

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
DENTAL BOARD OF CALIFORNIA)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
REGULATORY ACTION:)	(Gov. Code, sec. 11349.3)
)	
Title 16, California Code of Regulations)	OAL File No. 05-0301-02 S
AMEND SECTION: 1043.2)	
_____)	

SUMMARY OF REGULATORY ACTION

This regulatory action deals with the composition of onsite inspection and evaluation teams. The Dental Board of California (“Board”) submitted this regulatory action to the Office of Administrative Law (“OAL”) on March 1, 2005. On April 12, 2005, OAL notified the Board that OAL had disapproved the regulation because it failed to comply with the Clarity and Necessity standards contained in Government Code section 11349.1 and for incorrect procedure.

DISCUSSION

Regulations adopted by the Board must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) No exemption or exclusion applies to the regulatory action under review. Before this regulatory action may become effective, it is subject to a review by OAL for compliance with procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) For this reason, subdivision (a)(3) of Government Code section 11349.1 requires that OAL review all regulations for compliance with the Clarity standard. Government Code section 11349, subdivision (c), defines “Clarity” as meaning “. . . written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

Section 16, subdivision (a), of Title 1 of the California Code of Regulations (CCR) further provides in relevant part:

- “(a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those ‘directly affected’ by the regulation, and those terms are defined neither in the regulation nor in the governing statute; ...
- (b) Persons shall be presumed to be ‘directly affected’ if they:
- (1) are legally required to comply with the regulation;
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.”

Section 1043.3 of Title 1 of the CCR states that all dental offices in which general anesthesia or conscious sedation is conducted “. . . may in the discretion of the board be required to undergo an onsite inspection.”

Existing section 1043.2 of Title 1 of the CCR describes the composition of the onsite inspection and evaluation team as “. . . two or more persons chosen and approved by the board . . .” and specifies the criteria to be an evaluator.

1. Proposed subdivision (e) of section 1043.2 would add the following criteria: “All evaluators will have attended a Board approved training course.”

This language does not specify when an evaluator must attend the required course. As written, it is some unspecified time after a person has the status of being an evaluator. This open ended requirement conflicts with the following description of the Board’s intended effect of the regulation contained in the Informative Digest:

“Through the evaluation of this program, it has become apparent that evaluators, like all licensees, benefit from periodic training. One of the proposed amendments would require all evaluators to take a board-approved training course prior to appointment as an evaluator.” (Emphasis added.)

Clarification is needed from the Board. Subdivision (e) currently reads as if it applies only to persons who are already evaluators. If the course must be taken prior to being appointed as an evaluator then that requirement must be added to the regulation. The Informative Digest refers

to the benefit to evaluators from periodic training which is different from taking only one course before becoming an evaluator. It is not clear how, or even if, current evaluators are affected by proposed subdivision (e). Are they grandfathered in or must they also take the course, and if so, when and how frequently?

The phrase “Board approved evaluator training course” also raises clarity issues. How would a person know if a course was “Board approved”? Is this a situation where a provider of courses has to apply for approval status? If this is the Board’s intent then the application process including appeal rights would need to be in regulation. Alternatively, this proposed language could also reasonably and logically be interpreted to refer to a Board developed and sponsored course.

2. Proposed subdivision (f) of section 1043.2 states that “The Board may terminate an evaluator at any time and without cause.”

Persons are not “terminated”. Obviously a phrase is missing. Is it the status of being an evaluator or is there an employment relationship being terminated? Alternatively, this language might mean that being an evaluator does not guarantee being used on an onsite inspection and evaluation team.

Additionally the phrase that the termination can occur “. . . at any time and without cause” conflicts with the following description of the Board’s intended effect of the regulation contained in the Informative Digest:

“With regard to the second proposed amendment, there is occasionally in the public interest a need to remove an evaluator from the program; this proposed amendment would allow the Dental Board the flexibility to remove an evaluator at any time and without cause.” (Emphasis added.)

If there is a contractual relationship between the evaluator and the Board then an issue arises as to whether the proposed regulation is consistent with the contractual relationship.

NECESSITY

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349, subdivision (a) defines “necessity” to mean that

“. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard evidence includes, but is not limited to, facts, studies, and expert opinion.”

Section 10, subdivision (b) of Title 1 of the CCR provides that in order to meet the “necessity standard” the rulemaking record must include:

“(1) A statement of the specific purpose of each adoption, amendment, or repeal; and

(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.”

The rulemaking record does not contain adequate necessity for the proposed regulations. It is not clear what is the specific purpose for each regulatory provision and/or why each provision is required to carry out the described purpose. The necessity in this filing is either non-existent or inconsistent with the proposed regulation language.

INCORRECT PROCEDURE

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.)

1. Government Code section 11347.3, subdivision (b)(12) mandates that the rulemaking file shall include:

“An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.”

The closing Statement/Certification contains the following declaration:

“I declare under penalty of perjury under the laws of the State of California that the record in this matter closed on June 24, 2004. The file and this copy are complete.”

The Table of Contents preceding the Closing Statement/Certification lists as Item VIII “All Fiscal Impact/Cost Estimates/STD. 399.” Although the record was closed on June 24, 2004, both the “Request for Approval of Regulations” and the Standard Form 399 contained in Item VIII are dated February 23, 2005. The February 23, 2005 date indicates that either the record was not

complete when it was closed or that the closing date was later than June 24, 2004. Either conclusion is inconsistent with the Closing Statement/Certification.

Please note: When this regulatory action is resubmitted the new Closing Statement/Clarification closing date will resolve this issue.

2. Item B9 of the Form 400 is missing the Title of the signatory. This also can be resolved when a new Form 400 is used for the resubmittal of this regulatory action..

CONCLUSION

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the clarity and necessity standards, and for incorrect procedure.

Please contact me at (916) 323-6809 if you have any questions.

April 19, 2005

BARBARA ECKARD
Senior Staff Counsel

For:

WILLIAM L. GAUSEWITZ
Director

Original: Cynthia Gatlin, Executive Officer
Cc: Richard De Cuir