

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747
Fax No.: (775) 684-6600



LEGISLATIVE COMMISSION (775) 684-6800
RANDOLPH J. TOWNSEND, *Senator, Chairman*
Lorne J. Malkiewich, *Director, Secretary*

INTERIM FINANCE COMMITTEE (775) 684-6821
MORSE ARBERRY JR., *Assemblyman, Chairman*
Mark W. Stevens, *Fiscal Analyst*
Gary L. Ghiggeri, *Fiscal Analyst*

LORNE J. MALKIEWICH, *Director*
(775) 684-6800

BRENDA J. ERDOES, *Legislative Counsel* (775) 684-6830
PAUL V. TOWNSEND, *Legislative Auditor* (775) 684-6815
DONALD O. WILLIAMS, *Research Director* (775) 684-6825

June 17, 2008

Assemblywoman Sheila Leslie,
Chair of the Legislative Committee on Health Care
Legislative Building

Dear Assemblywoman Leslie:

The Legislative Committee on Health Care (Committee) has requested an overview of the laws relating to certain medical professional licensing boards, including the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine. Some of the concerns of the Committee stem from previous hearings held by the Committee concerning the investigation of Hepatitis C exposure in Clark County and the response of certain medical professional licensing boards to that situation.

Authority of Boards to Temporarily Suspend a Professional License

The Committee has asked for an overview of the legal authority of professional licensing boards to investigate and discipline persons who hold a license to practice a profession. Specifically, the Committee has asked: (1) whether a board has the authority to temporarily suspend a license; (2) under what circumstances a license may be temporarily suspended; (3) whether information must be kept confidential during an investigation; and (4) how boards should interact with other agencies. The provisions of chapter 233B of NRS, known as the Nevada Administrative Procedure Act, prescribe the general procedures that agencies of this State must follow when adopting regulations and adjudicating certain matters.

The professional licensing boards, established in Title 54 of NRS, are subject to the provisions of chapter 233B, including the provisions of NRS 233B.127 which provide that:

If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending

EXHIBIT F Health Care

Document consists of 10 pages.

X Entire document provided.

Due to size limitations, pages ____ provided. A copy of the complete document is available through the Research Library (775/684-6827) or e-mail library@lcb.state.nv.us. Meeting Date 6/17/08

proceedings for revocation or other action. Such proceedings must be promptly instituted and determined.

(Emphasis added). This provision clearly states that, as long as a licensing board finds that the “public health, safety or welfare” require emergency action and incorporates such a finding into an order, the board may summarily suspend a license and promptly institute disciplinary proceedings.

Additionally, various licensing entities have independent statutory authority to enact summary suspensions. For example, the State Contractors' Board has independent statutory authority in NRS 624.291(4), which reads in part:

The Board may suspend the license of a contractor without a hearing if the Board finds, based upon evidence in its possession, that the public health, safety or welfare imperatively requires summary suspension of the license of the contractor and incorporates that finding in its order.

Other entities that have similar, independent statutory authority include the State Board of Professional Engineers and Land Surveyors and the Commissioner of Mortgage Lending. *See* NRS 625.430(2) and 645B.720.

Furthermore, some licensing entities have statutory authority for summary suspensions based on specific reasons that appear to fall under the general umbrella of “public health, safety or welfare.” NRS 233B.127(3). Examples include the authority of the Nevada State Board of Veterinary Medical Examiners to summarily suspend a license for animal welfare reasons and the authority of the State Board of Cosmetology to immediately suspend a license for sanitation reasons. *See* NRS 638.1423(1) and 644.440(3).

The provisions of chapters 630, 632 and 633 of NRS, which relate to the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine, respectively, do not have specific authority for summary suspensions, and thus, the boards must rely on the provisions of NRS 233B.127 for such authority. At the April 21, 2008, hearing of the Committee, representatives of the Board of Medical Examiners and the State Board of Nursing testified regarding the authority of each board to summarily suspend a license pursuant to NRS 233B.127. The representatives of the Board of Medical Examiners were somewhat vague and claimed that this provision was meant to apply to state agencies generally and that the provisions of chapter 630 of NRS, which apply to the Board of Medical Examiners exclusively, do not specifically authorize a summary suspension without due process. The representative from the State Board of Nursing testified that the Board does rely on the provisions of NRS 233B.127 to summarily suspend licenses. As previously stated, the statutory language in question makes clear that the provisions of NRS 233B.127 apply equally to these boards and

authorize summary suspensions when the “public health, safety or welfare imperatively require emergency action.”

