

STATE OF NEVADA

Performance Audit

Nevada State Board of Dental Examiners

2016



Legislative Auditor
Carson City, Nevada

Agenda Item IV A-1 (SUNSET)
Meeting Date: 06-16-16

Audit Highlights



Highlights of performance audit report on the Nevada State Board of Dental Examiners issued on May 24, 2016. Legislative Auditor report # LA16-14.

Background

Assembly Bill 6 of the 1951 Session, known as the Nevada Dental Practice Act established the current system of regulation related to dentistry. The Board consists of 11 members appointed by the Governor who are to 1) develop and maintain programs to ensure only qualified professionals are licensed to practice dentistry and dental hygiene and 2) ensure violators of the laws regulating dental practitioners are sanctioned. The Board's register showed 1,809 and 1,393 actively licensed dentists and hygienists as of April 1, 2016.

The Board's office is located in Las Vegas and staffed with six people including the Executive Director. For fiscal year 2015, the Board had revenues of \$1.3 million and expenses of \$1.1 million.

The Board receives complaints from the public and licensed practitioners regarding services provided. The Board received 374 complaints from July 1, 2013, to December 31, 2015. About 64% of complaints were remanded, 32% resulted in some form of additional Board action, and 4% were not yet resolved.

Purpose of Audit

The purpose of this audit was to determine whether the Board has assessed reasonable costs to licensees for investigating and resolving complaints and disciplinary matters.

The scope of our audit focused on a review of the Board's disciplinary process and costs assessed for investigations resulting from approved Board actions during calendar years 2014 and 2015. Certain information included data from prior years to provide additional context or complete our analysis.

Audit Recommendations

This audit report contains 14 recommendations to improve the cost assessment and investigation processes. These recommendations address cost tracking, developing Board approved policies regarding cost assessment, a review of DSO investigations, and ensuring records are sufficient, accurate, and retained.

The Board accepted 11 recommendations and rejected 3 recommendations.

Recommendation Status

The Board's 60-day plan for corrective action is due on August 18, 2016. In addition, the six-month report on the status of audit recommendations is due on February 20, 2017.

Nevada State Board of Dental Examiners

Summary

The Board did not always assess reasonable costs to licensees for investigating and resolving complaints and disciplinary matters. Due to the Board's inadequate tracking of costs, many licensees were overcharged for the cost of investigations. Although the amounts overcharged were not significant to the Board overall, some amounts that individual licensees were overcharged were substantial. In addition, four licensees made charitable contributions totaling over \$140,000 as required by stipulation agreements; however, charitable contributions are not allowed under NRS 631.350. Board management has started making changes to correct problems found during the audit.

The Board's reporting and monitoring of legal expenses was not adequate. First, the manner in which legal expenses are reported reflects a lower amount than is actually spent. Second, the Board can reduce its legal expenses by hiring its own General Counsel. Since the Board is funded by fees, it is responsible for monitoring expenses to ensure resources are spent efficiently to minimize the burden on licensees.

The Board needs to provide greater oversight of complaint investigations performed by Disciplinary Screening Officers (DSOs). Investigation results are not reviewed and sufficient guidance has not been developed to provide additional assurance that DSO conclusions and recommendations are based on sufficient evidence. Without a review process, variations in DSO decisions are more likely to occur. In addition, we found the Board's investigation files were incomplete.

Key Findings

The Board overcharged licensees for investigative costs in almost half of the investigations in the last 2 years, including several over \$1,000. Overcharges were likely due to the Board lacking an effective process for accurately determining the amount of investigative costs for individuals. At the same time the Board overcharged some licensees, other licensees were charged less than actual investigation costs after negotiations between the parties. (page 8)

As part of the provisions imposed in Board approved stipulation agreements, four licensees agreed to donate over \$140,000 to organizations that provide health-related services. However, charitable contributions are not allowable under NRS 631.350. Furthermore, these amounts were not recorded in accounting records since the checks were made payable to the charitable organizations. (page 11)

The Board paid about \$200,000 more, on average, in legal expenses in fiscal years 2014 and 2015 than shown in its financial statements. Actual legal expenses were almost three times the reported amounts and exceeded the annual contract maximum for one firm. This occurred because the actual amount paid for legal expenses was reduced by the cost recoveries and assessments related to disciplinary matters. Recording expenses in this manner reduces transparency and, therefore, may impact decisions made by policy makers and others. (page 13)

The practice of reducing actual legal expenses also affected the Board's contract with outside counsel. Specifically, the contract approved in October 2013 stated payments will not exceed \$175,000 per year. However, payments exceeded \$300,000 in both calendar years 2014 and 2015, the first two full years under the new contract terms. Additionally, the overall contract maximum of \$700,000 has almost been reached with over a year left in the 4-year contract. (page 14)

The Board could save approximately \$100,000 per year by hiring a General Counsel while still utilizing the services of outside counsel when necessary. This estimate assumes the Board would still use outside counsel about 20% of the time. Boards have a fiduciary duty to be an effective steward of public resources, which in this case is fees collected from licensees. (page 15)

Investigation results and conclusions of DSOs are not reviewed by supervisory personnel or an independent review committee. A review process would help verify conclusions and recommendations are based on clear and sufficient evidence. Without a review process, there is an increased risk that investigations could result in licensees being treated too harshly or lightly. Although disciplinary actions are approved at Board meetings, Board members are not reviewing documentation specifically related to investigations and negotiations. Other state's dental boards and Nevada medical boards we contacted have review processes in place for investigations, including review committees. (page 16)

The Board's office does not have critical documentation related to the disciplinary process. In addition, when documentation was located it was often not in the disciplinary file as anticipated. The Board does not have certain documentation related to disciplinary proceedings because it is generated by, or submitted directly to, the Board's outside counsel. Furthermore, the Board does not have an organized filing method with checklists to ensure standard documentation related to disciplinary actions is onsite and retained. Without adequate documentation, the Board cannot fully support disciplinary actions or ensure compliance with statutes. (page 19)

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This report contains the findings, conclusions, and recommendations from our performance audit of the Nevada State Board of Dental Examiners. This audit was conducted pursuant to a special request by the Sunset Subcommittee of the Legislative Commission and was authorized by the Legislative Commission. The purpose of legislative audits is to improve state government by providing the Legislature, state officials, and Nevada citizens with independent and reliable information about the operations of state agencies, programs, activities, and functions.

This report includes 14 recommendations to improve the cost assessment and investigation processes. We are available to discuss these recommendations or any other items in the report with any legislative committees, individual legislators, or other state officials.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rocky Cooper".

Rocky Cooper, CPA
Legislative Auditor

May 13, 2016
Carson City, Nevada

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Introduction

Background

The Legislature established a board in 1895 to provide for the regulation of dental surgery. Various revisions to the regulation of dental providers occurred until 1951 when Assembly Bill 6, known as the Nevada Dental Practice Act, repealed all previous acts and made various changes to the board and practice of dentistry and dental hygiene.

The mission of the Nevada State Board of Dental Examiners (Board) is to protect the dental health interests of Nevadans by 1) developing and maintaining programs to ensure only qualified professionals are licensed to practice dentistry and dental hygiene, and 2) ensuring violators of the laws regulating the dental and dental hygiene professionals are sanctioned as appropriate. The Board consists of 11 members appointed by the Governor and must include:

- Six dentists who are residents and have practiced for at least 5 years.
- Three dental hygienists who are residents and have practiced for at least 5 years.
- One member who represents persons or agencies who provide health care to patients who are indigent, uninsured, or unable to afford health care.
- One member of the general public.

The Board is charged with adopting rules and regulations, appointing committees and other professionals and staff as necessary to carry out the provisions of NRS 631. It is also responsible for licensing and examining applicants, collecting appropriate fees, and maintaining a list of licensed dentists and hygienists. As of April 1, 2016, the Board's register showed 1,809 and 1,393 active licensed dentists and hygienists, and 904

dentists and 609 hygienists whose licenses were inactive, retired, revoked or suspended. The Board also investigates and disciplines licensees for violations of the Nevada Dental Practice Act (NRS and NAC 631). Board records must be open to public inspection per NRS 631.190(8).

Staffing and Budget

The Board's office is located in Las Vegas with six staff members, including the Executive Director. Licensed dentists and hygienists act as Disciplinary Screening Officers (DSOs), but are not staff of the Board. Furthermore, Board legal services are largely provided by one outside attorney who carries out certain duties on behalf of the Board. For the fiscal year ended June 30, 2015, the Board had revenues of almost \$1.3 million, which consisted mainly of licensing fees. Exhibit 1 shows the details of the Board's revenues for the past 3 years ended June 30.

Financial Statement Revenues Fiscal Years 2013 to 2015

Exhibit 1

Description	2013	2014	2015
Licensing	\$ 886,689	\$ 992,448	\$1,097,013
Exam Fees	48,041	—	—
Other Revenues ⁽¹⁾	17,662	16,888	18,727
Interest Income	1,310	1,761	548
Revenues per Financial Statements	953,702	1,011,097	1,116,288
Expenses Reimbursed by Licensees ⁽²⁾	123,528	186,915	220,648
Total Revenues	\$1,077,230	\$1,198,012	\$1,336,936

Source: Audited financial statements, with auditor reclassification related to expenses reimbursed by licensees.

⁽¹⁾ Other revenues consists of fines and miscellaneous provider fees.

⁽²⁾ Expenses reimbursed by licensees are primarily legal, DSO fees, and monitoring assessments.

The Board's expenditures for the fiscal year ended June 30, 2015, exceeded \$1.1 million. Major expenditures, other than personnel, were for legal and other investigative costs. Some of the legal and investigation costs are reimbursed under NRS 622.400 by dentists and hygienists who enter into agreements with the Board for matters related to complaints received. Exhibit 2 shows the details of the Board's expenses for the past 3 fiscal years ended June 30.

**Financial Statement Expenses
Fiscal Years 2013 to 2015**
Exhibit 2

Description	2013	2014	2015
Payroll	\$ 278,834	\$ 262,732	\$ 292,664
Legal (net of reimbursements)	160,816	123,266	103,315
Rent	76,909	65,620	66,768
Travel	52,455	12,640	19,580
Accounting	26,110	22,359	19,042
Exam Expense	22,937	—	—
Professional Fees	19,278	9,125	11,893
Equipment	18,707	7,712	1,021
Pension	—	—	56,842
Other ⁽¹⁾	368,899	325,571	346,190
Expenses Per Financial Statements	1,024,945	829,025	917,315
Expenses Reimbursed by Licensees ⁽²⁾	123,528	186,915	220,648
Total Expenses	\$1,148,473	\$1,015,940	\$1,137,963

Source: Audited financial statements, with auditor reclassification related to expenses reimbursed by licensees.

⁽¹⁾ Major other expenses include health insurance, DSO fees, legislative services, teleconference, scanning, information system, and credit card fees.

⁽²⁾ Expenses reimbursed by licensees are primarily legal, DSO fees, and monitoring assessments.

Complaint Resolution and Disciplinary¹ Process

The Board receives complaints from the public and licensed practitioners regarding services provided to the public.

Complaints must be in writing and verified by the complainant. In certain instances, the Board will allow for anonymous complaints if documentation or verification of the charges can be provided to support the complaint. The Board also authorizes investigations, by a vote of the Board, if it receives sufficient, verifiable information that a provision of NRS or NAC 631 may have been violated. Exhibit 3 provides details on the resolution of complaints received by the Board from July 1, 2013, to December 31, 2015.

¹ The Board enters into stipulation agreements that are non-disciplinary as well as disciplinary. For purposes of this report, we refer to the process as the “disciplinary” process or proceedings.

**Resolution of Complaints Received
July 1, 2013, to December 31, 2015**
Exhibit 3

Resolution	Number	Percentage
Remanded	185	63.8%
Corrective Action or Disciplinary Agreement ⁽¹⁾	82	28.3%
Scheduled for Further Action	13	4.5%
Good Faith Offer	3	1.1%
License Suspended	2	0.7%
Formal Board Hearing	2	0.7%
License Revoked	1	0.3%
Court Order Issued	1	0.3%
Held in Abeyance	1	0.3%
Total Complaints Resolved	290	100.0%
No Board Action ⁽²⁾	84	
Total Complaints Received	374	

Source: Auditor summary of Board records.

⁽¹⁾ These 82 complaints resulted in 41 agreements, since an agreement can address multiple complainants.

⁽²⁾ Typically these complaints are not resolved yet, or they were resolved by other means such as being withdrawn by the complainant.

Each complaint is submitted to the DSO Coordinator (a dentist paid on an hourly basis) who verifies the Board has jurisdiction over the matter and assigns it to a DSO to investigate. The Board then notifies the licensee of the complaint. The licensee has 15 days to respond and submit copies of the patient's records. The DSO investigates the matter by reviewing the complaint, the licensee's response and patient records, and examining the patient as needed. During the investigation phase, the DSO makes a recommendation to either:

- Remand – this occurs when the DSO determines a preponderance of evidence does not exist that a violation of NRS or NAC 631 has occurred. The complainant and licensee are notified of the decision. When the complaint is remanded, the licensee is not charged for the investigation, but the Board retains the right to reopen the case if another complaint against the licensee is received.
- Corrective Action – this occurs when the DSO determines a preponderance of evidence exists that a violation of NRS or NAC 631 has likely occurred and further investigation and possible Board action is warranted. If so, the DSO

communicates directly with the Board's outside counsel, who drafts an agreement based on the DSO's recommendations. An Informal Hearing is scheduled with the licensee.

Before the Informal Hearing begins, the DSO, Executive Director of the Board, and its outside counsel meet with the licensee and their counsel. The draft corrective action or disciplinary agreement is discussed and negotiated. Board actions usually include reimbursement to the patient, a period of monitoring by the Board of the licensee's work, training for the licensee, and an assessment to reimburse the Board for investigation and monitoring costs. Exhibit 4 shows the Board's investigation costs for calendar years 2014 and 2015 with related assessment totals.

