

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)
)
) **DECISION OF DISAPPROVAL**
PHYSICAL THERAPY BOARD) **OF REGULATORY ACTION**
OF CALIFORNIA)
)
REGULATORY ACTION:)
) **(Gov. Code, sec. 11349.3)**
Title 16, California Code of)
Regulations)
) **OAL File No. 05-0617-03 S**
Adopt Sections: 1399.50, 1399.52)
_____)

SUMMARY OF REGULATORY ACTION

This regulatory action deals with fees for applications, examinations and licensing of Physical Therapists and Physical Therapist Assistants. On August 1, 2005 the Office of Administrative Law (“OAL”) notified the Physical Therapy Board of California (“Board”) that OAL disapproved the regulations because they failed to comply with the Consistency and Clarity standards contained in Government Code section 11349.1.

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).)

Please note that the proposed regulatory amendments are shown in underline to indicate new language and strikeout to show deletions from existing regulatory language.

A. CONSISTENCY

OAL is required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the Consistency standard. “‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code, sec. 11349, subd. (d).)

Business and Professions Code section 2688, subdivision (b) mandates that:

“The examination and reexamination fees for the physical therapist examination, physical therapist assistant examination, and the examination to demonstrate knowledge of the rules and regulations related to the practice of physical therapy shall be the actual cost to the board of the development and writing of, or purchase of the examination, and grading of each written examination, plus the actual cost of administering each examination.”

1. The proposed amendment of section 1399.50, subdivision (c), which sets specific fees for Physical Therapists, requires that:

“The examination and re-examination fees for taking the national examination shall be ~~\$280.00 for those applications postmarked on or before April 30, 2000.~~ paid directly to the Federation of State Boards of Physical Therapy at the level established by the Federation of State Boards of Physical Therapy for all candidates from all states. For those applications postmarked on ~~or after May 1, 2000,~~ before June 30, 2005, the examination and re-examination fees for taking the national examination shall be \$380.00 if paid directly to the Physical Therapy Board of California.”

Proposed subdivision (c) of section 1399.50 is inconsistent with Business and Professions Code section 2688, subdivision (b) because it allows an outside entity, the Federation of State Boards of Physical Therapy (“Federation”), to set the examination and reexamination fees when those fees by statute must be based on the Board’s actual costs.

The pre-existing fee amount of \$380 is not inconsistent with Business and Professions Code section 2688, subdivision (b) because it has been previously reviewed by OAL for full compliance with the APA in a prior rulemaking

2. Proposed section 1399.50, subdivision (d) requires that for Physical Therapists:

“The examination and re-examination fees for taking the law and regulation examination shall be ~~\$85.00~~ \$60.00 and shall be paid directly to the Federation of State Boards of Physical Therapy. For those applications postmarked on or before June 30, 2005, the examination and re-examination fees for taking the law and regulation examination shall be \$85.00 if paid directly to the Physical Therapy Board of California.”

The \$60 fee is to be paid not to the Board but directly to the Federation. Although the rulemaking record is silent as to the basis for the \$60 fee, the rulemaking record clearly establishes that the \$85 fee is the only fee based on the Board’s actual costs. Therefore only the \$85 fee, but not the \$60 fee, is consistent with Business and Professions Code section 2688, subdivision (b).

3. Proposed section 1399.52, subdivision (b), requires that the fees for examination and re-examination for the physical therapist assistant national examination:

“. . . shall be paid directly to the Federation of State Boards of Physical Therapy at the level established by the Federation of State Boards of Physical Therapy for all candidates from all states.”

This language is inconsistent with Business and Professions Code section 2688, subdivision (a) for the same reasons contained in Issue A.1.

Proposed section 1399.52, subdivision (b) also states that:

“For those applications postmarked on or before June 30, 2005, after May 1, 2000, the examination and re-examination fees for taking the national examination shall be \$365.00 if paid directly to the Physical Therapy Board of California.”

The fee of \$365 that is paid directly to the Board is a pre-existing fee that was previously reviewed by OAL for full compliance with the APA in a prior rulemaking. It is not inconsistent with Business and Professions Code section 2688, subdivision (a).

4. Proposed section 1399.52, subdivision (c) states that for Physical Therapist Assistants:

“The examination and re-examination fees for taking the law and regulation examination shall be ~~\$85.00~~ \$60.00 and shall be paid directly to the Federation of State Boards of Physical Therapy. For those applications postmarked on or before June 30, 2005, the examination and re-examination fees for taking the law and regulation examination shall be \$85.00 if paid directly to the Physical Therapy Board of California.”

This language is identical to section 1399.50, subdivision (d) that is discussed in Issue A.2. The regulation establishes a fee of \$60 that is to be paid not to the Board, but directly to the Federation. The rulemaking record is silent as to what is the basis for the \$60 fee but the rulemaking record clearly establishes that the \$85 fee is based on the Board’s actual costs. Therefore only the \$85 fee, but not the \$60 fee, is consistent with Business and Professions Code section 2688, subdivision (b).

B. 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, subd. (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 that:

“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.”

1. The proposed amendments to section 1399.50, subdivisions (c) and (d) and section 1399.52, subdivisions (b) and (c) establish a deadline for applications to be postmarked no later than June 30, 2005 and if that deadline is met then the applicable fee must be paid directly to the Board.

This regulatory action was submitted to OAL on June 17, 2005. Item B5 on the Form 400 was checked for an effective date of 30 days after OAL has reviewed, approved and filed the regulations with the Secretary of State. Even if the proposed regulations had been reviewed, approved and filed at the Secretary of State on June 17, 2005, they would have not been effective until 30 days later. The postmarked application deadline of June 30, 2005 would have already expired. A regulation cannot be effective retroactively without specific statutory authority and there is no such statutory authority for these regulations. Requiring applicants to meet a deadline which has already passed is not only impossible to comply with, it raises the issue of what application procedure and fee is required after that date.

CONCLUSION

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the Consistency and Clarity standards contained in Government Code section 11349.1.

August 1, 2005

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