



BOARD MEETING MINUTES
May 29-30, 2014
Red Lion Hotel
150 Hegenberger Road, Oakland, CA 94621

Members Present

Fran Burton, MSW, Public Member, President
Bruce Whitchee, DDS, Vice President
Judith Forsythe, RDA, Secretary
Yvette Chappell-Ingram, Public Member
Katie Dawson, RDH (Friday only)
Luis Dominicis, DDS
Kathleen King, Public Member
Ross Lai, DDS
Huong Le, DDS, MA
Meredith McKenzie, Public Member
Steven Morrow, DDS, MS
Thomas Stewart, DDS
Debra Woo, DDS

Members Absent

Steven Afriat, Public Member
Stephen Casagrande, DDS

Staff Present

Karen Fischer, Executive Officer
Sarah Wallace, Assistant Executive Officer
Kim Trefry, Enforcement Chief
Linda Byers, Executive Assistant
Spencer Walker, DCA Senior Legal Counsel

Thursday, May 29, 2014

1. Call to Order/Roll Call/Establishment of Quorum

Fran Burton, President called the meeting to order at 9:04 a.m. Judith Forsythe, Secretary, called the roll and a quorum was established.

CLOSED SESSION – FULL BOARD

CLOSED SESSION – LICENSING, CERTIFICATION, AND PERMITS COMMITTEE

RETURN TO OPEN SESSION – FULL BOARD

Fran Burton, President, called the full Board back to order at 10:22 a.m.

2. Report from the Licensing, Certification and Permits Committee Regarding Closed Session

Dr. Bruce Whitcher, Chair of the Licensing, Certification and permits Committee, reported that the committee reviewed one application for a license to replace a cancelled license from applicant KLR. The Committee recommended that license be granted with the stipulation that the applicant must first complete the Registered Dental Assistant (RDA) written examination and a Law and Ethics course approved by the Board. Motioned/Seconded/ Carried (M/S/C) (Burton/Morrow) to accept the report and the committee's recommendations. The motion passed unanimously.

3. **Approval of the February 27-28, 2014 Board Meeting Minutes and the March 12, 2014 and April 9, 2014 Teleconference Minutes**

Dr. Alan Felsenfeld asked that the minutes of the February 2014 meeting be corrected to reflect his affiliation with the California Dental Association. M/S/C (Morrow/Dominicis) to accept the minutes as revised. The motion passed unanimously. M/S/C (Forsythe/Woo) to accept the March 2014 Teleconference minutes. The motion passed unanimously. M/S/C (Le/Burton) to accept the April 2014 Teleconference minutes. The motion passed with two abstentions.

4. **President's Report**

Fran Burton, President of the Dental Board, introduced the newest Board Member Dr. Debra Woo and our new Deputy Attorney General, Nicholas Tsukamaki. She reiterated the Board mission statement and gave a report on her activities for the Board since the last meeting in February. Ms. Burton congratulated Dr. Huong Le on her Western Clinician of the Year Award.

5. **COMMITTEE/COUNCIL MEETINGS**

6. **Presentation by a Representative from the California Dental Association (CDA) Regarding Recent Access to Care Event**

Gayle Mathe, representing the California Dental Association (CDA), provided a presentation on the CDA Cares event that occurred at the Solano County Fairgrounds in Vallejo in April. She underscored CDA's involvement in providing access to care for underserved populations.

7. **Discussion and Possible Action Regarding:**

A. **Comments Received During the 45-Day Public Comment Period for the Board's Proposed Rulemaking to Amend Section 1018 of Title 16 of the California Code of Regulations Relating to Revocation for Sexual Misconduct;**

Sarah Wallace, Assistant Executive Officer, explained that Board staff filed the initial rulemaking documents with the Office of Administrative Law (OAL) on March 18th and the proposal was published in the California Regulatory Notice Register on Friday, March 28, 2014. The 45-day public comment period began on Friday, Friday, March 28, 2014 and ended on Monday, May 12, 2014. The Board held a regulatory hearing in Sacramento on Tuesday, May 13, 2014. The Board received written comments from the California Dental Association (CDA). Ms. Wallace summarized the comments received from the CDA and recommended rejection of the CDA's comments for the following reasons:

