

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

I.

Introduction

The State Personnel Board (Board) proposes to amend section 547.60 (Section 547.60) and adopt section 547.60.1 (Section 547.60.1) of Title 2, Chapter 1, of the Code of Regulations (CCR). A public comment period on these regulations was held from April 15, 2016, through May 30, 2016. A public hearing was held on June 2, 2016. The Board did not receive any oral or written comments on Section 547.60.1. On June 1, 2016, the Board received a courtesy copy of SEIU Local 1000's comments to section 547.60. At the June 2 hearing, an SEIU Local 1000 representative appeared and presented oral comments on Section 547.60. The comments were taken under submission and considered. A summary of those comments and the Board's responses are below.

II.

Summary of Written and Oral Comments from Anne M. Giese, Attorney, on behalf of SEIU Local 1000, at the June 2, Hearing

Comment 1:

The proposed rule change in section 547.60 incorporates the five-year record retention requirement found in section 26. Section 26 provides that the five years is counted from the creation of the document. As applied in the context of personnel services contracts, this would allow a justification to be disposed of even though a personnel services contract may still be in effect.

Personnel services contracts may be challenged as unconstitutional under the process set forth in Board laws and rules. Any such contract may be challenged while it is still in effect. In a personnel services contract of five years or longer in duration, the justification may be disposed of pursuant to this proposed language in section 547.60 and section 26. At the very least, the language in section 547.60 shall provide for retention of the written justification for the duration of the contract and any of its extensions, but not less than the time allowed in the record retention requirement of section 26. It would surely be an unintended consequence for the justification to be disposed of while the personnel services contract is still in effect or is operating under an extension.

Response 1:

Regarding record retention requirements, the State Contract Manual states:

The Attorney General's Office has directed that in view of the need for purchase order and contract purchase files for antitrust litigation, such records should be retained for seven years from the end of the fiscal year in which encumbrance is liquidated. Destroy after the required seven years or when audited by the Bureau of State Audits or the Department of General Services, whichever comes first.

Since there are various sources that dictate records retention requirements (e.g., statute, policy, pending litigation, etc.) and the retention varies depending on document type and can vary by department, depending on their internal retention schedule, there is not a one size fits all retention rule. When in doubt, departments should retain for the longest period applicable.

(Chapter 11, Contract Administration, SCM Vol. 3, Revision 1, July 2010, § 11.4.2.)

Nonetheless, to ensure that section 547.60 does not result in the unintended consequences SEIU states may occur, the language of the regulation is amended to add that the contracting-out agency shall maintain the written justification for the duration of the contract and any extensions of the contract or in accordance with the record retention requirements of section 26, whichever is longer.

Comment 2:

Based on lengthy experience, many departments state one justification for the contract when it is executed, and if challenged, they simply change the justification to another subsection of Government Code section 19130(b). While the need for the legibility of the justification is obvious, there apparently is an even greater need to require the justification to be correct and accurate. In virtually all 19130(b) challenges, the justifications have conveniently changed to something "more convincing" by the time the arguments on the challenge must be submitted. The ease of these types of changes begs the question of how valid was the justification at the inception? To continue to allow a system in which the justifications for 19130(b) contracts truly weren't worth the paper they were written on seems to fly in the face of the constitutional merit system mandate. Frankly, it's a bit shocking given the level of detail that goes into justifying each and every Personnel Year Equivalent that outside vendors can be funded at large expense to the taxpayers without ever having to make a valid and correct justification at the outset.

Response 2:

The scope of this proposed regulatory action is limited to the recordkeeping and retention requirements for Government Code section 19130, subdivision (b) contracts and does not concern the procedures related to challenging those contracts. Section 547.60 is amended, however, to make clear that the person who signs the written justification is doing so based on his or her personal knowledge, information, or belief that the written justification correctly reflects the reasons why the contract satisfies Government Code section 19130, subdivision (b).

III.

Conclusion

The Board appreciates the feedback it received regarding this proposed regulatory action. 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.