

REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA

REVIEW OF
THE STATE BOARD OF OPTOMETRY'S
ENFORCEMENT PROGRAM

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OFFICE OF THE AUDITOR GENERAL

P-456

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STATE BOARD OF OPTOMETRY'S
ENFORCEMENT PROGRAM

JUNE 1985



Telephone:
(916) 445-0255

Thomas W. Hayes
Auditor General

STATE OF CALIFORNIA
Office of the Auditor General

660 J STREET, SUITE 300
SACRAMENTO, CA 95814

June 24, 1985

P-456

Honorable Art Agnos, Chairman
Members, Joint Legislative
Audit Committee
State Capitol, Room 3151
Sacramento, California 95814

Dear Mr. Chairman and Members:

The Office of the Auditor General presents its report concerning the State Board of Optometry's enforcement program. The report indicates a need for the board to take the appropriate action to ensure that its budget meets its enforcement needs.

Respectfully submitted,


THOMAS W. HAYES
Auditor General

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	1
AUDIT RESULTS	
THE STATE BOARD OF OPTOMETRY HAS SUSPENDED ITS ENFORCEMENT ACTIVITIES DURING EACH OF THE LAST TWO FISCAL YEARS	5
CONCLUSION	17
RECOMMENDATIONS	17
INFORMATION REQUESTED BY THE LEGISLATURE	
THE STATE BOARD OF OPTOMETRY HAS NO DATA TO DETERMINE THE NUMBER OF COMPLAINTS AGAINST CORPORATE CHAINS	19
RESPONSE TO THE AUDITOR GENERAL'S REPORT	
State and Consumer Services Agency	21

SUMMARY

For the past two fiscal years, the State Board of Optometry (board) has suspended investigative and disciplinary activities on complaints against optometrists because it overspent the budget for its enforcement program. In 1983-84, the board suspended at least 20 cases before year-end, and in 1984-85, the board suspended at least 21 cases. Some of the cases that were suspended included serious health and safety issues for consumers, such as allegations of eye damage and an optometrist practicing under the influence of alcohol and drugs. While these cases are suspended, the optometrists against whom the complaints are filed continue practicing, and the alleged unsafe or illegal conditions may continue. One reason that the board overspent its enforcement budget is that the board is pursuing a major case against a large optometric corporation. During the past two fiscal years, the board has spent approximately 53 percent of its enforcement budget to pursue this case. Instead of suspending cases, the board could have requested to use its reserve funds to continue its enforcement program.

The board's primary responsibility is to protect consumers of optometric goods and services. The board fulfills this responsibility by testing and licensing optometrists and by enforcing state laws and regulations related to optometrists. As part of its enforcement program, the board receives and screens complaints against optometrists, refers complaints to the Department of Consumer Affairs' Division of Investigation to be investigated, and when an investigation is completed, may refer the complaint to the Attorney General for administrative disciplinary action.

However, because the board overspent its enforcement budget in fiscal year 1983-84, the board suspended at least 7 cases with ongoing investigations at the Division of Investigation in May 1984 and 13 of 18 cases pending at the Attorney General's office in February 1984. In fiscal year 1984-85, the board suspended at least 9 cases with ongoing

investigations at the Division of Investigation in December 1984, only mid-way through the fiscal year. The board suspended 12 of 16 cases pending at the Attorney General's office in March 1985. The cases that were suspended included complaints that involved serious health and safety issues for consumers, such as allegations of eye damage caused by an optometrist, an optometrist practicing under the influence of alcohol and drugs, and unsanitary and unhealthful optometric practices.

Rather than suspending its enforcement program, the board could have taken administrative action to allow it to use its reserve funds to continue investigative and disciplinary activities during these periods. At the end of both fiscal years 1983-84 and 1984-85, the board had over \$300,000 in the State Optometry Fund reserved for economic uncertainties. The State Administrative Manual outlines procedures for agencies to follow to request use of these funds. However, the board chose not to do so because it believed it did not have sufficient staff to prepare a budget change request.

