

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE:	March 10, 2017	DEPT. NO.:	24
JUDGE:	HON. SHELLEYANNE W. L. CHANG	CLERK:	E. HIGGINBOTHAM
NED ALAN LEIBA, Petitioner, v. CALIFORNIA BOARD OF ACCOUNTANCY, Respondent.		Case No.: 34-2016-80002453	
Nature of Proceedings:		RULING ON SUBMITTED MATTER AND ORDER: PETITION FOR WRIT OF MANDATE	

The following shall constitute the Court's tentative ruling on the above matter, set for hearing in Department 24, on Friday, March 10, 2017, at 10:00 a.m. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

Petitioner seeks a writ of mandate ordering Respondent California Board of Accountancy (the Board) to set aside his administrative citation, and other related relief. The Petition is **GRANTED**.

I. BACKGROUND

In 1976, Petitioner became licensed by the Board. It is undisputed that he submitted a copy of his "rolled" fingerprints to the Board then. (See Jan. 4, 2016 Hearing Transcript, p. 32.) Petitioner's license has been continuously renewed¹ and he has had no history of license discipline with the Board.

In 1976, the Board did not submit licensees' fingerprint cards to the California Department of Justice (DOJ) for criminal background screening, as it does today. The Board has used its own internal system to perform criminal background checks on licensees using the licensees' fingerprints. The Board currently "contracts out" licensee background checks to the DOJ, as other State agencies do: after receiving the licensee's fingerprints, the Board transmits the fingerprints to the DOJ. DOJ maintains a repository of collected fingerprints, performs the criminal background check of the licensee, and reports back to that agency. (See May 19, 2016 Hearing Transcript, pp. 16-17.)

¹ The license renewal period is every two years.

The Board admits that some point in time, in the 1980s, the Board decided to destroy all copies of the licensees' fingerprints that it possessed, because it was concerned with the security risks associated with storing licensees' fingerprint cards. (Opposition Brief, p. 5:9-10; Jan. 4, 2016 Hearing Transcript, 22:12-14, 32:16-20.) The Board does not further elaborate upon its decision to destroy the licensees' fingerprints, but Court presumes the Board did this after deciding to use the DOJ to perform background checks on licensees. It is undisputed that the Board did not notify the licensees that it destroyed copies of their fingerprints.

In 2012, the Board promulgated California Code of Regulations, title 16, section 37.5, to become effective in 2013. (Regulation 37.5.) It provides in pertinent part:

- (a) A licensee applying for renewal...who has not previously submitted fingerprints as a condition of licensure or for whom an electronic record of the licensee's fingerprints does not exist in the Department of Justice's criminal offender record identification database shall successfully complete a state and federal level criminal offender record information search conducted through the Department of Justice by the licensee's renewal date that occurs after December 31, 2013.

In September 2014, Petitioner's license was subject to renewal. Petitioner submitted a renewal package.

The Board communicated to Petitioner that pursuant to Regulation 37.5, Petitioner needed to submit to a "Live Scan"² so that his fingerprints could be collected and sent to DOJ. Petitioner maintained that he had already furnished his fingerprints to the Board in 1976, and thus did not need to submit them again.

On June 26, 2015, the Board issued Petitioner an administrative citation of \$500.00 for violating Regulation 37.5, and not submitting fingerprints with his license renewal application for the renewal period that ended September 30, 2014. (AR, 6-14.)

Petitioner contested the citation.

On January 4, 2016, an administrative hearing was held before Administrative Law Judge (ALJ) Stephen Smith. ALJ Smith issued a proposed decision dismissing the citation, and finding that (1) Petitioner did not violate Regulation 37.5 and (2) that the Board was estopped from citing Petitioner, as the Board destroyed Petitioner's fingerprints. (AR, 184-211.)

On March 25, 2016, the Board rejected ALJ Smith's proposed decision and issued an order remanding to the ALJ to hold a new hearing and take additional evidence on the issue of whether petitioner is an individual for whom fingerprints do not exist in the DOJ's Criminal Offender Record Identification (CORI) database. (AR, 182.)

