

SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

45-Day Public Comment Period

**Proposed Regulatory Action
Extension of Probationary Periods**

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I.

Introduction

The State Personnel Board (Board) proposes to amend section 321 of Title 2, Chapter 1 of the Code of Regulations (CCR), concerning extension of probationary periods. A 45-day public comment period on this regulation was held from December 15, 2017, through January 29, 2018. A public hearing was held on February 1, 2018. The comments received by the Board have been taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written Comments from Jill O'Connell, Chief, Human Resource Services Division, Employment Development Department (EDD).

Comment 1:

Proposed § 321, subdivision (a).

Probation under subdivision (a) is not technically "automatic," as the extension needs to be keyed by the department. In addition, correct the spelling of "calender" to "calendar."

Response 1:

Proposed subdivision (a) provides that where a probationer has not worked the required number of hours the length of the probationary period is extended, as specified. This proposed rule thus creates an extended probationary period by operation of law. EDD's comment relates to the administration of the rule. There are other instances in the Board's rules where an event occurs automatically without specification as to the actual administration of the rule. For instance, the automatic effective date of a transfer is generally 30 calendar days after receipt of a written request for the employee's services (see § 425). The effective date of the transfer needs to be recorded or keyed into the system but this administrative requirement is not included in the rule. Thus, to add this requirement to subdivision (a) may result in confusion with other Board rules. In addition, subdivision (a) has been worded in this way for over thirty years without confusion. The Board thus declines to make this suggested change. The inadvertent spelling error of "calendar" has been corrected.

Comment 2:

Proposed § 321, subdivision (c).

There is a gray area in the interpretation of proposed subdivision (c). For example, if an appointing power fails to notify an employee of an automatic extension prior to the original probation end date, does the probationer pass probation by default as the appointing power failed to notify him or her before the extension? EDD recommends adding that written notice is “prior to the completion of the extended probationary period.”

Response 2:

Proposed subdivision (a) provides an extension of the probationary period by operation of law where the probationer has failed to serve the required length of the probationary period. Whether the probationer is given the written notice before or after the effective date of the extension does not legally impact the mandated extension of time. To add a time frame for service of the written notification may raise confusion as to the legal effect of proposed subdivision (a). Therefore, the Board declines to make this suggested change.

Comment 3:

Proposed § 321, subdivision (f).

EDD recommends adding text to proposed subdivision (f) that mirrors proposed subdivision (h). The reason for the recommendation is to provide the Board additional response time in the event there is a delay in the clearance/approval process between the appointing power and the California Department of Human Resources (CalHR).

Response 3:

Proposed subdivision (f) concerns a situation in which an appointing power submits a request to CalHR to extend the probationary period because the probationer has been continuously absent from work and the automatic extension of the probationary period is insufficient to properly evaluate the probationer’s job performance. The approval process requires CalHR to make a recommendation to the Executive Officer, who is granted authority to approve, modify, or deny the requested extension or request further information before making a decision. The specified timeframes for submitting the request and for the probationer to respond, should they choose, are sufficient. It should be added that delegating this authority to the Executive Officer will make for a more efficient and timely process, as Board meetings are scheduled once a month. Any delays should be infrequent or nonexistent, since the rule mandates specified timeframes and proposed subdivision (e) sets forth what information the request for extension must contain.

Proposed subdivision (h) concerns an agreement between a probationer with a disability and the appointing power to extend the probationary period for purposes of reasonable accommodation. By statute, the agreement is subject to Board approval. (See Gov. Code, § 19170, subd. (c).) Therefore, proposed subdivision (h) requires a different process than proposed subdivision (f). Accordingly, the Board declines to make the suggested change.

Comment 4:

Proposed § 321, subdivision (g).

EDD recommends adding language to proposed subdivision (g) to clarify that the appointing power has full authority to extend the probationary period and this extension is in addition to all other subdivisions.

Response 4:

Proposed subdivision (g) has been worded in this way for over thirty years without confusion. The rule makes plain that the five working day extension is for purposes of complying with the notice requirements set forth in section 52.6. The suggested change would not provide greater clarity or improve the notice procedures. The Board thus declines to make this suggested change.

Comment 5:

Proposed § 321, subdivision (h).

EDD recommends striking “to allow the appointing power sufficient time to proceed with a rejection during probation.” EDD reasons that an appointing power may not necessarily reject a probationer in the event that the Board denies a request to extend the probationary period.

Response 5:

The primary purpose of this proposed rule is to create a procedure to extend probationary periods so that probationers with disabilities are provided the opportunity to demonstrate the ability to perform satisfactorily the essential functions of the position with reasonable accommodation before the extended probationary period ends. An appointing power would only seek to use this process because during the regular probationary period the probationer was unable to demonstrate satisfactorily he or she could perform the essential functions of the position. If the Board were to deny an agreement, which would likely be a rare circumstance, the probationer would necessarily have failed to demonstrate during the regular probationary period the ability to perform satisfactorily the essential functions of the position; otherwise, the appointing power would not have requested an extension of the probationary period for purposes of reasonable accommodation. EDD does not explain or elaborate on why or how an

appointing power would nonetheless find that the probationer had successfully passed the regular probationary period. The wording used in proposed subdivision (h) has been in the regulation for more than thirty years without confusion. The Board thus declines to make this suggested change.

III.

Conclusion

The Board appreciates the feedback it received regarding this proposed regulatory action. No further public comment period will be held. The modified text with the changes clearly indicated are available to the public as stated in the Final Notice of Modification to Text of Proposed Regulation.