

**SUMMARY OF PUBLIC COMMENTS
AND
THE BOARD'S RESPONSES
(15-DAY COMMENT PERIOD)**

I.

INTRODUCTION

The State Personnel Board (Board) proposes to adopt, amend, and repeal regulations related to good faith and correction of appointments, Title 2, Chapter 1, of the Code of Regulations (CCR), sections 243 et seq. and 548.120 et seq. A 45-day public comment period on these regulations was held from July 7, 2017, through August 21, 2017. A public hearing was held on August 22, 2017. Based upon comments that were received, a 15-day written comment period was held from October 10, 2017, through October 25, 2017. A summary of the comments received during the 15-day written comment period and the Board's responses are below.

II.

**CHRISTINE SIMMER, STAFF SERVICES MANAGER I, CALIFORNIA HIGHWAY
PATROL (CHP)**

COMMENT 1:

Proposed Section 243.2. Correction of Unlawful Appointments.

The use of "may" in section 243.2, subdivision (b) implies that corrective action is not required. Is the intent to allow an agency to utilize discretion in taking corrective action when identifying an unlawful appointment within one year of the appointment?

RESPONSE 1:

The use of the word "may" in proposed section 243.2, subdivision (b), is consistent with Government Code section 19257.5, which uses the word "may." Therefore, the use of "may" in the regulation is appropriate. CHP raises a question related to delegation agreements. It is not the intent of this regulation to define the terms and conditions of such an agreement.

In further review of proposed section 243.2, nonsubstantive changes were made to subdivisions (a)(1), (2), and (3) for purposes of clarity and consistency. Subdivision (a)(2) has been changed to (a)(1)(A) and subdivision (3) has been changed to (a)(1)(B). Other changes to subdivision (a) are stylistic and nonsubstantive. Nonsubstantive changes were also made to subdivision (d) for purposes of clarity and simplification.

COMMENT 2:

Proposed Section 243.2. Correction of Unlawful Appointments.

Section 243.2, subdivisions (a)(1), (2) , and (3) provided circumstances in which corrective action can be taken when an unlawful appointment is identified within one year of the appointment date. Are these the only circumstances in which corrective action within this time frame can be taken? If so, CHP recommends adding the term "only."

RESPONSE 2:

The regulation provides that when the Board, Executive Officer, or Department determines that an appointment is unlawful corrective action up to and including voiding the appointment may be taken under certain specified circumstances. Absent from the regulatory wording is phrasing such as "including, but not limited to." Were such phrasing used, the intent of the regulation would plainly be not to limit action to those circumstances that are listed. Such phrasing, however, is not used. Therefore, the circumstances in which corrective action within the one-year time frame can be taken are those listed in the regulation. Adding the term "only" might emphasize this point, but would not provide added clarity. Accordingly, the Board declines to further modify the regulation.

COMMENT 3:

Proposed Section 243.2. Correction of Unlawful Appointments.

Section 243.2, subdivision (b) refers to circumstances in which the Board or Executive Officer determine that an appointment which has been in effect for more than one year is unlawful. The use of the word "may" implies corrective action is not required. Is the intent to allow for discretion to be utilized in taking corrective action when identifying an unlawful appointment that has been in effect for longer than one year? Are the Board and Executive Officer the only entities that can determine whether an appointment is unlawful and take corrective action when the appointment has been in effect for longer than one year? Should the California Department of Human Resources (CalHR) be included in this subdivision to mirror the addition of CalHR in subdivision (a)?

RESPONSE 3:

A range of facts and circumstances may be involved in appointments that are found to be illegal more than one year after the appointment. Therefore, the proposed regulation allows the Board or Executive Officer to use sound discretion with regard to what is fair and equitable under the circumstances and the law.

Pursuant to Government Code section 19257.5, CalHR may declare an appointment void from the beginning of the appointment where the action to void the appointment is taken within one year after the appointment if the appointment was made and accepted in good faith but would not have been made but for some mistake of law or fact that if known to the parties would have rendered the appointment unlawful when made. CalHR's statutory authority thus does not exceed one year. The Board has the constitutional authority to enforce the merit principle and civil service laws without a limitation period. (See Cal. Const., art. VII, §§ 1 & 3.) Therefore, there is no reference to CalHR in section 243.2, subdivision (b).

COMMENT 4:

Proposed Section 243.2. Good Faith Appointment Requirements.

