

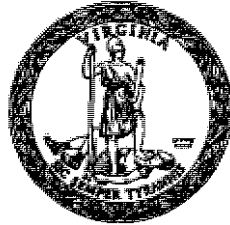
**JOINT LEGISLATIVE
AUDIT AND REVIEW
COMMISSION**

**THE
VIRGINIA
GENERAL
ASSEMBLY**

**THE OCCUPATIONAL AND
PROFESSIONAL REGULATORY
SYSTEM IN VIRGINIA**

**A report in a series dealing with occupational and professional
regulation in Virginia.**

REPORT OF THE
JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION
ON
THE OCCUPATIONAL AND PROFESSIONAL
REGULATORY SYSTEM IN VIRGINIA
TO
THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA



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COMMONWEALTH OF VIRGINIA
Richmond, Virginia
1983

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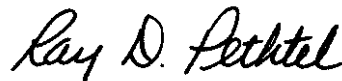
PREFACE

The Joint Legislative Audit and Review Commission (JLARC) has responsibility for operational and performance reviews of State agencies and programs. Under the Legislative Program Review and Evaluation Act, some of these reviews are selected from among seven functional areas of State Government according to a schedule adopted by the General Assembly.

This evaluation is the second of two reports prepared on occupational and professional regulation, which is encompassed within the Commerce and Resources function. The series was scheduled by Senate Joint Resolution 50 enacted by the 1980 General Assembly. A joint subcommittee of the House of Delegates and Senate committees on General Laws cooperated in the evaluation process.

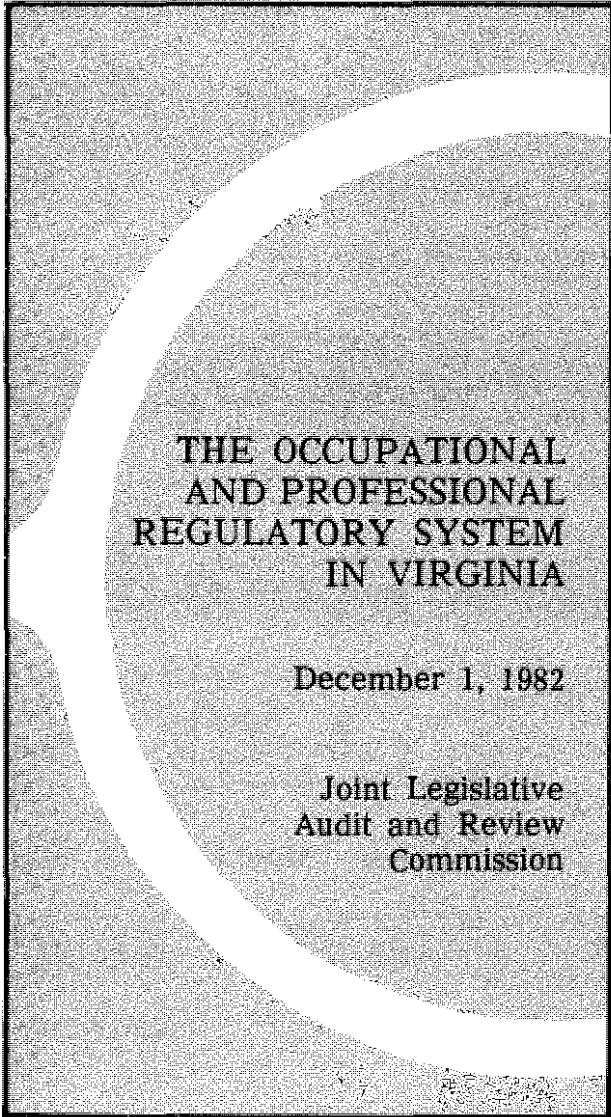
Occupational and professional regulation is one method used by the Commonwealth to protect the public from incompetent or unscrupulous practitioners. This report addresses the performance of the system that has been established in Virginia for occupational regulation, including 29 regulatory boards, the Board and Department of Commerce, and the Commission and Department of Health Regulatory Boards. Specifically, the areas of administrative rulemaking, enforcement of laws and regulations, and selected aspects of agency management were reviewed. Recommendations have been made to improve the performance of the system through administrative or legislative actions.

On behalf of the Commission staff, I wish to acknowledge the help provided by the officials and staff of the regulatory boards, the Department of Commerce, and the Department of Health Regulatory Boards.



Ray D. Pethtel
Director

December 1, 1982



THE OCCUPATIONAL AND PROFESSIONAL REGULATORY SYSTEM IN VIRGINIA

December 1, 1982

Joint Legislative
Audit and Review
Commission

Occupational regulatory programs are intended to protect the public from incompetent and unscrupulous practitioners. Although citizens have constitutional guarantees to practice lawful occupations of their choosing, the General Assembly has determined it is necessary for the Commonwealth to impose restrictions on an occupation when:

- its unregulated practice would endanger the health, safety, and welfare of the public;
- the profession requires specialized skill, and the public needs assurances of competence; and
- the public is not effectively protected by other means.

Most regulatory activity takes place in the occupational and professional boards (or programs) located within the Department of Commerce and the Department of Health Regulatory Boards. These boards regulate the professional practices of about 220,000 individuals in Virginia who provide a variety of health, business, and personal services to the public. During the 1980-82 biennium, expenditures for regulatory boards and agencies totalled \$10.1 million. These costs were covered by fees.

Significant steps have been taken in the Commonwealth to develop a comprehensive regulatory system. Virginia was one of the first states to centralize administrative and investigative services for the boards and to assign research and monitoring responsibilities to entities such as the Board of Commerce and the Commission of Health Regulatory Boards. The Legislature, of course, retains authority to oversee the entire system.

A JLARC REPORT SUMMARY

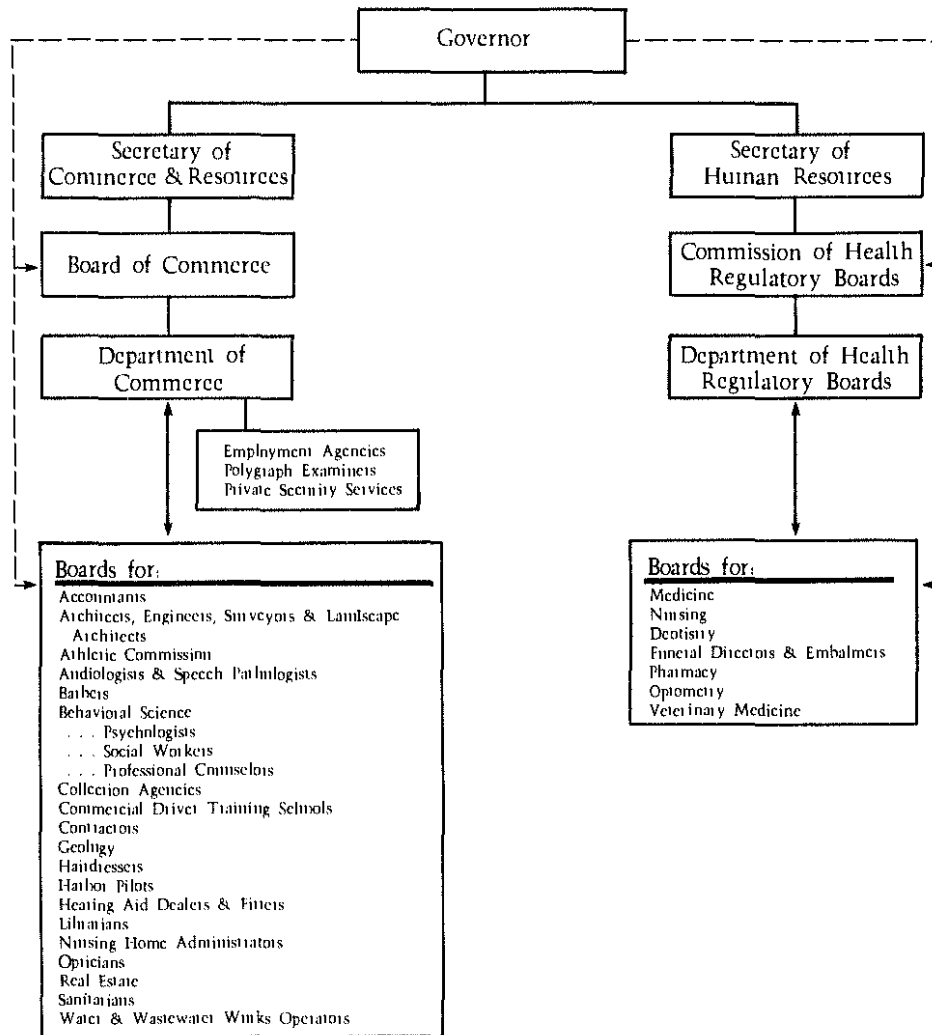
Generally, boards meet their responsibilities appropriately within this framework. They need to ensure, however, that rules are published in an understandable format and are consistent with legislative intent, that complaints are promptly and thoroughly investigated, and that agency roles are clarified and management practices improved.

This review of board and agency activities was authorized by SJR 50, passed during the 1980 session of the General Assembly. The first study under the resolution, *Occupational and Professional Regulatory Boards in Virginia*, reviews each of the independent regulatory boards. The purpose of this study is to assess the regulatory processes of rule-making, enforcement, and administration which cut across organizational entities or affect the entire regulatory system.

Rulemaking by State Boards (pp. 19-56)

The Commonwealth has recently taken steps toward improving rulemaking processes through requirements in the Administrative

ORGANIZATION OF OCCUPATIONAL REGULATION IN VIRGINIA



Process Act for public hearings and economic impact statements. However, rule development is inconsistent among boards; some existing rules appear to exceed a board's authority; and some aspects of legislative oversight of rulemaking are unresolved.

Development of Rules. Major components of rulemaking that require consideration include differences in the statutory framework, compliance with APA provisions, complexity of regulations, and use of staff. In 1974 the statutes for the

commercial boards were recodified, reducing detailed entry, examination, and disciplinary requirements and establishing specific authority for rulemaking in approved areas. The amendments to Title 54 do not apply to the health regulatory boards which were independent agencies at the time.

In contrast to the general statutes for the commercial boards, the statutes for the seven health regulatory boards contain all the relevant legislation for each occupation. Moreover, because the policy and general provisions for occupational and professional regu-

lation were adopted prior to creation of DHRB, their applicability to the health boards has been subject to question. Nevertheless, these provisions appear to embody the regulatory intent of the Commonwealth.

The General Assembly may wish to clarify the applicability of the general provisions of Title 54 to all boards and to consider recodifying the statutes for the health boards. This would create a consistent policy for the Commonwealth, relieve the General Assembly from having to act on regulatory details, and increase the flexibility of the boards to meet changing needs.

The Administrative Process Act provides agencies with guidelines for rulemaking to ensure public participation and to identify potential impacts of proposed regulations. However, few changes in proposed rules are made as the result of public hearings, and most testimony is from practitioners, not consumers. In addition, economic impact statements contain little useful information about the expected effects of regulations. Yet, regulations such as those that increase educational requirements or place restrictions on advertising can have substantial effects on the accessibility of services and on costs to practitioners and consumers.

In the absence of a standard format for rules, most formats used by boards are complex and difficult to follow. Typically, one numbered regulation includes several unrelated requirements. Entry criteria, for example, may be scattered throughout the entire set of regulations, and applicants may have to check both statutes and regulations to determine the full range of applicable criteria.

These problems could be overcome, in part, by better use of the centralized staff capacity of the administrative agencies. The staff of DOC and DHRB should develop guidelines for the preparation and content of economic impact statements and ensure that accurate information is available for public inspection prior to hearings. The staff should also develop a standardized format for rules to make them more understandable.

The General Assembly may wish to require each board to reformat its existing regulations and to promulgate new regula-

tions in a consistent format. The General Assembly may also wish to consider granting the Board of Commerce and the Commission of Health Regulatory Boards explicit authority to review proposed regulations for their potential impact on consumers.

Problems With Existing Rules. Shortcomings in the process for developing rules manifest themselves in existing regulations. JLARC staff systematically reviewed all existing rules of nine sample boards. Six of the nine had promulgated some rules for which they appeared to have no statutory authority. Problems were especially evident in rules promulgated after the 1974 recodification of Title 54 and rules dealing with temporary licenses. For example, some boards had erroneously adopted into regulation provisions that should be in law, such as procedures for appropriation of fees, establishment of criminal penalties, and authorization of temporary permits to practice. Each of the nine boards had criteria that appeared to be unclear, of questionable relevance to practitioner competence, or not equal for all applicants or practitioners.

Similar problems were found with other boards reviewed during the Commission's January 1982 report on the performance of all 29 regulatory boards. Many of these problems continue to exist because there are no systematic reviews of existing regulations. Boards within DOC do not uniformly carry out annual reviews of their rules as required by Section 54-1.17 of the Code. No review provisions exist for boards within DHRB.

The General Assembly may wish to direct the regulatory boards by resolution or by statute to conduct general reviews of existing regulations and report the results to the General Assembly. The reviews should focus on the statutory authority for each rule, the clarity of requirements, and the relevance to competence. Further, these reviews should adhere to a standard schedule and format and should utilize the full resources of the departments and the review boards. Each department should prepare a report, subject to public scrutiny, regarding actions taken and, where applicable, make recommendations to the General Assembly for changes in statute.

To strengthen the regular review of

existing rules, the General Assembly may wish to clarify the statutory authority of BOC and CHRB for regular review of existing rules and require the boards within DHRB to review their rules periodically.

Legislative Oversight of Rulemaking. The General Assembly has delegated extensive rulemaking authority to the occupational and professional regulatory boards, but has reserved to itself the right to review and modify board regulations. Several statutory provisions relate specifically to the oversight role:

- Provisions in Title 30 of the *Code* require Joint General Laws Subcommittees to hold hearings and make recommendations to agencies, regulatory bodies, or the General Assembly regarding complaints received about board rules and regulations.
- Section 30-77 requires performance reviews from time to time by the Joint Legislative Audit and Review Commission.
- Provisions of Title 54 explicitly reserve for the General Assembly "the right to review and modify, in whole or in part," any rule or regulation promulgated by the regulatory boards, the Board of Commerce, and the Commission of Health Regulatory Boards.

The authority to conduct hearings and performance reviews and to make recommendations for action appear to be clearly established in the *Code* and are in the process of being implemented. However, the exercise of the power to review and modify rules and regulations in Title 54 is less clearly defined and may raise constitutional questions regarding separation of powers. The General Assembly has recently been advised by the Attorney General that newly established provisions of the Administrative Process Act may embody an unconstitutional use of legislative power. These provisions empower the General Assembly to review and nullify by resolution rules promulgated by any executive agency, not just occupational regulatory boards.

It may be that the conditional grant of authority inherent in the language of Title 54 makes these boards unique cases that are exceptions to the current opinion of the Attorney General. Other major rulemaking

agencies do not appear to have such conditions in their enabling legislation. Moreover, since no implementing mechanism has been established, a constitutionally acceptable method might be adopted through amendment to Title 54. The amendment could specify, for example, that modification could occur only by a statute passed by both houses of the General Assembly.

The General Assembly may wish to consider this matter further or request an advisory opinion of the Attorney General regarding the constitutionality of the review powers specified in Title 54. The General Assembly may also wish to amend the APA to overcome the specific objections of the Attorney General regarding the nullification of rules for all agencies and consider various mechanisms for regulation review. Staffing responsibilities for regulation review could be assigned to an existing or newly created House/Senate organizational unit.

Enforcement of Regulatory Standards (pp. 57-90)

Regulatory rules are primarily enforced through investigating and resolving complaints against practitioners. During FY 1981, 1,153 complaints were investigated and approximately one-third resulted in disciplinary action. Complaints may come from a variety of sources, including consumers, other licensees, or board members, and may involve fees, standards of practice, unprofessional conduct, and unlicensed activity. In order to assess enforcement activities, JLARC reviewed a random sample of 90 investigations from each of the two administrative agencies and surveyed 41 complainants.

Enforcement activities of the boards and agencies have been significantly enhanced in recent years through the establishment of central enforcement units and use of better investigative procedures. Nevertheless, several shortcomings remain within the processes for reviewing, investigating, and adjudicating complaints.

Receiving Complaints. Regulatory boards are responsible under the *Code of Virginia* for receiving allegations against practitioners. However, not all complaints reach the boards. They may be handled independently by other organizations or not reported at all. Moreover, restrictive intake procedures and

incomplete and decentralized recordkeeping may limit the ability of boards and agencies to enforce standards. For example, most boards will not consider a complaint unless it is submitted in writing, and four boards require written complaints to be notarized. Yet, JLARC found that only one-third of the telephoned complaints are resubmitted in writing and that notarized statements necessary for subpoenaed records can be obtained as part of routine investigative procedures.

The agencies maintain centralized records only for complaints investigated by their enforcement units. This excludes complaints handled by boards or administrators but not referred for investigation. This lack of complete information and inadequate communication among staff can result in uncoordinated efforts to resolve complaints, failure to detect patterns of allegations involving individual practitioners or standards, and inability to monitor the performance of enforcement and board personnel.

Steps that should be taken by the boards and agencies to improve complaint handling include increasing consumer awareness, encouraging referrals from other organizations, developing procedures for processing complaints received by telephone, eliminating routine requirements for notarization of complaints, and improving recording and monitoring of complaints at the board level.

In addition, DOC and DHRB should each establish a central index of complaints received by boards. This activity is not precluded by present statutory provisions, but could be facilitated by a statutory change. The General Assembly may wish to amend Title 54 of the *Code of Virginia* to shift responsibility for receiving complaints from the regulatory boards to DOC and DHRB.

Investigating Complaints. Once a board has determined that an allegation needs to be investigated, the complaint is sent to the central enforcement unit of DOC or DHRB. These units are responsible for assembling all relevant facts and evidence about the allegation to allow the Board to determine whether there have been violations of law or regulation. Investigative findings are reported to the boards.

The 24 investigative personnel at DOC are located in four regional offices. Each

office has a supervisor who monitors activities and reviews completed reports. DOC's well organized and clearly presented investigative reports show the value of consistent supervisory review. DOC should continue its efforts to improve management information and also develop a means for prioritizing among cases and providing investigators with additional training in laws and regulations.

DHRB should address major problems in the enforcement area. The enforcement unit at DHRB is staffed by 18 people located throughout the State with minimal supervision. Investigators have primary responsibility for deciding what evidence or interviews will be necessary to support a violation, in accordance with an investigative manual. However, in almost one of every four completed investigations, no interviews had been conducted, and in 22 percent of their cases DHRB investigators collected no physical evidence such as contracts, bills, x-rays, and medical records. Investigative reports are disorganized, unclearly presented, and difficult to follow, and the unit is not supported by full-time clerical staff.

Adjudicating Complaints. Once a case has been investigated, boards must determine whether a violation has occurred and take appropriate disciplinary action. About 60 percent of investigated cases are closed without action, and about one-third of the complaints result in disciplinary action ranging from a reprimand to revocation of a practitioner's license. Problems involve timely resolution of complaints, use of staff, unresolved consumer grievances, and inadequate reporting of violations of the State's drug control laws.

Some cases take a substantial amount of time to resolve after investigation. Although most cases are closed within about two months, JLARC found that some had been pending as long as 28 months. Boards should ensure that such delays are not caused by procedural problems.

Several boards have delegated the responsibility for making initial decisions about investigations to agency staff without adequate review of their actions. The boards have statutory authority, however, for adjudicating complaints, and they should fully review and approve all decisions that are made on behalf of the full board.

Boards should also consider greater use of the consent order as a tool for requiring practitioners to resolve consumer grievances. Most boards use consent orders to establish fines, probation, or suspension of licenses. However, these orders can also be used to require repairs, refunds, or other forms of corrective action.

A particular problem that should be addressed at DHRB involves adjudicating cases involving the Drug Control Act. A special investigation conducted by the Virginia State Police in 1981 found that the health regulatory boards and DHRB attempted to deal with serious complaints by administrative measures even when potential felony violations were uncovered. DHRB and the health regulatory boards should routinely refer all potential violations of criminal law to local Commonwealth's attorneys for disposition. DHRB and the State Police should also consider means of cooperation in the investigation of potential criminal and regulatory violations involving licensed practitioners.

Administration of DOC and DHRB (pp. 91-112)

Both DOC and DHRB have administrative problems which stem as much from organizational growth as from increasing complexity in the regulatory system.

Administration of DHRB. Until appointment of a new director for DHRB in July 1982, management decisions that affected all boards' budgets and staffing levels were made by individuals who served specific boards. For example, the director and assistant director also served as executive directors to the Boards of Pharmacy and Dentistry, respectively. These dual roles affected staff morale and resulted in a substantial degree of mistrust among those executive directors who were placed in subordinate positions when DHRB was formed from boards that had previously functioned as independent entities. Moreover, combination of management and operational roles in single positions significantly weakened management "checks and balances." To ensure that management decisions are made from an organizational perspective, DHRB should realign existing positions so that

responsibilities for board operations and agency management are separated.

Fiscal controls and financial reporting should be strengthened by a recent change to dedicated special funding, which will require improved financial management in the agency.

In view of the major changes needed to improve the department's administrative structure and procedures, CHRB should require DHRB to report on its plans for correcting management difficulties and monitor the agency's progress through periodic status reports. Moreover, CHRB should study and implement additional measures which could serve to unify and coordinate the activities of the health regulatory boards.

Administration of DOC. The Department of Commerce provides administrative services for 22 regulatory boards. DOC has recently addressed many of its management problems through reorganization and improvement of some of its administrative systems. Much remains to be done.

DOC has reorganized to reduce the span of control of the Deputy Director, functionally divided the responsibilities formerly held by one administrative division, and created a new division to coordinate the operational activities carried out for the regulatory boards, including handling of complaints and maintaining records. A high priority for the new division should be establishing uniform procedures and standardized formats for board regulations.

An amendment to Section 54-1.28 of the Code during the 1981 session has also resulted in significant changes in the method used by DOC to reconcile expenditures through the fees charged by some boards. The statute requires boards located within DOC to adjust their fees if revenues are ten percent greater or less than expenditures over a biennium. Because DOC receives a single appropriation for all regulatory activities, expenditures have not been accounted for on a board-by-board basis until the end of a fiscal year, and larger boards, in effect, have subsidized the activities of smaller boards. DOC has recently employed three new accountants and has begun to address deficiencies in the cost allocation process.

Organization for Occupational Regulation **(pp. 113-120)**

DOC and DHRB carry out similar functions and activities such as recordkeeping, purchasing, accounting, enforcement, and data processing. Duplication creates the potential for inefficient operation of regulatory functions. For example, not all boards with a health or commercial orientation are located in the same agency, funding requirements are significantly different, and legislative direction is not the same. It is sometimes difficult to resolve issues between agencies or between two boards in different agencies because the agencies are in two different secretarial areas.

To improve the administrative efficiency and regulatory cohesion of the system for occupational and professional regulation, the General Assembly may wish to consider options such as requiring DHRB and DOC to share common services; realigning the regulatory boards according to their health or business orientation; merging the two agencies; or creating a single review board.

RECOMMENDATIONS

Recommendation (1). In order to provide a consistent legislative base for all regulatory boards, the General Assembly may wish to clarify the applicability of the general provisions of Title 54 to all boards. The legislature may also wish to consider recodifying the statutes for the health boards to provide a general legislative framework within which regulations would be promulgated.

Recommendation (2). DOC and CHRB should take steps to ensure that accurate and sufficient copies of proposed regulations are available for public inspection prior to and at each public hearing. The agencies should also improve their public information efforts to secure increased public involvement in hearings.

Recommendation (3). The Board of Commerce and the Commission of Health Regulatory Boards should develop guidelines to be followed by all boards in preparing economic impact statements. The statements should specify, at a minimum, additional

restrictions on entry into the occupation, limitations on competition, and potential effects on cost.

Recommendation (4). The General Assembly may wish to require each board to promulgate regulations in a consistent format that: (a) organizes rules by major categories; (b) uses simpler language; (c) limits numbered regulations to related criteria; and (d) distinguishes between statutory and administrative requirements. Guidelines for this format should be prepared by DOC and DHRB. Boards should also identify the authorizing section of the Code for each regulation they promulgate. Board staff should work with the assistant attorneys general assigned to DOC and DHRB to develop a format and procedure for determining the proper reference and authority of the board.

In addition, the General Assembly may wish to study the feasibility and cost of adopting an administrative code for the Commonwealth which would standardize style and format and provide a single source of regulations and a system of referencing and indexing regulatory requirements.

Recommendation (5). DOC and DHRB should develop procedures for comprehensive support of board activities during the consideration of new regulations. Moreover, the General Assembly may wish to amend Sections 54-1.25 and 54-955.1 to explicitly give BOC and CHRB the power to review board regulations.

Recommendation (6). The General Assembly may wish to direct the regulatory boards by resolution or by statute to conduct general reviews of existing regulations and report to the General Assembly on the results. Reviews should be conducted by each board according to a schedule, standard criteria, and format to be developed by DOC and DHRB. Regulations should be reviewed to determine whether they are authorized by statute, clearly defined, and relevant to practitioner competence or protection of the public.

As part of regulatory review actions, boards should address problems with regulation that include but are not limited to areas identified in the JLARC review.

Where statutory authority for a regulation is lacking, boards should repeal the

regulation or request necessary authority from the General Assembly. Each request should include documented reasons for the change and continued need for regulatory authority by the board in that area.

DOC and DHRB should prepare reports which specify actions taken by the boards to repeal, modify, or retain regulations. Where applicable, recommendations should be made to the General Assembly for needed changes in existing statutes or enactment of new statutes.

Recommendation (7). The General Assembly may wish to consider further or request an opinion of the Attorney General regarding the constitutionality of legislative review and approval of the rules of regulatory boards as provided by Sections 54-1.25, 54-1.28, and 54-955.1. The General Assembly may also wish to review the statute concerning the legislative review function, and assign responsibility for review to a new or existing joint committee.

Recommendation (8). BOC, CHRB, and the regulatory boards should improve their efforts to make the public aware of avenues for handling complaints against regulated practitioners. Options include using more public service announcements, publishing agency telephone numbers under "Community Service Numbers" in local telephone directories, installing toll-free telephones to receive complaints, and requiring licensees to display information about the boards with their posted licenses or to include such information on contracts with clients.

DOC, DHRB, and the boards should also identify all organizations which may receive complaints about practitioners and encourage their cooperation in referring the complaints to the boards.

Recommendation (9). DOC, DHRB, and the boards could improve receiving and evaluating complaints by:

- (a) developing guidelines for evaluating the seriousness of complaints received by telephone, appropriately recording the information, and referring complaints for investigation;
- (b) eliminating requirements that letters of complaint be notarized as a routine condition for investigation;
- (c) establishing guidelines for handling complaints administratively and developing standard recordkeeping systems

to retain information on the complaint and the action taken;

- (d) establishing a central index of all complaints received by boards.

Recommendation (10). DOC, DHRB, and the board should implement procedures to ensure that board members do not review complaints prior to adjudication. Alternatively, the General Assembly may wish to consider amending Title 54 of the *Code of Virginia* to shift the responsibility for receiving complaints from the regulatory boards to DOC and DHRB. The agencies, in cooperation with the boards, could establish central units for receiving, evaluating, and determining the need for investigation for all complaints filed against practitioners.

Recommendation (11). DOC and DHRB should consider developing written procedures for classifying complaints based upon the potential physical or financial harm to consumers and on the number of other complaints against the practitioner. Time guidelines for each classification could specify reasonable parameters for investigations and be used as part of a tracking system to monitor the timely completion of cases.

Recommendation (12). DHRB needs to take steps to ensure that investigations are thorough and that all necessary evidence is collected and clearly reported. Improvements that could be made include:

- (a) establishing a standard format for presenting case findings and carefully reviewing reports;
- (b) training enforcement personnel in investigative techniques, report writing, and laws and regulations;
- (c) providing full-time clerical support to the enforcement unit;
- (d) establishing periodic group meetings to better coordinate and improve communications among investigators;
- (e) establishing at least one additional supervisory position from within existing staffing levels.

Recommendation (13). DOC, DHRB, and the boards should develop a tracking system to alert boards to cases delayed during adjudication and take steps to close cases in a more timely manner. Special attention should be given to expediting cases that do not require a hearing.

Recommendation (14). Each board should review its regulations and statutes to ensure that it has sufficient authority to discipline in the area of professional competence. Where statutory authority is lacking, the boards should request appropriate powers from the General Assembly. Moreover, boards should make greater use of the consent order to resolve specific consumer problems. Repairs, refunds, or corrective action may be directed through consent orders.

Recommendation (15). Boards should establish procedures to review and approve all decisions that are made on behalf of the full board by subcommittees or agency personnel, particularly with regard to cases that are determined to be unfounded.

Recommendation (16). DHRB and the health regulatory boards should refer all potential violations of criminal law to local Commonwealth's attorneys for disposition. For drug cases, DHRB and the State Police should consider greater cooperation in investigating potential criminal and regulatory violations involving licensed practitioners.

Recommendation (17). Routine inspections which consist merely of checking to determine whether practitioners are licensed should be discontinued. These inspections should be conducted on a complaint basis. The two inspectors at DOC involved in license checks should be reassigned to other enforcement functions.

Recommendation (18). DOC and DHRB should take steps to ensure that qualitative inspections are kept up-to-date. The agencies should consult with the boards about the appropriateness of some inspection activities and establish frequency of inspections of this type. In addition, the agencies need to improve their records and information on inspections by establishing central records of facilities that require inspections and suspense files to identify which facilities are due for inspection.

Recommendation (19). Administrative activities at DHRB could be improved by:

- (a) separating support and operating functions which are combined in single positions;
- (b) assessing workload and adjusting the allocation of staff resources;
- (c) improving staff communication and

input in policy making and budget development;

- (d) ensuring that accounting systems accurately allocate direct and indirect costs to the boards, strengthening fiscal controls over board expenditures, and improving financial reporting to the boards;

- (e) decentralizing data processing operations and expanding data processing capabilities to include enforcement activities.

Recommendation (20). The General Assembly may wish to consider reconstituting CHRB to provide for a broader public perspective than is now represented.

Recommendation (21). The Commission of Health Regulatory Boards should more actively carry out its responsibility for monitoring DHRB. The Commission should require DHRB to develop plans for resolving management problems and monitor the agency's performance through periodic status reports.

Recommendation (22). DOC should continue in its efforts to improve cost allocation and reporting. Usable board-based budgeting and financial reporting systems are necessary to enable boards to comply with §54-1.28:1. DOC should carefully analyze the impact of this statute over the next biennium and take administrative action to ensure that it is appropriately implemented and that negative effects are minimized. Moreover, the General Assembly may wish to amend §54-1.28:1 to explicitly include private security services, polygraph examiners, employment agencies, and the health regulatory boards.

Recommendation (23). The General Assembly may wish to amend §54-1.25 to explicitly give BOC a stronger role in reviewing regulations and activities of the regulatory boards.

Recommendation (24). The General Assembly may wish to consider options for improving the administrative efficiency and regulatory cohesion of the system for occupational and professional regulation. Options include:

- (a) requiring DHRB & DOC to explore opportunities for increased efficiency and cost savings through sharing of common services and functions;

(b) realigning the regulatory boards to more clearly establish the "business-regulation" orientation of DOC and the "health-regulation" orientation of DHRB;

(c) merging DOC and DHRB into a single support agency in which the

health and commercial boards constitute distinct divisions;

(d) reconstituting BOC and CHRB as a single advisory board to review the activities and regulation of existing boards and review the need for additional regulation of professions and occupations.

JLARC

JLARC is an oversight agency of the Virginia General Assembly. Its primary function is to carry out operational and performance evaluations of State agencies and programs.

Joint Legislative Audit and Review Commission

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I. VIRGINIA'S SYSTEM FOR OCCUPATIONAL REGULATION

Occupational regulatory programs are intended to protect the public from incompetent and unscrupulous practitioners. Even though citizens have constitutional guarantees to practice lawful occupations of their choosing, the General Assembly has determined it is necessary for the Commonwealth to impose restrictions on an occupation when:

- its unregulated practice would endanger the health, safety and welfare of the public;
- the profession requires specialized skill, and the public needs assurances of competence;
- the public is not effectively protected by other means.

Although several State agencies regulate professions, most regulatory activity takes place in the occupational and professional boards (or programs) located within the Department of Commerce (DOC) and the Department of Health Regulatory Boards (DHRB). These boards regulate the professional practices of about 220,000 individuals in Virginia who provide a variety of health, business, and personal services to the public. During the 1978-80 biennium, expenditures for regulatory boards and agencies totalled \$7.9 million. These costs were covered by fees.

The General Assembly has established a multifaceted system for occupational regulation. Twenty-nine regulatory or advisory boards have responsibility for setting standards for entering and practicing an occupation, approving qualified individuals, and disciplining practitioners who do not comply with the standards. The Department of Commerce and the Department of Health Regulatory Boards provide centralized administrative and investigative services for the boards. The Board of Commerce and the Commission of Health Regulatory Boards were created to study the need for additional occupational regulation as well as to monitor the respective administrative agencies. The Legislature, of course, retains authority to oversee the entire system.

Scope of JLARC Review

The 1978 Legislative Program Review and Evaluation Act provides for JLARC to review selected programs, agencies, and activities of State government according to a specific schedule. Senate Joint Resolution 50, passed during the 1980 legislative session, directed JLARC to review the regulation of professions and occupations as carried out by the boards within the Department of Commerce and the Department of Health Regulatory Boards.

This review of occupational regulation in Virginia is the second study carried out under the provisions of SJR 50. The first study, *Occupational and Professional Regulatory Boards in Virginia*, reviews each of the independent regulatory boards.

The purpose of this review is to evaluate selected regulatory processes which cut across organizational entities or affect the entire regulatory system. The primary objectives of the study are:

- to evaluate rulemaking processes and existing oversight mechanisms;
- to assess complaint handling and inspection activities to ensure that practitioners are competent and that the public is protected;
- to determine whether costs of regulation are appropriately allocated and covered by board revenues;
- to analyze the extent to which administrative services have been appropriately and efficiently centralized; and
- to evaluate the roles and activities of the Board of Commerce and the Commission of Health Regulatory Boards.

