

COMMONWEALTH OF VIRGINIA

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JOINT COMMISSION ON ADMINISTRATIVE RULES

JCAR 1-13-09

I. 2 VAC 5-206 – Regulation for Scrapie Eradication - UPDATE

- Dr. Richard Wilkes, State Vet:
 - i. Concessions acceptable to USDA that could help smaller producers.
 - ii. Changes accepted except for small goat herds, but did allow changes for exhibition for instate goats.
 - iii. Suspended efforts upon notice of litigation – will resume once litigation outcome is determined.
- Questions? (none)

II. 18 VAC 41-70 – Estheticians – issue with grandfathering of licensing -

- Mark Courtney, Deputy Director for Licensing and Regulation, DPOR:
 - i. Bill included 12 months grandfathering period for July 2007 to 2008 – some individuals were not aware of these grandfather provisions contained in the code.
 - ii. Many efforts were made to ensure that they were aware of the grandfathering- notified groups, lacking source for identifying all potentially affected parties- participation guideline list, Virginia Regulatory Town Hall, free media articles (Richmond Times Dispatch, Virginia Pilot, Roanoke Times, etc).
 - iii. Created a notification list, added all people who contacted DPOR with questions or concerns.
- Senator Martin:
 - i. Clarify-Put in a grandfathering period, but in order to take advantage of this, had to go through process to identify yourself and ask for the license through the grandfathering provision
 - ii. Up to the esthetician to go through the process.
 - iii. DPOR was dependent upon all those who would qualify being a member of an organized group or receiving communication from these organized groups.
 - iv. Correct?
 - 1. Mr. Courtney: Yes, in addition to media, the participation guideline list, and the Virginia Regulatory Town Hall.
- Laura Todd, Executive Director of VA Association of Skin Care Professionals:
 - i. Association has five thousand members; all received mailings about the process.
 - ii. Conducted meetings since 2005.
 - iii. Adequate notice given by DPOR.
 - iv. Tight knit community- thousands of licensed estheticians.
 - v. Contacted, through mail, all licensed salons in VA that would possibly employ estheticians.
 - vi. The examination is key to ensure safety-
 - 1. During regulatory phase, fraudulent credentials were submitted;

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2. Applying acids to the face, many procedures that require training.
 3. The grandfather phase should end.
- Becky Doyle, Esthetician and husband Jeff Doyle:
 - i. Owns small salon and day spa in Chesterfield, catering to people in a one-on-one environment.
 - ii. Did not receive any notification of the end of the grandfathering period.
 - iii. Was in close contact with distributor, who did not inform of the close date of the grandfathering period.
 - iv. Agree that this practice should be licensed, but found out about the end of the grandfathering period on July 11, 2008, missing the deadline by ten days.
 - v. Most recent newspaper ad regarding the licensing requirements ran in 2005.
 - Senator Wagner:
 - i. The requirements are codified; JCAR we cannot do much.
 - Senator Martin:
 - i. Requested JCAR to address it because of the administrative process included.

III. 12 VAC 5-195 – WIC - UPDATE

- Donna Seward, Director, Division of WIC and Community Nutrition Services:
 - i. Completed the administrative appeal process, made a number of exceptions.
 - ii. Met with retailers in number of different venues.
 - iii. Increased participant-to-store ratios by approximately 20 percent.
 - iv. Eliminated the volume requirement.
 - v. Added criteria for exceptions to authorization.
 - vi. Moved informal settlement meetings out of the appeals process; now take place prior to any administrative action, which is better for working with the stores.
 - vii. Agreed to contract extension for those stores not authorized because of larger store moving into the area.
 - viii. Created state regulation standards.
 - ix. Moving forward, working with retail community, and working on a new computer system that will support level of cost containment needed.
- Senator Wagner:
 - i. Given the current economic situation, as there been an increase in the level of participation?
 1. Ms. Seward-Yes, very significant and climbing every month.
- May Fox, Virginia Retail Merchants Association:
 - i. Greatest concern was the elimination of the slotting system, minimum volume requirements, and peer grouping.
 - ii. Because of computer system, have not been able to completely eliminate slotting system, but have been able to address it short term.
 - iii. Thankful for the changes taken place, but still believe that the entire elimination of slotting is best – will continue to work with the Department on this issue.
- Margaret Ballard, Virginia Retail Federation:
 - i. Steve Wiseman, the owner of Best Value in Matthews County, was the retailer who voiced concern and addressed the issue with Delegate Morgan.
 - ii. Has since lost his WIC authorization.
 - iii. Continuing to encourage him to go forward with the appeals process.
 - iv. This is on the right track and elimination of slotting is the Federation's goal.

