

Proposed Text:

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CHAPTER 1. PUBLIC EMPLOYMENT RELATIONS BOARD

SUBCHAPTER 2. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

32056. State Mediation and Conciliation Service.

(a) “Service,” “SMCS” or “Division of Mediation” means the California State Mediation and Conciliation Service, as described in Government Code section 3600.

(b) “~~Supervisor-Director~~” means the officer of that title within the Division of Mediation designated by the Board.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code. Reference: Section 3600, Government Code.

32060. Headquarters Office

“The headquarters office” means the main office of the Board itself, the General Counsel, the Chief Administrative Law Judge, the Director of State Mediation and Conciliation Services, and the Executive Director. The headquarters office shall be located in Sacramento, CA.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(n), 3563(m), 71639.1 and 71825, Government Code; and Section 99561(m), Public Utilities Code.

Article 2. General Provisions

32110. Electronic Filing Requirements

(a) Except as otherwise provided by this Chapter, electronic filing is mandatory when filing documents with PERB. For the initial filing of a case, the filing party shall serve all parties pursuant to Section 32140, subdivision (a), and electronically file with PERB the initial filing and a proof of service. After the initial filing of a case, service of documents shall occur automatically through ePERB, except for unrepresented individuals not utilizing ePERB, in which case the filing party must serve the documents by personal delivery, mail, or with another delivery service properly addressed. Electronic filing is not required when submitting documents at formal hearing.

(b) Electronic filing is available but not mandatory for an unrepresented individual. For purposes of this subsection, the term “unrepresented individual” shall mean an individual natural person

not represented by an attorney or a union representative. However, an unrepresented individual that files electronically shall be required to electronically file all subsequent documents, and to accept electronic service, unless she or he provides written notice to all parties that future filings shall occur through a different authorized means.

(c) A party filing a document through e-PERB may use an electronic signature as defined in section 32092. However, a party submitting proof of support under section 32700 of these regulations, either through e-PERB or otherwise, may rely on electronic signatures only to the extent permitted under section 32700.

(d) Documents electronically filed shall be in PDF format and text searchable. However, a party lacking the capacity to make a PDF file text searchable shall file the document in a non-text searchable PDF format, and shall telephonically notify the Board that it has done so. Unless documents are compressed (in a zip file format), the maximum size of any single document that can be electronically filed is 25 MB. For documents larger than 25 MB, the filer shall separate them into multiple parts so that each part is no larger than 25 MB.

(e) Each document shall be filed individually. Attachments and exhibits are part of the document to which they are associated. Where a document exceeds the size limit specified under subsection (ed), the document must be split into parts and each filed individually. When a document is filed in multiple parts, each part must be identified as part of the document, e.g., unfair practice charge part 1, unfair practice charge part 2, etc.

(f) Filers may electronically file a document through e-PERB at any time. However, all documents electronically filed after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed filed the next regular PERB business day. This section shall not apply to requests for injunctive relief whose filing requirements are governed by sections 32450 and 32455.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3, 3551(a), 3555.5(c), 3563, 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513, 3514.5, 3541.3, 3541.5, 3551(a), 3555.5(c), 3563, 3563.2, 71639.1 and 71825, Government Code; and Sections 99561 and 99561.2, Public Utilities Code.

32121. Place to File Matters with the SMCS.

The ~~San Francisco~~ Sacramento Regional Office shall be the appropriate location for filing documents in all matters relating to functions of the Division of Mediation.

Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 3600, 3601, 3603 and 3611, Government Code; and Sections 25051, 25052, 28850, 28851, 30750, 30751, 30754, 30756, 40120, 40122, 50120, 50121, 70120, 70122, 90300, 95650, 95651, 98162.5, 100301, 100305, 100306, 101341, 101342, 101344, 102401, 102403, 103401, 103404, 103405, 103406, 125521, 125526, Appendix 1, Sections 4.2 and 4.4, and Appendix 2, Sections 13.90, 13.91 and 13.96, Public Utilities Code.

32140. Service; Proper Recipient for Filing or Service.

(a) All documents referred to in these regulations requiring “service,” except subpoenas, shall be considered “served” by the Board or a party when personally delivered, when deposited in the mail or with a delivery service properly addressed, or when sent by electronic service, as defined by Section 32093, and authorized in subdivision (b) of this section. All documents required to be served shall include a “proof of service” declaration signed under penalty of perjury which contains the following information: (1) The name of the declarant; (2) the county and state in which the declarant is employed or resides; (3) a statement that the declarant is over the age of 18 years; (4) the address of the declarant; (5) a description of the documents served; (6) the method of service and a statement that any postage or other costs were prepaid; (7) the name(s), address(es) and, if applicable, ~~fax number(s)~~ or electronic mail address(es) used for service on the party(ies); and (8) the date of service.

(b) Electronic service of a document is authorized only when a party has agreed to accept service electronically in that action. A party indicates that the party agrees to accept electronic service by:

(1) Serving a notice on all parties that the party accepts electronic service and filing the notice with the Board. The notice must include the electronic mail address at which the party agrees to accept service; or

(2) Electronically filing any document with the Board. The act of electronic filing is evidence that the party agrees to accept service at the electronic mail address the party has furnished to the Board.

(c) Whenever “service” is required by these regulations, service shall be on all parties to the proceeding and shall be concurrent with the filing in question.

(d) Whenever a document is required to be “filed” or “served” with any of the below listed entities, the proper recipient shall be:

(1) The Board: the appropriate or designated regional office (see, e.g. Section 32075) unless the headquarters office is specified, or the document is filed through e-PERB;

(2) The Board itself: only at the headquarters office unless the document is filed through e-PERB;

(3) An employer

(A) in the case of a public school employer: the superintendent, deputy superintendent, or a designated representative of a school district; or other public school employer under the Board’s jurisdiction; or to the school board at a regular or extraordinary meeting;

(B) in case of a state employer: The Governor or his designated representative on behalf of the State of California;

(C) in the case of a higher education employer:

(i) If the employer is the Regents of the University of California, the Office of the General Counsel of the University;

(ii) If the employer is the Directors of Hastings College of the Law, the Office of the General Counsel of Hastings;

(iii) If the employer is the Trustees of the California State University for unfair practice proceedings, service shall be on the Office of the General Counsel of the California State University; for representation proceedings, filing or service shall be on the Office of the Director of Employee Relations.

(D) in the case of a public agency employer as defined in Government Code section 3501(c): the chief executive officer, chief legal counsel, or individual whose job responsibilities includes receiving official documents on behalf of the chief executive officer, governing board, or chief legal counsel.

(E) in the case of a transit district employer as defined in Public Utilities Code section 99560.1(g), any person authorized to act on behalf of the employer.

(F) in the case of a trial court employer as defined in Government Code section 71601(k) or 71801(k): the individual designated to receive service or the executive officer.

(G) in the case of a regional committee employer as defined in Government Code section 71801(h) and 71807: the individual designated to receive service or the chair of the regional committee.

(H) in the case of the Judicial Council: the Administrative Director of the Courts or his or her designated representative.

(4) An employee organization: the individual designated to receive service or to the president or if there is no president, an officer of the organization.

(5) An individual: to the named person or to their representative of record.

(e) Documents filed electronically with PERB will be deemed to have been served with the appropriate recipient, except: (1) all initial filings with PERB must be served by personal delivery, mail or through another delivery service properly addressed, and (2) electronic service shall not qualify as sufficient for service on an unrepresented individual party who has declined to use e-PERB as permitted by section 32110 of PERB's regulations.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3551(a), 3555.5(c), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(n), 3551(a), 3555.5(c), 3563(m), 71639.1 and 71825, Government Code; and Section 99561(m), Public Utilities Code.