Staff does not share the view that Business and Professions Code sections 726 and 1680 are conflicting statutes; rather staff believes that both provisions operate concurrently in the interest of consumer protection. Section 726 provides that the commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and is grounds for disciplinary action for any healing arts professional licensed under Division 2 of the Business and Professions Code. Section 1680(e) defines the committing of any act or acts of sexual abuse, misconduct, or relations with a patient that are substantially related to the practice of dentistry as unprofessional conduct by a person licensed by the Board. Both sections 726 and 1680 are applicable to licensees of the Board; one provision does not prevail over the other unless there is express authority, such as utilizing the term “notwithstanding”, as is customary within the statutes contained in the Dental Practice Act.

Additionally, since Section 726 does not expressly exempt its provisions from applying to dentists, like it does for physicians and surgeons licensed by the Medical Board of California, one could subjectively argue that sexual contact with any patient, regardless of the relationship status, could be conceived to be substantially related to the practice of dentistry.

It should be noted that the provisions of Section 726 that provides the exemption for sexual relations between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship, has been in effect for the last twenty (20) years. Neither dentists, nor any other healing arts professional licensed under Division 2 of the Business and Professions Code have ever shared a like exemption.

Section 1680 is not cited as an “authority”, rather it has been cited as a “reference” for the following reasons:

- Pursuant to the California Code of Regulations, Title 1, Section 14, an “authority” source is considered a California constitutional or statutory provision which expressly permits or obligates the rulemaking agency to adopt, amend, or repeal the regulation, or a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted. Pursuant to Business and Professions Code Section 1614, the Board is granted rulemaking authority and is authorized to adopt, amend, or repeal such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Dental Practice Act. Therefore, section 1614 is cited as the “authority”.
- California Code of Regulations, Title 1, Section 14 also provides that a “reference” source is presumed to exist if an agency is empowered to implement, interpret or make specific a California constitutional provision, a California statute, federal statute or regulation, or a court decision or

order. Consequently, this proposed rulemaking lists sections 1680 and 726 as “reference” sources to implement how an Administrative Law Judge (ALJ) handles cases when issuing proposed decisions for the Board that contain findings of fact that the licensee engaged in any act of sexual contact with a patient, client, or customer, or the licensee has been convicted of or committed a sex offense.

No further legal analysis of the issue would be warranted as the rulemaking’s *Notice of Proposed Action* and *Initial Statement of Reasons* clearly explains the purpose of this rulemaking and provides a comprehensive analysis of the factual basis and rationale for the Board’s adoption of this proposed rule.

Recommendations for possible remedial action are unnecessary as this proposal merely provides direction from the Board to the ALJs that specifies that proposed decisions that contain findings of fact that the licensee engaged in any act of sexual contact with a patient, client, or customer, or the licensee has been convicted of or committed a sex offense are required to contain an order of revocation which may not be stayed. As provided in the *Initial Statement of Reasons*, ALJs are not granted any discretion to decide a matter. They can only propose a decision predicated upon findings made during a hearing in which he or she presided. This allows a Board to retain the sole discretion to decide a matter. As provided in Government Code section 11517(c)(2)(B), the Board has the authority and discretion to “reduce or otherwise mitigate the proposed penalty and adopt the balance of a proposed decision”.

Lastly, the staff recommends rejection of the CDA’s proposed amendment to the rulemaking language. The Board does not have the express statutory authority to provide an exemption from the provisions of Business and Professions Code Section 726 to permit sexual relationships between a dentist and a patient who is a spouse or significant other. Doing so would exceed the Board’s rulemaking authority.

M/S/C (Whitcher/Chappell-Ingram) to accept the staff recommendation to reject the California Dental Association’s comments and to adopt the final text as noticed and direct staff to take all steps necessary to complete the rulemaking process, including filing the final rulemaking package with the Office of Administrative Law and authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to Section 1018 of Title 16 of the California Code of Regulations Relating to Revocation for Sexual Misconduct. The motion passed unanimously.

B. Adoption of Proposed Amendment to Section 1018 of Title 16 of the California Code of Regulations Relating to Revocation for Sexual Misconduct

Adopted inclusively in Agenda Item 7A.

