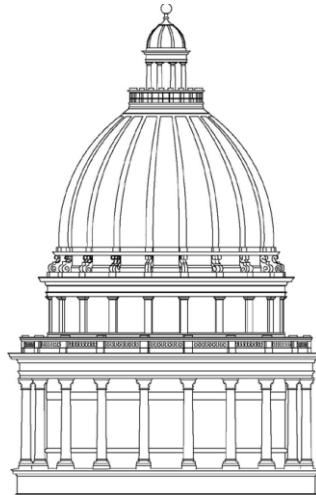


REPORT TO THE
UTAH LEGISLATURE

Number 2012-15



**A Performance Audit of The
Division of Occupational
And Professional Licensing**

December 2012

Office of the
LEGISLATIVE AUDITOR GENERAL
State of Utah



STATE OF UTAH

Office of the Legislative Auditor General

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JOHN M. SCHAFF, CIA
AUDITOR GENERAL

December 19, 2012

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report, A Performance Audit of the Division of Occupational and Professional Licensing (Report #2012-15). A digest is found on the blue pages located at the front of the report. The objectives and scope of the audit are explained in the Introduction.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

A handwritten signature in black ink that reads "John M. Schaff" with a stylized flourish at the end.

John M. Schaff, CIA
Auditor General

JMS/lm

Digest of A Performance Audit of the Division of Occupational and Professional Licensing

The Division of Occupational and Professional Licensing (DOPL) administers and enforces licensing laws for over 70 occupations and professions. DOPL establishes minimum levels of competence for licensure, processes applications and renewals, investigates violations of licensing laws, and disciplines and monitors licensees who engage in unlawful or unprofessional conduct. DOPL has an annual budget of about \$7.7 million and 96 full-time equivalent employees. As of November 2012, DOPL had issued over 190,000 active licenses.

DOPL Appears to Process License Applications Timely and Consistently. DOPL manually processed an average of about 42,000 license applications and 76,000 online license renewals over the last five fiscal years. Our review of pending application metrics found that DOPL processes the majority of applications in a timely and consistent manner. Furthermore, consistent processing practices within the agency ensure compliance with statutory requirements.

DOPL Should Improve Data Management Policies and Training. DOPL needs to provide better guidance so that staff consistently uses the agency's electronic case management and monitoring systems. The integrity of DOPL's electronic data can be protected by more clearly defining and controlling access rights. DOPL should also use its electronic systems to track payment plans.

Most Cases Close Within Policy Time Limits; Others Lack Approved Extensions. Our review found that most investigations adhere to DOPL policy by closing within 150 days. However, some cases take much longer, and often do not have an approved extension. By enforcing its policy on extensions, DOPL can help ensure that investigations do not languish unnecessarily.

Sample Investigations and Citations Appear to Lack Adequate Supervisor Review. We reviewed 16 investigations that exceeded the 150-day time frame without approval and found that 11 appeared to lack adequate supervisor review. Similarly, some citations lacked oversight and compliance with DOPL policies. Better training for investigators and documentation standards will promote more consistent investigative processes and outcomes.

Chapter I: Introduction

Chapter II: DOPL Processes Licenses Timely But Should Improve Data Management

Chapter III: DOPL Investigations Need Improved Management Review

**Chapter IV:
DOPL Needs to Be
More Proactive in
Managing Probation**

Some Probationers Are Allowed to Accumulate Numerous Violations Before DOPL Responds. Probation agreements require adherence to specific terms and conditions. We reviewed 21 case files from 7 license types and found inconsistent documentation and agency response to probation violations. We think a quick and appropriate response to probation violations is important to help encourage responsible behavior by the licensee and protect the public.

DOPL Should Clarify Policies for Imposing Sanctions on Probation Violations. DOPL should develop a range of intermediate sanctions to use in response to probation violations. Furthermore, the agency should respond promptly and appropriately to violations of probation in order to promote licensee accountability.

DOPL Should Review and Clarify Decision-Making Responsibilities. Clarification of staff responsibilities will enable the agency to respond more promptly and appropriately to probation violations, rather than waiting for board recommendations. Since the boards are advisory and only meet periodically, waiting for them to meet prevents a quick response to violations. We believe the bureau managers should initiate action against noncompliant probationers.

DOPL Needs a Clear Process for Monitoring Probation and Reporting Violations. DOPL should clarify compliance officers' job duties to ensure that they consistently document and report violations. Organizational responsibilities should be clarified to improve coordination among compliance staff and bureaus.

**Chapter V:
DOPL Should
Enforce Diversion
Program
Requirements**

DOPL Should Improve Program Entrance Process. Diversion is a confidential program for licensees with substance abuse issues. Because of the risks posed by substance abusers, DOPL needs to adhere to entrance evaluation time limits, fully state misconduct in diversion agreements, and clarify processes for pursuing disciplinary action against nonentrants when appropriate.

DOPL Should Improve Diversion Agreement Monitoring and Enforcement. In three of the four cases we reviewed in detail, DOPL did not take the actions needed to protect the public and aid licensee recovery. DOPL needs a consistent method for documenting and managing diversion cases and should establish policies for invoking a range of sanctions, depending on the severity of violations.

REPORT TO THE UTAH LEGISLATURE

Report No. 2012-15

A Performance Audit of The Division of Occupational and Professional Licensing

December 2012

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Table of Contents

	Page
Digest	i
Chapter I	
Introduction.....	1
DOPL Administers Professional And Occupational Licensing and Regulation	1
Audit Scope and Objectives.....	4
Chapter II	
DOPL Processes Licenses Timely But Should Improve Data Management.....	7
DOPL Appears to Process License Applications Timely and Consistently	7
DOPL Should Improve Data Management Policies And Training.....	10
Recommendations	14
Chapter III	
DOPL Investigations Need Improved Management Review.....	15
Most Cases Closed Within Policy Time Limits; Others Lacked Approved Extensions	15
Sample Investigations and Citations Appear To Lack Adequate Supervisor Review.....	19
Recommendations	27
Chapter IV	
DOPL Needs to Be More Proactive In Managing Probation	29
Some Probationers Are Allowed to Accumulate Numerous Violations Before DOPL Responds.....	30

DOPL Should Clarify Policies for Imposing Sanctions on Probation Violations	34
DOPL Should Review and Clarify Decision-Making Responsibilities	37
DOPL Needs a Clear Process for Monitoring Probation and Reporting Violations	38
Recommendations	41
Chapter V	
DOPL Should Enforce Diversion Program Requirements.....	43
DOPL Should Improve Program Entrance Process.....	44
DOPL Should Improve Diversion Agreement Monitoring And Enforcement.....	51
Recommendations	57
Appendices.....	59
Appendix A.....	61
Appendix B.....	67
Agency Response	71

Chapter I

Introduction

The Division of Occupational and Professional Licensing (DOPL) administers and enforces licensing laws for over 70 occupations and professions. DOPL protects the public and enhances commerce through licensing and regulation. Some of DOPL's major duties, functions, and responsibilities include:

- Establishing minimum levels of competence for occupational and professional licensure
- Processing licensing applications and renewals, including monitoring licensees who hold restricted licenses and ensuring that applicants achieve minimum licensing requirements
- Investigating allegations of unlawful and unprofessional conduct
- Conducting administrative adjudicative proceedings against licensees who engage in unlawful or unprofessional conduct

Approximately 60 advisory licensing boards and commissions assist the division in fulfilling some of its responsibilities. While DOPL's primary functions include licensing and investigations, the division also oversees a number of other programs related to those functions. This report addresses the efficiency and effectiveness of DOPL's licensing and investigative processes.

DOPL Administers Professional and Occupational Licensing and Regulation

DOPL's authority comes from the Division of Occupational and Professional Licensing Act (*Utah Code* Title 58), which contains both general enabling statutes and individual licensing acts for every occupation and profession regulated by DOPL. As the largest agency within the Department of Commerce, DOPL has an annual operating budget of nearly \$7.7 million and 96 full-time equivalent (FTE) employees. Most of DOPL's funding comes from fees it assesses on license applications and renewals; most licenses must be renewed every two years.

DOPL licenses and regulates over 70 occupations and professions.

DOPL is the largest agency within the Department of Commerce and operates a nearly \$8 million annual budget.

DOPL ensures only qualified professionals obtain a license in Utah.

In fiscal year 2012, DOPL processed almost 30,000 new applications and over 100,000 license renewals.

DOPL Issues Licenses to Qualified Entities

One of DOPL's primary purposes is to protect the public by limiting licensure to persons or businesses that are qualified to practice their respective occupations or professions. Six bureaus manage licensing and regulation for groups of occupations and professions. Bureau managers, board secretaries, licensing specialists, compliance officers, and in some cases, internal auditors carry out licensing processes within each of these bureaus.

Licensing staff in the six bureaus process licensing applications and renewals and respond to public inquiries regarding licensure. Processing applications and renewals primarily involves assessing applicants' qualifications to ensure they meet minimum requirements for licensure. Many applications require information related to professional education and/or qualifying experience, criminal and/or disciplinary history, proof of financial responsibility and/or credit reports, and proof of insurance. Following assessment of an application, DOPL may issue a full or restricted license, deny a license, or require re-application when submittals are incomplete. DOPL currently licenses over 190,000 professionals and businesses. See Appendix A for a list of all the professions and businesses licensed by DOPL. According to their 2012 annual report, DOPL processed 100,195 license renewals and 29,457 new applications during fiscal year 2012.

Utah Code 58-1-401 allows DOPL to deny or invoke disciplinary proceedings, including placing a licensee on probation, for a variety of reasons. Restricting a license through probation or diversion (discussed below) allows DOPL to mitigate risk to the public by monitoring or supervising a licensee who has engaged in unlawful or unprofessional conduct, while promoting commerce by allowing the licensee to continue to work.

DOPL May Place Licensees on Probation

DOPL's probation and compliance unit (probation) includes a compliance manager and five compliance officers (two of which also split their time monitoring diversion files, as discussed later). The probation unit informs the advisory boards and commissions about probationer compliance and works with the licensing bureaus and other DOPL staff to manage probation. DOPL uses probation when

licensees are qualified to practice but their actions warrant disciplinary action.

Probation requires licensees to adhere to terms and conditions set forth in a probation agreement, signed by DOPL and the licensee. Probation is a sanction that allows licensees to continue practicing their respective occupation or profession under DOPL's supervision. At the time of this audit, there were approximately 520 probationers.

DOPL's Diversion Program Offers License Monitoring to Ensure Public Safety

Diversion, also known as the Utah Recovery Assistance Program, is a confidential monitoring program for licensees who are dealing primarily with substance abuse and who have not been previously sanctioned by any regulatory body. Licensees may be eligible for program participation only once for the same or similar offense. Program administration is performed by a contracted program manager, two of DOPL's five compliance officers (who also split their time monitoring probationers), and five volunteer advisory committees. Entrance into the program is restricted based on the requirements set forth in *Utah Code* 58-1-404 and DOPL policy. While diversion is open to all Utah licensees, it is primarily used by those in medical professions.

Participants in diversion are called diversionees and successful program completion is confidential, having no public effect on the license. Program participation is guided by the terms and conditions of a diversion agreement signed by the diversionee, diversion manager, and the DOPL director. DOPL records show that, since the beginning of the program, roughly 800 licensees have been referred to the program. At the time of this audit there were approximately 130 active participants in diversion.

DOPL Investigates Allegations of Misconduct in Regulated Professions

According to *Utah Code* 58-1-106, DOPL is charged with "investigating the activities of any person whose occupation or profession is regulated or governed by the laws and rules administered and enforced by the division." DOPL's investigative staff consists of

Probation allows disciplined licensees to continue working under DOPL's supervision and monitoring.

Diversion is a confidential monitoring program for recovering professionals.

DOPL investigates reported violations of Utah's professional licensing laws.

31.75 FTE employees including two Investigative Supervisors and one Chief Investigator.

In order to ensure compliance with the law and protect the public, DOPL investigates complaints, which are reported allegations of violations of Utah’s professional licensing laws. The DOPL investigative unit receives complaints filed with the division concerning individuals who are practicing in regulated occupations and professions but who may or may not be licensed in that particular field. Complaints may come from many sources, including—but not limited to—citizens, an individual’s co-workers, other state agencies, and disciplinary databases. Investigations arise from the complaints that meet DOPL’s criteria for review, which includes “acts or practices inconsistent with generally recognized standards of conduct, unlicensed practice in regulated professions or occupations, allegations of gross negligence or incompetence, and patterns of negligence or incompetence.” During fiscal year 2012, DOPL reported receiving 3,777 complaints and closed 3,352 investigations.

During fiscal year 2012, DOPL received 3,777 complaints regarding allegations of misconduct in DOPL regulated professions.

Other DOPL Programs

DOPL oversees a number of independent programs related to licensing and commerce. Although this audit does not review them, two of the larger programs include:

- **Residence Lien Recovery Fund (LRF).** The LRF serves as an alternate payment source for subcontractors, suppliers, and laborers when the Residence Lien Restriction and Lien Recovery Fund Act voids their liens after a contractor fails to pay costs on a covered project.
- **Controlled Substance Database (CSD).** The CSD is a Utah prescription-monitoring program that collects and tracks dispensing of Schedule II–V controlled substances for Utah medical professionals and law enforcement.

Other DOPL programs include the Residence Lien Recovery Fund and the Controlled Substance Database.

