State of California

MEMORANDUM

Date: June 24, 1994

To: PERSONNEL MANAGEMENT LIAISONS Reference Code: 94-38

**THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:**

Personnel Officers
Labor Relations Officers

From: **Department of Personnel Administration**
Office of the Director

Subject: Pay-for-Performance (PFP) Rules for Managers and Supervisors

The Department of Personnel Administration (DPA) is beginning the process of adopting formal regulations to establish a PFP program for State managers and supervisors. This process will follow the rulemaking procedures prescribed by the Administrative Procedure Act (APA). The following rulemaking documents are attached to this memorandum:

- The Notice of Proposed Regulatory Action, which is being published in the California Regulatory Notice Register and contains important information concerning the public comment period and hearing for these proposed rules.
- The Informative Digest, which briefly summarizes the purpose of this rule action.
- The Initial Statement of Reasons, which provides a detailed discussion of the conditions and circumstances leading to this action, as well as an explanation of the proposed rules.
- The text of the proposed rules.

For managers, proposed Rule 599.799.1 will replace the PFP program that was in effect under former DPA Rule 599.799 from January 1, 1994 until April 27, 1994, when it was discontinued in response to a ruling by the Sacramento County Superior Court. One of the Court's findings was that the formal APA rulemaking process must be used to establish such a program.

Proposed Rule 599.799.2 will establish a PFP program for supervisors effective January 1, 1995. This is consistent with the plans described when the managerial PFP program was implemented in January 1994.

The proposed rules are based on the same fundamental concept as the earlier PFP rule, which is that periodic, general salary increases should be awarded to individuals based on their job performance, rather than be given to them automatically. As discussed in the attached Statement of Reasons, this is consistent with prevailing compensation practices (particularly in the private sector) and the State's need to achieve a maximum return from every expenditure.

Very similar rules are being proposed for managers and supervisors. They differ only with respect to effective date and the specific manner in which performance standards and appraisal systems are to be developed. The difference in effective dates arises from DPA's interest in making the managerial rule retroactive to January 1, 1994, so the period affected by the invalidation of former rule 599.799 can be covered. The difference in the way performance standards and appraisal systems are developed reflects statutory differences that are discussed further in the attached Statement of Reasons.

As specified in the Notice, the comment period on these rules runs through Thursday, August 18, 1994. There will also be a public hearing on Thursday, August 18, 1994, as detailed in the attached Notice. DPA welcomes comments and suggestions so that it can develop the most effective PFP system possible. If the comments received during the initial comment period and hearing lead to changes in the proposed rules, these changes will be published for further review before they are adopted. DPA hopes to complete this rulemaking process by late December 1994.

Questions concerning this process should be addressed to Richard Leijonflycht on (916) 324-9350, CALNET 454-9350. Further information on providing comments and testifying at the hearing is provided in the Notice.

Lillian Rowett
Chief Deputy Director

Attachments

CALIFORNIA CODE OF REGULATIONS

TITLE 2. ADMINISTRATION

CHAPTER 3. DEPARTMENT OF PERSONNEL ADMINISTRATION

## NOTICE OF PROPOSED REGULATORY ACTION

The Department of Personnel Administration (DPA) proposes to adopt the regulatory action described below after considering all comments, objections, or recommendations regarding the proposed action.

## PROPOSED REGULATORY ACTION

Notice is hereby given that DPA intends to add Sections 599.799.1 and 599.799.2 to Article 14, Subchapter 1, Chapter 3 of Title 2 of the California Administrative Code pursuant to Government Code sections 19815.4(d), 19826, 19829, 19832, 19992.8, 19992.9, 19992.10, 19992.11, 19992.12, 19992.13, and 19992.14. Proposed Section 599.799.1 will establish a Pay-for-Performance program, along with a related performance appraisal system, for State employees who are designated managerial. Section 599.799.2 will establish a similar program and system for State supervisors.

Copies of the proposed Sections 599.799.1 and 599.799.2 may be obtained from:

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Julie Lowe
(916) 324-9351, CALNET 454-9351

Any interested person may present written comments concerning the proposed code addition to:

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Richard Leijonflycht
(916) 324-9350, CALNET 454-9350

Comments must be received no later than 5:00 p.m., on Thursday, August 18, 1994 to be considered by DPA before it adopts Sections 599.799.1 and 599.799.2.

Any inquiries concerning the proposed rule actions should be directed to Richard Leijonflycht at (916) 324-9350, CALNET 454-9350.

DPA has prepared a written explanation of the reasons for adopting Sections 599.799.1 and 599.799.2 and has available the text and all of the information upon which the adoption is based.

A public hearing on this matter will be held on Thursday, August 18, 1994 beginning at 10:00 a.m. at:

First Floor Auditorium
744 P Street (OB #9)
Sacramento, California

The adoption of the proposed rules will not: 1) impose a cost on any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 or the Government Code; 2) result in any nondiscretionary cost or savings to local agencies; 3) result in any cost or savings in Federal funding to the State; 4) impose a mandate on local agencies or school districts; or 5) have any potential cost impact on private persons or businesses, including small businesses.

## ASSESSMENT OF JOB/BUSINESS CREATION OR ELIMINATION

The adoption of the proposed amendments to this regulation will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

## EFFECT ON HOUSING COST AND BUSINESS

The proposed regulatory action has no effect on housing costs and imposes no cost which would have an adverse economic impact on businesses including the ability of California businesses to compete with businesses in other states. No studies or data were relied upon in making this determination.

## FISCAL IMPACT

The addition of Sections 599.799.1 and 599.799.2 could slightly increase or decrease State agency costs for managerial salaries depending on how they apply the pay-for-performance provisions contained in it. This should not be significant, since current managerial pay rates already reflect previous performance pay decisions. Also, based on the State's experience with performance at the managerial level, it is not expected that the performance pay program would lead to widespread changes in supervisory salary levels. Consequently, DPA projects that this proposal will not have a significant cost impact.

DPA must determine that no alternative considered by the department would be more effective in carrying out the purposes for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

If the text of the proposed regulations is changed during or after the comment period or hearing, the full text of the revised regulations will be made available for public review at least 15 days before adoption.

The rulemaking file for this action contains the following documents on which DPA is relying in proposing the adoption of Rules 599.799.1 and 599.799.2. These are:

- Personnel Management in the State Service, which is the report resulting from an August 1979 study conducted by the Commission on California State Government Organization and Economy (Little Hoover Commission).
- Government Operations Review (Personnel section), which is a report resulting from a 1982 study by the Assembly Office of Research.
- 1992-93 American Compensation Association Salary Budget Survey.
- 1993/94 Top Management Report (Wyatt Data Services).
- 1992/93 Industry Report on Supervisory Management Compensation (Wyatt Data Services).
- Preliminary data from the 1994 Mercer California Benchmark Survey.
- The Mercer 1993-94 Compensation Planning Survey.
- The October 1990 Pay for Performance report prepared by the United States General Accounting Office.

All of these items are available for review at the location and telephone number specified above for obtaining copies of the proposed rules. DPA may add further supporting documents and information to the rulemaking file. If such items are added, they will be made available for public inspection for at least 15 days prior to the adoption of this regulation.

## AUTHORITY AND REFERENCE

Government Code section 19815.4(d) authorizes DPA to adopt, amend, and repeal rules pertaining to the administration of the State's personnel system, including employee performance and salaries.

Government Code section 19826 authorizes DPA to establish and adjust the salary ranges for State civil service classifications, including managerial and supervisory classes.

Government Code section 19829 provides that salary ranges shall have a minimum, maximum, and intermediate steps, but also provides that different rates or methods of compensation may be established by DPA when this is necessary to meet prevailing practices in the public and private sectors for comparable service.

Government Code section 19832 provides that employees who are not at the top of the salary range for their class shall receive merit salary adjustments when their job performance meets such standards of efficiency as prescribed by DPA rule.

Government Code sections 19992.8 - 19992.14 contain special provisions relating to the manner in which managerial performance is to be evaluated and reflected in their compensation and classification level. Basically, these sections allow DPA to establish a performance appraisal/pay system for managers that is more flexible than the system for other State employees and that is more specifically tailored to managerial jobs.

## DEPARTMENT OF PERSONNEL ADMINISTRATION

### Informative Digest

### Proposed Rules 599.799.1 and 599.799.2

Under the current law and rules, there is a three-step salary range for each managerial classification and a five-step range for supervisory classes. Employees move from the bottom to the top of these ranges by receiving merit salary adjustments (MSAs), which are based on their job performance. In addition, the salary ranges, themselves, are increased periodically through general (cost-of-living type) adjustments. When these general increases occur, all affected employees receive a corresponding increase in their pay, regardless of their individual job performance.

Under these proposed rules, there would be a more specifically defined performance appraisal process for determining when MSAs should be awarded to managers and supervisors. In addition, in lieu of the automatic salary increases that now accompany general salary range increases, there would be a process for awarding periodic salary increases based on individual job performance for these employees. The proposed rule would specify how these increases are to be provided and would establish the system for making the performance appraisals on which these salary increases would be based.

DEPARTMENT OF PERSONNEL ADMINISTRATION

**Proposed Rule 599.799.1**

**Original Text**

**599.799.1 Managerial Performance Appraisal and Compensation**

(a) Scope and purpose. This rule shall apply to all employees serving in positions that are designated managerial under Section 18801.1 of the Government Code. Its purpose is to specify the manner in which performance in managerial positions is appraised and to establish a program for determining managers' salary increases based on their job performance, rather than through automatic, general adjustments.

(b) Performance standards and appraisal.

(1) It shall be the responsibility of each appointing power to ensure that written standards of performance are developed and kept up to date for each managerial position under his/her jurisdiction. These standards shall be mutually developed and updated by managerial employees and their appointing powers and shall be based on individual and organizational requirements.