15. **Report on the April 16, 2014 Meeting of the Elective Facial Cosmetic Surgery Permit Credentialing Committee; Discussion and Possible Action to Accept Committee Recommendations for Issuance of Permits**

Dr. Bruce Witcher, liaison to the Elective Facial Cosmetic Surgery Permit Credentialing Committee (EFCS), gave an overview of the information provided. M/S/C (Dominicis/McKenzie) to accept the Committees recommendation to issue Dr. Daniel S. Witcher an EFCS Permit for unlimited Category I & II procedures. The motion passed unanimously.

16. **Discussion and Possible Action Regarding an Appointment to the Dental Assisting Council**

Judith Forsythe, RDA, gave an overview of the information provided and brought forward the subcommittee's recommendation to appoint Tamara McNealy, RDA, to the remaining three year term on the Dental Assisting Council. M/S/C (Forsythe/King) to accept the subcommittee recommendation to appoint Tamara McNealy to the Dental Assisting Council for the remaining three year term. The motion passed unanimously.

17. **Discussion and Possible Action to:**

A. **Reconsider Promulgation of a Regulation to Delegate Authority to the Executive Officer Regarding Stipulated Settlements to Revoke or Surrender a License;**

Sarah Wallace, Assistant Executive Officer, gave an overview and clarification of the information provided.

B. **Initiation of a Rulemaking to Amend California Code of Regulations, Title 16, Section 1001 Relating to Delegation of Authority to the Executive Officer Regarding Stipulated Settlements to Revoke or Surrender a License**

M/S/C (King/McKenzie) to approve the proposed regulatory language relevant to revocation for sexual misconduct and direct staff to take all steps necessary to initiate the formal rulemaking process, including noticing the proposed language for 45-day public comment, setting the proposed language for a public hearing, and authorize the Executive Officer to make any non-substantive changes to the rulemaking package. If after the close of the 45-day public comment period and public regulatory hearing, no adverse comments are received, authorize the Executive Officer to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopt the proposed amendments to California Code of Regulations, Title 16, Section 1001 as noticed in the proposed text. The motion passed unanimously.

21. **Licensing, Certification, and Permits**

A. **Review of Dental Licensure and Permit Statistics**

Dr. Whitcher, Chair of the Licensing, Certification and Permits Committee, gave an overview of the statistics provided. Fran Burton asked what type of follow-up is done on delinquent licenses. Ms. Wallace stated that a delinquent letter is sent to all licensees 31 days after their license expires.

B. **Review of General Anesthesia/Conscious Sedation Evaluation Statistics**

Dr. Whitcher gave an overview of the history of the General Anesthesia/Conscious Sedation Program and reviewed the statistics provided.

8. **Public Comment of Items Not on the Agenda**

There was no public comment.

9. **Recess**

The Board recessed at 3:02 p.m.

Friday, May 30, 2014

10. **Call to Order/Roll Call/Establishment of Quorum**
Fran Burton, President, called the meeting to order at 9:03 a.m. Judith Forsythe, Secretary, called the roll and a quorum was established.
11. **Executive Officer's Report**
Karen Fischer, Executive Officer, provided a report on her activities on behalf of the Dental Board.
12. **Budget Report**
Ms. Fischer gave an overview of the information provided.
13. **Update from the Department of Consumer Affairs' Executive Office**
There was no representative available.
14. **Update from the Dental Hygiene Committee of California (DHCC)**
Michelle Hurlbutt, Chair, and Lori Hubble, Executive Officer of the DHCC, provided a report on the activities of the Committee.
18. **Discussion and Possible Action Regarding the Bay Area Prescription Drug Abuse Summit**
Kim Trefry, Enforcement Chief, gave an overview of the information provided. She stated that the Dental Board has been asked to be part of the work group. Ms. Burton asked that any Board members interested in serving on a Prescription Drug Abuse Committee send her or Ms. Fischer an email.
19. **Discussion and Possible Action on Staff Update on the Dental Hygiene Committee of California's (DHCC) Regulatory Proposal to Adopt California Code of Regulations, Title 16, §§ 1103, 1105, 1105.1, 1105.2, 1105.3, 1105.4, and 1106 Relative to Educational Program Requirements**
Sarah Wallace, Assistant Executive Officer, gave an overview of the information provided. Dr. Witcher commented that on page two, the sixth line should read patient's dental hygiene needs. Add the word hygiene after the word dental. Gayle Mathe, California Dental Association (CDA), commented that CDA submitted comments suggesting certification to prove competency to operate radiographic equipment. Lori Hubble, Executive Officer of the Dental Hygiene Committee commented that they meant to add the word hygiene after the word dental on page two as Dr. Witcher mentioned so they will repost for another 15-day comment period with that change. Dr. Morrow commented about section 1106 and asked where the certified students would be allowed to take radiographs. The section does not specify where. Ms. Wallace commented that her interpretation was that with the certification they could operate radiographic equipment just as a Dental Assistant or Registered Dental Assistant working within the scope of practice requirements of the Dental Practice Act. There was no further comment.

