

# STATE PERSONNEL BOARD EVIDENTIARY HEARING PROCESS



## SPB STATUTES AND REGULATIONS SUPPLEMENT (Vol. II – Regulations)

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# STATE PERSONNEL BOARD

## California Code of Regulations, title 2, Division 1, Chapter 1, Subchapters 1.2, Hearings and Appeals

### ARTICLE 1. GENERAL PROVISIONS

#### § 51.1. Scope of Article

The regulations in this article shall apply to all Appellants, Complainants, and Respondents and all hearings and investigative reviews conducted by the Board or its designees.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

#### § 51.2. Definitions

Unless the context requires otherwise, the following definitions shall apply to regulations in this article.

(a) “Administrative Law Judge” or “ALJ” means a person employed by the State Personnel Board (SPB) to conduct evidentiary hearings under this article.

(b) “Adverse action” means an action taken by an appointing power to discipline an employee and includes formal reprimand, transfers for disciplinary reasons, suspension, reduction-in-salary, demotion and dismissal.

(c) “Affirmative defense” means an assertion by one party raising facts and arguments that, if true, will defeat the other party’s claim, even if all allegations in the other party’s complaint or Notice of Adverse Action are true.

(d) “Agency” means any agency, department, board, commission, district, or other designated entity that employs state civil service employees.

(e) “Appeal” means any written request for relief or review filed as provided in these regulations and includes “application,” “petition,” “protest,” “complaint” and “answer” pursuant to section 19575 of the Government Code.

(f) “Appeals division” means the Appeals Division of the State Personnel Board.

(g) “Appellant” means the person or organization filing any appeal with the

SPB.

(h) "Appointing authority" or "appointing power" means the individual or entity that possesses the final authority to appoint and/or dismiss a state employee.

(i)(1) (A) "Back pay" means the compensation Appellant would have received from Respondent if Appellant had not been subject to an adverse action, a non-punitive demotion, transfer, or termination, a medical demotion, transfer, or termination, or had not been rejected during employment, less any compensation Appellant earned or might reasonably have earned in private or public employment during the period the action or rejection was improperly in effect.

(B) Back pay shall not include overtime compensation that the Appellant may have earned from Respondent during the time period that Appellant was not working for Respondent due to the adverse action.

(C) Back pay shall not be authorized or paid for any portion of time during which Appellant was not ready, able, and willing to perform the duties of his or her position, whether or not the action or rejection was properly in effect.

(2) For purposes of adverse action appeals, non-punitive demotions, transfers, and terminations, and medical demotions, transfers, and terminations, back pay includes salary adjustments, shift differentials, and other special salary compensation, if sufficiently predictable. Subject to the memorandum of understanding for Appellant's classification and the provisions of Government Code sections 19584, 19253.5, and 19585, back pay may include:

(A) Reimbursement for substitute medical and dental insurance and other out-of-pocket medical and dental expenses that an Appellant incurred during the period of time the action was improperly in effect, but would not have incurred if he or she had been working for Respondent;

(B) Retirement benefits that Appellant would have accrued if he or she had been working for Respondent for the period of time the action was improperly in effect;

(C) Seniority benefits that Appellant would have accrued if he or she had been working for Respondent for the period of time the action was improperly in effect;



(D) Merit salary adjustments that Appellant would have received if he or she had been working for Respondent for the period of time the action was improperly in effect;

(E) Bilingual pay that Appellant would have earned if he or she had been working for Respondent for the period of time the action was improperly in effect; and

(F) Physical fitness, or other incentive, pay Appellant would have earned if he or she had been working for Respondent for the period of time the action was improperly in effect.

(3) Any monthly health premium that would have been deducted from Appellant's pay at the time of the action shall be deducted from an Appellant's back pay for the period the Appellant was not working for Respondent.

(j) "Board" means the five-member State Personnel Board.

(k) "Brought to Hearing" means when the record is opened for the purposes of initiating the evidentiary hearing and receiving evidence.

(l) "Business days" means all days that all state agencies are open for business, excluding weekends, holidays, or other designated days. For purposes of these regulations, unless otherwise indicated a business day commences at 8:00 a.m. and concludes at 5:00 p.m. The term "business days" includes the term "working days."

(m) "Complainant" means the person or organization filing a complaint of discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability.

(n) "Constructive Medical Action" means an involuntary transfer or demotion, or a refusal to permit an employee to return to work for purported medical reasons without providing the employee those due process protections set forth in Government Code section 19253.5.

(o) "Days" means calendar days, unless otherwise indicated.

(p) "Digital signature" means an electronic identifier, created by a computer, that is intended by the party using it to have the same force and effect as the use of a manual signature. The use of a digital signature is:

(1) unique to the person using it;

(2) capable of verification; and

(3) under the sole control of the person using it, or the person's designee.

(q) "Electronic signature" means an electronic sound, symbol, or process attached to, or logically associated with, an electronic record and executed or adopted by a person with the intent to sign the electronic record.

(r) "Examination appeal" means appeals concerning allegations that: an Appellant's civil service examination was not accepted by the examining agency; civil service examination statutes, regulations or policies were violated during the examination process; and/or improprieties in the appointment or promotion process.

(s) "Evidentiary hearing" means a hearing conducted before an ALJ, during which: opening and closing arguments are permitted; direct examination and cross examination of witnesses is permitted; physical and documentary evidence may be introduced and admitted; and a proposed decision is submitted by the ALJ for review by the Board.

(t) "Executive Officer" means the Executive Officer of the State Personnel Board, as designated in Article VII, section 3, subdivision (b), of the California Constitution.

(u) "Filed" means received by the State Personnel Board after the filing party has complied with applicable statutory and regulatory filing requirements.

(v) "Good cause" means a substantial and compelling reason allowing a party to be excused from Subchapter 1.2 of these regulations. Good cause shall be evaluated using the following factors and relevant issues and events beyond the party's control, considering the length of any delay, the diligence of the party making the request, and any potential prejudice to the other party:

(1) the unavailability of a party, a party's attorney, a party's representative, or an essential witness because of death, illness, or other excusable circumstances, in the discretion of the Chief ALJ or his or her designee;

(2) the discovery of new evidence previously unavailable, as long as the discovery is made within 15 days of the submission of the statement of good cause;

(3) a material change in the law, as long as that change occurred within 15 days of the submission of the statement of good cause;

(4) a party's inability to comply with a deadline despite the diligence of the party and his or her representative in complying with the board's regulations because of the development of matters which could not have been reasonably foreseen or anticipated;

- (5) a substitution of counsel or representatives that is required in the interests of justice;
- (6) the recent consolidation of the matter with another matter;
- (7) a party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; and
- (8) a party's mistake of law constituting excusable neglect.

(w) "Hearing officer" means a State Personnel Board employee designated by the Board, the Executive Officer, or other appropriate authority, to conduct a hearing concerning appeals from pre-employment medical or psychological disqualification, appeals from a failure of a pre-employment drug test, and other appeals as deemed appropriate, in accordance with sections 54.1 and 55.2.

(x) "Informal Hearing" means a hearing conducted pursuant to Government Code sections 11445.10 through 11445.60.

(y) "Investigative officer" means a State Personnel Board employee designated by the board, the Executive Officer, or other appropriate authority, to conduct an investigative review concerning merit issue appeals, requests-to-file-charges, appeals from withhold from certification, appeals from voided appointment, examination appeals, requests from dismissed employees to take civil service examinations, and other appeals as deemed appropriate.

(z) "Investigative Review" means an investigation conducted by an investigative officer during which the investigative officer shall have the authority to conduct the investigation in accordance with the provisions of section 55.1.

(aa) "Investigatory Hearing" means an evidentiary hearing conducted by the Chief ALJ's designee in accordance with the provisions of section 55.2.

(bb) "Medical Action" means an action to transfer, demote, dismiss, or to involuntarily apply for disability benefits on behalf of an employee for asserted medical reasons, pursuant to the provisions of Government Code section 19253.5.

(cc) "Merit issue appeal" means an appeal concerning allegations that the State Civil Service Act or State Personnel Board regulation or policy related to applications, appointments and promotions within the civil service system has been violated by an agency. Merit issue appeals include, but are not limited to: allegations of interference with promotional opportunities, disputes concerning the effective date of appointments and promotions, and the applicability of alternate salary ranges. Merit issue appeals do not include appeals of actions that are specifically provided for elsewhere in law or in board regulations.

(dd) “Non-punitive action” means an action to transfer, demote, or dismiss an employee for failure to meet one or more requirements for continuing employment pursuant to the provisions of Government Code section 19585.

(ee) “Office of the Chief Counsel” means the Office of the Chief Counsel for the board.

(ff) “Peremptory strike” means the disqualification without cause of an ALJ assigned to a hearing.

(gg) “Presiding officer” means an individual who presides over a hearing in a contested case.

(hh) “Rejection during probationary period” or “rejection” means an action to remove an employee from a probationary appointment.

(ii) “Respondent” means the person or state agency from whose action or decision the Appellant is seeking relief.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19180, and 19584, Government Code; *Swepton v. State Personnel Board* (1987) 195 Cal.App.3d 92.

### **§ 51.3. Construction of Regulations**

(a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.

(b) Statutory references are to the Government Code unless otherwise specified.

(c) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first day, and including the last day. If the last day is any day the board is closed for business, that day is also excluded.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 51.4. Contents of the Administrative Record**

The complete administrative record of an evidentiary, informal, or investigatory hearing shall include any pleadings, motions, notices, orders, proposed decisions, final decisions, evidence marked for identification and offered for introduction into the record, whether admitted or rejected, transcriptions of all recorded proceedings, and other written communication addressing substantive

issues pertinent to the case. The administrative record shall not include any evidence that a party has withdrawn.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 51.6. When Decisions Become Final**

A board decision on an appeal or a complaint becomes final the day the decision rendered by the board is served by the board upon the parties to the decision. This section does not apply to whistleblower retaliation complaints.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 19582, 19586, Government Code.

## **ARTICLE 2. FILING WITH SPB**

### **§ 52.1. Papers; type size; signatures**

(a) All papers filed with SPB must be on 8 ½ by 11 inch paper, printed or typewritten or be prepared by a photocopying or other duplication process that produce clear and permanent copies equally as legible as printing.

(b) All typewritten papers filed with SPB must be printed in type not smaller than 12 point.

(c) The use of an electronic or digital signature on a document filed with the board shall have the same force or effect as a manual signature on a document filed with the board. A person who signs a filed document electronically or digitally shall retain a copy of the original document with the person's manual signature.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 52.2. Changes in Mailing Address**

All parties shall inform the Appeals Division of any change in their mailing address at the time of the change but not later than 1 week after the change.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 52.3. Filing Notices of Adverse Action with SPB**

Thirty (30) days after the effective date of this section, the Appointing Authority shall file Notices of Adverse Action with the Board utilizing the Board's on-line filing system.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 52.4. Requirements and Method of Delivery for Filing Appeals and Complaints with the SPB**

Appeals filed with the SPB shall be subject to the following:

- (a) All appeals and complaints shall be in writing.
- (b) Except as otherwise provided in these Regulations, each appeal and complaint shall be filed with the Appeals Division and shall:
  - (1) Identify the name, address, and telephone number of the Appellant or Complainant;
  - (2) If different than the Appellant or Complainant, identify the name, address, and telephone number of the person filing the appeal or complaint, including the State Bar number if the person filing the appeal or complaint is an attorney;
  - (3) Except as provided in Government Code section 19575, state the facts that form the basis for appeal or complaint; and
  - (4) Identify all Respondents known to the Appellant or Complainant including, for individually-named Respondents, first and last name, job title, and business address.
- (c) Unless the appeal or complaint names some other Respondent, the Appellant's or Complainant's appointing power shall be considered the only Respondent.
- (d) The Appeals Division shall mail or serve a copy of the appeal or complaint to or on the Respondent(s).
- (e) Time Limitations for Filing Appeals or Complaints with the SPB

Except as otherwise provided in the act or these regulations, every appeal or complaint shall:

(1) be filed with the Appeals within the following time limits;

(A) Appeals from disciplinary action filed pursuant to the provisions of Government Code sections 19575, shall be filed within 30 days after the effective date of the notice of adverse action;

(B) Appeals from disciplinary action filed pursuant to the provisions of Education Code section 89539, subdivision (a), or Government Code section 19590, subdivision (c), shall be within 30 days of the employee's receipt of the notice of adverse action;

(C) Appeals from rejection during probationary period filed pursuant to the provisions of Government Code section 19175 shall be filed within 15 days of the effective date of the notice of rejection during probationary period;

(D) Appeals from non-punitive transfer, demotion, or termination filed pursuant to the provisions of Government Code section 19585 shall be filed within 30 days after the effective date of the notice of non-punitive action;

(E) Appeals from medical transfer, demotion, or termination filed pursuant to the provisions of Government Code section 19253.5, subdivision (f), shall be filed within 15 days of service of the notice of medical action;

(F) Appeals from Career Executive Assignment termination filed pursuant to the provisions of Government Code section 19889.2 shall be filed within 30 days of the employee's receipt of the notice of termination;

(G) Complaints of whistleblower retaliation filed pursuant to the provisions of Education Code section 87164 or Government Code sections 8547.8 and 19683, shall be filed within one year from the most recent act of reprisal complained about;

(H) Requests-to-File-Charges filed pursuant to the provisions of Government Code section 19583.5 shall be filed within one year of the event or events upon which the appeal is based;

(I) Appeals from constructive medical transfer, suspension, demotion, or termination shall be filed within 30 days of the employee being notified that he or she would not be permitted to resume the duties of their position;

(J) Appeals from the following types of cases shall be filed within 30 days of the effective date of the action:

(i) Termination of appointment from the Limited Examination and Appointment Program (LEAP); and

(ii) Termination or automatic resignation from a Permanent Intermittent appointment;

(K) Appeals from pre-employment medical disqualification, pre-employment psychological disqualification, and pre-employment drug test failure, shall be filed within 30 days of the date of service of the notice of disqualification;

(L) Appeals from improprieties in the civil service examination process shall be filed as follows:

(i) Appeals from qualification appraisal interviews shall be filed within 30 days of the date that examination results are mailed to the Appellant;

(ii) Appeals from written examinations shall be filed within 30 days of the date that examination results are mailed to the Appellant.

(M) Petitions to Set Aside Resignations pursuant to Education Code section 89542 shall be filed within 30 days after the last date upon which services to the state university or college are rendered, or the date the resignation is tendered, whichever is later;

(N) Appeals from Automatic Resignation for Absence Without Leave pursuant to Education Code section 89541 shall be filed within 90 days of the effective date of such separation. If the appointing authority has notified the employee of the automatic resignation, any request for reinstatement must be filed within 15 days of the service of notice of separation;

(O) Appeals from disciplinary action, rejection during probationary period, medical transfer or termination, automatic resignation, layoff, refusal to hire from a re-employment list, or grievance involving discrimination or political affiliation, filed pursuant to the provisions of Government Code section 19800 – 19810, pertaining to Local Agencies, shall be filed in accordance with the provisions of Title 2, Division 5, Chapter 2, Article 8, Subarticle 1, section 17550.



(P) Appeals from Withhold from Certification and Voided Appointment shall be filed within 30 days of the date that the Notice of Withhold from Certification or Notice of Voided Appointment is mailed to the Appellant.

(Q) Back pay claims and requests for back pay hearings, as described in section 61, shall be filed within one year of the date of the board's decision giving rise to the back pay obligation.

(2) In all other cases, the appeal or complaint shall be filed within 30 days after the event upon which the appeal or complaint is based.

(3) Any Appellant or complainant seeking to file an appeal or complaint beyond the time limits in this section, must file a petition with the Chief ALJ or his or her designee demonstrating good cause as to why the appeal or complaint should be accepted. Upon good cause being shown, the Chief ALJ or his or her designee may allow an appeal or complaint, except as otherwise limited by statute, to be filed within 30 days after the end of the period in which the appeal or complaint should have been filed.

(f) Methods of Delivery for Filing Appeals or Complaints with the SPB

(1) Appeals or complaints delivered by electronic mail (e-mail) will be filed on the date received by SPB.

(2) Appeals or complaints delivered by the U.S. Postal Service are filed on the date received by the SPB. An Appellant or Complainant may obtain proof of the filing of the appeal or complaint by submitting either an extra copy of the appeal or complaint or the first page only, with a self-addressed, return envelope, postage prepaid. The Appeals Division shall return the copy marked with the date of filing.

(3) Appeals or complaints hand delivered to the SPB during regular business hours will be filed on the date received by the SPB after the filing party has complied with applicable statutory and regulatory filing requirements.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675 and 19630, Government Code.

**§ 52.5. Requirements and Method of Delivery for Filing All Other Papers with the Appeals Division**

(a) After an appeal or complaint has been filed with the Appeals Division for review, investigation or hearing, all papers thereafter shall be filed with the Appeals Division, except as provided for in subdivision (b).

- b) The first page of each paper filed shall include the following:
- (1) The name, address, and telephone number of the person filing the paper, including the State Bar number if the person filing the paper is an attorney;
  - (2) A caption setting forth the title of the case, including the names of the Appellant(s) and the Respondent(s);
  - (3) The SPB case number, if assigned;
  - (4) A brief title describing the paper filed; and
  - (5) The date(s) of the hearing and any future prehearing or settlement conferences, if known.
- (c) Methods of Delivery for Filing All Other Papers with the Appeals Division
- (1) All other papers delivered by electronic mail (e-mail), will be filed on the date received by SPB.
  - (2) All other papers delivered by the U.S. Postal Service are filed on the date received by the SPB. An Appellant or Complainant may obtain proof of the filing of the appeal or complaint by submitting either an extra copy of the appeal or complaint or the first page only, with a self-addressed, return envelope, postage prepaid. The Appeals Division shall return the copy marked with the date of filing.
  - (3) Appeals or complaints hand delivered to the SPB during regular business hours will be filed on the date received.

Note: Authority cited: Section 18701, Government Code. Reference: 18675, Government code.

### **§ 52.6. Right to Respond to Proposed Personnel Action**

- (a) At least five working days before the effective date of a proposed adverse action, rejection during the probationary period, or non-punitive termination, demotion, or transfer under Government Code section 19585, the appointing power, as defined in Government Code section 18524, or an authorized representative of the appointing power shall give the employee written notice of the proposed action. At least 15 calendar days before the effective date of a medical termination, demotion, or transfer under Government Code section 19253.5 or an application for disability retirement filed pursuant to Government Code section 19253.5(i)(1), the appointing power or an authorized representative of the appointing power shall give the employee written notice of the proposed action. The notice shall include:

- (1) The reasons for such action;
- (2) A copy of the charges for adverse action;
- (3) A copy of all materials upon which the action is based;
- (4) Notice of the employee's right to be represented in proceedings under this section;
- (5) Notice of the employee's right to respond to the person specified in subsection (b); and
- (6) A statement advising the employee of the time within which to file an appeal with the SPB.

