



MEMORANDUM

DATE	January 30, 2020
TO	Veterinary Medical Board
FROM	Jessica Sieferman, Executive Officer
SUBJECT	Agenda Item 12. Discussion and Possible Action on Proposed Amendments to Business and Professions Code Sections 4875.2 and 4875.6 Regarding Contesting a Citation and Procedure for Issuing a Citation

Business and Professions Code (BPC) section [125.9](#) allows the Board to issue a citation and an administrative fine for *any* “violation of the applicable licensing act or any regulation adopted [by the Board] pursuant thereto” and requires the Board to develop a system for issuing the citation pursuant to certain provisions. BPC section 125.9 also establishes due process, which includes the need for a written description of the violation and the ability to request a hearing.

The Administrative Procedures Act (APA) thoroughly dictates due process for any Board action, including procedures for issuing a citation and contesting a citation. BPC section 4875.6 further provides due process procedures.

Procedures for Issuing a Citation

BPC section [4875.2](#) allows the executive officer to issue citations to veterinarians, registered veterinary technicians or unlicensed persons for Practice Act violations. However, the following portion of the statute is unnecessary because of due process procedures already in place:

“Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of this chapter alleged to have been violated. In addition, each citation may contain an order of abatement fixing a reasonable time for abatement of the violation and may contain an assessment of a civil penalty. The citation shall be served upon the veterinarian, registered veterinary technician, or unlicensed individual personally or by any type of mailing requiring a return receipt.”

In addition, the following portion of BPC section 4875.2 is overly burdensome and potentially in violation of *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) 574 U.S. 494 (state board was nonsovereign entity controlled by active market participants that did not receive active supervision by state; board’s anticompetitive actions were not entitled to state-action immunity from federal antitrust law), as a market participant (licensee and Board subject matter expert) is required to review and investigate a complaint for find probable cause to issue a citation to an unlicensed person:

Before any citation may be issued, the executive officer shall submit the alleged violation for review and investigation to at least one designee of the board who is a veterinarian licensed in or employed by the state.

Licensed subject matter experts are essential when determining whether animal patients received the minimum standard of care from a licensee. Board staff cannot make this determination. However, there are many other violations unrelated to the standard of care that may not warrant a subject matter expert review (e.g., criminal convictions, inadequate continuing education, unlicensed advertisements/practice, specific record keeping violations, etc.). Requiring a subject matter expert to review each case can significantly delay case

resolution and incurs unnecessary costs to the Board. If the Board seeks to issue a citation in these cases, the Board cannot recoup these costs.

Further, the statute enables repeat offenders by requiring each investigation to include attempts to discuss and resolve the alleged violation:

The review shall include attempts to contact the veterinarian, registered veterinary technician, or unlicensed person to discuss and resolve the alleged violation.

Regardless of the requirements of this statute, the enforcement process often includes contacting the subject with the allegations and providing an opportunity to respond and come into compliance. If the Board finds minor violations, but timely compliance is obtained, most cases are closed with educational letters to the subject documenting the subject has been informed of the necessary statutes/regulations and the possibility of enforcement/disciplinary action for similar violations in the future.

If the Board closes a case with an educational letter and the subject repeats the same offense in the future, the Board should not be required to attempt to resolve the alleged violation with the subject before issuing a citation.

Moreover, the statute may have additional issues raised in *North Carolina*, because you have an active market participant with the ability to find probable cause to issue the citation to a person not licensed under the Act:

Upon conclusion of the board designee's review, the designee shall prepare a finding of fact and a recommendation. If the board designee concludes that probable cause exists that the veterinarian, registered veterinary technician, or unlicensed person has violated any provisions of this chapter, a civil citation shall be issued to the veterinarian, registered veterinary technician, or unlicensed person.

Once the active market participant has concluded probable cause exists, the executive officer "shall" issue the citation without discretion.

There are no other DCA boards with this citation verbiage. The other boards appear to rely on due process established under BPC section 125.9.

Contesting a Citation

BPC section 125.9 allows a cited individual 30 days to contest a citation and request an informal conference or hearing. BPC section 4875.6, however, requires notification in 10 business days from receipt of the citation if the individual contests the citation and wants an informal conference. This inconsistency leads to confusion amongst Board staff and cited individuals wishing to appeal the citation.

With the advice of counsel, it has been determined that BPC section 125.9 is the controlling statute. To clarify that the due process of BPC section 125.9 controls citation procedures, and to maintain the ability for the Board to resolve citations through the informal conference process, the Board may want to consider repealing and replacing BPC section 4875.6 to mirror the California Architect's Board's provision (BPC § 5526.5, attached).

Action Requested:

For reasons stated above, please consider approving the attached legislative proposal for inclusion in the Board's Sunset bill.

Attachments:

1. Legislative Proposal Amending BPC Sections 4875.2 and 4875.6

Veterinary Medical Board
Proposed Legislation Regarding Procedures for Issuing and Contesting a Citation

Amend Section 4875.2 of the Business and Professions Code as follows:

4875.2

If, upon completion of an investigation, the executive officer has probable cause to believe that a veterinarian, a registered veterinary technician, or an unlicensed person ~~acting as a veterinarian or a registered veterinary technician~~ has violated provisions of this chapter, ~~he or she~~ the executive officer may issue, in accordance with Sections 125.9 and 148 and the Board's regulations established pursuant thereto, a citation to the veterinarian, registered veterinary technician, or unlicensed person, ~~as provided in this section. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of this chapter alleged to have been violated. In addition, each citation may contain an order of abatement fixing a reasonable time for abatement of the violation, and may contain an assessment of a civil penalty. The citation shall be served upon the veterinarian, registered veterinary technician, or unlicensed individual personally or by any type of mailing requiring a return receipt. Before any citation may be issued, the executive officer shall submit the alleged violation for review and investigation to at least one designee of the board who is a veterinarian licensed in or employed by the state. The review shall include attempts to contact the veterinarian, registered veterinary technician, or unlicensed person to discuss and resolve the alleged violation. Upon conclusion of the board designee's review, the designee shall prepare a finding of fact and a recommendation. If the board designee concludes that probable cause exists that the veterinarian, registered veterinary technician, or unlicensed person has violated any provisions of this chapter, a civil citation shall be issued to the veterinarian, registered veterinary technician, or unlicensed person.~~