Methods

To carry out this review, JLARC staff employed several specialized techniques. In the evaluation of rulemaking procedures, the regulations of nine randomly selected boards were analyzed in detail. The staff also examined board records, which document the rationale of promulgated regulations.

To evaluate the enforcement activities of DOC and DHRB, JLARC randomly selected 180 complaint records and collected detailed information about the cases. Individuals who filed complaints with boards were also surveyed.

Questionnaires were sent to all members of the regulatory boards and to professional associations that represent practitioners. In addition, JLARC conducted extensive interviews in each of the two agencies with staff assigned to the boards and with staff in centralized functions.

A technical appendix, which explains in greater detail the methodology and research techniques used in this study, is available upon request.

Report Organization

The following sections of this chapter provide historical perspectives and explain the major trends in occupational regulation. Chapter II analyzes existing board regulations, the processes by which boards promulgate rules, and oversight mechanisms. In Chapter III, enforcement activities of DOC, DHRB, and the boards are evaluated. Finally, Chapter IV looks at administration and financial management of the agencies and the boards, and assesses the administrative structure for occupational regulation in Virginia.

EVOLUTION OF THE OCCUPATIONAL REGULATORY SYSTEM

During the eighteenth and early nineteenth centuries, the policy of both federal and state governments was not to interfere in the affairs of the marketplace, especially in restricting the practice of professions and occupations. This *laissez faire* attitude came to an end in the mid-1800s when abuses in the "learned professions"--law and medicine--prompted state legislatures to enact controls over entry into and practice of certain occupations. These controls usually took the form of a board of practitioners which set entry standards, examined applicants for basic competency, and disciplined individuals who violated the law or board regulations.

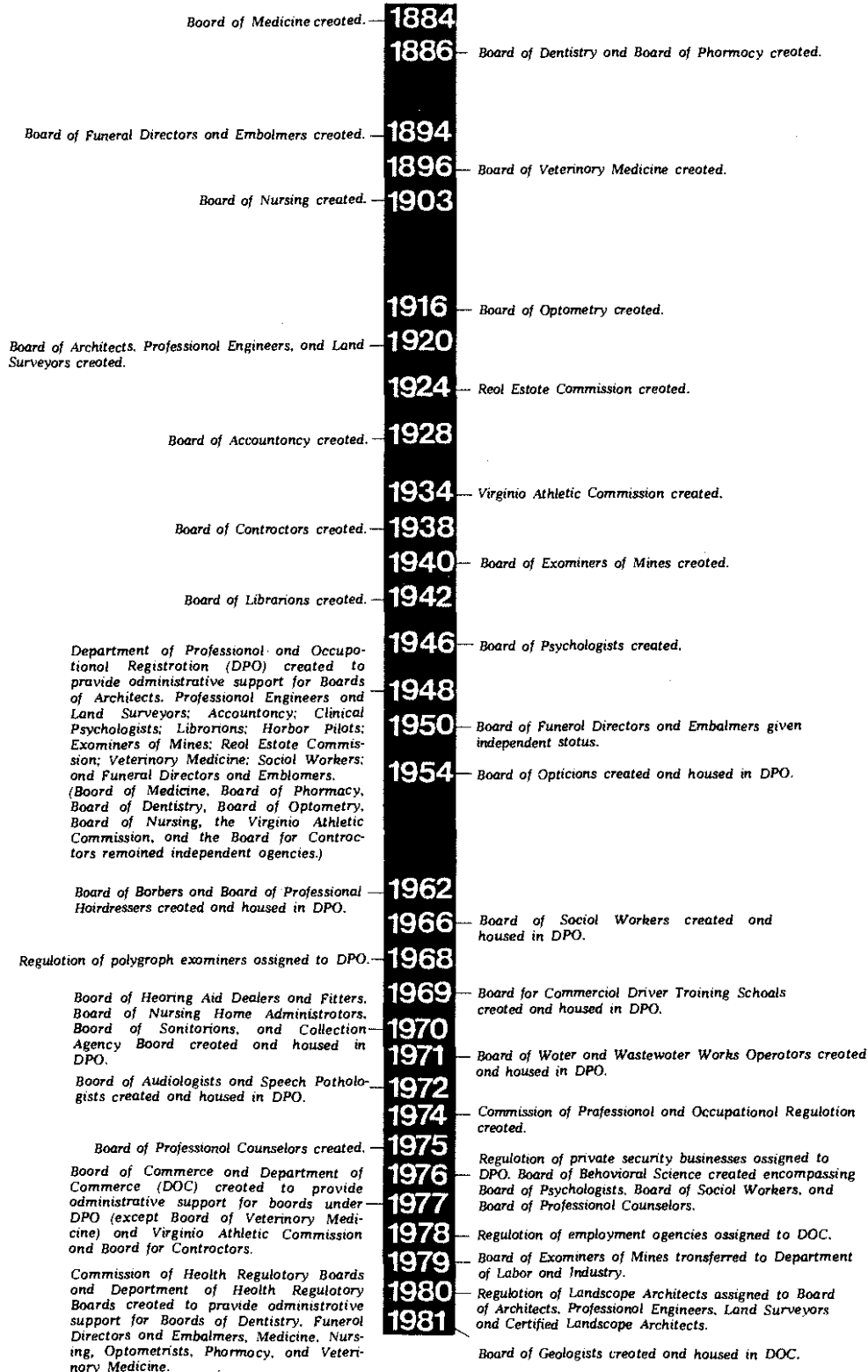
Virginia was the first state to regulate an occupation. In 1639, the colonial legislature passed a law regulating the practice of medicine. The State Board of Medicine was created in 1884 to regulate the healing arts. By 1900, four additional health-related boards were created to regulate dentistry, pharmacy, embalming, and veterinary medicine. During the first half of this century, occupational regulation was extended into several non-health professions such as architecture, real estate, and building contracting (Figure 1). In the last 15 years, regulation has expanded significantly. Since 1968, ten additional boards have been created to regulate occupations ranging from polygraph examiners to geologists.

Virginia was also one of the first states to create an administrative agency to house previously independent boards. The Department of Professional and Occupational Registration (which eventually became the Department of Commerce) was created in 1948. By 1977, all independent boards had been placed within the Department of Commerce or the newly created Department of Health Regulatory Boards.

In the early 1970s, the Virginia Advisory Legislative Council (VALC) reviewed the system for occupational regulation. VALC found that the system had become somewhat cumbersome and was placing a growing burden upon the General Assembly. It recommended that Title 54, *Code of Virginia*, regarding regulatory boards be streamlined and that the boards be granted broad quasi-legislative authority to promulgate necessary regulations. VALC also recommended creation of a special

Figure 1

HISTORY OF OCCUPATIONAL REGULATION IN VIRGINIA



Source: JLARC staff representation.

body to oversee the regulatory system. As originally recommended, a Commission for Professional and Occupational Regulation was to be responsible for evaluating the need for additional regulation, establishing regulatory boards, and reviewing and approving the regulations promulgated by all of the regulatory boards.

In 1974, the General Assembly did recodify Title 54 of the Code, eliminating many statutory provisions but giving the boards much broader rulemaking powers. It also established the Commission for Professional and Occupational Regulation to review the need for additional regulation and to make recommendations to the General Assembly. The legislature did not, however, grant the commission authority to establish regulatory boards or to review and approve board regulations.

In 1977, the commission was changed to the Board of Commerce and its membership was modified to include only public members. The legislature also established the Commission of Health Regulatory Boards at that time with similar powers and duties for health occupations.

Organization

Currently, occupational regulation is carried out through 26 independent regulatory boards, three advisory committees, two administrative agencies, and two review boards (Figure 2). Each component has separate and interrelating responsibilities for regulating occupations.

Regulatory Boards. The primary responsibility for regulating occupations lies with the boards and commissions created by the General Assembly. Each board is composed of three to 14 members who are generally appointed by the Governor. Practitioners (and public members in the case of 10 boards) are represented on the boards. The boards' duties include:

- promulgating regulations governing the occupation;
- establishing qualifications for entry and examining applicants;
- licensing qualified practitioners;
- levying fees;
- receiving complaints and taking disciplinary action; and
- ensuring continued competency of practitioners.

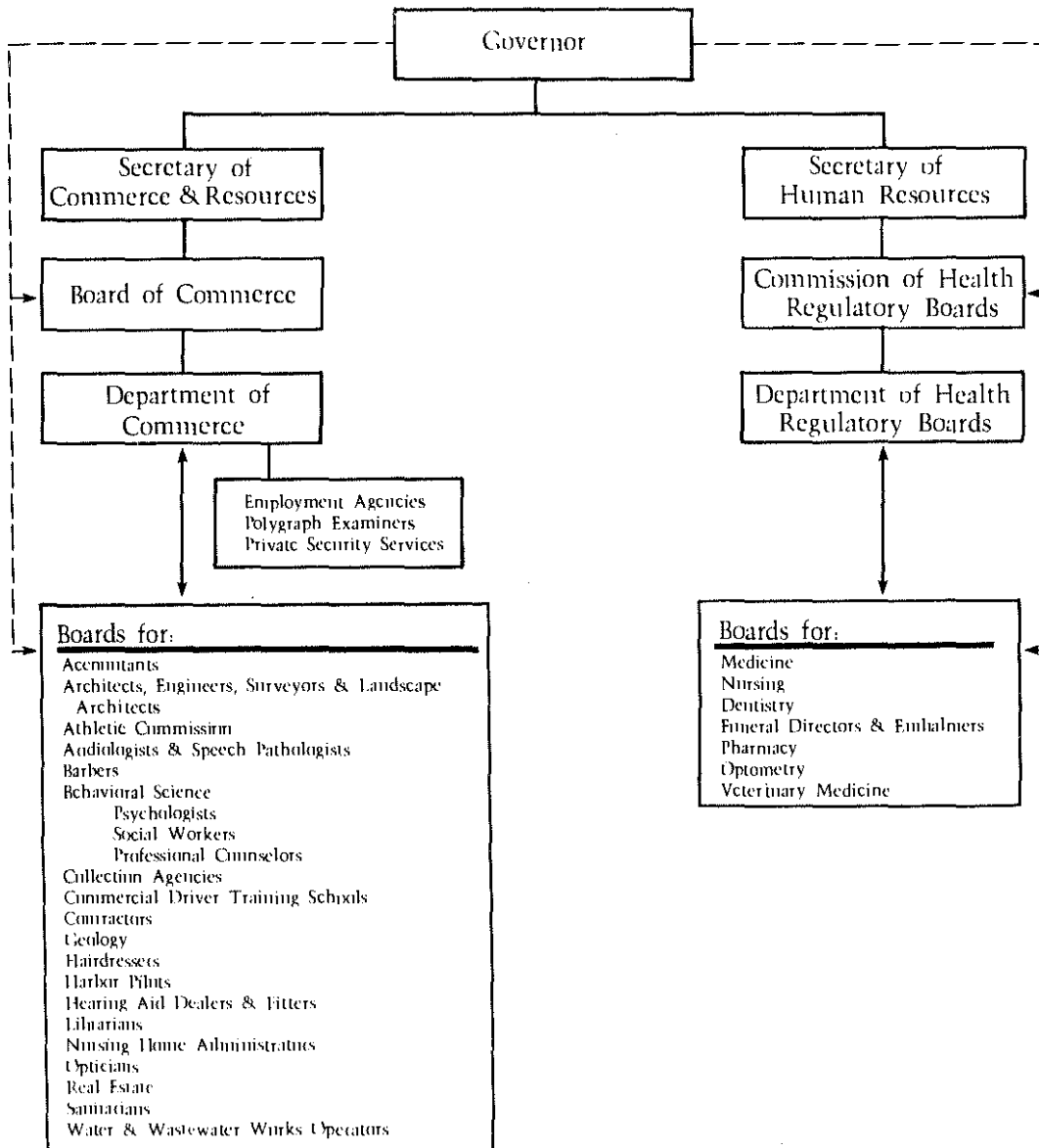
Administrative Agencies. The boards, including three advisory committees, are organized within two administrative agencies: the Department of Commerce and the Department of Health Regulatory Boards. These agencies provide support services for the boards by employing personnel, maintaining records, enforcing laws and regulations, and collecting fees.

Agency staff are responsible for the day-to-day regulatory activities. Each board is staffed with an administrator and support personnel. Some administrators handle the operations of more than one

Figure 2

ORGANIZATION OF OCCUPATIONAL REGULATION IN VIRGINIA

Currently in Virginia, occupational regulation is carried out through 26 independent regulatory boards and three advisory committees, which are organized under two administrative agencies and two review boards.



Source: DOC, JLARC staff representation.

board. Staff process applications for licensure, prepare materials for board meetings, receive complaints about practitioners, and handle inquiries to the board. Each agency also has a central staff for enforcement, data processing, personnel, and fiscal activities. DOC employs 94 persons; DHRB employs 58 persons.

DOC has been given direct responsibility by the General Assembly to regulate entry into the practice of three occupational groups: employment agencies, polygraph examiners, and private security services. Although DOC, rather than individual boards, regulates these occupations, it is assisted by three advisory committees composed of practitioners that provide technical assistance and advice to the agency.

Review Boards. Occupational regulation in the Commonwealth also involves two boards with broad advisory functions in the area of regulatory policy. The functions of the Board of Commerce and the Commission of Health Regulatory Boards include:

- evaluating the need to regulate additional occupations and making recommendations to the General Assembly;
- advising the Governor and the secretary on regulatory matters;
- monitoring the activities of the administrative agencies; and
- publicizing the programs and policies of the agencies.

The Board of Commerce is a nine-member citizen panel appointed by the Governor. The board meets monthly in Richmond. In addition to its review and monitoring functions, the board has studied regulatory problems such as the overlapping roles of engineers, architects, and contractors and has completed a task analysis of barbering and hairdressing. The Board of Commerce also sponsors an annual meeting of all regulatory boards within DOC.

The Commission of Health Regulatory Boards is composed of 11 members: one member from each of the seven health boards and four members from the State at large. The Commission meets two to three times a year. CHRB has a special responsibility to evaluate the need for coordinating among the boards and to promote the development of standards for evaluating the competency of health care professionals.

Scope of Regulation

In attempting to balance the rights of individuals and the public interest, the General Assembly has stated in §54-1.17 that:

...the right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitu-

tion of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgement is necessary for the preservation of the health, safety and welfare of the public.

The General Assembly further stipulated that no regulation should be imposed on an occupation except for the exclusive purpose of protecting the public interest.

There are five methods by which the Commonwealth regulates occupations:

- Private civil actions and criminal prosecutions: Whenever the State finds that existing laws are not sufficient to protect the public, it may provide by statute for more stringent grounds for civil action and criminal prosecution.
- Inspection: The activities and premises of persons in certain occupations are subject to periodic inspections to ensure that the public's health, safety, and welfare is protected. Anyone is allowed to practice the occupation without meeting specific entry criteria. However, an injunction can be issued to prevent persons who do not meet the inspection standards from engaging in the occupation. Restaurant inspection is an example of this type of regulation.
- Registration: Under this type of regulation, any person may engage in an occupation, but he or she is required to submit information concerning the location, nature, and operation of the practice. Political lobbyists, for example, must register.
- Certification: As a form of regulation, certification recognizes persons who have met certain educational and experience standards to engage in an occupation. Although anyone may practice the occupation, only those who are certified may use the occupational title. The certification of landscape architects exemplifies this type of regulation.
- Licensure: Under this method of regulation, it is illegal for anyone to engage in an occupation without a license, and only persons who possess certain qualifications are licensed. Physicians are one of over 60 occupational groups regulated by licensure in Virginia.

Licensure, the most typical method of regulation by the boards, is the most restrictive. Of the 70 occupations regulated under DOC and DHRB, four are registered, four are certified, and 62 are licensed.

In many instances, a business may be regulated in addition to the practitioner. The Board of Pharmacy, for example, regulates drug manufacturers, distributors, and pharmacies, and it licenses pharmacies. Eighteen types of firms or businesses are regulated in addition to individual practitioners. Table 1 depicts the scope of regulation for the regulatory boards and agencies.

Expenditures

For the most part, the regulatory boards and agencies are self-supporting; the fees for examinations and licensing cover the expenses. All of the revenues of the boards in DOC are paid into a dedicated special fund from which the Legislature appropriates monies to the agency. During the 1978-80 biennium, revenues totaled \$5,774,388 and expenditures were \$5,010,599.

Revenues from the seven boards in DHRB are paid into the State's general fund. During the 1978-80 biennium, revenues totaled \$2,716,637. DHRB receives a general fund appropriation for its expenses. Expenditures for 1978-80 were \$2,922,464.

TRENDS IN OCCUPATIONAL REGULATION

The right to enact legislation to protect the health, safety, and welfare of the public in occupational matters is recognized as a responsibility of state government. The right of individuals to pursue an occupation of their choosing is also recognized as a fundamental freedom. The proliferation of occupational regulatory boards and administrative regulations has raised questions both nationally and in Virginia about the most appropriate way to balance these conflicting rights. This interest has focused on four areas: assessing the need for occupational regulation, delegating legislative and judicial powers to practitioner boards, centralizing regulatory functions, and increasing oversight of rulemaking at the federal and state levels.

Assessing the Need to Regulate

Occupational regulation is typically sought by members of a professional group. There is rarely pressure from the public to establish regulatory mechanisms in occupational areas. Proponents of regulation generally attempt to show the need to prevent incompetent individuals from practicing or to provide uninformed consumers with information about capable practitioners. Regulation can, however, provide direct economic benefits to practitioners by limiting the number of individuals who may practice or imposing restrictions on the manner in which they may practice.

Since regulatory legislation has typically been enacted at the request of occupational groups, experts suggest that there is a

Table 1

OCCUPATIONS AND PROFESSIONS REGULATED BY VIRGINIA BOARDS

<u>Board/Commission</u>	<u>Regulated Occupations and Professions</u>	<u>Method of Regulation</u>	<u>Number Regulated</u>
DEPARTMENT OF COMMERCE			
ACCOUNTANCY • regulates individuals skilled in systems of recording and summarizing business and financial transactions	ACCOUNTANTS CPA PRACTICE UNITS LIABLE MEMBERS OF PRACTICE UNITS	CERTIFICATION LICENSURE LICENSURE	2,100 790 2,500
ARCHITECTS, PROFESSIONAL ENGINEERS, LAND SURVEYORS AND CERTIFIED LANDSCAPE ARCHITECTS • regulates individuals engaged in various aspects of the development of structures or projects such as residential or commercial buildings	ARCHITECTS ENGINEERS LAND SURVEYORS LANDSCAPE ARCHITECTS CORPORATIONS	LICENSURE LICENSURE LICENSURE CERTIFICATION CERTIFICATION	2,900 9,718 821 2 247
ATHLETIC • protects the contestants of certain athletic events from physical harm and the public from fraud and misrepresentation	BOXERS WRESTLERS PROMOTERS/CLUBS OTHERS	LICENSURE LICENSURE LICENSURE LICENSURE	480 103 59 19
AUDIOLOGY AND SPEECH PATHOLOGY • regulates individuals providing service to those with speech or hearing impairments	AUDIOLOGISTS SPEECH PATHOLOGISTS	LICENSURE LICENSURE	107 511
BARBERS • regulates individuals who provide services that include cutting, shampooing, and dyeing of the hair or beard	BARBERS BARBER TEACHERS BARBER SCHOOLS BARBER SHOPS	LICENSURE LICENSURE LICENSURE LICENSURE	3,646 40 4 1,288
BEHAVIORAL SCIENCE • regulates persons engaged in providing psychological, social work, and professional counseling services to the public	ALCOHOL COUNSELORS DRUG COUNSELORS PROFESSIONAL COUNSELORS PSYCHOLOGISTS SCHOOL PSYCHOLOGISTS CLINICAL SOCIAL WORKERS SOCIAL WORKERS ASSOCIATE SOCIAL WORKERS REGISTERED SOCIAL WORKERS	CERTIFICATION CERTIFICATION LICENSURE LICENSURE LICENSURE LICENSURE LICENSURE REGISTRATION REGISTRATION	125 0 655 304 19 356 69 53 728
COLLECTION AGENCIES • regulates agencies and businesses which are compensated for collecting money from third parties	COLLECTION AGENCIES SOLICITORS	LICENSURE CERTIFICATION	165 262
CONTRACTORS • regulates businesses engaged in the construction, removal, or repair of real property, such as residences, commercial buildings, and roads	CONTRACTOR A CONTRACTOR B	LICENSURE LICENSURE	8,367 12,717
COMMERCIAL DRIVER TRAINING SCHOOLS • regulates schools and instructors who provide clients with instruction in the operation of motor vehicles	TRAINING SCHOOLS INSTRUCTORS	LICENSURE LICENSURE	69 166
EMPLOYMENT AGENCIES • regulates firms and individuals who act as brokers for persons seeking jobs and employers with positions to fill	EMPLOYMENT AGENCIES EMPLOYMENT COUNSELORS	LICENSURE REGISTRATION	252 336
GEOLOGISTS • regulates individuals engaged in the study and evaluation of earthen materials and structures	GEOLOGISTS	CERTIFICATION	N/A
HAIRDRESSERS • regulates individuals who provide services that include cosmetic treatments and cutting, curling, or dressing of hair	HAIRDRESSERS BEAUTY SHOPS	LICENSURE LICENSURE	22,679 4,880
HARBOR PILOTS • regulates individuals who pilot vessels into and out of Virginia's ports	HARBOR PILOTS	LICENSURE	49

Table 1 (Continued)

<u>Board/Commission</u>	<u>regulated Occupations and Professions</u>	<u>Method of Regulation</u>	<u>Number Regulated</u>
HEARING AID DEALERS AND FITTERS • regulates individuals who fit and sell hearing aids based on audiometric measurement of a client's hearing capacity	HEARING AID DEALERS	LICENSURE	148
LIBRARIANS • ensures competency of individuals employed as full-time librarians in State-funded libraries	LIBRARIANS	CERTIFICATION	N/A
NURSING HOME ADMINISTRATORS • regulates individuals responsible for administering homes for the chronically ill and infirm	NURSING HOME ADMINISTRATORS	LICENSURE	546
OPTICIANS • regulates individuals who prepare, dispense, and fit eyeglasses or lenses prescribed by a physician or an optometrist	OPTICIANS	LICENSURE	916
POLYGRAPH EXAMINERS • regulates individuals who administer polygraph exams to determine truthfulness	POLYGRAPH EXAMINERS POLYGRAPH INTERNS	LICENSURE LICENSURE	277 50
PRIVATE SECURITY SERVICES • regulates businesses that provide various types of protective services, including armed guards, private investigators, and armored car personnel	PRIVATE SECURITY BUSINESSES QUALIFYING AGENTS OTHERS	LICENSURE LICENSURE REGISTRATION	245 322 12,000
REAL ESTATE • regulates individuals engaged in selling and renting residential or commercial property	BROKERS SALESPERSONS BUSINESSES RENTAL LOCATION AGENTS OTHERS	LICENSURE LICENSURE LICENSURE LICENSURE LICENSURE	8,584 37,408 4,208 9 16
SANITARIANS • establishes minimum qualifications to certify persons engaged in monitoring environmental health conditions	SANITARIANS	CERTIFICATION	365
WATER AND WASTEWATER WORKS OPERATORS • regulates individuals who are responsible for operating water and wastewater treatment plants	WATER WORKS OPERATORS WASTEWATER WORKS OPERATORS	LICENSURE LICENSURE	1,310 1,916
DEPARTMENT OF HEALTH REGULATORY BOARDS			
DENTISTRY • regulates individuals who provide preventive care and treatment of the teeth, gums, and oral cavity	DENTISTS DENTAL HYGIENISTS	LICENSURE LICENSURE	3,796 1,562
FUNERAL DIRECTORS AND EMBALMERS • regulates individuals and businesses that prepare the dead for burial or cremation and provide facilities for viewing the body	FUNERAL SERVICES PRACTITIONERS FUNERAL DIRECTORS EMBALMERS ESTABLISHMENTS	LICENSURE LICENSURE LICENSURE LICENSURE PERMIT	985 476 41 476
MEDICINE • regulates individuals engaged in the practice of the healing arts to diagnose, treat, and cure human ailments and diseases	PHYSICIANS OSTEOPATHS PODIATRISTS CHIROPRACTORS OTHERS	LICENSURE LICENSURE LICENSURE LICENSURE VARIOUS	14,348 128 262 208 1,757
NURSING • regulates individuals who provide care and counsel to the ill, injured, and infirm	REGISTERED NURSES PRACTICAL NURSES NURSE PRACTITIONERS NURSING PROGRAMS	LICENSURE LICENSURE CERTIFICATION ACCREDITATION	31,170 12,644 612 92
OPTOMETRY • regulates individuals who provide eye care and prescribe lenses	OPTOMETRISTS	LICENSURE	719
PHARMACY • regulates individuals who dispense, compound, and sell pharmaceuticals	PHARMACISTS PHARMACIES OTHERS	LICENSURE PERMIT VARIOUS	4,065 1,199 12,700
VETERINARY MEDICINE • regulates individuals who treat animals	VETERINARIANS ANIMAL TECHNICIANS ANIMAL FACILITIES	LICENSURE CERTIFICATION REGISTRATION	1,106 206 326

Sources: JLARC Representation of Department of Commerce Renewal Data, May 1981, and Department of Health Regulatory Boards Biennial Report, 1978-1980.

need for objective information about proposed regulations. Adoption of a regulatory approach should be based on thorough analysis of direct and indirect costs, other effects, and optional approaches. An American Bar Association committee has suggested that a "burden of proof" be imposed on those who would extend regulation into new areas. Specifically, proponents of regulation should be required to prove that the action would yield benefits greater than disadvantages.

Virginia is one of the few states that has a mechanism to provide objective information about the need for regulation. The General Assembly established the Board of Commerce and the Commission of Health Regulatory Boards to examine and make recommendations concerning the need to regulate additional occupations. The legislature has also established criteria that the review boards must consider in making their recommendations.

Both review boards have established guidelines and procedures for groups seeking regulation. Applicant groups are required to submit information about the need for and impact of the proposed regulation. The review boards then evaluate the information against the legislative criteria and make a recommendation to the General Assembly. Exhibit A depicts how one occupation became regulated in Virginia.

Delegating Legislative and Judicial Power

Most occupational and regulatory systems have been established as boards of practitioners from the regulated occupations. Practitioners have the technical knowledge to determine what standards are necessary for occupational competence and to evaluate the qualifications of applicants. Legislatures have typically delegated to these boards the authority to set standards for entry into the occupation, to approve individuals for licensure, to promulgate standards of practice, and to discipline individuals who violate board regulations.

Some experts in occupational regulation believe that these mechanisms give occupational groups an inordinate amount of discretion over who is allowed to practice and how they are allowed to practice. Although board members may be very competent practitioners, they may not be experienced as regulators. Some boards of practitioners, for example, have promulgated qualifications for obtaining and holding a license which are irrelevant to an individual's competence to practice and which do not affect the services provided to the public. In one case, a board of barbers in a northeastern state had promulgated a regulation that barber shops could not operate on Mondays. Although the regulation had a questionable relationship to practitioner competence or protection of the public, the board had revoked licenses for violation of the rule.

In balancing the need for technical expertise in occupational matters with regulatory control, state legislatures have adopted various means of review and oversight. In some states, such as New York, Illinois, and Florida, practitioner boards are advisory and regulations

Exhibit A

THE CREATION OF A REGULATORY BOARD

Typically, regulatory legislation is enacted in the request of occupational groups. These groups are required to submit information about the need for and impact of proposed regulation. The review board of the appropriate regulatory agency then evaluates the proposal and makes recommendations to the General Assembly.

The Case of Geology

Legislation was introduced in the 1973, 1974, and 1975 sessions of the General Assembly to create a regulatory board to license geologists. The General Assembly deferred action pending a study of the issue by the Commission of Professions and Occupations (now the Board of Commerce). The legislation was sought by the Virginia Institute of Professional Geologists.

The Commission conducted a study with assistance from the Board of Architects, Engineers and Land Surveyors, and the geologists' association. A 1976 report of the Commission recommended that geologists be licensed and that only licensed geologists be allowed to practice in Virginia. However, the proposed legislation failed to pass the General Assembly.

In 1979, the Virginia Institute of Professional Geologists approached the Board of Commerce and again requested that geologists be regulated. The Board established a subcommittee to review the need for regulation. The subcommittee's study included analysis of a substantial amount of information and data submitted by the geologist's association.

In 1980, the Board of Commerce recommended that a regulatory board be established to certify geologists. Under this method of regulation, the board would set standards for and examine individuals who wanted to be certified. Anyone would be allowed to practice geology, but only those certified by the board could use the title "Virginia certified geologist."

A controversy that arose over the Board of Commerce recommendation was the lack of a "grandfather" clause in the proposed statute. Although the legislation would not exclude any geologist from practicing, the geologists' association wanted to grandfather all practicing geologists for certification, even though some could not meet the entry standards for certification. At the request of the association, the Board of Commerce recommended that a grandfather clause be included.

The 1981 General Assembly, acting on the recommendations of the Board of Commerce, created the Board of Geology to certify qualified geologists and grandfathered all practicing geologists.

Source: Compiled by JLARC from legislative documents and DOC reports.

are promulgated by an agency director or central board. In 35 states, legislatures have established committees to review and sometimes approve all proposed agency regulations. At least two states, California and Tennessee, have executive agencies that review and approve regulations. The Virginia General Assembly has recently adopted provisions for the legislative review of administrative regulations. There are, however, unresolved constitutional issues regarding the authority of legislatures to review and approve the rules of administrative agencies.

Centralization

Although legislatures have generally created independent boards to regulate occupations, there has been some interest in placing boards under a central agency of state government. According to the Council of State Governments, centralization has usually come about as part of an overall reorganization of state government. In such reorganizations, agencies are grouped into broad functional areas, the number of agencies is reduced, single lines of authority are established, and departments are administered by single administrators rather than boards or commissions.

Centralization is intended to bring about greater efficiency and consistency in occupational regulation. Since many board functions are similar--processing applications, giving exams, collecting fees, and arranging for board meetings--centralized systems should be able to handle these responsibilities more economically and effectively. Moreover, centralization encourages the sharing of information about regulatory procedures among different boards.

Centralized occupational regulation has spread from five states in 1930 to 16 states in 1969 to 30 states currently. There are several popular models for centralization (Table 2), ranging from an agency which provides little more than office space and routine clerical support to an agency in which regulatory authority is vested in a single administrator and boards are advisory.

The predominant centralized model is similar to that which exists in Virginia, where boards have independent decisionmaking authority but the central agencies have broad control over staff, budgets, records, and enforcement activities. Eighteen states currently have regulatory systems of this type.

Reviewing Occupational Regulation

The proliferation of regulatory legislation and the growing number of occupational groups seeking regulation have generated considerable attention at both the federal and state levels. In particular, this attention reflects a growing awareness of the costs and impacts of regulation.

Table 2

ORGANIZATIONAL MODELS FOR OCCUPATIONAL REGULATION

State systems of occupational regulation have taken various forms across the nation, ranging from completely autonomous boards to centralized agencies. The trend since 1930 has been in the direction of centralization.

	Model	Number of States
A	Boards are completely autonomous. They hire their own staff, maintain their own offices, receive and investigate complaints, and conduct examinations. Each board sets qualifications for licensing and standards for practice, collects fees, and maintains financial records.	20, including Kentucky, North Carolina, and West Virginia
B	Boards are autonomous, but less so than Model A. They set policy and determine standards regarding licensing and professional practice. The board has responsibility for hiring and supervising its staff. A central agency is established for such housekeeping matters as providing space, answering routing inquiries, collecting fees, and issuing licenses and renewals.	6, including Georgia
C	Boards are autonomous and have decisionmaking authority in many areas. However, the central agency's powers go beyond housekeeping. For example, board budgets, personnel, and records may be subject to some degree of control by the agency. Complaints and investigations and adjudicatory hearings may be handled by a central staff, even when boards continue to make final decisions with respect to disciplinary actions.	18, including Virginia, Delaware
D	Boards are not fully autonomous; that is, they do not have final decisionmaking authority on all substantive matters. While the central agency provides a wide range of services, boards may be delegated responsibility for such functions as preparing exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions. A crucial distinction, however, is that certain board actions are subject to review by the central agency.	4: Connecticut, Florida, Utah, and Washington
E	The regulatory system is run by an agency director, commission, or council, with or without the assistance of a board. Where boards do exist, they are strictly advisory. The agency director, commission, or council has final decisionmaking authority on all substantive matters. Boards may be delegated such functions as preparing exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions.	2: New York and Illinois

Source: The Council of State Governments, *Centralizing State Licensure Functions*, 1980, and ILARC telephone survey.

Federal Review. Although occupational regulation has historically been the province of state government, and federal courts have generally upheld state licensing laws, the courts have ruled that certain board practices and specific regulations are invalid because they violate constitutional rights of free speech, due process, and equal protection, or because they violate anti-trust statutes.

Several rulings have involved first amendment protections. In *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council*, the Supreme Court ruled that the State ban against price advertising by pharmacies violated the first amendment right to free speech and the right to know.

The courts have also used the equal protection clause of the fourteenth amendment to void actions of state regulatory bodies. In *Schwartz v. Bar Examiners*, the Supreme Court held that boards could not use arbitrary or discriminatory standards in granting or revoking licenses. However, the courts have been reluctant to substitute their judgement for that of the state legislatures in establishing regulatory criteria.

Recently federal courts have begun to apply the federal anti-trust statutes to specific regulatory practices but not to licensing laws *per se*. In *Goldfarb v. Virginia State Bar*, the Supreme Court ruled that minimum fee schedules required by bar associations were price-fixing mechanisms and professional groups using such devices were subject to the provisions of the Sherman Anti-Trust Act.

