

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
DEPARTMENT OF REHABILITATION)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
REGULATORY ACTION:)	(Gov. Code, sec. 11349.3)
Title 9, California Code of)	
Regulations)	OAL File No. 2009-0227-01S
)	
ADOPT SECTIONS 7213.4, 7213.5, 7213.6,)	
7214.1, 7214.2, 7214.3, 7214.4, 7214.6,)	
7214.8, 7215.1, 7216.1, 7216.2, 7220.3,)	
7220.5, AND 7220.7)	
AMEND SECTIONS 7213, 7213.1, 7213.2,)	
7213.3, 7214, 7215, 7216, 7218, 7220,)	
7221, 7224, 7225, 7226, 7226.1, 7226.2,)	
7227, 7227.1, AND 7227.2)	
REPEAL SECTION 7219)	
_____)	

SUMMARY OF REGULATORY ACTION

The Department of Rehabilitation (Department) by this regulatory action sought to amend title 9, California Code of Regulations, concerning the Business Enterprises Program for the Blind. Specifically, this regulatory action would have amended existing regulations concerning licensing, establishment and operation of vending facilities, collection of vending machine income, the State Committee of Blind Vendors, administrative review, and full evidentiary hearing procedures, and would have adopted new regulations on interim vending facilities.

DECISION

On April 10, 2009, the Office of Administrative Law (OAL) disapproved the above referenced regulatory action for the following reasons: failure to comply with the consistency, clarity, and necessity standards of Government Code section 11349.1 and failure to include documents incorporated by reference and relied upon as required by section 20(b) of title 1 of the California Code of Regulations and sections 11343 and 11347.3(b)(7) of the Government Code.

DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act (APA) that governs rulemaking by a state

agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. CONSISTENCY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “consistency” standard. (Gov. Code, sec. 11349.1(a)(4).) “Consistency” as defined by Government Code section 11349(d) means “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

Section 19632(c)(1) of the Welfare and Institutions Code provides in part:

Upon receipt of a written notification, the department shall issue a letter of reprimand to the vendor which shall include a copy of the original notification and any supporting material. The letter of reprimand shall also state the *date of removal* and the vendor's right to appeal the decision of the director to remove, suspend, or terminate the vendor from participation in the Business Enterprises Program.... (Emphasis added.)

Subsections (c)(1) through (5) of new section 7213.4 of title 9 of the California Code of Regulations as proposed by this rulemaking would have specified the content of such a letter of reprimand. These subsections do not include the date of removal as required by Welfare and Institutions Code section 19632(c)(1).

2. CLARITY

The Legislature in establishing OAL, found that regulations, once adopted, were frequently unclear and confusing to the persons who must comply with them. (Gov. Code, sec. 11340(b).) For this reason, OAL is mandated to review each regulation adopted pursuant to the APA to

determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The following provisions fail to comply with the “clarity” standard.

- a. Subsection (c) of new section 7216.1 of title 9 as proposed by this rulemaking would have provided in part:

...The BEP Manager, after consultation with the California Vendors Policy Committee, herein CVPC, *may* permit vending facilities that comprise the single vending facility specified in (b) of this section to be more than 50 miles from the other vending facilities that comprise the single vending facility. (Emphasis added.)

No further description of any criteria or standards the BEP Manager is to follow in determining whether to permit this variance from the standard rule is provided in the regulations. A person directly affected by this proposed regulation would not easily understand under what circumstances the BEP Manager may permit vending facilities that comprise a single vending facility to be more than 50 miles apart. Any applicable criteria or standards need to be added to the regulation and made available for comment for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations. If there are no criteria or standards involved and the matter is treated strictly on a case-by-case basis, the reason for this lack of direction needs to be explained in the statement of reasons.

- b. Subsection (a)(2) of section 7213 of title 9 as amended by this rulemaking would have provided that an applicant for a vending facility license:

Possess a DR 456, Certification of Eligibility for BEP License (Rev. 07/07), as specified in Section **7212.1(i)** of these regulations.... (Emphasis added.)

Subsection (i) of section 7212.1 of title 9 of the California Code of Regulations does not currently exist. The adoption of section 7212.1 was part of a rulemaking previously submitted to OAL that was disapproved in December 2008 (OAL file #2008-1024-02S). It is anticipated that this disapproved rulemaking will be resubmitted to OAL no later than June 12, 2009. For this reason, subsection (a)(2) of section 7213 as amended by this rulemaking does not meet the “clarity” standard at this time.

The regulations as adopted or amended by this rulemaking would have contained many other references to requirements in other regulation sections in title 9 that, because of the December 2008 disapproval, do not yet exist, contain different provisions, or are numbered differently within the title. In this regard, please see the following subsections: 7213.1(c)(1), 7213.2(d)(1), 7213.3(c)(4), 7213.3(d)(7), 7213.3(e)(2), 7213.4(a), 7213.5(a)(1)(A), 7213.5(a)(1)(B), 7213.5(a)(2), 7213.6(b)(2)(A), 7213.6(b)(2)(B),

7213.6(b)(3), 7214(b), 7214(b)(1), 7214(b)(2), 7214(b)(3), 7214(b)(4), 7214(c), 7214.2(b)(1), 7214.3(a), 7214.3(c), 7214.6(d)(3), 7215(b), 7216(c)(5), 7216(g), 7216.1(a), 7216.1(d), 7216.1(e), 7216.2(a)(2), 7220.3(c)(1), 7220.5(a)(1), 7221(d)(1), and 7225(c)(1).

- c. Subsection (d) of new section 7214.4 of title 9 as proposed by this rulemaking would have provided in part:

... applicant scores shall be assigned in accordance with subsection *(e)(2)* herein.“
(Emphasis added.)

