

# 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.

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 2 of 20

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

---

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.

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 3 of 20  
 Re: Written response to revised audit report dated April 29, 2016

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.

	<b><u>Dentists</u></b>	<b><u>Dental Hygienists</u></b>
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,

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 4 of 20

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

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.

Licensure 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:

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 5 of 20

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

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.

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 6 of 20  
Re: Written response to revised audit report dated April 29, 2016

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 1<sup>st</sup> of each year and ends June 30<sup>th</sup>. 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:

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 7 of 20

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

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

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 8 of 20  
Re: Written response to revised audit report dated April 29, 2016

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.



Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 9 of 20

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

**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

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 10 of 20  
Re: Written response to revised audit report dated April 29, 2016

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 1<sup>st</sup> 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.

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 11 of 20  
Re: Written response to revised audit report dated April 29, 2016

**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

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 12 of 20  
Re: Written response to revised audit report dated April 29, 2016

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.

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 13 of 20  
 Re: Written response to revised audit report dated April 29, 2016

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.

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 14 of 20  
Re: Written response to revised audit report dated April 29, 2016

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**

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 15 of 20  
 Re: Written response to revised audit report dated April 29, 2016

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. 1, 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

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 16 of 20  
Re: Written response to revised audit report dated April 29, 2016

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.



Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 17 of 20

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

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.)**

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 18 of 20  
Re: Written response to revised audit report dated April 29, 2016

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

Mr. Rocky Cooper, CPA  
 Legislative Auditor  
 Nevada Legislative Counsel Bureau  
 May 11, 2016  
 Page 19 of 20

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

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.

Mr. Rocky Cooper, CPA  
Legislative Auditor  
Nevada Legislative Counsel Bureau  
May 11, 2016  
Page 20 of 20

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

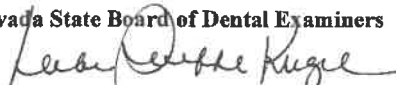
1. The Board may appoint one of its members and any of its employees, investigators or other agents to conduct an investigation and informal hearing concerning any practice by a person constituting a violation of the provisions of this chapter or the regulations of the Board.
2. The investigator designated 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>
<b>TOTALS</b>	<u>    11    </u>	<u>    3    </u>