

SUMMARY OF PUBLIC COMMENTS DURING 45-DAY PUBLIC COMMENT PERIOD AND THE BOARD'S RESPONSES

I.

Summary of Comments on Section 51.2(v)(2)

SEIU: The shortened timeframe increases the chance of possible injustice in that it may result in amendments being denied for reasons unrelated to good cause. Due to vacations busy schedules, delays in mail processing and the like, the 10 day period may elapse without allowing necessary amendments on discovery of new evidence.

Reject: The proposed amendment is designed to eliminate confusion between section 52.1(v)(2) as currently written and section 57.1 subdivision (i) allowing a party to amend their prehearing/settlement conference statement to include new evidence within 10 days from the date of discovery. SPB staff has noted no issues with parties complying with the 10-day period set forth in 57.1, subdivision (i) due to the vacations, busy schedules or mail processing delays. 10 days provides sufficient time to amend a conference statement on discovery of new evidence. In addition, the SPB's timeframe to conclude appeals is relatively short. (Gov. Code § 18671.1, subd. (a).) Also, an extension of the timeframe to file an amended prehearing/settlement conference statement can be granted on a showing of good cause.

DWR: The shortened timeframe is too short. If discovery of new evidence is made on a Friday this allows only a maximum of six working days to draft an amended statement. If a state holiday falls within the 10 day period along with a weekend, the time is cut to five days to amend the statement. At times, declarations from people other than the drafter are necessary to support the reasons for the amended statement and those persons may not be readily available to execute a declaration. In addition, other work deadlines, including hearings, may limit the time for drafting an amended statement.

Reject: The proposed amendment is designed to eliminate confusion between section 52.1(v)(2) as currently written and section 57.1 subdivision (i) allowing a party to amend their Prehearing/settlement conference statement to include new evidence within 10 days from the date of discovery. SPB staff has noted no issues with parties complying with the 10-day period set forth in 57.1, subdivision (i). 10 days provides sufficient time to amend a conference statement on discovery of new evidence. In addition, the SPB's timeframe to conclude appeals is relatively short. (Gov. Code § 18671.1, subd. (a).) Also, an extension of the timeframe to file an amended prehearing/settlement conference statement can be granted on a showing of good cause.

Summary of Comments on Section 51.2(v)(3)

SEIU: The shortened timeframe increases the chance of possible injustice in that it may result in amendments being denied for reasons unrelated to good cause. Due to vacations busy schedules, delays in mail processing and the like, the 10-day period may elapse without allowing necessary amendments in the event of a material change in law.

Reject: The proposed amendment is designed to eliminate confusion between section 52.1(v)(3) as currently written and section 57.1 subdivision (i) allowing a party to amend their Prehearing/settlement conference statement to include new evidence within 10 days from the date of discovery. SPB staff has noted no issues with parties complying with the 10-day period set forth in 57.1, subdivision (i). 10 days provides sufficient time to amend a conference statement in the event of a material change in law. In addition, the SPB's timeframe to conclude appeals is relatively short. (Gov. Code § 18671.1, subd. (a).) Also, an extension of the timeframe to file an amended prehearing/settlement conference statement can be granted on a showing of good cause.

DWR: The shortened timeframe is too short. If a change of law is made on a Friday this allows only a maximum of six working days to draft an amended statement. If a state holiday falls within the 10 day period along with a weekend, the time is cut to five days to amend the statement. At times, declarations from people other than the drafter are necessary to support the reasons for the amended statement and those persons may not be readily available to execute a declaration. In addition, other work deadlines, including hearings may limit the time for drafting an amended statement.

Reject: The proposed amendment is designed to eliminate confusion between section 52.1(v)(3) as currently written and section 57.1 subdivision (i) allowing a party to amend their Prehearing/settlement conference statement to include new evidence within 10 days from the date of discovery. SPB staff has noted no issues with parties complying with the 10-day period set forth in 57.1, subdivision (i). 10 days provides sufficient time to amend a conference statement in the event of a material change in law.

Summary of Comments on Section 51.2(ii)

CAPS & PEGG: CAPS and PEGG support including a definition of "rebuttal" and "rebuttal evidence" in the regulations but suggests the definition of "rebuttal" be more specific. CAPS & PEGG suggest the following. "'Rebuttal' is the opportunity for the presentation of additional evidence by either party after the conclusion of their cases-in-chief."

