



Legislative Background Brief

for the
Economic Affairs Interim Committee

3/14/14

Licensing Boards: Contingency Funds / Fees Commensurate with Costs

Professional and occupational licensing boards are a part of state government but they are funded through licensees. The Legislature's role is through providing spending authority as part of the base budgeting process. The budgeting process is not as cut-and-dried as may be expected in part because those who determine the costs are not necessarily those paying the costs. Each board's budget must pay both the direct costs of the board and the administrative costs of the Department. The Department notes that the indirect (administrative) costs typically run around 30% of the overall budget each year.

The Players:

- The Department of Labor and Industry, to which licensing boards are administratively attached, as part of its administrative functions under 2-15-121 determines each board's basic budget. Moreover, the Department houses the appropriation authority for each board. The Department staff, particularly the executive officers, work with the board to which they are assigned to determine the board's budget needs. Given that the department handles staffing and the budgets, there is an expectation that expenses will be covered if nothing out of the ordinary occurs. The Department is required to equitably distribute its costs, but licensing boards complain that they have no say in determining when or whether to pay for a new computer system, additional staff attorneys, or management training, among other costs not specific to any one board.
- Each individual board may request to enlarge its own budget by presenting a new proposal (as part of a decision package to the Legislature), but that proposal must receive both department and executive approval for new programs (see 37-1-131(1)(f), MCA). A new proposal also may be made to the Department if there is existing appropriation authority to cover costs.
- The Governor and the Legislature or both, as part of the budgeting process, may direct that expenditures be reduced by a certain percentage or that vacancy savings be achieved.
- Consumers may file complaints that drive up the legal and investigation costs of a board. Those boards that interact more with the public (such as the Board of Hearing Aid Dispensers) may face more complaints than, for example, the Board of Clinical Laboratory Scientists. Boards that allow anonymous complaints have no way of knowing without an investigation whether complaints derive from baseless competitive rivalries or legitimate problems from a consumer. Consumer-driven complaints cannot be normally anticipated.
- Licensees may increase or decrease in number, which can change the anticipated income from licensing renewals or initial applications.

The Problems

Given the uncertainties of income and expenditures for licensing boards, the likelihood of budgetary shortfalls seems higher than a board having too much money. Yet a Legislative Financial Audit for the two fiscal years ending June 30, 2013, found that

more than half of the licensing boards had excess equity balances. One argument, with which the Department does not necessarily agree, is that "budgets" for some boards may be set too high, possibly out of concern for unexpected expenditures. Conversely, the budgets may be appropriately set but unanticipated lack of expenses may have resulted in excess cash balances for some boards. For example, unexpected or hard-to-fill vacancies may occur, a situation that results in expenditures being less than revenues.

If the problem is budgets being "too high", that may mean that some boards have been overcharging possibly out of the Department's concern for unexpected legal actions or having a cushion in case of a shortfall in appropriation authority. Having too much money goes against the requirements of 17-2-302, MCA, which puts a limit on the balance in each board's account to less than twice the annual appropriation or no greater than the biennial appropriation. The audit indicated (p. 9) that the Department tries to maintain each board's cash balance at up to twice the annual appropriation but that some boards may not need that much cash. Whether trying to maintain a surplus but stay under the two-times appropriation authority or budget as closely to expenditures as possible, the Department has to act within the constraints of limited appropriation authority and a lengthy rulemaking process to increase fees (in cases where appropriation authority exists but revenues are short) or decrease fees if cash on hand pushes against the two-times limit of 17-2-302, MCA.

Potential Solutions

To address the excess cash balance problem, the Department said that a legislative remedy would be pursued to accomplish the following goals:

- protect licensees from excessive or inflated fees;
- provide auditors with a clear and consistent guideline to monitor the Department's effectiveness in doing this;
- allow the boards to maintain a reasonable cash contingency for unexpected expenses; and
- allow the Department to continue using a staggered renewal cycle for boards so that the Department staff can be used as efficiently as possible.

