

**State of California  
Office of Administrative Law**

**In re:  
Dental Board of California**

**Regulatory Action: Title 16  
California Code of Regulations**

**Adopt sections:  
Amend sections: 1018  
Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2010-0204-02 S**

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**SUMMARY OF REGULATORY ACTION**

On February 4, 2010, the Dental Board of California (“Board”) submitted to the Office of Administrative Law (“OAL”) a proposed action to amend section 1018 of title 16 of the California Code of Regulations (“CCR”) and to amend the “Disciplinary Guidelines With Model Language,” a document already incorporated by reference, to provide direction to administrative law judges who determine penalties for dentists, registered dental hygienists and registered dental assistants who have violated provisions of statutory law or regulations. On March 18, 2010, OAL notified the Board that OAL disapproved this regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedure Act (“APA”). This Decision of Disapproval explains the reasons for OAL’s action.

**DECISION**

The rulemaking was disapproved for the following reasons: failure to meet the clarity standard of Government Code section 11349.1; incorrect procedure; failure to make changes to the regulations available to the public for comments as required by Government Code section 11346.8; failure to comply with the requirements of title 1, CCR, section 20 concerning incorporation by reference; and for miscellaneous omissions and errors in the accompanying text and documentation.

Due to the scope of the issues discussed below, OAL reserves the right to conduct a complete APA review for compliance with the substantive standards and procedural requirements of the APA in the event that the Board resubmits this rulemaking to OAL for review. All APA issues must be resolved prior to OAL approval of any resubmission.

## **DISCUSSION**

### **A. CLARITY**

OAL reviews proposed regulations for compliance with the clarity standard pursuant to Government Code section 11349.1. Clarity is defined in section 11349, subdivision (c), as follows: “[c]larity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” The following provisions included in the proposed regulations are not clear and must be improved.

Text being added in the incorporated document under (25) PHYSICAL EVALUATION states: “Such an assessment shall be submitted in a format acceptable to the Board.” This section also states: “If medically determined, a recommended treatment program will be instituted and followed by the Respondent with the physician providing written reports to the Board on forms provided by the Board.”

A person directly affected by this language would not easily understand what to submit in order to satisfy the Board. It is not easily ascertainable what format would be acceptable to the Board. It is also difficult to know what forms are required to satisfy this section. These requirements are too general to be easily understood, and must be made more specific. If particular forms are intended those forms must be reviewed for compliance with the APA. If they are found to contain regulatory content that is not provided for in statute or other applicable law, the requirements for incorporation by reference would apply.

The incorporated document under (28) ABSTAIN FROM USE OF ALCOHOL, CONTROLLED SUBSTANCES AND DANGEROUS DRUGS adds language that states, “Respondent shall also provide a current list of prescribed medication with the prescriber’s name, address, and telephone number on each Quarterly Report of Compliance submitted.”

The Quarterly Report of Compliance and the “...forms provided by the Board...” are not discussed any further in the incorporated document or in any other regulatory provision. A person directly affected by this language would not easily understand what to submit to satisfy the Board. As discussed above, if a particular form or report is intended and that form or report contains regulatory content that is not provided for in statute or other applicable law, the requirements for incorporation by reference would apply.

### **B. FAILURE TO MEET APA PROCEDURAL REQUIREMENTS**

Government Code section 11347.3 requires that:

- (a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding....
- (b) The rulemaking file shall include:  
...

**(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.**

California Code of Regulations, Title 1, section 90 further articulates what constitutes compliance with section 11347.3 (b)(8). It states:

"Transcript," "Recording," or "Minutes."

(a) Information submitted in compliance with the requirements of Government Code section 11347.3(b)(8) shall fully and accurately reflect all proceedings applicable to the rulemaking action under review and shall be adequate:

(1) to ensure effective review of the record by OAL, in light of the provisions of the APA providing for meaningful public participation; and

(2) to permit effective judicial review of the record....  
(Emphasis added.)

While the file indicates that the Board approved the rulemaking there is no transcript, recording or minutes of this hearing in the rulemaking record. Therefore the rulemaking file does not meet the requirements of Government Code section 11347.3(b)(8) or title 1 CCR section 90. Upon resubmission of this file the Board must provide a transcript, minutes or recording to document the hearing wherein this rulemaking action was approved.

**C. FAILURE TO COMPLY WITH 1 CCR 20**

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 with the rulemaking file.

Subsection (c) of section 20 provides other requirements for a state agency that wishes to incorporate a document as part of a regulation by reference to that document. Subsection (c) of section 20 provides:

An agency may "incorporate by reference" only if the following conditions are met:

...

- (4) The regulation text states that the document is incorporated by reference and identifies the document by **title and date of publication or issuance**. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.... (Emphasis added.)

