

Petition for Reconsideration

Please consider this a petition to the California Public Employees' Retirement System (CalPERS) under Government Code section 11340.6, subdivision (d) for reconsideration of your denial in full of the changes requested to California Code of Regulations, title 2, sections 554 and 554.6, of the election code. I have also attached a draft petition to the Office of Administrative Law (OAL) concerning additional CalPERS regulations on elections, which do not appear in Title 2 and are therefore, underground regulations.

In the attachment to Fred Buenrostro's letter dated March 29, 2006, CalPERS repeats its denial of my previous recommendation for amendment of California Code of Regulations, title 2, section 554 during a previous rulemaking that "removing the phrase 'directly involved in conducting a CalPERS election,'may be excessively broad, thus becoming vague in its application to non-election activities...Also, there is no showing of necessity at this time for making the regulation broader in coverage..."

Reason why CalPERS should reconsider:

1. The rule conflicts with other legal requirements, violating Government Code section 19990, subdivision (a), and California Code of Regulations, title 1, section 11342.2.
 - a. By limiting the prohibition against using his/her official position to those "directly involved in conducting a CalPERS election," CalPERS clearly implies that staff not directly involved are free to use the prestige or influence of their appointing authority to the advantage of one of the candidates. The rule conflicts with Government Code section 19990, subdivision (a), which prohibits State agency staff from "using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another."
 - b. California Code of Regulations, title 1, section 11342.2 establishes that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute."
2. Who is "directly involved"? Where is that term defined in the CalPERS regulations? With regard to the comment there is no showing of necessity, consider the following:
 - a. A violation of the law should be necessity enough to change the regulations.
 - b. Examples from the 1998 elections for the state member seat. I would be happy to provide documentation of each of these examples.
 - i. Staff produced a CalPERS newsletter, distributed just before the elections, prominently featuring the incumbent in a 3-page cover article. Were they "directly involved" in the election?
 - ii. The Chief of Public Affairs tried to get the incumbent's challenger to remove information from his Internet site concerning his efforts and success in obtaining closed door minutes and potential conflicts of interest. Was she "directly involved" in election?
 - iii. The CEO attacked the incumbent's challenger in the press, implying he was unqualified to comment on the legality of actions supported by the incumbent, which were later overturned in court. Was he "directly involved" in the election?
 - iv. The Chief Counsel, whose salary was in part determined by the incumbent, allowed the incumbent to violate the rules by changing his

- statement after the legal deadline so that he could address issues raised by the challenger. Was she “directly involved” in the election?
- v. The Board allowed the Chief Counsel to appoint a protest panel to determine, in part, if she had violated Board rules. Were they “directly involved”?
 - c. What legitimate reason does the Board have for allowing CalPERS staff to use their official position to influence the outcome of CalPERS elections? I would think that a conflict between CalPERS regulations and California statute would be necessity enough.

With regard to suggested amendments to California Code of Regulations, title 2, section 554.6, your response is again based on CalPERS’ response to my comments during the 2001 rulemaking. “Any ballot required by an instant runoff voting process may be confusing to CalPERS voters and may reduce voter turnout.”

Reason why CalPERS should reconsider: Frankly I found this statement by CalPERS staff offensive in 2001 and I find it doubly offensive as the basis for “respectfully” denying the current petition. Given that CalPERS serves public employees, given that public employees on average have substantially higher levels of education than private sector employees, and given recent experience with instant runoff voting, this statement should now be seen as an embarrassing lapse in judgment.

The implication is that public employees are too stupid to rank candidates. Yet, many studies of preschool children involve how they rank preferences in their environment. See, for example, “Preschool children's preferences and recall for stereotyped versus nonstereotyped stories” by Jerri Jaudon Kropp and Charles F. Halverson, ISSN: 0360-0025. CalPERS members are fully capable of ranking candidates. There is no evidence in your response that CalPERS considered the rationale offered in the petition or the history of experience with San Francisco elections since 2001.