The following Table proposes Department solutions and legislative staff comments. For an explanation of the Department solutions, see the Department handout.

Revising the statute 37-1-134, MCA, related to "fees commensurate with costs"

The Department suggests:

- to revise 37-1-134, MCA, to more clearly define "fees commensurate with costs" in a way that allows boards to maintain a cash reserve to pay for unexpected costs that may arise. See Department handout (to be presented at EAIC meeting).

Legislative staff comments:

The Department suggests a simple approach to allow more flexibility (and staff has not seen the language). However, there may be a need to address the language not just to meet the audit concerns but to recognize that boards need limited flexibility for contingencies. Language is proposed below in Appendix A, along with the current statute. The current language recognizes routine fees but does not mention legal charges that may vary considerably. The proposed language clarifies what fees are charged by the Department because the Department determines the board's basic costs.

Create a restricted appropriation for boards to meet unexpected contingencies

The Department suggests:

- to create a restricted appropriation that could be used by boards to meet unexpected legal or investigation expenses if an enterprise fund is not created.

Legislative staff comments:

Legislative staff has not seen this proposal but provides some comments about the existing process of using borrowed appropriation authority and concerns about how a restricted contingency appropriation might be used.

The current Department process of tapping appropriation authority works for a board that has unanticipated cost overruns. The Department has said there also is a concern about what happens if there is not appropriation authority for cost overruns. Sufficient appropriation authority has been available to date from another board or within the Business Standards Division to tap unused spending authority. (There may be a question of whether the Department has been inflating appropriation authority by trying to achieve two times the annual appropriation for each board, but a contingency appropriation authority might resolve that question.) According to 17-2-107(2), a "loan" from one entity to another can be done for a year. The current borrowing of appropriation authority is cumbersome but workable. A board with a shortfall of funds still would need to raise fees or levy special assessments to make up its shortfall. There may be a question of whether there is statutory authority to levy assessments without using a rule process. The Department has made the current difficult situation work, but the gyrations aren't necessarily pretty or easy. The Department suggests that a contingency appropriation authority might be considered as one-time only or restricted in some fashion. While the contingency authority might resolve the audit concerns of surpassing two times the appropriation authority (against the requirements of 17-2-302, MCA), the "fix" appears to not quite resolve the issue of unexpected costs that boards still may face. The "fix" is more to address an audit issue than deal with cost overruns.

Contingency authority also too easily might be seen as "extra" money that either the Business Standards Division, the Department, or the Legislature may tap into. A more precise approach to overfunded budgets may be to refine the budgeting process by allowing exceptions for licensing boards to the two-times annual appropriations language in 17-2-302, MCA, and to the "fees commensurate with costs" language currently in 37-1-134, MCA.

Make boards into enterprise funds rather than state special revenue accounts

The Department suggests:

- to revise the state special revenue account designation to an enterprise fund.

Legislative staff comments:

An enterprise fund typically is for goods-delivering entities and may be used for service-providing entities but are not necessarily used for regulatory entities like licensing boards. An enterprise fund, defined in 17-2-102, MCA, allows accounting for operations financed and operated similarly to a private business whose costs of goods or services are met by user charges. An enterprise fund also may be established if the Legislature determines that approach is appropriate for accountability, among other measures.

Entities that operate under an enterprise fund do not, unless required by statute, have any legislative budgetary oversight. Those few enterprise funds required by statute to go through a budgetary process include the state lottery, the hail insurance board, and the liquor warehouse. An enterprise fund without a budgetary review exists to handle state park visitor services revenue; the revenue in the fund is to be used as directed by 23-1-105(5).