Investigation Costs and Assessments Calendar Years 2014 to 2015

Exhibit 4

Description	2014	2015	Totals	Percentage of Total
Legal Fees	\$308,951	\$315,497	\$624,448	82%
Disciplinary Screening Officer Fees	41,656	42,192	83,848	11%
Transcription Services	9,872	9,419	19,291	2%
Investigation and Monitoring Travel	4,494	7,936	12,430	2%
Disciplinary Screening Officer Coordinator Fees	3,700	3,450	7,150	1%
Private Investigator Fees	1,390	15,296	16,686	2%
Total Investigation Costs	\$370,063	\$393,790	\$763,853	100%
Cost Recovery Assessments	\$229,947	\$187,229	\$417,176	

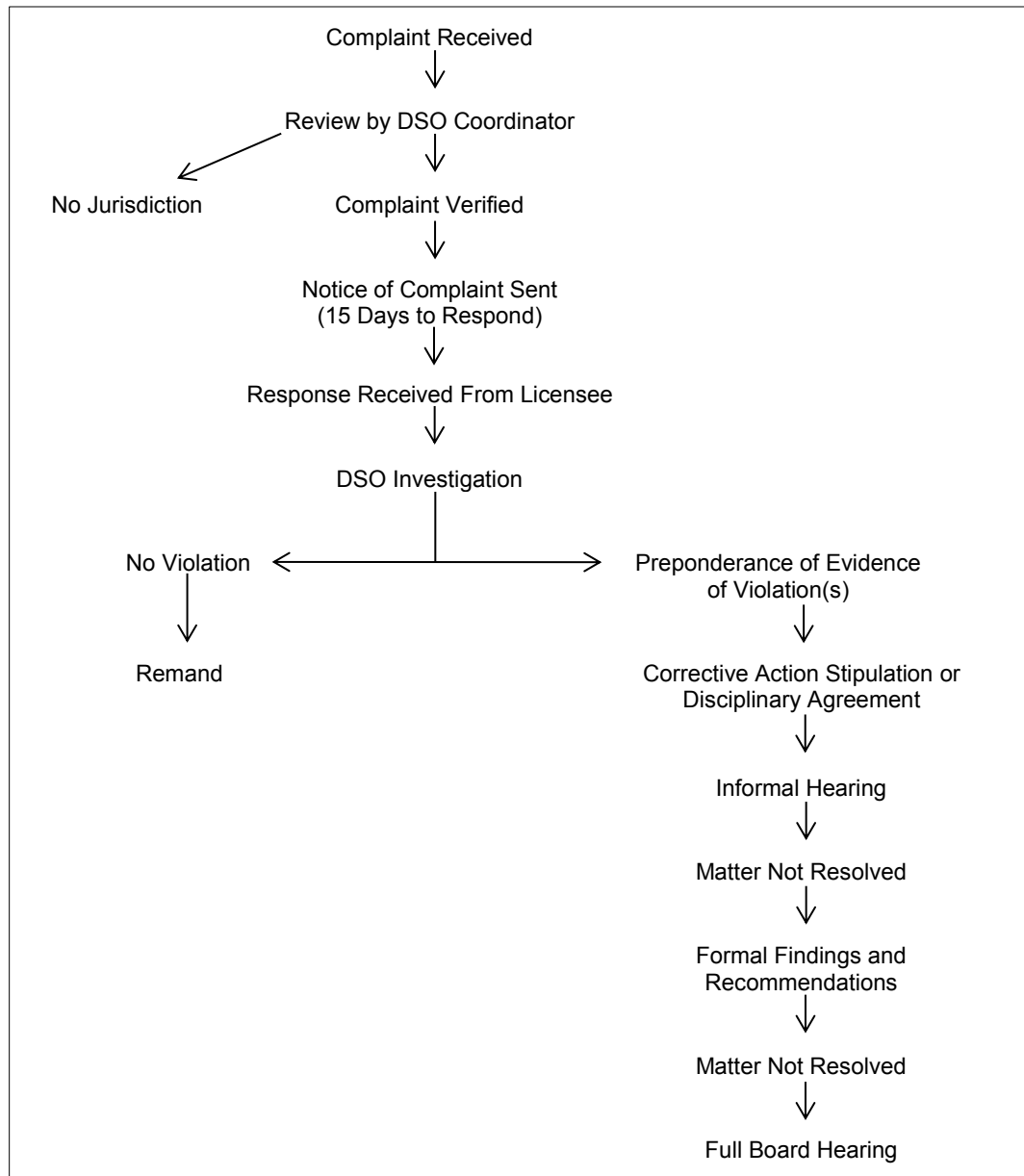
Source: Auditor compilation of Board accounting records.

Note: Totals noted here are not directly comparable to amounts noted in Appendix B since totals include all activities of the Board regardless of whether it could be recovered from a specific licensee. Further, Appendix B includes amounts from periods prior to that noted here since cases can span several years.

If an agreement cannot be reached, the Informal Hearing begins and is transcribed. Questions are asked of the licensee regarding the care provided to the patient, or other matters as described in the Informal Hearing notice. If an agreement still cannot be reached, a formal hearing is scheduled before the entire Board. Exhibit 5 shows a flowchart of the entire process.

Board's Flowchart of Disciplinary Process

Exhibit 5



Source: Board's DSO Manual

Classification of Non-Disciplinary and Disciplinary Stipulation Agreements

The Board enters into stipulation agreements with licensees that are classified as non-disciplinary or disciplinary. The classification generally depends on whether the licensee has a history of prior Board actions. In addition, any action involving revocation, suspension, probation, fine, and/or public reprimand is deemed to be disciplinary. Disciplinary actions must be reported to the National Practitioners Data Bank, a federal information repository established pursuant to federal law. For purposes of this report, we refer to the process as the “disciplinary” process or proceedings, regardless of whether the Board classified the action as disciplinary or non-disciplinary.

Scope and Objective

The scope of our audit focused on a review of the Board’s disciplinary process and costs assessed for investigations. This included an analysis of the Board’s legal and investigative expenditures and related cost recoveries resulting from approved Board actions during calendar years 2014 and 2015. Certain information included data from prior years to provide additional context or complete our analysis. Our audit objective was to:

- Determine whether the Board has assessed reasonable costs to licensees for investigating and resolving complaints and disciplinary matters.

This audit was conducted as a result of a special request from the Sunset Subcommittee of the Legislative Commission and was authorized by the Legislative Commission on February 19, 2016. Concerns of the Sunset Subcommittee included comments from some licensees that the Board’s investigative expenses are excessive in relation to the nature of the matter being investigated. We conducted our audit pursuant to the provisions of NRS 218G.010 to 218G.350. The Legislative Auditor conducts audits as part of the Legislature’s oversight responsibility for public programs. The purpose of legislative audits is to improve state government by providing the Legislature, state officials, and Nevada citizens with independent and reliable information about the operations of state agencies, programs, activities, and functions.

Licensees Were Overcharged for Investigations

The Board did not always assess reasonable costs to licensees for investigating and resolving complaints and disciplinary matters. Due to the Board's inadequate tracking of costs, many licensees were overcharged for the cost of investigations. Although the amounts overcharged were not significant to the Board overall, some amounts that individual licensees were overcharged were substantial. In addition, four licensees made charitable contributions totaling over \$140,000 as required by stipulation agreements; however, charitable contributions are not allowed under NRS 631.350. Board management has started making changes to correct problems found during the audit.

NRS 622.400 allows the Board to recover fees from licensees for costs incurred by the regulatory body as part of its investigative, administrative, and disciplinary proceedings. This statute indicates the Board may recover costs when it enters into a final order or consent or settlement agreement. Investigative costs include fees paid for outside legal counsel and Disciplinary Screening Officers (DSOs) to investigate the complaints. Other investigation costs include travel for investigators and for court reporters to transcribe hearings. Agreements often indicated amounts recovered included fees related to monitoring. However, the Board could not provide specific amounts recovered related to monitoring and indicated cost recoveries are all inclusive at the time fees are negotiated.

Overcharges for Investigation Costs

The Board overcharged licensees for investigative costs in almost half of the investigations in the last 2 years, including several over \$1,000. Overcharges were likely due to the Board lacking an effective process for accurately determining the amount of investigative costs for individuals. At the same time the Board overcharged some licensees, other licensees were charged less

than actual investigation costs after negotiations between the parties. Variation in amounts assessed to each licensee exist because costs are largely determined through negotiations with licensees and their counsel, if applicable.

The Board does not have a process to track and compile the actual cost of investigating each licensee. Instead, the amount assessed to a licensee for investigative costs is based on asking legal counsel and DSOs how many hours they have worked on the case, and estimating the cost of court reporting services. Although the total amounts paid are recorded in the Board's accounting system, the amounts attributable to each licensee are not tracked by the Board.

To compile the actual costs of investigating licensees, we reviewed invoices from attorneys, DSOs, court reporters, private investigators, and other vendors as necessary. These costs were compiled until the date the agreements were signed, which is typically the date the cost assessment is determined.

Overcharges and Undercharges

Our analysis found the Board overcharged licensees for investigative costs in 46% (23 of 50) of investigations in the last 2 years. The total amount overcharged was about \$28,000, including nine licensees that paid at least 25% more than the costs actually incurred by the Board.

Conversely, 54% (27 of 50) of cases were not assessed the full amount of incurred costs. Undercharges for cases totaled over \$41,000 and ranged from \$12 to \$4,900. Eleven licensees received discounts on costs of more than 25% with one licensee receiving a discount of 73%.

In total, the Board assessed costs of over \$400,000 in the last 2 years, averaging about \$8,000 per case. Appendix B on page 23 provides more detail regarding costs assessed and costs incurred by the Board at the time the agreement was signed.

Assessments for Monitoring Were Unclear

Settlement agreements indicated the assessed amounts were to recover costs for the investigation and future monitoring, where

applicable. In initial discussions with the Board, staff indicated the Board included amounts for monitoring at roughly \$100 per month in recovery totals. Later, staff indicated monitoring fees could not be estimated at this amount and assessments were meant to be one recovery total where monitoring was not separately identifiable. Further, since the Board did not document each cost assessed to licensees, the amount attributable to monitoring activities, which occur in the future and are largely unknown at the time assessments occur, could not be isolated from investigation cost recovery totals. However, NRS 622.400 does not provide for the Board to recover future unknown costs, only incurred costs of the Board. NRS 622.400 is shown in Appendix D on page 30.

During our audit we did compile monitoring costs. For those cases in Appendix B, monitoring costs equaled about \$8,500.

Board management indicated they revised the process for assessing monitoring costs in early 2016. Monitoring costs assessed will be based on costs incurred, and licensees will be billed monthly.

Some Invoices from DSOs Lacked Detail

Some DSO invoices lacked the detail to determine how much time was spent investigating a particular licensee. For example, one invoice showed that 5 hours was spent investigating two licensees. In such cases, we allocated the time equally between the two licensees. The total amount of time allocated from invoices lacking detail was not significant enough to materially change any of the numbers in our report. Nevertheless, to assess licensees accurately, DSO invoices need to include details of work performed for each licensee. This problem was caused by the Board not having written policies or guidelines for DSOs on recording and billing time.

Lack of Policies on Costs That Can Be Assessed

The Board does not have written policies regarding investigation and related due process costs that can be assessed to licensees throughout the investigation process. In addition, the Board does not have policies regarding travel cost limits. We found some costs assessed licensees appeared unreasonable. For example, we noted hotel charges of as much as \$228 per night.

NRS 622.400 allows the Board to recover fees from licensees if it issues an order or the licensee enters into a consent or settlement agreement. However, the Board has not defined its interpretation of assessing costs on remanded cases. Board counsel and staff indicated remanded costs are not charged to licensees. Counsel initially indicated to us that costs for investigating complaints that were remanded, in cases with multiple complaints, would not be assessed to licensees if a stipulation agreement was reached. Later, staff indicated that investigative costs for all complaints specified on the Informal Hearing notice may be assessed, even if some complaints are remanded.

We also noted several hotel charges were in excess of State per diem rates. Government rates for travel to Las Vegas in 2014 and 2015 ranged from \$92 to \$108 a night, depending on the month of travel. However, we noted hotel charges of \$150, \$195, and \$228. In addition, one DSO was reimbursed for \$810 in dictation costs. The Board needs to determine reasonable and necessary travel limits, as well as other cost limits to ensure amounts assessed to licensees are reasonable.

Charitable Contributions Not Allowed Under Statute

As part of the provisions imposed in Board approved stipulation agreements, four licensees agreed to donate over \$140,000 to organizations that provide health-related services. However, charitable contributions are not allowable under NRS 631.350. Furthermore, these amounts were not recorded in accounting records since the checks were made payable to the charitable organizations.

Board management and outside counsel indicated donations were imposed in lieu of a community service requirement. In these four instances, management and counsel indicated dentists received an economic benefit from having non-licensed individuals perform services. Therefore, instead of requiring dentists to refund numerous patients, which would have been burdensome, the parties agreed the economic benefit could be returned in the form of charitable contributions.

We requested Legislative Counsel review whether charitable contributions were allowed under NRS 631.350. Legislative

Counsel concluded the Board is not authorized to provide for a charitable contribution by the licensee as a condition of a stipulation. The Legislative Counsel's response to our request can be found at Appendix C on page 25.

Recommendations

1. Develop and document a process for tracking actual costs by complainant and licensee for investigations and monitoring activities.
2. Ensure DSO invoices include sufficient detail to track and assess costs accurately. Invoices should detail the licensee, complainant, activity performed, and other fees or costs incurred.
3. Refund licensees amounts that were overcharged.
4. Develop policies regarding fees to be assessed to licensees throughout the disciplinary process, including whether costs for remanded complaints discussed at Informal Hearing proceedings should be included in total amounts assessed to licensees. Seek Board approval of policies regarding fees to be assessed.
5. Determine, document, and adhere to appropriate travel cost limits.
6. Discontinue the use of charitable contributions as a condition within stipulation agreements.

Better Reporting and Monitoring of Legal Expenses Is Needed

Legal Expenses Higher Than Reported

The Board's reporting and monitoring of legal expenses was not adequate. First, the manner in which legal expenses are reported reflects a lower amount than is actually spent. Second, the Board can reduce its legal expenses by hiring its own General Counsel. Since the Board is funded by fees, it is responsible for monitoring expenses to ensure resources are spent efficiently to minimize the burden on licensees.

The Board paid about \$200,000 more, on average, in legal expenses in fiscal years 2014 and 2015 than shown in its financial statements. Actual legal expenses were almost three times the reported amounts and exceeded the annual contract maximum for one firm. This occurred because the actual amount paid for legal expenses was reduced by the cost recoveries related to disciplinary matters. Recording expenses in this manner reduces transparency and, therefore, may impact decisions made by policymakers and others.

Exhibit 6 shows actual legal expenses compared to legal expenses reported on financial statements in fiscal years 2014 and 2015.

Legal Expenses Fiscal Years 2014 and 2015 Exhibit 6

Description	FY 2014	FY 2015	Totals
Actual Legal Expenses ⁽²⁾	\$310,181	\$323,963	\$634,144
Reported Legal Expenses Per Financial Statements	123,266	103,315	226,581
Difference Due to Cost Recoveries ⁽¹⁾	\$186,915	\$220,648	\$407,563

Source: Auditor analysis of Board's financial statements and accounting records.

⁽¹⁾ Cost recoveries are amounts assessed to licensees to reimburse the Board for investigating and monitoring.

⁽²⁾ The Board contracts with multiple firms for legal representation but one firm provides the vast majority of services.

The Board's reported legal expenses were also reduced by cost recoveries of non-legal expenses, which creates additional problems. These cost recoveries included amounts related to non-legal investigation costs such as DSO fees, travel, transcription, and private investigator costs. Therefore, the Board did not distinguish between legal and non-legal cost recoveries when it applied the reduction to legal expenses, which further reduced the transparency of the actual cost for legal services.

According to Board management, it is netting legal expenses because Board members were unclear as to the amount of legal expenses for general matters versus disciplinary matters. However, legal expenses for each of these categories can be reported separately to avoid confusion. Furthermore, generally accepted accounting principles require that reimbursements received for out-of-pocket expenses be recorded as revenue, not as a reduction of expenses.

Board Exceeded Contract Maximum

The practice of reducing actual legal expenses also affected the Board's contract with outside counsel. Specifically, the contract approved in October 2013 stated payments will not exceed \$175,000 per year. However, payments exceeded \$300,000 in both calendar years 2014 and 2015, the first two full years under the new contract terms. Additionally, the overall contract maximum of \$700,000 has almost been reached with over a year left in the 4-year contract.

Since contract maximums reflected the reduced amount of expenses, both the Board and the Board of Examiners did not have accurate information when approving the contract. Contract maximums should reflect total payments expected to be made under the contract, not amounts reported net of recoveries.

The Board may not recognize that they have exceeded contract maximums since they reduce legal expenses by recoveries from disciplinary actions. Additionally, Board management indicated they do not actively monitor contract maximums since accounting functions are performed by a contractor as well.

Hiring Staff Attorney Would Reduce Legal Expenses

The Board could save approximately \$100,000 per year by hiring a General Counsel while still utilizing the services of outside counsel when necessary. This estimate assumes the Board would still use outside counsel about 20% of the time. Boards have a fiduciary duty to be an effective steward of public resources, which in this case, is fees collected from licensees.

The Board spends over \$300,000 annually on legal counsel. Based on the blended rate² for the partner and associate, approximately 1,400 work hours are utilized on Board activities for outside counsel. This is approximately equal to the number of hours worked for a full-time position.

