



Item: Discussion and Possible Action Regarding Adoption of Proposed Amendments to California Code of Regulations, Title 16, Sections 1399.370 and 1399.372 Relating to Substantial Relationship and Rehabilitation Criteria

Item Summary: At its June 7, 2019 meeting, the Respiratory Care Board (Board) approved regulatory language to implement AB 2138 (Chiu, Chapter 995, Statutes of 2018). The Board noticed the regulation proposal on May 29, 2020. Since then, based on feedback from the Office of Administrative Law and the Department of Consumer Affairs Legal Office, Modified Text is being presented for consideration as described within the following memo prepared by Karen Halbo, DCA Regulatory Counsel.

- Board Action:**
1. President calls the agenda item and it is presented by or as directed by the President.
 2. President requests motion on public comments received.
 3. If the Board is willing to adopt the modifications to the text, make a motion to:

“1) adopt the modifications to sections 1399.370 and 1399.372, and
2) instruct staff to send the Modified Text out for a 15-day public comment period, and if no comments are received, to take such steps necessary to promulgate the regulation in modified form.”

- any other appropriate motion.
 3. President may request if there is a second to the motion, if not already made.
 4. Board member discussion/edits (if applicable).



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MEMORANDUM

DATE	October 7, 2020
TO	Respiratory Care Board of California Members
FROM	Karen Halbo, Regulatory Counsel, Attorney III, Department of Consumer Affairs
SUBJECT	Proposed Modification of Text Regarding Proposed Amendments to Title 16, California Code of Regulations sections 1399.370 and 1399.372 (AB 2138 Implementation)

Proposed Changes to Board Approved Language

Before any Department of Consumer Affairs (DCA) programs began work to make a regulatory rulemaking to adopt the changes resulting from AB 2138 (Chiu, Chapter 995, Statutes of 2018), DCA's Legal Affairs Division negotiated with the Office of Administrative Law (OAL) to agree upon acceptable AB 2138 regulatory language, which was then circulated to DCA programs. Since then, the director at OAL retired and a new director took over. The new OAL director decided to take a fresh look at the AB 2138 packages. There are presently 16 DCA AB 2138 regulatory rulemakings under review at OAL. OAL is now requiring several standardized changes to the previously agreed-upon AB 2138 text. The changes include both substantive, and non-substantive changes. Non-substantive changes can be made by the Executive Officer (EO) without a Board vote. This authority is based on the motion made when the Board adopted the regulatory text, which instructed the EO to take such steps "necessary to promulgate the regulation."

Please refer to the Modified Text in Attachment A. The required changes to the regulation text are in double underline or double strikethrough. A brief description of each changes follows:

§1399.370. Substantial Relationship Criteria

In subdivision (a), add the phrase, ", or Sections 3750 and 3750.5 of the B&P,". OAL is requiring this addition so that the public is informed where in the regulations the Board's power to deny, suspend, or revoke a license is made clear. As this incorporates those provisions into this section, OAL considers this a substantive change that requires the Board's vote.

In subdivision (b), add the phrase, “the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Sections 3750, 3750.5, and 3755.”. OAL wanted citation made to the specific sections in the respiratory care practice act that give the Board authority to

In subdivision (b), paragraphs (1) & (2), punctuation changes. *These punctuation changes are required so this list conforms to the punctuation provided to the same list in statute. OAL considers this a non-substantive change.*

In subdivision (b) paragraph (3), removing the phrase “a person” and adding the phrase “profession in which the applicant seeks licensure, or in which the licensee is licensed.” *This language change includes when the Board seeks to deny a license to an applicant. The proposed language had inadvertently left such individuals out addressing only those holding an RCP license. OAL considers this a substantive change.*

Remove the citation to B&P 481 in the Authority citation in the Note. *OAL’s position is that the authority to promulgate the regulation comes from the respiratory care practice act, not from general B&P Code provisions regarding the Department of Consumer Affairs.*

§ 1399.372. Rehabilitation Criteria for Denials, Suspensions, or Revocations

In subdivision (a), replacing the term “an RCP” with “a respiratory care practitioner,” change “was” to “has been,” remove the phrase “and is presently fit for a license,” and remove an unnecessary space. *These changes are for clarity and grammar. The verb change mirrors the language in the statute. OAL finds the phrase “and is presently fit for a license” to be unnecessary and needlessly confusing and asked that it be removed. There was an inadvertent double space between sentences. OAL considers all of these to be non-substantive changes.*

In subdivision (b), replacing “If subdivision (a) is inapplicable” with “If the applicant has not completed the criminal sentence at issue without a violation of parole or probation.” *OAL is requiring this change for clarity.*

Also in subdivision (b), inserting the phrase, “the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Article 5, Chapter 8.3, Division 2 of the Code,”. *For clarity, OAL asked the Board to add those B&P sections that specify the Board can deny, suspend, revoke, reinstate, or take action on a license. OAL considered this a non-substantive change.*

In subdivision (b), paragraphs (1), (2) and (3), inserting the phrase “professional misconduct” in all three paragraphs. *OAL required this addition for clarity. OAL considers these additions a non-substantive change.*

In subdivision (c), replacing the term “an RCP” with “a respiratory care practitioner,” to change “was” to “has been,” and to remove the phrase “and is presently fit for a license,”.

