



SPECIAL INVESTIGATION

**Additional Appointments
of
Supervisorial and/or Managerial Employees**

**California Department of Forestry and Fire
Protection**

Prepared By:
Compliance Review Division
State Personnel Board
May 16, 2013

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INTRODUCTION

Established by the California Constitution, the State Personnel Board (the SPB or board) is charged with enforcing and administering the civil service statutes, prescribing probationary periods and classifications, adopting regulations, and reviewing disciplinary actions and merit-related appeals. The SPB oversees the merit-based recruitment and selection process for the hiring of over 200,000 state employees. These employees provide critical services to the people of California, including but not limited to, protecting life and property, managing emergency operations, providing education, promoting the public health, and preserving the environment. The SPB provides direction to departments through the board's decisions, rules, policies, and consultation.

In addition, the SPB may review an appointing authority's personnel practices to ensure compliance with civil service laws, rules, and policies. The four major areas of review are examinations, appointments, equal employment opportunity (EEO), and personal services contracts.

The SPB may also conduct special investigations of an appointing authority's personnel practices to ensure compliance with civil service laws, rules, and policies. Special investigations may be initiated in response to a specific request or when SPB obtains information suggesting a potential merit-related violation.

EXECUTIVE SUMMARY

In response to a request by the Legislature, the Compliance Review Division (CRD) of the SPB conducted a special investigation into the Department of Forestry and Fire Protection (CAL FIRE)'s personnel policies and practices related to supervisory and/or managerial employees who held an additional appointment in a rank-and-file position on January 11, 2013. On that date, CAL FIRE's records reflected that a full-time permanent Staff Services Manager I (SSM I) held an additional appointment as a rank-and-file Associate Personnel Analyst (APA) by way of reinstatement. The additional appointment was held as a limited term intermittent. On February 27, 2013, CAL FIRE issued a Notice of Personnel Action (NOPA) terminating the additional appointment with an effective date of December 31, 2012.

Regardless of whether an appointment is an additional appointment, civil service laws and rules apply to the appointment, unless the appointment is expressly exempted from civil service. Generally, those laws and rules require hiring departments to ensure a competitive and fair selection process that includes advertising for the position;

determining whether an eligible list for the classification exists; collecting applications; and conducting hiring interviews.

In addition, an appointment by way of reinstatement must be determined by candidate performance in selection procedures, including, but not limited to, hiring interviews, reference checks, background checks, and/or any other procedures assessing job-related qualifications. Selection procedures must be designed and administered to select those individuals who best meet the selection need.

CAL FIRE did not ensure a competitive and fair selection process for the APA position that included advertising for the position, determining if eligible lists for APA classifications existed, or conducting hiring interviews. In addition, CAL FIRE appointed the SSM I to the additional appointment as an APA without determining her performance in a selection procedure. Instead, CAL FIRE only offered the rank-and-file position to the SSM I. CAL FIRE formally separated the additional appointment on February 27, 2013, since the appointment expired on December 31, 2012.

The additional appointment was thus not made in compliance with civil service laws and rules, or merit principles. Corrective action is therefore warranted.

While departments are currently prohibited from appointing managers and supervisors to additional appointments (CalHR's Policy Memo 2013-015), this policy could be changed or modified in the future. Accordingly, it is recommended that CAL FIRE review, and if necessary, update its personnel policies and procedures to ensure that all additional appointments, regardless of the funding source, comply with civil service laws and rules, and merit principles, unless the additional appointment is expressly exempt from civil service. CAL FIRE should also provide its personnel managers and staff with information and/or training on the laws, rules, and policies related to additional appointments.

CAL FIRE must comply with the afore-stated recommendations within 60 days of the Board's Resolution and submit to the SPB a written report of compliance.

BACKGROUND

Section 350 of the SPB's Personnel Management Policy and Procedures Manual on "Appointments and Status" (300-911 (1/79) Rev. 10/30/86) states, in pertinent part, that an additional appointment is subject to civil service laws and rules:

Additional appointment is the term used when a State civil service employee is appointed to a second position in State service. The term is

descriptive only since the fact that an appointment is held as an additional appointment does not change the civil service law and rule provisions that would otherwise apply to it.

¶...¶

There are no laws or rules that relate specifically to additional appointments. The authorities for making additional appointments are the same as for making any other appointment. These include the provisions on list appointments, transfers, reinstatements, etc. For example, an Office Assistant II who was reachable on the promotional list for Stenographer could receive an additional appointment as a Stenographer in the same manner as any other reachable eligible.

