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Business, Consumer Services and Housing Agency
Department of Consumer Affairs
Gavin Newsom, Governor



To: Board Members

Subject: Agenda Item VIII. Discussion and Consideration of Adoption of Board Approved Regulations, Comments Pending Review by the Board

b. Proposed Regulation to Amend Title 16, Sections 1769 and 1770, Substantial Relationship and Rehabilitation Criteria

Nonsubstantial Modifications to Originally Approved and Noticed Text

At its May 7-8, 2019 meeting, the Board approved regulatory language to implement AB 2138 (Chiu, Chapter 995, Statutes of 2018). Key provisions of that bill, which becomes effective on July 1, 2020, are as follows:

1. Only permits a Board to deny a license on grounds that an applicant has been convicted of a crime or has been subject to formal discipline if either of these conditions are met (Business and Professions Code (BPC), § 480, subd. (a)):
 - a. The conviction was within 7 years of the date of the application and is substantially related to the qualifications, functions, or duties of the profession. The 7-year limit does not apply to convictions for a serious felony (defined in Penal Code, § 1192.7), or for those who must register as a sex offender as described in Penal Code section 290, subdivisions (d)(2) or (3).
 - b. The applicant has been subject to formal discipline by a licensing Board within the past 7 years for professional misconduct that would have been cause for disciplinary action by the Board and is substantially related to the profession. (The prior disciplinary action cannot be used to deny a license if it was based on a dismissed or expunged conviction.)
2. Prohibits a Board from requiring that an applicant for licensure disclose information about his or her criminal history. However, a Board is permitted to request mitigating information for the purpose of determining substantial relationship or evidence of rehabilitation. In such a case, the applicant must be informed that the disclosure is voluntary and failure to disclose will not be a factor in a Board's decision to grant or deny an application. (BPC, § 480, subd. (f)(2).)

3. Requires each Board to develop criteria to determine whether a crime is substantially related to the qualifications, functions, or duties of the profession.

These criteria are required to be considered when considering the denial, suspension, or revocation of a license. By law, Boards are required to adopt regulations that include all of the following criteria (BPC, § 481):

- a. The nature and gravity of the offense.
 - b. The number of years elapsed since the date of the offense.
 - c. The nature and duties of the profession in which the applicant seeks licensure or is licensed.
4. Prohibits a Board from denying a license based on a conviction without considering evidence of rehabilitation. (BPC, § 481.)
 5. Requires each Board to develop criteria to evaluate rehabilitation when considering denying, suspending, or revoking a license. A showing of rehabilitation shall be considered if the applicant or licensee has completed their criminal sentence without a violation of parole or probation, or if the Board finds its criteria for rehabilitation has been met. (BPC, § 482)

To successfully adopt, amend, or repeal a regulation, the Board is required to meet the following standards in the Administrative Procedure Act (APA): (1) necessity, (2) authority, (3) clarity, (4) consistency, (5) reference, and (6) nonduplication. (Gov. Code section 11349.1)

In November 2019, OAL reviewed another DCA Board's rulemaking file to implement AB 2138 and suggested several minor, technical corrections to be made to the regulatory text. The Board's proposed regulatory text is substantially similar to that Board's text; as such, OAL would have similar concerns with this Board's text.

DCA worked with OAL to resolve OAL's concerns with the other Board's regulatory proposal. The Board of Pharmacy has until March 12, 2021, to complete the rulemaking review with OAL; however, the rulemaking must be submitted prior to that date to meet the July 1, 2020 deadline in AB 2138.

Board staff recommends modifications to the originally approved and noticed text. Below is a description of the modifications that were made to the text.

Section 1769 (“Criteria for Rehabilitation”):