These changes are for clarity and grammar. The verb change mirrors the language in the statute. OAL requested the unnecessary and needlessly confusing latter phrase to be removed. OAL considers all of these to be non-substantive changes.

In subdivision (d), replacing “If subdivision (a) is inapplicable” with “If the applicant has not completed the criminal sentence at issue without a violation of parole or probation.” *OAL is requiring this change for clarity and considers this a non-substantive change.*

Also in subdivision (d), inserting the phrase, “the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Article 5, Chapter 8.3, Division 2 of the Code,”. *OAL wants a direct citation to the article in the Code which specifies the grounds on which the board can deny, suspend, revoke or reinstate a license for clarity. OAL considered this a non-substantive change.*

Also in subdivision (d), removing the phrase “and is presently fit for a license,”. *OAL this phrase to be unnecessary and needlessly confusing. OAL considers this a non-substantive change.*

Also in subdivision (d), inserting the phrase, “the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Article 5, Chapter 8.3, Division 2 of the Code,”. *For clarity, OAL asked the Board to add those B&P sections that specify the Board can deny, suspend, revoke, reinstate, or take action on a license. OAL considered this a non-substantive change.*

In subdivision (d), paragraphs (1) & (3), inserting the phrase “professional misconduct” in all three paragraphs. *OAL required this addition for clarity. OAL considers these additions to be non-substantive changes.*

Remove the citation to B&P 482 in the Authority citation in the Note. *OAL’s position is that the authority to promulgate the regulation comes from the respiratory care practice act, not from general B&P Code provisions regarding the Department of Consumer Affairs.*

Action Requested

Review the proposed changes set out in the Modified regulatory text in Attachment B. If the Board is willing to adopt the modifications to the text previously noticed on [May 29, 2020](#), make a motion to adopt the modifications to sections 1399.370 and 1399.372 as shown on Attachment A, to instruct staff to send the Modified Text out for a 15-day public comment period, and if no comments are received, to take such steps necessary to promulgate the regulation as modified.

California Code of Regulations
Title 16. Professional and Vocational Regulations
Division 13.6. Respiratory Care Board

MODIFIED LANGUAGE

Changes that are the subject of this 15-day noticed public comment period are shown as additions in double-underlined text and deletions in ~~double-strikethrough text~~.

Amend section 1399.370 to read:

§ 1399.370. Substantial Relationship Criteria.

(a) For the purposes of denial, suspension, or revocation of a license pursuant to Section 141 or Division 1.5 (commencing with section 475) of the B&P, Sections 3750, 3750.5, and 3755 of the B&P, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions, or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following:

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:

(1) The nature and gravity of the offense;

(2) The number of years elapsed since the date of the offense; and

(3) The nature and duties of a respiratory care practitioner ~~person~~ the profession in which the applicant seeks licensure, or in which the licensee is licensed, ~~holding the license.~~

(c) For purposes of subdivision (a), Such substantially related crimes, professional misconduct or acts include but are not limited to those involving the following:

(a)1 Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or term of the B&P.

(b)2 Commission of an act or conviction of a crime involving fraud, fiscal dishonesty theft, or larceny.

(c)3 Commission of an act or conviction of a crime involving driving under the influence or reckless driving while under the influence.

(d)4 Commission of an act or conviction of a crime involving harassment or stalking ~~as defined by the Penal Code and/or Civil Code.~~

(e)5 Commission of an act or conviction of a crime involving lewd conduct, prostitution or solicitation thereof, or pandering and/or indecent exposure, ~~as defined by the Penal Code.~~

(f6) Commission of an act or conviction of a crime involving human trafficking, ~~as defined by the Penal Code.~~

(g7) Commission of an act or conviction of a crime involving gross negligence in the care of an animal or any form of animal cruelty ~~as defined by the B&P or Penal Code.~~

(h8) Failure to comply with a court order.

(i9) Commission of an act or conviction of a crime, involving verbally abusive conduct or unlawful possession of a firearm or weapon.

(10) Commission of an act or conviction of a crime, of neglect, endangerment, or abuse involving a person under 18 years of age or over 65 years of age, or a dependent adult, without regard to whether the person was a patient.

Note: Authority cited: Sections ~~481 and~~ 3722, Business and Professions Code.