To determine whether a specific situation rises to a level such “that public health, safety or welfare” requires a license to be summarily suspended would depend on the facts of the given situation. Pursuant to state and federal law, “a professional license is property and is protected by the Constitution.” Mischler v. Nevada State Bd. of Medical Examiners, 896 F.2d 408, 409 (1990). *See also*, State v. Bd. of Medical Examiners, 68 Nev. 455, 464 (1951); Burleigh v. State Bar of Nev., 98 Nev. 140, 145 (1982); Potter v. State Bd. of Medical Examiners, 101 Nev. 369, 371 (1985). The United States Supreme Court has held that a state cannot exclude a person from the practice of his occupation without due process. Schwartz v. Bd. of Bar Examiners of New Mexico, 353 U.S. 232, 238-39 (1957). However, the Supreme Court of the United State has provided that the “due process is flexible and calls for such procedural protections as the particular situation demands.” Burleigh, 98 Nev. at 145 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). When determining what procedure is appropriate, a court must consider:

First, the private interest that will be affected by the official action;
second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In Burleigh, the Supreme Court of Nevada found that a grand jury indictment was sufficient evidence to temporarily suspend an attorney from the practice of law; however, the Court did not believe “that a criminal conviction is a necessary prerequisite to” a temporary suspension. Id. at 146. If sufficient evidence of a threat to the public health, safety or welfare can be identified and relied upon, then such evidence may be sufficient to ensure that a person is not erroneously deprived of his right to practice his profession. *See, Id.*, at 145-46.

Applying this reasoning to the medical professionals practicing at the Endoscopy Center of Southern Nevada (Endoscopy Center), the risk of erroneously depriving a person of his professional license is minimized by the reports, notices of deficiencies and other documentation produced by the Southern Nevada Health District, the United States Centers for Disease Control and Prevention, and the Nevada Department of Health and Human Services Bureau of Licensure and Certification. These agencies spent considerable time and effort investigating a cluster of Hepatitis C infections in the Las Vegas area. At the conclusion of the investigation, it was determined that there was

sufficient evidence to sanction the Endoscopy Center and notify 40,000 patients of the potential exposure to Hepatitis B, Hepatitis C and HIV as a result of unsafe medical practices used at the Endoscopy Center. The findings of the investigation, copies of the reports, notifications and other documents were made available to the public and may be used to ensure that a licensed medical professional is not erroneously deprived of his license.

The court in Burleigh appears to balance the interests of the licensee and the interests of the government and stresses “the importance of protecting the public through bar discipline and the resulting detrimental effect on public confidence in the legal profession if the court failed summarily to suspend the attorneys.” Id. at 146. Temporary suspensions without a hearing are necessary because they allow swift action to ensure that the public’s trust in the given profession is not eroded. Id. (“We believe that appellant’s continued practice . . . would erode public confidence in the legal profession and that the facts presented sufficient ‘exigent circumstances’ to warrant summary suspension.”). The same concerns may be present with regard to the medical professionals who owned and were employed by the Endoscopy Center. The temporary suspension of the licenses of these medical professionals would ensure that the public is protected and, as mentioned in Burleigh, that the continued practice of medicine or nursing by such persons does not erode the public confidence in the medical community.

The Supreme Court of Nevada also looks for some “extraordinary and exigent circumstances” to warrant summary suspension. Sweikert v. Briare, 94 Nev. 752, 755 (1978). In Sweikert, a building inspector was fired without a pre-termination hearing and the Court, when applying the considerations prescribed in Mathews, found that “[t]he danger to the public from structural collapse and fire hazards are sufficient extraordinary and exigent circumstances” to warrant termination without a hearing. Id. at 755. Similarly, the potential public harm from medical professionals using unsafe medical practices may be considered a sufficient extraordinary and exigent circumstance to warrant a summary suspension of medical personnel involved in those unsafe medical practices.

The clear language of NRS 233B.127 and the case law applicable to summary suspensions provide a professional licensing board with sufficient criteria to determine whether summary suspension of a license is appropriate. Further, the courts have outlined clear considerations to ensure that a board can suspend a license under emergency circumstances without violating the property interests or due process rights of the person who holds the license.