One reason the board overspent its enforcement budget in fiscal years 1983-84 and 1984-85 is that it has been pursuing a major case against a large optometric corporation. To date, the board has spent approximately 53 percent of its enforcement budget for the last two years on this case. The board has charged the corporation with multiple violations, including misleading advertising, unlawful professional relationships between optometrists and manufacturers or suppliers of optical products, and unlawful competition. The board has also charged that the corporation is engaging in the unlawful practice of optometry because the corporation is not licensed by the board although the individual optometrists working for the corporation are. Despite the many violations alleged by the board, since November 1979, the board has received from consumers only nine complaints that concern issues within the board's jurisdiction against the optometrists working for this corporation.

Additionally, the Legislature asked us to determine the number of optometrists in California working for "corporate chains" and the number of complaints that the board has received against these optometrists. We reviewed samples of all the files and records maintained by the board. We found that the board does not have any data that would identify the total number of optometrists in the State who work for corporate chains. Further, the board has no information to determine whether the optometrist against whom a complaint is filed works for such a corporation.

INTRODUCTION

The State Board of Optometry (board) within the Department of Consumer Affairs is responsible for protecting consumers of optometric goods and services. An optometrist performs eye examinations and prescribes corrective lenses or other optical devices. An optometrist is not required to be a licensed physician. The board protects consumers by assuring that only those who are qualified practice optometry. Additionally, the board attempts to resolve complaints received from consumers, and when necessary, the board may take disciplinary action against an optometrist.

To ensure that only qualified optometrists are practicing, the board tests and licenses all optometrists who practice in the State. Through the third quarter of fiscal year 1984-85, the board had tested 325 prospective optometrists and issued or renewed over 5,800 annual licenses to optometrists. The board also issues licenses for branch offices, issues permits for fictitious names, registers optometric corporations, accredits schools and colleges of optometry, and enforces state laws and regulations related to optometrists.* As part of its enforcement program, the board receives and screens complaints against optometrists, refers complaints that require investigation to the Department of Consumer Affairs' Division of Investigation, and when an

*A fictitious name is the business name under which an optometrist, an optometric group, or an optometric corporation practices if the business name is not the legal name of the optometrist.

investigation is completed, may refer the complaint to the Attorney General for administrative disciplinary action. The board may also provide to the public information such as whether the optometrist's license has been suspended or revoked or whether it is in good standing. An optometrist's license is considered to be in good standing if the Attorney General has not filed a formal accusation against the optometrist.

Board policy, regulations, and procedures are set by the nine members who compose the State Board of Optometry. Six members are practicing optometrists and three members are from the general public. The Governor appoints the six members who are optometrists and one public member. The Senate Rules Committee and the Speaker of the Assembly each appoint one of the remaining two public members. The nine-member board meets approximately four times a year.

To carry out its daily activities, the board has a staff of three full-time and two part-time employees. The staff includes an executive officer, who is employed by the nine-member board, a management services technician, and three clerical staff.

The board's budget for fiscal year 1984-85, as shown in the 1985-86 Governor's Budget, is \$307,000. Additionally, the Governor's Budget estimates that by the end of fiscal year 1984-85, the board will have \$367,000 reserved in the State Optometry Fund for economic uncertainties. The board is supported entirely by application,

licensing, and permit fees. State statutes specify the maximum limits for each type of fee. Currently, the board charges less than the maximum allowed for most fee categories.

SCOPE AND METHODOLOGY

This audit focused on the board's enforcement of compliance with state laws and regulations. We reviewed the laws and regulations related to the practice of optometry. We reviewed the board's policies and procedures in carrying out its enforcement responsibilities. We also examined a sample of complaint files and the files of all the cases that the board has investigated over the last four years. We interviewed the board's staff members and staff from other units within the Department of Consumer Affairs, including the Division of Investigation, the Division of Administration, and the Budget Office. We also spoke with representatives of the Attorney General's office.

