

## **INITIAL STATEMENT OF REASONS**

### **PROBLEM STATEMENT**

The proposed regulations update the Public Employment Relations Board's (PERB or Board) rules that govern the circumstances requiring Board members and PERB employees to recuse themselves from proceedings, the filing of exceptions to Proposed Decisions, the use of discovery and motions in formal hearings, standards for obtaining continuances of a formal hearing. In addition, the proposed regulations update the fee structure for facilitation services by State Mediation and Conciliation Service (SMCS), along with other technical changes.

Over time, the Legislature has continued to place additional public employers under PERB's jurisdictions, which, as a consequence, has added more than two million public employees and their associated caseloads to the Board's jurisdiction. As a result, PERB has continued to evaluate changes to case processing intended to be more efficient and streamlined. On April 13, 2017, the Board approved a Case Processing Efficiency Initiative to generate ideas for the improvement and streamlining of case processing. The Board solicited feedback from our staff and constituents on the updates needed to make our proceedings efficient and user-friendly, keeping in mind that many constituents are non-attorneys or pro per litigants unfamiliar with legal procedures in an administrative law setting. Here, it is notable that PERB's case-adjudication processes differ from other judicial forums in that non-attorney parties may not only self-represent (pro per litigants) but may be represented by non-attorney representatives. It is therefore not uncommon for non-attorneys to appear on behalf of individuals or organizations and navigate their way through PERB's case adjudication processes and the corresponding regulations. As revealed through the stakeholder meetings that were part of the Case Processing Efficiency Initiative, many of PERB's case processing regulations are unnecessarily complicated, incomplete, obsolete, or ambiguous. These problems often cause litigants to commit errors or missteps, which delay case adjudication. Aside from the delays, these errors create additional work for PERB's attorneys and judges. For this reason, the Board concluded it was necessary to amend the regulations to make them user-friendly, detailed, and understandable.

On June 14, 2018, the Board approved the Case Processing Efficiency Initiative Report, which included a number of recommendations. These proposed regulations incorporate some of those recommendations made by staff and our constituents.

### **ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS**

As part of PERB's Case Processing Efficiency Initiative, the Board seeks to make the agency's procedures for case processing easier to understand and therefore more accessible to non-attorney parties and representatives. In this, PERB determined that it

needed to amend many of its regulations to eliminate ambiguities, add missing information, and consolidate or remove redundancies. By making these changes, the proposed regulations will reduce case processing errors, which, in turn, will improve case processing times. In addition, the proposed regulations will make case adjudication more consistent. As one example, PERB's rules provide that a party may file a statement of exceptions to a Proposed Decision, and the opposing party may file a response brief to the statement of exceptions. The rules, however, are silent on whether a party may file a reply brief after the opposing party files its response. This has resulted in some parties filing a reply brief while other parties foregoing a reply brief, often because they did not know whether a reply brief was authorized by the regulations. The proposed regulations add a new rule that expressly authorizes reply briefs with specific word limits. This assists the Board by providing full briefing in a concise and detailed manner.

One proposed change is a result of circumstances that resulted from the COVID-19 pandemic. In particular, PERB's current regulations include no rules to govern the use of video conferencing to conduct formal hearings. In response to this problem, the proposed regulations authorize administrative law judges to determine the location of a formal hearing, and whether parties, representatives, and witnesses will participate in a hearing either in-person, telephonically, by video, or a combination. PERB also seeks to eliminate inefficient regulations. For example, the current regulations allow parties to request a continuance of a formal hearing at any time up to five days before the hearing, but the rule treats all requests equal regardless if the request comes 5 days or 30 days before a hearing. Because scheduling impacts are greater when a request is made less than a week before a hearing, PERB seeks to update its continuance regulation to include different standards for obtaining a continuance, each standard dependent on how close to the hearing a party makes the request.

The proposed regulations also close information gaps. As one example, PERB's regulation describing the circumstances that require PERB employees to recuse themselves from a case do not cover all PERB employees involved in case investigations and adjudication. In particular, the current regulation does not expressly cover Legal Advisors, the General Counsel, Chief Administrative Law Judge, Executive Director, PERB officers, employees, or contractors. The proposed regulation closes this gap in coverage by applying the recusal regulation to those individuals. Similarly, PERB's current regulation governing the use of subpoenas does not include the detailed information that is typically found in subpoena rules used by courts and other administrative law forums. As a result, the current regulation lacks the details to best guide constituents on how to obtain, serve, challenge, or enforce a subpoena. The proposed regulation solves the problem by defining the different types of subpoenas; specifying the content needed for each type of subpoena; describing the method of

serving a subpoena on the witness; adding rules for motions that seek to extend the date for production of documents, for revoking or limiting a subpoena, and to enforce a subpoena, as well as other changes that clarify the use of subpoenas.

Essentially, the proposed regulations are a continuation of the Boards efforts to update its case processing regulations so as to provide constituents with easy to understand yet comprehensive rules on case processing.

