

INITIAL STATEMENT OF REASONS

HEARING DATE(S):

August 22, 2017, at 10:00 a.m.
Room 150, 801 Capitol Mall, Sacramento,
California

SUBJECT MATTER OF THE PROPOSED REGULATIONS:

Good Faith and Correction of Appointments

SECTIONS AFFECTED:

Title 2, Chapter 1, California Code of
Regulations, sections 243 et seq. and
sections 548.120 et seq.

PURPOSE, RATIONALE, NECESSITY, AND BENEFITS OF REGULATORY ACTION:

Discussion of Each Adoption, Amendment, and Repeal, and Anticipated Benefits:

The following paragraphs set forth the problems with the current regulations; a summary of the proposed changes; the purpose and rationale of each adoption, amendment, or repeal; and the anticipated benefits of each adoption, amendment, or repeal.

I. Amend and Adopt Regulations Related to Good Faith Appointment Requirements.

The jurisdiction and authority of the State Personnel Board (Board) to enforce civil service statutes and the merit system, which includes ensuring lawful appointments, is rooted in the California Constitution, article VII, sections 1 and 3. (See also Gov. Code, §§ 18502, subd. (b), 18701, 18660, & 19889.) In general, any person acting in good faith when accepting an appointment to or employment in state civil service shall be paid for his or her services as specified in Government Code section 19257. Where the appointment has been made and accepted in good faith but would not have been made but for some mistake of law or fact that renders the appointment unlawful, the civil service statutory scheme provides the California Department of Human Resources (CalHR)¹ with limited authority to declare the appointment void from the beginning if the action is taken within one year after the appointment. (Gov. Code, § 19257.5.)

Board regulation, section 249 currently provides good faith appointment requirements and sanctions for violations, including civil or criminal sanctions and adverse action. Section 249 sets a presumption of good faith where certain specified actions and intent exist. In addition, section 249 provides that the Executive Officer, subject to the provisions of Board

¹ In Board regulations, CalHR is referred to as the "Department." (Cal. Code Regs., tit. 2, § 4.5.)

regulation, section 266, may cancel an improper appointment without regard to the one-year limitation set forth in Government Code section 19257.5.

Section 266 sets the standards for correcting unlawful appointments: When CalHR determines that an appointment is unlawful, CalHR must determine the good faith of the appointing power and the employee, as provided in section 249, and take corrective action up to and including voiding the appointment provided that no corrective action shall be taken for appointments (1) in effect one year or longer, if both the appointing power and employee acted in good faith, or (2) in effect five years or longer, unless the employee acted in other than good faith or CalHR determines that the rights of another employee are significantly endangered by the retention of the appointment. The rule also provides that when an unlawful appointment is terminated or corrected, the employee who acted in good faith shall retain only the compensation as defined in section 9 of the Board's regulations. In all cases, compensation shall be corrected on a prospective basis. Where an employee acts in other than good faith, he or she shall reimburse all compensation resulting from the appointment. In reviewing cases on appeal, the rule provides that the Board may provide for less than full reimbursement of compensation.

Board regulation, section 266.1 provides that where the appointment of an employee acting in good faith is terminated pursuant to section 266 the employee shall be afforded: (1) deferred competition in examinations in which in the judgment of CalHR the employee would be likely to have competed provided that the exam is in progress or that the eligible list which resulted from the last exam for the class is still existing and valid; and (2) placement back on the eligible list from which the employee was unlawfully appointed, provided that the eligible list still exists and is valid.

The Board's regulations also require that where CalHR plans to take corrective action on an unlawful appointment the employee is provided notice and the right to respond at least 15 days prior to the date of the proposed action. (Cal. Code Regs., tit. 2, § 266.2) In addition, when corrective action is taken on an unlawful appointment the employee and the appointing power may file a written appeal with the board within 30 calendar days after the date of notification of CalHR's final decision to take the corrective action.

The regulations concerning good faith and correction of Career Executive Appointment (CEA)s, sections 548.121 et seq., conform with the afore-stated regulations.

The problem with the process and procedures of these current regulations is that they are in need of clarification, updating, simplification, and streamlining. The overall intent and purpose of this rulemaking action is to correct these problems, which will in turn benefit civil service, state employees, and appointing powers.

A. Repeal Section 249 and Adopt Section 243. Good Faith Appointment Requirements.

Section 249, Good Faith Appointment Requirements and Sanctions for Violation, is repealed and renumbered as section 243, Good Faith Appointment Requirements. These

changes are necessary for better grouping of regulations related to good faith appointments, which will improve ease of reference. Proposed section 243 is substantially the same as section 249. Like section 249, proposed section 243 maintains the presumption that good faith exists if certain conditions are satisfied.

For purposes of clarity and specificity, proposed section 243 changes the following phrases relative to the presumption that the appointing power has acted in good faith:

(1) Changes “spirit and intent of the law” (§ 249(a)(1)) to “spirit and intent of any applicable laws, regulations, and policies” (§ 243(b)(1));

(2) Changes “reasonable and serious attempt to determine how the law should be applied” (§ 249(a)(2)) to “reasonable and serious attempt to determine how any applicable laws, regulations, and policies should be applied to the appointment” (§ 243(b)(2)).