(2) Each appointing power shall have a performance appraisal system for determining if managerial performance meets the established performance standards. Affected managers shall have a reasonable opportunity to review and comment on the system, and any changes to it, before they are implemented. Appointing powers shall consider comments and suggestions arising from this review in their development and revision of the appraisal systems.

(3) Performance appraisal reports shall be written and shall address the performance standards developed in accordance with subsection (b)(1) of this rule. They shall be completed at least annually and shall provide a clear assessment of managers' performance. As appropriate, they shall also provide suggestions and/or plans for further development and improvement.

(4) Each manager shall receive a copy of his/her appraisal report and shall have the opportunity to discuss it with the rater before it is filed. If the manager does not agree with the appraisal at the conclusion of this discussion, he/she shall be entitled to discuss it with the appointing power or his/her designee, unless the rater is the appointing power, in which case no further discussion shall be required.

(5) The performance appraisal reports required by this rule shall be kept on file by the appointing power for at least three years.

(c) Salary range increases.

(1) Notwithstanding Section 599.689, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range increase; provided, that these salary increases shall only be granted upon the appointing power's certification that the employee's job performance is successful. For periods of job performance occurring after January 1, 1995, these certifications shall be based on the performance appraisal process prescribed by this rule. At the discretion of the appointing power, the salary increases resulting from this process may occur on the date of the salary range increase, or at a later date.

(2) When the application of (c)(1) would result in an employee having a salary rate that is below the new minimum rate for his/her salary range, the employee shall receive the new minimum rate. When an employee is retained at the minimum rate for this reason, the appointing power shall determine if any of the causes for disciplinary action specified in Section 19572 of the Government Code apply.

(3) When an employee does not receive the full salary increase authorized by this rule on the date the salary range increase occurs, he/she may receive any remaining portion of the increase upon his/her appointing power's certification of successful job performance.

(d) Merit salary adjustments (MSAs).

(1) The performance appraisal process specified in this rule shall also be the basis for awarding MSAs to managers under Section 19832 of the Government Code. Only those managers whose performance the appointing power determines is successful shall receive a MSA.

(2) Notwithstanding Section 599.683, a manager shall not qualify for additional MSAs because he/she has failed to receive all or part of the salary increases authorized under (c)(1).

(e) Each appointing power shall specify the process through which he/she will consider managers' appeals regarding performance appraisals, salary increase decisions, MSAs, and other actions taken under this rule. Actions taken under this rule may only be appealed to the appointing power on the following grounds:

(1) Abuse, harassment, or legally prohibited discrimination.

(2) Improper political activity.

The appointing power shall be the final level of review for these appeals. For employees covered by this rule, this appeal procedure shall replace the one specified in Section 599.684 for MSA actions. It shall also be used in lieu of the procedure specified in Section 599.859 for grievances and appeals related to this rule.

(f) Effective date. This rule shall apply to salary range increases for managerial classifications that take effect on or after January 1, 1994.

Note: Authority cited: Section 19815.4(d) of the Government Code. Reference cited: Sections 19826, 19829, 19832, and 19992.8 through 19992.14 of the Government Code.

DEPARTMENT OF PERSONNEL ADMINISTRATION

Proposed Rule 599.799.2

Original Text

## 599.799.2 Supervisory Performance Appraisal and Compensation

(a) Scope and purpose. This rule shall apply to all employees serving in supervisory positions as defined by Section 3513(g) of the Government Code. Its purpose is to specify the manner in which performance in supervisory positions is appraised and to establish a program for determining supervisors' salary increases based on their job performance, rather than through automatic, general adjustments.

(b) Performance standards and appraisal.

(1) It shall be the responsibility of each appointing power to ensure that written standards of performance are developed and kept up to date for each supervisory position under his/her jurisdiction. These standards shall be based on individual and organizational requirements.

(2) Each appointing power shall have a performance appraisal system for determining if supervisory performance meets the established performance standards. This system shall result in written appraisals of each supervisor's performance, as specified in (b)(3). Affected supervisors shall be provided with a description of the performance appraisal system.

(3) Performance appraisal reports shall be written and shall address the performance standards developed in accordance with subsection (b)(1) of this rule. They shall be completed at least annually and shall provide a clear assessment of supervisors' performance. As appropriate, they shall also provide suggestions and/or plans for further development and improvement.

(4) Each supervisor shall receive a copy of his/her appraisal report and shall have the opportunity to discuss it with the rater before it is filed. If the supervisor does not agree with the appraisal at the conclusion of this discussion, he/she shall be entitled to discuss it with the appointing power or his/her designee, unless the rater is the appointing power, in which case no further discussion shall be required.

(5) The performance appraisal reports required by this rule shall be kept on file by the appointing power for at least three years.

(c) Salary range increases.

(1) Notwithstanding Section 599.689, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range increase; provided, that these salary increases shall only be granted upon the appointing power's certification that the employee's job performance is successful. For periods of job performance occurring after January 1, 1995, these certifications shall be based on the performance appraisal process prescribed by this rule. At the discretion of the appointing power, the salary increases resulting from this process may occur on the date of the salary range increase, or at a later date.

(2) When the application of (c)(1) would result in an employee having a salary rate that is below the new minimum rate for his/her salary range, the employee shall receive the new minimum rate. When an employee is retained at the minimum rate for this reason, the appointing power shall determine if any of the causes for disciplinary action specified in Section 19572 of the Government Code apply.

(3) When an employee does not receive the full salary increase authorized by this rule on the date the salary range increase occurs, he/she may receive any remaining portion of the increase upon his/her appointing power's certification of successful job performance.

(d) Merits salary adjustments (MSAs).

(1) The performance appraisal process specified in this rule shall also be the basis for awarding MSAs to supervisors under Section 19832 of the Government Code. Only those supervisors whose performance the appointing power determines is successful shall receive a MSA.

(2) Notwithstanding Section 599.683, a manager shall not qualify for additional MSAs because he/she has failed to receive all or part of the salary increases authorized under (c)(1).

(e) Each appointing power shall specify the process through which he/she will consider supervisors' appeals regarding performance appraisals, salary increase decisions, MSAs, and other actions taken under this rule. Actions taken under this rule may only be appealed to the appointing power on the following grounds:

(1) Abuse, harassment, or legally prohibited discrimination.

(2) Improper political activity.

The appointing power shall be the final level of review for these appeals. For employees covered by this rule, this appeal procedure shall replace the one specified in Section 599.684 for MSA actions. It shall also be used in lieu of the procedure specified in Section 599.859 for grievances and appeals related to this rule.

(f) Effective date. This rule shall apply to salary range increases for supervisory classifications that take effect on or after January 1, 1995.

Note: Authority cited: Section 19815.4(d) of the Government Code. Reference cited: Sections 19826, 19829, and 19832 of the Government Code.

DEPARTMENT OF PERSONNEL ADMINISTRATION

Initial Statement of Reasons

Proposed Rules 599.799.1 and 599.799.2

## CONDITIONS AND CIRCUMSTANCES THAT THE REGULATIONS ARE INTENDED TO ADDRESS

Under various statutes, including Government Code sections 19826, 19829, and 19832, the Department of Personnel Administration (DPA) is charged with establishing and administering the salary program for State employees. The implicit purpose of any salary program is to ensure that the compensation paid by the employer is sufficient to attract a qualified work force and encourages and rewards strong job performance. The statutes give DPA various directions for carrying out this responsibility including a requirement that consideration be given to prevailing compensation practices followed in the public and private sectors for employees with comparable duties and responsibilities.

As outlined in this Initial Statement of Reasons, DPA has found that there is not a sufficient link between the job performance and the level of pay for State managers and supervisors. Without a strong link between pay and performance, the State's compensation program cannot be an effective tool for encouraging and rewarding strong job performance. Moreover, DPA has found that it is a prevailing practice among other employers to base individual salary increases on individual job performance.

For these reasons, Rules 599.799.1 and 599.799.2 are being proposed to establish a meaningful performance-based pay program for State employees who are designated managerial, as defined in Section 3513(e) of the Government Code and supervisory as defined by Section 3513(g) of the Government Code. The specific reasons and facts supporting this proposal are outlined below.

<u>The State's current salary system does not contain an effective link between individual managers' and supervisors' job performances and their pay</u>.

The only performance-based element of the current managerial and supervisory salary structure is the merit salary adjustment (MSA) provision (Government Code section 19832). Under it, managers and supervisors who have not reached the top of the salary range for their job classification receive annual increases of five percent (not to exceed the top of the salary range) based on their appointing power's certification that their job performance has met applicable standards. As noted later in this statement, part of the proposed rule will provide additional guidance for the administration of this provision. However, even with this improvement, the MSA provision does not affect the majority of State managers and supervisors. The majority of them have already reached the top step of their salary range and, therefore, are no longer eligible for these pay adjustments. Managers and supervisors typically reach the top step of the salary range in only one or two years after their appointment to a managerial or supervisory class, and may remain there for many years. Therefore, the typical manager or supervisor is covered by the MSA provisions for only a relatively small portion of his/her career.

In addition to MSAs, there are also general (cost-of-living) salary increases that raise the salary ranges, themselves. These affect all employees, including those who are at the top of their salary range. However, there is currently no tie between these increases and employee performance. Instead, DPA Rule 599.689 requires each employee receive a salary increase that corresponds to the amount by which the salary range for his/her class was increased (e.g., if the range is increased by four percent, every employee in the range gets a four percent increase, regardless of job performance).

In summary, the performance-based salary provision that currently exists (MSAs) applies only to a limited number of employees; and, the general salary increases that do apply to all employees are not tied to their performance at all. The proposed rules are intended to correct this incongruous situation for managers and supervisors.

A number of factors call for strengthening the tie between the individual job performance and pay of State managers and supervisors.