Accept: CAPS's and PEGG's definition of "rebuttal" is accepted and will be substituted for the definition of "rebuttal" as proposed.

Summary of Comments on Section 52.10(b)

DIR: The proposed regulation fails to answer the question if additional time is required for service of a prehearing /settlement conference statement or trial setting conference statement if service of those documents is by mail.

Reject: The regulation specifically provides that service is complete on deposit in a post office, mailbox, sub post office, substation or mail chute or any like facility regularly maintained by the United States Post Office. Section 52.10, subsection (d) states in part that “Service of *all other documents* shall be made pursuant to sections ... 1013 ... of the Code of Civil Procedure.” (Emphasis added.) The proposed language clarifies that the time for service of prehearing/settlement conference statement and trial setting conference statement is not extended by Code of Civil Procedure section 1013.

Summary of Comments on Section 52.10(c)

SEIU: SEIU objects to requiring a complainant be responsible for the service of an accepted whistleblower retaliation complaint. As noted by the SPB, in its Initial Statement of Reasons, a complainant is “required to spend significant funds...to make enough copies of the complaints and attachments.” SEIU proposes that the SPB allow for electronic service of these documents, a process successfully utilized by state and federal courts.

Accept: The proposed changes to the regulation will be withdrawn.

Summary of Comments on Section 52.11

DIR: The proposed regulation confines itself to counting days for the filing of documents only, leaving uncertain how days are to be counted for acts (as opposed to filing documents) to be performed as found in other portions of SPB regulations. For example, Respondent may serve a request for discovery on Appellant 15 days after the Prehearing/Settlement Conference to obtain information relevant to any affirmative defense. Under the proposed regulation, there is no direction on how to count days to perform this act.

Accept: The words “an act,” “occur,” and “pleading” will be reinserted into the regulation along with the proposed amendments in both subsections (a) and (b).

Summary of Comments on Section 53.2

SEIU: SEIU strongly supports having discrimination complaints bypass the investigatory hearing process and proceed directly to the evidentiary hearing process.

Accept: Section 53.2 is amended to strike from the Authority cited reference to Government Code section 19702 as that reference is no longer applicable due to the modification of the regulation.

Summary of Comments on Section 52.3

SEIU: SEIU strongly supports having discrimination complaints bypass the investigatory hearing process and proceed directly to the **evidentiary** hearing process.

Accept: Section 53.3 is amended to include in the Authority cited reference to Government Code section 19702 as that reference is necessary in light of the modification to the regulation concerning appeals discrimination, harassment and retaliation.

Summary of Comments on Section 57.1(d)

CAPS & PECG: The proposed amendment does not go far enough to ensure Respondents efficiently engage in settlement discussions. There is no reason why Respondents cannot send someone carrying settlement authority to the prehearing/settlement conference. Appellants are required to appear in person and are not permitted to appear telephonically. Even with the amendment, the only reasonable method of ensuring meaningful participation in settlement conferences is in-person attendance by both parties.

Reject: The proposed regulation does not change the existing regulation providing that Respondent's with settlement authority may appear telephonically at prehearing/settlement conferences. The proposed regulation, however, would require those Respondents who appear telephonically to be available at any time for the duration of the prehearing/settlement conference to ensure they are immediately available to consider and respond to settlement proposals.

DWR: The application of this proposed amendment is not clear. Is it SPB's intent not to recognize the limits of the settlement authority delegated to Respondent's attorney/representative appearing at the prehearing/settlement conference? Settlement authority is delegated to the attorney/representative after being previously discussed, sometimes with the input of numerous persons, to arrive at acceptable limits. The proposed language would interfere with the attorney/client advisory role. DWR suggest the following language: "If Respondent appears at a prehearing/settlement conference without settlement authority, and is unable to obtain any settlement authority within a reasonable period of time, this may be deemed a failure of a party to appear and/or proceed."

Reject: Not all appointing authorities provide their attorney/representative a well-defined settlement authority prior to the prehearing/settlement conference, and on many occasions

settlement offers are proposed that were not anticipated by the person delegating settlement limits to their representative. In addition, a party's settlement posture may change during the prehearing/settlement conference due to a variety of factors. Thus, those persons vested with settlement authority must be immediately available by phone. DWR's proposed language regarding obtaining settlement authority within a "reasonable time" would not solve the problem the proposed regulation is designed to prevent i.e., ALJ's having difficulty immediately reaching Respondent's representatives with settlement authority during the prehearing/settlement conferences.