The department also has suggested that an enterprise fund would better meet some accounting standards and be a relief in particular to the Board of Public Accountants. However, audit information indicates there is no conflict between statute and the principles represented by GAAP (generally accepted accounting principles) or GASB (Governmental Accounting Standards Board) The Department reports: "...the issue of the GAAP appropriateness of an enterprise fund vs. a state special fund would not be looked at as a part of the Department audit, but rather as a part of the statewide CAFR [comprehensive annual financial report] audit, which has not yet happened." The Department also noted no conflict exists in statute because if state law conflicts with GAAP, state law trumps.

A question remains regarding enterprise fund flexibility for unexpected board costs, if a board is unable to meet those costs. However, an enterprise fund may resolve the issue of appropriation authority and excess cash balances.

Still another option suggested to the Economic Affairs Committee was that fines assessed by the board against licensees found to act unprofessionally be routed back to each board's use rather than to the general fund. Various comments have come in related to this suggestion. The Department has provided information that shows in FY 2012 all licensing boards reverted \$21,900, increasing to \$57,615 in FY 2013 and dropping to \$53,485 in FY 2014. The highest number of fines were for the Board of Realty Regulation (\$15,850 in FY 2014 and the Board of Plumbers, \$13,875 in FY 2013.)

The reversion of fines back to a particular licensing board would require a statutory change because now most of these fines are required to go to the general fund. HB 109 in the 2013 session proposed to allow costs and fees to the prevailing party. If that party was the licensing board, the fine was to be deposited in the board's special revenue account, up to a certain amount, instead of into the general fund. That bill, requested by the Department of Labor and Industry, applied only to the Board of Realty Regulation, the Electrical Board, and the Board of Plumbers. There are fans and opponents of this type of provision. Fans say that those who drive up costs because of litigation ought to pay those legal costs if found to be violating statutes. Opponents say that a board can initiate or sway proceedings to increase their funding through litigation. See Appendix B for comments on the fine reversion and Appendix C for Department data on fines received.

Appendix A:

Options for revising statutory language for "fees commensurate with costs"

The Department has asked for a better definition of "fees commensurate with costs". The language in 37-1-134, MCA, reads:

Each board allocated to the department shall set board fees related to the respective program area that are commensurate with costs for licensing, including fees for initial licensing, reciprocity, renewals, applications, inspections, and audits. A board may set an examination fee that must be commensurate with costs. A board that issues endorsements and licenses specialties shall set respective fees commensurate with costs. Unless otherwise provided by law, the department may establish standardized fees, including but not limited to fees for administrative services such as license verification, duplicate licenses, late penalty renewals, licensee lists, and other administrative service fees determined by the department as applicable to all boards and department programs. The department shall collect administrative fees on behalf of each board or department program and deposit the fees in the state special revenue fund in the appropriate account for each board or department program. Administrative service costs not related to a specific board or program area may be equitably distributed to board or program areas as determined by the department. Each board and department program shall maintain records sufficient to support the fees charged for each program area.

Possible changes to this statute would be to first describe what fees are to be commensurate with costs, starting with the fees charged by the Department because the Department determines the basic costs for the board. Current language also emphasizes routine fees but does not mention legal charges that may vary considerably.

A proposed revision of 37-1-134, MCA, to allow more flexibility might state:

1) Unless otherwise provided by law, the department shall establish standardized fees for:

a) administrative services, such as license verification, duplicate licenses, late penalty renewals, licensee lists, and other administrative service fees determined by the department as applicable to all boards and department programs; and

b) the other costs of staffing for each specific board, including the cost for program operations and the equitable costs of the department as provided in 37-1-101. Costs for investigations and legal issues must be set as provided in subsection (3).

2) The department, after consultation with licensing board members, may include in each board or program budget the equitable cost of an administrative service not related to a specific board or program area if the department considers the service cost necessary to improve the services to all boards or program areas. An explanation of the necessity must accompany each consultation with a board.

3) The department, after consultation with each licensing board, shall set the cost of staffing for investigations if necessary and for legal defense, rule writing, and legal advice to boards. The cost may be an exception to setting budgets commensurate with costs if any board or program area demonstrates in the previous biennium a greater number of complaints and investigations than had been projected for that biennium's budget. If in any year the cost of

investigations and legal fees surpasses the limitation of 17-2-302, the department shall adjust the board's next budget accordingly.