Section 350 also addresses two areas of “particular concern” regarding the good faith of an additional appointment:

1. The intent of the appointment must not be to circumvent the full-time appointment process; for example, making two part-time appointments of an individual who is eligible for part-time, but not full-time employment.
2. The intent of the appointment must not be to circumvent the overtime provisions.

Additionally, to ensure the proper use of additional appointments, Section 350 provides these examples: an additional appointment “to a distinctly different employment situation than the employee’s initial appointment; typically, this would involve appointment to a different class, department or State facility.”

The following departments had supervisors and/or managers who held additional appointments in rank-and-file positions within the same department on January 11, 2013:

Department	Count
Corrections and Rehabilitation	227
Department of State Hospitals	173
Social Services	101
Public Employees’ Retirement System	56
Employment Development Department	4
Education	2
Food and Agriculture	2
Motor Vehicles	2

Veterans Affairs	2
Consumer Affairs	1
Forestry and Fire Protection	1
Total	571

Source: State Controller's Office

The Legislature requested that SPB and CalHR review those additional appointments.¹ In order to provide a comprehensive review in the most expeditious manner, CalHR focused on compliance with classification, compensation and labor laws, rules, and policies, while SPB focused on compliance with civil service laws, rules, and policies.

This report contains only the results from the SPB's review.

SCOPE AND METHODOLOGY

The scope of this special investigation involved a review of additional appointments held by CAL FIRE's supervisors and/or managers in rank-and-file positions on January 11, 2013. CAL FIRE's records showed that on that date a permanent full-time SSM I held an additional appointment as a rank-and-file APA by way of reinstatement. The additional appointment was held on a limited-term, intermittent basis.

The primary objective of this review was to determine if the additional appointment complied with state civil service laws, rules, and policies, and to recommend corrective action for any violations identified.

The SPB held an entrance conference with CAL FIRE on March 5, 2013, to explain the special investigation process. On that same date, a material request form was provided to CAL FIRE requesting the appointment file and information relating to the additional appointment, to which CAL FIRE immediately responded.

The SPB examined the documentation, which included duty statements for the SSM I and APA classifications, a CAL FIRE organization chart, an employee-history printout, a request for personnel action, an internal memorandum justifying the additional appointment, the Notice Of Personnel Action (NOPA) effecting the additional

¹In January 2013, CalHR issued Policy Memo 2013-007 to Personnel Management Liaisons (PML) prohibiting departments from processing any new additional appointments. On April 25, 2013, CalHR issued Policy Memo 2013-015 instructing that effective immediately departments were no longer authorized to make any additional appointments for managers and supervisors. Policy Memo 2013-015 also sets forth options departments can consider in lieu of appointing managers and supervisors to additional positions.

appointment, and the NOPA terminating the additional appointment. The SPB also interviewed appropriate CAL FIRE staff.

On April 22, 2013, an exit conference was held with CAL FIRE to explain and discuss the SPB's initial findings and recommendations. CAL FIRE was also provided a copy of the SPB's draft report. CAL FIRE was given until April 24, 2013, to submit a written response. On April 24, 2013, the SPB received and carefully reviewed the department's response, which is attached to this final report.

FINDINGS

On June 6, 2012, CAL FIRE reinstated a permanent fulltime SSM I working as a Transactions Unit Manager in the Labor and Human Resources Division to an additional appointment as a limited term intermittent APA rank-and-file position in the Classification and Pay (C&P) Unit within the same division. The SSM I had previously worked in the C&P Unit as an APA and promoted from an APA to an SSM I on March 8, 2012.

At the time of the additional appointment, CAL FIRE's C&P Unit was reduced from four analysts and one manager to one analyst and no manager. CAL FIRE stated that a backlog of disciplinary actions developed, which created an immediate staffing need. CAL FIRE reinstated the SSM I to an additional appointment as an APA to work on eliminating the backlog. Before and during the months following the additional appointment, CAL FIRE filled the vacant positions in the C&P Unit and used the additional appointment to train the new employees and manage the backlog. Consistent with the hiring paperwork and the limited duration of the additional appointment, CAL FIRE issued a NOPA on February 27, 2013, terminating the additional appointment with an effective date of December 31, 2012,

Departments must have recruitment strategies designed to be "as broad and inclusive as necessary to ensure the identification of an appropriate candidate group." (Merit Selection Manual [MSM], § 1100, p. 1100.2 (Oct. 2003); Cal. Code Reg., tit. 2, § 50.) Generally, the typical steps a department takes after determining that approval to fill a vacant position has been secured include: determining whether there is an eligible list for the classification; determining whether an eligible list is necessary to fill the position; advertising the position, which may include certifying the eligible list; receiving applications, and if no applications are received, re-advertising the position with increased recruitment efforts; screening applications to determine which candidates meet minimum qualification requirements and are eligible for appointment; and conducting hiring interviews. (MSM, § 1200, pp. 1200.7-1200.8; Cal. Code Reg., tit. 2, § 50.)

