

# FIVE YEAR RULES REVIEW REPORT

## Title 2. Administration Chapter 5.1. State Personnel Board Article 1. General Provisions

### FOR GOVERNOR'S REGULATORY REVIEW COUNCIL (GRRC)

Submitted: February 26, 2013

## **EXEMPT RULEMAKING PURSUANT TO H.B. 2571**

The Board pursued an exempt rulemaking because House Bill 2571 made changes to the Board's governing statutes which required conforming changes to R2-5.1-101 and R2-5.1-103 due to the Governor's efforts regarding personnel reform. The exempt rulemaking was filed with the Secretary of State's office on October 24, 2012 with an effective date of October 29, 2012.

The changes made were minimal in nature. In R2-5.1-101, Definitions 1, 2, and 3 were modified to conform to the statutory changes regarding "covered" employees, the statute was renumbered, and the appealable actions were redefined. In R2-5.1-103, Appeal Procedures, Subsection (A), a reference to "covered" employee was added, the statutory reference was renumbered, and in Subsection (S), again, just the statutory reference was renumbered.

## INFORMATION THAT IS IDENTICAL FOR ALL OF THE RULES

### 3. STATUTORY AUTHORITY

General: A.R.S. §41-781, §41-782, §41-783, and §38-531 et seq.

Specific: A.R.S. §41-782

### 4. CONSISTENCY

The Board determined that the rules are consistent with other Board rules and Board statutes, and are fairly and consistently enforced.

### 6. ECONOMIC, SMALL BUSINESS AND CONSUMER IMPACT COMPARISON

The Board has two rules that were unchanged during the exempt rulemaking process discussed earlier, R2-5.1-102 Personnel Board Procedures and R2-5.1-104 Complaint Procedures. Complaints are prohibited personnel practice complaints, commonly referred to as whistleblower complaints. In 2011, the definition of an employee in the whistleblower complaint statute changed to include law enforcement officers of a city or town.

The Board's 2003 economic, small business and consumer impact statement found that the existing rules would have a minimal, if any, financial impact on small businesses or consumers since the rulemaking was intended to clarify

existing processes. The Board believes this to be the case. R2-5.1-102 concerns the creation of the Board's meeting notices, mailing of agendas, and taking and delivering of Board meeting minutes. The Board has put the meeting notices, agendas, and minutes on the agency's website which means interested parties may access that information readily from the internet. And with the addition of R2-5.1-104 for the whistleblower complaints, parties have a better understanding of the process for filing a complaint. The Board also provides a copy of the rules to every appellant and complainant who files an appeal with the Board.

The effects of the recent legislative changes regarding personnel reform have yet to be fully recognized. Approximately 40 percent of the covered work force decided to go uncovered, giving up their appeal rights. The Board received 83 appeals and complaints in fiscal year 2012. So far for fiscal year 2013 the Board has received 49 cases as of April 17, 2013. In 2012, 11 whistleblower complaints were filed, and so far this year, 2013, 11 complaints have been filed. The increase in whistleblowers is due to the law enforcement officers of cities and towns definition being added to the statute.

There was no economic burden other than the minimal expenses to the Board, the Secretary of State's Office, and the Governor's Regulatory Review Council for the rulemaking process.

The rules can be downloaded directly from the Personnel Board's website or ordered and obtained through the Office of the Secretary of State. As stated previously, the Board also provides at no cost a copy of the Board's rules with every appeal or complaint filed with the agency.

## 7. BUSINESS COMPETITIVENESS

No analysis was submitted to the Board comparing the rules' impact on this state's business competitiveness as compared to the competitiveness of businesses in other states.

## 8. PREVIOUS FIVE YEAR REVIEW PROCESS

The Council approved the Board's previous five year review report on February 5, 2008. During the preparation for the 2008 five year review, the Board solicited comments from 115 individuals who may be affected by the Board's rules, including agency directors and attorneys who have practiced before the Board. It was determined after the Board considered the suggestions that were received that the rules needed to be amended as they contained unnecessary language and did not reflect procedures that should have been included, such as providing notice of meetings electronically, service of subpoenas, and exchange of exhibits.

The Board also held three open meetings with stakeholders during the preparation for the 2008 five year rules review to discuss the comments and suggestions that had been received, and the suggestions the Board agreed with and have included in the recommended rulemaking have been delineated in the individual sections of this report.

The Board intended to amend each of the rules and submit a rulemaking to GRRC in April 2009.

The Board had opened a rulemaking docket in April 2008, but due to Governor Brewer's moratorium on rulemaking instituted in January 2009, that rulemaking was not completed. The Board is planning on renewing the rulemaking, incorporating personnel reform changes that need to be included, and have it submitted to GRRC in August 2013.