The State Board of Osteopathic Medicine adopted regulations for carrying out the summary suspension provisions of NRS 233B.127. *See* NAC 633.450. This regulation prescribes the circumstances in which the Board may order the summary suspension of a license, details the content of such an order and prescribes the effective dates of the order.

Similar provisions in regulations adopted by other professional licensing boards were not readily identifiable.

In addition to the authority provided pursuant to NRS 233B.127, the Legislature has provided to the Board of Medical Examiners and the State Board of Osteopathic Medicine the authority to suspend a license pending a physical or mental examination to determine that the physician is competent to practice medicine. These provisions authorize the appropriate board to conduct an examination of a physician when the conduct of the physician raises questions as to his competence to practice medicine with reasonable skill and safety to patients. NRS 630.318, 630.326, 630.329, 633.561, 633.571, 633.581 and 633.591. One argument that may be put forward by a physician who does not want to submit to an examination is that an examination is not appropriate if the physician ceases the unsafe medical practice. However, a display of seeming incompetence with regard to a basic standard of medical care raises concerns with regard to the ability of a physician to continue practicing medicine without breaching other standards of medical care. A physical or mental examination provides the licensing board the opportunity to assess whether the physician is sufficiently capable of safely practicing medicine and has adequate knowledge of standards of medical care. Requiring a physician to undergo an examination pursuant to these provisions would not preclude the board from pursuing other disciplinary actions.

As an alternative action, boards may file for a preliminary injunction or a temporary restraining order to prohibit a person from practicing a profession. While a board cannot accomplish this without taking legal action in a court of law, the action is similar to a summary suspension in that the requirements to receive the injunction or order are less than that required for permanent disciplinary action. *See* Rule 65 of the Nevada Rules of Civil Procedure. This authority is specifically granted to the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine. *See* NRS 630.388, 632.480 and 633.601. While these provisions differ slightly in the specific language, they generally authorize the Board, or the President, Secretary or Attorney General on its behalf, to apply to a court to suspend the license of a person who holds a license issued by the board. The Board of Medical Examiners used this provision in obtaining injunctive relief against two of the physicians who performed medical procedures which resulted in the transmission of Hepatitis C at the Endoscopy Center. The use of injunctive relief would also allow the Board of Medical Examiners or the State Board of Osteopathic Medicine to request that a court place restrictions on a license, instead of suspending it, pending the full investigation and final action of the board. Some non-medical professional licensing boards which also have this authority include the Commissioner of Mortgage Lending and the Commissioner of Financial Institutions. *See* NRS 645A.110(3) and 649.400(2).

Confidentiality of Records

The availability and confidentiality of records and documents obtained by a professional licensing board in the course of an investigation is also of some concern to this Committee. NRS 239.010 sets forth general provisions for public records of state agencies and prescribes that, unless information has been otherwise declared by law to be confidential, a record must be open for public inspection. In Donrey of Nevada v. Bradshaw, the Nevada Supreme Court interpreted NRS 239.010 and held that if information is not expressly deemed to be confidential, that information is subject to disclosure if policy considerations warrant disclosure based on a “balance of interests” test. 106 Nev. 630 (1990). The factors to be considered in the test are whether there is any: (1) “pending or anticipated criminal proceeding;” (2) “confidential sources or investigative techniques to protect;” (3) “possibility of denying someone a fair trial;” or (4) “potential jeopardy to law enforcement personnel.” Id. at 636. Consistent with Donrey, NRS 233B.050(1)(c) states that:

In addition to other regulation-making requirements imposed by law, each agency shall . . . [m]ake available for public inspection all final orders, decisions and opinions except those expressly made confidential or privileged by statute.

Additionally, the licensing boards are subject to the provisions of chapter 241 of NRS, which is frequently referred to as the Open Meeting Law. The Open Meeting Law prescribes the rules for conducting meetings of public agencies and generally requires all meetings of state agencies to be open and public. However, NRS 622.320 specifically provides that this requirement does not apply to proceedings of professional licensing boards “relating to an investigation conducted to determine whether to proceed with disciplinary action.” Such records are to remain confidential until the board decides to proceed with formal disciplinary action, at which time the documents become public records. Under no circumstances may medical records of a patient that are confidential or otherwise protected from disclosure by federal or state law be disclosed to the public during a proceeding or as part of a public record. NRS 622.310.

