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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

May 2, 2007

Thomas J. McGrath, DVM, Chairman
State Board of Veterinary Medicine
2601 North 3rd Street
Harrisburg, PA 17110

Re: Regulation #16A-5721 (IRRC #2594)
State Board of Veterinary Medicine
Professional Conduct

Dear Chairman McGrath:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director
wbg
Enclosure

cc: Honorable Robert M. Tomlinson, Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable P. Michael Sturla, Majority Chairman, House Professional Licensure Committee
Honorable William F. Adolph, Jr., Minority Chairman, House Professional Licensure Committee
Honorable Pedro A. Cortes, Secretary, Department of State

Comments of the Independent Regulatory Review Commission

on

State Board of Veterinary Medicine Regulation #16A-5721 (IRRC #2594)

Professional Conduct

May 2, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the March 3, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the State Board of Veterinary Medicine (Board) to respond to all comments received from us or any other source.

Section 31.21. Rules of Professional Conduct for Veterinarians. - Fiscal impact; Reasonableness; Implementation procedure; Clarity.

Principle 1. Competency.

Subsection (d) indicates that veterinarians should take certain steps when they believe another veterinarian's actions "demonstrate professional incompetence, neglect or animal abuse." By using the word "should," the first part of the subsection appears to give discretion to a licensee in dealing with the incompetence of a colleague. The proposed regulation adds new language mandating that veterinarians file a complaint with the Bureau of Professional and Occupational Affairs (BPOA), and thereby the Board, when they observe conduct that is "grossly incompetent, or involves neglect or animal abuse." We have three concerns.

First, the use of the word "should" in this subsection is inappropriate because it is nonregulatory language which indicates that the provision is optional. When a veterinarian observes questionable actions by a colleague that demonstrate "incompetence," the subsection states that the veterinarian "should" bring the matter to the colleague's attention. If a problem remains unresolved, the veterinarian "should bring the matter to the attention of the Board." It is inappropriate to include optional provisions in a regulation. Regulations establish binding norms of general applicability and future effect. Furthermore, there is confusion over the discretionary nature of this provision with the addition of "failing to report" incompetence as grounds for disciplinary action under Principle 3(11). If reporting certain cases is to remain optional, the first half of this subsection would be more appropriately placed in a policy statement or guidance document.

Second, new language in the first half of the subsection does not indicate how a licensee should "bring the matter to the attention of the Board." What process should a licensee use to notify the Board? If there is gross incompetence, the second half of this subsection mandates that an observing veterinarian file a complaint with the BPOA and this will bring the matter to the Board. However, if a veterinarian is exercising discretion in reporting incompetence under the

first part of the subsection, there are no details about how to bring the matter before the Board. Should the veterinarian file a formal complaint with BPOA or would a letter to the Board suffice?

Third, it is unclear when voluntary or mandatory reporting would apply to “neglect or animal abuse.” The subsection states that a veterinarian “**should**” report actions that “demonstrate professional incompetence, **neglect or animal abuse**” (Emphasis added). It also states:

If the conduct is grossly incompetent, or involves **neglect or animal abuse**, the veterinarian **shall** bring the matter to the attention of the Board by filing a complaint with the Bureau of Professional and Occupational Affairs. [Emphasis added.]

If a veterinarian observes cases involving “neglect or animal abuse” by another veterinarian, is the observer mandated to report it to the Board or does the veterinarian have discretion? If the voluntary and mandatory provisions are both retained, the Board needs to clarify when a veterinarian is mandated to report conduct involving “neglect or animal abuse and when reporting is voluntary.

Principle 3. Unprofessional conduct.

There are several amendments, including a title change, to Principle 3. We have identified the following issues.

First, we question the use of the word “immoral” in the opening paragraph of the amendments to Principle 3. A commentator suggested that the Board consider using the word “unethical” rather than “immoral.” We agree.

The last sentence of Paragraph (3) uses the word “should” and reads: “In these instances, the veterinarian should clearly note the reason for the surgery on the veterinary medical record of the animal.” As we noted above, the word “should” is nonregulatory language. We recommend that the word “should” in this sentence be replaced with “shall” in the final-form regulation.

In Paragraph (5), what constitutes “undue pressure” or “attempting to induce” in trying to convince an individual to file, not file or withdraw a complaint? If a veterinarian and client find a way to amicably resolve their differences and the client withdraws the complaint before the Board takes action, did “undue pressure” or an inducement occur?

