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OPINION	:	No. 83-505
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of	:	<u>OCTOBER 27, 1983</u>
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THE HONORABLE DAVID B. SWOAP, SECRETARY, HEALTH AND WELFARE AGENCY, requested an opinion on the following questions:

1. May the assessment of a civil penalty against a health facility for a second or subsequent violation of law be trebled pursuant to section 1428, subdivision (e), of the Health and Safety Code when the first violation resulted in a class "B" citation but the offensive condition for which it was issued was corrected within the specified time so that no penalty was imposed?

2. If a first violation by a health facility resulted in the issuance of a class "B" citation and civil penalties were assessed therefor, may civil penalties be trebled when the facility again violates the same regulation but now under circumstances which result in the issuance of a class "A" citation?

3. If a second violation by a facility occurs within 12 months of its having been issued a citation and assessed a civil penalty for a previous violation, what is the minimum amount that the facility may pay under section 1428, subdivision (b), in lieu of contesting the second citation?

## CONCLUSIONS

1. The assessment of a civil penalty against a health facility for a second or subsequent violation of law may not be trebled under section 1428, subdivision (e), when a previous violation by it resulted in a class "B" citation but the offensive condition for which it was issued was corrected within the specified time so that no penalty was imposed.

2. An assessment of civil penalties may be trebled upon a class "A" violation by a health facility of the same regulation for which it was previously issued a class "B" citation and assessed civil penalties within a 12-month period.

3. Where a second violation by a health facility occurs within 12 months of its having been issued a citation and assessed a civil penalty for a previous violation, the minimum amount that the facility must pay under section 1428, subdivision (b), in lieu of contesting the second citation is \$150 for a class "B" violation and \$3,000 for a class "A" violation.

## ANALYSIS

This opinion answers three questions relating to the trebling of the assessment of civil penalties against long-term health care facilities found repetitively wanting under the Long-Term Care Health, Safety and Security Act of 1978.

The Act (Stats. 1973, ch. 1057, p. 2088, § 1; Health & Saf. Code (to which all unidentified sections refer), div. 2, ch. 2.4, § 1417 et seq.) establishes a citation system "for the imposition of prompt and effective civil sanctions against long-term health care facilities [which violate] the laws and regulations of this state relating to patient care." (§ 1417.1 (declaration of legislative intent).) Its mechanism, which we must fully expose to adequately understand the questions asked, is as follows: All long-term health care facilities<sup>1</sup> in this state are subject to inspection as often as necessary but at least biennially

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<sup>1</sup> A long-term health care facility is a facility licensed pursuant to chapter 2 (§ 1250) of the code which maintains and operates 24-hour skilled nursing services for the care and treatment of chronically ill or convalescent patients, including mental, emotional, or behavioral problems, mental retardation, or alcoholism; or (2) provides supportive, restorative, and preventive health services in conjunction with a socially oriented program to its residents, and which maintains and

by the Department of Health Services ("DHS" or "the Department") to insure "that they are in compliance with state statutes and regulations pertaining to patient care." (§ 1417.1(2); §§ 1419-1422.) If upon an inspection or investigation it is determined that a facility has violated any of the statutes or rules or regulations "relating to its operation or maintenance," DHS must first issue a notice of violation and then within three days a citation describing with particularity the nature of the violation (and law violated) and fixing "the earliest feasible time" for the facility to eliminate the offensive condition. (§ 1423, subd. (a).) Citations are classified according to the nature of the violation for which they issue: class "A" violations are those violations which DHS has determined present an imminent danger to the patients of a facility or a substantial probability of resulting death or serious physical harm; class "B" violations are violations which have a direct or immediate relationship to the health, safety or security of a facility's patients. (§ 1424; *Beach v. Western Medical Enterprises, Inc.* (1981) 116 Cal.App.3d 153, 158-161; *Lackner v. St. Joseph Convalescent Hospital, Inc.* (1980) 106 Cal.App.3d 542, 550-553 (statutory classification constitutional).)<sup>2</sup> A citation must indicate its classification "on the face thereof." (*Ibid.*)

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operates 24-hour services including board, room, personal care, and intermittent nursing care. "Long-term health care facility" includes nursing homes, skilled nursing facilities, extended care facilities, intermediate care facilities, but does *not* include acute care hospitals or other licensed facilities except for that distinct part of them which provides nursing home, skilled nursing facility, extended care facility, or intermediate care facility services. (§ 1418, subd. (a).)

