

STATE PERSONNEL BOARD

NOTICE OF PROPOSED RULEMAKING

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

Notice is hereby given that the State Personnel Board (Board) is proposing to adopt the regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

A public hearing regarding the proposed regulations (proposals) will be held on January 26, 2017 at 9:00 a.m. in Room 150 at 801 Capitol Mall, Sacramento, CA. Room 150 is wheelchair accessible. At the hearing, any person may present statements or arguments, in written or oral form, relevant to the proposals described in the Informative Digest.

WRITTEN COMMENT PERIOD

Any interested party, or his or her authorized representative, may submit written comments relevant to proposed regulatory action to:

Julia Johnson
Presiding Administrative Law Judge
State Personnel Board
801 Capitol Mall
Sacramento, CA 95814
jjohnson@spb.ca.gov

The written comment period closes on January 27, 2017, at 5:00 p.m. The Board will only consider comments it receives by that time.

ADOPTION OF PROPOSALS

Following the public hearing, the Board may thereafter adopt proposals that are in-substantially the same form as those described below and modify the proposals if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposals will be made available for 15 days prior to their adoption. Such modified proposals will also be mailed to those persons who: 1) submit written comments related to the proposals; 2) provide oral testimony at the public hearing; or 3) have requested notification of any changes to the pertinent regulations.

AUTHORITY AND REFERENCE

Government Code section 18211, 18214, 18502, 18701, 19231, 19792, authorize the Board to adopt the proposed amendments to the California Code of Regulations, title 2, Division 1, Chapter 1, Subchapters 1 and 1.2. Such amendments would implement, interpret, and make specific the following statutes:

Code of Civil Procedure sections 415.30, 1008, 1012, and 1013.

Education Code sections 87160, 87161, 87162, 87163, 87164, 89538, and 89541.

Government Code sections 8547, 8547.1, 8547.2, 8547.3, 8547.8, 11440.20(b), 11515, 11511.5, 11511.7, 12926, 12926.1, 18575, 18670, 18671, 18671.1, 18672, 18675, 19058, 19083, 19100.5, 19173, 19175, 19180, 19230, 19231, 19243.4, 19253.5, 19572, 19574, 19574.1, 19575, 19582, 19583.5, 19584, 19585, 19590, 19683, 19701, 19702, 19702.1, 19803, and 19889.2.

Penal Code section 6129.

REGULATION SECTIONS AFFECTED

The Board is proposing to amend sections 10, 51.2, 52.1, 52.10, 52.11, 53.2, 53.3, 57.1, 58.6, 58.10, 58.13, 60.1, 64.1, 64.2, 64.3, 64.5, 67.2, 67.3, and 67.6.

The Board is proposing to adopt section 59.5.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The 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.

Board regulations pertaining to hearing procedures for disciplinary and merit appeals and disability discrimination complaints must comply with most of the Administrative Procedure Act provisions. (Gov. Code, § 18215, subd. (a)(2).) Pursuant to Government Code section 18215, subdivision (b), Board regulations pertaining to hearing procedures for disciplinary and merit appeals and disability discrimination complaints do not need to comply with the following portions of the Administrative Procedure Act:

- (1) Government Code section 11346.2, subdivisions (a)(1) and (b)(4) and (5) [notice of proposed action: plain language; reasonable alternatives; and supportive evidence];
- (2) Government Code section 11346.3 [economic impact on business enterprises and individuals];
- (3) Government Code section 11346.4, subdivision (a)(3) [notice of proposed action: mail to representative number of small business enterprises];
- (4) Government Code section 11346.5, subdivision (a)(3)(B), (a)(5), and (a)(7) through (a)(12) [notice of proposed adoption of regulation: description of differences with federal law; mandate on local agencies or school districts; determination of significant, statewide adverse economic impact on businesses; cost impact on representative private person or business; results and finding of economic impact assessment; and statement of significant effect on housing costs];
- (5) Government Code section 11346.9, subdivision (a)(2), (a)(4), and (a)(5) [final statement of reasons: mandate on local agencies or school districts; alternatives; rejection of alternatives];
- (6) Government Code section 11347.3, subdivision (b)(6) and (b)(7) [final rulemaking file: data, factual information, and empirical studies or reports];
- (7) Government Code section 11349, subdivisions (a), (e), and (f) [definitions of necessity, reference, and nonduplication]; and
- (8) Government Code section 11349.1, subdivision (a)(1), (a)(5), and (a)(6) [Office of Administrative Law (OAL) review for necessity, reference, and nonduplication].

Therefore, the Board does not have to comply with the foregoing requirements with respect to the proposed regulations at hand.