32150. Subpoenas.

~~(a) Before the hearing has commenced, the Board shall issue subpoenas at the request of any party for attendance of witnesses or production of documents at the hearing. Compliance with the provisions of Section 1985 of the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena for production of documents. After the hearing has commenced the Board may issue subpoenas.~~

Definitions

(1) “Testimonial subpoena” means a subpoena that solely requires a witness to appear at a Board hearing.

(2) “Records subpoena” means a subpoena that requires production of documents, electronically stored information, video records, audio records, or other records or things, either at a Board hearing or at a time and location in advance of such a hearing. A records subpoena may also require a witness to appear at a Board hearing to testify.

(3) “Declaration of materiality” means a declaration signed under penalty of perjury, submitted by the requesting party or that party’s representative, which:

(A) Describes the requested items; and

(B) Explains why the requested items are relevant to the issues involved in the case.

(4) “Consumer or employee notice” means a notice provided to a non-party consumer or employee as set forth in Code of Civil Procedure sections 1985.3 and 1985.6.

~~(b) Any subpoenas issued pursuant to subdivision (a) shall be extended to all parts of the State and shall be served in accordance with the provisions of sections 1987 and 1988 of the Code of Civil Procedure. Geographic Coverage of Subpoenas: Testimonial and records subpoenas issued shall extend to all parts of the State of California.~~

~~(c) All witnesses appearing pursuant to subpoena, other than the parties, shall receive fees and mileage in the amount as prescribed by law for civil actions in a superior court. Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed. Requests to Shorten or Lengthen Timelines: A Board agent has discretion to alter the timelines under subsections (d), (e), (f), (g) and (i).~~

~~(d) A written motion to revoke a subpoena may be filed prior to the proceeding or made by an oral motion at the commencement of the proceeding. The Board shall revoke the subpoena if the evidence requested to be produced is not relevant to any matter under consideration in the proceeding or the subpoena is otherwise invalid. Procedures for Obtaining Subpoenas: After the Board notifies the parties that an evidentiary hearing has been scheduled, and before the hearing is complete, any party may obtain signed testimonial and records subpoenas from the assigned Board agent (typically an Administrative Law Judge or hearing officer) or designee by using the following procedures:~~

(1) Blank subpoena forms may be obtained at each of the Board's offices as well as on the Board's website. A party or party representative shall fill out the blank form and provide it to the Board agent for review and signature.

(2) When filling out a blank records subpoena, a requesting party shall specify the records requested, and shall specify a production date that complies with subsection (f) below.

(3) When submitting a records subpoena to a Board agent for signature, a party or party representative must include a declaration of materiality.

(4) The Board agent has discretion to require a requesting party to serve a consumer or employee notice if a records subpoena seeks confidential personal records of a natural person who is not a party, an agent of a party, or an employee exclusively represented by a party.

(e) Upon a finding of the Board itself that a Board agent is essential to the resolution of a case and that no rational decision of the Board can be reached without such agent, the Board itself shall produce the agent if subpoenaed to do so by any party to the dispute. For purposes of this subdivision, the term "Board agent" includes a mediator or conciliator employed within the State Mediation and Conciliation Service. This subdivision shall not apply when the mediator or conciliator is performing services pursuant to Government Code section 3601 to which the confidentiality provisions of that section or section 703.5 and Chapter 2, commencing with section 1115, of Division 9 of the Evidence Code apply. Procedures for Serving Subpoenas: After obtaining a signed subpoena from a Board agent or designee, a party or party representative shall serve the subpoena by using the following procedures.

(1) Method of service: For a subpoena to be effective, it must be (a) personally served on the witness; or (b) if a subpoena is being served on a party or an agent of a party, it is permissible to serve a representative who is designated in a notice of appearance or who has signed a filing in the matter on behalf of the party, unless that representative no longer represents the party.

(2) Time of service: If a testimonial subpoena is served fewer than ten (10) days before the date on which the witness must testify, or if a records subpoena is served fewer than twenty (20) days before the records must be produced, then the person or entity subject to the subpoena may request that the subpoena be revoked or limited for insufficient notice. The Board agent shall have discretion to find that the amount of notice was sufficient under the circumstances and the subpoena is therefore effective, to declare the subpoena ineffective, or to adjust, as may be appropriate under the circumstances, the scope, timing, methods, or other details regarding the testimony or records requested.

(3) Service of the declaration of materiality: The declaration of materiality must be served together with the corresponding records subpoena.

(4) Witness fee and mileage reimbursement: A witness who is neither a party nor an agent of a party may demand, at the time of service, a witness fee of \$35.00 and a mileage reimbursement of \$0.20 per mile, round-trip, for travel required to testify. If such a

demand is made, the requesting party must provide the requested fee and reimbursement at the time of service.

(5) Service of the consumer or employee notice: If the Board agent has required a consumer or employee notice, such notice must be served, together with a copy of the records subpoena and the declaration of materiality, on the non-party consumer or employee. Such service must be made at least ten (10) days prior to the production date.

~~(f) Upon the failure of any person to comply with a subpoena, the Board may apply to an appropriate superior court for an order requiring such person to appear and produce evidence and give testimony regarding the matter under investigation or in question. Requests for compliance with a subpoena shall be made to the Board agent assigned the case. If the Board agent deems it appropriate, he or she shall promptly recommend to the General Counsel that the Board seek enforcement of the subpoena. A request that the Board apply for an order may be made by the General Counsel at any stage of the proceedings. The Board shall seek enforcement on recommendation of the General Counsel unless in the judgment of the Board the enforcement of such subpoena or notice would be inconsistent with law or the policies of the applicable Act. If the request is granted, the record will remain open in the matter until the Board determines that the court order will not be forthcoming, or that further delay would frustrate the policies of the applicable Act, or until the testimony sought is included in the record.~~ Production Schedule for Records Subpoenas

(1) The requesting party shall specify in the records subpoena the date, time, and location for production of requested items. The requested production date may be a hearing date. If the responding witness, entity, or party has at least twenty (20) days to respond following service of the records subpoena, then the requested production date may be a non-hearing date. The requested production date may not be later than the last scheduled day of hearing, unless otherwise ordered by the Board agent.

(2) The responding person or entity shall produce the requested items as specified in the records subpoena unless agreed otherwise or the Board orders otherwise. The responding person or entity need not produce items covered by a motion to revoke or limit a subpoena filed pursuant to subsection (h), pending resolution of the motion.

(3) If a records subpoena specifies a requested production date that is not a hearing date, and requires both records production and witness testimony, then the subpoena shall be deemed to require such testimony at the next scheduled hearing date, unless agreed otherwise or the Board orders otherwise.

(g) Motion to Extend Records Production Date: If a scheduled records production date is prior to the next scheduled hearing date, the responding person or entity with good cause may file a written motion to extend the requested production date by up to an additional ten (10) days or to the date of the scheduled formal hearing, if less than ten (10) days. The motion must be filed and served at least seven (7) days before the scheduled records production date.

(h) Motion to Revoke or Limit a Testimonial Subpoena: A motion to revoke a testimonial subpoena may be filed and served on the requesting party in writing or made orally at the

scheduled formal hearing. The Board Agent may grant or deny the motion, limit a witness's testimony, or grant a protective order in light of the arguments presented by the parties.

(i) Motion to Revoke or Limit a Records Subpoena: A responding person or entity may file a written motion to revoke or limit a records subpoena pursuant to the following procedures:

(1) The motion must be filed and served no later than twelve (12) days following service of the subpoena. The requesting party must submit any opposition no later than six (6) days after the responding person or entity serves such a motion. There shall be no reply briefs unless the Board agent directs otherwise.