Third, the new language in Paragraph (6) is unclear. The Pennsylvania Veterinary Medical Association (PVMA) asked the Board to “develop parameters for what constitutes verbal abuse and harassment.” In its comments dated April 18, 2007, the House Professional Licensure Committee (House Committee) questioned the application of this provision and whether it should be restricted to actions occurring while a veterinarian is practicing medicine. The Board needs to define, clarify and limit the breadth and scope of this provision in the final-form regulation.

Fourth, the new Paragraph (7) generated questions for the PVMA. It asked: “How is competence to perform determined?” What level of training or experience is required to be

competent in a medical procedure? The Board should include the standards that will be used to make this determination.

Paragraph (8) states that “making any false, misleading or deceptive statement or claim” is “unprofessional conduct or immoral conduct.” Since such a claim or statement is already prohibited under the existing Principle 5 in Section 31.21, the need for this new language is unclear. If it is limited to verbal claims to a client, PVMA questions how it could be proven. It suggests a paper record signed by the client and documenting a discussion with the client of the benefits and risks of treatments and medical procedures. Does the new documentation proposed in a different rulemaking for Section 31.22(d) (noted in the Preamble) include the client’s signature? The Board should explain how it intends to implement enforcement of this new code of conduct.

Regarding Paragraph (9), a commentator questioned the impact of the rule on shelters or animal rescue groups where unlicensed people are often involved in providing medical care to animals. The Board should carefully examine the impact of this proposed regulation on volunteers or nonprofit organizations that seek to assist stray, unwanted or abused animals.

Finally, in Paragraph (10), we share the questions and concerns noted by the House Committee and a commentator relating to standards, scope of practice and the laws and regulations in other states.

Principle 7. Veterinarian/client/patient relationships.

Concerning Subsection (a)(1), a commentator questioned whether the regulation could be amended to recognize that a certified veterinary technician could assess, or provide “triage” for, the incoming emergency case and determine the appropriate action such as a referral to another facility. The final-form regulation should clarify the duty of a veterinarian in these situations.

In Subsection (a)(2), what is a “reasonable time”? PVMA asked the Board to provide direction to veterinarians as to how much time they should give to a client to obtain necessary veterinary care for an animal from a different provider. The House Committee was concerned that this provision should include an affirmative duty to provide care until the time when another veterinarian may continue treatment. The final-form regulation should identify a minimum amount of time for this notice and also address the need for continuity and maintenance of medical care.

The amendments to Subsection (b) appear minor but they raised two concerns.

First, one revision generated financial concerns. The word “should” in the existing regulations was changed to “shall.” PVMA is concerned that this mandate places an undue burden on veterinarians. If they are required to care for animals without regard for costs including cases with no client or when a client has no money, then veterinarians, as small business owners, will be required to pass these costs onto other clients. PVMA also noted concerns for large animal veterinarians in cases that may involve services provided by the Department of Agriculture. Has the Board examined the potential fiscal impact of making this standard mandatory for veterinarians?

Second, there was a concern as to whether the phrase "ending suffering" included euthanasia. If so, the House Committee suggested that the word euthanasia be included in Subsection (b). We agree.

The House Committee expressed concerns with the use of the terms "familiarize" and "familiar" in the new Subsection (d). It characterized the use of these terms as setting a less stringent standard for requiring veterinarians to remain current with advancements in veterinary medicine. Veterinarians should strive to be competent in the application of existing treatments and in any advancement in medical treatment. The House Committee also noted similar concerns with the language in Subsection (f). The Board needs to explain and clarify its intent for the new Subsections (d) and (f).

A commentator suggested revising the new language in Subsection (e) to include discussing the benefits, risks and side effects of "treatments, preventatives, and products dispensed to their clients." This type of language would give greater detail to the term "treatment alternatives" that used in the proposed regulation. The commentator also suggested that this discussion or explanation of the risks, benefits and side effects of treatment options should be documented. We agree.

Facsimile Cover Sheet

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To: Tom Blackburn
Cynthia Montgomery
Agency: Department of State
Licensing Boards and Commissions
Phone: 3-7200 or 3-3394 (Cynthia)
Fax: 7-0251
Date: May 2, 2007
Pages:

Comments: We are submitting the Independent Regulatory Review Commission's comments on the State Board of Veterinary Medicine's regulation #16A-5721 (IRRC #2594). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by

Date:

5-2-07