

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

COMMISSION ON PEACE OFFICER
STANDARDS AND TRAINING

REGULATORY ACTION:
Title 11, California Code of
Regulations
AMEND SECTION 1955

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2013-0131-02S

SUMMARY OF REGULATORY ACTION

The Commission on Peace Officer Standards and Training (Commission) proposed to amend section 1955 of title 11 of the California Code of Regulations concerning peace officer psychological evaluations. On January 31, 2013, the Commission submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On March 15, 2013, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for failure to follow the required procedure, the regulatory filing did not meet the requirements for incorporation by reference, required documents included in the file were defective, and a required document was missing.

DISCUSSION

The adoption of regulations by the Commission must satisfy requirements established by the part of the 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. THE COMMISSION NEVER ADOPTED THE CHANGES TO SECTION 1955 OF TITLE 11 OF THE CALIFORNIA CODE OF REGULATIONS THAT WERE SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE

At a public meeting held on October 25, 2012, the Commission adopted proposed changes to section 1955 of title 11 of the California Code of Regulations which would require 6 hours of continuing professional education (CPE) to be completed by psychological evaluators between January 1, 2012 and December 31, 2013, 12 hours of CPE every two years thereafter, and required the submission of incorporated forms for approval of the CPE courses and to verify course completion. Subsequent to this adoption by the Commission, Commission staff revised proposed section 1955 to require the 6 hours of CPE to be completed by psychological evaluators between May 1, 2012 and April 30, 2014, 12 hours every two years thereafter, and replaced the previously incorporated forms required to be submitted for approval of the CPE courses and to verify course completion with electronic submission requirements. In making the change to electronic submission, some of the information required in the regulation and the incorporated forms adopted by the Commission on October 25, 2013 was dropped from or amended in revised section 1955, and a new information requirement was added. The Commission staff then made this version of proposed section 1955 available to the public for comment pursuant to Government Code section 11346.4. Following the conclusion of the public comment period, the rulemaking file and the revised regulation were submitted to OAL for review. As such, the proposed revisions to section 1955 of title 11 of the California Code of Regulations submitted to OAL for review and filing with the Secretary of State were neither considered nor adopted by the Commission. Government Code section 11343 requires in part:

Every state agency shall:

- (a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it....

The proposed revisions to section 1955 of title 11 of the California Code of Regulations in this submission must be adopted by the agency with rulemaking power, i.e., the Commission, prior to submitting the regulation to OAL for review and filing with the Secretary of State.

2. THE REGULATORY FILING DID NOT MEET THE REQUIREMENTS FOR INCORPORATION BY REFERENCE

March 22, 2013

Proposed subdivision (a)(2) of section 1955 of the regulations adopted by the Commission on October 25, 2012 provides:

The psychological evaluator (hereinafter referred to as “evaluator”) shall be competent in the conduct of preemployment psychological screening of peace officers. The required areas of competence, as defined in the POST Peace Officer Psychological Evaluator Competencies (Competencies), are herein incorporated by reference.

Section 20 of title 1 of the California Code of Regulations specifies the requirements for incorporating an external document by reference into the California Code of Regulations. Subdivision (c)(4) of section 20 provides in pertinent part:

The regulation text states the document is incorporated by reference and identifies the document by title and **date of publication or issuance**.... [Emphasis added.]

The incorporated document, the POST Peace Officer Psychological Evaluator Competencies, must be identified by a date of publication or issuance and that date must be specified in the text of proposed subdivision (a)(2) of section 1955 of the regulations. This is intended to ensure that the actual version of the Competencies adopted by the Commission remains the version of the Competencies required by the regulation.

Subdivisions (c)(1) and (c)(2) of section 20 of title 1 of the California Code of Regulations also require for a document incorporated by reference that:

- (1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.
- (2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source.

The Final Statement of Reasons submitted in this proposed regulatory action states that the document being incorporated by reference “...is not being submitted for printing in the California Code of Regulations since it is too cumbersome, unduly expensive, or otherwise impractical....” However, the Final Statement of Reasons does not demonstrate why the half-page document is too cumbersome, unduly expensive, or otherwise impractical to publish in the California Code of Regulations as required by subdivision (c)(1) of title 20.

The Final Statement of Reasons submitted in this proposed regulatory action states that the document being incorporated by reference “...**will** be available on the POST website (www.post.ca.gov) and linked within the regulations.” (Emphasis added.) However, the Final Statement of Reasons does not demonstrate that the document being incorporated by reference **was** made available upon request directly from the agency, or **was** reasonably available to the affected public from a commonly known or specified source, as required by subdivision (c)(2) of title 20.

3. REQUIRED DOCUMENTS INCLUDED IN THE RULEMAKING FILE ARE DEFECTIVE

Government Code section 11346.9 requires in subdivision (a)(4) that the final statement of reasons include several determinations, the latter of which is that no alternative considered by the agency "...would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law." This determination was not fully stated in the Final Statement of Reasons submitted with this rulemaking.

Also, the text of the proposed regulation submitted to OAL for review and filing with the Secretary of State is not completely accurate in depicting the existing regulation. There are a few discrepancies in the proposed text from existing subdivisions (d)(2) and (d)(4) of section 1955, including the omission of an entire paragraph in subdivision (d)(2), as well as in the authority and reference citations.

Also, the Fiscal Impact Statement portion of the Economic and Fiscal Impact Statement, STD. 399, included with this submission has no box checked in Part A, Fiscal Effect on Local Government. This may just be a problem that arose in the process of preparing the file for submission to OAL since a three hole punch has completely removed Box A.5, which may have been the box checked.

4. A REQUIRED DOCUMENT IS MISSING FROM THE RULEMAKING FILE

The Final Statement of Reasons submitted with this rulemaking includes a summary and response to an emailed comment that was reportedly received by Commission staff during the public comment period on January 25, 2013. Subdivision (b)(6) of Government Code section 11347.3 provides that the rulemaking file shall include:

All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

A copy of this email comment was not included in the rulemaking file submitted to OAL.

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.

OAL File No. 2013-0131-02S
March 22, 2013

Date: March 22, 2013

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