

**Agenda
Item
VII.**

State of Oregon

Board memo

Building Codes Division

June 1, 2010

To: Boards of Boiler Rules

From: Chris Huntington, Manager, Policy and Technical Services Section

Subject: Proposed Revisions to Enforcement Penalty Matrix

Action requested:

Board approve the proposed changes to the attached Advisory Board Penalty Matrix and OAR 918-001-0036

Background/Discussion:

The current Advisory Board Penalty Matrix was last revised in 2008 as a combined effort of BCD Enforcement staff, the Board Chair/Vice-chair group, and the various licensing boards. While in many respects the matrix has been effective in addressing violations and achieving compliance, there have been some unintended developments. After meeting and receiving guidance from the Board Chair/Vice-chair group, the division has prepared proposed revisions.

The division has seen an increase in cases going to contested case hearing where the respondent admits the violations, but is seeking relief from the penalty amounts. In some cases, application of the matrix results in substantial fines for first-time violators. The preparation and conduct of contested case hearings results in considerable use of enforcement staff time, and expense to the division for use of the Office of Administrative Hearings administrative law judges.

On February 12, 2010, the Board Chair/Vice-chair group met to discuss questions staff had raised about certain aspects of the current matrix. Based on the guidance the Board Chair/Vice-chair group provided at that meeting, the division prepared a modified penalty matrix. In developing the proposed changes, the division limited changes to first-time violations, and increased the maximum stay amounts to provide better flexibility. The division did not reduce overall penalty amounts, and the entire penalty is assessed in all cases. The proposed changes to the penalty matrix are summarized below:

1. The division added a permit-only category for situations where the local jurisdiction does not have authority to issue the violation, such as a boiler or elevator permit and for situations where the local jurisdiction has been unsuccessful in enforcing permit requirements.

2. The division increased the amount that the division or the board has the discretion to stay in the Volunteer category, to address circumstances where a complete suspension of the fine is appropriate.
3. The division increased the amount that can be stayed in most categories. For example, the violations of unlicensed activities, no permit, and no business license are often charged together. The total collected for these will now be \$750, with \$ 5250 stayed.
4. The division changed the “look back” period (the time period between violations to determine if there is a prior violation that increases the penalty) from three years to five years for the categories of Volunteer, Supervisor, Business, and Failure to Comply with a Corrective Order. This makes all the violation categories the same. If the group agrees, we will need to amend the administrative rule, OAR 918-001-0036, to implement this change.

The division sent the Board Chair/Vice-chair group the revised matrix and requested review and comments. No comments or proposed changes were received. The penalty matrix and the administrative rule with the proposed changes are attached to this memo.

Options:

- Approve proposed changes to the Advisory Board Penalty Matrix and rule.
- Make further modifications to the Advisory Board Penalty Matrix and rule, and approve as further modified.
- Disapprove proposed changes.

Recommendation:

Approve the Advisory Board Penalty Matrix and rule with proposed changes.

**Penalty Matrix
Draft Rule
4-27-10**

918-001-0036

Guidelines for Civil Penalties

(1) Scope and Authority. This rule sets guidelines for assessing a civil penalty under ORS 446.995 & 455.895.

(2) Definitions. For the purposes of this rule:

(a) “Continuing offense” or “continuing violation” means violation of a code, rule or law on one or more additional days after having been notified of the violation or ordered to correct the act, or the failure to act. A continuing violation is subject to a civil penalty each day the violation continues after notification.

(b) A “directive” includes, but is not limited to, a notice or warning, citation, order, consent decree or settlement agreement, rule, law, code requirement, or agency interpretation.

(c) “Pattern of violation” means two or more prior violations during a **five-year** given period of any provision of ORS chapter 446, 447, 455, 460, 479, 480, or 693, or the state building code as defined in ORS 455.010, whether or not a penalty was assessed. **A pattern of violation is calculated within a five-year period from the date of the latest violation.**

~~(A) For violations by volunteers performing unlicensed work, supervisor and business violations, and failures to comply with corrective orders, a pattern of violation is calculated within a three year period from the date of the latest violation.~~

~~(B) For scope of license violations, violations concerning other unlicensed activities, failure to obtain license and permit, failure to comply with a previous directive, or violations resulting in unsafe installations or health and safety hazards, a pattern of violation is calculated within a five year period from the date of the latest violation.~~

(3) A licensed person or contractor who performs an act resulting in an unsafe installation or a health and safety hazard, structural or financial damage, performs or allows another to perform work requiring a license without an appropriate license, violates a previous directive, or exhibits a pattern of violation may have their license, registration or certificate conditioned, suspended, or revoked.