As indicated in the petition, endorsers of instant runoff voting in civil elections include: USA Today, the Sacramento Bee, and the San Jose Mercury News. In San Francisco, a recent study by FairVote pointed to a near tripling of voter turnout under the new, highly preferred election system, over projections based on the previous runoff system. For more information see The Center for Voting and Democracy at <http://www.fairvote.org>.

The data from the two San Francisco IRV elections and the one Burlington election is clear:

- Voters can handle ranking their candidates.
- Exit poll results show that voters of all stripes prefer the system.
- There's no evidence that IRV discourages voters from participating. For example, drop-off rates for mayor (people showed up at the polls but didn't vote for mayor) were much lower under IRV than the previous couple mayor's races. And compared to a runoff, voter turnout under IRV is much higher.
- Spoiled ballots and drop-off in the IRV race were lower in Burlington than in the previous several mayoral races.

For San Francisco: studies of turnout, voter understanding and cost savings can be found at <http://www.sfrcv.com>. For Burlington, see <http://tinyurl.com/qkvbk>.

Please don't insult our intelligence. Public employees won't be anymore confused by instant runoff voting than voters in San Francisco or Burlington Vermont, where instant run-off voting has worked just fine.

Staff raised additional concerns in BPAC, Agenda Item 11, May 16, 2006. The following addresses those concerns.

1. IRV can result in no winner being selected. Yes, same as run-off. You could have a tie.
2. Fringe voters decide the winner.
 - a. The same "fringe voters" decide a runoff (assuming those who voted for candidates who make it to the runoff don't change their votes); it just takes longer.
 - b. "Fringe" is code for Green or other 3rd party. The dominant parties don't want IRV because voters can vote for who they really want, without fear of helping to elect the candidate they least want.
 - c. In San Francisco "it took days for the final results." Yes, as in most elections, unofficial election results were posted on election night. As in any other election, they continued counting absentee and provisional ballots for a couple weeks.
 - d. In the 11 recent public IRV elections (7 for supervisor in 2004 in SF, 3 citywide races in 2005, and 1 Burlington mayoral race in 2006), the candidate with the most first choices won every race, and every incumbent got re-elected. No "fringe candidates won."
3. Staff report says San Francisco approval "has not been extended." IRV vote is in San Francisco Charter, Section 13.102.
(http://www.sfgov.org/site/election_index.asp?id=27564) RCV/IRV "shall be use for the general municipal election in November 2002 and all subsequent elections." With 61% preferring IRV compared to 13% preferring a second ballot, changing the charter isn't likely.
4. Voter education required will nullify any savings.
 - a. Ranking preferences is an easy concept, understood by most 3 year olds.
 - b. The postcard mentioned in item A4 of agenda item 11 of the May 16th BPAC meeting could serve a dual purpose, including education. If not practical, CalPERS could simply include instructions with the ballot.
 - c. Confusion could lead to lower turnout. Use of Ranked Choice Voting (RCV) in San Francisco's November 2005 election increased voter participation in the decisive round of the Assessor-Recorder race by an estimated 120,000 voters. (Ranked Choice Voting and Voter Turnout in San Francisco's 2005 Election <http://www.sfrcv.com/reports/turnout.pdf>) I have never seen any evidence of lower turnout in IRV elections. What evidence does CalPERS have that IRV reduces turnout? I would happy to rebut an assertion of facts.

Please see attached for the beginning of allegations with regard to underground regulations. I have not included attachments, since the forms and rules referenced are those of CalPERS and I assume they are readily available to reviewing staff. However, I would be happy to forward these upon request.

Below is the body of the original petition.

Please consider this a petition to the California Public Employees' Retirement System (CalPERS) under Government Code section 11340.6, requesting amendments to the election code. I hope the advance notice of the petition, which I provided via your assistant Lanette Hunt on February 15th, was helpful in allowing more time for review since the 30 day response time required by section 11340.7 is so short.

