



BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY • GAVIN NEWSOM, GOVERNOR
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DATE	February 12, 2019
TO:	Board Members
FROM:	Elaine Yamaguchi, Executive Officer
SUBJECT:	Default Decision Delegation

1. INTRODUCTION

The delegation of authority to adopt default decisions has been discussed by this Board about ten times since 2015 and is in effect at several other boards including the California Medical Board and the Board of Registered Nursing. At the November 2018 Board Meeting, staff was directed to prepare a fact sheet and/or list of pros and cons regarding this matter. Attached is a chronology of the Board’s discussions and actions on this issue since 2015, and a draft memo for discussion from Board Member and Legislation and Regulations Committee Chair Cheryl Turner.

2. BACKGROUND

Default decisions are straightforward cases in which a licensee or respondent fails to file a notice of defense in response to an accusation or other disciplinary notice within the time required by the Administrative Procedure Act, Government Code sections 11370, et seq. Accusations or other disciplinary notices are served on respondents via certified mail with return receipt requested. When a respondent fails to file a timely notice of defense, Board staff reviews the case to determine whether it meets the criteria for a default decision and then uploads a recommended default decision for Board Members to review and approve or disapprove. Board staff does not exercise discretion when submitting a recommended default decision to the Board for approval: the respondent is either in default or not.

If the Board approves the recommendation, Board staff then serves the respondent with the default decision by certified mail with return receipt requested. Default decisions list an effective date, typically 30 days after the date they are served. The Administrative Procedure Act provides respondents with two means of seeking relief from a default

decision after it is served and before it becomes effective. They may move to vacate the default under Government Code section 11520, subdivision (c)¹, or may petition for reconsideration under Government Code section 11521². These two procedures offer a respondent the opportunity to explain to the Board why a timely notice of defense was not filed. If a respondent moves to vacate or petitions for reconsideration within the time permitted by the Administrative Procedure Act, the default decision comes before the Board for determination of the motion or petition through the mail balloting procedure. The Administrative Procedure Act allows the Board to relieve a defaulting respondent from the default and/or to order the case to a hearing or to modify the default decision when a motion to vacate or petition for reconsideration comes before the Board.

¹ Government Code section 11520, subdivision (c) provides:

Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:

- (1) Failure of the person to receive notice served pursuant to Section 11505.*
- (2) Mistake, inadvertence, surprise, or excusable neglect.*

² Government Code section 11521 provides:

(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The agency shall notify a petitioner of the time limits for petitioning for reconsideration. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

3. ACTION ON THE TABLE

At its meeting on November 4, 2016, the Board voted unanimously to seek legislation authorizing Executive Officer Default Delegation. This Board action was never countermanded in subsequent Board meetings, which means that it is an active directive to staff.

Legislatively, it was placed in the Board's 2017 Sunset bill, AB 1229, but was amended out of the bill before enactment. It was also contained in a 2018 bill, AB 888 (Low), which was gutted and amended to carry another proposal.

After the 2017-18 Legislative Session adjourned, the issue was returned to the Board's Legislation and Regulations Committee for discussion as to the next steps. While bill language was discussed, the Committee did not put a recommendation of final language before the full Board.

4. POTENTIAL IMPACT

In 2018, the Board processed 123 defaults, and all were adopted. Only seven were remanded back to hearing because of either a motion to vacate or a petition for reconsideration. On average, the regular semi-monthly packets the Board receives would have at least five fewer cases to review. Should the licensee request reconsideration or to vacate, the Board would see the cases as part of the regular packets for hearing.

5. ADVANTAGES

Consumer Protection

Enactment of the default decision delegation supports our paramount mission, consumer protection. These cases are serious in nature, have been investigated thoroughly by either Board staff or the Division of Investigation, and have been in process for months. The default delegation allows the Board to impose a penalty several months sooner than the existing practice. Consumers are better protected, because the revocation is issued sooner, and the individual is no longer licensed to practice and able to harm patients.

Efficiency

Staff analysis indicates an annual saving of more than \$15,000 in processing these cases for Board review and vote. It would also result in a significant time savings to each Board Member, by reducing the number cases to review and vote upon.

Effectiveness at Other Boards

Staff reached out to several Healing Arts Boards for input. The Medical Board of California, the Osteopathic Medical Board, the Respiratory Care Board, the Naturopathic Medicine Committee, the Board of Podiatric Medicine, the Speech Language Pathology and Audiology and Hearing Aid Dispensers Board, and the Board

of Registered Nursing all delegate the authority to approve default decisions to their Executive Officer.

The Medical Practice Act allows the Executive Officer of the California Medical Board to execute and approve all stipulated surrenders and all default decisions. It saves staff time processing the cases, as they don't have to wait for the Board vote, and it also saves time for the Board members, in that it reduces the number of cases they are asked to review.

The Nursing Practice Act expressly authorizes the Executive Officer of the Board of Registered Nursing to adopt a decision entered by default and stipulations for surrender of licenses. This provision will sunset January 1, 2022.

6. DISADVANTAGES

Staff researched and discussed this issue extensively, and perceives no disadvantages or negative impacts on the Board's operations. Concerns raised in the Legislation and Regulations Committee included the following:

Due Process

One possible concern is the seeming curtailment of due process for the licensee. This is not problematic, since due process is provided before a default decision is entered. The respondent is served with the accusation and then given an opportunity to file a notice of defense. Failure to contest the accusation after notice and opportunity to be heard constitutes a waiver of the right to a hearing. When a default decision subsequently issues, the respondent is given notice and an opportunity to seek relief through a motion to vacate or petition for reconsideration.

Disempowerment of the Board

This proposal was included in the Board's 2017 Sunset Legislation, as well as the Monitor's Report, and in concert with the temporary transfer of the authority to appoint the Board's Executive Officer. This policy may be perceived as an attempt to weaken the Board's overall authority. However, since the Board approved this action before the Sunset Legislation and the Monitor's Recommendations, this perception is unsupported. The November 2016 Board Minutes clearly indicate that the Board resolved to place this proposal in its 2017 Sunset Legislation.

7. STAFF RECOMMENDATIONS

Staff recommends that the Board immediately request legislation to achieve this goal.

Specifically, staff recommends that the Board authorize the Executive Officer to discuss the next step with DCA's Legislative Office, and the Senate and Assembly policy committees. The relevant statutory language for BRN was included in last year's technical omnibus legislation, SB 1480 (Hill), and Committee staff have expressed support for including our language in omnibus legislation this year.

Staff also recommends that once legislation is enacted, oversight for this function be assigned to the Board's Enforcement Committee.