

**State of California
Office of Administrative Law**

In re:

Veterinary Medical Board

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

**Amend Sections: 2000, 2010, 2010.1,
2015, 2015.2, 2020,
2023, 2024**

Repeal Sections: 2014.5, 2017, 2018

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2010-0715-02 S

DECISION SUMMARY

On July 15, 2010, the Veterinary Medical Board ("Board") submitted to the Office of Administrative Law ("OAL") proposed amendments to sections 2000, 2010, 2010.1, 2015, 2015.2, 2020, 2023, and 2024 and the repeal of sections 2014.5, 2017, and 2018 of Division 20 of Title 16 of the California Code of Regulations ("CCR") regarding veterinary and registered veterinary technician licensure examinations.

On August 19, 2010, OAL notified the Board that OAL disapproved the proposed regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedure Act ("APA"). The reasons for the disapproval are summarized below:

A. the proposed regulation fails to comply with the necessity standard of Government Code section 11349.1(a)(1);

B. the proposed regulation fails to comply with the consistency standard of Government Code section 11349.1(a)(4);

C. the proposed regulation fails to comply with the clarity standard of Government Code section 11349.1(a)(3) and 1' CCR section 16(a);

D. the agency failed to comply with the APA procedural requirements as follows:

(1) required licensing examination application forms and instructions, which are proposed for substantive amendment, were not listed by title and date in the Informative Digest consistent with Title 1 CCR Section 20(c)(3);

(2) required licensing examination application forms and instructions are not listed in the text of the regulations by their titles and current revision dates consistent with Title 1 CCR Section 20(c)(4); and

(3) the Final Statement of Reasons failed to demonstrate that the required licensing examination application forms and instructions were made available upon request from the Board or were reasonably available to the affected public from a commonly known or specified source, and the regulation failed to specify how copies of these documents may be obtained consistent with Title 1 CCR Section 20(c)(2).

All APA issues must be resolved prior to OAL approval of any resubmission of the regulations.

BACKGROUND

Because veterinary and registered veterinary technician examinations are currently taken at any time online, as opposed to on fixed examination dates, regulations governing applications to take these examinations were proposed for amendment by the Board so as to conform them to current practice. Significantly, for purposes of this Decision of Disapproval, the Board also revised the examination application forms and instructions for the veterinary and registered veterinary technician licenses but did not notice these revisions to the affected public as part of this rulemaking action. In addition, the Board proposed other related substantive changes to these licensing examination processes, such as excusing from the requirement of taking the veterinary law examination graduates of the Western University of Health Sciences, and certain non-substantive changes, such as the repeal of regulations which have expired by their own terms or for which the underlying statutory authority has been repealed.

DISCUSSION

Any regulation amended or adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute 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 review. Government Code sections 11340.5 and 11346. OAL reviews regulatory actions for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. Government Code section 11340.1(a). OAL review is an independent

executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide meaningful public opportunity to comment on rules and regulations before they become effective.

A. NECESSITY

OAL must review regulations for compliance with the necessity standard of the APA, in accordance with Government Code section 11349.1(a)(1). Government Code section 11349(a) provides that “necessity” means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for the 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. Necessity is explained primarily in the agency’s Initial Statement of Reasons (“ISR”). Government Code section 11346.2(b)(1).

Government Code section 11346.2(b)(1) requires that the ISR include a statement of the specific purpose of each adoption and the rationale for the determination by the agency that each adoption is reasonably necessary to carry out the purpose for which it is proposed.

Title 1 CCR section 10(b) requires that the rulemaking record include a statement of the specific purpose of each adoption, amendment, or repeal, and information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision.

Neither the ISR nor any other document in the rulemaking record contains an explanation of the purpose or necessity for changes which are being made to either of the relevant examination application forms or to their accompanying instructions. In addition, none of the proposed changes to the forms or instructions are contained in or required by any statute or existing regulation or in any amendment to these proposed regulations.

For the convenience of the Board, OAL lists below the elements of each form or instruction which are being changed from the prior version of the document to the version which is currently proposed for adoption and for which purpose and necessity explanations are absent.

(1) Form 25 (Veterinary examination application):

1. Section 9 of the 2000 version of this document asks whether the applicant has ever applied to take a veterinary examination in California. Section 4 of the 2008 version of the document asks if the applicant has ever applied for an examination or licensure in California. The more recent version of the form adds a second inquiry about licensure

application and, arguably, broadens the inquiry from application for veterinary examination to application for any examination or licensure in California.

2. Section 13 of the 2000 version of this document asks whether the applicant has ever applied to take the any of several other examinations in any state other than California. The 2008 version of this document no longer makes this inquiry.

3. Section 11 of the 2000 version of this document requires submission of certified copies of court documents in connection with a criminal conviction. The Instructions for Section 8 of the 2008 version of this document requires submission of certified copies of court documents and arrest reports.

4. Section 11 of the 2008 version of this document requires that the applicant report any conviction or discipline occurring between the date of the application and the date of licensure and requires an acknowledgement that failure to so report may result in denial of the application or discipline. The 2000 version of this document does not contain this reporting requirement or acknowledgement.

