STATE PERSONNEL BOARD

INITIAL STATEMENT OF REASONS

California Code of Regulations, title 2, Division 1, Chapter 1, Subchapters 1, General Civil Service Regulations and 1.2, Hearings and Appeals

INTRODUCTION

The State Personnel Board (Board) is a neutral body responsible for administering a merit system of civil service employment within California State Government. As part of its responsibility, the Board conducts hearings and appeals to resolve alleged violations of civil service laws and rules.

Government Code section 18701 provides the Board with broad authority to prescribe, amend, and repeal rules in accordance with law for the administration and enforcement of the Civil Service Act and other Government Code sections over which the Board is specifically assigned jurisdiction.

In 2010, the Board proposed and the Office of Administrative Law approved substantial amendments to the Board's hearing and appeals regulations to function in a more orderly and efficient manner. In 2012, the Board proposed and the Office of Administrative Law later approved clarifications to such amendments.

While the 2010 and 2012 amendments generally improved the functionality of the Board's hearings and appeals processes, the Board also recognizes that certain regulations needed further refinement. Such refinement will benefit the parties to the Board's hearing and appeals, promote fairness among the parties, and increase transparency in the Board's operations. Additionally, the Board has determined that the proposals will not impact the protection of public or worker health and safety or the environment.

Consistent with Government Code section 11346.5, subdivision (a)(13), the Board has determined that no reasonable alternative it considered or that otherwise has been identified and brought to its attention would be more effective in carrying out the purpose for which the adoption of these regulations are proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The only alternative to proposing the amendments to clarify the Board's regulations on hearings and appeals is to decline to

make such amendments. If the Board declined to make clarifications to its regulations, such regulations would continue to cause confusion and elicit questions from the Board's stakeholders. The least burdensome, most cost-effective and fair option is to propose the amendments set forth below.

The Board has relied upon its Economic Impact Analysis in determining what the effects of the proposed regulations will be and in determining whether to propose such amendments.

The specific purpose of each adoption, amendment, and repeal, and the rationale for the determination that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption, amendment, or repeal is intended to address is as follows:

Section 10

This regulation section includes a definition of "individual with a disability" that is no longer consistent with California statutory and case law. Government Code section 19702 prohibits any state employer from discriminating against a person on the basis of, among other things, a mental or physical disability, as defined in Government Code section 12926. While Section 10 states that a physical or mental disability must *substantially limit* one or more major life activity, Government Code sections 12926 and 12926.1 currently state that a disability need only *limit* a major life activity. In order to ensure that the Board's regulatory definition of "individual with a disability" is consistent with Government Code sections 19702, 12926, and 12926.1, the Board proposes to define "individual with a disability" as an individual who has a mental or physical disability, as those terms are defined in Government Code section 12926.

Section 51.2

The Board seeks to broaden the application of the definitions in Section 51.2 to the subchapter (Subchapter 1.2), instead of just the article. This change is warranted, since some of the defined terms are used in Subchapter 1.2 and such terms are not otherwise defined.

The Board's current definition of "good cause" includes an evaluation of certain factors. Those factors include, but are not limited to:

a) 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; and,
b) a material change in the law, as long as that change occurred within *15* days of the submission of the statement of good cause.

The phrase “good cause” is used throughout Subchapter 1.2 to refer to a showing that parties need to make in certain circumstances. One of the most common requests that the Evidentiary Appeals Unit receives that requires a showing of good cause is a request to amend a party’s prehearing/settlement conference statement (Statement) pursuant to California Code of Regulations, title 2, section 57.1, subdivision (i). Under Section 57.1, subdivision (i), a party is required to file an amendment within*10* days of learning of the discovery of new information. In order to ensure that Sections 51.2, subdivision (v), and 57.1, subdivision (i) are consistent, the Board proposes to change Section 51.2, subdivision (v) in the following manner:

a) The discovery of new evidence previously unavailable, as long as the discovery is made within *10* days of the submission of the statement of good cause; and
b) a material change in the law, as long as that change occurred within *10* days of the submission of the statement of good cause.

In addition to the fact that this will provide consistency among the regulatory sections, Board staff has determined that 10 days is a reasonable period of time within which the parties should be making requests to the Board.

