Hawaii. The assumption that mainland training programs are inferior is not supported by any evidence.

Our 1992 evaluation also found that Section 453-32, HRS, requires applicants to have completed a board-approved training program. The board's rule, however, expands on the statute by allowing for an *equivalent* to the board-approved training program and by requiring the equivalency to be demonstrated by passing an equivalency exam. This exceeds the scope of the statute and may be unenforceable.

In response to our report, the board agreed to amend its rules. In October 1992, the board took its first step toward amending the rules by voting in favor of having all applicants take the equivalency exam, eliminating the limit to the number of times a person can take the equivalency exam, and allowing temporary certification for mainland-trained applicants. However, the proposed rule changes were only recently drafted. The Department of Commerce and Consumer Affairs (DCCA) will be amending its application and instruction forms to reflect final rule changes.

The delay in amending the rules results in continuing, unwarranted discrimination against mainland-trained applicants. It is imperative that the board and department rectify the situation without further delay. It is also imperative that temporary certification for mainland-trained applicants be implemented.

The board and department are proceeding with the adoption of rules to implement the United States Medical Licensing Examination for physicians. Amendments to the emergency medical service personnel rule should be similarly expedited.

Passing score suspect

The board's passing score of 75 percent for the equivalency examination is suspect. It appears to be unrealistically high. In November 1990, the board established the passing score of 75 percent. In our 1992 evaluation, we reported that in a pilot test of the exam, six EMTs who were already Hawaii-certified took and failed the equivalency examination for EMTs. Three of the six already Hawaii-certified MICTs who took the MICT equivalency examination failed. Given the high rate of failure, the use of the equivalency exam as a test for minimum competencies specific to Hawaii is questionable and in need of reevaluation.

The department should validate the examination and its passing score by having a sufficient number of Hawaii-certified emergency medical service personnel take and pass the exam. The board initially conditioned acceptance of the exam on having half of at least 30 Hawaii-certified EMTs and 30 Hawaii-certified MICTs take and pass the exam. However, this validation was never carried out because of a lack of volunteers. Inasmuch as all of the six EMTs and one-half of the six MICTs who were already practicing in Hawaii could not pass the exam, the board needs to reevaluate the exam as a test for minimum competencies specific to Hawaii.

Tracking of Disciplinary Actions Is Needed for Physician Assistants and Emergency Medical Service Personnel

The board tracks disciplinary action on physicians by reporting to and receiving from national organizations accounts of disciplinary actions against physicians. The board also requires applicants for a physician license to submit a report which would indicate any prior disciplinary action. The board does not similarly track disciplinary actions or require reports on prior disciplinary actions for physician assistants and emergency medical service personnel.

Disciplinary actions in other states can be grounds for disciplinary action in Hawaii. Section 453-8(b), HRS, provides that the board may limit or suspend any license to practice medicine for disciplinary action taken by another state that would be a violation under Hawaii law. Practitioners must report to the board, in writing, a disciplinary action taken against them in another state within 30 days of the action or be subject to revocation, suspension, or limitation of their license.

Thus, the board should have methods to ensure that it is aware of all disciplinary actions taken against practitioners in all three professions. The board has a well-established tracking system for physicians, but not for physician assistants or for emergency medical service personnel.

Tracking system for physicians is well-established

The board requires the physician license applicant to request a report from the National Practitioner Data Bank on any prior disciplinary action and to submit it with the application. The application and accompanying information are submitted to DCCA and forwarded to the board for review.

The National Practitioner Data Bank was established by the federal Health Care Quality Improvement Act of 1986 to facilitate a more comprehensive review of professional credentials. The data bank provides information on medical malpractice payments made on behalf of health care practitioners and adverse actions taken against physicians and other health care practitioners.

Federal law requires any person or entity to report to the data bank any payments made for the benefit of a health care practitioner in settlement of a malpractice claim. The law also requires state medical boards to report to the data bank any adverse licensure actions against physicians and certain other health care practitioners. Furthermore, the law requires hospitals and health care entities to report to state medical boards any actions that adversely affect the clinical privileges of health care practitioners for 30 days or more. The state medical board must then report these actions to the national data bank.