The Legislature also asked us to determine the number of optometrists in California who work for "corporate chains" and the number of complaints filed against such optometrists. To determine whether the board has such information, we reviewed samples of all the files and records maintained by the board. We also contacted a representative of the Department of Corporations to determine whether that department had data on the number of optometrists working for optometric corporations.

AUDIT RESULTS

THE STATE BOARD OF OPTOMETRY HAS SUSPENDED ITS ENFORCEMENT ACTIVITIES DURING EACH OF THE LAST TWO FISCAL YEARS

The primary responsibility of the State Board of Optometry (board) is to protect consumers of optometric goods and services. However, for the past two fiscal years, the board has suspended investigative and disciplinary activities on complaints against optometrists because it overspent its enforcement budget. In fiscal year 1983-84, the board suspended investigative and disciplinary activity in May and February 1984, respectively. In fiscal year 1984-85, the board suspended investigative activity in December 1984, six months before the end of the fiscal year, and it suspended disciplinary activity in March 1985. Some of the cases that were suspended included serious health and safety issues for consumers, such as allegations of eye damage caused by an optometrist, an optometrist practicing under the influence of alcohol and drugs, and unsanitary and unhealthful optometric practices. While the cases are suspended, the optometrist against whom the complaint was filed continues practicing, and the alleged unsafe or illegal conditions may continue.

Rather than suspending cases, the board could have taken administrative action that would have allowed it to use its reserve funds to continue its enforcement program. One reason that the board overspent its enforcement budget is that the board was pursuing a major

case against a large optometric corporation. During the past two fiscal years the board has spent approximately 53 percent of its enforcement budget on this case.

The Board's Enforcement Program

A major part of the board's consumer protection program is following up on complaints that the board receives about optometrists. The board requires that complainants submit their allegations in writing to the board. Board staff conduct a preliminary review of every written complaint received to determine whether the complaint involves an issue over which the board has jurisdiction and to determine the seriousness of the charge. For instance, the board has no jurisdiction over complaints that are strictly fee disputes. In these cases, the board will usually send a letter to the optometrist stating that a complaint has been filed and requesting that the optometrist settle the matter with the complainant. If the optometrist will not settle the complaint, the board advises the complainant to take the matter to small claims court.

Cases over which the board does have jurisdiction involve violations of the Business and Professions Code such as allegations of incompetence, unprofessional conduct, molestation of a patient, and illegal advertising. When it receives a complaint within its jurisdiction, the board generally refers the complaint to the Department of Consumer Affairs' Division of Investigation. Complaints

alleging incompetence or inadequate examination are referred to a consulting optometrist to be verified.

When an investigation is completed, the Division of Investigation sends a report of its findings to the board. The board may then drop the case if the Division of Investigation determined there was insufficient evidence to confirm the charge, return the case to the Division of Investigation for further investigation, or refer the case to the Attorney General for disciplinary action.

When a case is referred to the Attorney General, the Attorney General reviews the case and, if appropriate, prepares a formal accusation. The board and the optometrist may then negotiate a settlement, or the case may proceed to the Office of Administrative Hearings. After considering all arguments in the case, a hearing officer will recommend either dismissal or some form of disciplinary action, such as probation or suspension of the optometrist's license. The nine-member board then either approves or rejects the hearing officer's recommendation. The nine-member board has the authority to enforce stronger disciplinary action than the hearing officer recommends. The optometrist has the right to appeal the board's decision to superior court.

The board judges as most serious those complaints that involve personal conduct of the optometrist (such as drug or alcohol abuse or convictions of moral turpitude), health and safety issues, and

incompetence or negligence. Lesser complaints include fraud, unprofessional conduct (such as illegal use of a fictitious name or unprofessional advertising), practicing without a license, inferior product quality, and contractual disputes.