<sup>2</sup> The Act directs that after consultation with industry, professional and consumer groups affected thereby, DHS adopt regulations setting forth the criteria and, where feasible, the specific acts that constitute class "A" and class "B" violations. (§ 1426.) DHS has done so for the various facilities affected. (See, e.g., 22 Cal. Admin. Code, §§ 72701-72705 (skilled nursing facilities); §§ 73701-73707, 76701-76705, 76962 (various intermediate care facilities).) Following the statutory classification, the violation of a particular provision can lead either to a citation for a class "A" or class "B" violation depending on the circumstances surrounding its commission. Whenever the situation in which it occurs "presents an imminent danger to the patients of the facility or a substantial probability that death or serious physical harm would result therefrom" a class "A" violation is found; whenever the situation in which it occurs has "a direct or immediate relationship to the health, safety or security of a facility's patients," a class B violation is had. (E.g., compare 22 Cal. Admin. Code, § 72703(a)(1) with *id.*, § 72705(a)(2).) (See generally *Beach v. Western Medical Enterprises, Inc.*, *supra*, 106 Cal.App.3d at 157-161.)

The Act also contemplates that violations of law that have only a minimal relationship to safety or health be handled under a different procedure and that a "notice of violation" be issued for them instead of a "citation." (§§ 1423, 1427.) The Department has denominated these as class "C" violations (see, e.g., 22 Cal. Admin. Code, §§ 72701(a)(4), 73709, 76707, 76960(e)) and has provided in their regard that "notices" of such violations be issued a facility and an appropriate plan of correction obtained at the time that an inspection is completed. (See, e.g., *id.*, former § 72717(c), §§ 73717(c), 76715(c), 76960(b).) A class "C" violation is not subject to a monetary civil penalty.

For each class "A" violation (which must be abated or eliminated immediately unless DHS fixes a period of time for its correction) a facility is subject to a civil penalty of from one thousand to five thousand dollars (\$1,000-\$5,000); for each class "B" violation, a facility is subject to a civil penalty of from fifty to two hundred fifty dollars (\$50-250). (§ 1424.)

In reviewing an alleged violation found by a DHS inspector, the district administrator (Facilities Licensing Section) for the district in which the facility is located will fix an exact amount of a "[*proposed*] civil penalty" *to be* imposed by the Department. (22 Cal. Admin. Code, former § 72717, now § 72711, §§ 73715, 76713, 76962.) The "amount of any *proposed assessment*" will be contained in the citation sent the licensee. (§ 1423, subd. (a).) The citation for a class "B" violation will also specify the time within which it must be corrected. (§ 1424, subd. (b); cf. § 1423, subd. (a).) If the condition is corrected within that time, and if it is not a second or subsequent violation by the facility of the same regulation within the preceding 13 months, no civil penalty is "*imposed*." (§ 1424, subd. (b).) Should a facility fail to correct a violation within the time specified in a citation, which the Act in general requires to be the earliest feasible time for its elimination (§ 1423, subd. (a)),<sup>3</sup> DHS must "assess" against it a statutorily established civil penalty of fifty dollars (\$50) for every day it remains uncorrected thereafter. (§ 1425.)

If a licensee wishes to "contest a citation or the *proposed assessment* of a civil penalty" it may request an informal conference with the designee of the DHS director for the county in which the facility is located. (§ 1428, subd. (a).)<sup>4</sup> At its conclusion the designee may either "affirm, modify or dismiss the citation or *proposed assessment* of civil penalty." (*Ibid.*) If still dissatisfied, a licensee may contest the designee's decision by notifying the director. (*Ibid.*) In that event the director must in turn notify the Attorney General who then "takes[s] all appropriate action to enforce the citation and recover the civil penalty prescribed thereon, and . . . such other action as [is] deem[ed] appropriate, in the superior court of the county in which the long-term health care facility is located." (*Id.*, subd. (c); *Myers v. Eastwood Care Centers, Inc.* (1982) 31 Cal.3d 628, 633.) In other words, "in case of a contest, the matter [is] given to the Attorney General's office for