(2) In resolving any dispute regarding a records subpoena, the Board agent may exercise discretion to set prehearing conferences, other formal hearings, or otherwise order other production dates. The Board agent may revoke or limit a records subpoena to the extent items requested to be produced are not relevant to any matter under consideration in the proceeding or are protected by an applicable privilege, or the subpoena is otherwise invalid. When the Board agent resolves such a dispute at a prehearing conference and orders production of certain items covered by the motion, the Board agent shall direct the date, format, and means of producing such items. When the Board agent resolves such a dispute on or after the first day of hearing and orders production of certain items covered by the motion, all such items shall be produced within 24 hours of the Board agent's ruling. The Board agent is also empowered to resolve any objections filed by a consumer or employee resulting from a consumer or employee notice regarding subpoenaed records.

(j) Motion to Enforce Testimonial or Records Subpoena in Superior Court: The Board itself may direct the General Counsel to apply to an appropriate superior court for an order requiring compliance with a subpoena. The following procedures shall apply.

(1) A party may make request to initiate enforcement proceedings to the Board agent assigned.

(2) At any stage in the proceeding, a Board agent may request, through the General Counsel, that the Board itself authorize the General Counsel to apply for an order of enforcement.

(3) The Board itself shall authorize the General Counsel to seek enforcement on the recommendation of the Board agent or General Counsel, unless, in the judgment of the Board itself, the enforcement of such testimonial or records subpoena would be inconsistent with the law or policies of the applicable Act.

(4) If the Board itself directs the General Counsel to seek enforcement, the evidentiary record will remain open until the Board agent determines that the court order will not be forthcoming or that further delay would frustrate the policies of the applicable Act, or until the responding party produces the testimony or records sought

(5) At any time, the Board itself may direct the General Counsel to withdraw an enforcement action based upon voluntary compliance or otherwise as the interests of fairness may require.

(k) Inferences and Sanctions for Failure to Comply with Subpoenas: As an alternative to seeking Superior Court enforcement as set forth in subdivision (i), the Board agent may draw adverse inferences from a party's failure to comply with a valid subpoena, and may prohibit such a party from presenting evidence or arguments, as the interests of fairness may require. The Board agent may not, however, draw an adverse inference against a party unless that party has been given advance notice and an opportunity to respond regarding such a potential adverse inference.

(l) Board Agent as Witness at a Hearing: The Board itself may order that a subpoenaed Board agent be produced at a formal hearing, only if that Board agent is deemed essential to the resolution of the case and no rational decision can be reached without such agent being produced.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3551(a), 3555.5(c), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(h), 3551(a), 3555.5(c), 3563(g), 3601, 71639.1 and 71825, Government Code; and Section 99561(g), Public Utilities Code.

§ 32155. Recusal Disqualification of Board Agent or Board Members

~~(a) No Board member, and no Board agent performing an adjudicatory function, and no mediator or conciliator employed within the State Mediation and Conciliation Service, shall decide or otherwise participate in any case or proceeding: (1) "Recusal" means refraining from participation in a case or proceeding, including but not limited to refraining from an attempt to influence any other person with respect to the matter.~~

~~(2) "Party representative," as used in this Section, means any person who has advised a party regarding the specific events giving rise to the case or proceeding at issue, entered an appearance in the case or proceeding, or otherwise been designated by a party as that party's representative in the case or proceeding.~~

~~(1) In which he or she has a financial interest in the outcome.~~

~~(2) When he or she is related to any party or to an agent or officer of any party, or to an attorney or counsel of any party by consanguinity or affinity within the third degree computed according to the rules of law, or when he or she is indebted, through money borrowed as a loan, to any party or to an attorney or counsel of any party.~~

~~(3) When, in the case or proceeding, he or she has been attorney or counsel for any party; or when he or she has given advice to any party upon any matter involved in the proceeding before the Board; or when he or she has been retained or employed as attorney or counsel for any party within one year prior to the commencement of the case at the Board level.~~

~~(4) When it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her.~~

~~(b) Whenever such a Board agent shall have knowledge of any facts, which under the provisions of this rule disqualify him or her from presiding over any aspect of a hearing or~~

investigation, it shall be his or her duty immediately to notify the General Counsel or the Chief Administrative Law Judge, as appropriate, setting forth all reasons for his or her belief. A Board member, Board agent, conciliator, mediator, or other PERB officer, employee, or contractor shall recuse himself or herself from a case or proceeding if any one of the following circumstances exists:

(1) He or she has a financial interest in the outcome of the case or proceeding, or is indebted, through money borrowed as a loan, to a party, party representative, or witness in the case or proceeding.

(2) He or she is related, by consanguinity or affinity within the third degree computed according to the rules of law, to a party, party representative, or witness in the case or proceeding.

(3) He or she at any time participated in the specific events giving rise to the case or proceeding, or served as a party representative in the case or proceeding.

(4) (A) For personnel covered by this Section other than Board members and Legal Advisors, within one year prior to the initial filing date of the case or proceeding, or at any time thereafter, he or she:

(i) was an officer, director, trustee, or employee of an entity that is a party in the case or proceeding;

(ii) personally served as an attorney, or as a non-attorney representative, on behalf of any person or entity that is a party or witness in the case or proceeding; or

(iii) held a paid position, including but not limited to a position as an employee, contractor, partner, or shareholder, with a law firm, legal department, or other organization representing a person or entity that is a party or witness in the case or proceeding.

(B) For Board members and Legal Advisors, if, within one year prior to the date that any appeal, exceptions, motion, or request in the case or proceeding was first placed on the Board's docket, or at any time thereafter, he or she:

(i) was an officer, director, trustee, or employee of an entity that is a party in the case or proceeding;

(ii) personally served as an attorney, or as a non-attorney representative, on behalf of any person or entity that is a party or witness in the case or proceeding; or

(iii) held a paid position, including but not limited to a position as an employee, contractor, partner, or shareholder, with a law firm, legal department, or other organization representing a person or entity that is a party or witness in the case or proceeding.

(5) As a result of other circumstances, he or she cannot fairly consider the case or proceeding, or the interests of justice require recusal.

(c) Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding. If such Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel or the Chief Administrative Law Judge, as appropriate, who shall designate another Board agent to hear the matter. Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation. If a Board member learns of any facts which, under the provisions of this Section, warrant recusal from a case or proceeding before the Board itself, he or she shall recuse and notify the Board of such recusal. If the General Counsel, Chief Administrative Law Judge, or Division Chief of the State Mediation and Conciliation Service learns of any facts which, under the provisions of this Section, warrant recusal from a case or proceeding in which he or she would otherwise be directly or indirectly involved, he or she shall recuse, notify the Board of such recusal, and designate a replacement to act in his or her place regarding such case or proceeding. If any other Board agent, conciliator, mediator, or PERB official, employee, or contractor learns of any facts which, under the provisions of this Section, warrant recusal from a case or proceeding in which he or she might otherwise be directly or indirectly involved, he or she shall notify his or her supervisor, who shall take appropriate action.

