

**State of California
Office of Administrative Law**

**In re:
Dental Hygiene Committee of California**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

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

Government Code Section 11349.3

**Adopt sections: 1139, 1140, 1141, 1142,
1143, 1144**

OAL File No. 2012-0430-02 S

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Dental Hygiene Committee of California (Committee) proposed to adopt sections 1139, 1140, 1141, 1142, 1143 and 1144 of title 16 of the California Code of Regulations (CCR) to establish criteria and procedures for the issuance of citations for fines and orders of abatement to licensees and unlicensed persons acting in the capacity of licensees. This proposed rulemaking also established procedures to contest a citation through an informal conference and an administrative hearing.

DECISION SUMMARY

On April 30, 2012, the Committee submitted to the Office of Administrative Law (OAL) the proposed adoption of sections 1139, 1140, 1141, 1142, 1143 and 1144. On June 12, 2012, OAL notified the Committee that OAL disapproved the proposed regulations 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 agency failed to comply with the Necessity standard of Government Code section 11349.1(a)(1);
- B. The agency failed to comply with the Clarity standard of Government Code section 11349.1(a)(3); and
- C. The agency failed to comply with the Reference standard of Government Code section 11349.1(a)(5).

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

BACKGROUND

Sections 1139, 1140, 1141, 1142, 1143 and 1144 implement provisions of the Dental Practices Act related to dental hygienists in the Business and Professions Code. Specifically: section 1139 establishes procedures for the issuance of citations for fines or orders of abatement and sets the range for any such fines; section 1140 describes the criteria to be considered when issuing a citation; section 1141 provides that citations may be issued against unlicensed persons acting in the capacity of a licensee; section 1142 establishes the procedures for contesting a citation; section 1143 describes the procedures for compliance or in the event of non-compliance with a citation; and section 1144 provides that the issuance and disposition of a citation shall be public.

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. (Gov. Code, secs. 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. 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. FAILURE TO COMPLY WITH THE NECESSITY STANDARD OF GOVERNMENT CODE SECTION 11349.1(a)(1).

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 purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

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 CCR 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 (ISR). (Gov. Code, sec. 11346.2(b).) The ISR 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 ISR 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 ISR submitted with this regulatory action for the adoption of sections 1139, 1140, 1141, 1142, 1143 and 1144 is inadequate. While it describes the specific purpose of each new provision in the proposed regulations, the only rationale or necessity included to explain the reasons for the provisions is as follows:

In order to assess civil penalties, guidelines and procedures must be in place by regulation to assure consistent and equitable application of the Committee’s citation and fine program. Each of the proposed regulations clarifies the requirements necessary to carry out the citation and fine program.

OAL provides a courtesy pre-review of the ISR to inform the agency whether its discussion of necessity is adequate or lacking. On January 25, 2011, the Committee submitted the ISR described above for this pre-review and was notified by OAL that it did not meet the necessity standard. The Committee then submitted a revised ISR on February 3, 2011. This revised ISR was not given another courtesy pre-review by OAL. The revised ISR added only four sentences that addressed necessity generally:

A citation and fine program is a valuable consumer protection tool. Such a program assists in addressing certain violations of the law in a more expedient fashion than other disciplinary options currently available to the Committee. Further, a citation and fine program puts individuals on notice of violations and allows for remedial action without exposing those individuals to the burden and cost of other disciplinary options.

...

Further, these proposed regulations provide for appropriate notice to cited individuals and an opportunity to be heard, thereby affording protection to cited individuals.

Neither ISR meets the necessity definition and standard of Government Code sections 11349 and 11349.1(a)(1) and section 10 of title 1 of the CCR. The ISR is required to include an explanation of the need and the rationale for each proposed new provision and it must be made available to the public with the initial notice. Neither ISR addressed the necessity for each new provision of the proposed regulation. For example, necessity is not addressed for the criteria not already listed in statute that are to be considered in the issuance of a citation: nature and severity of the violation; length of time that has passed since the date of the violation; consequences of the violation, including potential or actual patient harm; evidence that the violation was willful; and the extent to which the cited person has remediated any knowledge or skill deficiencies, which could have injured the patient. Neither is necessity addressed for: permitting the issuance of either a fine, an order of abatement or both; setting the range of fine amounts “between \$100 and \$5,000;” providing the option to request an informal conference to contest a citation; establishing the associated time frames and related procedures; including unlicensed persons in this system for issuance of citations; allowing for an extension of time to complete the correction within an order of abatement period and procedures related to compliance with a citation; and other provisions.