The American Medical Association (AMA) also assists states in keeping abreast of disciplinary actions against physicians. States inform the AMA of disciplinary actions against physicians. In turn, the AMA notifies all states in which the physicians are licensed about the disciplinary actions. Hawaii uses the AMA notification letters to verify whether physicians are truthful on their license renewal applications. The department also forwards copies of the AMA letters to RICO for investigation into possible violations of Hawaii licensing provisions.

Physician assistants and emergency medical service personnel are not tracked

The board could similarly track disciplinary actions for physician assistants and emergency medical service personnel but does not do so. The board requests information from the National Registry of Emergency Medical Technicians only for emergency medical service personnel taking the equivalency exam. Otherwise, the board does not request information on EMTs or MICTs from the NREMT or the National Practitioner Data Bank. The board also does not request information from the Federation of State Medical Boards or the National Practitioner Data Bank on physician

assistants. The board does not report its disciplinary actions against physician assistants and emergency medical service personnel to any national organization.

The NREMT grants national certification to EMTs and MICTs who pass the NREMT exam. The NREMT maintains a registry of all EMTs and MICTs who have active national certifications and receives reports of disciplinary actions taken by states. But Hawaii does not make full use of the NREMT's services. When a state notifies the NREMT that disciplinary action was taken against a nationally certified EMT or MICT, the NREMT suspends that person's national certificate and notifies all states in which the NREMT knows that the person is practicing. The NREMT also responds to requests from states for disciplinary reports on nationally certified members. However, limitations are (1) that the NREMT may not receive disciplinary information from states that do not require national certification, and (2) where a state has not informed the NREMT of the EMTs and MICTs working in that state, the NREMT may not update that state on disciplinary actions against those EMTs or MICTs. Hawaii does not inform the NREMT as to which nationally certified EMTs or MICTs are working in Hawaii. Hawaii, therefore, may not receive disciplinary updates from the NREMT. The board also does not request disciplinary information on all certification applicants—only those taking the equivalency exam.

Another national organization, the Federation of State Medical Boards, maintains a data bank separate from the National Practitioner Data Bank on physicians and physician assistants. The federation's data bank provides information on disciplinary actions such as license denials and voluntary surrenders, and information on duplicate licenses. Since Hawaii is a member of the federation, the board can ask the federation to search its files to see if a physician assistant has been disciplined in other states. Hawaii's board has not yet done so. The federation also contacts other agencies for any disciplinary action and forwards all information to the state requesting the information. However, the federation has no information from states whose medical boards do not have jurisdiction over physician assistants. Some states have physician assistant boards that are not members of the federation. Currently, five states have physician assistant boards.

Section 5 of Public Law 100-93, the Medicare and Medicaid Program Protection Act of 1987, expanded the Health Care Quality Improvement Act of 1986 to require state medical boards to submit information on disciplinary actions against all health care practitioners to the National Practitioner Data Bank. This includes physicians, physician assistants, and emergency medical service personnel. At the conclusion of this study, it was not clear whether the data bank had implemented the amended law. Hawaii currently does not attempt to obtain disciplinary information on physician assistants or emergency medical service personnel from the data bank.

To better protect the public, the board should improve its tracking of physician assistants and emergency medical service personnel to the degree that it tracks physicians. The board could require all applicants for emergency medical service certification to obtain a disciplinary report from the NREMT. The board should notify the NREMT of all nationally certified EMTs and MICTs who are also certified in Hawaii. This would help the NREMT to inform all states, where an EMT or MICT is licensed to practice, of disciplinary actions taken.

Since Hawaii is a member of the Federation of State Medical Boards, the board should request reports on physician assistants from the federation. The board should then require applicants to submit disciplinary reports along with their applications for initial certification and for recertification.

Additionally, the board should ask the National Practitioner Data Bank about the extent to which information on physician assistants and emergency medical service personnel is available and use this source as soon as it is feasible to do so. The board should plan to comply with any reporting requirements implemented by the data bank.