Section 243.2, subdivisions (b)(1), (2), and (3) set forth circumstances in which corrective action can be taken when an unlawful appointment is found and been in effect for longer than one year. If so, can "only" be added to the language?

RESPONSE 4:

Please see Response 2, *ante* at p. 2.

COMMENT 5:

Proposed Section 243.2. Correction of Unlawful Appointments.

Section 243.2, subdivision (b)(2) implies that at any time, including beyond five years, an employee can be terminated if it is determined the appointing power acted in other than good faith. Should there be a limitation to this time frame (e.g., five years)? At some point, an employee should no longer be at risk of termination due to an appointing power operating in other than good faith. Additionally, CHP would like to request clarification regarding whether it is appropriate to terminate an appointment beyond a five-year time frame.

CHP also requests clarification as to specifying section 243.2, subdivision (b)(3) as an exception.

RESPONSE 5:

Voiding an appointment found to be unlawful more than five years later due solely to the bad faith of the appointing power will likely be rare. Still, the facts and circumstances underpinning an unlawful appointment can vary in type or cause and degree of harm to the civil service merit system. Consequently, there may be circumstances warranting the voiding of an appointment beyond five years where the appointing power acted in other than good faith. Such determinations would be made on a case-by-case basis. The authority of the Board and Executive Officer to take appropriate corrective action, depending upon the facts and circumstances of the appointment, should not be unnecessarily limited in order that the civil service merit system is maintained and enforced. The proposed regulation therefore allows the Board and Executive Officer to use sound discretion with regard to what is fair and equitable under the facts and circumstances and law.

For an appointing power to take action to correct an unlawful appointment, regardless of the length of time the appointment has been in effect, requires delegation authority to the appointing power. The scope of that authority is set forth in the terms and conditions of the delegation agreement. Proposed section 243.2 does not concern delegation; rather, the proposed regulation sets forth under what circumstances the Board or Executive Officer may take action to correct an unlawful appointment that has been in effect for one year or longer.

For purposes of clarity, the reference to subdivision (b)(3) in subdivision (b) is stricken.

COMMENT 6:

Proposed Section 243.2. Correction of Unlawful Appointments.

Existing section 266 provides criteria regarding when corrective action shall not be taken. Is the intent of proposed section 243.2, subdivisions (a) and (b) to imply that corrective action shall only be taken under those specific circumstances? By deleting section 266, it implies corrective action may be taken where it was previously prohibited. Many departments operate under the rationale that if the regulation does not clearly prohibit an action, then the action is permissible.

RESPONSE 6:

As discussed in Responses 2 and 4, the term "only" has been added to proposed section 243.2, subdivisions (a) and (b) for purposes of clarity. Regarding CHP's comment about the rationale of departments, it is difficult to provide a specific response without more specificity. Certainly, depending upon subject matter, purpose and goals, regulations may be written as proscriptive, prescriptive, or performance standards. Regardless of the standard used, regulations should not be read in a way that attempts to circumvent the plain meaning and intent of the regulation.

COMMENT 7:

Proposed Section 243.6. Right to Appeal or Reconsideration.

For purposes of clarity, CHP would like to propose utilizing the term “against” rather than “as to” in proposed section 243.6, subdivision (a). The terminology “as to” leaves the intent unclear, whereas “against” makes it clear the action is being taken against the appointing power, “not merely as to the actions of an appointing power.”

RESPONSE 7:

The relevant sentence reads, “Where the corrective action is taken solely as to the appointing power, the appointing power may file a written appeal to the Board within 30 calendar days of receipt of the final decision to take corrective action.” The term “against” has connotations of “in opposition to” or “hostile to” or “at odds with.” The phrase “as to” means “relative to” or “concerning.” The phrase “as to” is thus clear and without unnecessary negative implications. Therefore, the Board declines to adopt this recommendation.

III.

SUMMARY OF WRITTEN COMMENTS FROM NICOLE HEEDER, STAFF ATTORNEY, SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1000

COMMENT 1:

Proposed Section 243. Good Faith Appointment Requirements.