Audit Scope and Objectives

We were asked to review the efficiency and effectiveness of DOPL’s programs. Specifically, we evaluated DOPL’s processes for the following:

- Issuing occupational and professional licenses
- Managing investigations and citations issued regarding complaints against individuals engaging in the practice of a licensed occupation or profession
- Monitoring licensees placed on probation and how DOPL takes action upon noncompliance; and
- Monitoring diversionees' adherence to program rules and requirements

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Chapter II

DOPL Processes Licenses Timely But Should Improve Data Management

Most of the resources within DOPL are devoted to issuing and regulating licenses. Our review of the agency found that DOPL appears to process license applications in a timely and consistent manner. However, we believe that DOPL could improve data management by providing policies and training to staff.

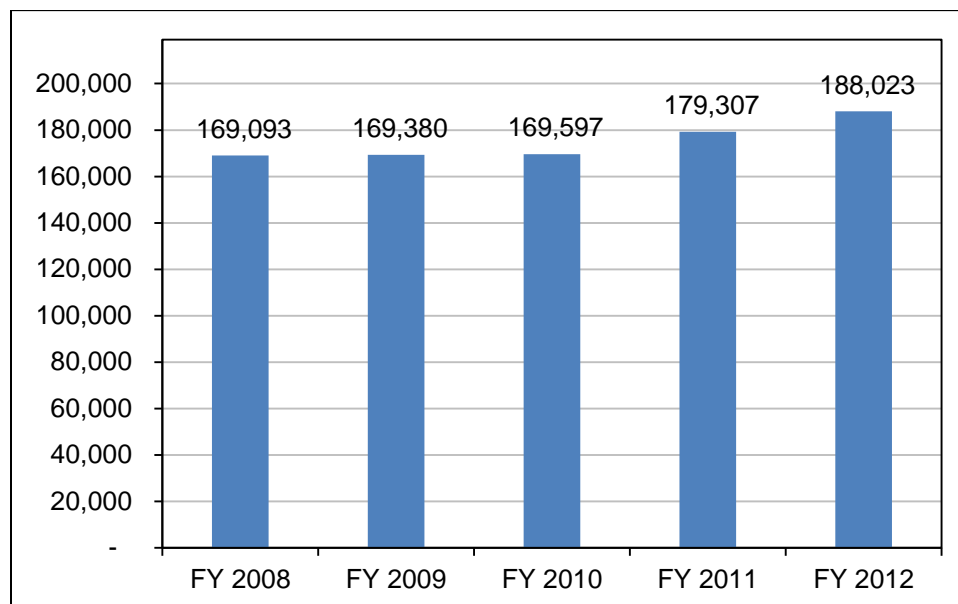
DOPL Appears to Process License Applications Timely and Consistently

Through a review of pending application metrics, we found that DOPL processes the majority of license applications in a timely manner. We also found common practices throughout the agency to ensure that license applications are consistently processed according to statutory requirements.

As of the end of fiscal year 2012, DOPL reported having issued 188,023 business and professional licenses. Figure 2.1 shows these annual totals from 2008 to the present.

As of fiscal year 2012, DOPL has issued about 190,000 licenses.

Figure 2.1 Professionals Holding DOPL Licenses by Fiscal Year.



Over the same period as shown in Figure 2.1, the Utah Department of Commerce reported that DOPL manually processed an average of roughly 42,000 license applications per year. DOPL also processed an average of just over 76,000 online license renewals per year with relatively little usage of personnel resources.

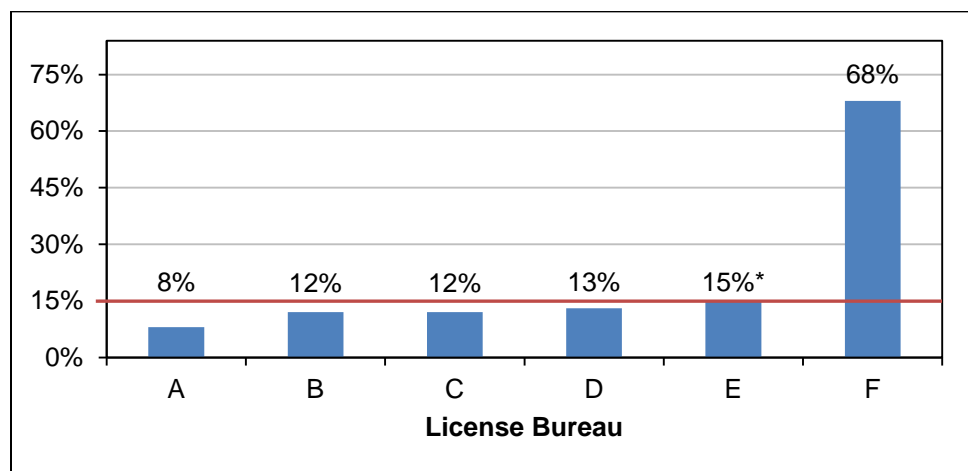
License Application Processing Appears to Be Timely

We reviewed a sample of all teams' pending applications and found that most appear to fall within DOPL's established processing goals. The DOPL strategic plan contains a goal for each licensing bureau to keep less than 15 percent of its total licensing applications from pending over 30 days unless a program has a unique requirement that prohibits a 30-day turnaround.

Figure 2.2 shows the results of our review of the sampled pending applications, measuring the time pending against the 30-day goal and accounting for unique license requirements that preclude a 30-day turnaround. Only one of six licensing bureaus exceeded the goal. The letters assigned to each licensing bureau in the figure do not correlate to DOPL's internal bureau numbering system; rather, the bureaus are ranked from the least to greatest percentage of applications exceeding the 30-day goal.

Five out of six licensing bureaus met DOPL goals for timely license processing.

Figure 2.2 Overview of Pending Application Review. Only one of six bureaus failed to achieve the strategic plan goal of less than 15 percent of applications (shown in red) taking more than 30 days to process.



*This percentage was adjusted to account for a batch of applications that were clearly set to be processed at the time of our review.

Sixty-eight (68) percent of bureau F's applications were pending longer than 30 days without justification. This time frame was due to a lack of bureau manager oversight of staff's application processing.

In speaking with bureau managers and employees, we found that the above-mentioned unique licensing requirements validly prohibit a 30-day turnaround for application processing. For example, applicants seeking to become physicians in Utah authorize DOPL to use a record coordination and verification service per *Utah Code* 58-67-302(1)(iii). We observed that this service routinely takes multiple months to complete, thereby extending the time needed to process license applications. We also found that with the nursing profession, graduates may submit license applications more than 30 days before graduation in order to take licensure examinations. All of these unique requirements appeared to be justified.

We also observed that if one licensing bureau becomes overwhelmed with too many licensing applications due to a renewal cycle or continuing education audit, management would shift a portion of the application processing to other bureaus' employees. This shift occurs until the heavy workload returns to more normal levels. This appears to be an adequate usage of staff resources to help alleviate a short-term backlog.

As a result, we believe that DOPL is generally processing license applications in a timely manner according to the unique qualification requirements of each profession.

License Processing Appears to Be Consistent

We also found methods used throughout the division that appear to increase consistency and efficiency in the license application process. First, we found that the license application templates are reviewed for compliance with statute and uniformity throughout DOPL by multiple managers. As the laws governing each profession are routinely amended, this process of updating license application forms will be ongoing.

We also found that profession-specific checklists are used during the application review process to verify that applications are consistently processed according to statutory requirements and division goals.

Application processing times vary by profession.

DOPL employs methods to continually improve the license application process.

We found that staff appears consistent in their application of the administrative rule to assess aggravating and mitigating circumstances.

Criminal Background Checks Are Performed Consistently and Securely. DOPL currently performs a criminal history review for 14 professions. This review is performed upon initial licensure but not upon subsequent license renewals for most license types. During fiscal year 2008, the criminal history check function was consolidated from the licensing bureaus to one team. The team is now isolated from other DOPL employees and criminal history documents are maintained in locked cabinets with limited access. These documents are then shredded immediately following license approval or denial.

Administrative Rule 156-1-102 defines aggravating and mitigating circumstances that may justify an increase or reduction of the severity of action to be imposed upon an applicant or licensee. We observed that the bureau managers and licensing staff review criminal information and other aggravating or mitigating factors that may affect licensure and appear to be doing so in a uniform manner.

Some Employees Process More or Fewer License Denials than Others. In reviewing management reports, we found that some licensing technicians process application denials more (or less) frequently than others. In three of the six bureaus, the bureau manager stated that this imbalance was without justification and at least one manager has already made efforts to monitor and reduce unintended inconsistencies. We recommend that all managers should better utilize productivity reports to ensure adequate workload allocation is being met.

DOPL Should Improve Data Management Policies and Training

While we found DOPL's staff conscientiously managing workload and having consistent practices to process applications, we found that DOPL's electronic case management and monitoring systems lack sufficient policies and training for consistent use. Data integrity is further weakened by vague and inconsistent user access rights. Also, an electronic case management system should be used to track DOPL payment plans.

Use of Electronic Case Management System Lacks Sufficient Policies and Training

Through discussions with DOPL staff and our observations, we found that DOPL lacks sufficient policies and training to guide the use of their electronic case management tool (LES). The LES program is used for general licensing and some compliance and investigation recordkeeping.

Staff expressed to us that LES is used differently among the staff because there is little training or processes to ensure consistency. This differing use leads us to question the integrity of the data when LES reports and other information are pulled. We attended an LES training session for investigators and found it somewhat vague. The investigators told us the training was not clear. The handouts provided were unlabeled, making it difficult to recreate the procedure.

Compliance staff reported that they make little use of LES to manage probation. Investigation staff reported and we observed that their use of LES is inconsistent for documenting investigations. The Chief Investigator stated that management is aware of the poor quality of the investigations data in LES and is currently seeking to improve processes.

Several DOPL employees reported that they mistrust LES data and use other means to track information and manage cases, including spreadsheets, databases, and a manual file drawer system. We found some employees printing hard copies of data screenshots, fearing it could be lost because they do not trust the integrity of the system. DOPL employees also reported concerns about data security.

Regarding the diversion program, we found data entries in the LES database that were either inconsistent or inaccurate. Four of 14 LES files reviewed contained inaccurate or conflicting participant information. For example, one diversionee still appeared as an active program participant several weeks after surrendering his license. Another diversionee had two profiles under the same user number; one showed him as active in the program, while another showed him as terminated.

This lack of policies and training leads to inconsistent data entry. One DOPL employee who manages LES report data said she spends

Use of the DOPL database is not consistent throughout the division.

three to four hours per day cleaning up LES reports. Staff reported mismatched, missing, or incomplete data entry. We recommend that DOPL improve its use of LES by creating policies and providing training to improve consistent program use.

Employees Have Vague and Inconsistent Access Rights Within DOPL Databases

DOPL employees with identical job titles and responsibilities were found to have inconsistent user access rights within the licensing and investigation database. Some employees have access to protected information or limited data entry fields without justification or specific additional training. This practice results in unnecessary access to protected information, and potentially, to inconsistent data entry.

The National Institute for Standards and Technology (NIST) published an introductory handbook on computer security. The handbook describes the best practices for user account management and logical access controls. In particular, the handbook states that staff responsibilities should be defined and access profiles created to correspond with the level of access the employee requires to complete those responsibilities. The NIST handbook states that users should be granted "...only those accesses they need to perform their official duties," and access authorizations "...should be removed promptly when no longer required." Additionally, the handbook emphasizes the need to train employees on job duties and computer security responsibilities in order to protect information and data integrity.

DOPL employees have one or more user access profiles that grant them a specific set of rights within the LES database. We compared user profiles for DOPL investigators and found that four of the thirteen we examined have additional user access rights that the other do not.

Three of these four investigators stated that their additional access rights likely originated in previously held DOPL positions. This shows that after changing positions, their duty-specific access authorizations were never appropriately removed. Also, three of the four were assigned a user profile titled Investigator Supervisor though none of them work in a supervisory capacity or know what access this profile grants. The system administrator was also not aware of the definition or origin of that particular user profile.

Computer access rights should be continually managed to protect information and data integrity.

DOPL employees' access profiles have been insufficiently managed.

We also compared the user profiles of employees with the title Office Specialists and found a similar pattern of inconsistent application of user access rights.

DOPL should adhere to NIST standards by clearly defining the levels of access each employee or employee type must have within LES and creating corresponding user access profiles. DOPL should actively manage user profiles to reduce inconsistencies and unnecessary access within the system.

LES Should Be Used to Track DOPL Payment Plans

DOPL's process for managing the data concerning issued citations and the payment of fines lacks appropriate controls. DOPL does not use the LES system to manage payment plans, although it is capable of doing so. Fines are manually entered into a spreadsheet, which does not allow for adequate payment tracking or aging reports because the spreadsheet does not contain citation dates.

During our review of DOPL's investigation and citation process, we reviewed how DOPL tracks fines. Because payment plans are not entered into LES, we reviewed the physical files and found payment plans being manually tracked. Here we discuss two examples where the subjects requested payment plans and then were allowed to make untimely payments.

One subject was sent two "final" demand letters for one citation, warning that if the payments were not made within 10 days, DOPL would send the outstanding fine to collections. The first final demand letter was sent in October. The subject made two payments within the next month, then ceased making additional payments. The second demand letter was not sent until March and the debt was not forwarded to the Utah Office of State Debt Collection until May.