SPB rules require appointments to positions in state civil service by way of reinstatement must be made on the “basis of merit and fitness, defined exclusively as the consideration of each individual’s job-related qualifications for a position...as determined by candidate performance in selection procedures, including, but not limited to, hiring interviews, reference checks, background checks, and/or any other procedures, which assess job-related qualifications” (Cal. Code Reg., tit. 2, § 250, subd. (a).)

CAL FIRE did not post or advertise the APA position, clear or certify an eligible list, or collect applications. There was also no screening or rating criteria for the position, and no other candidates were considered. In addition, CAL FIRE did not appoint the SSM I to the additional appointment as an APA by determining her performance in a selection procedure. Instead, CAL FIRE merely offered the APA position to the SSM I.

The APA position was funded by a temporary help blanket or budget. However, civil service laws and rules apply to all appointments, unless expressly exempted from civil service, regardless of how the positions are funded (i.e., funded through the department’s regular/on-going position budget or funded through the department’s temporary help position budget). The APA position was not exempted from civil service laws and rules.

CAL FIRE separated the additional appointment on February 27, 2013, as the appointment was set to expire at the end of December 2012. Nonetheless, because the additional appointment was made in violation of civil service laws and rules, or merit principles, corrective action is warranted.

While departments are currently prohibited from appointing managers and supervisors to additional appointments (CalHR’s Policy Memo 2013-015), this policy could be changed or modified in the future. Accordingly, it is recommended that CAL FIRE review, and if necessary, update its personnel policies and procedures to ensure that all additional appointments, regardless of the funding source, comply with civil service laws and rules, and merit principles, unless the additional appointment is expressly exempt from civil service. Further, CAL FIRE should provide its personnel managers and staff with information and/or training on the laws, rules, and policies related to additional appointments.

DEPARTMENTAL RESPONSE

CAL FIRE was provided a draft copy of the initial report to review. A copy of CAL FIRE’s written response is attached as Attachment 1.

SPB REPLY

The SPB carefully reviewed and considered CAL FIRE's position. For those reasons set forth below, the findings and recommendation of the compliance review remain unchanged.

CAL FIRE first asserts that the additional appointment was made and accepted in good faith. While the compliance review found no documentation or other evidence contrary to CAL FIRE's claim that the additional appointment was made and accepted in good faith, the purpose of the special investigation was to determine whether the additional appointment complied with civil service laws and board rules. As discussed in the report, CAL FIRE failed to ensure a competitive and fair selection process for the APA position that was filled by the SSM I.

CAL FIRE next asserts that the documentation and other information showed that the SSM I was eligible for the additional appointment as a rank-and-file APA and that the additional appointment was temporary and funded through a temporary help blanket fund. The SSM I's eligibility for the rank-and-file position, however, has no bearing on whether there was a competitive and fair selection process for the APA position that was filled by the SSM I. As the compliance review found, CAL FIRE did not ensure such a process but rather simply offered the APA position to the SSM I. Moreover, regardless of how the APA position was funded, civil service laws and rules apply to all appointments, unless expressly exempted from civil service. The APA position was not exempt.

CAL FIRE additionally asserts that the selection procedures cited in this report are not inclusive of all available selection tools, and implies that, because the hiring manager was already familiar with the SSM I's performance, it was appropriate to hand pick the employee. CAL FIRE fails to recognize that the merit system was constitutionally created to protect against this very type of selection—hiring based on familiarity rather than through an open and fair process. While SPB agrees that departments may utilize a variety of tools, including an evaluation of job performance, in selecting the most qualified candidate for a position, by hand picking an employee, CAL FIRE has no way of knowing whether the SSM I was the most qualified candidate for the job.

CAL FIRE also asserts that SPB "fails to provide factual data to support" its conclusions that CAL FIRE failed to advertise, determine the existence of an eligible list, conduct hiring interviews, develop and utilize screening and rating criteria, and consider other candidates. (CAL FIRE Response, p. 4). However, CAL FIRE did not provide any such evidence in its responses either to the material request form at the beginning of the

investigation or the draft report. If CAL FIRE wishes to produce documentation evincing such actions on its part, SPB will reopen the investigation for the purpose of reviewing the documentation and, if appropriate, revising its findings and recommendations. Furthermore, CAL FIRE implies that SPB's findings are based on incomplete information because the investigator did not interview the hiring supervisor, the person who determined the necessity of the work and the person who wrote the justification to hire the employee. Again, SPB has found no evidence contrary to CAL FIRE's assertion that there was a legitimate need and that the employee selected was qualified to fill that need. However, CAL FIRE fails to recognize that the merit principle requires that the selection process for civil service jobs be open and fair so that *all* qualified applicants have an opportunity to compete equally. Selection based solely on a hiring manager's personal experience and knowledge about a specific employee's performance deprives other *unknown*, qualified persons the opportunity to express interest and deprives the department of the opportunity to hire the *most* qualified person for the job. Only by strictly adhering to this principle can the state ensure that the people of California are being served by the best talent available.