The Quarterly Report of Compliance and the "...forms provided by the Board..." were not included in the rulemaking file, nor were they identified by title and date in the regulation text, nor were they made available to the public for comment during the public availability period. If the Quarterly Report of Compliance and the "...forms provided by the Board..." consist of a particular form with regulatory content that is not specified in statute or other applicable law, they have not properly been incorporated by reference as required by section 20 of title 1 of the California Code of Regulations, and must be added to the rulemaking record for review by OAL and made available to the public for comment for 15 days pursuant to sections 11346.8(d) and 11347.1 of the Government Code.

#### **D. FAILURE TO ADEQUATELY RESPOND TO COMMENTS**

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include a "... summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change."

On page 7 of the Final Statement of Reasons under "Page 4, comment 4" it says that the Board rejected a proposed change to (8) COST RECOVERY in the incorporated document, but the change was made. On page 8 under "Page 5, comment 5" it says that the changes to (19) RESTRICTED PRACTICE in the incorporated document were accepted and that the changes would be made. However, not all of the changes were made. These responses are inaccurate and inadequate. The Final Statement of Reasons will need to accurately reflect the Board's intent and actions taken in response to comments.

If any subsequent revisions to the text of regulations or the incorporated document are made in response to these comments, the changes should be made available for public comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c) and section 44 of title 1 of the CCR as discussed above. Additionally, the Board must summarize and respond to any comments received during the 15-day public comment period.

### **E. PROCEDURAL REQUIREMENTS OF THE APA**

OAL must review the rulemaking record to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.) Subdivision (a) of Government Code section 11346.2 requires that the adopting agency make available to the public upon request during the 45-day comment period the express terms of the proposed regulation. Subdivision (a)(3) of Government Code section 11346.2 provides:

The agency shall use **underline or italics** to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations. (Emphasis added.)

In this way a member of the public reading the initial text of the regulation made available would understand what changes are being proposed by this rulemaking, and therefore, subject to public comment. The following changes were not adequately made available because the proposed changes were not properly italicized or underlined.

(25) PHYSICAL EVALUATION in the incorporated document was illustrated as being amended in the following manner:

OPTION: Respondent shall not engage in the practice of dentistry until notified by the Board in writing of its determination that Respondent is safe to practice dentistry independently and safely.

The foregoing is improperly illustrated because this text is all new text being added to the document and the whole sentence should have been italicized or underlined. The improper display of the text may have caused confusion as to what is being newly added.

(30) ETHICS COURSE in the incorporated document is amended by this rulemaking to add the following language to limit the type of ethics course allowed:

No correspondence or Internet courses shall be allowed.

This is new text and should have been underlined or italicized to indicate that it was being added in this rulemaking. The new text was improperly illustrated as existing text. The failure to underline or italicize proposed new text may have caused confusion to the public because they would not know that this text was being added.

Under the section "RECOMMENDED PENALTIES," for the violation of Business and Professions Code section 1680(o), the amendment was illustrated as follows:

~~Suspension~~ Revocation stayed, ~~six-month suspension~~, Five (5) years probation, ~~45-days actual suspension~~. ~~Optional conditions can include restitution to patients, and community service program. These optional conditions are~~

~~predicated upon the possibility of harm to the patient which was caused by the actions of the respondent.~~

All of this language was new and was therefore improperly illustrated. The language in strikeout should not be illustrated as deleted since it was not existing text and everything being added should have been underlined or italicized. The improper display of the text may have caused confusion as to what is being newly added.

Also in the section, "RECOMMENDED PENALTIES," for a violation of Business and Professions Code section 1680(x), the amendment was illustrated as follows:

...five (5) years probation...

This was new text being added in this rulemaking. This new language added to the incorporated document was neither underlined nor italicized in the initial regulation text that was made available to the public during the 45-day comment period. For this reason, a member of the public reading the initial text made available during the 45-day comment period would not have easily understood that this language was being added and was subject to public comment.

For this reason, the changes described above must be properly displayed in underline or italics and be made available for comment pursuant to Government Code section 11346.8 (c) and section 44 of title 1 of the California Code of Regulations.

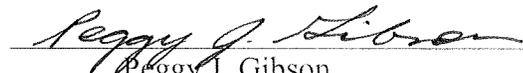
#### **F. ERRORS IN THE TEXT**

The proposed text of the incorporated document includes errors. The text has typos, internal inconsistencies and incorrect display of changes with respect to the existing regulations. None of the errors present a significant substantive issue with regard to the notice that was provided to the public or impair the adequacy of the Board's rulemaking proceeding, but they must nevertheless be corrected prior to OAL approval and filing with the Secretary of State. All of these various errors have been discussed with the Board's staff.

#### **CONCLUSION**

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-6805.

Date: March 24, 2010

  
Peggy J. Gibson  
Staff Counsel

FOR: SUSAN LAPSLEY  
Director

Original: Richard DeCuir  
Copy: Donna Kantner