

INITIAL STATEMENT OF REASONS

HEARING DATE(S):

WebEx/Teleconference

SUBJECT MATTER OF THE PROPOSED REGULATIONS:

Merit Issue Complaint & Appeals Process

SECTIONS AFFECTED:

Title 2, Chapter 1, California Code of Regulations, Repeal Sections 202 and 203.5 and Amend Sections 66.1, 186, 190, 213.4, and 548.49

In this rulemaking action, the State Personnel Board (Board) proposes to repeal sections 202 and 203.5 and amend sections 66.1, 186, 190, 213.4, and 548.49 of Title 2, Chapter 1 of the California Code of Regulations.

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

Background:

Certain aspects of merit issue complaints and the appeals process related to examinations still remain unclear and require more streamlining in order to promote a strong and nimble merit civil service system. Further clarity will be provided to help appointing powers and individuals accurately interpret Board Regulations.

Discussion of Amendment:

The purpose of repealing and amending these regulations is to: 1.) further clarify the merit issue complaint process; 2.) set the standards related to the appeals process of examinations including Career Executive Assignments (CEAs); 3.) repeal standards related to Qualification Appraisal Panel (QAP) and employee development appraisal rating appeal rights; and 4.) amend procedures related to drug testing appeal rights.

Anticipated Benefits of Regulatory Action:

The proposed regulations provide a number of significant benefits to the state civil service system. The anticipated benefits of this regulatory action include: 1.) conserving the fiscal interests of the state by improving the Board's merit issue complaint and appeals process

standards; 2.) updating the appeals process for Board examinations; and 3.) improving the organization of Board regulations.

Amend § 66.1. Merit Issue Complaints.

Section 66.1 provides that an individual must first file a merit issue complaint with the state agency prior to submitting an appeal with the Board. However, section 66.1 requires further clarity regarding the process for the filing and handling of merit issue complaints.

Subdivision (b) will read as: Each state agency shall establish and publicize to its employees the process for receiving and addressing merit issue complaints regarding its hiring and selection processes. That process shall include provisions for informing employees in writing of the state agency's decision and of the employee's right to appeal the state agency's decision on the merit issue complaint to the Appeals Division.

Subdivision (c) will read as: Prior to filing with the Appeals Division, Merit issue complaints shall first be filed with the state agency's human resources office, personnel officer or any unit/person designated to address merit issue complaints within three years of the alleged violation of Board regulation or policy. in the hiring and selection process.

(1) Persons may file a merit issue complaint themselves or designate an attorney or other authorized representative to represent them. No person(s) may file a merit issue complaint on behalf of another person(s) without their authorization.

Subdivision (d) will read as: Each state agency shall inform employees or applicants at the time the complaint is received of their right to challenge the state agency's decision, denial of the complaint or failure to respond by filing a complaint with the Appeals Division and the timelines for filing according to section 66.1, subdivision (e).

Subdivision (e) will read as: (e) A merit issue complaint shall be filed with the Appeals Division within 30 days of the state agency's decision or denial of the complaint. Failure of a state agency to respond to a merit issue complaint within 90 days of receipt of the complaint shall be deemed a denial of the complaint's allegations and shall release the appellant to file a merit issue complaint directly with the Appeals Division within 30 days of the 90th day.

(1) An appeal of a merit issue complaint filed with the Appeals Division shall:

(A) Include evidence of having filed a formal written complaint with the state agency's human resources office, personnel officer or any unit/person designated to address merit issue complaints.

(B) Include the original complaint submitted to the state agency.

(C) Identify any wrongdoing by the state agency supported by factual evidence and documentation.

Subdivision (f) will read as: (f) Merit Issue Complaints are assigned ~~for~~to investigative review by an Investigative Officer pursuant to section 53.2, ~~unless otherwise assigned pursuant to section 53.4.~~

Subdivision (g) will read as: (g) Persons not having competed in an examination or selection process who wish to file a complaint that the State Civil Service Act or Board regulation or policy has been violated by a state agency, may submit requests for review to the Board's Compliance Review Division.