CAL FIRE further contends that it was in the process of advertising, recruiting, conducting interviews, and reference checks to fill other vacancies in the C&P Unit using a selection process based on merit and fitness. CAL FIRE asserts that during the recruitment process for those vacancies a need developed for expertise in CAL FIRE's process and procedures related to progressive discipline and adverse actions. CAL FIRE determined that this need should be filled by an existing CAL FIRE employee due to the special expertise required, the temporary and intermittent nature of the work, and the funding source. CAL FIRE argues that there was no vacancy because the position was funded with temporary help blanket funds, and therefore, civil service laws and rules did not apply. CAL FIRE asserts that the SPB has a "myopic view" of filling a "vacant" position, since the additional appointment was an overtime assignment and the employee had to be in the appropriate classification to perform the work to prevent union allegations of an employee working out of class or doing the work of bargaining unit employees. CAL FIRE confuses labor relations issues with merit issues. Civil service laws and rules apply to additional appointments regardless of the tenure or time base of the appointment, unless the appointment is exempt from civil service. The APA position was not exempt. Additionally, CAL FIRE cannot justify avoiding compliance with civil service laws and the merit principle by loosely characterizing the APA position as "an overtime assignment" for the SSM I. For purposes of civil service laws and rules, an APA is not an assignment but a classification with duties and responsibilities separate from the SSM I classification. The SSM I held the additional appointment as an APA by way of reinstatement. SPB rules require that appointments by way of reinstatement be made on the "basis of merit and fitness, defined exclusively as the

consideration of each individual's job-related qualifications for a position...as determined by candidate performance in selection procedures, including, but not limited to, hiring interviews, reference checks, background checks, and/or any other procedures, which assess job-related qualifications" (Cal. Code Reg., tit. 2, § 250, subd. (a).) CAL FIRE did not follow this rule.²

CAL FIRE further believes that the SPB's findings and conclusions are overly sweeping and limits CAL FIRE's ability to transfer employees in other allowable scenarios. CAL FIRE describes other situations that allow departments to utilize discretion to move employees into positions without going through the selection process. Those situations, however, are not under review here. The SPB's findings and conclusions are specific to the additional appointment of an SSM I to a rank-and-file position. Certainly, if CAL FIRE had utilized another method for addressing the workload, a different analysis would apply.

In addition, CAL FIRE attacks the report as void of any specific direct law or rule, or clear policy directive that fits this particular situation. However, applicable civil service laws and rules are cited herein, in addition to section 350 of the PMPP manual, which provides that additional appointments are subject to civil service laws and rules.

CAL FIRE asserts that SPB only made the assumption that its personnel policies require updating. CAL FIRE was asked to submit all documents relevant to this special investigation, but CAL FIRE failed to submit any personnel policies that reflect a correct understanding of civil service requirements relative to additional appointments, leading SPB to believe that none existed. Nonetheless, the SPB modified the recommendation in the initial report to require CAL FIRE to review, and if necessary, update its personnel policies and procedures to ensure that all additional appointments, regardless of the funding source, comply with civil service laws and rules, and merit principles, unless the additional appointment is expressly exempt from civil service.

CAL FIRE further complains that SPB did not identify any available training to provide to CAL FIRE staff. CAL FIRE should refer to the CalHR training website for a list of courses on personnel topics. CAL FIRE should provide its personnel managers and staff with information and/or training on the laws, rules, and policies related to additional

² Because CAL FIRE repeatedly emphasizes that there was no "vacancy," the report was modified to describe the APA appointment as a "position." Regardless of the terminology, the APA position that was filled by the SSM I was an employment opportunity within state civil service and, thus, absent an exemption, civil service laws and rules were applicable.

appointments. Furthermore, CAL FIRE should consult with its assigned CalHR analyst for further guidance.

CAL FIRE must comply with the afore-stated recommendations within 60 days of the Board's Resolution and submit to the SPB a written report of compliance.



