



the parents contended that the pharmacist, by providing the dosage amounts, assumed a duty to them because he knew or should have known they would have to administer the prescription to their infant son and would do so in accordance with his direction. The court agreed with this argument, finding that "the action of a pharmacist, in providing incorrect dosage under circumstances making it necessary for a caregiver to administer the medication, would constitute negligence directed at the caregiver who did so administer." The court found that "[i]t would be ludicrous to argue that an infant of two months could either take the medication without help or could comprehend the misdirection of the dosage. Therefore, under those circumstances, the negligent giving of instructions to the Huggins is, by its very nature, directed at the parents, rather than solely at the infant."

In reviewing the public policy implications of its holding, the court noted that it discerned "no public policy warranting insulation from liability of a pharmacist who provides instructions for a prescription intended for an infant and who negligently misstates the dosage, setting in motion a process which results in death or serious injury to the child. Rather, we hold that a parent or close relative who, as a caregiver, relies upon the directions and administers the prescription should be allowed recovery under such circumstances."

RECENT MEETINGS

At the Board's October 14 meeting, representatives of Hoag Memorial Hospital requested that the Board issue a hospital pharmacy permit to Hoag's Cancer Center, which provides outpatient services on its hospital license. In February 1992, Hoag's first such request was denied. Since the Center is not physically part of the hospital, the Board found that the drug distribution procedures were not acceptable insofar as patients at the Center are considered outpatients and the pharmacy must dispense drugs via a prescription instead of a chart order. At the October meeting, the Board again rejected Hoag's request, stating that current law does not authorize the Board to issue a hospital pharmacy permit unless the pharmacy is physically located in the hospital. Deputy Attorney General William Marcus added that unless a statutory change is made, the Board lacks authority to issue a pharmacy permit for Hoag's proposed distribution system; Marcus recommended that Hoag work with other interested parties to pursue such a change.

FUTURE MEETINGS

July 28-29 in Sacramento.
October 6-7 in Sacramento.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Interim Executive Officer:
Curt Augustine
(916) 263-2222

The Board of Registration for Professional Engineers and Land Surveyors (PELS) regulates the practice of engineering and land surveying through its administration of the Professional Engineers Act, sections 6700 through 6799 of the Business and Professions Code, and the Professional Land Surveyors' Act, sections 8700 through 8805 of the Business and Professions Code. The Board's regulations are found in Division 5, Title 16 of the California Code of Regulations (CCR).

The basic functions of the Board are to conduct examinations, issue certificates, registrations, and/or licenses, and appropriately channel complaints against registrants/licenses. The Board is additionally empowered to suspend or revoke registrations/licenses. The Board considers the proposed decisions of administrative law judges who hear appeals of applicants who are denied a registration/license, and those who have had their registration/license suspended or revoked for violations.

The Board consists of thirteen members: seven public members, one licensed land surveyor, four registered Practice Act engineers and one Title Act engineer. Eleven of the members are appointed by the Governor for four-year terms which expire on a staggered basis. One public member is appointed by the Speaker of the Assembly and one by the Senate Rules Committee.

The Board has established four standing committees and appoints other special committees as needed. The four standing committees are Administration, Enforcement, Examination/Qualifications, and Legislation. The committees function in an advisory capacity unless specifically authorized to make binding decisions by the Board.

Professional engineers are registered through the three Practice Act categories of civil, electrical, and mechanical engineering under section 6730 of the Busi-

ness and Professions Code. The Title Act categories of agricultural, chemical, control system, corrosion, fire protection, industrial, manufacturing, metallurgical, nuclear, petroleum, quality, safety, and traffic engineering are registered under section 6732 of the Business and Professions Code.

Structural engineering and geotechnical engineering are authorities linked to the civil Practice Act and require an additional examination after qualification as a civil engineer.

MAJOR PROJECTS

PELS to Interview Prospective Executive Officers. PELS is continuing its efforts to fill the Executive Officer (EO) position vacated by Darlene Stroup in August 1992. [12:4 CRLR 118] At PELS' November 20 meeting, Interim EO Curt Augustine reported that the Board had received 178 applications for the position. At this writing, the semifinal round of interviews for the position is scheduled to be held in Sacramento on January 14-15, with final interviews taking place in Los Angeles on January 28.

