



PersWatch

**Enhancing Benefits Through
Increased Accountability**

Kurato Shimada, Chair
Benefits & Program Administration Committee
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, CA 94229-2707

March 18, 2008

Dear Mr. Shimada:

On behalf of the [PERSWatch e-mail group](#), thank you for the opportunity to comment on California Public Employees' Retirement System (CalPERS) proposed amendments to California Code of Regulations (CCR), title 2, regarding elections. I would also like to thank you for accepting our recommendations to reduce the use of Social Security Number digits and the likelihood of identity theft. However, three concerns remain.

First, CCR, title 1, section 44 requires that notice of proposed changes after an initial 45-day notice be "mailed" to all persons who testify at the hearing, submit written comments, or request notification. I did all three and did not receive the notice that apparently went out on January 18, 2008.

Second, and more directly on the proposed language, section 554.3, subdivision (e), is unclear with reference to how many signatures are required on nomination petitions. The proposed rules appear to anticipate future underground regulations to be promulgated without complying with the Administrative Procedure Act (APA), "at a noticed public meeting" of the Board. At that meeting the Board must "consider the goals of ensuring candidates have a minimum level of support and providing members and retirees access to candidacy." While the Initial Statement of Reasons provides some elaboration, stating that 96 candidates is unmanageable, it offers no firm criteria as to how the number of signatures is to be determined.

The clarity standards of Title 1, section 16, require that regulations be meaningful to those "directly affected" by the rule and "cannot be reasonably and logically interpreted to have more than one meaning." It is highly unlikely that any two people reading the proposed provision requiring specified considerations would arrive at the same number of required signatures. The provision has no unambiguous specific meaning, since 250 or 1,000 could both be reasonably interpreted as lending a "minimal level of support" and a requirement of either number would certainly

provide “members and retirees access to candidacy.”

In its determination that certain CalPERS election forms and procedures constitute underground regulations ([2007 OAL Determination No. 1](#)), the Office of Administrative Law (OAL) noted that CalPERS could adopt a regulation “establishing the criteria for setting the dates for submission of documents and the election itself.” They provided an example of the date of the election, which could be set at “three months before expiration of the term for which the election is held.” Under such a rule, any CalPERS member could determine the exact date of the election by simply counting back three months from the date a specific term is to expire.

Under proposed Section 554.3, subdivision (e), members would only know how many signatures are required once the Board sets the number. That can only be done legally through an APA rulemaking. As OAL warned in its 2007 Determination, “to the extent that requirements in the Notice of Elections meet the definition of a ‘regulation’ that information must be adopted pursuant to the APA.”

The proposed rule is a regulation which implements, interprets or makes specific the law administered by CalPERS, since the number of signatures required for election petitions is not specified in statute. Pursuant to Government Code section 11346, the procedures established in the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”

Additionally, the proposed amendments are not rules relating only to “internal management,” as that term is used in Government Code section 11340.9, subdivision (d), since neither nominees nor members are part of “internal management.” Additionally, in the words of *Poschman v. Dumke*, these are matters of “serious consequence involving an important public interest,” since the regulations impact all Californians. CalPERS cites no exception to the need to meet APA requirements in its attempt to authorize future changes in the number of valid signatures “at a noticed public meeting” and none apply.

The proposed provisions also fail the “necessity” standard of title 1, section 10, since the Initial Statement of Reasons contains no substantial evidence as to why the same number of signatures cannot be applied to all Board elections. In fact, since 1993 every Board election has required 250 signatures and that number has not varied based on the type of election.

It is highly unlikely that CalPERS will ever again see anything like 96 candidates in one election because candidates are now required to comply with the Political Reform Act (at Government Code section 81000 et seq.) and to file campaign statements of contributions and expenditures, among other things. CalPERS offers no substantial evidence or even speculation as to the necessity of why more than 250 signatures would ever be needed to ensure a minimum level of support and provide access to candidacy.

The Board could easily cure defects in the proposed rule by setting a firm requirement of 250 signatures or by specifying that X% (e.g., 1/10 of 1%) of signatures must be obtained from the population eligible to vote in the election.

Our last concern is that the Nomination Acceptance/Ballot Designation Form contained in proposed CCR, title 2, section 554.3, subdivision (g), contains the term "Proposed Ballot Designation" and the direction to "See attached Criteria." However, no attachment is included in the noticed materials. Therefore, it cannot be determined if the criteria meet clarity, necessity and other required standards. I presume the attachment was supposed to be a reprint of section 554.10. If that is the case, then you can simply reference that section on the form or include it as an attachment.

Summary of Recommendations

California Code of Regulations, title 2, sections 554.3, should be amended to:

1. Delete provisions, which appear to assert CalPERS has the authority to amend its regulations at a "noticed public meeting" without going through the APA.
2. Clarify how many valid signatures are required to meet the requirements for nomination.
3. Properly reference section 554.10 in section 554.3, subdivision (g) or include the specified "attached criteria."

Once again, I would like to remind the Board that Government Code section 11346.45 requires state agencies to "involve parties who would be subject to proposed regulations in public discussions" prior to publication of the first public notice if the regulations are "complex." When I headed legislative and rulemaking functions for a state department we routinely held workshops for almost all our rulemakings. I think if you surveyed other state agencies you would find that others do the same because it improves understanding and the final product.

Please contact me at (916) 869-2402 with any questions you may have concerning these comments or the suggested changes.

Sincerely,

James McRitchie