Like other governments, California is faced with demands for more and better services while, at the same time, there are limits on the amount of resources available to accomplish this. Under these conditions, a decision to spend money in one area almost inevitably means that funding cannot be provided for another highly deserving cause. This makes it critical to derive the maximum benefit from all State spending, including that for State manager and supervisor salaries. Given this, it must be assured that future salary increases will be awarded to only those managers and supervisors whose successful performance warrants a pay increase, and that additional dollars will not be spent to increase the salaries of managers and supervisors who are not meeting reasonable performance standards.

Beyond this, there is the broader issue of sustaining, and further enhancing, the job performance of the vast majority of managers and supervisors who are already successful. Clearly there are many non-monetary keys to this, including more training, better planning, and having leadership practices that foster and encourage strong performance. However, it is also important to have a pay plan that supports a commitment to strengthening managerial performance. As early as 1979 and 1982, studies by the Little Hoover Commission and the Assembly Office of Research (respectively), found that the MSA program, by itself, does not adequately encourage and reward strong performance. In addition, the private sector, which relies on competent management and supervision to survive in the marketplace, has historically made wide use of performance-based pay plans for its managers and supervisors. This is discussed further in the following section.

These rules are also consistent with the basic thrust of Government Code sections 19992.8 - 19992.14. These sections were added in 1982 and express the Legislature's clear interest in accurately assessing job performance and having a strong link between performance and a variety of personnel actions, including salary adjustments. While these statutes cover only managers, DPA believes that the concepts they represent are equally applicable to supervisors. (These concepts can be implemented for supervisors under the general authority given to DPA by Government Code sections 19826, 19829, and 19832.)

Finally, performance-based pay is consistent with the State's movement toward performance-based budgeting. While performance budgeting is not directly tied to the compensation program, its basic premise is that there should be specific, desired outcomes for every expenditure. As noted above, this is the same basis on which these performance-based pay rules are being proposed.

It is prevailing practice by other employers to base managerial and supervisory salary increases on performance.

As noted above, private sector employers have strong ties between the compensation and job performance of their managers and supervisors. This is indicated by the surveys referenced below:

- A 1992-93 report by the Wyatt Company (a major consulting firm) showed that approximately 90 percent of the major firms surveyed base salary increases for their supervisors and managers on job performance; fewer than 10 percent reported that increases were given across the board, regardless of job performance

- A 1993-94 Wyatt company report covering top management in the private sector showed that more than 90 percent of the major firms surveyed base salary increases for their top managers on performance; only about 10 percent of them granted cost-of-living adjustments to all top managers, regardless of their performance.

  The same survey asked the firms to rank the importance that various factors had in their top management salary decisions. With "4" indicating the highest importance, and "1" the lowest, performance received an average score of 3.8, while the cost of living received an average score of 1.9.

- A 1992-93 nationwide survey by the American Compensation Association showed that, for employees who are exempt from the Fair Labor Standards Act (FLSA), 2,657 firms based periodic salary increases on performance, while only 201 gave general, across-the-board increases that were not tied to performance. Data from the western part of the United States showed a similar pattern.

- A 1994 survey by the William M. Mercer Company (a major consulting firm) asked 267 major California employers to rank their reasons for granting salary increases. Two hundred of them ranked merit/performance as the most important, 32 ranked competitors' salaries as most important, and only 12 indicated that the cost of living was the most important.

- A 1993-94 national compensation planning survey by Mercer showed that 2,171 (96 percent) of the firms surveyed based 1993 pay increases for employees who are exempt from FLSA on performance alone, while only 90 firms reported across-the-board increases that were not tied to performance. Projections for 1994 indicate that 1,953 (96.6 percent) firms will be basing these increases on performance alone, while only 69 will be granting across-the-board increases.

- While performance pay is probably not as widespread in the public sector, there is increasing interest in it among government employers as they face shrinking resources and greater demands for service. For example, an October 1990 report by the United States General Accounting Office indicated a "general movement toward pay for performance" among State governments; the report went on to cite 23 states that had pay-for-performance systems, including such major states as New York, Michigan, and Illinois. While there have been operational problems with some of these systems (such as inadequate funding), our indications from discussions with other states are that a strong interest remains among them in having an effective pay-for-performance program.

- The Federal government has a performance-based pay program for its Senior Executive Service. This group is generally comparable to the State's career executive assignment levels, which are within the managerial group covered by proposed Rule 599.799.1.

These findings of prevailing practice support the establishment of a performance-based pay system for managers and supervisors under Government Code sections 19826 and 19829.

Regulatory action is needed to establish an effective pay-for-performance system for State managers and supervisors that is consistent with prevailing practice by other private and public employers.

As noted earlier, the only performance-based pay allowed by the current law and rules covering State managers and supervisors is the MSA provision. This affects only a small portion of managerial and supervisory employees at any one time, and is not a factor beyond the one to two years it typically takes for a managerial or supervisory employee to reach the top of the salary range. To reach all managers and supervisors on a consistent basis, the State needs to adopt a program, similar to those in the private sector, that ties the periodic, general salary increases to individual job performance. This requires a new rule, particularly since existing DPA Rule 599.689 now requires that general salary increases be given to all employees, regardless of their performance.

## SPECIFIC PURPOSE OF PROPOSED RULES 599.799.1 AND 599.799.2

This portion of the Statement describes how the proposed Rules 599.799.1 and 599.799.2 will address the problems and circumstances outlined above. Each of the following subsection discussions applies to both rules since their proposed language is identical, except for portions of subsection (b) (on performance standards/appraisal) and subsection (f) (effective dates).

Subsection (a) states the scope and general purpose of the rules. It indicates a clear movement from the practice of awarding automatic salary increases to all managers and supervisors when salary ranges are increased, to a concept that bases individual salary increases on performance and gives appointing powers flexibility with respect to the timing of any individual pay increases.

Subsection (b) provides that there will be standards of performance for each managerial and supervisory position and sets forth basic requirements for the performance appraisal process that will be used to assess each manager's and supervisor's success in meeting these standards. Performance standards and performance appraisals are obviously needed as a basis for any performance-based pay system.

In proposed Rule 599.799.1, performance standards for managers would be developed following the process specified for managerial positions in Section 19992.8 of the Government Code. DPA has elected not to specify a specific performance appraisal process and form in this rule; instead, it has outlined basic requirements, based on the provisions contained in Section 19992.9 of the Government Code, that departments would follow in developing their own systems. DPA believes that this will give State agencies appropriate flexibility to develop specific processes and forms that reflect their particular organizational structures and operating environments.

Proposed Rule 599.799.2 would establish generally similar provisions for supervisors. However, this rule does not contain provisions for individual supervisors' review of proposed performance standards and appraisal systems, since this would be accomplished under the meet and confer rights accorded to supervisors in Section 3533 of the Government Code.

The three-year retention period for performance appraisal reports is proposed to provide a sufficient historical record for any appeals or other actions arising from the application of this rule.

Subsection (c) specifies that when the salary ranges for managerial and supervisory classes are increased, the individual salary increases for the employees serving in these classes shall be performance based. This differs from DPA Rule 599.689, which currently provides automatic salary increases for all employees (including managers and supervisors) when the salary ranges for their classes are increased. This change will provide a performance-based pay provision that will be applicable to all managers and supervisors, including those who are currently at the top step of the salary range.

Under this subsection, a manager or supervisor would receive a salary increase only if his/her appointing power certified that he/she was performing successfully. These certifications would be based on the performance appraisal process described above for periods of performance occurring after January 1, 1995. This date has been chosen to give State agencies a reasonable opportunity to become aware of the performance standard/appraisal requirements contained in this rule, and implement them. Some performance-based pay decisions under this rule will be tied to job performance that occurred prior to January 1, 1995. State agencies would rely on previously existing appraisal methods in these cases. If any shortcomings in this area led to abuse, disparities, etc., affected employees could seek relief through the appeal process.

A manager or supervisor could not fall below the minimum of the salary range, since this subsection also provides that he/she must always receive at least the minimum rate. However, the rule also requires appointing powers to give specific consideration to taking disciplinary action when a manager or supervisor is retained at the minimum of the salary range for this purpose. This provision has been included since performance problems that warrant keeping an employee's salary at the range minimum are more appropriately dealt with through the disciplinary action provisions contained in the Civil Service Act. These provisions contain the merit system protections that are appropriate for such serious actions, and offer a greater range of remedial options, including demotion and dismissal.

This subsection also allows individual salary increases to be granted on the date of the salary range increase, or at a later date. This will give appointing powers more ability to coordinate salary increases with performance improvements, review cycles, etc.

Subsection (d) provides that MSAs for managers and supervisors will be based on the performance standards and appraisal process provided for under subsection (b) of this rule. This makes the basis for these performance-based increases consistent with the basis for PFP salary increases.

This subsection also provides that a manager's failure to receive a salary increase under (c)(1) will not qualify him/her for additional MSAs. For example, Manager A is at the maximum of the salary range. The range is then increased, but Manager A does not receive a salary increase because his/her job performance is sub-standard. Manager A's salary rate is now below the maximum rate of the new, higher salary range. However, this subsection would prevent Section 599.683 from automatically making Manager A eligible for a MSA, which would be illogical, since Manager A has just been denied a performance-based salary increase. Manager A could still move to the new top step at a later date if improved performance warranted the later granting of the pay-for-performance salary increase under (c)(3).

Subsection (e) provides that appointing powers shall establish a process through which they will consider appeals of performance appraisals, salary increase decisions, MSAs, and other actions under this rule. This will allow each appointing power to develop a specific process that is appropriate for their organization's size, structure, and setting. The appointing power is the highest level of review for these appeals, since they, rather than DPA are in the best position to determine when the performance of their managers and supervisors have met acceptable standards. For employees covered by this rule, this appeal provision replaces the MSA appeal process now contained in DPA Rule 599.684. This provision also replaces the grievance procedure contained in DPA Rule 599.859. This will result in there being a single appeal process within each State agency for hearing appeals under this rule.