PELS Adopts Policy Regarding Disadvantaged Business Enterprises. At its November 20 meeting, the Board reviewed an opinion of the Department of Consumer Affairs' (DCA) Legal Office regarding whether the Professional Engineers Act or Professional Land Surveyors' Act permits an unregistered person who is a part owner of a professional engineering or land surveying business to qualify the business as a minority-owned, women-owned, or disadvantaged business enterprise (DBE) in order to obtain state contracts. DCA previously concluded that an unregistered person may be a part owner or manager of a professional business, provided (1) there is a professional engineer as an owner, part owner, or officer in charge of the engineering practice of the business; (2) all engineering work is prepared under the responsible charge of a professional engineer in the appropriate branch of professional engineering; and (3) the unregistered person limits his/her managerial role to aspects of the business which do not involve the practice of professional engineering.

However, recently-enacted AB 486 (Polanco) (Chapter 1329, Statutes of 1992) creates uniform certification criteria for DBE firms hired by state agencies and defines the requisite control which must be exercised by a disadvantaged owner to qualify the firm as a DBE; the new law cites Part 23, Title 49 of the Code of Federal Regulations as the source of the



criteria. Under the new requirements, the minority or women owners shall possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations; if the owners of the firms who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered a minority- or women-owned business enterprise.

According to DCA legal counsel Don Chang, the requisite control as defined by the federal regulation is comprised of two parts: managerial and operational. Examples of managerial control include negotiation and execution of contracts and execution of financial transactions and agreements; Chang concluded that an unregistered person who is an owner or officer of an engineering or land surveying business exercising such managerial control over a professional engineering business would not be engaged in the practice of professional engineering or land surveying. However, operational control involves tasks such as making engineering or land surveying decisions, reviewing and approving proposed decisions prior to implementation, judging the qualifications of technical specialists and the validity and applicability of their recommendations before such recommendations are incorporated into the work, and selecting or developing design standards or methods of testing to be used in evaluating materials or completed works. According to Chang, such operational decisionmaking may be performed only by a professional engineer or land surveyor; thus, an unregistered person may not legally exercise operational control over a professional engineering or land surveying firm.

In conclusion, Chang opined that while unregistered persons may be part owners of professional engineering or land surveying businesses, they could not legally qualify as having the management and control of an engineering or land surveying business in a manner which is consistent with both the enabling acts and the DBE requirements. The Board accepted the opinion, and directed staff to send a copy of it to the various entities which certify DBEs.

Board Denies Safety Engineering Rulemaking Petitions. At its November 20 meeting, the Board considered two petitions requesting amendments to sections 438 and 404, Title 16 of the CCR. Section 438 exempts an applicant from the first division examination if the applicant meets the requisite educational and expe-

rience requirements. Specifically, section 438(a) provides that an applicant for registration as a professional engineer will be allowed to appear for only the second division of the written examination if he/she is a graduate of an approved engineering curriculum and submits satisfactory evidence to the Board that he/she has fifteen years or more of qualifying experience, or is a graduate of an engineering curriculum with a B.S. degree or equivalent four-year engineering degree and submits satisfactory evidence to the Board that he/she has seventeen years or more qualifying experience. According to both petitioners, James Hinson and Natalie Klein, neither applicable statutes nor regulations define the term "engineering curriculum." Both petitioners contend that section 438(a) has created confusion among applicants for registration as professional engineers in the branch of safety engineering, because they are unable to ascertain whether the term "engineering curriculum" applies only to an engineering curriculum of design professionals, such as civil engineers, mechanical engineers, and electrical engineers, or can be satisfied by a curriculum or degree in occupational safety and health or industrial hygiene. Both petitioners noted that the definition of the term "safety engineering" in section 404(bb), Title 16 of the CCR, provides that safety engineering is that branch of professional engineering which requires such education and experience as is necessary to understand the engineering principles essential to the identification, elimination, and control of hazards to people and property, and requires the ability to apply this knowledge to the development, analysis, production, construction, testing, and utilization of systems, products, procedures, and standards in order to eliminate or optimally control hazards; section 404(bb) provides that this definition of safety engineering shall not be construed to permit the practice of civil, electrical or mechanical engineering.