In fiscal year 1983-84, the board received 256 complaints; the board determined that 73 (or 28 percent) of these complaints were within its jurisdiction. Between July 1, 1984, and March 31, 1985, the board received 278 complaints and determined that 91 (or 33 percent) were within its jurisdiction. For fiscal year 1983-84, the board's enforcement budget, through which Division of Investigation and Attorney General services are funded, was \$63,517; for fiscal year 1984-85, the enforcement budget was \$66,030.

The Board Suspended Enforcement Activities
in Fiscal Years 1983-84 and 1984-85

The board suspended its investigative and disciplinary activities during each of the last two fiscal years because it overspent its enforcement budget. During fiscal year 1983-84, the board notified the Attorney General's office in February 1984 to suspend work until July 1, 1984, on 13 of 18 board cases pending at the Attorney General's office. The board notified the Division of Investigation in May 1984 to halt investigations of board cases; at that time the board had 28 cases pending at the Division of Investigation, at least 7 of which involved ongoing investigations.

During fiscal year 1984-85, the board notified the Division of Investigation in December 1984, mid-year, to suspend its activities on board cases until July 1, 1985, because of budgetary constraints. As of December 1984, the board had 31 cases pending at the Division of Investigation, at least 9 of which involved ongoing investigations. The board notified the Attorney General's office to suspend activities on 12 of 16 pending cases in March 1985. In addition to suspending the cases that were pending at the Division of Investigation and the Attorney General's office, curtailing enforcement activities meant that the board could not refer any new cases it received between the effective suspension dates and the beginning of the new fiscal year.

The board also overspent its original budget for investigations in fiscal year 1981-82 by over 50 percent, but that year the board was able to transfer funds from other budget categories and have a balance in the enforcement budget at year-end. However, board records show that at least two cases were suspended in fiscal year 1981-82 due to lack of funds. One of these cases involved 57 consumer complaints. A hearing on this case was scheduled in February 1982 but was cancelled by the board due to lack of funds. A hearing was subsequently held in June 1983. In October 1983, the board adopted the Office of Administrative Hearings' proposed decision to suspend the optometrist's license for 60 days, and to reduce the 60-day suspension to 2 days and place the optometrist on probation for two years.

While investigative and disciplinary activities are suspended, an optometrist against whom a complaint has been filed continues practicing, and the alleged unsafe or illegal conditions may continue. Further, if a consumer requests information from the board about the optometrist, unless the Attorney General has filed a formal accusation, the consumer will be told that the optometrist's license is in good standing. One case involving 23 consumer complaints alleging incompetence, unprofessional conduct, and fraud has been pending since 1981. In addition to the complaints received by the board, in 1981 this optometrist was convicted in criminal court on charges of grand theft involving Medi-Cal fraud. According to board staff, this conviction is substantially related to the practice of optometry and would be further reason for the board to take disciplinary action against the optometrist. This case was referred to the Attorney General in November 1983, but it was suspended there in both fiscal years 1983-84 and 1984-85. Despite the number of complaints involved in this case, a prospective consumer would not be told of the alleged violations since the Attorney General has not filed a formal accusation.

Some of the cases suspended by the board because of lack of enforcement funds involve serious health and safety issues. For example, in January 1983, the board received a complaint confirmed by the patient's physician that an optometrist prescribed a drug that was inappropriate and caused damage to the patient's eye. Since the law prohibits optometrists from prescribing this type of medication, the

optometrist was charged with unlawfully practicing medicine and causing serious injury. He was also charged with misrepresenting himself as a physician in order to prescribe drugs. This case is among those currently suspended at the Attorney General's office.