Executive Meeting Minutes Do Not Comply With Law

Board meetings are open to the public unless the board decides to hold an executive meeting. The law requires that minutes be taken at all meetings, even executive meetings, and be a true reflection of the matters discussed. Although the board keeps minutes of its executive meetings, the minutes lack sufficient detail to be in compliance with the law.

Chapter 92, HRS, provides that minutes need not be full transcripts or recordings, but must be a true reflection of the matters discussed and the views of the participants. The substance of all matters proposed, discussed, or decided should be included in the minutes. The DCCA *Operational Manual for Boards and Commissions* contains a detailed explanation of these requirements.

We reviewed minutes of executive meetings from the past two years and found them insufficient. The executive meeting minutes merely supply a general statement of the purpose of the meeting. For example: "To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." Another example is, "To consider and evaluate personal information relating to individuals applying for professional license cited in Section 26-9, HRS." The same statements appear in the regular board minutes to describe the board's vote to move into executive session. Minutes containing only these generalized statements are insufficient to satisfy the requirements of the law. They do not describe the substance of matters discussed and the views of the participants.

Noncompliance with Chapter 92 may result in legal action against the board. Section 92-12(c) provides that any person may commence a suit to require compliance with the law or to determine the applicability of the law to discussions or decisions of the board. Both the board and DCCA, through its executive secretary, should ensure that minutes of executive meetings have sufficient detail to comply with the law.

Board Needs Clarification About Information for Settlement Agreements

The board's responsibilities include disciplining licensees and certificate holders who violate licensing and disciplinary provisions. RICO investigates and prosecutes violators, and in some instances, negotiates settlement agreements with the licensee or certificate holder. For these agreements, RICO must request the approval of the board. In the event the board rejects the agreement, the case may go to a hearing, after which the board rules on the hearing officer's recommended order.

In our previous evaluation, we found the board dissatisfied with the amount of information RICO provided to the board for settlement agreements. Board members felt they needed more information to ensure their decisions were fair.

The problem of inadequate information stems from a conflict between the board's need for more detail and RICO's concerns for due process. In presenting settlement agreements to the board for approval, RICO does not fully present facts of the case to preserve the due process rights of the respondent in the event the case goes to a hearing. A violation of due process rights occurs if the board bases its disciplinary decision on extraneous information not presented during the hearing.

In our previous evaluation, we found RICO making efforts to help the board understand the settlement process and due process requirements. Since then, communications from RICO to the board have increased. RICO will be providing the board with quarterly reports containing the complaint history of specific physicians and professionals regulated by the board, including the type of allegation (e.g. negligence), the disposition of the case, and whether the matter is pending. RICO has also discussed the mechanics and operation of settlement agreements with the board. However, board members still report that they need more information to make fair decisions.

The board appears to need more clarification about the settlement agreement process and the requirements of due process. The board should seek a written opinion from the Department of the Attorney General on the type and amount of information it can receive from RICO for settlement agreements and on procedures for obtaining the information that would not jeopardize due process.

Board Has Made Mixed Progress on Previous Recommendations

Our previous sunset evaluation included recommendations on implementing a national exam for physicians, reviewing the guidelines on informed consent for breast cancer, implementing policies for the relicensing of physicians after an automatic termination of licensure, and reviewing examination administration. The board's responses to these recommendations have been mixed.

Informed consent guidelines for breast cancer are updated

In our previous evaluation, we noted that the law required the board to establish standards for informed consent to mastectomy. The board adopted guidelines on breast cancer in 1987, and in 1992, we recommended that the board review and amend the guidelines periodically for accuracy and appropriateness. As of September 1993, the board decided to adopt guidelines supported by the American Cancer Society in a brochure entitled, "Breast Cancer Treatment Alternatives." The board adopted these guidelines as its "Policy No. 1," which is included in the board's draft of proposed rules.

Implementation of amendments to the physician licensing statute and rules is on schedule

To be licensed in Hawaii, applicants must pass a three-part examination conducted by the National Board of Medical Examiners (NBME), or pass the two-component Federation Licensing Examination (FLEX) conducted by the Federation of State Medical Boards. Most graduates of accredited U.S. medical schools take the NBME examination, while foreign medical school graduates take the FLEX.