² Live Scan creates an electronic record of fingerprints. (See May 19, 2016 Hearing, p. 16.)

An additional hearing was held on May 19, 2016 before ALJ Karen Brandt.³ ALJ Brant issued a proposed decision upholding the citation, ordering that Petitioner have 30 days from the effective date of the decision to submit fingerprints, and noting that the Board may refuse to renew Petitioner's license if it did not timely receive Petitioner's fingerprints. (AR, 228-248.)

The Board adopted this decision on July 29, 2016, stating that the decision would become effective August 28, 2016. (AR, 227.)

On August 23, 2016, Petitioner submitted a Petition for Reconsideration (Petition). (AR, 249-288.) CBA issued a letter stating that, although it received the Petition on August 25, 2016, it should have received the Petition on August 19, 2016 to allow the Board to process it. The letter further stated that because the Petition was not received in time for the Board to properly route and process it, the decision sustaining the citation was now final.⁴ (AR, 367.)

Petitioner avers that he sent communications to the Board, urging it to process his Petition for Reconsideration, but received no response.

On September 26, 2016, Petitioner sent the Board a card with his fingerprints. (Petitioner's Exhibit, 5.) The Board responded that it would not process Petitioner's renewal application because Petitioner was required to submit fingerprints on two cards, and had submitted only one card,⁵ and because Petitioner had not paid the \$49.00 processing fee. (Petitioner's Exhibit, 7.)

II. DISCUSSION

a. Objections to Documents Not Included in Administrative Record

The Board objects to Petitioner's Supplemental Declaration that attaches 10 Exhibits that Petitioner believes should be part of the administrative record.

In an action pursuant to Code of Civil Procedure section 1094.5, review is ordinarily limited to the materials that were before the administrative decision-maker. (*Toyota of Visalia v. New Motor Vehicle Board* (1987) 188 Cal.App.3d 872, 881.) Extra-record evidence is only admissible in the following circumstances: when there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before the respondent. (Code Civ. Proc., § 1094.5(c).)

³ Petitioner contested the fact that a new ALJ heard the matter. On May 17, 2016, the Presiding ALJ issued an order stating that ALJ Smith was not reasonably available. (AR, 44.) It appears that ALJ Smith was unavailable, due to his retirement.

⁴ The Court concludes that Petitioner's submission was timely, in that he submitted it before the stated effective date of August 28, 2016. (Gov. Code., § 11521.)

⁵ That card shows fingerprints from the left and right hands.

Here, most of the extra-record evidence that is attached to Petitioner's declaration relates to events taking place after the Board's decision, and necessarily could not have been produced prior to the decision. The Exhibits relate to actions of Petitioner and the Board shortly after the Board's decision sustaining the citation, which decision indicated that Petitioner and the Board could both take action (submit fingerprints; license renewal) after the effective date of that decision.

The Court finds that the Exhibits are relevant, and are admissible extra-record evidence. Because the Court grants the writ, upon remand, the Board is instructed to consider the evidence in the Exhibits pursuant to Code of Civil Procedure section 1094.5(e).

b. Standard of Review

This is a proceeding to review the Board's administrative decision sustaining Petitioner's administrative citation pursuant to Code of Civil Procedure section 1094.5. The Court reviews "whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5(b).)

Here, the material facts are undisputed, and the ultimate conclusion to be drawn from them is a question of law. Accordingly, the Court conducts a *de novo* review in determining whether the Board abused its discretion. (*Moosa v. State Personnel Board* (2000) 102 Cal.App.4th 1379, 1384-1385.)

Additionally, when the determination in question is one of statutory or regulatory interpretation or an issue of law, the court exercises its independent judgment. (*Yamaha Corp. of Am. v. State Bd. of Equal.* (1988) 19 Cal.4th 1, 7.) The binding power of an agency's interpretation of a statute or regulation is contextual. (*Yamaha Corp. of Am.*, *supra*, 19 Cal.4th at p. 7.) The amount of deference given to an agency's interpretation "fundamentally *situational*." (*Id.* at p. 12 [emphasis in original].) "A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command." (*Ibid.*)

The rules of statutory construction govern Court's interpretation of regulations promulgated by administrative agencies. (*Butts v. Board of Trustees of the Calif. State Univ.* (2014) 225 Cal.App.4th 835, 823.)