(4) Civil penalties may be assessed by a board, the Director, or a board’s designee acting as agent for a board. A board or the Director may take into account any appropriate factors,

including previous directives, in determining the penalty amount or conditions within an order. The statutorily defined maximum penalty may only be assessed upon a finding of a pattern of violation.

(5) Civil penalties may be assessed in addition to, or in lieu of, the conditioning, suspension, or revocation of a license, certificate of competency, or similar authority issued by the Director.

(6) The Director may, subject to approval of a board, develop a penalty matrix for the board's use to promote equity and uniformity in proposing the amount and terms of civil penalties and conditions under which the penalties may be modified based on the circumstances in individual cases.

(7) If a dispute concerning the application of the state building code as defined in ORS 455.010 is appealed to a local appeals board, to a board under ORS 455.690 or to the program chief under ORS 455.475:

(a) A civil penalty that is being appealed, may be stayed until after resolution of the appeal or interpretation. If corrections are necessary, a civil penalty may be stayed for 30 calendar days or the time frame established in the appeal or in the interpretation process.

(b) An administrative appeal will not stay civil penalties when they were assessed for failure to obtain a permit unless the appeal involves determining whether a permit was necessary.

(c) The person seeking the appeal or interpretation has the obligation to notify the Director of the appeal for the purpose of granting a stay of the civil penalty.

(8) Violations of ORS chapters 446, 447, and 479 and ORS 455.020(2) and 455.610, wherein defects are noted by an inspector in an element of assembly or construction, shall not be considered a violation for the purposes of this section if the violation is corrected and an inspection request made in 20 calendar days unless extended in writing by the building official.

(9) The Building Codes Division shall forward a copy of final orders to the Construction Contractors Board.

Stat. Auth.: ORS 446.995 & 455.895

Stats. Implemented: ORS 446.995 & 455.895

Hist.: BCD 35-2002, f. 12-31-02, cert. ef. 1-1-03; BCD 10-2005, f. 4-29-05, cert. ef. 5-1-05

ADVISORY BOARD PENALTY MATRIX

~~Penalty/ Minimum Penalty with maximum amount Stayed~~
Adopted October 1, 2008*** , 2010**

~~This penalty matrix applies to the following trade specialty codes: amusement rides, boiler, electrical, elevator, manufactured dwelling/installer, one and two family dwelling, plumbing, recreational vehicle, structural and mechanical and is generally used for acts defined in OAR 918-001-0036. Pursuant to OAR 918-001-0036, this penalty matrix applies to the following trade specialty codes: boiler, electrical, elevator, manufactured dwelling/installer, plumbing, and mechanical.~~

~~A permit violation by itself is usually handled by the local jurisdiction. However, the boards and the division reserve the right to assess a civil penalty for a permit violation.~~ Absent an accompanying license violation, permit violations are handled by the issuing authority.

~~The entire penalty is imposed in all cases. A violator will not automatically receive the minimum amount due for the penalty. A stay of some portion of a penalty is within the sole discretion of the board or the division acting on the board's behalf for purposes of settling cases prior to hearing. In determining whether a portion of the penalty should be stayed the Division considers aggravating and mitigating factors including but not limited to risk to the public and the cooperation of the violator. The lesser amount on the matrix indicates the maximum amount of pre-hearing leeway that the boards and division have to stay a portion of a penalty for purposes of negotiation. Staying a portion of a penalty is within the sole discretion of the board or division acting on the board's behalf. Once a matter goes to hearing, the full penalty amount, as indicated on the matrix, will apply. Below each penalty are the maximum amount that can be stayed, and the minimum that must be paid when a settlement is negotiated. The lesser amount on the matrix indicates the amount to be paid if the maximum amount is stayed for purposes of settlement negotiations.~~

