SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

I.

Introduction

The State Personnel Board (Board) proposes to repeal Section 262 and amend Sections 170, 249.1.1, 249.1.2, 249.2, 249.4, 321, 438, 438.1, 439.2, and 439.4 of Title 2, Chapter 1, of the Code of Regulations (CCR). A 45-day public comment period on this rulemaking action was held from July 7, 2023, through August 22, 2023. A public hearing was held on August 22, 2023. The comments received by the Board were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written Comments from Jennifer Dong, Talent Management Division of Human Resources, California Department of Water Resources (DWR)

Comment I. Section 249.1.1.

The DWR is concerned with the Board allowing departments to group non-identical vacancies into single recruitments. The DWR believes this minimizes departments' requirement to advertise new job opportunities and compromises the merit selection principle. For example, each open position would require its own application screening criteria specific to the duties and desirable qualifications of the job(s). Allowing departments to add multiple non-identical vacancies to the same job advertisement will potentially confuse candidates and the department about which position the candidate is applying for and which screening criteria to apply. This may negatively impact transparency and fairness in the hiring process and increase merit issue complaints.

Response I.

The Board appreciates the feedback from the DWR on this regulatory package. The purpose of the proposed amendment is to support efficiency in the state's hiring process. Open vacancies involving identical classifications across multiple units should involve identical, or at least very similar, standards of assessment when comparing the qualifications of candidates because the duties and level of responsibilities are the same. The application screening criteria may be carefully designed to address multiple positions in order to best assess which

candidates would be successful in the respective positions. Moreover, if an applicant is not interested, or more interested, in a specific position then they may communicate their preference during the hiring process or it will be made evident by the knowledge, skills, abilities, competencies and work experience demonstrated during the hiring process. As long as the application screening criteria is based on job-related criteria and the selection instruments used are designed to objectively and fairly evaluate each candidate's qualifications to be successful in the position(s), transparency or fairness in the hiring process should not be negatively impacted or compromised.

Moreover, the proposed amendment does not require departments to advertise multiple vacancies involving the same classification. It merely provides departments with the opportunity to streamline the hiring process when appropriate. For example, advertising several entry-level, Office Technician vacancies across units should not require the use of complex application screening criteria designed to evaluate job qualifications specific to each position because Office Technician positions do not require specialized knowledge in a particular occupational area and generally perform the same duties regardless of unit location. As such, the proposed amendment allows departments to exercise discretion when deciding whether or not to combine open vacancies involving the same classifications into the same job advertisement depending on the nature of the position(s), recruitment strategies, and business needs. Finally, for purposes of clarity, the Board is removing the “same level of duties” from subdivision (d) because it is understood that positions of the same classification involve the same level of duties.

Comment II. Section 249.1.2.

The DWR seeks clarification on the definition of “surveys” and “checklists” under subdivision (f).

In order to provide clarity, the DWR suggests amending section 249.1.2. to state: “Appointing power shall not disqualify applicants for non-job-related reasons or otherwise reject applicants during the hiring process for failing to submit documentation that is not used to determine the qualifications of the applicants, such as checklists or incidental recruitment surveys.”

Response II.

The Board agrees with the DWR’s proposed amendment to section 249.1.2 and will adopt the following language: “Appointing powers shall not disqualify applicants for non-job-related reasons or otherwise reject applicants during the hiring process for failing to submit documentation that is not used to assess the qualifications of the applicants, such as checklists or incidental recruitment surveys ~~provide responses to department surveys or application package checklists~~.”

Comment III. Section 321.

The DWR is concerned that the proposed amendment to section 321 lacks clarity if it is tied to Absence Without Leave (AWOL). The DWR points out that the proposed amendment conflicts with Government Code section 19996.2, which allows the appointing authority to voluntarily separate a probationary or permanent employee who has been absent for five consecutive working days for any unapproved absence.

The DWR suggests that if the intent is to exclude approved dock time from consideration as working time, the text "and approved dock leave" should be added instead of "and absences of 5 or more consecutive working days." This would clarify the concept of "approved dock" and align with Government Code section 19996.2.

Moreover, the DWR argues that these amendments complicate probationary period calculations. The DWR states that there are already complicated calculations that human resources professionals perform to determine “qualifying time” across areas like benefits, retirement, and probation. Therefore, these amendments would further complicate those calculations.

