SUMMARY OF PUBLIC COMMENTS
AND
THE BOARD'S RESPONSES

Classifications, Examinations, and Selection Regulatory Package

15-Day Written Comment Period December 1, 2016, through December 15, 2016.

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AND
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I.

INTRODUCTION

The State Personnel Board (Board) proposes to adopt, amend, and repeal regulatory sections of Title 2, Chapter 1, of the Code of Regulations (CCR), which concern classifications, examinations, and selection (the CES Regulatory Package). A public comment period on these regulations was held from June 28, 2016, through August 22, 2016. A public hearing was held on August 24, 2016. The Board received both written and oral comments. All comments were taken under submission and considered. A 15-day written comment period was held from December 1, 2016, through December 15, 2016. All comments received were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

SUMMARY OF WRITTEN COMMENTS FROM PAMELA AHLEN, DIRECTOR, DEPARTMENT OF STATE HOSPITALS (DSH)

Comment 1:

Proposed CES Regulatory Package.

DHS supports the proposed CES Regulatory Package, as it enhances DSH's ability to employ sufficient staffing to meet licensing and regulatory requirements, and provide quality inpatient mental health services. Specifically, DSH supports the proposed regulations regarding three-score examinations as: (1) promoting a more streamlined and efficient examination process; (2) increasing the pool of qualified candidates; (3) strengthening its recruitment efforts to assist with acute vacancy rates; (4) allowing DSH to be more competitive in the hiring process; and (5) aiding in the reduction of overtime and mandatory overtime.

The following are examples of hard to recruit/hard to fill positions in DSH: Staff Psychiatrist (30.66 % vacancy rate); Hospital Police Officer (19.41 % vacancy rate); and Clinical Social Worker (18.86 % vacancy rate). A number of factors contribute to DSH's high vacancy rates, including geographic proximity to California Department of Correction's facilities and other local and county institutions where salaries are often higher than that of DSH; a less restrictive patient treatment and housing environments than CDCR; and the high-risk environment due to DSH's patient population, geographic isolation, and etc. In a February 2016 report, the Little Hoover Commission recommended a reduction in overtime and mandated overtime and reform of civil service procedures to make it easier to hire and retain qualified staff.

In summary, DSH looks forward to working with the Board and the California Department of Human Resources (CalHR) on implementing the proposed three rank exam process. If this is a phased approach, DSH requests consideration given our staffing needs and focus on reducing overtime.

Response 1:

The Board appreciates DSH's support of this regulatory package and, in particular, describing the positive impact the proposed three rank examination process will have on DSH's recruitment and retention efforts. As to DSH's request, proposed section 194 (Limited Three Rank Examinations) will not be phased in. The use of this type of scoring/ranking is at the discretion of CalHR or a designated appointing power.

It should also be noted that for purposes of clarity and consistency with the methodology chosen for scoring an examination, technical modifications have been made to proposed section 194 involving changing the title from "Limited Three Score Examinations" to "Limited Three Rank Examinations" and, in subdivision (b), changing "three passing scores" to "passing scores." In addition, for purposes of clarifying that the scoring and ratings for examinations shall be based upon an assessment and comparative evaluation of candidates, the proposed regulation has been amended to incorporate the language of proposed section 193.1

III

SUMMARY OF WRITTEN COMMENTS FROM LUISA MENCHACA, PRESIDENT, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, 2862 (LULAC).

Comment 1:

Proposed Section 85. (Obligations Under Other Federal or State Laws).

Include language in the Note to proposed section 85 under Authority that references Government Code section 19790 et seq. and Government Code section 18500, which combined constitute the State's general anti-discrimination statutes. It would also be important to include reference to Government Code section 19702, relating to medical conditions, which is not otherwise referenced in the package. This will further affirm that the selection process, which includes recruitment, examination and employment, will be conducted in a manner that does not constitute unlawful discrimination.

Response 1:

Proposed section 85 in the Note under Authority relies upon Government Code section 18701, which authorizes the Board to prescribe, amend, and repeal rules in accordance with the enforcement of the Civil Service Act (Gov. Code, §§ 18500-19799.) The statutes cited by LULAC do not authorize the Board to prescribe, amend, or repeal rules. Accordingly, citation to those statutes under Authority would not be consistent

with the proper use of the Authority note. Therefore, the Board declines to adopt this recommendation.

Comment 2:

Proposed Section 86.3. (Fair and Equitable Treatment in All Phases of the Selection Process).

Strike “without regard to any characteristic protected under” and in its place insert “consistent with” and after the reference to the California Fair Employment and Housing Act (FEHA) section include “and otherwise in accordance with the requirements set forth in Section 85.”

Response 2:

The intent of proposed section 86.3 is to ensure fair and equitable treatment in all phases of the selection process without regard to any characteristic protected under the federal Title VII or the FEHA. Using the term “consistent” lacks this specificity. Recitation of section 85 in section 86.3 would be duplicative and unnecessary, given that section 85 is part of the Board’s regulations and thus clearly applicable to state agencies. The Board, therefore, declines to adopt this suggestion.

IV.

SUMMARY OF WRITTEN COMMENTS FROM KATHY ALDANA, CHIEF, HUMAN RESOURCES OFFICE, CALIFORNIA DEPARTMENT OF WATER RESOURCES (DWR).