1. In subdivision (a), add the new heading “Examination of applicant by medical professionals to assess competency” to clarify the subject matter of this subdivision.
2. In subdivision (b), add the new heading “Denial of a license” to clarify that this subdivision sets forth rehabilitation criteria applicable to license applicants.
3. Consolidate subdivisions (b) and (c) into paragraphs (1)(A)-(E) and (2)(A)-(F) of subdivision (b), redesignate subdivision (d) as subdivision (c), and revise cross-references to those provisions accordingly, so that all provisions setting forth rehabilitation criteria for applicants are contained within one subdivision.
4. In subdivision (b)(1), replace “was” with “has been.” “Has been” refers to an activity that began in the past and continues in the present, while “was” refers to an activity that began and ended in the past. Board staff recommends changing “was” to “has been” to clarify that this subdivision applies to a licensee who continues to have a criminal conviction on their record.
5. In subdivisions (b)(1) and (c), revise “licensing or registration” and “the licensee or the registrant,” respectively, to delete the superfluous references to registrations and registrants, because B&P section 4032 already defines “license” to include “registration.”
6. In subdivision (b)(2), spell out the circumstances in which the rehabilitation criteria in paragraph (1) would be “inapplicable” in a denial proceeding under B&P section 480 and the Board would be required to apply the rehabilitation criteria in paragraph (2). Whereas paragraph (1) would apply if an applicant with a criminal conviction has completed their criminal sentence without violating parole or probation, paragraph (2) would apply if the applicant did violate parole or probation; the applicant did not violate parole or probation, but was not determined by the Board to have made a showing of rehabilitation based on the criteria in paragraph (1); or the denial proceeding under B&P section 480 is based on professional misconduct (and not a crime). The proposed modification would enable applicants to better understand which set of criteria will be used to evaluate their rehabilitation.
7. In subdivision (c), add the heading “Suspension or revocation of a license” to clarify that this subdivision sets forth rehabilitation criteria applicable to licensees.

8. In the Authority and References, delete B&P section 482 from the authorities cited because B&P section 482 does not provide express authority to adopt regulations.

Section 1770:

1. In subdivision (a), revise the reference to the “qualifications, functions, or duties of a licensee or registrant” to instead refer to the “qualifications, functions, or duties of the practice, profession, or occupation that may be performed under the license type sought or held” to clarify that the Board will evaluate a criminal conviction based on its relationship to a licensed practice, profession, or occupation, and not an individual applicant or licensee who may have qualifications, functions, or duties that are unrelated to the licensed practice, profession, or occupation.
2. In subdivision (a), revise “present or potential unfitness of a licensee” to read “present or potential unfitness of an applicant or licensee.” This modification was not recommended by OAL, but is a technical correction recommended by Board staff because section 1770 establishes substantial relationship criteria for license denial proceedings, which concern applicants, and not only disciplinary proceedings, which concern licensees.
3. In subdivision (a), revise each instance of “licensee or registrant” and “license or registration” to delete the superfluous references to registrations and registrants, because B&P section 4032 already defines “license” to include “registration.”
4. In the Authority and References, delete B&P sections 481 and 493 from the authorities cited because B&P sections 481 and 493 do not provide express authority to adopt regulations.

Summarized 45-day Comments Regarding Substantial Relationship and Rehabilitation Criteria with Board Staff Recommendations:

Written Comments from Vinuta Naik, Community Legal Services in East Palo Alto, Faride Perez, Root and Rebound, and Other Organizations

Initial Comment: General Statement/Purpose of the Letter

Commenters stated that the proposed regulations leave some gaps in the regulatory scheme pursuant to the changes to Business and Professions Code (BPC) section 480, 481, 482, and 493 as modified by AB 2138. The comment stated that the proposed regulations fail to fully implement these statutes. Additionally, the comment stated that the proposed regulations fall short of the intent of the bill, which includes combating

discrimination against people with records who have demonstrated rehabilitation and seek to establish themselves professionally.

Response:

Board staff recommend that this comment be rejected. The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138. (BPC, § 481.) Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board in implementing a balanced approach to evaluating an applicant's eligibility for licensure:

1. The nature and gravity of the offense.
2. The number of years elapsed since the date of the offense.
3. The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.

Clarifying how to determine whether a crime is substantially related and clarifying the factors that will be considered when evaluating rehabilitation should assist applicants and licensees with demonstrating their rehabilitation.

Comment 1: Commenters expressed concern that section 1769 relies heavily on law enforcement reports and determination of the applicant's progress. The commenters indicated that rehabilitation can take many forms and they believe the proposed text does not "embrace" this.

The commenters further reference another comment (number 5) within their own document. See response to comment number 7 for a response to this specific comment.

Response to Comment 1: Board staff recommend that this comment be rejected. The proposed text for section 1769, subdivisions (b)(2)(F) and (c)(6) already provide that the Board will consider any evidence of rehabilitation submitted by the applicant or licensee, including as provided in the Board's disciplinary guidelines, which is not limited to reports or determinations by law enforcement. The disciplinary guidelines already list various other forms of evidence an applicant or licensee may choose to provide to show rehabilitation.

