

comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code section 25658.” [16:1 CRLR 124–27; 15:4 CRLR 137]

In this case, 7-Eleven employee Danny Figueroa allegedly sold beer to an underage decoy working with the San Diego Police Department. Both Figueroa and the decoy testified that Figueroa asked whether the decoy was over 21; the decoy testified that he answered “no.” However, Figueroa testified that the decoy said “yes.” Based upon that answer and the decoy’s mature appearance, Figueroa sold him the beer. When later charged with a misdemeanor, Figueroa alleged that the decoy had lied about his age in violation of section 141, and that this failure to follow the guidelines entitled him to section 141’s affirmative defense to the criminal charge against him.

The Fourth District disagreed, holding that the legislature directed ABC merely to adopt and publish guidelines for the use of underage decoys. According to the court, ABC is not authorized to determine “what conduct is unlawful and the penalty for the unlawful conduct.” The court noted that

allowing the administrative guidelines to be used as a defense to a criminal prosecution would effectively permit ABC to define the elements of what does and does not constitute criminal conduct in the use of underage decoys, and that “[a]bsent an indication the legislature delegated such power to [ABC], this would constitute an improper usurpation of the legislature’s function to define what is criminal conduct.”

In concluding that the defense established by section 141(c) is limited to administrative actions taken by and within the authority of ABC, the court noted that when the legislature was directly presented with proposed legislation establishing noncompliance with the guidelines as a defense to criminal prosecution, it declined. According to the court, an early version of AB 3805 (Richter) (Chapter 1205, Statutes of 1994)—the bill that added subsection (e) to Business and Professions Code section 25658 and required ABC to adopt the minor decoy regulations—would have specifically stated that failure to observe the procedures is a defense to “any prosecution or accusation proceeding.” That language was not contained in the enacted version of AB 3805.

Athletic Commission

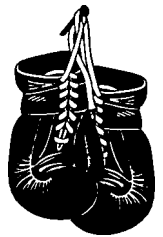
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The Athletic Commission, part of the state Department of Consumer Affairs (DCA), is empowered to regulate professional and amateur boxing and full contact martial arts and kickboxing under the Boxing Act, Business and Professions Code section 18600 *et seq.* The Commission’s regulations are found in Division 2, Title 4 of the California Code of Regulations (CCR). The Commission consists of eight members, each serving a four-year term. All eight members are “public members,” as opposed to industry representatives.

The Commission has sweeping powers to approve, manage, and direct all professional and amateur boxing and full contact martial arts shows or exhibitions held in California, and to license professional and amateur boxers and martial arts competitors, promoters and clubs, referees, judges, matchmakers, booking agents, timekeepers, managers, trainers, seconds, and training facilities. The Commission is authorized to develop and administer appropriate examinations to determine the qualifications of individual athletes, including pre-bout physical examinations, HIV/HBV testing, neurological testing, and eye examinations. The Commission is also responsible for establishing and administering financial protection programs for competitors, such as the Professional Boxers’ Pension Plan. The Commission places primary emphasis on boxing, where regulation extends beyond licensing and includes the establishment of equipment, weight, and medical standards. Further, the Commission’s power to regulate boxing extends to

the separate approval of each contest in order to preclude mismatches. Commission representatives attend all professional boxing contests.

The Commission’s goals are to ensure the health, safety, and welfare of the competitors, and the integrity of the sports of boxing and martial arts in the interest of the general public and the participating athletes.



MAJOR PROJECTS

Professional Boxers’ Pension Plan Issues

Due to declining contributions, the stability of the Commission’s Professional Boxers’ Pension Plan may be in jeopardy. Created in 1982 in Business and Professions Code section 18880 *et seq.*, the pension plan is intended to provide boxers with a small amount of financial security once they have retired from boxing. The plan is funded with required contributions from boxers, managers, and promoters, which are deposited into the Commission’s Boxers’ Pension Fund for distribution to eligible boxers upon regular retirement at age 55, medical retirement, or vocational early retirement at age 36.