Federal agencies have also reviewed state regulatory practices. The U. S. Department of Labor has conducted or funded several studies to determine the impact of occupational regulation. One recently completed study showed that states which restrict mobility of practitioners--through a lack of reciprocity agreements with other states, for example--have fewer practitioners per capita and higher costs for services than states with few or no restrictions. Also, the Federal Trade Commission has studied restrictions on price advertising and competitive bidding. The FTC has promulgated regulations that preempt state control over certain aspects of the practices of optometry, opticianry, hearing aid sales, and funeral services.

The Anti-trust Division of the U. S. Department of Justice has begun to investigate restraint-of-trade practices within professional groups. In recent years the department has filed suit against several professional associations for violating the Sherman Anti-Trust Act. The department also brought legal action against a state board on the grounds that the board's rules against competitive bidding violated the anti-trust laws.

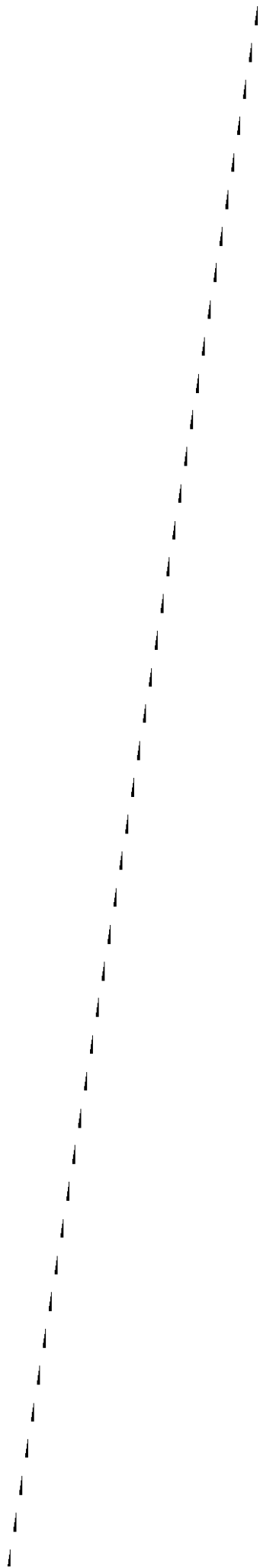
State-Level Review. In the mid-1970s, state legislatures attempted to meet their oversight responsibilities by enacting "sunset" legislation, which set specific termination dates for programs and agencies. Prior to termination, or "sunset," the legislature would

review the need for the agency and identify areas where modifications and improvements could be made. By 1980, 34 states had enacted some form of sunset law.

The focus of many sunset laws was on regulatory agencies, particularly licensing boards. Although legislative staff evaluations often recommended termination or substantial deregulation of an occupational group, few boards were actually abolished and very little deregulation took place. Legislators faced substantial opposition from the occupational groups over recommendations for termination or modification of the regulatory structure.

Proponents of sunset laws argue that even though large-scale terminations did not take place, substantial improvements in board operations occurred as a result of the evaluations. Critics argued that the cost of the reviews and extra workload imposed on legislators were not justified by the results. In several states sunset laws themselves faced increasing scrutiny, and there were moves to repeal several. Nevertheless, legislatures have generally supported the notion of periodic reviews, and sunset has experienced a recent resurgence.

Virginia's General Assembly reviewed the sunset concept in 1978 and adopted the Legislative Program Review and Evaluation Act. The act resembles sunset in many ways but has two important distinguishing characteristics. First, reviews are not limited to regulatory boards; they extend to all areas of State government. Second, the act sets no mandatory termination dates--relying instead on periodic legislative review and evaluation.



II. RULEMAKING BY STATE BOARDS

The General Assembly has established practitioner boards to protect the public by ensuring that only qualified individuals practice occupations. Because of board members' occupational expertise, boards have been delegated extensive powers to establish (1) criteria for entry into the occupation, (2) standards for practicing the occupation, and (3) grounds for disciplinary action. Such standards are established through administrative rules. An administrative rule is an agency statement that has general applicability and that implements, interprets, or prescribes law or policy. Rules are promulgated within parameters defined by the General Assembly.

Based upon criteria specified in Title 54 and the Evaluation Act, JLARC reviewed the rules of a random sample of nine regulatory boards to determine the extent to which they are relevant to occupational competence, understandable, measurable, and consistent with legislative intent and a board's mission. Additional examples were drawn from the Commission's January 1982 report on the performance of regulatory boards.

The Commonwealth has recently taken steps toward improving rulemaking processes through requirements in the Administrative Process Act for public hearings and economic impact statements. However, differences remain among boards in the statutory framework for rulemaking, and some boards have not consistently or adequately complied with APA requirements. As a result, rules are not published in a standard or easily understood format and central agency resources are not sufficiently used to support the rulemaking process. In the absence of specific guidelines for rulemaking and a mechanism for systematic oversight, JLARC found that boards have promulgated some rules that appear to exceed their legislative authority. To a significant degree, the problems apparent in some existing rules can be avoided in the future. Some form of regular oversight of rulemaking appears necessary to ensure the public that the State's regulatory power is being used appropriately.

DEVELOPMENT OF RULES

Administrative rules have the force and effect of law. In order for rules to be an appropriate implementation of legislative direction, they should be developed, promulgated, and applied consistently among all boards. A consistent pattern for administrative rules would facilitate oversight at the board level and beyond, and would promote an accurate interpretation and understanding of the regulation.

Title 54 of the *Code of Virginia* provides the statutory framework for occupational regulation, and the Administrative Process Act (APA) defines the process for agency promulgation of rules. Considerable differences exist within Title 54, however, in the clarity of legislative intent and the degree of legislative involvement in regulatory detail for the boards within DOC and DHRB. Moreover, as currently implemented by boards, public hearings and economic impact statements required by the APA do not generally provide adequate information on the impact of proposed rules. More attention needs to be given to ensuring that proposed rules are thoroughly assessed throughout the developmental process, and that published rules appear in a form that is useful and understandable to all users.

Statutory Framework

Title 54 of the *Code of Virginia* contains enabling legislation for each board, the two administrative agencies, and two review boards, and establishes general intent for the boards under DOC. For each board, the *Code* may contain various provisions--from defining the scope of practice to specifying the grounds for disciplining a licensee. Figure 3 illustrates the considerable differences in the regulatory legislation for the various boards.

Major changes in Title 54 were made following a legislative study in 1974 which recommended giving boards greater discretion in regulatory matters. In its report, the Virginia Advisory Legislative Council (VALC) noted that by including detailed regulatory provisions in the *Code*, legislators were required to spend substantial amounts of time dealing with requests for relatively minor changes. VALC recommended that the legislature provide a broad regulatory framework in the *Code* and that the boards operationalize the framework through administrative rules.

In 1974, the enabling statutes for most of the commercial boards were stripped of details such as specific entry criteria, examination requirements, and grounds for disciplinary action. The boards were given the general authority to promulgate regulations in these areas and were also required to adopt, as regulations, the regulatory requirements in the *Code* prior to recodification. However, the 1974 amendments to Title 54 applied only to the commercial boards within DOC, and not to the health regulatory boards which were independent agencies at the time.

The commercial boards, therefore, have much broader authority to set entry, practice, and discipline criteria than the health boards. In contrast to the general statutes for the commercial boards, there are no general provisions in the *Code* pertaining to the powers and duties of the health regulatory boards. The statutory base for each of the seven health regulatory boards is very detailed, with statutes specifying entry criteria, standards of practice, and grounds for discipline for each occupation. Each chapter contains all the relevant legislation for each occupation.

Figure 3

LEGISLATIVE PROVISIONS FOR REGULATORY BOARDS IN VIRGINIA

Board/Commission/Committee	Scope of Practice	Composition of Board	Powers and Duties of Board	Method of Regulation	Entry Criteria	Standards for Practice	Grounds for Disciplinary Action
Department of Commerce							
Accountancy		•		•			
APELSCLA	•	•	•	•			
Athletic Commission	•	•	•	•	•	•	•
Audiologists & Speech Pathologists	•	•		•			
Barbers	•	•		•			
Behavioral Sciences	•	•	•	•			
Collection Agencies	•	•		•			
Contractors	•	•	•	•			•
Driver Training Schools	•	•	•	•			
Employment Agencies	•			•	•		•
Hairdressers	•	•		•			
Harbor Pilots		•	•	•	•	•	•
Hearing Aid Dealers & Fitters	•	•		•			
Librarians	•	•		•	•		
Nursing Home Administrators	•	•		•			
Opticians	•	•		•			
Polygraph Examiners	•			•			
Private Security Services	•			•			
Real Estate	•	•	•	•	•	•	
Sanitarians	•	•					
Water and Wastewater Operators	•	•		•			
Geologists	•	•		•	•		•
Department of Health Regulatory Boards							
Dentists	•	•	•	•	•	•	•
Funeral Directors and Embalmers	•	•	•	•	•	•	•
Medicine	•	•	•	•	•	•	•
Nursing	•	•	•	•	•		•
Optometry	•	•	•	•	•	•	•
Pharmacy	•	•	•	•	•	•	•
Veterinary Medicine	•	•	•	•		•	•

Source: Title 54, Code of Virginia.

Because the policy and general provisions for occupational and professional regulation were adopted prior to creation of DHRB, their applicability to the health boards has been subject to question. However, based on the VALC study and the text of the statutes, these sections of Title 54 embody the regulatory intent of the Commonwealth.

The General Assembly may wish to clarify the applicability of the general provisions of Title 54 to all boards and to consider recodifying the statutes for the health boards to reduce the detail and provide specific authority for rulemaking in approved areas. This would create a consistent policy for the Commonwealth, relieve the General Assembly from having to act on regulatory details, and increase the flexibility of boards to meet changing needs.

Compliance with the APA

In accordance with the APA, boards must subject proposed rules to public scrutiny by holding a public hearing, identifying the potential economic impacts of proposed rules, and citing the authorizing sections of the Code to ensure consistency with legislative intent. These provisions of the APA apply to all administrative rules except those promulgated, with the approval of the Governor, for emergency situations of limited duration. However, JLARC found that, as implemented, the mechanisms of public hearing and economic impact statements were of limited value in assessing the actual potential of new rules. Moreover, boards did not regularly comply with the requirement for citing the Code.

Public Hearings. Few changes in rules result from public hearings, and most testimony is from practitioners, not the general public. Problems appear to involve inadequate notice and the inability of the public to recognize the broader impacts of proposals that appear to apply only to current licensees. According to a JLARC survey of board members, most changes in regulations are proposed by licensees or by board members.

JLARC reviewed the minutes and transcripts of ten public hearings since 1975 held by the nine boards in the review sample. In no instance did a member of the general public or a consumer organization speak. Most testimony came from practitioners, who were typically concerned about adverse economic impacts of proposed rules on licensees. Several complaints were made, however, about inadequate notice to prepare for the hearing and the failure of some boards to have accurate and sufficient copies of proposed rules for distribution prior to and during the public hearings. Recent changes in the APA should alleviate the problems associated with timely notification. The required time for notification of public hearings has been increased from 14 to 60 days.

DOC and DHRB should take steps to ensure that accurate copies of proposed regulations are available for public inspection. The

agencies should also increase public information efforts to secure public involvement in hearings.

Impact Statements. The usefulness of public hearings and of board member assessment of proposed rules could be greatly enhanced by preparation of more informative economic impact statements. The APA requires agencies which promulgate regulations to prepare economic impact statements detailing the number of people affected and the projected costs of implementation of and compliance with the regulations. Yet, the impact statements reviewed by JLARC generally did not include information other than changes in fees for licensees or increased administrative costs.

What appears on the surface to be a simple change in advertising practice can generate substantial controversy and also may involve extensive financial impact, as alleged in several legal actions concerning a proposed regulation of the Real Estate Commission.

In 1980, the Real Estate Commission revised its regulations and adopted a regulation regarding the manner in which franchised real estate brokers could advertise.

Even though the regulation would be likely to require most of the 165 franchised brokers to modify their signs and advertising, the impact statement contained no comprehensive estimate of the cost of complying with the regulation or potential impact on consumers. The impact statement contained testimony from two franchised brokers on the cost to their firms of complying. Cost estimates may vary considerably among firms, however.

The proposed rule has since been the focus of prolonged litigation by franchise dealers who claim that compliance will involve considerable cost and that the rule is irrelevant to protection of the public.

The direct and indirect effects of proposed regulations on the number of practitioners and on costs to consumers are not always readily apparent. More stringent educational or experience requirements for licensure, for example, might discourage some individuals from entering the occupation and increase the costs of becoming licensed. These two effects could raise costs to consumers by limiting the number of practitioners and increasing the educational costs to be amortized by practitioners.

The Federal Trade Commission (FTC) has conducted an extensive analysis of the relationship between optometry regulation and the cost and quality of optometric services. The FTC found that certain restrictions on commercial practices (such as controls on advertising and limiting practices in commercial settings) increased the costs of

optometric goods and services and decreased accessibility. Optometrists in cities with restrictive regulation were found on the average to charge significantly more for services than optometrists in non-restrictive cities. The FTC found no statistical differences between the quality of services delivered in restrictive versus non-restrictive cities. However, the findings of the study have been very controversial, especially with optometric professional associations.

While the total impact of proposed regulations on costs and labor supply may be difficult to estimate precisely, boards should adhere to basic guidelines and standard formats for preparing impact statements, utilizing the best available information and reasonable estimates of the probable impacts. The Board of Commerce and the Commission of Health Regulatory Boards should develop guidelines to be followed by all boards in preparing impact statements. Included in the statements, to the extent possible, should be the number of practitioners affected, number of consumers potentially affected, the anticipated impact on the labor market for that occupation, increases in direct cost to practitioners, potential indirect costs to consumers, the effect on other occupations, and additional administrative costs to the boards and agencies.

Code Citations. To ensure that each regulation has a basis in statute, the APA requires that each rule be referenced to the section of the *Code of Virginia* which authorizes it. However, as shown in Table 3, few boards comply consistently with this requirement.

Table 3

BOARD COMPLIANCE WITH
APA REQUIREMENT FOR CODE CITATIONS

<u>Board Procedures</u>	<u>Number of Boards</u>
Specific code reference for each regulation	3
One general reference for all regulations	19
No code reference	6

Source: Board regulations.

The impact of failure to reference the *Code* can be seen in the number of regulations promulgated by boards that are beyond their statutory authority. In JLARC's review of regulations, six of the nine sample boards had rules for which there was no apparent authority. Five of those six boards did not adequately reference the statutory authority for their regulations. The lack of statutory authority for some board regulations will be addressed later in this chapter.

Boards should identify the authorizing section of the Code for each regulation. Board staff should work with the assistant attorneys general to develop a proper format and procedure for determining the proper reference and for determining the authority of the board.

Format of Administrative Regulations

Since administrative rules are intended to implement legislation and to inform applicants and practitioners of the standards against which they will be measured, these rules should be understandable, concise and in a usable format. Unlike many states, Virginia does not have an administrative code which specifies a uniform drafting style and format for regulations. Each board, therefore, devises its own. Although the complexity and volume of regulations varies among boards, most formats are complex and difficult to follow.

Substantive Volume and Complexity of Regulations. The volume of regulations varies considerably among boards, and the actual number of regulatory criteria may greatly exceed the regulations given identification numbers by the boards. Typically one numbered regulation may include several unrelated requirements (entry criteria, for example, may be scattered throughout the entire set of regulations), and applicants may have to check both statutes and regulations to determine the full range of applicable criteria.

The sheer volume of board regulations in terms of the number of regulations involved is shown in Table 4. The Board of Optometry,

Table 4

VOLUME OF BOARD REGULATIONS

	(1) Number of Official Regulations	(2) Number of Substantive Provisions	Complexity Index* (Col. 2 ÷ Col. 1)
Collection Agencies	20	61	3.1
Driver Training Schools	18	54	3.0
Hairdressers	31	100	3.1
Private Security	20	60	3.0
Librarians	12	14	1.2
Sanitarians	13	24	1.9
Polygraph Examiners	19	64	3.4
Medicine	64	236	3.7
Optometry	7	59	8.4

*The complexity index indicates the average number of substantive provisions in each official regulation.

Source: JLARC Regulation Review. Based on nine sample boards.

for example, has promulgated seven numbered regulations which contain almost 60 substantive provisions. Other boards may promulgate more numbered regulations, but each rule may deal with fewer substantive matters. Regulations with fewer substantive provisions are less complex.

Some boards promulgate multiple sets of regulations, as do the Board of Behavioral Science and its three professional boards.

The Board of Behavioral Science and its member boards and committees have the most voluminous regulations among Virginia's boards. These four boards and two advisory committees have promulgated ten different sets of regulations of almost 100 pages. Each person licensed or certified by the board would be covered by at least three different sets of regulations.

A certified alcoholism counselor, for example, is subject to regulations of (1) the Board of Behavioral Science, (2) the Board of Behavioral Science promulgated for the Alcoholism Counselor Certification Committee, and (3) the Alcoholism Counselor Certification Committee.

Format and Complexity of Regulations. The differences in the format of regulations among boards and the complexity of language are illustrated in Exhibit B. Although most boards publish relevant statutes in the same pamphlet as their regulations, all related criteria in statute or regulations are not grouped together. Moreover, six of the nine boards reviewed by JLARC had further complicated matters by repeating statutory language in their regulations. An applicant may need to search through the section in the Code and several numbered regulations to learn all the substantive areas of entry, discipline, or business practices. For example, applicants for licensure of a commercial driver training school must be aware not only of regulation POR 20-1 "Application for Licensure," but also of POR 20-6 through POR 20-10, and POR 20-15, which detail the licensure requirements for schools. Applicants must also be aware of the provisions of Section 54-145.20 of the Code of Virginia which requires the State Department of Education to certify driver training courses offered by schools.

Development of new rules could avoid the problems in existing rules. Each board should repromulgate its existing rules in a more understandable format that (1) organizes rules by major categories such as entry, business, and disciplinary criteria; (2) uses simpler language; (3) limits numbered regulations to related provisions; and (4) distinguishes by type-face, or some other means, between statutory and regulatory requirements. Then as new rules are proposed, they could be formatted in the same style and reviewed against existing rules to avoid redundancy, contradictions, and unnecessary expansion of regulatory criteria.

Exhibit B

EXAMPLES OF BOARD REGULATIONS

Currently, regulations differ from board to board in regard to format and complexity of language. Some boards tend to write few regulations with many provisions under each. Others tend toward many numbered regulations, each dealing with fewer substantive matters.

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

Article XVIII FAIR TRADE PRACTICES

1. Solicitation. Business should not be solicited, directly or indirectly, by any means other than by legitimate advertising not forbidden by law or these rules. The offering or making of any payment or allowance or rebate, refund, commission, gratuity, credit, unearned discount or excess allowance as an inducement to employment shall be deemed improper solicitation. The offer or payment of money or other valuable consideration to any burial association, person, firm or corporation for the purpose of producing or procuring business shall be deemed improper solicitation. No person engaged in any manner in the care and disposition of the dead shall organize, promote, participate in or be a party to any enterprise, plan or scheme that restricts or has for its purpose the restriction of the freedom of choice in the open market of a person or persons having the legal right of such choice regarding contracts, purchases, or arrangements with reference to any part of a funeral service, or interferes with free and open competition in this Commonwealth or imposes upon the public in any manner.

BOARD OF EXAMINERS OF PROFESSIONAL HAIRDRESSERS

POR.13-14. Grounds for renovation or suspension of license. -(a) The Board shall revoke or suspend the license of any person for any of the following causes:

1. If such person is or becomes incompetent to practice as a "professional hairdresser," through addictions to narcotics, alcohol or otherwise;
2. If such person is guilty of fraud or deceit in the practice as a professional hairdresser or in complying with, or in securing any of the benefits provided by the provisions of Chapter 6.1, Title 54, Code of Virginia or these regulations.
3. If such person shall practice as a professional hairdresser while suffering any infectious or contagious disease in a communicable stage;
4. If such person violates, induces others to violate or cooperates with others in violating any of the provisions of Chapter 6.1, Title 54, Code of Virginia of these regulations, or
5. If such person violates, induces others to violate or cooperates with others in violating any lawful rule or regulation of the State Department of Health governing standards of health and sanitation of the establishment in which any professional hairdresser shall practice or offer to practice.

Source: JLARC review of Board regulations.

The General Assembly may wish to require each board to reformat its existing regulations and to promulgate new regulations in a consistent format. The General Assembly may also wish to study the feasibility of adopting an administrative code for the Commonwealth, although the expense involved may not be beneficial at this time. In addition to a standardized drafting style and format, such a code would provide a single source of regulations and a system for referencing and indexing criteria.

Use of Central Resources

Full use has not been made during the rulemaking process of central agency and review board resources to provide the perspective of persons who are outside the profession but who are familiar with regulatory issues. Yet DOC and DHRB staff, assistant attorneys general, and BOC and CHRB members are in positions to develop considerable expertise. In fact, most board members responding to a JLARC survey felt that BOC and CHRB should regularly review proposed rules.

No formal policies exist on the role of agency staff in the process or for the sharing of regulatory knowledge among boards. Assistant attorneys general assigned to the agencies provide legal advice to the boards upon request. And although BOC members have liaison assignments to one or more boards to review proposed regulations, some boards see this as an infringement on their rulemaking authority. At best, BOC's authority to review rules is unclear and CHRB is not involved in reviewing proposed rules at all.

More systematic use of central resources would require cooperative action by the regulatory boards and the departments and possible statutory changes in the composition and authority of the review boards. DOC and DHRB, in conjunction with the regulatory boards, should develop procedures for staff participation in the rulemaking process. This could include drafting of rules within a consistent format and researching a checklist of questions on potential economic impacts. As part of this process, the assistant attorneys general should comment on the statutory authority, legality, enforceability, and potential restrictiveness of proposed rules.

The General Assembly may wish to consider granting BOC and CHRB explicit legislative authority to review regulations. These boards could review proposed regulations during the drafting stage for their potential impact on consumers. Furthermore, BOC or CHRB representatives could testify at the public hearings on proposed regulations concerning the cost and availability of services to the public.

PROBLEMS WITH EXISTING RULES

Shortcomings in the process for developing rules manifest themselves in existing regulations. For the most part, boards have

used their rulemaking authority appropriately. However, an examination of current regulations showed that problems do occur. It is the policy of the Commonwealth that no regulation be imposed upon a profession or occupation "except for the exclusive purpose of protecting the public interest" (§54-1.17). Although all rules are restrictive to some extent because they impose conditions on persons who wish to practice an occupation, they should not unreasonably circumscribe who may practice an occupation or how it may be practiced.

JLARC's staff systematically examined the administrative rules of nine randomly selected boards and, in addition, drew upon the content of the Commission's January 1982 report on the performance of all 29 regulatory boards. Because board regulations vary greatly in the number of substantive provisions grouped under a single numbered item, each substantive portion of a board's regulations was treated as one rule.

Board rules were analyzed by a systematic process. First, all existing rules were reviewed to determine if the type of requirement was specifically authorized by statute and was within the prerogative of a regulatory board. Then rules in the major categories of (1) entry criteria, (2) practice standards, and (3) renewal and discipline were assessed according to specific criteria such as the applicability of educational requirements to actual job skills, the consistency of requirements for applicants and practitioners and the degree of ambiguity in standards against which individuals are measured. (The statutory basis for these criteria is shown in Table 5.)

Generally, as shown in Table 6, about one-third of all rules deal with minimum qualifications, and another third address practice standards and disciplinary criteria. However, as shown in Table 7, each of the nine sample boards had promulgated regulations for which they had no statutory authority or which appear to go beyond the intent of the General Assembly in restricting entry into or practice of an occupation. Regulations were also found which merely repeated what was already in statute.

Regular and systematic review of existing regulatory rules does not occur, although boards within the Department of Commerce are required to review their rules annually. Boards within DHRB have no review requirement. It appears, however, that periodic reviews according to specific and uniform criteria could ensure that existing rules are still needed and are consistent with the policy of the Commonwealth.

Statutory Authority

The first step of JLARC's analysis was to assess the statutory base for each regulation. Since administrative rulemaking is a function delegated by the General Assembly, boards can make regulations only in areas where they have received express statutory authority. The standard used to judge authority was drawn from a report issued by

Table 5

STATUTORY CRITERIA FOR RULE REVIEW

<u>Section(s) of Code</u>	<u>Review Criteria</u>
§§54-1.28, 54-145.12, 54-291, 54-376, 54-729.30, 54-917	Grant boards authority to promulgate regulations
§§54-1.28:1 through 54-1.28:9	Grant boards authority and standards for promulgating regulations regarding entry qualifications, examinations, competency and discipline
§54-1.17	Specifies that regulations are to be for exclusive purpose of protecting the public interest
§30-68	Specifies evaluation criteria that require programs and policies to: <ul style="list-style-type: none">-demonstrate valid public need-meet legislative intent-be in the public interest-define objectives

Source: *Code of Virginia*.

the National Association of Attorneys General, which concluded that boards can promulgate rules only within the scope of standards established by the legislature. The report further stated that rules should be promulgated only when there is substantial evidence that they are necessary to meet demonstrated problems or to comply with legislative mandates.

Section 54-1.28 of the Code grants regulatory boards the power to promulgate regulations to "assure continued competency, to prevent deceptive or misleading practices . . . and to effectively administer the regulatory system" established by statute for that board. Therefore, rules should be promulgated only in the areas specified by the enabling legislation for the board or in the areas explicitly authorized by Section 54-1.28.

Six of the nine boards in the sample reviewed by JLARC had promulgated some regulations for which they appeared to have no statutory authority. Problems appeared to exist especially with rules promulgated after the 1974 recodification of Title 54, and rules dealing with temporary licenses.

Table 6

SCOPE OF BOARD REGULATIONS

Board	Type of Regulation							Total
	Administration	Entry Qualifications	Exams	Practice Standards	Accreditation	Enforcement/ Discipline	Misc.	
Collection Agencies	31%	25%	0%	13%	0%	30%	1%	100%
Driver Training Schools	17	22	0	30	0	28	3	100
Hairdressers	11	16	10	2	53	6	3	100
Private Security Services	10	32	2	7	0	30	19	100
Librarians	14	36	29	0	0	21	0	100
Sanitarians	22	43	13	0	0	22	0	100
Polygraph Examiners	6	17	2	5	45	19	6	100
Medicine	41	29	19	5	0	4	2	100
Optometry	14	32	5	34	0	12	3	100
All Sample Boards	18%	28%	9%	11%	11%	19%	4%	100%

Source: JLARC review of Board regulations.

Table 7

TYPES OF PROBLEMS FOUND IN BOARD REGULATIONS

	Statutory Authority	Unnecessary Limits				Percent of Board Regulations with Problems
		Entry	Practice	Discipline	Repeats Code	
Collection Agencies		X		X	X	16%
Driver Training Schools	X	X	X	X		30
Hairdressers	X	X	X	X		65
Librarians	X	X			X	57
Private Security Services		X	X		X	17
Polygraph Examiners	X	X		X	X	19
Sanitarians		X	X			25
Medicine	X	X		X	X	14
Optometry	X	X	X	X	X	24

"X" indicates board had promulgated regulations with problems in the areas indicated by the column heading.

Source: JLARC review of Board regulations.

The technical appendix to this report includes a complete list of regulations in the sample boards which appear to be without statutory authority. Out of 672 rules, 67 were in this category. Table 8 provides examples of these rules.

Problems with Recodification. Some regulations were apparently promulgated in error because the boards did not understand their responsibilities for implementing regulations after the recodification of Title 54 in 1974. Under the recodification, boards were

Table 8

EXAMPLES OF RULES WITH NO STATUTORY AUTHORITY

<u>Boards</u>	<u>Regulation</u>	<u>Content</u>
Driver Training Schools	20-17	Establishes criminal penalties of fines and imprisonment for violation of laws or regulations
Hairdressers	13-19 to 13-28	Establishes a licensure mechanism for beauty schools and instructors
Librarians	2	Establishes a voluntary certification program for libraries which are exempt from the licensing law.
Polygraph Examiners	22-23(A) to (C)	Establishes qualifications for students in polygraph schools
Medicine	IX-4	Provides for issuance of provisional license to podiatrists' and physicians' assistants
Optometry	II-K	Implies that unlicensed persons can practice optometry under supervision of a licensed optometrist

Source: JLARC Regulation Review. Based on nine sample boards.

required to adopt former Code provisions as administrative rules. According to the former director of the Department of Commerce, the boards were not given much guidance regarding the difference between legislative and administrative prerogatives. Moreover, during the recodification, some provisions of the Code that agency officials felt should have been reserved to the General Assembly were apparently omitted from the Code. Boards that incorporated all the former Code provisions into their rules, therefore, may have adopted in regulation what may have been properly classified as law. Two regulations incorporated by the Board of Commercial Driver Training Schools illustrate this point:

The Board of Commercial Driver Training Schools has a regulation which appropriates fees paid by licensees to the board. But only the General Assembly has power to appropriate revenues received by State agencies.

The board also has promulgated a regulation that sets a penalty of a fine and imprisonment for violation of the law or regulations. However, the authority to set penalties for violations of criminal statutes lies with the legislature.

Regulations should not include provisions that should be in law, because the authority of a board to promulgate and change those provisions is misrepresented.

Temporary Permits. Several boards have correctly implemented a temporary permit mechanism as authorized by law. In at least four cases, however, boards have apparently exceeded their statutory authority by issuing permits for which there is no explicit authorization or by using permits for purposes other than those specified in statute (Table 9).

It is the General Assembly's prerogative to specify the degree of regulation for those who practice a regulated profession or occupation. Accordingly, provision is generally made in statute for granting full licensure or certification to individuals who meet board criteria and for issuing temporary credentials under specified circumstances.

In some cases, as illustrated below, boards have established unauthorized temporary permits by continuing, in regulation, permits that had been authorized by statute prior to the 1974 recodification. However, in the absence of current specific authorization in the Code, a board may not decide on its own to issue temporary permits.

Prior to 1974, the Board for the Certification of Water and Wastewater Works Operators could issue temporary operator permits in emergency situations and to operators-in-training. The temporary licenses were authorized by §54-573. However, this

Table 9

EXAMPLES OF BOARDS WHICH ISSUE TEMPORARY LICENSES

<u>Board</u>	<u>Occupation</u>	<u>Express Statutory Authority</u>
Dentistry	Dentist	\$54-152(1)
	Dental Hygienist	\$54-152(1)
Medicine	Physician Assistant	None
	Podiatrist Assistant	None
Nursing	RN	\$54-367.36
	LPN	\$54-367.36
Veterinarians	Veterinarian	None
	Animal Technician	None
Audiology & Speech Pathology	Audiologist	None
	Speech Pathologist	None
Behavioral Science	Psychologist	\$54-948
Contractors	Class A Contractor	\$54-129.1
Hearing Aid Dealers & Fitters	Hearing Aid Dealer and Fitter	\$54-524.110
Private Security Services	Security Guard	\$54-729.19
Water & Wastewater Works Operators	Water Works Operator	None
	Wastewater Works Operator	None

Source: Board regulations and *Code of Virginia*.

*section was repealed as part of the recodification
and the board adopted it as a regulation.*

*Existing statutes give the board authority to
license only operators. There is no reference to
temporary permits or operators-in-training.*

In contrast, the Board for Hearing Aid Dealers and Fitters appears to be using temporary permits in a manner inconsistent with the intent expressed in the *Code*.

A temporary permit is defined in the board's statutes as being issued to an applicant in training to become a licensed hearing aid dealer and fitter. However, the linkage between the temporary permit and licensure is not established in the board's regulations.

Moreover, most holders of permits do not appear serious about becoming licensed. Since 1975, only 35 of the 227 persons who have been issued temporary permits have taken the licensure exam. The permit system, in effect, allows persons who do not meet the board's regular entry criteria to be employed as dealers and fitters for as long as two years. Temporary permits should be authorized only to persons in bona fide training as authorized by the Code.

Boards should not promulgate regulations unless statutory authority is clear. If these regulations are deemed necessary, authority should be requested from the Virginia General Assembly.

Entry Criteria

JLARC staff next examined the entry criteria established in regulation by the nine sample boards. The General Assembly has directed the boards to protect the public by establishing standards of practitioner competence and integrity. Further, the General Assembly has acted in two specific areas to prohibit implementation of restrictive entry requirements:

- Section 54-1.21 prohibits boards from refusing to grant a license solely on the basis of a prior conviction unless the offense relates directly to the occupation.
- Section 54-83.22 prohibits the Board of Barber Examiners from refusing to issue a license solely for failure to produce a certificate from a physician that the applicant is free from infectious diseases.

JLARC's review of regulations found that each of the nine sample boards had promulgated at least one entry criterion where the degree of restriction was questionable. Almost one-fourth of the regulations pertaining to entry criteria were unclear, appeared to be irrelevant to practitioner competence, or were not equal for all applicants (Table 10). Corroborating examples from other boards indicate that the problem is not limited to the boards in the sample. Appendix A lists all of the entry regulations of the sample boards which appear to go beyond the intent of the legislation. Of 223 entry regulations, 51 were in this category.

Table 10

DEFICIENCIES IN RESTRICTIVE ENTRY CRITERIA

<u>Type of Deficiency</u>	<u>Number</u>	<u>Percent</u>
Not clearly defined	17	33%
Not related to occupational competence	24	47
Unequal requirement for out-of-state applicants	5	10
Other	5	10
Total Number of Restrictive Regulations	51	100%
Total Number of Entry Regulations	223	
Percent of Total Entry Regulations Which Are Restrictive	23%	

Source: JLARC Regulation Review. Based on nine sample boards.

Not Clearly Defined. Board regulations specifying entry standards should clearly express the criteria against which an applicant is being evaluated. Unclear entry criteria may not be restrictive *per se*, but they provide no guidance to applicants or licensees about how they are to be applied.

For example, most boards have regulations which require that applicants must be "of good moral character," which is a difficult quality to measure, or must not have been convicted of offenses of "moral turpitude." These terms are not further defined, and procedures for ascertaining moral character are often vague and differ considerably among boards. Some boards require applicants to provide references attesting to their good moral character. As shown in the following example, the Board of Medicine puts the burden of proof on the applicant.