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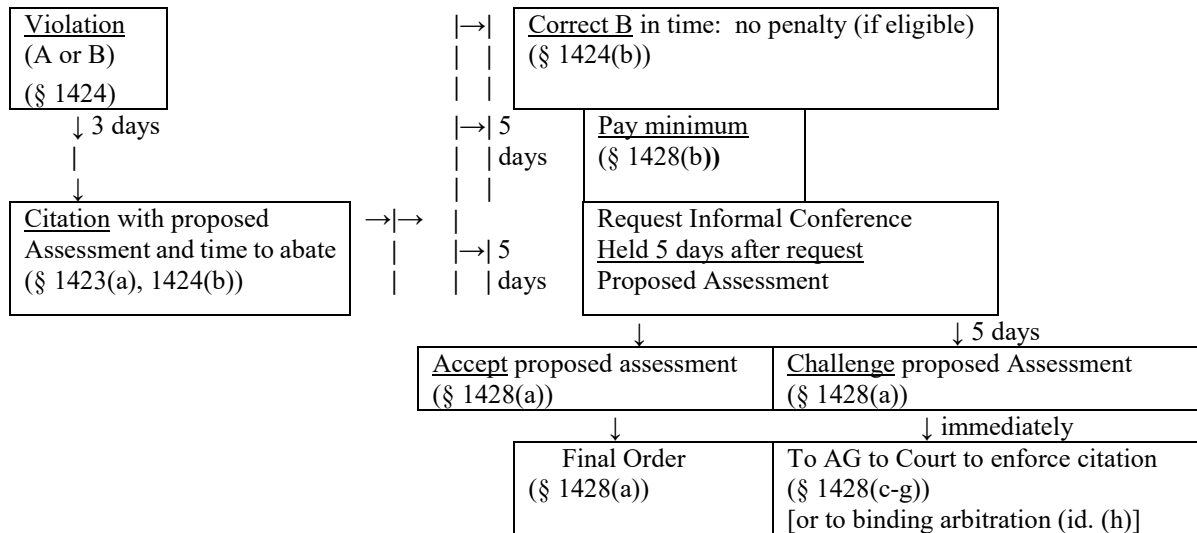
<sup>3</sup> The Department's regulations (for skilled nursing homes, for example) set this as "the shortest possible time within which the licensee reasonably can be expected to correct the alleged violation" considering a number of factors (e.g., the seriousness of the violation, the number of patients affected, the availability of required equipment, and the time needed to emplace it and make it operable. (22 Cal. Admin. Code, § 72709, subd. (a)(1).) (See *Beach v. Western Medical Enterprises, Inc.*, *supra*, 116 Cal.App.3d at 164; cf. 22 Cal. Admin. Code, §§ 73715(d)(2), 76713(d)(2) (intermediate care facilities).)

<sup>4</sup> A licensee may also request an informal conference to dispute either the Department's determination regarding an alleged failure to correct a violation or a determination regarding the reasonableness of a proposed deadline for correction. (§ 1425.)

enforcement after trial de novo in superior court (§ 1428, subd. (c)) and the court *will assess the actual penalty, if any* (§ 1428, subd. (d))." (*Lackner v. Perkins* (1979) 91 Cal.App.3d 433, 437; accord, *Lackner v. St. Joseph Convalescent Hospital, Inc. supra*, 106 Cal.App.3d at 548.)<sup>5</sup> If, on the other hand, a licensee is satisfied with the results of the informal conference and elects to do nothing thereafter (or fails to notify the director that it wishes to contest the designee's decision) then the designee's decision becomes "a final order of the department and [is] not subject to further administrative review." (§ 1428, subd. (a).)

One other possibility remains: after a citation issues, in lieu of contesting it in the manner described, a licensee may send the Department *the minimum amount* specified by law for each violation, i.e., \$1,000 for an "A" citation or \$50 for a "B" citation. (*Id.*, subd. (b).) "This would settle the matter." (*Lackner v. Perkins, supra*, 106 Cal.App.3d at 437; cf. *Myers v. Astoria Convalescent Hospital* (1980) 105 Cal.App.3d 682, 688, 690; see also *Beach v. Western Medical Enterprises, Inc., supra*, 116 Cal.App.3d at 165 (election is constitutional).)

Mindful of the ancient Chinese proverb that "one picture is worth more than ten thousand words" (Bartlett's *Familiar Quotations* (13th ed. 1955) at 1011a), the Act's schema is depicted as follows:



<sup>5</sup> Under an amendment to the Act in 1982 (Stats. 1982, ch. 1597, p. 950, § 4) either the state or a licensee which intends to contest a citation/citations totalling no more than \$15,000 may elect to submit the matter to binding arbitration. (§ 1428, subd. (h).)

With the general setting thus clearly in mind we proceed to section 1428, subdivision (e), the cynosure of this opinion, which provides for the trebling of penalties under certain circumstances:

"(e) An assessment of civil penalties authorized by this chapter shall be trebled and collected, except as provided for by law, for a second or subsequent violation occurring within any 12-month period, *if a citation was issued and a civil penalty assessed for the previous violation* occurring within such period, without regard to whether the action to enforce the previous citation has become final. However, the increment to the civil penalty required by this subdivision shall not be due and payable unless and until such previous action has terminated in favor of the state department."

Three questions are posed:

1. May the assessment of civil penalties for a second or subsequent violation be trebled when the first violation resulted in a citation for a "B" violation which was corrected within the specified time and no penalty was imposed? We will conclude that it may not.

2. If a first violation resulted in a "B" citation and within 12 months a second violation of the same regulation results in an "A" citation, may the second be trebled? We will conclude that it may.

3. If a second violation of law for which a facility was cited and assessed a civil penalty occurs within 12 months, what is the minimum amount that the facility may pay in lieu of contesting the citation? We will conclude that amount is \$150 for a "B" citation and \$3,000 for an "A" citation.

1. The Corrigible "B": Trebling the Penalties On the Second "B" Violation When the First "B" Was Corrected and No Penalty Was Imposed

The first question we are asked is whether the assessment of a civil penalty against a health facility for a second (or subsequent) "B" violation may be trebled where a first violation by it resulted in the facility receiving a citation for a class "B" violation which was corrected within the specified time and no penalty was imposed. We conclude that it may not.