4) Each board allocated to the department shall set board fees other than those standardized fees set by the department under subsections (1) and (2) that are necessary to meet related board costs. These fees must be commensurate with the costs of each board's anticipated funding cycle, which must be based on the renewal year set by rule. (or as defined in new definition in 317-1-130).

5) A board, or the department for a program area, may assess an emergency charge if the fees assessed under this section are insufficient to cover costs during the board's funding cycle.

**Appendix B:
Comments regarding diversion of licensing board fines to board coffers**

From Electricians or Electrician Representatives:

----- PRO -----

I would like to voice my opinion regarding monies from fines incurred to electrical license holders going into the Montana State general fund. Why not use the monies within the State Electrical Licensing Dept. ? The monies could be used for various things . A few examples would be , funds for enforcing licensing laws on smaller projects and in rural areas of the state which get neglected. Also keeping the license renewal costs from continuing to go up. The number of people who dont renew their Montana State journeyman license will go up and they will just go work elsewhere. Ive been doing this for 35 years and I hear it all the time. Please consider this request. James J Kotur, Master Electrician, Thank You !

I'm a Montana licensed electrician and I'm tired of paying for the laws to be enforced and our licensing fees keep going up. The Board cannot keep the fines it collects. These fines would in a small way help to control the costs of licenses. The Board needs to find another way to recover the costs of enforcing the law they are mandated to do.

I'm licensed in other states and the cost of my license in those states is no where close to the cost of the Montana license and the two year renewal is even more ridiculous. It costs me more money to get my educational credits in for my MT license and more in license costs than any other state in the US. You really need to change both things in Montana - your driving licensed electricians out of our state.

Please consider this. Thank you
James K. Downey

Dear Sir:

I believe first of all, the state inspectors should be allowed to fine any and all violations that they see. The board should back them 100% and keep their nose out if it happens to be someone they know. A violation is a violation, no matter who it is. Secondly, all revenue generated by these violations should belong to the board. This will help not only the cost of enforcing proper electrical practices, but also help keep the cost of our licenses down to a responsible level. Thank for your time.

Sincerely,
Lawrence Gebhardt

My name is Nick Allen and a licensed electrician in Montana license number ELE-EJ-LIC-9745. I'm tired of paying for the laws to be enforced and our licensing fee's keep going up and the Board cannot keep the fines it collects. If the board were able to recover the costs of enforcing the law they are mandated to do.

Thank You,
Nick Allen

To whom it may concern,

I am writing in concern to the increasing cost of the licensing fee for electricians which currently is one of the highest in the nation. Currently, any fines collected by the Electrical Board goes to the General Fund of the State of Montana. The Electrical Board still has to expend the money to go after the law breakers, and when a fine is issued, they get no reimbursement from the fine, rather it goes to the General Fund. I believe that allowing the income generated by the fines to go back to the Electrical Board would help with the enforcement of the laws that protect the lives and property of the Montana Citizens as well as helping with the cost of the license itself.

If you have any questions concerning this issue, please feel free to contact me.

Martin Wollenburg, IBEW

The board needs to stop raising license fees. The state waste more money chasing down NON-compliant people state wide for working with out a license. And doesn't fine them enough to even make it worth the while to stopping them from working illegal. If you need more money in Helena. (Jack up your Fines

The fine for illegal contracting is a joke. Then the legal contractors and journeymen electrician's that are working with-in there guild lines get pushed to the Max with fee's, taxes & rules.

The Montana state electrical board as turned into Washington DC. If they can find away to tax and regulate a group of hard working people they will.