Other boards we contacted utilized internal or Attorney General staff to fulfill legal service needs. Specifically, six boards had internal legal staff and three used state Attorney General personnel for legal representation, or a combination thereof. However, none of the boards we contacted indicated outside counsel was a significant provider of legal representation.

The Board did not adequately monitor the legal expenses and workload related to outside counsel to determine whether it would be cost beneficial to hire a staff attorney since legal expenses were reported net of cost recoveries. Moreover, recovery of legal expenses could continue with in-house counsel, with the added benefit of reducing assessment amounts passed on to licensees.

Recommendations

7. Record recoveries collected from licensees for disciplinary actions and monitoring activities as revenue instead of a reduction to expenses.
8. Prepare contracts that accurately reflect the maximum amount expected to be paid to the contractor.
9. Review, at a public Board meeting, the merits of contracting with outside counsel versus hiring a General Counsel to meet the majority of the Board's legal needs.

² The hourly blended rate used in calculating our estimate was \$197.50. This is the average of the \$210 and \$185 rates under the current contract for the partner and associate, respectively. The rates under the previous contract were \$190 and \$150.

Greater Oversight of Investigators' Work Is Needed

The Board needs to provide greater oversight of complaint investigations performed by Disciplinary Screening Officers (DSOs). Investigation results are not reviewed and sufficient guidance has not been developed to provide additional assurance that DSO conclusions and recommendations are based on sufficient evidence. Without a review process, variations in DSO decisions are more likely to occur. In addition, we found the Board's investigation files were incomplete.

Disciplinary Screening Officers Determine Violations and Sanctions Without Review

Investigation results and conclusions of DSOs are not reviewed by supervisory personnel or an independent review committee. A review process would help verify conclusions and recommendations are based on clear and sufficient evidence. Without a review process, there is an increased risk that investigations could result in licensees being treated too harshly or lightly. Although disciplinary actions are approved at Board meetings, Board members are not reviewing documentation specifically related to investigations and negotiations. Other state's dental boards and Nevada medical boards we contacted have review processes in place for investigations, including review committees.

Independent Role of Disciplinary Screening Officers

Disciplinary Screening Officers, who are licensed dental professionals, perform investigations on behalf of the Board for complaints and authorized investigations. DSOs can be board members, previous board members, or other dental professionals active in the dental community. As part of the complaint process, the Board requests complainants (patients) and licensees release their records related to the specific treatment identified in the complaint. Based on our review of Board files, typical methods used by DSOs to investigate a case include a review of patient

records, patient discussions, and examinations. DSOs can recommend that a case be remanded, or proceed for further disciplinary action.

Under the Board's process, investigation results are not reviewed by an independent person or committee to verify the accuracy and adequacy of the conclusions and recommended corrective action or sanctions. Instead, each DSO is the sole authority for determining whether violations occurred and the associated sanctions necessary. Also, DSOs report their preliminary conclusions and recommendations directly to the Board's outside counsel as instructed in the assignment letter. As a result, the Board's staff rarely receives documentation of the results of the investigation, the conclusions reached by the DSO, or corrective actions recommended by the DSO.

Variations in DSO Decisions

Review of investigation conclusions and recommendations is important for ensuring complaints are resolved consistently. Our analysis of complaint resolutions found certain DSOs executed actions significantly more frequently than others. For instance, two DSOs accounted for 49% of all disciplinary actions from July 1, 2013, to December 31, 2015, but were assigned 31% of cases. Overall, we found a wide disparity among DSOs in the percentage of investigations resulting in disciplinary actions. Exhibit 7 shows the varying percentages in investigations resulting in disciplinary actions for the DSOs with the six most investigations completed. These six DSOs accounted for 70% of the total investigations completed.

**Variation in DSO's Decisions
July 1, 2013, to December 31, 2015**

Exhibit 7

	Number of Completed Cases⁽¹⁾	Number of Disciplinary Actions	Percentage of Cases With Disciplinary Actions
DSO 1	53	4	8%
DSO 2	35	12	34%
DSO 3	21	5	24%
DSO 4	20	0	0%
DSO 5	17	9	53%
DSO 6	15	3	20%

Source: Auditor analysis of Board records.

⁽¹⁾ Cases may include multiple complainants, but are only counted as one case in this exhibit.

Board management indicated variances may exist as certain DSOs are assigned more difficult cases or specialize in cases where violations are more prevalent. While this may be true, allowing one person to determine the significance of a matter and the proper sanctions before a review by any other professional can lead to inconsistent resolutions of complaints.

Best practices in carrying out a regulatory program indicate investigations should be reviewed to ensure work is conducted in a way that is consistent with applicable laws, regulations, and agency policies. Furthermore, review ensures conclusions and recommendations are based on clear and sufficient evidence.

Other Boards and States Have a Review Process

Other boards we contacted also indicated a review of investigations is important. We contacted nine other boards, six dental boards in other states and three boards in Nevada dealing with medical licensing. Of the eight boards that assign a staff member or agent to conduct investigations, all indicated investigations are reviewed by at least one other independent party. Seven boards indicated investigations have multiple reviews or are evaluated by a committee.

The Board's outside counsel indicated a review process would make it more difficult to achieve the Board's goal of resolving complaints within 90 days. However, we found the average time to resolve disciplinary matters involving Board actions is already over 400 days. Furthermore, a review process could reduce the

amount of hours spent by outside counsel when working with DSOs. Based on the average rate per hour for legal services and the total legal fees in Appendix B, it takes over 30 hours of legal time, on average, to resolve a case.

Additional Guidance Is Needed for Investigators

Although the Board has developed a manual for DSOs, it is insufficient guidance for their investigations. The manual provides examples of various forms used to document and verify the complaint. The manual also describes the disciplinary process and includes examples of different disciplinary actions. However, the manual does not include checklists or other tools to ensure investigations are thorough and appropriately documented.

Board Files Were Incomplete and Disorganized

The Board's office does not have critical documentation related to the disciplinary process. In addition, when documentation was located it was often not in the disciplinary file as anticipated. The Board does not have certain documentation related to disciplinary proceedings because it is generated by, or submitted directly to, the Board's outside counsel. Furthermore, the Board does not have an organized filing method with checklists to ensure standard documentation related to disciplinary actions is onsite and retained. Without adequate documentation, the Board cannot fully support disciplinary actions or ensure compliance with statutes.

Critical documentation was not maintained at the Board's office. NRS 631.190(8) and NAC 631.023(2)(d) require documentation to be retained by the Board related to disciplinary proceedings at the Board's office. However, when we reviewed disciplinary files for Informal Hearing notices and transcripts related to those proceedings, we found only 1 of the 9 Informal Hearing notices and none of the transcripts in disciplinary files. The Board's Executive Director produced the remaining 8 Informal Hearing notices at our request, but transcripts had to be obtained from the Board's outside counsel.

Furthermore, DSO conclusions and recommendations were not often located in Board files since instructions from the Board

require DSOs to provide that information directly to the Board's outside counsel. Specifically, of 17 remand and disciplinary cases, we found only 2 where the DSO's preliminary conclusions and recommendations were included in Board files. While the Board's outside counsel provided this documentation in some instances, for two licensees with disciplinary action, the Board could not locate investigation results. Board management indicated the Board rarely receives investigation results because DSOs are instructed to provide results directly to Board counsel either by phone or email.

Other documentation pivotal to disciplinary proceedings was not always located in Board files. For instance, the verified complaint, authorization for release of records, and subpoenas for records were often not found in disciplinary files. Documentation could not be located because the Board does not have an organized filing method and documentation, when it was on-site, was waiting to be filed. Additionally, the Board's outside counsel generates or receives certain information on the Board's behalf that the Board may not eventually obtain.

Because the Board's disciplinary files are incomplete, it cannot ensure compliance with statutes regarding disciplinary proceedings. Moreover, the Board cannot provide an accurate and complete record of its activities.

Recommendations

10. Institute an independent review process regarding complaint investigation and resolution.
11. Develop and document guidance for investigations including procedure checklists and expected documentation.
12. Develop a standardized filing organization method.
13. Prepare a file checklist that details all routine documentation related to the disciplinary process needed to substantiate the Board's actions and compliance with statutes.
14. Ensure all records are obtained and retained by the Board to support disciplinary activities.

Appendix A

Board Disciplinary Actions for Calendar Years 2014 and 2015

Number	First Name	Last Name	License Type	Date Approved by Board	Board Action	Assessed Cost	Fine	Charitable Contribution
1	Meron	Anghesom	DDS	1/24/2014	Non-Disciplinary	\$7,300	\$ -	\$ -
2	Craig S.	Morris	DDS	2/5/2014	Disciplinary	24,550	-	-
3	Christine	Navales	DDS	4/25/2014	Non-Disciplinary	4,800	-	-
4	David T.	Ting	DMD	4/26/2014	Non-Disciplinary	6,250	-	50,000
5	David H.	Chung	DDS	4/26/2014	Non-Disciplinary	6,250	-	50,000
6	Ammar	Kerio	DMD	4/26/2014	Disciplinary	7,600	-	-
7	Caris L.	Crow	DDS	4/26/2014	Non-Disciplinary	8,250	-	-
8	Kaveh K.	Kohanof	DDS	4/26/2014	Non-Disciplinary	4,669	-	-
9	Michael	Husbands	DDS	4/26/2014	Non-Disciplinary	6,566	-	-
10	Kayla	Mai	DDS	6/27/2014	Non-Disciplinary	12,097	-	-
11	Young K.	Dill	DMD	6/27/2014	Non-Disciplinary	7,160	-	-
12	Adam	Lousig-Nont	DMD	6/27/2014	Additional Terms	1,800	-	-
13	Kenneth	Hill	DDS	6/27/2014	Non-Disciplinary	14,200	-	-
14	Gary	Toogood	DDS	6/27/2014	Non-Disciplinary	5,684	-	-
15	Harvey	Chin	DDS	8/1/2014	Disciplinary	5,672	-	-
16	Marianne	Cohan	DDS	10/3/2014	Reinstatement	3,600	-	-
17	Vahag	Kanian	DMD	10/3/2014	Non-Disciplinary	4,371	-	-
18	Silva	Battaglin	DMD	10/3/2014	Non-Disciplinary	14,300	-	-
19	Kevin	Deuk	DMD	10/3/2014	Non-Disciplinary	4,600	-	-
20	Georgene B.	Chase	DDS	10/3/2014	Disciplinary	27,250	1,000	-
21	James	Wright	DDS	12/12/2014	Non-Disciplinary	3,784	-	-
22	Don	Tiburcio	DDS	12/12/2014	Non-Disciplinary	3,850	-	-
23	Mark	Glyman, MD	DDS	12/12/2014	Non-Disciplinary	32,000	-	-
24	Howard	Chan	DDS	12/12/2014	Non-Disciplinary	4,950	-	2,450
25	Un Chong	Tam	DDS	1/30/2015	Non-Disciplinary	12,400	-	-
26	James	Mann	DDS	1/30/2015	Non-Disciplinary	8,301	-	-
27	Michael	Mierzejewski	DMD	1/30/2015	Non-Disciplinary	5,250	-	-
28	Ilya	Benjamin	DMD	1/30/2015	Non-Disciplinary	6,850	-	38,000
29	Hamada	Makarita	DDS	1/30/2015	Surrender	-	1,000	-
30	Walter	Robison	DDS	3/20/2015	Non-Disciplinary	3,805	-	-
31	Jesse	Cardenas	DDS	3/20/2015	Non-Disciplinary	4,416	-	-
32	Loveline	Reyes	DDS	3/20/2015	Non-Disciplinary	4,250	-	-
33	Thien	Tang	DDS	5/22/2015	Disciplinary	8,860	1,000	-
34	Cyrus D.	Kwong	DDS	5/22/2015	Non-Disciplinary	6,646	-	-
35	Hai	Xa	DMD	5/22/2015	Disciplinary	5,621	500	-
36	Peter P.	Doan	DDS	5/22/2015	Disciplinary	2,804	100	-
37	Travis	Sorensen	DDS	6/19/2015	Disciplinary	9,850	-	-
38	James	Brannan	DDS	6/19/2015	Order	-	-	-
39	Michael	Bell	DDS	6/19/2015	Non-Disciplinary	5,567	-	-
40	Lisa	Hoang	DDS	6/19/2015	Non-Disciplinary	3,746	-	-
41	Vincent G.	Colosimo	DMD	6/19/2015	Disciplinary	\$7,000	\$ -	\$ -

Appendix A

Board Disciplinary Actions for Calendar Years 2014 and 2015 (continued)

Number	First Name	Last Name	License Type	Date Approved by Board	Board Action	Assessed Cost	Fine	Charitable Contribution
42	Kayla	Mai	DDS	6/19/2015	Disciplinary	\$ 4,750	\$ -	\$ -
43	Christine T.	Navales	DDS	6/19/2015	Disciplinary	9,872	-	-
44	My G.	Tran	DDS	7/31/2015	Non-Disciplinary	4,338	-	-
45	Larry O.	Staples	DDS	7/31/2015	Non-Disciplinary	2,946	-	-
46	L. Scott	Brooksby	DDS	8/10/2015	Order	39,076	500	-
47	Erika J	Smith	DDS	9/18/2015	Non-Disciplinary	6,642	-	-
48	Min	Kim	DMD	9/18/2015	Non-Disciplinary	3,875	-	-
49	Albert G.	Ruezga	DDS	9/18/2015	Non-Disciplinary	5,705	-	-
50	Otabor	Okundaye	DDS	11/20/2015	Non-Disciplinary	1,975	-	-
51	Allyn	Goodrich	DDS	11/20/2015	Non-Disciplinary	3,150	-	-
52	Young K.	Dill	DMD	11/20/2015	Non-Disciplinary	2,850	-	-
53	Saeid	Mohtashami	DDS	11/20/2015	Non-Disciplinary	3,850	-	-
Totals						\$405,948	\$4,100	\$140,450

Source: Auditor prepared from public documents available on the Board's website and other documents obtained from the Board.