“Medical condition” is not currently defined in Subchapter 1.2, but it is a basis upon which a person can file a discrimination complaint with the Board pursuant to Government Code section 19702. Government Code section 19702 states that “medical condition” is defined consistent with Government Code section 12926 Therefore, in Section 51.2, the Board proposes to define “medical condition” consistent with the definition in Government Code section 12926.

California Code of Regulations, title 2, section 57.1, subdivision (f), requires all parties scheduled for a prehearing/settlement conference to file a Statement beforehand. The intent in requiring parties to attend prehearing/settlement conferences and to file Statements is that parties be prepared to discuss the evidence they intend to introduce and the strength and weaknesses of their cases, as well as to potentially settle such cases. Section 57.1, subdivision (f)(5) and (8) requires that the parties include in their Statement, among other things:

> (a) 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*; and
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> (b) 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*.

Because parties are not required to disclose in their Statements witnesses or exhibits that will be used for rebuttal or impeachment purposes at hearing, parties frequently do not include certain witnesses or exhibits on their Statements, and then argue about what "rebuttal" constitutes at hearing. The Board proposes to define rebuttal as "the part of the hearing after which all parties have presented their cases-in-chief." The Board further proposes to define "rebuttal evidence" as "evidence intended to respond to new points or new evidence first introduced by the opposing party." Additionally, the Board proposes to define "surrebuttal" as "the presentation of evidence in refutation of new evidence presented during rebuttal."

By defining these terms, the Board intends to clarify for the parties what "rebuttal" means. The Board further intends to discourage any parties from attempting to gain an unfair advantage on opposing parties by failing to include all relevant information in their Statements, unless such information truly constitutes rebuttal or impeachment evidence.

The Board also proposes renumbering the subdivisions in this section, as necessary with the additional changes proposed to this section.

Section 52.1

Currently, Section 52.1 requires that the font in typed papers filed with the SPB be no smaller than 12 point, so that the documents are easy to read and so that page limit requirements are not circumvented by parties complying with the page limit requirement, but typing in smaller fonts. While parties have complied with such requirements, some parties have filed documents with little to no margins, presumably to include more information in documents that have page limits. To stop that practice, the SPB is clarifying that documents filed with the Board must have at least one-inch margins.

Section 52.10

Currently, pursuant to California Code of Regulations, title 2, section 57.1, subdivision (h), parties are required to serve their Statements upon each other at least 10 days prior to the prehearing/settlement conference (or Trial Setting Conference). Under Section 52.10, service of the Statements must be made pursuant to Code of Civil Procedure section 1013, among other statutes. Many parties have been confused about whether filing a Statement pursuant to Section 57.1, subdivision (h), triggers a duty to perform an act pursuant to Code of Civil Procedure section 1013. If filing a Statement would trigger such a duty, the party would be required to extend the period of notice by a certain number of days depending upon the method of service (for example, extending the period of notice from 10 to 15 days for service of the Statement by United States mail).

The proposed changes to Section 52.10, subdivision (b), would clarify that the Board does not require the parties to extend any period of notice for service of a Statement.

The proposed changes to Section 52.10, subdivision (b) would also clarify that a Statement must be served by personal service (by a person other than the Complainant) or United States mail, unless agreed otherwise.

California Code of Regulations, title 2, section 67.3 currently requires people who file whistleblower retaliation complaints with the Board to file extra copies of the complaint, so that the Board may serve the respondents with the complaints. The proposed changes to Section 67.3 would require whistleblower retaliation complainants to serve the complaints on the respondents themselves. Consistent with such changes, Section 52.10, subdivision (c) requires complainants to serve the complaints by personal service (by a person other than Complainant) or by certified mail with return receipt requested.

Section 52.11

The proposed change to Section 52.11 would make clear that the counting days regulation applies to any deadline to file a document a certain number of days after an event and/or to file a document a certain number of days before an event.

Sections 53.2 and 53.3

Currently, Board regulations assign discrimination complaints to the investigative review process, unless otherwise assigned. Board staff recognizes that accepted discrimination complaints generally involve complicated factual and legal issues, and, therefore, warrant an evidentiary hearing. Therefore, the Board proposes to amend current regulations to assign accepted discrimination complaints to the evidentiary hearing process, instead of the investigative review process, unless otherwise assigned. Such a change would reflect the realistic assignments of most discrimination complaints.