This subsection also specifies the grounds on which appointing powers would have to accept appeals. For managers, abuse, discrimination, and harassment must be included to comply with Section 19992.13 of the Government Code. Improper political activity has been added since there is a strong public interest in keeping the State workplace free from such activity.

Subsection (f) in proposed Rule 599.799.1 provides that this rule shall apply to managerial salary increases that take effect on or after January 1, 1994. This would allow this rule to fill the void that was created when former DPA Rule 599.799 was invalidated by an April 1, 1994 court decision. Rule 599.799.1 could be used to reaffirm the increases granted in early 1994 under 599.799, as well as to consider the cases of employees who would have been considered for increases later in 1994 if the rule had not been invalidated.

For supervisors, subsection (f) in rule 599.799.2 provides for a January 1, 1995 effective date. Former Rule 599.799 did not apply to supervisors.

# Commenter Response Log
# Period End August 30, 1994

**HEARING**
**AUGUST 30, 1994**

| NAME OF SPEAKER | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED * |
|---|---|
| Al Riolo | 2, 6, 10, 11, 12, 15, 16, 17, 29, 31 |
| Ron Franklin | 2, 7, 8, 11, 16, 17, 31 |
| Tom Considine | 2, 11, 15, 17, 18 |
| Tim Behrens | 4, 8, 11, 17, 31 |
| John Bailey | 2, 4, 7, 9, 17, 30 |
| Richard Romanski | 7, 9, 10, 13, 19, 28 |
| Sunnie Froneck | 4, 6, 27 |
| John Sikora | 2, 4, 9, 10, 12, 17, 22, 24, 27 |
| Ron Willis | 29 |
| John Harrington | 29 |
| Tom Hollenbeck | 21, 29 |

* See response to comments section in Final Statement of Reasons

**COMMENT PERIOD**
**ENDING AUGUST 30, 1994**

| EXHIBIT # | NAME OF STATE AGENCY | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| AA-1 | Transportation | 1, 17, 25, 30 |
| AA-2 | Corrections | 2, 5, 13, 21, 25, 30 |
| AA-3 | State Compensation Insurance Fund | 21, 25 |
| AA-4 | Developmental Services | 13, 21, 25 |
| AA-5 | Industrial Relations | 14 |
| AA-6 | California State Library | 5, 21, 25 |
| AA-7 | Alcohol and Drug Programs | 2, 3, 20 |
| AA-8 | Toxic Substance Control | 13, 25, 30 |

**COMMENT PERIOD**
**ENDING AUGUST 30, 1994**

| EXHIBIT # | NAME OF PERSON | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| E-1 | L. J. Berry, DVM MPVM | 2, 6, 15, 19, 20 |
| E-2 | Janet K. Bradford | 5, 13, 24, 27 |
| E-3 | Barbara Carr | 5, 15, 25 |
| E-4 | Nigel Blampied | 1, 5, 8, 13 |
| E-5 | Alan S. Weinger | 8, 9, 18, 21, 25, 28, 30, 31 |
| E-6 | G. B. Leatherwood | 5, 6, 17, 25, 26 |
| E-7 | William A. Vance, Ph.D. | 6, 15, 30 |
| E-8 | William M. Jemison, L.C.S.W. | 20, 21, 25 |
| E-9 | William M. Schmidt | 5, 7, 15, 27 |
| E-10 | Carol J. Smith | 5, 17, 21, 25 |
| E-11 | John Mirolla | 2, 17, 21, 25 |
| E-12 | Robert Horton | 2, 3, 6, 19, 20, 31 |
| E-13 | Colleen Anderson, et al. | 2, 5, 6, 13, 15, 17, 19, 20, 23, 25, 30 |
| E-14 | Donald D. Kelly | 5, 8 |
| E-15 | Larry Sullivan | 4 |

**COMMENT PERIOD**
**ENDING AUGUST 30, 1994**

| EXHIBIT # | NAME OF EMPLOYEE ORGANIZATION | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| EO-1 | Coalition of Communications Supervisors | 2, 16, 25, 30 |
| EO-2 | California Association of State Managers and Supervisors | 1, 2, 3, 5, 6, 7, 8, 10, 13, 16, 17, 20, 21, 24, 25, 26, 27, 30, 31 |
| EO-3 | Professional Engineers in State Government | 2, 4, 7, 8, 9, 10, 11, 16, 17, 24, 25 |
| EO-4 | Association of California State Supervisors | 1, 2, 3, 6, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 21, 24, 25, 27, 31 |
| EO-5 | California Department of Forestry Employees Association | 4, 6, 27 |
| EO-6 | California Correctional Peace Officers Association | 2, 3, 6, 8, 10 |
| EO-7 | Association of California State Attorneys | 2, 4, 7, 8, 9, 10, 11, 16, 17, 24, 25 |

# Comments Received Period End August 20, 1994

AA-1

State of California | Business, Transportation and Housing Agency

# Memorandum

To: RICHARD LEIJONFLYCHT
Department of Personnel Administration
1515 "S" Street, North Bldg., Suite 400
Sacramento, CA 95814-7243

Date : July 28, 1994

File No. :

From : **DEPARTMENT OF TRANSPORTATION**
**Division of Maintenance**

Subject: Pay-for-Performance (PFP) Rules for Managers and Supervisors

This is in response to PML 94-38 requesting comments on DPA's intent to adopt formal regulations to establish a PFP program for State managers and supervisors. We have had an opportunity to review the proposed regulations with appropriate personnel, and the following provides you with our input and reactions on this matter.

Section 599.799.1 (b) (2)

This section requires each appointing power to develop a performance appraisal system for determining if managerial performance meets the established performance standards. However, as proposed each appointing power will be required to give all affected managers the opportunity to review and comment on the system, and any changes to it, before it is implemented. Specially, in departments with an extensive management population this could be an unreasonable requirement. Accordingly, we submit that your proposed language be modified. We propose that the second sentence of this section include language that limits the number of managers (no more than 10% of the management population) that will be given the opportunity to review and comment on the system, and any changes to it, before it is implemented.

Sections 599.799.1 (c) (3) and 599.799.2 (c) (3)

The present wording in these sections would allow an employee, who does not receive the full salary increase, an infinite amount of time to receive any remaining portion of the increase upon his/her appointing power's certification of successful job performance. It is our recommendation that the proposed language in these two sections be modified to include time restrictions. For instance, it would be reasonable to allow an employee to receive any remaining portion of the increase until the start of the next PFP cycle.

In addition to the above comments, we would like to obtain an answer to the following question: Is it DPA's intent to apply the proposed PFP rules to managers and supervisors whose collective bargaining designation has been changed from "M/S" to "E" as a result of the management reductions?

If you have any questions regarding our comments, please contact Ray Hernandez of my staff at (916) 653-4578.

DAVE BRUBAKER, Chief
Office of Labor Relations

1120 N St, Sacto 95814

AA - 3

**STATE COMPENSATION INSURANCE FUND**

INTER-DEPARTMENTAL COMMUNICATION

TO: Mr. Richard Leighonflycht
Department of Personnel Administration
1515 "S" St., North Building, #400
Sacramento, CA 95814

DATE: August 29, 1994

FROM: STATE COMPENSATION INSURANCE FUND

SUBJECT: MANAGERIAL PAY

Dear Richard,

Effective September 1, 1994, the State Fund will be promoting a current Manager II, SCIF to Manager IV, SCIF. Upon reviewing the current salary determination rules, we determined, and you confirmed, that this employee will only receive a 5% increase, despite this double promotion. Also, we are promoting a Manager II, SCIF to Manager III, SCIF who will receive less than a full step increase because he bumps into the "old" maximum of the Manager III class.

I understand that the pending Pay for Performance regulations would correct both these anomalies for future appointments and that DPA has requested that they be applied retroactively to individuals appointed during this interim period between the court ruling and the approval of the new system. This letter is to express the State Fund's support for both retroactivity and a future system which better correlates pay and responsibility.

The obvious inequity of the current system must be addressed and the individuals who happened to receive new appointments during this period should be made whole. Thank you for consideration of this matter.

David West
Personnel Services Manager

DW:ar

cc Bill Armstrong, Executive Vice President

SCIF 19300

1275 Market St
SF 94103

AA4

State of California

Department of Developmental Services

# Memorandum

To : Richard Leijonflycht
Policy Development Office
Department of Personnel
Administration
1515 S Street
North Building, Suite 400

Date : August 22, 1994

Subject: Pay-for-Performance

From : Personnel and Support Services
1600 9th Street, Room 340
654-2689

The Department of Developmental Services has reviewed the proposed Pay-for-Performance (PFP) regulations and has the following questions:

21 1. If PFP is denied for an employee for a complete calendar year, can that employee be granted that year's PFP in subsequent years if his/her performance improves?

13 2. Can an employee receive a Merit Salary Adjustment (MSA) if he/she only receives an increment of the PFP (e.g., receives 3 percent rather than the full 5 percent PFP)?

If you have any questions, please call Burl Jones of my staff at 654-3746.

LOU O'NEAL
Chief

AA5

**State of California**
# Memorandum

**To:** Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 'S' Street, North Bldg., Suite 400
Sacramento, CA 95814-7243

**Date:** August 23, 1994

455 Golden Gate Ave, 4th Floor
SF 94102

**From:** R. W. Stranberg, Chief Deputy Director
**Department of Industrial Relations**

**Subject:** Proposed Revisions to Proposed DPA Rules 599.799.1 and 599.799.2

This is in reference to the June 24, 1994, memo to Personnel Management Liaisons (94-38) from Lillian Rowett, Chief Deputy Director of the Department of Personnel Administration (DPA), and the Notice of Proposed Regulatory Action accompanying that memo.

In response to DPA's proposed new rules to establish pay-for-performance (PFP) programs for State managers and supervsors, we are proposing changes in the rules to clarify that agencies with more than one appointing power, like DIR, may establish a single pay-for-performance program under each rule for all employees in the agency who are covered by the rule, rather than separate programs for covered employees in each appointing power.