CAHP: CHAP's experience at prehearing/settlement conferences is that the appointing power has only one offer of settlement in dismissal cases – resignation. This blanket posture for all dismissal cases is suspect and questionable. In cases involving a suspension the appointing power is not settling those cases even though the employee's settlement offer is near the initial penalty range. This gives the impression of lack of good faith in the conducting meaningful settlement discussions. The appointing power's representative appearing at the prehearing/settlement conferences appears to have no ability to deviate from the settlement authority given them by the appointing power prior to the prehearing/settlement conference. To make the process effective and meaningful, the decision maker must be available either in person or telephone at the prehearing/settlement conference. That person would have to be at the executive management level, commissioner, deputy commissioner or assistant commissioner. If the person designated to be available by telephone has no latitude in negotiation then the actual decision maker is not in contact with the judge during the conference. Thus, the person with settlement authority who appears either in person or by telephone at the conference must have unfettered discretion and authority to resolve the matter.

Reject: The proposed regulation requires Respondents who appear at the conference have full settlement authority. If the person with full settlement authority is not personally present, that person must be immediately available by telephone at any time during the two-hour prehearing/settlement conference. It is outside the scope of the SPB's regulations to dictate the rank or job classification of the person the appointing power delegates with settlement authority.

Summary of Comments on Section 57.1(h)

SEIU: SEIU strongly opposes extending the time to serve prehearing/settlement conference statements to 12 days before the conference. Appellants, under the current regulation have a short timeframe in which to meet with the client, prepare, and file a prehearing/settlement conferences statement. This is especially true if the prehearing/settlement conference is scheduled soon after the appeal is filed. Respondents have months to prepare their case while Appellants can only do so once an adverse action is served and an appeal is filed. Also, it is

confusing to have the filing deadline for prehearing/settlement conference statements (10 days) be different than the service deadline (12 days) for the same document. Ten days before the conference is sufficient time for parties to review the opposing party's prehearing/settlement conference statement.

Accept: The proposed regulation actually provides additional time to prepare a prehearing/settlement conference statement if it is served by mail as the parties are no longer required to adhere to California Code of Civil Procedure 1013. The proposed regulation will also provide each party additional time to review the opposing party's statement. However, the commenter's concern that the time for service of a prehearing/settlement conference statement (12 days) and the time for filing the statement with the SPB (10 days) is confusing is well taken. Section 57.1, subdivision (f) will be amended from 10 days to 12 days to provide consistency between the service and filing dates.

CAPS & PEGG: The current requirement that prehearing/settlement conference statements be served 10 days prior to the prehearing/settlement conference is adequate. There is no need to extend the time by two days. Frequently the entire period between filing an appeal and 10 days service deadline for filing prehearing /settlement conference statements is needed to fully prepare the prehearing/settlement conference statement.

Reject: The proposed regulation actually provides additional time to prepare a prehearing/settlement conference statement if it is served by mail as the parties are no longer required to adhere to California Code of Civil Procedure 1013. The proposed regulation also addresses concerns raised that the parties that the current regulation deadline provides insufficient time to review an opposing party's prehearing/settlement conference statement.

DIR: Make the deadline for filing a prehearing/settlement conference statement the same as the deadline for service of the prehearing/settlement conference statement.

Accept: Section 57.1, subdivision (f) regarding the filing of prehearing/settlement conference statements with the SPB will be amended from 10 days to 12 days prior to the prehearing/settlement conference. The change will provide clarity and conform to other provisions of the regulations

Summary of Comments on Section 57.1(j)

SEIU: It is unclear what is meant by "settlement proposal in digital form." Does this require the parties to have a computer or cell phone at the prehearing/settlement conference? Not all representatives have a computer or cell phone and it is difficult to input amended settlement terms into a document using a cell phone.