Another example was a fine that arose from a probation agreement. The fine was initially due within 90 days of the licensee entering probation. The subject was granted a payment schedule, which was immediately violated with the first payment and continued to be violated through our review almost three years later. When a final demand letter was eventually sent, the subject informed DOPL that the probation board had extended his payment plan. This

DOPL could improve citation payment tracking by making greater use of LES.

extension was unknown to the citation coordinator, who is responsible for managing citations. It was not documented in the payment file at the time the final demand letter was sent to the licensee.

In both examples, the payment schedules were informally managed through handwritten notes on a copy of a letter responding to a request for a payment schedule. The payment plans are not established or maintained in LES, which would allow for the timely tracking of payments. Since our audit, DOPL has started using LES for payment tracking.

Recommendations

1. We recommend that DOPL managers review staff productivity reports to ensure adequate workload allocation is being met.
2. We recommend that DOPL improve its use of LES by creating policies and providing training to improve consistent program use.
3. We recommend that DOPL clearly define levels of LES access for each position by creating user profiles and actively managing the profiles to reduce inconsistencies and unnecessary access within the system.
4. We recommend that DOPL use LES for payment tracking.

Chapter III

DOPL Investigations Need Improved Management Review

Our review of the Utah Division of Occupational and Professional Licensing's (DOPL) investigative unit found that the majority of investigations meet policy time limits of closing within 150 days. However, most investigations that exceeded 150 days lacked policy-required extensions. Also, a sample of investigations and citations we reviewed appears to lack adequate supervisor review.

Utah Code 58-1-106 tasks DOPL with responsibility for “investigating the activities of any person whose occupation or profession is regulated or governed by the laws and rules administered and enforced by the division.” The first section of this chapter addresses DOPL’s timely closure of investigations and our concerns about the management of cases that did not close within policy time limits. The second section discusses our concerns that a sample of investigations and citations we reviewed appeared to lack adequate supervisor review.

Most Cases Closed Within Policy Time Limits; Others Lacked Approved Extensions

We reviewed DOPL investigation cases and found that most investigations adhere to DOPL policy and close within required time limits. However, most of those that did not close within the policy time limit of 150 days lacked a required extension approval.

Most Cases Adhere to Policy Time Limits

Two reviews of DOPL investigations showed that most cases met DOPL’s time policy limits. We reviewed the amount of time it took cases to close in fiscal year 2012; we also reviewed the cases currently open at the time of this audit to see how long they had been open and if case closure time limit policies were being followed.

DOPL policy states “investigators shall have a goal to complete each assigned investigation within 90 days of assignment.

DOPL investigates reported violations of Utah’s professional licensing laws.

Investigators shall not take more than 150 days from assignment to complete the investigation except as otherwise provided in this section.”

Most Cases Closed in Fiscal Year 2012 Were Completed in a Timely Manner. DOPL reported closing 3,352 cases during fiscal year 2012. We found that 84 percent of those cases closed within the 150-day policy for case closure.

84 percent of cases closed in fiscal year 2012 met the DOPL policy requirement of closing within 150 days.

Figure 3.1 Eighty-four (84) percent of the 3,352 Cases Closed in Fiscal Year 2012 Closed Within 150 Days.

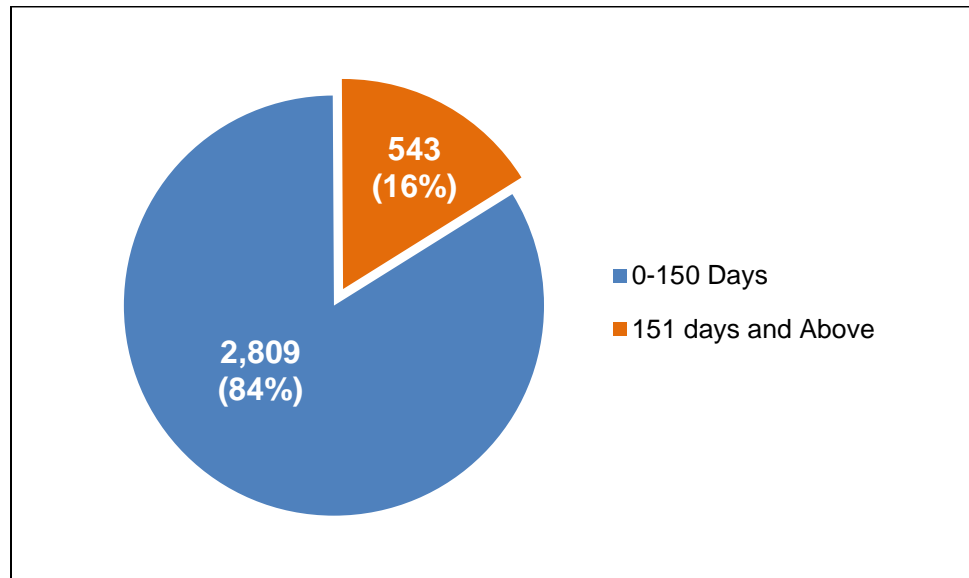
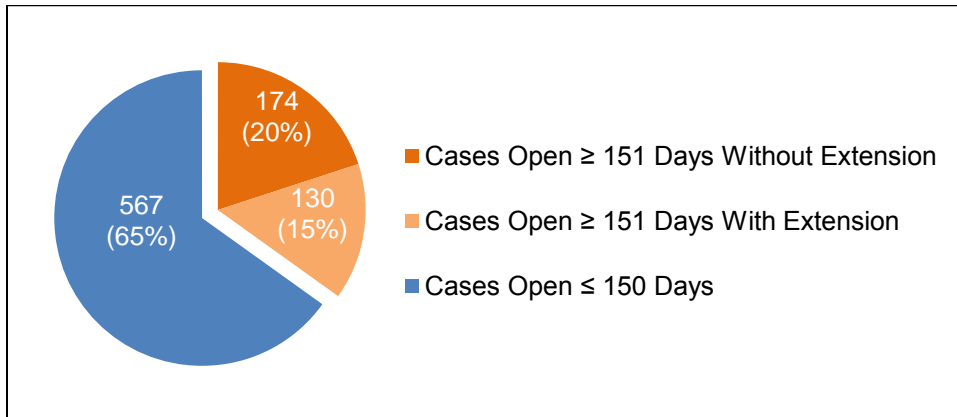


Figure 3.1 shows that 2,809 (84 percent) of the cases that closed in fiscal year 2012 were closed within policy-time limits of 150 days and 543 cases (16 percent) took longer than 150 days.

Currently Open Cases Also Suggest Adherence to Policy Time Limits. We also analyzed 871 investigation cases that were currently open in May of 2012. This analysis also showed that most cases did not exceed policy time limits; 567, or 65 percent, had been for open for less than 150 days. This data is shown Figure 3.2.

Figure 3.2 Sixty-five (65) Percent of the 871 Active Cases Fell Within the 150 Day Limit. However, the majority of cases over 150 days were not properly extended per policy.



In Figure 3.2, the blue section shows that 567 open investigations were still within policy time limits, having been open for 150 days or less. The orange sections of the pie chart, which total 304 cases (35 percent), show open investigations that exceeded policy time limits. The dark orange wedge on the chart shows that 174 of the 304 cases exceeding the time limit did not appropriately receive a case extension per division policy.

Therefore, analyzing both the reported closure figures for the 2012 fiscal year and the currently open investigations, we found that the majority of cases are processed within policy limits.

Most Investigations Exceeding 150 Days Lacked Approved Extensions

Of the 304 open cases that exceeded policy time limits, 57 percent (174 cases) lacked approval to extend the case beyond 150 days, as required by policy. After requiring case closure with 150 days, DOPL’s policy goes on to state:

An investigation shall not exceed 150 days unless the Unit Supervisor grants an extension. Requests for extension shall be in writing in Bureau-approved format, and shall become a part of the investigative case file.

Figure 3.3 shows the breakdown of the cases that were open beyond 150 days and whether they had a required extension.

Fifty-seven percent of cases open more than 150 days lacked required extensions to exceed policy time limits.

Figure 3.3 Fifty-Seven (57) Percent of the 304 Cases Open Beyond 150 Days Did Not Have an Approved Extension.

Extension Approval Status:	Number of Cases	Percent of Cases
Cases With an Extension	130	43%
Cases Without an Extension	174	57%
Total Cases Open More Than 150 Days	304	100%

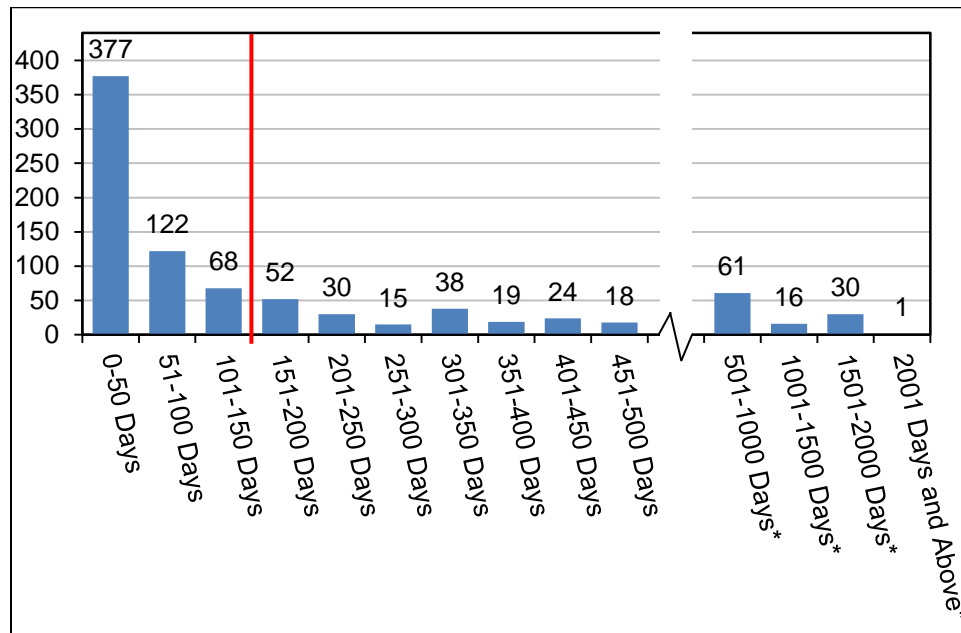
In addition, the cases with extensions (the 130 cases in Figure 3.3) did not receive extension approval promptly after 150 days.

In our review of the 130 cases with an extension, we allowed an additional 30 days (beyond the policy requirement of 150 days) to allow for a monthly case review between the investigator and supervisor. Even so, we found that 70 percent of the cases (91 of the 130 cases) received extension approval between 181 to 514 days after opening the investigation. Therefore, even when the investigators did request an extension, it was beyond 150 days from assignment. We were told that all cases requesting extension receive it, without question. According to the Chief Investigator, DOPL will be revising its extension policy by tightening it up and requiring more scrutiny.

In addition to reviewing case closure times, we believe that DOPL should review all cases that have been open beyond the policy limit of 150 days to ensure each is open for a justified reason. Figure 3.4 shows that we found 108 cases that had been open from 500 to over 2,000 days.

All investigations receive an extension at the investigator's request without question.

Figure 3.4 Number of Days the 871 Active Investigations Had Been Open. The red line denotes the 150-day investigation completion time limit required by policy.



*The scale for these totals shifts from groups of 50 days to groups of 500 days.

We found 108 cases that had been open from 500 to over 2,000 days.

We recommend that DOPL adhere to the policy requiring investigation case closure within 150 days unless promptly receiving a justified extension, based on supervisor determination.

Sample Investigations and Citations Appear To Lack Adequate Supervisor Review

In the sample of investigations we reviewed, we had concerns with the appearance of a lack adequate supervisor review in 11 of 16 investigations. In addition, we discuss seven selected citations where we identified concerns that show a lack of following DOPL policy and a lack of oversight. Further, training is needed to promote more consistent issuance of no-fine, cease-and-desist citations by investigators; we discuss six selected citations in this discussion. Finally, we believe DOPL should develop policies to provide consistent, organized documentation in investigation files.

From our sample, it appears that supervisors are not conducting a timely review of investigations.

Sample of Investigations Appears to Lack Adequate Supervisor Review

We have concerns that 11 out of the 16 investigations, from our sample of investigations that were open beyond 150 days without an approved extension, appear to demonstrate a lack of adequate supervisor review.

The investigation supervisors are expected to do a monthly case review of all investigators' cases, but this is not stated in policy. We were told supervisory review does not always happen. Thus, not only were time limits exceeded in the sample cases we reviewed, it appears they also lacked adequate supervisor review. Figure 3.5 addresses our concerns regarding the 11 cases.

Figure 3.5 These 11 Cases Indicate the Need for More Oversight.

Case	Case Details
A	According to the supervisor, several unnecessary delays by DOPL postponed action on the case, thereby losing the ability to prosecute certain issues due to statute of limitations provisions.*
C	Case sat idle for 9 months due to disagreements between licensing manager and investigation staff on how to proceed with discipline
D	Case was inactive for more than a year with little investigative activity
E	Case was inactive twice, first for about 8 months and second for another 5 months, without investigative activity
G	Subject was allowed to continue to work in a regulated field with no license while claiming to be pursuing licensure; licensing records do not reflect an application from this subject; at the time of our review, the case had already been open for 317 days.
I	Physical file lost with no evidence of investigative activity. Case had been open for over 280 days at the time of our review
J	Case was still open after about 280 days with little evidence of investigative activity
K	Case was still open at 246 days with little evidence of investigative activity. Investigator was waiting for additional complaints to be made in the proximity of this case to justify the travel
N	Investigator was keeping the case open, which was at about 220 days at the time of our review, just in case the subject reoffended; the case should have been closed.
O	Physical file lost with no evidence of investigative activity. Case was still open after 210 days.
P	Subject received a third citation, which was treated as a second citation, thwarting possible criminal prosecution and lacking appropriate fine amount. DOPL warned the subject that if he did not pay his previous citations DOPL would seek criminal prosecution, yet DOPL did not seek prosecution.