Appendix B

Incurring Costs Versus Assessed Costs for Calendar Years 2014 and 2015

Costs Incurred by the Board											
Number	First Name	Last Name	Legal Fees	DSO Fees	DSO Travel	Court Reporter	Other ⁽⁴⁾	Total	Assessed Costs	Overcharged / (Undercharged)	Percent Over / (Under)
1	Meron	Anghesom	\$5,941	\$1,050	\$ 11	\$221	-	\$7,223	\$7,300	\$ 77	1.1%
2	Craig S.	Morris	16,822	5,405	620	320	-	23,167	24,550	1,383	6.0%
3	Christine	Navales	3,830	725	360	219	-	5,134	4,800	(334)	(6.5%)
4 ⁽³⁾ & 5 ⁽³⁾	David T. & David H.	Ting & Chung	11,116	600	-	214	-	11,930	12,500	570	4.8%
6	Ammar	Kerio	4,988	750	-	408	-	6,146	7,600	1,454	23.7%
7	Caris L.	Crow	8,299	629	-	224	-	9,152	8,250	(902)	(9.9%)
8	Kaveh K.	Kohanof	4,141	225	-	316	-	4,682	4,669	(13)	(0.3%)
9	Michael	Husbands	4,364	225	-	257	-	4,846	6,566	1,720	35.5%
10	Kayla	Mai	9,235	3,638	20	267	-	13,160	12,097	(1,063)	(8.1%)
11	Young K.	Dill	5,379	400	-	231	-	6,010	7,160	1,150	19.1%
12	Adam	Lousig-Nont	5,298	1,025	25	351	-	6,699	1,800	(4,899)	(73.1%)
13	Kenneth	Hill	14,854	1,175	17	388	-	16,434	14,200	(2,234)	(13.6%)
14	Gary	Toogood	6,624	1,400	-	321	147	8,492	5,684	(2,808)	(33.1%)
15	Harvey	Chin	5,223	900	17	346	-	6,486	5,672	(814)	(12.6%)
16 ⁽²⁾	Marianne	Cohan	798	-	-	-	-	798	3,600	2,802	351.1%
17	Vahag	Kanian	5,820	625	34	573	-	7,052	4,371	(2,681)	(38.0%)
18	Silva	Battaglin	14,567	750	-	390	-	15,707	14,300	(1,407)	(9.0%)
19	Kevin	Deuk	4,442	525	-	223	-	5,190	4,600	(590)	(11.4%)
20	Georgene B.	Chase	20,387	3,188	-	1,501	673	25,749	27,250	1,501	5.8%
21	James	Wright	4,414	600	-	418	-	5,432	3,784	(1,648)	(30.3%)
22 ⁽⁵⁾	Don	Tiburcio	3,381	-	-	221	-	3,602	3,850	248	6.9%
23	Mark	Glyman	26,565	7,095	388	236	810	35,094	32,000	(3,094)	(8.8%)
24	Howard	Chan	3,709	325	-	216	-	4,250	4,950	700	16.5%
25	Un Chong	Tam	9,654	1,500	-	655	477	12,286	12,400	114	0.9%
26	James	Mann	7,025	175	-	348	477	8,025	8,301	276	3.4%
27	Michael	Mierzejewski	6,231	825	-	215	-	7,271	5,250	(2,021)	(27.8%)
28	Ilya	Benjamin	5,404	375	-	260	-	6,039	6,850	811	13.4%
29 ⁽¹⁾	Hamada	Makarita	-	-	-	-	-	-	-	-	-
30	Walter	Robison	4,596	450	-	-	453	5,499	3,805	(1,694)	(30.8%)
31	Jesse	Cardenas	3,351	225	-	-	453	4,029	4,416	387	9.6%
32	Loveline	Reyes	4,768	450	-	223	-	5,441	4,250	(1,191)	(21.9%)
33	Thien	Tang	5,698	750	35	447	-	6,930	8,860	1,930	27.8%
34	Cyrus D.	Kwong	4,723	400	-	397	585	6,105	6,646	541	8.9%
35	Hai	Xa	3,259	425	120	223	-	4,027	5,621	1,594	39.6%
36	Peter P.	Doan	3,265	458	180	248	-	4,151	2,804	(1,347)	(32.5%)
37	Travis	Sorensen	6,512	1,250	97	-	-	7,859	9,850	1,991	25.3%
38 ⁽¹⁾	James	Brannan	-	-	-	-	-	-	-	-	-
39	Michael	Bell	\$3,041	\$ 450	\$204	\$219	-	\$3,914	\$5,567	\$1,653	42.2%

Appendix B

Incurring Costs Versus Assessed Costs for Calendar Years 2014 and 2015 (continued)

Costs Incurred by the Board											
Number	First Name	Last Name	Legal Fees	DSO Fees	DSO Travel	Court Reporter	Other ⁽⁴⁾	Total	Assessed Costs	Overcharged / (Undercharged)	Percent Over / (Under)
40	Lisa	Hoang	\$ 3,503	\$575	\$ 17	\$231	-	\$4,326	\$ 3,746	\$ (580)	(13.4%)
41 ⁽²⁾⁽⁵⁾	Vincent G.	Colosimo	2,390	-	-	-	-	2,390	7,000	4,610	192.9%
42	Kayla	Mai	5,367	413	13	341	-	6,134	4,750	(1,384)	(22.6%)
43	Christine T.	Navales	7,622	1,900	25	280	20	9,847	9,872	25	0.3%
44	My G.	Tran	3,501	800	16	175	-	4,492	4,338	(154)	(3.4%)
45	Larry O.	Staples	3,023	250	-	220	-	3,493	2,946	(547)	(15.7%)
46	L. Scott	Brooksby	34,914	1,000	-	1,602	2,989	40,505	39,076	(1,429)	(3.5%)
47	Erika J	Smith	7,529	1,025	-	222	-	8,776	6,642	(2,134)	(24.3%)
48 ⁽⁵⁾	Min	Kim	2,777	-	-	271	-	3,048	3,875	827	27.1%
49 ⁽⁵⁾	Albert G.	Ruezga	3,699	25	-	224	-	3,948	5,705	1,757	44.5%
50	Otabor	Okundaye	2,531	100	-	247	-	2,878	1,975	(903)	(31.4%)
51	Allyn	Goodrich	3,708	500	-	289	50	4,547	3,150	(1,397)	(30.7%)
52	Young K.	Dill	3,186	358	-	265	-	3,809	2,850	(959)	(25.2%)
53	Saeid	Mohtashami	6,187	325	-	235	-	6,747	3,850	(2,897)	(42.9%)
Totals			\$347,661	\$46,259	\$2,199	\$15,698	\$7,134	\$418,951	\$405,948	\$(13,004)	
Percentage of Total			83.0%	11.0%	0.5%	3.8%	1.7%	100.0%			

Source: Auditor prepared based on information available on the Board's website, records, invoices, and auditor compilation and analysis.

Note: Amounts reflected here will not compare directly to costs noted in Exhibit 4 since amounts noted here may be from years prior to calendar year 2014.

Also, Exhibit 4 includes all costs for the Board including amounts not recoverable.

⁽¹⁾ No recovery of costs assessed due to this case being either a license revocation or a voluntary surrender of license, where costs would only be recovered if the licensee requested reinstatement.

⁽²⁾ Only legal fees were involved for this license reinstatement case.

⁽³⁾ The investigation costs were combined for both these doctors since the Board treated it as one case.

⁽⁴⁾ Other costs include outside counsel and Executive Director travel to Informal Hearings, postage and shipping, and small incidentals.

⁽⁵⁾ DSO fees were either not applicable since the case was related to license reinstatement, or we could not find an invoice submitted by the DSO and paid by the Board for activity related to this case. We also reviewed Board accounting detail to ensure there were no payments to the assigned DSOs for these cases.

Appendix C

Legal Opinion Regarding Charitable Contributions

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU

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SUSAN E. SCHOLLEY, Research Director (775) 684-6825

April 22, 2016

Mr. Rocky Cooper
Legislative Auditor
333 East 5th Street
Carson City, Nevada 89701

Dear Mr. Cooper:

In connection with a pending audit of the Board of Dental Examiners of Nevada (Board), you have asked whether the Board is authorized to enter into a "Corrective Action Non-Disciplinary Stipulation Agreement" with a licensee, under the terms of which the licensee is required to make a contribution to a charitable organization.

For the reasons we explain, it is our opinion that in the context of a complaint against a licensee, any "disciplinary" or "non-disciplinary" stipulation of the Board, regardless of its name, is inherently disciplinary, that the disciplinary authority of the Board is specifically set forth in NRS 631.350, and that NRS 631.350 does not authorize the Board, as a condition of a stipulation, to include a provision for such a contribution. Accordingly, while the Board is authorized to enter into a stipulation to resolve a complaint against a licensee, any provision of this sort is beyond the authority of the Board.

Background

An administrative agency is generally allowed to make an informal disposition of a contested case before the agency by "stipulation, agreed settlement, consent order or default." NRS 233B.121(5); *see also* NRS 622.330.

With reference to the Board, subsection 2 of NRS 631.190 authorizes the Board to "[a]ppoint such . . . examiners, officers, employees, [and] agents . . . and define their duties . . . as it may deem proper or necessary to carry out the provisions of this chapter." As a matter of practice, whenever a complaint is received by the Board, a Disciplinary Screening Officer (DSO) is assigned to investigate the complaint. *See* Board of Dental

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Examiners of Nevada, Disciplinary Screening Officer (DSO) Manual, Investigations and Processing of “Complaints” (Oct. 2013) (DSO Manual), at 2. If the DSO determines that the complaint has merit, the DSO is authorized by the Board to decide whether a “non-disciplinary” or “disciplinary” stipulation is offered to the licensee. Id. at 2. According to the DSO Manual, a “disciplinary” stipulation contains provisions for the revocation or suspension of a license, the placement of a person on probation, the imposition of an administrative fine, the issuance of a public reprimand or any combination of these sanctions; any other stipulation is “non-disciplinary.” Id. at 2-3. In any case, if the licensee enters into a stipulation, the DSO submits the stipulation to the Board for approval. Id. Upon approval of the stipulation, the matter is effectively resolved. Id. at 3.

NRS 631.350 enumerates the disciplinary powers expressly given to the Board with respect to a licensee or other person: (1) engaging in the illegal practice of dentistry or dental hygiene; (2) engaging in unprofessional conduct; or (3) violating a provision of chapter 631 of NRS or the regulations of the Board. Subsection 1 of NRS 631.350 provides for the revocation or suspension of a license, the imposition of an administrative fine, the placement of a person on probation and the issuance of a public reprimand. As noted above, under the Board’s practice the imposition of any of these sanctions is the distinguishing characteristic of a “disciplinary” stipulation.

Subsection 1 of NRS 631.350 also provides for the limitation of a person’s professional practice, the mandatory supervision of a practice, the fulfillment of additional training or educational requirements and the reimbursement of a patient. Even so-called “non-disciplinary” stipulations of the Board commonly provide for one or more of these measures. *See, e.g., Nevada State Board of Dental Examiners v. Erika J. Smith*, DDS, Case No. 74127-02832, 5 (approved Sept. 18, 2015).

But neither NRS 631.350 nor any other statute refers to a charitable contribution by a licensee or other person. Paragraph (i) of subsection 1 of NRS 631.350 authorizes the Board to require a licensee to “perform community service without compensation” and, to our understanding, the Board believes that any charitable contribution agreed to as a condition of a stipulation is in lieu of a community service requirement.

Discussion

A. Even a “non-disciplinary” stipulation of the Board is inherently disciplinary in nature.

Initially, because NRS 631.350 enumerates and, in our view, effectively limits the disciplinary powers of the Board, we must determine whether the terms and conditions of a “non-disciplinary” stipulation are in fact disciplinary.

As a general rule of statutory construction, Nevada courts presume that the plain meaning of statutory language reflects the intention of the Legislature. Villanueva v.

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State, 117 Nev. 664, 669 (2001). Therefore, if statutory language is clear and unambiguous on its face, a court generally will apply that meaning and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995). Statutory terms that are not defined in statute are given their “usual and natural meaning.” State v. Stu’s Bail Bonds, 115 Nev. 436, 439 (1999).

The dictionary definition of “discipline” is “treatment that corrects or punishes,” and “disciplinary” is “that [which] enforces discipline by punishing or correcting.” Webster’s New World Dictionary of American English, at 391 (3d ed. 1988). Thus, by definition, “discipline” may be punitive, corrective or a combination of the two.

Accordingly, in the context of a professional or occupational license, “disciplinary action” has been understood to include any “restriction or other limitation placed on the license of a person.” Bhuket v. State ex rel. Missouri State Bd. of Registration for the Healing Arts, 787 S.W.2d 882, 885 (Mo. Ct. App. 1990). In the same context, the Supreme Court of Missouri has said that “discipline is primarily remedial in nature,” although it may also include punitive elements. TAP Pharmaceutical Products Inc. v. State Bd. of Pharmacy, 238 S.W.3d 140, 144 (Mo. 2007).

It must be clear, then, that even a corrective, “non-disciplinary” stipulation is in fact disciplinary in the usual sense of that term. Certainly, in the wake of a complaint against a licensee, a limitation of the licensee’s practice, a requirement that the licensee be supervised or a requirement that the licensee reimburse a patient for the cost of treatment are corrective in that they are intended to prevent a recurrence of substandard conduct or compensate the patient for any loss incurred because of that conduct. More broadly, a requirement that a licensee perform community service without compensation is corrective in that it provides a benefit to the community at the expense of the licensee. An agreement that a licensee will make a charitable contribution in lieu of community service is apparently intended to be corrective in the same way, but the difference between such an agreement and the other sanctions described here is that those sanctions are authorized by statute, whereas the contribution is not.

B. The Board has no express or implied authority to make a charitable contribution a condition of a stipulation.

The Board is an administrative agency created by the Legislature. *See* NRS 631.120. As such, the Board “has no general or common law powers, but only such powers as have been conferred by law expressly or by implication.” Andrews v. State Bd. of Cosmetology, 86 Nev. 207, 208 (1970). We agree that the Board is authorized to enter into a stipulation as a means of resolving a complaint against a licensee. *See* NRS 233B.121 and 622.330.

However, nothing in NRS 631.350 or in any other provision of statute expressly authorizes the Board to agree to a charitable contribution by a licensee as a condition of a

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stipulation. By enumerating certain forms of discipline, NRS 631.350 impliedly precludes all others. *See, e.g., State Bar v. Sexton*, 64 Nev. 459, 464 (1947) (where a statute defined the disciplinary authority of the State Bar's Board of Governors to include only disbarment, reproof and suspension, the Board had no authority to revoke an attorney's order of admission or his license to practice law).

In our view, these specific provisions distinguish Nevada's statutory scheme from that at issue in *Rich Vision Centers, Inc. v. Board of Medical Examiners*, 192 Cal. Rptr. 455 (Ct. App. 1983), where the relevant statutes were silent on the permissible terms of a settlement agreement. While it may be desirable or convenient for licensees to agree to a charitable contribution in lieu of community service, only the latter has been authorized by the Nevada Legislature as a condition of a stipulation. If the Board desires to have the additional option of a charitable contribution, it must seek a statutory amendment to so provide.

In the absence of express authority, we must address whether implied authority exists for the Board to require or agree to such a contribution. "[C]ertain powers [of an administrative agency] may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties." *City of Henderson v. Kilgore*, 122 Nev. 331, 334 (2006). The Board's duties are generally set forth in NRS 631.190. Having reviewed that section and the other provisions of chapter 631 of NRS, we do not believe that a provision for a charitable contribution as a condition of a stipulation is necessary for the Board to perform any of its statutory duties. *Compare Clark Co. School Dist. v. Teachers Ass'n*, 115 Nev. 98, 102 (1999) (express authority granted to a hearing officer to compel testimony and the production of evidence would be meaningless without the implied authority to issue a prehearing subpoena).

Finally, because the Board does not have the specific authority to provide for a charitable contribution from a licensee as part of a stipulation, but does have general authority to enter into such agreements, we must address which authority controls in the situation where the Board attempts to provide for such a contribution. To the extent that any conflict exists between a general statute and a specific statute, the specific statute takes precedence over one that applies only generally to a given situation. *Nevada Power Co. v. Haggerty*, 115 Nev. 353, 364 (1999).

Here, the statutory provisions authorizing administrative agencies and regulatory bodies to enter into consent or settlement agreements apply generally to any agency or regulatory body. *See* NRS 233B.121 and 622.330. NRS 631.350 applies specifically to the Board, expressly authorizing it to impose only those forms of discipline enumerated in the statute. Because NRS 631.350 applies specifically to the Board and NRS 233B.121 and 622.330 apply only generally, NRS 631.350 controls the terms of any stipulation of the Board. Therefore, as we have explained, the Board is limited in its imposition of

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discipline to those sanctions enumerated in NRS 631.350 and has no authority to provide for a charitable contribution from a licensee as part of a stipulation.

Conclusion

For the foregoing reasons, it is the opinion of this office that the Board of Dental Examiners of Nevada is authorized to enter into a stipulation with a licensee as a means of resolving a complaint against the licensee. However, the Board is not authorized to provide for a charitable contribution by the licensee as a condition of such a stipulation.

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

Sincerely,

Brenda J. Erdoes
Legislative Counsel


By _____
James W. Penrose
Senior Principal Deputy Legislative Counsel

Michael K. Morton
Deputy Legislative Counsel

MKM:dtm
Ref No. 160324051809
File No. OP_Cooper16032417302

Appendix D

Nevada Revised Statutes 622.400 and 631.350

ATTORNEY'S FEES AND COSTS

NRS 622.400 Recovery of attorney's fees and costs incurred by regulatory body in certain regulatory proceedings.

