

March 10, 2014

# Department of Consumer Affairs Enforcement Delays

---

LEGISLATIVE ANALYST'S OFFICE

Presented to:

Senate Business, Professions and  
Economic Development Committee  
Hon. Ted W. Lieu, Chair

Assembly Business, Professions and  
Consumer Protection Committee  
Hon. Susan A. Bonilla, Chair





## Background

---

- ☑ **Overview.** The Department of Consumer Affairs (DCA) is responsible for promoting consumer protection while supporting a fair and competitive marketplace. Currently, there are roughly 40 boards and bureaus within the department that are responsible for regulating various professions. The Governor's budget requests a total of \$600 million for DCA and its boards and bureaus in 2014-15.
  
- ☑ **Enforcement Process.** One of the primary responsibilities of DCA is to enforce consumer protection laws by disciplining licensees. The enforcement process can vary for each of DCA's boards and bureaus, but it generally includes three steps:
  - **Intake.** The board/bureau receives a complaint against a licensee and assigns the case to an investigator.
  - **Investigation.** The board/bureau collects facts and determines whether there is sufficient evidence to pursue an action, and, if so, what type of action (formal discipline or a lesser action such as a citation and fine).
  - **Formal Discipline.** The board/bureau refers some cases to the Department of Justice (DOJ) for prosecution. The DOJ schedules the case for a hearing before an Administrative Law Judge (ALJ) at the Office of Administrative Hearings (OAH) within the Department of General Services. Cases are resolved when the board or bureau votes to adopt a decision.



## Enforcement Actions Often Exceed Target Timelines

---

- ☑ **Enforcement Targets.** The DCA and its boards and bureaus have set performance targets for the average number of days to complete each of the three main steps of its enforcement process: intake, investigation, and formal discipline. These performance targets are displayed in the Governor's annual budget proposal along with each board and bureau's actual average number of days to complete each step. The intake and investigation performance targets vary by board and bureau (for example, investigation targets vary from 60 to 365 days). However, the formal discipline target is set uniformly at 540 days, meaning that all three steps need to be completed within that time frame.
  
- ☑ **Many Boards and Bureaus Not Meeting Targets.** As shown in the figure (see next page), some boards and bureaus are failing to meet investigation performance targets, and many boards and bureaus are not meeting targets for the formal discipline process. Enforcement delays sometimes last for years and allow licensees to continue working despite outstanding complaints, which can compromise consumer protection.
  
- ☑ **Data Limitations.** Currently, the data reported by DCA has limitations. Specifically, DCA data does not differentiate the amount of time it takes to complete investigations for cases that proceed to the formal discipline stage versus those that are closed with a lesser action at the investigation stage. Cases that proceed to formal discipline may be more complex or involve more serious allegations than those that are closed at the investigation stage, and thus could take longer on average to investigate.



## Enforcement Actions Often Exceed Target Timelines *(Continued)*

Selected Department of Consumer Affairs Entities <sup>a</sup>	Average Number of Days Past Targets in 2012-13	
	Investigation	Formal Discipline
Board of Professional Engineers and Land Surveyors	—	988
Board of Vocational Nursing and Psychiatric Technicians	—	693
Veterinary Medical Board	49	592
Acupuncture Board	16	448
California Board of Podiatric Medicine	—	404
Board of Psychology	—	388
Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board	230	383
California State Board of Pharmacy	72	347
Dental Board of California	—	317
Board of Behavioral Sciences	—	313
California Board of Accountancy	—	255
Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation	—	253
Contractors' State License Board	—	249
Medical Board of California	—	235
Osteopathic Medical Board of California	—	226
Physical Therapy Board	87	202
Board of Registered Nursing	43	198
State Board of Optometry	92	178
Cemetery and Funeral Bureau	—	170
Physician Assistant Board	—	161
Dental Hygiene Committee	—	41
Board of Barbering and Cosmetology	—	39
Respiratory Care Board	—	18
Landscape Architects Technical Committee	76	—
Court Reporters Board of California	15	—
Bureau of Automotive Repair	—	—
Bureau of Security and Investigative Services	—	—
California Board of Occupational Therapy	—	—
Professional Fiduciaries Bureau	—	—
California Architects Board	—	—
Bureau for Private Postsecondary Education	—	—
Naturopathic Medicine Committee	—	—
State Board of Guide Dogs for the Blind	—	—

<sup>a</sup> Does not include boards and bureaus for which no data were available, including the State Athletic Commission, Board of Chiropractic Examiners, Structural Pest Control Board, Telephone Medical Advice Services Bureau, Bureau of Real Estate Appraisers, and Bureau of Real Estate.



## Potential Sources of Delays

---

- ☑ ***Anecdotal Information on Reasons for Delays.*** In our discussions with DCA and some of its boards, OAH, and DOJ, a number of possible sources of delays in the investigation and formal discipline steps were identified. At this time, there is insufficient data for us to estimate the relative impact of each of these explanations.
  