One subject continued working without a license after claiming pursuit of licensure.

*Utah Code 58-1-401 requires DOPL to take disciplinary action within four years after the conduct is reported to the division.

We believe that supervisory review or division oversight is necessary to ensure the investigators are timely and adequately

conducting and completing investigations. We recommend that investigative supervisors regularly review the status of open cases with the assigned investigator to ensure an appropriate investigation is being actively conducted.

Sample of Issued Citations Did Not Follow Policy And Appeared to Lack Adequate Supervisor Review

We found citations that did not follow DOPL policy and appeared to lack adequate oversight. We discuss seven selected citations that show these concerns and contain errors. We found subsequent citations that were assessed incorrect fine amounts or were not pursued criminally, contrary to DOPL policy and management's stated desire.

DOPL has general fine authority for all professions under its umbrella statute of *Utah Code* 58-1-502, as well as specific fine authority under 10 individual practice acts. The statute establishes that a person who practices or engages in unlawful or unprofessional conduct is guilty of a class A misdemeanor. If DOPL finds that disciplinary action is appropriate it may issue a citation, offer a stipulated settlement, or notify the person to appear at an adjudicative proceeding. Figure 3.6 shows the reported number of citations issued in the last five years.

Figure 3.6 Citation Statistics. These statistics are reported in the Department of Commerce Annual Report.

Fiscal Year	Citations Issued
2008	908
2009	510
2010	715
2011	582
2012	754

Utah Code 58-1-502 states that if a citation is to be issued, the fine may be assessed up to \$1,000 for a first offense, \$2,000 for a second offense, and up to \$2,000 a day for each subsequent offense. However, DOPL's *Administrative Rule* 156-1-502 states that most violations carry a fine of \$500 for a first offense; most second offense citations have a fine of \$1,000; and a third offense fine is \$2,000. However, it is DOPL's policy not to issue third offense citations,

Concerning DOPL regulated professions, DOPL has fine authority to issue a citation to anyone who engages in unlawful or unprofessional conduct.

Over the last five years, DOPL has issued an average of about 700 citations per year.

“except in extraordinary circumstances approved by the investigative supervisor.”

DOPL policy states that “Investigators should normally respond to ongoing misconduct after a second citation by filing a Notice of Agency Action, by screening the case for criminal prosecution, or by both.” DOPL’s Chief Investigator told us the reason issuing a third citation requires supervisor approval is that he does not want to give third citations but wants these offenses to be pursued criminally.

We found seven citations that were written for an incorrect amount and four of those that should have been reviewed for criminal prosecution. All of these citations were written for either contracting without a license or working on an expired license. Figure 3.7 shows the fine amount, the number of citations the person has received, and our suggested result based on DOPL policy and management discussion.

Four citations we reviewed were not, but could have been, assessed for possible criminal prosecution.

Figure 3.7 Fines for These Seven Citations Did Not Follow Policy, nor Were They Screened for Possible Criminal Prosecution.

Case	Fine Amount	Citation Number	Suggested Result
1	\$300*	4 th	Screen for criminal prosecution and/or \$2,000
2	500	2 nd	\$1,000
3	Consolidated*	3 rd *	Screen for criminal prosecution and/or \$2,000
4	500	2 nd	\$1,000
5	500	3 rd	Screen for criminal prosecution and/or \$2,000
6	500	3 rd	Screen for criminal prosecution and/or \$2,000
7	Cease & Desist only (\$0)*	2 nd	\$1,000

* These three cases are discussed in more detail below.

In Case 1, the fine amount was only \$300. Even if this was the first citation for this person, policy indicates the fine amount should be \$500 for a first offense for contracting without a license. DOPL policy does allow the investigative supervisor to deviate from the fine

schedule, but supervisor approval was not noted in either the closing report or in DOPL's electronic case management system (LES).

In Case 3, the third complaint was consolidated into the second complaint and one citation resulted. Consolidating cases is not uncommon for DOPL; however, the third complaint was filed by a different party than the second complaint, at a different location six weeks later. If this citation had been treated as a third citation, it would have been written for \$2,000 and possibly screened for criminal prosecution. DOPL's Chief Investigator said he agreed that there was no reason this case should not have been pursued criminally.

Case 7 was written for no fine amount, with only a cease-and-desist warning. Since this was the person's second citation for working with an expired license, the fine amount should have been \$1,000.

DOPL Staff Have Invoked a Nonexistent Policy That Reduces Fine Amount. We also found citations that received a fine less than the required amount due to the age of an offender's previous citation, though there is no policy directing such treatment. For example, Case 4 was issued to a subject that had received a first citation in 2006, but this second citation was treated as a first offense with a \$500 fine as opposed to \$1,000 for a second citation. Written on the citation, it was noted that because the first citation was issued more than five years ago, this citation would be treated as a first. Case 5 was actually a third citation, but was fined only \$500 because of the amount of time that had passed since the first two citations. The Chief Investigator stated this practice is not established in policy. We found no basis for this type of fine reduction. We recommend that DOPL determine if resetting the fine amount to \$500 on subsequent citations after five years is a desired practice that should be established in policy.

Policy should be established if DOPL decides to continue a practice that systematically reduces citation fine amount.

Further, we recommend that investigative supervisors review citations for statutory and policy compliance, for both fine amount and the appropriate sanction.

Training Could Provide More Consistency For Cease-and-Desist Citations

We believe training is needed to improve consistency in DOPL investigators' use of cease-and-desist citations. We reviewed citations

to compare those given a cease-and-desist warning, which carries no fine, to citations carrying a fine.

DOPL policy allows investigators to write citations for cease and desist only if they specify their justification for doing so in the documentation section of the citation. Policy does not define what type of violation warrants a cease-and-desist citation or if there are any limits. While some investigator discretion is necessary, we believe training could provide a more consistent approach within DOPL.

We selected four citations issued for the same type of violation, engaging or practicing in a particular trade without a license where two received a fine and two did not. In the citation sections explaining or justifying the citation amount (whether or not a fine will be issued) three of the four citations indicated that the subjects were not aware a license was needed. Therefore, we question why two received a fine and two did not.

We also question the issuance of a no-fine, cease-and-desist citation to a subject who tried to renew on-line but was unable to do so because of a bankruptcy. A bankruptcy is a serious concern for this type of professional license (contractor) that must be resolved before the license is renewed. Therefore, we question the appropriateness of the citation being issued as a cease and desist with no fine attached.

Finally, we reviewed a no-fine, cease-and-desist citation issued to a licensee who allowed the license to expire. The investigator noted that he could not find any reason that might stop the subject from renewing. We believe the apparent inaction on the part of the licensee to renew the license provides justification that should actually have aggravated the citation, not reduced it to receiving no fine.

According to one investigative supervisor, investigators have discretion when to write a no-fine, cease-and-desist citation. No prior approval is needed, no policy guides when it is appropriate, and (based on our concern of how it appears that supervisors fail to diligently review investigations and citations), cease-and-desist citations might also lack a final review. Training could provide a proactive way of unifying the investigations unit on when writing a citation with no-fine is appropriate with some consistency. We recommend that DOPL provide training to increase investigators' consistency when issuing no-fine, cease-and-desist citations.

Training is needed to help provide some consistency when writing no fine, cease-and-desist citations.

Investigators do not need approval to issue no-fine, cease-and-desist citations, which may also lack adequate supervisor review.

Documentation Policies Should Be Developed

We found investigative case files lacked consistency, organization, and adequacy in documenting the investigation. DOPL's policy on documenting investigations is vague and internal practices for case management are lacking. The investigations policy requires the results of an investigative effort be recorded "in the appropriate case report format after concluding an investigation, contacting a person involved in a case, gathering evidence, or taking any other substantial action on a case." However, in the cases we reviewed, how the investigations progressed was poorly documented and difficult to follow, making it difficult to track what the investigation entailed.

Documentation of investigations is inconsistent and disorganized, making them difficult to follow.

We reviewed some files that contained numerous disorganized records while others contained very little documentation. In addition, there is no uniformity in what documents should be in a file to justify an investigation. Documentation methods to record investigative practices varied by investigator. The investigation case files contained loosely placed documents and temporary notes that were not secured. We found the files riddled with post-it notes documenting telephone calls and noting possible investigation outcome. Some files contained an activity log documenting case progress, while other files had no log. We noted that some emails documenting the investigation were not printed and put in the file until after we questioned how the case was being documented.

We spoke with the Chief Investigator, who transferred to DOPL from another state agency late last year. He agreed that there is no office-wide standard on how to maintain investigation files. He believes that case files should be maintained chronologically and is working on improving their file management process. We recommend that DOPL develop documentation policies to provide consistency and organization to investigation files.

Recommendations

1. We recommend that DOPL adhere to its policy requiring investigation case closure within 150 days, unless promptly receiving a justified extension, based on supervisor determination.
2. We recommend that DOPL investigative supervisors regularly review the status of open investigations with the assigned investigators to ensure an appropriate investigation is being actively conducted.
3. We recommend that DOPL determine if resetting the fine amount to \$500 on subsequent citations after five years is a desired practice that should be established in policy.
4. We recommend that DOPL investigative supervisors review citations for statutory and policy compliance, for both fine amount and the appropriate sanction.
5. We recommend that DOPL provide training to guide investigators toward a more consistent issuance of no-fine, cease-and-desist citations.
6. We recommend that DOPL develop documentation policies to provide consistency and organization to investigation files.

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Chapter IV

DOPL Needs to Be More Proactive In Managing Probation

We reviewed the Division of Occupational and Professional Licensing's (DOPL) probation and compliance unit (probation) and found that some probationers are allowed to accumulate numerous violations before DOPL responds. A quick and appropriate response to probation violations is important to help encourage responsible behavior by the licensee and protect the public. DOPL can improve its probation program by establishing policy guidelines for imposing a range of sanctions depending on the seriousness of probation violations, clarifying roles and responsibilities, and improving monitoring of probationers.

As stated in the introduction, DOPL licenses about 190,000 professionals and businesses. At the time of our audit, DOPL managed 254 probationers. In addition, the Construction Services Commission (CSC) managed another 272 contractors on probation with the assistance of DOPL staff. Although the number of probationers compared to total licensees is small, monitoring a probationer can be an intensive, long-term commitment for DOPL. Figure 4.1 shows the breakdown of current probationers managed by DOPL.

Probation operations could be improved by developing a range of sanctions, establishing policies, clarifying staff roles, and improving probationer monitoring.

Figure 4.1 Nurses, Cosmetologists, and Pharmacists Account for about 60 Percent of Probationers Managed by DOPL. This figure excludes 272 probationers managed by the Construction Services Commission (CSC).

Profession Name	Number on Probation	Percent of Total
Nurse	66	26%
Cosmetology	59	23
Pharmacy	25	10
Massage	15	6
Security Companies & Guards	15	6
Physician	14	6
Social Work	11	4
Other (Includes 14 other professions)	49	19
Total Probationers	254	100%

Many resources are utilized in monitoring a relatively small group of disciplined licensees.

Management of probation involves many individuals. These include a compliance manager and five compliance officers (two of these officers also split their time monitoring diversionees, as discussed in Chapter V) as well as bureau managers and boards of the respective professions. Legal counsel is involved in drafting probation agreements and, when necessary, drafting orders to show cause for a license revocation. DOPL’s director makes final agency decisions that are subject to appeal according to the Utah Administrative Procedures Act.

We reviewed 21 DOPL probation cases comprised of seven different license types, including nursing, cosmetology, pharmacy, security officer, physician, social worker, and dentist. We chose cases to review by stratified sample, based on a few chosen professions. We wanted to review at least two cases from each of the bureaus and compliance officers to see if DOPL adequately managed probation cases consistently. Although we did not review probation files managed by the CSC, we believe many of the issues discussed in this chapter apply to them as well.

Some Probationers Are Allowed to Accumulate Numerous Violations Before DOPL Responds

In reviewing our sample of 21 cases, we found 19 with some type of violation of the probation agreement during the course of probation. Some cases contained more numerous violations than

others did and some violations appeared more egregious than others did. The number of violations in the 19 cases ranged from one to over 80 in a single case. Appendix B shows a list of the 21 cases we reviewed and the number of violations we could identify.

The conditions that probationers must comply with are specified in written agreements signed by both the licensee and DOPL. Some conditions are standard while others depend on specific situations. For example, someone on probation for substance abuse may be required to provide urine samples for drug screening, but others will not. Probationers are warned that failure to complete a term or condition in a timely manner constitutes a violation of the agreement and may subject the probationer to revocation or other sanctions.

Figure 4.2 shows seven common probation conditions that applied in all or most of the 21 agreements we reviewed and how frequently licensees from our sample cases violated those terms.

Figure 4.2 Probationers Violated Common Terms in Several Cases. The first four agreement terms listed applied to all 21 cases we reviewed. The next three applied to 13 of those cases.