(b) The person whom the employee is to respond to in subsection (a)(5) shall be above the organizational level of the employee's supervisor who initiated the action unless that person is the employee's appointing power in which case the appointing power may respond to the employee or designate another person to respond.

(c) The procedure specified in this section shall apply only to the final notice of proposed action.

Note: Authority cited: Sections 18701 and 19574, Government Code. Reference: Sections 19173, 19253.5, 19574 and 19574.1, and 19585, Government Code and *Skelly v. SPB* (1975) 15 Cal. 3d 194.

### **§ 52.7. Request to File Charges Against State Employees**

(a) Any request to file charges pursuant to Government Code section 19583.5, shall be filed by the requesting party with the Appeals Division of the SPB. The requesting party shall also serve the appropriate number of conforming copies on the appointing authority for each employee against whom disciplinary action is sought.

(b) Each request shall be in writing.

(c) Each request must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto. The accused employee has a right to provide an answer within 30 days of service of the request to file charges pursuant to Government Code section 19583.5.

(d) Each request must clearly state the legal cause(s) for discipline as set forth in Government Code section 19572.

- (e) Each request shall include a sworn statement, signed under penalty of perjury, that the contents of the request are true and correct.
- (f) Each request shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The requesting party shall submit a separate document with the request to file charges stating the reasons for good cause for the additional pages.
- (g) Where it does not appear that the material facts alleged are within the personal knowledge of the requesting party, the Appeals Division may require the requesting party to present supporting affidavits from persons having actual knowledge of the facts before acting upon the request.
- (h) Only after compliance with subdivisions (a) through (g) will the Appeals Division conduct an investigative review to determine whether the Board will give its consent to file charges.
- (i) If the Board approves the request after an investigative review, the parties will be notified that the request has been approved and that the matter will be scheduled for an evidentiary hearing before an ALJ. The Appeals Division will notify the parties of the time and location of the hearing.
- (1) The hearing shall be conducted in accordance with those regulations related to the adverse action hearing process pursuant to Sub-Article 6, beginning with section 56.1. During the hearing, the requesting party shall bear the burden of proving the allegations contained in the request by a preponderance of the evidence.
  - (2) No disciplinary action shall be imposed on the employee until after the completion of the hearing, and only upon a finding by the Board that disciplinary action is warranted against the employee.
  - (3) In those instances where the Board finds that disciplinary action is warranted against the employee, the Board shall notify the employee's appointing authority of the disciplinary action to be imposed on the employee. The appointing authority shall thereafter cause the disciplinary action mandated by the Board to be implemented against the employee within a reasonable period of time, not to exceed two weeks. The employee shall not be entitled to a right to respond pursuant to section 52.6. Within 30 days after a copy of the Board's decision is served upon the parties, either party may petition the Board for rehearing of the decision, pursuant to Government Code section 19586.

Note: Authority cited: Section 18701, Government Code. Reference: Section 19583.5, Government Code.

## **§ 52.8. Pleadings; Notice of Defense; Withdrawal of Notice of Defense**

(a) A party may seek approval from the board to amend a pleading, including a Notice of Adverse Action amended in accordance with Government Code section 19575.5. When a party seeks to amend a pleading, the party shall promptly serve on all other parties and file with the Appeals Division a complete, new pleading. The party seeking to amend the pleading shall use highlighting or italics or any other effective method to identify the changes made to the pleading. The new pleading shall be titled a "First Amended" pleading, and subsequent amended pleadings shall be titled consecutively. The ALJ, or the hearing officer, may allow exceptions for minor amendments during the hearing.

(b) The Chief ALJ or his or her designee may require a showing of good cause prior to making a determination as to whether to grant the request to amend a pleading.

(c) The board prefers amended to supplemental pleadings. However, if a party issues a supplemental pleading, the party shall serve on all other parties and promptly file with the Appeals Division the supplemental pleading, which shall be titled a "First Supplemental" pleading. Subsequent supplemental pleadings shall be titled consecutively.

(d) A party who withdraws a notice of defense, a request for hearing, or an asserted special defense, shall immediately notify the Appeals Division and all other parties in writing.

(e) At any time before the opening of the record in a matter, a claimant seeking back pay, a Respondent seeking a back pay hearing, or a Complainant may withdraw his or her request, claim or complaint and the request, appeal or complaint shall be deemed dismissed without prejudice.

(f) At any time after the commencement of a hearing and before a proposed decision has been submitted to the board for consideration, a claimant seeking back pay, a Respondent seeking a back pay hearing, or a Complainant may seek approval from the Chief ALJ or his or her designee to withdraw his or her a request for hearing, claim or complaint with prejudice. In making a determination about whether an individual may be permitted to withdraw his or her request, claim or complaint with prejudice, the Chief ALJ or his or her designee shall consider whether any parties object to the request. A whistleblower retaliation complaint shall not be permitted to be withdrawn following the closure of the record in the proceeding.

(g) Once a proposed decision on a request for back pay hearing, a back pay claim, or a complaint is submitted to the board for its consideration, the Respondent, claimant or Complainant shall not be permitted to withdraw his, her,

or its request, claim or complaint, unless all of the parties to the proceeding have submitted a settlement agreement in the matter with the board.

(h) For purposes of this section, a proposed decision on a back pay appeal or a complaint is considered submitted to the board for its consideration once the board has issued an agenda pursuant to Government Code section 11125 indicating that the appeal or complaint will be considered at its next board meeting.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

**§ 52.9. Right to Representation; Notice of Representation and Withdrawal of Counsel or Other Representative**

(a) Any party may be represented by counsel or any other person or organization of the party's choice in any hearing or investigation conducted pursuant to this article.

(b) Any counsel or other representative who has assumed representation of a party in any case submitted for hearing before the SPB shall give written notice to the Appeals Division if no presiding officer has been assigned, and written notice to all parties of his or her name, address, telephone number and fax number (if any) and the name of the represented party, within a reasonable time after assuming representation.

(c) Any counsel or other representative may withdraw as counsel or representative of record by giving written notice to the Appeals Division if no presiding officer has been assigned and written notice to all parties of the withdrawal. The written notice shall include the last known address of the formerly represented party.

(d) Upon withdrawal by counsel or other representative:

(1) The SPB retains jurisdiction over the case;

(2) The formerly represented party bears the burden of keeping the SPB and all parties informed of a current address for purposes of service. If written notice of change of address is not given, any party may serve the formerly represented party at the party's last known address; and

(3) The formerly represented party is responsible for preparation and representation throughout the remainder of the case, unless and until such party retains new counsel or other representative.

(e) Withdrawal or change of counsel or other representative does not alone constitute grounds for continuance of any previously scheduled proceeding in the case.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

#### **§ 52.10. Service; Proof of Service**

(a) Service of subpoenas and subpoena duces tecum shall be made by personal service, or by United States mail with postage fully prepaid, certified with return receipt requested.

(b) Service of all other documents shall be made pursuant to sections 1012, 1013, and 1013a of the Code of Civil Procedure.

Note: Authority cited: Sections 18211, 18214, 18701, Government Code. Reference: Sections 415.30, 1008, 1012, 1013, Code of Civil Procedure; Sections 89538, 89541, Education Code; Sections 11440.20(b), 18575, 18672, 19058, 19083, 19100.5, 19173, 19243.4, 19253.5, 19574, 19585, 19590, 19803, 19889.2, Government Code.

#### **§ 52.11. Counting Days**

(a) If an act must occur a certain number of days after an event, and the exact number of days after the event falls on a Saturday, Sunday, holiday, or other non-business day, then the pleading is due the business day immediately following the Saturday, Sunday, holiday or other non-business day.

(b) If an act must occur a certain number of days before an event, and the exact number of days before the event falls on a Saturday, Sunday, holiday, or other non-business day, then the pleading is due the business day immediately preceding the Saturday, Sunday, holiday or other non-business day.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **ARTICLE 3. ASSIGNMENT OF APPEALS OR COMPLAINTS**

#### **§ 53.1. Appeals or Complaints Assigned to Informal Hearing Process**

(a) Unless otherwise assigned, the following matters will be assigned to the informal hearing process:

- (1) Appeals from psychological and medical disqualification.
- (2) Appeals from voided civil service appointments.

(3) Appeals from denial to take state civil service examination or be certified to any position in state civil service, pursuant to section 211.

(4) Whistleblower retaliation complaints not consolidated with other appeals assigned to the evidentiary hearing process.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 53.2. Appeals or Complaints Assigned to Investigative Review Process and Investigatory Hearings**

(a) Unless otherwise assigned, the following matters will be assigned to the investigative review process:

(1) Complaints of discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability, challenges to examination results, rejection of application for state civil service employment based upon minimum qualifications, certification withholds, and merit issue complaints.

(b) Unless otherwise required by law, or otherwise assigned, appeals of rejections during probationary period and appeals of an adverse action where the penalty imposed is an official reprimand or other penalty equal to or less than a suspension without pay for five days or equal to or less than a one-step reduction in pay for four months will be assigned to the investigatory hearing process.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 53.3. Appeals or Complaints Assigned to the Evidentiary Hearing Process**

(a) Unless otherwise required by law, or otherwise assigned, the following shall be assigned to the full evidentiary hearing process:

(1) Approved requests to file charges pursuant to Government Code section 19583.5.

(2) Appeal of an adverse action pursuant to Government Code section 19575 or 19590 where the penalty imposed is greater than a suspension without pay for five days or a one-step reduction in pay for four months.

(3) Any other appeal or complaint deemed appropriate by the Chief ALJ, Executive Officer, the Board, or its President.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.



#### **§ 53.4. Reassignment of Appeals**

Except as otherwise provided by law, the Board, the Executive Officer, or the Chief ALJ may reassign an appeal to any process.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **ARTICLE 4. INFORMAL HEARING PROCESS**

#### **§ 54.1. Informal Hearing Process**

(a) For those appeals assigned to hearing before a hearing officer, the hearing officer shall have the authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers. The hearing officer shall have the sole discretion to determine whether the parties to the hearing shall have the authority to call and examine witnesses. The hearing officer shall have the authority to take official notice of those matters specified in Government Code section 11515, in accordance with the provisions of that section.

(b) Failure of any party to proceed at hearings presided over by a hearing officer shall be deemed a withdrawal of the action or appeal unless the hearing is continued for good cause.

(c) The provisions of section 59.2 and 59.3 shall apply to hearings conducted by hearing officers except that all motions or petitions filed with the Appeals Division pursuant to those regulations shall be directed to the attention of the Chief ALJ and not the hearing officer.

(d) The hearing shall be calendared for no more than 2 hours, except for Whistleblower Retaliation hearings which will be calendared for no more than 4 hours.

(e) The hearing officer may question the parties and the parties' witnesses and extend additional time to each of the parties.

(f) The hearing officer is not bound by common law/statutory rules of evidence or by technical or formal rules of procedure, except as set forth herein, but shall conduct the hearing in such a manner as necessary to reach a just and proper decision. Relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

(g) Declarations/affidavits made under penalty of perjury will be admissible even though they are technically hearsay, and may be relied upon by the hearing officer to make a finding of fact.

(h) The hearing officer shall prepare a proposed decision which will be forwarded to the board.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675 and 19570, Government Code.

## **ARTICLE 5. INVESTIGATIVE PROCESS**

### **§ 55.1. Investigative Review**

(a) For those appeals assigned to review by an Investigative Officer pursuant to section 53.2, the Investigative Officer shall have the authority to interview witnesses, administer oaths, subpoena, and require the attendance of witnesses and the production of books or papers. The Investigating Officer shall also have the authority to take official notice of those matters specified in section 11515 of the Government Code.

(b) No hearing shall be conducted concerning those appeals assigned to investigative review. No party to the appeal shall be authorized to conduct discovery concerning those issues subject to investigative review. No party to the appeal shall be authorized to call and examine witnesses as part of the investigative review. The investigative review shall be based upon any documentary or other information deemed relevant by the Investigative Officer.

(c) The Investigative Officer is not bound by common law/statutory rules of evidence or by technical or formal rules of procedure, except as set forth herein, but shall conduct the investigatory review in such a manner as necessary to reach a just and proper decision. Relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

(d) Declarations/affidavits made under penalty of perjury will be admissible even though they are technically hearsay, and may be relied upon by the Investigative Officer to make a finding of fact.

(e) Upon conclusion of the Investigatory Review, the Executive Officer, or his or her designee shall either:

(1) Present a recommended decision to the Board, or

(2) Render a decision.

Note: Authority cited: 18701, Government Code. Reference: 18675, Government Code.

## **§ 55.2. Investigatory Hearings**

(a) Failure of any party to proceed at the investigatory hearing shall be deemed a withdrawal of the action or appeal, unless the investigatory hearing is continued for good cause.

(b) The investigatory hearing shall be calendared for no more than 6 hours. Each party will be allotted a total of 3 hours to be allocated at that party's discretion for presentation of its case, including examination and cross-examination of witnesses, presentation of declarations, documentary evidence, and exhibits, and presentation of arguments. While use of the time allotted is at each party's discretion, the suggested format for the hearing is as follows: 10 minutes each for opening statements, 120 minutes each to call witnesses and present declarations, documentary evidence and exhibits, 30 minutes each for cross-examination of the opposing party's witnesses, and 20 minutes each for closing arguments. The presiding officer is authorized to conduct a full evidentiary hearing in an appeal defined in this regulation upon mutual agreement of the parties or, upon motion by one of the parties, if the presiding officer finds it in the interest of justice to do so.

(c) The presiding officer has discretion to ask clarifying questions of the witnesses or the parties either during or at the conclusion of each party's case-in-chief and has sole discretion to extend additional time to each of the parties.

(d) The presiding officer is not bound by common law/statutory rules of evidence or by technical or formal rules of procedure, except as set forth herein, but shall conduct the investigatory hearing in such a manner as necessary to reach a just and proper decision. Relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

(e) Declarations/affidavits made under penalty of perjury shall, at the discretion of the presiding officer, be admissible even though they are technically hearsay, and may be relied upon by the presiding officer to make a finding of fact.

(f) The presiding officer shall prepare a short-form proposed decision which would be forwarded to the board within 30 days of the investigatory hearing. The decision shall include enough information to allow the board to exercise its constitutional authority to review disciplinary actions, such as (1) introduction; (2) factual allegations sustained and not sustained, referring to the Notice of Adverse Action; (3) legal causes, sustained and not sustained, referring to the Notice of Adverse Action and any other applicable legal authority; (4) penalty including brief references to any applicable legal authority; and (5) any finding of fact that the presiding officer decides is necessary to highlight.

(g) Absent board rejection of the proposed decision, each case should be opened and closed in no more than 180 days.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19570 and 19576, Government Code.

## **ARTICLE 6. EVIDENTIARY HEARING PROCESS**

### **Subarticle 1. ADMINISTRATIVE LAW JUDGES**

#### **§ 56.1. Authority of ALJ**

When an ALJ has been assigned to evidentiary or investigatory hearing matters, an ALJ is fully authorized and empowered to control the litigation before them and may grant or refuse extensions of time, receive evidence, hold appropriate conferences before or during hearings, rule upon all objections or motions, hear argument, and fix the time for the filing of briefs. An ALJ is fully authorized and empowered to perform any and all other acts in connection with such proceedings that may be authorized by law or these regulations, including those acts necessary to ensure due process for all parties, and has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code; *Mileikowsky v Tenent Healthsystem* (2005) 128 Cal.App.4<sup>th</sup> 531, 560.

#### **§ 56.2. Peremptory Strike**

(a) A party is entitled to one peremptory strike (disqualification without cause) of an ALJ assigned to a hearing. In no event shall a peremptory strike be allowed if it is made after the hearing has commenced.

(b) A peremptory strike shall be:

(1) Filed with the Appeals Division and directed to the Chief ALJ within 20 days of the date that the Appeals Division mails a letter of acknowledgement of the filing of the matter together with a list of the available ALJ's to all the parties;

(2) Filed by a party, or a party's attorney or authorized representative; and

(3) Made in writing in substantially the following form:

"I am a party to [CASE NAME AND NUMBER] and am exercising my right to a peremptory strike regarding ALJ [NAME], pursuant to section 56.2."

(c) Nothing in this regulation shall affect or limit the provisions of a challenge for cause under section 56.3, or any other applicable provisions of law.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 56.3. Disqualification of Presiding Officer or Board Member for Cause**

(a) A presiding officer shall perform his or her duties without bias or prejudice. A presiding officer shall dispose of all matters fairly, promptly, and efficiently.

(b) A presiding officer shall disqualify himself or herself in any proceeding in which disqualification is required by law, including those instances in which the presiding officer has a bias, prejudice, or interest in the proceeding.

(1) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(A) is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group;

(B) has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or

(C) has as a lawyer or public official participated in the drafting of laws or regulations, the meaning, effect, or application of which is at issue in the proceeding.

(2) The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the presiding officer, and included in the record.

(c) A presiding officer shall disclose on the record information that is reasonably relevant to the question of disqualification, other than the information listed in subdivision (b)(1) of this section, even if the presiding officer believes there is no actual basis for disqualification.

(d) Any party may request the disqualification of any presiding officer by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that the presiding officer should be disqualified. The issue shall be determined by the Chief ALJ or his or her designee.

Note: Authority cited: 18701, Government Code. Reference: 18675 and 11512(c), Government Code.

#### **§ 56.4. Ex Parte Communications**

(a) While any adjudicatory proceeding is pending before the board or a presiding officer, there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from any party, party representative, or interested third party, or to any party, party representative, or interested third party, from a presiding officer, without notice and opportunity for all parties to participate in the communication.

(1) Nothing in this section precludes a communication made on the record at the hearing.

(2) For the purpose of this section, a proceeding is pending from the submission of an appeal to the Appeals Division.

(b) A communication otherwise prohibited under subdivision (a) is permissible in any of the following circumstances:

(1) The communication is required for disposition of an ex parte matter specifically authorized by statute;

(2) The communication concerns a matter of procedure or practice; or

(3) The communication is directly related to settlement negotiations between the parties and both parties are aware that the presiding officer is discussing issues related to settlement with both parties.

(c) If, while the proceeding is pending, but before serving as the presiding officer, a person receives a communication of a type that would be in violation of this section if received while serving as the presiding officer, the person promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in subdivision (d).

(d) If a presiding officer receives a communication in violation of this section,

(1) The presiding officer shall make all of the following a part of the record in the proceedings:

(A) If the communication is written, the writing and any written response of the presiding officer to the communication; or

(B) If the communication is oral, a memorandum stating the substance of the communication, any response made by the

presiding officer, and the identity of each person from whom the presiding officer received the communication.