1. A regulatory body may recover from a person reasonable attorney's fees and costs that are incurred by the regulatory body as part of its investigative, administrative and disciplinary proceedings against the person if the regulatory body:

(a) Enters a final order in which it finds that the person has violated any provision of this title which the regulatory body has the authority to enforce, any regulation adopted pursuant thereto or any order of the regulatory body; or

(b) Enters into a consent or settlement agreement in which the regulatory body finds or the person admits or does not contest that the person has violated any provision of this title which the regulatory body has the authority to enforce, any regulation adopted pursuant thereto or any order of the regulatory body.

2. As used in this section, "costs" means:

(a) Costs of an investigation.

(b) Costs for photocopies, facsimiles, long distance telephone calls and postage and delivery.

(c) Fees for court reporters at any depositions or hearings.

(d) Fees for expert witnesses and other witnesses at any depositions or hearings.

(e) Fees for necessary interpreters at any depositions or hearings.

(f) Fees for service and delivery of process and subpoenas.

(g) Expenses for research, including, without limitation, reasonable and necessary expenses for computerized services for legal research.

(Added to NRS by 2003, 3417)

DISCIPLINARY ACTION

NRS 631.350 Disciplinary powers of Board; grounds; delegation of authority to take disciplinary action; deposit of fines; claim for attorney's fees and costs of investigation; private reprimands prohibited; orders imposing discipline deemed public records.

1. Except as otherwise provided in NRS 631.271, 631.2715 and 631.347, the Board may:

(a) Refuse to issue a license to any person;

(b) Revoke or suspend the license or renewal certificate issued by it to any person;

(c) Fine a person it has licensed;

(d) Place a person on probation for a specified period on any conditions the Board may order;

(e) Issue a public reprimand to a person;

(f) Limit a person's practice to certain branches of dentistry;

(g) Require a person to participate in a program to correct alcohol or drug abuse or any other impairment;

Appendix D

Nevada Revised Statutes 622.400 and 631.350
(continued)

- (h) Require that a person's practice be supervised;
 - (i) Require a person to perform community service without compensation;
 - (j) Require a person to take a physical or mental examination or an examination of his or her competence;
 - (k) Require a person to fulfill certain training or educational requirements;
 - (l) Require a person to reimburse a patient; or
 - (m) Any combination thereof,
- ↪ upon submission of substantial evidence to the Board that the person has engaged in any of the activities listed in subsection 2.
2. The following activities may be punished as provided in subsection 1:
- (a) Engaging in the illegal practice of dentistry or dental hygiene;
 - (b) Engaging in unprofessional conduct; or
 - (c) Violating any regulations adopted by the Board or the provisions of this chapter.
3. The Board may delegate to a hearing officer or panel its authority to take any disciplinary action pursuant to this chapter, impose and collect fines therefor and deposit the money therefrom in banks, credit unions or savings and loan associations in this State.
4. If a hearing officer or panel is not authorized to take disciplinary action pursuant to subsection 3 and the Board deposits the money collected from the imposition of fines with the State Treasurer for credit to the State General Fund, it may present a claim to the State Board of Examiners for recommendation to the Interim Finance Committee if money is needed to pay attorney's fees or the costs of an investigation, or both.
5. The Board shall not administer a private reprimand.
6. An order that imposes discipline and the findings of fact and conclusions of law supporting that order are public records.
- [10:152:1951]—(NRS A 1981, 1976; 1983, 1114, 1535, 1546, 1547; 1987, 860; 1999, 1531, 1658, 2849; 2001, 91; 2001 Special Session, 154; 2003, 3438; 2005, 287; 2009, 1529)

Appendix E

Audit Methodology

To gain an understanding of the Nevada State Board of Dental Examiners (Board), we interviewed staff and reviewed statutes, regulations, policies, procedures, and guidelines significant to the Board's disciplinary process. We also reviewed financial information, legislative committee and Board minutes, and other information describing the Board's activities. Finally, we reviewed and assessed controls related to our audit objective.

To determine if licensee cost recoveries for investigations was reasonable, we discussed with the Board how they determine and assess costs. We obtained, from the Board's website, all Board actions during our scope period. There were 53 Board actions during our scope period and 51 had some form of cost recovery. We also combined two cases together since the Board investigated the matter as one case. Therefore, the total number of cases with the cost assessments was 50. We obtained and verified the accuracy of the Board's complaint log by comparing the log to Board documentation. Since the Board did not track costs by licensee, we determined the costs applicable to each licensee. We reviewed each stipulation agreement and identified the complainant(s) identified in the agreement, if any. We compared this information to the complaint log to identify if there were other complaints and investigations during the period covered by the stipulation or disciplinary agreement. In addition, we identified the date in which the first complaint was received, when the stipulation agreement was signed and the total amounts to be paid including cost recovery assessments.

To determine legal fees applicable to each case, we reviewed and compiled the data from the legal summary invoices, for each month, for the period January 2013 to December 2015. For older cases, we requested the Board provide legal costs prior to January 2013. We determined total legal costs related to each

complainant noted in the applicable stipulation agreement. We specifically excluded legal fees related to complaints that were remanded, even if the complainant was noted on the Informal Hearing notice, since initial discussions with Board management and outside counsel indicated costs related to remands are not passed on to licensees.

To determine other costs related to an investigation, we reviewed Board invoices submitted by Disciplinary Screening Officers (DSOs) and identified if the DSO submitted, and was paid for, time applicable to each investigation. We also identified whether the DSO was reimbursed for ancillary costs or travel. Similar to legal fees, if time was shown related to a remanded complaint we did not include those amounts in total investigation costs for that licensee. We determined if DSO hours or travel were related to the investigation or monitoring of the licensee. Total DSO hours for each case and activity were multiplied by the \$50 an hour rate DSOs are paid. We specifically identified and separated DSO costs by investigation or monitoring activity and compiled these costs individually. We also reviewed the Board's invoices related to recording services, private investigators, and the Board's credit card to identify other related costs and travel.

We then compared costs assessed through the agreement or order, to the total costs incurred calculated based on Board invoices and payments. We totaled these costs and compared those totals to the amounts assessed.

In addition, we reviewed the contract executed for the Board's outside counsel. We compared rates as stated in the contract to rates charged for services. Furthermore, we calculated legal fees for calendar years 2014 and 2015, based on payments made by the Board, and compared that total to stated contract maximums. We inquired with Board management about accounting for recoveries and legal fee contract overages.

During our discussions with Board staff and outside counsel and review of Board records, we documented the disciplinary process used by the Board. We compared this process to that noted in the Board's policies and procedures. We reviewed existing policy

manuals. We held discussions with the Board's Executive Director and outside counsel as necessary.

Our samples related to determining whether certain documentation was included in Board files. For our sample design, we used nonstatistical audit sampling, which was the most appropriate method for concluding on our audit objective. Based on our professional judgment, review of sampling guidance, and consideration of underlying statistical concepts, we believe that nonstatistical sampling provided sufficient, appropriate audit evidence to support the conclusions in our report. Since we do not know the population of Board files, as determining that would have taken excessive time, we cannot project our error rates to the population.

Our audit work was conducted from February to March 2016. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In accordance with NRS 218G.230, we furnished a copy of our preliminary report to the Executive Director of the Nevada State Board of Dental Examiners. On April 26, 2016, we met with the Board's Executive Director and outside counsel to discuss the results of the audit and requested a written response to the preliminary report. That response is contained in Appendix F, which begins on page 35.

Contributors to this report included:

Jennifer M. Brito, MPA
Deputy Legislative Auditor

Shannon Ryan, CPA
Audit Supervisor

Drew Fodor, MBA
Deputy Legislative Auditor

Rick Neil, CPA
Audit Supervisor

Appendix F

Response From Nevada State Board of Dental Examiners

Nevada State Board of Dental Examiners



6010 S. Rainbow Blvd., Bldg. A, Ste.1 • Las Vegas, NV 89118 • (702) 486-7044 • (800) DDS-EXAM • Fax (702) 486-7046

May 11, 2016

Mr. Rocky Cooper, CPA
Legislative Auditor
Nevada Legislative Counsel Bureau
401 South Carson Street
Carson City, NV 89701-4747

Re: Written response to revised audit report dated April 29, 2016

Dear Mr. Cooper:

Thank you for your correspondence dated April 29, 2016, requesting a written response to the revised audit report on the Nevada State Board of Dental Examiners (the "Board"). Included with your letter was a document captioned "Nevada State Board of Dental Examiners' Response to Audit Recommendations" ("Recommendation Form") which you ask that check marks be placed in the appropriate columns and the completed form be returned with the Board's written response. As requested, the completed Recommendation Form accompanies this written response.

As you can see from the completed Recommendation Form, eleven (11) of the fourteen (14) recommendations are "accepted." The accepted recommendations are as follows:

1. Develop and document a process for tracking actual costs by complainant and licensee for investigations and monitoring activities.
2. Ensure DSO invoices include sufficient detail to track and assess costs accurately. Invoices should detail the licensee, complainant, activity performed, and other fees or costs.
- ***
4. Develop policies regarding fees to be assessed to licensees throughout the disciplinary process, including whether costs for remanded complaints discussed at Informal Hearing proceedings should be included in total amounts assessed to licensees. Seek Board approval of policies regarding fees to be assessed.

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Legislative Auditor
Nevada Legislative Counsel Bureau
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5. Determine, document, and adhere to appropriate travel cost limits.

 7. Record recoveries collected from licensees for disciplinary actions and monitoring activities as revenue instead of a reduction to expenses.
 8. Prepare contracts that accurately reflect the maximum amount expected to be paid to the contractor.
 9. Review, at a public board meeting, the merits of contracting with outside counsel versus hiring a General Counsel to meet the majority of the Board's legal needs.

 11. Develop and document guidance for investigations including procedure checklists and expected documentation.
 12. Develop a standardized filing organization method.
 13. Prepare a file checklist that details all routine documentation related to the disciplinary process needed to substantiate the Board's actions and compliance with statutes.
 14. Ensure all records are obtained and retained by the Board to support disciplinary activities.

Id., completed Recommendations Form. As discussed at our April 26, 2016, meeting, as referenced in your audit report, and/or as more fully addressed in the attached written response, a number of the recommendations have already been implemented or substantial progress has been accomplished in completing the recommendation(s).

The three (3) "rejected" recommendations, numbers 3, 6, and 10, are as follows:

3. Refund licensees amounts that were overcharged.
6. Discontinue the use of charitable contributions as a condition within stipulation agreements.
10. Institute an independent review process regarding complaint investigation and resolution.

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 Legislative Auditor
 Nevada Legislative Counsel Bureau
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Id., completed Recommendations Form. These recommendations are addressed in more fully below.

Below are responses/comments regarding certain aspects of the audit report. Beginning at page 12, the written response then discusses the audit report's recommendations 3, 6, and 10.

**RESPONSES/COMMENTS REGARDING CERTAIN
ASPECTS OF THE AUDIT REPORT**

1. Introduction-Background (audit report, pgs. 1-7)

Upon review of the report submitted by the Legislative Auditors under "Introduction", the Board provides the following response/explanation.

The licensee information contained in the audit report may not accurately reflect the number of licensees and the licensure status. On April 1, 2016, the Board provided the exact number of dentists and dental hygienists that are registered with the Board and their licensure status to the auditors. The Board provides the chart below detailing the information.

	<u>Dentists</u>	<u>Dental Hygienists</u>
Active:	1809	1393
Inactive:	304	249
Retired/Disabled:	81 (76 retired/5 disabled)	30 (20 retired/10 disabled)
Suspended Non-Renewal:	189	0
Suspended Board Action:	4	0
Revoked Non-Renewal:	326	330
Total:	2,713	2,002

2. Staffing and Budget (audit report, pgs. 2-3)

The Board has five (5) full-time employees and one (1) part-time employee, which includes, the Executive Director. In addition, the Board has twenty seven (27) Disciplinary Screening Officers comprised of general dentists, dental specialists, and dental hygienists approved by the Board to conduct investigations pursuant to NRS 631.363.

The Board collects fees as set forth in NRS 631.345 and NAC 631.029. Most fees collected by the Board are application for licensure fees and license renewal fees. The Board has not increased the fees associated with application for licensure since 2001. The application fee for dental licensure is \$1,200.00. This application fee includes the application process,

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fingerprinting costs, background investigation, on-line jurisprudence examination, and review of the application. The process for dental hygienist licensure is the same. However, the application fee for dental hygiene is \$600.00. The Board does provide licensure by reciprocity for military personnel or military spouses and the fee is 50% of the applicable fee. The issuance of a new license is approximately 30-35 days from the time the application is received in the Board office. The Board has seen an increase in persons applying for licensure I think in part due to the change in AB89 which removed the five (5) year requirement for the Western Regional Examining Board certification.

Licensees renew their licenses biennially. The Board has not increased the biennial renewal fee since 1991. The fee associated to renew a dental license is \$600.00 (active), \$200.00 (inactive), and \$25.00 (retired/disabled) for the two (2) year period and for dental hygienists the renewal fee for the two (2) year period is \$300.00 (active), \$50.00 (inactive, retired or disabled). Per Exhibit 2 of the Legislative Auditors report, the Board since 2013 has strived to reduce various expenses, to include, but not limited to, travel, examination expenses, equipment, and legal (net reimbursements).

3. Complaints Resolutions and Disciplinary Process (audit report, pg. 3)

Pursuant to NRS 631.360, the Board may, upon its own motion (e.g. authorized investigative complaints) authorize an investigation of a licensee which must be approved by the Board at a properly noticed meeting identifying the possible violations. However, the licensee is not identified on the agenda; he/she is identified as Dr X or RDH Z. The Board shall upon the verified complaint in writing of any person setting forth facts, which, if proven, would constitute grounds for refusal, suspension or revocation of a license or certificate under this chapter, investigate the licensee. The Board investigates complaints to determine whether a licensee has violated Chapter 631 of NRS and NAC.

A. Remand Cases:

Verified complaints or authorized investigative complaints that are determined to warrant no action are remanded and are confidential pursuant to NRS 631.368(1). According to the audit report, 63.8 % of the complaints investigated by the Board are remanded to the practitioners file with no further action. The licensee who is investigated and the investigation results in a remand prior to the issuance of the Notice of Informal Hearing or otherwise known as "continue investigation" will not be responsible for any costs associated with the investigation. The remand investigation costs are paid by way of licensure fees.

B. Corrective Action Non Disciplinary Stipulations or Disciplinary Stipulations Agreements -

Pursuant to the Nevada Attorney General's *Nevada Board and Commission Manual* (August 2013), pages 31-39 outlines the Attorney General's guidelines for investigations, administrative hearings and the courts. In pertinent part, the manual provides:

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Disciplinary procedures for licensing boards typically include these steps:

- Consumer complaint received or complaint received from another source, or board or commission initiated administrative complaint
- Investigation
- Report of Investigation

Once a report of the investigation is drafted, it should be reviewed by the board or commission's executive director or executive secretary, in conjunction with legal counsel, if necessary, to determine whether there is sufficient evidence to proceed to a hearing before the board or commission in the case.

Options if there is insufficient evidence to go to hearing:

Dismiss case [**Remand**]

If, after the conclusion of the investigation there is insufficient evidence to go to hearing, the file should be closed with notice sent to the complainant and licensee. For many boards and commissions, a recommendation for dismissal must be brought by staff before the board or commission.

Continue investigation [**Notice of Informal Hearing**]

Options if sufficient evidence to go to hearing:

Settlement agreement [**Corrective Action Stipulation or Disciplinary Stipulation Agreement**]

Formal disciplinary hearing

The interest in safeguarding public health, safety, and welfare is the primary purpose of a board or commission and the basis of its existence. It is imperative that boards and commissions vigorously enforce statutes and regulations governing conduct of licensees or regulated individuals and entities under their jurisdiction. At the same time, however, boards and commissions must be conscientious in following due process standards established for conducting investigations and taking administrative actions.