Our previous sunset evaluation found that the national board and the federation were phasing out the NBME and FLEX examinations and replacing them with a three-step examination known as the United States Medical Licensing Examination (USMLE). The designated date for the full implementation of the USMLE is June 1994. However, by this date, many medical students and physicians will have successfully completed some parts of either the NBME exam or the FLEX. Therefore, the USMLE program has recommended that state boards accept certain combinations of elements of the NBME exam, FLEX, and USMLE for medical licensure if completed prior to the year 2000.

We had recommended that the board propose amendments to Section 453-4, HRS, to accommodate applicants taking the full USMLE or mixing elements of the NBME exam, FLEX, and USMLE. In 1993, Act 164 was enacted to allow the board to establish rules to accept a combination of the three exams. In April 1993, the board established combinations of the three exams that it found acceptable for licensure. The combinations are a part of the recently drafted proposed rules.

Exam administration has improved

In our previous report, we noted some potential problems in administering examinations that could compromise the testing process. As a part of our current evaluation, we returned to DCCA's Princess Victoria Kamamalu building to observe the administration of an examination. We found that the department's examination administration has improved. The proctor read all the instructions in the test manual, the aisles were sufficiently spaced to allow the proctor to walk between the rows of desks, and lighting was uniform.

However, we believe the department could still make some minor improvements without much effort. For example, signs to indicate restroom locations could be posted. Also, the proctor could ask if any examinee needs a left-handed desk. We observed a left-handed examinee sitting at a right-handed desk who had to sit at an angle facing the right instead of facing forward.

Policies still needed for relicensure requirements after automatic termination

Licensees or certificate holders must renew their license or certification every two years. Those who fail to renew are allowed a two-year period for restoration. After two years, the license or certification is automatically terminated and the person must then submit a new application to be licensed or certified.

In our previous evaluation, we found that the board made determinations on four relicensure requests by physicians on a case-by-case basis without a clear policy. In two of the cases, the board reinstated licenses. In the third case, the board did not reinstate the license. In the fourth case, the board gave a limited and temporary "medical government license."[2] We recommended that the board develop a consistent policy and consider using the Special Purpose Examination (SPEX) for these situations. SPEX was developed by the national board and the federation to re-examine physicians and to assess whether physicians who are five years or more beyond medical school graduation remain competent to practice medicine.

The board claims that the action taken in each instance was legally defensible and fully within the parameters of the law. In these instances, the board was advised by a deputy attorney general.

We believe, however, that the law is specific in allowing restoration only within the two-year renewal period. Once the two-year period has passed, the law states that the license or certification cannot be restored and a new application shall be required.

Board members are inconsistent on the application of the law. Most board members believe that physician licenses should be terminated if not renewed. Board members believe that physicians are responsible for informing the board of any address change to ensure receiving the renewal

notification. Most board members, however, also believe that there should be some exceptions, such as allowing license restoration for an older physician who never took a national exam now required for licensure.

Older physicians, licensed without a national exam, who have specialized for many years, may not be able to pass a national licensing exam because they may lack the required general knowledge. A retired physician may want to return to practice because of unforeseen events. The new national exam, the USMLE, emphasizes general principles of biomedical science, therapy, health promotion, disease prevention, and patient management in ambulatory settings.

If the board believes exceptions should be allowed, it should develop policies for exceptions rather than crafting exceptions on a case-by-case basis. Some board members have expressed an interest in developing an inactive status category of licensure. Physicians who decide not to practice can elect to be inactive. To reenter private practice, the physician can then activate the inactive license. The automatic termination provision would remain and would not be bent for those who are negligent in renewing their licenses and do not elect inactive status. If the board chooses to establish an inactive status, it should define what constitutes inactive status and establish the requirements for reactivating an inactive license, such as a certain number of continuing education hours and/or a competency exam (SPEX) and fees.

Recommendations

1. The Legislature should continue the regulation of physicians, physician assistants, and emergency medical service personnel.

