



agreement with TOV states that Toyota may terminate the franchise if NMVB suspends TOV for seven days or longer; Toyota argued that because NMVB has suspended TOV for thirty days, Toyota is authorized under the agreement to terminate TOV's franchise.

TOV denied Toyota's claims and requested that NMVB reexamine the evidence before it allows Toyota to terminate the franchise. The Board and the ALJ took the evidence under consideration; at this writing, the Board is expected to announce its decision in early 1993.

LITIGATION

In *Ray Fladeboe Lincoln-Mercury, Inc., v. New Motor Vehicle Board, Jaguar Cars, Inc., et al., Real Parties in Interest*, No. B060651 (Sept. 14, 1992), Fladeboe sought to overturn the decision of respondent NMVB which allowed real party in interest Jaguar Cars, Inc. (Jaguar) to terminate Fladeboe's Jaguar dealership, and rejected Fladeboe's petition seeking damages for Jaguar's assertedly wrongful conduct in the allocation of vehicles among its dealers. The Second District Court of Appeal concluded that the trial court properly denied Fladeboe's petition for writ of mandate, substantial evidence supports NMVB's findings, Fladeboe received a full and fair hearing before NMVB, and NMVB had jurisdiction to hear Fladeboe's petition claims.

Fladeboe contended that NMVB lacked jurisdiction under Vehicle Code section 3050(c)(2) to arbitrate the dispute between Fladeboe and Jaguar; that section states in part that the Board shall consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative submitted by any person. After such consideration, NMVB may do any one or any combination of the following: direct the Department of Motor Vehicles (DMV) to conduct an investigation of matters that the Board deems reasonable, and make a written report on the results of the investigation to NMVB; undertake to mediate, arbitrate, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative; or order DMV to exercise any and all authority or power that it may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer.

Fladeboe asserted that section 3050(c)(2) addresses only differences of opinion between any "member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative." Fladeboe argued that the term "member of the public" refers to individuals served by the new motor vehicle industry, and claimed that the disputes described in section 3050(c)(2) do not include differences between new motor vehicle businesses. Fladeboe contended that the directive to "consider" matters under section 3050(c) is to be contrasted with language in subsections 3050(b) and (d) which directs the Board to "hear and consider" protests and appeals by franchisees and licensees.

The Second District noted that, although the Board possesses only such power as has been conferred upon it by statute, the cases of *Yamaha Motor Corp. v. Superior Court*, 185 Cal. App. 3d 1232 (1986) (*Yamaha I*), and *Yamaha Motor Corp. v. Superior Court*, 195 Cal. App. 3d 652 (1987) (*Yamaha II*), have held that section 3050(c) confers upon NMVB the authority to consider any matter concerning the activities or practices of any person holding a license as a new motor vehicle dealer, manufacturer, or representative submitted by any person.

However, Fladeboe argued that the more recent decision in *Ri-Joyce, Inc. v. New Motor Vehicle Board*, 2 Cal. App. 4th 445 (1992), undermines the holdings of *Yamaha I* and *Yamaha II*; the *Ri-Joyce* court commented that NMVB is a quasi-judicial administrative agency of limited jurisdiction, which does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee. [12:2&3 CRLR 255] According to *Ri-Joyce*, NMVB's "jurisdiction under section 3060 encompasses disputes arising over the attempted termination, replacement or modification of a franchise agreement. Claims arising from disputes with other legal bases must be directed to a different forum."

In response to Fladeboe's argument, the Second District held that it disagrees with *Ri-Joyce* to the extent that it held that NMVB lacks authority over disputes involving the termination of franchises whenever a claim of impropriety is based upon estoppel or fraud. The court based its decision on the findings that *Ri-Joyce* failed to mention or consider *Yamaha I* and *Yamaha II*; segregation of claims otherwise proper for the Board's consideration, based upon the underlying basis of the claim, would allow franchisees to circumvent NMVB's jurisdiction through artful pleading; and the *Ri-Joyce* rule

would require franchisees to pursue simultaneous actions before NMVB and in state court, wreak havoc with the exhaustion of remedies doctrine, and defeat the public policy which favors resolution of franchise disputes before the administrative agency.

On December 31, the California Supreme Court denied Fladeboe's petition for review.

FUTURE MEETINGS

To be announced.

OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA

Executive Director:
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In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners; 1991 legislation changed the Board's name to the Osteopathic Medical Board of California (OMBC). Today, pursuant to Business and Professions Code section 3600 *et seq.*, OMBC regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine, and enforces professional standards. The Board is empowered to adopt regulations to implement its enabling legislation; OMBC's regulations are codified in Division 16, Title 16 of the California Code of Regulations (CCR). The 1922 initiative, which provided for a five-member Board consisting of practicing doctors of osteopathy (DOs), was amended in 1982 to include two public members. The Board now consists of seven members, appointed by the Governor, serving staggered three-year terms.

Two new members were recently appointed to OMBC by Governor Wilson. They are Michael A. Danforth, DO, an osteopathic physician from Fullerton, and Robert P. David, director of national accounts for the Sutter Corporation in San Diego. Board member Stanley L.K. Flemming recently resigned from OMBC, leaving the Board with one vacant DO position.