Comment 2: Commenters expressed concern that section 1770 lists certain crimes, professional misconduct, or act(s) and defines them as substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of AB 2138, Business and Professions Code (B&P) section 481. Commenters note that AB 2138 allows the Board discretion in determining which crimes are substantially related on an individual basis. The commenters expressed concern that section 1770 does not include language stating that a licensee may not be denied a license based on criminal history (a conviction) or acts underlying the conviction if the applicant obtains a

Certificate of Rehabilitation, is granted clemency or a pardon by a state or federal executive, dismissal per Penal Code section 1203.4 et seq., or an arrest that resulted in a disposition other than a conviction (including an infraction, citation, or juvenile adjudication) shall not be denied a license, as provided in B&P section 480, subdivisions (b) through (d).

Response to Comment 2: Board staff recommend that this comment be rejected.

In response to the comment that section 1770 deems certain listed crimes to be substantially related without requiring the Board to consider those crimes on an individual basis, section 1770 lists those crimes in order to save the Board duplicative determinations in the case of crimes that would necessarily disqualify an applicant from licensure, for the reasons stated in the Initial Statement of Reasons, and to save applicants who have been convicted of those crimes the time and resources necessary to apply for a license.

In response to the comment that, in listing those crimes, Section 1770 does not state the exceptions set forth in B&P section 480 to the Board's authority to deny a license based on a criminal conviction, Board staff notes that the proposed text does not need to include the time periods already set out in statute [B&P section 480(a)(1)], or the above-described extenuating circumstances already set out in statute [B&P section 480(b)-(d)], as this information would be duplicative with statute. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).)

Additionally, Board staff notes that within the disciplinary guidelines, the time passed since the act(s) or offense(s) and evidence of the case being set aside or dismissed are factors to be considered in denial and disciplinary proceedings.

Comment 3: Commenters again expressed concern that the proposed regulations do not include the 7-year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under Penal Code 1192.7.

Response to Comment 3: Board staff recommend that this comment be rejected. Board staff notes that the proposed text does not need to include the time periods already set out in statute [B&P section 480(a)(1)] as this information would be duplicative. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).) Additionally, Board staff notes that within the disciplinary guidelines, the time passed since the act(s) or offense(s) is a factor to be considered when determining penalties.

Comment 4: Commenters again expressed concern that the proposed regulations do not specify that a person with a criminal history shall not be denied a license on the basis of a conviction for which the applicant has obtained a Certificate of Rehabilitation, a conviction that has been dismissed per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or on the basis of an arrest that led to a disposition other than a conviction, including an arrest that resulted in an infraction, citation, or juvenile adjudication.

Response to Comment 4: Board staff recommend that this comment be rejected. Board staff notes that the proposed text does not need to include whether the conviction has been dismissed, pardoned, etc., as this information would be duplicative with statute [B&P section 480(c)]. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).) Additionally, Board staff notes that within the disciplinary guidelines, the time passed since the act(s) or offense(s) and evidence of the case being set aside or dismissed are factors to be considered in denial and disciplinary proceedings.

Comment 5: Commenters expressed concern that the proposed regulations do not include that the Board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history.

Response to Comment 5: Board staff recommend that this comment be rejected. Board staff notes that the amendments made to B&P section 480, subdivision (f)(2) already prohibit the Board from requiring an applicant to disclose any information or documentation regarding the applicant's criminal history. Including this requirement in regulation is not appropriate as it would be duplicative with statute. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).) In addition, inclusion of this requirement would not fall within the scope of the regulation, which establishes substantial relationship and rehabilitation criteria for the Board to consider after the Board already has knowledge of a conviction.

Comment 6: Commenters expressed concern that the proposed regulations do not include the requirement for the Board to notify the applicant in writing if the applicant is denied or disqualified from licensure. The commenters note that the Board must provide procedures describing the process for the applicant to challenge the decision or to request reconsideration, that the applicant has a right to appeal the Board's decision, and the process of requesting a complete conviction history.

Response to Comment 6: Board staff recommend that this comment be rejected. Board staff notes that notification requirements and the appeal process are already set forth in B&P sections 480, subdivision (f)(3), 485 through 487, and the Administrative Procedure Act, at Government Code section 11500, *et seq.*, including requirements for providing the legal and factual basis for the denial, service of the denial on the applicant, and notice to the applicant regarding the opportunity to request a hearing to challenge the decision. Including the process in regulation is not appropriate as it would be duplicative. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).)