As we recall, the Act provides that a citation for a class "B" violation must specify the time within which it must be corrected (§ 1424, subd. (b); cf. § 1423, subd. (a)) and that if it is corrected within that time and it is not a repeat violation by the facility of

the same regulation during the preceding 13 months, no civil penalty is imposed. (§ 1424, subd. (b).)<sup>6</sup> Thus under section 1428, subdivision (e), two conditions must be satisfied in order for the trebling mechanism on a facility's second or subsequent violation occurring within any 12-month period to be triggered: a citation must have been issued "*and a civil penalty assessed* for [a] previous violation occurring within [that] period. . . ." (§ 1428, subd. (e).) With the situation presented by the corrected "B" then, the question resolves to determining whether a civil penalty is to be considered *assessed* under the statutory scheme when a citation issues for a class "B" violation but a facility corrects the offensive condition within the time specified in the citation and no civil penalty is imposed. Refined further, the key to the resolution is determining whether a "civil penalty" is "assessed" when a citation issues.

The wording of subdivision (e) and that of other provisions of the Act, particularly those of section 1428, subdivision (a), help us in that regard. (Cf. *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698; *People v. Belleci* (1979) 24 Cal.3d 879, 884.) Subdivision (e) speaks in terms of a "citation [having been] issued and a civil penalty assessed" for a prior violation for a penalty to be trebled on a subsequent violation. Since a citation must contain a reference to the amount the Department would impose on the facility for a violation (§ 1423, subd. (a); 22 Cal. Admin. Code, former § 72717, §§ 73715, 76713), we have our first inkling that the reference in subdivision (e) to a penalty being "assessed" must refer to something other than the evaluation or determination of the amount contained in the citation. Otherwise the words "and penalty assessed" in the subdivision would become statutory surplusage, a rendering

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<sup>6</sup> Section 1424, subdivision (b), provides:

"(b) Class 'B' violations are violations which the state department determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients, other than class 'A' violations. A class 'B' violation is subject to a civil penalty in an amount not less than fifty dollars (\$50) and not exceeding two hundred fifty dollars (\$250) for each and every violation. *A citation for a class 'B' violation shall specify the time within which the violation is required to be corrected.*

*"If a class 'B' violation is corrected within the time specified, no civil penalties shall be imposed, unless it is a second or subsequent violation of the same regulation occurring within the period since and including the previous full annual licensing survey inspection or 12 months, whichever is greater. In no case shall the period extend beyond 13 months. At the informal conference, the director's designee may waive or reduce the penalty as specified in subdivision (a) of Section 1428, taking into consideration the seriousness of the previous and present violations, the similarity between the two violations, the extent to which there is a direct relationship to the health and safety or security of patients and the good faith exercised by the licensee in correcting the problem. The decision to waive or not to waive those penalties shall not be reviewable."* (Emphases added.)

to be avoided. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844; *Fields v. Eu* (1976) 18 Cal.3d 322, 328; *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.) Then the fact that section 1423 refers to the amount to be included in a citation as "a *proposed* assessment of a civil penalty," leads one to further suspect that at least at that point in the administrative process a civil penalty is not yet assessed and that something more must transpire for such to occur.

Other provisions of the statutory scheme, particularly those found in section 1428, subdivision (a), do the same and confirm that a penalty is not "assessed" at the citation stage of departmental action. Throughout, the Legislature refers to the Department's evaluation or determination for a penalty at that time as a "*proposed* assessment." Thus we find in section 1428, subdivision (a), that "[i]f a licensee desires to contest the citation or the *proposed assessment* of a civil penalty therefor . . . [he shall notify the director]"; that at the conclusion of the informal conference the director's designee "may affirm, modify, or dismiss the citation or *proposed assessment* of a civil penalty"; that "[i]f the . . . designee modifies or dismisses the citation or *proposed assessment* of a civil penalty" he shall state his reasons with particularity in writing; and that if a licensee fails to notify the director that he intends "to contest the citation or the *proposed assessment* of a civil penalty therefor or the decision made by a director's designee after an informal conference . . . the citation or the *proposed assessment* of a civil penalty or the decision . . . shall be deemed a final order of the . . . department." With similar language the Department's regulations recognize the tentative nature of the penalty contained in a citation as well. (See, e.g., 22 Cal. Admin. Code, §§ 73715, 76713 (district administrator to fix an exact amount of a "*proposed* civil penalty *to be* imposed . . ."); cf. § 72711, subd. (a) (" . . . the amount of the civil penalty *to be* imposed").)