Amend § 186. Inspection of Examination Papers.

For purposes of clarity, the Board proposes language from section 190 subdivisions (a) and (b) to be reassigned to section 186.

Subdivision (a) will read as: (a) During regular office hours in the seven calendar days beginning on the first working day after a written examination has been held and at any of the offices of the Department or such other places as may be designated by the Department, any competitor may inspect a keyed copy of the questions in the competitor's examination for the express purpose of requesting review of such items as the competitor may believe are incorrectly or improperly keyed. Keyed copies of copyrighted or standardized examinations will not be available for review.

Subdivision (b) will read as: (b) For examinations given to fill urgent and immediate vacancies in the state service, the Department may provide that there will be no key inspection privileges. Notice of the suspension of this privilege shall be made a part of the written examination instructions given to each competitor at the time of the written examination.

Amend § 190. Appeal from Written Examination.

The purpose of this proposed regulatory change is to establish a uniform standard for filing an appeal with the Board for all examinations.

~~(a) During regular office hours in the seven calendar days beginning on the first working day after a written examination has been held and at any of the offices of the Department or such other places as may be designated by the Department, any competitor may inspect a keyed copy of the questions in the competitor's examination for the express purpose of requesting review of such items as the competitor may believe are incorrectly or improperly keyed. Keyed copies of copyrighted or standardized examinations will not be available for review.~~

~~(b) For examinations given to fill urgent and immediate vacancies in the state service, the Department may provide that there will be no key inspection privileges. Notice of the suspension of this privilege shall be made a part of the written examination instructions given to each competitor at the time of the written examination.~~

Subdivision (a) will read as: ~~(a)~~ The competitor may, during the period of inspection provided above for in section 186, file with the Department a written appeal from any part of the test, citing the item or items against which the appeal is directed and stating the reason for such appeal. The examination shall not be scored until all the disputed items have been reviewed and appropriate adjustment, if any, made by correction in the scoring key or elimination of the disputed items. In no event is the Department required to furnish keyed copies of questions of an essay or problem type when in the judgment of the Department such questions are not subject to scoring by an absolute standard.

Subdivision (b) will read as: ~~(b)~~ In addition to the appeal herein above provided, a written appeal may be made from the result of the written examination on the grounds of fraud or clerical error in scoring the papers. Such appeal must be filed with the Board's Appeals Division within 60 days after notice of the result of the competitor's examination has been mailed to the competitor filing the appeal.

Subdivision (c) will read as: (c) Appeals of examinations may be submitted to the Board by the following individuals:

(1) Applicants who applied to compete in the examination, but were not admitted to the examination for reasons including, but not limited to, the following:

(A) the application was not received by the Department or designated appointing power;

(B) the Department or designated appointing power rejected the application; or

(C) the Department or designated appointing power denied the application having determined the application does not meet the minimum qualifications of the classification upon which the exam is based.

(2) Applicants who were admitted to and competed in the examination.

(d) Appeals of examination submitted to the Board shall be based upon one or more of the following grounds: fraud; discrimination; erroneous interpretation of minimum qualifications; or significant irregularities.

(1) In order to establish a cause of action for fraud, the competitor shall provide evidence demonstrating the following:

(A) a misrepresentation or a material omission of fact;

(B) which was false and known to be false by the appointing power;

(C) made for the purpose of inducing the competitor to rely upon it;

(D) justifiable reliance of the competitor on the misrepresentation or material omission; and;

(E) resulting injury.

(2) Appeals alleging discrimination in the examination process require evidence that demonstrates illegal discrimination on a basis prohibited under California's Fair Employment and Housing Act. (Gov. Code, §§ 12900, et seq.) The appeal shall establish a connection between the complained of activity and the individual's status as a member of a protected class.

(3) For purposes of this section, erroneous interpretation of minimum qualifications is considered to have occurred when the Department or designated appointing power makes an inaccurate analysis of the applicant's qualifications to compete in the examination and, as a result, an otherwise qualified applicant is not admitted to compete in the exam.

