

SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

45-Day Public Comment Period

**Proposed Regulatory Action
Good Faith and Correction of Appointments**

DRAFT

TABLE OF CONTENTS

I.....	1
Introduction	1
II.....	1
Summary of Written Comments from Peter Brown, Staff Services Manager I, Classification and Performance Services Section, Department of Health Care Services (DHCS).....	1
Comment 1:.....	1
Response 1:	2
III.....	3
Summary of Written Comments from Christine Zimmer, Staff Services Manager I, Classification and Hiring, California Highway Patrol (CHP).....	3
Comment 1:.....	3
Response 1:	3
Comment 2:.....	3
Response 2:.....	4
Comment 3:.....	4
Response 3:.....	4
Comment 4:.....	4
Response 4:	4
IV.....	5
Summary of Written Comments from Gerald Rax.....	5
Comment 1:.....	5
Response 1:	5
V.....	5
Summary of Written Comments from Kelly Nordli, Senior Attorney, Office of Systems Integration (OSI.).....	5
Comment 1:.....	5
Response 1:	6
IX.....	7
Conclusion	7

SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

I.

Introduction

The State Personnel Board (Board) proposes to adopt, amend, and repeal regulations related to good faith and correction of appointments, beginning with proposed regulatory section 243 of Title 2, Chapter 1, of the Code of Regulations (CCR). 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. 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 Peter Brown, Staff Services Manager I, Classification and Performance Services Section, Department of Health Care Services (DHCS).

Comment 1:

Proposed § 243.3. Compensation or Reimbursement for Voided Appointments.

DHCS requests consideration to modify the definition of compensation as specified in section 9 to include "experience credit for time served," as this would allow employees, victim to an illegal appointment in good faith, the opportunity to utilize on the job experience gained under the unauthorized appointment to make whole their employment status/salary earnings on a current or expedited basis through list appointment.

Further, it seems inequitable to allow an employee the opportunity to retain salary/benefits received under an illegal appointment without also allowing them to utilize experience gained through successful performance on the job. Board Rule 212 allows employees to utilize out-of-class-assignment experience toward meeting the minimum qualifications for civil service examinations. It would be reasonable to afford employees who have acted in good faith, but are nonetheless illegally appointed, the same opportunity to utilize their time and experience in that classification towards meeting the MQs for exams on a current basis even though their appointment is voided.

Additionally, illegal appointments disrupt employees's personal and professional lives. Where it is honorable that the state allows for an employee to retain monetary compensation earned during the period of their illegal, albeit good faith, appointment, we cannot deny employees compensation for the most valuable commodity human beings have on this earth . . . time.

We therefore ask the Board to strongly consider revising the definition for compensation to include provisions for employees to utilize experience gained under an illegal appointment toward meeting minimum qualifications (MQs) for subsequent appointments.

Response 1:

As a threshold matter, the comments of DHCS fall outside the scope of this regulatory action, since proposed section 243.3 merely incorporates section 9 by reference rather than making any proposals to change section 9. Nonetheless, Government Code section 19050 requires that all civil service appointments be made in strict accordance with the Civil Service Act and Board rules, not otherwise. "This ensures that employees are treated equitably and consistently and it also serves the public's interest by preventing patronage and similar abuse of the State's employment system." (Personnel Management Policy and Procedures Manual (PMPPM) § 395, p. 395.3.) It has long been recognized that illegal appointments have the following detrimental effects:

Such appointments circumvent and/or contradict the laws and rules that are intended to govern civil service rights and transactions.

They cause inconsistencies that jeopardize the Board's overall objective of evenly and equitably administering the civil service system.

They often give employees unfair and unearned advantages over others whose appointments have been processed in the normal manner.

(*Id.* at p. 395.4.)

Examples of illegal appointments vary. As illustrative: (1) The agency improperly clears the eligible list and appoints a person who is not reachable on the list; (2) The agency transfers a person from an exempt position to a civil service position for which the person has no civil service eligibility; (3) A person competes in an examination when the person does not meet the minimum qualifications for competition and that person is later appointed from the list; (4) A short duration appointment of a CEA employee to a civil service class made solely to establish a higher civil service return right than would otherwise be the case; or (5) An appointment of an employee to one class, location or time base that is made solely to establish the employee's eligibility to transfer to another class, location, or time base. (PMPPM, § 395, pp. 395.12-.13.)