Comment 1:

Proposed Section 171.1 (Calculating the Amount of Time Required to Satisfy Minimum Qualifications for Experience).

Please define occasional or incidental. For example, if an employee acts in the place of a supervisor who is on vacation, whether for one or two days or a longer time period, such as two weeks, may this time be accrued and counted or will an official out of class or acting assignment be required?

Response 1:

“Occasional or incidental” is not defined in the regulations and therefore should be given common or ordinary meanings. The American Heritage Dictionary defines “occasional” as “occurring from time to time; not habitual; infrequent; created for a special occasion . . . .” (*American Heritage Dict*. (4th college ed. 2004) p. 961.) The American Heritage Dictionary also defines “incidental” as “occurring or likely to occur as an

unpredictable or minor accompaniment; of a minor, casual, or subordinate nature . . . ." (*Id*. at p. 700.)

Because the example involves out-of-class experience, section 212 of the Board's rules must be followed. To ensure clarity, reference to out-of-class experience has been added to proposed section 171.1, subdivision (d).

Comment 2:

The change to proposed section 171.1, subdivision (e) will, in essence, give double credit to an employee for completing the same duties of their position that they complete during their regular working hours. We believe that this is not equitable, because State employees working in agencies or divisions with restricted funding that prohibit overtime will be disadvantaged. The rule will also provide an unfair advantage for certain candidates by allowing them to progress through the ranks of a classification more quickly than those who do not work overtime. As candidates become aware of this rule, there may be instances where an employee may request overtime and a supervisor grants the request solely for the purpose of assisting the employee to gain experience, so he or she can qualify to take an examination. If overtime is granted for this purpose, we anticipate that appeals will occur for employees who were not provided the same opportunity to work overtime.

Moreover, auditing by HR staff to confirm overtime hours and whether they may count toward meeting MQs will be an administrative challenge and may cause delays in completing exams. There will also be challenges for non-civil service candidates that will require extensive time and effort by HR offices to confirm overtime eligibility toward meeting MQs. Further, excluded employees who do not receive overtime compensation will also be disadvantaged by this proposal.

Response 2:

The Board appreciates DWR's concerns related to allowing overtime hours to be counted when determining if an applicant has satisfied the experience component of the MQ requirement for taking a civil service examination. LULAC, in its comments to proposed section 171.1 during the 45-day public comment period, presented the case that not to allow the counting of overtime was a barrier not supported by any reasonable rationale. "If experience is generally based on number of hours worked (173.33) there is no rational basis to exclude time spent by persons in many entry-level positions and seasonal jobs, often filled by women of color and ethnic minorities. Why should not a lower-level employee be credited with six-months work of experience if he or she worked 6 or 7 days a week for 12 (plus) hours?" (LULAC Letter, 8/22/16, p. 10.)

In considering LULAC's comments, the Board found that overtime hours allows employees to gain additional time performing their assigned tasks and duties; thus, it was reasonable to conclude that this additional time serves to enhance and reinforce for them whatever competencies are required for those tasks and duties. (45-Day

Comments and Response, Written Comments from Luisa Menchaca, President, League of United Latin American Citizens, 2862 (LULAC), IX, Comment and Response 13(A), pp. 33-34.) Given that the instant proposed regulatory package is designed, in part, to update civil service practices to include the concept of competencies, proposed subdivision (d) was deleted and replaced with subdivision (e), which allows the counting of overtime as specified.

DWR's concern that overtime may be misused as a result of this regulation must be viewed in the context of memorandums of understanding (MOU)s between the state and recognized state employee unions. Most MOUs include clauses related to the assignment of overtime work. Therefore, the misuse of overtime in state service as a consequence of this regulation is minimal, if nonexistent, since agencies are required to follow the terms and conditions of MOUs, including those related to overtime.

DWR's other concern, that counting overtime provides applicants who work extra hours with an unfair advantage, can be reversed by asking LULAC's question, "Why should not a lower-level employee be credited with six-months work of experience if he or she worked 6 or 7 days a week for 12 (plus) hours?" (LULAC Letter, 8/22/16, p. 10.) As already noted, it is reasonable to conclude that working additional time serves to enhance and reinforce for employees whatever competencies are required for those tasks and duties. So, a persuasive argument can be made that not to count overtime is unfair.

Finally, DWR's position that determining the amount of overtime an applicant worked will create an administrative challenge and may cause delays concerns more a common issue that occurs whenever changes impacting a process and procedure are made. While a new method of requesting information from applicants about their experience or assessing the experience component of MQs may be required, nothing has been raised to suggest that such changes will be overly burdensome or result in significant new or unnecessary costs. Accordingly, the Board declines to amend subdivision (e) of proposed section 171.1.

Comment 3:

Proposed Section 195.3 (Alternate Rating for a QAP Examination).