Thus, under the statutory and regulatory scheme, a penalty is far from being fixed when a citation issues. Whenever the time may be that one might finally be deemed to be "assessed," at the citation stage at least, a "penalty" is acknowledged to be merely an amount *proposed* by the Department which is still inchoate in the administrative process. (Compare § 1428, subd. (a) (designee may modify citation's proposed penalty) and § 1424, subd. (b) (designee may waive or reduce trebled penalty for subsequent violation with § 1425 (penalty amount of \$50/day for uncorrected condition is not reviewable; Department *assesses* that penalty).) Since a timely correction of a class "B" violation precludes the ultimate imposition of a civil penalty (§ 1424, subd. (b)), that timely correction perforce will also obviate the need for the amount of the penalty to be determined with finality, for that would be an idle act. (Civ. Code, § 3532; "*Lex non praecipit inutilia quia inutilis labor stultus*" ("The law commands not useless things, because useless labor is foolish").) We therefore would conclude that a penalty is not assessed within the meaning of section 1428, subdivision (e), when a citation for a "B"

violation is issued and the condition which undergirt it is corrected within the specified time.<sup>7</sup>

The basic purposes of the Act, which we must heed in construing it (*California Mfrs. Assn. v. Public Utilities Com.*, *supra*, 24 Cal.3d at 844-846, 848; *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 163; *Select Base Materials, Inc. v. Board of Equal.* (1959) 51 Cal.2d 640, 645), constrain us to conclude so. As those ends were stated in *Myers v. Astoria Convalescent Hospital*, *supra*, 105 Cal.App.3d 682:

"We are dealing here with a statute which seeks to insure adequate long-term health care for a group of largely helpless patients by providing a thorough and prompt state system of inspection of the facilities that furnish them with such care and by further providing a prompt and effective system of essentially civil sanctions in order to eliminate speedily the inadequacies in such care that state inspections have revealed." (105 Cal.App.3d at 688. Accord, *Myers v. Eastwood Care Center, Inc.*, *supra*, 31 Cal.3d at 632 ("[T]o provide prompt and effective discovery of violations and enforcement of the applicable statutes and regulations through administrative action.").)

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<sup>7</sup> It has been suggested that the 1980 amendment to subdivision (e) compels a different result, in that it indicates a legislative understanding that the assessment of a violation occurs when a citation is issued. We do not understand it so. In 1980 the Legislature amended section (e) of section 1428 as follows:

"(e) ~~The~~ *An assessment of civil penalties authorized by this chapter shall be trebled and collected, except as provided for by law, for a second or subsequent violation occurring within any 12-month period, if a citation was issued and a civil penalty assessed for the previous violation occurring within such period, and a civil penalty was assessed therefore without regard to whether the action to enforce the previous citation has become final. However, the increment to the civil penalty required by this subdivision shall not be due and payable unless and until such previous action has terminated in favor of the state department.*"

(Stats. 1980, ch. 1082, § 4, p. 3462.) The amendment no doubt was prompted by a legislative concern that delays in obtaining final resolution of a citation matter in court were hampering the effectiveness of the Act's treble penalty sanctions by taking them safely beyond the 12-month period. The suggestion posits that by the amendment the Legislature has indicated that penalties are "assessed" at the administrative level and merely enforced in court. The correctness of that position aside (see § 1428, subd. (d)) ("In assessing the civil penalty . . . a court shall consider . . ."), it begs the question of exactly *when* at the administrative level a penalty is assessed and it certainly does not counter our observation that at the *citation stage* of departmental review a penalty is still nascent and merely proposed.

The Act not only calls for the utmost speed in the disposition of citations (*ibid.*, citing § 1428, subds. (a), (c) and (f)), but also directs the Department to fix the "earliest feasible time" for a facility to eliminate the offensive condition. (§ 1423, subd. (a); cf. § 1424, subd. (b).) In excusing the imposition of penalties for the annually isolated, less serious, class "B" violation if it would be corrected in a timely fashion, the Legislature apparently has made a determination that the timely correction of such a violation is more important than securing the imposition of a penalty upon it. It would certainly dissuade facilities from undertaking that corrective action however if it would serve their record no better vis-a-vis the penalties for a subsequent violation being trebled. Inasmuch as that result would threaten the purposes of the Act (to obtain speedy correction), an interpretation of its provisions which would produce it must be rejected.

We therefore conclude that a penalty is not "assessed" within the meaning of section 1428, subdivision (e), where a citation issues for a class "B" violation but it is corrected within the specified time and no penalties are imposed and, accordingly, that the penalties for a second or subsequent violation may not be trebled where the first violation on which that is to take place resulted in a citation for a class "B" violation which was timely corrected and no penalty was imposed.

2. May the Penalty for a Subsequent "A" Be Trebled By Reason of a Former "B"?

The setting prompting the second question is the following: A facility receives a class "B" citation and is assessed a penalty for having violated a particular regulation. Within the year it is again found to have violated the same regulation but this time the circumstances surrounding the violation call for the issuance of a class "A" citation. The question asked is whether the civil penalty to be imposed on that subsequent "A" may now be trebled. We conclude that it may.