The Legislature also established statutes which are applicable to the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine which require certain complaints filed with those boards and “all documents and other information filed with the complaint and all documents and other information compiled as a result of an investigation conducted to determine whether to initiate disciplinary action” to be kept confidential. NRS 630.336(4), 632.405(1) and 633.301(2). These provisions also require the complaint or other document filed by a board to initiate disciplinary action and all documents and information considered by the board when determining whether to impose discipline to be public records. The Legislature further provided that orders of the State Board of Osteopathic Medicine which impose

“discipline and the findings of fact and conclusions of law supporting that order are public records.” NRS 633.651.

Cooperation with Law Enforcement and Other Licensing Entities

NRS 622A.150 allows professional licensing boards to communicate and cooperate with other investigating governmental entities without fear of civil liability. NRS 622A.150(2)(b) reads in relevant part:

A governmental entity, officer or employee is immune from any civil liability for...[c]ommunicating or cooperating with or providing any documents or other information to any other governmental entity, officer or employee conducting an investigation, disciplinary proceeding or civil or criminal prosecution.

While some boards in Title 54 are exempted from the provisions of chapter 622A of NRS, including, without limitation, the State Contractors’ Board, the Board of Medical Examiners, the Board of Dental Examiners of Nevada and the State Board of Nursing, the Legislature has adopted provisions within the appropriate chapters of NRS to ensure that, although chapter 622A does not apply, these boards have similar language authorizing cooperation with other governmental entities. *See* NRS 622A.120 for a complete list of exempted regulatory bodies. For example, the provisions of NRS 630.336, 632.405 and 633.301 specifically authorize the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine, respectively, to communicate or cooperate with any other licensing board or any agency which is investigating a licensee, *including a law enforcement agency*. Such cooperation may include, without limitation, providing the board or agency with minutes of a closed meeting, transcripts of oral examinations and the results of oral examinations. Although these provisions do not *require* such cooperation or communication, the laws make clear that the Legislature contemplated such cooperation and communication to ensure that the interests of the public are protected.

Oversight of Professional Licensing Boards

The Committee has also asked the Legal Division to address issues relating to the oversight of professional licensing boards and employees of those boards.

Oversight of professional licensing boards may take many different forms. As the appointing authority, the Governor has a certain amount of persuasion over those whom he appoints. The Governor has the authority to appoint new members and, when necessary, appoint replacements for members who do not complete a term in office. Through this process, the Governor can reappoint members and maintain the status quo or he can appoint persons who will influence change in the policies of the board.

Although the appointment process results in slow change over time, the threat of not being reappointed may encourage members to heed the advice and counsel of the Governor. Other oversight techniques which may be used by the Governor may include issuing a letter of reprimand or appointing a special counsel to investigate the conduct of the board or members of the board. The Governor of Connecticut employed a similar technique by appointing a special counsel within the Office of the Governor to oversee ethics, and assigned the special counsel to independently investigate certain claims of ethics violations and to work collaboratively with the state ethics agency to ensure that the laws were being appropriately carried out.

Most agencies in this State are required to use the Attorney General's office for legal counsel. The Attorney General consequently has some degree of oversight to ensure that each board knows and understands its duties and responsibilities under the laws of this State. Some boards, such as the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine, have the authority to hire their own attorneys. By authorizing a board to hire its own attorneys, the Legislature has removed some of the ability of the Attorney General to guide and counsel these boards. However, it must be noted that testimony from representatives of the Board of Medical Examiners and letters that have recently been made available through the media indicate that the Board of Medical Examiners does consult with the Attorney General's office on some legal matters.