CalHR's Chairperson Training Manual states that providing panel members with competitor's applications may lead to bias among panel members regarding a competitor's previous work experience and/or educational background. Panel members have not been allowed to see applications of candidates and have no access to them. With this in mind, it's unclear as to how the panel will determine that a candidate doesn't qualify during the QAP exam. MQs are currently determined by a qualified examination analyst. Exam staff have already determined that the candidate qualifies and any questionable applications are redacted and reviewed by SME's prior to the candidate being accepted into the exam. The proposed regulation seems to infer that any candidate who does not meet the MQs will be invited to the QAP interview and will be

rated as passing the exam. This would create an unmanageable workload for HR examination staff. We do not understand how this new section will apply.

Additionally, if a candidate is failing on the QAP exam, then he or she fails the exam. Proposed section 195.3 seems to state that if a candidate who didn't meet the MQs fails to answer the questions, they will receive a passing score, while others who met the MQs will solely fail, receive no score but will have exam appeal rights. Please clarify if we've misunderstood this proposal.

Response 3:

Section 199.1 (Alternate Ratings) currently provides for alternate ratings when the only reason for the elimination of a competitor is a determination that he or she did not satisfy the minimum qualifications of the class that is the subject of the examination. The purpose of section 199.1 is to provide a process for appeal in those circumstances. This regulatory package proposes to delete section 199.1 and renumber it as proposed section 195.3, so as to fit within the new numbering scheme of the Board's regulations. Like section 199.1, the purpose of proposed section 195.3 is to provide a process for an appeal where the only reason for eliminating a candidate from a QAP exam is a determination that the candidate fails to satisfy the minimum qualifications of the class that is the subject of the exam.

Proposed section 195.3 does not require that applications be given to panel members; thus, the current practice of not providing panel members applications is not impacted. However, should a circumstance arise where, the only reason for eliminating a competitor is based upon a failure to satisfy the minimum qualifications, proposed section 195.3 provides an appeal process.

V.

SUMMARY OF WRITTEN COMMENTS FROM PETER BROWN, STAFF SERVICES MANAGER, DEPARTMENT OF HEALTH CARE SERVICES (DHCS).

Comment 1:

Proposed Sections 83 (From and To Classes) and 83.1 (Unit).

The terms "from" and "to" and "unit" are used with regard to other HR scenarios, like transfers and demotions, not just promotions in place. Therefore, DHCS recommends that the definitions of these terms be broadened.

Response 1:

The comments submitted by DHCS were untimely and beyond the scope of the 15-Day Written Comment Period. However, DHCS has raised points that will improve and

appropriately expand these definitions to fit other personnel transactions. Accordingly, in proposed sections 83 and 83.1, references to “for a promotion in place” are stricken.

Comment 2:

Proposed Section 86.2 (Probationary Period).

Have either the Board or CalHR provided direction regarding the Job Examination Period (JEP) requirement for LEAP employees serving in a classification with a 12-month probation? Temporary appointments, which encompasses LEAP hires, can only be made for nine months. Are LEAP hires not required to fulfill a 12-month JEP (in a class requiring a 12-month probation), as would probationary incumbents serving in the same class? Will the provisions for TAU appointments be modified to allow for 12 months of service?

Response 2:

In a PML dated October 7, 2016, CalHR provided guidance to agencies on LEAP. The Board’s current regulations concerning LEAP are still in effect. Those rules do not require a candidate to serve a 12-month JEP (see § 547.54); however, there may be a reduction or extension of the JEP, not to exceed nine months (see § 547.55). The Board will be posting proposed regulations concerning LEAP that will allow for a 12-month JEP if the parallel civil service classification has a 12-month probation.

Comment 3:

Proposed section 86.2(a)(2) appears to define permanent status. How does this impact transfer eligibility? Must an employee complete the probationary period in order to utilize that classification for the purpose of a subsequent transfer?

Response 3:

For transfers, persons selected for appointment must satisfy the minimum qualifications of the classification to which he or she is appointed or have previously passed probation and achieved permanent status in that same classification. (See proposed § 250, subd. (d).)

Comment 4:

Proposed Section 171.1, subdivision (h) (Calculating the Amount of Time Required to Satisfy Minimum Qualifications for Experience).

(A) This calculation method allows for up to two additional months of qualifying experience, with no supportive substantiation. Applications should include specific dates of hire; otherwise this evaluation method will be applied inconsistently between candidates applying for the same positions, providing candidates who are less specific

an advantage in the minimum qualifying process. Those familiar with the regulation will purposefully choose not to disclose specific dates of employment to gain an additional month or two or experience.

(B) Post audit of an employee's work experience via the records of the Office of the State Controller, may reveal an illegal hire. DHCS has had incumbents apply for promotional opportunities within the year of their original appointment. In evaluating experience patterns for the promotion, illegal appointments have been discovered.

Response 4:

The comments submitted by DHCS are beyond the scope of the 15-Day Written Comment Period. For purposes of clarity, the Board exercises its discretion to respond.

(A) and (B) The Board's regulations do not currently address a situation where an applicant states the month and year of the hire and ending date, but fails to include the specific day of hire or employment termination. Consequently, appointing powers may address this issue differently. This regulatory action is intended, in part, to promote uniformity and transparency in selection procedures and practices. DHCS, however, raises legitimate concerns that some applicants may be disadvantaged. Accordingly, subdivision (h) is stricken.

Comment 5:

Proposed Section 242 (Promotions in Place).

