

**State of California
Office of Administrative Law**

In re:
Athletic Commission

Regulatory Action:

Title 4, California Code of Regulations

Adopt sections: 511
Amend sections: 323, 399
Repeal sections:

**NOTICE OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-0722-05 S

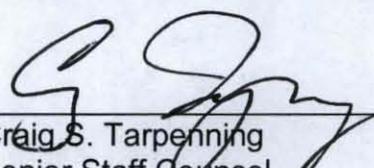
The State Athletic Commission (Commission) proposed to amend sections 323 and 399 and adopt section 511 of title 4 of the California Code of Regulations to revise hand wrapping standards, specify criteria to be considered by the Commission when considering denial or reinstatement, and specify a range for the number of rounds scheduled for martial arts and kickboxing contests.

OAL disapproves this regulatory action for the following reason(s):

The agency failed to follow the correct procedure in that changes made to section 323 were not properly made available for public comment; the regulatory file does not contain all required documents, and/or required documents included in the file are defective; and the disapproved regulations fail to comply with the Necessity standard of Government Code section 11349.1.

Within seven (7) calendar days of the date of this notice, the Office of Administrative Law will send the adopting agency a written decision detailing the reason(s) for disapproval of this regulatory filing. Pursuant to Government Code section 11349.4, the adopting agency may resubmit the regulation(s) within 120 calendar days of receipt of that written decision.

Date: September 2, 2011



Craig S. Tarpenning
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For: DEBRA M. CORNEZ
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Original: George Dodd
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**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

STATE ATHLETIC COMMISSION

REGULATORY ACTION:

Title 4, California Code of
Regulations

ADOPT SECTION 511

AMEND SECTIONS 323 AND 399

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2011-0722-05S

SUMMARY OF REGULATORY ACTION

The State Athletic Commission (Commission) proposed to adopt section 511 and amend sections 323 and 399 of title 4 of the California Code of Regulations to revise hand wrapping standards, specify criteria for consideration by the Commission when considering denial or reinstatement of a license, and establish a range for the number of rounds scheduled for martial arts and kickboxing contests. On July 22, 2011, the Commission submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On September 2, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for failure to follow the required procedure in making changes to section 323 available for public comment, for failure to comply with the necessity standard of Government Code section 11349.1, and because the rulemaking file did not contain all required documents and required documents included in the file were defective.

DISCUSSION

The adoption of regulations by the Commission must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted 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 rule or regulation subject to the APA may become effective, the rule or 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 rule or 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 rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. THE REGULATION TEXT MADE AVAILABLE TO THE PUBLIC AND SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS CHANGES TO THE REGULATIONS THAT WERE NOT MADE AVAILABLE TO THE PUBLIC FOR COMMENT

Subdivision (a) of Government Code section 11346.2 requires that an agency proposing to make changes to the California Code of Regulations make the proposed changes available to the public for comment:

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

...

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The text of section 323 made available to the public for comment during the 45 day availability period contained extensive changes from section 323 as it currently exists in title 4 of the California Code of Regulations. Many of these changes were not shown in underline and strikeout as required by subdivision (a)(3) of Government Code section 11346.2. As a result, a member of the affected public would not reasonably have known that those changes not shown in underline and strikeout were being proposed and for this reason never had an opportunity to comment on these proposed changes. Also it is not clear from the record that the Commission was aware of the changes not shown in underline and strikeout. These changes to section 323 will need to be accurately illustrated in underline and strikeout in the text of the regulation and then made available to the public before being adopted by the Commission.

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment for at least 15 days before the changes are adopted by the agency:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

Prior to resubmission to OAL, the changes to section 323 previously not shown in underline and strikeout will need to be shown in underline and strikeout and made available to the public for at least 15 days prior to adoption by the Commission pursuant to Government Code section 11346.8(c) and section 44, title 1, California Code of Regulations.

Similarly, please note that the text of the regulations attached to the STD 400 submitted to OAL for review and filing with the Secretary of State did not accurately illustrate in underline and strikeout the changes to section 323 as it appears in the California Code of Regulations.

2. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the "necessity" standard. Government Code section 11349(a) defines "necessity" to mean ". . . 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 purpose 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, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

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.

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(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, 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(b)(1).) The initial statement of reasons 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, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The "Factual Basis/Rationale" in the initial statement of reasons submitted with this regulatory action for the amendment of section 399 and adoption of section 511 describes only the effect of the new or revised provisions in the regulations rather than explaining the reasons for the various provisions. This does not meet the necessity standard of Government Code section 11349 and section 10 of title 1 of the California Code of Regulations. In that the initial statement of reasons is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations and this document is required to be made

available to the public with the 45 day notice, any addition to the statement of reasons now providing the necessity missing from the existing initial statement of reasons must be made available to the public for at least 15 days prior to adoption of the regulations by the Commission pursuant to Government Code section 11347.1.

Government Code section 11347.1 provides in part:

(a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.

(b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

(1) Persons who testified at the public hearing.

(2) Persons who submitted written comments at the public hearing.

(3) Persons whose comments were received by the agency during the public comment period.

(4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.

(c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

We also note that the "Factual Basis/Rationale" in the initial statement of reasons submitted with this regulatory action for the amendment of section 323 says "...the amendment would revise the language to meet the current industry standard...." The "Underlying Data" specified in the initial statement of reasons for the amendment of section 323 identifies the following as being relied upon:

Association of Boxing Commission hand wrap guidelines and a survey of selected seconds, managers, boxers and commission enforcement staff that are considered some of the best in the industry.

These documents were not included in the rulemaking file. (See discussion below.) If the "current industry standard" that the changes to section 323 are conforming to is not contained in

these documents, the initial statement of reasons needs to further explain how the changes “...meet the current industry standard....”

3. THE RULEMAKING FILE DID NOT CONTAIN ALL REQUIRED DOCUMENTS AND REQUIRED DOCUMENTS INCLUDED IN THE FILE WERE DEFECTIVE.

- a. Subdivision (b)(7) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

The “Underlying Data” specified in the initial statement of reasons for the amendment of section 323 identifies the following as being relied upon:

Association of Boxing Commission hand wrap guidelines and a survey of selected seconds, managers, boxers and commission enforcement staff that are considered some of the best in the industry.

These documents need to be included in the rulemaking file pursuant to Government Code section 11347.3(b)(7) and made available to the public for at least 15 days pursuant to Government Code section 11347.1 if not previously available during the 45 day comment period.

- b. Subdivisions (b)(2) and (b)(10) of Government Code section 11347.3 require that the rulemaking file include:

(b)(2) **All published notices** of proposed adoption, amendment, or repeal of the regulation, and an updated informative digest, the **initial statement of reasons**, and the final statement of reasons. (Emphasis added.)

...

(b)(10) The **text of regulations as originally proposed** and the modified text of regulations, if any, that were made available to the public prior to adoption. (Emphasis added.)

The notice of proposed regulatory action, the initial statement of reasons, and the text of the regulations originally made available to the public included in the rulemaking file for OAL review had been modified from their original versions. The original version of each must be included in the rulemaking file as required by Government Code section 11347.3.

Also, the rulemaking file did not include a copy of a notice described in the rulemaking file as having been published in the General Public Interest part of the California Regulatory Notice Register on November 12, 2010. Reportedly, this notice explained there was a continuation of the original 45 day hearing from November 29, 2010, to December 7, 2010, for this regulatory action. This notice must be included in the rulemaking file as required by subdivision (b)(2) of Government Code section 11347.3.

- c. Subdivision (b)(12) of Government Code section 11347.3 requires that the rulemaking file include:

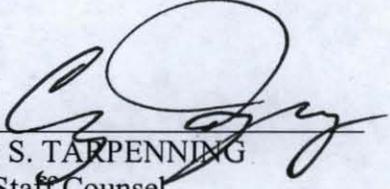
An index or table of contents that identifies **each item** contained in the rulemaking file.... (Emphasis added.)

The Table of Contents provided with this regulatory action did not identify each item included in the rulemaking file.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: September 7, 2011


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Assistant Chief Counsel/Acting Director

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cc: Kathi Burns