Another example involves an optometrist who, since 1982, has been the subject of numerous complaints alleging incompetence and unsanitary office practices such as not cleaning examining equipment and trial glasses between patient use, not washing his hands between examination of patients, and dropping contact lenses on the floor and then putting them in patients' eyes without properly cleaning them. Additional complaints about this optometrist include using misleading advertising and operating too many branch offices. The case against this optometrist was suspended at the Attorney General's office in fiscal year 1983-84. In fiscal year 1984-85, however, this was one of four cases that the board's executive officer asked the Attorney General's office to continue work on while other cases were suspended.

Another case has been pending since April 1982. This case consists of seven complaints against an optometrist by consumers alleging improper care and unsanitary conditions, and five complaints from other optometrists alleging illegal advertising and operation of too many branch offices. This case was among those in which the Division of Investigation suspended active investigations in both fiscal years 1983-84 and 1984-85.

A final example involves a case that the board received in February 1985. This case was referred to the board by the Drug Enforcement Administration and involves two complaints alleging that an optometrist was practicing under the influence of alcohol and drugs. Because the board had already suspended its investigative activities for the year, the board has been holding this case for referral to the Division of Investigation in July 1985, five months after the complaint was received.

In each of the years that the board suspended its enforcement program, the board instead could have requested to use its reserve funds in order to continue operations. To ensure that the board has sufficient funds to cover expenditures, the board maintains in the State Optometry Fund a balance that is reserved for economic uncertainties. According to the 1985-86 Governor's Budget, at the end of fiscal year 1983-84, the board had \$306,000 in its reserve, and it will have an estimated \$367,000 reserved at the end of 1984-85.

State Administrative Manual Section 6000 et seq. outlines administrative procedures that the board could follow to get authorization to use the reserve funds. At least two other boards within the Department of Consumer Affairs submitted budget change proposals in fiscal year 1984-85 requesting additional funds to continue their enforcement programs. According to the department's budget officer, both requests were approved.

The board's executive officer said that the board did not submit a request for additional spending authority for its enforcement program for fiscal years 1983-84 and 1984-85 for two reasons.* First, the board did not have sufficient staff to prepare a budget change request. Second, a large portion of the board's enforcement budget was consumed by one major case, and the board had not anticipated the full cost of this case.

A request for additional spending authority must be supported by current and historical workload data. According to the executive officer, with only three full-time and two part-time employees, the board did not have the staff to gather the necessary statistics and develop a budget change request. One reason that it would be a time-consuming task for the board is that the board does not have a system to track the status of its cases. To prepare an adequate budget change request, the board would have to review all of its open case files to determine the status of each case and evaluate future requirements. Although this would be a time-consuming task for the board, we believe that the time requirement would not be prohibitive since, as of April 1985, the board had a total of 35 pending cases,

*In March 1985, the board did request additional funds to continue its legal suit against one large optometric corporation; however, the board did not ask for funds to continue work on other cases. According to the department's budget officer, the board's request was approved.

including 31 open cases and 4 new cases that the board was holding for referral to the Division of Investigation or the Attorney General after July 1, 1985. The investment of the time to prepare a budget change request appears especially worthwhile considering the alternative--suspending the overall enforcement program mid-way through the fiscal year.

The second reason that the executive officer gave for not requesting a budget change is that the board is pursuing a major case and did not accurately anticipate how costly this case would be or how much of the enforcement budget it would consume. However, the board has underestimated its enforcement expenditures for three of the last four years. Our analysis shows that for fiscal years 1981-82 and 1983-84, the board would have underestimated enforcement expenditures even if it had not had this case. For fiscal year 1984-85, we cannot estimate what enforcement costs would have been without this case since almost all other enforcement activities were suspended mid-year.

Considering that for three of the last four years the board has underestimated its enforcement expenditures and that for the last two years the board has suspended enforcement activities because of the lack of funds, the board should reevaluate its enforcement needs and take the steps necessary to adjust the budget to meet those needs.