Agreement Terms Required of Probationers	Number of Agreements With Term	Number Violating	Percent Violating
Submit various documents and paperwork	21	13	62%
Meet with the board	21	6	29
Maintain a current license	21	5	24
Obey all laws	21	5	24
Fulfill all drug screening requirements (including call-ins)	13	12	92
Report prescriptions	13	6	46
Abstain from drugs/alcohol	13	5	38%

In reviewing the cases, we found a wide variety not only in the behavior of probationers, but also in DOPL’s records and actions. Generally, we found that case files were unreliable in providing a comprehensive record of probationer compliance and DOPL responses. However, it was clear that many different individuals decide how to respond to violations on a case-by-case basis with little policy guidance or oversight.

To help understand the cases, we interviewed compliance officers and bureau managers and reviewed board meeting minutes. As will be

Probationers agree to adhere to specific terms and conditions stipulated in probation agreements.

Case documentation lacked clarity, organization, and sufficiency.

discussed more in the next section, we found that compliance officers exercise a great deal of discretion in monitoring and reporting compliance but have little oversight, some bureau managers are more involved in responding to violations than others, and waiting for boards to make decisions may cause delays and inconsistent responses to violations.

To help illustrate the nature of the cases we reviewed, Figure 4.3 provides four case examples showing the number and type of violations within a specific time frame. Below the figure, we discuss each case in more depth.

Figure 4.3 Four Cases Show Probation Violations Over Time.

Case Number	Violations*	Time Frame*	Key Violations
1	46	19 months	<ul style="list-style-type: none"> • 14 failed drug screens* • 14 un-submitted documents • 12 missed call-ins • 6 unreported prescriptions • expired license • failed to pay drug screening costs for over 1 month, resulting in account placed on hold
5	84	22 months	<ul style="list-style-type: none"> • 37 missed call-ins • 21 un-submitted documents • 14 failed drug screens* • 12 unreported prescriptions • used multiple prescribers and pharmacies (count unclear)
9	3	10 months	<ul style="list-style-type: none"> • 1 criminal conviction • 2 missed board meetings • expired license • failed to register for drug screening throughout probation[†]
21	28	18 months	<ul style="list-style-type: none"> • 4 failed drug screens* • 20 missed calls • 4 un-submitted documents

* Number of violations includes those violations we could identify. The time frame does not necessarily equal the total time on probation. Appendix B provides a list of all the cases we reviewed but does not list the time frame of those violations.

[†] Cases 4 and 10 in Appendix B also failed to register for drug testing. Case 4 failed to register for the first two months of probations. Case 10 failed to register for the first four months of probation.

* Failed drug screen include positive, dilute, and un-submitted samples for drug analysis.

The following paragraphs provide additional depth on each of the four cases in Figure 4.3.

- Case 1 (Nurse):

In 11 of 14 monthly board meetings, DOPL reported that this probationer was noncompliant. Eventually, DOPL recommended to the board that it take action against the probationer upon missing one more drug test. The board warned the probationer to come into compliance within the next quarter or they would order a hearing. Within one week of the board's warning, the probationer tested positive for drugs and over the next five months, missed or failed at least four more drug tests. DOPL did not initiate formal disciplinary action against probationer, as they warned in at least eight noncompliance letters. However, DOPL did accept two board recommendations to ease certain probationary terms and conditions by amending the probation agreement. DOPL eventually revoked the license.

Case 1 repeatedly violated probation without intermediate sanctions and eventually faced license revocation.

- Case 5 (Nurse):

Case 5 entered probation after being terminated from DOPL's diversion program (a program monitoring rehabilitation) for failing to comply with program terms (discussed in Chapter V). After the first 12 months of probation, the licensing board commented that the probationer had never been in compliance and should consider a license suspension. The board urged complete compliance in the next month or the board would take action. The probationer was not compliant by the next month, a fact DOPL reminded the board of, but DOPL failed to pursue further action. The probationer continued to violate probation for at least the next seven months and the probationer eventually requested DOPL suspend the license, which they did.

Case 5 requested license suspension after never fully complying with probation.

- Case 9 (Cosmetologist):

Case 9 entered probation after revealing unprofessional conduct—related to substance abuse—on the application for licensure. Case 9 never completely complied with the probation agreement because the probationer never registered for drug screening, and never submitted any evidence of drug testing. Furthermore, the probationer failed to submit required paperwork, missed required meetings with the board, and was

Case 9 was non-compliant for about two years before DOPL suspended the license.

Despite several violations and no intermediate sanctions, case 21's license was reinstated about 18 months into a two-year probation.

convicted of theft before DOPL pursued formal disciplinary action about 10 months into probation. DOPL suspended the license about one year later.

- Case 21 (Dentist):

Case 21 reentered probation after voluntarily surrendering the professional license for several years following unprofessional and unlawful conduct related to substance abuse. About one month into probation, the probationer failed the first drug screen; however, DOPL did not respond until the board meeting two months later. Their response was to inform the board but no other action was taken. Case 21 also missed three call-ins for random drug screening with no response from DOPL and no indication to the board. The probationer met with the board three months into probation when it was noted that the probationer was noncompliant for the failed drug test and for failure to submit two required documents. Over the next 15 months, the probationer missed an additional three drug screens, which DOPL considers as failed. The probationer also missed an additional 19 call-ins and failed to submit another two required documents. Although DOPL did send two letters indicating concerns with compliance, they did not mention sanctions for failure to submit required paperwork or to contact DOPL regarding missed tests. Regardless of the noncompliance, DOPL reinstated the probationer's license about a year and a half into a two-year probation.

In the cases we reviewed, it appears that when a probationer violates an agreement term DOPL does not promptly respond to each violation individually but appears to allow violations to accrue. DOPL then waits for the board to take action instead of pursuing discipline on its own. Instituting a range of intermediate sanctions, which may include fines based on severity, frequency, or type of violation could encourage probationers to come into compliance more quickly.

DOPL Should Clarify Policies for Imposing Sanctions on Probation Violations

Although the probation agreement includes terms the probationer is required to adhere to, it is not clear what sanctions should be

imposed when those terms are violated. The division director said that probationers are technically out of compliance anytime they violate any provision in the agreements. However, DOPL has not clarified in policy what course of action should be taken upon the violation. DOPL should develop a range of sanctions to apply to initial and minor violations to help encourage compliance without allowing violations to go largely unpunished until a revocation.

We reviewed national studies from the Department of Justice and the PEW Center for the States on managing an effective probation program. Best practices for responding to probation violations, include:

- Prompt and appropriate responses to every violation
- Having a range of violation responses available and used wisely

Policy clarification on whether and how to sanction probation violations, while allowing for violation risk and severity, can help ensure DOPL treats licensees consistently, fairly, and effectively.

Policy Should Guide When Violations Warrant Sanctions

DOPL's probation agreements state that if any term or condition is violated the division may take action, including imposing appropriate sanction, in the manner provided by law. Such sanction may include revocation or suspension of the license, or other appropriate sanction. Although the agreements state that a violation of any term may result in a sanction, there is no policy to clarify how the severity and the risk posed by the licensee are considered in determining an appropriate sanction.

For example, when probationers are required to call to see if they are scheduled for drug testing that day, but fail to call-in, DOPL has not established when (or even if) such failure warrants sanctions and what those sanctions should be. We reviewed three cases where nursing license probationers failed to call-in for drug testing numerous times (ranging from three to six times) and warnings were given that further noncompliance "may result in additional disciplinary action," a citation being issued, or investigative examination. However, in these cases, the probationers were given multiple subsequent warning letters of noncompliance, yet DOPL did not follow through with additional

National studies support using a range of sanctions to respond promptly to every violation.

Clarifying in policy appropriate sanctions of probation violations may mitigate the escalation of discipline.

Probationer noncompliance is addressed inconsistently.

sanctions mentioned in the warning letters. Such empty threats send the wrong message to probationers and may lead to more serious violations.

Several DOPL staff told us they informally try to adhere to a “three strikes” rule where three violations would constitute noncompliance requiring a sanction. However, we found this practice is not established in policy and was not used consistently in our sample cases. In contrast, the Montana Board of Cosmetology policy manual articulates the importance of having set guidelines for disciplinary sanction by stating, “This policy will enable the Board to maintain consistency with regard to board sanctions for the similar licensing and compliance offenses.”

Policy Should Guide What Type of Sanctions Are Appropriate

DOPL is seeking clarification of its fine authority by the 2013 Legislature.

DOPL faces a challenge in developing a range of sanctions to apply, depending on seriousness of violations. However, the agency recognizes that it needs a range of intermediate sanctions short of revocation to address violations more effectively. DOPL intends to ask the 2013 Legislature to clarify in statute the division’s fine authority so it may enforce violations of probation as citable offenses for all license types.

We spoke with a member of Utah’s Board of Nursing. She provided us with sanctioning guidelines that have been articulated in the State of Maryland’s Board of Nursing Act. She believes these guidelines can help the Utah Board of Nursing by providing a model for evaluating violations. The Maryland sanctioning guidelines divide the violations into categories, such as abuse, noncompliance with board orders, and substance abuse, ranking what type of conduct applies to each violation, from least to greatest. The board applies sanctions ranging from reprimand to revocation, along with a monetary penalty ranging from \$1,000 to \$5,000. Utah’s board member found this guidance helpful and stated that the Board of Nursing is currently working with DOPL to create written guidelines for compliance and probationer evaluation.

Consistently using fine authority as an intermediate sanction, according to written policies, can help foster equal treatment of

licensees and strengthen the importance of adhering to probation requirements among the licensed community.

DOPL Should Review and Clarify Decision-Making Responsibilities

In addition to establishing guidelines for imposing sanctions, DOPL should clarify staff responsibilities for making decisions about sanctions, including initiating agency actions based on probationer's compliance with requirements. Since the boards of professionals that assist DOPL are statutorily assigned an advisory role, the responsibility to act when necessary clearly resides with DOPL staff. Furthermore, given the importance of responding promptly to violations, boards that meet only periodically cannot be relied on when quick action is needed.

We believe that bureau managers are in the best position to evaluate probation violations and know when DOPL should initiate action against noncompliant probationers. The bureau managers are responsible for the licensing of their respective professions and have a thorough knowledge of licensing standards. Alternatively, decision-making responsibility could reside with the compliance manager (who is not a bureau manager) but the division director has not defined the job duties associated with this position. Furthermore, as discussed later, the compliance manager has little involvement in, or knowledge about, individual probation cases and does not have the detailed knowledge of licensing standards that bureau managers have.

The professional boards provide an important advisory function in guiding probation decisions. The boards include the probationers' peers in their respective fields and have insight specific to that profession or industry. However, given the frequency of board meetings, DOPL cannot wait to consult with boards if it wants a quick response to probation violations. For example, the nursing board generally meets monthly, while the cosmetology and dental boards meet quarterly.

Bureau managers should initiate action against probationers' noncompliance.

DOPL Needs a Clear Process for Monitoring Probation and Reporting Violations

In addition to establishing guidelines for imposing sanctions and clarifying decision-making responsibilities, DOPL needs a clear process for identifying probation violations and reporting them to decision makers. We found some ambiguity within DOPL's probation program about responsibilities and duties. The job duties of compliance officers should be better defined. In addition, DOPL should review the roles of bureau managers and the compliance manager to better direct compliance officers' activities.

Job Duties of Compliance Officers Should Be Clarified

Compliance officers should be given clear guidance about their job duties. They are the gatekeepers of tracking compliance and have the most frequent and direct contact with probationers. Structured standards should guide how compliance officers monitor, document, and report probation compliance.

We are concerned with the current process of probation monitoring. Compliance officers report that they determine and report compliance on a case-by-case basis and at their discretion. One compliance officer reported she may or may not require evidence justifying missed call-ins. Two compliance officers reported that they may or may not require certain documentation when excusing tests or missed call-ins, depending on the situation.

DOPL does not have policies establishing the appropriateness of excusing agreement violations, limits on the number of excuses, or required evidence from probationers to support valid excuses. This includes missed call-ins, missed or failed drug tests, unsubmitted reports, and other violations.

In one of our sample case files, we found drug-testing reports that showed over a dozen missed call-ins during the last four months of the licensee's probation and at least seven unexplained excused drug tests during the first six months of a two-year probation. The compliance officer explained that the probationer reported having been on vacation, but there was no documentation supporting that claim in the file. In addition, a discipline tracking sheet and licensing board

Currently, monitoring and reporting probationer noncompliance is subjective.

meeting minutes concerning this licensee's probation reflected compliance throughout probation.

Even a review of the entire case file may not guarantee a clear understanding of compliance due to unreliable documentation. Poor documentation and inconsistent case management make it difficult to assess violations of probation. Furthermore, compliance officers report that their use of a web-based program designed to track and record probationer drug screening information is not consistent. There are no policies guiding its appropriate usage and compliance staff reported they exercise individual discretion when using the web-based program. The division director told us DOPL purchased the program to improve the probation process but DOPL has yet to develop policy guiding its usage and has just recently begun to review its effectiveness.

As discussed in the next section, the compliance manager is working with bureau managers and compliance officers to develop performance plans for compliance officers that specify probation-specific duties. These job duty descriptions should provide structure for compliance officers on monitoring, documenting, and reporting probation compliance.

