



MEMORANDUM

DATE	October 11, 2022
TO	Veterinary Medical Board (Board)
FROM	Jeffrey Olguin, Lead Administrative & Policy Analyst
SUBJECT	Agenda Item 10.B. Section 2043, Article 5.5, Division 20, Title 16 of the California Code of Regulations (CCR) Regarding Civil Penalties for Citation

Background

As discussed in more detail [here](#), during its January 2020 meeting, the Board discussed concerns raised by the Board’s Executive Officer (EO) that California Code of Regulations (CCR) section 2043 currently hinders the Board’s ability to carry out its consumer protection mandate.

[BPC section 125.9](#) allows the Board to establish, by regulation, a system for the issuance of a citation to a licensee which may contain an order of abatement or an order to pay an administrative fine assessed by the Board where the licensee is in “violation of the applicable licensing act or any regulation adopted [by the Board] pursuant thereto”. [BPC section 4875.2](#) provides the Board with similar citation and fine authority specific to the Practice Act (BPC sections 4800 to 4920.8) and the EO’s authority to issue, upon completion of an investigation and based upon probable cause, a citation to a veterinarian, a registered veterinary technician, or an unlicensed person who has violated provisions of the Practice Act.

However, 16 CCR section [2043](#) currently limits the Board’s authority to issue a citation and assess an administrative fine to a violation that occurs “while engaged in the practice of veterinary medicine.” This is an unnecessary restriction on the Board, given that the governing statutes do not limit the Board’s authority to issue citations and levy administrative fines for only violations occurring “while engaged in the practice of veterinary medicine,” and that many violations of the Practice Act can occur while not physically practicing on an animal at the time of the violation.

To remedy this issue, the Board approved a regulatory proposal striking the limiting phrase from 16 CCR section 2043. The proposal also makes minor grammatical and technical changes.

Public Comment

The 45-day public comment period began on August 19, 2022 when the Board’s [Notice of Proposed Regulatory Action](#), [Initial Statement of Reasons](#) (ISR) and [Proposed Regulatory Language](#) were posted on the Board’s website and [published](#) by the Office

of Administrative Law (OAL). By the close of the comment period on October 4, 2022, the Board had received public comments from the California Veterinary Medical Association (CVMA), Rodney Ferry, DVM, and Timothy Metzger, DVM. The public comments are attached for Board review.

Summaries of and Proposed Responses to Objections to the Proposal

In accordance with Government Code section [11346.9](#), subdivision (a)(3), the Board, in its final statement of reasons supporting the rulemaking, must summarize each objection or recommendation and the reasons for making no change. Summaries of and proposed responses to objections are below for Board consideration and approval.

1. Concerns with open-ended and ambiguous scope, lack of staff training, and too much discretion in a very small group of individuals.

Letter from CVMA, September 12, 2022

The CVMA raises concerns that, by striking “while engaged in the practice,” licensees will not understand where the Board’s authority ends and begins and seeks clarification on the intent of the expansion. Specifically, CVMA asks if the intent is to allow the Board to levy civil penalties based on criminal and civil violations outside the context of veterinary practice. CVMA states the scope of the Board’s power to issue citations “needs to be significantly clarified so that the licensees will be placed on clear, seasonable [sic] notice of what categories of conduct may be subject to citation and fine.”

In addition, CVMA is concerned Board staff does not have the training to assess whether a civil or criminal violation occurring outside “the practice of veterinary medicine” is related to the practice, and that the proposed amendments “vest too much discretion in a very small group of individuals.”

While CVMA objects to the proposed amendments to 16 CCR section 2043, subsections (a)-(c), they request the Board consider making the following changes identified in italics:

“Class ‘ ___ ’ violations involve a person who, while engaged in the practice of veterinary medicine, has violated a statute or regulation *substantially* relating to the practice of veterinary medicine *and included in the Veterinary Medicine Practice Act...*”

Proposed Board Response:

As stated in its ISR, BPC sections [125.9](#), [148](#) and [4875.2](#) provide the Board statutory authority to issue citations for violations of any sections of the Board’s licensing act or regulations adopted by the Board. In addition, BPC section [4883](#), subdivision (a) authorizes the Board to assess a fine for criminal convictions substantially related to the qualifications, functions, or duties of veterinary medicine. Striking “while engaged in the practice” does not expand the scope of the Board’s authority to issue citations beyond what the Legislature has already authorized in statute. Citations cannot be issued for violations outside the scope provided by the Legislature.

The Board does not intend to issue citations for violations unrelated to the practice of veterinary medicine. With that said, criminal convictions occurring outside the actual engagement of veterinary practice can be, and often are, still considered related to the practice of veterinary medicine.

A crime or act is substantially related to the qualifications, functions, or duties of veterinary medicine “if to a substantial degree it evidences present or potential unfitness of a person holding a license to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare.” (CCR section [2040](#)). 16 CCR section 2040, subsection (b) provides further guidance when determining a substantial relationship.