Section 57.1

The Board proposes to modify subdivision (c) of Section 57.1 to fix a grammatical error. Subdivision (c) currently states that each respondent "and *his or her* representative" shall appear in person. Respondents are generally entities, and not individuals. Therefore, it is appropriate to change the phrase to "Respondent and *Respondent's* representative."

Subdivision (d) of Section 57.1 requires respondents or their representatives attending prehearing/settlement conferences to have full settlement authority or to be able to obtain authority immediately by telephone. It further permits an administrative law judge to require respondent's representative with settlement authority appearing by telephone to participate in a teleconference. Administrative law judges have repeatedly encountered difficulties in reaching respondent's representative with settlement authority by telephone. Therefore, the Board proposes to clarify that, in cases where respondent's settlement authority is only available by telephone, the administrative law

judge may require the person with that authority to participate in a teleconference at any time during the two-hour prehearing/settlement conference.

Subdivision (f) of Section 57.1 requires each party scheduled to attend a prehearing/settlement conference to file a Statement that includes certain information. Board staff has experienced difficulties, at times, with being able to schedule hearings requiring video conferencing around the unavailability of respondents' video conference equipment. Therefore, the Board proposes to require that, if a respondent knows or should know that a portion or all of the hearing will be held by video conference, the respondent must include the dates of unavailability of respondent's video conferencing equipment in its Statement.

Subdivision (h) currently requires that parties serve their Statements on all the other parties ten days prior to the scheduled prehearing/settlement conference. As mentioned above with respect to Section 52.10, parties have raised concerns about whether the period for notice should be extended based upon the manner of service (for example, requiring the party serving the Statement by United States mail to put it in the mailbox 15, rather than 10, days prior to the prehearing/settlement conference). Parties have also raised concerns about having enough time to review the other parties' Statements before the prehearing/settlement conference. Therefore, the Board proposes requiring the parties to serve their Statements on the other parties 12 calendar days prior to the prehearing/settlement conference, without any extensions of the notice period, regardless of the method of service. Such an amendment would benefit the parties by providing them with clarification about such service.

Currently, subdivision (i) of Section 57.1 permits a party to file amendments to its Statement upon a showing of good cause. The Board proposes to amend subdivision (i) to clarify that a party must actually request to amend its Statements, since a showing of good cause must be found by the Board designee. Additionally, the Board proposes to amend this subdivision to correct a typographical error in the last sentence. The sentence will now read: "The new prehearing/settlement conference <u>statement</u> shall be titled a 'First Amended Prehearing/Settlement Conference Statement,' and subsequent amended statements shall be titled consecutively."

Subdivision (j) of Section 57.1 currently requires that each party bring a copy of a draft settlement proposal on a portable drive or in digital format to a prehearing/settlement conference. Nevertheless, the Board's computer privacy policies prohibit the use of non-Board portable drives with Board computers. Therefore, the Board proposes requiring parties at prehearing/settlement conferences to have access to settlement proposals in a digital format.

Subdivision (l) of Section 57.1 states that a failure of any party to appear and/or proceed at a prehearing/settlement conference shall be deemed a withdrawal of the appeal or action unless the hearing is continued for good cause. Because of the difficulties administrative law judges have encountered in reaching respondent's representative with settlement authority by telephone, the Board proposes to add that respondent's

failure to be able to obtain settlement authority immediately in person or by telephone may be deemed failure of a party to appear and/or proceed. This amendment is proposed so that all parties are treated equally and fairly and all parties are expected to participate in the prehearing/settlement conference.

Section 58.6

Currently, Section 58.6 permits an administrative law judge to conduct all or part of a hearing by telephonic conference call or video conference upon a motion of a party. Under the current law, parties have requested to conduct all or part of a hearing by telephonic conference or video conference without providing a justification. Some parties believe that they are entitled to conduct a hearing by telephonic conference call or video conference as long as they ask for it. Nevertheless, the intent of this regulatory section was that the moving party state good cause to do so. Accordingly, the Board proposes to permit an administrative law judge to conduct all or part of a hearing by telephonic conference call or video conference upon a showing of good cause.

