

**PROPOSED AMENDMENTS TO  
SUBCHAPTERS 1 AND 1.2 OF TITLE 2 OF THE  
CALIFORNIA CODE OF REGULATIONS**

**MARKED TO SHOW CHANGES**

**§ 10. Disability**

~~(a) “Individual with a disability” means any ,with respect to an individual who has a (1) having a physical or mental or physical disability, as those terms are defined in Government Code section 12926; impairment that substantially limits one or more major life activities of such individual; (2) having a record of such impairment; or (3) being regarded as having such an impairment.~~

~~(b) “Physical Impairment” means any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.~~

~~(c) “Mental impairment” means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.~~

~~(d) “Major life activities” means activities that an average person can perform with little or no difficulty, such as: walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, working, sitting, standing, lifting, or reaching, etc.~~

~~(e) “Substantially limits” means the individual with a disability is: 1) unable to perform a major life activity that the average person in the general population can perform; or 2) significantly restricted as to the condition, manner or duration under which the average person in the general population can perform that same major life activity.~~

Note: Authority cited: Sections 18701, 19231, 19244 and 19792, Government Code. Reference: Sections 12926, 12926.1, 19230, and 19231 and ~~19240-19244, Government Code; and Federal Public Health and Welfare Code, Title 42, Chapter 126, Sections 12101-12117 (Americans with Disabilities Act of 1990 [ADA]).~~

## § 51.2. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) unique to the person using it;

(2) capable of verification; and

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

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

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

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

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

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

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

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

(2) the discovery of new evidence previously unavailable, as long as the discovery is made within 10~~15~~ days of the submission of the statement of good cause;

(3) a material change in the law, as long as that change occurred within 10~~15~~ days of the submission of the statement of good cause;

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

(5) a substitution of counsel or representatives that is required in the interests of justice;

(6) the recent consolidation of the matter with another matter;

(7) a party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; and

(8) a party's mistake of law constituting excusable neglect.

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

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

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

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

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

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

(cc) "Medical condition" has the same meaning as the definition in Government Code section 12926.

(dd) "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.

(~~dee~~) "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.

(~~eff~~) "Office of the Chief Counsel" means the Office of the Chief Counsel for the board.

(~~ggg~~) "Peremptory strike" means the disqualification without cause of an ALJ assigned to a hearing.

(~~ggh~~) "Presiding officer" means an individual who presides over a hearing in a contested case.

(ii) "Rebuttal" means the part of the hearing after which all parties have presented their cases-in-chief.

(ij) "Rebuttal evidence" means evidence intended to respond to new points or new evidence first introduced by the opposing party.

(~~hkk~~) "Rejection during probationary period" or "rejection" means an action to remove an employee from a probationary appointment.

(~~ill~~) "Respondent" means the person or state agency from whose action or decision the Appellant is seeking relief.

(mm) "Surrebuttal" means the presentation of evidence in refutation of new evidence presented rebuttal.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 12926, 18675, 19180, and 19584, and 19702, Government Code; Swepston v. State Personnel Board (1987) 195 Cal.App.3d 92.

**§ 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 have at least one-inch margins and be printed in type not smaller than 12 point.

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

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

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

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

(b) Service of prehearing/settlement conference and Trial Setting Conference statements shall be made by personal service or United States mail, unless the parties to a matter agree in writing to a different method of service. Service of prehearing/settlement conference and Trial Setting Conference statements may be made by email or fax if the parties agree to such service and a written confirmation of that agreement is made. Service of the prehearing/settlement statement and Trial Setting Conference statement is considered complete at the time the statement is: delivered personally; transmitted by facsimile; transmitted by email; or deposited in a post office, mailbox, sub post office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service.

(c) Service of an accepted whistleblower retaliation complaint shall be made by personal service, by a person other than Complainant, or by certified mail with return receipt requested pursuant to Section 67.3, subdivision (e).