- (a) The changes in proposed section 243 place increasingly divergent requirements on employees in contrast to the State. The effect of these changes inappropriately creates a double standard in favor of the State. For example, in proposed section 243, subdivision (b)(6), the proposed change lessens the burden on the appointing power by removing the term “serious” and in subdivision (c) places a more onerous burden on the employee by adding the word “sincere.” These types of subjective and potentially superfluous undefined terms create “insurmountable” hurdles for employees defending their appointments.
- (b) The proposed changes do not clarify whether these presumptions are rebuttable, which they should be.
- (c) Proposed section 243, subdivision (c)(3) states that the employee must make “prompt” and reasonable efforts “to correct” inaccurate information when they only had to “seek correction” before. Because adverse actions are mandated by the regulations when there is an allegation of bad faith, it is critical to define an employee’s obligations more clearly. This is especially true in situations where an

employee does not possess the ability to ensure that requested corrections are made, as materials are within the exclusive control of the departments.

RESPONSE 1:

The comments by SEIU concerning proposed section 243 are beyond the scope of the 15-day written comment period. Nonetheless, for purposes of clarity, the Board exercises its discretion to respond.

- (a) Proposed section 243, subdivisions (b)(6) and (c)(2) concern different situations for the appointing power and employee. Under proposed subdivision (b)(6), the appointing power must make reasonable efforts to provide officers and employees involved in the selection process with relevant reference materials, training, and supervision necessary to avoid mistakes of law or fact related to making civil service appointments. Proposed subdivision (c)(2) requires employees to make sincere and reasonable efforts to provide complete, accurate, and factual information whether verbally or on documents or other materials. Thus, these subdivisions concern different situations and hence different criteria.

Additionally, proposed subdivision (b)(6) changes the word “attempt” (which generally means to try to perform) to “efforts” (which generally means an earnest attempt). (See e.g., *The American Heritage College Dictionary* (4th ed. 2004) pp. 92 & 447.) Thus, with this word change, the term “serious” is not required to modify “efforts,” since by definition efforts involves an earnest or serious attempt. Nonetheless, for purposes of clarity, “serious” is added to proposed section 243, subdivision (a)(6).

Additionally, the Board disagrees that adding “sincere” to proposed subdivision (c)(2) places an onerous or insurmountable burden on employees. The criteria for good faith has involved elements of intent and honesty for numerous years without issue. The term sincere is a commonly understood word, i.e., without pretense or not feigned. (*The American Heritage College Dictionary* (4th ed. 2004) p. 1293.) Using “sincere” as part of the subdivision (c)(2) criteria is reasonable given that employees are in the best position to find, gather, and provide accurate job-related information about themselves, since they have personal knowledge of such information. Further, proposed subdivision (c)(2) is consistent with the general qualifications required of all candidates for and employees in state civil service, e.g., integrity, honesty, and thoroughness. (Cal. Code Regs., tit. 2, § 172.)

- (b) Section 249, formerly section 8, has been in effect since 1982 without substantive change. SEIU provides no rationale or justification for why the wording as to the term presumed should be changed. If there were an appeal regarding the issue of good faith, laws related to presumptions and burdens of proof would apply. Therefore, the Board declines to adopt the recommendation.

- (c) Proposed section 243, subdivision (c)(3) is sufficiently clear that employees must make prompt and reasonable efforts to correct any information, documents, or other materials that the employee, while initially believing were correct, later learns is inaccurate, misleading, or false. Acting promptly to correct job-related information or documents is to the benefit of the employee, appointment power, and merit system as a whole. The hypothetical scenario SEIU presents misses the mark. If an employee makes prompt and reasonable efforts to correct a document that is within the exclusive control of an appointing power and that appointing power fails to timely make the correction or fails to make the correction at all, the employee would have nonetheless satisfied the good faith criteria of subdivision (c)(3), because subdivision (c)(3) concerns the efforts of the employee, not the appointing power.

COMMENT 2:

Proposed Section 243.1. Adverse Actions for Violations of Good Faith.

- (a) Proposed section 243.1 discloses disparate treatment of rank and file employees by imposing a disciplinary scheme based on reference to Government Code section 19570, without providing any similar system of discipline for management conduct. For clarity, reference to Government Code section 19590 should be included in the proposed regulation.
- (b) Mandating adverse actions for an alleged violation of good faith will create a slew of new appeals based upon a highly subjective set of criteria. SEIU believes that rank and file employees will be "targeted" for discipline based upon the more subjective terminology of proposed section 243, subdivision (c). Also, there is an increased likelihood that departments will use these adverse actions to detract from their own wrongdoing in the appointment process.

