

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
TITLE 4. BUSINESS REGULATIONS
DIVISION 1.1 ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

FINAL STATEMENT OF REASONS

HISTORY OF PROPOSED ACTION

At the Alcoholic Beverage Control Appeals Board's ("Board") hearing on April 9, 2021, the Board voted on, and approved, proposed regulations adding, amending, or revoking rules 176-178, 181.1, 183- 184, 187-190, 193-197.1, 198-199. The Board filed its proposed regulations with the Office of Administrative Law ("OAL") and published its Notice of Proposed Rulemaking on June 25, 2021. The 45-day public comment period allowed interested persons to submit written comments to the Board on or before August 10, 2021. Initially, the Board did not schedule a public hearing. However, a public hearing was held on July 29, 2021, after one was requested. The Board received one oral comment at the July 29th hearing and one written comment prior to the August 10th deadline.

At the Board's public hearing on September 3, 2021, the Board determined that neither of the two public comments received were responsive or relevant to the Board's proposed rulemaking. On that basis, the Board determined that no changes to the proposed regulations were needed and voted to submit the proposed rulemaking file to OAL for review, and ultimately, publication.

After its review, OAL contacted the Board to discuss the proposed rulemaking package. Several additional revisions were made to sections 177, 178, 181.1, 194, 195, 196, 197, 197.1, 198, and 199. On January 4, 2022, the Board voted to adopt the proposed changes and initiate a 15-day comment period. The 15-day comment period concluded on January 20, 2022. No public comments were received.

On January 27, 2022, the Board voted to submit the modified proposed regulation back to OAL for final review and approval. During OAL's review, OAL informed the Board that the Board's second and pending proposed rulemaking package regarding electronic filing was "substantially related" to the Board's current rulemaking package. The additional revisions would affect sections 178, 181, 181.1, 181.2, 184, 187, 197.1, and 199. Accordingly, on March 11, 2022, the Board voted to withdraw the second rulemaking file and issue a second 15-day notice to include all proposed changes related to electronic filing. The 15-day comment period concluded on

March 28, 2022. No public comments were received. On April 8, 2022, the Board voted to adopt the modified rulemaking package and submit it to OAL for final review and approval.

UPDATE OF INITIAL STATEMENT OF REASONS

The Board published its Initial Statement of Reasons on June 25, 2021. Since then, there have been two updates to the proposed regulations. On January 4, 2022, the Board voted to adopt the first set of changes to the proposed regulations. Please refer to the Addendum to Initial Statement of Reasons for further details on these changes. On April 8, 2022, the Board adopted its second and most recent set of changes to the proposed regulations. Please refer to the Second Addendum to Initial Statement of Reasons for further details.

In addition, the Board updates its Initial Statement of Reasons from June 25, 2021, to add the following explanations:

§ 184. Contents of Notice of Appeal.

The proposed regulation removes subsection (c), eliminating the requirement for Notice of Appeals to be typewritten or printed upon paper 8 1/2 x 11 inches in size and be double spaced. It was necessary for the Board to make this change in order to allow for those parties who appear before it to submit handwritten appeals in the unlikely event they do not have immediate access to a computer or printer.

§ 187. Preparation, Payment, and Filing of the Record of Appeal.

Subsection (f) requires the Department to file the record with the Board. This is necessary since the Board will base its decision on the administrative record in the underlying action. Requiring the Department to file the record with the Board will eliminate unnecessary delays, since the Department produces the record itself and is in the best position to submit the record to the Board.

§ 193. Filing of Briefs.

As stated in the Initial Statement of Reasons, the existing language of subsection (a) was deleted in its entirety. This is necessary because the formatting requirements for briefs have been moved to and expanded on in proposed rule 194.

Subsection (a) eliminates the requirement for briefs to be “typewritten or printed” and “reproduction thereof may be by any process, provided all copies are clear and permanently legible.” Again, these circumstances are unlikely, but these changes necessary to allow for

those parties who appear before the Board to submit handwritten briefs in the event they do not have access to a computer or printer. These changes accomplish the Board's overall goal to make the appellate process more accessible to individuals with different means.

The proposed revision also eliminates the requirement for a party to certify that it served its brief on the Attorney General's (AG) office. The AG is not a stakeholder in the Board's administrative appeals process. The AG does not appear before the Board, and is not involved in alcoholic beverage licensing, law enforcement, or administrative oversight. There is no reason or justification why it should receive briefs from the parties to an appeal. Given the AG's lack of involvement in the appeals process, the Board finds it necessary to remove the requirement that parties must serve the AG with briefs on the grounds that the requirement is overly burdensome and unnecessary.

§ 197. Oral Argument.

Section 197(a)(4) adds language prohibiting references to evidence not contained in the administrative record. This is necessary because it is consistent with Business and Professions Code section 23083, which states, "[t]he board shall not receive any evidence other than that contained in the record of the proceedings of the department."

§ 199. Dismissal of Appeal.

