

INITIAL STATEMENT OF REASONS

HEARING DATE(S):

July 6, 2022
WebEx/Teleconference

SUBJECT MATTER OF THE PROPOSED REGULATIONS:

Whistleblower Appeals Rights

SECTIONS AFFECTED:

Title 2, Chapter 1, California Code of Regulations, Amend Section 67.6 & 67.7

In this rulemaking action, the State Personnel Board (Board) proposes to amend section 67.6 & 67.7 of Title 2, Chapter 1 of the California Code of Regulations.

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

Background:

California Code of Regulations, title 2, section 67.6 grants Respondents the right to appeal a Notice of Findings (NOF) by the Executive Officer sustaining a retaliation complaint. However, under Government Code section 19683, subdivision (b), any supervisor, manager, employee, or appointing power that the Executive Officer finds committed retaliation has a right to appeal the NOF by requesting a full evidentiary hearing. The term “respondent”, as defined by rule 51.2, may be misinterpreted to mean only those persons or state agencies directly named or identified by the complainant in the retaliation complaint from whose action(s) or decisions the complainant is seeking relief.

Additionally, section 67.7 states that the Board shall directly discipline any employee determined to have engaged in improper retaliatory acts, whether or not they were a named Respondent in the informal hearing. While named Respondents are subject to discipline following a final determination of the Board, unnamed, non-party individuals found to have engaged in whistleblower retaliation receive a Notice of Adverse Action (NOAA) from their appointing power. (Gov. Code, 19683, subd. (e).) As such, the aforementioned Government Code section appears to provide more process to unnamed individuals than provided by the current Board regulations.

Anticipated Benefits of Regulatory Action:

The anticipated benefits of this regulatory action include: 1) clarity for the parties who may request a hearing regarding the NOF, namely any manager, supervisor, employee, or appointing power, regardless of whether or not they are a named party to the retaliation complaint and 2) states the appropriate actions to follow when the Board issues a final decision for unnamed managers, supervisors, or employees, who may have engaged in improper retaliatory acts.

Discussion of Amendment:

The purpose of amending these regulations is to clarify the processes for requesting a hearing for both named and unnamed parties concerning disciplinary actions for proven retaliatory acts.

Specifically, the changes will make clear that there are two distinct processes when responding to Board issued final decisions as a named or unnamed party to retaliation complaints related to whistleblower activity.

§ 67.6. Findings of the Executive Officer.

Language will be added to section 67.6 to clarify who shall be provided a copy of the NOF: the complainant and any supervisor, manager, employee, or appointing power, regardless of whether or not they are a named party to the retaliation complaint. Additionally, the term respondent has been amended to “any manager, supervisor, employee, appointing power, or party”. Furthermore, the term “his/her” have been changed to “them/their” to further align with future State language.

Section 67.6, subdivision (a) will now read as: The Executive Officer shall issue a Notice of Findings within 60 business days of the date the Executive Officer accepts the complaint pursuant to Section 67.3, unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled. The Notice of Findings shall be served upon all parties to the complaint including, but not limited to, the following:

- (1) The Complainant;
- (2) Any supervisor, manager, employee, or appointing authority who is a named party to the retaliation complaint; and,

(3) Any supervisor, manager, employee, or appointing authority who is not a named party to the retaliation complaint.

Section 67.6, subdivision (b) will now read as: In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint and that decision shall be deemed the final decision of the Board. The Notice of Findings shall notify the Complainant that ~~his or her~~ their administrative remedies have been exhausted and that the Complainant may pursue whatever judicial remedies are available to ~~him or her~~ them.

67.6, subdivision (c) will now read as: In those cases where the Executive Officer concludes that the Complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and ~~the named Respondents~~ any manager, supervisor, employee, or appointing power deemed found to have engaged in retaliatory acts. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall identify the legal causes for discipline under section 19572 of the Government Code.

67.6, subdivision (d) will now read as: The Notice of Findings shall notify any manager, supervisor, employee, or appointing power ~~inform any Respondent~~ found to have engaged in retaliatory acts of ~~his or her~~ their right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Appeals Division, and served on all other parties within 30 days of the issuance of the Notice of Findings. If a timely request for hearing is not filed with the SPB, the Board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct prohibited by section 8547.3 of the Government Code

67.6, subdivision (f) will now read: Failure of ~~Complainant or any of Respondents~~ party to appear and/or proceed at a Trial Setting Conference, unless the hearing is continued for good cause pursuant to Section 58.3, shall result in evidentiary sanctions.

§ 67.7. Disciplinary Action for Proven Retaliatory Acts.

Language in section 67.7 has been amended to now state the appropriate actions to follow when the Board issues a final decision for unnamed managers, supervisors, or employees, who may have engaged in improper retaliatory acts.

A new subdivision in section 67.7, subdivision (d) has been added in order to explain the appropriate actions to follow when the Board issues a final decision for unnamed managers, supervisors, or employees, who may have engaged in improper retaliatory acts.

67.7, subdivision (a) will now read as: In those cases where the Board issues a final decision that finds that a manager, supervisor, or other state civil service employee who is a named party to the retaliation complaint has engaged in improper retaliatory acts and those acts constitute legal cause for discipline, the Board shall order the appointing authority to place a copy of the Board's decision in that individual's Official Personnel File within 30 days of the issuance of the Board's order and to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's order, notify the Board that it has complied with the provisions of this subdivision.

67.7, subdivision (b) will now read as: In those cases where the Board issues a final decision that finds that a manager, supervisor, or employee who is not a named party to the retaliation complaint may have engaged in improper retaliatory acts, the Board shall notify the manager's, supervisor's, or employee's appointing power of that fact in writing.

- (1) Within 60 calendar days after receiving the notification, the appointing power shall either serve a notice of adverse action on the manager, supervisor, or employee, or set forth in writing its reasons for not taking adverse action against the manager, supervisor, or employee and submit the reasons for not doing so to the Board.

67.7, subdivision (d) will now read as: ~~(d)~~ (e) For purposes of this Section, the Board's decision is deemed to be final after:

- (1) 30 days has elapsed from the date the Executive Officer issued his ~~or her~~ their Notice of Findings dismissing the complaint; or
- (2) a request for hearing pursuant to section 67.6, subdivision (d), has not been timely filed with the Board; or
- (3) 30 days has elapsed from the date that the Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or
- (4) a decision has been issued by the Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

ECONOMIC IMPACT ASSESSMENT:

The proposed regulations set standards only related to the Board's appeal 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 only related to whistleblower appeal rights. 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.