At its January 15 and March 26 meetings, the Commission discussed the Professional Boxing Safety Act of 1996, 15 U.S.C. section 6301 *et seq.*, a relatively new federal statute that preempts state regulation of professional boxing on

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tribal lands. Because of this statute, many promoters are holding their fights on Indian reservations; from January 1 through March 26, seven of the thirteen boxing events held in California were held on tribal lands. According to Executive Officer Rob Lynch, past Commission administration negotiated a flat fee of \$1,500 per event for Commission staff to supervise events on tribal lands, but this fee does not include an assessment for either the pension plan or the Commission's neurological fund which finances required neurological tests for all licensed boxers.

To bolster the stability of the pension plan, the Commission at its January meeting decided to engage in rulemaking to amend section 403(a), Title 4 of the CCR, which currently requires promoters to contribute 46 cents per ticket (excluding complimentary tickets) to the pension plan, up to a maximum of \$4,600 per show. To meet its goal of \$91,000 in annual contributions to the pension plan, the Commission agreed that an increase to 88 cents per ticket is necessary. On March 26, the Commission published official notice of its intent to adopt this change in the *California Regulatory Notice Register*; at this writing, a public hearing on the proposed change is scheduled for May 13. The Commission also agreed to reconstitute its Pension Plan Advisory Committee to research alternative funding mechanisms for the plan.

In November 1998 the Commission adopted emergency regulatory changes to sections 401(a)(2) and 405(c), Title 4 of the CCR, to implement a relatively new aspect of the pension plan. By virtue of legislation passed in 1995 and implementing regulations adopted in 1996, the Commission converted the pension plan from a "defined benefit" plan to a "defined contribution" plan. Due to the conversion, certain boxers who made contributions to the plan prior to May 1, 1996 will never be entitled to benefits from the plan; thus, they are owed a refund in the amount of their contribution plus interest. As amended in 1996, section 401(a)(2) requires the Commission to set up a "refund account" as a sub-account within the Pension Fund to hold the contributions of these boxers. Under sections 401(a)(2) and 405(c), the sub-account exists until January 1, 2000, and Commission staff had until January 1, 1999 to contact these boxers and notify them that they may be entitled to a refund. Eligible boxers must claim a refund by January 1, 1999, or forfeit it. However, the task of notifying eligible boxers was more difficult and took much longer than originally anticipated. In its November 1998 emergency amendments to sections 401 and 405, the Commission extended the January 1, 1999 claiming deadline to January 1, 2000, thus giving staff another year to contact boxers eligible for a refund from the Pension Fund. [16:1 CRLR 128] On April 2, just prior to the April 5 expiration of those emergency amendments, the

Commission readopted and the Office of Administrative Law (OAL) approved these emergency changes for another 120-day period.

On March 26, the Commission published notice of its intent to permanently amend sections 401 and 405 to extend the existence of the refund account until January 1, 2002, to give the Commission ample time to contact boxers who contributed to the pension plan prior to May 1, 1996. At this writing, the Commission is accepting public comments on this proposal until May 10.

Update on Other Commission Rulemaking

On January 19, OAL approved the Commission's repeal of section 281(a), Title 4 of the CCR, which had stated that no boxer over the age of 36 may be granted a license except by "special approval of the Commission." This approval process has traditionally involved a personal appearance by the boxer before the Commission. Under existing procedures, Commission staff screen boxers over the age of 36 in supervised sparring sessions, and make a recommendation to the Commission as to whether to approve the license. The Commission has never overturned staff's recommendation. The repeal of the subsection, which was adopted by the Commission at its September 1998 meeting [16:1 CRLR 130], now permits staff to approve or deny licenses to boxers over the age of 36, pursuant to Business and Professions Code section 18642.5 and section 283, Title 4 of the CCR.

LEGISLATION

SB 160 (Peace) and **AB 135 (Ducheny)** are the Senate and Assembly budget bills, respectively, for fiscal year 1999–2000. These bills would appropriate \$937,000 to the Commission from the general fund for general support of the Commission's activities during FY 1999–2000. The Commission is the only occupational licensing agency in the Department of Consumer Affairs that is supported by the general fund; all others are required to support themselves on licensing fees. The Commission is unable to support itself because it lacks a stable licensee base; many licensees fail to renew their licenses until a fight is scheduled in this state. These bills would also authorize the Commission to spend \$79,000 from the Professional Boxers' Pension Plan and \$97,000 from the Boxers' Neurological Examinations Account, for a total 1999–2000 Commission budget of \$1.1 million. [A. *Budg*]

The court enjoined the Commission from enforcing Business and Professions Code section 18832, which requires broadcasters of pay-per-view boxing, martial arts, and wrestling events to pay the Commission a 5% tax on their gross receipts.