## **SECTION-BY-SECTION EXPLANATION FOR ADOPTION**

### **A. Adoption of New Sections**

**Proposed Section 32312** adds a provision to allow the filing of a reply brief in support of a statement of exceptions to a decision by a Board agent.

### **B. Amendments to the Text of Existing Sections**

**Section 32056** provides definitions for State Mediation and Conciliation Service and the officer that oversees that division. The amendment replaces the term “Supervisor” with “Director” as the definition for the officer that oversees State Mediation and Conciliation Service.

**Section 32060** states that the Board itself, the General Counsel, the Chief Administrative Law Judge, and the Executive Director are located in the headquarters office. The proposed amendment adds the Director of State Mediation and Conciliation Services as being located in the headquarters office.

**Section 32110** provides electronic filing requirements. The proposed amendment corrects a typographical error that cites to the incorrect subdivision which sets size limits on a Portable PDF.

**Section 32121** describes the appropriate location for filing documents with State Mediation and Conciliation Service. The proposed changes would replace the San Francisco Regional office with the Sacramento Regional Office as the office to file matters with State Mediation and Conciliation Service.

**Section 32140** describes the proper recipient for service of process. The proposed amendment removes the reference to service by facsimile, which is no longer authorized by the regulations. In addition, the proposed change adds “other public school employers” to the list of public entities authorized to receive service of process in a PERB proceeding.

**Section 32150** describes the issuance of subpoenas in formal hearings. The proposed changes would define the different types of subpoenas; specify the

content needed for each type of subpoena; describe the method of serving a subpoena on a witness; add rules for motions that seek to extend the date for production of documents, for revoking or limiting a subpoena, and to enforce a subpoena, as well as other changes that clarify the use of subpoenas.

**Section 32155** describes the grounds for disqualifying a Board agent or Board Member from participating in PERB proceedings. The proposed changes would describe grounds for recusal of Board Members and Board agents, but also adds the General Counsel, Chief Administrative Law Judge, Legal Advisors, conciliators, mediators, and other PERB officers, employees, or contractors as being subject to recusal.

**Section 32170** describes the powers and the duties of a Board agent conducting a hearing. The proposed change now describes the “authority” of a Board agent conducting a hearing. The proposed change includes definitions for “Prehearing conference”, “Formal Hearing”, and “Hearing”. The proposed amendment further authorizes the use of video conferencing to conduct hearings and describes a Board agent’s authority to address motions during a hearing, including motions related to protective orders.

**Section 32180** concerns the rights of parties during a hearing. The proposed change provides that parties may self-represent, be represented by counsel, or be represented by a non-attorney representative. The proposed amendment gives a Board agent the authority to decide the best forum to conduct a hearing, including the use of a video hearing.

**Section 32190** concerns motions filed with PERB. The proposed change would establish that the rules governing motions apply only after the Office of the General Counsel issues a complaint. The proposed regulation also designates deadlines for the filing of certain motions, as well as longer briefing schedules for those motions.

**Section 32205** concerns requests for continuances during a formal hearing. The proposed change includes additional rules for parties requesting a continuance, which differ based on the number of days the request is made prior to a formal hearing. The proposed regulation also includes new filing requirements and describes the grounds that the administrative law judge considers when ruling on a request for a continuance.

**Section 32300** concerns the filing of exceptions with the Board itself to a Proposed Decision. The proposed change eliminates the requirement that parties file a brief along with the statement of exceptions, describes the required content of the statement of exceptions, sets a 14,000 word limit, and describes the grounds that the Board will consider in its decision.

**Section 32310** concerns a party's response to exceptions filed with the Board itself. The proposed change sets forth the required content to a response to a statement of exceptions and establishes a word limit to that response.

**Proposed Section 32312** concerns the filing of a reply brief in support of a statement of exceptions. The proposed section authorizes parties to file a reply brief after the opposing party files its response to a statement of exceptions. The proposed section places a 5000 word limit on a reply brief unless the Board permits a longer brief.

**Section 32720** concerns the Board's authority to conduct representation elections. The proposed change makes clear that section 32720 does not apply to elections for transit districts, or elections under the under the Meyers-Milias Brown Act, Trial Court Act, or Court Interpreter Act when conducted by State Mediation and Conciliation Service under specified circumstances.

**Section 32792** concerns a party's requests that the Board determine impasse and appoint a mediator. The proposed change makes clear that section 32792 applies only to the Ralph C. Dills Act, Educational Employment Relations Act, and Higher Education Employer-Employee Relations Act.

**Section 32998** concerns reimbursement rates for service by State Mediation and Conciliation Service. The proposed change limits the services to facilitation services and increases the rates for those service.

**Section 32999** concerns representation and agency shop elections by State Mediation and Conciliation Service. The proposed change specifies that section 32999 does not apply to elections conducted by the Office of the General Counsel or an agency shop election.