Accept: The regulation will be amended to delete the word “digital” in the last sentence and replace it with “an electronic.” Added to the last sentence after the word “format” will be the phrase, “which can be electronically mailed to the ALJ.” Most representatives have a cell phone or computer to use to electronically email a draft settlement proposal to the ALJ. The ALJ can then modify the settlement draft during the prehearing/settlement conference as the settlement terms change during negotiation. Alternatively, a representative’s office staff may email the settlement proposal to the ALJ if a party does not have access to a computer or cell phone while attending the prehearing/settlement conference.

CAPS & PEGG: Clarification is needed as to what format the Board prefers to comply with the proposed regulation. Will Wi-Fi be available to the parties in all SPB hearing rooms?

Accept: The proposed regulation will be amended to delete the word “digital” in the last sentence and replace it with “electronic.” Added to the last sentence after the word “format” will be “which can be electronically mailed to the ALJ.” The amendment will help clarify that a settlement proposal must be in an electronic format that can be electronically mailed the ALJ presiding at the prehearing/settlement conference.

DIR: The proposed regulation does not specify who has the obligation to make the draft agreement accessible or who the draft agreement will be accessible to.

Reject: The proposed regulation provides that each party shall have access to any settlement proposal irrespective of who brings the settlement proposal to the prehearing/settlement conference. The proposed regulation does not mandate a settlement proposal be brought to a prehearing/settlement conference. If a settlement proposal is brought to the prehearing/settlement conference, then the other party and the ALJ shall have access to it in electronic format.

DWR: SPB’s proposed language requires the parties to separately provide a drafted settlement agreement in digital form to the prehearing/settlement conference because of the SPB’s internal procedures against using the parties’ portable electronic drives. DWR is unclear of what is intended by the phrase “digital form.” If this means the parties must be able to email the judge a settlement draft, then not all appellants or respondents have access to computers or “smart” phones to use to email the draft settlement proposal. If mobile equipment is not assigned to a representative, state law and internal policies prohibit requiring the use of personal mobile devices for state work. Therefore, what the SPB proposes may be a violation of state law and internal work policies. DWR proposes that the regulation remain the same without modification and the SPB develop some screening policy for portable electronic drives to address its security concerns.

Reject: The proposed regulation does not require either party to bring a settlement proposal to a prehearing/settlement conference. The proposed regulation also does not require the parties,

or their representatives, bring laptop computers or “smart” phones (personal or state issued) to the prehearing/settlement conference. It has been the ALJ’s experience that many of respondent and appellant representatives prefer bringing an electronic version of a settlement proposal to the prehearing/settlement conference because it helps expedite the proceeding. On occasion, the representative will have his or her office staff email the ALJ with the settlement proposal if the representative does not have the equipment or capability to email the settlement proposal themselves. In sum, the regulation provides that if a party intends to bring a settlement proposal to the prehearing /settlement conference for the other parties consideration and for the ALJ to use in finalizing a settlement, then find some way to electronically transfer it to the ALJ and the parties without requiring the SPB to insert portable drives from other agencies or associations into their computer system.

Summary of Comments on Section 57.1(I)

DWR: The application of this proposed amendment is not clear. Is it SPB’s intent not to recognize the limits of the settlement authority delegated to Respondent’s attorney/representative appearing at the prehearing/settlement conference? Settlement authority is delegated to the attorney/representative after being “previously confidentially discussed” sometimes with the input of numerous persons to arrive at acceptable limits. The proposed language would interfere with the attorney/client advisory role. DWR suggest the following language: “If Respondent appears at a prehearing/settlement conference without settlement authority, and is unable to obtain any settlement authority within a reasonable period of time, this may be deemed a failure of a party to appear and/or proceed.”

Reject: Not all appointing authorities provide their attorney/representative a well-defined settlement authority prior to the prehearing/settlement conference, and on many occasions settlement offers are proposed that were not previously anticipated by the person with settlement authority. Thus, those persons vested with settlement authority must be immediately available by telephone if they choose not to personally appear at the prehearing/settlement conference. DWR’s proposed language regarding obtaining settlement authority within a “reasonable time” is a vague standard and completely eviscerates the purpose of the proposed regulation. ALJ’s have raised concerns about the difficulty reaching Respondent’s representatives with settlement authority when the need arises. The regulatory change here requires those with settlement authority be immediately available during the entire two-hour conference.

Summary of Comments on Section 58.6

SEIU: Add language to the proposed regulation to the effect that good cause to proceed electronically may include a reasonable accommodation for a disability. The proposed

regulation should also include a general, non-exhaustive list of examples of good cause such as reasonable accommodation, travel issues, location issues.

