

**SUMMARY OF PUBLIC COMMENTS FOR SECOND 45-DAY PUBLIC COMMENT PERIOD AND THE BOARD'S RESPONSES**

**I.**

**Introduction**

The State Personnel Board (Board) proposes to amend section 242 of Title 2 of the California Code of Regulations (CCR). A second 45-day public comment period on this rulemaking action was held from April 22, 2021, through June 7, 2021. The comments received during the second 45-day public comment period were taken under submission and considered. A summary of those comments and the Board's responses are below.

**II.**

**Summary of Written Comments from Steven Stovich, Section Chief, Human Resources Branch – Employment & Classification Services Unit, Covered California (Covered CA).**

Comment 1: Amended § 242, subdivision (b).

The Covered CA proposes that the Board further clarify which eligible employees shall be notified that were not selected for promotion in place and how an eligible employee is defined. The Covered CA believes that it would cause an administrative burden to require that they notify employees who do not possess permanent civil service status in their current position or who failed to pass the examination for the "to" class being considered for promotion in place. As such, the Covered CA suggests including the following language to section 242, subdivision (b), identified in bold: "For purposes of this section, an eligible employee is any person who satisfies the minimum qualifications to examine for the "to" class being considered for promotion in place **and meets the criteria for a promotion in place as set forth in section 242, subdivision (a)(1-6)**, and, when applicable, meets the criteria set forth in sections 233, 234, 235, and 237.

**Response 1**

The Board declines to make the recommended change. The purpose of expanding the definition of eligible employee is to ensure a fair, transparent, merit-based process to effectuate promotions-in-place. Requiring managers and/or supervisors to candidly

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communicate and engage with their subordinate employees in order to carefully explain the reasons why the employee was not selected for the promotion-in-place (which may include how the employee did not meet the criteria outlined in section 242) supports a fair, transparent, and merit-based process. Moreover, this critical step in the process will also create a workplace environment wherein supervisors and/or managers proactively mentor and encourage all of their subordinate employees to develop their professional knowledge, skills and abilities in order to be more competitive and considered for future promotions and/or job opportunities. This definition also prevents a supervisor from avoiding meeting with an employee simply because the employee has not established list eligibility.

Comment 2: Amended § 242, subdivision (d).

The Covered CA recommends that the Board clarify that promotions in place may be made to high-level specialist classifications regardless of their supervisory or managerial designation by adding “supervisory” or “managerial” to section 242, subdivision (d).

**Response 2**

The Board thanks the Covered CA and will amend subdivision (d) to include the recommended language.

**III.**

**Summary of Written Comments from Allen Chancey and Peter Brown, Department of Health Care Services (DHCS).**

Comment: Amended § 242, subdivision (b).

For purposes of clarity, the DHCS proposes including the terms “unit or location” in the first and last sentences of section 242, subdivision (b) in order to qualify which eligible employees not selected for the promotion-in-place should be notified.

**Response**

The Board thanks the DHCS and will amend section 242, subdivision (b), to include those eligible employees within the “unit” which conforms to existing state policy. However, the Board declines including the term “location” because it is vague, overly broad, and does not align with the intent of the regulation. Additionally, an employee’s “unit” generally denotes a shared geographical location among the eligible employees that must be notified.

#### IV.

#### **Summary of Written Comments from J. Edgar Boyd, Pastor, Alice Huffman, President (NAACP), and Dr. Amos C. Brown (Pastor), Council Chair and Vice Chairs of the African American Empowerment Council (AAEC)**

##### Comment:

The AAEC states that, while the proposed regulations appear to favor the selection of candidates based on an individual's knowledge and abilities, the system of competitive examinations has produced no evidence of superior or unbiased results. The AAEC believes that SPB's current regulatory proposal, which limits promotions in place to those within a classification, disproportionately impacts employees in lower classifications while providing an unfair advantage to those in high entry-level compensation categories, such as provisionally licensed lawyers.

The AAEC asserts that promotion in place represents the meritorious process of personnel evaluation and calibration of job fitness over a period of time, akin to a long working interview. The supervising manager is best suited to determine whether requisite talent and underlying skill sets exist within the business unit prior to conducting a statewide search and resource intensive "competitive" selection process.