Organizational Responsibilities Should Be Reviewed and Clarified

We believe the organizational relationships of DOPL's probation program are confusing. The six bureau managers are responsible for most licensing activity within their assigned professions, including issuing probationary licenses when appropriate. However, the compliance officers, who monitor probationers, report organizationally to a compliance manager who has little involvement in the licensing function.

Insufficient case documentation makes it difficult to assess probationer compliance.

The compliance manager's job duties have not been clearly defined.

In fact, the compliance manager's job duties also include managing DOPL's web content and the Lien Recovery Fund, from which his salary is paid. He took on the additional responsibility to manage probation when the prior full-time compliance manager left the division. However, he told us that his job duties in the probation program are not well defined beyond completing performance appraisals for the compliance officers. The compliance manager does not review probation files or direct day-to-day compliance officer activities. He indicated that compliance officers receive some guidance from the bureau managers.

Some bureau managers provide needed guidance to compliance officers, but others do not. One bureau manager told us she was not aware that she could set expectations for compliance officers and was under the impression that the compliance manager set policy and guidance for compliance staff. The compliance manager is currently working on improving compliance staff performance plans. In a recently revised performance plan, the compliance manager directed one compliance officer to:

Work with their assigned Bureau Manager(s) to draft a plan that will include guidelines that establish the information the Bureau Manager would like reported to him/her and the timeframes the information will be provided. The plan shall also include ways to increase enforcement of probationary agreements.

However, the compliance manager reports having difficulty setting clear goals in the performance plan because of unclear divisionwide goals for probation management.

This lack of defined roles makes it difficult to understand the process of tracking and reporting probation compliance. In practice, compliance officers may simply report their summary assessment of a probationer as either compliant or noncompliant at board meetings. As indicated earlier, this approach is problematic because boards only meet periodically and have an advisory rather than decision-making role. We believe the bureau managers are in the best position to decide when action should be taken on noncompliance; these decisions should be guided by DOPL policies and timely information received from the compliance officers who monitor probationer violations.

DOPL should consistently monitor and proactively manage and act on probationer noncompliance.

Recommendations

1. We recommend that DOPL develop a range of sanctions and establish policies for invoking appropriate sanctions based on the severity, frequency, and type of probation violations.
2. We recommend that DOPL review and clarify the responsibilities of staff to initiate actions when probation violation sanctions are appropriate and of boards to provide advice and input in probation cases.
3. We recommend that DOPL review and clarify the authority and responsibility relationships among bureau managers, compliance officers, and the compliance manager.
4. We recommend that DOPL improve written compliance officer job duty standards for monitoring probation compliance and reporting violations, including case documentation standards.

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Chapter V

DOPL Should Enforce Diversion Program Requirements

The Division of Occupational and Professional Licensing (DOPL) can improve its diversion program by clarifying and adhering to program requirements. The program poses a high potential risk to the public because DOPL holds information about licensees' substance abuse problems confidential and allows the individuals to continue their professional practice without restriction. We think DOPL needs to follow guidelines in rule regarding program entrance and should clarify follow-up procedures for licensees who are considered, but do not enter the program. For those who do enter the program, DOPL should improve how it monitors and enforces the terms and conditions of diversion agreements.

Diversion, also known as the Utah Recovery Assistance Program, is a confidential monitoring program for licensees who are dealing primarily with substance abuse and who have not been previously sanctioned by any regulatory body. Entrance into the program is further restricted based on criteria articulated in statute (*Utah Code* 58-1-404), administrative rule, and policy. Licensees may be referred to diversion by themselves, peers, family members, employers, or other states' diversion programs. They can also be referred by a DOPL manager or investigator upon discovering that qualifying misconduct has occurred. Program participation is guided by the terms and conditions of a contract called the diversion agreement; this is signed by the diversionee, diversion manager, and DOPL director.

The administration of the program is performed by a contracted program manager (diversion manager), two DOPL compliance officers who also split their time with probation duties, and five volunteer advisory committees whose organization and duties are articulated in *Utah Code* 58-1-404 and administrative rule.

In order to examine both program entrance and program participation, we reviewed 14 diversion case files. Initially, we reviewed a stratified selection of 10 cases and found that some had been incorrectly classified as self-referred in the program database. Therefore, to expand our examination of the entrance evaluation process, we received a chronological list of program referrals and

Diversion is a confidential recovery program for licensees who meet certain entrance criteria.

identified four additional cases of self-referred licensees who did not enter the program. Figure 5.1 shows an overview of these cases.

As also shown in Figure 5.1, nine of the fourteen cases did not enter the program. This apparently high level of entrance denial is due to our selection of four additional cases of such and does not accurately represent the true program entrance denial rate.

Figure 5.1 Overview of 14 Diversion Cases Reviewed

The vast majority of program participants are medical licensees.

Case Review for Entrance Evaluation		
Case	Profession	Conclusion of Evaluation
A	Nurse	Entered Program
B	Nurse	Rejected by Director; High Risk
C	Pharmacy Tech	Chose Not to Enter
D	Respiratory Care	Chose Not to Enter
E	APRN*	Chose Not to Enter
F	Dentist	Chose Not to Enter
G	Nurse	Rejected by Committee; High Risk
H	Nurse	Rejected by Committee; High Risk
I	Nurse	Rejected by Committee; No Public Threat
J	Nurse	Rejected by Committee; No Public Threat

Case Review for Entrance Evaluation and Program Participation		
Case	Profession	Conclusion of Participation
K	Nurse	Successful Completion
L	Nurse	Successful Completion
M	Social Work	Terminated from Program
N	Physician	Terminated from Program

* Advanced Practice Registered Nurse

Any mention made of cases throughout this chapter will be referenced to the lettered key in this figure.

DOPL Should Improve Program Entrance Process

Given the risks posed by individuals with substance abuse problems, DOPL needs to follow an effective process to screen potential program entrants. First, DOPL should adhere to the time limit for entrance evaluation as defined in administrative rule. Second,

diversion agreement fact statements need to adequately state licensee misconduct. Third, DOPL should review and clarify the process it follows when licensees do not enter the program and ensure that disciplinary action is pursued when appropriate.

Throughout this section, we discuss portions of the diversion entrance procedure described in *Administrative Rule 156-1-404d*. This procedure prescribes steps for diversion entrance evaluation that we believe provide strong guidance for the program. However, we also discuss a clarification that should be made to this procedure concerning how to appropriately pursue disciplinary action if a licensee fails to enter the program.

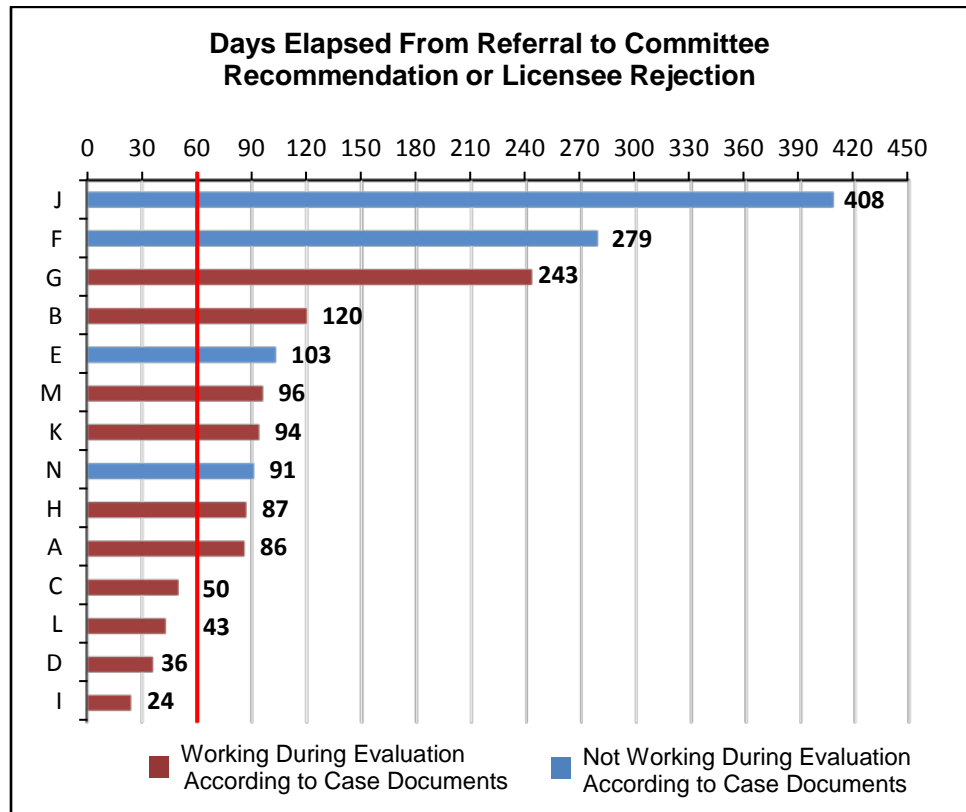
DOPL Is Not Adhering to Entrance Time Limits in Most Sample Cases

It is essential that the entrance evaluation process be completed as quickly as possible because the potential for public harm increases the longer a potentially impaired licensee is allowed to practice without appropriate oversight. A time limit of 60 days was therefore established in administrative rule to expedite the entrance evaluation process. Ten of the fourteen cases we reviewed exceeded the 60-day entrance time limit requirements, some by several months. Six of those ten licensees whose cases violated the time limit were actively practicing their profession during that time, thereby increasing the potential for public harm.

Administrative Rule 156-1-404d allows 60 days from the date of a program referral for the committee to perform its evaluation for entrance into diversion and make a recommendation to the DOPL director. The program manager who has administered the program since 1996 stated that, prior to our audit, he was unaware of the 60-day limit in rule. Figure 5.2 shows the time it took to accomplish this task in the 14 cases we reviewed.

Just over 70 percent of reviewed cases exceeded program entry time limits established by rule.

Figure 5.2 Six of fourteen cases reviewed (G, B, M, K, H, and A) exceeded the 60-day time limit while the licensee was actively practicing his or her profession. The vertical red line reflects the 60-day time limit.



Diversion staff appeared to place little urgency on timely program entrance in most cases reviewed.

When we examined the circumstances surrounding the delays illustrated above, it appeared that diversion staff placed little urgency on timely program entrance. Some candidates for entrance failed to get required evaluations in a timely manner and missed multiple monthly diversion committee meetings with no explanation.

For example, the licensee in Case G was referred to the diversion program by DOPL investigations in early October, following a complaint made to the agency. The licensee was not invited to a committee meeting in early November, then was invited to, but missed, the December, January, February, April and June meetings. In addition, tasks assigned as part of the evaluation were never completed. Despite this lack of compliance with DOPL requests, it took 243 days to reject the licensee from the program. Throughout this time period, a public search of DOPL records would not have shown any disciplinary concern for this licensee even though the division knew the individual had a substance abuse problem.

It is our view that time is of the essence during this evaluation process. The potential for public harm increases when DOPL does not meet acceptable time limits while evaluating licensees for entrance into the diversion program.

Most Reviewed Diversion Agreements Lacked Adequate Fact Statements

Diversion program participation is guided by the terms and conditions of a contract called the diversion agreement that is signed by the diversionee, diversion manager, and DOPL director. The majority of the diversion agreements we reviewed lacked detailed fact statements as required in statute. Because of this omission, the director does not consistently receive sufficient information to determine appropriate program entrance.

Utah Code 58-1-404(6)(b)(i) requires that all diversion agreements contain a full detailed statement of the facts upon which entrance into the program is premised. DOPL legal counsel interprets this provision to mean that the fact statement must contain an admission of misconduct specific enough to clearly show that the candidate meets program entrance requirements and to distinguish the qualifying misconduct from other incidents, past or future. These fact statements are written by diversion staff members.

In our sample of 14 cases, 10 contained diversion agreements and 4 did not. DOPL's legal counsel reviewed the 10 agreements and found that 7 fact statements were inadequate according to requirements in statute.

For example, one agreement simply recites the charges alleged in a complaint filed with DOPL investigations and contains no specific admission of misconduct by the licensee. Another agreement states only that the licensee was admitted for inpatient treatment for alcohol dependency which, lacking an admission of some specific misconduct, does not justify program entrance.

In addition, once the committee recommends a candidate for entrance, the DOPL director relies upon these statements of fact to inform him of case details when deciding whether to approve or deny program entrance. He reports that he does so by comparing the diversion agreement fact statement to statute and policy to verify that

Most sampled diversion agreements lack adequate information as required in statute.

the misconduct falls within the limits for acceptance. However, because of the insufficient information provided in those agreements, we believe the director cannot make an informed evaluation of diversion candidates.

In another case we reviewed, a physician who was already participating in the program stole controlled substances from the hospital in which he was working, was caught, and later pled guilty to associated charges. The diversion agreement was amended following the misconduct, but no information regarding the incident was included in the new agreement. The director, not being aware of the case details, approved the new agreement believing it was a commonplace extension. When we discussed this case with the director, he stated that he was concerned and would have made his decision differently had he been provided the full facts of the case.

Based on these findings, DOPL has updated its policy to provide for an additional level of case review before an agreement is presented to the director. Additionally, we believe DOPL would benefit from a checklist that includes all elements necessary to determine appropriate program entrance, including fact statement completeness; the checklist should then be completed for each licensee evaluated and provided to the director.