Reject: What constitutes good cause is left to the discretion of the ALJ presiding over the hearing. What constitutes good cause is heavily dependent on the circumstances present, and no general list of examples could illustrate the factors that may come into play in determining good cause. For example, “travel issues” may be good cause in one scenario, but not good cause in another. Reasonable accommodation is a separate and distinct basis contemplated in other provisions of the regulations and is treated differently than good cause to proceed electronically. There may also be other means of accommodation available other than electronic recording.

Summary of Comments on Section 58.10

SEIU: SEIU has no objection to the SPB taking official notice of the State Controller’s Office’s Employment History Summary or prior Notices of Adverse Action, SEIU does object to SPB taking official notice of job descriptions as they are often not accurate and out-of-date. Similar issues may exist with the current classification system. Thus, the accuracy of a job description and employee classification should be a factual question. In addition added to taking “official notice” should be a relevancy requirement as some Adverse Actions should be excluded on relevancy grounds due to being quite old or issued after then misconduct in the current adverse action occurred, thus not serving as prior notice.

Accept: Any party in an evidentiary hearing is free to object to an ALJ taking official notice due to relevancy or any other ground permitted by law. In the event an objection is made, the ALJ presiding over the hearing will have authority to rule on the objection. Absent an objection, official notice can be taken. However, to clarify the proposed regulation as to the meaning of “job description,” the regulation will be amended to strike “the job description of an appellant’s classification” and the phrase be replaced with “the board’s adopted class specification for an appellant’s job classification.” In addition, the word “and” shall be stricken from the second to the last line of the proposed regulation and the phrase, “filed with the board including” will be added between the word “appellant” and the phrase, “administrative records.”

CAPS & PECG: No changes are needed to the current rule. Official notice is commonly taken of the State Controller’s Office Employment History Summary and the Board’s classification specifications. It is not appropriate to take official notice of prior adverse actions or administrative records of prior SPB cases where Appellant was a party. The burden of establishing relevancy of the prior adverse actions should rest with the Respondent. The ALJ’s must continue to have discretion to make the required evidentiary rulings on these documents.

Reject: Any party in an evidentiary hearing is free to object to an ALJ taking official notice due to relevancy or any other ground permitted by law. In the event an objection is made, the ALJ presiding over the hearing will have authority to rule on the objection. Absent an objection, official notice can be taken.

Summary of Comments on Section 58.13

SEIU: Requiring good cause for requests to proceed electronically for a hearing makes good sense. However, for some individuals, proceeding electronically may be required for a reasonable accommodation. For example a party, attorney or judge who is hard of hearing may not be able to hear a tape recording. In such a situation, the cost of a transcript should be borne by the SPB not the party or representative requiring a written transcript. Adding language that good cause includes using a court reporter as a reasonable accommodation for a disability would be helpful in preventing problems and possible discrimination. A time-frame for requests, e.g. two weeks; an explanation of costs; and a general non-exhaustive list of examples of good cause would be helpful.

Reject: What may constitute good cause for a court reporter will vary greatly depending on the circumstances presented. Including a non-exhaustive list to what constitutes good cause is not plausible given the fact that what constitutes good cause in one case may not constitute good cause in another depending on all the circumstances presented. Whether good cause exists may also take in consideration the timeliness in which the request is made. Reasonable accommodation is directly dealt with in Rule 58.8 and is treated differently than a showing good cause. In addition there may also be other means of accommodation available other than a court reporter that needs to be considered. The party making the request bears the costs of the court reporter if one is approved. The proposed regulation was not intended to shift the costs of a court reporter to the SPB.

Summary of Comments on Section 59.5

SEIU: Inserting language that, “Respondent is not required to order an employee to participate in an interview if the employee declines the request” would seem to make it more difficult for appellants to interview potential witnesses. Language should be included in the regulation that employees are encouraged, but not required to, to be interviewed. Witness interviews may help the parties achieve settlement. Also the following clarifying language would be helpful: “Nothing in this subsection shall be deemed to require an Appellant or his or her representative to obtain permission from Respondent prior to directly contacting witnesses who are employees of Respondent.”

Accept: The proposed regulation will be withdrawn.