Section 58.10

This section already permits an administrative law judge, the designee of the Chief Administrative Law Judge (Chief ALJ), a hearing officer, or presiding officer to take official notice of those matters specified in section 11515 of the Government Code. The Board proposes to amend this section to specify that official notice may be taken of the State Controller's Office's Employment History Summary for an appellant, the job description of an appellant's classification, prior Notices of Adverse Actions taken against an appellant, and administrative records of SPB cases in which an appellant was a party. These are documents of which official notice is generally taken in disciplinary proceedings.

Section 58.13

Generally, Board hearings are electronically recorded. Under Section 58.13, parties may request that any hearing be recorded by a certified court reporter, and that such court reporter be approved by the Chief ALJ and retained by the Board. Based upon the current language used in Section 58.13, some parties believe that they are permitted to obtain a certified court reporter to record the proceedings as long as they ask an administrative law judge if they can do so. The Board proposes to amend Section 58.13 to clarify that the parties need to state good cause to obtain a certified court reporter to record the proceedings.

Section 59.5

Government Code section 19574.1, subdivision (a), permits an employee who has been served with a Notice of Adverse Action to interview other employees having knowledge

of the acts or omissions upon which the adverse action was based. Section 19574.1, subdivision (a), states that interviews of other employees shall be at times and places reasonable for the employee and for the appointing power. Subdivision (b) of Section 19574.1 requires the appointing power to make all reasonable efforts necessary to assure the cooperation of any other employees interviewed. Parties have disputed the meaning of subdivision (d). Therefore, the Board proposes to clarify that Respondent shall inform an employee who appellant requests to interview of such request and make available a room for appellant to conduct such interview of the employee wishes to participate in an interview, but respondent is not required to order any employee to participate in an interview if the employee declines appellant's request. This proposed change promotes fairness among and provides clarification to the parties.

Section 60.1

Currently, Section 60.1 describes general motion requirements. Historically, parties in evidentiary matters have generally filed the motions that are scheduled for law and motion hearings. Nevertheless, more recently, the Board has received more requests for law and motion hearings in informal and investigatory matters. Accordingly, the Board proposes to clarify that, unless otherwise ordered by the Chief ALJ, a motion will only be scheduled for a law and motion hearing if filed in an evidentiary matter or if it is a motion to dismiss a Notice of Rejection during Probation. This amendment would help ensure the efficient processing of the investigatory and informal matters for hearing.

The Board also proposes renumbering the subdivisions in this section and making corresponding changes to the referencing of such subdivisions, necessitated by the additional changes proposed to this section.

Section 64.1

Section 64.1 currently permits any state civil serve employee, or applicant for state civil service employment, to file with the Board a discrimination complaint on any protected basis set forth in Government Code section 12926. This section reflects outdated law, as Government Code section 19702 no longer authorizes the Board to accept discrimination complaints on all protected bases. Instead, Government Code section 19702 authorizes the Board to accept complaints for discrimination, harassment, or retaliation based on the medical condition or mental or physical disability of the employee or applicant, or on the basis that the employee or applicant was denied reasonable accommodation. Therefore, the Board proposes to amend Section 64.1, so that it is consistent with Government Code section 19702.

Section 64.2

Currently, Section 64.2 sets forth the prerequisites for filing a discrimination complaint. Based upon outdated law (the previous version of Government Code section 19702 described above), Section 64.2 infers that any state employee or applicant for state employment who reasonably believes that he or she has been subjected to discrimination, harassment, or retaliation, or denied reasonable accommodation, may file a complaint with the Board once he or she has filed a written complaint with the appointing power's Equal Employment Opportunity Office. The Board proposes to clarify that the Board may only accept discrimination complaints from applicants or employees on the basis of their medical condition, mental or physical disability, or denial of reasonable accommodation, consistent with state law.

Section 64.3

Section 64.3 currently requires appointing powers to establish in writing their own internal discrimination complaint processes in response to allegations of discrimination, harassment, or retaliation, or denial of reasonable accommodations. This reflects outdated law, under which the Board had greater authority over discrimination complaints. Therefore, the Board proposes to amend the section to clarify that appointing powers are required to establish in writing their own internal discrimination complaint processes in response to allegations of discrimination, harassment, or retaliation based on a medical condition or mental or physical disability, or denial of reasonable accommodation.