2. The Board of Medical Examiners should:

   a. Place priority on clarifying the requirements for the supervision of physician assistants.

   b. Expedite the adoption of rule amendments for the certification of EMTs and MICTs to avoid further discrimination against mainland-trained applicants.

   c. Reevaluate the equivalency exam after a sufficient number of Hawaii-trained emergency medical service personnel have taken it.

   d. Develop tracking procedures for disciplinary actions against physician assistants and emergency medical service personnel similar to the tracking of physicians, and participate in reporting disciplinary actions to national organizations.

e. Work with the department and the board's executive officer on ensuring that executive meeting minutes comply with Chapter 92, Hawaii Revised Statutes.

f. Request a written opinion from the Attorney General as to what information the board is entitled to receive in reviewing settlement agreements.

g. Develop policies for exceptions to relicensure requirements after an automatic termination of a physician license and consider establishing an inactive status option.

Notes

Chapter 1

1. Hawaii, Department of Commerce and Consumer Affairs, *Summary Geographic Report* (printout), Honolulu, February 4, 1994, p. 16.
2. Ibid., p. 15.
3. Ibid., p. 16.
4. Hawaii, Legislative Auditor, *Sunset Evaluation Report: Medicine and Surgery*, Report No. 84-5, Honolulu, January 1984.
5. Hawaii, Legislative Auditor, *Sunset Evaluation Update: Medicine and Surgery*, Report No. 92-25, December 1992.

Chapter 2

1. U.S., Department of Labor, *Occupational Outlook Handbook,* May 1992, pp. 146, 158, 193.
2. Section 453(2), HRS.

Responses of the Affected Agencies

Comments on Agency Responses

We transmitted a draft of this report to the Board of Medical Examiners and to the Department of Commerce and Consumer Affairs on August 5, 1994. A copy of the transmittal letter to the board is included as Attachment 1. A similar letter was sent to the department. The response from the board is included as Attachment 2 and that from the department is included as Attachment 3.

The Board of Medical Examiners agrees with our recommendation to continue Chapter 453, Hawaii Revised Statutes, on the regulation of physicians, physician assistants, and emergency medical service personnel. It concurs with most of our other recommendations, including our recommendations to clarify the requirement for the supervision of physician assistants, to track disciplinary actions taken against physician assistants and emergency medical service personnel, and to expedite the adoption of rule amendments for the certification of EMTs and MICTs. The board disputes that its rules discriminate against mainland-trained EMT and MICT applicants and finds our recommendation to reevaluate the equivalency exam to be moot because its proposed rules eliminate the equivalency exam. The board will take under advisement our recommendation to request a written opinion from the attorney general concerning receiving information for settlement agreements. Finally, the board disagrees with our recommendation to develop policies for exceptions to relicensure requirements after an automatic termination of a physician license. It says its decisions were fair and legally sound. We believe, however, that a policy is needed. Exceptions to the law should not be made inconsistently on a case-by-case basis.

The board deferred to the department on our recommendation to work with the department to ensure that executive meeting minutes comply with Chapter 92, HRS. The department responded that it believes that it is complying with the law and that all parties will diligently follow the law to ensure compliance. Our review of the minutes of executive sessions indicate, however, that they lack sufficient detail to be in compliance with the law.

ATTACHMENT 1

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917

MARION M. HIGA
State Auditor

(808) 587-0800
FAX: (808) 587-0830

August 5, 1994

COPY

Dr. William E. Iaconetti, Chair
Board of Medical Examiners
Department of Commerce and Consumer Affairs
Kamamalu Building
1010 Richards Street
Honolulu, Hawaii 96813

Dear Dr. Iaconetti:

Enclosed for your information are 10 copies, numbered 9 to 18 of our draft report, *Sunset Evaluation Update: Medicine and Surgery*. We ask that you telephone us by Tuesday, August 9, 1994, on whether or not you intend to comment on our recommendations. Please distribute the copies to the members of the board. If you wish your comments to be included in the report, please submit them no later than Tuesday, September 6, 1994.

The Department of Commerce and Consumer Affairs, Governor, and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Marion M. Higa
State Auditor

Enclosures

ATTACHMENT 2

JOHN WAIHEE
GOVERNOR

CLIFFORD K. HIGA
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

BOARD OF MEDICAL EXAMINERS

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. BOX 3469
HONOLULU, HAWAII 96801

September 6, 1994

Marion H. Higa, State Auditor
Office of the Auditor
State of Hawaii
465 S. King Street, Room 500
Honolulu, HI 96813-2917

Dear Mrs. Higa:

The Board of Medical Examiners ("Board") thanks you for the opportunity to provide comment on the Sunset Evaluation Update for Medicine and Surgery. We will comment on the recommendations as they appear chronologically in the report.