CAPS & PEGG:

The proposed regulation appears to eliminate the, “right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based,” and replaces it with a completely different, and much weaker, “right to request an interview.” This impermissibly conflicts with the clear language of Government Code section 19574.1. The Board lacks authority to adopt this new standard in contravention of the statute. (See *Cooper v. Swoop* (1974) 11 Cal. 3d.856,864.) The proposed phrase, “if the employee wishes to participate in the interview” is also inconsistent with the intent of the statute as the statute clearly confers on appellants the right to interview other employees having knowledge of relevant information. The regulation, as proposed, shifts to the other employee the right not to participate in an interview and thwarts the purpose of the statute. The phrase, “employees of Respondent” also conflicts with Government Code section 19574.1 as the statute confers on appellant the right to interview any employee having knowledge of relevant information not just employees of Respondent.

Accept: The proposed regulation will be withdrawn.

Summary of Comments on Section 64.1

SEIU: Updating the language in 64.1 is appropriate. However the meaning of, “known physical or mental disability” is unclear as it may be perceived as requiring that the disability be “known” prior to a reasonable accommodation be requested. This is not consistent with the FEHA or the ADA as any statement requesting a workplace adjustment or change due to a medical condition is sufficient to constitute a reasonable accommodation request for a disability under the law. Only the employee’s limitations need to be disclosed not the underlying condition. To be consistent with anti-discrimination laws, the word “known” should be stricken.

Reject: “[A] department, agency, or commission shall make reasonable accommodation to the *known physical or mental limitations* of an otherwise qualified applicant or employee who is an individual with a disability unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program.” (Gov. Code § 19230, subd. (c), italics added.)

Summary of Comments on Section 64.2

SEIU: The meaning of “known physical or mental disability” is unclear as it may be perceived as requiring that the disability be “known” prior to a reasonable accommodation be requested. This is not consistent with the FEHA or the ADA as any statement requesting a workplace adjustment or change due to a medical condition is sufficient to constitute a reasonable

accommodation request for a disability under the law. Only the employee's limitations need to be disclosed not the underlying condition. To be consistent with anti-discrimination laws, the word "known" should be stricken.

Reject: "[A] department, agency, or commission shall make reasonable accommodation to the *known physical or mental limitations* of an otherwise qualified applicant or employee who is an individual with a disability unless the hiring authority can demonstrate that the accommodation would impose an undue hardship on the operation of its program." (Gov. Code § 19230, subd. (c), italics added.)

Summary of Comments on Section 64.3

SEIU: Updating this section so it accurately reflects SPB authority is desirable. However, it would be helpful to establish timeframes for the appointing powers to establish its own complaint process if not already done, such as within 60 or 90 days. Also, it would be helpful for SPB to suggest time periods for appointing powers to utilize in the actual complaint process. For example, a policy that appointing powers will respond to discrimination complaints within 14 days and issue a final decision within 30 days seems reasonable.

Reject: The purpose of this proposed changes is to conform this provisions to existing law.

Summary of Comments on Section 64.5

SEIU: It is a good idea that the requirement that complainants submit additional copies of the discrimination complaint to the SPB be stricken. But the language and requirements contained in section 52.10 should mirror the proposed language in section 64.5. Beyond the proposed changes, further changes are necessary. The timeframes in section 64.5 are far too long for proceeding with a discrimination complaint. The failure to provide reasonable accommodation may lead to performance issues and adverse actions. The appointing power should provide a response within 14 to 21 days to any complaint filed. If no response, the complainant should be able to file with the SPB within 45 days. Otherwise, an employee could be subject to adverse action and performance issues while the complaint for failure to reasonably accommodate languishes. For example, EEOC asserts that most reasonable accommodation requests can be evaluated within 15 days. To add 3 to 5 months additional delay before the employees can even file with the SPB is unfair.

Reject: The comments concerning the internal timeframe for an appointing power to respond to a complaint alleging a failure to reasonably accommodate are outside the scope of the proposed changes. However, the internal complaint process allows the appointing power to evaluate the complaint, reconsider its initial determination, and if appropriate, engage the employee in the interactive process. It also allows the employee sufficient time to obtain further medical information if needed to assist the appointing power and the employee in the

interactive process and to identify an appropriate accommodation. The process allows the employee and the appointing power time to resolve the dispute informally without resorting to the SPB.