We also question the appropriateness of the emphasis that the board has placed on one major case at the expense of its other cases. One reason the board gives for overspending its enforcement budget is that it is pursuing a case against a large optometric corporation. During the last two fiscal years, this case has accounted for over 53 percent of the board's enforcement expenditures. Further, for fiscal year 1984-85, the board submitted a request for an additional \$74,440 to continue work on this case through June 30, 1985. In fiscal year 1984-85 alone, board estimates show that the board will spend over \$87,000 on this case in Attorney General and Division of Investigation costs. The board's original budget for all Attorney General and Division of Investigation costs in fiscal year 1984-85 was \$43,475.

According to the board's executive officer, the nine-member board decided to pursue this case because the corporation is flagrantly violating the law. The board is charging this corporation with numerous violations of the Business and Professions Code. For example, the board has charged that the corporation is unlawfully practicing optometry because the corporation is not licensed by the board. (However, the individual optometrists working for the corporation are licensed by the board.) The board has charged the corporation with multiple violations, including misleading advertising, unlawful professional relationships between optometrists and manufacturers or suppliers of optical products, and unlawful competition.

Despite the many violations alleged by the board, since November 1979, the board has received from consumers only 9 complaints that concern issues within the board's jurisdiction against the optometrists working for this corporation.* From these 9 complaints, at least 2 of the complainants have received full refunds. In addition, since July 1980, the board has received from consumers 59 complaints that the board considers nonjurisdictional because they involve issues such as fee disputes and delays in delivering glasses or contact lenses. For 47 (80 percent) of these 59 nonjurisdictional complaints, the complaint was settled between the optometrist and the complainant. The other 12 complaints the board dismissed or determined to be invalid.

Meanwhile, other cases that involve serious health and safety issues for consumers have been suspended. In rating the priority of cases, the board lists the personal conduct of the optometrist, health and safety, and incompetence or negligence as the most serious issues. Violations such as misleading advertising, unlicensed activity, and other administrative violations are considered less important. Issues such as fee disputes the board does not even consider to be within its jurisdiction. As noted earlier, some of the cases that were suspended involved more serious issues, according to board criteria, than this one case against the large corporation.

*Only 2 of these 9 complaints were included in the investigation file for this case.

CONCLUSION

During the last two fiscal years, 1983-84 and 1984-85, the State Board of Optometry has suspended its enforcement activities because it spent its enforcement budget before year-end. Some of the cases that were suspended involved serious health and safety issues for consumers. Rather than suspending cases, the board could have requested budget changes to allow it to use its reserve funds to continue enforcement activities. One reason that the board overspent its enforcement budget is that the board is pursuing a case against a large optometric corporation. Since this case, according to board criteria, does not involve issues as serious as those in other cases that were suspended, it may be inappropriate for the board to put such emphasis on this case when it does so at the expense of other cases.

RECOMMENDATIONS

The State Board of Optometry should evaluate its enforcement workload and its budget for enforcement activities, and it should take appropriate action to ensure that its budget meets its enforcement needs. The board should ensure that it has sufficient funds to continue enforcement activities on all serious cases.

The board should implement a system to track the status of cases in its enforcement program.

Finally, the board should reconsider the merit of pursuing the case against the large optometric corporation when it does so at the expense of other serious cases.

INFORMATION REQUESTED BY THE LEGISLATURE

THE STATE BOARD OF OPTOMETRY
HAS NO DATA TO DETERMINE THE NUMBER
OF COMPLAINTS AGAINST CORPORATE CHAINS

The Legislature asked us to determine the number of optometrists who work for "corporate chains" and the number of complaints filed against those optometrists. The board defines a corporate chain as follows:

A group of optometric facilities tied together by a single, common ownership which exercises all controls as to business, and sometimes professional, policies. This ownership (in the broader sense) may be an optometrist, partnership, corporation or other consortium of investors. The chain may be commercial in its practice methods, located in a high volume commercial setting, have a high visibility either by such location or by heavy media advertising, usually including price advertising.