(d) ~~If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits. Any party to a case or proceeding before the Board itself may file directly with a Board member a written motion for recusal. The motion shall set forth by competent evidence all relevant facts. A motion for recusal must be filed and served on all parties no later than twenty (20) days after the party seeking recusal first knew or should have known that the Board member was eligible to be assigned to a panel in the case or proceeding and should be recused from the case or proceeding. Any response to such a motion by another party must be filed and served on all parties within ten (10) days after service of the motion. There shall be no reply briefs unless requested by the Board. The Board member subject to the recusal motion shall decide the motion. If the motion is denied, then the party seeking recusal can seek review reconsideration from the Board itself within ten (10) days from such denial. Any response to such a reconsideration motion by another party to such a request for review must be filed and served on all parties within ten (10) days after service of the motion. There shall be no reply briefs regarding such a request for review reconsideration motion, unless requested by the Board.~~

(e) Whenever a Board member shall have knowledge of any facts which, under the provisions of this rule, disqualify him or her to consider any case before the Board, it shall be his or her duty to declare the disqualification to the Board immediately upon learning of such facts. This

~~declaration shall be made part of the official record of the Board. The Board member shall then refrain from participating and shall attempt in no way to influence any other person with respect to the matter. Any party to a case or proceeding that is not before the Board itself may file a motion for recusal directly with any Board agent, conciliator, or mediator to whom the matter is assigned. Such motion shall be written, or if oral, reduced to writing within 24 hours of the motion. The motion shall set forth by competent evidence all relevant facts. A motion for recusal must be filed no later than twenty (20) days after the party first knew or should have known that the Board agent, conciliator, or mediator has been assigned a formal role in the case or proceeding. Any response to such a motion by another party must be filed and served on all parties within ten (10) days after service of the motion. There shall be no reply briefs unless requested by the Board agent. The Board agent, conciliator, or mediator subject to the recusal motion shall decide the motion, unless otherwise ordered. If the motion is granted, a new Board agent, conciliator, or mediator shall be assigned. If the motion is denied, the party seeking recusal may, within ten (10) days after its motion for recusal is denied, file with the Board itself a request for special permission to appeal such denial. If the Board does not grant special permission to appeal the denial, the party seeking recusal may file an appeal after hearing or investigation and issuance of any decision, and may choose to combine such an appeal with an appeal or exceptions as to the merits.~~

~~(f) Any party to a case before the Board may file directly with the Board member a motion for his or her recusal from the case when exceptions are filed with the Board or within ten days of discovering a disqualifying interest provided that such facts were not available at the time exceptions were filed. The motion shall be supported by sworn affidavits stating the facts constituting the ground for disqualification of the Board member. Copies of the motion and supporting affidavits shall be served on all parties to the case. Any party aggrieved by the Board's determination regarding a motion for recusal may include the matter in a writ of extraordinary relief filed pursuant to Government Code Section 3509.5, 3520, 3542, 3564, 71639.4 or 71825.1 or Public Utilities Code section 99562 seeking judicial review of the Board's decision on the merits, or, in cases reviewed by the Board itself pursuant to Section 32635, in a writ proceeding in superior court challenging the Board's refusal to issue a complaint.~~

~~(g) Within ten days after the filing of a motion for recusal, the Board member alleged to be disqualified shall render a decision stating the reasons therefore. If the Board member is not on the panel assigned to hear the case, he or she shall so inform the parties and indicate that he or she does not intend to participate in the case. In the event that the Board member decides to participate, he or she shall render a decision on the motion for recusal before doing so. Nothing herein shall preclude any person subject to recusal from invoking the rule of necessity as provided for under section 87101 of the California Government Code.~~

~~(h) Any party aggrieved by a determination made pursuant to subsections (d) or (g) of this rule may include the matter of claimed disqualification in a writ of extraordinary relief filed pursuant to Government Code Section 3509.5, 3520, 3542, 3564, 71639.4 or 71825.1 or Public Utilities Code section 99562 seeking judicial review of the Board's decision on the merits.~~

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3551(a), 3555.5(c), 3563, 3603, 71639.1(b) and 71825(b), Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 99561(f), 100301, 101344, 102403, 103401, 120505, 125521, Appendix 1, Section

4.4 and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 3509, 3509.5, 3513, 3520, 3541.3, 3542, 3551(a), 3555.5(c), 3557, 3563, 3564, 71639.1, 71639.4, 71825 and 71825.1, Government Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 99561, 99562, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code.

SUBCHAPTER 3. HEARINGS

32170. ~~Powers and Duties~~Authority of Board Agent Conducting a Hearing.

(a) Definitions:

(1) “Prehearing conference” means a proceeding conducted by the Board agent with the parties, either before a formal hearing or between scheduled formal hearing days in order to resolve procedural issues; coordinate and organize the hearing; rule on preliminary and jurisdictional matters; take limited sworn witness testimony, admit documentary or other evidence, take official notice of facts, and approve stipulated facts; and consider any other matters.

(2) “Formal Hearing” means an adjudicative proceeding conducted by the Board agent with the parties, which may include taking sworn witness testimony, admitting documentary or other evidence, taking official notice of facts, and approving stipulated facts.

(3) “Hearing” means those prehearing conference(s) and/or formal hearing day(s) conducted for an individual case or consolidated cases.

(b) The Board agent conducting a hearing shall have ~~authority~~the powers and duties to:

(1)~~(a)~~ Inquire fully into all issues and obtain a complete record upon which the decision can be rendered;

(2)~~(b)~~ Authorize the taking of depositions;

(3)~~(c)~~ Issue appropriate subpoenas and rule upon motions related to subpoenas, set dates, formats, and means for production in response to a records subpoena, and limit the parties’ use of produced records;

(4)~~(d)~~ Regulate the course and conduct of the hearing, including, but not limited to, the power to exclude a witness from the hearing room;

(5)~~(e)~~ ~~Hold~~ Order the parties to participate in (A) in-person, video, or telephonic settlement conferences with a designated Board agent; and/or (B) in-person, video, or telephonic prehearing conferences to clarify and resolve issues raised by the parties or by the Board agent, including but not limited to for the settlementsimplification of ~~issues~~scheduling issues, subpoena disputes, motions, requests to consolidate proceedings, requests to bifurcate proceedings, requests to stay, abate, or continue proceedings, and other substantive or procedural matters;

- ~~(6)(f)~~ Rule on objections, motions and questions of procedure;
- ~~(7)(g)~~ Administer oaths and affirmations;
- ~~(8)(h)~~ Take evidence and rule on the admissibility of evidence, and rule on offers of proof;
- ~~(9)(i)~~ Examine witnesses for the purpose of clarifying the facts and issues;
- (10) Approve or reject proposed stipulations, including stipulations of fact, or requests for administrative notice;
- (11) Issue any needed protective orders limiting use of, or access to, records produced pursuant to a subpoena, exhibits, transcripts, and any other parts of the hearing file;
- (12) Conduct an in camera review of records;
- ~~(13)(j)~~ Authorize the submission of briefs and set the time for the filing thereof;
- ~~(14)(k)~~ Hear oral argument;
- ~~(15)(l)~~ Render and serve the proposed decision on each party;
- ~~(16)(m)~~ Carry out the duties of administrative law judge as provided or otherwise authorized by these regulations or by the applicable Act.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(h), 3541.3(k), 3563(g), 3563(j), 71639.1 and 71825, Government Code; and Sections 99561(g) and 99561(j), Public Utilities Code.

32180. Rights of Parties

- (a) Each party to the a hearing shall have has the right to appear in person self-representation, or representation by counsel or by other non-attorney representative, and to call, examine and cross-examine witnesses and introduce documentary and other evidence on the issues.
- (b) Each party to a hearing may, subject to appropriate rulings by the board agent conducting the hearing pursuant to section 32170 of these regulations, introduce non-testimonial evidence and to call, examine, and cross-examine witnesses and introduce documentary and other evidence on the issues.
- (c) The board agent conducting a hearing shall determine the location of the hearing and whether parties, representatives, and witnesses shall participate in a hearing in person, telephonically, by video, or a combination thereof.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3551(a), 3555.5(c), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference:

Sections 3509, 3513(h), 3541.3(h), 3551(a), 3555.5(c), 3563(g), 71639.1 and 71825, Government Code; and Section 99561(g), Public Utilities Code.

32190. Motions.

(a) After a complaint has been issued, written motions made before, during or after a formal hearing shall be filed with the Board agent assigned to the proceeding. Service and proof of service pursuant to Section 32140 are required.

(1) Motions to strike an allegation, to defer a case to arbitration, or to dismiss or partially dismiss a complaint, including motions styled as motions for summary judgment or for judgment on the pleadings, must be filed with the Board agent assigned to the proceeding no later than forty-five (45) days prior to the first day of the scheduled formal hearing, unless otherwise ordered by the Board. Service and proof of service pursuant to Section 32140 are required.