MAJOR PROJECTS

Continuing Medical Education. At its December 12 meeting in Irvine, OMBC discussed modifying its existing continuing medical education (CME) requirements. Under section 1635, Division 16, Title 16 of the CCR, OMBC currently



requires 150 hours of CME during each three-year period, including a minimum of sixty hours of Category I-A or I-B coursework approved by the American Osteopathic Association (AOA). Category I-A consists of formal education programs sponsored by recognized osteopathic institutions which meet the definition of "osteopathic" CME; Category I-B allows credit for alternative projects such as preparing scientific papers and publications, engaging in osteopathic medical teaching, and conducting osteopathic hospital inspections. Board members discussed the possibility of allowing an osteopath to fulfill the required minimum sixty hours of AOA-approved credit hours with American Medical Association (AMA)-approved credit hours.

OMBC decided to contact both AOA and AMA to seek their input before initiating rulemaking to modify its CME regulations, and thus took no action on this issue.

OMBC Budget Cut. As a result of the ongoing fiscal crisis in California, OMBC recently suffered a 10% cut in its operating budget and a loss of excess funds accumulated in its reserve account. The 10% cut amounts to an approximate \$53,000 reduction in the Board's 1992-93 budget. At its December meeting, the Board expressed concern that the budget reduction would cause OMBC to run out of money as early as March 1993, and noted that the cut would undoubtedly affect the Board's ability to engage in enforcement and disciplinary activities. However, Board members also noted that AB 2743 (Frazee) (Chapter 1289, Statutes of 1992) authorizes OMBC in disciplinary proceedings to request the administrative law judge to direct the licensee, in certain circumstances, to reimburse OMBC for its reasonable costs of the investigation and prosecution of the case. [12:4 CRLR 225] This "cost recovery" mechanism may provide some revenue enhancement for OMBC.

Also at the December meeting, the Board discussed the possibility of raising its licensing fees to increase its reserves; however, Executive Director Linda Bergmann and Deputy Attorney General Alan Mangels pointed out that such action would be futile, since the new budget restrictions would not allow OMBC to spend any additional money accumulated in its reserve account and any such increase in fees would probably be transferred into the state's general fund. OMBC is expected to discuss other possible solutions to its budget problems at its next meeting.

■ LEGISLATION

Anticipated Legislation. During the

1993-94 legislative session, OMBC may seek an amendment to Business and Professions Code section 2154(a), relating to requirements for the issuance of a license based on reciprocity. Existing section 2154 requires OMBC to issue an osteopathic physician's certificate based upon reciprocity to an applicant if (among other things) the applicant holds an unlimited license to engage in the practice of osteopathic medicine in another state whose written licensing examination is recognized and approved by OMBC as equivalent to California's exam requirements. For this purpose, the Board may recognize and approve as equivalent an examination prepared by the Federation of State Medical Boards (FSMB) if an applicant has been licensed in another state as a result of the successful completion, prior to December 31, 1993, of that examination. In lieu of such an approved and recognized state examination, OMBC may require the applicant to successfully complete a special examination in general medicine and osteopathic principles as prepared by OMBC or the National Board of Osteopathic Medical Examiners (NBOME). OMBC's proposed amendments to section 2154(a) would provide that, in lieu of a Board-recognized and approved state written license examination, OMBC may also utilize a special purpose examination prepared by FSMB. OMBC may incorporate this proposal into a bill sponsored by Osteopathic Physicians and Surgeons of California.

■ RECENT MEETINGS

At its December 12 meeting, OMBC reviewed a draft of a new format of its Application for Physician's and Surgeon's Certificate. The Board approved the draft, but expressed concern that the format may still not be specific enough in requiring the disclosure of any pending investigations or inquiries into the applicant's professional conduct.

At the same meeting, OMBC again considered adopting guidelines to prevent the transmission of the human immunodeficiency virus (HIV) and hepatitis B virus (HBV) between an osteopath and a patient. At its February 1992 meeting, the Board had reviewed the policy statement prepared by the FSMB and decided to further study that statement and discuss possible modifications. [12:2&3 CRLR 257] At its December meeting, it appeared that OMBC would adopt the FSMB policy guidelines; however, the Board tabled the proposal for consideration at its next meeting. The Board is also expected to discuss the methods for communicating the guidelines to DOs.

Also at its December meeting, Deputy Attorney General Alan Mangels presented a report regarding the possible impact on OMBC of the federal Americans with Disabilities Act (ADA), which took effect in January 1992. The ADA is a comprehensive civil rights measure protecting people with disabilities; it was patterned after the Rehabilitation Act of 1973, which affords similar protection for employees of governmental agencies which receive federal funds. Among other things, the ADA prohibits all state government agencies from discriminating against people with disabilities and from excluding participation in or denying benefits of programs, services, or activities to people with disabilities. It also prohibits governmental agencies from discriminating based on disability in all aspects of employment. All public sector programs, services, and activities must now be accessible to and usable by people with disabilities. In effect, what previously applied only to federally-funded programs now applies to all state agencies, departments, commissions, and colleges.

Public agencies must complete a transition plan for the removal of structural barriers necessary to achieve accessibility. Moreover, by January 26, 1993, all public agencies were required to complete a comprehensive self-evaluation plan to identify and correct policies and practices that are inconsistent with the ADA. Mangels stated that the ADA requires that OMBC's offices—as well as meeting locations—be wheelchair accessible; the Act may also have such far-reaching consequences as requiring the creation of a Braille examination for osteopaths.

Also at its December meeting, OMBC adopted a resolution extending its contract with Occupational Health Services, Inc., for the purpose of administering the Board's Diversion Program for substance-abusing osteopaths during fiscal year 1992-93.

■ FUTURE MEETINGS

May 8 in Orange County (tentative).

PUBLIC UTILITIES COMMISSION

Executive Director:

Neal J. Shulman

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The California Public Utilities Commission (PUC) was created in 1911 to regulate privately-owned utilities and ensure reasonable rates and service for the