Repeal and add Section 4875.6 of the Business and Professions Code as follows:

4875.6

~~(a) If a veterinarian, a registered veterinary technician, or an unlicensed person desires to administratively contest a civil citation or the proposed assessment of a civil penalty therefor, he or she shall, within 10 business days after receipt of the citation, notify the executive officer in writing of his or her request for an informal conference with the executive officer or his or her designee. The executive officer or his or her designee shall hold, within 60 days from the receipt of the request, an informal conference. At the conclusion of the informal conference, the executive officer may affirm, modify, or dismiss the citation or proposed assessment of a civil penalty, and he or she shall state with particularity in writing his or her reasons for the action, and shall immediately transmit a copy thereof to the board, the veterinarian, registered veterinary technician, or unlicensed person, and the person who submitted the verified complaint. If the veterinarian, registered veterinary technician, or unlicensed person desires to administratively contest under subdivision (c) a decision made after the informal conference, he or she shall inform the executive officer in writing within 30 calendar days after he or she receives the decision resulting from the informal conference.~~

~~If the veterinarian, registered veterinary technician, or unlicensed person fails to notify the executive officer in writing that he or she intends to contest the citation or the proposed assessment of a civil penalty therefor or the decision made after an informal conference within the time specified in this subdivision, the citation or the proposed assessment of a civil penalty or the decision made after an informal conference shall be deemed a final order of the board and shall not be subject to further administrative review.~~

~~Notwithstanding any other provision of law, where a fine is paid to satisfy an assessment based on the finding of a violation, payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure.~~

~~(b) A veterinarian, a registered veterinary technician, or an unlicensed person may, in lieu of contesting a citation pursuant to this section, transmit to the board the amount assessed in the citation as a civil penalty, within 10 business days after receipt of the citation. An unlicensed person may notify the board and file a petition for a writ of administrative mandamus under Section 1094.5 of the Code of Civil Procedure within 30 calendar days after receipt of the citation, without engaging in an informal conference or administrative hearing. If a petition is not filed pursuant to this section, payment of any fine shall not constitute an admission of the violation charged.~~

~~(c) If a veterinarian, a registered veterinary technician, or an unlicensed person has notified the executive officer that he or she intends to administratively contest the decision made after the informal conference, the executive officer shall forward the matter to the Attorney General's office who shall prepare a notice of appeal of the citation and civil penalty. After the hearing, the board and administrative law judge shall issue a decision, based on findings of fact, affirming, modifying, or vacating the citation, or directing other appropriate relief that shall include, but need not be limited to, a notice that the failure of a veterinarian, registered veterinary technician, or unlicensed person to comply with any provision of the board's decision constitutes grounds for suspension or denial of licensure, or both, or suspension or denial of registration, or both. The administrative proceedings under this section shall be conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), and the board shall have all the powers granted therein.~~

~~(d) After the exhaustion of the review procedures provided for in this section or if the time for all appeals has passed, the board may bring an action in the appropriate court in the county in which the offense occurred to recover the civil penalty and obtain an order compelling the cited person to comply with the order of abatement. In that action, the complaint shall include a certified copy of the final order of the board, together with the factual findings and determinations of the board and administrative law judge. The findings shall be prima facie evidence of the facts stated therein, and in the absence of contrary evidence may serve as the basis for the issuance of the judgment and order.~~

~~(e) Failure of a licensee or registrant to pay a civil penalty within 30 days of the date of receipt of the assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board. When a citation is not contested and a civil penalty is not paid, the full amount of the assessed civil penalty shall be added to the fee for renewal of the license or registration. A license or registration shall not be renewed without payment of the renewal fee and civil penalty.~~

~~(f) Any civil penalties received under this chapter shall be deposited in the Veterinary Medical Board Contingent Fund.~~

~~(Amended by Stats. 2009, Ch. 80, Sec. 12. (AB 107) Effective January 1, 2010.)~~

4875.6

(a) In addition to requesting an administrative hearing as provided for in paragraph (4) of subdivision (b) of Section 125.9, the cited person may request an informal conference to review the acts shared in the citation. The cited person shall make the request for an informal conference in writing, within 30 days of the date of issuance of the citation, to the executive officer.

(b) The executive officer or their designee shall hold, within 60 days from the receipt of the request, an informal conference with the cited person. The executive officer or their designee may extend the 60-day period for good cause.

(c) Following the informal conference, the executive officer or their designee may affirm, modify, or dismiss the citation, including any fine that is levied, order of abatement, or order of correction issued. The executive officer or their designee shall state in writing the reasons for the action and transmit a copy of those findings to the cited person within 30 days after the informal conference.

(d) If the citation, including any fine that is levied or order of abatement or correction, is affirmed or modified following the informal conference, the respondent may make a request in writing to the executive officer within 30 days of the affirmed or modified citation, for a formal hearing, which shall be conducted as provided for in paragraph (4) of subdivision (b) of Section 125.9.

(e) A cited person shall not request an informal conference for a citation that has been affirmed or modified following an informal conference.