(2) A response to a motion filed pursuant to subsection (a)(1) shall be filed with the Board agent within twenty (20) days of service of the motion, or within such time as is directed by the Board agent. Service and proof of service pursuant to Section 32140 are required. There shall be no reply briefs unless requested by the Board agent.

(3) The above filing deadlines shall not apply in any proceeding designated for expedited treatment pursuant to Section 32147. In expedited hearings, the Board agent shall have the authority and discretion to set timelines for the filing of motions and responses.

(4) Once the scheduled formal hearing has commenced, no motion specified in subsection (a)(1) above may be filed or orally presented until the charging party has fully presented evidence in its case, exclusive of rebuttal evidence.

(b) Except as specified in subsection (a)(2) above, Responses to all other motions shall be filed with the Board agent within fourteen (14) days of service of the motion, or within such time as is directed by the Board agent. Service and proof of service pursuant to Section 32140 are required. There shall be no reply briefs unless requested by the Board agent.

~~(c) During the hearing, a motion or the response thereto may be made orally on the record,~~
Except as specified in subsections (a)(1) and (a)(4), during the hearing, a motion or the response thereto may be made orally on the record.

(d) The Board agent may hear oral argument or take evidence on any motion.

(e) No hearing shall be delayed because a motion is filed unless the Board so directs.

(f) Rulings on motions shall not be appealable except as specified in Sections 32200 and 32360.

(g) This Section shall not apply to motions pertaining to subpoenas under Section 32150, nor to motions to amend a complaint.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(h), 3563(g), 71639.1 and 71825, Government Code; and Section 99561(g), Public Utilities Code.

32205. Continuances Request to Continue a Formal Hearing.

~~A party may file a request for a continuance of the formal hearing no later than five days prior to such hearing. Such request shall be in writing, signed by the party or its agent, state the grounds for the request, and state the position of each party regarding the request. An oral request or a request for continuance submitted less than five days prior to the hearing may be made only under unusual circumstances. A request for a continuance shall be granted only under unusual circumstances and if the other party will not be prejudiced thereby.~~

(a) Request Filed At Least Seven Days Prior to the Hearing. Prior to filing a request for continuance, the requesting party must attempt to contact representatives from all other parties to ascertain their positions on the request. The request for continuance must explain in writing the grounds for the request and, to the extent the requesting party has been able to ascertain, the other parties' positions regarding the request. The request shall be granted only if the requesting party demonstrates good cause for the continuance that outweighs any prejudice to other parties.

(b) Request Filed Fewer Than Seven Days Prior to the Hearing. A request for continuance filed fewer than seven days prior to the hearing may only be considered if it demonstrates extraordinary circumstances. Prior to filing such a request, the requesting party must attempt to contact representatives from all other parties to ascertain their positions on the request. The request must be in writing or, if made orally, explain why it cannot be reduced to writing. It must explain the grounds for the request, any reasons the request was not made earlier, and, to the extent the requesting party has been able to ascertain, the other parties' positions regarding the request. The request shall be granted only if the requesting party demonstrates extraordinary circumstances justifying the continuance that outweigh any prejudice to other parties.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3551(a), 3555.5(c), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(h), 3551(a), 3555.5(c), 3563(g), 71639.1 and 71825, Government Code; and Section 99561(g), Public Utilities Code.

SUBCHAPTER 4. DECISIONS OF THE BOARD ITSELF

Article 2. Appeal of Board Agent Decision to the Board Itself

§ 32300. Exceptions to Board Agent Decision.

(a) A party may file with the Board itself ~~an original and five copies of~~ a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, ~~and supporting brief,~~ within 20 days following the date of service of the decision, or as provided in Section 32310. The statement of exceptions ~~and briefs~~ shall be filed with the Board itself in

the headquarters office pursuant to Section 32135. Service and proof of service of the statement of exceptions ~~and brief~~ pursuant to Section 32140 are required. The statement of exceptions ~~or brief~~ shall:

- (1) ~~clearly and concisely state why the proposed decision is in error~~State the specific issues of procedure, fact, law or rationale to which each exception is taken;
- (2) ~~cite to the relevant exhibit or transcript page in the case record to support factual arguments~~Identify the page or part of the decision to which each exception is taken; and
- (3) ~~cite to relevant legal authority to support legal arguments. Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception~~
- (4) ~~State the grounds for each exception.~~

(b) A statement of exceptions shall be a single integrated document that must not exceed 14,000 words, including footnotes. A statement of exceptions may be in the form of a brief and may contain tables of contents and authorities. Tables of contents and tables of authorities do not count toward the word limit. Reference shall be made in the statement of exceptions only to matters contained in the record of the case.

(c) Exceptions shall cite only to evidence: (1) in the record of the case, and (2) in the record of another case before PERB, or (3) of which administrative notice may properly be taken. An exception not specifically urged shall be waived.

(d) Absent good cause, a statement of exceptions that does not comply with this Section will not be considered by the Board itself.

(e) Absent good cause, the Board itself will not consider: (1) issues and arguments not raised in the statement of exceptions, or (2) arguments raised in the statement of exceptions that do not impact the outcome of a case. This subdivision shall not preclude the Board itself from applying the unalleged violations doctrine or making *sua sponte* findings of fact or conclusion of law.

(f) A request for permission to file a statement of exceptions exceeding 14,000 words must be filed with the Board itself and served on all parties pursuant to Section 32140 no later than five days before the exceptions are due. The request must establish good cause to permit a longer statement of exceptions. The party requesting to exceed the word limit may not file its exceptions until the Board rules on the request.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 3603, 71639.1(b) and 71825(b), Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 99561(f), 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(k), 3541.3(n), 3563(j), 3563(m), 71639.1 and 71825, Government Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 99561(j), 99561(m), 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code.

§ 32310. Response to Exceptions.

(a) Within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself in the headquarters office pursuant to Section 32135.

(b) The response shall clearly and concisely state why the exceptions should not be granted. The response shall cite to relevant legal authority to support legal arguments and shall cite to the relevant exhibit or transcript page in the case record to support factual arguments. Subsections (b) through (f) of Section 32300 shall apply to a response to exceptions. Absent good cause, a response to exceptions that does not comply with these requirements will not be considered by the Board itself.

(c) The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed recommended decision. Any such statement of cross-exceptions shall comply in form with the requirements of Section 32300, except that a party that is both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission.

(d) A response to cross-exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this Section.

(e) Service and proof of service of these documents pursuant to Section 32140 are required.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 3603, 71639.1(b) and 71825(b), Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 99561(f), 100301, 101344, 102403, 103401, 120505, and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(k), 3541.3(n), 3563(j), 3563(m), 71639.1 and 71825, Government Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 99561(j), 99561(m), 100301, 101344, 102403, 103401, 120505, and 125521, Public Utilities Code.

§ 32312. Reply Briefs.

(a) Within 10 days following the date of service of the response to its exceptions or cross-exceptions, a party may file with the Board itself a reply brief of no more than 5,000 words. A reply brief may contain a table of contents and table of authorities, but such tables, if any, shall not count toward the word limit. A request for permission to file a reply brief exceeding 5,000 words must be filed with the Board itself and served on all parties pursuant to Section 32140 no later than five days before the brief is due. The request must establish good cause to permit a longer reply brief. The party requesting to exceed the word limit may not file its reply brief until the Board rules on the request.

(b) Subsections (c) through (e) of Section 32300 shall apply to a reply brief. The reply brief shall be filed with the Board itself in the headquarters office pursuant to Section 32135. Service and proof of service of the reply brief pursuant to Section 32140 are required

(c) The Board itself may exercise its discretion to consider a reply brief in support of exceptions or cross-exceptions if (1) the response has raised new issues, discussed new case law, or formulated a new defense, or (2) the Board otherwise determines that consideration of the reply would assist the Board in deciding the case. The Board itself has discretion to disregard a reply brief if neither of these criteria is satisfied.