Comment 7: The commenters indicated that the intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. Commenters indicated that looking to law enforcement will not adequately show how an applicant would do on the job. Rather, commenters state that rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. To better define rehabilitation, commenters recommend that the Board

provide examples of evidence of mitigating circumstances and rehabilitation efforts to assist both the Board and licensing applicants. The letter recommends that the Board consider adding the following rehabilitation criteria:

- Volunteer service;
- Successful employment in a related field;
- A history of work experience in an employment social enterprise.
- Unpaid work in the community;
- Furthered education;
- Abstinence from controlled substances and/or alcohol;
- Stability of family life, fulfillment of parental and familial responsibilities;
- New and different social and business relationships from those which existed at the time of the underlying charges at issue;
- Change in attitude of the applicant as evidenced by:
 - Personal testimony,
 - Evidence of rehabilitation submitted by the applicant,
 - Evidence from family, friends, and/or other persons familiar with the applicant's previous behavior patterns and subsequent attitude and behavioral changes; and
- Other markers of rehabilitation.

Response to Comment 7: Board staff recommend that this comment be rejected. Board staff notes that section 1769, subdivisions (b)(2)(F) and (c)(6) already require the Board to consider any evidence of rehabilitation submitted by the applicant or licensee, including as provided in the Board's disciplinary guidelines. The disciplinary guidelines already list various forms of evidence an applicant or licensee may choose to provide to show rehabilitation, and Board staff believes that including a lengthy list of more examples, in section 1769, of evidence an applicant or licensee may provide to show rehabilitation—including the examples suggested by commenters—may result in misinterpretation by applicants, licensees, or others that the list is exhaustive. In addition, Board staff believes it is misleading to say any one specific criteria in and of itself demonstrates rehabilitation.

Comment 8: Commenters expressed concern that the proposed regulations fail to include any mention of requirements to obtain statistical information on the number of applicants with a criminal record who apply and receive notice of denial/disqualification of licensure, provided evidence of mitigation or rehabilitation, the final disposition of the application, and demographic information, as provided in B&P section 480, subdivision (g).

Response to Comment 8: Board staff recommend that this comment be rejected. Board staff notes that this a requirement for the Board to maintain and post records on its website and as such, does not fall within the scope of the regulation, which would establish substantial relationship and rehabilitation criteria. Additionally, Board staff notes that including this requirement in regulation is also not appropriate as it would be

duplicative with statute [B&P 480(g)]. Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).)

POSSIBLE MOTIONS: Should the Board agree with the staff recommended comment responses and modifications to the originally noticed text, a possible motion is as follows:

Reject the proposed comments for the reasons stated in the meeting materials, approve the proposed modified text, and delegate to the executive officer the authority to adopt the proposed modified text, to make any technical or non-substantive changes that may be required to complete the rulemaking file before adoption, to prepare and submit to the Office of Administrative Law a Final Statement of Reasons including an Updated Informative Digest, and to complete the regulatory process.

Should the Board wish to modify the regulation language to address concerns expressed by stakeholders, a possible motion is as follows:

Approve a modified text [addressing specific comment(s)] and initiate a 15-day public comment period. Additionally, if no adverse comments are received regarding the modifications during that 15-day comment period, delegate to the executive officer to adopt the proposed modified text, to adopt the proposed modified text, to make any technical or non-substantive changes that may be required to complete the rulemaking file before adoption, to prepare and submit to the Office of Administrative Law a Final Statement of Reasons including an Updated Informative Digest, and to complete the regulatory process.

**Criminal Conviction
Substantial
Relationship and
Rehabilitation Criteria
16 CCR §§
1769 and 1770**

Modified Regulation

Title 16. Board of Pharmacy Modified Regulation

Proposed changes to the current regulation language are shown by ~~striketrough~~ for deleted language and underline for added language.

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

Amend section 1769 of Article 8 of Division 17 of Title 16 of the California Code of Regulations to read as follows:

§ 1769. Criteria for Rehabilitation.

(a) Examination of applicant by medical professionals to assess competency.