(A) DHCS suggests incorporating "no true vacancy" language to remain consistent with the SROA Manual verbiage and the definition of "true vacancy" in proposed section 83.2. This inclusion would also remain consistent with proposed section 242, subdivision (c).

(B) DHCS suggests replacing "shall" with "may" in the following sentence of proposed Section 242, subdivision (b): "...all such qualifying employees in the unit ~~shall~~ may be promoted in place to the "to" class . . ." There will be cases where employees within the unit are not capable of performing duties at the higher classification level. The language for this provision appears to be unnecessarily binding agencies to promotions for all eligible employees, qualified/capable or not. In addition, the clause, "The appointing power may also decide not to promote" is vague and does not directly link to the previous statements.

(C) DHCS does not believe that the appointing power should be required to open the opportunity for promotion to competition. There may be circumstances where the employee being considered for upgrade is the only person performing work in the area considered for upgrade and/or is the only qualified/experienced person to perform the work. The standard for promotional consideration should not be mandated to include all

employees in the unit who have taken the exam and who are on the list. List eligibility is too broad in scope when considering promotions in place.

Response 5:

(A) The comment by DHCS on proposed section 242, subdivision (i) is beyond the scope of the 15-Day Written Comment Period. Nonetheless, for purposes of clarity, the Board exercises its discretion to respond.

Proposed section 83.2 defines a "true vacancy" as "a vacant position in the employee's unit that is in the employee's "from" or "to" class for which the appointing power is actively recruiting." Subdivision (i) refers to the position occupied by the employee to be promoted in place, not a separate position in the unit that is vacant. To refer to the position occupied by the employee as a "true vacancy" would confuse this important distinction. Therefore, the Board declines to amend the regulation as suggested.

(B) (C) DHCS's comments suggest a situation in which one employee is allowed to work at a higher level than other employees in the unit who are in the same class. While employees may work out-of-class as specified in Board regulations, using this practice as a means to justify a promotion in place only for that employee, when other employees within the unit are also eligible for promotion, raises concerns of favoritism and inequity in selection procedures, all of which fly in the face of the merit principle. Thus, appointing powers must ensure that out-of-class assignments are proper and in compliance with laws, rules, and policies.

All list eligible employees in the unit, however, may not be prepared for advancement. To place an employee at a higher level of duties and responsibilities he or she is not yet ready to assume, is not in that employee's best interest or the best interest of the state. Accordingly, proposed section 242, subdivision (b) has been modified. For those list-eligible employees not chosen, the proposed changes require that they are informed of the reasons why they were not promoted in place. The proposal also requires that they be given the opportunity to obtain the competencies necessary for a promotion in the future. Appointing powers must document the reasons why a list-eligible employee in the unit was not promoted in place and also document the in-person meeting with the employee, as specified. This documentation is required to be maintained pursuant to section 26. These modifications are intended to ensure that list-eligible employees who are in the unit and not selected for a promotion in place know why and are afforded the opportunity to promote in the future.

Comment 6:

Proposed Section 249.2 (Postings of Job Announcements on Websites or by Other Electronic Means).

In proposed section 249.2, has CalHR's "designated website" been defined, or is it assumed as CalHR/ECOS?

Response 6:

The comment by DHCS on proposed section 242, subdivision (i) is beyond the scope of the 15-Day Written Comment Period. Nonetheless, for purposes of clarity, the Board exercises its discretion to respond.

CalHR's "designated website" is not defined, because the domain name of the website may change. Reference to "designated website" provides sufficient clarity to mean that CalHR will designate a website for state job announcements.

Comment 7:

Proposed Section 249.7 (Non-Disclosure of a Candidate's Basis of Eligibility).

Hiring managers will not know if the candidates they are interviewing have eligibility, let alone if they are reachable. It sounds like agencies will no longer be able to send certified lists to the programs.

Response 7:

For certain agencies, proposed section 249.7 will require a change in procedures to ensure compliance with the regulation. The procedures of other agencies may currently be in compliance with the regulation and therefore require no change. Based on this comment, it appears that DHCS sends the certification lists to its programs. Because the certification list discloses the basis of eligibility of candidates, this practice will need to be changed so as not to violate proposed section 249.7. Please also see Written Comments by DOJ, VII., Response 4, pages 17-18, which discusses changes to proposed sections 249.6 and 249.7.

Comment 8:

Proposed Section 250, subdivision (d) (Determining Merit and Fitness During the Hiring Process).

(A) Do employees seeking transfer have to pass probation in a classification to utilize that classification as their highest A01 for transfer consideration?

(B) What is the universal definition for permanent status, and how does the proposed language correlate to use of the term with relation to transfers?

(C) Can an employee utilize an A01 appointment from a class in which he or she has not passed or completed probation for the purpose of a transfer?

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Response 8:

(A) Board regulations do not prohibit an employee from transferring while on probation. Board regulations also do not expressly refer to the "highest A01," which refers to the appointment transaction codes used by the State Controller's Office.[1] Use of the "highest A01" may be appropriate as long as using the "highest A01" complies with Board regulations related to transfers. Generally, those regulations (see sections 250 and 425 et seq.) allow a transfer without examination if the employee meets the minimum qualifications of the class to which he or she seeks a transfer, and the levels of duties, responsibility, and salary of the two classes are substantially the same. Adding the language "or have previously passed probation and achieved permanent status in that same class" to proposed section 250, subdivision (d) is intended to avoid confusion with CalHR's Rule 250, FAQ, No. 10.