As already alluded (fn. 2, *ante* & accompanying text), citations under the Act are classified as class "A" or class "B" according to their gravity and whether a facility's violation of a particular regulation will result in a class "A" citation or a class "B" citation depends upon the circumstances surrounding its commission. Where the violation is committed under circumstances which "present an imminent danger to the patients of the facility or a substantial probability that death or serious physical harm would result," a class "A" violation is found; where the situation in which it occurs has a direct or immediate relationship to the health, safety or security of a facility's patients," a class "B" violation is had. (Compare § 1424, subd. (a) with § 1424, subd. (b) and compare, e.g., 22 Cal. Admin. Code, § 72703 with, e.g., 22 Cal. Admin. Code, § 72705; see also *Beach v. Western Medical Enterprises, Inc.*, *supra*, 116 Cal.App.3d at 158-161; *Lackner v. St. Joseph Convalescent Hospital*, *supra*, 106 Cal.App.3d at 550-553.) Whether an "A" citation or a "B" citation is appropriate to a given set of circumstances is a question of fact. (*Beach v.*

*Western Medical Enterprises, Inc., supra*, at 160-161; *Lackner v. St. Joseph Convalescent Hospital, supra*, at 552.) Needless to say, "[i]n the hierarchy of violations envisioned by the Legislature an "A" violation is the [more] serious." (*Ibid.*)

Section 1428, subdivision (e), calls for the trebling of an assessment of civil penalties against a facility for "a second or subsequent violation occurring within any 12-month period, if a citation was issued and a civil penalty assessed for the previous violation." The question is whether it works when the second violation is of class "A" when the first was of class "B." We conclude that it does.

To begin with, we think it clear that under the statutory scheme the *same* regulation must again be violated within a 12-month period in order for a trebling of civil penalties upon the second violation to take place. The Department has always interpreted subdivision (e) to require such (22 Cal. Admin. Code, §§ 73717(e), 76715(e); cf. former § 72717(e)) and this administrative construction is entitled to great respect unless there are compelling indications that it is wrong. (*Judson Steel Corp. v. Workers Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668; *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 92-93; *Mullaney v. Woods* (1979) 97 Cal.App.3d 710, 717.) We do not find any; to the contrary, we find clear indications that Department's interpretation reflects the Legislature's intention regarding the subdivision's operation.

Subsequent to the time the Department promulgated its regulations interpreting subdivision (e) to require an identity of regulation having been violated for a trebling of civil penalties to occur (Reg. No. 75-24, June 14, 1975), the Legislature has amended the subdivision along with other provisions of the Act in related areas (i.e., § 1424, subd. (b)) without affecting the Department's interpretation. (Stats. 1980, ch. 1082, p. 3461, § 2; Stats. 1982, ch. 1597, p. 949, § 3.) That strongly suggests that the interpretation that the Department had made regarding subdivision (e) reflected and was consonant with the Legislature's will in its regard and that the Legislature considered it to be correct and wished it to continue. (*Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922-923; *Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382; cf. *El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739; *Universal Eng. Co. v. Bd. of Equalization* (1953) 118 Cal.App.2d 36, 43; *Cal. M. Express v. St. Bd. of Equalization* (1955) 133 Cal.App.2d 237, 239-240.) Indeed, when the Legislature amended section 1424, subdivision (b), to excuse civil penalties if a facility would correct a "B" violation in a timely fashion, it utilized the same distinction in providing that those penalties would be excused absolutely only if the violation was not of the *same* regulation that was the subject of a previous violation within a 12-13 month period. (Stats. 1982, ch. 1597, § 3, *supra*; see fn. 6, *ante*.)

The reasons that underlie the requirement that the *same* regulation be violated for a trebling of civil penalties to take place on the subsequent violation convince us that the two violations need not necessarily be of the same class for the trebling to occur, and that a prior "B" will support the trebling of penalties on a subsequent "A."

The declared purpose of the Act is to "assure that long-term health care facilities provide the highest level of care possible" (§ 1422) and, as found by the Legislature, "inspections are the most effective means of furthering this policy." (*Ibid.*) But it is the system of citation and penalty upon violation that gives the Act its proverbial "teeth" through "the imposition of prompt and effective *civil sanctions* against . . . facilities [which violate] the laws and regulations of this state relating to patient care." (§ 1417.1.) Those regulations however are legion, for they are many. "Sixteen examples of the types of violations [by skilled nursing facilities, for example] which may give rise to 'A' citations are described in the [Department's] regulations" (*Lackner v. St. Joseph Convalescent Hospital, Inc., supra*, 106 Cal.App. at 552; see 22 Cal. Admin. Code, § 72703) and fifty-nine examples of the types of violations which may give rise to "B" citations are set forth (see 22 Cal. Admin. Code, § 72705)! With that array it is almost inevitable that a facility will eventually be found wanting for violating one provision or another - an eventuality the Legislature recognized, for example, when it provided the limited time period within which a violation would have to be repeated for civil penalties to be trebled upon it. (§ 1428, subd. (e); cf. § 1424, subd. (b), similarly providing a limited period within which the same "B" violation has to be repeated for civil penalties on it not to be excused absolutely if it is corrected in time.)