(4) A significant irregularity occurs when the examination is not administered as outlined on the bulletin, the examination method was not applied fairly to all competitors, or the examination does not test and determine the qualifications, fitness and ability of the competitors to perform the duties of the classification(s) in the exam.

Subdivision (e) will read as: (e) If the Board grants the appeal, the Board may order remedies including, but not limited to, voiding the examination, abolishing the eligibility list, and/or voiding any appointments made therefrom.

Subdivision (f) will read as: (f) The provisions within this section apply to all types of exams, except CEA exams. The provisions to appeal CEA exams are provided in California Code of Regulations, title 2, section 548.49.

Sections 202 and 203.5 which specifically address the appeal standards for QAP and employee development appraisal rating examination appeal rights are no longer required, therefore, they will be repealed from the Board's regulations.

Repeal § 202. Appeal from Qualifications Appraisal Panel.

Repeal § 203.5. Appeal from Employee Development Appraisal Rating.

Amend § 213.4. Required Components for Drug Testing.

The Board proposes to amend section 213.4 in order to ensure that departments inform applicants of their right to appeal the results of a drug test with the Board.

213.4, subdivision (i) will read as: (i) The written notice shall inform the applicant of their right to file an appeal with the Board.

Amend § 548.49. Appeals from CEA Examinations.

The purpose of this proposed regulatory change is to establish a uniform standard for filing an appeal with the Board for CEA examinations.

Section 548.49 subdivision (a) will read as: (a) Appeals from CEA examinations shall be filed in accordance with subchapter 1.2, article 2, section 52.4, subdivision (e)(1)(L) of ~~the these regulations~~. The appeal may be based upon allegations of improprieties in the examination process, including but not limited to, fraud, ~~illegal~~ discrimination, erroneous interpretation of minimum qualifications or other improper acts or circumstances significant irregularities.

(1) In order to establish a cause of action for fraud, the competitor shall provide evidence demonstrating the following:

(A) a misrepresentation or a material omission of fact;

(B) which was false and known to be false by the appointing power;

(C) made for the purpose of inducing the competitor to rely upon it;

(D) justifiable reliance of the competitor on the misrepresentation or material omission;
and

(E) resulting injury.

(2) Appeals alleging discrimination in the examination process require evidence that demonstrates illegal discrimination on a basis prohibited under California's Fair Employment and Housing Act. (Gov. Code, §§ 12900 et seq.) The appeal must establish a connection between the complained of activity and the individual's status as a member of a protected class.

(3) For purposes of this section, "an erroneous interpretation" of minimum qualifications is considered to have occurred when there is an inaccurate analysis of the applicant's qualifications to compete in the examination and, as a result, an otherwise qualified applicant is not permitted to compete.

(4) A significant irregularity occurs when the examination is not administered as outlined in the bulletin, the examination method was not applied fairly to all competitors, or the examination does not test and determine the qualifications, fitness, and ability of the competitors to perform the duties of the CEA position.

ECONOMIC IMPACT ASSESSMENT:

The proposed regulations set standards related to the Board's appeals, merit, and examination procedures. Therefore, the adoption of these regulations will not:

1. Create or eliminate jobs within California.

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

The adoption of these regulations, however, will have a positive impact on the general health and welfare of California residents in that the benefits of this regulatory action create a fair, equitable, and consistent process for the civil service hiring process.

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

None.

SPECIFIC TECHNOLOGIES OR EQUIPMENT:

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

EFFORTS TO AVOID CONFLICT WITH AND DUPLICATION OF FEDERAL REGULATIONS:

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

SIGNIFICANT ECONOMIC IMPACT ON BUSINESS:

The proposed regulation sets a standard related to appealing to the Board's appeals, merit, and examination procedures. Accordingly, it has been determined that the adoption of the proposed regulations would not have a significant, statewide adverse economic impact affecting California businesses, including the ability of California businesses to compete with businesses in other states.

CONSIDERATION OF ALTERNATIVES

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