

**VIRGINIA BOARD OF HEALTH PROFESSIONS
DEPARTMENT OF HEALTH PROFESSIONS
FULL BOARD MEETING
OCTOBER 22, 2003**

TIME AND PLACE: The meeting was called to order at 12:30 p.m. on Wednesday, October 22, 2003, Department of Health Professions, 6603 W. Broad St., 5th Floor, Room 2, Richmond, VA.

PRESIDING OFFICER: Alan Mayer, Chair

MEMBERS PRESENT: David R. Boehm, L.C.S.W.
Lynne M. Cooper
Joe Gieck, P.T.
David H. Hettler, O.D.
Joseph Jenkins, Jr., F.S.L.
Nadia B. Kuley, Ph.D.
Michael W. Ridenhour, Au.D.
Harry S. Seigel, D.D.S.
Mary M. Smith, L.N.H.A.
Demis L. Stewart, Citizen Member
Joanne Taylor, Citizen Member
Lucia Anna Trigiani, Citizen Member
Natale A. Ward, L.P.C.

MEMBERS NOT PRESENT: Michelle R. Easton, R.Ph.
Terone B. Greene, Citizen Member
Jerry A. Hinn, D.V.M.
Diane Reynolds-Cane, M.D.

STAFF PRESENT: Robert A. Nebiker, Agency Director
Gail Jaspen, Chief Deputy Director
Elizabeth A. Carter, Ph.D., Executive Director for the Board
Elaine Yeatts, Senior Regulatory Analyst
Faye Lemon, Enforcement Division Director
Carol Stamey, Administrative Assistant

OTHERS PRESENT: Grace Horsley, National Association of Nephrology Technicians/Technologists (NANT) - Virginia Chapter
Evelyn Donigan, dialysis patient
William H. Edwards, II, (NANT) - National

QUORUM: With fourteen (14) members present, a quorum was established.

INTRODUCTION OF NEW MEMBERS: Mr. Mayer welcomed Mr. Boehm and Ms. Ward, and an introduction was made by each.

PUBLIC COMMENT: Public comment in support of the regulation of patient care dialysis technicians was offered by Mr. William Edwards, the Legislative Affairs Director of NANT. He indicated that NANT

fully supports the Regulatory Research Committee's recommended regulatory proposal for approving credentialing organizations for patient care dialysis technicians. However, a related issue that is still of concern for NANT is the provision in statute for grandfathering current incumbents. He stated that he knows that this is a matter for the General Assembly to address but wanted the Board to be aware of NANT's position.

APPROVAL OF MINUTES: On properly seconded motion by Mr. Gieck, the Board voted unanimously to approve the minutes of the September 4, 2003 meeting with the amendment described below. Under the Board Report for Nursing Home Administrators, the language is corrected as follows:

Ms. Smith reported that the Board of Nursing Home Administrators had been discussing the fact that Complaints are being received problems have been reported to the Department regarding directors for assisted living facilities who are not currently regulated by any of the health regulatory boards.

Ms. Smith noted that there is no current mechanism for addressing complaints concerning the directors, themselves.

UPDATE ON THE IMPLEMENTATION OF JLARC RECOMMENDATIONS:

As requested to at the last meeting, Mr. Nebiker reported on the agency's response to the recommendations from the 1999 JLARC Report on the Department of Health Professions. Mr. Nebiker stated that many of the issues are being addressed through implementation of HB1441. The following highlights the response to each recommendation.

Recommendation (1) - Certified Nurse Aide Registry Budget Deficit. Mr. Nebiker noted that under-funding is a chronic problem for the Certified Nurse Aide Registry. Unlike some other states, Virginia affords Certified Nurse Aides the same due process rights as other health care professions. In the four year interim since the JLARC report, the deficit was addressed by funding from the Department of Medical Assistance Services. In August of 2003, DHP was informed that there would be a "hard cap" for the program with a reduction in federal funding of \$400,000. To meet the gap, four options are under consideration for the 2004-06 biennium budget: 1. reduce expenses (i.e., investigations and disciplinary proceedings), 2. raise fees by \$20, 3. obtain additional federal funds, or 4. obtain general funds. None of the options is without problems.

Recommendation (2) and (3) - Mandatory Reporting by All Licensees to their Own Boards, Mandatory Reporting of Behavioral Science Professionals, Provision of Criminal and Civil Liability Immunity, and BHP Study of Extension of the Mandatory Reporting Requirement. Mr. Nebiker reported that

although BHP has not undertaken this study, the reporting requirements of HB1441 (2003) which expand mandatory reporting beyond the Board of Medicine's licensees and strengthen enforceability may accomplish the primary aims of this recommendation without further study by the Board. He reported that since July 1, 2003, the agency has received approximately 60 mandatory reports resulting from that statute -- most dealing with Board of Nursing and Board of Medicine licensees. He stated that we are seeing serious misconduct being reported.

