



MEMORANDUM

DATE	January 30, 2020
TO	Veterinary Medical Board (Board)
FROM	Jessica Sieferman, Executive Officer
SUBJECT	Agenda Item 10.D. Sections 2040 and 2041, Article 5, Division 20, Title 16 of the CCR Regarding Substantial Relationship and Rehabilitation Criteria with the Requirements of Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018)

Background

As previously reported [here](#), [AB 2138](#) amended several sections of the Business and Professions Code related to how regulatory licensing boards respond to applicants with criminal convictions. This bill generally removed the Board’s authority to deny an application based on formal discipline by a licensing board in or outside of California or criminal convictions and underlying acts occurring over seven years ago. The bill also required each board to develop criminal conviction substantially related and rehabilitation criteria by July 1, 2020.

As AB 2138 applies to all boards within the Department of Consumer Affairs (DCA), DCA consulted the Attorney General’s Office (AG) and the Office of Administrative Law (OAL) to develop regulatory template language for use by all DCA boards. The Board approved its regulatory language on January 23, 2019. On February 13, 2019, the Board submitted its rulemaking file for review by DCA, the Business, Consumer Services, and Housing Agency (Agency), and the Department of Finance. On June 28, 2019, the Board’s proposal was published by OAL. Following public comment and review of the Board’s final rulemaking file by DCA and Agency, the Board’s proposal was the first AB 2138 rulemaking file submitted to OAL on October 8, 2019, and the Department of Finance performed a concurrent review.

On November 20, 2019, OAL advised me of several minor, technical corrections to be made to the regulatory text and the following substantive concerns:

1. Proposed Amendments to CCR, title 16, section 2040: the term “professional misconduct” is not defined in statute or regulation. OAL requested the text include a definition of “professional misconduct to clarify the difference between “professional misconduct,” as used in Business and Professions Code (BPC) section 480, and “unprofessional conduct,” as used in BPC section 4883, subdivision (g).

2. Proposed Amendments to CCR, title 16, section 2041:
 - a. The phrase “is presently eligible for a license” appears to mean that rehabilitation will only be evaluated if the initial eligibility threshold is met; if that is what the Board intends, the language should be clarified.
 - b. The proposal requires consideration of “act(s)” but “professional misconduct” is not included in the criteria for rehabilitation; OAL requested the Board consider changing “act(s)” to “professional misconduct.”

On November 20, 2019, I withdrew the rulemaking from OAL. As the regulatory proposal was based on the DCA template being used by 40 DCA boards, DCA worked with OAL to resolve the substantive concerns with the regulatory proposal. The Board has until June 28, 2020, to complete the rulemaking review with OAL.

Modifications to the Regulatory Proposal

DCA and OAL have agreed on the following modified proposed regulatory language:

1. CCR, title 16, section 2040:
 - a. Subsection (a):
 - i. Add reference to BPC section 4883, subdivision (n), which authorizes the Board to deny, revoke, or suspend a license or registration for disciplinary action taken by any public agency in any state or territory for any act substantially related to the practice of veterinary medicine or the practice of a veterinary technician.
 - ii. Add new definition of “license” to make clear the proposal applies to licenses, registrations, and permits issued by the Board. . This provision conforms to BPC section 23.7, which defines “license” to mean “license, certificate, registration, or other means to engage in a business or profession regulated by [the BPC].” For professions regulated under the Veterinary Medicine Practice Act, the Board issues veterinarian licenses, veterinary technician registrations, and veterinary assistant controlled substance permits.
 - b. Subsection (b): Insert “all of” before “the following criteria” to reflect the statutory requirement in BPC section 481, subdivision (b).
 - c. Subsection (b)(3): Remove and replace “a person holding the license” with “the profession in which the applicant seeks licensure or in which the licensee is licensed” to clarify the nature and duties of the profession to be considered when determining the substantial relationship.
 - d. Subsection (c): Make technical revisions to conform the term “subsection” and the use of singular nouns throughout the section.
 - e. Authority and Reference: Make minor revisions to delete inapplicable authority sections and add statutes relevant to substantial relationship criteria.