- (2) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
- (3) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

- (A) The party shall be allowed to comment on the communication. The presiding officer shall have the discretion to permit either written or oral comment; and

- (B) The presiding officer has the discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

(e) Receipt or initiation by the presiding officer, other than a board member, of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 11430.10, 11430.20, 11430.30, 11430.40, 11430.50, and 11430.60, Government Code.

### **§ 56.5. Avoiding Impropriety and the Appearance of Impropriety**

(a) A presiding officer shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the position.

(b) A presiding officer shall neither allow family, social, political, or other relationships to influence the conduct or judgment of the presiding officer nor permit others to convey the impression that any individual is in a special position to influence the presiding officer.

(c) A presiding officer shall not lend the prestige of his or her office or use his or her title in any manner to advance the pecuniary interests of the presiding officer or family members of the presiding officer.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **Subarticle 2. Prehearing Provisions**

### **§ 57.1. Prehearing/Settlement Conferences**

- (a) After an evidentiary matter, or any other matter deemed appropriate by the Chief ALJ or his or her designee, has been filed with the Appeals Division, the matter shall be scheduled for a prehearing/settlement conference, unless ordered otherwise.
- (b) The ALJ at the prehearing/settlement conference shall not preside as the ALJ at the evidentiary hearing unless otherwise stipulated by the parties.
- (c) Each Appellant and his or her representative, and each Respondent and his or her representative, shall appear in person at all prehearing/settlement conferences. Individually named Appellants and Respondents must also personally appear at all prehearing/settlement conferences.
- (d) Each party or representative who attends the prehearing/settlement conference shall be fully familiar with the facts and issues in the case. Respondents or their representatives must have full settlement authority, or be able to obtain authority immediately by telephone. If Respondent's settlement authority is made available by telephone, the ALJ may require the person providing settlement authority to participate in a teleconference.
- (e) A request to continue a prehearing/settlement conference shall be addressed to the Chief ALJ pursuant to section 60.2.
- (f) Each party shall file a written prehearing/settlement conference statement, along with a proof of service, with the Appeals Division 10 calendar days prior to the hearing. The statement shall contain the following information:
- (1) The identification by SPB Case Number of all appeals or complaints pending before the Appeals Division or the board, arising out of the same transaction, occurrence, or series of transactions or occurrences.
  - (2) A brief summary of any stipulated facts.
  - (3) Identification of affirmative defenses to any claim.
  - (4) A current estimate of the time necessary to try the case.
  - (5) The identity of each witness each party may call at the hearing, the subject matter on which the witness is expected to present evidence, and a summary of each witness's expected testimony. Parties are not required



to disclose any witness that will be called for rebuttal or impeachment purposes.

(6) The identity of any witness who may be called to testify who is an inmate of any correctional facility. In addition, at the discretion of the Chief ALJ, such individuals may be required to testify via closed circuit television, or by other electronic means.

(7) The name and address of each expert witness each party intends to call at the hearing, together with a brief statement of the opinion each expert is expected to give, and a copy of the current resume or curriculum vitae of each expert witness.

(8) A list of documentary exhibits each party intends to present at the hearing, and a description of any physical or demonstrative evidence. Parties are not required to disclose exhibits that will be used for rebuttal or impeachment purposes.

(9) A concise statement of any significant evidentiary issues to assist the ALJ in conducting the hearing.

(10) Dates of unavailability of the parties, counsel, and witnesses.

(g) Failure to timely file or fully disclose all required items in the prehearing/settlement conference statement without good cause may, at the discretion of the ALJ, result in the exclusion or restriction of evidence at the hearing.

(h) All prehearing/settlement conference statements shall be served on all other parties 10 calendar days prior to the prehearing/settlement conference, and a copy shall be provided to the assigned ALJ at the pre hearing/ settlement conference.

(i) Upon a showing of good cause, a party may amend his or her prehearing/settlement conference statement. If the amendment is based upon the discovery of new information, the amendment shall be filed within 10 days of learning such information. When a party seeks to amend the prehearing/settlement conference statement, the party shall promptly serve on all other parties and file with the Appeals Division a complete, new prehearing/settlement conference statement incorporating the amendments, along with a declaration supporting his or her request and establishing good cause. The party seeking to amend the statement shall use highlighting or italics or any other effective method to identify the changes made. The new prehearing/settlement conference shall be titled a "First Amended Prehearing/Settlement Conference Statement," and subsequent amended statements shall be titled consecutively.

(j) Each party shall bring a copy of the prehearing/settlement conference statement as well as a draft of any settlement proposal on a portable drive or in digital format to the prehearing/settlement conference.

(k) Where a case cannot be settled at the prehearing/settlement conference, the ALJ may address such issues as:

- (1) Discovery disputes;
- (2) Preparation of stipulations;
- (3) Clarification of issues;
- (4) Rulings on identity and limitation of the number of witnesses;
- (5) Objections to proffers of evidence;
- (6) Order of presentation of evidence and cross-examination;
- (7) Rulings regarding issuance of subpoenas and protective orders; and
- (8) Any other matters that promote the orderly and prompt conduct of the hearing.

(l) Failure of any party to appear and/or proceed at a prehearing/settlement conference shall be deemed a withdrawal of the appeal or the action, unless the hearing is continued for good cause pursuant to section 58.3.

(m) An ALJ presiding over a prehearing/settlement conference for a back pay claim or a request for back pay hearing shall instruct the parties, consistent with section 61, which parties have the burden to prove which portions of the case at the evidentiary hearing.

Note: Authority cited: Section 18701, Government code. Reference: Sections 18675, 11511.5, and 11511.7, Government Code.

## **§ 57.2. Consolidated Proceedings; Separate Proceedings**

a) When proceedings that involve a common question of law or fact are pending, the Chief ALJ or his designee on the judge's own motion, or on the motion of a party, may order a joint hearing of any or all matters at issue in the proceedings. The Chief ALJ or his designee may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) A party who brings a motion for consolidated proceedings or separate proceedings shall comply with section 60.1.

(c) Where a motion for consolidated proceedings or separate proceedings is made on the day of the hearing, the moving party must demonstrate that the issues were not discoverable at an earlier time.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **Subarticle 3. Hearings**

#### **§ 58.1. Waiver of Government Code Section 18671.1**

(a) For any appeal pending before the Appeals Division, if the Appellant does not affirmatively waive the provisions of section 18671.1 of the Government Code, then the Appeals Division has the discretion to either set the matter for hearing at any location the Board determines will be able to hold the hearing in the most expeditious manner possible, or require the hearing to be held by telephonic conference call, or video conferencing pursuant to section 58.6 .

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18701, 18671.1 and 18675, Government Code.

#### **§ 58.2. Requests for Priority Hearing in Appeals and Complaints from Dismissal**

(a) For appeals from actions resulting in the termination of an employee, where an evidentiary hearing has not commenced within 6 months of the filing of the appeal, an Appellant may request a priority hearing with the board. Requests for priority hearing shall be in writing, and shall be filed with the Appeals Division, with copies sent to all other parties.

(b) Upon a request for a priority hearing as provided in subdivision (a), the evidentiary hearing shall be scheduled to occur within 60 days of the request at an SPB hearing location designated by the Chief ALJ or his or her designee, and may where practicable, utilize an electronic proceeding as set forth in section 58.6, for all or part of the hearing.

Note: Authority cited: Sections 18671.1 and 18701, Government Code. Reference: Sections 18671.1 and 18675, Government Code.

#### **§ 58.3. Dismissal of Appeals Not Brought to Hearing and Failure to Proceed**

(a) Any appeal assigned to the ALJ, hearing officer, Chief ALJ's designee, or presiding officer, shall be dismissed unless it is brought to hearing within three years after such appeal was filed with the Board. "Brought to hearing" means

when the record is opened for the purpose of initiating the evidentiary hearing pursuant to section 51.2(i).

(b) Failure of any party to proceed at a hearing or a prehearing/settlement conference, shall be deemed a withdrawal of the appeal or the action, unless the hearing is continued for good cause.

Note: Authority: Section 18701, Government Code. Reference: Section 18675(a) Government Code.

#### **§ 58.4. Hearings are Public**

Every appeal hearing, including the hearing of an adverse action appeal, shall be public, unless otherwise required by law to be closed to the public.

(a) A hearing shall be open to public observation. Nothing in this subdivision limits the authority of the presiding officer to order on the record, closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes:

(1) To satisfy the United States Constitution, the California Constitution, federal or state statute, or other law, including but not limited to laws protecting privileged, confidential, or other protected information.

(2) To ensure a fair hearing in the circumstances of the particular case.

(3) To conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability, as defined in section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

(b) To the extent a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity to be physically present at the place where the presiding officer is conducting the hearing.

(c) This section does not apply to a prehearing conference or settlement conference, or proceedings for alternative dispute resolution.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

#### **§ 58.5. Exclusion of Witnesses**

Upon the motion of any party, ALJ, hearing officer, Chief ALJ's designee, or presiding officer shall have the authority to exclude from the hearing room any

witnesses not at the time under examination; but a party to the proceeding, or the party's counsel or other person representing a party, shall not be excluded. When a state agency is a party it is entitled to the presence of one other officer or employee in addition to its counsel or representative.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 58.6. Electronic Proceedings**

(a) The presiding ALJ may, upon the motion of a party or upon the presiding ALJ's own motion, conduct all or part of a hearing by telephonic conference call or video conference if each participant in the proceeding has an opportunity to participate in and hear the entire proceeding while it is taking place and to observe exhibits.

(b) If a party objects, the presiding ALJ may proceed upon a finding that no party to the proceeding will be prejudiced by all or part of the hearing being conducted by telephone or other electronic means.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 58.7. Request for Security**

(a) Any party or participant in an evidentiary hearing may request security for the hearing. The request shall be made as soon as the need for security is known. The request shall be filed with the Appeals Division and directed to the Chief ALJ or the assigned ALJ. To ensure that appropriate safety measures are arranged, the person requesting security shall inform the Chief ALJ, or the assigned ALJ, the nature of the security risk.

(b) The Chief ALJ or his or her designee will evaluate the request for security and make the decision whether to provide security. Costs for security are reimbursed pursuant to Government Code section 18671.2.

(c) If the request for security is made without sufficient time for appropriate security personnel to be procured, the Chief ALJ, or the assigned ALJ, has the discretion to continue the proceeding.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

### **§ 58.8. Accommodation for Persons with Disabilities**

In proceedings where an Applicant has a disability requiring accommodation either at the hearing or at any other stage of any administrative adjudication at

the State Personnel Board (SPB), the Applicant shall be responsible for requesting accommodations.

(a) "Persons with disabilities" means individuals covered by California Civil Code section 51 et seq.; the Americans With Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.); or other applicable state and federal laws. This definition includes persons who have a physical or mental impairment that limits one or more of the major life activities, have a record of such impairment, or are regarded as having such an impairment.

(b) "Applicant" means any lawyer, party, witness, or other person with an interest in attending any proceeding before the SPB.

(c) "Accommodations" means actions that result in services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites. Although not required where other actions are effective in providing access to SPB services, programs, or activities, alteration of existing facilities by the SPB may be an accommodation.

(d) Process for Requesting Accommodations

The process for requesting accommodations is as follows:

(1) Requests for accommodations may be presented ex parte on a form provided by SPB, in another written format, or orally. Requests must be forwarded to the SPB Appeals Division to the attention of the Presiding Administrative Law Judge.

(2) Requests for accommodation must include the name of the Appeal and SPB's case number, along with a description of the accommodation sought, along with a statement of the impairment that necessitates the accommodation. The SPB, in its discretion, may require the applicant to provide additional information about the impairment.

(3) Requests for accommodation must be made as far in advance as possible, and in any event must be made no fewer than 30 days before the requested implementation date. The SPB may waive this requirement for good cause.

(4) The SPB will keep confidential all information of the Applicant concerning the request for accommodation, unless confidentiality is waived in writing by the applicant or disclosure is required by law. The Applicant's identity and confidential information will not be disclosed to the public or to persons other than those involved in the accommodation process. Confidential information

includes all medical information pertaining to the Applicant, and all oral or written communication from the Applicant concerning the request for accommodation.

(5) Permitted communication under this rule must address only the accommodation requested by the applicant and must not address, in any manner, the subject matter or merits of the proceedings before SPB.

(e) Response to Accommodation Request

The SPB will respond to a request for accommodation as follows:

(1) The SPB will inform the Applicant in writing, as may be appropriate, and if applicable, in an alternative format, of the following:

(A) That the request for accommodation is granted or denied, in whole or in part, and if the request for accommodation is denied, the reason therefore; or that an alternative accommodation is granted:

(B) The nature of the accommodation to be provided, if any; and

(C) The duration of the accommodation to be provided.

(f) Denial of Accommodation Request

A request for accommodation may be denied only when the SPB determines that:

(1) The applicant has failed to satisfy the requirements of this rule;

(2) The requested accommodation would create an undue financial or administrative burden on the SPB; or

(3) The requested accommodation would fundamentally alter the nature of the service, program, or activity.

(g) Review Procedure

(1) An Applicant or any participant in the proceedings in which an accommodation request has been granted or denied may seek review of a determination made by the Presiding ALJ within 10 days of the date of the response by submitting, in writing, a request for review to the Chief Administrative Law Judge or his or her designee.

(h) Duration of Accommodations

The accommodation by the SPB must be provided for the duration indicated in the response to the request for accommodation and must remain in effect for the

period specified. The SPB may provide an accommodation for an indefinite period of time for a limited period of time, or for a particular matter or appearance.

### **§ 58.9. Interpreters**

(a) As used in this section, “language assistance” means oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

(b) Nothing in this section limits the application or effect of section 754 of the Evidence Code to interpretation for a deaf or hearing impaired party or witness in an adjudicative proceeding.

(c) All hearings shall be conducted in English. If a party or the party’s witness needs language assistance, that party or the party’s witness must notify the Chief ALJ or the assigned ALJ, no later than 15 days before the hearing, that an interpreter is going to be utilized. Such notification must identify the interpreter, and provide evidence of certification.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, 11435.05, 11435.10, 11435.20, and 11435.25, Government Code.

### **§ 58.10. Official Notice**

Official notice may be taken of those matters specified in section 11515 of the Government Code by the ALJ, Chief ALJ’s designee, hearing officer, or presiding officer in any hearing or investigative review, in accordance with the provisions of that Section.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675 and 11515, Government Code.

### **§ 58.11. Notice of Settlement**

(a) The parties shall promptly notify the Appeals Division of any resolution that terminates a case assigned for hearing. The Appeals Division shall vacate all hearing dates upon receipt of a written request signed by all parties notifying the Appeals Division that the appeal or complaint, or personnel action has been withdrawn through settlement.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.



## **§ 58.12. Documents Introduced Into Evidence**

Each party shall bring to the hearing at least four exact copies of any document that the party intends to mark as an exhibit during the course of the hearing. Failure of a party to possess at least four copies of any document that the party proposes to introduce into evidence may prohibit its use at hearing.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **§ 58.13. Court Reporters**

At the request of any party, a hearing may be recorded by a certified court reporter approved by the Chief ALJ or his or her designee. The certified court reporter shall be retained by the board. The cost of the court reporter shall ultimately be borne by the person making the request. The board shall receive a copy of the transcript from the court reporter at no expense to the board.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **Subarticle 4. Discovery**

### **§ 59.1. Request for Discovery; Statements; Writings; Investigative Report; Witness List**

(a) Except as otherwise provided in subdivision (a) (1), each party to an appeal, complaint, or any other matter scheduled for an evidentiary hearing, is entitled to serve a request for discovery on any other named party to the complaint or appeal. All requests for discovery shall be served on the responding party no later than 90 days after filing the appeal or complaint with the board. The right to inspect documents and interview witnesses provided for under Government Code section 19574.1 is separate and distinct from a request for discovery expressed in this section and is not governed by the provisions of this section.

(1) For appeals from Notice of Adverse Action served pursuant to Government Code section 19574 or 19590, a request for discovery may only be served by the Appellant or the Appellant's representative upon the Respondent as provided for in subdivision (a). However, a Respondent may serve a request for discovery on Appellant in said appeal no later than 15 days after the prehearing/settlement conference solely for the purpose of obtaining information relevant to any affirmative defense alleged by Appellant in the prehearing/settlement conference statement. If Appellant amends his or her prehearing/settlement conference statement after a prehearing/settlement conference to include an affirmative defense,

Respondent may serve a request for discovery on Appellant no later than 15 days after receiving the amended prehearing/settlement conference statement. If Appellant alleges an affirmative defense simultaneously with filing his or her appeal, a Respondent may serve a request for discovery on Appellant no later than 90 days after the Respondent's receipt of Appellant's defense to the notice of proposed action.

(b) Any party seeking discovery beyond the 90 days from the filing of an appeal or complaint with the board or more than 15 days after the prehearing/settlement conference or the receipt of a prehearing/settlement conference statement, may do so only upon an order issued by the Chief ALJ or his or her designee. The party seeking discovery must file a petition showing good cause why they exceeded the 90, or 15, day periods, and shall attach a copy of the proposed discovery request. The matter will be decided upon the moving papers by the assigned ALJ, in his or her discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. No hearing on the motion will be scheduled.

(c) A request for discovery may include the following:

(1) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law. The responding party may, at his or her discretion, provide either the home or business address of the witness, except to the extent that disclosure of the address is prohibited by law;

(2) Statements, as defined in Evidence Code section 225, to the extent such statements exist as of the date of the request, of witnesses proposed to be called during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal. The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently amend their witness list if they intend to call additional witnesses not previously disclosed;

(3) All writings, as defined in Evidence Code section 250, that the responding party proposes to enter into evidence. The responding party shall, upon a showing of good cause and subject to the discretion of the ALJ, subsequently provide the requesting party with additional writings that it proposes to enter into evidence;

(4) Any other writing or thing that is relevant to the appeal or complaint; and

(5) Investigative reports made by or on behalf of any party pertaining to the act, omission, event, decision, condition or policy which is the basis for the appeal or complaint, including all supporting materials, pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in subdivision (c)(5) (A) to (B), inclusive, or summary thereof.

(d) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production, within 30 days of receipt of the discovery request. The parties may extend the deadline by mutual agreement, by no more than 30 days.

(1) A responding party may object to any item or category demanded in a request for discovery in whole or in part. The objection must:

(A) Identify with particularity the specific document or evidence demanded to which the objection is made; and

(B) Set forth the specific ground for objection, including claims of privilege, work product, or right of privacy protection.

(C) If an objection is based on a claim of privilege, the particular privilege invoked shall be stated.

(D) If an objection is based on a claim that the information sought is protected work product, that claim shall be expressly asserted.

(2) If a responding party fails to serve a timely response to a request for discovery:

(A) The responding party waives any objection to the request for discovery, including one based on privilege or on the protection for work product.