These standards are embodied in statutes, regulations, and state and federal constitutions, and are designed to protect the interest of the licensed or regulated party. The licensed or regulated party must be afforded due process by the board or commission before administrative action can be taken or discipline can be imposed.

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In the area of investigations and regulatory actions, board and commission members should scrupulously follow statutes and regulations. Those who carry out investigations and administrative actions on behalf of boards and commissions should always work closely with legal counsel during all phases of the investigatory and administrative process.

Id., pgs. 31-32.

The process outline above in the Nevada Attorney General's *Nevada Board and Commission Manual* (August 2013) is the process of the Nevada State Board of Dental Examiners uses and in accordance with NRS 631 and NAC 631. See further discussion below regarding this matter at the Board's response to the audit report's recommendation #10.

4. Scope and Objective (audit report, pg. 7)

The Legislative Auditors conducted the audit at the special request of the Sunset Committee and upon authorized by the Legislative Commission to determine whether the Board has assessed reasonable costs to licensees of the Board for investigating and resolving complaints and disciplinary matters. The audit should include an analysis of the Board's legal and investigative expenditures and related cost recoveries during Calendar years 2014-2015. The Nevada State Board of Dental Examiners fiscal year starts July 1st of each year and ends June 30th. The Board does not run on a calendar year. The audit conducted has included the disciplinary process which appears to be outside the scope of the special request of the Sunset Committee and the approval by the Legislative Commission. On such a point, a February 11, 2016, letter from Senator James A. Settlemeyer, Chair, Sunset Subcommittee of the Legislative Commission to Senator Michael Roberson, Chair, Legislative Commission, provides as follows for the scope of the at-issue audit:

The objective of the audit is to determine whether the Board [i.e., Nevada State Board of Dental Examiners] has assessed reasonable costs to licensees of the board for investigating and resolving complaints and disciplinary matters. The audit should include an analysis of the Board's legal and investigative expenditures and related cost recoveries during Calendar Years 2014 and 2015."

Accordingly, the Subcommittee believes it is appropriate to audit these expenditures and related cost recoveries."

Id., first and second paragraphs, respectively. Similarly, Minutes of the February 19, 2016, meeting of the Legislative Commission, Nevada Legislative Counsel Bureau, provide as follows regarding the scope of the audit:

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Vice Chair Settelmeier moved approval of a request for an audit of the legal fees of the Board of Dental Examiners of Nevada on behalf of the Sunset Subcommittee of the Legislative Commission”

Id., at pg. 47. Notwithstanding Senator James A. Settelmeier’s February 11, 2016, letter and/or the Minutes of the February 19, 2016, meeting of the Legislative Commission, Nevada Legislative Counsel Bureau, references to the scope of the audit, the actual audit addressed additional issues and matters, including the Board’s investigative and disciplinary processes.

The Nevada Attorney General’s Office through the Board and Commission Manual (August 2013) distinctly states in the area of investigations and regulatory actions, board and commission members should scrupulously follow statutes and regulations. The Board’s investigative process which is contained in the Disciplinary Screening Officers Manual scrupulously follows the investigative and disciplinary processes outlined in statute and regulation.

5. Classification of Non Disciplinary and Disciplinary Stipulations Agreements (audit report, pg. 7)

The Nevada State Board of Dental Examiners, like other occupational licensing boards, is authorized to enter into consent and settlement agreements pursuant to NRS 622.330 and/or NRS 233B.121(5). The administrative action better known as a “Corrective Action Plan Stipulation Agreement” is remedial in nature, not discipline. The provisions contained in the corrective action plan do not place a license on probation, suspension, revocation or restrict the licensee from performing any branch of dentistry or dental hygiene. The action plan is a mechanism to assist licensees in areas where the licensee may be deficient in their education or training of a particular area of dentistry or dental hygiene and find appropriate remedial measures to protect the public and provide remedial measures to assist the licensee with the deficiencies.

Disciplinary Stipulations are agreements entered into with the licensee in where the licensee is admitting to violation(s) of the Nevada Dental Practice Act and is consenting to provisions set forth under NRS 631.350. The provisions contained in a Disciplinary Stipulation Agreement are required reportable adverse actions to the National Practitioners Data Bank. Whether corrective action plan or disciplinary, the proceedings should be refer to as “investigative proceedings” and not classified as disciplinary since that may lead one to believe the Board has already made a pre-determination.

6. Licensees were Overcharged/Undercharged for Investigations (audit report, pgs. 8-9)

The Nevada State Board of Dental Examiners denies any licensees who entered into a corrective action stipulation agreement, disciplinary stipulation agreement, or by Order of the

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Board (53 in 2014-2015) were overcharged and the costs agreed to by the licensees for investigating and resolving complaints and disciplinary matters are unreasonable. First, all the licensees who consented to the reimbursement of investigation costs (those not being monitored by the Board) or investigation and monitoring costs (those being monitored by the Board) are inclusive. The total amounts licensees agreed to reimburse the Board are the exact amounts the Board received from each licensee. Further, outline in **Exhibit A** (figures were obtained by the auditor's report) you will see the 53 licensees identified paid the reimbursed amount as stated in their stipulated agreements. It is the Board's understanding the auditors did not provide the Board credit for monitoring costs incurred and paid in the amount of \$6,500.00 due to lack of information on the Disciplinary Screening Officer's ("DSO") expense summary form. There is no question the licensees were monitored and the DSO visited the dental office due to the expense summary form, receipts and reports but since the DSO was not specific on which office they visited the \$6,500.00 incurred costs were not credited. The reason the DSO did not specifically identify which dental practice was visited is because the monitoring fees are inclusive to the investigation costs and the costs were already paid whether the licensee's office is visited 1 time or 100 times, it does not have a fiscal impact on the licensee. In addition, the auditors determined the end date when calculating investigation costs for the 53 licensees was the date the licensee executed the agreement. However, the agreement is not considered final until the Board approves the agreement pursuant to NRS 622 and upon the licensee receiving written notification of approval by the Board. During the period of execution and notification to the licensee by the Board, the Board incurred costs associated with the investigation. Therefore, based upon the 33 licensees identified in column "O" it is determined there is an additional \$4,543.34 incurred costs not noted in the auditor's report. Based upon the amounts contained in **Exhibit A** (figures obtained through the auditor's report), the "Difference Over" amount for 2014-2015 is \$3,164.56 and the "Difference Under" amount for 2014-2015 is \$47,971.00. Therefore, based upon the amounts identified in **Exhibit A**, the Board did not overcharge any of the licensees and did not assess unreasonable costs to licensees for investigating and resolving complaints and disciplinary matters. In the District Court Case A-, Judge Bare determined the Board's costs to be reasonable when accessing the investigation costs to Ms. Andrea Smith.

In addition, the legal and investigative expenses noted in the report did not include those investigations for the illegal practice of dentistry and dental hygiene the Board prosecutes in district court to seek injunctive relief. The costs associated with these types of investigations do not usually result in reimbursements for all costs associated with the investigative and attorney fees.

Lastly, if regulatory bodies could not assess reasonable costs to licensees pursuant to NRS 622 to recover costs associated with an investigation, regulatory bodies would be forced to raise licensure and renewal fees for all licensees to cover the costs of investigations and the licensees who do comply with the statutes and regulations would pay for those who do not.

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 Legislative Auditor
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7. Assessment of Monitoring Were Unclear (audit report, pg. 9)

The Nevada State Board of Dental Examiners does not believe for those licensees who agree to investigation and monitoring costs the amount is unclear. The licensee and/or their legal counsel are fully advised of the amount of the investigation costs and monitoring costs prior to execution of the stipulation agreement. Investigation and monitoring costs are inclusive. The costs paid are one amount, not separate amounts. No licensee has paid the Board more than the amount agreed upon in stipulation agreements. Some instances, the Board does not recover the total investigation and monitoring costs incurred by the Board. Most licensees preferred to have the monitoring costs included in the investigation costs because it brought finality to the case. However, in light of the complaints by a hand full of licensees, the Board will now invoice the licensee in the event of a monitoring visit, not to exceed \$50.00 per hour and the licensee will have thirty (30) days to pay the invoice or their licensee may be suspended. The licensees preferred paying this amount inclusive with investigation costs to avoid invoicing and possibly forgetting to pay the invoice in the time allotted.

8. Some Invoices from DSO's lacked detail (audit report, pg. 10)

Upon review by the auditors the Board realized some of the DSO's expense summary forms lacked detail. The Board has taken appropriate measures and revised the DSO expense summary form to provide better detailed information of the service they are providing to the Board when issuing the expense summary form for payment. See Exhibit B. Further, the Board has incorporated checklists for both the complaint files (see Exhibit C) and the DSO's work product (see Exhibit D) to provide an up to date tracking of the complaint status.

9. Charitable Contributions (audit report, pg. 11)

It is of the opinion of the Nevada State Board of Dental Examiners that charitable contributions are permissible when entering into corrective action non disciplinary stipulation agreements and the licensee consent to the contribution that is not required by the Board under NRS 631.350. See also discussion herein regarding response to recommendation #6.

First, charitable contributions are a tool to provide real benefits to the community for services that might otherwise not be done and they allow the licensee to make reparation to the community for wrongs done.

Providing Charitable Contributions

- benefits the community;
- is aimed at not-for-profit, charitable organizations and bodies and community interests;
- and provides an opportunity for offenders to payback for their wrongdoing

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In the four (4) referenced charitable contributions, the licensee hired a person to practice dentistry and/or dental hygiene without possessing a valid license. The licensee billed patients and/or insurance carriers for the services performed by the unlicensed person and received an economic benefit. When determining the economic benefit received by the licensee, the Board requests a detail of all patients who received services from the unlicensed person. Based upon the time and money it would take the licensee to reimburse all patients and/or insurance companies, a contribution to a non-profit to provide dental treatments to the underserved population or the low income veteran population, the licensees would prefer to donate to the charitable organization.

One of the charitable organizations that received the donations was “Adopt a Vet” program in Northern Nevada. This program provides dental services to Veterans. The donations received by the “Adopt a Vet” program provided complete restorative treatment to eighty six (86) veterans that had been on a waiting list for 2-3 years. According to the program, the donations have made an enormous impact on our low income veterans and they are now without pain. See Exhibit E.

10. Legal Expenses Higher Than Reported (audit report, pg. 13)

The Nevada State Board of Dental Examiners adequately reported legal expenses. The Board has a contra account that indicates reimbursed legal fees Acct #73650-6. However, under Investigations/Complaints on the Statement of Revenues, Expenses and Fund Balance the Board accurately accounts for incurred legal fees under Account Number 73650-3 for John Hunt, Esq., Lee Drizin, Esq. and the Attorney General. Under Professional Fee Account Number 73600-2, these fees are for general board matters not associated with any investigations or complaints. These general matters are not fees charged to a licensee.

11. Better Reporting and Monitoring of Legal Expenses (audit report, pg. 13)

In reviewing the audit report regarding the offset of legal reimbursements to legal expenses and stating Board Management is offsetting the reimbursements to legal costs on the financial statements is not an accurate statement. The financial statements being referred by the Legislative Auditors is the FY 2014 and FY 2015 audit reports, not the bi-monthly financial statements reviewed by the Board at every public meeting. The audit is conducted by a CPA. The audit report is submitted to LCB by December 1st of each year. As Board Management, the undersigned does not generate the audit report. So, whether the offset of reimbursements of legal reimbursements to legal expenses is or is not permissible under GASB or for generally accepted auditing standards, the same is outside my expertise.

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12. Board Exceeded Contract Maximum (audit report, pg. 14)

The Nevada State Board of Dental Examiners has been informed that the maximum contract amount for John Hunt, Esquire as exceeded the maximum limits. As Board Management I was offsetting the fees paid by licensees for reimbursed legal fees to the amount paid to Morris, Polich & Purdy, LLP. Once the Board exceeded the \$175,000.00 per year the contract would need to be approved/rejected for amendment. Since I am now aware I cannot do that I will be placing before the Board to approve/reject the amended contract. This contract offsetting methodology was **NOT** noted on the financial statements issued to the Board bi-monthly which are prepared by the Board's bookkeeper. This contract methodology was internal for my tracking purposes only. This offset was in no way reflected on the financial statements that are issued and reviewed by the Board at properly noticed meeting with Hummel & Associates present.

13. Hiring Staff Attorney would reduce Legal Expenses (audit report, pg. 15)

Pursuant to NRS 631.190, the Nevada State Board of Dental Examiners shall appoint committees, examiners, officers, employees, agents, attorneys, investigators, and professional consultants and define their duties and incur such expense as it may deem proper or necessary to carry out the provisions of the chapter. In addition, the Board has already has joint representation with the Nevada Attorney General. The Board will notice on an upcoming agenda to discuss and determine the benefits and alternatives to in-house counsel versus independent contractor.

14. Greater Oversight of Investigator's Work is Needed (audit report, pg. 16)

The Nevada State Board of Dental Examiners does not agree with the statements outlined by audit report. The Board's disciplinary process is outlined in Chapter 631 of the NRS and NAC. The process is there to protect the due process rights of the licensee. The Board Members utilize the Board and Commission Manual (August 2013) as a resource to Board Members offered by the Nevada Attorney General's office in conjunction with training through their office.

The oversight of the DSO's is through the Board and in conjunction with Board Counsel. The Board conducts the investigations in compliance with the statutes and regulations and through the guidance of the Nevada Attorney General's office. Specifically, as noted above, pages 31-39 of the Nevada Attorney General's *Nevada Board and Commission Manual* (August 2013) (see **Exhibit F**, pgs. 31-39 of the Manual) provides Board Members and Investigators with specific guidelines when conducting investigations, administrative hearings and the courts. In part, the manual states:

Once a report of the investigation is drafted, it should be reviewed by the board or commission's executive director or executive secretary, in conjunction with legal

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counsel, if necessary, to determine whether there is sufficient evidence to proceed to a hearing before the board or commission in the case.

Id., pg. 31.

Currently, all preliminary findings drafted by the DSO regarding the limited investigation are submitted to Board Counsel along with draft preliminary findings submitted to both the Executive Director and Board Counsel. When the investigation continues, an Informal Hearing is conducted to discuss and obtain information related to the complaints. In attendance at the Informal Hearing is the Disciplinary Screening Officer, Licensee, Legal Counsel for licensee, Executive Director and Board Counsel. A licensed court reporter is present. The Board's process is in accordance with the statutes and regulations and follows the procedures outlined in the Nevada Attorney General's office.

DISCUSSION OF RECOMMENDATIONS 3, 6, AND 10

Recommendation #3: "Refund licensees amounts that were overcharged."

Response: As noted and discussed above, this recommendation is "rejected." Fundamentally, the recommendation is rejected because the Board rejects and/or disagrees with the contention any licensees have been "overcharged." The at-issue stipulation agreements contain a negotiated and agreed upon amount for fees and costs. The amount was voluntarily agreed upon by the licensees with the advice of counsel. No licensee has paid more than the negotiated and agreed upon amount which is set forth in the stipulation agreements. Accordingly, there have been no overcharges.

Recommendation #6: "Discontinue the use of charitable contributions as a condition within stipulation agreements."

Response: Included with the audit report as Appendix C is the "Legal Opinion Regarding Charitable Contributions" which is an April 22, 2016, letter from James W. Penrose, Senior Principal Deputy Legislative Counsel. As addressed above, and as more fully noted below, we respectfully disagree with the Mr. Penrose's analysis and opinion.