The Board of Medicine has promulgated a rule for physician's assistants which requires that "an applicant shall be of good moral character and the applicant shall have the burden of proving that he is possessed of good moral character . . . All investigations in reference to the moral character of an applicant may be informal, but shall be thorough with the object of ascertaining the truth. Neither the hearsay rule nor any other technical rule of evidence need be observed."

This regulation provides no guidance about what constitutes good moral character or how to show that the applicant has it. Although the board wants to keep investigations regarding moral character informal, the section regarding evidence raises questions about the applicant's rights to due process.

In contrast, some boards have attempted to define "good moral character" more specifically. For example, the Board of Accountancy defines good character as "fiscal integrity and a lack of any history of acts involving dishonesty" or acts which would constitute a violation of the board's rules. In order to be licensed as a polygraph examiner, an applicant must not have been convicted of a felony or misdemeanor involving dishonesty, fraud, or deceit.

Other regulatory language which provides no guidance to applicants about requirements for licensure includes vague or discretionary phrases such as "in the opinion of the board" or "acceptable to the board". Entry criteria promulgated by the Board for Contractors illustrate the lack of specific criteria.

The Board of Contractors has not established written criteria for evaluating the qualifications of applicants for Class A licenses. Instead, the board relies on "rules of thumb" and the expertise of board members to make case-by-case decisions.

Board regulations state that a license will be issued when "it has been determined that the demonstrated qualifications, experience, and financial responsibility of an applicant are sufficient to complete satisfactorily contracts to be undertaken." The regulations do not specify how these criteria will be measured. In the absence of written guidelines, applicants do not know the standards against which they will be measured.

Regulations regarding standards for receiving credentials should clearly specify the necessary requirements, provide boards with objective criteria against which to judge applicants, and protect the applicants' rights of due process.

Not Related to Occupational Competence. In some cases, age restrictions and educational requirements do not appear to be clearly related to public protection or to the ability of an individual to perform the occupation. About half of the boards require an applicant to be 18 or 21 years of age, but generally there is not a demonstrable relationship between age and occupational ability. Boards regulating accountants, architects, engineers, and real estate brokers, however, appear to make reasonable use of the requirement because the age qualification ensures that applicants are legally eligible to enter into enforceable contracts.

Some boards require applicants to present a high school diploma, even for occupations that require specialized education. For applicants with advanced degrees, this practice is duplicative. In other cases, this requirement could prevent otherwise qualified individuals from being licensed.

Education requirements for polygraph examiners are typical of those which do not appear to relate to occupational competence.

A polygraph examiner uses a special instrument to test persons for the purpose of determining truthfulness. The practice of polygraphy involves asking questions and interpreting physiological responses as recorded on the instrument. In addition to completing a 240-hour course in polygraphy, a six-month internship, and passing an examination, an applicant must have met certain other educational or experience criteria:

- a bachelor's degree from a college or university, or*
- an associate degree in a police-related field and three years experience as an investigator, or*
- a high school diploma and five years experience as an investigator.*

The board requires a basic level of education and/or experience prior to entering a training course to attempt to ensure that potential licensees have acquired a basic level of skill as an interrogator. Moreover, the national professional association requires a bachelor's degree for membership.

Although education or experience in a police-related field might be useful, it does not ensure that an applicant necessarily has the basic interrogative skills required in polygraphy. Moreover, a bachelor's degree in any discipline does not seem to provide specific skills necessary to practice the occupation.

Standards for receiving credentials should be directly relevant to the skills needed by an individual to practice competently.

Unequal Requirements for Out-of-State Applicants. For the most part, unequal requirements for non-resident applicants, such as higher fees or experience requirements, have been eliminated in Virginia. However, some regulations still appear to be excessive.

The Board of Examiners of Professional Hairdressers requires foreign applicants who wish to sit for the hairdresser exam to have at least five years of experience in cosmetology before entering the United States. Five years of experience seems excessive when compared to the 2,000 hours of training that is required of students.

Since the hairdresser examination is supposed to measure occupational competence, the experience requirement for foreign applicants should be changed to make it equivalent to that required for other applicants.

Board regulations regarding out-of-state and foreign applicants should be consistent with requirements for residents except where special conditions in this State require further experience or education.

Practice Standards

The next step in JLARC's review was to examine regulations pertaining to practice of an occupation. As with entry standards, rules establishing standards by which an individual may practice an occupation should be clear and relevant to protecting the public. Nevertheless, five of the nine boards reviewed by JLARC had established practice standards which appeared to be unnecessary. Over one-fourth of the regulations pertaining to practice were unrelated to protection of the public (Table 11), particularly in the areas of supervision,

Table 11

DEFICIENCIES IN RESTRICTIVE PRACTICE STANDARDS

<u>Type of Deficiency</u>	<u>Number</u>	<u>Percent</u>
Restrictions on business operations and supervision	8	42%
Restrictions on advertising	7	37
Other	<u>4</u>	<u>21</u>
Total	19	100%
Total Number of Practice Standards	67	
Percent of Total Practice Standards Which Are Restrictive	28%	

Source: JLARC Regulation Review. Based on nine sample boards.

business operations, and advertising. A listing of all practice regulations of the sample boards which appear to go beyond the intent of the General Assembly is available as part of the technical appendix to this report. Of 67 regulations, 19 were in this category.

Restrictions on Business Operations and Supervision. Boards frequently promulgate regulations which affect how licensees may operate their practices or businesses. In some cases, however, the regulations may unnecessarily restrict the manner in which professional services may be offered. For example, some boards have established physical standards regarding a licensee's facility. The purpose of these regulations is to protect the public from unsafe conditions. However, the following facility requirement does not appear to be clearly necessary for public protection.

The Board of Professional Hairdressers requires that beauty salons have at least 110 square feet of floor space for each operator and that salons which are part of a residence have a separate entrance. The floor space requirement was established by the board as the minimum amount of space needed to house a hair dryer, hydraulic chair, mirror, and equipment stand. The requirement for a separate entrance is to keep living and business areas separate.

Board regulations do not require beauty shops to have hydraulic chairs, equipment stands, mirrors and hair dryers. Therefore, the need for all shops to have 110 square feet for each operator has an unclear relationship to protection of the public or practitioner competence. Moreover, a separate shop entrance does not ensure that living and business areas are separated, and separation is specifically required by another regulation.

Although requirements for posting or disclosure of fees on contracts appears to be sufficient protection for the client, the regulations for commercial driver training schools and statutes for employment agencies require licensees to submit, in addition, a schedule of fees and charges to the board. The reported charges can be changed only if the board is notified in advance. These requirements imply that the boards have the power to review fees and charges--which they do not--and may also limit the ability of a licensee to adjust fees to meet changing business conditions.

Several boards have also promulgated regulations which limit the number of personnel that a practitioner may supervise or which set standards regarding the licensee's facility, disclosure of fees, and other business practices. For example, dentists may supervise two dental hygienists, physicians may supervise two physician's assistants, and pharmacists may supervise one trainee. Restrictions on the number of personnel that a licensee can supervise unnecessarily limits the

manner in which services can be provided, according to a report of The Council of State Governments National Task Force on State Dental Policies. The task force stated that enforcement of practice and competence standards is a more effective approach to protection of the public's health and safety.

The development of alternate methods of service delivery can also be inhibited by prohibitions against general business corporations offering professional services. Prior to 1982, restrictions existed for architects, engineers, and surveyors. They still exist for physicians and dentists. Restrictions on health professionals practicing in a commercial setting, such as a department store or shopping mall, can also inhibit the development of alternative methods of service delivery. Boards should only establish limits on practice that are clearly related to protection of the public and which do not impede alternative methods of offering services.

Restrictions on Advertising. Some boards have set standards regarding a practitioner's advertising and solicitation of business. The purpose of these regulations is to protect the public from fraudulent and deceptive practices. Restrictions on advertising practices have been considerably reduced as the result of court decisions during the 1970s. However, some existing prohibitions against advertising styles and formats that require licensees to maintain a "professional" character in their advertising are not clearly necessary for public protection.

The Board of Optometry requires that all advertisements bear the names of every optometrist at the location. In addition, optometrists are prohibited by law and regulation from using a trade name in connection with their practice. Licensees are also prohibited from using the title "optometrist" in connection with another profession or business.

* * *

The Board of Dentistry has promulgated regulations which define and prohibit false, deceptive, or misleading advertising by dentists. However, the board also prohibits licensees from publishing advertisements which:

- *assert superiority or quality of services*
- *contain testimonials or endorsement of a dentist*
- *are intended to attract patients by use of "showmanship, puffery, self-laudation, or hucksterism, including the use of slogans, jingles, or garish or sensational language or format."*

Boards should prohibit only practices that are clearly false and deceptive.

Renewal and Discipline

The final step in JLARC's analysis was to review regulations which deal with the renewal of licenses and practitioner discipline. Boards are responsible for ensuring that licensees continue to be competent to practice after their initial licensure. Practitioners must periodically renew their credentials and are subject to disciplinary action for violating particular laws or board regulations. However, some renewal criteria are vague and not of generally accepted value, and not all disciplinary criteria address the competence of practitioners (Table 12). The technical appendix to this report includes a list of all the regulations of the sample boards which appeared to be unnecessary renewal and discipline requirements. Of 113 regulations, there were 18 in these categories.

Table 12

DEFICIENCIES IN RENEWAL AND DISCIPLINARY STANDARDS

<u>Type of Deficiency</u>	<u>Number</u>	<u>Percent</u>
Questionable renewal criteria	6	33%
Unnecessary disciplinary standards	<u>12</u>	<u>67</u>
Total	18	100%

Source: JLARC Regulation Review. Based on nine sample boards.

Questionable Renewal Criteria. For most boards renewal consists merely of paying the necessary fee on an annual or biennial basis. Six boards require practitioners to meet certain additional criteria, and some boards have inconsistent procedures for renewal of lapsed licenses.

Continuing education requirements have been controversial due to concerns about their value in ensuring competency and the appropriateness of rescinding a license for failure to take a course or seminar. Lack of specificity in continuing education requirements is a further problem, as illustrated in the following examples:

The Board of Social Work requires practitioners to show evidence of keeping abreast of new developments in the profession through continuing education. However, the number of hours of education is not specified. Although the Board indicated that licensees are not required to take a certain number of hours, it requires licensees to

submit courses attended and it notifies licensees who have fewer hours in continuing education than the average licensee.

* * *

The Board of Optometry requires licensees to take 24 hours of continuing education every two years. Although courses must be approved in advance, the regulations state that the board will not approve any course "deemed of unacceptable quality." The Board does not define this term further and thus gives no guidance to practitioners about what is acceptable.

Boards should use special renewal requirements only when clearly related to continued competency and when standards are precisely specified.

Technically, individuals who continue to practice after their licenses have expired are in violation of the law. However, some boards extend "grace" periods of up to five years for licensees to renew. Board procedures vary considerably regarding renewals, as shown in the following examples:

The Board of Optometry has a regulation which requires optometrists to renew their licenses by October 31. A licensee who does not renew by that date can be reinstated by paying a late fee of \$15 up to November 30. The regulation states that "reinstatement after that date shall be at the discretion of the Board."

* * *

The Collection Agency Board has no grace period for renewals. Each renewal received after January 1 is considered to be a new application and the practitioner must meet all entry criteria including a background investigation.

* * *

The Board of Examiners of Professional Hairdressers revokes every license not renewed within 30 days of the due date. However, the license can be reactivated at any time within five years by paying a five dollar penalty and the cost for licenses for the years not renewed.

Requirements for renewal should specify conditions for reinstatement of lapsed licenses and establish reasonable grace periods. Although the lack of a provision for a grace period may cause undue

hardship, extended grace periods may be inappropriate without a means to ensure that the applicant is still competent to practice.

Unnecessary Disciplinary Standards. Board regulations typically contain a listing of reasons for which a board may take disciplinary action against a licensee, such as:

- fraudulently obtaining a license;
- violation of laws or regulations pertaining to the
- profession;
- addiction to drugs or alcohol;
- negligent or incompetent practice of the profession.

At least two boards, hairdressers and private security services, do not include professional incompetence or negligence as grounds for disciplinary action against a licensee. Nevertheless, it appears that professional incompetence should be a primary reason for disciplinary action.

At least one board makes the subordinate responsible for the activities of the employer. The Board of Medicine will terminate its approval of a physician's assistant if the assistant has been delegated a task by his or her employer which is beyond the assistant's competence. Moreover, assistants may not perform any service which the employing practitioner is not qualified to perform. Since physician's assistants work under the supervision of a physician, the responsibility for incorrect assessment of duties should rest with the physician.

Need for Review of Existing Rules

JLARC's review of rulemaking by occupational and professional boards has indicated rules which lack statutory authority and are questionable in terms of relevance to practice and clarity of intent. Many of these problems continue to exist because there is no systematic review of rules which have been promulgated. Generally, the authority to promulgate, revise, or repeal regulations rests with the individual boards, and support and review mechanisms have not been effectively implemented.

Problems With Current Review Mechanisms. Inconsistent use of mechanisms for informing boards of potential problems with existing regulations is shown in the following circumstances:

- Boards within DOC are required under Section 54-1.17 to review existing regulations at least annually. However, the form of the review, the method of reporting results, and the participants involved vary considerably among the boards. No similar requirements exist for boards within DHRB. Agency staff have regulatory expertise and can facilitate the transfer of innovative policies and procedures among boards.

However, staff participation in rulemaking has varied among boards and has depended on board willingness to include them in the process.

- Legal advice on regulations is provided through official opinions of the Attorney General and from assistant attorneys general assigned to DOC and DHRB. However, formal opinions apply only to specific boards and circumstances. Other boards with similar regulations are not required to change their rules on the basis of these opinions.
- A 1978 review of all board rules by assistant attorneys general assigned to DOC was weakened by a lack of uniform criteria. Nevertheless, the review revealed ambiguous language, restrictive regulations, and an absence of statutory authority in some cases. Although some changes have been made, many of the same problems remain.
- The review boards could provide a broader perspective on existing rules. However, BOC and CHRB have been involved in reviewing existing regulations only to a limited extent, and specific statutory authority appears to be lacking. BOC has reviewed statutes and regulations involving contractors, engineers, and architects which resulted in new legislation. But the board also undertook a controversial study of the rules of hairdressers and barbers which led to a challenge of BOC's authority to review rules. CHRB has not become involved in reviewing regulations.

Provisions for Comprehensive Review. The lack of consistent reviews of existing regulations and the sporadic involvement of knowledgeable parties indicate that a general reassessment of existing rules is needed. The General Assembly may wish to direct the regulatory boards by resolution or by statute to conduct and report to the General Assembly on the results of general reviews of existing regulations.

Such reviews should be conducted by each board according to a schedule, standard criteria, and format to be developed by DOC and DHRB. The review should focus on the statutory basis for each rule, the clarity of criteria against which applicants will be measured, and relevance to professional competence. The review should involve the expertise of board members, agency staff, assistant attorneys general, and the two departments' review boards. Rules should be subject to public scrutiny as well. A report should be prepared by each department which documents actions taken by the boards to repeal, modify, or retain regulations. Where applicable, recommendations should be made to the General Assembly for changes in statute.

To strengthen the regular review of existing rules, the General Assembly may also wish to clarify the statutory authority of the BOC and CHRB for regular review of existing rules and require the boards within DHRB to review their rules periodically.

LEGISLATIVE OVERSIGHT OF RULEMAKING

The General Assembly has delegated extensive rulemaking responsibility to the occupational and professional regulatory boards, but has reserved to itself the right to review and modify board activities and regulations. The authority of the General Assembly over administrative rules of all executive agencies was greatly expanded during the 1980 session by amendments to the Administrative Process Act which made any administrative rule subject to deferral, modification, or annulment prior to going into effect. These actions in Virginia reflect similar concerns by Congress and other state legislatures about proliferation of administrative rules and the number of regulations that either exceed the statutory authority of an agency or violate legislative intent. Nevertheless, establishment of review and nullification procedures has raised constitutional issues at both the federal and state levels regarding the separation of legislative, executive, and judicial powers and the manner of implementing the review process within the legislative body. In Virginia, a recent opinion by the Attorney General addressed these constitutional questions.

Oversight of Regulatory Boards

Oversight of regulatory boards has been part of a national trend to establish legislative oversight for state programs and agencies. In many states, such oversight has taken the form of "sunset" legislation with a particular emphasis on regulatory boards. In Virginia, oversight of each major functional area of government is required on a periodic basis, but separate sections of the Code address the oversight of regulatory boards specifically.

General Approach to Oversight. States that have enacted "sunset" legislation seek to accomplish oversight goals by requiring a systematic review of agencies and programs to determine if they are fulfilling their legislative intent, operating efficiently, or duplicating any other activity. A program or agency may be modified, continued, or terminated as a result of the review. In fact, the unique feature of "sunset" is the scheduled automatic termination of existing programs unless reauthorized by legislative action.

According to a 1981 report by the Council of State Governments, regulatory boards have been the primary focus of "sunset" studies in most states because of factors which include:

- the feeling that it was unreasonable to expect termination of a corrections, health or transportation department;
- the desire to use untested sunset methodologies on agencies with less comprehensive, more easily defined missions; and
- the recognition that occupational regulatory boards often escape other state oversight mechanisms.

Virginia's response to the "sunset" phenomenon nationwide was to enact an alternative mechanism, the Legislative Program Review and Evaluation Act, in 1978. The Act provides for a periodic review of programs, agencies, and activities of state government according to a legislatively adopted schedule. Topics are selected from among the seven functions of State government: (1) Individual and Family Services; (2) Education; (3) Transportation; (4) Resource and Economic Development; (5) Administration of Justice; (6) Enterprises; and (7) General Government. No automatic termination date is established in the Act. The reviews are conducted by the Joint Legislative Audit and Review Commission with provision for coordination with the appropriate standing committees of both houses of the General Assembly.

Specific Oversight of Regulatory Boards. The specific concern of the Virginia General Assembly for oversight of regulatory boards is evidenced in several statutory provisions regarding review of the performance and regulations of boards. While performance review is clearly a legislative prerogative, the extent of legislative authority to review and modify rules has been called into question by a recent opinion of the Attorney General. The applicability of that opinion to the occupational and professional boards is not entirely clear.

In 1978, the General Assembly enacted Chapter 9 of the Code which established oversight provisions for all the boards within DOC and DHRB. The General Laws Committees of the House and Senate were authorized to hold hearings and provide recommendations pertaining to complaints received regarding the rules and regulations of these boards, and the Joint Legislative Audit and Review Commission was required to conduct performance reviews "from time to time."

- § 30-74. *Hearings by joint general laws subcommittees.* - A. Joint laws subcommittees shall schedule and hold hearings on the call of the chairmen when complaints are received about rules and regulations established by the board, for the purpose of receiving public testimony on rules and regulations of each of the following: (list of boards within DOC and DHRB)
- § 30-75. *Joint general laws subcommittees.* - The chairmen of the General Laws Committees of the Senate and the House of Delegates shall appoint subcommittees which shall hold hearings pursuant to § 30-74. (1978, c. 511.)
- § 30-76. *Recommendations.* - Following any such hearings conducted pursuant to § 30-74, the joint general laws subcommittees may make such recommendations as they deem appropriate to any State regulatory body or agency, or to the General Assembly for legislative action. (1978, c. 511.)
- § 30-77. *Performance reviews.* - From time to time, the regulatory agencies specified in § 30-74 shall be the subject of a performance review by the Joint Legislative Audit and Review Commission in accordance with the provisions of the Legislative Program Review and Evaluation Act (1978, c. 511.)

This JLARC report and a companion report issued in January 1982 entitled *Occupational and Professional Regulatory Boards in Virginia* were conducted in compliance with SJR 50 enacted by the 1980 General Assembly and the provisions of §30-77. The first report consisted of a systematic review of each board's regulatory responsibilities and performance in selected areas. It provided basic information about each board, addressed specific issues of legislative interest, and identified areas in which the General Assembly may wish to request more in-depth information or hold hearings. It can now serve as a baseline for future reviews. The General Laws Committees may now hold hearings on the findings of both JLARC reports under the provisions of the Evaluation Act or under their continuing authority in Chapter 9.

In 1974, when recodification broadened the regulatory flexibility of the boards within DOC and established the Board of Commerce, the General Assembly explicitly reserved to itself "the right to review and modify, in whole or in part," any rule or regulation promulgated by any regulatory board or the Board of Commerce (Sections 54-1.25 and 54-1.28). Similar rights were reserved in 1977 when the Commission of Health Regulatory Boards was created (Section 54-955.1). No specific mechanism for the exercise of this review and modification right was established in Title 54, however. For example, there are neither provisions for regular review of rules nor specifications for whether rules should be modified by resolution or statute.

Extent of Legislative Authority. The authority to conduct hearings and performance reviews and to make recommendations for action appear to be clearly established in the Evaluation Act and Chapter 9 and are in the process of being implemented. However, the exercise of the power to review and modify rules and regulations in Title 54 is less clearly defined and may raise constitutional questions regarding separation of powers. The General Assembly has recently been advised by the Attorney General that an unconstitutional use of legislative power may be constituted by provisions of the Administrative Process Act which allow for the review and nullification by resolution of the General Assembly of rules promulgated by any executive agency, not just those promulgated by these boards.

It may be that the conditional grant of authority inherent in the language of Title 54 makes these boards unique cases that are not included within the current opinion of the Attorney General. Other major agencies that promulgate rules do not appear to have been given such conditional authority in their enabling legislation. Moreover, since no implementing mechanism has been established, a constitutionally acceptable method might be adopted through amendment to Title 54. The amendment could specify, for example, that modification could occur only by a statute passed by both houses of the General Assembly.

The General Assembly may wish to consider this matter further or request an advisory opinion of the Attorney General regarding the constitutionality of the review powers specified in Title 54.

Review of Executive Agency Rules

In 1981 the General Assembly amended the Administrative Process Act to establish the authority and implementing procedures for legislative review, deferral, and nullification of any rule promulgated by any executive agency, such as the Boards of Health and Welfare, and the State Water Control Board. The General Assembly has not yet determined a course of action regarding the opinion of the Attorney General that these provisions are unconstitutional. Although each state must determine the validity of its procedures based on its own constitution and relevant court decisions, also to be taken into account are the actions of the federal courts with regard to congressional nullification of executive rules.

Provisions of the APA. The changes in the APA extended the authority of the General Assembly, established implementing mechanisms, and extended the time between proposal and promulgation of new rules. (As illustrated in Figure 4, the process may extend the time necessary to promulgate rules by a minimum of four months and up to one year.)

- Proposed regulations are transmitted to the Committee of each house of the General Assembly to which the Registrar of Regulations believes it to be properly referable.
- If the Committees do not act within 90 days of referral, the regulations may be adopted. A majority of the members may vote to defer the effective date of the regulation, however.
- For deferred regulations, the committee prepares a resolution to permanently defer, which is acted on by both houses of the next General Assembly.
- If the General Assembly does not pass the resolution the agency may adopt the regulation. If the resolution is passed, the regulation is declared null and void and no regulation having substantially the same affect shall thereafter be adopted unless the General Assembly repeals the resolution.

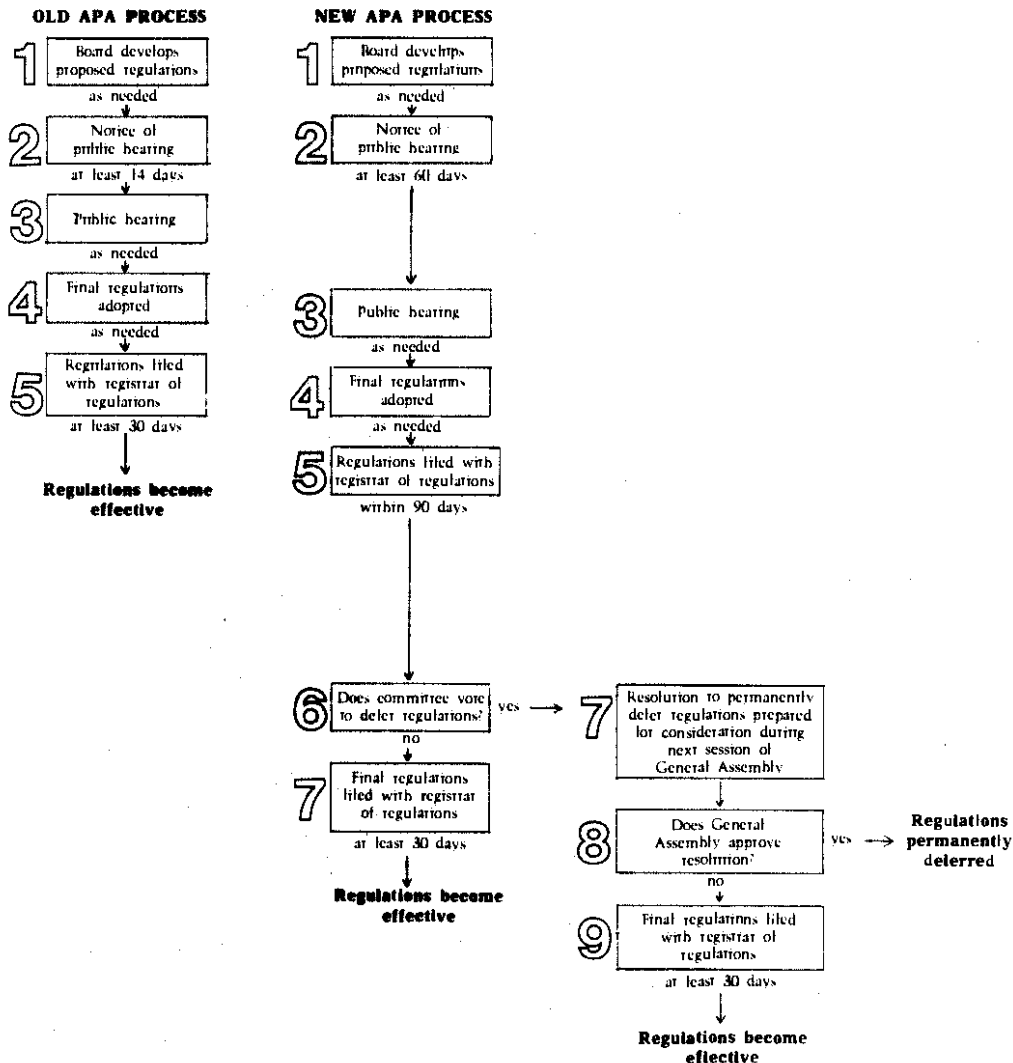
Constitutional Issues. According to a publication of the National Council of State Legislatures, Restoring the Balance: Legislative Review of Administrative Regulations, the three major questions being raised about legislative review processes relate to: (1) the issues of constitutional separation of legislative, executive, and judicial powers; (2) the delegation of legislative review authority to a legislative committee; and (3) the use of a bill or resolution to sustain committee action.

The constitutional question of separation of powers is addressed by opponents and proponents of legislative review. The opponents contend that once enabling legislation has been passed, rule-making is strictly an administrative or executive function and that only the judiciary may interpret laws. Proponents view rulemaking as a

Figure 4

CHANGES IN APA PROCEDURES FOR ADMINISTRATIVE RULEMAKING

In 1981, the General Assembly amended the Administrative Process Act (APA), establishing the authority and procedures for legislative review of the regulations promulgated by executive agencies. The new APA process could extend by a year the time necessary to promulgate rules.



Source: JLARC staff representation.

power that may be conditionally delegated to executive agencies, that the function is more quasi-legislative than executive, and that regulation review is the final step in the legislative process.

According to the NCSL publication, legislatures appear to have a stronger position if an agency's enabling legislation grants rulemaking authority subject to review by the legislature, the review is conducted by a joint committee, and the action is based upon a joint or concurrent resolution acted upon by both houses. The use of committee action alone or a simple resolution of either house may be constitutionally the weakest methods. In the latter instance only one house is exercising the power of the legislative branch.

Use of a bill to repeal a regulation has been supported as the only proper implementing method because regulations have the force of law. But it has also been argued that since a bill requires a gubernatorial signature, the use of a bill brings the governor into determining legislative intent. This procedure may constitute a different violation of separation of powers.

Opinion of the Attorney General. The APA in Virginia (Section 9-6.14:9) appears to use a relatively strong method of implementing legislative review, including a resolution introduced by a standing committee of jurisdiction that must be approved by both houses. However, the Attorney General's opinion questions

...the constitutionality of Section 9-6.14:9, because it projects the legislative branch into the executive branch beyond constitutionally permissible limits. Moreover, the General Assembly cannot by statute confer upon agencies the power and responsibility to promulgate regulations, and then defer, modify or nullify these regulations by resolution.

According to the Attorney General, Section 9-6.14:9 as written violates both Article II, Section One and Article IV, Section Two of the Constitution of Virginia. Article II specifies that the three branches of government shall be separate and distinct and that none may exercise the powers properly belonging to the others. An impermissible intrusion could occur if, for example, under the APA a committee of the General Assembly were to change existing rights, privileges, and obligations. Moreover, Article II cites judicial review of administrative actions but makes no mention of legislative review of regulations that could result in their delay or nullification.

The Attorney General regards as even more serious the provisions of Article IV of the Constitution which specify that "no law shall be enacted except by bill . . ." As interpreted by the Attorney General, the APA now permits the General Assembly to repeal by resolution, for all practical purposes, a statute that has conferred upon an agency the authority to regulate. The APA also prohibits the agency

from promulgating any regulation with the same object until the resolution has been repealed. The Attorney General holds that "the object" of any regulation is the same "object" of the statute that confers regulatory authority upon the administrative agency.

Federal Court Actions. A federal case involving separation of powers is cited by the Attorney General as currently under review by the Supreme Court. The case Chadha v. Immigration and Naturalization Service, 634 F.2d 408 9th (1980), 102 S. Ct. 87 (1981), involves a statutory provision which permits Congress to veto, by a resolution passed by either house, a suspension of a deportation order by the Immigration and Naturalization Service. Important aspects of the opinion of the appeals court which initially heard the case hinged on action taken by only one house, and on Congress' interference with an action carried out by an executive agency in accordance with established procedure and legal principles. A more proper course of action according to the court would be for Congress to change the general operating standards of the agency or to formulate policies and guidelines that are sufficiently clear for compliance by the executive and for ascertainment by the judiciary.

The decision of the Supreme Court on the Chadha case is expected soon. It is also anticipated that the court will agree to hear a currently controversial case involving Congressional veto of rules promulgated by the Federal Trade Commission regarding sale of used cars by dealers. This case may have even broader implications for state review of rules.

Legislative Review in Other States

Thirty-five states have formal legislative regulation review mechanisms. The powers of the legislature range from review of certain agencies' rules to repeal of the rules of any agency by the legislature or a legislative committee. Several states have faced constitutional challenges. The authority, methods, organization, and staffing of the review function differs considerably among states (Table 13).

Generally the powers of the legislature regarding review of regulations fall into these categories: (1) advisory, (2) repeal of a regulation by statute, and (3) repeal of a regulation by legislative resolution. Fourteen of the 35 states have only advisory review powers, which according to NCSL can be effective and are less likely to be challenged on constitutional grounds.

Florida, for example, has attempted to acquire repeal powers through a constitutional amendment, but the proposal was defeated in a statewide referendum in 1976, as was a similar proposal in Missouri. Florida has continued its review of rules, which appears to have useful results.

In 1975, the Florida legislature created a joint committee to review proposed regulations and to review statutory authority underlying each rule.

Table 13

LEGISLATIVE REVIEW OF
ADMINISTRATIVE REGULATIONS IN OTHER STATES

<u>Type of Reviewing Committee</u>	<u>Number of States</u>
Joint	21
Joint bipartisan	3
Standing	<u>11</u>
	35
 <u>Type of Rules Reviewed</u>	
Proposed only	6
Existing only	12
Both proposed and existing	<u>17</u>
	35
 All rules	33
Selected rules	<u>2</u>
	35
 <u>Legislative Powers</u>	
Suspend or modify rule by resolution	15
Suspend or modify rule by statute	6
Advisory powers only	<u>14</u>
	35

Source: National Conference of State Legislatures, Restoring the Balance: Legislative Review of Administrative Regulations, 1979.

The committee, with a staff of 13, has only advisory powers but has found that agencies are willing to respond to legislative objections. Of the rules reviewed during 1976, 79% contained some error and 6.3% exceeded statutory authority.

States with review powers may recommend to the full legislature that the law authorizing the promulgation of the objectionable rules be amended. Iowa has an advisory process which places the burden of proof on the agency once objections to a regulation are raised by the committee. The burden of proof shifts to the agency on any future court action, and it must prove that it did not violate legislative intent or statutory authority in adopting the regulation over the committee's objection.

In Virginia, it appears that the General Assembly will soon need to deal with the legal issues raised by the Attorney General and the U.S. Supreme Court rulings. The General Assembly may wish to amend the APA to overcome specific objections by permitting changes in regulations only by statute and repealing the specific provision that prohibits agencies from again promulgating rules with the same object until the resolution is repealed. Staffing responsibilities for a regulation review could be assigned to an existing or newly created joint House/Senate organizational unit.

CONCLUSION AND RECOMMENDATIONS

Administrative rulemaking is a necessary mechanism for implementing the legislative policies established by the General Assembly. Although regulatory board members possess a great deal of professional expertise, they may be generally inexperienced as regulators. Some rules have been promulgated which are unclear, unauthorized by statute, or unnecessary for protecting the public. Although significant steps have been taken in Virginia to improve regulations, additional steps to strengthen and systematize the rulemaking process could assist boards in carrying out their responsibilities. Moreover, oversight of rulemaking could be strengthened to ensure a final check on the use of regulatory authority.

Development of Rules

Recommendation (1). In order to provide a consistent legislative base for all regulatory boards, the General Assembly may wish to clarify the applicability of the general provisions of Title 54 to all boards. The Legislature may also wish to consider recodifying the statutes for the health boards to provide a general legislative framework within which regulations would be promulgated.

Recommendation (2). DOC and CHRB should take steps to ensure that accurate and sufficient copies of proposed regulations are available for public inspection prior to and at each public meeting. The agencies should also improve their public information efforts to secure increased public involvement in hearings.