I request amendments to California Code of Regulations, Title 2, sections 554 and 554.6, in order to:

1. Avoid possible conflicts of interest by CalPERS staff in the performance of their duties in elections, and
2. Change the system of board elections to assure board members will be elected by the greatest possible majority of CALPERS members using a single ballot by implementing an "instant runoff" vote-counting procedure.

The CalPERS Board of Administration has authority to make these amendments under Government Code sections 20120 and 20121.

Presented below are the requested changes, followed by the rationale for the request.

§554. Election of Board Members.

Board member elections shall be conducted by the Election Coordinator designated by the Executive Officer in accordance with procedures adopted by the Board.

All CalPERS staff directly involved in conducting Board elections shall be required to sign a statement that they have fully complied with the CalPERS Board election procedures and have faithfully performed their assigned duties in the election. These statements shall be on file with the CalPERS Executive Office and shall be completed each time an election is held. No CalPERS staff ~~directly involved in conducting a CalPERS election~~ shall use his/her official position to favor one candidate over another. Nothing in this section shall prohibit CalPERS staff who are eligible to vote in an election from exercising the same personal rights as other eligible voters.

Rationale: It does not matter if CalPERS staff is "directly involved" in conducting CalPERS elections or not involved at all, California Code of Regulations, Title 2, §558. Incompatible Activities Statement, subdivision (1) prohibits CalPERS staff from "using the prestige or influence of the state or PERS for the officer's or employee's private gain or advantage or the private gain of another." Using their official position to favor one candidate over

another violates this provision, since staff would be influencing the elections of CalPERS to provide advantages to one candidate over another. Similar provisions are contained in section 19990, subdivision (a) of the Government Code.

CalPERS election regulations must be consistent with these and other legal provisions, as required by Government Code section 11349(d). Additionally, Government Code section 11342.2 states that “no regulation is valid or effective unless consistent and not in conflict with the statute and reasonable necessary to effectuate the purpose of the statute.” Allowing CalPERS staff who are not directly involved in the election to use their official position to favor one candidate over another is not reasonably necessary.

§554.6. Ballot Counting and Instant Runoff Election.

(a) Ballot Specifications and Directions to Voters

Ballots approved under this section shall be simple and easy to understand, and in elections involving more than two candidates for one board position shall allow a voter to rank candidates for that office in order of choice. Sample ballots illustrating voting procedures shall be included in the instruction packet with ballots.

Directions provided to voters shall conform substantially to the following specifications, although subject to modification based on ballot design and vote counting equipment:

“Vote for candidates by indicating your first-choice candidate, your second-choice candidate and so on. Indicate your first choice by marking the number “1” beside a candidate's name, your second choice by marking the number “2” by that candidate's name, your third choice by marking the number “3,” and so on, for as many choices as you wish. You are free to rank only one candidate, but ranking additional candidates cannot help defeat your first-choice candidate. Do not mark the same number beside more than one candidate. Do not skip numbers.”

(b) Ballot Counting

Signed ballot envelopes shall not be opened until the deadline for final receipt of valid ballots. On the date specified in the Notice of Election at the location designated by CalPERS, the sealed signed envelopes containing the valid ballots shall be opened and canvassed publicly by an independent, neutral agent appointed by CalPERS for the purpose.

(1) In elections involving two or fewer candidates for the same board position, The the candidate having a majority of votes, or the winning lot as drawn by the Secretary of State in case of a tie vote, or the single candidate as provided in section 554.5(b), shall be certified by the Secretary of State as having been elected.

(2) In elections involving more than two candidates for the same board position the following procedures shall be used:

(A) The top marked choice on each ballot shall be counted initially by election officials.

(B) If any candidate receives a majority of the top choices, that candidate shall be certified by the Secretary of State as having been elected.

(C) If no candidate receives a majority of top choices, the agent shall conduct the instant runoff consisting of additional rounds of ballot counting.