Initially, it should be noted licensees have never been required to make voluntary charitable contributions as a condition to negotiated corrective action non-disciplinary stipulation agreements (see discussion above regarding such agreements). In general, stipulation agreements are by their very nature contractual and voluntary between the parties (see discussion and authority below). In each case involving a voluntary charitable contribution, it was the licensee who requested the option of making a charitable contribution in lieu community service. In addition, some charities will not accept service from licensee who has action(s) with the Board.

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The Board is authorized to enter into settlement agreements with licensees. NRS 233B.121(5) provides, in pertinent part: [u]nless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.” NRS 622.330 also provides the Board with specific authority to enter into stipulation agreements. It states, in pertinent part:

1. Except as otherwise provided in this section, a regulatory body may not enter into a consent or settlement agreement with a person who has allegedly committed a violation of any provision of this title which the regulatory body has the authority to enforce, any regulation adopted pursuant thereto or any order of the regulatory body, unless the regulatory body discusses and approves the terms of the agreement in a public meeting.

3. If a regulatory body enters into a consent or settlement agreement that is subject to the provisions of this section, the agreement is a public record.

NRS 233B.121 and NRS 622.330 each expressly provide the Board with specific authority to enter into stipulation agreements. Neither NRS 233B.121 nor NRS 622.330 set forth limitations or conditions that may or may not be included in a settlement agreement. It is well established that the court must interpret statutes consistent with the intent of the legislature. See Recanzone v. Nevada Tax Comm’n, 92 Nev. 302, 305, 550 P.2d 401, 403 (1976). In addition the court must ascribe an intent which will accomplish a reasonable result. Rose v. First Federal Savings & Loan, 105 Nev. 454, 457, 777 P.2d 1318, 1320 (1989). When interpreting a statute, any doubt as to legislative intent must be resolved in favor of what is reasonable, and against what is unreasonable, so as to avoid absurd results. Cragun v. Nevada Pub. Employees’ Ret. Bd., 92 Nev. 202, 205, 547 P.2d 1356, 1358 (1976). Thus, as more fully addressed herein, it is respectfully submitted that charitable contributions can be included in a corrective action non-disciplinary stipulation agreement which has been negotiated and agreed with a licensee and which is later adopted and approved by the Board. Such an interpretation of NRS 233B.121 and/or NRS 622.330 is consistent with their intent, is reasonable, and avoids absurd results.

The April 22, 2016, letter from James W. Penrose, Senior Principal Deputy Legislative Counsel (Appendix C to the audit report) provides, in pertinent part:

Here, the statutory provisions authorizing administrative agencies and regulatory bodies to enter consent or settlement agreements apply general to any agency or regulatory body. *See* NRS 233B.121 and 622.330. NRS 631.350 applies specifically to the Board, expressly authorizing it to impose only those forms of discipline enumerated in the statute. Because NRS 631.350 applies specifically to the Board and NRS 233B.121 and 622.330 apply only generally, NRS 631.350 controls the terms of any stipulation of the Board.

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Id., pg. 4. We respectfully disagree with this analysis. It is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally. W. R. Co. v. City of Reno, 63 Nev. 330, 172 P.2d 158 (1946). Here, the “given situation” is a Board’s authority to enter into settlement agreements. The admitted statutory provisions that “specifically appl[y]” to such a “given situation” are NRS 233B.121 and/or NRS 622.330.

Mr. Penrose’s April 22, 2016, letter focuses on NRS 631.350. NRS 631.350, however, is inapplicable to the “given situation” because it does not address settlement agreements and, therefore, it cannot be seen as specifically applying to the given situation. It is respectfully submitted that NRS 631.350 is an incorrect starting point for analysis because the same pertains to disciplinary powers of the Board. Moreover, as addressed above, the scope, effect, and intention of corrective action non-disciplinary stipulation agreements (sometimes referred to as “corrective action plan”) is remedial in nature, not discipline. The provisions contained in corrective action plans do not place a license on probation, suspension, revocation, or restrict the licensee from performing any branch of dentistry or dental hygiene. The corrective action plan is a mechanism to assist licensees in areas where the licensee may be deficient in their education or training of a particular area of dentistry or dental hygiene and find appropriate remedial measures to protect the public and provide remedial measures to assist the licensee with the deficiencies.

Here, it is submitted the issue is not the breadth of the disciplinary powers of the Board, which NRS 631.350 addresses. Instead, the issue is a Board’s authority to enter into stipulation agreements which is specifically addressed at NRS 233B.121 and NRS 622.330. Hence, NRS 233B.121 and/or NRS 622.330, statutes which specifically address settlement agreements, control.

Again, neither NRS 233B.121 nor NRS 622.330 (the two (2) statutes expressly providing the Board with specific authority to enter into settlement agreements) set forth limitations or conditions that may or may not be included in a settlement agreement. Moreover, courts have found there are no limitations on conditions that may be included in a settlement agreement except that such conditions must not violate public policy. In Rich Vision Centers, Inc. v. Board of Medical Examiners 144 Cal.App.3d 110 (1993), the California Court of Appeal, Second District, Division 3, held the Board of Medical Examiners has implied power to settle licensing disputes, since settlement is administratively efficient and furthers the purpose for which the Board was created. The court also noted there are no limitations on conditions that may be included in a settlement agreement except that such conditions must not violate public policy. More particularly, the Rich Vision Centers, Inc. court stated:

[A]n agency’s powers are not limited to those expressly granted in the legislation; rather, “[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute or as may fairly be implied from the statute granting the powers.” (Dickey v. Raisin

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Proration Zone No. 1 (1944) 24 Cal.2d 796, 810, 151 P.2d 505; see also Stackler v. Department of Motor Vehicles (1980) 105 Cal.App.3d 240, 245, 164 Cal.Rptr. 203.)

No statute expressly authorizes the Board even to settle licensing disputes, let alone spells out conditions governing settlement. We must therefore first decide whether the ability to negotiate settlement of disputes may be implied from the overall statutory scheme. In so doing, we look to the purpose of the agency for guidance. (See Dickey v. Raisin Proration Zone No. I, *supra*, at p. 802, 151 P.2d 505.)

The main purpose of the Board, like other agencies within the Department of Consumer Affairs is to insure that persons engaged in the profession possess and use “the requisite skills and qualifications necessary to provide safe and effective services to the public, ...” (Bus. & Prof.Code, § 101.6.) This broad purpose is effectuated mainly by the issuance, renewal or revocation of a license to practice. (See Bus. & Prof.Code, §§ 2553, 2555.)

Permitting the Board to settle disputes over present or continuing fitness for a license helps to achieve the Legislature’s purpose. Settlement negotiations provide the Board greater flexibility. Importantly, settlements provide the means to condition the issuance or renewal of licenses in order best to protect the public. Licensing can be tailored to suit the particular situation. Because conditions are voluntarily accepted by the applicant, enforcement problems are unlikely.

Increased efficiency inures to the busy Board possessed of the authority to settle disputes.

Because settlement is administratively efficient and furthers the purpose for which the Board was created, we hold that the Board has the implied power to settle licensing disputes. (Cf. Hamilton v. Oakland School District (1933) 219 Cal. 322, 327, 26 P.2d 296 (ability to settle claims against district an implied power of school board).) **This holding is consistent with the general policy of favoring compromises of contested rights.** (See Id., at p. 329, 26 P.2d 296; Fisher v. Superior Court (1980) 103 Cal.App.3d 434, 441, 163 Cal.Rptr. 47.)

That at least part of a settlement must be incorporated into a formal Board decision to be effective does not change our determination that the Board has the ability to formulate the settlement in the first instance. In other areas of the law, parties may try privately to settle problems even though a court must adopt or ratify their agreement. (See e.g. Robinson v. Robinson (1949) 94 Cal.App.2d 802, 805, 211 P.2d 587 (marital property settlement incorporated in interlocutory

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decree of divorce); Fed.Rules Civ.Proc., Rule 23(e) (requiring court approval of class action settlement).)

Additionally, we see no limitations on the conditions that may be included in a settlement except that such conditions must not violate public policy. A party need not have a legally enforceable right to a concession granted in a compromise agreement. (*Hall v. Coyle* (1952) 38 Cal.2d 543, 546, 241 P.2d 236; *Stub v. Belmont* (1942) 20 Cal.2d 208, 217, 124 P.2d 826.) There is little danger that the agency will obtain concessions on extraneous matters, or will overreach the applicant. To be valid, all the terms of a settlement must be voluntarily agreed to by the parties. (*See Enslow v. von Guenther* (1961) 193 Cal.App.2d 318, 321, 14 Cal.Rptr. 231.) An applicant who believes that a Board is asking for unreasonable concessions or is making unlawful demands always retains the option to refuse a proffered settlement and to proceed to hearing.

The ability to negotiate favorable settlement terms has long been among attorneys most effective tools for promoting their clients best interests. To successfully use this tool however, an attorney must have flexibility in formulating the terms and conditions of any agreement to maximize benefit to the client. **Settlement negotiations involve give and take, and the final agreement is a compromise. Government attorneys no less than attorneys in the private sector are responsible for promoting their clients best interests.**[footnote omitted.] (*See People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157, 172 Cal.Rptr. 478, 624 P.2d 1206.) **There is no reason to handicap those members of the Attorney General staff who represent licensing agencies in performing their duty by limiting their ability to propose and include any settlement term beneficial to the public.**

Id., 114-16 (emphasis added). This analysis applies to the Board entering into stipulation agreements with licensees. Thus, in keeping with the authority just discussed, the Board is able to enter into stipulation agreements because there are no limitations on the conditions that may be included in a settlement agreement except that such conditions must not violate public policy. As noted above, should a licensee believe the Board is asking for unreasonable concessions or is making unlawful demands in a proposed stipulation agreement, the licensee always retains the option to refuse a proffered settlement and to proceed to hearing.

Boards have implied power to enter into settlements of licensing disputes and to incorporate such settlements into formal Board orders. See Frankel v. Board of Dental Examiners, 46 Cal.App.4th 534, 544, 54 Cal.Rptr.2d 128 (1996). In California Dept. of Insur. v.

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State Farm Gen. Insur. Co., 2004 WL 2404695 (2004), the California Court of Appeal, Second District, Division 3, stated as follows with citation to Rich Vision Centers, Inc.:

However, an agency's powers are not limited to those expressly granted in the legislation; rather, "[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." [Citations.]” (Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal.App.3d 110, 114; italics in original [Rich Vision].)[footnote omitted.]

In Rich Vision, two opticians entered into a settlement agreement with the Board of Medical Examiners to resolve a number of pending disputes and administrative matters. Under the settlement they agreed to pay the Board's attorney's fees, investigative costs and administrative hearing expenses. **The opticians, however, later challenged the settlement agreement, arguing that “the Board did not have the authority” to require them to make such payments. We rejected that contention and held that the authority to settle disputes was well within the authority of the Board.**

“Permitting the Board to settle disputes over present or continuing fitness for a license helps to achieve the Legislature's purpose. Settlement negotiations provide the Board greater flexibility. Importantly, settlements provide the means to condition the issuance of renewal of licenses in order best to protect the public. Licensing can be tailored to suit the particular situation. Because conditions are voluntarily accepted by the applicant, enforcement problems are unlikely.... [¶] Because settlement is administratively efficient and furthers the purpose for which the Board was created, we hold that the Board has the implied power to settle licensing disputes. [Citation.] This holding is consistent with the general policy of favoring compromises of contested rights. [Citations.] ... [¶] The ability to negotiate favorable settlement terms has long been among attorneys' most effective tools for promoting their clients' best interests. To successfully use this tool however, an attorney must have flexibility in formulating the terms and conditions of any agreement to maximize benefit to the client. Settlement negotiations involve give and take, and the final agreement is a compromise. Government attorneys no less than attorneys in the private sector are responsible for promoting their clients' best interests.” [Citation.] There is no reason to handicap those members of the Attorney General staff who represent licensing agencies in performing their duty by limiting their ability to propose and include any settlement term beneficial to the public.” (Rich Vision, *supra*, 144 Cal.App.3d at pp. 115-116.) **We also held that “we [saw] no limitations on the conditions that may be included in a settlement except that such conditions must not violate public policy.” (Id. at pp. 115-116.)**

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Id., at *7 (emphasis added).

Any challenge to a stipulation agreement on public policy grounds would face a high burden as in only the rarest of occasions are contracts invalidated on a base of a violation of public policy. The court in California Dept. of Insur. v. State Farm Gen. Insur. Co., *supra* went on to state as follows regarding the steep burden to have a stipulated agreement overturned on public policy grounds:

It has long been the law in California that only in the rarest of circumstances should a contract be invalidated on the basis of a violation of public policy. “It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths.... While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. ‘The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.’ [Citation.]

... ‘No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.’ [Citation.]” (Stephens v. Southern Pacific Co. (1895) 109 Cal. 86, 89-90.)

“ ‘Public policy’ as a concept is notoriously resistant to precise definition, and ... courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, ‘lest they mistake their own predilections for public policy which deserves recognition at law.’ “ (Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1095 [overruled on other grounds by Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66]; (see also Moran v. Harris, *supra*, 131 Cal.App.3d at p. 919 [“courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts” because the phrase “public policy” is so “subjective” and “amorphous”].)

The California Supreme Court thus held that a violation of public policy must be tethered to a constitutional or statutory provision or, at the very least, to a regulation carrying out statutory policy. (See Green v. Ralee Engineering Co., *supra*, 19 Cal.4th 66 at p. 90; see also Moran v. Harris, *supra*, 131 Cal.App.3d at p. 921 [a court may not encroach upon the lawmaking branch of the government in the guise of public policy unless the challenged transaction is contrary to a

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statute or some well-established rule of law] citing San Bernardino County v. Gate City Creamery Co. (1913) 103 Cal.App.367, 373.)

Id., at *8-9.

Stipulation agreements between the Board and a licensee are governed by principals of contract law. Courts rely on basic contract principles to interpret stipulation agreements. An agreement to settle a legal dispute is a contract and its enforceability is governed by familiar principles of contract law. Miller v. Fairchild Indus., 797 F.2d 727, 733 (9th Cir.1986); Village of Kaktovik v. Watt, 689 F.2d 222, 230 and n. 62 (D.C.Cir.1982). Each party agrees to “extinguish those legal rights it sought to enforce through litigation in exchange for those rights secured by the contract.” Village of Kaktovik, 689 F.2d at 230; Protective Closures Co. v. Clover Inds., Inc., 394 F.2d 809, 812 (2d Cir.1968). Since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts. Vertex Distributing, Inc., 689 F.2d at 892 (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 236–37, 95 S.Ct. 926, 934–35, 43 L.Ed.2d 148 (1975)). Furthermore, enforceability of these compromise agreements is favored in the law.

The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation.

In re Springpark Assoc., 623 F.2d 1377, 1380 (9th Cir.) (quoting Dacanay v. Mendoza, 573 F.2d 1075, 1078 (9th Cir.1978)), cert. denied, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980).

As noted above, included with this written response, please find a May 2, 2016, letter (w/attachments) from the Adopt a Vet Dental Program (“AAVD”) addressing the enormous impact the \$69,000 in financial contributions have had in allowing the Program to care for low-income veterans. The AAVD notes that based on an average dental lab cost of \$800 per case for complete restoration, 86 low income veterans received dental care who had been waiting up to 2-3 years in the program. See Exhibit E.

Recommendation #10: “Institute an independent review process regarding complaint investigation and resolution.”

Response: This recommendation is addressed at page 18 of the audit report. It recommends investigations be reviewed by an independent party or committee. In addition to the matters addressed above regarding the Board’s investigatory and disciplinary processes, NRS 631.363 sets forth the statutory requirements for an appointed member or agent to conduct the investigation and hearing. NRS 631.363 provides:

NRS 631.363 Appointment of member or agent to conduct investigation and hearing; notice of hearing; report; hearing by Board.