Both petitioners contended that under section 404(bb), the education curriculum for a safety engineer is implicitly recognized as distinct from that for a civil, electrical, or mechanical engineer; however, both stated that "the Board has applied Rules 404(bb) and 438 so as to require all such graduates and degree holders to take the first division examination, with the result that virtually everyone seeking registration as a safety engineer has been asked to take the examination and virtually no one has passed the examination. The test focuses primarily on mathematics and physics, but not any subjects related to safety engineering." According to both

petitioners, "there is no rational basis nor compelling state interest for requiring a safety engineer to demonstrate by examination or curriculum any proficiency in the fields of mathematics and science required of a civic [sic], electrical, or mechanical engineer, when the object is to establish his or her qualifications in hazard recognition and control." As a result, both petitioners requested that the Board revise sections 404(bb) and 438 so that applicants for registration as professional engineers in the branch of safety engineering are exempt from the first division examination if they have a master's degree or bachelor of science degree in occupational safety and health.

Following discussion, PELS unanimously denied both petitions.

Citation and Fine Regulations. At its November 20 meeting, PELS agreed to commence the rulemaking process to adopt new sections 472 and 472.5, Title 16 of the CCR; the sections would implement provisions of SB 2044 (Boatwright) (Chapter 1135, Statutes of 1992). [12:4 CRLR 120] The proposed regulations would create a regulatory scheme under which the Board may impose citations and levy fines against licensed and unlicensed persons.

Proposed language for section 472 would provide that class "A" violations involve either (1) a person who, while engaged in the practice of engineering or land surveying, has violated a statute or regulation relating to the practice of engineering or land surveying and which has caused the death of or bodily injury to another person; or (2) a person who has committed a class "B" violation and has two or more prior, separate class "B" violations. A class "A" violation would be subject to a civil penalty in an amount not less than \$750 and not exceeding \$2,500 for each and every violation.

Class "B" violations would involve either (1) a person who, while engaged in the practice of engineering or land surveying, has violated a statute or regulation relating to the practice of engineering or land surveying and which has caused physical damage to a structure or building or to real property or monetary damage to a client or member of the public; or (2) a person who has committed a class "C" violation and has two or more prior, separate class "C" violations. A class "B" violation would be subject to a civil penalty in an amount not less than \$250 and not exceeding \$750 for each and every violation.

Class "C" violations would involve a person who, while engaged in the practice of engineering or land surveying, has vio-



lated a statute or regulation relating to the practice of engineering or land surveying and which has not caused the death or bodily injury to another person or physical damage to a structure or building or to real property or monetary damage to a client or member of the public. A class "C" violation would be subject to a civil penalty in an amount not less than \$50 and not exceeding \$250 for each and every violation.

Proposed section 472.5 would describe how persons cited may request a citation review conference in order for the Board's designee to review the citation, including any fine levied or order of abatement issued. The section would provide that a person does not waive his/her right to request a hearing to contest a citation by requesting a citation review conference after which the citation is affirmed by the Board or its designee.

PELS published notice of intent to adopt these sections on December 4; the Board is scheduled to conduct a public hearing on the proposed sections on January 22. On December 24, the Board extended the public comment period on the proposals until February 9.

Corner Records. At its November 20 meeting, PELS agreed to commence the rulemaking process to amend section 464, Title 16 of the CCR, regarding corner records. Existing law provides specific instances when a land surveyor is required to file a corner record with the county recorder. Section 464(e) provides that when a survey is a retracement of lines shown on a recorded map, no material discrepancies with this record are found, and sufficient recorded monumentation is found to establish the precise location of property corners thereon, a corner record may be filed in lieu of a record of survey for any property corners which are set or reset or found to be of a different character than indicated by prior records. PELS proposes to amend this regulation to delete the requirement that the monumentation found to establish the precise location of property corners must be recorded.