20. Enforcement

A. Enforcement Program Status

Kim Trefry, Enforcement Chief, gave an overview of the information provided. Ms. King asked if electric vehicles were utilized. Ms. Trefry stated that they are used whenever possible but they can only travel limited distances and the trunks are too small to carry evidence that is sometimes obtained.

B. Enforcement Program Statistics and Trends

Ms. Trefry gave an overview of the statistics provided.

C. Review of Third Quarter Performance Measures from the Department of Consumer Affairs

Ms. Trefry gave an overview of the information provided.

D. Diversion Program Report and Statistics

Ms. Trefry gave an overview of the information provided. She commented that there may be two possible candidates to fill the vacancies on the Northern Diversion Evaluation Committee. Gayle Mathe, California Dental Association, asked if there were any trends over the past five years. Ms. Trefry stated that the number have remained relatively the same.

21. Dental Assisting Council Report

Teresa Lua, Chair of the Dental Assisting Council gave a summary of what the Council discussed.

22. Legislative and Regulatory Committee Report

Fran Burton, Chair of the Legislative and Regulatory Committee reported that the Committee recommends the Board take the following positions on these bills:

AB 1174 (Bocanegra) Dental Professionals: Teledentistry Under Medi-Cal

Support if amended with the additional suggestion of recommending that the formulation of the additional duties for RDAEF be in a format in which it is issued as a permit rather than additional licensure and if the board agrees, request that staff submit a letter to the author's office outlining these suggestions.

AB 1702 (Maienschein) Professions and Vocations: Incarceration

Neutral position.

AB 1758 (Patterson) Healing Arts: Initial License Fees: Proration

Watch position.

AB 2058 (Wilk) Open Meetings

Oppose this bill and direct staff to send a letter to the author addressing our concerns including the reasons why these practices would be problematic.

AB 2396 (Bonta) Convictions: Expungement: Licenses

Watch.

AB 2720 (Ting) State Agencies: Meetings: Record of Action Taken

No action.

SB 1091 (Galgiani) Administrative Procedures: Notice Register

(Assuming the bill moves) send a letter of opposition to the author acknowledging the intent but discussing the negative impact on the Dental Board as a healing arts board.

SB 1159 (Lara) License Applicants: Federal Tax Identification

Watch.

SB 1245 (Lieu) Dental Hygiene Committee of California

Support.

SB 1258 (DeSaulnier) Controlled Substances: Prescriptions: Reporting

No action

SB 1416 (Block) Dentistry: Fees

Support.

M/S/C (King/Chappell-Ingram) to accept the Committees recommendations. The motion passed unanimously.

23. Examination Committee Report

Dr. Morrow, Vice-Chair of the Examination Committee reported that there were two minor modifications to the minutes from the February 2014 Examination Committee meeting. He stated that the Committee recommends that the Board accept the subcommittee report on the Western Regional Examination Board (WREB) Occupational Analysis Performed by the Department of Consumer Affairs' (DCA) Office of Professional Examination Services (OPES) and approve WREB to continue providing the clinical examinations for the Dental Board. M/S/C (Forsythe/Le) to accept the report and approve WREB. The motion passed unanimously.

24. Public Comment of Items Not on the Agenda

There was no public comment.

25. Future Agenda Items

There were no future agenda items.

26. Board Member Comments for Items Not on the Agenda

Dr. Stewart requested the Board consider ideas on how to communicate with licensees. He suggested developing a communication plan.

27. Adjournment

The meeting adjourned at 11:29 a.m.