- ☑ ***Investigations.*** Departments identified a couple of factors that can delay timely completion of investigations:
  - ***Inadequate DCA Staffing.*** The DCA and some of its boards and bureaus suggest that a lack of sufficient staffing is a key contributor to not completing investigations on schedule. The Governor's budget for 2014-15 includes several proposals to add positions to address enforcement backlogs.
  
  - ***Challenges Securing Investigation Information.*** Some DCA boards identify difficulty obtaining information necessary to complete investigations (such as personnel records and medical records) as a barrier to completing investigations in a timely manner. This challenge appears to be particularly prevalent for investigations related to the "healing arts" boards (such as the Board of Registered Nursing), which sometimes require protected medical information. Such issues vary by board, depending on what statutory authority they have to obtain information (such as subpoena power).



## Potential Sources of Delays

(Continued)



**Formal Discipline.** Departments identified additional factors that can delay timely resolution of the formal discipline process:

- **Incomplete Cases.** The DOJ raised the concern that it sometimes receives cases from DCA without all necessary information to proceed to a hearing. The DOJ returns these cases to the relevant board or bureau or secures the missing information itself. The DOJ suggested that turnover or lack of trained investigators within DCA and its boards and bureaus might be a possible reason for the submission of incomplete cases.
- **DOJ Case Preparation.** Some boards and bureaus indicate that DOJ's process of preparing cases for hearings might add to delays. Although we have requested data from DOJ on the length of time it takes to prepare a case for a hearing, we have not received this information. Thus, it is unclear at this time how much time in the formal discipline process is related to DOJ.
- **Timeliness of Setting Hearings.** The OAH reports that the average number of days between when it receives a hearing date request from DOJ and when it can set the first hearing date was 192 days in 2012-13. There are a couple of issues that might contribute to this, including lack of staff at OAH—especially ALJs. (As we discuss later, the Governor's budget includes some additional funding for OAH staffing.) In addition, current law prioritizes some types of cases (such as teacher dismissals) over others, which can make it more difficult to schedule those cases that are not prioritized. We also note that about a quarter of DCA cases are postponed at the request of one of the parties involved, which increases the number of days until a hearing by an average of an additional 110 days.
- **Guidance on Settlement Terms.** Boards and bureaus must approve any settlements negotiated by DOJ. However, DOJ reports certain challenges in settling some cases because it lacks clear guidance on the specific settlement terms that will be acceptable to DCA's boards and bureaus.



## Governor's Budget Proposals Might Reduce Backlogs

---

- ☑ ***Additional Positions Proposed for DCA.*** The Governor's budget for 2014-15 includes 19 enforcement-related proposals affecting 16 boards and bureaus. Together, these proposals total \$12.4 million from special funds to add 90 positions at DCA's boards and bureaus and to reimburse OAH and DOJ for their services. Some of these positions are aimed at eliminating backlogs and reducing timelines, while others are focused on expanding enforcement efforts. The budget also includes budget bill language that requires annual reporting—by January of 2016 through 2018—on complaint and disciplinary workload statistics, case processing times, staffing levels, and effectiveness at meeting targets.
  
- ☑ ***DCA Proposals May Provide a Partial Solution to Staffing Issues.*** The DCA enforcement proposals should help address enforcement delays. However, it is unclear whether the enforcement proposals would fully address the lengthy investigation time frames. Further, the Governor's budget does not include proposals to assist all boards and bureaus that report delays in meeting timelines—especially for the formal discipline process.
  
- ☑ ***Additional Positions Proposed for OAH.*** The Governor's budget also proposes a net increase of \$1.8 million annually from the Service Revolving Fund for OAH to support 19 additional positions, including 14 ALJs. The proposal includes a reduction in funding for temporary (commonly referred to as "pro tem") ALJs.
  
- ☑ ***OAH Proposal May Not Fully Address Issues.*** The Governor's OAH proposal replaces pro tem ALJ hours with a roughly equal number of permanent ALJ hours. It is not clear that this proposal would be sufficient to address the lengthy case-setting timelines.



## Additional Information Needed to Determine Contributors to Delay

---

The Legislature would need to have additional information than is currently available to determine how much each of the various factors contribute to the delays in the investigation and formal discipline process. Accordingly, the Legislature may wish to consider requiring additional reporting from DCA, OAH, and DOJ on an annual basis through 2018. Such information could include:

- DCA.** Length of time for DCA to complete the investigation process for the cases that are referred to DOJ as well as those that are closed with a lesser action at the investigation stage. This information is necessary, along with DCA's existing and proposed reporting requirements, to identify the extent to which DCA's investigations contribute to the time required to complete cases that go through the formal discipline process.
- DOJ.** Length of time between the receipt of cases and the request for a hearing date, as well as the number of cases returned to each board due to being incomplete. This information is necessary to determine the amount of time DOJ takes to prepare cases for hearing.
- OAH.** Statistics on caseload, staffing, and the amount of time between request and first hearing date. This information would need to be delineated for each board and bureau, as well as for each OAH location, which would allow the Legislature to identify future trends regarding delays related to setting hearings.