LITIGATION

The Commission has decided not to appeal the October 1998 decision of the U.S. District Court for the Eastern District of California in *United States Satellite Broadcasting Company v. Lynch, et al.*, 41 F.Supp.2d 2113. In that decision, the court enjoined the Commission from enforcing

Business and Professions Code section 18832, which requires broadcasters of pay-per-view boxing, martial arts, and wrestling events to pay the Commission a 5% tax on their gross receipts. The court found that the law exclusively taxes one form of entertainment, which is protected by the first amendment. The law thus imposes a content-based restriction which triggers "strict scrutiny," meaning the state must assert and prove that the tax is "necessary to serve a compelling state interest and...narrowly drawn to achieve that end." Because the Commission failed to satisfy this burden, the court declared the statute unconstitutional and enjoined the Commission from enforcing it. [16:1 CRLR 131]

RECENT MEETINGS

At its January 15 meeting, the Commission reelected Commissioner Ernest Weiner as Chair and Commissioner Manuel "Cal" Soto as Vice-Chair.

At its March 26 meeting, the Commission reestablished its Martial Arts Advisory Committee to review proposed rules for the conduct of "submission"-type events for possible Commission approval and promotion in California. "Submission

fighting" is a mix of wrestling and martial arts; participants fight in a cage (not a ring) until one of them "submits" by tapping the canvas. Several submission fighting organizations approached the Commission in November 1998, and were notified that while the Commission has adopted regulations to govern kickboxing, it has no rules to govern submission events. The organizations were instructed to submit proposed regulations to govern various types of submission events. By the March meeting, the Commission had received proposed regulations from various prospective promoters of shootfighting, shooto, and pancrase events, and reactivated its Martial Arts Advisory Committee to review these proposals and make recommendations to the Commission at a future meeting.

FUTURE MEETINGS

- May 13, 1999 in San Jose.
- July 23, 1999 in Los Angeles.
- September 17, 1999 in Burbank.
- November 5, 1999 in Sacramento.

Cal-OSHA

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California's Occupational Safety and Health Administration (Cal-OSHA) is part of the cabinet-level Department of Industrial Relations (DIR). The agency administers California's programs ensuring the safety and health of California workers.

Cal-OSHA was created by statute in October 1973; its authority is outlined in Labor Code sections 140-49. It is approved and monitored by, and receives some funding from, the federal Occupational Safety and Health Administration (Fed-OSHA). Cal-OSHA's regulations are codified in Titles 8, 24, and 26 of the California Code of Regulations (CCR).

Cal-OSHA's Occupational Safety and Health Standards Board (OSB) is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety regulations which affect California employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's worker safety and health standards must be at least as effective as Fed-OSHA's standards within six months of promulgation of a given federal standard. Current procedures require OSB to justify its adoption of standards that are more stringent than the federal standards. OSB is authorized to grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternative process would provide equal or superior safety to employees. The Board may also consider petitions for new or revised regulations proposed by any interested person concerning occupational safety and health. OSB holds monthly

meetings to permit interested persons to address the Board on any occupational safety and health matter.

The seven members of OSB are appointed by the Governor to four-year terms. Labor Code section 140 mandates the composition of the Board. At this writing, OSB is comprised of occupational health representative Jere Ingram, who serves as Board Chair; occupational safety representative Gwendolyn Berman; management representatives William Jackson and Victoria Bradshaw; labor representatives Elizabeth Lee and Kenneth Young; and public member Sopac Tompkins.

The duty to investigate complaints and enforce OSB's safety and health regulations rests with the Division of Occupational Safety and Health (DOSH). DOSH issues citations and abatement orders (granting a specific time period for remedying the violation), and levies civil and criminal penalties for serious, willful, and repeated violations. In addition to performing routine investigations, DOSH is required by law to investigate employee complaints and accidents causing serious injuries, and to make follow-up inspections at the end of abatement periods. The Occupational Health and Safety Appeals Board adjudicates disputes arising out of DOSH's enforcement of OSB's standards.

Cal-OSHA's Consultation Service provides onsite health and safety recommendations to employers who request assistance. Consultants guide employers in adhering to Cal-OSHA standards without the threat of citations or fines.

