

Agenda Item 9.A.V.a)

Public Comment and Response for AB 2138

Rulemaking for 16 CCR Sections 2521 and 2522

Background: Per the Administrative Procedure Act of Government Code sec. 11346.4, the Board sent a public Notice of proposed action. The 45-day public comment period was from July 31st, 2020 to September 14th, 2020. The Board received one letter of Public Comment regarding the proposed action. The letter was from Vinuta Naik, Senior Attorney for Community Legal Services in East Palo Alto, and Zachary Gautier-Klos of Root & Rebound Reentry Advocates. The comments in the letter, and the Board's recommended responses thereto, are as follows:

General Statement/Purpose of the Letter

Summary

The letter states that the proposal should go further in order to fully implement the intention and spirit of the AB 2138 text. The letter's authors believe there is a lack of clarity in the licensure process for individuals who have been impacted by the criminal justice system that leads many of them to give up. The authors believe the proposed regulations leave gaps and fail to implement Business and Professions Code (BPC) sections 480, 481, 482 and 493, falling short of the intent of the bill to combat discrimination against people with records who have demonstrated rehabilitation and are seeking a professional career.

Response

The Board appreciates this comment and concern but will not be advancing this premise. The proposed regulations clarify the substantial relationship criteria and criteria for rehabilitation, as required by AB 2138. Clarifying how to determine whether a crime is substantially related and the factors that will be considered when evaluating rehabilitation should assist applicants and licensees when planning how they are going to demonstrate their rehabilitation. In conjunction with the effective date of AB 2138 and the proposed regulations, the Board also plans to engage in outreach to answer some of the more commonly asked questions about seeking licensure after being impacted by the criminal justice system.

Comment 1 Summary

Section 2521 fails to clearly state that criminal history in which the applicant obtained a Certificate of Rehabilitation, pardon, dismissal per Penal Code section 1203.4 *et seq.*, or an arrest that resulted in a disposition other than a conviction **shall** not be denied a license. See BPC section 480(b), (c), and (d).

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Comment 1 Response

The Board appreciates this comment and concern. BPC section 480(c) already clearly states that a license may not be denied based on a conviction, or its underlying acts, if it has been dismissed or expunged pursuant to Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42. In addition, BPC section 480(b) prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d) prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. BPC section 480(b), (c), and (d) explicitly prohibit denial of a license in these circumstances. Since this is already in the relevant statute, it is not necessary to repeat it in these regulations.

Comment 2 Summary

The current language in section 2521(c) states that certain violations are substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of BPC section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

Comment 2 Response

The Board appreciates this comment and concern; if the BPC may seem to be inconsistent with AB 2138 and the amended 16 CCR section 2578, please refer to BPC section 4501.1 which states, "Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." Board discretion shall prioritize protection of the public above any other consideration.

Comment 3 Summary

Section 2522(b) as written, relies too heavily on law enforcement's reports and determination of the applicant's progress (e.g., in considering the circumstances of an applicant's parole or probation period). Rehabilitation can and does take many forms that the current language does not fully embrace.

Comment 3 Response

The Board appreciates this comment and concern. BPC 482 requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without the violation of probation or parole, or if the Board otherwise finds the applicant rehabilitated. Section 2522(a), states that the Board shall consider "whether the applicant or licensee 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." Existing language of 2522(a)(13), "Other rehabilitation evidence," permits the Board's consideration of other demonstrations of rehabilitation, including the time elapsed since the crime, evidence of any subsequent crimes, compliance with the

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probation/parole, and evidence of rehabilitation submitted by the applicant or licensee. This provides applicants with an opportunity to demonstrate volunteer or charity work, furthered education, successful employment, or other activities.

Comment 4 Summary

Further, while section 2522(b)(13) recognizes that other rehabilitation evidence may be considered, providing more concrete examples and guidelines in these criteria could help the BVNPT, applicants, and licensees. Please see number 5 below for examples of rehabilitation to expand the proposed regulations.

Comment 4 Response

The Board appreciates this comment and concern. BPC section 482(b) states, "Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee." It is thus unnecessary to place suggestions of potential examples of rehabilitation criteria in regulatory rulemaking; rather it is incumbent on the license applicant or licensee to present this evidence to the Board, and for the Board to evaluate such evidence on a case by case basis.