Pursuant to Government Code section 11347.1, any addition to the ISR to provide the necessity missing from the existing ISR must be made available to the public for at least 15 days prior to adoption of the regulations by the Committee. Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
 - (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

Prior to resubmission of the proposed regulations, the Committee must provide notice for a 15 day availability period for a revised ISR, summarize and respond to any comments on the revised ISR in an addendum to the final statement of reasons (FSR) and include all the related documents that are required in the rulemaking record.

B. FAILURE TO COMPLY WITH THE CLARITY STANDARD OF GOVERNMENT CODE SECTION 11349.1(a)(3).

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 “clarity” standard is further defined in section 16 of title 1 of the CCR, OAL's regulation on “clarity,” which provides:

- 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 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; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons ‘directly affected;’ or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.
 - (b) Persons shall be presumed to be ‘directly affected’ if they:
 - (1) are legally required to comply with the regulation; or
 - (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) Proposed Adoption of Section 1139 and Section 1141.

The Committee proposed to adopt title 16, CCR, section 1139:

- (a) The Executive Officer of the Committee or his or her designee may issue a citation containing an order to pay a fine between \$100 and \$5,000 and an order of abatement against a licensee for any violation of Article 11 of the Business and Professions Code, or any regulations adopted pursuant thereto, or any laws governing the practice of dental hygiene. A citation may be issued without either the assessment of a fine, or an order of abatement when determined by the Executive Officer or his or her designee.
- (b) Each citation shall be in writing and shall describe with particularity the nature and facts of each violation specified in the citation, including a reference to the law or regulation alleged to have been violated.
- (c) The citation shall be served upon the cited person either personally or by certified United States mail.

The proposed adoption of subdivision (a) lacks clarity in its reference to "...violations of Article 11 of the Business and Professions Code, or any regulations adopted pursuant thereto...." First, there are currently fourteen "Article 11"s in the Business and Professions Code, none of which regard violations by dental hygienists. Second, it is unclear what regulations are referred to as being adopted pursuant to that article, whether existing regulations or regulations to be adopted in the future. Consequently, those directly affected would not know either how to comply with the regulation or how to enforce the regulation. Licensees would be unable to determine the full set of violations for which they might receive a citation. The Executive Officer would be unable to determine which violations might engender the issuance of a citation.

In addition, the proposed adoption of subdivision (a) provides that section 1139 regards the issuance of a citation "against a licensee." Section 1141 provides that citations may also be issued to an unlicensed person:

The Executive Officer or his or her designee may issue a citation against any unlicensed person who is acting in the capacity of a licensee and who is not otherwise exempt from licensure. Each citation may contain an order of abatement fixing a reasonable period of time for an [sic] abatement and an order to pay a fine not to exceed \$5,000 per occurrence of a violation. Any sanction authorized for activity under this section shall be separate from and in addition to any other administrative, civil or criminal remedies.

As written, subdivisions (b) and (c) of section 1139 are only applicable to licensees and there are no similar requirements for unlicensed persons. Consequently, it is unclear to those directly affected, unlicensed persons and the Executive Officer, how citations must be issued to unlicensed persons.

Prior to resubmission of the proposed adoption of section 1139 and/or section 1141 for OAL review, the Committee must make amendments to clarify the set of violations for which a licensee and an unlicensed person may be issued a citation. In addition, the Committee must clarify how citations must be issued to unlicensed persons.

(2) Proposed Amendments to Section 1142.

The Committee proposed to adopt title 16, CCR, section 1142:

(a) The citation shall inform the licensee that if he or she desires a hearing to contest the finding of a violation, that hearing shall be requested by written notice to the Committee within 30 calendar days of the date of issuance of the citation. Hearings shall be held pursuant to the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) In addition to requesting a hearing provided for in subdivision (a) of this section, the cited person may, within 14 calendar days after service of the citation, submit a written request for an informal conference with the Executive Officer.

(c) The Executive Officer or his or her designee shall, within 30 calendar days from receipt of the written request, hold an informal conference with the person cited and or his or her legal counsel or authorized representative, unless continued for good cause.

(d) The Executive Officer or his or her designee may affirm, modify or dismiss the citation at the conclusion of the informal conference. A written decision stating the reasons for the decision shall be mailed to the cited person and his or her legal counsel, if any, within 14 calendar days from the date of the informal conference. This decision shall be deemed to be a final order with regard to the citation issued[.]