##### **Response**

Article VII of the California Constitution plainly states that "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." This proposed regulatory package and promotion in place process complies with that constitutional mandate and the Board's authority to enforce civil service statutes. (California Constitution, article VII, section 3.)

It is accurate that the proposed regulation limits promotions in place to classifications that perform the same job functions just at a higher level. Likewise, as already explained in our previous response to the AAEC, the reason that promotions in place are not permissible from rank and file to supervisory or supervisory to managerial is that they do not meet the definition of "in place." In other words, they are not promotions to a higher level within the same job. Supervisory and managerial classifications have distinctly different duties, responsibilities, knowledge, skills, abilities, and competencies from each other and from rank and file classifications, and therefore are different jobs than the incumbent's current job. Therefore, a competitive promotional process is required in order to give all eligible employees and applicants an opportunity to be considered for

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the promotion, especially since there are a limited number of supervisory and managerial positions allocated to each program.

The Board has added an exception for the Graduate Legal Assistant classification in order to incorporate the Supreme Court's temporary Covid-19-created Provisionally Licensed Attorney program into the civil service. The added exception to permit provisionally licensed lawyers to promote in place is to ensure that law school graduates hired as Graduate Legal Assistants (GLA) serving as provisionally licensed attorneys may more easily promote in place when they are admitted to the California Bar under the criteria outlined in the California Supreme Court administrative orders as long as all other criteria under section 242 are met. Without this exception, departments would face unnecessary barriers to promote otherwise qualified employees such as forcing graduate legal assistants to complete a 12-month probationary period. The key distinction here is that the incumbents are already performing a broad array of legal services including appearing before a court; drafting legal documents, contracts or transactional documents, and pleadings; engaging in negotiations and settlement discussions; and providing other legal advice. Essentially, the GLAs are performing the same job functions as an entry-level attorney under the provisional license program (PLP) and as such meet the criteria outlined in section 242.

### V.

#### **Summary of Written Comments from Christine De Leon, Human Resources, Personnel Officer, California State Teachers' Retirement System (CalSTRS)**

##### Comment 1: Amended § 242, subdivision (d).

The CalSTRS asserts that the proposed text does not clearly permit promotions in place from a rank and file classification to a supervisory classification used in a high-level specialist capacity. Specifically, the proposed regulations could be interpreted to prohibit an Associate Governmental Program Analyst (AGPA) from promoting in place to a Staff Services Manager (SSM) I (Specialist) as there is no SSM I (Specialist) classification.

The CalSTRS recommends changing the language in subdivision (d) to state "Nothing in this section prohibits a promotion in place from a rank and file or supervisory to a higher level classification utilized in a non-supervisory specialist capacity where all the elements of subdivision (a) are met, regardless of whether the classification is designated as supervisory or managerial."

## **Response 1**

The Board thanks CalSTRS for their recommendation and will amend subdivision (d) to make it clear that promotions in place from a rank and file classification to one designated as supervisory but used in a high-level specialist capacity is allowed. The CalSTRS' recommended language will be incorporated.

## Comment 2:

The CalSTRS believes that if the Board maintains that a promotion in place from a supervisory to managerial classification is prohibited due to the supervisory and managerial jobs being distinctly different in terms of the level of duties, responsibilities, knowledge, skills, abilities, and competencies required then that same prohibition should apply to movement between a rank and file classification and high level specialist designated as supervisory or managerial because they also have distinctly different jobs in terms of level of duties, responsibilities, knowledge, skills, abilities, and competencies required. For example, an Information Technology Specialist (ITS) II, which has a collective bargaining unit identifier (CBID) of R01, to an ITS III, which has a CBID of M01. The ITS III is a managerial classification but does not supervise staff. The proposed regulations would allow a promotion in place from an ITS II to an ITS III, but would prohibit a promotion in place from a S01 classification to a M01 classification.

Additionally, the CalSTRS asks, if an employee is promoted from a rank-and-file to a high-level specialist, such as an SSM I (Specialist), could that position and incumbent later be promoted in place to a supervisory SSM I if the duties evolved to require subordinate staff?

## **Response 2**

As previously stated, promotions in place, by definition, are promotions within the same job. Part of the purpose of amending section 242 is to make it clear that promotions from supervisory to managerial classifications require a competitive selection process because supervisory and managerial jobs are distinctly different in terms of the level of duties, responsibilities, knowledge, skills, abilities, and competencies required. Promotions in place from a non-supervisory classification, in this case an SSM I (Specialist), to a supervisory classification like an SSM I are not allowed because the job functions of a supervisor are inherently different than a specialist.