DIR currently has nine appointing powers, as follows:

The Director

The Administrative Director of the Division of Workers' Compensation (DWC)

The Workers' Compensation Appeals Board (WCAB)

The Industrial Welfare Commission (IWC)

The Industrial Medical Council (IMC)

The Occupational Safety and Health Standards Board (OSHSB)

The Occupational Safety and Health Appeals Board (OSHAB)

The Commission on Health and Safety and Workers' Compensation (CHSWC)

The State Compensation Insurance Fund (SCIF)

Of these, only the State Fund (SCIF) operates administratively as a separate State agency, with its own internal administrative support and independent program operations. The other eight appointing powers range in size from only four staff (IWC) to over 1,000 employees (the Director's appointing power and DWC), with administrative support provided by DIR's centralized Division of Administration.

In our view, it would be most cost-effective and also allow for greater equity to have a single pay-for-performance program established for all eight of these appointing powers, with a single performance appraisal system and appeal process. The requirement in the rules that performance standards "be based on individual and organizational requirements" would provide for appropriate variations in these standards based on the work of the employees themselves and their organizational subdivisions within the Department. However, centralizing the appraisal system and appeal process for the Department will avoid unnecessary duplications or variations in these elements of the PFP program across appointing powers and help to prevent inconsistencies within the Department in decisions on the approval of salary increases under the proposed rules.

Since our reading of the proposed rules would tend to indicate that such a centralization would be problematic with their present language, our proposal is basically to change the language to more closely parallel that of DPA Rule 599.796 "Managerial Performance Appraisal System Bonuses," which refers to "State agencies" rather than "appointing powers," and reflects our implementation of that rule in the past. Although, as with all procedures involving the granting of pay increases, there was not universal satisfaction with the mangerial bonus program, we would anticipate significantly greater dissatisfaction among some employees with implementation of the planned PFP programs. Our experience in handling the managerial bonus program on a centralized departmental ("State agency") basis, rather than appointing power by appointing power, has convinced us that this will be the most effective way to administer the new PFP programs as well.

As indicated in the enclosed proposed revisions of the new rules, we have provided that departments may choose to implement PFP programs for individual appointing powers, rather than on a departmental basis, and we would of course expect that to occur for the State Fund.

We are not as concerned with the actual language of the rules as we are with the ability to proceed as we have indicated, so we are open to alternative language. If you need to discuss this matter further, please feel free to contact Rich Camp, DIR's Personnel Officer, at CALNET 593-4060.

## Proposed Revisions* to Proposed Rule 599.799.1

599.799.1 Managerial Performance Appraisal and Compensation

(a) Scope and purpose. This rule shall apply to all employees serving in positions that are designated managerial under Section 18801.1 of the Government Code. Its purpose is to specify the manner in which performance in managerial positions is appraised and to establish a program for determining managers' salary increases based on their job performance, rather than through automatic, general adjustments.

(b) Performance standards and appraisal.

(1) It shall be the responsibility of each ~~appointing power~~ State agency to ensure that written standards of performance are developed and kept up to date for each managerial position under ~~his/her~~ its jurisdiction. These standards shall be mutually developed and updated by managerial employees and their ~~appointing powers~~ agencies and shall be based on individual and organizational requirements.

(2) Each ~~appointing power~~ State agency shall have a performance appraisal system for determining if managerial performance meets the established performance standards. State agencies containing more than one appointing power may establish separate performance appraisal systems for different appointing powers. Affected managers shall have a reasonable opportunity to review and comment on the system, and any changes to it, before they are implemented. ~~Appointing powers~~ The agencies shall consider comments and suggestions arising from this review in their development and revision of the appraisal systems.

(3) Performance appraisal reports shall be written and shall address the performance standards developed in accordance with subsection (b)(1) of this rule. They shall be completed at least annually and shall provide a clear assessment of managers' performance. As appropriate, they shall also provide suggestions and/or plans for further development and improvement.

(4) Each manager shall receive a copy of his/her appraisal report and shall have the opportunity to discuss it with the rater before it is filed. If the manager does not agree with the appraisal at the conclusion of this discussion, he/she shall be entitled to discuss it with the appointing power or his/her designee, unless the rater is the appointing power, in which case no further discussion shall be required. State agencies containing more than one appointing power may designate someone other the manager's appointing power for discussion of the rater's report.

(5) The performance appraisal reports required by this rule shall be kept on file by the ~~appointing power~~ agency for at least three years.

(c) Salary range increases.

(1) Notwithstanding Section 599.689, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range increase; provided, that these salary increases shall only be granted upon the ~~appointing power's~~ agency's certification that the employee's job performance is successful. For periods of job performance occurring after January 1, 1995, these certifications shall be based on the performance appraisal process prescribed by this rule. At the discretion of the ~~appointing power~~ agency, the salary increases resulting from this process may occur on the date of the salary range increase, or at a later date.

* Deletions are shown by strike out; additions are underlined.

(2) When the application of (c)(1) would result in an employee having a salary rate that is below the new minimum rate for his/her salary range, the employee shall receive the new minimum rate. When an employee is retained at the minimum rate for this reason, the appointing power shall determine if any of the causes for disciplinary action specified in Section 19572 of the Government Code apply.

(3) When an employee does not receive the full salary increase authorized by this rule on the date the salary range increase occurs, he/she may receive any remaining portion of the increase upon his/her ~~appointing power's~~ agency's certification of successful job performance.

(d) Merit salary adjustments (MSAs).

(1) The performance appraisal process specified in this rule shall also be the basis for awarding MSAs to managers under Section 19832 of the Government Code. Only those managers whose performance the ~~appointing power~~ agency determines is successful shall receive a MSA.

(2) Notwithstanding Section 599.683, a manager shall not qualify for additional MSAs because he/she has failed to receive all or part of the salary increases authorized under (c)(1).

(e) Each ~~appointing power~~ State agency shall specify the process through which ~~he/she~~ it will consider managers' appeals regarding performance appraisals, salary increase decisions, MSAs, and other actions taken under this rule. State agencies containing more than one appointing power may establish separate appeals processes for different appointing powers. Actions taken under this rule may only be appealed ~~to the appointing power~~ on the following grounds:

(1) Abuse, harassment, or legally prohibited discrimination.

(2) Improper political activity.

The ~~appointing power~~ employee's agency shall be the final level of review for these appeals. For employees covered by this rule, this appeal procedure shall replace the one specified in Section 599.684 for MSA actions. It shall also be used in lieu of of the procedure specified in Section 599.859 for grievances and appeals related to this rule.

(f) Effective date. This rule shall apply to salary range increases for managerial classifications that take effect on or after January 1, 1994.

## Proposed Revisions* to Proposed Rule 599.799.2

599.799.2 Supervisory Performance Appraisal and Compensation

(a) Scope and purpose. This rule shall apply to all employees serving in supervisory positions as defined by Section 3513(g) of the Government Code. Its purpose is to specify the manner in which performance in supervisory positions is appraised and to establish a program for determining supervisors' salary increases based on their job performance, rather than through automatic, general adjustments.

(b) Performance standards and appraisal.

(1) It shall be the responsibility of each ~~appointing power~~ State agency to ensure that written standards of performance are developed and kept up to date for each supervisory position under ~~his/her~~ its jurisdiction. These standards shall be based on individual and organizational requirements.

(2) Each ~~appointing power~~ State agency shall have a performance appraisal system for determining if supervisory performance meets the established performance standards. State agencies containing more than one appointing power may establish separate performance appraisal systems for different appointing powers. This system shall result in written appraisals of each supervisor's performance, as specified in (b)(3). Affected supervisors shall be provided with a description of the performance appraisal system.

(3) Performance appraisal reports shall be written and shall address the performance standards developed in accordance with subsection (b)(1) of this rule. They shall be completed at least annually and shall provide a clear assessment of supervisors' performance. As appropriate, they shall also provide suggestions and/or plans for further development and improvement.

(4) Each supervisor shall receive a copy of his/her appraisal report and shall have the opportunity to discuss it with the rater before it is filed. If the supervisor does not agree with the appraisal at the conclusion of this discussion, he/she shall be entitled to discuss it with the appointing power or his/her designee, unless the rater is the appointing power, in which case no further discussion shall be required. State agencies containing more than one appointing power may designate someone other the manager's appointing power for discussion of the rater's report.

(5) The performance appraisal reports required by this rule shall be kept on file by the ~~appointing power~~ agency for at least three years.

(c) Salary range increases.

(1) Notwithstanding Section 599.689, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range increase; provided, that these salary increases shall only be granted upon the ~~appointing power's~~ agency's certification that the employee's job performance is successful. For periods of job performance occurring after January 1, 1995, these certifications shall be based on the performance appraisal process prescribed by this rule. At the discretion of the ~~appointing power~~ agency, the salary increases resulting from this process may occur on the date of the salary range increase, or at a later date.

(2) When the application of (c)(1) would result in an employee having a salary rate that is below the new minimum rate for his/her salary range, the employee shall receive the new minimum rate. When an employee is retained at the minimum rate for this reason, the appointing power shall determine if any of the causes for disciplinary action specified in Section 19572 of the Government Code apply.

* Deletions are shown by strike out; additions are underlined.

(3) When an employee does not receive the full salary increase authorized by this rule on the date the salary range increase occurs, he/she may receive any remaining portion of the increase upon his/her ~~appointing power's~~ agency's certification of successful job performance.

(d) Merit salary adjustments (MSAs).

(1) The performance appraisal process specified in this rule shall also be the basis for awarding MSAs to supervisors under Section 19832 of the Government Code. Only those supervisors whose performance the ~~appointing power~~ agency determines is successful shall receive a MSA.

(2) Notwithstanding Section 599.683, a ~~manager~~ supervisor shall not qualify for additional MSAs because he/she has failed to receive all or part of the salary increases authorized under (c)(1).