Reference: Sections 141, 480, 481, 488, 490, 492, 493, 3750, 3750.5, 3752, 3752.5, 3752.6, 3752.7, 3754.5, and 3755, Business and Professions Code; ~~and Sections 266, 288, 314, 646.9, 647, 1203.097, 11414, 13519.6 and 13519.7, Penal Code.~~

California Code of Regulations

Title 16. Professional and Vocational Regulations Division 13.6. Respiratory Care Board

MODIFIED LANGUAGE

Changes that are the subject of this 15-day noticed public comment period are shown as additions in double-underlined text and deletions in ~~double-strikethrough text~~.

Amend section 1399.372 to read:

§ 1399.372. Rehabilitation Criteria for Denials, Suspensions, or Revocations

~~(a) When considering the denial, petition for reinstatement, modification of probation, suspension or revocation of an RCP license, the board will consider the following criteria in evaluating the rehabilitation of such person and his or her eligibility for a license:~~

~~(a) The nature and severity of the act(s) or offense(s).~~

~~(b) The total criminal record.~~

~~(c) The time that has elapsed since the commission of the act(s) or offense(s).~~

~~(d) Compliance with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.~~

~~(e) Evidence of any subsequent act(s) or crime(s) committed.~~

~~(f) Any other evidence of rehabilitation submitted that is acceptable to the board, including:~~

~~(1) Successful completion of respiratory care courses with a "C" or better, as determined by the institution;~~

~~(2) Active continued attendance or successful completion or rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;~~

~~(3) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.~~

~~(g) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (f).~~

(a) When considering the denial of an ~~RCP~~ respiratory care practitioner license pursuant to section 480 of the B&P on the grounds that the applicant ~~was~~ has been convicted of a crime, the board shall consider whether the applicant made a showing of rehabilitation and is presently fit for a license, if the applicant completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board will consider the following criteria in evaluating the rehabilitation of such person and his or her fitness for a license:

- (1) The nature and gravity of the crime(s).
- (2) The length(s) of the applicable parole or probation period(s).
- (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.
- (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation.
- (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.
- (b) ~~If subdivision (a) is inapplicable~~ If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the denial is based on professional misconduct, or the denial is based on one or more grounds specified in Sections 3750, 3750.5, and 3755 of the B&P, the board shall apply the following criteria in evaluating an applicant's rehabilitation. The board shall find that the applicant made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated:
- (1) The nature and severity of the act(s), professional misconduct, or crimes(s) under consideration as grounds for denial.
- (2) Evidence of any act(s) or crime(s) committed subsequent to the act(s), professional misconduct, or crime(s) under consideration as grounds for denial under Section 480 of the B&P.
- (3) The time that has elapsed since commission of the act(s), professional misconduct, or crime(s) referred to in paragraph (1) or (2).
- (4) Whether the Applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the Applicant.
- (5) The criteria in subdivision (a)(1)-(5), as applicable.
- (6) Evidence, if any, of rehabilitation submitted by the Applicant.
- (c) When considering the petition for reinstatement, modification of probation, suspension or revocation of an ~~RCP~~respiratory care practitioner license on the ground that the licensee ~~has been~~ ~~was~~ convicted of a crime, the board shall consider whether the licensee made a showing of rehabilitation ~~and is presently fit for a license~~, if the licensee completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board shall consider the following criteria:
- (1) The nature and gravity of the crime(s).
- (2) The length(s) of the applicable parole or probation period(s).

(3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

(4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation.

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

~~(d) If subdivision (a) is inapplicable~~ If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, or the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (c), the denial is based on professional misconduct, or the denial is based on one or more of the grounds specified in Sections 3750, 3750.5, and 3755, the board shall apply the following criteria in evaluating a licensee's rehabilitation. The board shall find that the licensee made a showing of rehabilitation ~~and is presently fit for a license if~~, after considering the following criteria, the board finds that the licensee is rehabilitated:

(1) The nature and severity of the act(s), professional misconduct, or crime(s).

(2) The total criminal record.

(3) The time that has elapsed since commission of the act(s), professional misconduct, or crime(s).

(4) Compliance with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against such person.

(5) The criteria in subdivision (c)(1)-(5), as applicable.

(6) If applicable, evidence of dismissal proceedings pursuant to section 1203.4 of the Penal Code.

(7) Evidence of any subsequent act(s) or crime(s) committed.

(8) Any other evidence of rehabilitation submitted that is acceptable to the board, including:

(i) Successful completion of respiratory care courses with a "C" or better, as determined by the institution;

(ii) Active continued attendance or successful completion or rehabilitative programs such as 12-step recovery programs or psychotherapy counseling;

(iii) Letters relating to the quality of practice signed under penalty of perjury from licensed health care providers responsible for the supervision of his/her work.

(9) Statements, letters, attestations of good moral character, or references relating to character, reputation, personality, marital/family status, or habits shall not be considered rehabilitation unless they relate to quality of practice as listed in section (d)(8)(iii).

Note: Authority cited: Sections ~~482~~ and 3722, Business and Professions Code.
Reference: Sections 475, 480, 481, 482, 488, 490, 493, 3750, 3751 and 3753, Business and Professions Code.