In practical terms, this added language allows an employee to transfer to another appointing power in a class where the employee has already passed probation and achieved permanent status in that class. Different scenarios could arise. For instance, an employee could seek to transfer to another appointing power in a class that is the same class in which he or she is currently serving and passed probation or to a different class in which he or she had previously served and passed probation. In those situations, the employee may or may not satisfy the first prong of subdivision (d) (i.e., satisfy the minimum qualifications of the "to" class), but he or she does satisfy the second prong (i.e., previously passed probation and achieved permanent status in that same classification). As another example, an employee could seek to transfer to a class in a position with the same or another appointing power and the employee has never served in that class or served in that class but did not pass probation. In that instance, the employee must satisfy the first prong, i.e., the minimum qualifications of the "to" class.

(B) A state employee does not gain permanent civil service status and the protections of that status until he or she passes probation. Unless there is an intra-agency reassignment, as defined in the Board's proposed regulations, persons selected for appointment shall satisfy the minimum qualifications of the class to which he or she is appointed or have previously passed probation and achieved permanent status in the same class. As to how permanent status correlates to transfers, please see Response 8(A), above.

(C) It is assumed that this question relates to an employee who is seeking to transfer to a different class than his or her current class and that he or she has never served in that class or served in that class but did not pass probation. Assuming the transfer satisfies sections 425 et seq., the employee must also satisfy the minimum qualifications of the class to which he or she seeks appointment, since he or she has never passed probation and achieved permanent status in the class to which he or she seeks appointment.

[1] "A01" is used for "all appointments requiring authorization through the certification process. Includes TAU, LT and CEA list appointments."

VI.

SUMMARY OF WRITTEN COMMENTS FROM BECKY SHELTON, STAFF SERVICES MANAGER I, CALIFORNIA HIGHWAY PATROL (CHP).

Comment 1:

Proposed Section 89.6 (Class Abolishment in General).

Proposed section 89.6 requires that all lists associated with the class shall be abolished. The concern is that once classifications are merged as a result of the consolidation project any list that CHP has active would be abolished. As an example, this could affect the Office Services Supervisor I examination that is currently in progress.

Response 1:

The consolidation project will result in certain classes being abolished where appropriate. When a class is abolished, there will be no further appointments to that class. Therefore, maintaining lists associated with an abolished class serves no useful purpose. Proposed section 89.6 ensures that provisions are made for incumbents in that class and others with mandatory reinstatement rights to an abolished class.

Comment 2:

Proposed Section 171.1, Subsection (e) (Calculating the Amount of Time Required to Satisfy Minimum Qualifications for Experience).

Unless overtime hours are disclosed on the application, how is staff going to determine and verify overtime hours worked. Staff currently does not have a way to access this information for any of the applicants.

Response 2:

This question relates to creating and implementing new procedures that will conform to the requirements of this regulation. CalHR is currently working on an HR manual that will provide agencies with suggested best practices to ensure compliance with Board regulations.

Comment 3:

Deletion of Proposed Section 171.3 (Criteria for Equivalencies and Equivalent Combinations).

This regulation is eliminating the substitution for education and experience requirements. This could negatively impact promotional applicants in a promotional

examination. Some class specs indicate that education/experience can be substituted. Would this require class specification revisions?

Response 3:

The deletion of proposed section 171.3 does not eliminate the substitution for education and experience requirements or require class specification revisions. Where it is determined to be appropriate, class specifications may allow for equivalencies and equivalent combinations. The deletion of this proposed regulation was intended to avoid potential conflicts with class specifications.

Comment 4:

Proposed Section 195.3 (Alternate Rating for a QAP Examination).

Applications are no longer provided to QAP members. As a result, we no longer accept applications on a “subject to QAP” basis or assign alternate ratings. Why is this language being added if we have been instructed not to use the application in the QAP process?

Response 4:

Please see Written Comments by DWR, IV., Response 3, page 6.

Comment 5:

Proposed Section 242, Subdivision (b) (Promotions in Place).

Proposed section 242, subdivision (b) states that all such qualifying employees in the unit shall be promoted. The concern is that although an employee passes an exam, it does not necessarily mean they are ready to be promoted. If a supervisor feels an employee is not yet ready to promote, why shall we promote them? Subdivision (b) states the appointing power shall open the opportunity for promotion to competition. How can employees compete for a promotion in place? Additionally subdivision (b) states that the appointing power may also decide not to promote. Is this an all or nothing statement? If the appointing power does not promote all employees, are they not allowed to promote any employees?

Response 5:

Please see Written Comments by DHCS, Response 5, page 9.

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Comment 6:

Proposed Section 249.3 (Conditions for Not Re-Announcing a Job Vacancy).

Certification lists in CalHR's ECOS system currently expire at 120 days. Will the ECOS system be updated to 180 days?

Response 6:

Yes.

Comment 7:

Proposed Section 250, Subdivision (e) (Determining Merit and Fitness During the Hiring Process).