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

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

### **§ 52.11. Counting Days**

(a) If an ~~act~~ document must be filed ~~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~~ filing is due the business day immediately following the Saturday, Sunday, holiday or other non-business day.

(b) If an ~~act~~ document must be filed ~~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~~ filing 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 based upon medical condition, mental disability, or physical disability, including denial of reasonable accommodation, complaints of retaliation under Government Code section 19702, C~~challenges to examination results, rejection of application for state civil service employment based upon minimum qualifications, certification withholds, appeals of layoff review findings under Government Code section 19798, 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: Sections 18502 and 18701, Government Code. Reference: Sections 18675 and 19702, 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) Complaint of discrimination, harassment, or retaliation based upon medical condition or mental or physical disability, or denial of reasonable accommodation for a physical or mental disability accepted pursuant to Section 64.6.

(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.

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

(a) After an evidentiary matter, or any other matter deemed appropriate by the Chief ALJ or his or her designee, has been filed with the Appeals Division, the matter shall be scheduled for a prehearing/settlement conference, unless ordered otherwise.

(b) The ALJ at the prehearing/settlement conference shall not preside as the ALJ at the evidentiary hearing unless otherwise stipulated by the parties.

(c) Each Appellant and his or her representative, and each Respondent and ~~his or her~~ Respondent's 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 at any time during the two-hour prehearing/settlement conference.

(e) A request to continue a prehearing/settlement conference shall be addressed to the Chief ALJ pursuant to section 60.2.

(f) Each party shall file a written prehearing/settlement conference statement, along with a proof of service, with the Appeals Division 10 calendar days prior to the hearing. The statement shall contain the following information:

(1) The identification by SPB Case Number of all appeals or complaints pending before the Appeals Division or the board, arising out of the same transaction, occurrence, or series of transactions or occurrences.

(2) A brief summary of any stipulated facts.

(3) Identification of affirmative defenses to any claim.

(4) A current estimate of the time necessary to try the case.

(5) The identity of each witness each party may call at the hearing, the subject matter on which the witness is expected to present evidence, and a summary of each witness's expected testimony. Parties are not required to disclose any witness that will be called for rebuttal or impeachment purposes.

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

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

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

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

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

(11) If Respondent knows or should know that a portion or all of the hearing will be held by video conference, dates of unavailability of Respondent's video conferencing equipment.

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

(h) All prehearing/settlement conference statements shall be served on all other parties at least ~~40~~12 calendar days prior to the prehearing/settlement conference in a manner consistent with Section 52.10, subdivision (b), and a copy shall be provided to the assigned ALJ at the prehearing/ settlement conference.

(i) Upon a showing of good cause, a party may seek to amend his or her prehearing/settlement conference statement by a request to amend its 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 statement shall be titled a "First Amended Prehearing/Settlement Conference Statement," and subsequent amended statements shall be titled consecutively.

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

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

- (1) Discovery disputes;
- (2) Preparation of stipulations;
- (3) Clarification of issues;
- (4) Rulings on identity and limitation of the number of witnesses;
- (5) Objections to proffers of evidence;
- (6) Order of presentation of evidence and cross-examination;
- (7) Rulings regarding issuance of subpoenas and protective orders; and

(8) Any other matters that promote the orderly and prompt conduct of the hearing.

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

(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.

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

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

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

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

#### **§ 58.10. Official Notice**

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

(a) 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.

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

### **§ 58.13. Court Reporters**

Upon a showing of good cause by a~~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.

### **§ 59.5. Interviewing Witnesses**

(a) Any Appellant, or his or her designated representative, shall have the right to request to interview employees of Respondent's having knowledge of the acts or omissions upon which Appellant's adverse action was based. Respondent shall inform an employee whom Appellant requests to interview of such request, and shall make available a room for Appellant to conduct such interview if the employee wishes to participate in an interview. Respondent is not required to order any employee to participate in an interview if the employee declines the request.