DOPL Is Not Pursuing Appropriate Disciplinary Action when Licensees Do Not Enter the Program

DOPL needs to clarify the process it follows when licensees do not enter the program and ensure disciplinary action is pursued when appropriate. Although program rule requires that DOPL pursue disciplinary action if a licensee declines a proposed agreement, diversion staff has not always done so. In addition, rules should be amended to address appropriate action when DOPL does not offer an agreement. Given the risks posed by substance abusers and the reluctance of diversion staff to pursue possible discipline, the DOPL director's approval should be required whenever diversion staff decide against referring nonentrants to investigations.

Diversion staff practices differ from program rule. *Administrative Rule 156-1-404d(4)* states that, "If a final diversion agreement is not reached with the director within 30 days from service of the proposed diversion agreement, the Division shall pursue appropriate disciplinary

The DOPL director did not receive adequate information to evaluate diversion candidates.

Diversion staff is not consistently pursuing disciplinary action as required in rule.

action against the licensee.” However, instead of basing actions regarding nonentrants on whether an agreement was offered as required by rule, diversion staff base actions on the referral source. Diversion staff states that licensees referred to diversion as a result of a DOPL investigation should always be referred back to investigations for appropriate disciplinary consideration if they fail to enter the program. However, it is the practice of the diversion team not to pursue similar disciplinary action against self-referred licensees who are either rejected or choose not to enter the program.

Figure 5.3 shows that only four of the nine cases of nonentrants we reviewed were referred for possible discipline. Of the five who were not referred to DOPL’s investigative unit, four had been offered a diversion agreement, so DOPL should have pursued discipline according to rule. The fact that Case E is not covered by rule, since no agreement was offered, shows that the rule should be clarified.

Figure 5.3 Five of nine nonentrant cases were questionably handled following DOPL consideration. Cases highlighted in red reflect those in which we feel disciplinary consideration were inadequate.

Case	Agreement Proposed	Referral Source	Case Referred to Investigations
B	Yes*	DOPL License Bureau	No
C	Yes	Self-referral	No
D	Yes	Treatment Center	No
E	No	Self-referral	No
F	Yes	DOPL Investigations	Yes
G	No	DOPL Investigations	Yes
H	No	DOPL Investigations	Yes
I	No	DOPL Investigations	Yes
J	Yes*	DOPL Investigations	No

*Agreement was proposed but final agreement was rejected by either the DOPL director or the diversion committee.

Diversion Staff Should Follow Program Rule. As shown in Figure 5.3, Cases B, C, D, and J were offered diversion agreements but then not appropriately referred for disciplinary consideration after failing to enter the program. This left the licensees to practice their respective professions without appropriate DOPL oversight.

Disciplinary actions have been determined by referral source, not by criteria in rule.

Licensees who admitted substance abuse have been allowed to practice without oversight.

In Case B, for example, the licensee admitted to two alcohol-related DUI incidents and to spending time in jail for a separate, alcohol-related probation violation. The director determined that the misconduct was too severe for the diversion program and rejected the proposed diversion agreement. However, before the director had issued his decision to reject the licensee from the program, the licensee's registered nurse license was renewed to full, active status. Following the director's decision, a temporary bureau manager eventually reviewed the case and determined to allow the licensee to continue practicing with no sanction or oversight. In light of the director's decision, we feel the decision not to monitor this licensee exposed the public to undue risk.

The licensee in Case C was a self-referral to the diversion program. Two days following the self-referral, the licensee's employer filed a complaint with the DOPL investigation unit regarding the licensee's substance abuse as a pharmacy technician. After entrance evaluation, diversion staff told DOPL investigations that the licensee had signed an agreement and entered the program and the investigation was closed based on that information. However, the licensee had not signed an agreement and ultimately decided not to enter the program. No subsequent report was made to DOPL investigations and at the time of this audit, the licensee has never faced sanction or oversight for the admitted misconduct.

We recognize that not all cases will result in discipline but nonetheless believe that if a licensee fails to enter the program, he or she should be reviewed by the director for potential referral to DOPL investigations.

Rule Should Be Amended to Clarify Process. Case E in Figure 5.3 illustrates a scenario in which a licensee chose not to enter the program before being offered a diversion agreement. The administrative rule cited above does not state what action should be taken in this specific scenario.

We discussed this scenario with the diversion manager, who explained that it is his belief that pursuing discipline against self-referred licensees who fail to enter the program would have a "chilling effect" on the tendency of professionals to self-refer to the program, yet also admitted there is nothing limiting the ability to report the misconduct to the proper authority.

Not all candidates will face disciplinary action, but they should be systematically reviewed for sanctions to minimize public risk.

We are concerned that the risk of allowing an impaired medical professional to practice without appropriate oversight may outweigh the potential “chilling effect” and that creating a mechanism for disciplinary consideration is necessary. Given the reluctance diversion staff showed for referring nonentrants to investigations, we think the issue should be clearly addressed in rule. First, the rule should be amended to address situations where no agreement is offered. Second, we think the DOPL director’s approval should be required whenever diversion staff do not refer nonentrants to investigations.

DOPL Should Improve Diversion Agreement Monitoring and Enforcement

Because the goals of the diversion program are to protect the public and aid in the licensee’s recovery from substance abuse, accountability and consequences for agreement violation are essential. In three of the four cases of program completion we reviewed, DOPL did not sufficiently monitor program compliance. In those same cases, DOPL did not take sufficient action to encourage program compliance or terminate excessively noncompliant participants from the program.

DOPL Should Improve Diversion Agreement Monitoring

DOPL’s diversion agreement compliance monitoring is not sufficient. This is due primarily to two factors:

- Similar to the programs discussed in the previous two chapters, the diversion case files we reviewed were inconsistent in their organization and use of documentation methods.
- There are no guidelines for case management software usage and, as a result, a number of inaccuracies were encountered in participant data.

Disorganized Case Files Reduce the Ability to Monitor Compliance. Because case file documentation can span multiple years of activity, many records and notes can be generated during a licensee’s participation in the program. Despite a general structure for

Accountability and consequences are essential for proper diversion program management.

Poor documentation hinders compliance monitoring.

file organization, many documents in the case files we reviewed were not organized according to that structure. Documents were either sporadically mixed throughout the physical file or partially maintained in multiple locations (physical file, online, employee's computer hard drive). Diversion staff and committee members acknowledged that this approach to documentation is not conducive to seeing a full, useful picture of compliance while monitoring a licensee's program participation.

For example, in Case K, drug test results spanning five years were found mixed throughout the case file in multiple formats and for varying time periods. Only after we assembled the information in one comprehensive, chronological list was the extent of noncompliance visible. Once assembled, we reviewed this list with the diversion committee members who had worked with this particular licensee. They expressed surprise at the extent of noncompliance considering that the licensee was granted successful termination from the program (see Figure 5.4).

Decision makers must have clear access to all pertinent case information.

Diversion staff and committee members further acknowledged, and our file review confirmed, that documentation has at times been incomplete, thereby reducing the ability to effectively monitor licensees' program compliance. During our initial review of Case J, the physical case file contained no notes explaining why the case was closed as it was. Three months later, a letter was discovered on an employee's computer hard drive that clarified the question. Before that point, however, nobody was able to clearly recall what had happened.

Consistent Use of Case Management Software Could Improve Compliance Monitoring. As discussed in Chapter IV, DOPL started using a web-based software program in August of 2011 as their primary tool for recording and tracking drug tests and other required tasks. According to diversion staff and committee members, the software has provided an overall improvement to their ability to monitor case files. However, diversion management and staff stated that no clear guidelines have been established directing how or when to record participant information in the software. As a result, we found case file notes and reports that were partially recorded in either the physical file or the online system. This separation of information inhibits diversion program management from making fully informed decisions when assessing compliance.

We agree that the software facilitates better case management but only to the extent that decision makers can review all pertinent information.

DOPL Does Not Adequately Enforce Some Diversion Agreements

Statute states that licensees who violate diversion agreement terms are to be terminated from the confidential diversion program and placed on public probation. Three of the four case files we reviewed showed extensive diversion agreement violations that were allowed to occur without appropriate disciplinary response.

Diversion agreements clearly outline terms and conditions with which the licensee must comply and diversion guidelines articulate a list of potential consequences that may be applied in the event that a diversion agreement is violated. These consequences are intended to encourage compliance or, in the case of serious violations, remove the licensee from the program.

These consequences include:

- Increasing the frequency of random drug tests, committee meetings, or support group meetings
- Requiring an education or relapse prevention program
- Requiring evaluation or counseling
- Requiring admission to a rehabilitation program
- Extending the length of the agreement
- Restricting controlled substance access
- Requiring cessation of practice
- Terminating diversion agreement

However, the guidelines do not provide guidance concerning which consequences to invoke based on severity, frequency, or type of agreement violations. The determination, therefore, is made on a case-by-case basis and the guidelines are inconsistently or inadequately enforced. While we believe that diversion staff and diversion committees should have discretion in determining consequences, we also believe that the program would benefit greatly from improved structure to guide disciplinary decisions.

Consequences are intended to encourage compliance or remove the licensee from the program.

Policy should lend structure to case-by-case decision making.

Our sample included two cases in which diversionees completed the program successfully (K & L) and two cases in which diversionees were ultimately terminated from the program (M & N). We found that one of the cases of successful completion involved many agreement violations. We also found that the two unsuccessful participants were terminated only after prolonged agreement violations. Because of the extent of the violations, we believe DOPL failed to reasonably act to correct the behavior or to terminate these licensees from the diversion program.

Figure 5.4 shows some of the diversion agreement violations encountered in the four case files reviewed. Due to the large amount of data, Figure 5.4 shows only a portion of the findings in these files.

Figure 5.4 Three of Four Completed Diversion Cases We Reviewed Show Significant Lack of Compliance. This chart shows selected agreement violations.

DOPL did not adequately act to oversee sampled diversion participants.

Cases of Successful Program Completion		
Case	Time Frame	Key Violations
K	5 years	<ul style="list-style-type: none"> • 18 positive drug tests • 36 missed drug tests* • 5 out-of-range drug tests** • 16+ months of missing employer reports
L	5 years, 10 months	<ul style="list-style-type: none"> • Licensee completed program successfully with few concerns

Cases of Program Termination		
Case	Time Frame	Key Violations
M	2 years, 2 months	<ul style="list-style-type: none"> • Prolonged alcohol consumption • Stole and used OxyContin from family member • 29+ missed weekly counseling sessions • Misused prescription medication
N	4 years, 4 months	<ul style="list-style-type: none"> • 41 positive drug tests or relapse episodes • Stole a controlled substance from a hospital 3 times • 2 DUI incidents involving a controlled substance • Unlawfully obtained controlled substance for the use of a family member

* Diversion program guidelines state that these tests are considered positive.

** Out-of-range means that the urine sample submitted for drug testing did not meet acceptable criteria of the testing facility.

The following paragraphs provide additional information regarding the three cases with excessive agreement violations in Figure 5.4.

- Case K (Registered Nurse):

In addition to nearly 60 positive or missed drug tests, the licensee failed to provide employer reports for over 16 months and was ultimately found not to have spoken with two separate employers as required in the agreement. Documentation shows minimal repercussions for these prolonged agreement violations. During the last year of program participation, the licensee missed seven drug tests, failed to appear at a mandatory committee meeting without excuse, and failed to provide copies of prescriptions as required in the diversion agreement. Despite these violations, the licensee was ultimately granted an order of successful completion from diversion and, at the time of this report, holds an active license with no associated disciplinary record.

- Case M (Social Work):

In Case M, the licensee was in the program for just over two years. Within one month of signing the agreement, the licensee stole OxyContin from a family member. This occurrence was labeled a “slight relapse” in case file documents. Six months later, reports from addiction counselors began to show a pattern of missed counseling sessions and alcohol use throughout the remainder of the time in the program. During this period, despite an agreement term to abstain from drinking, the licensee tested positive for alcohol and expressed to the diversion committee that the occurrence was not a very concerning thing. Eventually, the licensee stopped participating in the program, resigned from a professional position, and chose to surrender the license. We believe, based on the extended pattern of noncompliance, that DOPL should have taken earlier action to encourage compliance or remove the licensee from the program.

- Case N (Physician):

The licensee in Case N committed numerous egregious violations throughout the course of the diversion program. Within roughly one year of entering the program, the licensee stole a controlled substance from separate hospitals on two occasions and was found

Excessive agreement violations were met with minimal repercussions.

guilty on charges resulting from the second incident. Despite the existence of documents from DOPL investigations, the diversion committee, and the diversion manager expressing the intent to terminate the diversion agreement at that point, the agreement was instead extended. Two months later, the licensee illegally obtained a prescription and gave it to a family member. Despite previous ultimatums, DOPL did not take action at that point. Roughly 18 months later, the licensee was arrested in two separate DUI incidents while using a controlled substance. DOPL stated that they would again extend the diversion agreement. The licensee then tested positive for a controlled substance and was removed from the program.

It is our view that DOPL should have taken action earlier in these cases to either encourage compliance or terminate the respective diversion agreements. We believe DOPL should act on each case of agreement violation and provide more guidance to diversion staff and committee members on how to consistently discipline noncompliant diversionees.