The recommendation that this Board study the requirement for expansion of mandatory reporting was not pursued by this Board. Although the Board could still choose to do so, the General Assembly has addressed it through legislation last year. Expansion of the reporting requirements for all licensees was considered during HB1441 discussion by members and staff of the General Assembly but was not incorporated into the legislation. The Department has recommended a legislative proposal for 2004 that would extend immunity to all licensees making mandatory reports.

Recommendation (4) - Minimum Timeframe for Consideration of Reinstatement Requests After Revocation.

HB1441 establishes a minimum three-year period before a licensee may petition for reinstatement of a revoked license. Although discussed during the formulation of the legislation, there has been no consideration of affording boards flexibility at this time.

Recommendation (5) - Uniform Reinstatement Process Across Boards.

Although there has been discussion by boards about this recommendation, no action has been taken because each board has developed its own process tailored to its licensees which seems to work well.

Recommendation (6) - Removal of the Prohibition Against the Practice of Dentistry under a Firm Name.

The Board of Dentistry has faced court challenge concerning its interpretation of §54.1-2718 of the *Code of Virginia*. In light of this, they have developed guidance for licensees and have been working on legislation to redefine what is permissible. A prior legislative proposal to repeal §54.1-2718 failed. Their current proposal would amend the statute to more clearly reflect the Board's guidance.

Recommendation (7) - Pursuing Unlicensed Activity Through Warrant.

HB 1441 provides this authority to the Department, and recently the policies and procedures for implementation have been developed. The local Commonwealth's Attorney will be apprised of those cases involving actual harm.

Recommendation (8) - Case Resolution Time Guidelines. On May 8, 2002, DHP adopted Directive 4.6 which establishes specific time frames for the completion of action on allegations of misconduct -- generally within a year. There are exceptions for those cases resolved through informal and formal proceedings. Mr. Nebiker reported that the agency is only meeting the Case Standards approximately 50 percent of the time. He stated that Case Standards performance reports should be on the DHP website on a board-by-board basis by December. He stated that the agency will ensure that the additional staff granted will improve performance.

Recommendation (9) - Serious misconduct cases should move expeditiously. Since this report, the agency has instituted new computer tracking systems which provide accounting of performance overall, by unit, and by staff member. The most serious cases account for a minority of complaints and are handled most expeditiously.

Recommendation (10) - Review of Case Processing. HB1441 did a number of things to address case processing. The agency has revised procedures for handling unlicensed activity cases. One of the more difficult impediments to achieving Case Standards is demonstrated within the Board of Medicine and Board of Nursing -- the unreasonable caseload that board members face. They are expected, as volunteers, to devote 40-60 days per year. The Department is proposing for the 2004 General Assembly session a measure that would allow delegation of part of the informal fact finding for certain cases to subordinates (i.e., certain board members, appropriate staff of the board). For example of cases involving abuse, neglect, and misappropriation of property could be handled through professional staff of the board or attorneys on staff to draft findings of fact and conclusions of law for consideration by the board. Board member time would be reserved for more serious and contentious cases that might involve standards of care issues. If passed, this legislation should significantly address the problem. The agency budget anticipates this legislation and attendant support from the Attorney General's office is also anticipated.

Recommendation (11) - Board of Pharmacy Inspection Plan Modification: Routine Inspections Every Two Years. Since October of 1999, the pharmacy inspection plan has called for inspections every two years.

Recommendation (12) - Re-establishment of Board of Pharmacy Drug Audit Program. A drug audit in a pharmacy entails an inspector, who is a pharmacist, going into a pharmacy, selecting a limited number of high scheduled drugs (II - III), reconciling the wholesaler's shipment into the pharmacy with the drugs that were actually dispensed or wasted. This is a very

expensive, labor intensive effort -- requiring, in some cases, a week or two for a single audit. The agency only does a limited number of them in, usually in response to an allegation from an inspection.

Mr. Mayer asked whether this issue should be directed back to the General Assembly to appropriate funding for what would appear to be an unfunded mandate. Mr. Mayer asked for a report on the actual costs of implementation of a drug audit program as described in the JLARC recommendation. Mr. Nebiker indicated that funding to support all disciplinary case activities has been obtained through fee increases to the constituent boards, especially the Board of Medicine and Board of Nursing. He opined that the General Assembly would likely direct the agency to seek fee increases before they would consider any general fund support. Mr. Mayer reported that the Board of Pharmacy may need to consider the need to increase fees to address this recommendation.