2. CCR, title 16, section 2041:
 - a. Subsection (a): Add new definition of “license” applicable to subsections (c) and (d) to make clear the proposal applies to licenses, registrations, and permits issued by the Board. This provision conforms to BPC section 23.7, which defines “license” to mean “license, certificate, registration, or other means to engage in a business or profession regulated by [the BPC].” For professions regulated under the Veterinary Medicine Practice Act, the Board issues veterinarian licenses, veterinary technician registrations, and veterinary assistant controlled substance permits.
 - b. Subsection (b): Add new definition of “licensee” applicable to subsections (c) and (d) to make clear the proposal applies to Board licensees, registrants, and permit holders of the Board. . This provision conforms to BPC section 23.8, which defines “licensee” to mean “any person authorized by a license, certificate, registration, or other means to engage in a business or profession regulated by [the BPC].” Professionals regulated under the Veterinary Medicine Practice Act are veterinarian licensees, veterinary technician registrants, and veterinary assistant controlled substance permit holders.
 - c. Subsection (c): Add a new heading “Denial of a license” to clarify this subsection refers to criteria for rehabilitation applicable to license applicants.
 - d. Paragraph (c)(1): Revise subsection numbering, make technical revisions, and strike “and is presently eligible for a license” to resolve OAL’s concerns that this phrase may be misinterpreted.
 - e. Subparagraphs (c)(1)(A) through (E): Make technical revisions to reflect the new subsection numbering and lettering scheme.
 - f. Paragraph (c)(2): Revise subsection numbering and remove and restate the subsection to clarify the circumstances under which the Board will apply rehabilitation criteria to applicants who have not completed a criminal sentence without a violation, the applicant with a criminal conviction did not make a showing of rehabilitation under paragraph (c)(1), the denial is based on professional misconduct (as that term is used under new BPC section 480), or the denial is based on one or more grounds specified under the Veterinary Medicine Practice Act applicable to veterinarian licenses (BPC section 4883), veterinary technician registrations (BPC sections 4842, 4845.5, and 4883), and VACSPs (BPC sections 4836.2). These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for all application denials, regardless of whether the grounds for denial stem from BPC section 480. The clarifications promote equity and fairness to all applicants in keeping with the legislative intent of AB 2138.
 - g. Subparagraphs (c)(2)(A) through (C): Add “professional misconduct” to include the conduct described under BPC section 480 as grounds for denial.
 - h. Subparagraphs (c)(2)(A) through (F): Make technical revisions to reflect the new subsection numbering and lettering scheme.

- i. Subparagraph (c)(2)(B): Strike “under Section 480 of the code” as new paragraph (c)(2) is applicable to all statutory grounds for denial, as specified, not just grounds under BPC section 480.
- j. Subsection (b): Add a new heading “Suspension or revocation of a license” to clarify this subsection refers to criteria for rehabilitation applicable to issued licenses.
- k. Paragraph (b)(1): Clarify the conditions for applying rehabilitation criteria for suspension or revocation of a license for criminal convictions pursuant to BPC section 490 and strike “and is presently eligible for a license” to resolve OAL’s concerns that this phrase may be misinterpreted.
- l. Subparagraphs (b)(1)(A) through (E): Make technical revisions to reflect the new subsection numbering and lettering scheme.
- m. Paragraph (b)(2): Remove and restate subsection (d) as paragraph (b)(2) and clarify the circumstances under which the Board will apply rehabilitation criteria to licensees who have not completed a criminal sentence without a violation, the licensee with a criminal conviction did not make a showing of rehabilitation under paragraph (b)(1), the suspension or revocation is based on a disciplinary action as described in BPC section 141, or the suspension or revocation is based on one or more grounds specified under the Veterinary Medicine Practice Act (Act) applicable to veterinarian licenses (BPC section 4883), veterinary technician registrations (BPC sections 4837, 4845.5, and 4883), and VACSPs (BPC sections 4836.2). These clarifications are necessary to inform the public, licensees, and Board staff that rehabilitation criteria will be considered for all license suspensions and revocations, regardless of whether the grounds for discipline stem from BPC section 490. The clarifications promote equity and fairness to all licensees in keeping with the legislative intent of AB 2138.
- n. Subparagraphs (b)(2)(A) and (C): Add “disciplinary action(s)” to include the conduct described under BPC section 141 as grounds for suspension or revocation.
- o. Subparagraphs (b)(2)(A) through (G): Make technical revisions to reflect the new subsection numbering and lettering scheme.
- p. Subsection (c): Correct the cross-reference to reinstatement petition evaluations applicable under the Act (BPC section 4887), and clarify consideration of these criteria for petitions filed for reinstatement of a license or registration pursuant to the language used in BPC section 4887. The proposal maintains the existing requirement to consider rehabilitation criteria applicable to license denials when the Board considers a former licensee’s or registrant’s petition for reinstatement.
- q. Authority and Reference: Minor technical revisions to delete inapplicable authority sections and add statutes relevant to rehabilitation criteria.

Recommendation

The Board is asked to review and approve the attached modified regulatory proposal for resubmission to OAL.

Attachment: Modified Proposed Regulatory Language

California Code of Regulations
Title 16. Professional and Vocational Regulations
Division 20. Veterinary Medical Board

MODIFIED PROPOSED REGULATORY LANGUAGE

Proposed amendments to the regulatory language are shown in single underline for new text and ~~single strikethrough~~ for deleted text.

Modifications to the proposed regulatory language are shown in double underline for new text and ~~double strikethrough~~ for deleted text.