Summary of Comments on Section 67.2

SEIU: SEIU objects to adding additional requirements for employees who file whistleblower retaliation complaints. Adding an internal exhaustion requirement is unnecessary and will delay obtaining relief as the appointing authority will almost always find that retaliation did not occur. The process is duplicative and possibly requires an employee to reassert protected disclosures to the same appointing authority which has already taken adverse action against them. California Labor Code section 98.7, subdivision (g) specifically provides that, “In the enforcement of this section [regarding discrimination complaints] there is no requirement that an individual exhaust administrative remedies of procedures.” SPB should not have more cumbersome procedures than exist under the Labor Code. Further an employee may be in the undesirable position of making the internal complaint to a supervisor who retaliated against him or her who may also be involved in and influence the internal complaint process.

Accept: The proposed changes to the regulation will be withdrawn.

Summary of Comments on Section 67.3(e)

SEIU: As noted in the Initial Statement of Reasons, for this section, “whistleblower complainants are requires to spend significant funds. . .to make enough copies of the complaints and attachments.” Allowing electronic service would help with the problems noted in the comments regarding this section.

Accept: The proposed changes to the regulation will be withdrawn.

DWR: In the past, DWR has not received from SPB all documents that have been filed along with a whistleblower retaliation complaint. Thus, it is questionable whether an unsophisticated complainant would know how to keep an intact record of all filed documents (original and supplemental) and provide those documents to a Respondent after SPB has accepted the complaint. There is no guarantee that the complainant will actually understand and have kept separate exact copies of what SPB has identified as the accepted complaint including all documentation filed with the SPB to support that complaint. In civil litigation, the filed complaint is accessible in an electronic form for the parties to review and confirm it is the same version. The SPB does not have this functionality. DWR proposes that upon acceptance of the complaint, SPB could conform/stamp and number the pages of all materials forming the basis of an accepted complaint through the use of some document watermark or page identification software. SPB could then provide that version of the complaint back to the complainant to then make copies and serve on all Respondents. Since the SPB scans its documents, they should have

the ability to electronically identify them using a software program. In this way, the SPB would not be serving the complaint, yet all the parties would be assured of identification and receipt of all documents/versions forming the basis of the accepted complaint.

Accept: The proposed changes to the regulation will be withdrawn.

Summary of Comments on Section 67.6(e)

DWR: SPB proposes to eliminate a prehearing/settlement conference and instead provide a trial setting conference in an accepted whistleblower retaliation complaint. This change does not seem necessary. The nature of resolving a whistleblower retaliation complaint does not seem to vary from the circumstances when SPB encourages a respondent to consider settlement terms for an adverse action against an individual employee regardless of the alleged conduct. Further, remedies which might be proposed in settlement of a whistleblower retaliation complaint may not be appropriate remedies after an evidentiary hearing. In a similar context – for a Request to file charges -- a complainant commonly wants a resolution to which they are not entitled – such as reassignment in a different position, or under a different supervisor. This remedy may not have been requested or considered by the complainant when filing the whistleblower retaliation complaint; therefore, those remedies are not available after an evidentiary hearing. Maintaining the prehearing/settlement conference structure, which allows for other terms in settlement, may be more appropriate – regardless of SPB’s initial determination of fault.

Reject: The policy of the California Whistleblower Protection Act (Act) is to prevent retaliation against individuals who report improper, wasteful or illegal conduct occurring in state employment and to discipline employees who have retaliated against an individual who has exercised his or her rights under the Act. Prior to setting the matter for an evidentiary hearing, an initial determination has already been made by the Executive Officer that one or more of the Respondents have engaged in retaliation in violation of the Act. Thus, further efforts by the SPB at that point to settle the case, potentially with no discipline imposed, frustrates the purpose of the Act. However, the proposed regulation will be amended by striking the phrase “instead of a prehearing/settlement conference” from the end of the first sentence, delete the second sentence in its entirety, and replace that sentence with the following sentence: “At least 12 days prior to the Trial Setting Conference, each party shall file with the Appeals Division, and serve on the opposing party, a Trial Setting Conference Statement setting forth the party’s estimated time for hearing; a list of all witnesses that the party intends to call; and, the dates the party, the party’s representative, and the party’s witnesses are unavailable for hearing.”