Recommendation (13) - Board of Veterinary Medicine's Routine Inspections Plan - Modification to Unannounced Inspections. Shortly after the report came out, the board amended its plan to require unannounced routine inspection. This has remained a contentious issue for this board. Prior to 1999, three-day prior announcements of an impending routine inspections occurred. Inspections of facilities regulated by the other boards with inspection programs (i.e., Pharmacy and Funeral Directors and Embalmers) had unannounced inspections for many years.

Recommendation (14) - Review of Facility Inspection Programs by Board of Pharmacy, Board of Funeral Directors and Embalmers, and Board of Veterinary Medicine. All three boards have addressed this recommendation by revising their inspection plans to reflect their desired goals and objectives.

Recommendation (15) - BHP Taking a More Active Role in Oversight of Disciplinary Process. The Board has taken up several issues relating to disciplinary process. This work has evolved in an ad hoc, rather than comprehensive fashion, with the exception being its Sanction Reference Study. This extensive study has taken a comprehensive deliberative evidence-based approach to examining the factors affecting sanctioning decision-making. The Board of Medicine has been the first subject board, with additional work beginning for the Board of Pharmacy and Board of Dentistry. The Board of Nursing's work will begin next year.

Recommendation (16) - Certain Case Processing and Staffing Data to be Included Biennial Report. HB1441 mandates such reporting for October 2004. It is anticipated that this report will be incorporated into the ongoing agency website

reports beginning this Fall.

Recommendation (17) - Board of Medicine Standard for Negligence Change from Gross to Simple. HB1441 amendments made this change which applies to conduct after July 1, 2003.

Recommendations (18) & (19) - Malpractice Payment Reports Should be Handled Like Other Standard of Care Complaints at Case Intake; DHP Should Re-evaluate its Policies. The Enforcement Division investigates all medical malpractice complaints as standard of care cases since the JLARC recommendation. Prior to the JLARC report, there was a procedure that expedited and less thoroughly reviewed malpractice reports. For the Board of Medicine this was a particularly important change since approximately 100 malpractice cases each year are reported.

Mr. Mayer asked that Mr. Nebiker grade each recommendation as: "substantially complied with, " (specific item) needs to be completed," and "recommendation not accepted," to make clear what needs to be accomplished.

Mr. Mayer stated that he will assign each recommendation to the appropriate committee for review to ensure that the Board has a full response for the General Assembly, in keeping with the Board's mandate. Also, he advised that each of the health regulatory boards should take accounting of their status relative to the JLARC recommendations to ensure that they are proactively prepared for questions from the General Assembly.

COMMENTS OF EXECUTIVE DIRECTOR

Sanction Reference Study Update

Dr. Carter reported that the Board of Medicine had completed the development of their sanction scoring sheets for the various types of cases that they most often encounter and was preparing to begin the pilot phase of the study. The scoring system is grounded in a strong empirical analysis of Board of Medicine data over the past six years and takes into account factors related to the patient as well as the respondent. The Board of Medicine's Counsel is being consulted by staff to assist in resolving questions related to implementation. The plan is to begin piloting in late November or early December.

She also reported that from a purely policy research standpoint, the original intention was to have the sanction scoring sheets piloted on all sanctioning decisions. However, upon reflection by legal Counsel, the agency is being advised that the scoring sheets use at the formal hearing level may add a new basis for appeal. Because this issue relates more to a legal than research perspective, Dr. Carter asked Mr. Casway to explain the rationale for the formal hearing exclusion. Mr. Casway indicated that the

advice rendered was through attorney-client privilege, and if the Board wanted specific information, they would need to move into closed session.

CLOSED SESSION:

On properly seconded motion by Mr. Gieck, the Board voted unanimously to recess open session and immediately reconvene in closed session pursuant to §2.2-3711.A.7 of the *Code of Virginia* for the purpose of consultation with and provision of legal advice by the Assistant Attorney General regarding the use of sanction reference sheets. It was also moved that Howard Casway, Robert Nebiker, Gail Jaspen, Elizabeth Carter, and Carol Stamey remain in closed session as their presence was deemed necessary and would aid the Board in its discussion.

OPEN SESSION:

On properly seconded motion by Mr. Gieck, the Board recessed closed session and reconvened in open session and unanimously voted to certify that, to the best of each member's knowledge, (1) only public business matters lawfully exempted from open meeting requirements by Virginia law were discussed in the previous closed meeting and (2) only such public business matters as were identified in the motion convening the closed meeting were heard, discussed or considered by the Board of Health Professions, as required by §2.1-344.1 of the *Code of Virginia*.