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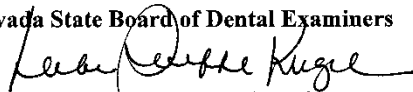
1. The Board may appoint one of its members and any of its employees, investigators or other agents to conduct an investigation and informal hearing concerning any practice by a person constituting a violation of the provisions of this chapter or the regulations of the Board.
2. The investigator designated by the Board to conduct a hearing shall notify the person being investigated at least 10 days before the date set for the hearing. The notice must describe the reasons for the investigation and must be served personally on the person being investigated or by mailing it by registered or certified mail to his or her last known address.
3. If, after the hearing, the investigator determines that the Board should take further action concerning the matter, the investigator shall prepare written findings of fact and conclusions and submit them to the Board. A copy of the report must be sent to the person being investigated.
4. If the Board, after receiving the report of its investigator pursuant to this section, holds its own hearing on the matter pursuant to NRS 631.360, it may consider the investigator's report but is not bound by his or her findings or conclusions. The investigator shall not participate in the hearing conducted by the Board.
5. If the person who was investigated agrees in writing to the findings and conclusions of the investigator, the Board may adopt that report as its final order and take such action as is necessary without conducting its own hearing on the matter. (Added to NRS by 1983, 1108)

In light of this specific statute dealing with investigations and hearings of the type at issue here, it is respectfully submitted that recommendation #10 could only be implemented following a change in the statute.

Please contact me at (702) 486-7044 if you have any questions regarding the above.

Sincerely,

Nevada State Board of Dental Examiners



Debra-Shaffer-Kugel, Executive Director

Accompanying documents: as stated above.

Nevada State Board of Dental Examiners' Response to Audit Recommendations

<u>Recommendations</u>	<u>Accepted</u>	<u>Rejected</u>
1. Develop and document a process for tracking actual costs by complainant and licensee for investigations and monitoring activities	<u>X</u>	<u></u>
2. Ensure DSO invoices include sufficient detail to track and assess costs accurately. Invoices should detail the licensee, complainant, activity performed, and other fees or costs incurred	<u>X</u>	<u></u>
3. Refund licensees amounts that were overcharged	<u></u>	<u>X</u>
4. Develop policies regarding fees to be assessed to licensees throughout the disciplinary process, including whether costs for remanded complaints discussed at Informal Hearing proceedings should be included in total amounts assessed to licensees. Seek Board approval of policies regarding fees to be assessed	<u>X</u>	<u></u>
5. Determine, document, and adhere to appropriate travel cost limits	<u>X</u>	<u></u>
6. Discontinue the use of charitable contributions as a condition within stipulation agreements	<u></u>	<u>X</u>
7. Record recoveries collected from licensees for disciplinary actions and monitoring activities as revenue instead of a reduction to expenses	<u>X</u>	<u></u>
8. Prepare contracts that accurately reflect the maximum amount expected to be paid to the contractor	<u>X</u>	<u></u>
9. Review, at a public Board meeting, the merits of contracting with outside counsel versus hiring a General Counsel to meet the majority of the Board's legal needs	<u>X</u>	<u></u>
10. Institute an independent review process regarding complaint investigation and resolution	<u></u>	<u>X</u>
11. Develop and document guidance for investigations including procedure checklists and expected documentation	<u>X</u>	<u></u>
12. Develop a standardized filing organization method.....	<u>X</u>	<u></u>
13. Prepare a file checklist that details all routine documentation related to the disciplinary process needed to substantiate the Board's actions and compliance with statutes	<u>X</u>	<u></u>
14. Ensure all records are obtained and retained by the Board to support disciplinary activities	<u>X</u>	<u></u>
TOTALS	<u>11</u>	<u>3</u>

Appendix G

Auditor's Comments on Agency Response

The Board, in its response, included certain statements we believe are misleading or inaccurate. In addition, the Board rejected three recommendations. Therefore, we have provided our comments on some of the issues mentioned in the Board's response to inform the reader of our position and demonstrate why we believe our findings, conclusions, and recommendations, as stated in the report, are accurate and appropriate.

Scope and Objective

1. The Board, in its response, indicates our audit included the disciplinary process, which appears to be outside the scope of the audit approved by the Legislative Commission. (see page 40)

Legislative Auditor's Comments

Because investigation costs and the disciplinary process are interrelated, our audit findings are well within the scope of our audit as stated on page 7 of our report. Our audit was conducted in accordance with Government Auditing Standards for performance audits and NRS 218G. Performance audit standards state that planning is a continuous process throughout the audit, and auditors may need to adjust the scope during the audit.

During our work related to identifying costs for investigating and resolving complaints and disciplinary matters, we identified numerous internal control weaknesses related to our work. For example, on page 19 in our report, we identified that critical documentation related to the disciplinary process was not maintained at the Board's office as required by NRS 631.190(8) and NAC 631.023(2)(d). Performance audit standards require auditors to include in the audit report internal control deficiencies significant to the audit objective. To exclude this information from our report and the Legislature would be inappropriate.

Overcharges for Investigation Costs

2. The Board, in its response, denies that licensees were overcharged because licensees consented to the reimbursement. In addition, the Board indicates that since amounts received from licensees do not exceed the amount assessed, licensees were not overcharged. Consequently, the Board rejected Recommendation 3 to refund licensees amounts that were overcharged. (see pages 41 and 46)

Legislative Auditor's Comments

From the Board's response, we assume the Board is indicating it may assess licensees any amount it deems appropriate, through its negotiating process, as long as the licensee agrees to such an amount. This is contrary to NRS 622.400 (see page 30). NRS 622.400 allows the Board to recover from licensees the costs incurred from its investigative, administrative, and disciplinary proceedings. As stated in page 10 of our report, NRS 622.400 does not authorize the Board to recover future unknown costs.

According to Kohler's Dictionary for Accountants, an incurred cost is one arising from cash paid out or an obligation to pay for an acquired asset or service. Therefore, it is clear any amount recovered in excess of an actual incurred cost of the Board is an overcharge, regardless of whether a licensee consented to pay the assessed amount.

3. The Board indicates in its response that \$6,500 in monitoring costs was not credited to the Board in our calculation of actual costs. The Board also indicates another \$4,543 in actual investigation costs that occurred after agreements were signed should have been included in our calculation of actual costs. (see page 42)

Legislative Auditor's Comments

We firmly stand by our calculations in Appendix B on page 23. First, as stated previously, NRS 622.400 allows the Board to recover from licensees costs incurred from its investigative proceedings. It does not provide for estimated amounts to be recovered from licensees for future monitoring of the licensee. Moreover, the Board did not document or specify what portion of the assessment, if any, was related to future monitoring activities as indicated on page 10. As a result, we cannot verify or confirm the amount of monitoring fees that were considered or included as part of the actual amount assessed. As such, future costs, whether related to monitoring or other investigation activities were appropriately excluded from our cost calculations.

Second, we disagree there is no ambiguity regarding the \$6,500 in uncredited monitoring costs. As stated on page 10 of our report, DSO invoices lacked detail to determine how much time was spent investigating a particular licensee. Furthermore, the Board can monitor licensees for several years. Because the DSO invoices related to the \$6,500 in costs did not indicate the licensee monitored, we could not reasonably determine to what extent, if any, these costs were attributable to any of the 53 licensees for which we calculated the costs.

4. The Board discusses in its response that the auditors determined the end date when calculating investigation costs for the 53 licensees was the date the licensee executed the agreement. The Board asserts the agreement is not considered final until the Board approves the agreement pursuant to NRS 622 and upon the licensee receiving written notification of approval by the Board and that costs totaling \$4,543 during this time period should be incorporated in our cost calculations. (see page 42)

Legislative Auditor's Comments

During the Informal Hearing, the Board negotiates with licensees regarding the terms of the stipulation agreement including the amount assessed for the investigation. The Board and the licensee agree on the terms, including the amount assessed, and the stipulation is signed by the parties. Even though the agreement is not final until approved at a Board meeting, the date the stipulation is signed is the date the assessment is determined. As noted above, we do not believe a future cost, regardless of its timing should be incorporated in cost totals since they are not known at the time of the assessment. Including such amounts would not represent what was known to the Board at the time the assessment was determined.

5. Based on the Board's addition of costs noted in Items 3 and 4 above, the Board recalculated total amounts overcharged as \$3,164 and the total amount undercharged as \$47,971. The Board further indicates that it did not overcharge any of the licensees and did not assess unreasonable costs to licensees for investigations and resolving complaints and disciplinary matters. (see page 42)

Legislative Auditor's Comments

We disagree with the Board's calculation of costs. We believe the Board is either attempting to mislead the reader, or lacks an understanding of the matter. First, the Board's calculations contained errors and omissions that affect the total overcharges and undercharges noted on page 57. Second, the Board included projected future costs in its totals. As we have previously discussed above, this is contrary to NRS 622.400. Third, the Board's calculations included a licensee from 2016 that is not included in Appendix B on page 23. Additional detail on some of the errors in the Board's calculation of costs are noted below:

- Three of five column totals are not correct, including two that are incorrect by several thousand dollars.
- The Board's cost analysis reduced the total overcharges by \$6,500 for monitoring costs incurred, as explained in Item 3 above. However, since the Board does not know whether the monitoring costs relate to licensees that were overcharged or undercharged, it does not have any basis for reducing the total overcharged amount by \$6,500.
- The Board's cost analysis also reduced the total overcharges by \$4,543 for investigation costs incurred as explained in Item 4 above. However, our review of the Board's analysis found that \$2,333 of that amount was for licensees that were undercharged and therefore should not have reduced the total overcharges.
- The Board omitted assessed costs of \$10,600 for two licensees and two other assessed cost amounts were incorrect by \$1,200 and \$871.

In summary, the Board did not track investigation costs by licensee. Our analysis and calculation of the Board's costs related to each licensee was based on documentation of actual costs obtained from Board files. We incorporated all costs that could be identified and attributed as being specific to one of the 53 licensees. We believe our calculation of the costs in Appendix B on page 23 are accurate, based on the Board's records, and reflect the activities and obligations of the Board at the time the assessment was determined. Therefore, any amount recovered in excess of actual costs incurred is an overcharge to the licensee.

Finally, we fundamentally disagree with the Board's assertion that the costs assessed are reasonable. As noted in our report on page 9, 46% of licensees were overcharged and 54% were undercharged. Any amount recovered in excess of an actual cost attributable to a specific licensee's investigation is not a reasonable cost. Furthermore, the Board determines assessments through a negotiation process that is not documented. As a result, the Board has no documented basis for why one licensee was overcharged and another was undercharged. The negotiation process results in significant variation among licensees. Without documentation to justify why one licensee received a steep discount while another paid more than the actual investigation cost and the facts explained above, we conclude the Board did not always assess reasonable costs to licensees.

Charitable Contributions Not Allowed Under Statute

6. The Executive Director's response indicates it is the opinion of the Board of Dental Examiners that charitable contributions are permissible when entering into stipulation agreements. (see page 43) The response also indicates it respectfully disagrees with the Legislative Counsel's analysis and opinion on this matter.

Legislative Auditor's Comments

Our statement in the audit report that charitable contributions by licensees, as required by stipulation agreements, are not allowed under NRS 631.350 is based on the Legislative Counsel's opinion. As indicated on page 12 of the report, the Legislative Counsel concluded the Board is not authorized to provide for a charitable contribution by the licensee as a condition of a stipulation. See Appendix C, beginning on page 25, for the Legislative Counsel's entire legal opinion.

The Board has rejected Recommendation 6 to discontinue the use of charitable contributions as a condition within stipulation agreements. As shown in Appendix A on page 21, two licensees paid charitable organizations \$50,000 each as part of the provisions imposed in Board approved stipulation agreements. Since the Board has approved agreements whereby licensees made significant contributions to charitable organizations and the Board feels strongly about continuing this practice, it can resolve this matter by requesting legislation to obtain specific statutory authority to do so.

Legal Expenses Higher Than Reported

7. The Board, in its response, indicates it adequately reported legal expenses relative to a series of internal general ledger numbers. The Board also indicates our audit report inaccurately states that Management is offsetting the reimbursements to legal costs on the financial statements. The Executive Director asserts that the financial statement audits are conducted by a CPA, she does not generate the financial statements, and has no such knowledge of accounting standards. (see page 45)

Legislative Auditor's Response

As stated on page 13 of our report, the Board paid about \$200,000 more, on average, in legal expenses than shown on its financial statements. Our report does not mention or address the manner in which the Board accounts for legal fees internally or in its accounting software. We are unsure how this portion of the Board's response is pertinent to the issues noted in our report regarding the reduction of legal fees on financial statements and contract documentation.

During the course of our audit, we discussed with the Board's Executive Director the presentation of legal fees and cost recovery assessments being applied as a reduction to those expenditures. Even though accounting functions are performed by a contractor, the Executive Director was aware and knowledgeable as to the circumstances and reasons regarding why cost recovery assessments were used to reduce legal fees. Moreover, as indicated in the Board's response on page 45, the Executive Director indicated she was responsible for the offsetting of fees.

Regardless of the work performed by the contractor or the CPA, management is responsible for the accurate and fair presentation of its accounting information and financial statements. As noted on the Independent Auditor's Report, paragraph two titled, Management's Responsibility for the Financial Statements:

Management is responsible for the preparation and fair presentation of these financial statements in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

As such, management cannot abdicate its responsibility for providing accurate financial statements.

We continue to maintain the Board's legal fees were not adequately reported. As noted in Exhibit 6 of our report on page 13, the Board reported on its financial statements only about one-third of its total legal fees. We do not believe that this represents adequate and transparent reporting.

Disciplinary Screening Officers Determine Violations and Sanctions Without Review

8. The Board, in its response, rejected Recommendation 10, which was to "Institute an independent review process regarding complaint investigation and resolution." The response indicates that the specific statute (NRS 631.363) dealing with investigations and hearings would have to be changed to implement this recommendation. (see page 53)

Legislative Auditor's Comments

As indicated on page 16 of the report, investigation results and conclusions of DSOs are not reviewed by supervisory personnel or an independent review committee. Our recommendation was based on several factors:

- DSOs' investigation results are not reviewed by an independent person or committee to verify the accuracy and adequacy of the conclusions and recommended corrective action or sanctions.
- We found a wide disparity among DSOs in the percentage of investigations resulting in disciplinary actions.
- We contacted six dental boards in other states and three boards in Nevada dealing with medical licensing. Of the eight boards that assign a staff member or agent to conduct investigations, all indicated investigations are reviewed by at least one other independent party.
- Best practices in carrying out a regulatory program indicate investigations should be reviewed to ensure work is conducted in a way consistent with applicable laws, regulations, and agency policies.

In addition, under NRS 631.190, the Board shall adopt rules and regulations and appoint such committees, examiners, officers, employees, agents, and investigators as it deems necessary to carry out the provisions of this chapter. We do not believe adding a level of independent review conflicts with the provisions of NRS 631, but rather helps ensure the provisions are carried out fairly and consistently.

The Board in its response on page 46 stated, DSO preliminary findings are submitted to Board Counsel and the Executive Director. During the audit, we discussed this matter at length with Board Counsel and the Executive Director. In those discussions, they indicated a review of DSO investigation results was not performed in part because they did not have the expertise. Regardless, our recommendation relates to instituting a review by another dental professional prior to the matter being submitted to counsel or management. Since the Board's investigations require expertise regarding accepted dental standards and practices, we believe a review by another dental professional with the appropriate knowledge and background is necessary to ensure investigation conclusions and recommendations are sound.

Exhibits From Agency Response Are Not Included in Audit Report

It has been the Audit Division's longstanding practice not to put every document received, in response to the audit, in the audit report. Accordingly, we included the Board's 20-page response

in our audit report; however, we did not include all 46 pages received. Although we did not include Exhibits A to F of the Board's response in the report, we provided the Audit Subcommittee of the Legislative Commission with a complete copy of the response under separate cover. In addition, a complete copy of the Board's response is available upon request.