1. "The Legislature should continue the regulation of physicians, physician assistants, and emergency medical service personnel."

   The Board agrees that the regulation of physicians, physicians assistants, and emergency medical service personnel should be continued.

2. "The Board of Medical Examiners should:

   a. "Place priority on clarifying the requirements for the supervision of physician assistants."

      The Board agrees with this recommendation and has drafted proposed rules with the assistance of the Physician Assistants Advisory Committee.

   b. "Expedite the adoption of rule amendments for the certification of EMTs and MICTs to avoid further discrimination against mainland-trained applicants."

      We dispute the allegation of "discrimination against mainland-trained applicants", but do agree that our proposed rules, drafted with the assistance of the Emergency Medical Personnel Advisory Committee, which deletes the equivalency examination entirely needs to be expedited.

c. "Reevaluate the equivalency exam after a sufficient number of Hawaii-trained emergency medical service personnel have taken it."

This point becomes moot. As stated in 2b, the Board has drafted proposed rules which will eliminate the equivalency examination. Pursuant to advice from our deputy attorney general the Board is precluded from discontinuing the equivalency examination until the proposed rules are officially adopted.

d. "Develop tracking procedures for disciplinary actions against physician assistants and emergency medical service personnel similar to the tracking of physicians, and participate in reporting disciplinary actions to national organizations."

The Board agrees with this recommendation and has drafted proposed rules to require information regarding disciplinary actions. Additionally, we plan to report disciplinary actions taken against licensees.

e. "Work with the department and the board's executive officer on ensuring that executive meeting minutes comply with Chapter 92, Hawaii Revised Statutes."

On our behalf, the Department of Commerce and Consumer Affairs will be submitting a separate response regarding this recommendation.

f. "Request a written opinion from the Attorney General as to what information the board is entitled to receive in reviewing settlement agreements."

The Board appreciates your concern and will take this under advisement.

g. "Develop policies for exceptions to relicensure requirements after an automatic termination of a physician license and consider establishing an inactive status option."

The Board does not agree that policies need to be developed for exceptions to relicensure requirements. While the Legislative Auditor believes the Board acted on four relicensure requests between July, 1990 through November, 1991 without a clear policy, it is the Board's opinion that decisions on those applications were legally sound and fairly applied.

The Board has continued to review applications in light of their laws and rules. The Legislative Auditor has not found nor determined that there were any other questionable decisions made by the Board since November, 1991. Therefore, this confirms our belief that we have been acting prudently. As a result, we feel that there is no need to develop policies for exceptions to relicensure requirements.

The Board of Medical Examiners would like to thank you for the opportunity to comment on the Sunset Evaluation Update for Medicine and Surgery.

Very truly yours,

for Constance L. Callow

William E. Iaconetti, M.D.
Chairperson
Board of Medical Examiners

JOHN WAIHEE
GOVERNOR

CLIFFORD K. HIGA
DIRECTOR

LINDA CHU TAKAYAMA
DEPUTY DIRECTOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

September 6, 1994

Marion H. Higa, State Auditor
Office of the Auditor
State of Hawaii
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917

Dear Ms. Higa:

On behalf of the Board of Medical Examiners, the Department of Commerce and Consumer Affairs ("department") wishes to take the opportunity to comment on the issue regarding executive session minutes as contained in the Sunset Evaluation Update: **Medicine and Surgery.**

At the end of the report you recommend the board, the department and department staff work together to ensure executive meeting minutes comply with Chapter 92, HRS.

We believe that we are complying with the requirements of Chapter 92, HRS, regarding executive session minutes. All parties have, and will continue to, diligently follow all provisions of Chapter 92, HRS, to ensure compliance.

Very truly yours,

Clifford K. Higa
Director

cc: Noe Noe Tom, Licensing Administrator