Promotions in place are not dependent on the CBID, but dependent on the job functions of the position. Generally speaking, movement from a non-supervisory position to another non-supervisory position only requires that the same job functions are being

performed just at a higher level. If the job functions are not the same then the promotion-in-place is prohibited.

Proposed section 242, subdivision (a) (3) requires that the appointing power determine, demonstrate, and document whether or not the “to” classification shares the same job functions but at a higher level as the “from” classification in order to justify and effectuate the promotion in place.

The CalSTRS’ provided examples relate to the implementation of the proposed regulation on specific classifications rather than on the process itself. Questions concerning implementation regarding specific classifications can be addressed to the assigned Personnel Management Division (PMD) Department of Human Resources (CalHR) analyst once the regulations become effective.

## VI.

### **Summary of Written Comments from Colleen Hardin, Human Resources, Personnel Analysis Manager, California Conservation Corps (CCC)**

#### Comment: Amended § 242, subdivision (d).

The CCC proposes a scenario in which a department identifies the need to establish a new supervisory position, for example, an intermediate supervisor in the Accounting realm, like Senior Accounting Officer (Supervisor). Specifically, the CCC asks how it would be accomplished if there are no vacancies to utilize. Without a true vacancy, the CCC asks if the best way to remedy this dilemma would be to conduct an internal promotional opportunity and advertise to all eligible candidates, and then do a promotion in place with the selected candidate (reclass their position and promote them at the same time)? In another example, if a department has determined that, due to pending changes in their staffing, an office chief will need to be upgraded a level, like SSM II (S) to SSM III (M). If promotions in place are not allowed from supervisory to managerial, how would the department handle that change? Since there would be no one else eligible to promote in place, why wouldn’t a promotion in place be appropriate in that case?

#### **Response**

Please see V., Written Comments, Response 2 (*ante*, at p. 5) which discusses promotion in place classification limitations.

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Most importantly, promotions in place are not to be used to resolve issues related to position allocation. We urge you to consult with your CalHR PMD analyst to determine alternatives.

Comment 2:

The existing regulation language states that the candidate must be in one of the top three ranks. Initially this made sense because it mirrors how a usual job vacancy would proceed. The CCC feels that this does not make sense when looking at all the other required parameters (only for permanent positions). The CCC believes that if a candidate has passed the exam and is in a Perm/FT position, but not in a reachable rank, then the following outcomes are likely: 1) the candidate takes a promotion elsewhere through the vacancy process since an advertised vacancy has the ability to clear ranks through use of contact letters, or 2) the candidate has to wait to retake the exam to be able to promote (and possibly “cheats” to score higher on the exam to become reachable). This seems like an extraordinarily unfair rule when the same person could potentially be hired into the higher classification via the vacancy/rank clearing process (and there is no vacancy/rank clearing when the person is in a Perm/FT position). The CCC wonders if this will lead to departments losing qualified staff because they are not in a reachable rank for a promotion in place, but become reachable through an advertised vacancy and the clearing of ranks.

The CCC believes that a promotion in place should be allowed for anyone who is on the exam list as long as the department documents their fitness for the higher level. It would help departments retain staff and reduce hiring costs, benefitting the employee, department and the State.

**Response**

The Board declines to make this recommended change. The merit-based civil service system is based on an employee’s performance in an exam. Therefore, in order to ensure that a promotion in place is based on merit, an appointee must be in one of the top three ranks per California law. Additionally, to completely ignore employment list rankings would be unfair to eligible employees that performed in an exam and received a higher ranking. Appointing powers are not restricted to fill vacancies through promotions in place. In other words, an appointing power can choose to advertise the vacancy.

**VII.**

**Summary of Written Comments from Jennifer Gothier, Staff Services Manager II, Classification and Pay Unit, Department of General Services (DGS)**

Comment 1: Proposed § 242, subdivision (a)(3).

The DGS hopes the definition of "same job functions" could be added to the regulation for purposes of clarity.

**Response 1**

The Board believes that the term "job functions" is clear. Forthcoming policy will provide specific examples in order for appointing powers to better understand when promotions in place are appropriate.