Recommendation (3). The Board of Commerce and the Commission of Health Regulatory Boards should develop guidelines to be followed by all boards in preparing economic impact statements. The statements should specify, at a minimum, additional restrictions on entry into the occupation, limitations on competition, and potential effects on cost.

Recommendation (4). The General Assembly may wish to require each board to promulgate regulations in a consistent format that (1) organizes rules by major categories; (2) uses simpler language; (3) limits numbered regulations to related criteria; and (4) distinguishes between statutory and administrative requirements. Guidelines for this format should be prepared by DOC and DHRB. Boards should also identify

the authorizing section of the Code for each regulation they promulgate. Board staff should work with the assistant attorneys general assigned to DOC and DHRB to develop a format and procedure for determining the proper reference and authority of the board.

In addition, the General Assembly may wish to study the feasibility and cost of adopting an administrative code for the Commonwealth which would standardize style and format and provide a single source of regulations and a system of referencing and indexing regulatory requirements.

Recommendation (5). DOC and DHRB should develop procedures for comprehensive support of board activities during the consideration of new regulations. Moreover, the General Assembly may wish to amend Sections 54-1.25 and 54-955.1 to explicitly give BOC and CHRB the power to review board regulations.

Use of Rulemaking Authority

Recommendation (6). The General Assembly may wish to direct the regulatory boards by resolution or by statute to conduct and report to the General Assembly on the results of general reviews of existing regulations. Reviews should be conducted by each board according to a schedule, standard criteria, and format to be developed by DOC and DHRB. Regulations should be reviewed to determine whether they are authorized by statute, clearly defined, and relevant to practitioner competence or protection of the public.

As part of regulatory review actions, boards should address problems with regulation that include but are not limited to the following areas:

- A. Regulations which repeat or reiterate provisions of the Code should be eliminated or separately identified.
- B. Regulations for becoming credentialed should be clearly defined and relevant to practitioner competence. For example, regulations which require applicants to be of "good moral character" should be reviewed for their appropriateness. If such regulations are needed, boards should more specifically define what those characteristics are.
- C. Board regulations regarding out-of-state and foreign applicants for licensure should be reviewed to ensure that they do not discriminate unnecessarily against non-residents.
- D. Boards should review their regulations regarding facility requirements to ensure that they are necessary for public protection.

- E. Board requirements for licensees to file fee schedules with the boards should be eliminated if there is not authority to set or review fees.
- F. Boards should review their restrictions on advertising to ensure that they relate only to false and deceptive practices.
- G. Boards with continuing education requirements should review the need for such rules. If they are determined to be the most appropriate method for ensuring continued competency, standards should be clearly and precisely specified.
- H. "Grace" periods should be reviewed to ensure that they are reasonably consistent among boards. The review boards should establish guidelines to be followed by the regulatory boards.
- I. Board regulations regarding discipline should be reviewed to ensure that they are appropriate and relevant to practitioner competence. All boards should specifically include professional incompetence as a reason for taking disciplinary action.

Where statutory authority for a regulation is lacking, boards should repeal the regulation or request necessary authority from the General Assembly. Each request should include documented reasons for the change and continued need for regulatory authority by the board in that area.

DOC and DHRB should prepare reports which specify actions taken by the boards to repeal, modify, or retain regulations. Where applicable, recommendations should be made to the General Assembly for needed change in existing statutes or enactment of new statutes.

Legislative Oversight of Rulemaking

Recommendation (7). The General Assembly may wish to consider further or request an opinion of the Attorney General regarding the constitutionality of legislative review and approval of the rules of regulatory boards as provided by Sections 54-1.25, 54-1.28, and 54-955.1. The General Assembly may also wish to review the statute concerning the legislative review function, and assign responsibility for review to a new or existing joint committee.

III. ENFORCEMENT

Board action can protect the public from incompetent and unscrupulous practitioners through enforcement of the standards established in regulations. Enforcement activities consist mainly of investigating and resolving complaints against practitioners and conducting routine inspections of businesses. During FY 1981, there were 1,153 complaints investigated and just over 4,100 inspections made.

Regulatory laws and rules are enforced by a network in which boards receive complaints, the administrative agencies conduct the investigations and inspections, and the boards then determine whether a violation has occurred and take disciplinary actions (Exhibit C). The separation of investigation and adjudication is intended to protect the rights of licensees by maintaining impartiality in the enforcement process and providing investigative expertise to the boards.

In order to assess enforcement activities, JLARC reviewed a random sample of 90 investigations from each of the two administrative agencies. Each investigation was based on a complaint filed with one of the regulatory boards between January 1979 and December 1980. Investigative records were reviewed to analyze procedures and timeliness of investigations. In addition, 41 complainants were surveyed by telephone, and enforcement personnel were interviewed. The findings are believed to be representative of all enforcement activities during that period.

Enforcement activities of the boards and agencies have been significantly enhanced in recent years through the establishment of central enforcement units, use of better investigative tools, and the use of hearing officers. Nevertheless, several shortcomings remain. Many complaints do not come to the attention of the boards. Some investigative activities are not promptly or thoroughly carried out. Complaints may be closed without adequate board oversight or attention to redressing the problem of the consumer. Improvements are also needed in the process for receiving and investigating complaints and adjudicating allegations. Moreover, routine inspections do not appear to be effective as an enforcement mechanism.

RECEIVING COMPLAINTS

Complaints may come from a variety of sources--consumers, other licensees, enforcement personnel, board members, and employers. In addition to a practitioner's occupational competence, complaints may involve allegations of unprofessional conduct, unlicensed activities, or fees.

Exhibit C

THE ENFORCEMENT PROCESS

Procedures for enforcing regulatory laws and rules involve receiving complaints, conducting investigations, and determining the validity of the complaint. Some boards also attempt to enforce laws and regulations through routine inspections, but these activities are a relatively small portion of enforcement efforts.

RECEIVING COMPLAINTS. The General Assembly has directed the regulatory boards to receive complaints about practitioners. Complaints generally come from consumers or other practitioners by telephone or letter or from enforcement staff. Complaints are first reviewed by board administrators or members to determine whether complaints have met filing requirements, whether a prima facie case exists for board action, and whether adequate information exists to justify further investigation. Based on the initial review, a complaint may be returned so that filing requirements such as notarization may be met. All other complaints are either referred to the enforcement unit for investigation or are closed because no basis exists for further board action.

INVESTIGATING COMPLAINTS. Complaints referred to the enforcement unit from boards are assigned to an investigator who is responsible for collecting evidence on the allegation. Investigations typically include interviewing the complainant, the practitioner, and any witnesses, and collecting evidence such as contracts, records, and documents. In situations where the allegations are difficult to document or there is danger of evidence being destroyed, the agency may conduct an undercover investigation or issue a subpoena to require a practitioner to produce certain records.

The investigator then prepares a written report summarizing the nature of the allegations, what the investigation uncovered, and occasionally a recommendation about the validity of the complaint. The reports are returned to the boards for review.

ADJUDICATING COMPLAINTS. Upon receiving an investigation report, a board reviews the evidence to determine whether there is a probable violation of law or regulation. The complaint may be reviewed by the board administrator, an assistant attorney general, or a board member. If no violation is found, the complaint is closed. Otherwise, complaints may be resolved through such means as a cease-and-desist order, a consent order, or a hearing. Potential violations of law may be referred to local Commonwealth's attorneys for prosecution.

Hearings held by boards are presided over by hearing officers appointed from a list of attorneys maintained by the Virginia Supreme Court. Boards have the option of hearing the case with the hearing officer but may delegate to the officer the authority to determine the findings of fact, conclusions of law, and recommended sanctions. The Administrative Process Act provides guidelines to ensure due process of law.

If the board determines that the licensee has violated regulations or law, disciplinary action can be taken against the individual. Sanctions may range from a reprimand to a revocation of the practitioner's license and may include fines, additional education, or resolving a consumer's complaint. Board actions may be appealed only by the licensee to the circuit court. The complainant cannot appeal a board's decision. Resolving a complaint ranges in time from less than a month to two years and longer.

Source: JLARC review of complaint procedures.

Regulatory boards are responsible under the *Code of Virginia* for receiving allegations against practitioners. However, some complaints do not reach the boards, and may be handled independently by other organizations or not reported at all. Moreover, restrictive intake procedures and incomplete and decentralized recordkeeping may limit the ability of the boards and agencies to enforce standards.

Boards Do Not Receive All Complaints

Although one complaint may not warrant an investigation, a series of complaints may signal that a problem exists with a practitioner or in an area of practice. However, boards do not receive all complaints about practitioners because the public is not sufficiently aware of a board's existence or purpose, and there is little regular coordination among the boards and other agencies that receive complaints. Therefore, a complaint may not be filed at all or may be filed with more than one organization -- each unaware of the other's involvement.

JLARC contacted 41 complainants as part of this study and found that most were not aware that a board or agency existed to receive complaints until they had attempted to resolve their complaints through other channels. Two instances are typical of the responses:

A man alleged that there were a number of construction defects in his newly constructed home, including a roof that leaked and an uneven floor. He contacted the contractor to have the necessary repairs made. Receiving no satisfaction, the complainant contacted a local building official who verified that there were several building code violations needing correction. Some minor repairs were made by the contractor, but not all that were needed.

The homeowner next contacted an attorney who notified him two weeks before the court date that he would not be able to take the case. The complainant then contacted the Office of Consumer Affairs, which did not handle this kind of case but referred his complaint finally to the State Board of Contractors.

* * *

A woman who was fitted with dentures claimed that their improper fit caused her pain. Unsuccessful at having the dentist adjust them or refund her money, she called a better business bureau. She felt the better business bureau took the dentist's word, however, and did not resolve her complaint.

She next contacted the Office of Consumer Affairs, which referred her to the Board of Dentistry. Her complaint was accepted by the board.

In 1980, JLARC contacted the Office of Consumer Affairs, better business bureaus, and professional associations. They identified 932 complaints against licensed practitioners (Table 14). Due to differences in record keeping, incomplete information, and lack of formal referral patterns, it is impossible to determine what proportion of these complaints was eventually received by the regulatory boards. Nevertheless, only four of 21 professional associations responding to a JLARC survey indicated that they always referred complaints to the boards, and the better business bureaus were found to be inconsistent in their referral practices. Only the State and local offices of consumer affairs routinely referred complaints about licensees to the regulatory boards.

Table 14

ESTIMATED NUMBER OF COMPLAINTS
RECEIVED BY VARIOUS ORGANIZATIONS

<u>Agency</u>	<u>Number of Complaints Received During FY 1980</u>
DOC	664 ^A
DHRB	538 ^A
Professional Associations	180 ^B
Better Business Bureaus	600 ^C
State and Local Offices of Consumer Affairs	152

^ATotal number of complaints unknown. Agencies record only the number of investigations conducted.

^BTotal number of complaints reported by 14 professional associations.

^CEstimated.

Source: DOC and DHRB reports, JLARC surveys.

There is no legal requirement that private organizations must forward complaints to the regulatory boards, except in the case of medical societies. (The president of the state medical society or any local medical society is required by statute to report any disciplinary action that the association takes against any of its members to the

Board of Medicine. However, this particular provision does not require the association to forward all complaints to the board, only those that result in disciplinary action. The board has no assurance that complaints which are not referred are appropriately handled or are without merit.)

These problems could be overcome, at least in part, by more effective public information about the role of boards and better coordination among agencies that receive complaints. The Board of Commerce and the Commission of Health Regulatory Boards have statutory responsibility for public information, but there has been little action in this area. The best efforts are:

- The Commission of Health Regulatory Boards has prepared a pamphlet describing the agency and the health regulatory boards.
- The Department of Commerce sponsors an information booth at the State Fair.
- The Board of Contractors and the Real Estate Commission have used public service television announcements.
- Contracts issued by employment agencies must contain information about the Department of Commerce.

BOC, CHRB, and the regulatory boards need to improve efforts to make the public aware of their existence. They should explore the feasibility of greater use of public service announcements, publish agency telephone numbers under "Community Service Numbers" in local telephone directories, and consider use of toll-free telephone numbers for receiving complaints. In addition, licensees could be required by boards to display information about how to register complaints or include it on any contractual agreements between a licensee and a client.

To establish better coordination with other agencies, DOC, DHRB, and the regulatory boards should identify organizations which may receive complaints about licensees. These organizations should be informed about the Board's role in complaint resolution, and encouraged to refer complaints to the boards.

Some Boards Inhibit Complaints

Boards also limit some potential complaints by their own restrictions on the manner in which complaints can be filed. These restrictions prevent or delay the receipt and investigation of complaints, and result in incomplete records on alleged violations of standards.

Requirements for Written Complaints. Many consumers initiate complaints by telephone, but boards generally will not consider a

complaint unless it is submitted in writing. They usually request the caller to send a letter specifying the nature of the allegation. At times, the board administrator may advise the caller on actions to take other than filing a complaint. However, neither DOC nor DHRB log information on the number and type of complaints received by telephone or the action taken by the administrator.

In order to determine the effect of requiring callers to follow-up in writing, JLARC requested board administrators to keep a log of complaints received by telephone (Table 15). For an eight-week period, board administrators recorded 155 complaints by telephone. Approximately ten percent of the calls regarded alleged diversion of controlled drugs and these were immediately referred for investigation without written follow-up. Ninety callers were required to resubmit their complaints in writing, but only one-third did so. Failure to follow-up in writing may not, however, indicate that cases are not serious. Repeated complaints could be an indication of an emerging problem with a practitioner.

Table 15

TELEPHONE COMPLAINTS RECEIVED BY THE BOARDS*

	<u>Number of Complaints</u>	<u>Percent</u>
Total	155	100.0%
Dispositions:		
Referred to enforcement for investigation	15	9.7
Complainant sent information	19	12.3
Complainant requested to submit written complaint	71	45.8
Complainant advised of lack of jurisdiction	18	11.6
Other	32	20.6

*For an eight-week period June-July 1981

Source: JLARC telephone complaint log.

Most board administrators, however, will not refer complaints to the enforcement units of DOC or DHRB for investigation unless they are submitted in written form. The rationale is to eliminate complaints which may be "frivolous." Some limitations are appropriate, but boards should not routinely disregard allegations made in a telephone call. Instead, guidelines should be developed for (1) evaluating

the seriousness of telephone complaints, (2) appropriately recording the information, and (3) referring complaints for investigation.

Requirement for Notarized Complaints. Four boards require written complaints to be notarized: the Real Estate Commission; the Board of Dentistry; the Board of Architects, Professional Engineers, Land Surveyors, and Certified Landscape Architects; and the Board of Commercial Driver Training Schools.

The Real Estate Commission returns complaint letters that have not been notarized to the complainant. Only those complaints that are returned to the board in a notarized letter are forwarded to the enforcement unit for investigation, as illustrated in the following example:

A man submitted a letter of complaint with supporting documents to the Virginia Real Estate Commission alleging that a real estate salesman misrepresented the conditions of a real estate transaction involving the disbursement of escrow funds. The letter was returned to the man, and he was notified that complaints had to be notarized before an investigation could begin.

The man sent the same letter back to the board with the requested notarization. The complaint was then referred to the enforcement unit, causing a delay of more than one month from the time the original complaint was made. Investigation began three months later.

Boards prefer allegations to be submitted in a notarized letter to further reduce frivolous complaints and to help investigators subpoena records to document violations. However, signed statements have been and can continue to be obtained during the investigation itself. Boards should, therefore, eliminate the requirement that letters of complaint be notarized.

Incomplete Recording of Complaints

Neither DOC nor DHRB maintains a central index of information on complaints, nor do boards maintain information about complaints that are handled without an investigation.

Little Information on Administrative Actions. A board administrator may determine that there is no basis for investigating a complaint or may attempt to resolve a problem by contacting the complainant or licensee and mediating a solution. But boards do not have adequate information on the number, types, and disposition of complaints handled administratively. Moreover, there is no standard method (such as mandatory review or oversight) to ensure that board administrators are appropriately handling cases on the board's behalf.

Both DOC and DHRB should provide board administrators with guidelines for handling complaints administratively and develop standard recordkeeping systems to retain information on the complaint and the action taken. Once records are maintained according to the recommended guidelines, they should be regularly reviewed by boards and top agency personnel.

Inadequate Complaint Information. The agencies maintain centralized records only for complaints investigated by their enforcement units. This excludes complaints handled by boards or administrators, but not referred for investigation. Other inconsistent forms of information exist at the board level. Currently, some boards have logbooks on all written complaints; others have logs or index files of complaints handled without investigations; still others maintain only general correspondence files. No boards retain files on complaints received by telephone.

An incomplete information system and a lack of communication between board administrators and enforcement personnel can lead to uncoordinated and delayed efforts to substantiate and resolve violations of laws and regulations, as the following case illustrates:

A pharmacist contacted a DHRB inspector to report that a physician was prescribing excessive quantities of stimulants. Prior to notifying the board of the complaint, the inspector conducted a survey of prescriptions and verified the pharmacist's claim. The investigation included interviewing the physician and conducting additional investigative activities.

During the same period of time, the Board of Medicine received an anonymous complaint against the same physician. The complaint was not initially referred to the enforcement unit for investigation. But after receiving notification of the inspector's initial activities, the board administrator requested a more thorough investigation of the two related complaints.

The investigator should have notified the board immediately upon receiving the initial complaint. Had the administrator known the anonymous complaint was not an isolated incident, an immediate and more thorough investigation could have been requested in conjunction with the other complaints. As of March, 1982, the case was still open pending a formal hearing--three years after the initial allegation was received.

Development of a central index in each agency would give board and enforcement personnel immediate and complete access to all allegations against a practitioner. Although one call or letter may

not warrant an investigation, a series of complaints may signal that a problem exists with the practitioner. Furthermore, a central index would allow the boards and top agency staff to monitor the performance of enforcement and board personnel. In addition to investigated complaints, the index should include telephone calls, "tips" to enforcement personnel, and complaints which are resolved by the board administrators without investigation.

Centralizing Complaint Receipt

Centralizing responsibility for receiving and evaluating complaints could have an even greater impact on alleviating problems with inconsistent and incomplete information. In addition, it would serve to protect the impartiality of board members. A fundamental requirement of the quasi-judicial functions of regulatory boards is that complaints be decided by impartial bodies. When boards or board members review complaints before all evidence has been collected and presented, they may be jeopardizing their ability to reach fair and unbiased decisions.

Although regulatory boards have statutory responsibility for receiving complaints about practitioners, policy manuals at both DOC and DHRB direct board administrators not to inform board members about complaints or on-going investigations in order to maintain the boards' impartiality. A JLARC survey of board members showed, however, that this written policy is not consistently followed in practice. In many cases, board members are involved in reviewing complaints received and making decisions about further investigations (Table 16). Only seven boards have completely delegated the responsibility for reviewing the complaints to the board administrators. The agencies and the boards should ensure that board impartiality is maintained by following specified procedures or establishing centralized complaint processing.

Table 16

BOARD PROCEDURES FOR REVIEWING COMPLAINTS

<u>Procedure</u>	<u>Number of Boards*</u>
Review by full board	9
Review by subcommittee or single board member	6
Review by board administrator	7
Review procedure undetermined	8

*Total number of boards surveyed was 30 because the three boards under the Board of Behavioral Sciences receive complaints about licensees.

Source: JLARC Survey of Board Members.

Under a centralized system, a unit in each agency, such as the enforcement unit, would receive all complaints about licensees, evaluate the need for further investigation, and initiate action to process the complaint. Expertise regarding the particular profession or regulation could be provided to the central unit through the board administrator or a single board member who would then be excluded from the adjudication process.

A number of states have established central units for receiving complaints about regulated professions. For example, the Florida Department of Professional Regulation has established a central complaint analysis unit to receive and evaluate all complaints against regulated practitioners. The unit determines whether an investigation is needed or may attempt to resolve a relatively minor complaint through correspondence. The unit also enters all types of complaints into a computerized system for information and tracking and assigns a priority depending on the seriousness of the complaint.

Although regulatory boards in Virginia have the responsibility under the Code to receive complaints against practitioners, they are not prohibited from delegating this responsibility to a central unit within each agency. To ensure consistency, however, the General Assembly may wish to consider amending Title 54 of the Code in order to shift responsibility for receiving complaints from the regulatory boards to DOC and DHRB. These agencies could then establish central units for receiving, evaluating, and determining the need for investigation for all complaints filed against practitioners.

INVESTIGATION OF COMPLAINTS

Once a board has determined that an allegation needs to be investigated, the complaint is sent to the central enforcement unit of the DOC or DHRB. The enforcement units have independent responsibility for collecting all relevant facts and evidence about an allegation. The information is reported to the board, which determines whether there has been a violation of law or regulation.

Enforcement activities of the boards and agencies have been significantly enhanced by creation of centralized units to carry out investigations. Additional attention should now be directed to continued improvement of procedures for setting priorities, monitoring investigations, training investigators, and reporting to boards. Particularly serious problems now exist at DHRB with regard to supervision of personnel and documentation of evidence.

Scope of Investigations

Complaints against practitioners may come from a variety of sources and involve many different types of problems. About half of

the complaints investigated by the DOC and DHRB enforcement units are initiated by consumers (Table 17). Other licensees, enforcement unit personnel, and board members also frequently initiate complaints against violations of law or rules.

Table 17

SOURCE OF INVESTIGATED COMPLAINTS

<u>Source of Complaint</u>	<u>Percent of Investigated Complaints</u>	
	<u>DOC</u>	<u>DHRB</u>
Consumer	59.1%	40.0%
Another Licensee	20.5	13.8
Enforcement Unit	3.4	10.0
Board Member	9.1	1.3
Anonymous	1.1	1.3
Other or unable to tell from records	6.8	33.6
	100.0%	100.0%

Source: JLARC Investigation Analysis. Based on 90 investigations in each agency.

Complaints cover a wide range of problems including standards of practice, unprofessional conduct, unlicensed activity, and fees (Exhibit D). About half of the investigated complaints arise out of allegations of incompetence, misrepresentation, or inadequacy of professional services rendered.

During FY 1981, DOC initiated 703 investigations and DHRB began 450. The number of investigations conducted by DOC has doubled in four years, with most of the increase in contractor and real estate complaints (Table 18). The number of investigations reported by DHRB has declined by 25 percent in the last three years; however, agency personnel indicate that the apparent decline is actually due to inconsistencies in recordkeeping. Because of inconsistent reporting at DHRB, any actual change in investigative workload could not be determined. Moreover, since neither agency compiles separate statistics on complaints and background investigations of applicants for licensure, figures on investigated complaints are not completely accurate.

Investigations by DOC

DOC has established an effective investigation process including appropriate supervision, well-defined investigative procedures, and good documentation of findings. The enforcement staff of 24 people is located in four regional offices, each with a supervisor and investigators. Two investigators provide specialized assistance in the

Exhibit D

TYPES AND EXAMPLES OF COMPLAINTS HANDLED BY BOARDS

Standards of Practice

Standards of practice complaints deal with allegations of incompetence, misrepresentation, or improper provision of a professional service to a consumer. About 43 percent of complaints investigated deal with standards of practice.

A woman complained to the Real Estate Commission that a salesman had misrepresented the terms of a contract. She alleged that promised home repairs were not completed after buying the home.

Unprofessional Conduct

Unprofessional conduct complaints are violations of laws or board regulations which do not involve a consumer and may not necessarily involve the professional competence of a licensee. These complaints account for 31 percent of all investigations.

A licensed dentist sent the Board of Dentistry a newspaper advertisement of another licensed dentist who had used a trade, or assumed, name to identify his practice. Use of trade names by dentists is prohibited by law.

Unlicensed Activity

This type of complaint involves an unlicensed individual who is allegedly practicing an occupation for which a license is required by law. Regulatory boards generally do not have jurisdiction over unlicensed individuals. These are criminal violations which may be handled in the court system. Unlicensed practitioner complaints total 16 percent of all investigations.

A licensed land surveyor sent a letter to the Board of Architects, Professional Engineers, Land Surveyors and Certified Landscape Architects claiming that an unlicensed individual was doing boundary surveys.

Fee Dispute

Fee disputes arise between a consumer and a practitioner over the amount of money charged for a service. Boards generally do not have jurisdiction in this area unless there are allegations of fraud or misrepresentation. These complaints total only about 3 percent of all investigations.

An anonymous caller to the Board of Medicine complained that she had received a bill from her surgeon and a second bill from an attending surgeon for additional services. She claimed that she was not notified before the operation that two charges would be involved. The caller was advised to take the matter up with the hospital where the surgery was performed.

Other

Some boards may investigate other types of complaints in addition to the previous types. For example, the Real Estate Commission receives complaints about alleged violations of the Fair Housing Act. This category accounts for 7 percent of all complaints.

A black couple complained to the U.S. Department of Housing and Urban Development (HUD) that they were denied an apartment because of their race. The couple alleged that the apartment manager had rented two apartments to white couples after their application. HUD referred the complaint to the Virginia Real Estate Commission for investigation and disposition.

Source: JLARC Investigation Analysis.

Table 18

ANNUAL NUMBER OF COMPLAINT INVESTIGATIONS BY BOARDS

	Fiscal Year			
	1978	1979	1980	1981
<u>Department of Commerce:</u>				
Accountancy	5	12	13	18
Architects, Engineers, Surveyors	67	28	34	36
Athletic Commission	0	1	0	0
Audiologists and Speech Pathologists	1	1	2	1
Barbers	0	5	6	10
Behavioral Sciences	16	25	13	7
Collection Agencies	17	20	28	26
Contractors	*	78	105	160
Driver Training Schools	2	1	3	6
Employment Agencies	0	7	12	25
Hairdressers	7	18	35	36
Harbor Pilots	0	0	0	0
Hearing Aid Dealers & Fitters	1	2	5	4
Librarians	0	0	0	0
Nursing Home Administrators	1	2	1	0
Opticians	4	3	9	7
Polygraph Examiners	0	2	4	3
Private Security Services	17	32	57	53
Real Estate	211	344	336	310
Sanitarians	0	0	0	0
Water and Wastewater Operators	<u>2</u>	<u>12</u>	<u>1</u>	<u>1</u>
DOC TOTAL	351	593	664	703

*Contractor complaints were not handled by DOC until FY 1979.

<u>Department of Health Regulatory Boards:</u>	**			
Dentistry	80	88	68	
Funeral Directors and Embalmers	18	26	22	
Medicine	212	190	122	
Nursing	74	52	73	
Optometry	17	42	25	
Pharmacy	163	104	103	
Veterinary Medicine	<u>50</u>	<u>36</u>	<u>37</u>	
DHRB TOTAL	614	538	450	

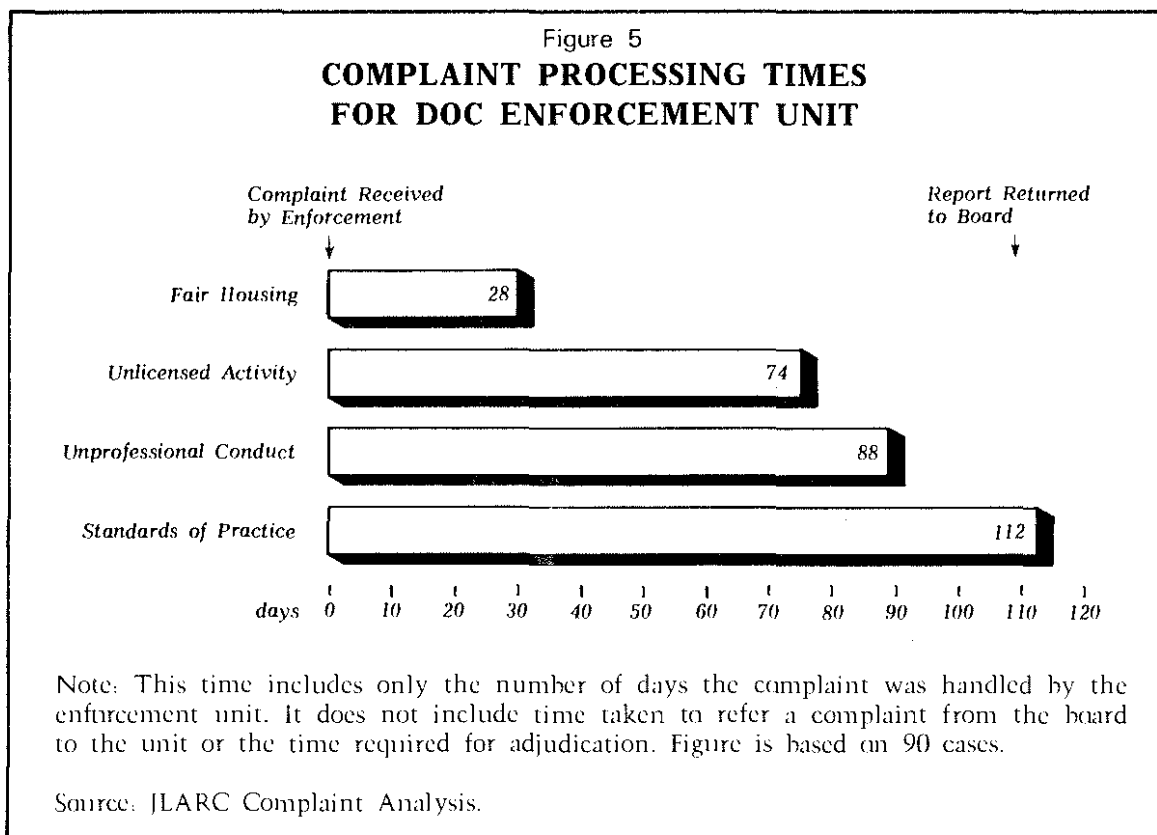
**DHRB has no information on investigations conducted in FY 1978.

Sources: DOC and DHRB Annual Reports.

areas of construction and financial audits, and two full-time staff are primarily responsible for checking licenses in barber, beauty, and optician shops. The agency now needs to further develop management tools for establishing priorities among cases, for tracking cases more effectively, and for providing additional training to enforcement staff.

Complaint Priorities. DOC does not have standard guidelines for rating the seriousness of complaints or time guidelines for investigating most cases. Although supervisory personnel are responsible for ensuring that no case is delayed unnecessarily, the investigator has primary responsibility for establishing priorities among investigations.

Only fair housing cases have specific time requirements. Regulations require that investigations of all fair housing complaints be commenced within 30 days of receipt and adjudicated by the Real Estate Commission within 15 days of completion of the investigation. They are given top priority within the DOC enforcement unit. JLARC's review of complaint investigations showed that the DOC enforcement unit processed fair housing complaints within 28 days, significantly faster than any other type of complaint (Figure 5).



Both agencies might consider establishing general guidelines for prioritizing cases on the basis of their nature and seriousness. Such guides could be useful for expediting the processing of all cases. DOC could develop written procedures for classifying complaints on the basis of the potential physical or financial harm to the consumer and on the number of other related complaints that have been received against the same practitioner. Time guidelines for each classification could then specify reasonable parameters for investigations. This approach could be used as part of a tracking system to monitor the timely completion of cases.

Monitoring Enforcement Activities. DOC now appears to have an appropriate supervisory structure in its enforcement unit to monitor the quality of investigations. It does not currently have a mechanism to assess workload among investigators or to track the progress of cases, but is making progress in these areas.

Each regional office is directed by a supervisor who monitors the activities of the investigators and helps plan difficult investigations. Supervisors review all completed investigations to determine if investigators have gathered all the relevant evidence and conducted the necessary interviews. DOC's well-organized and clearly-presented investigative reports show the value of consistent supervisory review. Supervisory personnel meet every two weeks to develop more coordinated efforts among the regions.

The lack of a tracking system may cause a case to be unnecessarily delayed, however, as the following example illustrates:

A homeowner filed a complaint against a contractor who made repairs to some property the complainant was attempting to sell. The complaint alleged that the contractor underbid the cost of the repairs, escalated the price after the contract was awarded, and delayed completing the project for six months, a delay that caused weather damage.

The administrator for the Board of Contractors initially attempted to resolve the complaint by contacting the homeowners and contractor. After a delay of months, the contractor wrote that a financial settlement had been reached with the complainant. The administrator closed the case as "resolved."

A month later the case was reopened at the request of a DOC investigator who had investigated similar complaints against the contractor. The original complainant wrote to the investigator that several persons had heard the contractor admit that construction items were inflated in cost and improperly installed. The homeowner also indicated that the financial settlement did not cover his expenses.

Before the investigation could begin, the investigator was promoted and the case was reassigned to another person. Nothing was done on the case for over a year. A week after JLARC reviewed the case, a DOC investigator contacted the complainant's attorney, who could not remember the details of the case. Attempts to contact the complainant were unsuccessful. No additional investigation was conducted.

The case was returned to the Board of Contractors and closed as "resolved" three months later. More than two years had transpired from the time the complaint was originally made to the board.

A mechanism for tracking cases could have prevented the several delays in this complaint at the board level and in the enforcement unit. Moreover, prompter action in this case might have aided the collection of evidence against the contractor.

In a substantial proportion of cases, investigative staff take a significantly longer time than usual to complete an investigation. Most investigations are begun about 23 days after the complaint is received by the enforcement unit, investigated within about a week, and reported to the board within 40 days. In almost one out of three complaints, however, investigations are not begun until at least two months after the enforcement unit has received the complaint. In 27 percent of the cases, DOC takes more than 60 days to complete a report and return it to the board.

DOC is taking two steps to improve its monitoring and tracking capabilities. First, the agency is instituting productivity standards for its investigators. Varying workloads among investigators, ranging from 14 to 60 cases completed during FY 1981, prompted DOC to establish a minimum standard of 50 cases completed annually for each investigator. While establishing guidelines provides supervisors with a measure by which to evaluate investigators, the complexity of the investigations required also needs to be taken into consideration.

DOC is implementing an automated data processing system for enforcement activities. This system should enable agency managers to track cases more effectively and provide DOC and the regulatory boards with complaint information which is currently unavailable on their manual system.