Now if the state is so concerned about public safety and need's more money. Increase our fee's YES, But they should make it a rule like other state's!!! That NO one can do electrical work even on there own home unless they are trained in the field of electrical installation and licensed and insured. This will protect future buyer's of the property and generate ton's of money in fines and increased license fee's. Or just abolish the state board and license fee's as a contractors insurance company will cover all and any work. The state pretty much allows the home owner and another to do as they please, while only regulating the licensed trained,insured personal.

Matthew D Burg , Pres.
Advanced Electric

Honorable Committee Members,

I'm a Montana licensed Master Electrician. In the past two sessions I have supported legislation to help licensing boards retain/recover fines they collect for enforcing the law. Currently, the fines go to the General Fund of the State of Montana. As electricians, we do not mind carrying our fair share, but expending monies to enforce licensure laws and then have any fines that are collected be sent to the Montana general fund is frustrating.

Our license fees have increased the past few years and we believe that if the boards can retain all the fines they collect or at the minimum cover the costs to enforce those laws that might help hold down the costs of our licenses.

The Department of Labor has many employees administratively tied to the Boards and when they (clerks, lawyers, court transcribers, etc.) help enforce the laws, their time is charged back to the boards. I'm sure you can imagine how this gets very expensive, very quick.

The right thing to do is let the boards retain the fines they collect or let them cover their costs and if there is extra fines left over, then the extra could go back to the Montana General Fund. It would be even better if the extra fines were mandated to be used to help educate the public about the dangers of electricity and the need to use licensed electricians.

Keith Allen
Master Electrician

Montana Legislature Economic Affairs Interim Committee,
It has come to my attention you are considering legislation regarding licensing boards **which would allowing boards to retain all fines or a portion of fines be an appropriate approach to help boards remain solvent when they have unexpected and unbudgeted-for legal costs? Is a**

contingency assessment or fund another way of handling unexpected costs?

As a contractor and master electrician I feel retaining the fine as the best solution. It is important to fully fund the licensing boards and putting it all on the law a bidding electricians and contractors isn't the right approach. Violators are the ones that drive these unexpected costs and it makes sense to utilize the money collected to fund the legal costs.

Please keep in mind when these Boards are poorly funded then the laws of this state are poorly enforced. This puts the unsuspecting public at risk and creates a bigger problem of unlicensed and untrained performing work. What happens in the long run is these people can cause insurance rates and workmen comp. rates to go up. Please help us fight crime and support this measure.

Sincerely,
Jeff Hoffer - Estimator/Project Manager
Eagle Electric Inc.

Hello, my name is David Lull, I am a licensed journeyman wireman out of Butte MT (License # ELE-EJ-LICL11484). I'd like to add my 2 cents worth regarding the fines levied by the electrical board. I think allowing the money from any fines to be retained by the licensing board is a great idea, as it helps encourage enforcement, and helps right a wrong, that wrong is that currently, the licenced pay for enforcement of our laws and codes, while the state receives the (financial) benefit. In my view, and I'm sure many others would agree, it's much more fair for those who break the law to pay for its enforcement, rather than those of us who abide by it. This also encourages the board to go after law breakers, by keeping the money is in the boards hands, rather than dumping it into the States General Fund... To sum it up, the board needs the money as it is having solvency issues, and the state most definitely does not. I believe it is unfair for those issues to be solved solely upon the backs of those of us who are licensed, and choose to do the right thing.

Thanks to all who read this, for your valuable time, and for hearing my voice. It is much appreciated.

-David M Lull

----- CON -----

I am writing on behalf of the Montana Independent Electrical Contractors (IEC) regarding a proposal that licensing boards be allowed to retain fines. The Board that concerns the IEC is the State Electrical Board. The IEC opposes allowing this Board to retain fines.

Independent Electrical Contractors make up a large majority of Electrical Contractors in Montana and do a majority of the electrical work in the State, as well. The Electrical Board currently has only one Independent Electrical Contractor on its 5-member Board. The Board is simply not representative of the electrical industry. Additionally, there are many non-consumer complaints filed against independent electrical contractors and the Board can also generate its own complaints. In many cases, complaints are being used as a form of harassment.