**Section 93000** provides definitions for matters involving transit districts. The proposed change replaces the term "Supervisor" with "Director" to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93025** concerns investigations by State Mediation and Conciliation Service of representation matters involving transit districts. The proposed change replaces the term "Supervisor" with "Director" to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93030** concerns hearings by State Mediation and Conciliation Service in representation matters involving transit districts. The proposed change replaces the term "Supervisor" with "Director" to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93045** concerns the issuance of subpoenas by State Mediation and Conciliation Service in representation matters involving transit districts. The proposed change replaces the term “Supervisor” with “Director” to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93055** concerns the duties of a hearing officer with State Mediation and Conciliation Service following a hearing in a representation matter involving a transit district. The proposed change replaces the term “Supervisor” with “Director” to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93070** concerns election procedures by State Mediation and Conciliation Service in representation matters involving transit districts. The proposed change replaces the term “Supervisor” with “Director” to describe the PERB officer that oversees State Mediation and Conciliation Service.

**Section 93075** concerns run-off election procedures by State Mediation and Conciliation Service in representation matters involving transit districts. The proposed change replaces the term “Supervisor” with “Director” to describe the PERB officer that oversees State Mediation and Conciliation Service.

**C. Amendments to the Authority and Reference Only**

None

**TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

In April 2017, the Board approved a Case Processing Efficiency Initiative to generate ideas on improving and streamlining the processing of cases. PERB engaged constituents and staff in the Los Angeles, San Francisco, and Sacramento regional offices to discuss changes the Board could consider to process our workload more efficiently. Preliminary results of these meetings were tabulated and presented for public comments in March 2018. On June 14, 2018, the Board met in open session to consider the final recommended report and vote on changes to enact. Among the approved initiatives, the Board adopted a number of changes to the PERB regulations that address recusals, exceptions to Proposed Decisions, discovery and motion practice, continuances, and SMCS. Those, as well as other proposals, are described in the Case Processing Efficiency Initiative Report.

**ECONOMIC IMPACT ASSESSMENT (Government Code section 11346.3(b))**

The proposed regulations are designed to update its processes and procedures for law and motion practice, continuances, exceptions to Proposed Decisions, pre-hearing

discovery, and staff recusals, making them user-friendly, detailed, and intelligible. In addition, the proposed regulations update the fee structures for matters filed with SMCS, along with other technical changes.

In accordance with Government Code Section 11346.3(b), PERB has made the following assessments regarding the proposed regulations:

#### Creation or Elimination of Jobs Within the State of California

The proposed regulations are designed to improve PERB's case processing procedures by making the rules more efficient, comprehensible, and detailed. In doing so, no jobs in California will be created or eliminated.

#### Creation of New Businesses or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to improve PERB's case processing procedures by making the rules more efficient, comprehensible, and detailed. In making these changes, no new businesses will be created, or existing businesses eliminated in California, and the ability of California businesses to compete with businesses in other states will not be impacted.

#### Expansion of Businesses Within the State of California

The proposed regulations are designed to improve PERB's case processing procedures by making the rules more efficient, comprehensible, and detailed. The only parties that will be affected by this regulatory action are public employers, public employees, and employee organizations. In updating PERB's case processing rules, no existing businesses in California will be expanded.

PERB will continue to investigate the potential for economic impact throughout this rulemaking process.

#### Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

By updating the updating PERB's case adjudication processes and procedures, PERB will improve public sector labor relations by providing processes that are efficient and, therefore, provider a quicker means for the Board to address labor disputes before those disputes escalate. This, in turn, will promote fuller communication between public employers and their employees in resolving disputes over wages, hours and other terms and conditions of employment. The proposed regulatory action will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. The proposed regulatory action will further the policies underlying prompt resolution of labor disputes by providing a process to expediently resolve alleged violations of

California's labor relations laws. California residents' general welfare will be benefitted by stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that California's public agencies and employees provide to California's communities.

In addition, the enhanced use of video conferencing in case adjudication provides PERB employees and constituents a safe means for telework during a public health crisis, as experienced in 2020 during the COVID-19 crisis. Despite the closure of PERB's offices and subsequent telework requirements, PERB has continued its full range of services to the public. The proposed regulations allow PERB and its constituents to experience the full range of PERB services, including evidentiary hearings on disputed matters.

### **INFORMATION RELIED UPON TO SUPPORT PERB'S INITIAL DETERMINATION THAT THE PROPOSED REGULATORY ACTION WILL NOT HAVE A SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS**

The public sector labor relations statutes that PERB is charged with enforcing set forth the rights and obligations of entities and individuals operating in the public sector. Because the public sector labor relations statutes that PERB is charged with enforcing is limited to the public sector, PERB has initially determined that the proposed regulatory action updating the regulations that govern the filing and processing of PERB cases will not have a significant adverse economic impact on business.

### **REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

PERB has not identified any adverse impacts on small business as a result of these proposed regulations and has not identified alternatives that would lessen any adverse impact on small business. Thus, no such alternative has been proposed.

### **MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT**

PERB's proposed regulations do not mandate the use of specific technologies or equipment.