Will rating/screening criteria and interview scoring sheet be enough documentation or will departments need to provide a formal documentation (i.e., justification memo) identifying all actions taken in making the hiring decision?

Response 7:

This question raises the issue of whether proposed section 250 is concerned with the forms used by appointing powers or the necessity of a competitive hiring process. The intent of proposed section 250, subdivision (b) is to ensure competition among candidates while not creating regulations that unduly constrain the selection methods appointing powers may determine are appropriate for filling a particular position. Therefore, the proposed rule has been amended to strike reference to "measurement criteria" and, rather, to emphasize the mandate that the hiring process must involve competitive elements. Thus, the proposed rule has been changed to require that the hiring process shall be competitive and involve an assessment of the qualifications of the candidates chosen for interview and be designed and administered to hire candidates who will be successful. In addition, the proposed rule requires that interviews shall be conducted by using job-related criteria. To assist agencies, CalHR is currently in the process of preparing an HR manual that will include best practices for compliance with Board regulations, including the record keeping requirements of proposed section 250, subdivision (e).

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VII.

SUMMARY OF WRITTEN COMMENTS FROM CHARLAIN SWENSON, PERSONNEL OFFICER, OFFICE OF HUMAN RESOURCES, STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE (DOJ).

Comment 1:

Proposed Section 171.1 (Calculating the Amount of Time Required to Satisfy MQs for Experience).

(A) Proposed subdivision (b) doubles the normal efforts, since the calculation of part time experience would need to be processed twice to determine which calculation is greater. DOJ suggests that only one standard equation is used. DOJ notes that the current calculation provided by CalHR is to divide the number of hours per week by 40, which is a standard number of full-time hours per week, multiplied by the total time worked. Why should this calculation no longer be used? When applying it to the example identified in proposed section 171.1, subdivision (b) the answer (10 hours per week divided by 40 = 25%, 25% multiplied by 3 years = 9 months) is the same. As this calculation has been used for years, why change it to another format that will provide the same answer?

(B) Will the STD 678 application be revised to ask candidates how many overtime hours have been worked or will it be stated otherwise on the application? DOJ's intent in asking this question is to show the practically of applying such a change while understanding that CalHR will identify policy for these new regulations.

Response 1:

(A) In the 45-day response period, LULAC commented that it had reviewed various regulations relating to the counting of time for purposes of establishing minimum qualifications and found that the detail in this regulation only appeared to hurt part-timers and working class applicants. (Summary of Oral and Written Comments, LULAC, IX, Comment 13(B), pp. 33-34.) In addition, LULAC commented that the 40-hour-work week was not necessarily considered full-time employment any more. The 52 weeks to equal one year and the 4.35-weeks conversion factors were added to bring the regulation up to date with changes in employment trends and to ensure a consistent and fair calculation of years and months worked for all applicants. DOJ's example shows why failure to also use the 4.35-weeks conversion factor could negatively impact certain applicants who work part-time or hourly; also using the 4.35-weeks monthly calculation equals 9.03 months, a slightly greater time than the 52-weeks yearly conversion factor or the percentage conversion factor previously used.

As to whether proposed subdivision (b) doubles normal efforts, the proposed rule does require using both conversion factors and using the result that represents a greater time worked. However, both the yearly and weekly conversion calculations are simple,

straightforward, and not overly complicated or burdensome. Thus, when the benefits of the two conversion factors are also considered, the Board declines to further amend proposed subdivision (b).

(B) The Board appreciates the intent of DOJ's comment and recognizes that certain administrative changes may need to occur for agencies to comply with proposed section 171.1. Whether that means changing the STD 678 application or making other appropriate changes, CalHR will lead that effort.

Comment 2:

Proposed Section 193 (Formula Rating).

No questions or recommendations.

Response 2:

No response necessary.

Comment 3:

Proposed Section 193.1 (Ratings for Examinations).

CalHR has been adamant that candidates are scored by comparing their responses against pre-established, job-related scoring criteria and that candidates should not be compared to one another. The issue is that a candidate's score could be different depending on other candidates taking the exam, thus violating reliability and opening up possibilities for complaints of unfairness from candidates due to the inherent subjectivity in this method.

Response 3:

The essential nature of a competitive examination requires consideration of the applicant's standing in relation to others. (See *Alexander v. State Personnel Bd.* (2000) 80 Cal.App.4th 526, 542.) Proposed section 193.1 conforms to this essential nature of competitive examinations. This proposal does not require that the scoring criteria be different depending upon other candidates taking the exam. Nonetheless, for purposes of clarity proposed section 193.1 has been amended to require that the scoring and rating of each candidate shall be done by assessing and comparing his or her qualifications, responses, or performance with the pre-established, job-related scoring criteria of the examination. Based upon this assessment, each candidate shall be ranked and compared against all other candidates.

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Comment 4:

Proposed Section 194 (Limited Three Score Examinations).

(A) When determining an examination pass point, subject matter experts are told to think of the “Minimally Acceptable Candidate (MAC).” While some classifications are more appropriate for this type of examination, e.g., doctors or lawyers, allowing agencies unfettered access to this type of list can result in heavy pressure on hiring managers to ensure a highly competitive hiring process. The appropriate use of this examination should be clear in the regulation.