DOC should continue in its efforts to improve the monitoring and tracking of complaint investigations. The automated data processing system being implemented should include a mechanism based on the priority guidelines to alert enforcement personnel when cases are off-schedule so that they can determine the causes and take corrective action.

Investigator Training. Since investigators generally work independently on cases, adequate training in investigative and reporting techniques is essential. Training for new investigators currently consists of on-the-job experience with another investigator. The unit has recently increased its focus on classroom training, however. Group sessions have been planned to take place four times every year. Additionally, special sessions on skill areas such as report writing have been initiated in the last year.

DOC enforcement staff have indicated a desire for additional training opportunities. One area where training would be useful, according to the investigators, is board laws and regulations. This type of training is important since investigators may handle complaints from all 21 boards, which have different laws and regulations. DOC should place top priority on this area of training. Development of additional programs should be based on regular assessment of the training needs of investigators and supervisors.

Investigations by DHRB

The creation of DHRB has not resulted in any more systematic or effective handling of enforcement activities. The enforcement section of DHRB, known as the compliance unit, was formed in 1977 from the investigative staffs of the previously independent boards. Most of the staff, however, came from the Board of Pharmacy. The unit's primary focus has remained in drug-related areas: almost three-fourths of the inspections and one-third of the complaint investigations involve drug laws and regulations.

The compliance unit is staffed by 18 persons located throughout the State: four investigators, four drug auditors, eight pharmacy inspectors, the compliance manager, and a part-time compliance coordinator. The auditors and inspectors have investigative caseloads in addition to their other duties. The compliance coordinator is responsible for recordkeeping and complaint tracking in the unit.

DHRB needs to develop a broader orientation for the unit and to address serious shortcomings in the operation of enforcement activities. As at DOC, attention should be given to prioritizing and tracking cases. Additional problems at DHRB include poor documentation and reporting of case findings and inadequate supervision and training of staff.

Thoroughness of Investigations. DHRB has developed a manual describing proper investigative procedures in which conducting interviews and gathering evidence are specified as central components of a standard investigation. The information gathered through these means is needed in order to provide enough evidence for the boards to determine whether a violation has occurred. However, JLARC's review showed that in almost one of every four investigations completed by DHRB investigators, no interviews were conducted by the investigators. And

in 22 percent of their cases, DHRB investigators collected no physical evidence such as contracts, bills, x-rays, medical records, or photographs.

Failure to collect relevant information delays the completion of a complaint investigation and can affect the final disposition as shown in the following examples:

Following an investigation, a woman was notified by the Board of Dentistry that her complaint against a dentist was unfounded. She was told that the investigation failed to produce evidence proving the dentist had acted negligently when filling her teeth.

Only after the woman wrote back to the board, dissatisfied with the decision, were the dentist's x-rays of her mouth actually obtained. Although the board administrator determined after reviewing the x-rays that the dentist did not act negligently, these x-rays were an important part of the investigation and should have been obtained during the initial investigation.

* * *

A woman wrote to the board claiming that a veterinarian misdiagnosed and improperly treated her cat's broken foot. After investigating the complaint, the investigator reported finding no violations.

In reviewing the completed investigation, the board administrator noted a lack of documentation and referred it back to the investigator. In collecting additional information, the investigator noted potential violations of the Code and board regulations, although the case ultimately was closed with "no action necessary."

Investigators have primary responsibility for deciding what evidence or interviews will be necessary to substantiate a violation. Therefore, DHRB needs to take steps to ensure through training that investigators recognize the significance of evidence. In addition, supervisors should review all cases carefully and work with investigators to ensure that documentation is complete.

Investigative Reports. DHRB's investigative reports are often disorganized, unclearly presented, and difficult to follow. The evidence is neither labeled nor referred to in the investigative summary, if there is a summary.

Some final reports are submitted in handwritten form and are difficult to read. No clerical staff has been assigned exclusively to DHRB's enforcement unit. Reports are typed either by investigators or, when time permits, by clerical staff assigned to board administrators.

Since regulatory boards rely on the reports to adjudicate complaints, clearly organized and presented investigative reports are necessary to the appropriate disposition of complaints. DHRB needs to improve its investigative report presentation. At a minimum, the department should establish a standard format for presenting cases. In addition, enforcement personnel should receive training in report writing. DHRB should also assign adequate clerical support to the enforcement unit.

Supervision and Training. At DHRB, supervision is not available to enforcement personnel on a day-to-day basis because investigators work out of their homes located throughout the State. All supervision is provided by a compliance manager who is responsible for monitoring the activities of the 16 investigative staff, assisting in planning investigations, and reviewing reports. A compliance coordinator performs part-time recordkeeping functions for the enforcement unit but has no supervisory responsibilities.

Most supervision is provided through periodic meetings in Richmond between the compliance manager and investigative personnel. The compliance manager meets individually with investigators every four to six weeks. Group meetings of investigators are infrequent, the last being a training session in September 1980. Limited contact with other investigators constrains coordination and exchange of information on investigative techniques.

Problems with investigations and documentation of case findings could be alleviated, at least in part, by improved approaches to supervision. At a minimum, DHRB should implement periodic group meetings of all investigative staff so that enforcement efforts may be better coordinated and communications among investigators improved. The department should also establish at least one additional supervisory position from within existing staff levels to provide more review and supervision of investigative staff.

Investigator training at DHRB is also limited and should be improved. Initial training consists of on-the-job experience with another investigator for a period of four to eight weeks. Other training has consisted of three sessions in the past two years: a seminar for the drug auditors presented by the federal Drug Enforcement Administration, a two-day session on dental and optometry investigations, and training for veterinary hospital inspections.

Investigators have indicated a desire for additional training, especially in the areas of report writing, investigative techniques, and laws and regulations. Deficiencies in some investigations and reports indicate an immediate need for supervision and training in those areas.

ADJUDICATION OF COMPLAINTS

After agency enforcement units complete an investigation, the regulatory boards must determine whether a violation of law or regulations has occurred and take disciplinary action if necessary. Boards may issue a variety of sanctions ranging from a reprimand to revocation of a license. Boards must follow the requirements of the Administrative Process Act when adjudicating complaints to ensure that the due process rights of the practitioner are protected.

The JLARC review found that it typically takes 66 days to close a case after the board has received the investigative report, but some cases take substantially longer. Disciplinary action is taken in about one of every three investigated complaints, either by boards or agency staff acting on a board's behalf. For the most part, regulatory boards appear to be primarily concerned with disciplining incompetent or unscrupulous practitioners. Resolving the specific consumer grievances that prompt complaints appears to be a secondary consideration at best. To improve adjudication of cases, boards need to address problems associated with timely closing of cases, the appropriate level of delegation of adjudicatory tasks to staff, methods of securing restitution for consumers with valid complaints, and increased coordination with law enforcement officials when violations of regulations are found that have the potential for resulting in criminal prosecution.

Methods and Types of Disciplinary Actions.

Boards can take action against an individual who violates laws or regulations in several ways: a cease and desist order, a consent order, formal or informal hearings, or referral to a law enforcement agency (Exhibit E). Because of the time and expense involved, boards prefer not to conduct hearings, especially if compliance can be obtained through cease-and-desist or consent orders. Only about 18 percent of investigated complaints go to a hearing.

According to the investigative reports, about half of the allegations of violations are unfounded or are not within the jurisdiction of the board. Disciplinary actions are taken by boards in about one-third of the cases (Table 19). In another 18 percent of the cases, complaints are founded but no disciplinary action is taken by the board because the licensee has resolved the violation.

Typically an unfounded complaint is one in which the word of the complainant contradicts the word of the licensee as shown in the following case.

A man purchased a lot in a recreational development. He alleged that the real estate salesman told him that the property was worth more than the price he was paying. The man tried to re-sell the

Exhibit E

**METHODS OF HANDLING COMPLAINTS
AFTER INVESTIGATION**

Cease and desist order: The board may issue an order to a practitioner to stop the activity which is in violation of the law or regulation. This method can also be attempted with unlicensed individuals engaging in activities reserved only for licensed individuals. However, the board has no authority to enforce any action against a non-licensee. Individuals are requested to respond, affirming compliance.

Consent order: The practitioner acknowledges the validity of the complaint and agrees to a disciplinary action imposed by the board. The action can include a reprimand, probation, suspension, revocation, or fine. Boards prefer to settle complaints with consent orders because of the time and expense of hearings. The consent order is the most frequently used method for taking disciplinary action.

Informal hearing: The practitioner appears before the board to discuss the allegations and evidence. The board makes a determination on the validity of the complaint and imposes a settlement. Informal hearings usually result in a consent order. Conduct of informal hearings is specified in the Administrative Process Act.

Formal hearing: If the practitioner disputes the validity of the complaint, a formal hearing is usually held. This is a quasi-judicial proceeding with formal notice, a presiding hearing officer, formal presentation of evidence, cross-examination of witnesses, and a judgment. Boards have the option of sitting with the hearing officer and may delegate to the officer (1) finding of fact, (2) conclusions of law, and/or (3) recommended sanctions. The board issues a final order.

Criminal action: In cases where there has been a violation of law, the board may refer the complaint to a law enforcement agency for possible prosecution. Boards may or may not take additional action against the licensee.

Closed without action: An investigation may show that the complaint is not within the jurisdiction of the board, that the allegations cannot be proven or are unfounded, or that the licensee has taken corrective action. In these instances, the board may close the case without action.

Source: JLARC Investigation Analysis.

Table 19

OUTCOME OF INVESTIGATED COMPLAINTS

<u>Description</u>	<u>Percent of Investigated Complaints¹</u>	
	<u>DOC</u>	<u>DHRB</u>
<u>No Action:</u>	67.6%	57.9%
No jurisdiction	13.0%	5.8%
Unfounded	37.7	33.3
Complaint Founded but no action indicated	16.9	18.8
<u>Disciplinary Action:²</u>	32.4%	42.1%
Order to cease activity	12.5	8.5
Reprimand	6.3	8.5
Fine	6.3	2.8
Probation	2.5	15.5
Suspension	0.0	2.8
Revocation	2.5	5.6
Other or unknown	7.6	18.3
Total	100.0%	100.0%

¹Based on 81 closed cases in DOC and 71 closed cases in DHRB.

²More than one disciplinary action may have been taken as a result of a complaint.

Source: JLARC Investigation Analysis.

lot at a later date but was unable to make a profit. He alleged that the salesman had misrepresented the value of the property.

A DOC investigator interviewed the parties involved but was unable to document the allegation as being other than the word of the complainant. The Real Estate Commission dismissed the complaint as unfounded.

Timely Adjudication of Complaints. Protection of the public interest and practitioner rights is ensured not only by appropriate but also by prompt disciplinary action. Failure to take prompt action can unnecessarily expose the public to potential harm or restrict the practice of a licensed individual.

The following cases illustrate the range of actions that boards take on legitimate complaints.

A hospital notified the Board of Nursing that a nurse had been fired from its staff for allowing an unlicensed aide to administer medication, which is a violation of State law. The board administrator requested an investigation to gather evidence to substantiate the allegations. After a formal hearing, the nurse's license was revoked by the board.

* * *

The director of a real estate school complained that a competing school was not providing 60 hours of course work as required by the regulations of the Real Estate Commission. A DOC investigator was sent to document the allegation. The president of the school admitted that his course previously had not given the required number of hours. But he indicated that the course was changed to comply with the regulations. Since the individual had taken corrective action, the commission took no disciplinary action.

* * *

A routine drug audit of a pharmacy conducted by the DHRB enforcement unit showed that the pharmacy's records of controlled drugs were not accurate or complete. The Board of Pharmacy, after consulting the assistant attorney general, held an informal hearing with the licensed pharmacist.

As a result of the hearing, the Board and the pharmacist agreed to a consent order which officially reprimanded the licensee for carelessness. The individual was allowed to continue his practice without restrictions.

Most cases are closed in about two months after a board receives an investigative report from the enforcement unit. The time involved appears to relate to the type of action required (Table 20). Nevertheless, some cases take a substantial amount of time to resolve after investigation. JLARC found that about 19 percent of the 180 complaints filed between January 1, 1979 and December 31, 1980 were still held open by boards in March 1982. Some of these cases had been pending as long as 32 months. The following case shows the problems associated with investigatory delays and prolonged decision-making.

Table 20

TIME FOR COMPLAINT DISPOSITION

<u>Type of Action</u>	<u>Median Number of Days from Receiving Investigative Report to Closing Case</u>	<u>Number of Cases</u>
No action	45	63
Administrative Action	75	19
Informal Hearing	205	9
Formal Hearing	182	4

Source: JLARC Investigation Analysis.

An attorney wrote to the Board of Medicine on behalf of a client who alleged that a physician misdiagnosed an illness and improperly treated the client. The attorney forwarded a copy of the complaint to the hospital involved. After receiving the complaint from the board administrator, a board member decided to wait on the hospital's disposition of the complaint before determining what action the board should take.

Six months later, there was no conclusive response from the hospital. The assistant attorney general suggested the board conduct an investigation of its own. The board administrator appointed a medical complaint investigation committee to review the complaint. More than a year and a half later, the committee had not returned a recommendation to the board.

When JLARC reviewed the case in March 1982, the board had not yet reached a decision on what action to take--almost three years from the time the complaint was originally filed. During this time, other hospitals requested notification of the board's action in this case so they could decide whether to extend privileges to the physician. The physician has moved out of the State.

At a minimum, a tracking system should be established to alert boards to delayed cases. Boards should ensure that case circumstances, not procedural delays, are the problem. Whenever possible, cases should be expedited for the benefit of the public and the practitioner.

Delegation of Decisionmaking Authority

Impartial adjudication of alleged violations of standards is a primary function reserved by statute for the boards. Departmental staff may receive and investigate, but not adjudicate complaints. Yet, at the conclusion of an investigation, various personnel are involved in deciding whether the evidence establishes the validity of a complaint. The full board participates in this decision in only 24 percent of the cases, usually when hearings are conducted (Table 21). Complaints for which no action is taken, or for which an administrative action such as a cease-and-desist or consent order is taken, are typically handled at the staff level with only cursory review by boards.

Table 21

PARTICIPANTS IN DETERMINING COMPLAINT VALIDITY

<u>Participant</u>	<u>Percent Investigated Complaints^{1,2}</u>	
	<u>DOC</u>	<u>DHRB</u>
Enforcement	43%	35%
Board Administrator	29	31
Assistant Attorney General	25	30
Board Member (or Subcommittee)	33	30
Full Board	28	20

¹More than one participant may be involved in a decision.

²Based on 81 closed cases in DOC and 71 closed cases in DHRB.

Source: JLARC Investigation Analysis.

Boards should certainly draw upon the professional expertise of attorneys and others familiar with the case and board processes. However, the full board should either decide cases or monitor and approve all decisions made on its behalf. This should be particularly true of cases that may be dismissed as unfounded. DOC and DHRB should clarify roles and responsibilities of all participants, establish reasonably standard procedures, and provide orientation and training when necessary.

Resolution of Consumer Complaints

Because most board enforcement efforts focus on disciplining practitioners, relatively few of the consumers' complaints were re-

solved by the board. Only eight of the 41 complainants contacted by JLARC stated that the boards had corrected the problems which initiated their complaints.

Boards view complaints as evidence of the incompetence of a licensee. Resolving specific consumer grievances or securing restitution is a secondary consideration. In actions against licensees, boards, not complainants, act as the "plaintiffs" against licensees. Boards could, however, address consumer complaints more often by ensuring that incompetent performance of duties by practitioners is made an offense within the jurisdiction of the board and by making greater use of the consent order to secure restitution for consumers.

Use of Regulations to Ensure Quality Practice. Boards, of course, can discipline only in areas in which they have statutory or regulatory authority. Some boards, however, do not attempt to regulate the quality of services or competence of a practitioner other than at the entry level. At least two boards, those regulating hairdressers and librarians, have not promulgated regulations regarding professional competence. And some boards, such as those regulating commercial driver training schools and employment agencies, focus primarily on business practices rather than professional competence. Other boards, such as the Collection Agency Board, are reluctant to discipline on grounds of incompetence. Yet, most consumer complaints deal with issues of professional competence.

Boards need to be cognizant of the grievances of consumers and be willing to deal with questions of professional competence when reviewing complaints. Each board should review its regulations and statutes to ensure that it has sufficient authority to discipline in the area of professional competence.

Use of Consent Orders. Boards could make greater use of consent orders for attempting to resolve the specific problems of consumers. A consent order is a voluntary agreement between the licensee and the board through which a licensee consents to specific disciplinary actions. A consent order may be issued after an investigation or informal hearing.

Most boards use consent orders to establish fines, probation, or suspension of licensees. More than 37 percent of the complaints that result in disciplinary action are handled with consent orders. However, the orders can also be used to direct practitioners to take additional education or to resolve a consumer's grievance satisfactorily. The Board of Contractors uses the consent order routinely to gain redress for the consumer.

An individual notified the Board of Contractors that a contractor had not repaired a storm drain that had been broken when his lot was graded. A DOC investigator obtained a copy of the contract and photographs of the damages.

Using the investigator's evidence, the board conducted a hearing on the charges. Rather than taking restrictive action against the contractor's license, the board and the licensee agreed to a consent order in which the contractor agreed to make necessary repairs to the storm drain and pay a \$2,000 fine.

Whenever possible, boards should consider a consent order as a means of correcting consumer problems. Repairs, refunds, or corrective action, for example, can be directed through consent orders.

Referrals to Law Enforcement Agencies

Boards have jurisdiction to discipline licensees, but have no authority to adjudicate criminal violations or to impose criminal penalties. Some cases that come before boards and result in disciplinary action for violations of board regulations also involve actions that could be classified as felonies or misdemeanors. Nevertheless, some boards rarely refer cases to law enforcement authorities.

Almost half of the complaints filed with the seven health regulatory boards involved drug diversion, substance abuse, or illegal prescribing. This type of violation could also be a potential misdemeanor or felony under the Drug Control Act. Out of 46 cases, two were referred to law enforcement agencies and three came to the board's attention because of the arrest of a licensee (Table 22). The legality of the other cases was not determined. In 21 cases, boards disciplined practitioners; 18 cases were determined to be unfounded; 9 cases were still open at the time of the review.

During the course of the JLARC review, the State Police initiated an independent study with the approval of then Governor Dalton, to evaluate whether a significant drug diversion problem exists in the Commonwealth and whether the policies and practices of the Department of Health Regulatory Boards contributed to it. JLARC cooperated with the police team, which concentrated its efforts in the area of the Board of Pharmacy.

The police concluded that there was no evidence of criminal violations on the part of DHRB personnel or of favoritism in handling official duties by these State employees. However, their report strongly concluded that DHRB was attempting to deal with drug diversion by regulation and administrative measures even in those instances where potential felony violations were uncovered.

The report noted an "almost total lack of regard for apparent violations of the Criminal Code of Virginia by both the DHRB staff and the Attorney General's representatives." In many of the cases reviewed by the State Police, Commonwealth's attorneys were excluded from situations involving criminal and regulatory violations, and DHRB was criti-

Table 22

COMPLAINTS RELATED TO DRUG CONTROL

<u>Nature of Complaint</u>	<u>Medicine</u>	<u>Pharmacy</u>	<u>Nursing</u>	<u>Veterinarians</u>	<u>Dentistry</u>
1. Indiscriminate Prescribing	8	-	-	-	2*
2. Other Prescribing Violations	5	-	-	-	1
3. Substance Abuse	3	-	-	-	-
4. Drug Diversion	1	6	6*	1*	-
5. Improper Filling of Prescriptions	-	7	-	-	-
6. Inaccurate Records/ Improper Drug Storage	1	2	-	-	-
7. Other	<u>1</u>	<u>2</u>	<u>-</u>	<u>-</u>	<u>-</u>
Total Drug Related Complaints	19	17	6	1	3
Total Complaints Reviewed	32	17	9	7	15

*One case from each of these three boards was initiated by an arrest.

Source: JLARC Investigation Analysis.

cized for extraordinarily lenient actions taken in serious drug cases. The review also indicated the need for tighter management control of investigations and greater coordination among the boards.

It appears that problems noted in the State Police investigation and this review could be addressed through establishment of a more formal link between DHRB and law enforcement agencies. Other states have established mechanisms to enhance coordination between regulatory and law enforcement activities. In Michigan, for example, a special investigative unit was created to handle potential drug law violations. The unit is staffed by drug investigators from the Department of Licensing and Regulation and investigators from the Michigan State Police. In Florida, the enforcement unit of the Department of Professional Regulation refers potential criminal violations to the state's attorney immediately. Boards are not involved in the process at all until an investigation is ready for adjudication by the board.

DHRB and the health regulatory boards should routinely refer all potential violations of criminal law to local Commonwealth's attorneys for disposition. For drug cases, DHRB and the State Police should

consider means of cooperation in the investigation of potential criminal and regulatory violations involving licensed practitioners.

INSPECTIONS

The routine inspection of licensees and facilities is a mechanism that boards can use to ensure that practitioners are competent and that they are practicing within the laws and regulations. Since entry standards ensure that an individual is competent to practice at the time of initial licensure, inspections can be used to check that practitioners continue to be in compliance with regulations.

Whereas complaint investigations are conducted in response to an allegation of a violation, inspections may be conducted routinely to ensure that practitioners comply with State laws and rules. However, DOC and DHRB enforcement personnel do not conduct the inspections on a routine basis on all boards, but generally conduct inspections while investigating specific complaints against practitioners. Moreover, although the JLARC survey showed that board members consider inspections an effective way of ensuring practitioner competence, only 11 boards require inspections, and some inspections have little relationship to practitioner competence.

Inspection Activities

Through periodic inspections, regulatory boards ensure the continued competency of those regulated. This function is specified in the *Code of Virginia*. Eleven boards currently require inspections (Table 23).

Some current inspection activities do not appear to relate to practitioner competence. Inspections of barbers, hairdressers, opticians, and private security services consist primarily of ensuring that practitioners are licensed and that licenses are properly displayed.

Such inspections, which do not assess the performance or competence of a practitioner, are not an effective enforcement method and should be discontinued. The two DOC inspectors assigned to this activity could be reassigned to other enforcement functions.

Timeliness of Inspections

If qualitative inspections are conducted, they should be kept up-to-date. At DOC, inspections are conducted as enforcement staff can find the time or as part of a complaint investigation. Some inspections may be conducted if an investigator is in a particular geographic region investigating a complaint. At DHRB, some licensees have not been inspected in over five years. A review of the last inspection

Table 23

NATURE OF ROUTINE INSPECTIONS BY BOARDS

<u>Board</u>	<u>Inspection Activities</u>	<u>Number of Inspections (FY 1980)</u>
Barbers	Check licenses	849
Collection Agency	Check licenses, review bonds, and audit trust accounts	22
Employment Agencies	Check license, verify advertising book, verify job orders	13
Hairdressers	Check licenses	2,347
Opticians	Check licenses	3
Private Security Services	Check registration of employees	86
Real Estate Commission	Check licenses, audit escrow accounts, check business sign	252
Dentistry	Carry out drug audits, sanitation inspections, review of dental hygienist activities	166
Funeral Directors	Check contracts, embalming room, casket room	103
Pharmacy	Carry out drug audits and sanitation inspections for pharmacies, hospitals, manufacturers	981
Veterinary Medicine	Review animal hospitals for sanitation, equipment, drug audits	82

Source: DOC and DHRB Annual Reports.

dates for pharmacies, funeral homes, and veterinary hospitals showed that over 47 percent of the facilities had not been reviewed in one year (Table 24).

Table 24

TIME SINCE LAST INSPECTION

Facility	Percent of Facilities			
	Less Than 1 Year	1-2 Years	2-3 Years	More than 3 Years
Pharmacies	48	52	*	*
Veterinary hospitals	32	15	50	3
Funeral homes	57	8	16	19

*Last inspection dates for Board of Pharmacy licensees were not available beyond two years.

Source: Commonwealth Occupational Regulatory and Licensing System (CORALS).

DOC and DHRB should take steps to ensure that qualitative inspections are kept up-to-date. The agencies should consult with boards about the appropriateness of some inspection activities and to establish how often inspections are necessary.

Inspection Records

Neither DOC nor DHRB maintains uniform records on inspections conducted by the enforcement units. At DOC there is no central file to show what facilities require inspection, when the last inspection was conducted, or what the findings were. At DHRB only the Board of Veterinary Medicine and the Board of Funeral Directors and Embalmers maintain records on inspections of regulated facilities.

Both DOC and DHRB need to improve their records on inspections. As a first step, the agencies should establish central records of what facilities require inspections. In addition, the departments should establish "tickler" mechanisms to identify which facilities are due for inspection. Inspection reports summarizing findings and actions taken should be maintained centrally for use by enforcement investigators and board personnel.

CONCLUSIONS AND RECOMMENDATIONS

Occupational laws and regulations have been established to protect the public from harm. Laws and regulations are enforced through investigations, inspections, and appropriate disciplinary action when violations are discovered. The regulatory boards, DOC, and DHRB need to improve their procedures for receiving, investigating and resolving complaints and in conducting inspections. Recommendations to address these needs follow.

Receiving Complaints

Recommendation (8). BOC, CHRB, and the regulatory boards should improve their efforts to make the public aware of avenues for handling complaints against regulated practitioners. Options include using more public service announcements, publishing agency telephone numbers under "Community Service Numbers" in local telephone directories, installing toll-free telephones to receive complaints, and requiring licensees to display information about the boards with their posted licenses or to include such information on contracts with clients.

DOC, DHRB, and the boards should also identify all organizations which may receive complaints about practitioners and encourage their cooperation in referring the complaints to the boards.

Recommendation (9). DOC, DHRB, and the boards could improve receiving and evaluating complaints by:

- (a) developing guidelines for evaluating the seriousness of complaints received by telephone, appropriately recording the information, and referring complaints for investigation;
- (b) eliminating requirements that letters of complaint be notarized as a routine condition for investigation;
- (c) establishing guidelines for handling complaints administratively and developing standard recordkeeping systems to retain information on the complaint and the action taken;
- (d) establishing a central index of all complaints received by boards.

Recommendation (10). DOC, DHRB, and the boards should implement procedures to ensure that board members do not review complaints prior to adjudication. Alternatively, the General Assembly may wish to consider amending Title 54 of the *Code of Virginia* to shift the responsibility for receiving complaints from the regulatory boards to DOC and DHRB. The agencies, in cooperation with the boards, could establish

central units for receiving, evaluating, and determining the need for investigation for all complaints filed against practitioners.

Complaint Investigations

Recommendation (11). DOC and DHRB should consider developing written procedures for classifying complaints based upon the potential physical or financial harm to consumers and on the number of other complaints against the practitioner. Time guidelines for each classification could specify reasonable parameters for investigations and be used as part of a tracking system to monitor the timely completion of cases.

Recommendation (12). DHRB needs to take steps to ensure that investigations are thorough and that all necessary evidence is collected and clearly reported. Improvements that could be made include:

- (a) establishing a standard format for presenting case findings and carefully reviewing reports;
- (b) training enforcement personnel in investigative techniques, report writing, and laws and regulations;
- (c) providing full-time clerical support to the enforcement unit;
- (d) establishing periodic group meetings to better coordinate and improve communications among investigators;
- (e) establishing at least one additional supervisory position from within existing staffing levels.

Adjudication of Complaints

Recommendation (13). DOC, DHRB, and the boards should develop a tracking system to alert boards to cases delayed during adjudication and take steps to close cases in a more timely manner. Special attention should be given to expediting cases that do not require a hearing.

Recommendation (14). Each board should review its regulations and statutes to ensure that it has sufficient authority to discipline in the area of professional competence. Where statutory authority is lacking, the boards should request appropriate powers from the General Assembly. Moreover, boards should make greater use of the consent order to resolve specific consumer problems. Repairs, refunds, or corrective action may be directed through consent orders.

Recommendation (15). Boards should establish procedures to review and approve all decisions that are made on behalf of the full board by subcommittees or agency personnel, particularly with regard to cases that are determined to be unfounded.

Recommendation (16). DOC, DHRB, and the regulatory boards should refer all potential violations of criminal law to local Commonwealth's attorneys for disposition. For drug cases, DHRB and the State Police should consider greater cooperation in investigating potential criminal and regulatory violations involving licensed practitioners.

Inspections

Recommendation (17). Routine inspections which consist merely of checking to determine whether practitioners are licensed should be discontinued. These inspections should be conducted on a complaint basis. The two inspectors at DOC involved in license checks should be reassigned to other enforcement functions.

Recommendation (18). DOC and DHRB should take steps to ensure that qualitative inspections are kept up-to-date. The agencies should consult with the boards about the appropriateness of some inspection activities and establish frequency of inspections of this type. In addition, the agencies need to improve their records and information on inspections by establishing central records of facilities that require inspections and establishing suspense files to identify which facilities are due for inspection. Inspection reports should be maintained centrally for use by enforcement and board personnel.

IV. ADMINISTRATION OF THE CENTRAL AGENCIES

Having examined the major functions of rulemaking and enforcement, this review now focuses on the administration of the central agencies. Virginia was one of the first states to create a central agency to carry out administrative functions formerly performed by each individual board. The Department of Professional and Occupational Regulation, which was created in 1948, became the Department of Commerce in 1978. It supports the commercial boards. The Department of Health Regulatory Boards was established in 1977 to house formerly independent health boards. Each board retains responsibility for rulemaking and disciplinary activities, while administrative functions such as hiring staff, processing applications and fees, budgeting, recordkeeping, and enforcement are carried out by the central agency.

Centralization was intended to unify and coordinate the activities of the boards, increase administrative efficiency, separate responsibility for complaint investigation from the quasi-judicial function of the boards, and fix responsibility for considering additional regulatory policy and needs. Significant steps have been taken toward achieving these objectives. Nevertheless, both DOC and DHRB have administrative problems, which stem as much from organizational growth as from increasing complexity in the regulatory system. DHRB has not yet developed a cohesive organizational structure nor effective management systems. DOC has recently addressed many of its management difficulties through reorganization and improvements in some of its administrative systems. Much remains to be done.

DEPARTMENT OF HEALTH REGULATORY BOARDS

The Department of Health Regulatory Boards (DHRB) provides administrative and support services for seven health-related boards. The agency was intended to "unify and coordinate" the regulatory activities of the formerly independent boards by consolidating routine administrative functions and providing enforcement services. The Commission of Health Regulatory Boards (CHRB) is an oversight body which is responsible for monitoring the department and providing advice on regulatory policy to the department and the General Assembly.

Creation of the department and assignment of the health boards have been significant first steps toward centralizing administrative and enforcement functions. DHRB has had difficulty, however, in establishing clear lines of authority, a cohesive staff, and a coordinated approach to occupational and professional regulation.

Organization and Staffing

Although DHRB is a relatively small organization, a complex structure has been established to administer agency functions. Effective operations are hindered because of blurred management and operational relationships and inefficient use of staff resources.

Blurred Management and Operational Roles. Some employees of DHRB fulfill dual roles combining operational responsibilities for boards with management responsibilities for the agency (Figure 6). For example, the director, assistant director, personnel officer, and compliance coordinator also serve as executive directors to specific boards. This combination of management and operational roles in one position significantly weakens management "checks and balances", and these dual roles create both actual and perceived conflicts. As agency managers, these individuals are responsible for establishing policies and procedures for the whole agency, for employing and supervising staff, and for developing budgets and authorizing expenditures. As board directors, they carry out policies they have established.

Management decisions that affect every board's budget and staffing level are being made by individuals who serve specific boards. As a result, there is a substantial undercurrent of suspicion among those executive directors who were placed in subordinate positions when DHRB was formed from boards that had previously functioned as independent entities. Moreover, a mechanism is lacking to ensure that one board does not receive preferential treatment in agency funding and staffing decisions.

Because of the demanding nature of his position as executive director to the Board of Pharmacy, the director of DHRB has delegated many of the day-to-day administrative functions to the assistant director. Thus, in addition to being executive director to the Board of Dentistry, the assistant director is responsible for directly supervising at least eight staff members and more than 20 administrative activities including data processing, budgeting, fiscal management, personnel, compliance, and legislative liaison.

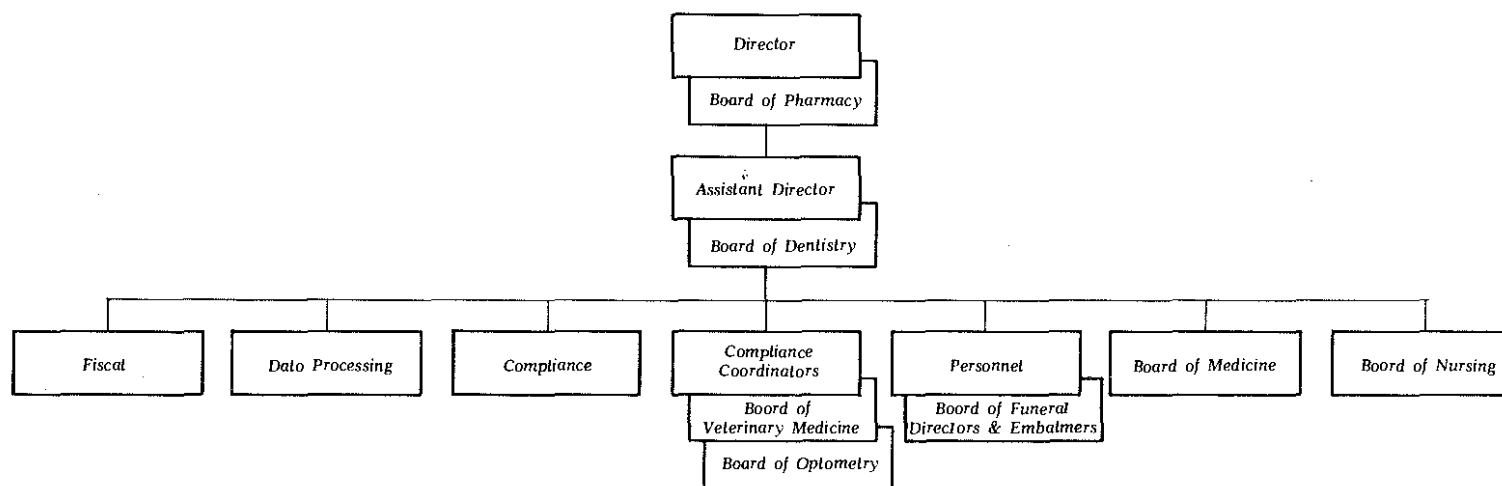
A new classification of positions appears necessary to establish appropriate separation of potentially conflicting responsibilities. DHRB received permission from the Department of Personnel and Training to establish a new position of executive director to the Board of Pharmacy. DHRB plans to separate the positions of administrator to the Board of Dentistry and assistant director of the agency.

