

STATE PERSONNEL BOARD

Notice of Public Availability Of Modifications to Text of Proposed Regulation

September 28, 2012

**California Code of Regulations, title 2,
Division 1, Chapter 1, Subchapters 1.2,
Hearings and Appeals and 1.3,
Examinations and Appointments
OAL Notice File No. Z2012-0327-03**

Pursuant to Government Code section 11346.8, subdivision (c), and California Code of Regulations, title 1, section 44, the State Personnel Board (Board) hereby provides notice of proposed modifications to the sections of Title 2 of the California Code of Regulations set forth below. Such regulatory sections were the subject of a regulatory hearing on June 1, 2012 in the above-captioned rulemaking. The proposed modifications are in response to direction received from the Office of Administrative Law after the closure of the Board's first 15-day comment period.

Proposed Modifications

The Board proposes the following changes:

1. Section 51.2, subdivision (i)(1)(A)

Deletion of the words "would" and "have" from the definition of "back pay" so that the phrase reads had not been for grammatical purposes.

Addition of the phrase "demotion, transfer, or" after the word "non-punitive" for consistency between Sections 51.2 and 61 and to ensure that persons who are erroneously non-punitively demoted or transferred have the ability to seek back pay from the Board.

2. Section 51.2, subdivision (i)(2)

Addition of the phrase "demotions, transfers, and" after the word "non-punitive" for consistency between Sections 51.2 and 61 and to ensure that persons who are erroneously non-punitively demoted or transferred have the ability to seek back pay from the Board.

3. Section 51.2, subdivision (v)(1)

Addition of the phrase “death, illness, or other” before the phrase “excusable circumstances” to list examples of the types of circumstances that are excusable.

Addition of the phrase “in the discretion of the Chief ALJ or his or her designee” to the end of the sentence to clarify that the Chief ALJ or his or her designee has discretion to determine whether the parties’ circumstances are excusable.

4. Section 51.2, subdivision (v)(2)

Deletion of the phrase “close in time” and replacement of the phrase “within 15 days of” to provide greater clarity to parties about how close in time the statement of good cause must be submitted after the discovery of new evidence.

5. Section 51.2, subdivision (v)(3)

Deletion of the phrase “occurs close in time to” and replacement of the phrase “occurred within 15 days of” to provide greater clarity to parties about how close in time the statement of good cause must be submitted after a material change in law occurs.

6. Section 51.6

Deletion of the prior language about when decisions become final (“Unless a proper application for rehearing is made pursuant to Government Code section 19586, every board decision shall become final 30 days after service by the board of a copy of such decision upon the parties to the proceeding in which the decision is rendered.”)

Addition of the language that was introduced in the 45-day comment period of this rulemaking under Section 62 (“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.”)

The purpose of this change is to maintain consistency between the former rule, in Section 51.6, and the new rule, previously proposed in Section 62.

The change originally proposed at the initiation of this rulemaking is less confusing and is more consistent with general rules of civil procedure.

7. Section 52.4, subdivision (e)(1)(Q)

Addition of the phrase “and requests for back pay hearings” after the phrase “back pay claims” to maintain consistency between Sections 52.4 and 61 and to clarify that both Appellants who file back pay claims and Respondents who file requests for back pay hearings must file such claims and requests within one year of the Board’s decision.

8. Section 52.8, subdivision (b)

Replacement of the word “board” with the phrase “Chief ALJ or his or her designee” to maintain consistency between the Hearing and Appeals regulations. As a practical matter, the board delegates this power to the Chief ALJ.

9. Section 52.8, subdivision (e)

Addition of the phrase “a Respondent requesting a back pay hearing” and the word “request” for consistency between Sections 52.8 and 61, i.e. to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. Both requests for back pay hearings and back pay claims are subject to the rules pertaining to withdrawals of complaints and requests.

10. Section 52.8, subdivision (f)

Addition of the phrase “a Respondent requesting a back pay hearing” and the word “request” for consistency between Sections 52.8 and 61, i.e. to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. Both requests for back pay hearings and back pay claims are subject to the rules pertaining to withdrawals of complaints and requests.