The concerns regarding the lack of training and too much discretion are unwarranted, as the Board’s EO already has the discretion to initiate disciplinary action for any Practice Act violation, including substantially related criminal convictions. (16 CCR section 2003). The Board’s EO and staff regularly depend on BPC sections 125.9, 148, 4875.2, and 4883 and 16 CCR sections 2040 and 2043 when determining the appropriate course of action for consumer protection. To claim the Board’s EO and staff do not have adequate training to assess criminal convictions and that striking “while engaging in the practice” provides too much discretion to issue a citation, a much lower enforcement action than disciplining a licensee, is illogical.

As such, the Board rejects CVMA’s recommendation.

2. Proposed amendments leave too much to interpretation.

Email from Rodney Ferry, DVM, August 22, 2022

Dr. Ferry states that he is not opposed to the intent of the changes. However, he raises a concern that removing “while engaged in the practice of veterinary medicine” in subsection (c) and not adding the clause “has violated a statute or regulation relating to the practice of veterinary medicine...” that is contained in subsection (a) and (b) (1) and (2) leaves too much to interpretation. As an example, Dr. Ferry states the Board “could make euthanasia of a patient a class ‘C’ violation.”

Proposed Board Response:

The Board can only issue citations for statute or regulation violations. (BPC sections 125.9, 148, 4875.2, and 4883). If a statute or regulation violation does not occur, no citation would be issued. Therefore, adding the language recommended by Dr. Ferry is unnecessary.

3. Expressed opposition to all Board fines.

Email from Timothy Metzger, DVM, September 6, 2022

Dr. Metzger states, “Sounds like VMB is running out of money again. Can go crazy with fines to support their life style. They can fine a person who can not afford to fight them. At least one good thing that, big corp has is the money and lawyers to bankrupt them.”

Proposed Board Response:

Dr. Metzger appears to oppose all board fines and does not reference this specific rulemaking. However, it should be noted that citations are not used to generate revenue or act as a form of cost recovery for investigations. As stated in the ISR, citations and administrative fines are used as an enforcement tool to incentivize compliance with applicable statutes and regulations. They are often used when violations warrant more than an educational letter but do not rise to the level of formal discipline.

Action Requested

Please review the attached public comments and the above summaries and proposed responses. If the Board agrees with the summaries of and proposed responses to the public comments, please entertain a motion to direct staff to incorporate the responses into the Final Statement of Reasons and instruct the Executive Officer to take all steps necessary to complete the rulemaking process and authorize the Executive Officer to make any technical or non-substantive changes to the rulemaking package.

Attachments:

1. Letter from CVMA, September 12, 2022
2. Email from Rodney Ferry, DVM, August 22, 2022
3. Email from Timothy Metzger, DVM, September 6, 2022

September 12, 2022

Jessica Sieferman
Executive Officer
California Veterinary Medical Board
1747 North Market Blvd., Suite 230
Sacramento, CA 95834

**RE: Comments on 16 CCR Section 2043
Proposed Civil Penalties for Citations Regulatory Amendments**

Dear Ms. Sieferman:

The California Veterinary Medical Association (CVMA), representing over 7,800 veterinarians, registered veterinary technicians, and veterinary students, has comments on recent proposed changes to California Code of Regulations, Title 16, section 2043: Civil Penalties for Citations.

The proposed changes at issue relate to the authority of the Veterinary Medical Board (VMB) to issue so-called “cite and fines” to California veterinary licensees. Of note, the CVMA expended significant effort in helping to create and twice amend the “cite and fine” framework so that minor and/or first-time infractions relating to veterinary practice did not have to rise to a formal disciplinary process in order to be resolved. Among the infractions to be addressed by the “cite and fine” program were those relating to a failure to meet continuing education requirements, recordkeeping, minor premises inspection violations, and the like. Overall, the intention behind the “cite and fine” framework was to reduce burden, conserve resources, lower costs, and save time for both the VMB and veterinarian respondents by vesting authority in the VMB’s executive officer to address minor violations of the Veterinary Medicine Practice Act.

Regarding the proposed changes now under review, the CVMA has two categories of comment, set forth below:

1. Proposed Amendments to 16 CCR Section 2043(e)

The CVMA is in full support of any steps that the VMB takes to deter illegal veterinary practice in California. In that regard, the CVMA is made aware on an ongoing basis of unlicensed individuals practicing veterinary medicine on equine, food animal, small animal, and avian/exotic animals. Those activities pose significant threats to animal welfare, public health,

and consumer protection, and the CVMA encourages the VMB, the Department of Consumer Affairs, and the legislature as a whole to take all necessary steps to curb them.