(3) Changes “positions are properly classified” (§ 249(a)(3)) to “the position of the appointment has been properly classified” (§ 243(b)(3));

(4) Changes “[a]ssure that appointees have appropriate civil service appointment eligibility” (§ 249(a)(4)) to “ensure prior to the appointment that the selected candidate is eligible for the appointment” (§ 243(b)(4));

(5) Changes “employ the appointee in the class, tenure and location to which appointed under the conditions reflected by the appointment document” (§ 249(a)(5)) to “employ the selected candidate in the classification, tenure, and location, and under the terms and conditions set forth in the appointment documents” (§ 243(b)(5));

(6) Changes “provide the relevant reference materials, training, and supervision necessary to avoid any mistakes of law or fact to the persons responsible for the pertinent personnel transactions” (§ 249(a)(6)) to “provide officers and employees involved in the selection process the relevant reference materials, training, and supervision necessary to avoid any mistakes of law or fact related to making civil service appointments” (§ 243(b)(6)); and

(7) Changes “act in a manner that does not improperly diminish the rights and privileges of other persons affected by the appointment, including other eligibles” (§ 249(a)(7)) to “acts in a manner that does not violate the rights and privileges of other persons affected by the appointment, including other eligible candidates” (§ 243(b)(7)).

For purposes of clarity and specificity, the proposed regulation changes the following phrases relative to the presumption that the employee has acted in good faith:

(1) Changes “serve in the class to which the employee is being appointed under the tenure, location, and other elements of the appointment as reflected by the appointment document” (§ 249(b)(1)) to “serve in the classification, tenure, and location, and under the terms and conditions set forth in the appointment documents” (§ 243(c)(4));

(2) Changes “provide the appointing power with complete, factual, and truthful information necessary for a proper appointment” (§ 249(b)(2)) to “answers all questions, including but not limited to, questions related to experience, education, and level of competencies, truthfully and honestly (§ 243(c)(1)) and “makes sincere and reasonable efforts to provide complete, accurate, and factual information whether verbally or on documents or other materials” (§ 243(c)(2)); and

(3) Changes “make a reasonable attempt to seek correction of any aspects of the appointment that the employee knows are illegal” (§ 249(b)(3)) to “makes 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” (§ 243(c)(3)).

Currently section 249 contains provisions relative to sanctions and adverse actions for violations of the good faith appointment requirement. In order to group like subject matter together, proposed section 243 does not include those standards. Rather, as explained below, proposed section 243.1, Adverse Actions for Violations of Good Faith, contains such provisions.

B. Adopt Section 243.1. Adverse Actions for Violations of Good Faith.

Proposed section 243.1 sets the standards for adverse actions related to violations of the good faith appointment requirement. These standards are currently found in section 249, which is proposed to be repealed. The intent and purpose of adopting the adverse action standards in a distinct rule is to group like subject matter together for ease of reference.

C. Repeal Section 266 and Adopt Section 243.2. Correction of Unlawful Appointments.

The intent and purpose of proposed section 243.2 is to clarify the roles and authority of the Board, Executive Officer, and CalHR when the correction of an unlawful appointment is necessary. Where the correction occurs within one year after the appointment, the standard for correcting the appointment is the same whether ordered by the Board, Executive Officer, or CalHR, namely: (1) the appointment was accepted and made in good faith by both the appointing power and employee, and (2) the appointment 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. This standard conforms these types of actions with Government Code section 19257.5.

Currently section 266 provides that no corrective action shall be taken on any appointment which has been in effect for one year or longer (but less than five years) if both the appointing power and the employee acted in good faith. Additionally, the rule provides that no corrective action shall be taken on any appointment which has been in effect for five years or longer unless the employee acted in other than good faith or CalHR determines that the rights of another employee are significantly endangered by the retention of the appointment in question.

Proposed section 243.2 changes these standards: Where the action to correct or void an unlawful appointment commences one year or longer after the appointment, the Board or Executive Officer may take action to correct the appointment where the employee acted in other than good faith; if, however, only the appointing power acted in other than good faith, the Board or Executive Officer may take corrective action as to the appointing power by, for example, voiding examinations administered by the appointing power or revoking delegated authority.

The intent and purpose of changing the standard for correcting appointments after one year is to simplify the process, ensure that employees who acted in good faith are not disadvantaged due to a mistake that was not their doing, and encourage appointing powers to act in good faith when making appointments by providing a penalty should they act in other than good faith.

D. Adopt Section 243.3. Compensation or Reimbursement for Voided Appointments.

The rules for compensation or reimbursement related to voided appointments are currently found in section 266, which this proposed rulemaking action repeals. Accordingly, this proposal moves the provisions of section 266 to proposed section 243.3. The change is technical and stylistic only for purposes of clarity and consistency with other Board regulations.