IV. 24 VAC 27-30 – Towing and Recovery Operations

- J. Marc Copeland, Interim Executive Director, Virginia Board for Towing and Recovery Operations:
 - i. Credentials due out January 1, 2009.
 - ii. Backlog – unable to get licenses out in a timely manner- have one thousand issued, but still five thousand pending.
 - iii. Police have been notified; not enforcing licensing until further notice.
 - iv. Hiring contractual workers to help with the backlog, processing the applications and getting them into systems.
 - v. Hope to have a reversal of these numbers by the end of the month.
 - vi. Website contains:
 - 1. Applications for credentials;
 - 2. Regulatory and statutory links;
 - 3. Explanations and information on status of the issuance of credentials.
 - vii. Cashied all the checks coming in – collected revenues exceeding \$700,000 – this is an annual fee.
 - 1. Paying off treasury loans due to be paid off by July 1, 2010.
 - 2. Loans were used to get the Board started in July 1, 2006.
- Eric Fly, Virginia Beach Wrecker Associations:
 - i. Current state statutes make most towers illegal right now- if they are operating right now, without a license, they are criminals.
 - ii. SB 707 required the Board to hold public safety meetings; many towers still in Virginia not aware of these regulations, do not know that the license is now required.
 - iii. This is a concern for small business owners
- Senator Edwards:
 - i. What are the sanctions for operating without a license?
 - 1. Mr. Copeland: Class 1 misdemeanor, up to \$1,000 penalty, and civil remedies as well (the board can seek prosecution).
- Delegate Hull:
 - i. Are provisional licenses granted for the pending licenses?
 - 1. Mr. Copeland: Acknowledgement letter sent which is proof that the person applied.
- Delegate Mathieson:
 - i. What is the outreach to the community for this?
 - 1. Since July 2006, major efforts by the board to make contact:
 - a. Obtained contact lists of people who owned tow trucks from the DMV;
 - b. Went through telephone books;
 - c. Worked with associations that represent towing companies;
 - d. Contacted VACO, VML, Sherriff's Association, Chief's Association, and State Police (who are members of the board).
- Delegate Ware:
 - i. As to the legal status of those who are not licensed today, what about civil liability if the tower is towing a vehicle and is not licensed (private litigation)?
 - 1. Mr. Copeland: This question has been raised; the towers are insured, and insurance coverage should handle these situations. However, insurance contracts may require that the insured by licensed properly within the state.
- Delegate Hull:
 - i. Can you contact the insurance companies who provide the insurance to towers regarding the issue?

1. Mr. Copeland: Yes, we have contacted them, and have not heard any feedback regarding this specific issue, but it has not been addressed.
- Delegate Howell:
 - i. Are there any instances where someone should not have a license?
 1. Mr. Copeland: There are instances where they will be denied, because of criminal backgrounds. The application review committee noted that of the several thousand applicants, roughly 55 percent have some sort of criminal history. The committee looks for particularly heinous crimes that will affect public safety and welfare- safety issue for those being towed.
 - Senator Wagner:
 - i. Would it help to put some emergency legislation in to extend the deadline, giving enough time to get all the licenses out, so people are not put into this situation?
 1. Mr. Copeland: This would be helpful.
 - Delegate Howell will carry this bill, and put an emergency clause in the bill.