Comment 2:

The DGS asks if promotions in place from supervisory to supervisory are permissible, and if that can be addressed in the regulation? For example, an SSM I (Supervisor) to an SSM II (Supervisor) or a Personnel Supervisor I to a Personnel Supervisor II. Although the proposed text does clearly outline that rank and file to supervisory or managerial and supervisory to managerial are not permissible, the proposed text does not speak to supervisory promotions in place and it would be beneficial to have that clearly outlined.

**Response 2**

The proposed regulation makes clear that as long as the "from" class has the same job functions as the "to" class just at a higher level and all other criteria are met then a promotion in place is permissible. As such, the proposed regulation clearly permits promotions in place between supervisory classifications depending on the actual job functions.

The DGS's specific question relates to the implementation of the proposed regulation on specific classifications rather than on the process itself. Questions concerning implementation regarding specific classifications can be addressed to the assigned CalHR analyst once the regulations become effective.

Comment 3: Amended § 242, subdivision (b).

For the proposed text in subdivision (b), must an eligible employee not selected for the promotion in place have to be notified in person? Given the current telework

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environment caused by the COVID-19 pandemic, the department wonders if a virtual meeting or telephone call would be sufficient?

**Response 3**

The Board thanks DGS for pointing out this out. Forthcoming policy will clarify that the meaning of “in person” in the current telework environment may be interpreted more broadly and include virtual meetings and/or a phone call.

Comment 4:

The additional language in subdivision (b) speaks to who is considered an eligible employee. The DGS asks if there should be additional clarification added to make it clear that the position should be within the same unit or share the same reporting supervisor as the employee being considered for the promotion in place?

**Response 4**

Please see III., Written Comments, Response (*ante*, at p. 2).

**VIII.**

**Summary of Written Comments from Charlain Swenson, Assistant Director, Human Resources, Department of Justice (DOJ)**

Comment 1:

The DOJ points out that they will have to ensure that those employees not selected for a promotion in place receive written notification, and that the notifications be kept on file with the program in case of an audit. Additionally, they would need to develop a standardized template for these notifications which will help ensure that programs are notifying their employees in writing and create consistency across their department.

**Response 1**

The regulation does not prohibit documentation from being retained. It does prevent the documentation from being included in an employee’s official personnel file. In regards to templates, an inquiry of that sort should be directed to CalHR.

Comment 2: Amended § 242, subdivision (7)(b).

The DOJ asserts that subdivision (7)(b) does not specify that the employee also have active list eligibility in a reachable rank or another form of eligibility. While some exams are online and provide easy access for staff to obtain list eligibility, not all exams are readily available. Additionally, it is possible for candidates to fail the online exams. If a candidate fails, does not obtain a reachable rank, or has no ability to examine for several months, the supervisor would not consider them for promotion. It would not be fair to require the supervisor to wait for the employee to be able to retest or for the test to become available. Therefore, the DOJ proposes to revise the above-referenced sentence to: "For purposes of this section, an eligible employee is any person who satisfies the minimum qualifications to examine for the "to" class being considered for promotion in place, meets the criteria as specified in subdivision (6), and, when applicable, meets the criteria set forth in sections 233, 234, 235, and 237."

The DOJ believes that departments should have the discretion to promote employees in place that are eligible and qualified for the higher classification. The inability to do so has negatively impacted their ability to retain their best employees.

## **Response 2**

Section 242 does not require that an appointing power must wait for an eligible employee to retest in order to effectuate a promotion in place of another employee. However, the appointing power must notify and meet with the eligible employee to explain why they were not selected for promotion in place. If the reason that an employee is not selected for a promotion in place is that the employee is not in a reachable rank, has failed to take the exam, or has failed the exam, the appointing power may simply explain to the employee that they do not meet the criteria set forth in section 242 and as such, may not be considered for promotion in place until they take the exam and are in a reachable rank. If, however, the employee would not be selected even if the employee were in a reachable rank, the supervisor must meet with the employee to discuss the reasons the employee is not ready for promotion to give the employee an opportunity to gain the knowledge, skills and abilities needed for future promotion. Please see II., Written Comments, Response 1 (*ante*, at p. 1).

## **IX.**

## **Conclusion**

The Board appreciates the feedback it received regarding this proposed regulatory package. 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.