DEPARTMENT OF FORESTRY AND FIRE PROTECTION

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April 24, 2013

James L. Murray, Division Chief
Michael Brunette, Compliance Review Manager
Compliance Review Division
State Personnel Board
801 Capital Mall
Sacramento, CA 95814

Dear Mr. Murray and Mr. Brunette:

This letter is the formal response from the California Department of Forestry and Fire Protection (CAL FIRE) to the State Personnel Board (SPB) report regarding additional appointments of supervisory and/or managerial employees received via electronic mail on April 16, 2013.

On March 5, 2013, SPB notified CAL FIRE that it had been identified for a review by SPB related to the use of additional appointments. The notification was delivered on the same day when SPB arrived to conduct an on-site review of appointment information related to the one CAL FIRE additional appointment. In addition to the information provided during the on-site review, CAL FIRE responded to the SPB material request on March 14, 2013. SPB made no further contact with CAL FIRE regarding this matter until the report was sent electronically on April 16, 2013. On April 22, 2013, an exit conference was conducted between the parties and CAL FIRE was granted an extension until April 24, 2013 to provide a formal response to this report.

The report is specific to a CAL FIRE Staff Services Manager (SSM) I (Permanent, Full-Time) who held an additional appointment in the rank and file classification of Associate Personnel Analyst (APA) on a Limited-Term, Intermittent basis. The additional appointment was processed through the State Controller's Office as a reinstatement and was for the period of June 6, 2012, until it expired on December 31, 2012.

SPB's report "Scope and Methodology" states the following:

"The primary objective of this review was to determine if the additional appointment complied with civil service laws, rules and policies and to recommend corrective action for any violations identified."

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The report "Executive Summary" states the following:

*"**Generally**, those laws and rules require hiring departments to ensure a competitive and fair selection process that includes advertising for the **vacancy**; determining whether an eligible list for the classification of the vacant position exists; collecting applications; and conducting interviews."* [Emphasis added]

*"CALFIRE [sic] did not ensure a competitive and fair selection process for the APA position that included advertising for the **vacancy**, determining if eligible lists for the APA classification existed, or conducting hiring interviews."* [Emphasis added]

The report "Findings" states the following:

"Departments must have recruitment strategies designed to be "as broad and inclusive as necessary to ensure the identification of an appropriate candidate group."

*"Generally, the **typical** steps a department takes in making a civil service appointment include: determining whether there is an eligible list for the classification in which the vacancy exists, determining whether an eligible list is necessary to fill the vacancy; advertise the vacancy, which may include certifying the eligible list; receive applications and ... conduct hiring interviews."* [Emphasis added]

*"SPB rules require appointments to positions in state civil service by way of reinstatement must be made on the 'basis of merit and fitness, defined exclusively as the consideration of each individuals job-related qualifications for a position ... as determined by candidate performance in selection procedures, **including but not limited to**, hiring interviews, reference checks, background checks, **and/or any other procedures, which assess job-related qualifications.** ..."* [Emphasis added]

*"CAL FIRE did not post or advertise the APA **vacancy**, clear or certify an eligible list, or collect applications. There was no screening or rating criteria for the position, and no other candidates were considered. In addition, CAL FIRE did not appoint the SSM I to the additional appointment as an APA by determining her performance in a selection procedure."*

*"The **appointment** of the SSM I to an APA classification violated civil service laws and rules, and the merit principles related to the selection and hiring process."* [Emphasis added]

The Department recognizes the requisite authorities for making additional appointments are the same as for any other appointment, unless exempt from civil service as stated in the SPB Personnel Management Policy and Procedures Manual (SPB PMPPM). Based

upon the below summary, CAL FIRE disagrees with the general, non-supportable conclusion that the appointment violated civil service laws and rules and the merit principles related to the selection and hiring process. The appointment was valid for the following reasons:

A. The Appointment Was Made And Accepted In Good Faith.

The SPB PMPPM Section 350 states, in part: "Additional appointments, as with any other appointment must be made and accepted in good faith." The policy also refers to SPB Rule 8 regarding good faith appointment requirements. In addressing good faith, the SPB PMPPM also indicates the intent of the appointment must not be to circumvent the full-time appointment process or circumvent the overtime provisions and be made to a different class, department or State facility."

This appointment was not made to circumvent the full-time appointment process, as the Department was on a separate track to fill the vacancies it had in the unit at the time utilizing selection procedures. Nor did this appointment circumvent overtime provisions as there were no employees available to perform these duties. Furthermore, the appointment met the criteria outlined in SPB Rule 8, therefore qualifying as a good faith appointment and was pursued to meet a critical operational need while the selection process to fill vacant positions was completed.