To grant experience credit for meeting MQs to an employee whose appointment has been voided as unlawful would provide the employee with an unfair and unearned advantage over others whose appointments complied with civil service laws and Board rules. The comparison of the use of out-of-class experience in meeting MQs for an examination, as set forth in section 212, is misplaced. Section 212 requires all employees to obtain verification of the out-of-class experience based upon specified criteria. If the verification is not obtained, the out-of-class experience may not count as experience credit. Therefore, section 212 does not give certain employees unfair and unearned advantages over others; but instead, sets a fair and equitable process for all employees seeking to use out-of-class experience to meet MQs for an examination.

III.

Summary of Written Comments from Christine Zimmer, Staff Services Manager I, Classification and Hiring, California Highway Patrol (CHP).

Comment 1:

Proposed § 243. Good Faith Appointment Requirements.

(a) Subdivision (c)(3) use the term “employee.” Should this reference be changed to “selected candidate” or “selected candidate/employee”? This would mirror the changes from “employee” to “selected candidate” contained throughout proposed section 243.

(b) CHP recommends that Government Code section 18525 be added to the reference section of the note for this proposed regulation. Section 18525 defines an appointment as “the offer to and acceptance by a person of a position in the State civil service in accordance with this part.”

Response 1:

(a) Proposed section 243, subdivision (a) refers to “employee,” as does subdivision (c)(3). Therefore, for purposes of consistency, proposed section 243, subdivision (c) is amended to change “selected candidate” to “employee.”

(b) For purposes of clarity, Government Code section 18525 is added to the reference section of the note.

Comment 2:

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

Should Government Code section 19682 be added to the authorities cited for this proposed regulation, since it provides clarification along with the other authorities cited?

Response 2:

Government Code section 19682 provides, in relevant part, that every person who violates any provision of Chapter 10 of the Government Code is guilty of a misdemeanor. Section 19682 thus does not permit or obligate the Board to adopt, amend, or repeal proposed section 243.1. Accordingly, it is not necessary to refer to Government Code section 19682 in the authorities cited.

Comment 3:

Proposed § 243.2. Correction of Unlawful Appointments.

What happens if the appointment is less than one year? Based on information obtained from the “Unlawful Appointment Actions Chart,” obtained from the California Department of Human Resources (CalHR), if the appointing power acted in good faith and the employee did not, the appointment may be cancelled at any time; if the appointing power and the employee acted unlawfully the corrective action would be to cancel the appointment at any time. Additionally, if a lack of good faith exists on the part of either the appointing power or employee, the Executive Officer may cancel the appointment without regard to the one-year limitation. CHP would like this language to remain in proposed section 243.2.

Response 3:

For purposes of clarity, proposed section 243.2 has been amended to add language that the Board, Executive Officer, or CalHR may take action to correct an appointment that commenced within one year after the appointment and either the appointing power or employee or both acted in other than good faith in making and/or accepting the appointment.

Comment 4:

Proposed § 243.5. Right to Respond.

(a) CHP would like to propose adding either “calendar” or “business” to the 15 days stated in the proposed regulation for purposes of clarification.

(b) Should “reasons” be stated as “reason(s),” which actually covers more bases. It seems it would be more appropriate to state it to indicate that this could cover one or multiple issues.

Response 4:

(a) For purposes of clarity and consistency, “working” is added to modify the 15 days referenced in proposed section 243.5.

(b) For purposes of clarity and consistency, “reasons” is changed to “reason(s).”

IV.

Summary of Written Comments from Gerald Rax.

Comment 1:

I ask the Board to afford back pay with interest for an appointment that was made in bad faith by the appointing authority that has been in existence for more than five years, where the employee received an adverse action that was caused by the appointment. I also ask that the Board allow any other relief and compensation, such as compensatory and punitive damages to make the employee whole.

Response 1:

These comments fall outside the scope of this regulatory action, since these proposed regulations do not concern adverse actions. It should be noted, however, that the Board’s authority regarding relief and compensation for an adverse action that has been revoked or modified is set forth in the Civil Service Act and does not include the authority to grant compensatory or punitive damages. (See Gov. Code § 19584; Cal. Code Regs., tit. 2, § 61.)