(b) Any interviews conducted pursuant to this section shall be at times and places reasonable for the employees and for the Respondent.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19574.1, Government Code.

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

(a) Unless otherwise ordered by the Chief ALJ, a motion described in this section shall only be scheduled for a law and motion hearing if the motion is filed in an evidentiary hearing matter, or if the motion is a motion to dismiss a Notice of Rejection During Probation.

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

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

(2) Motion to Dismiss; and

(3) Motion to Strike.

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

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

(2) Motion for Change of Venue;

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

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

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

(~~d~~e) 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~~f) Prior to the filing and service of any law and motion matter under subdivision (~~a~~b), 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~~c) and (~~e~~d), unless determined necessary by the Chief ALJ or his or her designee.

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

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

(~~h~~i) 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.

(ij) 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.

(jk) 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.

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

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

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

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

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

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

Any state civil service employee or applicant for state civil service employment who reasonably believes that he or she has been subjected to discrimination, harassment, or retaliation based on his or her medical condition or mental or

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

Note: Authority cited: Section 18701, Government Code. Reference: Sections 18675, 19701 and 19702.1, Government Code.

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

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

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

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

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

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

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

(b) The Complainant shall submit to the Appeals Division a complaint and any attachments, ~~and enough copies for the SPB to serve each entity and person~~



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

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

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

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

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

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

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

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

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

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

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

(a) Any state employee or applicant for state employment who believes he or she has been subjected to actual or attempted acts of reprisal, retaliation, threats, coercion, or similar improper acts prohibited by Government Code section 8547.3 for having made a protected disclosure or for failing to obey an illegal order shall 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 Appeals Division.

~~(a)~~ The complaint shall be filed with and received by the Appeals Division within one year of the most recent alleged act of reprisal. The complaining party shall submit an original a complaint and copy of all relevant documents for the presiding officer to review attachments, and enough copies of the complaint and attachments for the Appeals Division to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

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

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

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

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

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

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

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

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

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

(ef) The above procedures do not apply in those cases where an Appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code section 19175, when appealing a notice of medical action, pursuant to Government Code section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other SPB hearing, unless that party has first complied with all filing requirements set forth in this section.

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

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

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

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

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

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

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

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

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

(e) Once the Executive Officer has accepted a whistleblower retaliation complaint, the SPB shall serve upon Complainant a letter accepting the Complainant's complaint. Within three days of receipt of the SPB's acceptance letter, Complainant shall serve all of the Respondents at their business or residence addresses with the whistleblower retaliation complaint and all attachments provided to the SPB. Complainant shall either arrange for Respondents to be personally served with the documents by an individual other than the Complainant or Complainant shall serve Respondents by certified mail with return receipt requested. On the same day that Complainant serves Respondents, Complainant is required to file with the SPB a proof of service, indicating that the Complainant has served the Respondents with the complaint and attachments and specifying the addresses at which Complainant served the Respondents.

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

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

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

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

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint and that decision shall be deemed the final decision of the Board. The Notice of Findings shall notify the Complainant that his or her administrative remedies have been exhausted and that the Complainant may pursue whatever judicial remedies are available to him or her.

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

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

(e) Upon receipt of a timely request for hearing, the Appeals Division shall schedule the matter for a Trial Setting Conference, instead of a prehearing/settlement conference. For purposes of the Trial Setting Conference, the parties to the whistleblower retaliation appeal must comply with Section 57.1, subdivisions (c), (e), (f), (g), (h), and (i).

(f) Failure of Complainant or any of Respondents to appear and/or proceed at a Trial Setting Conference, unless the hearing is continued for good cause pursuant to Section 58.3, shall result in evidentiary sanctions.

(g) At the Trial Setting Conference, the ALJ shall schedule the matter for an evidentiary hearing. The hearing shall be conducted in accordance with Article 6, beginning with section 56.1.

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