In 2010, the Board proposed and the OAL 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 OAL 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. The proposed amendments include:

1. A modified definition of “good cause,” an amended definition of “individual with a disability,” and new definitions of “medical condition,” “rebuttal,” “rebuttal evidence,” and “surrebuttal.”
2. A requirement that prehearing/settlement conference and Trial Setting Conference statements are served at least 12 days prior to the conference, regardless of the method of service;
3. A requirement that whistleblower complainants serve accepted whistleblower retaliation complaints upon respondents by personal service or certified mail return receipt requested.
4. The assignment of accepted discrimination complaints to the evidentiary, and not the investigative review, process.
5. Recognition that Respondent’s failure to be able to obtain settlement authority immediately by telephone at a prehearing/settlement conference may be deemed failure of Respondent to appear or proceed.
6. A requirement that Respondent include the dates of unavailability of Respondent’s videoconferencing equipment in its prehearing/settlement conference statement if Respondent knows or should know that a portion or all of a hearing will be held by videoconference.
7. A requirement that each party participating in a prehearing/settlement conference have access to its settlement proposal in digital format.
8. Clarification that an administrative law judge may conduct all or a part of a hearing by telephonic conference call or video conference upon a party’s showing of good cause.
9. The authorization of an administrative law judge to take official notice of administrative records of SPB cases in which an appellant was a party and an appellant’s: Employment History Summary, job description, prior Notices of Adverse Actions.
10. Clarification that a hearing may be recorded by a certified court reporter approved by the Chief Administrative Law Judge upon a party’s showing of good cause.
11. Recognition that an appellant may request to interview employees of a respondent’s who have knowledge of the relevant events upon which an appellant’s adverse action is based, the requirement that a respondent inform the pertinent employees of an appellant’s request and make available a room for appellant to conduct an interview, and the recognition that a respondent is not required to order employees to participate in interviews if the employees decline the request.

12. Recognition that only motions to dismiss, to strike, and for failure to state a cause of action in evidentiary matters and motions to dismiss Notices of Rejection During Probation must be heard at law and motion hearings, unless otherwise ordered by the Chief Administrative Law Judge.

13. The requirement that a state employee or applicant for state employment who believes he or she has been retaliated against for making a protected disclosure first file a written complaint with his or her supervisor, manager, or the appointing power before he or she files a whistleblower retaliation complaint with the Board.

14. The requirement that the Board schedule a matter for a Trial Setting Conference after the Board Executive Officer issues a Notice of Findings in which a respondent is found to have engaged in retaliatory acts, and the respondent requests a hearing.

PUBLIC WORKER HEALTH AND ENVIRONMENT SAFETY

The Board has determined that the proposals will not impact the protection of public or worker health and safety or the environment.

CONSIDERATION OF ALTERNATIVES

Pursuant to Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is 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.

SMALL BUSINESSES

Consistent with California Code of Regulations, title 1, section 4, the Board has determined that the regulatory proposals do not affect small businesses, as defined in Government Code section 11342.610. The proposals only apply to state agencies, employees of state agencies, and such employees' representatives in appeals before the Board. No small business would derive a benefit or incur a detriment from the enforcement of the proposed regulations. (Cal. Code Regs., tit. 1, § 4, subd. (a).)

EVALUATION OF CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS

In reviewing other state regulations, the Board found that the instant regulatory proposals are consistent and compatible with existing state regulations.

ANY OTHER MATTERS PRESCRIBED BY STATUTE

Pursuant to Government Code section 11346.5, subdivision (a)(4), there are no other matters prescribed by statute applicable to the Board or to any specific regulation or class of regulations.

DETERMINATION OF COSTS OR SAVINGS

This proposal does not impose costs on any local agency or school district for which reimbursement would be required pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code. This proposal does not impose other nondiscretionary costs or savings on local agencies. Additionally, this proposal does not result in any costs or savings in federal funding to the State.

COSTS OR SAVINGS TO STATE AGENCIES

No additional costs or savings to state agencies are anticipated.

CONTACT PERSONS

Inquiries and comments concerning the proposed regulatory action may be directed to:

Julia Johnson
Presiding Administrative Law Judge
State Personnel Board
801 Capitol Mall
Sacramento, CA 95814
(916) 651-6532
jjohnson@spb.ca.gov

In the event the contact person is unavailable, inquiries regarding the proposed action may be directed to the following backup contact person:

Paul Ramsey
Appeals Division Chief
State Personnel Board
801 Capitol Mall, CA 95814
(916) 651-6888
pramsey@spb.ca.gov

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND REMAINDER OF RULEMAKING FILE

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this

notice is published, the rulemaking file consists of this notice, the proposed text of the regulations, and the initial statement of reasons. Copies may be obtained by contacting Julia Johnson.

If written comments, data, or other factual information, studies or reports are received, they will be added to the rulemaking file. The file is available for public inspection during normal working hours at the State Personnel Board, 801 Capitol Mall, Sacramento, CA 95814. This notice, the Initial Statement of Reasons, and the proposed text of the regulations are also available on the Board's website at www.spb.ca.gov under "What's New?" Copies may be obtained by contacting the Contact Persons listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After conducting the public hearing and considering all timely and relevant comments received, the Board may adopt the proposals substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Julia Johnson at the address indicated above. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available to the public.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

It is anticipated that the proposed regulations will be filed with OAL and shall include a Final Statement of Reasons. Copies of the Final Statement of Reasons may be obtained by contacting Julia Johnson at the address, phone number, and email above when it becomes available.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulations in underline and ~~strikeout~~ can be accessed through our website at www.spb.ca.gov under "What's New?"