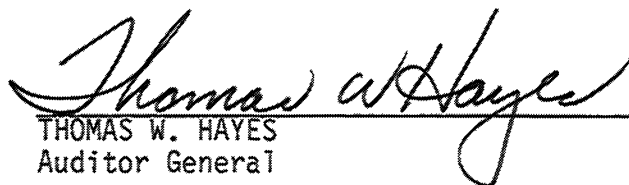
We reviewed samples of all the files and records maintained by the board. We found that the board does not have any data that would identify the total number of optometrists in the State who work for corporate chains. Further, the board has no information to indicate whether the optometrist against whom a complaint is filed works for such a corporation. The board requires optometrists to report their business address, but optometrists do not have to report whether they are self-employed or whether they work for other optometrists or corporate chains.

We discussed our findings with the executive officer of the board who concurred that the board has no means to identify optometrists who work for corporate chains or to determine the number of complaints filed against those optometrists.

We also contacted the Department of Corporations to determine whether that department had information on the number of optometrists working for corporate chains. The Department of Corporations does not have these data.

We conducted this review under the authority vested in the Auditor General by Section 10500 et seq. of the California Government Code and according to generally accepted governmental auditing standards. We limited our review to those areas specified in the audit scope section of this report.

Respectfully submitted,


THOMAS W. HAYES
Auditor General

Date: June 17, 1985

Staff: Robert E. Christophel, Audit Manager
Melanie Kee
Peter Allyn Goldstein



State and Consumer Services Agency

OFFICE OF THE SECRETARY
915 Capitol Mall, Suite 200
Sacramento, CA 95814

(916) 323-9493
TDD: (916) 323-6975

June 14, 1985

Mr. Thomas W. Hayes
Auditor General
Office of the Auditor General
660 J Street, Suite 300
Sacramento, CA 95814

Dear Mr. Hayes:

The State and Consumer Services Agency has reviewed the Auditor General Report, P-456, "Review of the State Board of Optometry's Enforcement Program" and also the response prepared by the Board of Optometry. The Agency believes that the action planned by the Board will correct the deficiencies noted by the auditors.

The Department of Consumer Affairs will work closely with the Board's staff to evaluate its enforcement budget needs and to implement an enforcement case tracking system.

Sincerely,

SHIRLEY R. CHILTON
Secretary of the Agency

Attachment



BOARD OF OPTOMETRY
1020 N STREET, SACRAMENTO, CALIFORNIA 95814
TELEPHONE: (916) 445-2095



June 14, 1985

Mr. Thomas W. Hayes
Auditor General
660 J Street, Suite 300
Sacramento, CA 95814

Dear Mr. Hayes:

Thank you for the opportunity to respond to your draft report entitled, "Review of the State Board of Optometry's Enforcement Program." The report contains three specific recommendations which I will respond to in order:

Recommendation: The State Board of Optometry should evaluate its enforcement workload and its budget for enforcement activities, and it should take appropriate action to ensure that its budget meets the board's enforcement need. The board should ensure that it has sufficient funds to continue enforcement activities on all serious cases.

The board's staff is currently in the process of evaluating its enforcement needs for the 1985/86 and 1986/87 fiscal years. If, as a result of this evaluation, a budget augmentation is indicated, a budget change proposal will be submitted to the appropriate agencies in July, 1985.

Recommendation: The board should implement a system to track the ongoing status of cases in its enforcement program.

The board concurs that a system is needed to adequately monitor and track its enforcement cases and activities. The Department of Consumer Affairs is in the process of designing and implementing a new data processing system. This system will include an automated enforcement tracking system. However, this component will not be available until approximately July, 1988. In the interim, the board will immediately implement a manual tracking system.

cc: Members of the Legislature
Office of the Governor
Office of the Lieutenant Governor
State Controller
Legislative Analyst
Assembly Office of Research
Senate Office of Research
Assembly Majority/Minority Consultants
Senate Majority/Minority Consultants
Capitol Press Corps