Note: Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 3603, 71639.1(b) and 71825(b), Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 99561(f), 100301, 101344, 102403, 103401, 120505, and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 3509, 3513(h), 3541.3(k), 3541.3(n), 3563(j), 3563(m), 71639.1 and 71825, Government Code; and Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 99561(j), 99561(m), 100301, 101344, 102403, 103401, 120505, and 125521, Public Utilities Code.

SUBCHAPTER 6. REPRESENTATION PROCEEDINGS

Article 2. Elections

32720. Authority to Conduct Elections.

(a) An election shall be conducted when the Board issues a decision directing an election or approves an agreement for a consent election, pursuant to the provisions of Articles 3, 4 or 5 of this Subchapter; Chapter 2, Subchapters 1 and 2; Chapter 3, Subchapter 1; Chapter 4, Subchapter 1 or 2; or Chapter 6 of these regulations. This Section does not apply to:

(1) elections involving transit districts, as defined by Chapter 9, Section 93000, where SMCS conducts elections pursuant to Chapter 9, section 93020, or

(2) consent elections conducted by SMCS under the MMBA, Trial Court Act, or Court Interpreter Act, pursuant to Section 32999.

(b) The Board shall determine the date, time, place and manner of the election absent an approved agreement of the parties.

Note: Authority cited: Sections 3513(h), 3541.3(g) and 3563(f), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3541.3(c), 3541.3(e), 3541.3(g), 3541.3(l), 3541.3(m), 3513(h), 3520.5(b), 3544.1(a), 3544.3, 3544.7(a), 3546, 3563(c), 3574(a), 3577, 3579(e) and 3583.5, Government Code; and Sections 99561(c), 99561(e), 99561(k), 99561(l), 99564, 99564.1, 99564.2, 99564.3, 99564.4 and 99566.1, Public Utilities Code.

32792. Request that Board Determine Impasse and Appoint Mediator.

(a) After declaring impasse orally or in writing to the other party or after jointly declaring impasse, either or both parties may request the Board to determine that an impasse exists and appoint a mediator. This Section, however, applies only to the Dills Act, EERA and HEERA. This request may initially be made by telephone, but a request in writing shall follow. The request shall be signed under penalty of perjury that the information alleged therein is true and

complete to the best of the requesting party's/parties' knowledge and belief, and contain the following information:

- (1) The name, address and telephone number of the employer and the exclusive representative;
 - (2) The name, title, address and telephone number of the agent to be contacted for each party;
 - (3) A description of the established unit, the approximate number of employees in the unit and the date the exclusive representative was recognized or certified;
 - (4) The type of dispute;
 - (5) The date(s) the parties' initial proposals were presented to the public;
 - (6) The date negotiations commenced, the number of negotiating sessions and the approximate total number of hours spent in negotiations to date;
 - (7) The status of negotiations, including the date impasse was declared by the party/parties pursuant to this section, the number and subject matter of issues on which the parties have reached tentative agreement, and the total number and subject matter of issues which remain in dispute;
 - (8) A clear and concise description of the negotiations which have occurred, including the extent to which the parties have made counter-proposals and have discussed the issues which remain in dispute, and any facts which indicate that future meetings without the assistance of a mediator would be futile.
- (b) Unless the request is made jointly, the filing party shall concurrently serve a copy of the written request on the other party. Proof of service pursuant to Section 32140 shall be filed with the regional office.

Note: Authority cited: Sections 3513(h), 3541.3(g) and 3563(f), Government Code. Reference: Sections 3518, 3548 and 3590, Government Code.

SUBCHAPTER 9. STATE MEDIATION AND CONCILIATION SERVICE

Article 1. Services

32998. Reimbursement for Services.

(a) ~~Beginning July 1, 2010, training and fFacilitation services provided by the SMCS pursuant to Section 3602 of the Government Code and representation services, other than election services, as defined herein relating to public transit labor relations pursuant to the Public Utilities Code shall be reimbursed at the rate of one hundred and fifteen dollars (\$115.00) per hour, prorated for each quarter hour of work that is less than a full hour. The actual time charged shall begin when a mediator commences providing such services, and shall include travel time not to exceed two hours in one direction or a total of four hours per day, and time~~

spent with the parties to ~~determine the content of the training and goals for the facilitation,~~ and shall continue until the services are completed.

(1) ~~Facilitation services include facilitation of collective bargaining prior to impasse, facilitation of labor management processes such as labor management committees, and facilitation mediation of workplace disputes and conflict resolution processes not covered by collective bargaining.~~ Facilitation services do not include mediation services resulting from certification of impasse by the Board, mediation under Government Code section 3611, mediation of collective bargaining disputes in which the parties have bargained to impasse, or near impasse, and have requested mediation, or mediation of grievances arising under a collective bargaining agreement or memorandum of understanding.

(2) ~~Representation services shall include all services related to the investigation and resolution of questions concerning representation of transit district employees other than election services.~~

(3) ~~Hearing officer services related to representation services provided under the Public Utilities Code, unless provided by a Board agent, shall be divided equally between or among the parties to the hearing.~~

(4) SMCS shall bill the parties for ~~training, facilitation and representation services~~ after completion of the work. The matter of which party or parties will be responsible for reimbursement of SMCS will be determined between or among the parties and will be recorded in a memorandum of agreement signed by all parties. The cost of representation services shall be split equally between or among the parties unless otherwise agreed to by the parties as permitted by law.

(b) ~~Beginning July 1, 2010, e~~Election services provided by SMCS shall be reimbursed at a flat rate depending upon the size of the bargaining unit. Election services covered by this regulation do not include representation elections (certification, decertification and unit clarification), ~~agency shop elections~~, and card and petition checks relating to a petition for recognition or certification, but will include the conduct of other elections, including but not limited to contract ratification votes.

(1) Election services shall be reimbursed as follows:

- | | |
|---|-------------|
| (A) Bargaining units of 1 to 49 employees: | \$1,000.00; |
| (B) Bargaining units of 50 to 199 employees: | \$1,250.00; |
| (C) Bargaining units of 200 to 999 employees: | \$2,000.00; |
| (D) Bargaining units of 1000 or more employees: | \$4,000.00. |

The cost of election services shall be split equally between or among the parties unless otherwise specified in local rules or agreed to by the parties. Which party or parties shall be responsible for reimbursement of SMCS, and in what amount, shall be determined at the initial set up meeting and will be recorded in the memorandum of election agreement.

(c) ~~Beginning July 1, 2010, e~~Each arbitrator shall pay one hundred and fifty dollars (\$150.00) per fiscal year (July 1 to June 30) to join and to remain listed on SMCS's statewide panel of private arbitrators. An arbitrator shall be removed from the panel if payment of the annual fee is not made within thirty (30) days of notice that it is past due.

(4) A party requesting a list of arbitrators shall pay fifty dollars (\$50.00) for each list of arbitrators requested. Payment for a list of arbitrators must be made at the time each list is requested. There will be no charge for substitute lists for the same case.

Authority cited: Sections 3541.3(g), 3555.5(c), 3602 and 3603, Government Code. Reference: Sections 3555.5(c), 3557, 3600, 3601, 3602, 3603 and 3611, Government Code; Sections 25051, 25052, 28850, 28852, 30750, 30751, 30756, 40120, 40122, 50120, 50121, 70120, 70121, 95650, 95651, 98162.5, 100301, 100304, 100305, 100306, 101341, 101342, 101344, 102401, 102403, 103401, 103404, 103405, 103406, 120502, 120503, 120505, 125521, 125524, 125525 and 125526; Appendix 1, Section 4.1 and Appendix 2, Section 13.90, Public Utilities Code; Section 11010, Government Code; and Sections 8740 and 8752, State Administrative Manual.

