

ARTICLE 10. WHISTLEBLOWER RETALIATION COMPLAINT PROCESS

§ 67.1. Whistleblower Retaliation Complaints

Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code section 8547.2(b), or Education Code section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code section 8547.2(e), or Education Code section 87162(b), may file a complaint and/or appeal with the State Personnel Board in accordance with the provisions set forth in sections 67.2 through 67.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

Note: Authority cited: Section 18701, Government Code. Reference: Sections 87162, 87164, Education Code; and Sections 8547.2, 8547.8, and 19683, Government Code.

§ 67.2. Requirements for Filing Whistleblower Retaliation Complaint with the State Personnel Board

An individual desiring to file a complaint of retaliation with the SPB must adhere to the following requirements:

(a) The complaint shall be filed with and received by the Appeals Division within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and attachments for the Appeals Division to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(b) All complaints shall be in writing and shall identify and include the following:

(1) Clearly identify the protected activity that the Complainant engaged in, the date(s) the Complainant reported the improper governmental activity, and the person(s) to whom the Complainant reported the improper governmental activity;

(2) Clearly identify the specific act(s) of reprisal or retaliation alleged to have occurred, and the entity and/or person(s) responsible for the reprisal or retaliation;

(3) A sworn statement, under penalty of perjury, that the contents of the complaint are true and correct;

(4) The name and business address of each individual and entity alleged to have committed reprisal or retaliatory acts; and

(5) Specify what relief and/or damages Complainant is seeking against any Respondent(s) as a result of the alleged reprisal or retaliation, and include an extra copy of the complaint and all accompanying documents for the SPB to serve on each of the Respondents.

(c) If adverse action is sought against any individually named Respondent, pursuant to the provisions of Government Code section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(d) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The Complainant shall submit a separate document with the complaint stating the reasons for good cause.

(e) The above procedures do not apply in those cases where an Appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code section 19175, when appealing a notice of medical action, pursuant to Government Code section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other SPB hearing, unless that party has first complied with all filing requirements set forth in this section.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2, Government Code; and Section 6129, Penal Code.

§ 67.3. Acceptance of Whistleblower Complaint.

(a) Within 10 business days of receipt of the complaint, the Appeals Division shall determine whether it has jurisdiction over the complaint and whether the Complainant meets the filing requirements set forth in Section 67.2. The Appeals Division shall also determine whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code sections 8547-8547.12 and 19683 and/or Education Code sections 87160-87164.

(b) If the Appeals Division determines that the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party may thereafter be permitted to file an amended complaint within 10 business days of service of the notice of non-acceptance of the complaint.

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 business days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

(2) refer the case for investigation in accordance with the provisions of section 67.4; or

(3) schedule the case for an informal hearing before a hearing officer in accordance with the provisions of section 67.5.

(d) Except for those complaints amended pursuant to subsection (b), any amendment for a whistleblower retaliation complaint may only be accepted upon a showing of good cause.

(e) In accordance with the provisions of Penal Code section 6129, the SPB shall be entitled to defer review of a complaint filed by an employee of the Department of Corrections and Rehabilitation in those cases where the employee has filed a similar complaint with the Office of the Inspector General.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 67.4. Cases Referred to Investigation

(a) If the Executive Officer assigns a complaint for investigation, the Executive Officer or the assigned investigator(s) shall conduct the investigation in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators, pursuant to the provisions of Government Code section 18671, shall have authority to administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this state under Article 3 (commencing with section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure, in order to ensure a fair and expeditious investigation.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation, in accordance with the provisions of section 67.6.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; Section 6129, Penal Code, and Section 2016 *et seq.*, Civil Procedure Code.

§ 67.5. Cases Referred to Informal Hearing

(a) For those complaints assigned to an informal hearing before a Hearing Officer the Appeals Division shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

(1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named Respondent to serve on the Complainant and file with the Appeals Division, at least 10 days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code section 11445.10 *et seq.*, and may in the discretion of the Hearing Officer, include such supplemental proceedings as ordered by the Hearing Officer, and as permitted by section 11445.10 *et seq.* of the Government Code, to ensure that the case is heard in a fair and expeditious manner. The Hearing Officer shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the Hearing Officer. All parties shall, upon request and payment of applicable reproduction costs, be provided with a transcript or a copy of the recording of the informal hearing.

(c) Following the informal hearing and any supplemental proceedings, the Hearing Officer shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the Hearing Officer's findings and recommended remedies in their entirety; modify the Hearing Officer's findings and recommended remedies; or reject the Hearing Officer's findings and recommended remedies, and:

- (1) issue independent findings after reviewing the complete record; or
- (2) remand the case back to the Hearing Officer, or refer the matter to an ALJ for further proceedings.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

§ 67.6. Findings of the Executive Officer

(a) 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.

(b) 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 administrative remedies have been exhausted and that the Complainant may pursue whatever judicial remedies are available to him or her.

(c) 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 deemed 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.

(d) The Notice of Findings shall inform any Respondent found to have engaged in retaliatory acts of his or her 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.

(e) Upon receipt of a timely request for hearing, the Appeals Division shall schedule the matter for a Trial Setting Conference. At least 12 calendar 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.

(f) Failure of Complainant or any of Respondents 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.

(g) At the Trial Setting Conference, the ALJ shall schedule the matter for an evidentiary hearing. The hearing shall be conducted in accordance with Article 6, beginning with section 56.1.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, 19582, 19590 and 19683, Government Code; and Section 6129, Penal Code.

§ 67.7. Disciplinary Action for Proven Retaliatory Acts

(a) In those cases where the Board issues a final decision that finds that a manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, 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.

(1) In accordance with the provisions of Penal Code section 6129, subdivision (c)(3), any employee of the Department of Corrections and Rehabilitation found to have engaged in retaliatory acts shall be disciplined by, at a minimum, a suspension without pay for 30 days, unless the Board determines that a lesser penalty is warranted. In those instances where the Board determines that a lesser penalty is warranted, the decision shall specify the reasons for that determination.

(b) In those cases where the Board issues a final decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, 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 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.

(c) Any decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) 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 Notice of Findings dismissing the complaint; or

(2) a request for hearing pursuant to section 67.7(c) 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.

Note: Authority cited: Section 18701, Government Code. Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592 and 19683, Government Code; and Section 6129, Penal Code.

§ 67.8. Consolidation with Other Hearings

(a) The Executive Officer or the assigned ALJ shall possess the requisite discretion to direct that separate, reasonably related cases be consolidated into a single hearing. Whenever two or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date, if the discovery provisions set forth in sections 59.1 through 59.4 are negatively impacted by the consolidation.

(b) In those cases where one or more individually named Respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named Respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

(c) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of section 67.2(c) each individually named Respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named Respondent;

(3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) to present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

Note: Authority cited: Section 18701, Government Code. Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.