(e) If the citation is dismissed, the request for a hearing shall be deemed withdrawn. If the citation is affirmed or modified, the cited person may, in his or her discretion, withdraw the request for a hearing or proceed with the administrative hearing process.

(f) If a cited person wishes to contest an affirmed or modified citation, the cited person shall, within 30 days after service of the citation, contest the affirmed or modified citation by submitting a written request for an administrative hearing, as provided for in subdivision (b)(4) of Section 125.9 of the Code, to the [E]xecutive [O]fficer or his or her designee. An informal citation conference shall not be held on affirmed or modified citations.

First, the “written request” referred to in subdivision (c) can, on its face, be reasonably and logically interpreted to have more than one meaning pursuant to title 1 CCR section 16(a)(1). Subdivision (a) provides that if a licensee wants a hearing to contest a citation:

... that hearing shall be **requested by written notice** to the Committee within 30 calendar days of the date of issuance of the citation. [Emphasis added.]

Subdivision (b) provides that the cited person may also:

... within 14 calendar days after service of the citation, submit a **written request** for an informal conference with the Executive Officer. [Emphasis added.]

Then, subdivision (c) provides that the Executive Officer:

... shall, within 30 calendar days from receipt of the **written request**, hold an informal conference with the person cited.... [Emphasis added.]

The difference between the description of the starting date for counting days in subdivisions (a) and (b) does not appear to be significant. The date of issuance may be the same as the date of service in some instances, but may be different in other instances. However, the “written request” referred to in subdivision (c) could reasonably refer to either the one required in subdivision (a) or the one required in subdivision (b), and these are required within different time periods. In addition, subdivision (b) does not clearly indicate to whom the written request must be submitted. Although it might be assumed the request must be submitted to the Committee as is required for the written request for a hearing in subdivision (a), this is uncertain. Therefore, subdivisions (b) and (c) do not meet the clarity standard of Government Code section 11349 since they cannot be easily understood by those persons who are directly affected. Subdivision (c) also does not meet the clarity standard of title 1, CCR, section 16 since it can, on its face, be reasonably and logically interpreted to have more than one meaning.

Prior to resubmission of the proposed adoption of section 1142 for OAL review, the Committee must make amendments to clarify to whom the written request in subdivision (b) must be submitted and to clarify whether subdivision (c) refers to the “written request” in subdivision (b) or the request “by written notice” in subdivision (a).

Second, the requirement to request a hearing to contest a citation in subdivision (a) and the option to, in addition, request an informal conference in subdivision (b) conflicts with the agency’s description of the effect of the regulation on page two of the ISR, which purportedly allows the cited person to request either one forum or the other:

Allow the cited person to request a hearing or informal conference....

Subdivision (a) requires the cited person to request a hearing if they desire to contest a citation. Subdivision (b) allows the cited person to request an informal conference “[i]n addition to requesting a hearing...,” not as an alternative to the hearing.

Prior to resubmission of the proposed adoption of section 1142 for OAL review, the Committee must make amendments to clarify whether the cited person may request either a hearing or an informal conference, or whether the cited person must request a hearing first if they also want to request an informal conference.

Third, deeming the decision from the informal conference a “final order” in subdivision (d) lacks clarity since it is internally inconsistent with the requirements in subdivisions (e) and (f), and it conflicts with the agency’s description of the effect of the regulation on page two of the ISR:

Sets forth requirements for a cited person to contest the decision of an affirmed or modified citation.

Subdivision (d) states that the decision of the Executive Officer from the informal conference is "... deemed to be a final order with regard to the citation issued." However, the hearing process required in subdivision (a) has begun and subdivision (e) indicates that if the citation is affirmed or modified, the cited person may "proceed with the administrative hearing process." In addition, subdivision (f) provides for a new request for an administrative hearing.

Prior to resubmission of the proposed adoption of section 1142 for OAL review, the Committee must make amendments to clarify whether the decision from an informal conference is a "final order" in regard to the initially issued citation, and, if so, what effect the "final order" has in regards to the administrative hearing process and consideration of the affirmed or modified citation.

Fourth, subdivision (f) lacks clarity since it is internally inconsistent with subdivisions (a) and (e) in that the meaning of "submitting a written request for an administrative hearing" in subdivision (f) will not be easily understood by those persons directly affected, because he/she will have already made such a request pursuant to subdivision (a) and may have decided to proceed with the administrative hearing process pursuant to subdivision (e).