Section 64.5

The Board proposes to delete the requirement that a discrimination complainant needs to file additional copies of his or her complaint with his or her original complaint. Additionally, the Board makes grammatical changes to this section.

Section 67.2

Government Code section 8547.8, subdivision (a), permits a state employee or applicant for state employment *who has filed a written whistleblower retaliation complaint with his or her supervisor, manager, or the appointing power alleging actual or attempted acts of reprisal* to file a copy of such complaint with the Board. Currently, Section 67.2 does not require a person who files a whistleblower retaliation complaint with the Board to have previously filed a whistleblower retaliation complaint with the appointing power. Accordingly, the Board proposes to bring Section 67.2 in line with Government Code section 8547.8 by requiring any person who files a whistleblower retaliation complaint with the Board to have previously filed a whistleblower retaliation complaint with the appointing power.

Because the Board is proposing to require whistleblower complainants to serve such complaints upon the respondents (as opposed to requiring the Board to do so), the

Board proposes to delete the requirement that complainants file multiple copies of their complaints and attachments with the Board.

The Board further proposes to delete the requirement that the whistleblower complainant state in his or her complaint whether he or she has filed a complaint of retaliation with the Office of Inspector General, and the date of any such complaint. The Board has determined this requirement is not necessary.

The Board also proposes renumbering the subdivisions in this section, as necessary to accommodate the additional changes proposed to this section.

Section 67.3

Currently, the Board requires a whistleblower complainant to file additional copies of his or her complaint and attachments for all respondents, and the Board has served copies of the complaint and attachments on any respondents against which the complaint is accepted. Board staff has discovered multiple problems with this process. First, whistleblower attachments tend to be large. Accordingly, whistleblower complainants are required to spend significant funds, at times, to make enough copies of the complaints and attachments to send to the Board. Because many of the complaints are not accepted, the complainants have wasted money in copying all of their documents. And in order to send the complaints and attachments back to complainants, the Board incurs additional funds. Second, Board staff has served complaints on respondents, which have been returned to the Board as undeliverable. Staff is then in a position to confer with the parties about the next steps. And if complainant needs to try to prove that a respondent was properly served, he or she needs to rely upon Board staff records, and not his or her own, to prove it. Third, service is generally a requirement that is placed on parties, not the entity adjudicating the dispute. Given these issues, the Board proposes to change the way accepted whistleblower retaliation complaints are served.

The Board proposes to require complainant to serve respondents with the whistleblower retaliation complaint within three days of receiving the Executive Officer's letter accepting the whistleblower retaliation complaint. The Board proposes to require that complainant either arrange for respondents to be personally served by an individual other than complainant or that complainant serve respondents by certified mail with return receipt requested. Additionally, the Board proposes to require complainant to file with the Board a proof of service, indicating he or she has served respondents.

Section 67.6

Section 67.6, subdivision (d), currently permits any respondent found to have engaged in retaliatory acts against a whistleblower complainant to file a request for hearing with the Executive Officer within 30 days' receipt of a Notice of Findings. Board staff has determined that such a request is better addressed to the Appeals Division, rather than the Executive Officer. Therefore, the Board proposes to change subdivision (d) accordingly.

Additionally, Board staff has found that, once a respondent who has been found to have engaged in retaliatory acts in a Notice of Findings requests an evidentiary hearing, parties to that evidentiary hearing generally request to participate in a status conference or prehearing/settlement conference prior to the evidentiary hearing. Nevertheless, because the Executive Officer has already determined that, based upon the informal hearing, there was sufficient evidence that at least one respondent retaliated against a whistleblower complainant, Board staff does not generally encourage settlement of such a matter. Therefore, the Board proposes to require the parties in this situation to attend a Trial Setting Conference, and to file a Trial Setting Conference Statement. Because the Trial Setting Conference would be mandatory, the Board proposes that failure of complainant or any of respondents to appear and/or proceed at a Trial Setting Conference shall result in evidentiary sanctions, unless the hearing is continued for good cause.