2. Proposed Amendments to 16 CCR Section 2043(a)-(c)

As noted above, the original intent undergirding the “cite and fine” program was to address minor infractions in a more streamlined and economical way. While that same justification is referenced in the VMB’s Initial Statement of Reasons (see, *inter alia*, p. 2 of 8, second-to-last paragraph) in support of the proposed amendments to Section 2042(a)-(c), the CVMA is concerned about the contemplated expansion of the regulation through the deletion of the phrase “while engaged in the practice of veterinary medicine” in the description of Class “A,” Class “B,” and Class “C” violations. The CVMA’s concerns are threefold, as follows:

- a. First and foremost, the deletion of “while engaged in the practice of veterinary medicine”—especially when coupled with the *maintenance* of the clause “relating to the practice of veterinary medicine” just seven words later—renders the regulation open-ended and ambiguous for licensees who need to understand where the VMB’s authority begins and ends. Is the intent of this deletion to significantly expand the scope of the VMB’s citation authority, allowing the VMB to levy civil penalties based on criminal and civil violations outside the context of veterinary practice? If so, what are the confines of that newly-granted authority, and how would the still-extant term “relating to the practice of veterinary medicine” operate—if at all—to delimit that authority? In short, if the *only* governor on the VMB’s cite and fine authority is the “relating to” language, what is the spectrum of conduct that will be determined to “relate to” veterinary practice? The issue is further clouded by the fact that while the newly-amended regulation itself uses the words “relating to,” the VMB’s Initial Statement of Reasons employs the term “substantially related to” (see p. 2 of 8, third full paragraph). In short, the scope of authority that the proposed amendment is intended to grant needs to be significantly clarified so that licensees will be placed on clear, seasonable notice of what categories of conduct may be subject to citation and fine.
- b. Similarly, *if* the proposed amendment is intended to significantly expand the VMB’s scope of authority to cover acts outside the confines of veterinary practice, the CVMA has significant concern about the unwieldiness of such a framework in practical application. In that vein, while the staffs of the Department of Consumer Affairs’ constituent boards receive formalized training on the practice acts of the professions they oversee, we are not aware of them receiving training in assessing whether and to what extent other civil or criminal violations occurring outside the confines of the pertinent practice (here, veterinary medicine) have the requisite “relation” to that practice to serve as an appropriate beachhead for a civil penalty. Accordingly, it is inappropriate to place the burden of assessing whether an act occurring outside “the practice of veterinary medicine” has a sufficient nexus to such practice in the hands of one or more persons who have not been trained to make that assessment.
- c. As an overall matter, and especially in combination with the above observations, the CVMA is concerned that the proposed amendments to Section 2043(a)-(c) vest too much discretion in a very small group of individuals. While we recognize that the enabling

statutory framework does provide some leeway for enforcement expansion, we also note that this precise subject was extensively discussed when similar amendments to Section 2043 were proposed in both 2000 and 2016. On each of those occasions, and after no small amount of analysis, the contemplated expansion of discretionary authority was deemed a bridge too far, and ultimately shelved.

Given the above, the CVMA requests that the VMB refrain from enacting the proposed amendments to Section 2043(a)-(c), especially in absence of substantial clarification concerning the amplified scope of authority contemplated thereby. *At the very least*, and consistent with the VMB's own recitation contained in its Initial Statement of Reasons, the CVMA asks that the VMB utilize regulatory language indicating that the violations sought to be captured by the amendment be "*substantially* related to" the practice of veterinary medicine, rather than just "related to." Such could be accomplished through use of the following language (changes in italics):

"Class ' __ ' violations involve a person who, ~~while engaged in the practice of veterinary medicine~~, has violated a statute or regulation *substantially* relating to the practice of veterinary medicine *and included in the Veterinary Medicine Practice Act...*"

Thank you for your consideration of these matters.



Dan Baxter
Executive Director

Olguin, Jeffrey@DCA

From: docrod outbackvet.com <docrod@outbackvet.com>
Sent: Monday, August 22, 2022 2:51 PM
To: Olguin, Jeffrey@DCA
Subject: Notice of Proposed Regulatory Action

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California Veterinary Medical Examining Board,

I have just read the information pertaining to amending section 2043 of Article 5.5 of Division 20 of Title 16 of the California Code of Regulations and would like to make the following comments:

I am not opposed to the intent of the changes themselves. However, I believe that the Proposed Regulatory Language could use some work. (a) and (b) of the proposed amendment to 2043 both state "...a person who has violated a statute or regulation relating to the practice of veterinary medicine...". (c) states "...a person who (1) has caused death or serious harm to an animal patient, or ...". By removing the "while engaged in the practice of veterinary medicine" and not adding a clause such as contained in (1) and (2) the wording leaves too much to interpretation. As it reads, this could make euthanasia of a patient a class "C" violation. 2,3, & 4 mention a violation and this wording needs to find it's way into (1) also.

Thanks,

Rod
Rodney W. Ferry
Lakeview Animal Hospital
CA Lic# 10055

Olguin, Jeffrey@DCA

From: Timothy Metzger <timothybigguy8064@gmail.com>
Sent: Friday, September 16, 2022 11:35 AM
To: Olguin, Jeffrey@DCA
Subject: fines:

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Sounds like VMB is running out of money again. Can go crazy with fines to support their life style. They can fine a person who can not afford to fight them. At least one good thing that, big corp has is the money and lawyers to bankrupt them.