(B) At the discretion of the assigned ALJ, a responding party may be relieved from this waiver based upon a determination that both of the following conditions are satisfied:

(i) The responding party has subsequently served a response that is in substantial compliance with the request for discovery, and

(ii) The responding party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(e) Failure to produce information or material responsive to a request for discovery may result in the exclusion of a witness or other evidence at the discretion of the assigned ALJ. A responding party may, at the discretion of the assigned ALJ, and upon a showing of good cause amend a response to request for discovery no later than 30 days prior to the evidentiary hearing.

Note: Authority cited: Sections 18701 and 18214, Government Code.  
Reference: Sections 225 and 250, Evidence Code; and Sections 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

### **§ 59.2. Depositions**

(a) On verified petition of any party, the Chief ALJ or the assigned ALJ may order the testimony of any material witness residing within or without the state be taken by deposition in the manner prescribed in Government Code section 18673.

(b) Any party who requests to submit a deposition in lieu of testimony at the hearing shall identify those portions of the deposition that are relevant to the issues of the case.

(c) At the discretion of the Chief ALJ or the assigned ALJ as set forth in section 56.1, in lieu of a deposition, witness testimony may be conducted by video conferencing.

Note: Authority cited: 18701, Government Code. Reference: Sections 11511, 18673, and 18675, Government Code.

### **§ 59.3. Subpoenas**

(a) Licensed members of the California State Bar in a representative capacity, may issue subpoenas and subpoenas duces tecum to compel attendance of an individual at a hearing or production of an item at any reasonable place and time, so long as the individual being served does not reside more than 100 miles from the location where the hearing or investigation is to be held, or more than 100 miles from the location where the witness testifies or is interviewed if testimony or a statement is taken electronically pursuant to section 58.6, whichever applies.

- (1) If a witness resides more than 100 miles from the hearing location, the party intending to serve the subpoena must submit an affidavit or a declaration attesting to the materiality of the witness to the Chief ALJ or his or her designee.
- (b) Subpoenas and subpoenas duces tecum issued pursuant to (a)(1), or at the request of a person not licensed as a member of the State Bar, shall be issued by the Chief ALJ or his or her designee.
- (c) Subpoenas and subpoenas duces tecum issued under this section shall be on a form provided by the board, (SPB-76, Revised 12/09), attached as Appendix "A" to these regulations.
- (d) A person served with a subpoena or subpoena duces tecum may object to its terms by a motion for a protective order and/or for a motion to quash. The motion shall be made within 15 days after receipt of the subpoena.
- (e) Witness fees are to be remitted pursuant to Government Code section 18674.

Note: Authority: Section 18701, Government Code. Reference: Sections 18672 through 18675, Government Code.

#### **§ 59.4. Abuse of the Discovery Process; Sanctions**

- (a) Abuse of the discovery process includes, but is not limited to, the following:
- (1) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.
  - (2) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.
  - (3) Failing to respond or to submit to an authorized method of discovery.
  - (4) Making, without substantial justification, an unmeritorious objection to discovery.
  - (5) Making an evasive response to discovery.
  - (6) Disobeying an order to provide discovery.
  - (7) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

(8) Failure to meet and confer for an informal resolution of a discovery dispute.

(b) At the discretion of the Chief ALJ or the assigned ALJ, any party who is found to have abused the discovery process as set forth in subdivision (a) shall be subject to sanctions as ordered by the Chief ALJ or the assigned ALJ. Such sanctions may include:

(1) An order prohibiting the introduction of designated matters into evidence by the abusing party;

(2) An order establishing designated facts, claims, or defenses against the abusing party; and/or

(3) Any other order as the Chief ALJ or assigned ALJ may deem appropriate under the circumstances.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **Subarticle 5. Law and Motion**

### **§ 60.1. Law and Motion; Procedures; Motions**

(a) The following motions shall be filed with the Appeals Division no later than 90 days from the date the appeal or complaint was filed with the SPB:

(1) Failure to State a Cause of Action: Will only be heard where it pertains to Discrimination, Harassment, Retaliation, and Whistleblower Retaliation Cases.

(2) Motion to Dismiss; and

(3) Motion to Strike.

(b) The following motions shall be filed with the Appeals Division within 15 days subsequent to learning of the basis for the motion:

(1) Motions to compel deposition of an unavailable witness pursuant to section 60.3;

(2) Motion for Change of Venue;

(3) Consolidation or severance of matters for hearing pursuant to section 57.2; and

(4) Motion to suppress evidence based upon a party's failure to timely file or fully disclose all required items in the prehearing/settlement conference statement pursuant to section 57.1, subdivision (f)(10).

(c) Other motions shall be filed with the Appeals Division no later than 15 days after learning of the basis for the motion.

(d) The board shall provide a motion form for use by a party who is representing him or herself. A party representing him or herself is not required to use the motion form to file a motion. If such a party does not use the motion form to file a motion, and does not otherwise comply with this section, the Chief ALJ or his or her designee may reject the motion.

(e) Prior to the filing and service of any law and motion matter under subdivision (a), the moving party must secure a date and time for the hearing on the motion from the Appeals Division Calendar Clerk, and this information shall be included on all copies of the motion filed with the SPB and served on all parties. The moving party shall file their motion with the Chief ALJ or his or her designee, and serve all parties no later than 30 days prior to the hearing date scheduled with the Appeals Division Calendar Clerk. No hearing shall be held on any motion filed pursuant to subdivisions (b) and (c), unless determined necessary by the Chief ALJ or his or her designee.

(f) Motions, Oppositions to Motions, and Replies to Oppositions must be filed with the Chief ALJ or his or her designee, and served on all parties pursuant to section 52.10.

(g) Oppositions to Motions must be filed with the Chief ALJ or his or her designee, and served on all parties no later than 15 days after service of the motion.

(h) Replies to Oppositions must be filed with the Chief ALJ or his or her designee, and served on all parties no later than 8 days after service of the Opposition.

(i) If the motion is to be heard via a telephonic conference call, the party requesting the telephonic conference call is responsible for making arrangements with a telephone service provider, such that the assigned ALJ shall be provided the opportunity to call into the conference call at the designated date and time of the hearing. Calling instructions shall be provided to the Appeals Division within 5 days prior to the hearing.

(j) Motions and Oppositions shall be limited to 15 pages. In addition, the motion may be supported by such documentation as affidavits, declarations, depositions, and matters of which official notice shall or may be taken. Replies to Oppositions shall be limited to 5 pages.

(1) Where a motion or opposition is supported by additional documentation, the motion must specifically identify the relevant portions of each piece of documentation. Failure to identify the relevant portions may, at the discretion of the Chief ALJ or his or her designee, result in the supporting documentation not being considered.

(k) Failure to comply with the requirements of subdivisions (a) through (i) may, in the discretion of the assigned ALJ, constitute sufficient ground for denial of the motion.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **§ 60.2. Motions for Hearing Continuances**

(a) Motions for continuance of a hearing shall be considered only upon the moving papers. No hearing on the motion will be scheduled.

(b) Grounds for continuance

(1) Motions for continuances based upon good cause shall be considered only if filed no later than 10 days subsequent to learning of the basis for a continuance. Circumstances that may indicate good cause include:

(A) The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;

(B) The unavailability of a party or counsel because of death, illness, or other excusable circumstances;

(C) The substitution of counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;

(D) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts.

(2) Motions for continuances by mutual agreement of the parties shall be considered only if filed no later than 90 days prior to the hearing. The motion must be signed by all parties or their representatives.

(3) When the acts or omissions that lead to an adverse action or rejection also lead to criminal charges being filed against the Appellant, continuances shall be granted when the parties mutually concur to allow for completion of the criminal proceedings, subject to the three year limitation in section 58.3.



(c) Requirements for filing a motion for continuance

- (1) The moving party must meet and confer with all other parties on the motion prior to filing the motion with the Appeals Division, directed to the Chief ALJ or his or her designee pursuant to section 52.5.
  - (2) The motion shall include all facts which support the request to continue the hearing, as well as the following information;
    - (A) The case name and SPB case number;
    - (B) The date, time and place, and type of hearing to be continued;
    - (C) The address and daytime telephone number of the moving party and all other parties;
    - (D) A list of all previous motions to continue the hearing and the dispositions;
    - (E) The positions of all nonmoving parties to the motion;
    - (F) Any future dates when the parties are unavailable for hearing over the next three months and any preferred future hearing dates;
    - (G) If Appellant is the moving party, whether Appellant waives the provisions of section 18671.1 of the Government Code; and
    - (H) All factual assertions must be accompanied by a declaration under penalty of perjury, that the facts are true and correct.
- (d) In ruling on a motion for continuance, the ALJ shall consider all the facts and circumstances that are relevant to the determination. These may include:
- (1) The proximity of the hearing date;
  - (2) Whether there was any previous continuance, extension of time, or delay of a hearing due to any party;
  - (3) The length of the continuance requested;
  - (4) The prejudice that parties or witnesses will suffer as a result of the continuance;
  - (5) The hearing calendar and the impact of granting a continuance on other pending cases;
  - (6) Whether counsel is engaged in another hearing;

- (7) Whether all parties have stipulated to a continuance;
- (8) Whether the interests of justice are best served by a continuance, by the hearing of the matter, or by imposing conditions on the continuance; and
- (9) Any other fact or circumstance relevant to the fair determination of the motion.

Note: Authority: Section 18701, Government Code. Reference: Section 18675, Government Code

### **§ 60.3. Motion to Compel Discovery**

- (a) A petition or motion to compel a request to inspect documents under Government Code section 19574.1 is governed by the procedures provided in Government Code section 19574.2. Motions to compel a request for discovery issued pursuant to section 59.1 are governed by the procedures stated in subdivisions (b) through (e).
- (b) Any party seeking further responses to a request for discovery shall meet and confer with the responding party.
- (c) After complying with subdivision (b), a party may serve and file with the Appeals Division a motion to compel discovery, naming as responding party any party who has refused or failed to provide discovery as required by section 59.1. A copy of the motion shall be served on the responding party on the same date the motion is filed with the Appeals Division. The motion shall be served upon the responding party and filed with the Appeals Division within 14 days after the responding party first evidenced his or her failure or refusal to comply with section 59.1.
- (d) The matter will be decided upon the moving papers, as well as any responses and replies unless ordered otherwise.
- (e) The motion shall state facts showing the responding party failed or refused to comply with section 59.1, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the issue has been made, and the grounds of the responding party's refusal.
- (f) Motions, responses and replies shall be limited to 15 pages. In addition, the motion may be supported by such documentation as affidavits, declarations, depositions, and matters of which judicial notice shall or may be taken.

(1) Where a motion or opposition is supported by additional documentation, the motion must specifically identify the relevant portions of each piece of documentation. Failure to identify the relevant portions may, at the discretion of the Chief ALJ or his or her designee, result in the supporting documentation not being considered.

(2) The responding party shall have a right to file an opposition to the motion within 15 days of service of the motion. Any reply to the opposition shall be filed with the Chief ALJ or his or her designee and served on the moving party within 10 days of service of the opposition motion.

Note: Authority cited: Section 18701, Government Code. Reference: Section 915, Evidence Code; and Sections 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

## **Subarticle 6.**

### **§ 61. Claims for Back Pay and Requests for Back Pay Hearings**

(a) This section applies to Appellants:

(1) who are entitled to salary pursuant to Government Code sections 19584, 19180, 19253.5, and 19585; and

(2) whose appeals with the board resulted in a final board decision:

(A) revoking or modifying Appellant's adverse action;

(B) restoring a rejected probationer to his or her position;

(C) revoking or modifying a medical demotion, transfer, or termination; or

(D) revoking or modifying a non-punitive termination, demotion, or transfer.

(b)(1) Any Appellant described in subdivision (a) may file a claim with the board for back pay, if Respondent has not restored the Appellant's salary, with appropriate interest, and, if appropriate, the reinstatement of all relevant benefits. Appellant shall, consistent with section 52.4, serve Respondent with a copy of a back pay claim.

(2) Any Respondent that is a party to a proceeding in which the board has directed the payment of appropriate salary, benefits, and interest to an Appellant described in subdivision (a) may file a request for a back pay hearing, in the event that the Respondent and the Appellant are unable to agree to the salary,

benefits, and interest, if any, due to Appellant. Respondent shall, consistent with section 52.4, serve Appellant with a copy of the request for back pay hearing.

(c) A claim for back pay or a request for back pay hearing shall include:

- (1) A description of any salary for which Respondent has reimbursed Appellant, including the total dollar amount of salary and the time period for which the salary is being reimbursed;
- (2) A description of any benefits for which Respondent has reimbursed Appellant, including the total dollar amount of benefits and the time period for which the benefits are being reimbursed;
- (3) A description of any interest for which Respondent has reimbursed Appellant, including the rate, the total dollar amount of interest, and the time period for which the interest is being reimbursed;
- (4) A description of any salary which remains unpaid by Respondent, including the total dollar amount of unpaid salary and the time period that corresponds to the unpaid salary;
- (5) A description of any benefits which remain unpaid by Respondent, including the total dollar amount of unpaid benefits and the time period that corresponds to the unpaid benefits;
- (6) A description of any interest payments which remain unpaid by Respondent, including the total amount of unpaid interest, the rate that Respondent should have paid, and the time period that corresponds to the unpaid interest payments;
- (7) A description of what, if any, other out of pocket expenses remain unpaid by Respondent, including the total dollar amount of unpaid expenses and the time period that corresponds to the unpaid expenses; and
- (8) A statement of any other issues that remain unresolved between Appellant and Respondent.

(d) Within 45 days of receipt of a back pay claim, Respondent or Appellant shall file an answer to the back pay claim or request for back pay hearing filed by the opposing party. The answer shall include:

- (1) A description of any salary for which Respondent has reimbursed Appellant, including the total dollar amount of salary and the time period for which the salary is being reimbursed;

(2) A description of any benefits for which Respondent has reimbursed Appellant, including the total dollar amount of benefits and the time period for which the benefits are being reimbursed;

(3) A description of any interest for which Respondent has reimbursed Appellant, including the rate, the total dollar amount of interest, and the time period for which the interest is being reimbursed;

(4) An explanation for why Respondent has not paid Appellant additional salary which Appellant claims he or she is owed, if applicable;

(5) An explanation of why Respondent has not paid Appellant additional benefits which Appellant claims he or she is owed, if applicable;

(6) A description of why Respondent has not paid Appellant additional interest payments which Appellant claims he or she is owed, if applicable;

(7) A description of why Respondent has not paid Appellant the other out of pocket expenses which Appellant claims he or she is owed, if applicable; and

(8) A statement of any other issues which remain unresolved between Appellant and Respondent.

(e) A claim for back pay or request for back pay hearing which meets all of the requirements of this section shall be scheduled for an evidentiary hearing, as described in Article 6.

(f) Prior to the parties' prehearing/settlement conference, as described in section 57.1, the Appellant and Respondent shall meet and confer to determine the issues which remain unresolved between the parties and the facts to which the parties can stipulate.

(g) Consistent with section 57.1, the ALJ conducting a prehearing/settlement conference for a back pay claim or request for back pay hearing shall instruct the parties who shall have the burden of proof for contested issues. Instructions shall include the following:

(1) Appellant shall have the burden to prove that he or she is entitled to the reimbursement of any salary and benefit described in section 51.2, subdivision (i);

(2) Respondent shall have the burden to prove that the back pay for an Appellant entitled to salary pursuant to Government Code sections 19584, 19253.5, or 19585 should be offset because Appellant earned, or might reasonably have earned, salary during any period commencing more than

six months after the initial date of the suspension, demotion, transfer, or termination;

(3) Respondent shall have the burden to prove that the back pay for an Appellant entitled to salary pursuant to Government Code section 19180 should be offset because Appellant earned, or might reasonably have earned, salary in private or public employment during the period the rejection was improperly in effect; and

(4) Respondent shall have the burden to prove that Appellant was not ready, able, and willing to perform the duties of his or her position for any period of time that the Appellant was subject to the improper action or rejection.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 19584, 19180, 19253.5, and 19585, Government Code.

#### **Subarticle 7.**

#### **§ 62. Decisions**

A board decision on an appeal or a complaint becomes final the day the decision rendered by the board is served by the board upon the parties to the decision. This section does not apply to whistleblower retaliation complaints.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 19582, 19586, Government Code.

### **ARTICLE 7. NAME CLEARING HEARINGS**

#### **§ 63.1. Name Clearing Hearing Procedures**

(a) In those situations where an employee's Limited Term (LT), Seasonal, or Temporary Authorization (TAU) appointment is terminated for fault, based on charges of misconduct which might stigmatize his or her reputation, or seriously impair his or her opportunity to earn a living, or which might seriously damage his or her standing or association in his community, the employee shall be entitled to file a request for a "Name Clearing" Hearing to be conducted by the appointing authority.

(b) Any Name Clearing Hearing conducted by an appointing authority should, at a minimum, conform to the following requirements:

(1) The employee should file his or her request with the appointing authority within five business days of the effective date of the notice of termination;

(2) The appointing authority should conduct the hearing and issue its decision within 21 days of the effective date of the notice of termination, unless the employee agrees to a hearing to be conducted at a later date;

(3) The employee should be entitled to be represented by a representative of his or her choosing;

(4) The appointing authority's representative should be a neutral, impartial decision-maker, who has the authority to sustain the termination, or revoke the "for fault" designation concerning the appellant's termination;

(c) Upon conclusion of the hearing, the appointing authority's representative shall determine whether the allegations contained in the notice of termination are supported. If the allegations are not supported, a decision shall be issued to reflect that the employee's termination was without fault. Such a decision will not, however, require that the appellant be reinstated to his or her position, except as otherwise required by law.

(d) The Board does not conduct Name Clearing Hearings, nor is there any right of appeal to the Board from a decision by an appointing authority, except as otherwise required by law.

Note: Authority cited: Section 18701, Government Code. Reference: Section 18675, Government Code.

## **ARTICLE 8. DISCRIMINATION COMPLAINT PROCESS**

### **§ 64.1. Discrimination; Harassment; Retaliation; Denial of Reasonable Accommodation**

Any state civil service employee, or applicant for state civil service employment, who reasonably believes that he or she has been subjected to discrimination, harassment, retaliation, or denied reasonable accommodation for a known physical or mental disability in state employment, on any basis listed in section 19701 or 19702 of the Government Code, or subdivision (a) of section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code, may file a complaint by complying with the provisions of Sections 64.2 through 64.6.

Note: Authority cited: Section 18701, Government Code. Reference: Sections, 18675, 19701 and 19702, Government Code.

