

STATE PERSONNEL BOARD

TEXT OF PROPOSED REGULATIONS

California Code of Regulations, title 2, Division 1, Chapter 1, Subchapters 1.2, Hearings and Appeals and 1.3, Examinations and Appointments

Text proposed to be added for the 45-day comment period is displayed in underlined font.

Text proposed to be deleted for the 45-day comment period is displayed in ~~strikeout~~ font.

Text proposed to be added for the first 15-day comment period (July 13-30, 2012) is displayed in double underlined font.

Text proposed to be deleted for the first 15-day comment period (July 13-30, 2012) is displayed in ~~double strikeout~~ font.

Text proposed to be added for the first 15-day comment period (September 28, 2012 - October 15, 2012) is displayed in *italicized double underlined* font.

Text proposed to be deleted for the first 15-day comment period (September 28, 2012 – October 15, 2012) is displayed in ~~*italicized double strikeout*~~ font.

§ 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 new 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.

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

~~(d)~~(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.”

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

~~(f)~~(g) “Appellant” means the person or organization filing any appeal with the SPB.

~~(g)~~(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 would not have~~ been subject to an adverse action, a non-punitive ~~demotion, transfer, or termination, a medical demotion, transfer, or termination, or 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.

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

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

~~(j)~~(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."

~~(k)~~(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.

~~(l)~~(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.

~~(m)~~(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.

~~(n)~~(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.

~~(e)~~(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.

~~(p)~~(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 and accepted by the State Personnel Board after the filing party has complied with applicable 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 close in time to* 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 ~~a close in time to~~ 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.

~~(q)~~(w) "Hearing ~~O~~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 ~~the provisions of sections~~ 54.1 and 55.2.

~~(r)~~(x) "Informal Hearing" means a hearing conducted pursuant to Government Code sections 11445.10 through 11445.60 ~~by a Presiding Officer~~.

~~(s)~~(y) "Investigative ~~O~~officer" means a State Personnel Board employee designated by the ~~B~~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.

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

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

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

~~(w)~~(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.

~~(x)~~(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.

~~(y)~~(ee) “Office of the Chief Counsel” means the Office of the Chief Counsel for the Board.

~~(z)~~(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.

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

~~(bb)~~(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; Swepston v. State Personnel Board (1987) 195 Cal.App.3d 92.

§ 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

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.

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.

§ 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 that 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.

§ 52.4 . 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 Respondents.

(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 ~~and accepted by the board~~ SPB after the filing party has complied with applicable filing requirements.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675 and 19630, 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~~ amends a pleading, including a Notice of Adverse Action amended in accordance with the provisions of Government Code section ~~19575.5~~, the party shall promptly serve on all other parties and promptly file with the Appeals Division a complete, new pleading incorporating 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. ~~If the amendments are made during the hearing, the party shall use highlighting or any other effective method to identify the changes made to the pleading.~~ The ALJ, or the ~~H~~hearing ~~O~~fficer, may allow exceptions for minor amendments during the hearing.

(b) The ~~board~~ 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.

~~(b)~~(c) The SPB board prefers amended to supplemental pleadings. However, if a party ~~issues~~ seeks to amend 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.

~~(e)~~(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. ~~(d) When an Appellant or Complainant withdraws a request for hearing, the appeal or complaint will be deemed to be dismissed.~~

(e) At any time before the opening of the record in a matter, a claimant seeking back pay, a Respondent requesting a back pay hearing, or a Complainant may withdraw his or her request, claim or complaint and the 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, When an claimant seeking back pay Appellant, a Respondent seeking a back pay hearing, or a Complainant may seek approval from the Chief ALJ or his or her designee to withdraws his or her a request for hearing, the appeal claim or complaint will be deemed to be dismissed 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 Respondents 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, or 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.

§ 52.11. 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.

§ 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) Appeal of rejection during probationary period.~~

~~(3)~~ ~~(4)~~ 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.

§ 54.1. Informal Hearing Process

(a) For those appeals assigned to hearing before a ~~H~~hearing ~~O~~fficer, the ~~H~~hearing ~~O~~fficer shall have the authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers. The ~~H~~hearing ~~O~~fficer 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 ~~59.1~~ 59.2 through ~~59.4~~ 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 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.~~

(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.

§ 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 ~~ALJ~~ 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 ~~ALJ~~ presiding officer finds it in the interest of justice to do so.

