

EMERGENCY MEDICAL SERVICES AUTHORITY

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DATE: March 10, 2015

TO: Peggy Gibson, Senior Attorney
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FROM: Howard Backer, MD, MPH, FACEP
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Emergency Medical Services Authority

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Daniel R. Amely for

SUBJECT: **Response to Public Comments**
Proposed Emergency Regulations: EMS Plan Appeal Process
Title 22, Section 100.450
OAL File No. Z2015-0302-02

Attached is the Emergency Medical Services Authority's (EMSA) response to public comments received on the above-mentioned emergency regulations.

EMSA received many of the same comments from multiple agencies. Where a comment was repeated by multiple agencies, EMSA combined the comments and summarized the concern.

1. Finding of Emergency

Comment: There were many comments surrounding the basis for the Finding of Emergency. The purpose of the Finding of Emergency is to provide specific information to the Office of Administrative Law (OAL) that supports the need for emergency regulations. This document is used by OAL in making a determination on whether an emergency exists.

Response: Title 2, California Code of Regulations, Section 11349.6 states: "...the office [OAL] shall allow interested persons five calendar days to submit comments on the proposed emergency regulations [emphasis added]...". Since the rulemaking procedure for emergency regulations allows for public comment only on the regulations, EMSA is not providing a separate response to public comment on the Finding of Emergency. EMSA believes our initial justification is appropriate and supports the need for immediate adoption of these regulations.

2. Page 1, subsection (b), line 15:

“(b) The Office of Administrative Hearings, using an administrative law judge, shall evaluate all information submitted by the Authority and the local EMS agency”.

Comment: The language, “...*the ALJ shall evaluate all information*” limits the introduction of evidence or testimony, prevents a full and complete hearing, and limits the ALJs ability to fully analyze the issues.

Request the proposed change: “*the ALJ shall hold a hearing, receive such testimony and evidence as may be presented by the parties, and evaluate all information.*”

Response: In accordance with Government Code Sections 11513, 11514, and 11515, the types of evidence that may be received, their relevance, and whether any evidence shall be excluded, is determined by the administrative law judge (ALJ) during a hearing. The proposed regulation simply states that the ALJ shall consider all evidence submitted by both parties. What weight to give that evidence, and the determination to exclude any evidence submitted, is at the ALJ’s discretion. EMSA believes that this portion of the proposed regulation is consistent with the statutes in the Administrative Procedures Act regarding the submission of evidence.

3. Page 2, subsection (h), line 37:

“The decision by the Commission is final”.

Comment: This language, as written, could allow EMSA to bar judicial recourse after an adverse administrative decision.

Request the proposed change: “*The decision of the Commission is final shall be deemed an exhaustion of administrative remedies*”.

Response: The language in the proposed regulation is consistent with Health and Safety Code, Section 1797.105(d), which states: “*In an appeal pursuant to subdivision (c), the commission may sustain the determination of the authority or overrule and permit local implementation of a plan, and the decision of the commission is final*”. The language in the proposed comment is not consistent with the plain language of the statute and attempts to add a definition not contemplated by the language of the statute.

4. Page 2, subsection (i), line 38:

“Pursuant to California Code of Regulations, Title 1, Section 1042, the prevailing party may recover costs.”

Comments: EMSA has no statutory basis to recover costs; appears punitive; may discourage LEMSAs from appealing; propose deleting this subsection and require each party to bear their own costs.

Response: The comments stating that EMSA does not have a specific cost recovery statute are correct. However, Title 1 of the California Code of Regulations (CCR), Section 1042, states:

“(a) An agency shall allege in its pleading any request for costs, citing the applicable cost recovery statute or regulation.”

Our proposed regulations would authorize cost recovery on its face. The CCR is clear that as long as there is a regulation that authorizes cost recovery, a party may in fact, recover costs. While there have been many comments stating that allowing cost recovery would have a “chilling” effect on appeals, the converse is also true. The regulation, as written, is neutral to either party. Both must proceed in good faith as the potential sanction for an arbitrary denial or a frivolous appeal is the same.

5. Page 2, subsection (e), line 26:

“(e) The Commission shall permit public comment pursuant to the Bagley-Keene Open Meeting Act. The Commission shall not accept new evidence at the meeting, but shall rely solely on the evidence of record at the administrative hearing.”

Comment: If the Commission may not consider new evidence at the Commission meeting, what is the point of the public comment?

Response: Through the public comment process, the general public has an opportunity to express their opinion regarding an appeal and the ALJs proposed decision. The public may advocate to the Commission either to adopt or not adopt the ALJs proposed decision. The Commission may consider these comments when taking a vote on the proposed decision. The public may not submit additional evidence for the consideration of the Commission, as the evidentiary record would have been closed by the ALJ when the proposed

decision was submitted to the Commission for consideration. Although it is not strictly considered "evidence" pursuant to statute, through this process the public does in fact, have input to the Commission regarding its vote.