There are many possible ways of showing rehabilitation and many unique scenarios of mitigating circumstances. Attempting to specifically list some, but not others, may be too limiting or misleading. In addition, the circumstances of each enforcement case are unique and what is sufficient evidence of rehabilitation for one case may not suffice for another or may not be relevant for all types of crimes; i.e., attendance at Alcoholics Anonymous is a common demonstration of rehabilitation for alcohol-related crimes but is not a good example of rehabilitation for a crime where alcohol was not involved. The Board believes that this concern will be better addressed by engaging in outreach to answer some of the more commonly asked questions about demonstrating rehabilitation.

Comment 5 Summary

The letter asks that the full extent of AB 2138 be incorporated into the regulations by including the seven-year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under the Penal Code. (See BPC section 480(a)(1))

Comment 5 Response

The Board appreciates this comment and concern. The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1). As this is already included in statute, it is not necessary to repeat it in the regulations.

Comment 6 Summary

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The proposed regulations should provide that a person with a criminal history **shall not** be denied a license if the applicant has obtained a Certificate of Rehabilitation, dismissal per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication. See BPC section 480(b), (c), and (d).

Comment 6 Response

The Board appreciates this comment and concern. BPC section 480(c) already clearly states that a license may not be denied based on a conviction, or its underlying acts, if it has been dismissed or expunged pursuant to Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42. In addition, BPC section 480(b) prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d) prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. Therefore, BPC section 480(b), (c), and (d) explicitly prohibit denial of a license in these circumstances. Since this is already in the relevant statute, it is not necessary to repeat it in these regulations.

Comment 7 Summary

The proposed regulations should include that the BVNPT shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. See BPC section 480(f)(2).

Comment 7 Response

The Board appreciates this comment and concern and reminds that BPC section 480(f)(2) also states that the Board "may request mitigating information from an applicant regarding the applicant's criminal history for purposes of determining substantial relation or demonstrating evidence of rehabilitation, provided that the applicant is informed that disclosure is voluntary and that the applicant's decision not to disclose any information shall not be a factor in a board's decision to grant or deny an application for licensure." Moreover, BPC section 4501.1 states, "Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." Board discretion shall prioritize protection of the public above any other consideration and shall continue to request the voluntary submission of applicant/licensee information to determine substantial relation or to assess evidence of rehabilitation in keeping with its charge of protection of the public.

Comment 8 Summary

The proposed regulations should include that the BVNPT shall notify the applicant in writing if the applicant is denied or disqualified from licensure. The BVNPT must provide procedures describing the process for the applicant to challenge the decision or

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to request reconsideration, that the applicant has a right to appeal the BVNPT's decision, and the process of requesting a complete conviction history. See BPC section 480(f)(3).

Comment 8 Response

The Board rejects this comment. 10 BPC section 480(f)(3) already contains these requirements. It is not necessary to repeat them in regulations.

Comment 9 Summary

The intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. Merely looking to law enforcement will not adequately show how an applicant would do on the job. Rather, rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. To better define rehabilitation, we recommend that the BVNPT provide examples of evidence of mitigating circumstances and rehabilitation efforts to assist both the BVNPT and licensing applicants.

Comment 9 Response

The Board appreciates this comment and concern. BPC section 482(b) states, "Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee." It is unnecessary to place suggestions of potential examples of rehabilitation criteria in regulatory rulemaking; rather it is incumbent on the license applicant or licensee to present this evidence to the Board, and for the Board to evaluate such evidence on a case by case basis. Attempting to specifically list some, but not others, may be limiting or misleading.

There are many possible ways of showing rehabilitation, and many unique scenarios of mitigating circumstances. The circumstances of each enforcement case are unique and what is sufficient evidence of rehabilitation for one case may not suffice for another or may not be relevant for all types of crimes.

Comment 10 Summary

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. See BPC section 480(g).

Comment 10 Response

The Board appreciates this comment and concern. BPC section 480(g) already contains specific requirements regarding the annual publication of deidentified information collected accordingly. This annual reporting of the aforementioned

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statistical data is contained in statute and does not need to be unnecessarily duplicated in regulatory language.

Public Comment and Response for AB 2138

Rulemaking for 16 CCR Sections 2578 and 2579

Background: Per the Administrative Procedure Act of Government Code sec. 11346.4, the Board sent a public Notice of proposed action. The 45-day public comment period was from June 19th to August 3rd of 2020. The Board received one letter of Public Comment regarding the proposed action. The letter was from Vinuta Naik, Senior Attorney for Community Legal Services in East Palo Alto, and Faride Perez-Aucar, Senior Legal Fellow at Root & Rebound Reentry Advocates. The comments in the letter, and the Board's recommended responses thereto, are as follows:

General Statement/Purpose of the Letter

Summary: The letter states that the proposal should go further in order to fully implement the intention and spirit of the AB 2138 text. The letter's authors believe there is a lack of clarity in the licensure process for individuals who have been impacted by the criminal justice system that leads many of them to give up. The authors believe the proposed regulations leave gaps and fail to implement Business and Professions Code sections 480, 481, 482 and 493, falling short of the intent of the bill to combat discrimination against people with records who have demonstrated rehabilitation and are seeking a professional career.