Staffing. In addition to dual responsibilities, staffing problems include an insufficient number of supervisory positions in the enforcement unit, poor allocation of clerical resources, unclear statutory authority for employment of some staff, and unnecessary requirement of a pharmacy degree for some enforcement personnel.

Figure 6

ORGANIZATION OF THE DEPARTMENT OF HEALTH REGULATORY BOARDS

Although DHRB is a relatively small organization, a complex structure has been established to administer agency functions. Some employees fulfill dual roles combining operational responsibilities for boards with management responsibilities for the agency.



Source: JLARC staff representation.

The enforcement unit currently has only one supervisor for sixteen personnel located throughout the State. A compliance coordinator performs primarily administrative tasks, such as monitoring paperwork, on a part-time basis. No clerical personnel are assigned to the unit to file investigative data or type reports. The result, as discussed in the previous chapter, has been inadequate documentation of cases and faulty record keeping. In contrast to the enforcement unit, each board has an executive director and a clerical staff similar to that when the health boards were independent.

Reluctance to reassign staff may result from difficulties in absorbing existing staff when the boards were combined, and from the retention of statutory language regarding staffing in the Code provisions for individual boards. Section 54-952 of the Code gives the director of DHRB power to employ persons to carry out the duties of the department. For five boards, however, statutory language remains which gives them the authority to hire their own staff. Although § 54-952 takes precedence over provisions for the boards, the conflicting language adds to the confusion of the authority of the boards vis-a-vis the department.

The strong association of the director with the Board of Pharmacy, which predated the formation of DHRB, and the volume of drug-enforcement activity in the agency may have caused the director to establish an unnecessary requirement that a pharmaceutical background is necessary for some enforcement personnel.

In 1979, the director of DHRB requested approval of a new position to handle activities of the compliance coordinator and executive director for the Board of Optometry and the Board of Veterinary Medicine. The compliance activities involved tracking complaints and maintaining enforcement records.

The director insisted that the position needed to be filled by a pharmacist, even though an analyst with the Department of Personnel and Training could not establish that the job duties required that special expertise. The position was filled by an individual with a pharmacy background.

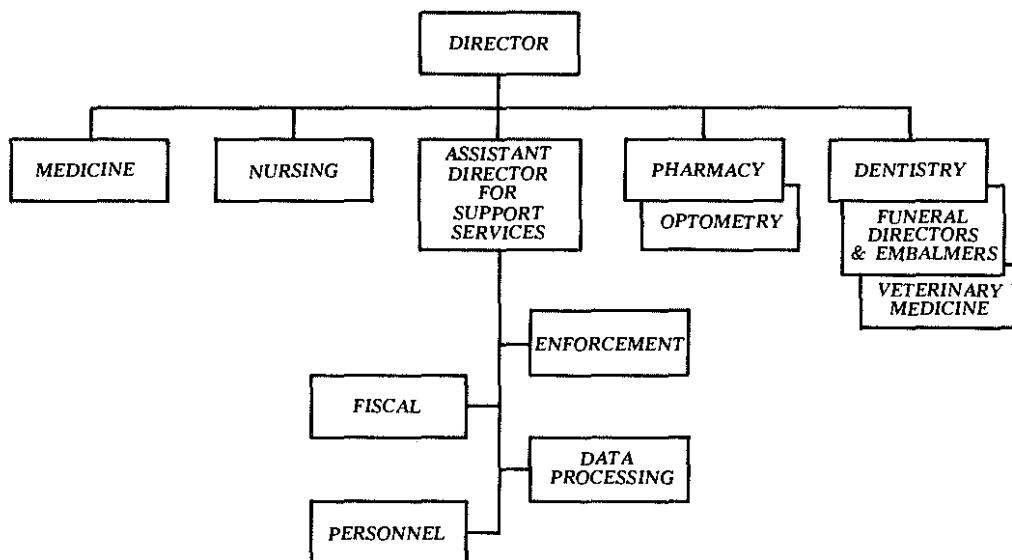
DHRB Reorganization and Staffing. Reorganization of the 56 staff positions within DHRB could resolve some of the administrative and staffing problems within the agency. The separation of the functions of agency director and executive director to the Board of Pharmacy was implemented on July 15, 1982 with the appointment of a new director of DHRB. However, the assistant director, personnel director, and compliance coordinator still maintain board responsibilities in addition to their management functions. These dual responsibilities should be separated.

A realignment of staff within DHRB could also address structural shortcomings in the agency, as well as staffing needs within some units of the department. DHRB needs to review the actual workload of each board to determine those that could be jointly served by single administrators. The Boards of Medicine and Nursing appear to require full-time executive directors. The other five boards, however, (Pharmacy, Dentistry, Funeral Directors and Embalmers, Optometry, and Veterinary Medicine) do not appear to require full-time executive directors, and their activities could be handled by two or three administrators.

A careful assessment of clerical staff needs throughout the agency should be conducted to identify positions that could be reallocated to the enforcement unit to perform routine clerical tasks and also the record keeping duties currently assigned to the compliance coordinator. At least one additional supervisory position should be established to improve supervision within the enforcement unit. This position could be created out of existing investigative positions and the part-time activities of the compliance coordinator.

Figure 7 depicts one organizational option for DHRB. Under this option, central administrative and enforcement units would report to an Assistant Director for Support Services. Agency administrative personnel would not serve individual boards as executive directors. In addition, some executive directors would be assigned to more than one board. This appears possible because some executive directors cur-

Figure 7
OPTIONAL ORGANIZATION FOR DHRB



Source: JLARC staff representation.

rently staff more than one board or hold additional departmental administrative functions.

DHRB managers need to evaluate the agency's structure and staffing levels to overcome weaknesses. A streamlined organization and separation of management and board responsibilities could improve the administrative services provided to the boards.

Communication and Agency Morale

The creation of DHRB from previously independent health boards understandably caused frustration and morale problems for board staff, especially those who were placed in subordinate positions in the new agency. It is essential to the effective and efficient operation of the agency that personnel openly discuss and resolve common administrative problems. Any perception of inequitable treatment can exacerbate morale problems. In the absence of effective and regular communications at DHRB, rumors are frequent, and questionable judgements by administrators have generated perceptions of wrongdoing.

For example, agency morale was affected by an outside employment situation involving the agency's former Assistant Director.

The Assistant Director was concurrently the executive director of the Southern Regional Dental Testing Board. The board is part of a four-state consortium which has formed a private corporation to provide examinations for applicants for licensure by the board. The Assistant Director was hired by the consortium on a part-time basis to oversee the day-to-day operations of the corporation. The organization was staffed by an office manager and a part-time secretary. It was located in the same building as DHRB.

The Assistant Director stated that consortium activities were strictly after-hours and did not interfere with duties at DHRB. Some DHRB staff, however, had the impression that some consortium activities were handled during work hours.

This arrangement was reviewed with a former Attorney General who originally advised there was no conflict of interest in the dual employment. Recently, Attorney General Baliles has ruled there is a conflict and has advised the Assistant Director to resign from one of the positions.

Agency staff also expressed frustration during JLARC interviews that meetings of board administrators occur infrequently and then only to relay information -- not to discuss problems among boards or to

permit discussion of agency policies. The policy manual of the agency was initially developed by the fiscal officer with review and revision only by the director and assistant director. According to board administrators, no provision was made for their formal review and comment. And although the department was created in 1977, the policy manual was not issued until February 1981. Before then, policy was communicated informally.

Although DHRB was created to "unify and coordinate" the activities of the health boards, a lack of communication among agency staff makes it difficult to accomplish this legislative objective. DHRB should provide staff with relevant and timely information and meaningful opportunities for discussion of agency policies and problems through regular staff meetings.

Financial Management

Fees generated by boards are the primary source of funding for occupational regulation in the Commonwealth. DHRB and the boards spend over \$1.5 million annually to cover the expenses of the boards and administrative services. DHRB should have procedures that identify costs, allocate them to appropriate categories, and maintain effective fiscal controls. However, DHRB's current procedures are not sufficient to provide adequate information for a consolidated agency or to support the planned change from general funding to dedicated special funding during the next biennium.

Inaccurate Allocation of Costs. The accounting and reporting system at DHRB does not assign expenditures in a way that allows boards to set fees based on an assessment of their own direct expenses as well as a pro-rated share of central agency costs for overhead and services. DHRB assigns costs into eight subprograms: one for each of the seven boards and a technical assistance subprogram. The technical assistance subprogram should include the cost for services used by all boards, such as data processing, fiscal, and enforcement functions. However, many expenses are arbitrarily assigned to the subprograms, and they do not accurately reflect the costs of the activity. The following example illustrates this problem:

Each enforcement employee handles work for several boards, so the costs for that employee cannot be assigned exclusively to a particular board. All enforcement expenses, therefore, should be assigned to the technical assistance subprogram and allocated to the boards on a performance-based measure, such as work-hours of activity per board for a fiscal year.

Instead, enforcement expenses have been allocated arbitrarily. For example, the salaries and benefits of 12 enforcement staff are assigned to

the Board of Pharmacy, the salary of the compliance manager is assigned to the technical assistance program, and the salary of the compliance coordinator is assigned to the Board of Optometry.

Allocating enforcement costs in this manner does not accurately reflect the relative use of enforcement services by particular boards. It is not possible to tell how much each board spends for enforcement.

A second problem with the allocation of costs at DHRB is that central service expenses assigned to the technical assistance subprogram are not allocated back to the boards. During FY 1981, expenses for this subprogram totalled \$357,000 or 20 percent of agency expenditures. Included in this subprogram were costs for the Commission of Health Regulatory Boards, and salaries of the director, assistant director, fiscal officer, and data processing staff. Costs for technical assistance should be allocated to the boards on the basis of usage or another measurable criterion in order for boards to set their fees at a sufficient level to cover total costs. DHRB should develop a cost allocation methodology which appropriately assigns costs to each board.

Problems with Budgeting. Budgeting at DHRB is impeded, not only by inaccurate cost allocation, but by limited participation in the process by board personnel and the inadequacy of fiscal reporting. An agency budget is an important management tool in which goals and objectives are identified and resources planned to accomplish the objectives. Without accurate historical costs by boards, future expenses cannot be projected and boards cannot set fees appropriately.

At DHRB, the budget is developed by the director, assistant director, and fiscal officer with little involvement of board administrators other than the descriptive portions of their program proposals. This situation appears to be contrary to §54-955 of the Code, which states that the director is supposed to coordinate the budget requests of the boards. DHRB should include board administrators in the budget preparation process.

Until FY 1981, board administrators were not provided with monthly and year-to-date reports on disbursements for their boards or their remaining appropriation. Nevertheless, board administrators have primary responsibility for ensuring that board expenditures remain within budgets and authority for approving direct expenditures for their boards. Board administrators are now provided with monthly computerized statements, but these do not fully represent all expenditures on a board's behalf. The statements do not include technical assistance costs which are not allocated to the boards and DHRB has provided no training on the use of the statements.

DHRB should improve its financial reporting. As a first step, board administrators should be provided with training on the use of the monthly financial statements. In addition, the department needs to assign and report technical assistance costs to the boards on at least a quarterly basis.

Change in Funding. Effective July 1, 1982, DHRB will switch to dedicated special funding. Under the change, all revenues of the boards will be deposited into a dedicated special fund from which agency and board expenses will be paid. In order to provide operating cash during July, \$460,000 in Board of Medicine revenues received during FY 1982 has been deferred into the special dedicated fund.

Since DHRB has in the past received a general fund appropriation, it has not had to rely on revenues from fees to cover expenditures. Revenues generated by the seven health regulatory boards fell more than \$181,000 short of expenditures during the 1978-80 biennium (Table 25). DHRB revenues fluctuate substantially from year to year due to biennial renewal cycles for several of the boards. Over a biennium, however, revenues should be sufficient to cover expenses.

Table 25

DHRB REVENUES, APPROPRIATIONS AND EXPENDITURES

<u>Fiscal Year</u>	<u>Revenues From Fees</u>	<u>Appropriations</u>	<u>Expenditures</u>	<u>Difference Between Fees and Expenses</u>
1978	\$1,113,111	\$1,152,028	\$1,044,591	\$ 68,520
1979	1,491,119	1,476,535	1,388,108	103,011
1980	1,249,840	1,535,090	1,534,355	(284,515)
1981 ¹	2,099,197	1,725,330	1,717,484	381,713
1982 ¹	1,572,088	1,807,050	1,807,050	(234,962)

¹Estimated

Sources: CARS 409 Reports, DHRB Budget Request.

Because of such fluctuations and inadequacies in methods of projecting and allocating costs, the change in funding could create cash flow problems for the agency if revenues are lower than expectations. DHRB currently projects the lowest cash balance in the fund to be \$71,000 at the end of September 1982. Monthly expenditures will average over \$180,000. DHRB will have to carefully monitor revenues and expenses during the first quarter of FY 1983 to ensure that revenues will be sufficient to cover costs.

The change to dedicated funding now makes the method of funding DHRB consistent with DOC. Should the General Assembly also require that revenues from fees be within + 10% of each board's expenses, as is required for DOC boards, DHRB will have additional need to improve its cost accounting, allocation, and financial reporting methods.

Inadequate Controls over Agency Expenses. At DHRB several individuals are authorized to approve expenses. This diffusion of authority raises questions about proper internal controls. Each board executive director and the agency's fiscal officer have authority to approve expenditures. The executive directors, who in several instances are also agency managers, are responsible for approving vouchers related to board expenses.

DHRB needs to strengthen fiscal control procedures over board expenses, especially for travel. DHRB should focus authority to approve expenses with the fiscal officer and the director and assistant director (assuming they do not have board-related responsibilities).

Data Processing

The routine nature of the work at DHRB lends itself easily to automated data processing. Although DHRB has a centralized data processing system known as the Commonwealth Occupational Regulation and Licensing System (CORALS), it is not easily accessible to users, and important complaint information is maintained manually and not integrated with the overall system.

The CORALS system keeps a computer record on all applicants and licensees of the seven health boards. It maintains information on the status of a licensee or applicant, generates renewal notices, prints licenses, records fee transactions, and can also generate various informational reports and listings.

Access to CORALS is centralized, an arrangement that creates paperwork and increases inquiry time. Staff for each board must fill out forms to create, modify, or delete a licensee record. That information is then entered into the computer by a central data processing staff. In order to get data about a licensee, board personnel must request the data processing staff to access the record and provide the information.

When the Department of Management Analysis and Systems Development originally designed CORALS, it recommended a decentralized system. In a decentralized system, board staff would have direct access to the system to create and update records and to obtain information about a licensee. A decentralized system would eliminate the need for a central data processing staff, reduce the amount of paperwork for creating or changing a record, and provide direct access to licensee information. Currently, only the Board of Nursing has direct access to CORALS for information about licensees. This board was provided access because of its large number of licenses.

One area of agency activity that has not been automated is complaint tracking and investigation. Records on complaints are kept manually and are not completed or updated in a timely fashion. A basic level of information, such as the number of investigations conducted, disposition of complaints, and disciplinary actions, is not accurately available at DHRB. Complaints are not consistently tracked through the enforcement process to prevent delays. By automating enforcement activities, DHRB could more effectively monitor complaint investigations and provide information about complaints against licensees.

DHRB should consider decentralizing the CORALS system to enhance the accessibility and usefulness of the system. Access at the board level would reduce paperwork and increase the use of licensee information. The new ADP system at the Department of Commerce is one model which could easily be applied at DHRB. The department should also consider expanding the use of CORALS to include enforcement activities.

Limited Activities of CHRB

The Commission of Health Regulatory Boards (CHRB) was created in 1977 along with DHRB to monitor the agency and to provide advice in the area of regulatory policy. The commission is composed of one member from each of the regulatory boards and four public members. It has taken only a limited role in health regulation and the activities of DHRB.

Activities and Composition. Section 54-955.1 of the *Code of Virginia* lists the following powers and duties of CHRB:

- to evaluate the need for coordination among the boards;
- to evaluate unregulated health care professions to determine whether there is a need to regulate;
- to provide an effective means to respond to and deal with federal and State programs for the delivery and standards of care;
- to provide a means of citizen access to the department and to publicize its policies and programs;
- to monitor the policies and activities of the department;
- to promote the development of standards to evaluate the competency of regulated health professions.

In its first five years, the Commission has met 17 times. An analysis of the minutes of CHRB meetings showed that the Commission has addressed its mandates only in the areas of publicizing the activities of the department and evaluating the need to regulate additional health

professions. For example, CHRB is in the process of evaluating the need to regulate respiratory therapists. Publicity efforts have involved preparing a brochure which describes the boards and the agency.

As presently constituted, CHRB has few members with a strictly public perspective in regulatory matters. Seven of the eleven members of CHRB are appointed from the regulatory boards and are practitioners of regulated professions. As members of CHRB, they have responsibilities which affect their own regulatory boards as well as influence policy regarding other health professions. Thus, in controversial matters, the objectivity of CHRB could be challenged.

Increasing the number of public members could bring a unique perspective to reviewing the impact of regulation on citizens and unregulated practitioners. The General Assembly may wish to consider reconstituting CHRB to provide for a broader public perspective than is now represented. This will be particularly needed if the General Assembly decides that CHRB should actively review proposed board regulations. If technical expertise is required for an activity of the commission, board members could provide this expertise on an *ad hoc* basis. The Board of Commerce is comprised totally of public members.

Oversight. The Commission of Health Regulatory Boards has responsibility under § 54-955.1 to monitor the activities and policies of the department, but it needs to take a more active approach to this responsibility, in view of the major changes needed to improve the department's administrative structure and procedures. The commission should require DHRB to report on its plans for correcting management difficulties and monitor the agency's progress through periodic status reports. Moreover, the commission should study and implement additional measures which could serve to unify and coordinate the activities of the health regulatory boards.

DEPARTMENT OF COMMERCE

In 1948, ten occupational regulatory boards were combined under the Department of Professional and Occupational Registration, the predecessor to the Department of Commerce. DOC currently employs 92 persons who provide administrative and enforcement services for 22 boards. The Board of Commerce was created in 1977 to monitor the activities of DOC and to provide advice regarding regulatory policy.

DOC is a relatively mature organization. Key agency staff have a well-developed knowledge of regulatory procedure. However, DOC has only recently begun to implement management systems to overcome longstanding administrative deficiencies in agency structure and in data and financial management. The Board of Commerce has been involved in a wide range of functions since its inception, but has not actively engaged in oversight of the department.

Agency Organization

Increasing agency workloads and staff growth over the past ten years have recently resulted in significant organizational changes at DOC. When the JLARC review was initiated, an unmanageable workload existed in the administration division, and several critical functions, such as financial management and board operations, were not given sufficient attention. Central agency functions were organized into two divisions: enforcement and administration. Virtually all support functions were carried out by the administration division, including data processing, financial management, purchasing, and personnel.

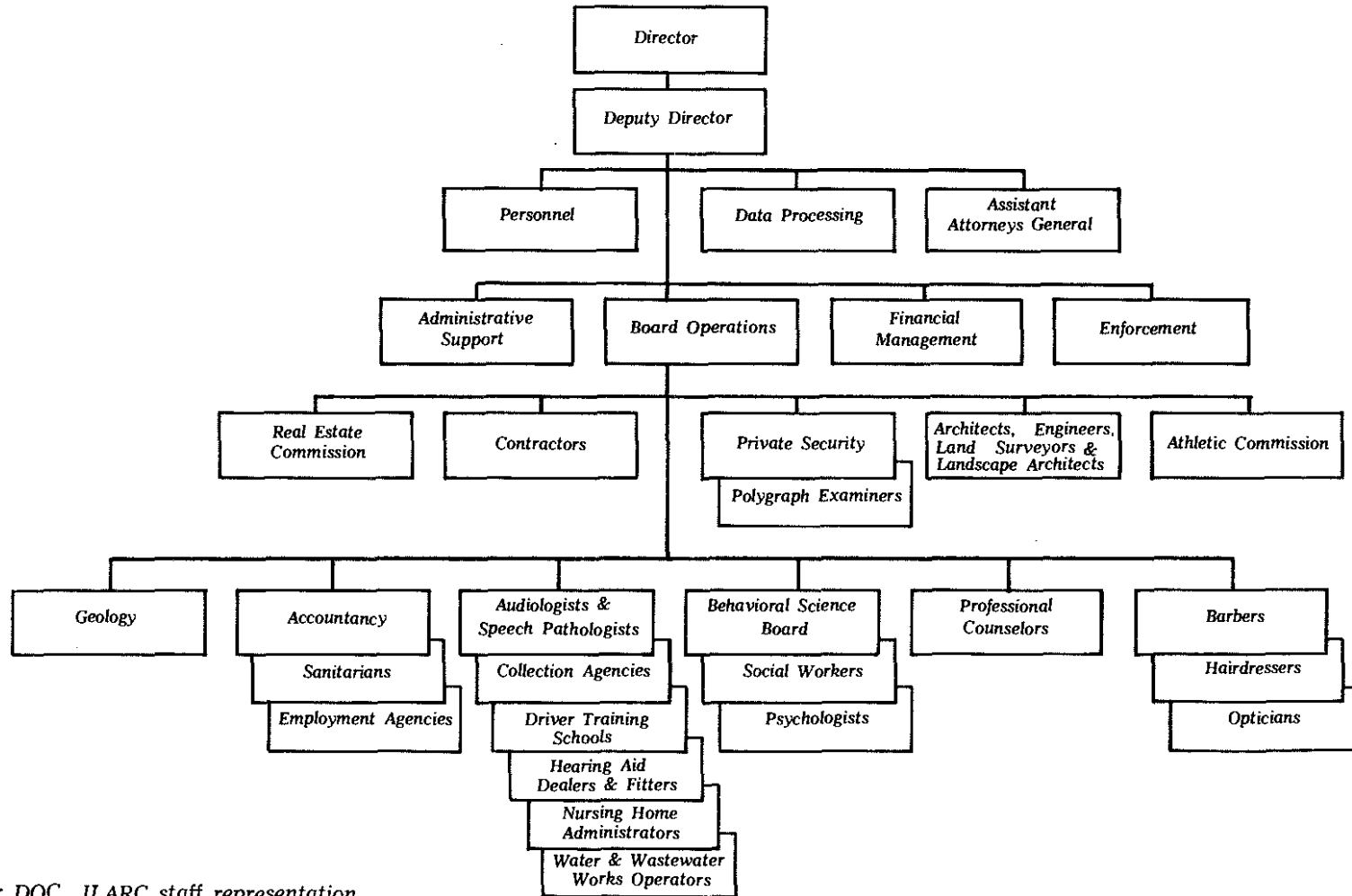
The deputy director of DOC had a direct supervisory role over each board administrator in addition to other administrative responsibilities in the agency. The deputy director was involved in day-to-day operational matters, and no uniform policy was developed regarding how boards functioned. Board administrators developed different procedures for handling complaints, maintaining records, and carrying out board functions. These inconsistencies created weaknesses in administrative procedures and management information. In several cases, board members were involved in routine administrative matters, such as reviewing applications.

In early 1981, the Department of Management Analysis and Systems Development reviewed the organization and selected operations at DOC. Based on this review, DOC was reorganized effective June 1981 to provide clearer lines of authority along functional lines (Figure 8). With the reorganization, responsibilities for financial management, personnel, and data processing were separated from other support functions and established as three separate units reporting to the deputy director. A new division was created to coordinate the operational aspects of the regulatory boards.

The reorganization of DOC provides a sound structure for operational efficiency. The reduced span of control and responsibilities of the deputy director should increase the effectiveness of that position. Moreover, the additional personnel in accounting, data processing, and board operations are intended to give the agency expertise in previously weak areas.

The establishment of the new division for board operations provides an opportunity to improve communication and make board activities more consistent. The manager of this division should put a high priority on ensuring that boards and their executive directors have a clear understanding of their respective roles and responsibilities. To the greatest extent, standardized procedures should be developed to improve drafting and reviewing of new rules, receiving and disposing of complaints, and processing of budgetary information. Regulatory trends and relevant Congressional, judicial, or board actions in this and other states should be regularly communicated throughout the agency.

Figure 8
ORGANIZATION OF THE DEPARTMENT OF COMMERCE



Source: DOC, JLARC staff representation.

Data Processing and Management Information

The Department of Commerce has three primary needs for information. First, the agency needs to keep data on the number and types of licensees, applicants, and businesses under the jurisdiction of the regulatory boards. Second, information on enforcement activities should be readily available to determine whether board efforts to protect the public are effective. Third, in order to manage financial activities of the agency and the boards, fiscal information must be current and accurate. DOC has begun to develop the needed information systems.

Data Processing. In July 1981, DOC implemented a new automated data processing system, the General Applicant Tracking System (GATS), to handle new applications for licensure, renewals, and cash receipts. Board personnel enter information directly into this decentralized system from terminals located throughout the agency's offices. Previously, all work was handled by a central data processing unit. GATS is designed to improve applicant tracking, provide a detailed audit trail for revenues, provide management information to agency personnel, and simplify work flow within the department.

The department has also begun to automate enforcement activities. A data processing system is being developed to provide information on complaints filed with the boards, to track complaints through investigation and adjudication, and to allocate investigator time to complaints and boards. The new system should enable DOC to ensure that complaints are handled expeditiously and provide better information to the agency and the boards to detect patterns and trends.

The new automated systems significantly increase the capabilities of DOC to manage administrative functions and provide better and more timely management information. The department should carefully monitor the systems to be certain that all data needs have been effectively identified and that the systems operate smoothly for intended purposes. There is now considerable potential for these systems to provide top management with previously unavailable management information.

Management Information. During the course of the two JLARC reviews, DOC was unable to provide accurate and timely information on work activities of the department. Although board administrators had good working knowledge of board activities, basic operational data necessary for effective agency management often could not be provided, including:

- the number of active licenses in each occupational category for some boards;
- complaint and enforcement information, such as the total number of complaints received, nature of complaints, and disposition of complaints; and

- results of examinations, such as pass/fail rates and historical trends.

Management information is the base upon which agency performance can be measured and rational changes made. A major cause of information deficiencies was that most of DOC's data was kept manually and there was no systematic effort to maintain accurate and timely information. Refinements to the new data processing systems should alleviate these problems to some extent.

Financial Management

During FY 1981, DOC and the boards spent over \$2.8 million to operate regulatory programs. Regulatory activities at DOC are completely supported by revenues from examination, licensing, and renewal fees. Although once operating with a surplus, the agency now needs to greatly improve its capacity for financial management to cope with increasing costs and a recent statutory requirement for each board's revenues to be within ± 10 percent of its expenditures. Areas requiring particular attention are allocation of expenses to the boards and fiscal reporting.

In the 1970s, revenues significantly exceeded expenditures so that by 1980 a \$2.4 million surplus had accumulated in the agency's dedicated special fund. In 1980, the General Assembly appropriated \$1.9 million of the surplus for other State programs. The balance of the fund as of the end of FY 1981 was \$667,000.

Over the last five years, expenditures were increasing while revenues remained relatively constant for the agency (Table 26). Board

Table 26

REVENUES AND EXPENDITURES OF THE DEPARTMENT OF COMMERCE

<u>Fiscal Year</u>	<u>Revenues</u>	<u>Expenditures</u>	<u>Difference</u>
1978 ^a	\$2,185,919	\$1,858,045	\$ 327,874
1979	3,356,468	2,352,176	1,004,292
1980	2,417,920	2,658,423	(240,503)
1981	3,243,126	2,804,026	439,100
1982	3,356,000	3,728,728	(372.128)

^aIncludes revenues and expenditures for the Athletic Commission and Board of Contractors which were not included in DOC statistics.

Sources: CARS 411 report, DOC Annual Reports and DOC estimates.

fees were not increased and the number of licensees remained constant. At the same time, costs and enforcement activities were increasing. In order to cover costs, several boards have recently increased their fees or are proposing increases.

Cost Allocation. DOC receives a single appropriation for all regulatory activities. The agency's budget is a consolidation of projected expenses for all boards and central services. Until FY 1982, DOC did not account for expenditures on a board-by-board basis except at the end of each fiscal year, and direct and indirect costs were not accurately allocated. Therefore, boards did not know what their estimated expenses were or the rate of expenditures during the year. They had no reason to attempt to control costs nor any basis upon which to adjust fees.

Expenditures should be charged to boards using a pre-arranged method which reflects the actual cost of services used by each board. There are two types of expenses which should be charged:

- Direct expenses: Costs incurred by a board which can be directly attributed to the board, such as salaries of board staff, travel, rent, office supplies, telecommunications, postage, and printing.
- Indirect expenses: Costs of centralized services which are shared by all boards, such as enforcement, data processing, and salaries of management personnel.

The expenditures should be charged on a current basis so that boards have information regarding their rate of expenditures.

In the past, costs which should be charged directly to boards were assigned to an overhead category and allocated as an indirect expense (Table 27). For example, employee benefits, postage, office supplies, and telecommunications are expenses which should be charged directly to the boards using the services. However, DOC allocated the costs indirectly on the basis of the number of applications processed for each board. This method can overcharge or undercharge boards for their direct expenses.

The allocation of indirect or overhead costs should be based on a measure of workload which approximates actual use by the board. However, DOC allocated enforcement costs, for example, on the basis of the number of investigations per board. This method does not recognize that investigations for some boards are more complex than others and take more time to complete. Therefore, enforcement costs were over- or underestimated for some boards by as much as \$16,200 when compared to costs computed using man-hours of investigative time.

On the basis of 53 investigations conducted by DOC in FY 1981, Private Security Services was charged \$31,714 for enforcement services. However,

Table 27

MISALLOCATION OF SELECTED DIRECT COSTS BY DOC
FY 1980

Cost Category	Costs Allocated by DOC		JLARC Estimates of Actual Costs		Costs Misallocated to Overhead
	Boards	Overhead	Boards	Overhead	
Employee Benefits	\$ 0	\$134,984	\$102,362	\$32,622	\$102,362
Postage	6,294	74,939	76,869	4,364	70,575
Office Supplies	974	10,932	11,278	628	10,304

Source: DOC; CARS 411 reports and JLARC estimates.

if enforcement costs had been allocated by man-hours during that year, expenses would have been approximately \$20,300--\$11,414 less.

* * *

Investigations for the Real Estate Commission comprise most of the enforcement unit's workload. In FY 1981, the Commission was charged \$186,599 for enforcement expenses on the basis of 310 cases. Had man-hours been used as the basis for allocating costs, the Commission would have paid \$16,226 more. These extra costs were assigned to other boards.

Three new accounting positions have been established for the agency, and DOC has begun to address weaknesses in the cost allocation process. Changes have been made in the process for coding direct expenses; the cost allocation methodology for indirect expenses has been revised; and both direct and indirect expenses are being charged to boards on a current basis so that boards can monitor costs against revenues. These actions should improve DOC's capability to effectively manage financial activities within the department. DOC should provide board members and agency staff with sufficient training to use the new accounting and reporting mechanisms effectively.

Requirement for Self-Sufficiency. Section 54-1.28:1 of Code of Virginia passed by the 1981 session of the General Assembly requires regulatory boards under DOC to adjust their fees if revenues are ten percent greater or less than expenditures over a biennium. In the past, revenues generated by the large volume boards, such as the Real Estate Commission and the Board of Professional Hairdressers, have, in effect, subsidized other boards. Had the legislation been in effect during the 1978-80 biennium, all but six boards would have had to

adjust their fees (Table 28). The act now requires each board to be self-supporting.

As amended §54-1.28:1 is designed to ensure that boards pay for their appropriate share of regulatory costs. It has had the positive effect of reinforcing the need for improved financial management. However, there are several potential negative impacts of the change:

- Some boards may have to increase fees to the point where they become barriers to entry. For example, the fee for a private security services license has been recently increased from \$75 to \$550 plus \$200 for each additional security specialty.

Table 28

REVENUES AND EXPENSES FOR DOC boards
1978-80 Biennium

	<u>Revenues</u>	<u>Expenses</u>	<u>Difference</u>	<u>% Revenues Exceeded or Were Below Expenses</u>
Accountancy	\$ 442,583	\$ 442,483	\$ 100	0.1%
APELSCLA	436,427	470,574	(34,147)	(7.8)
Athletic Commission	232,710	125,852	106,858	45.9*
Audiology & Speech Pathologists	20,901	27,473	(6,572)	(31.4)*
Barbers	95,379	91,049	4,330	4.5
Behavioral Sciences	174,429	285,386	(110,957)	(63.6)*
Collection Agencies	24,628	48,501	(23,873)	(96.9)*
Contractors	530,281	530,458	(177)	(0.1)
Driver Training Schools	12,742	12,691	51	0.4
Employment Agencies	41,100	38,973	2,127	5.2
Hairdressers	568,144	454,814	113,330	19.9*
Harbor Pilots	5,665	4,387	1,278	22.6*
Hearing Aid Dealers	11,759	17,928	(6,169)	(52.5)*
Librarians	273	419	(146)	(53.5)*
Nursing Home Adm.	45,312	30,841	14,471	31.9*
Opticians	40,305	46,729	(6,424)	(15.9)*
Polygraph Examiners	18,035	21,106	(3,071)	(17.0)*
Private Security Services	237,061	366,024	(128,963)	(54.4)*
Real Estate	2,720,967	1,817,572	903,395	33.2*
Sanitarians	8,287	15,249	(6,962)	(84.0)*
Water & Wastewater Operators	109,686	128,234	(18,548)	(16.9)*

*Boards which would have had to adjust fees under §54-1.28.

Source: DOC Annual Reports.