## 9. BENEFITS OF THE RULES

The benefits of the rules outweigh the probable costs of the rules because the rules clarify the appeals process. Without the rules, appellants and complainants would not know the procedures for filing a complaint or appeal, or how the hearing progresses through to the Board making a final decision. There are minimal costs incurred due to copies of exhibits needing to be supplied to all parties involved in a hearing or motions/objections supplied to the opposing side in an appeal or complaint. Due process is the underlying objective of the rules, and even though there are a minimal burden and cost due to the need for copies of exhibits, without that minimal burden, there would be no due process for those who choose to file an appeal or complaint with the Board.

## 10. FEDERAL LAW

The rules are governed entirely by state law.

## 11. REGULATORY PERMITS, LICENSE OR AGENCY AUTHORIZATION

This section is not applicable because the Board does not issue regulatory permits, licenses, or agency authorizations. In addition, these rules were all adopted before July 29, 2010.

## **ANALYSIS OF INDIVIDUAL RULES**

### **R2-5.1-101. DEFINITIONS**

#### **1. EFFECTIVENESS**

This rule is needed to provide definitions for terms commonly used during the progression of an appeal or whistleblower complaint. The definitions, with the proposed changes, will be more effective because terms will be more understandable to stakeholders.

#### **2. WRITTEN CRITICISMS**

The Board, after the last five year rules review, opened a rulemaking docket in April 2008 but in January 2009 Governor Brewer instituted a moratorium on rulemaking. Due to the moratorium, the rulemaking endeavor was dropped.

A few comments were received prior to the moratorium which included comments from board members, hearing officers who conduct the appeal hearings for the Board, and the Board's attorney. Those comments, along with comments received from customer satisfaction surveys submitted during the previous five years were also reviewed to see whether any comments related to this rule. The following is a brief summary of the comments received:

- Ministerial changes should be made to the definitions.
- A glossary of commonly used legal terms should be included.

Other than the comments referenced above, no written criticisms were received during the previous five years concerning this rule.

## 5. CLARITY, CONCISENESS AND UNDERSTANDABILITY

The rule would be more clear, concise and understandable if:

- Repetitious and unnecessary language was deleted such as citing specific language from the statute in the definition for a “complaint” and removing the repetitive language in the definition for a “hearing officer.”
- New terms were added to define terms used throughout the rules (commonly used legal terms).

## 12. COURSE OF ACTION

This rule provides basic definitions and will be edited for brevity, clarity, and organization. A few new definitions will be added. As indicated in #5 above, the Board agrees with the comments and will incorporate the suggested changes in

its anticipated submission of a final rulemaking to the Governor's Regulatory Review Council in August 2013 to amend Rule R2-5.1-101.

## R2-5.1-102. PERSONNEL BOARD PROCEDURES

### 1. EFFECTIVENESS

The objective for this rule is to provide Board procedures for noticing meetings, sending out agendas, and recording the minutes of meetings. This is important to comply with the state's Open Meeting Law and to provide the public with as much information as possible regarding the Board's activities. The Board believes the rule is effective as it currently exists but could be more concise.

### 2. WRITTEN CRITICISMS

The Board, after the last five year rules review, opened a rulemaking docket in April 2008 but in January 2009 Governor Brewer instituted a moratorium on rulemaking. Due to the moratorium, the rulemaking endeavor was dropped.

A few comments were received prior to the moratorium which included comments from board members, hearing officers who conduct the appeal hearings for the Board, and the Board's attorney. Those comments, along with comments received from customer satisfaction surveys submitted during the previous five years were also reviewed to see whether any comments related to this rule. The following is a brief summary of the comments received:

- Consideration should be given to a provision to allow for electronic transmission of various items to and from the parties and the Board. The rule should include the use of email and/or electronic means when possible.

Other than the comments referenced above, no written criticisms were received during the previous five years concerning this rule.

## 5. CLARITY, CONCISENESS AND UNDERSTANDABILITY

The rule would be more clear, concise, and understandable if:

- Subsections were combined or deleted to eliminate redundancy.
- Language was added allowing the use of electronic means to provide the meeting notice to board members and state agencies.
- Language was amended removing the five business days mailing time for agendas and meeting notices prior to a Board meeting since the rule already states the notice must be as required by law.

## 12. COURSE OF ACTION

It is the opinion of the Board that some of the text is redundant and can be combined. Additional text is necessary to inform constituents of the Board's

desire to utilize electronic mechanisms as much as possible when mailing documents and obtaining information. The rule needs to be amended to clarify time limits in some instances, particularly regarding the mailing of agendas as mentioned in #5 above. The Board agrees with the comments delineated in #5 above and will propose making the changes. The Board anticipates submitting a final rulemaking to the Governor's Regulatory Review Council in August 2013 to amend Rule R2-5.1-102.

## R2-5.1-103. APPEAL PROCEDURES

### 1. EFFECTIVENESS

The objective of this rule is to clarify the procedures for an appeal hearing through the final Board order. Parties to appeals need to understand the procedures involved to provide for a more expeditious hearing process. The effectiveness of the rule, with the proposed changes, will meet that objective.