### **§ 64.2. Prerequisites for Filing a Discrimination Complaint with the Board**

Any state civil service employee or applicant for state civil service employment who reasonably believes that he or she has been subjected to discrimination, harassment, retaliation, or denied reasonable accommodation for a known

physical or mental disability in employment shall first file a written complaint with the appointing power's Equal Employment Opportunity Office, or other office or individual designated by the appointing power to investigate such complaints, prior to filing a discrimination complaint with the SPB.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19701 and 19702 1, Government Code.

### **§ 64.3. Appointing Power Discrimination Complaint Process**

(a) Each appointing power shall establish in writing its own internal discrimination complaint process through which a complainant may obtain review of, and a written response to, an allegation of discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability.

(b) Each complaint filed with the appointing power shall be in writing and shall state the facts upon which the complaint is based, and the relief requested, in sufficient detail for the appointing power to understand the nature of the complaint and to determine the individuals involved. The complained of act, omission, event, decision, condition, or policy must have occurred no more than one year prior to the date that the complaint is filed with the appointing power. This period may be extended by not more than 90 days in those cases where the complainant first obtained knowledge of the facts of the alleged discrimination more than one year from the date of its occurrence.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19701 and 19702, Government Code.

### **§ 64.4. Response of Appointing Power to Discrimination Complaint**

(a) The appointing power shall provide the complainant a written decision within 90 days of the complaint being filed. If the appointing power has not completed its review and/or is unable to provide a written decision within the 90 day time period, the appointing power shall, within that same time period, inform the complainant in writing as to the reason(s) it is unable to issue its decision within the required time period.

(b) Upon the expiration of the 90 day time period stated in this section, Complainant may thereafter file a discrimination complaint with the SPB as provided in section 64.5. However, a discrimination complaint may not be filed with the SPB more than 150 days after the complainant filed his or her complaint of discrimination with the appointing power.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19701 and 19702, Government Code.



## **§ 64.5. Requirements for Filing Discrimination Complaint with the SPB**

Any complaint to the SPB alleging discrimination, harassment, retaliation, or denial of reasonable accommodation for a known physical or mental disability shall be subject to the following filing requirements:

(a) The complaint shall be filed with the Appeals Division within 30 days of the date the appointing power served its decision concerning the complaint of discrimination on the Complainant. If the appointing power has failed to provide a decision to the Complainant within 90 days of the complaint being filed, the Complainant may file a complaint with the Appeals Division within 150 days of the date the Complainant filed his or her complaint of discrimination with the appointing power.

(b) The Complainant shall submit to the Appeals Division a complaint and any attachments, and enough copies for the SPB to serve each entity and person alleged to have engaged in discriminatory conduct and against whom damages and/or disciplinary action is sought.

(c) The complaint shall be in writing, and shall:

(1) identify the facts that form the basis for the complaint, including, but not limited to the specific protected classification or activity as set forth in sections 19701 or 19702 of the Government Code; all discriminatory acts experienced by the Complainant, including the date that each act occurred; the name and job title of each person who allegedly subjected Complainant to each discriminatory act; and all information that the Complainant possesses that shows that the complained of employment action(s) were the result of discriminatory conduct;

(2) identify all Respondents known to the complainant (i.e. the appointing power as well as all state employees alleged to have discriminated against the complainant), and identify the business address of each Respondent named as a party to the complaint. Unless the complainant names some other known Respondent, the Complainant's appointing power shall be considered the sole Respondent;

(3) have attached a copy of the Complainant's complaint of discrimination filed with the appointing power, together with a copy of the decision or other response of the appointing power to the complaint. If the appointing power failed to provide the Complainant with a written decision or other response to the discrimination complaint within the time period set forth in section 64.4, the Complainant shall so state in the complaint;

(4) specify the relief and/or remedies sought by the Complainant; and

(5) be limited to a maximum of 15 pages of double-spaced typed or printed text. Additional pages may be allowed upon a showing of good cause. The Complainant shall submit a separate document with the appeal stating the reasons for good cause. The 15 page limit does not apply to any documents attached to the appeal pursuant to the requirements of subdivision (3) of this section, or any other exhibits.

(d) The above procedures do not apply in those cases where a complaint raises discrimination as an affirmative defense to any case scheduled for hearing. A party who raises discrimination solely as an affirmative defense shall not be entitled to the relief specified in section 19702 of the Government Code, unless that party has also complied with all filing requirements set forth in sections 64.2 through 64.6.

Note: Authority cited: Sections 18701, Government Code. Reference: Sections 18675, 19701 and 19702 Government Code.

#### **§ 64.6. Acceptance of Complaint; Notice**

(a) If, after review of the complaint, the Appeals Division determines that the complaint does not meet all filing requirements, the Appeals Division shall notify the Complainant in writing of the reasons for its determination. The Complainant may file an amended complaint within 20 days of receipt of the notice of rejection of the complaint.

(b) Upon acceptance of the complaint or amended complaint, the Appeals Division shall serve the operative complaint on the named Respondents by mailing a copy of the complaint to the legal office, or other designated office, of the appointing power, and to the business address of any individually named respondent.

(c) The provisions of Article 6 of these regulations apply to discrimination complaints accepted by the Appeals Division.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 1970 and 19702, Government Code.

### **ARTICLE 9. MERIT ISSUE COMPLAINTS**

#### **§ 66.1. Merit Issue Complaints**

(a) Merit issue complaints are complaints that the State Civil Service Act or Board regulation or policy has been violated by a state agency. These complaints include but are not limited to, interference with promotional opportunities, interference with a person's access to any SPB appeals process, and the designation of managerial positions pursuant to Government Code section 3513. Merit issue complaints do not include appeals of actions that are specifically

provided for elsewhere in law or in Board regulations. Each state agency shall establish and publicize to its employees its process for addressing merit issue complaints. That process shall include provisions for informing employees of their right to appeal the state agency's decision on the merit issue complaint to the Appeals Division. Failure of a state agency to respond to a merit issue complaint within 90 days of receipt of the complaint shall be deemed a denial of the complaint's allegations and shall release the appellant to file an appeal directly with the Appeals Division. An appeal of a merit issue complaint shall be filed with the Appeals Division within 30 days of the state agency's denial of the complaint.

(b) Merit Issue Complaints are assigned to investigative review by an Investigative Officer pursuant to section 53.2.

Note: Authority cited: Section 18701, Government Code. Reference: Section 12940, 18675, 18952, 19701, 19702, 19230, 19231, Government Code.

## **ARTICLE 10. WHISTLEBLOWER RETALIATION COMPLAINT PROCESS**

### **§ 67.1. Whistleblower Retaliation Complaints**

Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code section 8547.2(b), or Education Code section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code section 8547.2(e), or Education Code section 87162(b), may file a complaint and/or appeal with the State Personnel Board in accordance with the provisions set forth in sections 67.2 through 67.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

Note: Authority cited: Section 18701, Government Code. Reference: Sections 87162, 87164, Education Code; and Sections 8547.2, 8547.8, and 19683, Government Code.

### **§ 67.2. Requirements for Filing Whistleblower Retaliation Complaint with the State Personnel Board**

An individual desiring to file a complaint of retaliation with the SPB must adhere to the following requirements:

(a) The complaint shall be filed with and received by the Appeals Division within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and attachments for the Appeals Division to serve each entity and

person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(b) All complaints shall be in writing and shall identify and include the following:

(1) Clearly identify the protected activity that the Complainant engaged in, the date(s) the Complainant reported the improper governmental activity, and the person(s) to whom the Complainant reported the improper governmental activity;

(2) Clearly identify the specific act(s) of reprisal or retaliation alleged to have occurred, and the entity and/or person(s) responsible for the reprisal or retaliation;

(3) A sworn statement, under penalty of perjury, that the contents of the complaint are true and correct;

(4) The name and business address of each individual and entity alleged to have committed reprisal or retaliatory acts;

(5) Specify what relief and/or damages Complainant is seeking against any Respondent(s) as a result of the alleged reprisal or retaliation, and include an extra copy of the complaint and all accompanying documents for the SPB to serve on each of the Respondents; and

(6) Whether the Complainant has filed a complaint of retaliation with the Office of the Inspector General pursuant to Penal Code section 6129, and if so, the date the complaint was filed.

(c) If adverse action is sought against any individually named Respondent, pursuant to the provisions of Government Code section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(d) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The Complainant shall submit a separate document with the complaint stating the reasons for good cause.

(e) The above procedures do not apply in those cases where an Appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code section 19175, when appealing a notice of medical action, pursuant to Government Code section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career

executive assignment termination pursuant to Government Code section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other SPB hearing, unless that party has first complied with all filing requirements set forth in this section.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2; and Section 6129, Penal Code.

### **§ 67.3. Acceptance of Whistleblower Complaint**

(a) Within 10 business days of receipt of the complaint, the Appeals Division shall determine whether it has jurisdiction over the complaint and whether the Complainant meets the filing requirements set forth in section 67.2. The Appeals Division shall also determine whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code sections 8547-8547.12 and 19683 and/or Education Code sections 87160-87164.

(b) If the Appeals Division determines that the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party may thereafter be permitted to file an amended complaint within 10 business days of service of the notice of non-acceptance of the complaint.

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 business days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

(2) refer the case for investigation in accordance with the provisions of section 67.4; or

(3) schedule the case for an informal hearing before a hearing officer, in accordance with the provisions of section 67.5.

(d) Except for those complaints amended pursuant to subdivision (b), any amendment for a whistleblower retaliation complaint may only be accepted upon a showing of good cause.

(e) In accordance with the provisions of Penal Code section 6129, the SPB shall be entitled to defer review of a complaint filed by an employee of the Department of Corrections and Rehabilitation in those cases where the employee has filed a similar complaint with the Office of the Inspector General.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

#### **§ 67.4. Cases Referred to Investigation**

(a) If the Executive Officer assigns a complaint for investigation, the Executive Officer or the assigned investigator(s) shall conduct the investigation in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators, pursuant to the provisions of Government Code section 18671, shall have authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this state under Article 3 (commencing with section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure, in order to ensure a fair and expeditious investigation.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation, in accordance with the provisions of section 67.6.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; Section 6129, Penal Code, and Section 2016 *et seq.*, Civil Procedure Code.

#### **§ 67.5. Cases Referred to Informal Hearing**

(a) For those complaints assigned to an informal hearing before a Hearing Officer the Appeals Division shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

- (1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named Respondent to serve on the Complainant and file with the Appeals Division, at least 10 days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code section 11445.10 *et seq.*, and may in the discretion of the Hearing Officer, include such supplemental proceedings as ordered by the Hearing Officer, and as permitted by section 11445.10 *et seq.* of the Government Code, to ensure that the case is heard in a fair and expeditious manner. The Hearing Officer shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the Hearing Officer. All parties shall, upon request and payment of applicable reproduction costs, be provided with a transcript or a copy of the recording of the informal hearing.

(c) Following the informal hearing and any supplemental proceedings, the Hearing Officer shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the Hearing Officer's findings and recommended remedies in their entirety; modify the Hearing Officer's findings and recommended remedies; or reject the Hearing Officer's findings and recommended remedies, and:

(1) issue independent findings after reviewing the complete record; or

(2) remand the case back to the Hearing Officer, or refer the matter to an ALJ for further proceedings.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

#### **§ 67.6. Findings of the Executive Officer**

(a) The Executive Officer shall issue a Notice of Findings within 60 business days of the date the Executive Officer accepts the complaint pursuant to section 67.3, unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled.

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive

Officer shall issue a Notice of Findings dismissing the complaint and that decision shall be deemed the final decision of the Board. The Notice of Findings shall notify the Complainant that his or her administrative remedies have been exhausted and that the Complainant may pursue whatever judicial remedies are available to him or her.

(c) In those cases where the Executive Officer concludes that the Complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named Respondents deemed to have engaged in retaliatory acts. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall identify the legal causes for discipline under section 19572 of the Government Code.

(d) The Notice of Findings shall inform any Respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Executive Officer, and served on all other parties within 30 days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the Board, or an evidentiary hearing before an ALJ, regarding the findings of the Executive Officer. The hearing shall be conducted in accordance with Article 6, beginning with section 56.1. If a timely request for hearing is not filed with the SPB, the Board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct prohibited by section 8547.3 of the Government Code.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, 19582, 19590 and 19683, Government Code; and Section 6129, Penal Code.

#### **§ 67.7. Disciplinary Action for Proven Retaliatory Acts**

(a) In those cases where the Board issues a final decision that finds that a manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's decision in that individual's Official Personnel File within 30 days of the issuance of the Board's order and to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's order, notify the Board that it has complied with the provisions of this subdivision.



(1) In accordance with the provisions of Penal Code section 6129, subdivision (c)(3), any employee of the Department of Corrections and Rehabilitation found to have engaged in retaliatory acts shall be disciplined by, at a minimum, a suspension without pay for 30 days, unless the Board determines that a lesser penalty is warranted. In those instances where the Board determines that a lesser penalty is warranted, the decision shall specify the reasons for that determination.

(b) In those cases where the Board issues a final decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall order the appointing authority to place a copy of the Board's decision in that individual's Official Personnel File within 30 days of the issuance of the Board's order and also, within 40 days of the issuance of the Board's order, notify the Board that it has complied with the provisions of this subdivision.

(c) Any decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

(1) 30 days has elapsed from the date the Executive Officer issued his or her Notice of Findings dismissing the complaint; or

(2) a request for hearing pursuant to section 67.7(c) has not been timely filed with the Board; or

(3) 30 days has elapsed from the date that the Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or

(4) a decision has been issued by the Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

### **§ 67.8. Consolidation with Other Hearings**

(a) The Executive Officer or the assigned ALJ shall possess the requisite discretion to direct that separate, reasonably related cases be consolidated into a

single hearing. Whenever two or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date, if the discovery provisions set forth in sections 59.1 through 59.4 are negatively impacted by the consolidation.

(b) In those cases where one or more individually named Respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named Respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

(c) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of section 67.2(c) each individually named Respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named Respondent;

(3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint;  
and

(6) to present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

## **CHAPTER 1, SUBCHAPTER 1.3**

### **ARTICLE 8. EXAMINATIONS**

#### **§ 211. Eligibility**

If an employee is dismissed from state employment by adverse action or as a result of disciplinary proceedings, that dismissed employee shall not thereafter be permitted to take any state civil service examination or be certified from an eligible list to any position in the state service without the prior consent of the Executive Officer.

Dismissed employees' requests to participate in state civil service examinations shall be subject to the following:

(a) Requests must be filed with the Board at least five (5) working days prior to the final filing date of the examination(s) for which the dismissed employee wishes to apply.

(b) All requests shall be in writing and accompanied by a completed state examination application.

(c) Requests shall clearly identify the facts, circumstances, and reasons that support the dismissed employee's request to take the examination(s). The request, at a minimum, shall include the date of the dismissal, the reasons for the dismissal, and the reasons why the dismissed employee believes that he or she should be permitted to take the examination(s). The dismissed employee may also submit substantiation of corrected behavior, letters of recommendation, employment evaluations, and other materials and/or declarations to support the request.

(d) Requests will be reviewed on a case-by-case basis, taking into consideration the following factors:

1. The type of examination/classification for which the dismissed employee wishes to apply.
2. The circumstances/causes surrounding the dismissal and any restrictions that impact the request.
3. Any pattern of successful employment after the dismissal.
4. Confirmation/assurance of corrected and/or sustained improved behavior.
5. Acceptance of responsibility for past wrongful actions.

6. Demonstration of readiness to re-enter state service.
7. Information, in writing, from the dismissing department responding to the dismissed employee's request to participate in the examination(s).
8. Any other factor deemed relevant to the request, including those factors set forth in Government Code Section 18935.

No later than 30 days after receipt of the request, the Executive Officer shall determine whether to grant the dismissed employee permission to participate in the examination(s). If the Executive Officer determines that additional time is necessary in order to obtain relevant information he or she may extend the time for determination and notify the dismissed employee of the extension and the reasons therefor. If the Executive Officer determines that the information submitted by the dismissed employee so warrants, the Executive Officer may grant the dismissed employee a blanket waiver to apply for any examination for which the dismissed employee meets the minimum qualifications. The Executive Officer shall set forth his or her decision in writing. A dismissed employee may appeal to the Board from the Executive Officer's decision within 30 days after receipt of that decision.

## **ARTICLE 14. PROBATIONARY PERIOD**

### **§ 321. Extension of Probationary Periods**

(a) In the event a probationer has not, during a prescribed calendar length of the probationary period, worked the hours set forth below, probation will automatically be extended until the probationer has worked the required number of hours.

- (1) 840 if serving a six months' probationary period; or
- (2) 1260 if serving a nine months' probationary period; or
- (3) 1680 if serving a one year probationary period.

Vacation, sick leave, military leave or other leave of absence, compensating time off, suspension or other separations, including separations subsequently voided or otherwise set aside, shall not be considered working time.

The board shall be notified of an extension under this section.

(b) If a probationer has had a continuous period of absence of 60 or more working days and upon return from such absence the appointing power determines that the remaining portion of the probationary period is insufficient to evaluate that probationer's current performance the appointing power may

extend the probationary period with the approval of the executive officer. The length of such extension shall be determined by the length of the completed portion of the probationary period at the beginning of the probationer's absence as follows:

(1) If up to one-third of the minimum number of hours required for the probationary period was worked, the remainder of the probationary period plus the extension shall not exceed the minimum number of hours required for the original probationary period.

(2) If over one-third but not more than two-thirds of the minimum number of hours required for completion of the probationary period was worked, the remainder of the probationary period plus the extension shall not exceed two-thirds of the minimum number of hours required to complete the original probationary period.

(3) If over two-thirds of the minimum number of hours required to complete the probationary period was worked, the remainder of the probationary period plus the extension shall not exceed one-third of the minimum number of hours required to complete the original probationary period.

(c) The probationary period may be extended for a maximum of five working days in order to comply with notice requirements as set forth in section 52.6 for rejection during probation.

(d) Pursuant to Government Code section 19170, an appointing power and an employee, who alleges that he/she has a disability as defined in Government Code section 12926, may submit a written agreement for approval by the board, that would extend the employee's probationary period within his/her existing classification for up to six months to provide a reasonable accommodation to the employee as follows:

(1) The agreement shall describe the period of the extension, beginning and ending dates, and how the extended probationary period will allow the employee to demonstrate, before the extended probationary period ends, the ability to satisfactorily perform the essential functions of the position with the reasonable accommodation. The written agreement must be received by the board for review prior to the end of the employee's probationary period.

(2) If the employee's probationary period will end during the board's review, the board will automatically extend the probationary period until a determination is made to approve or disapprove the agreement. This period of time is inclusive of the extension time requested by the department. If the board does not approve the agreement, the board will extend the employee's probationary period by an additional ten working days from the date of service of the board's determination, to allow the

appointing power sufficient time to proceed with a rejection during probation. This ten working day extension is in addition to that provided under subsection (c) above.