Response: The Board appreciates this comment and concern but will not be advancing this premise. The proposed regulations clarify the substantial relationship criteria and criteria for rehabilitation, as required by AB 2138. Clarifying how to determine whether a crime is substantially related and the factors that will be considered when evaluating rehabilitation should assist applicants and licensees when planning how they are going to demonstrate their rehabilitation. In conjunction with the effective date of AB 2138 and the proposed regulations, the Board also plans to engage in outreach to answer some of the more commonly asked questions about seeking licensure after being impacted by the criminal justice system.

Comment 1 Summary

Section 2578 states that certain violations are 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 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

Comment 1 Response

The Board appreciates this comment and concern. If the Business and Professions Code (BPC) appears to be inconsistent with AB 2138 and the amended 16 CCR section §2578, please refer to BPC sec. 4501.1 which states, "Protection of the public shall be the highest

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priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.” Board discretion shall prioritize protection of the public above any other consideration. The Legislature and/or Board have deemed certain crimes and acts to be substantially related to the occupation of psychiatric technician regardless of the passage of time from the offense and the applicant’s desire to apply for a license without having to disclose the individual’s prior offenses in the application process.

Comment 2 Summary

Section 2578 fails to note that a board may deny a license only if the criminal/formal disciplinary history occurred within the preceding seven years from the date of application. See BPC sec. 480(a). See Gov. Code section 11349.1.

Comment 2 Response

The Board appreciates this comment and concern. The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC sec. 480(a)(1). As this is already included in statute, it is not necessary to repeat it in the regulations.

Comment 3 Summary

Section 2578 fails to note that criminal history that resulted in the applicant obtaining a Certificate of Rehabilitation, pardon, dismissal per Penal Code section 1203.4 et seq., or an arrest that resulted in a disposition other than a conviction shall not be denied a license. See BPC sections 480(b), (c), and (d).

Comment 3 Response

The Board appreciates this comment and concern. BPC sec. 480(c) already clearly states that a license may not be denied based on a conviction, or its underlying acts, if it has been dismissed or expunged pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42. In addition, BPC sec. 480(b) prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC sec. 482. BPC sec. 480(d) prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. BPC sec. 480(b), (c), and (d) explicitly prohibit denial of a license in these circumstances. Since this language is already in the relevant statute, it is not necessary to repeat it in these regulations. See Gov. Code section 11349.1.

Comment 4 Summary

Section 2579, as written, relies too heavily on law enforcement’s reports and determination of the applicant’s progress (e.g., in considering the circumstances of an applicant’s parole or probation period). Rehabilitation can and does take many forms that the current language does

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not fully embrace. Please see number 5 below for examples of rehabilitation to expand the proposed regulations.

Comment 4 Response

The Board appreciates this comment and concern but will not be advancing this premise. BPC sec. 482 requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without the violation of probation or parole, or if the Board otherwise finds the applicant rehabilitated. 16 CCR 2579(a), states that the Board shall consider “if the applicant completed the criminal sentence at issue without a violation of parole or probation.” Nonetheless, 16 CCR 2579(b) has been added to clarify, “if the applicant has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the applicant did not make a showing of rehabilitation based on the criteria in subsection (a).”

Existing language of 16 CCR 2579(b)(13), “Other rehabilitation evidence,” permits the Board’s consideration of other demonstrations of rehabilitation, including the time elapsed since the crime, evidence of any subsequent crimes, compliance with the probation/parole, and evidence of rehabilitation submitted by the applicant or licensee. This provides applicants with an opportunity to demonstrate volunteer or charity work, furthered education, successful employment, or other activities.

Comment 5 Summary

Section 2579(b) sets forth the applicant’s “overall disciplinary record,” “overall criminal actions taken by any federal, state or local agency or court,” “prior warnings on record or prior remediation,” and “number and/or variety of current violations” as criteria to be considered in determining a licensee’s rehabilitation. This criteria undermines the seven-year time limitation in AB 2138, where, except in certain circumstances, the board may deny a license to an applicant only on the basis of certain actions that occurred within the preceding 7 years. Allowing the examination of an applicant’s history of violations and their criminal record to determine rehabilitation subverts AB 2138.