(e) Each ~~appointing power~~ State agency shall specify the process through which ~~he/she~~ it will consider supervisors' appeals regarding performance appraisals, salary increase decisions, MSAs, and other actions taken under this rule. State agencies containing more than one appointing power may establish separate appeals processes for different appointing powers. Actions taken under this rule may only be appealed ~~to the appointing power~~ on the following grounds:

(1) Abuse, harassment, or legally prohibited discrimination.

(2) Improper political activity.

The ~~appointing power~~ employee's agency shall be the final level of review for these appeals. For employees covered by this rule, this appeal procedure shall replace the one specified in Section 599.684 for MSA actions. It shall also be used in lieu of of the procedure specified in Section 599.859 for grievances and appeals related to this rule.

(f) Effective date. This rule shall apply to salary range increases for supervisory classifications that take effect on or after January 1, 1995.

AA-6

# CALIFORNIA STATE LIBRARY

LIBRARY—COURTS BUILDING • P.O. BOX 942837 • SACRAMENTO, CA 94237-0001

**CALIFORNIA STATE LIBRARY**

**MEMORANDUM**

TO: Dept. Personnel Administration
Policy Development Office
1515 S St., North Bldg. Suite 400
Sacramento, Ca. 95814-7243

8/29/94

ATTN: Richard Leijonflycht

FROM: Andrew St. Mary
Personnel Office

SUBJECT: Pay-for-Performance (PFP) Rules for Managers/Supervisors

This is in response to the proposed regulations, California Administrative Code Sections 599.799.1 and 599.799.2.

The proposed rules provide the flexibility and structure needed for evaluating performance levels for managers and supervisors at the California State Library and awarding compensation corresponding to their individual job performance.

The CSL is particularly interested in subdivision (f) which allows for retroactive pay increases. Managerial pay increases were not decided upon at the California State Library because of budget uncertainties which have since been resolved. In order to compensate those managers at the CSL who merited a pay increase during that time of uncertainty, the CSL strongly recommends inclusion of the option of retroactive pay increases in the regulations.

In view of the CSL's support of the fundamental concept governing pay-for-performance, no other comments are made at this time.

State of California Health and Welfare Agency

M E M O R A N D U M

To : Richard Leijonflycht Date: August 29, 1994
Department of Personnel Administration
Policy Development Office

From : **Department of Alcohol and Drug Programs**
1700 K Street, 3rd Floor, (916) 323-9201
95814

Subject : Proposed Pay-for-Performance Rules

The Department of Alcohol and Drug Programs has reviewed the proposed Pay-for-Performance rules and offers the following comments:

- Under the proposed rules, cost of living adjustments will be authorized to managers based upon job performance. If line staff continue to receive salary adjustments in addition to merit salary adjustments, line-staff salaries may exceed management salaries. There is no provision in the proposed rule to prevent this from occurring.

- ✓ Grounds for appeal are limited and the appointing powers have final level review. As a result, the process may be perceived as biased and the integrity of the process threatened. Alternatives for final level review would be to designate someone within the Department outside the employee's level of review, or provide an appeal to the Director of the Department of Personnel Administration.

- ✓ Standard and consistent application of the performance evaluation and subsequent salary increases must be ensured to eliminate the ability of the appointing power to manipulate the department's budget by awarding or withholding salary increases and merit salary adjustments.

If you have any questions regarding these comments, please contact Lisa Fien at 323-1859.

Lisa Fien for
Marnie Badgley
Labor Relations Officer

fm M Strazzo
8/30/94 PfPmtg

STATE OF CALIFORNIA—ENVIRONMENTAL PROTECTION AGENCY PETE WILSON, *Governor*

**DEPARTMENT OF TOXIC SUBSTANCES CONTROL**
400 P Street, 4th Floor
P.O. Box 806
acramento, CA 95812-0806
(916) 324-1800

AA 8

**M E M O R A N D U M**

**TO:** Richard Leijonflycht
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

**FROM:** Mike Strazzo
Office of the Director

**DATE:** August 30, 1994

**SUBJECT:** Managerial and Supervisory Performance Appraisal and Compensation Proposal

---

Per our discussion of July 21, 1994, we have some questions regarding the subject proposals. They are as follows:

1. The proposed new rule 599.799.1 states that Government Code Section 19832 (which allows MSA's of one step - 5 percent) shall be the basis for awarding MSA's to managers. This is contrary to GC 19992.11 which says that performance appraisal reports shall be used to award managers merit salary increases of up to 10 percent. What has happened to GC 19992.11; and, How does the proposed rule 599.799.1 impact GC 19992.11?

2. What are the pay range structures for managerial and supervisory classes under the new proposals? Are cost of living increases added to the base pay range for these classes, or do the current base pay ranges remain the same and COLA's are considered pay differentials? What happens to the minimum step?

Attached are 1) copies of existing DPA laws for managerial employees (Title 2, Division 5, Part 2.6, Chapter 3.5); and 2) Chapter 938, Section 1 from the Statutes of 1982, which describes the legislative intent of Chapter 3.5. Thank you for your consideration of these issues.

Attachments

19992.4. (a) The department may establish rules under which records of unsatisfactory service may lead to reduction in class and compensation, and providing for the manner in which persons falling below the standards of efficiency fixed by its rules may be removed from their positions by the department, substantially as in the case of removals for cause. The department shall report such unsatisfactory records to the appointing power.

(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(Added by Stats. 1981, Ch. 230.)

## CHAPTER 3.5. PERFORMANCE REPORTS FOR MANAGERIAL EMPLOYEES

19992.8. After consultation with appointing powers and other supervising officials the department shall assist and encourage state agencies to establish standards of performance for managerial employees and may provide training in developing performance appraisal systems. Such standards shall be mutually developed by managerial employees and their appointing powers. These standards shall be based on individual and organizational requirements established, in writing, for the reporting period. The reporting period shall be no more than 12 months from the date of the last report following the end of the employee's probationary period.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.9. The system of performance appraisal reports shall be designed by managerial employees and their appointing powers to permit the evaluation by appointing powers of each employee's work performance as accurately and fairly as is reasonably possible. The evaluation shall be set forth in a written performance appraisal report, the form for which shall be approved by the department. The department may investigate administration of the system and enforce adherence to appropriate standards.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.10. Appointing powers shall prepare performance appraisal reports and keep them on file as prescribed by department rule.

The rules shall provide that managerial employees be shown the performance appraisal report covering their own service and are privileged to discuss it and sign it with the appointing power before it is filed. The extent to which the reports shall be open to inspection by the public shall be prescribed by department rule.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.11. Performance reports shall be considered, in the manner prescribed by department rule, for purposes of employee development, in determining salary increases and decreases, the order of layoffs, the advisability of transfers, demotions, and dismissals. Performance reports shall be considered in promotional examinations in the manner prescribed by State Personnel Board rule. On or before July 1, 1988, performance appraisal reports for managers shall be used to award merit salary increases on a flexible basis so that each such employee may receive up to a 10-percent increase provided that this does not increase the employee's salary beyond the highest step of the range for the class of position occupied by the employee. The total amount awarded by the appointing power for merit salary increases through this practice shall not exceed the amount which otherwise would be available under current methods.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.12. The department may establish rules under which records of unsatisfactory service may lead to reduction in class and compensation, and providing for the manner in which persons falling below the standards of efficiency may be removed from their positions by the appointing powers, substantially as in the case of removals for cause.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.13. The department shall establish a procedure whereby a managerial employee may appeal his or her performance appraisal report to the appointing power. At a minimum, these procedures shall permit appeals on the basis that the performance appraisal report was used to abuse, harass, or discriminate against the employee.

(Added by Stats. 1982, Ch. 938, § 3, operative July 1, 1983.)

19992.14. Each state agency shall establish a system of performance appraisal reports which shall form the basis for awarding merit salary increases to managers on or before July 1, 1988. Any agency which fails to establish such a system on or before July 1, 1988, shall forfeit 50 percent of merit salary funds otherwise available for eligible managerial employees during that fiscal year. Any agency which fails to establish such a system on or before July 1, 1989, shall forfeit 75 percent of merit salary funds otherwise available for eligible managerial employees during that fiscal year. Any agency which fails to establish such a system on or before July 1, 1990, shall forfeit all merit salary funds otherwise.

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## CHAPTER 938

An act to add Section 18801.1 to, and to add Chapter 3.5 (commencing with Section 19992.8) to Part 2.6 of Division 5 of Title 2 of, the Government Code, relating to state employees.

[Approved by Governor September 10, 1982. Filed with Secretary of State September 13, 1982.]

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds that an effective employee performance appraisal system depends on the active involvement of appointing powers and managerial employees in its design and application. The history of performance appraisals in the California civil service demonstrates that when employees do not participate in the formation and use of the system, it often is ignored or otherwise rendered ineffective.

The Legislature finds that an employee performance appraisal system can be worthwhile only if agencies have adequate time for reviewing methods currently used in business and government, developing appropriate standards which reflect the unique characteristics of each governmental unit, and testing on-the-job effectiveness before implementation.

The Legislature finds that when an employee performance appraisal system is administered properly:

(1) Employees who do especially good work are given recognition.

(2) Employees are assisted in preparing for promotion and in improving present performance.

(3) The judgment of the supervisor is not based on his or her personal likes and dislikes.

(4) The supervisor and the employee have a clearer understanding of what is expected in their work.

(5) Dissatisfactions are brought into the open and adjusted more promptly and fairly.

The Legislature declares it is in the public interest to measure performance at every level of employment in the state civil service. Moreover, this goal can be achieved best by first establishing practical approaches enabling appointing powers to evaluate managers.

SEC. 2. Section 18801.1 is added to the Government Code, to read:

18801.1. The Department of Personnel Administration shall designate managerial positions, as defined in subdivision (e) of Section 3513, and shall report the designations to the board annually. Any disputes as to the managerial classification or position designations may be appealed to the State Personnel Board.