- If a board has a surplus, it could increase its rate of expenditures rather than lowering fees.
- DDC will need to modify its fiscal systems to budget and account for expenditures on a board basis.
- Boards may feel an increased ownership of their revenues and be reluctant to support essential central services.

DDC should carefully analyze the impact of the changes over the next biennium and take administrative action to ensure that §54-1.28:1 is implemented appropriately and that negative effects are minimized.

Activities of the Board of Commerce

The Board of Commerce was created in 1977 to serve several purposes, including providing a means of citizen access to the Department of Commerce; monitoring the activities of DDC; advising the Governor, the Secretary of Commerce and Resources, and the Director on regulatory matters; and evaluating the need for regulation of other occupations. BDC is a nine-member citizen panel which meets monthly in Richmond.

The Board of Commerce has been involved in many activities over the last five years. The Board has reviewed several unregulated occupations and has also engaged in some activities regarding existing boards which have raised questions about its appropriate role. The Board needs to take a more active approach to its statutory responsibility to monitor the Department.

Determining the Need to Regulate. BDC has the responsibility to evaluate occupations to determine whether regulation should occur and make recommendations to the Governor and the General Assembly. It is the policy of the Commonwealth that an occupation should be regulated when:

- its unregulated practice would harm the health, safety and welfare of the public and the potential for such harm is recognizable;
- it can be distinguished from ordinary work and labor;
- the occupation requires specialized skill or training and the public will benefit by initial and continued competence; and
- the public is not protected by other means.

BOC has prepared detailed guidelines of the type of information and evidence that is required for the board to make a judgement. Parties seeking regulation of an occupation must provide evidence to

show the need for and impact of such regulation. Since 1974, the Board of Commerce (and its predecessor, the Commission for Professional and Occupational Regulation) has reviewed requests from over 25 occupations seeking regulation (Table 29). The Board recommended that seven occupations be regulated; the General Assembly enacted regulatory legislation for five occupations.

Definition of BOC's Role. Although the Board of Commerce has become involved in the regulatory matters of existing boards, its role has not been clearly defined. In 1980, an assistant attorney general assigned to DQC interpreted §54-1.25 to mean that BOC had only those specific powers cited in the Code. The Code does not mention what role the BOC has regarding the regulatory boards, but does assign BOC board responsibilities over the activities carried out within the department.

Each member of the BOC serves as a liaison to one or more of the regulatory boards. BOC has requested that all regulatory boards submit proposed regulations for review prior to the public hearing. Some regulatory board members see this as an infringement on their authority and responsibility. However, a majority of the regulatory board members responding to a JLARC survey indicated that BOC should regularly review proposed regulations.

BOC efforts to review the activities of some regulated occupations have had mixed results. As shown in the following example, significant opposition has occurred in at least one instance.

The Board of Commerce contracted with the Educational Testing Service to conduct a task analysis on hairdressing and barbering. A major purpose of the study was to determine exactly what areas of the occupation were critical to safe and competent job performance.

BOC members had raised some questions about educational prerequisites for taking the hairdresser's licensure examination and wanted the board to base educational requirements on activities necessary to provide a basic level of competence. The Board of Professional Hairdressers currently requires 2,000 hours of instruction.

The Board of Professional Hairdressers objected to the study and the authority of the BOC to conduct it. At one point, the board proposed raising the number of hours of instruction to 2,100. The issue of educational requirements for hairdressers continues to be controversial and has not yet been resolved.

The BOC has also conducted a study dealing with problems of overlap in the areas of architecture, engineering, and contracting.

Table 29

REVIEW ACTIVITIES OF THE BOARD OF COMMERCE

<u>Occupation</u>	<u>BOC Recommendations</u>	<u>Action of General Assembly</u>
Auctioneers	Deregulate	
Audio-Stress Examiners	No regulation	
Automotive Repair	Regulation	
Behaviorial Scientists	Regulation	Created board
Data Processors	No regulation	
Electrologists	No regulation	
Electronic Service Business	No regulation	
Esthelicians	No regulation	
Foresters	No regulation	
Geologists	Licensure- Certification	Created board for certification
Home improvement contractors	No further regulation	
Interior designers	No regulation	
Landscape architects	Certification	Authorized certifica- tions and assigned to APELS board
Massage Technicians	Regulation	
Mechanotherapists	No regulation	
Occupational therapists	No regulation	
Pesticide applicators	Regulation required by federal law	Assigned to Department of Agriculture
Pet groomers	No regulation	
Practicing accountants	No regulation	
Private security guards	Regulation recommended by Crime Commission	Assigned to DOC directly
Professional salespersons	No regulation	
Property managers	No regulation	
Refrigeration and air con- ditioning mechanics	No regulation	
Soil scientists	No regulation	
Watchmakers	No regulation	
Waterwell contractors	No regulation	

Source: Annual Reports of the Board of Commerce and Commission for
Professional and Occupational Regulation.

Proposed findings and recommendations for deregulation generated substantial controversy among these occupations in 1980. However, a compromise solution was reached and extensive legislative changes were enacted without opposition during the 1982 Session of the General Assembly.

BOC appears to be involved in activities which go beyond a strict interpretation of the Code, but which can serve to highlight significant regulatory issues and facilitate communication among protagonists. The General Assembly may wish to give the BOC a stronger role in reviewing the regulations and activities of existing boards. Title 54 of the Code could be amended to specify this review responsibility of BOC.

ORGANIZATION FOR OCCUPATIONAL REGULATION

Virginia is unique in having two agencies whose sole responsibility is to provide administrative support to regulatory boards. Most states with centralized functions have a single organization which serves all regulatory boards. The development of the two agencies and two advisory boards for occupational regulation in the Commonwealth is the result of historical, political, and administrative factors.

Historical Development

In 1948, the Commission on Reorganization of State Government recommended that all occupational regulatory boards be combined for administrative purposes under a Department of Professional and Occupational Registration. The agency was created housing only ten out of the proposed 17 boards, however. Seven of the larger and more powerful boards retained their independent status, including the boards for Contractors, Dentistry, Medicine, Nursing, Optometry, and Pharmacy, and the Virginia Athletic Commission.

In 1950, the Board of Funeral Directors and Embalmers was separated from the agency and made an independent entity. Between 1948 and 1974, the composition of the department changed as new boards were created and existing boards were altered or abolished.

In 1976, the Commission on State Government Management recommended that the seven independent boards be housed in administrative agencies. The Commission proposed that the health boards be assigned to the Department of Health and that the Virginia Athletic Commission and Board of Contractors be placed in the Department of Professional and Occupational Regulation.

The six independent health boards objected to placement in the Department of Health and suggested creating a new agency which would provide administrative support for the six boards plus the Board

of Veterinary Medicine, which had been housed in the Department of Professional and Occupational Regulation. In 1977, the General Assembly created the Department of Health Regulatory Boards to house the seven health boards and placed it in the human resources secretarial area. The boards had previously been under the Secretary of Commerce and Resources.

The General Assembly also changed the name of the Department of Professional and Occupational Regulation to the Department of Commerce. Moreover, a citizen-member Board of Commerce was created to replace the Commission for Professional and Occupational Regulation, which had been composed of four department directors (Health, Mental Health and Mental Retardation, Agriculture, and Labor and Industry) and three citizen members.

Organization in Other States

Of the 30 states with centralized administrative agencies, 24 have a single department which serves both health and commercial regulatory boards (Table 30). In a few states, health regulatory boards

Table 30

STATES WITH CENTRAL ADMINISTRATIVE AGENCIES

<u>Model</u>		<u>Number of States</u>
I. Single administrative agency for all regulatory boards	12	Including Florida, Illinois, Georgia, and New York
II. Single administrative agency; some boards independent agencies (both health and commercial boards)	12	Including Arizona, Delaware, New Jersey, and Vermont
III. Single administrative agency for business-related boards; health regulatory boards housed in health department	5	Connecticut, Maryland, Minnesota, Rhode Island, and Tennessee
IV. Two administrative agencies with boards split between agencies (business-related/health)	1	Virginia only
	—	
Total	30	States with central administrative agencies

Source: JLARC survey of states with administrative agencies.

are housed in a health department which is also responsible for administering health care programs. Virginia is the only state which has two agencies whose sole responsibility is to provide administrative support for regulatory boards.

States with single administrative agencies often group similar boards into divisions within the department. For example, Michigan's Department of Licensing and Registration has a division for health regulatory boards. However, administrative functions, such as enforcement, data processing, and financial management, are typically handled by a single central unit.

Effects of Separate Agencies

Although there are two administrative agencies in Virginia, their functions and activities are essentially similar, if not duplicative, and the placement of health and commercial boards within agencies is not clearly delineated. Issues that arise among the agencies and boards sometimes appear to be magnified by jurisdictional turf, and inconsistency exists in the statutory requirements of boards within the two departments.

Functional Similarities. The central services provided by each agency include recordkeeping, purchasing, accounting, enforcement, and data processing. Personnel are hired by the agency for the boards. Boards are typically staffed by a board administrator and one or more clerical personnel.

Each agency provides essentially the same services in the same manner to its regulatory boards. These activities include:

- receiving and processing applications for licensure;
- arranging for board meetings and other board activities;
- maintaining official records of the board;
- answering routine correspondence; and
- receiving complaints about practitioners.

The functional similarities between DOC and DHRB mean that administrative systems are duplicated. For example, each agency has an automated data processing system for licensees and applications, which are unnecessarily different. Other duplicated functions include financial management, recordkeeping, and enforcement.

Maintaining similar functions for separate agencies can also result in less effective and efficient provision of support services. For example, the enforcement unit in DOC has a system of regional offices and supervisors to conduct investigations and inspections. Since the DHRB enforcement unit is smaller, enforcement personnel work out of their homes. There is only a single supervisor located in Richmond, which appears to contribute, in part, to problems with supervision of enforcement activities conducted by DHRB.

Placement of Boards. DHRB was created to provide administrative support for regulatory boards involving health and allied health professions. DOC houses boards which, for the most part, regulate commercial and other service occupations. However, the strict health/commercial division does not apply to all boards (Table 31); there are seven boards in DOC which regulate health-related occupations.

Table 31

NATURE OF REGULATORY BOARDS

Boards regulate a wide range of professions, from specialized health occupations to miscellaneous services and business enterprises. As this table illustrates, boards that are similar in nature are not necessarily housed within the same agency. Boards in regular type are in the Department of Commerce. Boards in boldface type are in the Department of Health Regulatory Boards.

Health Occupations

Dentistry

Medicine

Nursing

Behavioral Science

- Psychology
- Professional Counselors
- Social Work

Other Health-Related Occupations

Water & Waste Water Works Operators

Sanitarians

Funeral Directors & Embalmers

Athletic Commission

Business Enterprises

Collection Agencies

Private Security Services

Driver Training Schools

Employment Agencies

Allied Health Occupations

Opticians

Optometry

Audiology & Speech Pathology

Nursing Home Administrators

Veterinary Medicine

Pharmacy

Hearing Aid Dealers and Fitters

Design/Construction/Real Estate

Contractors

Real Estate Commission

Architects, Engineers, Surveyors

& Landscape Architects

Geologists

Miscellaneous

Accountants

Barbers

Hairdressers

Harbor Pilots

Librarians

Polygraph Examiners

Source: JLARC analysis of Board activities.

It would appear logical to locate all health-related occupations within the same organizational framework. However, according to agency officials, some boards or professionals in DOC may object to placement in DHRB. The hierarchical nature of the health-care delivery

system, with physicians at the head, appears of concern to personnel who may be viewed as carrying out subordinate health care activities.

Statutory Framework. As noted in previous sections of this report, there are significant differences between the statutory frameworks for boards within DOC and those within DHRB. Boards within DOC have a general statutory framework within which they promulgate standards for entry, practice, and discipline. In contrast, the statutory provisions for boards within DHRB are very detailed, with specific standards and criteria.

Another difference between the agencies is the application of Section 54-1.28:1, which requires regulatory boards under DOC to adjust their fees if revenues are greater or less than ten percent of expenditures. As written, the legislation does not appear to apply to polygraph examiners, private security services, and employment agencies, which are located within DOC but are not regulated by boards. Neither does it apply to the seven health regulatory boards.

Issues Among Boards and Agencies. With two administrative agencies in two different secretarial areas, it is sometimes difficult to resolve issues between agencies or between two boards within different agencies. Issues relating to clinical psychologists and eyecare professionals are examples:

The regulation of clinical psychologists is split between the Board of Psychology and the Board of Medicine. The Board of Psychology evaluates, examines, and collects fees from applicants and makes recommendation for licensure to the Board of Medicine. The Board of Medicine issues the license.

The division of responsibilities has created several problems, including the need for a licensed clinical psychologist to be a member of both boards, unclear responsibility for investigating complaints, the issuance of a specialty license by the Board of Psychology permitting the same scope of practice as a clinical psychologist, and a proposal by the Board of Medicine to establish its own examination criteria for clinical psychologists.

* * *

Scope of practice controversies have existed for several years among ophthalmologists, optometrists, and opticians. The boards for these three groups are under two different agencies. Current controversies include the dispensing of contact lenses by opticians, the use of drugs by optometrists, referral of patients, and supervision of unlicensed employees.

The General Assembly is often asked to resolve the "turf battles" between professions and boards. However, it is often difficult for the legislature to determine all of the relevant facts necessary to make decisions.

Organizational Options

The system for administrative support of regulatory boards in the Commonwealth is unique among the states. It resulted from the initial concerns of the independent health boards at the time relocation of boards was proposed. However, after four years of operation, it appears that further improvements for administrative efficiency and regulatory cohesion should be explored. At a minimum, DOC and DHRB should take the necessary steps to overcome deficiencies in agency organization, staffing, enforcement, financial management, and management information. In addition, organizational options include developing shared services, realigning boards, creating a single agency, and creating a joint advisory board.

Development of Shared Services. Since DOC and DHRB perform similar functions, increased efficiency and cost savings could result by sharing common services. Currently, DOC and DHRB each have separate computer operations, office space, public information, purchasing, mailroom, and other administrative functions. While maintaining their separate identities, the agencies could explore opportunities for establishing joint services. Shared services could result in cost savings and improved services to boards.

Realignment of Boards. In order to more clearly establish the business and health orientations of DOC and DHRB, the General Assembly may wish to realign the regulatory boards between the two agencies. However, should realignment occur, steps should be taken to avoid dominance of one profession over another within an agency. One method to avoid this problem would be for the General Assembly to authorize BOC and CHRB to review and make recommendations regarding scope of practice and other "turf" issues.

Creation of a New Agency. A more far-reaching option that the General Assembly may wish to consider is combining DOC and DHRB into one centralized support agency for all regulatory boards. The health and commercial boards could become divisions within a new agency. Creation of a single agency could result in cost savings by eliminating dual administrative structures, data processing systems, offices, and enforcement units. In addition, a single agency would facilitate a more cohesive regulatory policy.

Creation of a Joint Advisory Board. A final option that the General Assembly may wish to consider is creating a single advisory board for all regulatory matters. A joint board could be responsible for reviewing the activities and regulations of all commercial and health boards, for reviewing the need to regulate additional occupations, and for monitoring DOC and DHRB. A joint advisory board would

also facilitate the development of a more comprehensive and cohesive regulatory system.

CONCLUSION AND RECOMMENDATIONS

Centralizing the support functions of the regulatory boards would increase administrative efficiency and effectiveness. The organization of Virginia's regulatory system is unique in that there are two agencies which function solely to serve regulatory boards.

Both DOC and DHRB have shortcomings in their administration and financial management which have been created by an increasing workload and a more complex regulatory network. Several steps can be taken to improve operations within each department or to develop a comprehensive regulatory system for the Commonwealth.

Department of Health Regulatory Boards

Recommendation (19). Administrative activities at DHRB could be improved by:

- (a) separating support and operating functions which are combined in single positions;
- (b) assessing workload and adjusting the allocation of staff resources;
- (c) improving staff communication and input in policy making and budget development;
- (d) ensuring that accounting systems accurately allocate direct and indirect costs to the boards, strengthening fiscal controls over board expenditures, and improving financial reporting to the boards;
- (e) decentralizing data processing operations and expanding data processing capabilities to include enforcement activities.

Recommendation (20). The General Assembly may wish to consider reconstituting CHRB to provide for a broader public perspective than is now represented. If technical expertise is required, it could be provided on an *ad hoc* basis by the regulatory board members.

Recommendation (21). The Commission of Health Regulatory Boards should more actively carry out its responsibility for monitoring DHRB. The Commission should require DHRB to develop plans for resolving management problems and monitor the agency's performance through periodic status reports.

Department of Commerce

Recommendation (22). DOC should continue in its efforts to improve cost allocation and reporting. Useable board-based budgeting and financial reporting systems are necessary to enable boards to comply with § 54-1.28:1. DOC should carefully analyze the impact of §54-1.28:1 over the next biennium and take administrative action to ensure that it is appropriately implemented and that negative effects are minimized. The General Assembly may wish to amend §54-1.28:1 to explicitly include private security services, polygraph examiners, employment agencies, and the health regulatory boards.

Recommendation (23). The General Assembly may wish to amend §54-1.25 to explicitly give BOC a stronger role in reviewing regulations and activities of the regulatory boards.

Recommendation (24). The General Assembly may wish to consider options for improving the administrative efficiency and regulatory cohesion of the system for occupational and professional regulation. Options include:

- (a) requiring DHRB & DOC to explore opportunities for increased efficiency and cost savings through sharing of common services and functions;
- (b) realigning the regulatory boards to more clearly establish the "business-regulation" orientation of DOC and the "health-regulation" orientation of DHRB;
- (c) merging DOC and DHRB into a single support agency in which the health and commercial boards constitute distinct divisions;
- (d) reconstituting BOC and CHRB as a single advisory board to review the activities and regulation of existing boards and review the need for additional regulation of professions and occupations.

APPENDIXES

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Technical Appendix Summary

JLARC policy and sound research practice require a technical explanation of research methodology. The full technical appendix for this report is available on request from JLARC, Suite 1100, 910 Capitol Street, Richmond, Virginia 23219.

The technical appendix includes a detailed explanation of special methods and research employed in conducting the study. The following areas are covered:

1. Regulation Analysis. The administrative regulations of nine randomly-selected boards were reviewed to determine whether they were authorized by statute, applicable to occupational competence, necessary for protection of the public, consistent and clear. Review standards were based on criteria specified in the *Code of Virginia* and on standards developed by the National Association of Attorneys General. A listing of the problem regulations identified in the review is included.
2. Investigation Analysis. Enforcement activities were evaluated using several methods: (1) a log of complaints received by telephone for an eight-week period; (2) a survey of organizations which receive consumer complaints; (3) a review of the agency records of a random sample of 180 complaints filed with the boards between January 1980 and December 1981; and (4) a telephone survey of 41 persons who filed complaints with the boards.
3. Surveys. Written questionnaires were sent to 216 board members and to 48 professional associations which represent practitioners. The surveys covered board responsibilities, agency activities and performance, and regulatory issues. Responses were received from 148 board members (69%) and 32 professional associations (67%).

Agency Responses

As part of an extensive data validation process, each State agency involved in JLARC's review and evaluation effort is given the opportunity to comment on an exposure draft of the report.

Appropriate technical corrections resulting from the written comments have been made in the final report. Page references in the agency responses relate to the exposure draft and may not correspond to page numbers in the final report.

The following agency responses are included herewith:

Department of Commerce
Virginia Commission of Health Regulatory Boards
State Board of Nursing
Board of Optometry*

**A response from JLARC to this letter is also attached.*



COMMONWEALTH of VIRGINIA

BERNARD L. HENDERSON, JR.
Director

Department of Commerce

2 SOUTH NINTH STREET, RICHMOND, VIRGINIA 23219

September 7, 1982

Mr. Ray D. Pethtel, Director
Joint Legislative Audit and
Review Commission
Suite 1100
910 Capitol Street
Richmond, VA 23219

Dear Ray:

I have read with great interest the draft report dated August 13, 1982, concerning occupational regulation in Virginia. On the whole the report appears logical and the recommendations sound.

Under separate cover we have provided you with what may be a few factual errors we have detected and hope you will find this information useful.

I am concerned with some of the findings that rules are "unnecessary" or "without legislative authority." Some of these findings may be based on subjective judgments or limited legal research and may warrant further analysis or research.

We were quite pleased with the overall thrust of the report, and believe it will be extremely helpful in improving occupational regulation in the Commonwealth.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bernie".

Bernard L. Henderson, Jr.

BLHjr/rbt

Suggested Revisions to the August 13, 1982, JLARC Draft

Beginning on Page 43

Is "explicit" the right word? Attorneys have advised that "expressed" and "implied" be more generally accepted terms. It may be that the methodology would explain this criteria in more depth.

Page 44, Figure 5, Pages 44-45

This board had no choice but to adopt the cited rule. See Acts of Assembly, 1974, Vol. 2, Chapter 534, page 1018. It doesn't make sense that a board can be exceeding its authority by complying with a statutory directive. In any event the last sentence in the initial paragraph on page 45 is unclear.

Page 48

Section 54-112.3 was amended by 1982 Acts of Assembly, Chapter 197. The prohibition no longer exists.

Page 51

A person under 18 is eligible to enter into a contract. It may not, however, be enforceable.

Page 54

The requirement for filing of an employment agency's fee is a matter of law, not regulation. See Section 54-872.20. This implies it is a matter of agency choice. Recommendation should be directed to General Assembly.

Page 55

As above restrictions on corporate practice are generally matters of law, not regulation. 1982 Acts of Assembly, Chapter 590 permit corporate practice for architects, engineers, and surveyors.

Page 57, Table 5

There seems to be a date missing. See Table 4, page 53.

Page 84

The Department, not the Board, has sponsored the booth. Booth existed years before there was any board.

Page 100

The minimum case load was established at 50 not 25.

Page 118

The recommendation in the first paragraph has been the written policy, practice, and training at the Department of Commerce.

Page 119

Regulatory boards in the Department of Commerce have responsibility to "ensure inspections are conducted" not necessarily conduct them.

Page 129

Department of Professional and Occupational Regulation did not become DOC until July 1, 1978. Legislation passed in 1977.



COMMONWEALTH of VIRGINIA

Department of Health Regulatory Boards

Virginia Commission of Health Regulatory Boards

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September 3, 1982

Mr. Ray D. Pethtel
Director
Joint Legislative Audit and Review
Commission
Suite 1100
910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Pethtel:

I appreciate the opportunity to review the exposure draft on your study of occupational regulation in Virginia. As the recently appointed Director, I found your staff's assessment of the Department of Health Regulatory Boards provided useful insights into the complex and diverse nature of our regulatory activities.

On balance, your review of the regulatory activities of the Department of Health Regulatory Boards appears to detail in an objective fashion the management and organizational problems which have plagued the early development of the Agency. The solution of these problems will require a highly cooperative effort by the seven health regulatory boards, the Commission of Health Regulatory Boards, and the staff of the Agency.

I am pleased your staff has raised the larger public policy issue of the extent to which public rather than private interests are served by occupational regulation. This is an especially important issue for the Commission of Health Regulatory Boards as it seeks to evaluate those health professions currently regulated as well as those requesting regulation. As is pointed out in your Report, occupational regulation is typically sought by members of a professional group rather than the public for whose benefit such governmental intervention is often proposed. The extension of regulation into new occupational areas demands that it be demonstrated we clearly understand the economic impact of such regulatory activities.

I would like to comment on efforts which are already underway to address the general areas of concern included in this Report:

I. ENFORCEMENT

Recommendations #9 and #10 - (Complaint Investigations)

Preliminary work has already begun on development of a uniform procedure for the classification of complaints and the setting of priorities based on potential risk to the public health. This will enable us to establish time objectives for the management of various types of cases. A proposed automated departmental management information system would use these time objectives to monitor case handling performance so as to shorten the time for processing cases.

Recommendations #11, #12 and #13 - (Complaint Investigations)

Staff conferences for investigative personnel are now being held on a monthly basis to provide opportunities for training and development and coordination of departmental investigative policy. In addition, a full-time secretary has now been assigned to the Compliance Office.

Plans are also underway to convert an existing investigative position to a more senior position with managerial and technical consultative responsibilities for the Statewide investigative staff.

Recommendation #18 - (Adjudication of Complaints)

The Attorney General's Office and the Department of Health Regulatory Boards have under review draft procedures for the referral of all potential violations by licensees of criminal law to local Commonwealth's Attorneys for disposition.

The Department has just recently begun discussions with the investigative officials of the Virginia State Police on how cooperation in cases of drug diversion can be improved. Participation of State Police officials in future investigative staff conferences has already been planned.

Recommendation #21 - (Inspections)

The Department has requested that a feasibility study be conducted by the Department of Management Assistance and Systems Development (MASD) to design an improved automated data processing system. The conversion of the manual record keeping system of the Compliance Office to an automated system offers the potential of timely management, program activity, and evaluation information.

II. ADMINISTRATION OF CENTRAL AGENCIES

Recommendation #1

The following actions have been taken to delineate management, support, and operating functions of departmental staff.

- (a) Effective July 15, 1982, the positions of Director of the Department of Health Regulatory Boards and Executive Director of the Board of Pharmacy are held by two individuals.
- (b) The positions of Assistant Director and Executive Secretary of the Board of Dentistry have been separated with the establishment of a full-time position of dental board administrator. The former position of Assistant Director is being redefined as an Operations Manager responsible for administrative, personnel, fiscal, and other support services. This position will be lateral in the organization to the board administrators. All of the administrators at this organizational level will report directly to the Agency Director.
- (c) The position of Executive Secretary of the Board of Optometry and the Board of Veterinary Medicine no longer includes departmental enforcement responsibilities. The individual chosen to serve in the joint capacity of Executive Secretary to the Boards of Optometry and Veterinary Medicine will serve exclusively as a board administrator.

Recommendations #2, #4, #5, #6 and #7

The Department of Health Regulatory Boards has requested an organizational and systems development study by the Department of Management Assistance and Systems Development (MASD).

The scope of the study will include:

- 1. An analysis of management systems and organizational performance including staffing patterns.
- 2. Budgetary planning and financial management and reporting systems.
- 3. Automated data processing systems, and
- 4. Word processing.

Mr. Ray D. Pethtel
September 3, 1982
Page Four

This broad organizational study is necessary as we design an operational plan for improving the management systems and organizational performance of the Agency.

Recommendation #3

Biweekly management conferences are now held by the Department. These conferences are intended to enhance managerial competence of board administrators and program managers by involving them in organizational decision-making.

Recommendation #9

The Commission of Health Regulatory Boards will be meeting in September, 1982 to discuss a more effective role in monitoring the Department. An additional Commission concern is the need to develop policies and review criteria by which the Commission might evaluate health professional and occupational groups currently regulated as well as those requesting regulation in the future.

Recommendation #4

(b) The Department of Commerce (DOC) and Department of Health Regulatory Boards (DHRB) have already begun discussions about the realignment of regulatory boards to more clearly establish the "business regulation" and "health regulation" orientation of DOC and DHRB.

These measures have been taken over the last six weeks to improve the management systems and organizational performance of the Department of Health Regulatory Boards. Implicit is our assumption that regulatory activities shall be effective, timely, efficiently organized, and appropriate with respect to the potential harm to the public health and safety of unregulated health care practice.

I hope my comments will contribute to this significant review of occupational regulation in Virginia.

Sincerely,



H. Bryan Tomlinson, II.
Director

HBT:pjg

cc: Dr. Joseph L. Fisher
Secretary of Human Resources



COMMONWEALTH of VIRGINIA

(804)786-0377

ELEANOR J. SMITH, R.N.
EXECUTIVE SECRETARY

Department of Health Regulatory Boards State Board of Nursing

~~1894X367-9850X~~

September 1, 1982

517 WEST GRACE ST
RICHMOND, VA 23220

Mr. Ray D. Pethel, Director
Commonwealth of Virginia
Joint Legislative Audit and Review Commission
Suite 1100, 910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Pethel:

I thank you for sending me a copy of the exposure draft "Occupational Regulation in Virginia" for review and comment.

The extensive assessment of the agencies has produced some recommendations which if implemented will have far-reaching effects on the regulatory process.

I agree that there is duplication in the present organizational structure. Consolidation and standardization could be cost-effective and administratively efficient. I also agree that the health related professions and occupations could be grouped in a more cohesive manner.

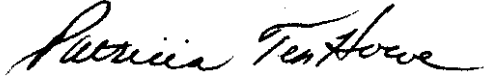
The idea of creating one Agency with two divisions could be effected but I do believe that the super structure would be combersome.

The recommendations specific to the Health Regulatory Boards should be able to be accomplished with few problems. It is within the purview of administrative management to fulfill these responsibilities.

Mr. Ray D. Pethel, Director
Joint Legislative Audit and Review Commission
page - 2 -

This review constitutes a most objective assessment of the departments and I can support most of the recommendations. The merger of DOC, and DHRB would be difficult, but not impossible, but the division of the two would need to be more clearly defined.

Sincerely,



(Mrs) Patricia TenHoeve, R.N.
President, Board of Nursing

PT:pr

cc: Eleanor J. Smith, R.N.
Mr. H. Bryan Tomlinson II.



COMMONWEALTH of VIRGINIA

Department of Health Regulatory Boards

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BERNARD STIER, O.D., SEC'Y., ALEXANDRIA

Board of Optometry

JAMES R. PRINCE, O.D., KILMARNOCK
MAURY L. OSSEN, O.D., NORFOLK

517 West Grace Street

Richmond, Virginia 23220

(804) 786-0131

September 2, 1982

Mr. Ray Pethel, Director
Joint Legislative Audit and Review Committee
Suite 1100 - 910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Pethel:

In response to your request for the review of the JLARC Report on Occupational Regulations in Virginia, I feel that the lead time was extremely inadequate as to the number of responses made about optometry, all of which are unfounded and stated without consultation of the Board of Optometry and the Virginia Optometric Association.

So as to address these acquisitions, I further had the need for input from the Board. I was only able to circulate this report to two other Board members. Thus, there are two other Board members who have not seen this report.

To point out the areas of unfounded information:

Page 32 failed to note that in private offices the biomicroscope is used much more extensively than in professional offices. A biomicroscope enables the practitioner (optometrist) to examine in detail the individual parts of the eye. Furthermore, the report did not make mention of the fact that in "low" restrictive states, the number of price advertising establishments was only a percentage of the total practicing optometrists in that state. I believe the FTC financed a study in California and Oregon, with one state highly restrictive and the other low restrictive, and this study concluded that there was no difference between private and commercial office fees. (See attached study).

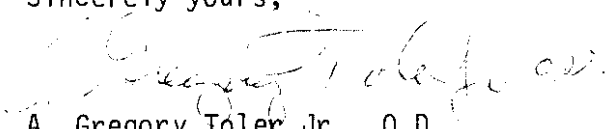
Page 35 - Volume of Board Regulations - The point here is not understood of the problems created by either numbering of the regulations and having numbers only subdividing regulations in specific categories by alphabet lettering.

Page 44 - Statement that unlicensed persons who practice under the supervision of a licensed optometrist: This pertains to dispensing and repair of ophthalmic materials and does not refer to the actual practice of optometry as defined in Section 54-368 of the Code of Virginia.

Page 52 - Practice Standards clarifies as to how a practitioner is to conduct himself and his practice and not create a false, deceptive or misleading situation.

The examples cited above seem to be the more obvious areas of misinterpretation. It would be advisable if JLARC wants factual information that they meet with a committee of the Board and review with them the statutes of the Rules and Regulations so that a factual report can be written. It would be much more comfortable if additional time could be given to allow all Board members to review and critique this documentation so that total input could be obtained.

Sincerely yours,


A. Gregory Toler Jr., O.D.
President
Board of Optometry

AGT/mw

Enclosures

cc: Mr. H. Bryan Tomlinson II., Director
Department of Health Regulatory Boards

Optometry Board Members



COMMONWEALTH of VIRGINIA

Joint Legislative Audit and Review Commission

Suite 1100, 910 Capitol Street

Richmond, Virginia 23219

(804) 786-1258

September 15, 1982

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RAY D. TOLSON
Chairman

A. Gregory Toler, Jr., O.D.
1407 Westover Hills Boulevard
Richmond, Virginia 23225

Dear Dr. Toler:

Thank you for your response to the JLARC Exposure Draft, *Occupational Regulation in Virginia*. The points that you raise in your letter will be carefully reviewed. I would like to summarize our phone conversation last week.

As I mentioned, the example of the FTC optometry study was used to illustrate the potential indirect economic impacts of administrative regulations. I realize that the findings were controversial and have been criticized by optometric professional associations. However, other studies have confirmed the general findings that regulations can have substantial indirect impacts on costs and quality of services. Our point is that these impacts need to be identified in proposed rules of regulatory boards.

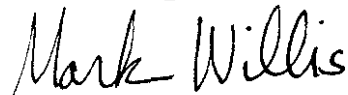
You also raised a question about our use of Regulation II(k) of the board regarding the supervision of unlicensed employees. You indicated that this rule pertains only to the dispensing and repair of ophthalmic materials and does not refer to the actual practice of optometry. However, as I mentioned, the regulation states "unlicensed employees engaged in activities falling within the definition of the practice of optometry." The wording of the regulation includes all activities of optometry as defined by §54-368 of the Code and is not limited to the dispensing and repair of ophthalmic materials. As you know, §54-396(1) makes it illegal for an individual to practice optometry without a license.

A. Gregory Toler, Jr., O.D.
September 15, 1982
Page two

I would also like to reiterate our contacts with the regulatory boards during the two studies conducted by JLARC. During the course of the two reviews, we interviewed board chairmen and board members, surveyed all board members through a mailed questionnaire, had extensive contacts with board administrators and agency personnel, and gave each board and the agencies the opportunity to review and respond to the JLARC exposure drafts. We also surveyed professional associations. As I mentioned, our procedures allowed for extensive input from and review by boards and agencies.

Again, I would like to thank you for your response to our draft. If you have any further questions or comments, please give me a call.

Sincerely,

A handwritten signature in cursive script that reads "Mark Willis".

Mark D. Willis
Principal Legislative Analyst

MDW/da

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