11. Section 52.8, subdivision (g)

Addition of the phrase “a request for back pay hearing, a,” the word “Respondent,” and the phrase “or its request,” and the deletion of the word “or” for consistency between Sections 52.8 and 61, i.e. to make a distinction between back pay claims, which are filed when an Appellant is seeking back pay and requests for back pay hearings, which are generally filed by Respondents who are requesting that the Board make a determination about back pay in a particular case. Both requests for back pay hearings and back pay claims are subject to the rules pertaining to withdrawals of complaints and requests.

12. Section 52.11, subdivision (a)

Addition of the word “Saturday” for grammatical and clarity purposes.

13. Section 52.11, subdivision (b)

Addition of the word “Sunday” for grammatical and clarity purposes.

14. Section 55.2, subdivision (b)

Replacement of the word “ALJ” with the phrase “presiding officer” for consistency.

15. Section 56.3, subdivision (c)

Addition of the phrase “other than the information listed in subdivision (b)(1) of this section” for clarity.

16. Section 56.5, Reference

Deletion of the citation “Canon 2 of the California Code of Judicial Ethics” because the Office of Administrative Law deems it not appropriate as a legal reference.

17. Section 57.1, subdivision (m)

Addition of the phrase “or a request for back pay hearing” for consistency between Sections 57.1 and 61, i.e. to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for

back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. ALJs must instruct the parties in back pay claim proceedings and requests for back pay hearings proceedings on the burdens of proof.

18. Section 59.1, subdivision (b)

Addition of the phrase “more than” before the number 15 to provide clarification.

19. Section 61 Heading

Addition of the phrase “and Requests for Back Pay Hearings” to the heading of the section, to include the Respondent’s request for back pay hearings, as well as back pay claims.

20. Section 61, subdivision (b)(2)

Replacement of the word “claim” with the word “request,” addition of the phrase “request for” before the phrase “back pay” and replacement of the word “claim” with the word hearing to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case.

21. Section 61, subdivision (c)

Addition of the phrase “or a request for back pay hearing” to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. Both requests and claims are subject to the inclusion requirements, set forth in subdivision (c).

22. Section 61, subdivision (d)

Addition of the phrase “or request for back pay hearing” to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. Both requests and claims are required to be answered by the

opposing party pursuant to (d).

23. Section 61, subdivision (e)

Addition of the phrase “or request for back pay hearing” to make a distinction between back pay claims, which are filed when an Appellant seeks back pay

and requests for back pay hearings, which are generally filed by Respondents who request that the Board make a determination about back pay in a particular case. Both requests and claims that meet all Section 6 requirements shall be scheduled for an evidentiary hearing.

24. Section 61, subdivision (g)

Addition of the phrase “or request for back pay hearing” to make a distinction between back pay claims, which are filed when an Appellant seeks back pay and requests for back pay hearings, which are generally filed by Respondents who requests that the Board make a determination about back pay in a particular case. ALJs shall instruct parties to both requests and claims about burdens of proof.

25. Section 62

Deletion of the language regarding final decisions. The language previously set forth in this section is now proposed to be set forth in Section 61.6.

If you have any comments regarding the proposed changes described above, the Board will accept written comments between September 28, 2012 and October 15, 2012. The comments must pertain to the modifications identified in this notice, be submitted no later than 5:00 p.m. on October 15, 2012, and be addressed to:

Julia Johnson
State Personnel Board
801 Capitol Mall
Sacramento, CA 95814
JJohnson@spb.ca.gov

All comments received by 5:00 p.m. on October 15, 2012 which pertain to the changes set forth herein will be reviewed and responded to by the Board as part of the compilation of the rulemaking file.

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Any person who has questions or comments about this notice or the underlying rulemaking may e-mail Julia Johnson at JJohnson@spb.ca.gov or call Ms. Johnson at (916) 651-6532.