(e) Prior to the completion of the probationary period, the appointing power shall notify the employee in writing that the probationary period is being extended under this rule and of the length of the extension. Employees whose probationary periods are extended under this rule must also, over the entire course of their original and extended probationary periods, meet the minimum service requirements specified in subsection (a) above. The State Personnel Board shall notify the employee and the appointing power in writing of its decision to approve or disapprove any agreement reached pursuant to subsection (d) above.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 19170 and 19173, Government Code.

### **§ 322. Probationary Period Requirements**

Probationary period requirements for permanent appointments from an employment list; or by reinstatement, or by transfer, or by demotion are:

(a) A new probationary period shall be required when an employee enters or is promoted in the state civil service by permanent appointment from an employment list; upon reinstatement after a break in continuity of service resulting from a permanent separation; or by reinstatement or appointment from a reemployment list, pursuant to Section 548.152 or 548.153, to a classification with a promotional relationship to the classification of the employee's former position.

(b) An employee who has not attained permanent status when accepting another appointment shall serve the remainder of that probationary period unless required to serve a new probationary period.

(c) A new probationary period shall be required unless waived by the appointing power when an employee is being appointed:

(1) Without a break in service in the same class in which the employee has completed the probationary period but under a different appointing power.

(2) Without a break in service to a class with substantially the same or lower level of duties and responsibilities and salary range as a class in which the employee has completed the probationary period.

(3) From a general reemployment list to the same class in which the employee has completed the probationary period but under a different appointing power.

(4) By reinstatement or appointment from a reemployment list, pursuant to Section 548.152 or 548.153, to a classification to which the employee could have transferred from his or her former position.

(d) A new probationary period shall not be required when an employee is being appointed:

(1) From any reemployment list under the same appointing power, except as otherwise provided in this section;

(2) By reinstatement with a right of return, except as otherwise provided in this section;

(3) Without a break in service under the same appointing power and to the same class in which the employee had completed the probationary period; or

(4) By demotion under Government Code Section 19997.8.

"Without a break in service" as used in this section is continuous service as defined in Section 6.4.

Note: Authority cited: Section 19170, Government Code. Reference: Sections 18527 and 19171, Government Code.

#### **§ 324. Duty to Reject Probationer**

If the conduct, capacity, moral responsibility, or integrity of the probationer is found to be unsatisfactory, it shall be the duty of the appointing power to reject that probationer from the position.

#### **§ 325. Duty to Report Delinquencies**

If, during the probationary period of any state employee, there is presented to the executive officer convincing evidence that the moral conduct, character, or integrity of the employee is unsatisfactory, the executive officer shall present such evidence to the appointing power.

#### **§ 326. Restoration to Eligible List**

If after investigation the board or the executive officer determines that the probationer's name should be restored to the eligible list under Section 19175(b) of the act, the name shall be restored to the eligible list from which the probationer was certified if such list is still in existence. If the probationer's name is restored to the eligible list, it shall be placed thereon in accordance with the probationer's score in the examination from which such list resulted.

### **§ 327. Cancellation or Withdrawal of Notice of Rejection**

The appointing power may cancel or withdraw a notice of rejection of a probationer in the following manner and not otherwise: (a) by filing with the board on or prior to the thirtieth calendar day after the effective date of rejection, a written notice of cancellation or withdrawal setting forth the reasons therefor, and (b) by obtaining the concurrence of the executive officer to such cancellation or withdrawal prior to such filing. An employee whose probationary rejection is canceled or withdrawn shall, for such time as the executive officer determines is necessary to prevent injustice to the employee, be entitled to payment of salary less legal offsets, if any, and to credit for seniority, sick leave, vacation, and merit salary adjustment. A cancellation or withdrawal of rejection shall be without prejudice to further rejection, punitive action, or disciplinary proceedings for the same or other reasons.

## **ARTICLE 20. SEPARATIONS FROM SERVICE**

### **§446. Temporary and Permanent Separations**

Temporary separations from state service shall include all types of leave of absence including leave under Section 599.785, military leave, suspension, termination for medical reasons, termination of permanent or probationary employee by layoff, termination by displacement, and disability retirement. Permanent separations from state service shall include dismissal; resignation; automatic resignation (AWOL); rejection during probationary period; termination for failure to meet conditions of employment; termination of limited-term, temporary authorization, emergency, Career Executive Assignment, or exempt appointment; and service retirement.

Note: Authority cited: Section 18701, Government Code. Reference: Section 19996, Government Code.

### **§ 448. Automatic Resignation of Intermittent Employees.**

(a) An intermittent employee whose continuity of employment in a position is interrupted by a nonwork period that extends longer than one year may be considered to have automatically resigned from the position without fault as of one year from the last day the employee was on pay status subject to the restrictions in subsection (b).

(b) separations are restricted to:

(1) nonwork periods not covered by a paid leave, a formal leave of absence without pay or other temporary separation and,



(2) those circumstances which create a presumption that the employee has abandoned his or her position.

Note: Authority cited: Section 18701, Government Code. Reference: Section 19100.5, Government Code. Note: Authority cited: Section 18701, Government Code. Reference: Section 19100.5, Government Code.

## **CHAPTER 1, SUBCHAPTER 2.**

### **ARTICLE 1. CAREER EXECUTIVE ASSIGNMENT RULES.**

#### **§ 548. Scope**

This chapter shall have special reference to the category of civil service appointment called "career executive assignments." Except as may be included in these regulations by specific reference, Chapters 3 through 8 of Part 2 of the Civil Service Act and the regulations stemming from this authority do not apply to this category. Regulations adopted by the State Personnel Board under the provisions of the Government Code applicable to career executive assignments shall apply to such assignments.

Note: Authority cited: Section 19889, Government Code. Reference: Sections 18546, 18547, 19889, 19889.2 and 19889.3, Government Code.

#### **§ 548.1. Purpose**

It is the purpose of these regulations to establish a system of merit personnel administration which will further the development, selection, and effective use of career executives in the California state civil service. They are general in nature and are intended to facilitate the multi-departmental and service wide procedures which recognize and afford opportunity to the most competent. Responsibility rests upon appointing powers, competitors and the Personnel Board alike to be sure that all actions under these regulations conform to the intent and goals of this program.

Note: Authority cited: Section 19889, Government Code. Reference: Section 19889, Government Code.

#### **§ 548.30. Career Executive Assignment Examinations**

The appointing power may conduct competitive examinations subject to these regulations and the approval of the executive officer. The results of an examination may be used to make additional appointments to Career Executive Assignment positions that are substantially the same as the one for which the original examination was announced. However, the eligibility of persons for appointment to such positions shall be subject to either,

(a) The appointing power specifying in the announcement for the original examination the additional positions for which the competition shall be used to make appointments, the methods and standards of evaluation to be used in the examination, and the time for which the results of the original competition shall be used; or

(b) The appointing power subsequently announcing that applications will be accepted as a supplement to the original announcement and that all otherwise qualified persons who apply will be considered with those who applied under the original announcement.

Lists of persons who apply for announced examinations shall be maintained by the appointing power as long as the results of the competition are to be used. These lists shall be kept for the purpose of facilitating future competition by reducing the need for repetitive evaluation and for the purpose of providing a record of the results of competitive examinations. Such lists of persons who apply and are evaluated for consideration for appointment shall not confer eligibility for appointment to other positions in the Career Executive Assignment category which are not among those provided for in this section.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18546, 19889, 19889.2 and 19889.3, Government Code.

#### **§ 548.136. Appeal from Termination (C.E.A.)**

Within 30 days after receipt of notice of termination of a career executive assignment, the affected employee may appeal to the State Personnel Board upon the grounds that the termination was effected for reasons of age, sex, sexual preference as prohibited by Governor's Executive Order B-54-79 (4/4/79), marital status, race, color, national origin, ancestry, disability as defined in Government Code Section 19231(a)(1), religion, or religious opinions and affiliations, political affiliation, or political opinions. After hearing the appeal, the board may affirm the action of the appointing power, or restore the affected employee to the career executive assignment.

Note: Authority: Sections 18701 and 19889.2, Government Code. Reference: Sections 19231, 19700, 19701, 19702, 19702.1, 19702.2, 19703, and 19889.2, Government Code; *Gay Law Students Association v. Pacific Telephone and Telegraph Company* (1979) 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592.

#### **§ 548.145. Separation of Employee (C.E.A.)**

A person serving in a career executive assignment may be separated from state service through resignation, automatic resignation, dismissal, retirement, or for medical reasons under the provisions of Government Code Section 19253.5 in the same manner as is provided for other civil service employees. The career executive assignment of a person so separated shall be deemed to have been

terminated, and the separation to have been from a position in the class in the general civil service in which the employee had permanent status.

#### **§ 548.150. Definition**

"Former position," for the purposes of this article, means the last position an employee held as a probationer or permanent employee or a position that is at least at the same salary level and to which the appointing power could have transferred the employee.

Note: Authority cited: Section 18701, Government Code. Reference: Section 19889.3, Government Code.

#### **§ 548.151. Reinstatement to Former Position Following Termination**

An employee terminated from a Career Executive Assignment shall be reinstated to his or her former position unless the employee elects to be appointed to another position, offered by the appointing power, for which he or she is eligible.

Note: Authority cited: Section 18701 and 19889.3, Government Code. Reference: Section 19889.3, Government Code.

#### **§ 548.152. Permissive Reinstatement**

An employee terminated from a Career Executive Assignment on or after January 1, 1981, after completing at least five years of state service may on or after the effective date of this rule be reinstated to a vacant position at the discretion of any appointing power within four years of such termination as follows:

1. Such employees who have completed at least one year but less than three years of career executive service may be reinstated to a position in a class that is not more than two steps higher in salary than the class in which the employee last served as a probationer or permanent employee, provided that such class is at least two steps lower in salary than the career executive level from which the employee is being terminated.
2. Such employees who have completed three or more years of career executive service may be reinstated to a position in any class that is at least two steps lower in salary than the career executive level from which the employee is being terminated.

For employees who are separated from state service, reinstatement eligibility under this rule shall not extend beyond the employee's reinstatement eligibility under Government Code Section 19140.

Note: Authority cited: Sections 18701 and 19889.3, Government Code. Reference: Section 19889.3, Government Code.

### **§ 548.153. Mandatory Reinstatement**

(a) The reinstatement rights provided under this section apply only to employees who are terminated from a Career Executive Assignment on or after April 3, 1981, after completing at least ten years of state service, including at least three consecutive years of career executive service under a single appointing power as specified in part (b) of this section, and who request reinstatement pursuant to this section, in writing, within ten days of receiving notice of the termination of their Career Executive Assignment.

(b) The three consecutive years of career executive service specified under part (a) must

(1) have occurred entirely within six years of the effective date of the employee's termination from a career Executive Assignment, and

(2) must terminate on or after January 1, 1981.

For the purposes of meeting this service requirement, exempt service shall not affect otherwise qualifying career executive service.

(c) Reinstatements under this section shall be to the last appointing power under which the employee completed three consecutive years of career executive service, as specified above.

(d) An eligible employee may request reinstatement to any general civil service level that is:

(1) At least two steps lower in salary than the lowest Career Executive Assignment level at which the employee served during his/her qualifying period of career executive service under this section, provided that the requested level is at least two steps lower than the level from which the employee is being terminated; and

(2) Above the level of the employee's former position.

An employee may limit his/her reinstatement request under this section to positions that the employee could reasonably be expected to accept without a change in his/her place of residence.

(e) Upon receipt of such a request, the appointing power shall reinstate the employee to a position at the requested level and, if applicable, location that is:

(1) Vacant; and

(2) In the same occupational area(s) as the Career Executive Assignment(s) that the employee held under the appointing power,

provided such employee possesses any license, certificate, or registration required for the class in which the employee is being reinstated and performance in the Career Executive Assignment(s) combined with the employee's prior employment history would reasonably predict successful performance in the lower level position.

An employee's refusal to accept a position offered pursuant to these provisions shall constitute a waiver of the employee's rights under this section to be reinstated to or to receive reemployment list eligibility for other positions at the same level, but shall not otherwise impact the rights and eligibilities provided by this article.

(f) If the appointing power does not have a vacant position that can satisfy the employee's reinstatement requested under this section, the following actions shall occur:

(1) If the employee's reinstatement request is not limited to his/her current location, the employee's name shall be placed on the appointing power's departmental and local subdivisional reemployment list for any classes containing positions which, if vacant, would satisfy the employee's reinstatement request pursuant to this section. If the employee's reinstatement request is limited to his/her current location, the employee's name shall be placed on a subdivisional reemployment list covering that location for the classes indicated above. Departmental or subdivisional reemployment list eligibility granted under this section shall not result in the employee's name being placed on any general reemployment list. Subdivisional eligibilities may be changed with the concurrence of the employee and the appointing power.

(2) The reinstatement and reemployment provision outlined in parts (e) and (f)(1) of this section shall be applied in descending order to any lower general civil service levels under the appointing power that contain positions which meet the criteria outlined in parts (d) and (e)(2) of this section.

(g) If an employee cannot be placed in a vacant position pursuant to this section, the employee shall be reinstated to his or her former position.

Note: Authority cited: Section 18701 and 19889.3, Government Code. Reference: Section 19889.3, Government Code.

#### **§ 548.154. Sequence of Reinstatement**

When two or more employees are simultaneously seeking reinstatement or reemployment to the same class pursuant to the rights provided under this article, the appointing power shall act in the following sequence:

(a) All employees exercising a mandatory return right to their former position shall be reinstated.

(b) Employees seeking mandatory reinstatement or reemployment pursuant to Section 548.153 to a position other than their former position shall be appointed in seniority order to any remaining positions, provided that persons on reemployment lists shall be appointed only as allowed by Government Code Section 19056.

(c) Employees seeking permissive reinstatement pursuant to Section 548.152 may be reinstated to any remaining vacant positions.

Note: Authority cited: Section 18701, Government Code. Reference: Section 19889.3, Government Code.

### **§ 548.155. Probationary Period**

An employee who is reinstated pursuant to Rules 548.152 or 548.153 shall be subject to the probationary period requirements specified in Section 322.

Note: Authority cited: Section 19889.3, Government Code. Reference: Sections 19170, 19171 and 19889.3, Government Code.

## **LOCAL AGENCY PERSONNEL STANDARDS**

### **§ 17010. Purpose**

These Standards are adopted by the State Personnel Board to implement Government Code Sections 19800-19810 which require establishment of personnel standards in regulatory form necessary "to assure state conformity with applicable federal requirements". These standards are intended to be used as broad, flexible guidelines reflecting generally accepted personnel practices. The State Personnel Board Executive Officer will provide necessary interpretations of the standards.

They provide for meeting the federal and state requirements by local agencies and are applicable to both Approved Local Merit Systems and the Interagency Merit System directly administered by the State Personnel Board. These standards must be met by a local agency wishing to establish its own Approved Local Merit System in order to qualify for certain state and federally funded programs. In Approved Local Merit Systems, the State Personnel Board Executive Officer will review each system for sufficient conformity with applicable Federal requirements. If sufficient conformity is found, the approval will be continued.

The departments administering state and federally funded programs in local agencies which have not met the criteria for Approved Local Merit System status

constitute the Interagency Merit System directly administered by the State Personnel Board.

Note: Authority cited: Sections 19800 and 19801, Government Code. Reference: Sections 19800-19810, Government Code.

### **§ 17030. Definitions**

The following definitions apply to both Chapter 1 and Chapter 2 of the Local Agency Personnel Standards. Where more appropriate, definitions are incorporated into the text of a regulation.

(a) Appointing Authority: Local agency legislative body or a department head (or their representative) having authority to appoint and to remove employees from employment.

(b) Career Service: All positions in a local agency that are covered by these rules. See Section 17200 for identification of covered and exempted positions.

(c) Certification: Forwarding of names of eligibles from an appropriate eligible list or lists to the appointing authority.

(d) Discrimination: The adverse effects of a personnel management decision on employees or applicants based on race, color, sex, age, disability, religious creed, national origin, ancestry, marital status, or other category identified by statute, when such decision is not based on job-related criteria.

(e) Executive Officer: The individual appointed by the California State Personnel Board to serve as its executive officer. Under the provisions of Government Code Section 18654, any power, duty, or jurisdiction which the Board may legally delegate is presumed to have been delegated to the executive officer unless the Board has formally reserved the same for itself.

(f) Federal Standards: Those standards contained in the "STANDARDS FOR A MERIT SYSTEM OF PERSONNEL ADMINISTRATION" which are filed in regulatory form in the Consolidated Federal Register (CFR) under Title 5, Part 900, Subpart F (Vol. 44, No. 34, Friday, February 16, 1979) or such future revisions which become applicable.

(g) Impartial Process: A dispute resolution procedure wherein a decision is rendered by a group or individual capable of making an objective judgment free of favor or prejudice. Such group or individual may include but is not limited to the following:

- (1) A "civil service commission" established substantially as set forth in Government Code Sections 31110 through 31113, inclusive, provided no member serves in any other capacity in the local agency; and

(2) Any other group or individual selected:

(A) By mutual agreement of the parties; or

(B) By some other objective method which will ensure impartiality. Examples of those who might satisfy these latter conditions are ad hoc panels, State Hearing Officers, and professional arbiters.

(h) Local Agency: As defined in Government Code Section 19810, local agency means any city, county, city and county, district, or other subdivision of the state or any independent instrumentality thereof.

(i) Permanent Appointment: The status of an employee who has completed a probationary period.

(j) Permanent Status: The employment condition in which an employee has rights in the career service and in a class. Upon satisfactory completion of the probationary period following initial appointment, an employee gains permanent status in the career service, and is subject to removal from the career service only for cause, curtailment of work or lack of funds. Upon satisfactory completion of the probationary period following promotion within the career service, an employee gains permanent status in the class to which promoted, and is subject to removal from the class only for cause, curtailment of work or lack of funds.

(k) Personnel Plan: The personnel plan consists of all documents governing employment in the departments of a local agency administering state and federally funded programs. These include, but are not necessarily restricted to: charter provisions; salary, position budget, and enabling ordinances; rules and regulations; class specifications, examination announcements, and related materials that set forth standards; employee-management memoranda of understanding; and such other reports, minute orders, administrative rules, and procedural instructions that may be specifically requested by the State Personnel Board Executive Officer and necessary to establish a merit system for its grant-in-aid departments in accordance with these standards.

(l) Position: Any office or employment (whether part time or full-time, temporary or permanent, occupied or vacant) calling for the performance of specified and related duties.

(m) Probationary Period: The time limited period of paid service which is an extension of the examination process required before an employee gains permanent status.