Violation Type	1st	2nd	3rd	Length of Time
Permit Violation	Penalty Assessed: \$1000 Max. Amt. Stayed: \$750 Min. Amt. Due/payable: \$250	Penalty Assessed: \$ 2000 Max. Amt. Stayed: \$1250 Min. Amt. Due/payable: \$750	Penalty Assessed: \$3000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$2000	5 years from last violation
Above section applies to violations of permit requirements				
Volunteer Who Has Violated Licensing Laws	Penalty Assessed: \$1000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$0 \$100	Penalty Assessed \$2000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$1000	Penalty Assessed: \$5000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$4000	3 5 years from last violation

Black = Current text
 Blue = Proposed additions
 Red with strikethrough = Proposed deletions

Violation Type	1st	2nd	3rd	Length of Time
Above section applies to individuals not licensed in one of the specialty trades listed above, who make an installation that requires a license for no remuneration or other benefit				
Unlicensed Activities	Penalty Assessed: \$2000 Max. Amt. Stayed: \$1750 Min. Amt. Due/payable: \$250 \$750	Penalty Assessed: \$2500 With Max Stay: \$1000 Min. Amt. Due/payable: \$1500	Penalty Assessed: \$5000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$4000 Condition/deny/suspend/revoke/injunction	5 years from last violation
Above section applies to individuals or companies and includes working without a license and allowing an unlicensed individual to perform specialty work.				
Scope of License Violations	Penalty Assessed: \$2000 Max. Amt. Stayed: \$1750 Min. Amt. Due/payable: \$250 \$750 (Apprentices: max. amt. stayed: \$2000/ min. due: \$0)	Penalty Assessed: \$3000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$2000	Penalty Assessed: \$5000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$4000 and/or condition/denial/suspension/revocation	5 years from last violation
Above section applies to individuals or companies in one of the specialty trades working outside the scope of their license. This also includes apprentices.				
Scope of License Violations (apprentice)	Fine: \$2000 With max stay: 0	Fine: \$3000 With max stay: \$2000	Fine: \$5000 With max stay: \$4000 and/or condition/denial/suspension/revocation	5 years from last violation
Combo— License and Permit	Fine: \$2500 With max stay: \$1500	Fine: \$3500 With max stay: \$2500	Fine: \$5000 With max stay: \$4000 and/or condition/denial/suspension/revocation	5 years from last violation
Supervisor	Penalty Assessed: \$3000 Max. Amt. Stayed: \$2750 Min. Amt. Due/payable: \$250 \$1000	Penalty Assessed: \$4000 Max. Amt. Stayed: \$2000 Min. Amt. Due/payable: \$2000	Penalty Assessed: \$5000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$4000 and/or condition/denial/suspension/revocation	3 5 years from last violation

Violation Type	1st	2nd	3rd	Length of Time
Above section applies to supervising electricians not performing the duties of a supervisor, as listed in OAR 918-282-0140.				
Business	Penalty Assessed: \$3000 Max. Amt. Stayed: \$2750 Min. Amt. Due/payable: \$250 \$2000	Penalty Assessed: \$4000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$3000	Penalty Assessed: \$5000 Max. Amt. Stay: \$1000 Min. Amt. Due/payable: \$4000 and/or condition/denial/suspension/revocation	3 5 years from last violation
Above section applies to individuals engaging in the business or of a contractor working in a trade that requires a specialty license.				
Unsafe Installations/Health and Safety Hazard/failure to comply with directive	Penalty Assessed: \$3000 Max. Amt. Stayed: \$2500 Min. Amt. Due/payable: \$500	Penalty Assessed: \$5000 Max. Amt. Stayed: \$3000 Min. Amt. Due/payable: \$2000 and/or condition/denial/suspension/revocation		5 years from last violation
Above section applies to individuals or companies that have made an unsafe installation causing immediate danger to the public.				
Failure to Comply with Order of Corrective Action	Not more than Up to \$1000 per day and/or suspension/ revocation			3 5 years from last violation
Above section applies to orders to correct an installation.				
Failure to Comply with Directive & aggravating factors	Penalty Assessed: \$4500 Max. Amt. Stayed: \$1500 Min. Amt. Due/payable: \$3000	Penalty Assessed: \$5000 Max. Amt. Stayed: \$1000 Min. Amt. Due/payable: \$4000 and/or condition/denial/suspension/revocation		5 years from last violation
Above section applies to directives given to anyone failing to comply with the Oregon specialty codes listed above. This includes jurisdictions.				