The idea allowing this Board to keep its fines is very concerning and gives the Board more incentive to issue fines. In our opinion, ALL licensed professions should consider this major change in philosophy very carefully.

In the case of Electrical Board, perhaps if the only fines that were able to kept were those filed by Consumers, it may be okay.

However, we see a need for information and statistics. How many complaints are filed per year by consumers, versus the total number of complaints? How much annual revenue comes in to the General Fund through fines, broken down by each individual Board? And, of course, we are interested in how much money is generated from fines from complaints from Consumers versus complaints from other groups.

We think that the EAIC would need to know the numbers from all of the Boards before it could proceed with such a large change in how Boards are completely funded.

A different solution would be to add a small assessment should be added on to every license fee, as needed. That way, Boards with plenty of money would not need an assessment at all for legal costs, and Boards with few legal costs may not need an assessment. Those Boards that need to build a Legal Fund may have to add an assessment on to their License Fees.

Margaret Morgan
Representing Montana IEC

From Other Public Commenters

As to licensing boards keeping fine money. I strongly oppose that concept for two reasons. First, it would make them harder to deal with and more likely to levy fines even in questionable cases as they retain the money to pad their budget and grow their agencies. Second, it would make them less responsive and responsible to the legislature as they became less dependent on legislative appropriation for their funding. Thus the legislature and ultimately the public would lose their check and balance on the agencies.

Pat Keim

**Appendix C:
Board fines submitted to General Fund For FY 2012 through FY 2014 to Date**

BUSINESS STANDARDS DIVISION FINES RECEIVED
PER DEPOSITS TO ACCELA DATABASE

BOARD OR FUND	FIS	FISCAL YEAR 12S	FISCAL YEAR 13S	FISCAL YEAR 14
ARCHITECTS	\$	500.00		\$ 1,500.00
BARBERS/COSMETOLOGY	\$	9,000.00	\$ 2,850.00	\$ 3,725.00
CHIROPRACTORS			\$ 1,350.00	\$ 2,800.00
CLIN LAB SCIENCE			\$ 300.00	
DENTISTRY				\$ 400.00
ELECTRICAL	\$	4,975.00	\$ 4,050.00	\$ 3,750.00
FUNERAL			\$ 6,000.00	\$ 8,500.00
HEARING AID DISPENSERS			\$ 3,750.00	
LICENSED ADDICTION CO			\$ 600.00	\$ 250.00
MASSAGE THERAPY				\$ 300.00
MEDICAL	\$	5,000.00	\$ 2,600.00	
OPTOMETRY			\$ 500.00	\$ 500.00
OUTFITTERS *	\$	(6,600.00)	\$ 2,700.00	\$ 3,050.00
PHARMACY			\$ 2,000.00	
PHYSICAL THERAPY	\$	200.00		
PLUMBERS	\$	3,400.00	\$ 13,875.00	\$ 1,300.00
PRIVATE SECURITY			\$ 750.00	\$ 9,400.00
PROFESSIONAL ENGINEERS	\$	1,000.00		
PUBLIC ACCOUNTANTS	\$	1,125.00	\$ 500.00	
REAL ESTATE APPRAISERS	\$	1,800.00	\$ 3,050.00	\$ 1,500.00
REALTY REGULATION			\$ 11,680.00	\$ 15,850.00
SOCIAL WORK EXAMINERS	\$	500.00	\$ 560.00	\$ 160.00
VETERINARY SCIENCE	\$	1,000.00	\$ 500.00	\$ 500.00
TOTALS FOR LICENSING	\$	21,900.00	\$ 57,615.00	\$ 53,485.00
BUILDING CODES BUREAU			\$ 500.00	
TOTAL FOR BUILDING CODES			\$ 500.00	

*OUT ADJUSTMENT =FWP PAYMENT STATUTORLY REQUIRED DURING FY 15 FOR FWP PORTION OF CLIENT/HUNTER FEE