(B) New proposed regulations prohibit hiring managers from viewing candidate eligibility information, as long as a candidate passes the examination, his or her ultimate rank does not matter in the hiring process. Due to this decreased competitive nature, it is even more imperative for hiring managers to conduct hiring assessments that truly identify which candidates are most qualified for the job. DOJ’s recommendation is to include in this proposed regulation language to allow agencies to set pass points beyond 70% to ensure only the top candidates pass the examinations or to include this language in CalHR’s new policy. It is also DOJ’s recommendation to add language similar to what is listed in the California State Selection Manual, “The hiring process will be completed in a manner consistent with the competitive intent of the selection process.” While this is mentioned in previous sections of these regulations, it is imperative to clearly identify that requirement for this type of examination.

Response 4:

(A) Proposed section 194 gives CalHR or a designated appointing power the discretion to determine when Limited Three Rank Examinations should be given. This delegation is appropriate because it allows CalHR the flexibility to manage exams and to meet the needs of agencies when it is determined that this type of scoring and ranking method would be appropriate for a particular exam. To set a standard that Limited Three Rank Examinations may only be used for particular classifications or occupations would be unduly restrictive and not support the goals of this proposed regulation: to promote a more streamlined and efficient examination process while maintaining competitive examinations, and increase the pools of qualified candidates seeking employment with the state.

(B) Proposed section 194 provides an additional method of scoring and ranking examinations; the rule does not decrease the competitive nature of examinations or eliminate the relevance of exam rankings. Nothing in the Board regulations prevents a hiring manager from requesting, for instance, only the candidates in the first rank or only the candidates in the first and second rank.

However, for purposes of clarity and to ensure the merit principle, proposed section 194 is amended to allow hiring managers and any employee involved in making the hiring decision to know the ranking of list candidates. Thus, the proposed regulation has been

modified to apply when a candidate has employment list and/or LEAP referral-list eligiblity. The changes to the proposed rule require that the list upon which the candidate is eligible shall not be disclosed during the hiring process to certain specified persons; however, the ranking of list eligible candidates shall be available to the hiring manager or any other employee involved in the hiring decision. Additionally, if there are eligible LEAP candidates, those candidates shall be placed in the first rank in no particular order with the other non-LEAP candidates in the first rank. Placing LEAP candidates in the first rank is consistent with and promotes the state's policy that qualified persons with a disability shall be employed in the state service. (See Gov. Code, §§ 19230.) Proposed section 249.6 has also been amended to reflect the changes to proposed section 249.7. These changes are intended to allow the decisionmakers to know the exam standing of list candidates in relation to one another while also promoting the hiring of persons with disabilities.

The impact on exam standings by including LEAP-referral candidates in the first rank is minimal given that all employment list candidates in the first three ranks are reachable (Gov. Code, § 19057.1) and that the hiring process remains a competitive phase of the selection process. Proposed section 250 states clearly that the hiring process for eligible candidates chosen for job interviews shall be competitive and involve an assessment of the qualifications of the candidates. In addition, the hiring process shall be designed and administered to hire candidates who will be successful.

Statutory changes to Government Code sections 18936 and 18937 transferred the functions of computing examination scores and setting passing marks from the Board to CalHR or a designated appointing power. (Assem. Bill No. 1062 (2013-2014 Reg. Sess.) § 427; Gov. Code, §§ 18936 & 18937.) Accordingly, adding language to proposed section 194 concerning pass points would not comport with these statutory changes. The Board also declines to add language regarding the competitiveness of the hiring process, since proposed section 250 is clear on this point and reiterating it in proposed section 194 would be unnecessarily duplicative.

Comment 5:

Proposed Section 195 (Composition of Qualifications Appraisal Panels).

How will the Board gauge if "consideration was given to selecting members who represent the diversity of the State civil service workforce?" Are there firm standards panels must adhere to or is this regulation a recommendation for agencies to explore the feasibility of increasing diversity when it is available? From a pragmatic standpoint, since panels usually only consist of three people and are usually dependent upon panel member availability, the latter interpretation seems most appropriate.

Response 5:

Proposed section 195 requires, "When selecting members, consideration shall be given to selecting members who represent the diversity of the State civil service workforce."

This aspect of the regulation is a requirement when QAP member are being selected. As discussed, CalHR is currently in the process of preparing a HR manual that will include best practices for compliance with Board regulations.

Comment 6:

Proposed Section 195.2 (Ratings for QAP Examinations).

While those on a panel may on occasion compare candidates to gain perspective on the candidate pool's spectrum of ability and quality of responses, this sort of comparison should not replace the standard of rating responses against pre-established, job-related scoring criteria developed by examination analysts and qualified subject matter experts.

Response 6:

To clarify the scoring and rating criteria, proposed section 195.2 has been amended to add reference to proposed section 193.1

Comment 7:

Proposed Section 195.3 (Alternate Rating for a QAP Examination).

The way this regulation reads implies that all candidates who apply for QAP exams must be tested given that the only reason any candidate would be disqualified is due to not satisfying the minimum qualifications. Is this the intent of this regulation? If this regulation is maintained, it should be applied to all examinations with a panel of subject matter experts, not just QAPs. It is our recommendation that this regulation be removed to align with CalHR's training material.