The SPB report did not identify that CAL FIRE made an appointment that was in conflict with SPB Rule 8.

B. The Employee Was Eligible For Appointment.

SPB's PMPPM Section 350 states "... To receive an additional appointment through reinstatement the employee must have current reinstatement eligibility that applies to the position in question."

Government Code Section 19140 states, in part: "Permissive Reinstatement (a) in addition to reinstatement required under any other section, an appointing power may, in his or her discretion, reinstate any person having probationary or permanent status who was separated from his or her position (1) by resignation ... or (5) without a break in continuity of state service to accept another civil service or exempt appointment."

The employee had prior permanent status as an APA, and that status had been attained through a competitive selection process. Furthermore, the employee successfully completed probation, maintained permanent status in the position of APA for approximately two and half years and had no break in service, which gave her permissive reinstatement rights under Government Code Section 19140.

The SPB report concurs that the employee had successfully completed the probationary period as an APA, and does not dispute that the additional appointment was made and accepted in good faith. The SPB report does not reflect CAL FIRE's actions were inconsistent with SPB's PMPPM Section 350.

C. The SPB Laws And Rules Regarding the Hiring Process Selection Procedures Are Not Inclusive.

The SPB Merit Selection Manual (SPB MSM) Section 1200.4 states, in pertinent part:
“The selection procedures can be administered as part of the formal examination process to establish an eligible list or as part of the hiring process. The selection procedures **may** include the use of written examinations, structured interviews, performance tests, **evaluations of education and experience**, hiring interviews, reference checks, background testing, **a review of one’s work history and personnel file, as well as any other procedure designed to assess candidate job-related qualifications**”. [Emphasis added]

SPB Rule 250 also lists the above available selection options but does not limit those options or mandate that those are the **ONLY** options available to a department. Both the SPB MSM and SPB Rule 250 provide a variety of examples of available options which were qualified with “including, but not limited to,” which allows a variety of options for the departments to consider in hiring for a **vacant** position.

The SPB MSM Section 1200 includes a chart identified as “*Attachment A: Typical Steps in the State’s Civil Service Selection Process*”. The very first step is identified as “Department determines that approval to fill a vacant position in the civil service has been secured”. The appointment papers that SPB requested and reviewed clearly identified that there was no vacancy to be filled.

In the *Findings* section of the report, SPB MSM Section 1100 was referenced which appears to address Equal Employment Opportunity in the civil service examination processes. However, SPB did not request any information that would be subject to this provision of their manual nor did they develop a nexus between their review and this section or identify a specific violation of this section.

Further, the report makes the conclusion that the department failed to advertise for the “vacancy,” determine an eligible list, or conduct hiring interviews. It further identified that there was no screening or rating criteria and no other candidates were considered. SPB fails to provide factual data to support this conclusion.

In the *Background* section of the report, SPB identified they interviewed appropriate CAL FIRE staff. During the exit conference SPB identified they only spoke to one person. The person they spoke to was not the hiring supervisor nor was it the person who determined the necessity of the work, and wrote the justification to hire the employee (which SPB is not disputing was a qualified, eligible employee). SPB does not acknowledge that their laws and rules provide a myriad of options that are not inclusive. They make the affirmative statement that CAL FIRE must take specific actions when their own laws and rules state otherwise.

D. A Vacant Position Did Not Exist And The Additional Appointment Did Not Affect Any Hiring Processes.

The SPB MSM Section 1200 also provides guidelines in the appointment stage (hiring and promotion) which results in the hiring authority selecting the individual best suited to fill the **vacant** position. The report in several areas cited the failure to post or advertise the "vacancy" or determine an eligible list for the vacancy.

At the time of the additional appointment, the SPB report acknowledged the untenable position of CAL FIRE's Classification and Pay (C&P) Unit, which had been one analyst performing the work of a unit normally staffed by a manager and four analysts. CAL FIRE was in the process of advertising, recruiting, conducting interviews, references checks and all the various other tasks necessary to fill the **vacancies** using a selection process based on merit and fitness. However, what SPB's report neglected to acknowledge is that during the recruitment process, a need developed for expertise in CAL FIRE's process and procedures along with CAL FIRE's progressive discipline and adverse action process.

If SPB had discussed any questions or concerns with the hiring manager, they would have been informed that the candidate pool, although qualified in the other areas, did not rise to the level of the needed expert knowledge. In order to maintain integrity of CAL FIRE's Human Resources program we looked within to see who had those requisite skills to perform overtime work.