On December 4, PELS published notice of its intent to amend section 464; a public hearing regarding the amendment is scheduled for January 22, with the public comment period ending on February 9.

Electrical Engineering Regulations. The Board received critical comments from industry members on its proposed amendments to regulatory sections 404(k) and 404(l) and proposed adoption of new section 426.70, Title 16 of the CCR, regarding the practice of electrical engineering; as a result, those amendments were not submitted to OAL for review and ap-

proval within one year of the proposed action's publication in the *California Regulatory Notice Register*, as required by Government Code section 11346.4. [12:4 CRLR 120] At its November 20 meeting, the Board agreed to continue formulating a definition of the term "electrical engineer."

PELS Rejects Challenge to Underground Rulemaking. At its November 20 meeting, PELS reviewed a petition submitted by attorney William M. Goode challenging the definition of the term "negligence" which was allegedly utilized by the Board in a recent disciplinary case. Goode contended that the definition is legally unacceptable and constitutes an underground regulation because it was not formally adopted pursuant to the Administrative Procedure Act (APA).

The definition in question arises from a May 1992 letter from PELS Consumer Services Representative Margie Freeman to a Civil Engineering Technical Advisory Committee member, asking him to review an investigative report to determine negligence of the subject. According to Freeman, the definition of the term "negligence," as used by the Board, means "departure from the standard of civil engineering practice."

Goode contended that this definition of the term "negligence" is contrary to case-law and statutory law, and is inconsistent with the California jury instructions required to be used by the courts of this state when instructing a jury on professional negligence. According to Goode, the definition confuses standards of practice with standards of care. Goode noted that negligence relates to standards of care; while departure from custom or practice may in some cases be evidence of negligence, it is not negligence itself.

In addition to contending that the definition is incorrect, Goode contended that it constitutes an underground regulation, since it was not properly adopted pursuant to the APA. Accordingly, Goode requested that the Board "revoke this regulation, if in fact the Board has done anything in the past to legitimize it, or in the alternative to take all necessary steps that may be required to ensure that the definition of 'negligence' not be utilized, followed, or enforced in any way."

After discussing Goode's petition, the Board unanimously agreed that the statement in the letter does not constitute a regulation; accordingly, PELS denied the petition. However, the Board asked legal counsel to review the definition of "negligence" contained in the letter and present recommended revisions at the next Board meeting.

LITIGATION

In *Center for Public Interest Law (CPIL) v. Board of Registration for Professional Engineers and Land Surveyors*, No. 3712217, CPIL seeks a peremptory writ of mandate to force PELS to produce closed consumer complaints regarding engineer billing abuses under the California Public Records Act. [12:4 CRLR 120] On December 16, CPIL filed its reply memorandum of points and authorities in support of its petition in Sacramento County Superior Court; the court heard oral argument from both parties on December 18. At this writing, the court has the matter under submission.

RECENT MEETINGS

At PELS' November 20 meeting, Interim Executive Officer Curt Augustine announced a projected first-quarter budget deficit resulting from the Board's office relocation in September. [12:4 CRLR 121] Augustine reported that a budget change proposal submitted by PELS to recoup the moving costs is on hold within the administration. PELS unanimously agreed to prepare a resolution expressing the Board's expectation to be fully reimbursed for the costs of the move, which the Board was ordered to make. In response to a staff report on the costs of issuing PELS' newsletter, the Board decided to postpone the publication of its newsletter until its budget allows for such an expenditure.

At its November 20 meeting, PELS adopted a policy of the National Council of Examiners for Engineering and Surveying (NCEES) denying "access to or review of previous examinations except for review by individuals who have failed the examination. Review by an applicant shall be restricted to a review of questions attempted during the last examination."

Also at PELS' November meeting, interim EO Curt Augustine announced that Gary Duke replaces Don Chang as DCA's legal counsel to the Board, effective January 1.

FUTURE MEETINGS

- June 4 in Los Angeles.
- July 16 in San Diego.
- August 27 in Sacramento.
- October 8 in Los Angeles.
- November 19 in San Diego.