32999. Elections.

(a) The provisions of this Article are applicable whenever SMCS conducts representation ~~and agency shop elections~~ pursuant to the local rules of an MMBA, Trial Court Act or Court Interpreter Act employer. These provisions, however, do not apply to elections conducted by the Office of the General Counsel pursuant to Section 32720.

(b) SMCS shall conduct such elections only pursuant to a Consent Election Agreement entered into by all parties and SMCS. The term "Consent Election Agreement" means either an agreement by the parties as to the time, place and manner of an election, or an agreement by the parties that authorizes the election supervisor assigned by SMCS to determine the time, place and manner of the election.

Note: Authority cited: Sections 3509(a), 3541.3(g), 3541.3(n), 3600, 3603(a), 71639.1(b) and 71825(b), Government Code. Reference: Sections 3502.5(b), 3502.5(d), 3507.1(c), 71632.5(c), 71636.3 and 71814(c), Government Code.

93000. Definitions.

(a) "District" means the Alameda-Contra Costa Transit District, the Fresno Metropolitan Transit District, the Golden Empire Transit District, the Marin County Transit District, the North County Transit District, the Orange County Transit District, the Sacramento Regional Transit District, the San Diego County Transit District, the San Diego Metropolitan Transit Development Board, the San Francisco Bay Area Rapid Transit District, the San Mateo County Transit District, the Santa Barbara Metropolitan Transit District, the Santa Clara Valley Transportation Authority, the Santa Cruz Metropolitan Transit District, the Southern California Rapid Transit District, the San Joaquin Regional Transit District, and the West Bay Rapid Transit Authority, as the case may be.

(b) "Law" means the Transit District Law, Public Utilities Code, Section 24501 et seq.; Fresno Metropolitan Transit District Act of 1961, Public Utilities Code, Appendix 1, Section 1.1 et seq.;

Golden Empire Transit District Act, Public Utilities Code, Section 10100 et seq.; Marin County Transit District Act of 1964, Public Utilities Code, Section 70000 et seq.; North County Transit District Act, Public Utilities Code, Section 125000 et seq.; Orange County Transit District Act of 1965, Public Utilities Code, Section 40000 et seq.; Sacramento Regional Transit District Act, Public Utilities Code, Section 102000 et seq.; San Diego County Transit District Act of 1965, Public Utilities Code, Section 90000 et seq.; Mills-Deddeh Transit Development Act, Public Utilities Code, Section 120000 et seq.; San Francisco Bay Area Rapid Transit District Act, Public Utilities Code, Section 28500 et seq.; San Mateo County Transit District Act, Public Utilities Code, Section 103000 et seq.; Santa Barbara Metropolitan Transit District Act of 1965, Public Utilities Code, Section 95000 et seq.; Santa Clara Valley Transportation Authority Act, Public Utilities Code, Section 100000 et seq.; Santa Cruz Metropolitan Transit District Act of 1967, Public Utilities Code, Section 98000 et seq.; Southern California Rapid Transit District Law, Public Utilities Code, Section 30000 et seq.; San Joaquin Regional Transit District Act, Public Utilities Code, Section 50000 et seq.; and West Bay Rapid Transit Authority Act, Public Utilities Code, Appendix 2, Section 1.1 et seq.

(c) "Hearing officer" as used in this Chapter means a hearing officer appointed by the ~~Supervisor~~ Director.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505, and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor-Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93025. Investigation of Petition by Service.

(a) After a petition has been filed under Section 93005(a) or (b), if no agreement for a consent election is entered into and if it appears to SMCS that there is reasonable cause to believe that a question of representation exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of the employees in the appropriate unit, the ~~Supervisor~~ Director shall serve upon the petitioner, the district, any known individuals or labor organizations purporting to act as the representative of any employees directly affected by such investigation and any other parties a notice of hearing before a hearing officer at a time and place fixed therein, which notice shall be given at least 10 days in advance of the date specified for the hearing. Any such notice of hearing may be amended or withdrawn by the ~~Supervisor~~ Director at any time prior to the commencement of the hearing and by the hearing officer after commencement and prior to the close of the hearing. When more than one petition has been filed involving all or part of the same group of employees, or otherwise raising common issues, SMCS may, on the motion of any of the parties, or on its own motion, order that said petitions be consolidated for the purpose of hearing and decision.

(b) After a petition has been filed under Section 93005(c), the ~~Supervisor~~ Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and serve on the petitioner, the district, any known individuals or labor organizations purporting to act as

representatives of any employees directly affected by such an investigation and any other parties, a notice of hearing before a hearing officer at a time and place fixed or take other appropriate action. Any such notice of hearing may be amended or withdrawn by the ~~Supervisor~~ Director at any time prior to the commencement of the hearing and by the hearing officer after commencement and prior to the close of the hearing.

(c) If after investigation of the petition it appears to the ~~Supervisor~~ Director that there is no reasonable cause to believe that there exists a question whether a labor organization represents a majority of employees of the district in an appropriate unit, or if the ~~Supervisor~~ Director determines that the petition has not been filed in accordance with these regulations, the ~~Supervisor~~ Director shall have the power to dismiss the petition without a hearing or approve the withdrawal of the petition.

(d) Any determination made by the ~~Supervisor~~ Director pursuant to this Section may be appealed to the Board itself in accordance with Sections 32350 through 32380 or, if applicable, in accordance with and subject to the limitations provided in Section 32200.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93030. Conduct of Hearings.

(a) Hearings shall be conducted by a hearing officer appointed by the ~~Supervisor~~ Director and shall be open to the public unless otherwise ordered by the hearing officer. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which SMCS, the ~~Supervisor~~ Director, the hearing officer, or the Board may discharge their duties under the Laws described in Section 93000. A hearing officer may be substituted by the ~~Supervisor~~ Director at any time.

(b) The hearing officer may, in his or her discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at a hearing or by other appropriate notice.

(c) All motions, including motions for intervention pursuant to Section 93035 below, shall be in writing, or if made at the hearing may be stated orally on the record, and shall briefly state the action or relief sought and the grounds for such motion. An original and one copy of written motions shall be filed with the hearing officer, and a copy thereof shall immediately be served by the moving party upon each of the other parties to the proceeding. The hearing officer shall rule either orally on the record or in writing upon all motions, including all motions to dismiss a petition.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521,

Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93045. Subpoenas.

(a) Application for subpoenas may be filed in writing by any party with the ~~Supervisor~~ Director if made prior to the hearing, and with the hearing officer if made at the hearing. The ~~Supervisor~~ Director or the hearing officer shall forthwith cause the subpoenas to be issued. Applications for subpoenas may be made ex parte. Any person served with a subpoena, whether ad testificandum or duces tecum, who does not intend to comply therewith shall within five days after the date of service file with the hearing officer a petition to revoke the subpoena. Notice of the filing of a petition to revoke shall be promptly given by the hearing officer to the party at whose request the subpoena was issued. The hearing officer shall revoke a subpoena if in his or her opinion the evidence sought does not relate to any matter under investigation or in question in the proceedings, is not relevant, or the subpoena does not describe with sufficient particularity the evidence requested, or if for any other reason the subpoena is otherwise invalid. The hearing officer shall make a statement in writing or on the record of the procedural or other grounds for this ruling. Filing with reference to the revocation of a subpoena shall not become part of the record except upon the request of the party aggrieved by the ruling on the petition. Persons compelled to produce written evidence are entitled to retain the same, but the party compelling its production may pay the cost of procuring a copy thereof to be submitted in evidence in lieu of the original.

(b) Witnesses summoned before the hearing officer shall be paid by the party for whom the witness appears.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93055. Duties of Hearing Officer Following Hearing.