The only available APA had not obtained that particular skill or expertise and was already overloaded trying to cover multiple assignments. In evaluating its existing staff, the Human Resources program determined that it had one individual who had the requisite knowledge, skills and abilities to perform this temporary and intermittent function. However, that individual had been promoted to an SSM I (using a selection based process based on merit and fitness) over CAL FIRE's Transaction Unit, which made it inappropriate in the employee's current capacity to perform the tasks necessary in carrying out the Department's progressive discipline and adverse action process. Therefore, to reduce any potential conflict and allegations of misallocation or working out-of-class (potential violation of the Bargaining Unit 1 MOU) CAL FIRE opted to hire the employee based on the definition of an additional position found within the SPB PMPPM. The employee selected was based solely on the knowledge, skills and abilities necessary to carry out the duties to be completed and an assessment of available employees "education and experience" and "review of employment history". The Department was fully aware of her ability to successfully perform these duties based on her previous performance as an APA in this very unit.

During the exit conference, SPB confirmed again that whenever a department is filling a "vacancy" the process must be through the merit principle process, in every circumstance (unless exempted by law). Again, the employee selected was doing work that would have been completed on an overtime basis had CAL FIRE had the employees available to perform such work. There was no position to be filled only duties to be completed.

SPB's PMPPM does not mandate that an additional position can only be used for one scenario – to fill a vacant position. SPB's PMPPM does not mandate that Departments must advertise and fill overtime positions. SPB's PMPPM nor their law and rules mandate that all appointments must be advertised.

Further, SPB failed to support its own conclusion that a position existed. The additional appointment **was not** made into one of the vacant positions nor did it replace a vacant position. It was merely to supplant the CAL FIRE expertise that needed to be developed in the employees selected in the vacant positions.

E. The Need Was Temporary For A Limited Duration.

As stated above, a specialized skill was needed during a catastrophic time period within CAL FIRE's Human Resources. Further, all hours worked were authorized in advance and were limited to an average of 11 hours a month, or barely 3 hours a week. The appointment started around June 2012 and ended in December 2012, just as supported and identified in the appointment justification documents.

SPB correctly identified in their report that the APA was limited term appointment and intermittent time base. However, SPB's report neglected to identify that the justification included in the hiring package for the APA additional position identified the specific need (and SPB has not disputed this need or the specialized skill necessary to complete the task). SPB's lone conclusion is based solely on a myopic view of filling a "vacant" position and since CAL FIRE "hired" someone it must be a "vacant" position. SPB has failed to acknowledge that this was an overtime assignment and the employee had to be in the appropriate SPB recognized classification to perform this type of function to prevent union allegations of an employee working out of class, or doing the work of bargaining unit employees.

F. The Assignment Was Funded Through Temporary Help Blanket Funds.

SPB states that civil service laws and rules apply to appointments, regardless of funding source; CAL FIRE does not dispute this statement. However, what the SPB report clearly missed is that if CAL FIRE had an employee in the classification of APA possessing the knowledge, skills, and abilities to perform the specialized skill of CAL FIRE's progressive discipline and adverse actions, the Department would have used that APA on an overtime basis, within blanket funding. In that CAL FIRE had one employee with the requisite skill, and to have her perform those specialized duties would have created a potential conflict due to her current classification, CAL FIRE appointed the employee to the appropriate SPB classification and was funded through a blanket position. This supports CAL FIRE's assertion that this appointment was not to fill a "vacant position."

G. SPB's Broad Over Sweeping Conclusion Limits The Department's Ability To Transfer Employees In Other Allowable Scenarios

SPB's report continually references appointment to **vacant** positions MUST go through the merit selection process. However, there are many other situations, bargaining unit agreements, and State processes that allow Department's to utilize discretion to move employees into positions without going through the selection process. As an example, placing an employee in a different position due to a medical disability through the reasonable accommodation process, movement of employees for health and safety, workplace violence situations, or even layoff mitigation requires Departments to move employees into vacant positions which may not go through the merit principle process. Many MOU's require Departments to appoint employees in the same classification over any other eligible candidate. Most importantly, Government Code Section 19994.1 provides the department discretion to transfer an employee to another position in the same class, transfer an employee from one location to another whether in the same position or a different position. In this case, SPB's myopic view for this one scenario does not comport with all the other laws, rules and other control agency directives that allow Departments limited discretion to move employees between positions.