Board Workplan

Dr. Carter reported that the Board had requested a draft workplan for the upcoming year with staff-suggested topics and issues (see the Appendix). She reported that the workplan had been reviewed by the Executive Committee and they had asked that the names of the Committee members be included on the final workplan.

Dr. Carter described the workplan as being designed around the Board's current committee structure, with items assigned to the Chair and the Executive, Regulatory Research, Education, and Enforcement Committees. She provided an overview of each Committee's role in addressing the issues. She advised, however, that the Board could alter the committee structure and workplan as it deemed appropriate. With the exception of including Committee members' names, no amendments were made to the workplan.

To adequately accomplish the goals set forth, Dr. Carter indicated that the committees needed additional members. Mr. Mayer requested members to inform Dr. Carter to which committees they would like to be appointed. He said that he will make appointments after everyone responded. He stated that each member should serve on at least one committee, preferably more and that all members should expect to be actively involved. The Committees should be prepared to make informed reports

and recommendations to the full Board.

Dr. Carter said that because meaningful communication is essential to achieving the mission of the Board, its minutes have been routinely disseminated to the health regulatory boards and other interested parties. She stated that the Regulatory Townhall has made it relatively easy to download minutes and asked if members wished to receive the other boards' minutes on a routine basis. The Board members agreed that this would enable them to review issues in a more in depth, focused, and timely manner than is currently possible through quarterly Board reports. Dr. Carter stated that she invites members inform her of items of interest which may then be addressed through Board presentation and discussion.

COMMITTEE REPORTS

Regulatory Research

Mr. Gieck reported that the Committee had reviewed the credentialing requirements of the national certifying organizations for dialysis patient care technicians and the requirements of the other states which currently regulate dialysis technicians in some manner. Ms. Yeatts provided that the Committee is presenting for the Board's review and approval the proposed regulations, §18 VAC 75-40-10 *et seq*, with the following amendments:

- Subsection 4 is being deleted because the Certification in Biomedical Nephrology Technology (CBNT) of the National Nephrology Certification Organization (NNCO) covers dialysis equipment rather than patient care.

and

- The following underlined amendment is offered for Subsection 5 in recognition of the diverse nature of the state regulation of patient care dialysis technicians, where it exists, across the country:

Certification or licensure as a dialysis technician or similar title by another jurisdiction in the United States provided that the criteria for credentialing is substantially equivalent."

Upon properly seconded motion by Mr. Gieck, the Board voted unanimously to accept the proposed regulations, 18 VAC 75-40-10, with the amendments presented by the Committee.

Mr. Gieck reported that the Committee examined the request for the sunrise study of assisted living facility directors in light of the traditional approach to such studies found in the Board's *Policies and Procedures for the Evaluation of the Need to Regulate Health Occupations and Professions (1998)*. They concluded that, until the assisted living directors can be consulted to provide

input, they will defer action until the next meeting in January.

Executive Committee

Mr. Mayer reported that the major item of business for the Committee was the Department's proposed budget for 2004-2006. Mr. Mayer asked Mr. Nebiker to provide a general overview and to describe the major issues the proposed budget addresses.

Mr. Nebiker described the expenditures for the preceding two biennia and the anticipated expenditures for 2004-2006, contrasted against cost center manager requests and the Director-approved expenditures.

Mr. Nebiker indicated that a large factor driving the proposed budget is additional positions and expenditures required to meet the demands of the increased disciplinary caseload resulting from HB1441. For the Board of Medicine, alone, it is anticipated that mandatory reporting will increase their caseload by approximately 300 cases per year.

Another factor is the need for increase in the Board of Nursing budget to compensate for the loss of licensure fees resulting from the Interstate Nurse Compact. Through this compact, nurses in Virginia, Maryland, and North Carolina will hold a single license based upon their state of residence -- not based upon where they practice.

Finally, the Nurse Aide Registry's federal funding has been capped which will create a \$400,000 shortfall. This gap must be met to address the substantial caseload for this group which consists largely of abuse, neglect, and misappropriation of property cases.

Upon properly seconded motion by Dr. Ridenhour, the Board voted unanimously to approve the Department's proposed budget.

COMMITTEE ASSIGNMENTS:

Mr. Mayer emphasized the importance of committee participation in accomplishing the Board's duties. He reiterated that members should serve on at least one committee and should contact Dr. Carter with their preferences.

CALENDAR FOR 2004:

Dr. Carter requested the Board to establish its calendar for full Board meetings for 2004. She advised that the staff would endeavor to schedule all committee meetings on the same date as the full board meeting whenever possible. She stated, however, that the Committees' workloads may dictate additional dates. The following dates were set:

- January 12, 2004
- April 15, 2004
- July 15, 2004
- October 21, 2004

NEW BUSINESS:

No new business was introduced.