Prior to resubmission of the proposed adoption of section 1142 for OAL review, the Committee must make amendments to clarify whether a cited person may proceed with the administrative hearing requested in subdivision (a) as provided for in subdivision (e) or whether an affirmed or modified citation is considered to be a new citation for which a cited person desiring to contest it must submit a new request for an administrative hearing.

Prior to resubmission of the proposed regulations, the Committee must provide notice of a 15 day comment period for the modifications to the proposed text. This 15 day period may be during the same period as the availability period for the revised ISR. The Committee must summarize and respond to any comments on the modified text in an addendum to the final statement of reasons (FSR) and include all the related documents that are required in the rulemaking record.

C. FAILURE TO COMPLY WITH THE REFERENCE STANDARD OF GOVERNMENT CODE SECTION 11349.1(a)(5).

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the "authority" and "reference" standards. (Gov. Code, sec. 11349.1(a)(2) and (a)(5).) "Authority," as defined by Government Code section 11349(b), means "... the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." "Reference," as defined by Government Code section 11349(e), means:

... the statute, court decision, of other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

Subdivision (a) of Government Code section 11346.2 requires that the adopting agency submit to OAL the express terms of the proposed regulation. Subdivision (a)(2) of Government Code section 11346.2 provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.

The text of the proposed regulations adopted by the Committee and submitted to OAL for review and filing with the Secretary of State in this regulatory action has the same authority and reference citations for each of the six sections. Since each reference citation should only cite the specific statute or statutes being implemented, interpreted, or made specific by that particular regulation, one of the reference citations for both section 1139 and section 1142 is inaccurate. As discussed above, the current language in section 1139 and section 1142 only implements requirements for licensees. Section 148 of the Business and Professions Code, which regards unlicensed persons, is not an applicable reference citation for these sections. However, if the Committee makes clarifications in the text prior to resubmission of the proposed adoption of these sections such that the requirements of these sections are clearly applied to unlicensed persons, section 148 of the Business and Professions Code must be listed as a reference citation.

D. MISCELLANEOUS.

Pursuant to Government Code section 11346.8(a) and (c) and section 11347.3(b)(8), the agency with rulemaking authority must include in the rulemaking record either a transcript, recording or minutes of any public hearing connected with the adoption, amendment or repeal of regulations. The Committee included minutes from a full Committee meeting on December 6, 2010, prior to the publication of notice in which the Committee adopted the text presented at that meeting with some modifications. The Committee included in the record the minutes of the public hearing held on March 21, 2011, at the end of the 45 day public comment period. The Committee also included a "Draft" of minutes for the full Committee meeting on April 29, 2011, at which the Committee reviewed two options and voted to accept option 1 which stated:

If the committee adopts sections 1139 - 1144 as presented, direct staff to take all necessary steps to complete the rulemaking process, include the final rulemaking package to Office of Administrative Law and authorize the Executive Officer to make any non-substantive [changes] to the proposed regulations before completing the rulemaking process.

The minutes do not indicate whether the Committee adopted sections 1139 – 1144 as presented at that meeting and what version of the proposed text, if any, was adopted. It is also uncertain whether the originally proposed text in the record or the final proposed text were presented to the Committee on December 6, 2010, or April 29, 2011. The modification period was October 10 to October 25, 2011, and included some substantive changes to the text from that which is included in the record as the originally proposed text that was made available to the public for the 45 day

comment period. It is uncertain whether the Committee adopted the proposed text with the modifications.

Prior to resubmission, the Committee must adopt the final version of the proposed text, except for any non-substantive changes, and include in the rulemaking record the minutes from the meeting in which it was adopted.

The revised ISR which the Committee provided to OAL on February 3, 2011 to accompany the publication of notice is not included in the record. Upon resubmission, the Committee must include this in the rulemaking record pursuant to Government Code section 11347.3(b)(11).

OAL also notes that the Form 400 submitted with this rulemaking action fails to identify the dates of any 15-day availability period in Part B, Section 4. Prior to resubmission of amendments to this section for OAL review, the Board must list the beginning and ending dates of all 15-day availability periods in Part B, Section 4 of the Form 400.

CONCLUSION

For the foregoing reasons, OAL disapproves the above-referenced rulemaking action.

Date: June 14, 2012



George C. Shaw
Senior Staff Counsel

For: Debra M. Cornez
Director

Original: Lori Hubble, Executive Officer
Cc: Traci Napper