V.

Summary of Written Comments from Kelly Nordli, Senior Attorney, Office of Systems Integration (OSI).

Comment 1:

Proposed § 243.2. Correction of Unlawful Appointments.

(a) Currently, CalHR can void appointments longer than one year if the appointment was accepted by the employee in other than good faith. Under proposed section 243.2, subdivision (c), only the Board or Executive officer may do so. This has the effect of limiting CalHR’s (and therefore delegated departments) ability to make corrective action in those rare instances where an employee accepted a position in other than good faith. If this is the intent behind the regulations, then the regulations should clarify the process that a department needs to follow if a potential unlawful appointment is discovered and the appointment has been in place for one year or longer.

(b) Existing section 249 provides for the voiding of an appointment if the appointment was made in other than good faith by the department. This provision appears to have been eliminated in proposed section 243.2, and it is not clear why this change was made. It seems that if it is acceptable to void an appointment where good faith exists by

both the appointing power and employee (as provided in proposed section 243.2, subdivision (a)(1) and 243.2, subdivision (b)(1)), then it should be acceptable to void an appointment made in other than good faith on the part of the appointing power.

(c) Under proposed section 243.2, subdivision (b), CalHR should have the ability to void an appointment under one year if the appointment was accepted in other than good faith. Likewise, the Board should be able to take corrective action against an appointing power whenever it acts in other than good faith in making appointments.

(d) The structure of the proposed regulation could be simplified to help improve its clarity by incorporating the following principles: 1) an appointment less than one year can be voided if made by CalHR in other than good faith; 2) that CalHR can void an appointment within one year if the employee accepted it in other than good faith, and 3) that the Board can take corrective action against appointing powers whenever they act in other than good faith. The Board should also consider whether CalHR and therefore delegated departments should retain the ability to void an appointment accepted in other than good faith, even though the appointment has been in place longer than one year.

Response 1:

(a) 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.) This proposed regulatory action clarifies these respective duties and powers.

Regarding delegations, the Board and CalHR may delegate, share, or transfer between them responsibilities for programs within their respective jurisdictions pursuant to an agreement. (Gov. Code, § 18502, subd. (c).) Additionally, section 37 of the Board's regulations provides that CalHR or an appointing power delegated by CalHR has the power to act as specified in the Board regulations. Likewise, the Executive Officer is granted delegation power to subordinates or appointing powers. (See Gov. Code § 18654 [Unless by affirmative vote, any power, duty, purpose, function, or jurisdiction that the Board may lawfully delegate shall be conclusively presumed to have been delegated to the Executive Officer].)

Thus, the Board, Executive Officer, or CalHR may delegate their respective authority where they determine such delegation is appropriate. Accordingly, for example, the Executive Officer may delegate to CalHR the authority to correct unlawful appointments that are found after the one-year period. CalHR may in turn re-delegate that authority to appointing powers. Any potential confusion that may arise concerning delegated

authority may be clarified in written delegation statements, guidelines, or agreements. Nonetheless, for purposes of clarity and to avoid any confusion, subdivision (d) has been added to proposed 243.2. Proposed subdivision (d) sets forth the delegation authority of the Executive Officer and CalHR.

(b) There may be circumstances warranting the voiding of an appointment after one year where the appointing power acted in other than good faith. There may also be circumstances where the action(s) or omission(s) found to render an appointment unlawful results in a selection process not based solely on merit or that significantly disadvantaged the other candidates. These determinations are made on a case-by-case basis, and 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. Accordingly, subdivision (b) has been amended to include situations where the appointing power acted in other than good faith and where the action or omission found to render the appointment unlawful resulted in a selection process not based solely on merit or that significantly disadvantaged the other candidates.

(c) Proposed section 243.2 has been clarified to include that the Board, Executive Officer, or CalHR may void the appointment within one year where the appointing power or employee or both the appointing power and employee acted in other than good faith

(d) The suggestion of OSI ignores the language of Government Code section 19257.5. In addition, as discussed in subdivision (c) above, proposed section 243.2 has been clarified.

IX.

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 as stated in the Notice of Modification to Text of Proposed Regulation.