ADJOURNMENT:

On properly seconded motion by Dr. Seigel, the meeting adjourned at 2:40 p.m.

Alan E. Mayer, Chair

Elizabeth A. Carter, Ph.D., Executive Director for the Board

ATTACHMENT

DRAFT

VIRGINIA BOARD OF HEALTH PROFESSIONS WORKPLAN FALL 2003-2004

October 22, 2003

I. CHAIR—Mr. Mayer (Staff: Dr. Carter, Mr. Nebiker)

- A. Set agenda - (30 days in advance of meeting)
- B. Rebuild committees Due to large turnover in Board membership, the various committees have been depleted. The Executive Committee has full membership, but the others require additional seats.
(October 22, 2003)

II. EXECUTIVE COMMITTEE—Mr. Mayer (Staff: Dr. Carter, Ms. Jaspen, Ms. Yeatts, Mr. Monson, Mr. Nebiker)

Mission: To review matters of interest to the Board and make recommendations to the Board. To evaluate the need for coordination among the boards and their staffs and report findings and recommendations to the Director and the boards. To monitor policies and activities of the Department, to serve as a forum for resolving conflicts among the boards and Between the boards and the Department. To review and comment on the budget for the Department.

A. Orient new appointees – Orient new members within 30 days of appointment, individually and at Board Member Training conducted annually. - (September 4, 2003; October 30, 2003).

B. Review and comment on budgetary proposal for the agency (October 22, 2003)

C. Develop a committed membership by working with current and future board members for a clearer understanding of the role of BHP (ongoing).

Provide minutes for members of health regulatory boards after each meeting for their use in respective health regulatory board's meetings and discussions of the citizen members as they deem appropriate (Draft distributed within ten (10) days after board meeting and final minutes within three (3) days of approval).

III. REGULATORY RESEARCH COMMITTEE—Mr. Gieck (Staff: Dr. Carter, Ms. Yeatts, Research Contractor)

To evaluate regulated and unregulated health care professions to consider whether the professions should be regulated and the degree of regulation to be imposed. To examine scope of practice conflicts involving regulated and unregulated professions and advise the boards and the General Assembly regarding the nature and extent of these conflicts.

DRAFT

A. Recommend regulations on the credentialing of dialysis care technicians (October 22, 2003)

B. Review the *Policies and Procedures* as they relate to the review of the need to conduct a study on the need to regulate directors of assisted living facilities (October 22, 2003)

C. Contingent upon the determination of the need for the review, study and report on the need to regulate directors of assisted living facilities

D. Review the criteria on risk of harm in consideration of the regulation of an unregulated profession or practice. (Ongoing)

Monitor the introduction of all legislation substantially affecting regulation of health providers and provide comment to the Secretary, Governor, and relevant General Assembly Members through the Director. (*January/February 2004*)

IV. EDUCATION COMMITTEE – Mr. Green (Staff: Dr. Carter, Ms. Yeatts, Ms. Stamey)

To provide a means of citizen access to the Department. To provide a means of publicizing the policies and programs of the Department to educate the public and elicit public support. To promote the development of standards to evaluate the competency of professions represented on the Board.

Hold an issues exchange for policy makers and other invited guests. (Dr. Carter, Ms. Yeatts)

- Determine topic for holding an issues forum in the Spring/Summer of 2004.
- Evaluate results and establish a plan for further events
- Organize additional events accordingly

V. ENFORCEMENT COMMITTEE – Dr. Hinn (Staff: Ms. Lemon, Dr. Carter, Ms. Jaspén, Mr. Nebiker)

To review periodically the investigatory, disciplinary, and enforcement processes of the Department and the boards to ensure the protection of the public and the fair and equitable treatment of health professions.

A. Continue work on Sanction Reference Study (*ongoing*)

- Complete pilot testing for Board of Medicine
- Continue analysis and begin piloting for Board of Pharmacy

- Continue analysis and begin piloting for Board of Dentistry
- Begin analysis for Board of Nursing

DRAFT

B. Develop workplan for review of DHP enforcement processes for 2003-04 (*January 2004 meeting*)

- Continue to remain abreast of agency performance in meeting investigative and case resolution standards through periodic reports at Board meetings.
- Review report from staff on a study of a review of the current case priority system to determine if 6 Priorities constitute an optimal management tool.
- Determine if case adjudication process may be streamlined through legislative amendment to allow boards to move forward to formal hearings on Priority 1 and 2 cases rather than wait for an informal.