In addition to any other requirements for licensure, when considering the approval of an application, the board or its designee may require an applicant to be examined by one or more physicians and surgeons or psychologists designated by the board if it appears that the applicant may be unable to safely practice due to mental illness or physical illness affecting competency. An applicant's failure to comply with the examination requirement shall render his or her application incomplete. The board shall pay the full cost of such examination. The board shall seek that the evaluation be conducted within 60 days of the date the applicant is advised that an examination is required. The board shall receive the examiner's evaluation within 60 days of the date the examination is completed. The report of the examiner shall be made available to the applicant.

If after receiving the report of the evaluation, the board determines that the applicant is unable to safely practice, the board may deny the application.

(b) Denial of a license.

(1) When considering the denial of a facility or personal license under Section 480 of the Business and Professions Code on the grounds that the applicant ~~was~~ has been convicted of a crime, the board will 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: ~~the board, in evaluating the rehabilitation of the applicant and his present eligibility for licensing or registration, will consider the following criteria:~~

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

(4B) 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 applicant's rehabilitation.

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

(e2) 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 paragraph (1) or the denial is based on professional misconduct, ~~if subdivision (b) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (b),~~ the board will apply the following criteria in evaluating an applicant's rehabilitation:

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

(2B) 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 under Section 480 of the Business and Professions Code.

(3C) The time that has elapsed since commission of the act(s), professional misconduct, or crime(s) referred to in ~~subdivision paragraph (1) or (2)~~ subparagraph (A) or (B).

(4D) 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 ~~subdivisions (b)(1)-(5)~~, paragraphs (1)(A) through (E), as applicable.

(5)(6F) Evidence, if any, of rehabilitation submitted by the applicant, including as provided in the board's Disciplinary Guidelines, identified in section 1760.

(c)(d)(c) Suspension or revocation of a license.

When considering the suspension or revocation of a facility or a personal license on the ground that the licensee ~~or the registrant~~ has been convicted of a crime, the board, in evaluating the ~~will consider whether the licensee made a showing of rehabilitation of such person and his present eligibility 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 will consider the criteria in ~~subdivisions (b)(1)-(5)~~ subdivisions (b)(1)(A) through (E). If the licensee 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 subdivisions (b)(1)(A) through (E), the board will apply the following criteria in evaluating the licensee's rehabilitation: ~~If the board determines that the licensee did not make a showing of rehabilitation based on the criteria in subdivisions (b)(1) (5), or if a licensee has not completed the criminal sentence at issue without a violation of parole or probation, the board will consider the following criteria:~~

- (1) Nature and ~~severity~~gravity of the act(s) or offenses.
- (2) Total criminal record.
- (3) The time that has elapsed since commission of the act(s) or offenses.
- (4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.
- (5) The criteria in ~~subdivisions (b)(1) (5), subdivisions (b)(1)(A) through (E), as applicable.~~
- (6) Evidence, if any, of rehabilitation submitted by the licensee, including as provided in the board's Disciplinary Guidelines, identified in section 1760.

Note: Authority cited: Sections ~~482 and~~ 4005, Business and Professions Code.
Reference: Sections 480, 481, 482, 488, 493, 4030, 4200 and 4400, Business and Professions Code.

Amend section 1770 of Article 8 of Division 17 of Title 16 of the California Code of Regulations to read as follows:

§ 1770. Substantial Relationship Criteria.

(a) For the purpose of denial, suspension, or revocation of a personal or facility license pursuant to Section 141 or Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime, professional misconduct, or act shall be considered substantially related to the qualifications, functions or duties of ~~a licensee or registrant~~ the practice, profession, or occupation that may be performed under the license type sought or held if to a substantial degree it evidences present or potential unfitness of ~~a~~ an applicant or licensee or registrant to perform the functions authorized by ~~his~~ the license or registration in a manner consistent with the public health, safety, or welfare.

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board will 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 the ~~profession practice, profession, or occupation~~ ~~the person may perform with~~ that may be performed under the license type sought or held.

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

(1) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of law of this state, or any other jurisdiction, governing the practice of pharmacy.

(2) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or any law of this state, or any other jurisdiction, relating to controlled substances or dangerous drugs.

(3) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of law of this state, or any other jurisdiction, relating to government provided or government supported healthcare.

(4) Involve dishonesty, fraud, deceit, or corruption related to money, items, documents, or personal information.

(5) Involve a conviction for driving under the influence of drugs or alcohol.

Note: Authority cited: Sections ~~481, 493, and~~ 4005, Business and Professions Code.
Reference: Sections 141, 480, 481, 490, 493, 4300, 4301, 4301.5, and 4309, Business and Professions Code.