There is a substantial difference in the seriousness of concern, however, between a facility which violates *different* regulations in such a period and one which repeatedly violates the *same* regulation. The facility which violates a regulation on just one occasion may have been careless or caught in the laws of probability. Whatever the case, it has not repeated its transgression. But a facility which repeats a violation appears to have refused to learn from its mistakes and poses a greater danger to its patients. The Legislature in fact has treated them differently and as we have seen has indicated a willingness to excuse absolutely the imposition of civil penalties in the first instance of the nonrepetitive violator but has required a demonstration of the "good faith of the licensee in correcting the problem" before it will do so where a facility repeats a violation. (§ 1424, subd. (b).)

As demonstrated, the provisions of section 1428, subdivision (e), calling for the trebling of civil penalties on a subsequent violation were adopted in that frame of reference, i.e., they were directed against facilities which would repeatedly violate the *same* regulation. With respect to *them* the trebling provisions serve both as a meaningful

deterrent against a repetitive violation of a particular provision and as a vehicle for more appropriate sanction when a subsequent violation occurs.<sup>8</sup>

This overview convinces us that the subsequent violation need not be of the same class as the previous one for an assessment of civil penalties to be trebled upon it. Although "[i]n the hierarchy of violations envisioned by the legislature" an "A" violation is more serious than a "B" for the same provision of law, the salient fact remains that the *same* provision of law is violated on both occasions. And when the subsequent violation is an "A," what is clearly shown is that not only has a facility failed to learn from its earlier mistake but that its failure to do so has now become demonstrably more serious with patients' lives in jeopardy. Besides being inconsistent with the statutory scheme (cf. § 1424, subd. (a) ("A" violation to be abated immediately and civil penalties therefor not excused even where it is the first one in a year)), it would be absurd to say that an assessment of penalties could not be trebled on that subsequent "A" violation which is fraught with serious consequences, when it could be trebled if the consequences were less serious and the violation "merely" a "B." The Act must not be interpreted to foist that mischievous absurdity. (*Fields v. Eu* (1976) 18 Cal.2d 322, 328; *Schulz v. Superior Court* (1977) 66 Cal.App.3d 440, 446; *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 36.) We therefore conclude that the assessment of a civil penalty for a class "A" violation may be trebled when a class "B" citation was issued and a civil penalty assessed for a previous violation of the same regulation within the year.

### 3. The Minimum Amount To Be Paid In Lieu Of Contesting a Second or Subsequent Violation

The third question we are asked is what the minimum amount is that a facility must pay under section 1428, subdivision (b), in lieu of contesting a citation for a second or subsequent violation occurring within a year of its having been issued a citation and assessed a civil penalty for a previous violation. We conclude that amount is one hundred fifty dollars (\$150) if the second citation is for a class "B" violation and three thousand dollars (\$3,000) if it is for a class "A" violation.

Again we recall that when a citation issues, it must specify the amount of the civil penalty that DHS proposes to assess the facility. (§ 1423, subd. (a); cf. 22 Cal. Admin. Code, former § 72715(c), §§ 73715(c), 76713(c).) Class "A" violations are subject to a civil penalty "in an amount not less than one thousand dollars (\$1,000) and not exceeding

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<sup>8</sup> The ultimate sanction of course is the suspension or revocation of a facility's license to operate. (§ 1294.) Willful and repeated violations of the Health Facilities Licensing Law (div. 2, ch. 2, § 1200 et seq.) or the rules and regulations adopted thereunder may also be charged as a misdemeanor. (§ 1290.)

five thousand dollars (\$5,000) for each and every violation" (§ 1424, subd. (a)) and class "B" violations are subject to a civil penalty "in an amount not less than fifty dollars (\$50) and not exceeding two hundred fifty dollars (\$250) for each and every violation." (*Id.*, subd. (b).) Subdivision (b) of section 1428, however, provides that:

"A licensee may, in lieu of contesting a citation pursuant to this section, transmit to the department *the minimum amount specified by law* for each violation within five business days after the issuance of the citation."<sup>9</sup>

What then is the "minimum amount specified by law for each violation" that a facility may pay in lieu of contesting a citation? On the facility's first violation the answer is clear; it is the \$50 and \$1,000 specified in section 1424 for a class "B" violation and a class "A" violation, respectively. Regarding the second or subsequent violation we are reminded of section 1428, subdivision (e), which provides that:

"*An assessment of civil penalties authorized by this chapter shall be trebled and collected . . . for a second or subsequent violation occurring within any 12-month period. . . .*"

The question is whether it comes into play in determining the minimum that a facility may elect to pay in lieu of contesting a citation for a second violation. In other words, does the facility then pay the basic minimum amount specified in section 1424 (i.e., \$50 or \$1,000) or that amount trebled. The answer depends on whether the payment of the minimum amount in lieu of contesting a citation pursuant to section 1428, subdivision (b), is "an assessment of civil penalties authorized by [the Act]." We believe that it is.