In construing a statute or regulation, the Court's task is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 186-187; In determining such intent, the Court must look first to the words of the statute themselves, giving the language its usual, ordinary import. (*Central Pathology Service Medical Clinic, Inc.*,

supra, 3 Cal.4th at pp.186-187.) The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Ibid.*) The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Traffic School Online, Inc. v. Superior Court* (2001) 89 Cal.App.4th 222, 230.)

c. The Board Abused Its Discretion in Citing Petitioner for Not Submitting Fingerprints with His License Renewal Application

i. Regulation 37.5

The Board found that Petitioner violated Regulation 37.5 by not submitting fingerprints as a condition of his license renewal. The Board abused its discretion in concluding that Petitioner violated this regulation.

Regulation 37.5 provides in part:

(a) A licensee applying for renewal as a certified public accountant or public accountant who has not previously submitted fingerprints as a condition of licensure or for whom an electronic record of the licensee's fingerprints does not exist in the Department of Justice's criminal offender record identification database shall successfully complete a state and federal level criminal offender record information search conducted through the Department of Justice by the licensee's renewal date that occurs after December 31, 2013.

(1) A licensee shall retain for at least three years as evidence of having complied with subdivision (a) either a receipt showing that he or she has electronically transmitted his or her fingerprint images to the Department of Justice or, for those who did not use an electronic fingerprint system, a receipt evidencing that his or her fingerprints were recorded and submitted to the board.

(2) An applicant for renewal shall pay the actual cost of compliance with subdivision (a).

.....

The Board has not shown that Petitioner failed to comply with the requirements of Regulation 37.5(a).

It is undisputed that Petitioner previously submitted fingerprints to the Board "as a condition of licensure." Thus, he has complied with regulation 37.5(a)

Regulation 37.5 permits a licensee to comply with subdivision (a) by submitting fingerprints as a condition of licensure. Indeed, subdivision (a)(1) provides that a licensee may retain proof of compliance with Regulation 37.5 by either (1) retaining a receipt indicating that the licensee submitted fingerprints to the DOJ, or (2) retaining a receipt evidencing that the licensee's fingerprints were "recorded and submitted to the Board." If the Court were to allow the Board to cite Petitioner notwithstanding the undisputed fact that Petitioner submitted his fingerprints to the Board as a condition of licensure, this language regarding the latter method of compliance with Regulation 37.5 would be surplusage. The Court will not construe Regulation 37.5 in a manner that renders this language surplusage. (*See, Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 [courts should give effect to every word of a statute, and avoid reading the statute as to render language surplusage].)

Even if the Court were to accept the Board's construction of Regulation 37.5—that the Board may also cite licensees who have previously submitted their fingerprints if the Board believes that DOJ does not have a licensee's fingerprints, the Board has not shown that Petitioner falls into this category.

The Board has not shown that Petitioner is a person "for whom an electronic record of the licensee's fingerprints **does not** exist in the Department of Justice's criminal offender record identification database." (Regulation 37.5. Emphasis added.) Petitioner submitted his fingerprints to the Board years ago, and the Court presumes that the Board transmitted those fingerprints to the DOJ, as the Board performs criminal background checks of licensees and arranged with DOJ to perform this function. (See Evid. Code, § 664 [It is presumed that official duty has been regularly performed].) The evidence presented by the Board, namely, the testimony of DOJ Chief of Bureau of Criminal Information and Analysis, Julie Basco, indicates at best, that a record of Petitioner's fingerprints *may* not exist at the DOJ. This uncertainty is not sufficient to show that Petitioner is a person "for whom an electronic record of the licensee's fingerprints *does* not exist in the Department of Justice's criminal offender record identification database."

The Board argues that because the DOJ must have a copy of Petitioner's fingerprints to perform a criminal background check (e.g., the DOJ cannot run such a check based on Petitioner's name), the Board was justified in finding that Petitioner failed to comply with Regulation 37.5. This argument is meritless. There is no dispute that Petitioner submitted his fingerprints to the Board. The fact that the Board destroyed the fingerprints does not negate Petitioner's compliance, and does not justify the Board's decision to cite Petitioner.