H. SPB Report Is Void Of Any Specific Direct Law Or Rule, Or Clear Policy Directive That Fits This Particular Situation.

SPB's report identifies that laws, rules, and policy sections were violated, but it fails to specify which laws, rules, and policies. Specifically, SPB has not identified a particular directive that says that for "every appointment" the department "must" perform specific tasks. In addition, Page 5 of SPB's initial report (draft) misquotes its own law. According to the report, "SPB rules **require** appointments to positions in state civil service by way of reinstatement must be made on the basis of merit and fitness...as determined by candidate performance in selection procedure, **including, but not limited to** hiring interview, reference checks background checks **and/or any other procedures, which assess job –related qualifications**" [Emphasis Added]. Actually, CCR Section 250 states that appointments to positions in the State civil service by way of reinstatement, "shall be made on the basis of merit and fitness... including, **but not limited to**, hiring interview, reference checks,...or other procedures which assess job-related qualifications and are designed and administered to **select those individuals** who best meet the **selection need.**"[Emphasis added]

During its review, SPB did not question the qualifications or eligibility for appointment to the specific classification. It reviewed the SSM I's employment history but did not question whether or not she possessed all the necessary job-related qualifications. SPB did not discuss with the hiring supervisor any criteria or any other procedure that was used to determine the best individual to meet the need. Instead, SPB relies solely on misinterpreting its own laws, rules, and policy manuals that allow departments the discretion on the **best measurable option in selecting the most qualified candidate** through the merit based system.

I. SPB Recommends Corrective Action Which Is Not Consistent With Their Analysis Or Review.

SPB determined that CAL FIRE as a corrective measure be required to update its personnel policies and procedures "to ensure that all additional appointments, regardless of funding source, comply with civil service law and rules,...". However, SPB has not identified any specific CAL FIRE personnel policies that conflict with SPB law and rules. During the exit conference, it was confirmed that SPB did not seek copies of any of CAL FIRE's policies, but made the assumption that the policies need to be updated. Further, SPB recommends that CAL FIRE should also be required to provide its personnel managers and staff with training on revised policies and procedures. Again, SPB's PMPPM does not provide clear guidance, nor has SPB provided training to personnel departments in this specific and limited area. SPB is unable to point to any training or guidance they have provided except as identified in the SPB PMPPM Section 350 which gives the departments the authority for additional position and SPB did not identify that CAL FIRE violated any provision of this section of their manual. SPB did not identify any available training to provide to CAL FIRE staff. As a control agency over this specific area of law, and in light of the fact that there are MOU's and other laws in direct conflict with SPB's laws, it would be helpful for the control agencies like SPB to provide clear directions and guidelines that do not conflict with MOU's and other control agency laws and rules.

Upon receiving clear guidance and direction, based on specific law or rule, CAL FIRE will be able to fully comply with the parameters as set by SPB.

CAL FIRE appreciates SPB's acknowledgement that additional appointments are a legally allowable appointment and additional appointments are a viable option to fill vacant positions.

Based upon the foregoing reasons, we respectfully disagree with the inaccurate reasoning and unsupported conclusions of this report.

CAL FIRE is interested in continuing the conversation about this additional appointment and the information contained in our response. If SPB is inclined to continue the dialogue, please contact me at (916) 324-6976.

Sincerely,



KRISTINE M. RODRIGUES
Assistant Deputy Director
Labor and Human Resource Management

cc: Janet Barentson, CAL FIRE Chief Deputy Director
Tony Favro, CAL FIRE Deputy Director Management Services
Tina Ramirez, CAL FIRE Personnel Services Manager



**BOARD RESOLUTION ADOPTING
SPECIAL INVESTIGATION REPORT AND FINDINGS BY SPB
COMPLIANCE REVIEW DIVISION OVER ADDITIONAL APPOINTMENTS OF
SUPERVISORIAL AND MANAGERIAL EMPLOYEES IN
THE CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION**

WHEREAS, the State Personnel Board (SPB or the Board) at its duly noticed meeting of May 16, 2013, carefully reviewed and considered the attached Special Investigation Report submitted by SPB's Compliance Review Division concerning additional appointments of supervisory and managerial employees in the California Department of Forestry and Fire Protection.


WHEREAS, the Report was prepared following a special investigation that was conducted in response to the Legislature's request to examine whether the practice of appointing supervisory and/or managerial employees in additional rank-and-file positions within the California Department of Forestry and Fire Protection violates civil service laws.

WHEREAS, each Report details the background, scope and methodology of the review, the findings and recommendations, and the affected department's response.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby adopts the Report, including all findings and recommendations contained therein, and authorizes the issuance of the Report to the Legislature in response to its request for review. A true copy of the Report shall be attached to this Board Resolution and the adoption of the Board Resolution shall be reflected in the record of the meeting and the Board's minutes.

* * * * *

The foregoing Board Resolution was made and adopted by the State Personnel Board during its meeting on May 16, 2013, as reflected in the record of the meeting and Board minutes.



SUZANNE M. AMBROSE
Executive Officer