### 2. WRITTEN CRITICISMS

The Board, after the last five year rules review, opened a rulemaking docket in April 2008 but in January 2009 Governor Brewer instituted a moratorium on rulemaking. Due to the moratorium, the rulemaking endeavor was dropped.

A few comments were received prior to the moratorium which included comments from board members, hearing officers who conduct the appeal hearings for the Board, and the Board's attorney. Those comments, along with comments received from customer satisfaction surveys submitted during the previous five years were also reviewed to see whether any comments related to this rule. The following is a brief summary of the comments received:

- Allow disclosure of documents prior to a hearing to allow the appellant time to review the documentation.

- Let the hearing officer mediate disclosure arguments; do not mandate disclosure prior to hearings. Since the law states the technical rules of evidence do not apply to Board hearings, the hearing officers made these suggestions. They further suggested a list of witnesses and exhibits be exchanged rather than full disclosure of exhibits and witnesses.

Other than the comments referenced above, no written criticisms were received during the previous five years concerning this rule.

## 5. CLARITY, CONCISENESS AND UNDERSTANDABILITY

The rule would be more clear, concise, and understandable if:

- Subsections were combined or deleted to allow for reorganization of the information. The reorganization allowed for a “flow chart” of the appeal process following a somewhat linear line, rather than jumping from one topic to another.
- Language was added allowing the use of electronic transmission of documents by the parties and the Board.
- Additional provisions were added clarifying the procedure for requesting a change of hearing officer, time for hearing, burden of proof, failure to appear for a hearing, exchanging exhibits and witness lists, requesting and serving subpoenas, telephonic testimony, and withdrawal of appeals.

## 12. COURSE OF ACTION

It is the Board's opinion that additional text is necessary to inform constituents of changes in Board procedure. The rule needs additional text to clarify the procedure for requesting a change of hearing officer; time of hearing; burden of proof; failure to appear for a hearing; exchanging exhibits and witness lists; requesting and serving subpoenas; telephonic testimony; and withdrawal of appeals. The Board agrees with the comments delineated in #5 above and will incorporate them in its proposed rulemaking. The Board anticipates submitting a final rulemaking to the Governor's Regulatory Review Council in August 2013 to amend Rule R2-5.1-103.

## R2-5.1-104. COMPLAINT PROCEDURES

### 1. EFFECTIVENESS

The objective of this rule is to clarify the procedures for a complaint hearing through the final Board order. Parties involved in complaints need to understand the procedures to provide for a more expeditious hearing process. The effectiveness of the rule, with the proposed changes, will meet that objective.

### 2. WRITTEN CRITICISMS

The Board, after the last five year rules review, opened a rulemaking docket in April 2008 but in January 2009 Governor Brewer instituted a moratorium on rulemaking. Due to the moratorium, the rulemaking endeavor was dropped.

A few comments were received prior to the moratorium which included comments from board members, hearing officers who conduct the complaint hearings for the Board, and the Board's attorney. Those comments, along with comments received from customer satisfaction surveys submitted during the previous five years were also reviewed to see whether any comments related to this rule. The following is a brief summary of the comments received:

- Allow disclosure of documents prior to a hearing to allow the complainant time to review the documentation.

- Let the hearing officer mediate disclosure arguments; do not mandate disclosure prior to hearings. Since the law states the technical rules of evidence do not apply to Board hearings, the hearing officers made these suggestions. They further suggested a list of witnesses and exhibits be exchanged rather than full disclosure of exhibits and witnesses.

Other than the comments referenced above, no written criticisms were received during the previous five years concerning this rule.

## 5. CLARITY, CONCISENESS AND UNDERSTANDABILITY

The rule would be more clear, concise, and understandable if:

- Subsections were combined or deleted to allow for reorganization of the information. The reorganization allowed for a “flow chart” of the complaint process following a somewhat linear line, rather than jumping from one topic to another.
- Language was added allowing the use of electronic transmission of documents by the parties and the Board.
- Additional provisions were added clarifying the procedure for requesting a change of hearing officer, time for hearing, burden of proof, failure to appear for a hearing, exchanging exhibits and witness lists, requesting and serving subpoenas, telephonic testimony, and withdrawal of complaints.

## 12. COURSE OF ACTION

It is the Board's opinion that additional text is necessary to inform constituents of changes in Board procedure. The rule needs additional text to clarify the procedure for requesting a change of hearing officer; time for hearing; burden of proof; failure to appear for hearing; exchanging exhibits and witness lists; requesting and serving subpoenas; telephonic testimony; and withdrawal of complaints. The Board agrees with the comments received in #5 above and will incorporate them in its proposed rulemaking. The Board anticipates submitting a final rulemaking to the Governor's Regulatory Review Council in August 2013 to amend Rule R2-5.1-104.