Section 7214.4 of title 9 as proposed by this rulemaking contains no subsection (e)(2).

- d. Subsection (m) of new section 7214.4 of title 9 as proposed by this rulemaking would have provided in part:

...The BEP also provide *the of the* vendor operating agreement, including exhibits thereof, in the vendor’s preferred mode of communication, to the extent possible. (Emphasis added.)

There is either a word missing or perhaps words are inadvertently included.

- e. Subsection (a)(1) of section 7221 as amended by this rulemaking would have provided in part:

Payment of the set-aside fee shall be made monthly based upon the net proceeds, *as defined in Welfare and Institutions Code section 19629(c)*, of the vending facility for the preceding month.... (Emphasis added.)

The term “net proceeds” is defined in Welfare and Institutions Code section 19629(d).

- f. Subsection (a) of section 7224 as amended by this rulemaking would have provided in part:

...a vendor may claim the deduction from his or her set-aside charges as provided for in Section 7220(*p*) of these regulations. (Emphasis added.)

The deduction from the set-aside charges is described in section 7220(r).

- g. Subsection (k)(1) of section 7226 as amended by this rulemaking would have provided:

Preparing nomination letters...in accordance with *subsection (b) of this section*....(Emphasis added.)

Subsection (b) of section 7226 as amended by this rulemaking describes the California Vendors Policy Committee, not the preparation of nomination letters.

h. Subsection (c) of section 7226.1 as amended by this rulemaking would have provided:

...nomination forms shall be reviewed to ensure ...the nominated vendor meets the requirements specified in subdivisions (d), (f), and *(i)* of section 7226....
(Emphasis added.)

Subsection (i) of section 7226 as amended by this rulemaking does not contain a vendor requirement.

2. NECESSITY

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

... 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. (Emphasis added.)

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal;
and
- (2) information explaining *why* each provision of the adopted regulations 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. (Emphasis added.)

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). (Gov. Code, sec. 11346.2(b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed

and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The ISOR and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

The ISOR provided with this regulatory action simply states for most of the regulations that the new provisions are needed to comply with various APA standards and to clarify what the regulatory provisions require. It fails to provide information explaining the need for each of the regulatory provisions themselves. Specifically, the ISOR fails to explain the reasons for provisions in 7213.1(b)(1)-(2), (c)(1)-(5), (e)(2), 1st and 3rd sentences in (e)(3); 7213.2 (b)(1)-(4), (c)(1)-(2), (d)(1)-(5), (f)(1)-(2), (g), 1st and 3rd sentences of (h), (i)-(k); 7213.3(c)(2)-(6), (e)(1)-(3); 7213.4(c)(2)-(4), (g)(1)-(2), (h), (i); 7214 ten day period in (a), 15 day period in (b)(2) and (4); 7214.1; 7214.2(a)(1)-(2), (b)(1); 7214.3; 7214.4(a)-(g), (i)-(n)(1); 7214.6(a)-(d)(2); 7214.8; 7215; 7215.1 five day posting requirement in (a), (b)-(e); 7216(d)-(f), (h)-(i); 7216.1(n); 7216.2(a)(1), (a)(3)-(5); 7220(b), (f)(1)-(4); 7220.3(b)-(c)(5), (d)(1)-(f); 7220.5 six month period in (b); 7220.7(a)-(e); 7221(a)(2), requirement to file a completed DR 478 by the 25th day of the month following the report month in (b), (b)(2)-(f), the August 31 report date in (i); 7225(b)-(e)(2); and 7226(d). This information must now be added to the rulemaking file and be made available to the public for 15 days pursuant to Government Code sections 11346.8(d) and 11347.1.

4. REQUIRED DOCUMENTS WERE NOT PROVIDED

- a. OAL adopted section 20 of title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (b) of this section provides in pertinent part:

Material proposed for “incorporation by reference” shall be **reviewed in accordance with procedures and standards for a regulation** published in the California Code of Regulations.... (Emphasis added.)

In order to be reviewed by OAL, a document incorporated by reference must be included along with the regulation text submitted to OAL pursuant to section 11343 of the Government Code. The regulations proposed in this rulemaking would have incorporated by reference ten different forms: DR 456, DR 460, DR 461, DR 462, DR 463, DR 468, DR 469, DR 478, DR 484 and DR 1310. Only four of these forms, DR 456, DR 468, DR 478 and DR 484, were included in the rulemaking file and none of the forms were attached to the regulation text.

- b. Subdivision (b)(7) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

The ISOR for this regulatory action explains on pages 184 and 185 that changes were made to subsections (b) and (c) of section 7225 "...to be consistent with the court's order Margaret Morrison, Joe Roofener, Lucas Latorres, Steve Adams v. Brenda Premo, Director of Department, et al. (Sacramento Superior Court Case No. 95CS00247 (1996))." A copy of this court order was not included in the rulemaking file as required by Government Code section 11347.3(b)(7).

We also note that subsection (g)(5) of proposed new section 7214.5 refers to a form but does not provide its identifying DR number, subsection (j) of section 7220 as it would have been amended by this rulemaking should describe DR 478 as the "Vendor's *Monthly* Operating Report," and subsection (a)(3) of section 7227.2 as it would have been amended by this rulemaking appears to be missing a verb. Also, the titles to proposed new sections 7213.6 and 7220.7 should be underlined, as should the proposed new authority and reference citations for section 7215.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: April 15, 2009


CRAIG S. TARPENNING
Senior Staff Counsel

for: SUSAN LAPSLEY
Director

Original: Anthony P. Sauer, Director
cc: Lisa Niegle, Senior Staff Counsel