E. Renumber and Amend Section 266.1 to Section 243.4. Remedial Measures.

The proposed changes are all technical and stylistic. Section 266.1 is renumbered to proposed section 243.4 to group regulations related to good faith appointments together for ease of reference. Other changes conform to the new proposed numbering scheme of the regulations and are stylistic without substantive impact.

F. Renumber and Amend Section 266.2 to Proposed Section 243.5. Right to Respond.

The proposed changes are all technical and stylistic. Section 266.2 is renumbered to proposed section 243.5 to group regulations related to good faith appointments together for ease of reference. Other changes conform to the new proposed numbering scheme of the regulations and are stylistic without substantive impact.

G. Renumber and Amend Section 266.3 to Proposed Section 243.6. Right to Appeal.

The proposed changes are all technical and stylistic. Section 266.3 is renumbered to proposed section 243.6 to group regulations related to good faith appointments together for ease of reference. Other changes conform to the new proposed numbering scheme and are stylistic without substantive impact.

H. Repeal Section 548.123 and Adopt Section 548.120. Good Faith Requirement for CEA Appointments.

Section 548.123 provides that good faith provisions as contained in section 8 apply to appointments in the CEA category. Section 8 has been previously repealed. Therefore, section 548.123 must be updated.

This proposed rulemaking action repeals section 548.123 and proposes to adopt section 548.120 in its place. In particular, proposed section 548.120 provides that to be valid CEA appointments require the appointing power make and the employee accept the appointment in good faith as specified in proposed section 243. This change is technical, stylistic, and updates the rule to be consistent with other changes in the Board's regulations. In addition, the intent and purpose of this proposed regulation is to provide clear, concise, and consistent procedures for appointing powers to follow when candidates are appointed to positions in civil service or to career executive assignments.

I. Repeal Section 548.124 and Adopt Section 548.120.1. Actions to Correct Unlawful CEA Appointments.

Current section 548.124 provides that when CalHR determines that a CEA appointment is unlawful it shall take corrective and remedial action in the same manner as in the general civil service, as provided in sections 266 and 266.1. It also provides that the employee shall have the right to receive notice, to respond, and to appeal the corrective action pursuant to sections 266.2 and 266.3.

This rulemaking action repeals section 548.124 and proposes to adopt section 548.120.1 in its place. Like section 548.124, proposed section 548.120.1 aligns the correction of unlawful CEA appointments with the correction of unlawful civil service appointments, which includes compensation or reimbursement for voided appointments, remedial measures, right to notice and response, and right of appeal. The intent and purpose of this proposed regulation is to provide clear, concise, and consistent procedures for correcting unlawful appointments, whether in civil service or to career executive assignments.

J. Repeal Section 548.121. Unauthorized Employment.

Current section 548.121 provides that any person acting in good faith in accepting an appointment or employment that is voided shall be paid by the appointing power the compensation promised by or on behalf of the appointing power or, in case no compensation is so promised, the actual value of any service rendered and the expense incurred in good faith and has a cause of action against the appointing power therefore.

This rulemaking action repeals section 548.121 and adopts proposed section 548.120.1, which provides that compensation or reimbursement for voided CEA appointments shall be the same as provided in proposed section 243.3. The intent and purpose of this proposed regulation is to provide clear, concise, and consistent procedures for compensation or reimbursement of voided appointments, whether in civil service or to career executive assignments.

K. Renumber Section 548.122 to 548.121. Medical Examination.

This proposed amendment is technical only to conform to other renumbering changes in the regulations without substantive change to the text of the regulation.

ECONOMIC IMPACT ASESMENT:

The proposed regulations set standards only related to state civil service appointments and CEA appointments. Therefore, the adoption of these regulations will not:

1. Create or eliminate jobs within California.
2. Create new businesses or eliminate existing businesses within California.
3. Affect the expansion of businesses currently doing business within California.
4. Affect worker safety or the state's environment.

The adoption of these regulations, however, will have a positive impact on the general health and welfare of California residents in that the benefits of this regulatory action include a more simplified, streamlined, and updated civil service and CEA appointment process related to the good faith requirement.

TECHNICAL, THEORETICAL AND/OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS:

None.

ANTICIPATED BENEFITS OF THE REGULATORY ACTION:

The benefits of this regulatory action include a more simplified, streamlined, and updated civil service and CEA appointment process related to the good faith requirement, which in turn conserves and promotes the fiscal interests of the state.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

This regulation does not mandate the use of specific technologies or equipment.

EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS:

Not applicable. The Board is not a department, board, or commission within the Environmental Protection Agency, the Resources Agency, or the Office of the State Fire Marshall.

SIGNIFICANT ECONOMIC IMPACT ON BUSINESS:

The proposed regulations set standards related to the good faith appointment requirement in civil service and for CEA appointments. Accordingly, it has been determined that the adoption of the proposed regulations would not have a significant, statewide adverse economic impact affecting California businesses, including the ability of California businesses to compete with businesses in other states.

CONSIDERATION OF ALTERNATIVES:

The Board has initially determined that no reasonable alternatives have been identified that would be more effective in carrying out the purposes for which the instant action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.