Response 7:

Please see Written Comments by DWR, IV., Response 3, page 6.

Comment 8:

Proposed Section 242 (Promotions in Place).

(A) Proposed subdivision (b), as written, is accurate if it is applicable only to a true vacancy. Incumbents in positions that can be upgraded in place (e.g., Staff Services Analyst to Associate Governmental Program Analyst) may demonstrate readiness at different points in time, based on their individual progression. The regulation implies that all incumbents that are reachable on an eligibility list within the same program area must be promoted at the same time; however, if the duties of one position within the same classification have evolved and encompass more advanced skills than others within the unit, an agency should be able to promote the incumbent in place.

(B) Proposed section 242, subdivision (b) also seems to suggest that list eligibility constitutes the sole basis for determining who is eligible for a promotion in place; however, this does not sufficiently demonstrate the most qualified candidate. DOJ proposes that this section is clarified to eliminate the ambiguity concerning promotions in place.

Response 8:

(A) (B) Please see Written Comments by DHCS, V., Response 5(B)(C), page 9.

Comment 9:

Proposed Section 249.3 (Conditions for Not Re-Announcing a Job Vacancy).

DOJ recommends adding “shift” and “work schedule” when comparing both vacancies to ensure they are identical.

Response 9:

The current requirements are sufficiently clear as to what constitutes identical vacancies. The Board, therefore, declines to make further modifications.

Comment 10:

Proposed Sections 249.6 (Redaction of Confidential Information on Candidate Documentation) and 249.7 (Non-Disclosure of a Candidate’s Basis of Eligibility).

While DOJ recognizes and fully supports the intent of proposed section 249.6 in protecting privacy and preventing discriminatory hiring practices, requiring that the redaction of this information is performed within the HR office is overly burdensome and not practical. Since all agencies are required to use ECOS to advertise positions, collect/store application materials and share the information with the appropriate audience, perhaps ECOS can be modified to provide only unrestricted information to HR liaison users. Another option is to allow HR liaisons to redact information as long as they are not involved in the hiring process. Prior to adopting this section, DOJ suggests creating a workgroup of state HR professionals to explore alternative solutions.

Response 10:

As discussed in Response 4, *ante*, pages 17-18, proposed sections 249.6 and 249.7 have been amended. Suggestions and ideas as to what administrative procedures can be adopted in light of this proposed regulation, including whether ECOS can be modified, should be directed to and coordinated with CalHR.

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Comment 11:

Proposed Section 265.1 (Counting Time Temporary Appointments).

While this amendment provides more flexibility for employees who work more than eight hours per day, many temporary appointments include student/youth/seasonal classifications with an intermittent time base and limited daily work schedule. Imposing a 189 working-day limit would unfairly penalize these employees. The Board has allowed for a work time limit of 1500 hours in 12-consecutive months for Student Assistant, Graduate Student Assistant, and Youth Aid classifications, because of their enrollment in school. A similar argument can be made for the Seasonal Clerk, since their required hours may vary due to operational needs. In addition, the bargaining unit contract indicates they may work up to 1500 hours in any calendar year. DOJ suggest the 1500-hour limitation remain in effect for these classifications.

Response 11:

Proposed section 265.1 has been amended to add subdivision (d), which provides that for student, youth, and seasonal classifications a maximum work-time limit of 1500 hours within 12 consecutive months may be used rather than the 189-day calculation set forth in subdivision (b).

XIII.

SUMMARY OF OTHER CHANGES

Upon further review and consideration, the following changes have been made:

Proposed Section 85 (Obligations Under Other Federal or State Laws):

For purposes of clarity and consistency in the Board's regulations, subdivision (b) has been amended to strike "assesses, compares, and ranks" and add "involves an assessment and comparative evaluation" of the job related qualifications of candidates. Also for the purposes of clarity and consistency, subdivision (b) has been changed from hire candidates who "meet the need of" to "can be successful" in the position to be filled.

Proposed Section 89 (Review of the Classification Plan):

For purposes of clarity, proposed section 85 has been amended to require that the Department shall be responsible for presenting to the Board any recommended changes. Further, if an agency determines that a change in the Classification Plan is warranted, the agency shall coordinate with the Department and provide the Department with whatever information the department determines is relevant and necessary.

Proposed Section 156 (Creating a Hiring Manager's Report Where a Corresponding LEAP-Referral List Exists):

Given the changes to proposed section 249.7, allowing the disclosure of the ranking of eligible candidates but not the basis of their list eligibility, proposed section 156 has been added to this regulatory package and amended to incorporate proposed section 156.

Proposed Section 195.1 (QAP Interviews and Responsibilities):

For purposes of clarity, proposed section 195.1, subdivision (a) has been changed to state that the Department, or an appointing power that has been designated under section 195, may allow QAP interviews for an exam to be conducted by the same QAP members or a different composition of QAP members.

XIV.

CONCLUSION

The Board appreciates the comments and feedback it received regarding these proposed regulations. The modified text with the changes clearly indicated are available to the public as stated in the Notice of Modification to Text of Proposed Regulation.