(n) Statistically Significant: the degree of underutilization is equal to or greater than the .05 level of significance using the one-tailed Z Test method of statistical analysis outlined in Appendix 4 of the Interim Guidelines for Conducting the Annual Analysis of the State Work Force, issued March 2002, by the State



Personnel Board. Using this methodology, a computed Z value of 1.65 or greater is sufficient to conclude that any underutilization is statistically significant.

(o) Status: The condition of an employee's appointment, such as provisional, probationary, permanent, or as defined in the personnel rules adopted by the governing board of a local agency.

(p) Suspension: An enforced leave of absence for disciplinary purposes or pending investigation of charges made against an employee.

(q) Underutilization: Having fewer persons of a particular race/ethnic or gender group in an occupation or at a level in a department than would reasonably be expected by their availability in the relevant labor force.

Note: Authority cited: Sections 19801, Government Code. Reference: Sections 19800-19810, Government Code; Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16; and Hazelwood School District v. United States (1977), 433 U.S. 299, 308, fn. 14.

#### **§ 17140. General Requirement**

Employees shall be retained on the basis of the adequacy of their performance, and provision shall be made for correcting inadequate performance and separating employees whose inadequate performance cannot be corrected.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

#### **§ 17141. Separation and Layoff**

Employees who have acquired permanent status shall not be subject to separation except for cause or such reason as curtailment of work or lack of funds. Procedures will be established to provide for the transfer, demotion or separation of employees whose performance continues to be inadequate after reasonable efforts have been made to correct it. Retention of employees in classes affected by reduction in force shall be based upon systematic consideration of type of appointment and other relevant factors.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

#### **§ 17142. Employee Evaluation**

Local agencies should establish a systematic method of evaluating employee performance which should influence such personnel management decisions as merit salary adjustments, need for training, and order of layoff.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

### **§ 17150. General Requirement**

Fair treatment of applicants and employees in all aspects of personnel administration will be assured, without discrimination and without regard to political affiliation, and with proper regard to their privacy and constitutional rights as citizens.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803 Government Code.

### **§ 17151. Equal Employment Opportunity**

(a) Equal opportunity shall exist in recruitment, examination, appointment, training, promotion, retention, discipline, or any other aspect of employment.

(b) Prohibitions against discrimination consistent with the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000e et seq.), the Rehabilitation Act of 1973 as amended (29 U.S.C. § 791 et seq.), the Age Discrimination in Employment Act of 1967 as amended (29 U.S.C. 621 et seq.), the Equal Pay Act of 1963 (29 U.S.C. § 206 (d)(1)) and other relevant statutes shall be established and enforced.

(c) Equal employment opportunity programs shall be developed and implemented to include the following:

(1) Removal of artificial barriers to equal employment opportunity.

(2) Assessment of the local agency's work force, including a comparison of the local agency's work force composition with the relevant labor force composition. Records of such assessments and comparisons shall be provided annually and at such other time as required to the State Personnel Board Executive Officer.

(3) Where there is statistically significant underutilization of any group based on race, ethnicity or gender as shown by the work force-labor force comparison, the local agency shall:

Develop and implement written recruitment plans which will ensure all-inclusive outreach and equal opportunity for all groups. Copies of such recruitment plans shall be made available, upon request, to the State Personnel Board Executive Officer.

Assess selection processes to ensure that they are based solely on job-related criteria and are free of illegal adverse impact as defined in the Uniform Guidelines on Employee Selection Procedures (Guidelines),

incorporated in Section 17112, against any group. Such assessments shall be conducted consistent with procedures outlined in the Guidelines. Where illegal adverse impact is found, the local agency shall identify the cause and take appropriate corrective action on a timely basis. Comply with all equal employment opportunity requirements mandated by federal agencies as a condition for obtaining or maintaining federal funding of programs.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code; Connerly v. State Personnel Bd.(2001) 92 Cal. App. 4th 16; and Hazelwood School District v. United States (1977), 433 U.S. 299, 308, fn. 14.

### **§ 17152. Employee/Management Relations**

(a) Nothing in a local agency employee-management relations agreement shall conflict with these standards.

(b) There shall be written procedures for resolving employee grievances and discrimination complaints. To the maximum extent possible, the procedures should include steps to resolve discrimination and all other types of employee grievances without recourse to formal appeals procedures.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

### **§ 17153. Appeals**

(a) In the event of separation for cause or demotion for cause, local agencies shall provide permanent employees in covered programs with the right to appeal through an impartial process that results in timely, enforceable decisions.

(b) Local agencies shall provide for appeals of alleged discrimination, by an applicant or employee, through an impartial process that results in timely, enforceable decisions.

(c) In the event of reduction in force, employees with permanent status shall have the right to appeal the application of reduction in force rules as they relate to the establishment of and certification from layoff and reemployment lists. Such appeals shall be through an impartial process that may be recommendatory or enforceable on the appointing authority. This provision shall not be construed to provide for employee appeals of management rights to identify the classes of layoff, number of positions to be reduced, and effective date of the layoffs.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

## **§ 17200. Employment Covered and Exempted from Standards.**

(a) These standards apply to personnel engaged in the administration of federally aided programs which by law or regulation require a merit system of personnel administration that meets standards published by the United States Office of Personnel Management. These rules are applicable to all positions in such programs, irrespective of the source of funds for their individual salaries, except those exempted by this section.

(b) The following positions may be exempted from application of these standards: Members of policy, advisory, review, and appeals boards or similar bodies who do not perform administrative duties as individuals; officials serving ex officio and performing incidental administrative duties; one confidential assistant or secretary to any of the foregoing exempted officials; attorneys serving as legal counsel or conducting litigation; the executive head of an independent local agency or department administering programs covered by these rules; deputies who share with executive head authority over all major functions in covered local agencies or departments; time-limited positions established for the purpose of conducting a special study or investigation; and unskilled labor.

(c) County Welfare Directors and Deputy Directors who had permanent status in such classes on the date these regulations became effective shall continue to retain the rights of permanent status as long as they continue to occupy positions they held on the effective date of these regulations.

(d) Additional exemptions of positions must receive the prior approval of the State Personnel Board Executive Officer.

(e) Waivers from specific provisions of these regulations may be granted by the State Personnel Board Executive Officer, at the request of a local agency, for time-limited experimental or research projects designed to improve merit systems or their operations. To the extent such a waiver also involves waiving provisions of the Federal Standards for a Merit System of Personnel Administration, the State Personnel Board Executive Officer shall review the request and make a recommendation in the manner required by the United States Office of Personnel Management.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

## **§ 17201. Extension of Merit System and Changes in Merit System Jurisdictions.**

Upon the initial extension of merit system coverage to a program, an employee may obtain status through a noncompetitive qualifying process.

An employee with permanent status under a merit system meeting these standards will retain comparable status if the program is placed under the jurisdiction of another merit system.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

### **§ 17210. Procedure for Establishing and Maintaining an Approved Local Merit System**

(a) Any local agency wishing to establish and administer its own Approved Local Merit System for its grant-aided departments shall:

(1) request the State Personnel Board Executive Officer to review and approve its system; and

(2) adopt a personnel plan for its grant-in-aid departments in accordance with these standards. The State Personnel Board Executive Officer shall publish criteria for determining if personnel plans and personnel management practices meet the requirements of these standards.

(b) Amendments to personnel plan materials for an Approved Local Merit System and its continuing administration shall be subject to review on an ongoing basis by the State Personnel Board Executive Officer for conformity and compliance in operation. Materials requested by the State Personnel Board Executive Officer to determine conformity with these standards will be supplied by local agencies.

Note: Authority cited: Section 19801, Government Code. Reference: Sections 19802 and 19803, Government Code.

### **§ 17220. Requirements for Records and Reports**

Appropriate records shall be maintained and available to permit determination by the State Personnel Board that a jurisdiction conforms to these requirements and its own rules and regulations. Decisions on selection, classification and certification require documentation.

### **§ 17400. Interagency Merit System Regulations**

The provisions of Local Agency Personnel Standards Chapter 1 apply to all local agencies, including those in the Interagency Merit System (IMS), subject to the requirements of Government Code Sections 19800-19810.

The provisions of Chapter 2 are the regulations for the Interagency Merit System. They are adopted by the State Personnel Board in accordance with the provisions of Government Code Section 19803, which provides for State Personnel Board administration of a merit system for local agencies not administering their own merit systems, in order to assure State conformity with applicable Federal requirements.

### **§ 17403. Delegation to the State Personnel Board Executive Office and State Personnel Board Staff**

The provisions of Government Code 18654 and 18654.5 are reprinted in these regulations, and are applicable in the Interagency Merit System: “18654. The intention of the Legislature is hereby declared to be that the executive officer shall perform and discharge under the direction and control of the board the powers, duties, purposes, functions, and jurisdiction vested in the board and delegated to him by it.

“Any power, duty, purpose, function, or jurisdiction which the board may lawfully delegate shall be conclusively presumed to have been delegated to the executive officer unless it is shown that the Board by affirmative vote recorded in its minutes specifically has reserved the same for its own action. The executive officer may redelegate to his subordinates unless by board rule or express provision of law he is specifically required to act personally.

“18654.5. The executive officer shall administer the civil service statutes under rules of the board, subject to the right of appeal to the board.”

Whenever it is stated in these rules that the “State Personnel Board” may or shall act, the State Personnel Board specifically has reserved the same for its own exclusive action. Whenever it is stated that the “State Personnel Board Executive Officer” may or shall act, the Executive Officer of the State Personnel Board has the authority to act thereon. Nothing herein prohibits the Executive Officer from re delegating to subordinates as provided in Section 18654 of the Government Code. Any party in interest may appeal to the State Personnel Board for review of the actions and decisions of the Executive Officer.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17408. Adequate Notice of Action Taken**

Where provisions of these regulations require that a party or parties concerned be notified of actions taken, notification by letter to that party's or parties' last known address(es) shall constitute adequate notice of such action.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17481. Appointments**

All appointments to positions in the Interagency Merit System shall be as a result of certification from eligible lists or reemployment lists, or as provided in Sections

on employment covered and exempted from standards (17200), provisional appointments (17482), emergency appointments (17485), promotional examinations (17446), transfer (17498, 17500, 17515, and 17590), reinstatement (17528 and 17590), extension of merit system coverage (17201), and demotion (17525). The provisions of these listed sections shall not be applied in a manner which circumvents the general requirement that appointments shall be made on the basis of competition.

Note: Authority cited: Section 19801, Government Code. Reference: Section 19803, Government Code.

### **§ 17486. Limited-Term Appointment**

If an employee is needed for a limited period, a certification of names shall be made by the State Personnel Board Executive Officer of those eligibles who have indicated willingness to accept limited-term employment. The duration of limited-term appointments shall be for no longer than one day less than the probationary period.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17488. Intermittent Appointments**

Extra-help or on-call positions which require work on an intermittent basis shall be filled by people on eligible lists willing to work on that basis. If there is not a sufficient number of eligibles willing to work on that basis, the eligible list shall be considered exhausted for that type of appointment, as provided in Section 17468, and a provisional appointment may be made. The employment of persons on an irregular or extra-help basis shall not be used as a way of circumventing the requirements in these regulations. The State Personnel Board Executive Officer shall establish procedures to control the use of intermittent appointments.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code. Probationary Periods

### **§ 17490. Probationary Periods**

(a) The probationary period is considered an extension of the selection process. Each appointment to a permanent position from an eligible list shall include a probationary period as a condition of appointment. The probation period shall not exceed one year, and shall be the same for each position within a class.

(b) Reports of probationers' overall performance shall be made to them at sufficiently frequent intervals to keep them adequately informed of their progress on the job. A written appraisal of performance shall be made to the employee at least twice during the probationary period, the first being no later than upon

completion of the first half of the probationary period and the second being prior to the completion of the last month of the probationary period. The final probationary report shall be made available, on request, to the State Personnel Board Executive Officer. If the required performance report is not prepared, a probationer automatically acquires permanent status at the end of the probationary period unless formally rejected under Section 17493.

(c) Provisional or limited-term employment, or employment in the same agency in employment or rehabilitation programs authorized by Congress or the California Legislature, may be credited as part of the probationary period when such employment is immediately followed by probationary appointment to the same class.

(d) An employee in a permanent position who is working less than a normal work week shall remain on probation for an hourly equivalent of the probationary period.

(e) The appointing authority may require an employee who receives an appointment either through permissive reinstatement or transfer to serve a new probationary period.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17491. Use of Local Agency Rules on Probationary Periods**

The State Personnel Board Executive Officer may authorize use of local agency rules governing probationary periods if such rules meet all of the following criteria:

(a) Probationary periods must be time limited and must be the same for all positions in a class.

(b) If the local agency rules provide that probationary periods may be extended, extensions shall be allowed only for extended absence of the employee or for other similar reasons written into the rules and approved by the State Personnel Board Executive Officer.

(c) There shall be a written report of probationary performance at the end of the probationary period and such report will document whether the probationer is to be given permanent status. If the required performance report is not prepared, a probationer automatically acquires permanent status at the end of the probationary period unless formally rejected under Section 17493.

(d) Provisions shall be written into the rules to cover length of probationary periods for other than full-time employees.



Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17493. Rejection During Probationary Period**

At any time an employee may be rejected from a probationary appointment without right of appeal or hearing, except that such rejection shall not be based on political affiliation or discrimination. A statement of cause for rejection shall be delivered to the employee in writing before the rejection shall be finally effective.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17495. Performance Appraisal**

Each IMS agency should establish a systematic method of evaluating employee performance, which should influence such personnel management decisions as merit salary adjustment, need for training, performance improvement and order of layoff. In order to be recognized under these rules, such a system should meet all of the following criteria:

- (a) It must be applied systematically to all employees in the department.
- (b) It must require regular, periodic reports, at least once each year.
- (c) Reports must be in writing, and there must be a system for retaining written reports.
- (d) Performance rating criteria must be job related and objective and applied consistently to all employees in a class.
- (e) The employee shall have an opportunity to review and respond to each written performance evaluation before it becomes an official part of that employee's record.
- (f) There must be a local agency administrative complaint process through which employees can challenge performance evaluations which are overall below standard or lower.
- (g) Employees must be made aware of the purposes for which performance reports are made and the personnel management decisions which will be influenced by employee performance reports.
- (h) Performance reporting forms must be designed in such a way that overall performance which is superior and overall performance which is unacceptable are clearly distinguished from other possible ratings of overall performance.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17502. Reduction in Force**

(a) Whenever it is necessary because of lack of funds or whenever it is otherwise in the best interests of the appointing authority to reduce staff, the appointing authority may lay off employees including those who have been granted an approved leave of absence. The order in which employees would be separated or demoted in a reduction in force shall be based upon type of appointment, seniority and to the extent practical, relative efficiency. If a performance reporting system is used to determine relative efficiency, it must meet the requirements of Section 17495.

(b) When a layoff is imminent in a local agency, the State Personnel Board Executive Officer may prohibit appointments, except from reemployment lists, to classes of potential layoff, lower level classes in the same series, and classes to which transfer under Section 17500 or 17515 could be made.

(c) If federal law or the United States Constitution requires the adjustment of the order of layoff pursuant to Government Code Section 19798, or if the failure to adjust the order of layoff in accordance with Government Code Section 19798 would result in ineligibility for a federal program and a loss of federal funds, a local agency may not proceed with a seniority-based layoff, but may have to adjust the order of layoff in accordance with Section 17520.

Note: Authority cited: Section 19803, Government Code. Reference: Sections 19798 and 19800, Government Code; and Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16.

### **§ 17504. Area of Layoff**

The classes and geographic areas of layoff are to be determined by the appointing authority, subject to concurrence by the State Personnel Board Executive Officer.

Employees laid off in designated programs or geographic areas of a department shall have the right to displace employees in other programs or geographic areas of the department who are lower on the seniority list as determined by Section 17510.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17508. Seniority Score Computation**

(a) Persons with permanent or probationary appointments in an IMS agency shall

receive credit for all employment in agencies governed by LAPS Chapter 1 and Chapter 2 if that employment has not been broken by a permanent separation of 6 months. When there has been a permanent separation of 6 months or more, credit shall be given only for employment following such break in service.

Persons hired from a reemployment list regain all previously earned seniority on the date of reemployment. An employee who transfers from a department covered by these rules to another department in the same local agency, and who subsequently returns without a permanent separation, retains seniority earned prior to the transfer from the IMS-covered department.

(b) Notwithstanding the provisions of 17508(a), employees on approved leaves of absence such as educational leave, military leave, maternity leave, and disability leave shall retain seniority accumulated before the leave of absence. The time on such approved leave of absence is not included in the seniority score computation. Time on industrial disability leave shall be included in the seniority score computation.

(c) One point seniority credit shall be given for each qualifying month of service.

(d) Twelve points shall be added to the seniority score of an employee with an overall rating of superior, outstanding or similar term denoting the highest rating category in the local agency performance appraisal system, on the last two regularly scheduled written performance reports. This provision applies only if the local rating system meets the provisions of Section 17495.

(e) When two or more employees have the same total seniority score, the tie shall be broken and preference given in the following sequence: employee with the greatest seniority in the class in which layoff is being made and in higher level classes; employee with the greatest seniority in the department of layoff; employee with the greatest seniority in agencies covered by LAPS Chapter 1 and Chapter 2; employee with the greatest seniority in the local agency; employee whose name is drawn by lot by the State Personnel Board Executive Officer.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17510. Order of Separation in Reduction in Force**

(a) Separation of employees shall be in order in which their names appear on the seniority list for the affected class. Persons having the least seniority credit shall be separated first, except as otherwise provided in these rules.

(b) Employees in the same class shall be separated during a reduction in force in the following appointment sequence:

(1) Emergency

(2) Provisional

(3) Intermittent

(4) Limited term

(5) Permanent part time and permanent full time Within limited-term and permanent part-time and permanent full-time appointments, employees with probationary status in a class shall be laid off before employees with permanent status in the same class.

Exceptions to 17510(b) may be approved by the State Personnel Board Executive Officer upon request of the local agency.

(c) Employees who have been selectively certified by examination for special qualifications, or who have been employed from an examination given only for positions requiring special qualifications, shall be considered to be in separate classifications for purposes of reduction in force.

(d) The following provisions apply only if the local agency performance reporting system meets the provisions of Section 17495.

(1) Within each of the permanent appointment groups, probationary employees whose last recorded overall performance rating is unsatisfactory, unacceptable or similar term denoting the lowest rating category in the local agency performance appraisal system, shall be laid off before any other permanent or probationary employee.

(2) Within each of the permanent appointment groups, permanent employees whose last two recorded overall performance ratings are unsatisfactory, unacceptable or similar term denoting the lowest rating category in the local agency performance appraisal system, shall be laid off before any other permanent or probationary employee with satisfactory performance.