5. Section 11 of the 2008 version of this document requires an acknowledgement that providing false information or omitting required information is grounds for denial or revocation. The 2000 version of this document does not contain this acknowledgement.

(2) Form 26 (Registered Veterinary Technician examination application):

1. Section 3 of the 2010 version of this document requires the applicant to provide a physical description and photograph of himself or herself. The 1998 version of this document does not contain this requirement.

2. Section 10 of the 1998 version of this document requires a listing of the other jurisdiction(s) in which the applicant is licensed and his/her registration number(s). Section 5 of the 2010 version of this document requires this information but also requires: the date the license was issued, whether it was issued by examination or credentials, and the period(s) of practice.

3. Section 14 of the 1998 version of this document requires submission of accompanying certified copies of court documents. The Instructions for Section 8 of the 2010 version of this document require submission of accompanying certified copies of court documents and arrest reports.

4. Section 9 of the 2010 version of this document requires that the applicant report any conviction or discipline occurring between the date of the application and the date of licensure and requires an acknowledgement that failure to so report may result in denial of the application or discipline. The 1998 version of this document does not contain this reporting or acknowledgement requirement.

5. Section 9 of the 2010 version of this document requires an acknowledgement that providing false information or omitting required information is grounds for denial or revocation of licensure in California. The 1998 version of this document does not contain this acknowledgement requirement.

B. CONSISTENCY

Government Code section 11349.1(a)(4) requires that OAL review all regulations for compliance with the consistency standard. Government Code section 11349(d) defines “consistency” to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

In this rulemaking, the instructions for the proposed new revision of Form 26 (Registered Veterinary Technician Examination Application) conflict with Title 16 CCR Section 2068.6(b). The instructions, on page 3 under Category 5, require direct supervision by a California-licensed veterinarian. Section 2068.6(b), however, requires only supervision by a veterinarian licensed in any state or U.S. territory or in Canada.

C. CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. Government Code section 11340(b). Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(c) defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.” Title 1 CCR section 16 states in part that:

In examining a regulation for compliance with the ‘clarity’ requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exist:

(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; ...

As discussed below, OAL determined that several of the proposed regulatory provisions did not satisfy the “clarity” standard.

(1) Form 25 (Veterinary Examination). This form and its instructions differ from one another and, therefore, create a clarity problem. Regarding AVMA accredited school

candidates, the instructions require submission of a copy of the candidate's diploma or official transcript. The form requires submission of either a diploma or certified transcript. It is unclear whether the terms "official" and "certified" in this context mean the same thing. If the terms mean the same thing, it is unclear why different terms are used. To the extent these two terms mean different things, the two documents are inconsistent and an internal clarity problem is created.

(2) Form 25 (Veterinary Examination) Instructions. The Instructions for this form conflict with the proposed amended regulation and, therefore, create a clarity problem. Page two of the instructions, under AVMA Accredited School Candidates, requires that a candidate be within six months of graduating before applying to take the licensure examination. Proposed amended Title 16 CCR Sections 2010.1(a) and 2023(a) allow a candidate to apply for the licensure examination if he or she is within eight months of graduation.

D. PROCEDURAL REQUIREMENTS OF THE APA

(1) Failure to list required application forms and instructions in the Informative Digest pursuant to Title 1 CCR Section 20(c)(3).

The application forms and accompanying instructions for the Veterinary and Registered Veterinary Technician examinations were not listed in the Informative Digest. Members of the regulated public, therefore, would not have been informed by the Notice that the Board was proposing changes to these forms and would not have been aware of the need or opportunity to submit public comments on proposed changes to these forms.

(2) The Final Statement of Reasons failed to demonstrate that the required licensing examination application forms and instructions were made available upon request from the Board or were reasonably available to the affected public from a commonly known or specified source, and the regulation failed to specify how copies of these documents may be obtained consistent with Title 1 CCR Section 20(c)(2).

The Final Statement of Reasons failed to demonstrate that the required licensing examination application forms and instructions were made available upon request from the Board or were reasonably available to the affected public from a commonly known or specified source. The rulemaking file does not contain evidence that the proposed amendments to these forms and instructions were sent, together with the regulatory text, as part of the notice of this rulemaking action or that the proposed changes to the forms and instructions were otherwise reasonably available to the affected public. Moreover, the text of the regulations does not indicate how a member of the affected public could obtain a copy of the proposed amendments to the forms and instructions. These failures compromised the ability of regulated persons and entities to submit informed comments to the Board regarding the proposed changes during the public comment periods.

(3) Failure to list the required licensing examination application forms and instructions in the text of the regulations by their titles and current revision dates consistent with Title 1 CCR Section 20(c)(4).

The titles and current revision dates of the required licensing examination application forms and instructions are not listed in the text as required by Title 1 CCR Section 20(c)(4). This failure further compromised the ability of the affected public to identify, obtain, and comment on changes to these documents, and it compromises the clarity of the regulation in terms of specifying which forms and instructions apply to these examination application processes.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-4237.

Date: August 26, 2010



Dale Mentink
Senior Staff Counsel

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Director

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