Whether an "assessment" be considered the basic determination or evaluation of an amount to be paid, or the actual imposition or levy of that amount (see Webster's Third New Internat. Dict. (1971 ed) at 131, assess = to determine an amount and/or impose it; *Pac. Gas & E. Co. v. Shasta Dam, etc. Dist.* (1955) 135 Cal.App.2d 463, 470-473 (for the purposes of district assessment "to assess" means to evaluate or place a value upon; an assessment is not a levy but is the valuation found by the assessor); *Smith v. Byer* (1960) 179 Cal.App.2d 118, 121 (the word "assessment" in Code Civ. Proc., § 325 refers to the act of the assessor, the word "levied" to the act of the board of supervisors or city council)), it is clear that section 1428, subdivision (b), constitutes an "assessment," for it both

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<sup>9</sup> The minimum penalty provision of section 1428, subdivision (b), is not unconstitutional by reason of a "chilling effect" on a licensee's right to contest a penalty. (*Beach v. Western Medical Enterprises, supra*, 116 Cal.App.3d at 165; *Lackner v. St. Joseph Convalescent Hospital, Inc., supra*, 106 Cal.App.3d at 554; *Myers v. Astoria Convalescent Hospital, supra*, 105 Cal.App.3d at 689; *Lackner v. Perkins, supra*, 91 Cal.App.3d at 438-440.)

prescribes, albeit by reference, an amount to be paid and it imposes or levies that amount. The amount so imposed, as we proceed to explain, is a "civil penalty."

The penalties prescribed by the Act are civil in nature. (*Lackner v. Perkins, supra*, 91 Cal.App.3d at 439, fn. 8.) When a licensee exercises his option to forego an informal conference and pay the minimum amount, he in effect elects to accept a legislative "offer of settlement" (*id.*, at 439; *Myers v. Astoria Convalescent Hospital, supra*, 105 Cal.App.3d at 688) and pay what has been characterized as a "minimum fine." (*Lackner v. Perkins, supra*, at 439; *Myers v. Astoria Convalescent Hospital, supra*, at 689.) The procedure is thus "quite analogous to a citee's discretionary forfeiture of minimum bail in return for dismissal of charges of traffic violations." (*Ibid.*) But bail for a traffic offense is nonetheless "a fine and one employed more for *punishment* and judicial convenience than to insure that a trial will take place." (*Ibid.*, citing *McDermott v. Superior Court* (1972) 6 Cal.3d 693, 696.) Thus when an errant licensee pays a minimum amount it is penalized for its transgression. In lieu of contesting the citation and *its* proposed penalty the facility pays another amount, and while it may be less than that which was proposed, it is a *penalty* nonetheless. Indeed, the court in *Myers* also described the procedure as a "statutory offer of settlement of the citation at the earliest possible time in exchange for the least possible *penalty*." (105 Cal.App.3d at 688.)

We therefore find that the payment of a minimum amount prescribed by statute in lieu of contesting a citation to be an "assessment of civil penalties authorized by [the Act]." Since subdivision (e) requires that such be trebled for a second or subsequent violation occurring within the year, we conclude that the amount a licensee must pay under section 1428, subdivision (b), in lieu of contesting a citation for a repeated violation is the minimum amount specified in section 1424 *trebled*, i.e., one hundred fifty dollars (\$150) if the citation is for a class "B" violation and three thousand dollars (\$3,000) if the citation is for a class "A" violation.<sup>10</sup>

In summary recapitulation we conclude as follows: The assessment of a civil penalty against a health facility for a second or subsequent violation of law may not be trebled pursuant to section 1428, subdivision (e), when the previous violation resulted in a class "B" citation which was corrected within the time specified and no penalty was

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<sup>10</sup> It would be quite incongruous for the repeat violator to escape the trebling effect of subdivision (e) by tendering the minimum amount. For a first violation the Legislature permits payment of a minimum which bears a ratio of 1:1 to 1:5 to the possible range of penalty amounts for both the class "A" and the class "B" violation. If the minima were not trebled those ratios would range instead from 1:3 to 1:15, proportions which substantially distort the Legislature's "statutory offer of settlement of the citation." (*Myers v. Astoria Convalescent Hospital, supra*, 105 Cal.App.3d at 688.)

imposed. An assessment of civil penalties may be trebled when a health facility is issued a class "A" citation for the violation of a regulation which it had also violated within the year and been issued a class "B" citation and assessed civil penalties therefor. The minima that a facility must pay in lieu of contesting a subsequent citation within a year of its having been issued a citation and assessed a civil penalty for violating the same regulation are one hundred fifty dollars (\$150) and three thousand dollars (\$3,000).

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