The Legislature has ensured that it also maintains some level of oversight with regard to professional licensing boards. In NRS 218.737 to 218.893, inclusive, the Legislature created the position of Legislative Auditor and authorized certain audits of state agencies, including boards. These audits are intended to provide the Legislature with information necessary to carry out its duties. In addition to the general audits which may be conducted by the Legislative Auditor, NRS 630.127 requires the Legislative Commission to issue a request for proposals to conduct regular performance audits of the Board of Medical Examiners. This performance audit must include, without limitation:

- (a) The methodology and efficiency of the Board in responding to complaints filed by the public against a licensee;
- (b) The methodology and efficiency of the Board in responding to complaints filed by a licensee against another licensee;
- (c) The methodology and efficiency of the Board in conducting investigations of licensees who have had two or more malpractice claims filed against them within a period of 12 months;
- (d) The methodology and efficiency of the Board in conducting investigations of licensees who have been subject to one or more peer review actions at a medical facility that resulted in the licensee losing his professional privileges at the medical facility for more than 30 days within a period of 12 months;

(e) The methodology and efficiency of the Board in taking preventative steps or progressive actions to remedy or deter any unprofessional conduct by a licensee before such conduct results in a violation under this chapter that warrants disciplinary action; and

(f) The managerial and administrative efficiency of the Board in using the fees that it collects pursuant to [chapter 630 of NRS].

NRS 630.127(7)

With regard to employees of a licensing board, the authority to direct the administrative affairs of a board and to manage employees of a board lies with each board and the members of that board. The number and type of employees hired by each board varies widely from board to board and is determined by the statutory authority and budget of the individual board. The Board of Medical Examiners is specifically required by NRS 630.103 to employ an Executive Director, who serves as the chief administrative officer of the Board, and is authorized, pursuant to NRS 630.106, to employ hearing officers, experts, administrators, attorneys, investigators, consultants and clerical personnel as the Board determines necessary to carry out its duties pursuant to chapter 630 of NRS. These employees, including the Executive Director, serve at the pleasure of the Board. The Board has the exclusive power to manage its staff and to direct the actions of the staff. Similar provisions exist for the State Board of Nursing and the State Board of Osteopathic Medicine. NRS 632.060, 632.065 and 633.271.

Removal of Members

Finally, the Committee has asked for information concerning the removal from office of members of professional licensing boards. Article 7 of the Nevada Constitution establishes measures relating to the impeachment and removal from office of public officers. Section 2 of that Article enumerates that the removal of state officers must be by impeachment and a state officer may not be removed by any means other than impeachment. Robison v. First Judicial Dist. Ct., 73 Nev. 169 (1957). Specifically, Section 2 of Article 7 provides that “the Governor and other state and judicial officers, except justices of the peace shall be liable to impeachment for misdemeanor or malfeasance in office.”

In Robison, a petition was filed pursuant to statute to remove the State Superintendent of Banks from office for an alleged failure to perform his official duties. The State Superintendent of Banks fought this action on the theory that, because he was a state officer, he was only removable from office by impeachment. In coming to its decision, the Supreme Court of Nevada conducted an extensive review of the Constitutional debates surrounding the adoption of Article 7 and found that the provisions regarding impeachment under Section 2 of Article 7 apply to all state officers, regardless of whether their offices are created by constitutional or statutory provision and whether

they are appointed or elected. Id. at 173-74. Therefore, a state officer, including a person appointed to a licensing board, who allegedly commits malfeasance or a misdemeanor in office can only be removed by impeachment. Section 1 of Article 7 of the Constitution of the State of Nevada clearly outlines the impeachment process as follows:

The Assembly shall have the sole power of impeaching. The concurrence of a majority of all the members elected, shall be necessary to an impeachment. All impeachments shall be tried by the Senate, and when sitting for that purpose, the Senators shall be upon Oath or Affirmation, to do justice according to Law and Evidence. The Chief Justice of the Supreme court, shall preside over the Senate while sitting to try the Governor or Lieutenant Governor upon impeachment. No person shall be convicted without the concurrence of two thirds of the Senators elected.

(Emphasis added).

The statutory language relating to the terms of office and removal of members of several of the professional licensing boards provides that the Governor may remove a member for good cause. *See e.g.*, NRS 630.070 and 633.201. Even though these provisions have not been addressed by a court in this State, applying the same reasoning as Robison, these provisions are likely to be held unconstitutional. Therefore, the members of the Board of Medical Examiners, the State Board of Nursing and the State Board of Osteopathic Medicine can only be removed by impeachment.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
Sara Partida
Senior Deputy Legislative Counsel

Cc: Members of the Legislative Committee on Health Care

SLP:dtm

Encl.

Ref No. 0806161038

File No. OP_Leslie080616113229