(i) In every round of counting, subject to the rules of (iv) below, each ballot is counted as one vote for that ballot's highest ranked advancing candidate. "Advancing candidate" means a candidate for that office who has not been eliminated.

(ii) A candidate receiving a majority of valid votes in a round shall be certified by the Secretary of State as having been elected. If no candidate receives a majority of valid votes in a round, the candidate with the fewest votes shall be eliminated, and all ballots shall be recounted.

(iii) This process of eliminating the candidate with the fewest votes and recounting all ballots shall continue until one candidate receives a majority of the valid votes in a round.

(iv) If a ballot counting towards some candidate has no more available choices on it, that ballot shall be declared "exhausted" and shall not be counted in that round or any subsequent round. Ballots skipping numbers or eliminated candidate shall be counted for that voter's next clearly indicated choice. Ballots with two or more of the same number shall be not be counted in that round unless only one of the candidates with the duplicate ranking is an advancing candidate.

~~(b)~~ (c) Where the Board members elected under Government Code section 20090, subdivision (g)(1) are elected in the same election, the two positions shall be separately designated Position A and Position B. The position held by Charles Valdes on November 15, 2000 shall thereafter be designated Position A. The position held by William B. Rosenberg on November 15, 2000 shall thereafter be designated Position B.

~~The candidate receiving the majority vote for each position, either outright or after instant runoff rounds, shall be certified by the Secretary of State as having been elected. In the event that no candidate for any position receives a majority of votes (i.e., 50% of votes cast plus one vote), a runoff election will be conducted involving the two candidates who received the highest number of votes.~~

~~The amendments to this section adopted on March 21, 2001 shall become operative on January 16, 2002. The amendments to this section filed December 1, 1995 shall remain in effect until that time.~~

Rationale: In 1993, 96 candidates ran for two Board positions. One of the winning candidates received less 5.5% of the vote. We certainly can't say this was the candidate

most voters wanted. CalPERS corrected that situation a few years ago by requiring a runoff to ensure all board members are elected by a majority vote. However, as CalPERS recently experienced, such runoff elections are expensive, costing about \$1 million. I believe, and I hope the Board agrees, this is not the best use of our retirement funds.

The proposed amendments would institute instant runoff voting (IRV), which eliminates the "spoiler" impact of long-shot candidacies and avoids expense of runoff elections. IRV is equivalent to a series of runoff elections conducted by allowing voters to rank the candidates in order of preference, 1, 2, 3, and so on. The candidate who receives the fewest number of first choices from the voters would be eliminated in the first count round and all the ballots counting towards that candidate would be redistributed to the voters' second choice. Each successive count round eliminates the next lowest polling candidate, transferring those ballots, until one candidate achieves a majority.

Endorsers of instant runoff voting in civil elections include: USA Today, Sacramento Bee, and the San Jose Mercury News. Instant runoff voting has been implemented in San Francisco and other jurisdictions. In San Francisco, a recent study by FairVote pointed to a near tripling of voter turnout under the new, highly preferred election system, over projections based on the previous runoff system. For more information see The Center for Voting and Democracy at <http://www.fairvote.org>.

CalPERS has long been a leader in corporate governance, endorsing proxy access for shareholder director nominees, majority voting for directors, and even sponsoring SB 1207 (Alarcón) to make majority voting for directors the default for California corporations.

However, what if the CalPERS Board of Administration is successful, not only in requiring a majority vote default but also in obtaining shareholder access to the corporate proxy for director nominees? If suddenly there were dozens of contested elections each year, several may involve multiple candidates for the same position. Would the Board of Administration really want corporations to also go through the additional expense of a second proxy vote to decide run-offs?

CalPERS should set the standard with its own elections to the Board of Administration. Yes, ensure candidates are chosen by a consensus majority, but do it in the most economical way possible.

Thank you for your consideration. Please contact me at (916) 869-2402 with any questions you may have concerning this petition.

Sincerely,

James McRitchie