The Board also argues that if the Court finds that Regulation 37.5 does not empower the Board to cite Petitioner, the public would be harmed. This argument is meritless as well.

The Board makes a somewhat academic argument that if Regulation 37.5 is not interpreted to provide the Board authority to cite persons such as Petitioner, the public will be harmed, because the Board will not be able to perform criminal background checks on a certain class of licensees who submitted prints to the Board long ago, but

may not exist in the DOJ database. The Court understands the Board's concerns and its goal to check the criminal backgrounds of all licensees. However, the Board could have, but did not, promulgate Regulation 37.5 to require a certain class of licensees (such as Petitioner) to re-submit fingerprints if the Board deemed it necessary. Additionally, the Board has not been forthcoming with information regarding when the cards of older licensees were destroyed, and what information it provided to the DOJ. Consequently, the Court has no idea about the number of older licensees who submitted fingerprints to the Board and for whom fingerprints may not exist at the DOJ, and simply cannot quantify the harm to the public in this petition.

In this case however, there is no harm to the public. As noted above, Petitioner has recently submitted a "hard copy" of his fingerprints to the Board. The Board accepts "hard copies" from out-of-state licensees, and can provide these fingerprints to the DOJ. Consequently, Petitioner will not be able to evade a criminal background check.

Accordingly, the Board abused its discretion in sustaining the administrative citation against Petitioner. To the extent that Petitioner seeks other mandate relief, these claims are denied.

III. DISPOSITION

The Petition is granted, in part, in that the Court orders the Board to set aside its July 29, 2016 order sustaining the administrative citation issued to Petitioner. The Court remands the matter to the Board to make a new decision in light of this ruling. Upon remand, the Board is commanded to admit and consider the exhibits attached to the Supplemental Declaration of Petitioner.

Counsel for Petitioner is directed to prepare a formal order and a separate judgment, each incorporating this ruling as an exhibit thereto, and a separate writ of mandate. Counsel for Petitioner shall submit the order, judgment, and writ to opposing counsel for approval as to form, and thereafter submit them to the Court for approval in accordance with the California Rules of Court, rule 3.1312. The writ of mandate shall further command the Board to make and file a return, within 60 days after service of the writ, setting forth what the Board has done to comply with the writ. The writ shall be prepared for the signature of the Clerk of the Court.

RULING AFTER HEARING

The Court took the matter under submission. The Court affirms the tentative ruling with the following modifications.

Counsel for the Board noted that the Board does not currently possess Petitioner's fingerprints and is unable to submit them to the DOJ, as the Board returned Petitioner's fingerprint card. The Board's concerns about harm to the public in this case—that Petitioner will evade a criminal background check-- are nonetheless speculative. Petitioner has pled and appears willing to submit his fingerprints in a manner acceptable

to the Board. If the Board were truly concerned with protecting the public, and ensuring that Petitioner submit to a criminal background check, the Board would work in good faith with Petitioner to obtain his fingerprints and transmit them to the DOJ. Additionally, if the Board were concerned with protecting the public, it could have better drafted Regulation 37.5 to allow it to collect fingerprints from licensees such as Petitioner, rather than issuing citations to such licensees.

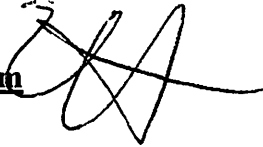
At oral argument, Counsel for Petitioner advised the Court that it was "tax season," and that Petitioner was asked to perform accounting services by many clients. Having resolved the legal issues before it, and in light of the need for urgency expressed by Petitioner, the Court urges the Board to resolve Petitioner's citation and the status of his license as expeditiously as possible. Accordingly, the Court orders the Board to make and file a return to the Petition within 15 days after service to the writ.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: March 13, 2017

E. Higginbotham, Deputy Clerk /s/ E. Higginbotham

A handwritten signature in black ink, appearing to be 'E. Higginbotham', written over the printed name and signature line.

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