Comment 5 Response

The Board appreciates this comment and concern. However, review of a disciplinary record may be used in consideration of a licensee’s rehabilitation efforts and does not undermine the seven-year limitation provisions of BPC sections 480(a)(1) and (a)(2). Review of an “overall” record to clarify rehabilitation efforts should not be construed as decision-making to inappropriately deny a license.

Comment 6 Summary

While Section 2579(b)(13) recognizes that other rehabilitation evidence may be considered, providing more concrete examples and guidelines in these criteria could help the Board, applicants, and licensees. Please see number 5 below for examples of rehabilitation to expand the proposed regulations. [Item 5 references volunteer service, successful employment in a

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related field, unpaid work in the community, furthered education, abstinence from controlled substances, stability of family life, etc.]

Comment 6 Response

The Board appreciates this comment and concern. BPC sec. 482(b) states, "Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee." It is thus unnecessary to place suggestions of potential examples of rehabilitation criteria in regulatory rulemaking; rather it is incumbent on the license applicant or licensee to present this evidence to the Board, and for the Board to evaluate such evidence on a case by case basis.

There are many possible ways of showing rehabilitation, and many unique scenarios of mitigating circumstances. Attempting to specifically list some, but not others, may be too limiting or misleading. In addition, the circumstances of each enforcement case are unique and what is sufficient evidence of rehabilitation for one case may not suffice for another or may not be relevant for all types of crimes; i.e., attendance at Alcoholics Anonymous is a common demonstration of rehabilitation for alcohol-related crimes but is not a good example of rehabilitation for a crime where alcohol was not involved. The Board believes that this concern will be better addressed by engaging in outreach to answer some of the more commonly asked questions about demonstrating rehabilitation.

Comment 7 Summary

The letter asks that the full extent of AB 2138 be incorporated into the regulations by including the seven-year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under the Penal Code. (See BPC sec. 480(a))

Comment 7 Response

The Board appreciates this comment and concern but will not be advancing this premise. The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC sec. 480(a)(1). As this language is already included in statute, it is not necessary to repeat in the regulations. See Gov. Code section 11349.1.

Comment 8 Summary

The proposed regulations should provide that a person with a criminal history **shall not** be denied a license if the applicant has obtained a Certificate of Rehabilitation, dismissal per Penal Code section 1203.4, 1203.4(a), 1203.41 or 1203.42 or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication.

Comment 8 Response

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The Board appreciates this comment and concern. BPC sec. 480(c) already clearly states that a license may not be denied based on a conviction, or its underlying acts, if it has been dismissed or expunged pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42. In addition, BPC sec. 480(b) prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC sec. 482. BPC sec. 480(d) prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. BPC sec. 480(b), (c), and (d) explicitly prohibit denial of a license in these circumstances. Since this language is already in the relevant statute, it is not necessary to repeat it in these regulations. See Gov. Code section 11349.1.

Comment 9 Summary

The proposed regulations should include that the board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. See Cal Business and Professions Code section 480(f)(2).

Comment 9 Response

The Board appreciates this comment and concern and reminds that BPC sec. 480(f)(2) also states that the Board "may request mitigating information from an applicant regarding the applicant's criminal history for purposes of determining substantial relation or demonstrating evidence of rehabilitation, provided that the applicant is informed that disclosure is voluntary and that the applicant's decision not to disclose any information shall not be a factor in a board's decision to grant or deny an application for licensure." Moreover, BPC sec. 4501.1 states, "Protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." Board discretion shall prioritize protection of the public above any other consideration and shall continue to request the voluntary submission of applicant/licensee information to determine substantial relation or to assess evidence of rehabilitation in keeping with its charge of protection of the public.

Comment 10 Summary

The proposed regulations should include that the Board shall notify the applicant in writing if the applicant is denied or disqualified from licensure. 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. See Cal Business and Professions Code sec. 480(f)(3).

Comment 10 Response

The Board appreciates this comment and concern, but rejects this comment, since BPC sec.

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480(f)(3) already contains these requirements. It is, therefore, not necessary to repeat these requirements in the regulations. See Gov. Code section 11349.1.

Comment 11 Summary

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. See Cal business and Professions Code 480(g).

Comment 11 Response

The Board appreciates this comment and concern. However, BPC sec. 480(g) already contains specific requirements regarding the annual publication of deidentified information collected accordingly. This annual reporting of the aforementioned statistical data is contained in statute and does not need to be duplicated in regulatory language. See Gov. Code section 11349.1.