The proposed regulation changes "may" to "shall," when listing the circumstances in which the Board will dismiss an appeal. Changing the language from permissive ("may") to required ("shall") is necessary to eliminate inconsistent rulings by the Board. Under the current rules, it is possible for the Board to dismiss an appeal, and then later, decline to dismiss a different appeal under the same circumstances. These types of inconsistent rulings would cause great harm to the public confidence in the Board to carry out its constitutional and statutory mandate.

UPDATED INFORMATIVE DIGEST

As referenced in the "Update of Initial Statement of Reasons" section above, all modifications to the originally proposed regulations have been summarized in the Addendum to Initial Statement of Reasons and the Second Addendum to Initial Statement of Reasons. Both are included as part of this final rulemaking package.

As background, the Board did not have the authority to allow electronic filing and service when it initiated its rulemaking action on June 25, 2021. Since then, however, Assembly Bill 1589 (Chapter 306) (amending Business and Professions Code sections 23081, 23081.5, and 23088)

was approved by the Governor, filed with the Secretary of State on September 24, 2021, and became effective as of January 1, 2022. With the bill's passage, parties could file their appeals and the Board could disseminate its final orders electronically.

This statutory change, however, necessitated a second modification to the Board's proposed regulations on March 11, 2022. This is because while AB 1589 authorized electronic filing and service, the Board's regulations at that time only permitted delivery of documents by hand or physical mail. Therefore, the Board revised its proposed regulations to reflect the availability of electronic filing and service as a delivery option during the appeals process, eliminate the need for appellants to serve multiple copies of a Notice of Appeal, and remove superfluous language from existing regulatory language. Except as summarized above, there have been no other changes in the laws related to the proposed action or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

SUMMARY AND RESPONSE TO COMMENTS DURING THE COMMENT PERIOD OF JUNE 25, 2021, THROUGH AUGUST 10, 2021

The Board received one written comment from the public during the public written comment period from June 25, 2021, through August 10, 2021, and one oral comment at the public hearing held on July 29, 2021.

Comment 1: Attorney Roger Diamond submitted a written comment on June 29, 2021, wherein he voiced his displeasure with the Department of Alcoholic Beverage Control ("Department"), accused the Board of colluding with the Department, discussed past appeals where he appeared before the Board, and brought up a pending appeal before the Board.

Response: This comment is outside the scope of this regulatory action. No response by the Board is required.

Comment 2: At the public hearing held on July 29, 2021, Mr. Diamond stated that he believes the Board is "too cozy" with the Department, that there is no necessity for the proposed regulations, and that the brief lengths, deadlines, and extensions for hearings are "extremely harsh."

Response: No change needed. There is no support in the record for Mr. Diamond's comment. The Department receives no special treatment under the proposed regulations. In fact, the substantive portions of the proposed regulations do not reference the Department, but rather appellants and respondents, respectively.

Further, the justification for the proposed regulations is set out in the Board's Initial Statement of Reasons. Namely, the proposed regulations provide the benefit of:

[C]learly defining the process parties must follow when filing or responding to an appeal of a licensing decision by the Department. The rules and regulations will clarify what the Board's deadlines and criteria are for hearing and deciding cases – thus fostering greater transparency in the appeals process. The adoption of a uniform appeals process will help prevent discrimination and promote fairness for parties appealing an adverse licensing decision. It also provides for openness in how the Board conducts its business.

Finally, the brief deadlines are more generous under the proposed regulations than they were under existing regulations. The page lengths were created to balance the need of a party to adequately describe the basis and argument for their appeal or response, with the Board's need to limit the amount of material to review. The goal is to incentivize a party to make concise and direct arguments. Of course, if a party is unable to comply with the proscribed page lengths, there is a process for relief under the proposed regulations.

In addition, the standard of "good cause" for an extension of time to file a brief is unchanged from the Board's prior regulation, and that same standard is used to determine whether the Board will grant a continuance of oral argument. There is also a requirement that the parties attempt to stipulate to a continuance before requesting one from the Board, which gives more ownership of the appeals process to the parties.

The Board has concluded that the comments submitted by Mr. Diamond do not require any changes to the proposed regulatory package.

COMMENTS RECEIVED DURING THE PERIOD THE FIRST MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC

The first modified text was made available to the public for comment from January 4, 2022 to January 20, 2022. No public comments were received during this comment period.

COMMENTS RECEIVED DURING THE PERIOD THE SECOND MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC

The second modified text was made available to the public for comment from March 11, 2022 to March 28, 2022. No public comments were received during this comment period.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

No alternatives proposed to the Board that would lessen any adverse economic impact on small businesses were rejected by the Board.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Board has determined that no alternatives were presented to, or considered by, the Board that would be more effective in carrying out the purpose of the proposed regulation, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

ADDITIONAL DOCUMENTS OR INFORMATION IN THE RULEMAKING FILE

The Board did not add any other documents or information to the rulemaking file.