Upon the close of a hearing, the hearing officer shall as expeditiously as possible prepare a proposed decision and order which shall include a written analysis of the record and of the arguments of the parties, findings of fact and a determination upon the issues submitted to the hearing officer. If the hearing officer determines that an election is to be held, the hearing officer shall set forth the appropriate unit or units within which such election(s) shall be held and the categories of employees who shall be eligible to vote in such unit or units. The original of such proposed decision and order, together with the petition or petitions, notices of hearing, written motions, rulings or orders, the transcript of the hearing, stipulations, exhibits and

documentary evidence, affidavits of service, depositions, and briefs or other legal memoranda submitted by the parties - shall constitute the record in the proceedings and shall promptly be forwarded to the ~~Supervisor~~ Director by the hearing officer. The decision of the hearing officer shall be final if not appealed as set forth in Section 93060. A copy of the proposed decision and order shall concurrently be served upon each of the parties by the hearing officer.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93070. Election Procedures.

(a) All elections shall be conducted by SMCS and shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, any participant, upon its prompt request to and approval thereof by the ~~Supervisor~~ Director, whose decision shall be final, may have its name removed from the ballot. Provided, however, that in a proceeding involving a district-filed petition or a petition for decertification, the labor organization certified, currently recognized or found to be seeking recognition may not have its name removed from the ballot without timely notice in writing to all parties and to SMCS disclaiming any representation interest among the employees in the unit.

Any party may be represented by observers of its own selection, subject to such limitations as SMCS may prescribe. Any party and any agent or representative of SMCS may challenge for good cause the eligibility of any person to vote in the election. Each challenged ballot shall be impounded. Upon the conclusion of the election SMCS shall issue a tally of the ballots to each party. Within five days thereafter any party may file with SMCS two copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons for the objections. The objecting party shall immediately serve a copy of such objections upon each other party and file with SMCS proof of service and shall, upon request, promptly furnish evidence to support the objections.

(b) If (1) no objections are filed within the time specified in subsection (a) above, and (2) any challenged ballots are insufficient in number to affect the results of the election, and (3) no runoff election is to be held pursuant to Section 93075 below, SMCS shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate; and the case will be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the ~~Supervisor~~ Director shall investigate such objections or challenges, or both, and shall prepare and serve upon the parties a report on such objections or challenged ballots, or both. Within 10 days from the date of issuance of the report on such objections or challenged ballots, or within such additional period as the ~~Supervisor~~ Director may allow upon written application for

extension made within such 10-day period, any party may file with the ~~Supervisor~~ Director an original of exceptions to such report. Concurrently upon the filing of such exceptions, the filing party shall serve a copy upon each of the other parties, and proof thereof shall be promptly filed with the ~~Supervisor~~ Director. If no exceptions are filed to such report within the time permitted, the ~~Supervisor~~ Director may issue a written decision in conformity with such report, as to the validity of such objections or challenges or may make other disposition of the case based on an administrative investigation or in the exercise of reasonable discretion, and SMCS shall thereupon promptly act to close the case in accordance with such decision.

(d) If exceptions are filed, either to the report on challenged ballots or objections, or both if it is a consolidated report, the ~~Supervisor~~ Director shall appoint a hearing officer to examine the exceptions and make recommendations. If it appears to the hearing officer that such exceptions do not raise substantial and material factual issues with respect to the conduct of the election or conduct affecting the results of the elections, the hearing officer may make written recommendations to the ~~Supervisor~~ Director forthwith, and shall concurrently serve copies of said recommendations upon the parties. Within 10 days from the date of issuance of the aforesaid recommendations, or within such additional period as the ~~Supervisor~~ Director may allow upon written application for extension made within the 10-day period, any party may file with the Board itself an original and five copies of exceptions to the hearing officer's recommendations, in accordance with the provisions of Section 93065. Concurrently upon the filing of such exceptions, the filing party shall serve a copy upon each of the other parties and proof thereof shall be promptly filed with the Board.

(e) If it appears to the hearing officer that any exceptions filed to the report of the ~~Supervisor~~ Director on challenged ballots or objections raise substantial and material factual issues, the hearing officer shall cause to be served upon the parties a notice of hearing on said exceptions, which notice shall be given at least 10 days in advance of the date specified for the hearing. The hearing shall be conducted by the hearing officer in accordance with the provisions of Sections 93030, 93040, 93045, and 93050 insofar as applicable. Upon the close of the hearing, the hearing officer shall prepare and deliver to the ~~Supervisor~~ Director a proposed decision resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the challenges or objections, or both if it be a consolidated matter. Said decision, - together with (1) the notice of hearing, (2) motions, (3) rulings, (4) orders, (5) transcript of the hearing, (6) stipulations, (7) exceptions, (8) documentary evidence and briefs, (9) objections to the conduct of the election or conduct affecting the results of the election, (10) the report of ~~Supervisor~~ Director on such objections, (11) the report of ~~Supervisor~~ Director on challenged ballots, (12) exceptions to the report of the ~~Supervisor~~ Director on objections or to the report on challenged ballots, and (13) the record previously made, - shall constitute the record in the case. A copy of the hearing officer's proposed decision shall immediately be served upon each of the parties, where-upon any of the parties may file exceptions to said report within the same time limitations and requirements as to service, and proof thereof, as are provided for in the case of exceptions filed under subsection (d) of this section.

(f) After the period for the filing of exceptions under subsection (d) or (e) has expired the Board shall issue a written decision and serve copies upon the parties. If the hearing officer has issued recommendations under subsection (d), finding that the exceptions to the report of the ~~Supervisor~~ Director do not raise substantial and material factual issues, and exceptions to such

recommendations have been filed, and after consideration of such exceptions the Board decides that the exceptions to the report of the ~~Supervisor~~ Director do raise substantial and material factual issues, the Board shall direct the hearing officer to issue a notice of hearing, whereupon the procedures for a hearing and the issuance of the hearing officer's report provided for in subsection (e) of this section (including the provision for filing exceptions to the hearing officer's report) shall be followed. The Board may adopt the recommendations of the hearing officer issued under subsection (d) or the proposed decision of the hearing officer issued under subsection (e) as its own. SMCS shall thereafter promptly proceed to take such action as may be called for by the decision of the Board, after which the case will be closed.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.

93075. Runoff Elections.

(a) SMCS shall conduct a runoff election when an election in which a ballot providing for not less than three choices (i.e., at least two representatives and “neither” or “none”) results in no choice receiving a majority of the valid ballots cast. The runoff election shall be held promptly following final disposition of any challenges, objections or exceptions which followed the prior election as provided in Section 93070. Only one runoff election shall be held pursuant to this section.

(b) Employees who were eligible to vote in the original election and who are employed in an eligible category on the date of the runoff election shall be the only employees eligible to vote.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the highest and second highest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and “neither” or “none” is equally divided among the several choices, or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the ~~Supervisor~~ Director shall declare the first election a nullity and shall conduct another election among the three choices which received the greatest number of ballots in the original election; provided that in the event there was a tie in the original election between the third and fourth choices or among the third, fourth and other choices, the ~~Supervisor~~ Director shall in the runoff election include on the ballot all such tied choices. In the event two or more choices receive the same number of ballots, and if either (1) there are no challenged ballots which would affect the results of the election, or (2) after all challenges have been disposed of it is found that all eligible voters have cast valid ballots, there shall be no runoff election and the petition shall be dismissed. Only one such further election pursuant to this subsection (d) may be held.

(e) The provisions of Section 93070 above shall be applicable to a runoff election.

Note: Authority cited: Sections 3541.3(g) and 3603, Government Code; and Sections 30751, 40122, 70122, 90300, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Appendix 1, Section 4.4, and Appendix 2, Section 13.91, Public Utilities Code. Reference: Sections 4.4, 13.91, 25052, 28851, 30751, 40122, 50121, 70122, 90300, 95651, 98162.5, 100301, 101344, 102403, 103401, 120505 and 125521, Public Utilities Code. Additional reference: Labor Management Relations Act, 1947, Section 9, 29 USC Section 159; 29 CFR Sections 102.60-102.72.