

CLOSED SESSION DISCIPLINARY DECISIONS

The background information provided below is contained in the Department of Consumer Affairs Reference Manual for Board Members and gives an overview of part of a board's disciplinary process. Certain aspects of this overview were changed by the passage of SB 523 (Kopp, Chapter 938, Statutes of 1995). The changes regarding ex parte communications are described in the memorandum attached after the overview.

Accusation/Statement of Issues

The principal responsibilities of licensing boards are to determine whether a license should be issued and whether a disciplinary action should be taken against a license. The Administrative Procedure Act (Government Code, Sections 11500 through 11528) prescribes the process necessary to deny, suspend or revoke a license. An action to suspend or revoke a license is initiated by the filing of an Accusation. An action to deny a license is initiated by the filing of a Statement of Issues.

In disciplinary matters, a Deputy Attorney General (DAG) acts as the board's attorney and coordinates all necessary legal procedures. If a case is referred to the Office of the Attorney General and accepted for prosecution, the DAG assigned the matter will prepare a Statement of Issues or an Accusation. The person against whom the action is filed is called the respondent.

Once drafted, the Statement of Issues or Accusation is forwarded to the Executive Officer (EO) for approval. Except where the preparation of administrative pleadings are voluminous and routine, the EO will normally review an Accusation or Statement of Issues for accuracy. Board staff will then assign a case number, and the EO will sign it before returning it to the Attorney General's Office for service on the respondent.

The document is then served on the respondent. The respondent may contest the charges by filing a Notice of Defense, since the law requires an opportunity for a hearing.

The DAG will then schedule a hearing before an Administrative Law Judge (ALJ) from the Office of Administrative Hearings.

Hearing Process

An administrative hearing is similar to a trial in a civil or criminal court. Both parties introduce evidence (oral and documentary) and the respondent has a right to confront his or her accusers.

Although a board may sit with an ALJ and hear the case, most cases are heard by the ALJ because it is an expensive procedure and may require from several days to several weeks of time.

Proposed Decision

After hearing the case and considering all the evidence presented, the ALJ renders a Proposed Decision that contains findings of fact, a determination of issues and a proposed penalty (assuming a violation is found). This Proposed Decision is submitted to the board for consideration and final decision.

It is critical for board members to remember that the only evidence upon which a decision may be based is the evidence presented at the hearing. Evidence received outside the hearing (e.g., through telephone calls, reputation in the professional community, letters, information from staff, etc.) may not be considered. The respondent's constitutional right to due process may be violated and the entire disciplinary action may be invalidated if the evidence is received outside the hearing. If board members receive such outside information, they must disqualify themselves from voting on the case and from participating in discussions regarding final action on the case.

The board may vote on the Proposed Decision by mail ballot or at a meeting in a closed session. A board has three basic options when considering a Proposed Decision: (a) adopt the Decision as written, including the proposed penalty; (b) adopt the Decision and reduce the penalty; or (c) not adopt the Proposed Decision. The Proposed Decision must be voted upon by the board within 100 days of receipt or it becomes final as proposed by the ALJ.

Rejecting a Decision

A board may choose not to adopt a Proposed Decision of an ALJ for several reasons which might be grouped generally under the following categories:

- The board finds the penalty or terms of probation inappropriate to the violation(s).
- The board disagrees with the ALJ's determination of the issue(s) in the case.
- The board disagrees with the ALJ's findings and determination that no grounds for discipline exist.

When a Proposed Decision is not adopted, the board is required to obtain a copy of the transcript of the hearing and documentary evidence unless this requirement is waived by all parties. Each Board member must read the entire transcript and consider only that evidence presented at the hearing. The DAG and the respondent are entitled to submit oral or written arguments on the case to the board. The board must render its own decision after reading the transcript and arguments within 100 days from the receipt of the transcript. Only that part of the Decision which the board disagrees with should be rewritten. The Department's Legal Office or the DAG can prepare the board's Decision.

After promulgation, prompt service of the Decision should be made on the parties affected.

Petition for Reconsideration

A respondent may petition the board within 30 days of the effective date of a Decision for reconsideration of the Decision rendered. In this instance, the respondent will present a written argument to the board requesting dismissal of the charges or modification of the penalty. If the 30-day time period lapses or the board does not act on the petition, it is deemed to be denied.

Appeal Process

A respondent has the right to appeal disciplinary action imposed by a board by filing a writ of administrative mandamus in a Superior Court. This may include a request by the respondent for a stay or postponement of the board's Decision invoking disciplinary action. A court has the authority to uphold or set aside a Decision or return the case to the board with specific directions for further consideration.

A Decision rendered by a Superior Court can be further appealed to the Court of Appeals and then to the Supreme Court by either the board or the respondent.

Stipulation

Once an Accusation has been filed, rather than proceeding to a formal hearing, the parties may stipulate (agree) to a determination of the violations charged against the respondent and to a proposed penalty. Stipulations are negotiated and drafted by the DAG representing the board and the respondent and his/her legal counsel. In negotiating a stipulation, the DAG is encouraged to work closely with the board's EO to arrive at a stipulation that will be acceptable to the board.

The stipulation is presented to the board for its consideration in much the same way that a Proposed Decision is presented. In the case of a stipulation, the board has more latitude to modify its terms as part of the negotiation process and to look beyond the mere contents of an Accusation, though it should confine its consideration to information that is relevant to the charges at hand. While there is no time limit within which a stipulation must be considered, any undue delays should be avoided.

Stipulations are strongly encouraged because they significantly reduce the time and money spent in prosecuting a disciplinary action. Each day of a formal hearing will cost a board approximately \$1,600.00.

ETHICAL DECISION MAKING

Questions	Mandatory Disqualification	Need Further Discussion
Have you served as <ul style="list-style-type: none"> • investigator • prosecutor, or • advocate before or during the adjudicative proceeding?	Yes	
Are you biased or prejudiced for or against the person? or Do you have an interest (including a financial interest) in the proceeding?	Yes Yes	
Have you <ul style="list-style-type: none"> • engaged in a prohibited ex parte communication before or during adjudicative proceeding (may result in disqualification)? OR <ul style="list-style-type: none"> • complained to you about investigation currently in progress and said how great he or she is ✓ "Ex parte" communication: direct or indirect communication with you by one of the parties or its representative without notice and opportunity for all parties to participate in the communication (e.g. applicant or licensee (or someone acting on that person's behalf)		Yes Yes
Do you or your spouse or a close family member (such as an uncle or cousin) have personal knowledge of disputed evidentiary facts concerning the proceeding?		Yes
Do you doubt your capacity to be impartial?		Yes
Do you, for any reason, believe that your recusal would further the interests of justice?		Yes