SEC. 3. Chapter 3.5 (commencing with Section 19992.8) is added

EXHIBIT
E-1

August 17, 1994

Richard Leijonflych
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

While I do not agree in principal with removing a cost of living increase in pay from supervisors or managers if they are not top performers, I assume that it will be carried out as the Governor has requested. I think the cost of living pay increases are for increased living costs and should not to be used as a **punitive performance tool**. I feel this "pay for performance" program is just another political ploy by the Governor for publicity. It is an additional tool to assist in the destruction of his management team. As soon as a down graded supervisor wins a lawsuit against his or her superior for not getting a cost of living pay increase everyone will get the cost of living pay increases. So you are embarking on a program that eventually will be unenforceable. Most of the cost savings will be eaten up by litigation.

I suggest that if they are going to take away salary for average or below average performance, then there should be a provision for an above the top of the salary range pay increase for outstanding performance. As an example, this could be a short term increase of 5% to 10% for a period of six months or a year. I think it would be more positive to give than to take away.

I think the surveys cited are comparing apples to oranges because I think they are comparing "TOP MANAGEMENT" in private industry with "MID" or even "LOW MANAGEMENT" levels in the state. Non-public organizations have the flexibility to alter their top salary at will and can give meaningful salaries and salary increases to their top managers. Most state employed supervisors or managers do not have the luxury of a variable top salary.

Our branch is already finding that there are few candidates for supervisorial positions because the minimal pay increase over a field position does not offset the increased cost of living in Sacramento and the increased level of responsibility associated with managing statewide programs. Non-supervisory employees are also in less danger of having their pay and benefits reduced on the whim of the Governor.

Sincerely,

fax (916) 653-7215

L. J. Berry, D.V.M., M.P.V.M.
Staff Veterinarian
Animal Health Branch
Division of Animal Industry
(916) 654-1447

Food Agriculture
1220 N St Room A107
P.O Box 942871
94271-0001

EXH E-2

*Janet K. Bradford*
170 C Brisco Road
Arroyo Grande, CA 93420
(w) 805/549-3541 (h) 805/481-2135

August 16, 1994

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243
ATTN: Richard Leijonflycht

COMMENT REGARDING PROPOSED ACTION ON PAY-FOR-PERFORMANCE

As a supervisor in the state system, I thank you for being provided the opportunity to comment on this matter. My suggestions are at the policy, not implementation, level. I agree with a performance-based personnel system. The system should have the following characteristics:

1) MERIT SALARY ADJUSTMENTS: These should be as the name implies, based on merit, and not longevity. An employee should not top-out automatically within the first few years of their career.

2) COST OF LIVING INCREASES: Based on inflation, these should be applied across the board as needed. The cost of living does not affect employees differentially and should not be used in the manner proposed.

3) ACCOUNTABILITY: As the other side of the merit coin, employees who don't perform should be fired. As a supervisor, one of my greatest accomplishments has been *almost* firing someone. Even in this case, after three years, and a file of documentation over eight inches thick, the individual ended up going out on a stress claim before completion of the process. I am not a ruthless or vindictive person, and of course tried corrective actions first, but the documentation required to fire a state employee is ridiculous.

I feel I personally would probably benefit from a true pay-for-performance plan; and I also feel the state and its citizens would benefit. But I also feel, with equal fervor, that the current plan is not well enough developed to accomplish the goals intended. Therefore, I recommend a more comprehensive analysis and development before implementation. If you would like a "person-in-the-system's" involvement on this development, with the concurrence of my department, I would be happy to participate.

Sincerely,

JANET K. BRADFORD

E-3

August 12, 1994

Department of Personnel Administration
Attention: Richard Leijonflych
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

This is to comment on proposed regulations relating to Supervisory/Managerial Pay for Performance (PFP).

According to the Conditions and Circumstances that the Regulations are Intended to Address, DPA is charged with attracting a qualified work force and encouraging and rewarding strong job performance. DPA is also required to consider prevailing compensation practices in the public and private sectors in carrying out this charge. To more closely meet these goals, DPA is proposing a PFP program for supervisors and managers. This appears to be a positive step toward bringing state practices into alignment with those found successful in private industry.

To achieve full alignment, however, it appears that the TOTAL compensation practices of private industry should be considered. Such factors as pay comparability for similar positions (previously evaluated by pay surveys), pay differential between supervisors and subordinates, differential pay adjustments between supervisors and subordinates, bonuses, and employee perquisites (such as use of company cars, club memberships, first class travel and others) should also be considered. To achieve the full benefit of alignment with private industry practices, it would not be effective to select only one aspect of their pay programs (PFP). Instead, the complete compensation practice should be identified and incorporated. This appears to be the most effective way of achieving the desired goal of comparability--and will allow the State to attract, retain, and reward effective supervisors and managers.

On a less philosophical level, I note that the proposed regs part (c)(1) allow the effective date to occur at any date following the salary range increase, at the discretion of the appointing power. It appears that since the State is the employer of State supervisors and Managers, to achieve equity among such employees in all of the various departments, the State should establish one effective date for all adjustments. This would avoid disadvantaging employees of small or financially strapped departments.

I appreciate the opportunity to input to the regulation process and am available should questions arise about my comments at 323-5625.

Barbara V. Carr
1344 3rd Avenue
Sacramento, CA 95818

E-4

1019 Fordham Drive
Davis, CA 95616
July 28, 1994

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento CA 95814-7243

Attention: Richard Leijonflycht

Dear Mr. Leijonflycht:

I have the following comments regarding the proposed Rules 599.799.1 and 599.799.2.

1. The rules need to make clear that employees may receive <u>both</u> a salary increase <u>and</u> an MSA. An MSA may not be refused solely because the employee has recently received a salary increase and a salary increase may not be refused solely because the employee has recently received an MSA.

2. The rule needs to state how the abuse of pay letter 94-01A will be addressed. The "Reasons" for the proposed rules state that major firms base pay increases on performance. What major firms practice arbitrary abuses such as that described in item 4 below? These abuses discredit pay-for-performance and deny every principle listed in the "Reasons."

3. It is incompatible for an appointing power to be both the rater and the final level of review. How many appointing powers will admit to abuse, harassment, prohibited discrimination or improper political activity? There needs to be an appeal to a neutral outside entity to address these practices.

4. As an example of the abuse of pay-for-performance, I cite my own experience:

   In January 1994, I received a 5% pay-for-performance increase. With the increase, my salary for that month was $30 below the <u>former</u> maximum for my class.

February 1, 1994, was the anniversary of my promotion to my present position. Accordingly, I supposedly received a merit salary adjustment. My salary for February was $30 higher than the previous month (i.e., my salary was raised to the former maximum for my class). Pay letter 94-01A (example 4) states quite clearly that I should have received both a 5% pay-for-performance increase and a full-step MSA. However the MSA was arbitrarily limited to $30.

Had my anniversary been one month earlier, I would have received the full MSA. This would have placed my salary at the then maximum for my class. The pay-for performance increase would have then been added to the then maximum, and my salary for the past six months would have been 5% higher than is has been (and continues to be).

I have no quarrel with pay-for-performance if it is pay-for-performance. Based on my experience over the past six months, it seems that the State has no intention to pay for performance. If you need more details, please call me at (916) 654-5395.

Nigel Blampied

cc: Winnie Ramsey - Caltrans, Labor Relations
Ray Hernandez - Caltrans, Labor Relations

ES

State of California — Business, Transportation and Housing Agency

**M E M O R A N D U M**

To: Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Richard Leijonflycht

Date: July 28, 1994

File No: ALPHA

Subject: Pay-For-Performance

From: Department of Corporations
Alan S. Weinger
Supervising Counsel

I have just completed my review of the Pay-for-Performance(PFP) Rules for Managers and Supervisors. I find it extremely distressing that these rules will perpetuate ~~the blatant~~ unfairness and inequity of the PFP system that ~~was ruled illegal by the Sacramento Superior Court.~~ I and other managers welcome fair and objective rules and standards to gauge our work product, but not the arbitrary and, in fact, non-standards that we were and will be rated on. At no point prior to the PFP did my appointing power indicate what standards I was being held to or what aspect of my work needed improvement. My job performance under the prior PFP had received the highest rating from my supervisor and I have been rated exceptional by my immediate supervisor for the last nine years. Then without any notice, statement of standards or an opportunity to have a fair and impartial review, the appointing power imposed a 4% pay increase instead of the 5% increase which I understand was awarded to 88% of all eligible managers.

The rules you are now attempting to promulgate are an obvious attempt to ratify an unfair system that was put into place without any sound analysis. The prior PFP system and these proposed rules are a cynical attempt to demonstrate sound management on the part of the present administration at the expense of dedicated and hard working employees. Why was the PFP system put into place less than a year prior to the election? Where was the administration and DPA for the last 3+ years. How long has this PFP system been in the planning stages? Why weren't managers given an opportunity for input prior to its implementation in January, 1994. What analysis and review was undertaken to insure that the PFP would be fairly and uniformly implemented?

Obviously, I am one of the infamous 12% of the managers who did not receive a 5% PFP increase. I doubt you will be hearing many objections from those who received their 5%. Isn't it obvious that a system that finds that 88% of its managers deserve the maximum 5% is being unfairly implemented? What action is DPA taking to address the obvious unfairness of the prior PFP? Also, any fair-minded person will see that the proposed PFP rules will do nothing to right the past errors and will simply perpetuate them. It is a sad day when good and loyal employees are used in

this way.