Response III.

This amendment to section 321 was proposed in order to address the period of time between an employee’s acceptance of an offer of employment and the date the employee reports to work.

The Third District Court of Appeal recently issued a published decision in *Nancy Michaels v. State Personnel Board (2022)* 76 Cal.App.5th 560, interpreting Government Code section 18525’s definition of “appointment” as it relates to calculating the one-year period for voiding an unlawful appointment under section 19257.5. The court held that, under section 18525, the appointment occurs on the date the employee accepts the offer of employment from the appointing authority. While the court’s holding was limited to the timely voiding of a good faith unlawful appointment, the decision has raised the question of whether the court’s reasoning extends to the timeframe for rejections during probation.

Although the court appeared to recognize a distinction between the timeframe involved in voiding an appointment and evaluating an employee’s performance during the probationary period, the decision does not appear to be determinative as to when a probationary period commences.

The proposed amendment was designed to consider this period of time between an employee’s acceptance of an offer of employment and the date the employee reports to work as nonqualifying toward the probationary period similar to a leave of absence and is unrelated to Government Code section 19996.2.

However, Senate Bill 510 recently signed into law by the Governor on July 13, 2023, and due to be effective on January 1, 2024, amends Government Code section 19170 to specify that the probationary period commences on the first day that the employee reports to work or begins performing the job duties. As such, the time between the acceptance of an offer of employment and the date the employee reports to work may not be considered toward the probationary period. The Board's proposed amendment to section 321 is no longer necessary and will be removed.

Comment IV 439.4.

The DWR states that training and development (T&D) assignments should already be recorded in the State Controller's Office (SCO) Personnel Information Management System (PIMS) history, which is accessible to departments. Additionally, existing regulations mandate departments to advertise and archive T&D assignments for five years, making verification possible. The DWR doubts the necessity of additional regulations for a few non-compliant departments and suggests instead that the Board introduce rules allowing employees to file an appeal regarding inaccurate employment records. The DWR argues that relying on employee submitted documents for T&D completion verification isn't reliable. The DWR urges the Board to strike section 439.4 subdivision (e) through (f).

Response IV.

While fraud is always a concern, there are alternative means to verify the timeframe(s) of T&D assignments as the DWR notes above. The intended letter provides an additional method to support and verify the duration and scope of an employee's T&D assignment. Based on information discovered through the Board's routine compliance reviews and appeal proceedings, T&D departments fail to consistently input T&D assignments into PIMS and/or fail to properly document, or retain documentation, related to T&D assignments. As such, the employee may be unable to demonstrate the scope and duration of the T&D assignment as qualifying for future promotional movement. Furthermore, a department's ability to terminate a T&D assignment at any time may also lead to inaccurate documentation of the duration of the T&D assignment.

As such, the proposed amendment is aimed to assist employees who have been impacted by departments inaccurately documenting or failing to document T&D assignments. The letter merely serves as supporting documentation of an employee's T&D assignment's duration and scope. Nevertheless, the SCO record remains the primary source when verifying T&D assignments. Therefore, the Board declines to adopt the DWR's proposed recommendation.

Summary of Written Comments from Anita Barrientos, Associate Director, California Correctional Health Care Services (CCHCS).

Comment V. Section 249.1.1.

The CCHCS seeks clarification on the advertisement duration for limited-term (LT) appointments. The CCHCS questions whether departments should advertise the position for 12 months or for the full potential of 24 months.

The CCHCS cites concerns that advertising for 12 months and later extending it to 24 months might disadvantage applicants who would have otherwise applied if the full 24-month duration was initially stated. Conversely, advertising for 24 months but offering a 12-month appointment could also disadvantage applicants who wouldn't have applied for the shorter duration. The CCHCS seeks guidance on finding a balanced approach that doesn't inadvertently disadvantage potential applicants based on the advertised appointment duration.

Response V.

The Board appreciates the feedback from the CCHCS on this regulatory package. Pursuant to Government Code section 19080.3, limited term appointments may not exceed one year. As such, departments may not advertise a limited term position for a 24-month duration. This regulation merely codifies current best practice wherein a department notes in the job advertisement that the limited term appointment may be extended up to 24 months, if in fact this is the case. In those instances where the department knows that the limited term appointment will not exceed 12 months or will be for a shorter duration, then the department shall properly reflect that knowledge in the job advertisement to ensure transparency in the hiring process.