(e) Notwithstanding seniority provisions of these rules, employees in trainee level classes, as defined in the class specifications, shall be laid off or demoted in lieu of layoff before employees in first journey level classes in the same class series.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17512. Notice to Affected Employee in Reduction-in-Force Situation**

The State Personnel Board Executive Officer, or local agency to which such authority has been delegated, shall send written notice to each employee

affected by a reduction in force at least 21 calendar days prior to the effective date of the action. The notice shall include the:

- (a) Reason for layoff;
- (b) Classes to which the employee has rights under Section 17514 to demote in lieu of layoff;
- (c) Effective date of the action;
- (d) Seniority score of the employee;
- (e) Location of the seniority list so that employees may compare their scores with others;
- (f) Formula by which the seniority score is computed;
- (g) Appeal rights of the employee;
- (h) Conditions governing retention on and reinstatement from reemployment lists;
- (i) Rules regarding waiver of reinstatement and voluntary withdrawal from the reemployment list; and
- (j) Other relevant information provided by the local agency or the State Personnel Board.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

#### **§ 17514. Demotion in Lieu of Layoff**

In lieu of being laid off, employees may elect demotion to:

- (a) Any class with substantially the same or lower maximum salary in which they had permanent or probationary status; or
- (b) A class in the same line of work as the class of layoff, but of lesser responsibility if such classes are designated by the State Personnel Board Executive Officer.

Demotion rights to specified classes may be applicable only within the department of layoff.

To be considered for demotion in lieu of layoff, employees must notify their appointing authority in writing of their election no later than seven calendar days after receiving the notice of layoff.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17515. Interdepartmental Transfer**

When a local agency is experiencing layoffs in departments not covered by the Interagency Merit System the State Personnel Board Executive Officer may approve local agency requests for appointments of individuals being laid off from other departments to vacant positions in departments in the Interagency Merit System. The State Personnel Board Executive Officer shall determine, after consideration of the selection plans under which such individuals were hired, if the knowledge and abilities of the classes involved are sufficiently related that such employees can reasonably be expected to discharge the duties of the new class by the end of the probationary period. This section cannot be used for classes where there is a reemployment list in the Interagency Merit System department.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17516. Qualifying Month of Service**

(a) When computing seniority for full-time employees the starting and ending months of a period of service shall be considered a complete month if the employee has 15 or more calendar days of service in the appropriate calendar month. No credit is given for less than 15 days of service. The State Personnel Board Executive Officer may approve a different method of computing months of full-time service to be consistent with the method used in the local agency for departments not covered by these regulations.

(b) For other than full-time employees, 160 hours worked shall be equivalent to one month's service and seniority credit shall be given upon the completion of each 160 hours worked. The State Personnel Board Executive Officer may approve a different method of computing months of part-time service to be consistent with the method used in a local agency for departments not covered by these regulations.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17518. Departmental Reemployment Lists**

(a) The State Personnel Board Executive Officer shall establish departmental reemployment lists, and certify names from them, for all classes in which reduction in force occurs in local agency departments covered by these rules. Such reemployment list establishment and certification may be delegated to local agencies. Departmental reemployment lists shall remain in effect for three years.

Reemployment lists may be extended by the State Personnel Board Executive Officer.

(b) Departmental reemployment lists shall contain the names of permanent employees who were laid off or demoted in lieu of layoff for each class. Local agencies shall fill all vacancies in affected classes with persons on appropriate class departmental reemployment lists based on type of appointment at time of layoff. Names shall be certified in inverse order of separation, the most senior first.

The highest available eligible who has expressed a willingness to accept employment shall be appointed. An employee whose name appears on an active departmental reemployment list will be allowed three waivers to offers of employment.

(c) Individuals may have their names removed from a departmental reemployment list and placed on an inactive list in accordance with the provisions of 17478(b). When an employee fails to reply to an offer of reemployment within 10 calendar days after mailing of the offer or, after accepting a job offer, fails to appear for work as scheduled, the employee's name will be placed on the inactive list. An employee's name may be restored to the active departmental reemployment list upon written request to the State Personnel Board Executive Officer or to the local agency to which certification for reemployment was delegated.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17525. Demotion**

An appointing authority may demote an employee for disciplinary or medical reasons. An employee may demote in lieu of layoff. An employee may demote voluntarily with appointing authority approval. In all cases demotion shall be to a position in:

(a) A class determined by the State Personnel Board Executive Officer to be in the same series as the present class; or

(b) A class in which the employee has previously held permanent or probationary status; or

(c) A class, the knowledge and abilities of which, are determined by the State Personnel Board Executive Officer to be closely related to those of the employee's present class.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

## **§ 17527. Medical Demotion, Transfer or Termination**

The provisions of this rule apply to employees with permanent or probationary appointments. An appointing authority may require an employee to submit to a medical examination by a physician or physicians designated by the appointing authority to evaluate the capacity of the employee to perform the work of the position. When such a requirement is made of an employee, fees for the examination shall be paid by the appointing authority. When the appointing authority, after considering the conclusions of the medical examination provided for by this section, or medical reports from the employee's physician, and other pertinent information, concludes that the employee is unable to perform the work of the present position, but is able to perform the work of another position including one of less than full time, the appointing authority may demote or transfer the employee to such a position.

When the appointing authority concludes that the employee is unable to perform the work of the present position, or any other available position in the agency, the appointing authority may terminate the employee. The appointing authority shall make reasonable job restructuring and other accommodation before demoting or terminating an employee under this section.

The appointing authority may demote, transfer, or terminate an employee, without requiring the employee to submit to a medical examination, when the appointing authority relies upon a written statement submitted to the appointing authority by the employee as to the employee's condition, or upon medical reports submitted to the appointing authority by the employee.

The employee shall be given written notice 15 calendar days prior to the demotion, transfer or termination. No later than 30 calendar days following the notification of action, the employee may file an employment rights appeal as provided in Article 8 of these rules.

If it is determined by the appointing authority, or the State Personnel Board upon petition of the employee, that the employee who was terminated, demoted, or transferred in accordance with this section is no longer incapacitated for duty, the employee shall be reinstated to a vacant position in the class from which he or she was originally removed, in a comparable class, or in a lower related class. If there is no vacant position in the class from which the employee was originally removed, the name of the employee shall be placed upon the reemployment list for that class and upon such other reemployment lists as are determined to be appropriate by the State Personnel Board Executive Officer.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.



## **§ 17528. Reinstatement**

(a) **Permissive Reinstatement.** Upon request of an appointing authority to the State Personnel Board Executive Officer, a person who has held permanent or probationary status in the IMS shall be eligible for reinstatement. Reinstatement may be made to any class in which the employee previously had permanent or probationary status, or to another class with substantially the same duties as determined by the State Personnel Board Executive Officer. An appointing authority may require a reinstated employee to serve the probationary period for the class to which the employee is reinstated.

(b) **Mandatory Reinstatement After a Nonpermanent Appointment.** A permanent or probationary employee who has accepted an emergency, limited-term or provisional appointment in a higher class within the same agency shall, if the employee so desires at the termination of that appointment, be reinstated to a position in the former class.

(c) **Mandatory Reinstatement After an Exempt Appointment.** An employee with permanent status in the IMS who has accepted an exempt appointment as county welfare director or deputy director in the same or another IMS agency shall, if the employee so desires at the termination of that appointment, be reinstated to a position in the former class.

(d) **Mandatory Reinstatement After Rejection During Probation.** A permanent appointee who has vacated a position within a department or subdivision that is in IMS in a county to accept another position within the same or another department or subdivision that is in IMS in the same county, and who is rejected during the probationary period, shall be reinstated to a position in the former class, except if dismissed under Section 17544. Reinstatement shall be reported to the State Personnel Board Executive Officer by the appointing authority on the appropriate personnel document.

Note: Authority cited: Section 19801, Government Code. Reference: Section 19800, Government Code; and Karen Patchin (1998) SPB Dec. No. 98-06.

## **§ 17530. Absence Without Leave**

Absence without leave, whether voluntary or involuntarily, for five consecutive working days may be considered an automatic resignation by the local agency.

## **§ 17532. Informal Leave**

An approved absence from duty without pay of an employee for a period not exceeding 20 working days will not be considered a break in service.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17534. Approved Leaves of Absence**

With the approval of the appointing authority, a permanent or probationary employee may be granted a leave of absence without pay or with partial or full pay. Except for military, education and disability leaves, the provisions of Section 17508 regarding loss of previously earned seniority credit apply to leaves that exceed six months. The State Personnel Board Executive Officer may waive this provision in order to be consistent with the rules regarding leaves of absence used by a local agency for departments not covered by these regulations.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17538. Records and Reports**

The State Personnel Board Executive Officer shall establish and maintain a service record for each employee in the Interagency Merit System.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17542. Disciplinary Action**

As used in these regulations, disciplinary action means dismissal, demotion, reduction in compensation, suspension, or any other disciplinary action that affects the employee's present status. The appointing authority, or a designated representative of that authority, may take disciplinary action against an employee for the causes specified in this Article. Under these rules rejection during probation is not a disciplinary action.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17544. Cause for Disciplinary Action**

The action of an employee which reflects discredit upon a public service, or is a hindrance to the effective performance of the department in which the employee is employed shall be considered good cause for discipline. Such actions are:

- (a) Incompetency
- (b) Inefficiency
- (c) Neglect of duty
- (d) Insubordination

- (e) Absence without leave
- (f) Conviction of a felony
- (g) Discourteous treatment of the public or other employees
- (h) Improper political activity
- (i) Willful disobedience
- (j) Willful concealment or misrepresentation of material facts in applying for or securing employment
- (k) Other conduct either during or outside of duty hours which causes discredit to the agency or the employment.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

#### **§ 17546. Notice of Disciplinary Action**

Written notice of disciplinary action shall be served on the recipient personally, or by certified mail.

For employees with permanent status in the class of employment or another class in the Interagency Merit System, such written notice shall be served at least five calendar days prior to the effective date of any disciplinary action, and shall include:

- (a) A description of the action taken and its effective date or dates;
- (b) A clear and concise statement of the reasons for such action including the acts or omissions on which the disciplinary action is based;
- (c) A statement advising the employee of the right to appeal to the State Personnel Board and the time within which the appeal must be made;
- (d) A statement that a copy of the materials upon which the action is based is attached or available for inspection upon request; and
- (e) A statement advising the employee of the right to respond either verbally or in writing, to the authority proposing the action prior to its effective date.

For employees without permanent status in the class of employment or another class in the Interagency Merit System, such written notice shall be served no later than 15 calendar days after the effective date of any disciplinary action, and shall include items (a), (b) and (c) above.

The notice of disciplinary action shall conform to standards approved by the Executive Officer.

A copy of the notice of disciplinary action shall be filed with the State Personnel Board Executive Officer.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§17548. Disciplinary Action Becomes Final**

If the employee fails to appeal a disciplinary action within the time specified, or, after appealing, withdraws his appeal, the disciplinary action taken by the appointing power shall be final.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17550. Appeals**

(a) Employment Rights Appeals -As provided in Government Code Section 19803, the State Personnel Board shall hear and decide employment rights appeals. The following actions, when taken against employees with permanent status in the Interagency Merit System, are appealable to the State Personnel Board: Involuntary demotion, dismissal, suspension, medical termination or transfer, automatic resignation, reduction in pay for disciplinary reasons, other disciplinary action that affects the employee's present status, layoff, refusal to hire from a reemployment list, and grievances involving discrimination or political affiliation. Grievances involving discrimination or political affiliation shall be processed as provided in Sections 17570-17575, and be filed with the State Personnel Board only if not resolved locally.

Rejection during probation is not appealable to the State Personnel Board unless such rejection is alleged to be on the basis of discrimination or political affiliation.

Employment rights appeals shall be processed as provided for in Sections 17552- 17567 of these rules.

(b) Selection Process Appeals -Employees and applicants may appeal selection process decisions as provided in Sections 17580-17582 of these rules.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

## **§ 17551. Grievances**

(a) Where the term grievance is defined in a local memorandum of understanding, ordinance or resolution applicable to employees in positions covered by these rules, that definition shall be used in lieu of the definition in Section 17571. Where the term grievance is not defined in a local memorandum of understanding, ordinance or resolution applicable to employees in covered positions, the definition in Section 17571 shall be used.

(b) Grievances shall be processed as provided in applicable local memoranda of understanding, ordinances or resolutions. If there is no memorandum of understanding, ordinance or resolution for covered positions, the Interagency Merit System grievance procedure described in Sections 17571-17572 shall be used.

(c) If an employee grievance alleges the improper act or failure to act was due to discrimination in terms of race, color, sex, age, handicap, religious creed, national origin, ancestry, marital status or other categorization identified by statute; the employee shall be allowed to use either the applicable grievance procedure or the discrimination complaint procedure described in Section 17575. The employee shall not use both procedures for the same complaint. Under either procedure the employee has the further right of appeal to the State Personnel Board.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

## **§ 17552. Initiation of Employment Rights Appeals**

Except as otherwise provided in Section 17567, all employment rights appeals shall be filed in writing with the State Personnel Board within 30 calendar days from the date of the action, or notification of action against which the appeal is made.

Appeals shall state the facts upon which they are based, and the relief requested in sufficient detail to enable the State Personnel Board to understand the nature of the proceeding and the parties concerned.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

## **§ 17553. Referral to Hearing Officer**

When there is filed with the State Personnel Board an employment rights appeal; such filing shall automatically operate as the reference of every such proceeding to the hearing officer for hearing, or investigation without hearing as appropriate;

but no such reference shall preclude the State Personnel Board from recalling the proceeding for hearing or investigation by it. Any proceeding may be assigned by the State Personnel Board or its president to the hearing officer for hearing or investigation. In any case, when a proceeding has been assigned to the hearing officer, the hearing officer is the authorized representative of the State Personnel Board and is fully authorized and empowered to grant or refuse extensions of time, to set such proceeding for hearing, to conduct a hearing or investigation in every such proceeding, and to perform any and all other acts in connection with such proceeding that may be authorized by law or these rules. The State Personnel Board Hearing Officer shall mail to or serve on the respondent a copy of the appeal.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

#### **§ 17554. Amended Notice of Disciplinary Action**

At any time before an employee's appeal is submitted to the State Personnel Board or its authorized representative for decision, the appointing authority may, with the consent of the Board, or its authorized representative serve on the employee and file with the Board an amended or supplemental notice of disciplinary action.

If the amended or supplemental notice presents new causes or allegations, the employee shall be afforded a reasonable opportunity to prepare a defense thereto, but he shall not be entitled to file a further appeal unless the State Personnel Board or its authorized representative so orders. Any objections to the amended or supplemental causes or allegations may be made orally at the hearing and shall be noted in the record.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

#### **§ 17555. Notice of Hearings**

The employee and local agency shall be given written notice of hearing.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

#### **§ 17556. Scope of Hearing Involving Convictions**

In the case of dismissal under the provisions of Section 17544(f), the scope of the appeal shall be limited to the issues of the nature of the offense and the jurisdiction of the court.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17557. Evidence Submitted in Hearing**

Oral evidence shall be taken only on oath or affirmation.

Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issue, even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called the witness to testify; and to rebut the evidence.

If appellants do not testify in their own behalf they may be called and examined as on cross-examination.

The hearing need not be conducted according to technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Hearsay evidence shall be admitted and may be used for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a dismissal, suspension, or demotion unless it is the type of hearsay admissible over objection in a civil action. The rules of privilege shall be effective to the same extent to which they are now or may hereafter be recognized in civil actions.

Irrelevant and unduly repetitious evidence shall be excluded.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17558. Right of Representation**

The appellant and local agency may be represented by counsel or other representation.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17559. Subpoenas**

The State Personnel Board shall issue at the request of the parties, subpoenas and subpoenas duces tecum in accordance with the provisions of Section 1985 of the Code of Civil Procedure.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17560. Depositions**

The State Personnel Board may order the taking of depositions in the manner prescribed in Section 11511 of the Government Code.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17561. Reporting**

In all appeals involving dismissal or demotion the proceedings shall be recorded. Proceedings involving other issues need not be recorded but either party may at its own expense provide a recorder for the hearing.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17562. Hearings Are Public**

All hearings shall be public except when the parties stipulate otherwise. At the request of either party and in the sound discretion of the hearing officer, witnesses who have not testified may be excluded from the hearing room until such time as they are called to testify.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17563. Basis for Decision**

Whenever the decision of the local agency is found to be supported by substantial evidence it shall be affirmed; provided, however, that the State Personnel Board may reduce the severity of the action and make such other orders as are just and proper under the circumstances.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17564. Proposed Decisions**

In all cases referred or assigned to the hearing officer for hearing or investigation, the hearing officer shall submit to the State Personnel Board a proposed decision in such form that it may be adopted as the decision of the State Personnel Board. The proposed decision shall include findings of fact. The findings may be stated in the language of the pleadings or by reference thereto and shall include determination of all relevant issues presented. A copy of the proposed decision shall be filed with the State Personnel Board as a public record. Upon the filing of the proposed decision, the State Personnel Board may adopt it in its entirety;



may take action in accordance with Section 17563; or may itself decide the case upon the record, including the transcript, with or without taking additional evidence, except in appeals where no transcript shall be required, and where in the absence of a transcript the Board may act upon its own investigation of the facts.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17565. Rehearing**

Any party to the appeal, within 30 calendar days after service of a copy of the decision on such party, may apply for a rehearing by filing with the State Personnel Board a written petition therefor. Within 30 calendar days after such filing, a copy of the petition shall be served upon the other party to the proceedings. Within 60 calendar days after such service of the petition for rehearing, the State Personnel Board itself shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this 90-day period shall constitute a denial of the petition. If a rehearing is granted, the State Personnel Board may either rehear the case itself, decide the case on the pertinent parts of a prior hearing and such additional evidence and argument as the State Personnel Board shall in its discretion permit, or may refer the matter to a hearing officer.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17566. Decision Becomes Final**

Unless proper application for rehearing is made, the decision on every Interagency Merit System appeal shall become final 30 calendar days after service of a copy of the decision on the parties to the proceedings.

Note: Authority cited: Section 19803, Government Code. Reference: Section 19800, Government Code.

### **§ 17567. Use of Local Agency Process**

The State Personnel Board may permit use of a local agency procedure, rather than the procedures in Sections 17553-17566, to resolve an employment rights appeal; if such is requested by the employee and the local agency prior to the beginning of formal hearing officer proceedings. When the Board permits use of a local agency procedure for resolving an employment rights appeal, the following is required:

(a) The appellant shall formally waive the right to decision by the State Personnel Board on a waiver form provided by the Executive Officer.

(b) The resolution procedure to be used shall be an impartial procedure that meets the requirements of Section 17030(g).

(c) The decision resulting from the local procedure shall be binding upon the parties to the dispute.

Note: Authority cited: Section 19801, Government Code. Reference: Section 19803, Government Code.