Recommendations

1. We recommend that DOPL comply with the diversion candidate evaluation procedure and associated time limits as defined in *Administrative Rule 156-1-404d*.
2. We recommend that DOPL consider creating a checklist that includes all of the necessary elements to determine appropriate program entrance, including adequacy of fact statement, and complete the checklist for each licensee evaluated.
3. We recommend that DOPL amend *Administrative Rule 156-1-404d(4)* to address situations in which no diversion agreement is offered and require the director's approval whenever diversion staff decide against referring nonentrants to investigations.
4. We recommend that DOPL develop a consistent, easily reviewed method for documenting and managing diversion case activity both in physical and electronic files and that DOPL provide employee training regarding these processes to ensure diversion staff understand the preferred method of file management.
5. We recommend that DOPL establish policies for invoking a range of appropriate sanctions based on the severity, frequency, or type of diversion violations.

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Appendices

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Appendix A

Current Professions Licensed by DOPL (November 2012)

PROFESSION NAME	LICENSE NAME	COUNT
Accountancy	C.P.A. Firm	603
	Certified Public Accountant	4,324
Acupuncture	Licensed Acupuncturist	118
Architect	Architect	2,123
Athlete Agents	Athlete Agent	27
Athletic Trainer	Athletic Trainer	397
Building Inspector	Combination Inspector	282
	Limited Inspector	353
	Burglar Alarm	185
Burglar Alarm	Burglar Alarm Company Agent	10,928
	Temporary Burglar Alarm Company Agent	691
	Chiropractic	832
Chiropractic	Chiropractic Physician	832
	Temporary Chiropractic Physician	2
	Clinical Mental Health	Assoc Clinical Mental Health Counselor
Assoc Clinical Mental Hlth Cnslor Extern		14
Clinical Mental Health Counselor		749
Volunteer Clinical Mental Hlth Counselor		1
Contractor	Contractor With LRF	15,985
	Contractor Without LRF	684
	Handyman Exemption Registration	712
	Instructor for Construction Mechanical	1
	Instructor for Electrical Trades	6
	Instructor for General Bldg Trades	23
	Instructor for Plumbing Trades	3
	Controlled Substance Handler	Controlled Substance Handler Facility
Controlled Substance Handler Individual		46
Cosmetology	Barber	177
	Barber Instructor	3
	Barber School	4
	Cosmetologist / Barber	26,056
	Cosmetologist / Barber Instructor	1,573
	Cosmetology / Barber School	51
	Electrologist	134
	Electrologist Instructor	7
	Electrology School	1
	Esthetician	497
Esthetician Instructor	343	

PROFESSION NAME	LICENSE NAME	COUNT
	Esthetics School	26
	Master Esthetician	3,244
	Nail Technician	4,198
	Nail Technician Instructor	168
	Nail Technology School	11
Court Reporter	Certified Court Reporter - Shorthand	116
CS Precursor	Controlled Substance Precursor	8
Deception Detection	Deception Detection Examiner	22
	Deception Detection Intern	2
Dental	Dental Hygienist	163
	Dental Hygienist with Local Anesthesia	2,232
	Dentist - Anesthesia Class I Permit	715
	Dentist - Anesthesia Class II Permit	1,580
	Dentist - Anesthesia Class III Permit	245
	Dentist - Anesthesia Class IV Permit	81
	Volunteer Dentist Anesthesia Class II	1
Dietitian	Certified Dietitian	574
Direct-Entry Midwife	Direct-Entry Midwife	23
Electrician	Apprentice Electrician	3,639
	Journeyman Electrician	4,257
	Master Electrician	2,146
	Residential Journeyman Electrician	154
	Residential Master Electrician	175
Elevator Mechanic	Elevator Mechanic	136
Engineer/Land Surveyor	Professional Engineer	6,902
	Professional Land Surveyor	779
	Professional Structural Engineer	2,216
Environmental Health Scientist	Environmental Health Scientist	234
	Environmental Health Scientist -Training	4
Factory Built Housing	Factory Built Housing Dealer	29
Funeral Service	Funeral Service Director	312
	Funeral Service Establishment	113
	Funeral Service Intern	39
Genetic Counselor	Genetic Counselor	54
	Temporary Genetic Counselor	9
Geologist	Professional Geologist	882
Health Facility Administrator	Health Facility Administrator	350
Hearing Instrument	Hearing Instrument Intern	22
	Hearing Instrument Specialist	72
	Temp Hearing Instrument Specialist	1
Hunting Guides/Outfitters	Hunting Guide	236
	Outfitter	103
Landscape Architect	Landscape Architect	372

PROFESSION NAME	LICENSE NAME	COUNT	
Marriage & Family Therapy	Associate Marriage & Family Therapist	133	
	Marriage & Family Therapist	475	
	Marriage & Family Therapist Externship	1	
Massage	Massage Apprentice	33	
	Massage Therapist	6,053	
Medical Language Interpreter	Certified Medical Language Interpreter	25	
Naturopathic	Naturopath including Surgery & OB	1	
	Naturopathic Limited CS Testosterone	16	
	Naturopathic Physician	31	
	Temporary Naturopathic Physician	2	
	A.P.R.N.	1,459	
Nurse	A.P.R.N. Intern	17	
	A.P.R.N. without P.P.	43	
	APRN-CRNA Controlled Substance	230	
	APRN-CRNA without PP	239	
	Certified Nurse Midwife	142	
	Certified Nurse Midwife without P.P.	2	
	Licensed Practical Nurse	2,912	
	Registered Nurse	27,618	
	Occupational Therapy	Occupational Therapist	634
		Occupational Therapy Assistant	261
Online Internet Facilitator	Online Internet Facilitator	2	
Optometrist	Optometrist	418	
	Optometrist (Without Certification)	6	
	Optometrist Diagnostic Only	11	
	Osteopathic Online Prescriber	3	
Osteopathic Physician	Osteopathic Physician & Surgeon	561	
	Volunteer Osteopathic Physician/Surgeon	1	
	Lethal Injection Use	1	
Pharmacy	Online Contract Pharmacy	2	
	Pharmacist	3,145	
	Pharmacy - Class A	477	
	Pharmacy - Class B	229	
	Pharmacy - Class C	81	
	Pharmacy - Class D	483	
	Pharmacy - Class E Business	485	
	Pharmacy Intern	796	
	Pharmacy Technician	4,798	
	Temporary Pharmacist	1	
	Physical Therapist	Physical Therapist	1,819
		Physical Therapist Assistant	539
Temporary Physical Therapist		1	
Temporary Physical Therapist Assistant		1	

PROFESSION NAME	LICENSE NAME	COUNT	
Physician	Physician & Surgeon	8,630	
	Physician Educator CS	4	
	Physician Educator Type II	4	
	Physician Online Prescriber	4	
	Temporary Physician & Surgeon	6	
	Volunteer Physician & Surgeon	2	
	Volunteer Physician/Surgeon CS	2	
Physician Assistant	Physician Assistant	1,000	
Plumber	Apprentice Plumber	1,309	
	Journeyman Plumber	802	
	Master Plumber	2,323	
	Residential Journeyman Plumber	68	
	Residential Master Plumber	51	
Podiatric Physician	Podiatric Physician	188	
Preneed	Pre-Need Sales Agent	263	
Private Probation Provider	Private Probation Provider	89	
Psychologist	Psychologist	816	
	Psychology Resident	44	
	Radiologic Technologist	2,377	
Radiology	Radiologist Assistant	5	
	Radiology Practical Technician	571	
	Master Therapeutic Recreation Specialist	47	
Recreational Therapy	Temp - Therapeutic Recreation Specialist	2	
	Therapeutic Recreation Specialist	345	
	Therapeutic Recreation Technician	378	
	Respiratory Care Practitioner	1,270	
	Respiratory Care	Respiratory Care Practitioner	1,270
Security Companies & Guards	Armed Private Security Officer	1,248	
	Armored Car Company	9	
	Armored Car Security Officer	421	
	Armored Car Training Program Provider	8	
	Contract Security Company	69	
	Contract Security Training Program Prov	6	
	Temp Unarmed Private Security Officer	2	
	Unarmed Private Security Officer	4,083	
	Social Work	ASWB Clinical Exam	1
		Certified Social Worker	1,006
Certified Social Worker Intern		13	
Licensed Clinical Social Worker		2,840	
Social Service Worker		1,712	
Speech/Audiology	Audiologist	240	
	Speech Lang Pathologist & Audiologist	10	
	Speech Language Pathologist	680	
	Temp Speech Language Pathologist	30	

PROFESSION NAME	LICENSE NAME	COUNT
Substance Use Disorder	Certified SUDC	74
	Certified SUDC Intern	12
	Licensed Advanced SUDC	62
	Licensed SUDC	389
Veterinarian	Veterinarian	640
	Veterinary Intern	18
Vocational Rehab Counselor	Licensed Vocational Rehab Counselor	221
TOTAL ACTIVE LICENSES		193,672

Source: http://dopl.utah.gov/Stats/2012_Nov.pdf

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Appendix B

Case #	Violation Count*	Specific Violations of Agreement Terms and Conditions
NURSE 1	46	<ul style="list-style-type: none"> • 14 failed drug screens* • 14 un-submitted documents • 12 missed call-ins • 6 unreported prescriptions • expired license[‡] • failed to pay drug screening costs for over 1 month, resulting in account placed on hold[‡]
NURSE 2	32	<ul style="list-style-type: none"> • 16 failed drug screens* • 2 criminal convictions • 8 un-submitted documents • 4 unreported prescriptions • 2 missed (required) meetings with the board • used multiple prescribers and pharmacies (count unclear)[‡] • expired license (throughout probation)[‡]
NURSE 3	6	<ul style="list-style-type: none"> • 3 counts of drug diversion • 2 unreported prescriptions • 1 failed drug screen*
NURSE 4	66	<ul style="list-style-type: none"> • 41 missed call-ins • 12 failed drug screens* • 12 un-submitted documents • 1 failure to show up for required treatment • failed to register for drug testing (2 months)[‡] • ingested alcohol (count undocumented)[‡]
NURSE 5	84	<ul style="list-style-type: none"> • 37 missed call-ins • 21 un-submitted documents • 14 failed drug screens* • 12 unreported prescriptions • used multiple prescribers and pharmacies (count unclear)[‡]
NURSE 6	5	<ul style="list-style-type: none"> • 4 counts related to criminal arrests and convictions • 1 self-reported overdose
PHARMACIST 7	15	<ul style="list-style-type: none"> • 5 failed drug screens* • 5 counts ingested alcohol • 3 missed call-ins • 1 unreported prescription • 1 count drug diversion

	Case #	Violation Count*	Specific Violations of Agreement Terms and Conditions
PHYSICIAN	8	1	<ul style="list-style-type: none"> • 1 unreported address/phone change • inadequate documentation (count unclear)[‡] • failed to submit documents (count undocumented)[‡]
COSMETOLOGIST	9	3	<ul style="list-style-type: none"> • 1 criminal conviction • 2 missed meetings with the board • expired license[‡] • failed to register for drug screening throughout probation[‡]
COSMETOLOGIST	10	7	<ul style="list-style-type: none"> • 6 months of noncompliance • 1 un-submitted report • failed to register for drug screening (4 months)[‡]
COSMETOLOGIST	11	15	<ul style="list-style-type: none"> • 15 missed call-ins
PHARMACIST	12	0	<ul style="list-style-type: none"> • N/A
PHYSICIAN	13	1	<ul style="list-style-type: none"> • 1 un-submitted document
SOCIAL WORKER	14	7	<ul style="list-style-type: none"> • 3 un-submitted documents • 2 missed meetings • 1 unreported address change
SOCIAL WORKER	15	2	<ul style="list-style-type: none"> • 1 un-submitted document • 1 unfavorable employer report
SECURITY OFFICER	16	2	<ul style="list-style-type: none"> • 2 missed meetings • failed to submitted documents throughout probation (count undocumented)[‡]
SECURITY OFFICER	17	3	<ul style="list-style-type: none"> • 2 un-submitted document • 1 missed meeting • failed to register for drug screening (throughout probation)[‡]

	Case #	Violation Count*	Specific Violations of Agreement Terms and Conditions
SECURITY OFFICER	18	5	<ul style="list-style-type: none"> • 4 missed meetings • 1 un-submitted document • expired license
SECURITY OFFICER	19	2	<ul style="list-style-type: none"> • 2 un-submitted documents • expired license[‡]
DENTIST	20	0	<ul style="list-style-type: none"> • N/A
DENTIST	21	28	<ul style="list-style-type: none"> • 4 failed drug screens[♦] • 20 missed calls • 4 un-submitted documents

* These counts represent the minimum number of violations we could quantify using existing case documentation.

‡ Due to the nature of these violations and/or insufficient documentation, we were unable to quantify these violations; therefore, they are not included in the "Violation Count" column.

♦ Failed drug screen include positive, dilute, and un-submitted samples for drug analysis.

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Agency Response

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State of Utah
Department of Commerce
Division of Occupational and Professional Licensing

GARY R. HERBERT
Governor

FRANCINE A. GIANI
Executive Director

MARK B. STEINAGEL
Division Director

Tuesday, December 11, 2012

Mr John M. Schaff, CIA
Legislative Auditor General
315 House Building
PO Box 145315
Salt Lake City, UT 84114-5315

Subject: Response to “A Performance Audit of the Division of Occupational and Professional Licensing.” (Report No. 2012-15)

Dear Mr Schaff:

Thank you for the opportunity to review and respond to “A Performance Audit of the Division of Occupational and Professional Licensing.” (DOPL) Many of the recommendations were already being addressed by DOPL staff prior to the audit, while many others were not. **DOPL has implemented or will implement each recommendation made in the audit.**

Sincerely,

Mark Steinagel
Director