(c) The ~~ALJ~~ 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 ~~ALJ~~ 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 ~~will~~ 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 ~~will~~ shall, at the discretion of the presiding officer, be admissible even though they are technically hearsay, and may be relied upon by the ~~ALJ~~ presiding officer to make a finding of fact ~~pursuant to section 11514 of the Government Code.~~

(f) The ~~ALJ~~ presiding officer shall prepare a short-form proposed decision which would be forwarded to the ~~B~~board within 30 days of the investigatory hearing. The decision ~~will~~ shall include enough information to allow the ~~B~~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 ~~ALJ~~ presiding officer decides is necessary to highlight.

(g) Absent ~~B~~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.

§ 56.3. Disqualification of ~~ALJ, Hearing Officer, or 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. An ~~ALJ or Hearing Officer~~ shall voluntarily disqualify him or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under section 11425.40 of the Government Code. 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 ~~ALJ~~ 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.

(b)(d) In accordance with the provisions of section 11425.40 of the Government Code, a Any party may request the disqualification of any ~~ALJ or Hearing Officer~~ 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 ~~ALJ or Hearing Officer~~ presiding Officer should be disqualified. The issue shall be determined by the ~~ALJ or Hearing Officer~~ Chief ALJ or his or her designee.

Note: Authority cited: 18701, Government Code. Reference: 18675, 11425.40, 11430.60, and 11512(c), Government Code.

§ 56.4. Ex Parte Communications

(a) While any adjudicatory proceeding is pending before the Board or a presiding officer, ~~an ALJ, a Hearing Officer, an Investigative Officer, or any other designated representative of the Board~~, 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; ~~or~~

(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) ~~T~~he 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 the Bboard 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; ~~Canon 2 of the California Code of Judicial Ethics.~~

§ 57.1. Prehearing/Settlement Conferences

(a) After an evidentiary matter ~~case~~, 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 ~~that~~ contains 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 witnesses each party may call at the hearing, ~~together the subject matter on which the witness is expected to present evidence, and a summary of the~~ with a brief statement of the content 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) Failure to fully disclose all required items in the prehearing/settlement conference statement without good cause will, at the discretion of the ALJ, result in the exclusion or restriction of evidence at the hearing. 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.

~~(g)(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 filed with provided to the assigned ALJ at the prehearing/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.

~~(h)(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 writing to the prehearing/settlement conference.

~~(j)~~(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.

~~(j)~~(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.

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

(a) For appeals from actions resulting in the termination of an employee and complaints involving the penalty of dismissal, where an evidentiary hearing has not commenced within ~~8~~ 6 months of the filing of the appeal ~~or complaint~~, an Appellant ~~or Complainant~~ may request a priority hearing with the board. ~~Appeals Division~~. 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 ~~90~~ 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.

§ 58.12. 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.

§ 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, or complaint, or any other matter scheduled for an evidentiary which is scheduled for a 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 Bboard. 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 Pprehearing/Ssettlement Cconference solely for the purpose of obtaining information relevant to any affirmative defense raised alleged by Appellant in the Pprehearing/Ssettlement Cconference 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, days 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: ~~Section 87164, Education Code~~; Sections 225 and 250, Evidence Code; and Sections ~~8547.8~~, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, 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 Bboard, (SPB-76, Revised 12/09), attached as Appendix "B" 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.

§ 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;

~~(4) Consolidation or severance of matters for hearing pursuant to section 57.2.~~

(b) The following motions shall be filed with the Appeals Division within ~~40~~ 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)~~(e) Prior to the filing and service of any law and motion matter under ~~this section 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.

~~(d)~~(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.

~~(e)~~(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.

~~(f)~~(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.

~~(g)~~(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.

~~(h)~~(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.

~~(i)~~(k) Failure to comply with the requirements of subdivisions (a) through ~~(h)~~(j) 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.

§ 60.3. 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 ~~this section 60.3,~~ subdivisions (b) through (e).

(b) Any party seeking further responses to a request for discovery shall meet and confer with the responding party.

~~(b)(c)~~ After complying with subdivision (b), A 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.

~~(e)(d)~~ The matter will be decided upon the moving papers, as well as any responses and replies unless ordered otherwise.

~~(d)(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.

~~(e)(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 87164, Education Code;~~ Section 915, Evidence Code; and Sections ~~8547.8,~~

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 claim~~ 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 claim 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.

§ 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 52.3~~ 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.