Currently, some departments do not include the estimated duration of limited-term positions in their job announcements. This proposed amendment would simply require job announcements to specify the expected duration of limited-term appointments.

Comment VI. 249.1.1.

The CCHCS questions if the California Department of Human Resources (CalHR) Examination and Certification Online System (ECOS) will need to undergo updates to address the challenge of advertising multiple open positions in different units that share similar responsibilities. The CCHCS would like to know if ECOS will be enhanced to allow the attachment of multiple duty statements to job advertisements, as the current system only permits the upload of a single duty statement.

Response VI.

CCHCS’s comment addresses an administrative issue not within the scope of this regulatory

proposal.

However, currently, departments may advertise interchangeable positions (e.g. SSA/AGPA) through the CalHR's Examination and Certification Online System and may combine both duty statements into a single file when uploading to ECOS. As such, SPB does not believe that this change would require a modification of ECOS. However, since CalHR administers ECOS, we defer to CalHR on whether modifications will be required after the regulation is adopted. Please see I., Written Comments, Response (ante, at p. I).

Comment VII. Section 438.

The CCHCS suggests the term "ten working days" to be clarified to "ten business days". The CCHCS cites instances where departments have 24/7 facilities, so clarifying from 10 working days to 10 business days may be helpful.

Response VII.

The Board appreciates the CCHCS' comments on this amendment. In light of the fact that business days and working days can be different based on the appointing authority's working environment and legislative mandate(s), the Board declines to incorporate CCHCS' proposed amendment.

Summary of Written Comments from Karen Van Amerongen, Assistant Division Chief, Human Resources Division, California Public Employees' Retirement System (CalPERS)

Comment VIII. Section 249.1.2.

The CalPERS would like confirmation that Statements of Qualification (SOQ), supplemental questions, or any other requirements stated on the job bulletin would not fall under non-job-related reasons. The CalPERS considers these useful screening tools and disagrees with the change if these items are included in this section.

Response VIII.

Please see II., Written Comments, Response (ante, at p. 2).

Comment IX. Section 321.

The CalPERS seeks guidance regarding the following language "and absences of 5 or more consecutive working days". The CalPERS questions if the sentence should read as "and absences of 1 or more consecutive working days shall not be considered working time."

The CalPERS suggests the addition of the following language: (a) and/or (d), the probationer shall be notified in writing of the extension, the reason for the extension, and shall also be

notified of the date the extended probationary period will end.”

Response IX.

The Board declines to adopt the CalPERS suggested language.

Please see III., Written Comments, Response (ante, at p. 3).

Comment X. Section 439.4.

The CalPERS suggests amending section 439.4, subdivision (e), to state “or via United States mail to the employee” instead of “and United States mail to the employee”.

Response X.

After consideration, the Board has decided to remove the proposed language of “electronically and via United States mail” in order to modernize and to provide flexibility to departments.

Subdivision (e) will now read as: “Within 30 calendar days of the completion and/or termination of the training and development assignment, the appointing power shall provide a written statement ~~both electronically and via United States mail~~ to the employee certifying the training and development experience.”

Summary of Written Comments from Peter Brown, Chief, Human Resources Branch, Covered California

Comment XI. Section 321.

The Covered California questions what specifically is "...absences of 5 or more consecutive working days" referring to?

Response XI.

Please see III., Written Comments, Response (ante, at p. 3).

Additional Note.

The Board has also amended section 249.1.1. to include LEAP, SROA and reemployment eligibility as types of eligibilities to be included in job advertisements. Section 249.1.1. will now read as: “(2) The types of eligibility being considered (e.g., list eligibility; transfer; training and development, LEAP, SROA and reemployment eligibility). ~~Each eligibility type shall be specified, except for reemployment eligibility and SROA, or any other type of eligibility that is the result of layoffs, demotion, or mandatory reinstatement.~~"

III.

Conclusion:

The Board appreciates the comments and feedback it received regarding this proposed amendment. The modified text with the changes clearly indicated are available to the public as stated in the Notice of Modification to Text of Proposed Regulation.