RESPONSE 2:

The comments by SEIU concerning proposed section 243.1 are beyond the scope of the 15-day written comment period. Nonetheless, for purposes of clarity, the Board exercises its discretion to respond.

- (a) Government Code section 19590 provides that managerial employees, as specified therein, may be demoted, dismissed, or otherwise disciplined under section 19590 for any of the causes specified in section 19572. One of the causes specified in section 19572 is violation of a Board rule. Accordingly, referencing section 19590 in the proposed regulation is not necessary. Nonetheless, for purposes of clarity, section 19590 has been added to proposed section 243.1. Other changes to the proposed regulation are for purposes of style and consistency.
- (b) SEIU's stated concerns appear premised on the belief that adverse actions related to good faith are being newly presented in this rulemaking action. This is incorrect. Section 249, formerly section 8, has historically provided for adverse actions where

any officer or employee violates the provisions of the regulation or directs any officer or employee to violate any of the provisions of the regulation. This proposed rulemaking action, in relevant part, reorganizes the adverse action provisions to a separate rule. In addition, the use of subjective criteria related to good faith has been long standing without issue. Please also see Summary of Written Comments, III, Response 1(a), page 6. Accordingly, the Board declines to further modify this regulation, except as set forth in paragraph (a).

COMMENT 3:

Proposed Section 243.2. Correction of Unlawful Appointments.

- (a) Under the proposed regulation, it would seem that an employee who makes a complaint about an appointment being made in other than good faith may not have any recourse, because the appointment is not required to be voided by rule. The proposed change lacks clarity as to what the remedy is in the event that there is no requirement to void the appointment.
- (b) The five year time period that served to save an employee who acted in good faith has been abrogated. This is an unfair result given the length of time that may be allowed to pass before the correction is made. SEIU opposes elimination of the five year rule.
- (c) Section 37 allows for the delegation of Board power to departments. However, the mechanism for that delegation should be clarified including when and how the delegation is to occur.

RESPONSE 3:

- (a) Given that corrective action may vary depending upon the facts and circumstances of the situation, proposed section 243.2 is sufficiently clear. Additionally, the use of the word "may" is consistent with Government Code section 19257.5, which uses the term "may."
- (b) Please see Summary of Written Comments, II, Response 3, page 3.
- (c) Section 37 was not amended as part of this rulemaking action. Therefore, the comment by SEIU concerning section 37 is beyond the scope of the 15-Day written comment period. Additionally, SEIU's comment is conclusory without any supporting reasons. The Board thus declines to adopt this recommendation.

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COMMENT 4:

Proposed Section 243.3. Compensation or Reimbursement for Voided Appointments.

SEIU rejects the notion that the State may insist on reimbursement of all, or any, compensation resulting from the appointment, if the employee acted in bad faith. Employees are entitled to be paid for work time and work time includes all hours they suffered or were permitted to work. It is a basic tenet of wage and hour law that employees shall be paid for time worked. (See 29 C.F.R. § 785.11 [work not requested but suffered or permitted is work time].)

RESPONSE 4:

The comments by SEIU concerning proposed section 243 are beyond the scope of the 15-day written comment period. Nonetheless, for purposes of clarity, the Board exercises its discretion to respond.

Government Code section 19050 requires that all civil service appointments be made in accordance with the Civil Service Act and Board rules, not otherwise. The Board has historically had rules in place that an employee who acts in other than good faith shall reimburse all compensation resulting from the appointment, subject to appeal to the Board. SEIU provides no authority that the federal regulation it relies upon applies to California civil service employment. In addition, the basic tenet of wage and hour law that SEIU cites does not concern a situation in which a state civil service employee acts in other than good faith to secure his or her appointment. Therefore, the Board declines to further modify proposed section 243.3.

IV.

ADDITIONAL AMENDMENTS

Upon further review of proposed section 243.4, concerning remedial measures to be taken when an employee who acted in good faith is terminated, the requirement that the employee must be qualified for the examination is added for purposes of clarity.

V.

CONCLUSION

The Board appreciates the feedback it received regarding these proposed regulations. The modified text with the changes clearly indicated are available to the public for a second 15-day public comment period. Written comments will be accepted as provided in the Notice of Further Modification to Text of Proposed Regulation for Second 15-Day Comment Period.