

**State of California
Office of Administrative Law**

In re:
**Commission on Peace Officer Standards
and Training**

Regulatory Action:

Title 11, California Code of Regulations

Adopt sections:

Amend sections: 1005, 1007, 1008

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0921-03

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On September 21, 2016, the Commission on Peace Officer Standards and Training (Commission) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to amend the California Code of Regulations, Title 11, sections 1005, 1007, and 1008. These amendments update the *Training and Testing Specifications for Peace Officer Basic Courses*, which is a document incorporated by reference. The update makes changes to several learning domains, such as the investigative report writing, vehicle operation, use of force, crimes in progress, crimes against the justice system, and first aid, CPR and AED.

On November 2, 2016, OAL notified the Commission that OAL disapproved the proposed regulations for failure to comply with the necessity standard of Government Code section 11349.1. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulations failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1), and title 1 of the California Code of Regulations (CCR), section 10, subdivision (b).

DISCUSSION

The adoption, amendment, or repeal of regulations by the Commission must satisfy requirements established by the part of the California Administrative Procedure Act (APA) that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its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 regulation subject to the APA may become effective, the 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 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 regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. NECESSITY STANDARD OF THE APA

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

(a) ... 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, Title 1 of the CCR, section 10, subdivision (b) provides:

(b) 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. (Gov. Code, sec. 11346.2, subd. (b).) The initial statement of reasons (ISOR) must include a statement of the *specific purpose* for each adoption, amendment, or repeal, the *problem* the agency intends to address, 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, subd. (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, sec. 11346.2, subd. (b) and sec. 11346.5, subs. (a)(16) and (b).) In this way, the public is informed of the basis of the regulatory action and may comment knowledgeably.

2. ISOR'S DISCUSSION ON EMSA REQUIREMENTS

Among the changes to its *Training and Testing Specifications for Peace Officer Basic Courses*, the Commission updated Learning Domain #34, which addresses first aid, CPR, and AED. To justify the necessity for these updates, the ISOR in the rulemaking record states:

All content changes were completed to comply [with] the requirements of recent regulatory changes to Title 22, Division 9, Chapter 1.5, Section 100017(a) made by the Emergency Medical Services Authority (EMSA). POST [Commission] collaborated with EMSA and [Subject Matter Experts] SME's to ensure thoroughness and accuracy with regulatory and professional requirements.

Title 22, CCR, section 100017, subdivision (a), simply requires that the "initial course of instruction shall at a minimum consist of not less than twenty-one (21) hours in first aid and CPR." Subdivision (c) of section 100017 provides a list of topics which EMSA requires training courses to include. The Commission's mere reference to section 100017 in the ISOR does not meet the necessity standard of the APA for all the numerous substantial modifications made to Learning Domain #34. For example, the Commission proposes section I.D. of Learning Domain #34 to require peace officers to be trained and tested on the following skill:

Recognize first aid equipment and precautions peace officers may utilize to treat others and to ensure their own personal safety when responding to an emergency including:

1. Types and levels of Personal Protective Equipment (PPE) used to accomplish Body Substance Isolation (BSI)
 - a. Removal of contaminated gloves
 2. Decontamination considerations
- [Underlining and deletions omitted.]

This topic is not listed in section 100017. The ISOR does not provide any discussion as to where and how the Commission's proposed language is required by EMSA. If it is not required by EMSA, then the Commission must indicate why they have determined it is necessary to test

peace officers on this subject matter. Other examples of added skills that are not listed as required in section 100017 can be found in the Commission's proposed sections II.B and IV.H. of Learning Domain #34.

In proposed section III.G. of Learning Domain #34, peace officers will no longer be required to demonstrate rescue breathing techniques but will simply be required to discuss them. Nowhere in section 100017 of CCR, Title 22, does EMSA require the demonstration of rescue breathing techniques to be changed to a mere discussion and the ISOR does not explain why peace officers will now only be required to discuss breathing techniques rather than demonstrate them as it has been previously required.

In short, several substantial changes in Learning Domain #34 go beyond the requirements listed in section 100017 of CCR Title 22. The Commission exercised its discretion in adding and changing requirements in Learning Domain #34 but the ISOR does not discuss the specific purpose for these modifications, the problem the modifications intend to address, and the rationale for determining that these modifications are reasonably necessary to carry out the purpose for which they are proposed. Thus, the ISOR failed to meet the necessity standard of the APA.

3. FACTS, STUDIES, AND EXPERT OPINION

The ISOR contains the following general statement of necessity for all of the changes made in the *Training and Testing Specifications for Peace Officer Basic Courses*:

All changes to basic academy curriculum begin with recommendations from law enforcement practitioners or, in some cases, via legislative mandates. POST [Commission] then facilitates meetings with curriculum advisors and subject matter experts (SMEs) who recommend changes to existing academy curriculum. The Commission approved them at the June 23, 2016 Commission meeting, subject to the Notice of Proposed Regulatory Action process.

Although this general statement describes the Commission's process for revising its regulations, it does not explain why the changes in the regulations are needed and how the regulations fill that need.

The APA requires the Commission's rulemaking record to demonstrate 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. The APA clarifies that "substantial evidence" may include facts, studies, and expert opinion. However, the rulemaking record must then contain that actual expert opinion or study upon which the Commission is relying. The ISOR for this matter only indicates that the Commission collaborated with subject matter experts; the record does not reflect or include what the subject matter experts' opinions are.

The APA further clarifies that “substantial evidence” is evaluated after taking into account the totality of the record. In other words, if the subject matter experts’ opinion is found in a document which the Commission relied on, including that document as part of the record would satisfy the necessity requirement for the changes made in Learning Domain #34. However, the rulemaking record does not include any document or study containing or supporting the subject matter experts’ opinion. Thus, even after taking into account the totality of the record, the Commission did not meet the necessity standard for several changes made in Learning Domain #34.

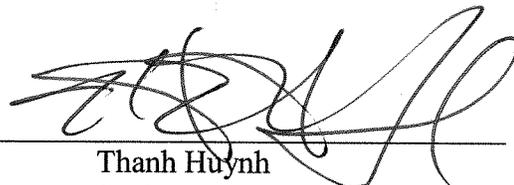
A mere mention of discussions with subject matter experts does not constitute substantial evidence demonstrating the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific. The ISOR is required to include an explanation of the need and the rationale for *each* proposed new provision or change to the existing regulations. The ISOR is further required to be made available to the public during the 45-day public comment period. Any addition to the ISOR that provides the missing necessity must be made available to the public for comment for at least 15 days pursuant to Government Code section 11347.1. The document in which supplements to the ISOR are made will then need to be included in the rulemaking record before resubmitting these regulations to OAL for review.

Due to the limited information provided in the file, OAL cannot evaluate whether the changes made in Learning Domain #34 meet the consistency standard of the APA. OAL reserves the right to review for the “consistency” standard upon resubmission of this action.

CONCLUSION

For these reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Commission may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: November 9, 2016



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