V. 12 VAC 30-80-130 Overpayments to Ambulance Providers

- Delegate Griffith:
 - i. General concern- Overpayment to the ambulance providers, now they are receiving a bill from DMAS; many of the providers have already spent this money; hardship for the businesses to pay the money back.
- Patrick Finnerty, Director, DMAS:
 - i. Many of the providers have exercised appeal under APA; going through these hearings right now.
 - ii. Overview-
 1. Dual eligible recipients- receive Medicare and Medicaid, Medicare is primary payer, Medicaid is secondary.
 2. Crossover claim forwarded to DMAS- goes to Medicare first, and then crosses over to Medicaid for any additional payments owed. DMAS makes this determination.
 - iii. An error occurred in processing that prevented a change to occur for crossover claims with regard to ambulance providers; the error came to DMAS's attention through internal auditing in 2007, and was verified by outside accounting firm.
 - iv. DMAS notified the ambulance providers of the error and correction going forward; sent letters to each of the providers requesting the funds from the overpayment be returned – under Federal regulations, Virginia has to return the Federal portion of the overpayments amounts within 60 days.
 - v. Virginia Code provides that we must collect overpayment amounts, regardless of whether or not this is a DMAS error.
 - vi. DMAS sent notice to 217 providers; 101 providers have appealed DMAS's actions. During the appeals process, DMAS does not pursue collection.
 - vii. The total dollar amount of the overpayments is \$13.4 million, 50-50 split between federal and state funds.
 - viii. Appeals process:
 1. Informal fact finding conference held by a hearing officer in the appeals division.
 2. If this provider appeals this decision, moves to a formal appeal hearing conducted by independent hearing officers who are appointed by the Supreme Court of Virginia.
 3. This can then be appealed in the Circuit Court.
- Delegate Hull:

- i. Can a payment plan be agreed upon?
 - 1. Mr. Finnerty: DMAS can allow up to 36 months for repayment; many of the providers are on such a plan. About 80 providers have paid; the amount collected so far is just under \$1 million.
- Senator McDougle:
 - i. Should the providers have noticed that they were getting a double payment?
 - 1. Mr. Finnerty: DMAS does not believe that providers purposefully missed the overpayments; the claims processing is complicated. There is no evidence that the providers should have known about this; they were being paid as they had been previously before the change.
- Delegate Griffith:
 - i. The appeals process only looks at whether there was actually an overpayment, is this correct?
 - 1. Mr. Finnerty- This is correct.
- David Bailey, VA Ambulance Association:
 - i. Governor's amendment denied.
- Delegate Hull:
 - i. Is there a Federal remedy? There does not seem to be much flexibility on the part of the State, but maybe there is at the Federal level?
 - 1. Dominic Madigan, McCandlish Holton, attorney for provider: Position is that the state actually does have flexibility, and that DMAS has misinterpreted these rules; state moved to a brokerage system, which moved the process into a separate box from the rules that DMAS is trying to impose now (DMAS); the error was not in 2003 with the computer system, the error is now in trying to collect the overpayments- meanwhile, providers are having to drop out of Medicare system.
- Delegate Hull:
 - i. Is it possible to waive your right to the informal process and ask that you go directly to a formal hearing?
 - 1. Usha Koduru, Assistant Attorney General, attorney for DMAS: Providers can waive the informal fact finding conference and go directly to the formal hearing, conducted by an independent hearing officer appointed by Supreme Court of Virginia, outside of the department.
- Senator Edwards:
 - i. What is the flexibility in terms of collecting money, other than the extended payment plan?
 - 1. Ms. Koduru: If provider had to file for bankruptcy, then DMAS would not be able to collect the amount.
- Delegate Griffith:
 - i. Has the Federal portion already been paid?
 - 1. Mr. Finnerty: It is in the process of being paid.
- Delegate Griffith:
 - i. How is this affecting the volunteer rescue squads?
 - 1. Ed Rhodes, Virginia Association of Volunteer Rescue Squads – Seventy volunteer rescue squads are expected to pay back a total of approximately half a million dollars.
- Senator Wagner:
 - i. JCAR will send a letter to the governor, asking for flexibility as to the state portion of monies owed ; request adding language to the budget that allows for repayment of federal

funds on behalf of volunteer rescue squads and possibly other ambulance service providers.

Adjourn 11:33