Article 5

§ 2040. 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), or subdivision (n) of Section 4883 of the code, a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions, or duties of a person holding a license under Chapter 11 of Division 2 of the code if to a substantial degree it evidences present or potential unfitness of a person holding a license to perform the functions authorized by his or her the license in a manner consistent with the public health, safety, or welfare. For purposes of this subsection, "license" shall mean license, registration, or permit. Such crimes or acts shall include but not be limited to those involving the following:

(b) In making the substantial relationship determination required under subsection (a) for a crime, the board shall consider all of 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 person holding the license the profession in which the applicant seeks licensure or in which the licensee is licensed.

(c) For purposes of subsections ~~subdivision~~ (a), a substantially related crimes, professional misconduct, or acts shall include, but ~~are~~ is not limited to, the following:

(a1) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of Chapter 11, Division 2 of the code or other state or federal laws governing the practice of veterinary medicine.

(b2) Conviction of a crime involving fiscal dishonesty.

Note: Authority cited: Sections ~~481, 493,~~ 4808, Business and Professions Code.
Reference: Sections 141, 480, 481, 488, 490, and 492, and 493 and 4883, Business and Professions Code.

§ 2041. Criteria for Rehabilitation.

(a) For purposes of subsections (c) and (d), "license" shall mean license, registration, or permit.

(b) For purposes of subsections (c) and (d), "licensee" shall mean licensee, registrant, or permit holder.

(c) Denial of a license.

(1) When considering the denial of a license under Section 480 of the code on the ground that the applicant ~~was~~ has been convicted of a crime, the board, in evaluating the rehabilitation of the applicant and his or her present eligibility for a license will consider the following criteria: shall consider whether the applicant made a showing of rehabilitation and is presently eligible 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 shall consider the following criteria:

(~~4~~A) The nature and gravity of the crime(s).

(~~2~~B) The length(s) of the applicable parole or probation period(s).

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

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

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

(~~b~~2) If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subsection (c)(1), the denial is based on professional misconduct, or the denial is based on one or more of the grounds specified in Sections 4836.2, 4842, 4845.5, or 4883 of the code, the board shall apply the following criteria in evaluating an applicant's rehabilitation: ~~If subsection (a) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subsection (a), 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 eligible for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated:~~

(~~4~~A) The nature and ~~severity~~ gravity of the act(s), professional misconduct, or crime(s) under consideration as grounds for denial.

(~~2~~B) Evidence of any act(s), professional misconduct, or crime(s) committed subsequent to the act(s), professional misconduct, or crime(s) under consideration as

grounds for denial ~~which also could be considered as grounds for denial under Section 480 of the code.~~

~~(3C)~~ The time that has elapsed since commission of the act(s), professional misconduct, or crime(s) referred to in subdivision paragraph (4A) or (2B).

~~(4D)~~ The extent to which Whether the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

~~(5E)~~ The criteria in subsection (a)(1)(A)-(E), as applicable.

~~(6F)~~ Evidence, if any, of rehabilitation submitted by the applicant.

~~(b)~~ Suspension or revocation of a license.

~~(1)~~ When considering the suspension or revocation of a license under Section 490 of the code on the ground that a person holding a license under Chapter 11 of Division 2 of the code has been convicted of a crime, the board shall consider whether the licensee made a showing of rehabilitation and is presently eligible 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, shall in evaluating the rehabilitation of such person and his or her eligibility for a license will consider the following criteria:

~~(4A)~~ The nature and gravity of the crime(s).

~~(2B)~~ The length(s) of the applicable parole or probation period(s).

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

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

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

~~(2)~~ If the licensee has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subsection (d)(1), the suspension or revocation is based on a disciplinary action as described in Section 141 of the code, or the suspension or revocation is based on one or more of the grounds specified in Sections 4836.2, 4837, 4845.5, or 4883 of the code, the board shall apply the following criteria in evaluating the licensee's rehabilitation: If subsection (c) is inapplicable, or the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subsection (c), the board shall apply the following criteria in evaluating the licensee's rehabilitation. The board shall find that the licensee made a showing of rehabilitation and is presently eligible for a license if, after considering the following criteria, the board finds that the licensee is rehabilitated:

~~(4A)~~ Nature and severity gravity of the act(s), disciplinary action(s), or offense crime(s).

~~(2B)~~ Total criminal record.

~~(3C)~~ The time that has elapsed since commission of the act(s), disciplinary action(s), or offense crime(s).

(4D) Whether the licensee has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5E) The criteria in subsection (ed)(1)(A)-(E), as applicable.

(6F) If applicable, evidence of expungement/dismissal proceedings pursuant to Section 1203.4 of the Penal Code.

(67G) Evidence, if any, of rehabilitation submitted by the licensee.

(ee) When considering a petition for reinstatement of a license or registration under the provisions of Section 4887 of the code 11522 of the Government Code, the board shall evaluate evidence of rehabilitation submitted by the petitioner considering those criteria specified in subsection (ac) of this section.

Note: Authority cited: Sections ~~482 and~~ 4808, Business and Professions Code.

Reference: Sections 141, 475, 480, 481, and 482, 488, 490, and 493, 4836.2, 4837, 4842, 4845.5, 4883 and 4887, Business and Professions Code.