The following are the inadequacies in the proposed PFP rules:

1. Rule 599.799.1(b)(1) - No standards are stated in the rules. No guidance or parameters are given to the appointing powers. When does someone deserve 5% v. 1-4%? This is left to the responsibility of the same appointing powers who somehow determined that 88% of their employees deserved 5%. This will allow wholesale discrepancies between agencies, and result in the same unfairness and inconsistency that the prior PFP created. Will the appointing power be able to ignore or overrule the determination of each manager's supervisor? How can you justify each agency having different standards? Have you done any analysis of the prior PFP system to determine whether there were abuses by the appointing powers and to see if the plan was fairly and impartially implemented? Were there any anomalies in the granting of the PFP increases? Did you do a survey? Did one agency give all of their managers 5% and others less?

2. Rule 599.799.1(b)(2) - Allowing managers a "reasonable opportunity to review and comment" is meaningless without some limitations. What is a reasonable time and what are a manager's remedies if inadequate time is given? What does "consider comments" mean? What remedy is there if comments are ignored?

3. Rule 599.799.1(b)(4) - There are no time limits associated with the receipt and right to discuss the appraisal report. This could lead to abuses by the appointing power resulting in inadequate notice and right to be heard. There should be statewide uniform time requirements.

4. Rule 599.799.1(c)(1) - What criteria will be used to determine whether an employee's job performance is "successful" ? The criteria needs to be stated to avoid inconsistency, arbitrariness and abuse. How will this criteria interact and be related to salary increases that are less than the amount of the salary range increase?

5. Rule 599.799.1(c)(2) - Why is there a reference to disciplinary action contained in the rule? As managers we are well versed in Section 19572 of the Government Code and have been trained to know when and how this section applies. Is this some attempt to intimidate either the manager or their supervisors?

6. Rule 599.799.1(c)(3) - Under what circumstances will the appointing power determine an employee's performance is satisfactory in order for the employee to receive any portion of the increase they did not initially receive? What will be the procedures to insure that an employee can petition for an increase to an amount equal to the salary range increase? This

procedure needs to be uniform throughout the state to avoid abuses.

7. Rule 599.799.1(e) - Why is there no uniform statewide standard for the process of managers' appeals concerning performance appraisals, MSA's, salary increase decisions and other actions? You will end up with different procedures for different agencies, some fair and some not. Who is going to insure that minimum levels of due process are followed? Why are the bases for appeal so narrow? Will managers be able to appeal a decision if the appointing power is just plain wrong? Why is the appointing power the final level of review? Where are the managers' due process rights to have their appeals heard by independent, unbiased parties? What is the likelihood that an appointing power will overturn their own decisions? (Not likely at all.) Why is it that state managers are provided with less due process rights than the employees they manage?

8. Rule 599.799.1(f) - If this rule applies retroactively to January 1, 1994, will appointing authorities be required to reevaluate the salary increases they gave so that they conform to standards and procedures that are in compliance with this rule. Obviously, since there are no standards or rules in this rule, the appointing powers will simply ratify their prior insupportable decisions. This section is not fooling anyone and its purpose and intent to ratify past illegal acts are obvious.

Your attempt to rationalize the pay for performance syatem by comparing it to prevailing practices by other employers is the height of cynicism and absurdity. As an attorney with 15 years experience and nine as a manager, I would be a senior partner in a law firm. Why don't you survey law firms and determine what a senior partner makes and pay us accordingly? If you paid managers a prevailing salary then you could justify instituting a prevailing practice such as PFP. Be consistent and your managers will support a reasonable and well thought out proposal, but don't insult us with simplistic and insupportable logic.

In conclusion, I had always been proud to be an employee and manager with the State of California. I have always felt that I was providing a public service that was important and necessary. These new rules and the fiasco with the prior PFP make me ashamed to be part of this system. If a manager isn't doing his or her job, then let the appointing power demote or remove that manager. Don't nickel and dime us in such an arbitrary and capricious way, it's an insult.

July 21, 1994

E-6

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814–7243

Attn: Richard Leijonflycht

RE: Proposed Regulatory Action: Pay for Performance

Although I agree with the notion that pay should be related to job performance, I strongly believe that job performance and the cost of living are two distinctly different issues.

First, job performance relates to the individual circumstances of job description, environment, job assignment, training, support from superiors, peers, and subordinates, political climate, etc. The ability to perform one's job relate partly to one's own capacity, interest, suitability for the work, education, background, even age and physical condition. A highly motivated person may perform well or poorly depending on a number of factors, some under the control of the individual, some outside his/her control. Conversely, a marginal employee with "good connections" may look good when it comes time for performance evaluation.

Second, the cost of living has nothing whatsoever to do with any of the factors described above. Whether one is doing an outstanding job exceeding the expectations of everyone or whether one is just barely staying out of trouble has no bearing on the cost of lettuce in the supermarket, the cost of gasoline at the pump, or the price of a shirt/blouse at K-Mart. The cost of living is determined by the overall economy, not how well or poorly one does one's job.

Third, some employees are very good at promoting themselves–"tooting their own horns", so to speak. Others, who quietly and competently perform their work, are reluctant to promote themselves. Who, then, is going to benefit from an evaluation system based on visibility? Certainly not the quiet ones. Will managers suddenly develop the skills needed to differentiate between the self-promoters and the self-effacers? Hasn't happened so far; unlikely that it will happen now.

Fourth, you cite studies showing that private industry widely uses some sort of "pay for performance" scheme. I suppose this is in line with the State's traditional pay setting practice of tying the State's pay to the interquartile ranges of private industry pay. That's fine, but doesn't that fly directly in the face of the "Total Quality Management" philosophies of such as W. Edwards Deming, Joseph Juran, et al.? Has anyone looked at the experience of McClellan AFB? It is my understanding that they tried a "pay for performance" program several years ago and scrapped it because all it did was create exactly the kind of dissention, distrust, and hostility that they were trying to avoid!

Finally, "pay for performance" pits one individual against another in a time when we are supposedly doing everything we can to develop such things as self–managed

teams, cross–functional teams for work improvement, and empowerment of workers at all levels. One of the most positive aspects of the civil service is that everyone has access to the pay scales, so the raises we get are no secret. Under the "pay for performance" scheme, we will all become secretive about how come we got more (or less) than someone else, we will demand to know on what basis the decision was made, and I can almost guarantee the grievances will fly thick and fast claiming discrimination, favoritism, and fraud.

No, "pay for performance" does not seem to be the answer, especially if it totally replaces across the board cost of living increases as the economy dictates. I would concede performance pay increases if divorced from cost of living increases, but I strongly oppose combining the two.

Sincerely,

G. B. LEATHERWOOD
2820 Silver Tip Lane
Pollock Pines, CA 95826
Home: 916/644–7285
Work: 916/657–5996 (DMV Training Section)

E-7

July 18, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243

Dear Mr. Leijonflycht:

This letter is in response to solicitations to comment on the Department of Personnel Administration's (DPA) Proposed Rule 599.799.2, "Pay for Performance (PFP)", for state supervisors. I have reviewed the materials included in Lillian Rowett's memorandum of June 24, 1994 and have some concerns.

In the "Informative Digest" of Proposed Rules 599.799.1 and 599.799.2, it is stated that "salary ranges, themselves, are increased periodically through general (cost-of-living type) adjustments." Further, "when these general increases occur, all affected employees receive a corresponding increase in their pay ..." This is a little misleading. Cost of living increases are obtained through collective bargaining for represented employees. Non-represented employees, in particular managers and supervisors, receive the cost of living adjustment at the discretion of the Governor. Also, non-represented employees have little or no input into the determination of the size or frequency of cost of living adjustments.

In the Proposed Rule 599.799.2 (a), reference is made to "automatic, general adjustments" which refers to merit salary awards (MSA) and cost-of-living adjustments, which I believe to be a misrepresentation of these salary increases. When one is promoted from Staff Toxicologist to Senior Toxicologist there is a one "step" increase in salary, or it is not considered a "promotion" by DPA rules. If one is at the top range of Staff Toxicologist, the promotion puts you at the top of the Senior Toxicologist salary range. This is not an "automatic, general adjustment" (it was earned) and the only "adjustments" after this are the cost-of-living increases approved by the Governor. Therefore, it is grossly unfair to represent salary increases in the supervisory classes for toxicologists as being "automatic."

Equating a cost-of-living adjustment to a merit adjustment significantly diminishes the concept of merit pay and the incentive process. Elementary economics would tell you that cost-of-living pay when tied to inflation, as measured by the consumer price index, is meant to maintain a constant purchasing power for one's salary. It has nothing to do with performance. Substandard performance as a supervisor should be dealt with on an individual basis and within DPA guidelines. The presence of a poor supervisor can adversely affect the performance of every person she/he supervises and the moral

of an entire unit. If a supervisor fails to perform up to standard after having successfully passed his or her probationary period, then remedial measures other than just denial of a cost-of-living adjustment would be appropriate. PFP is the wrong way to correct poor performance. Merit pay and PFP should be more in keeping with compensating employees for their increased skills and knowledge levels as these become more valuable to the state. This type of pay should be for above standard performance. Cost-of-living adjustments would be for standard performance and neither punitive nor rewarding in nature.

It is important that DPA appreciate that after ten years the federal government has discontinued its experiment with pay for performance. It does not take long for the public to confuse a cost-of-living increase with a "bonus" and begin to criticize public servants for receiving pay that they, the tax-paying public may not get from their employers. It is essential to maintain the distinction between cost-of-living adjustments and merit pay to avoid such criticism. It is unfortunate, but true, that many people have lost faith in their government and its workers to provide them with the services they need. If subjected to a popular vote, civil servants would probably not receive any "merit increases" in pay. However, much of the public would not deny civil servants a cost-of-living increase that many of them receive from their employers. Please, let's not confuse the public as to what these salary adjustments represent - an adjustment for inflation, not pay for performance.

Sincerely,

William A. Vance

William A. Vance, Ph.D.
Senior Toxicologist
Office of Environmental Health
Hazard Assessment

E8

William M. Jemison
42 Parkhurst Street
Chico, CA 95928

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

To: Personnel Administration Officers,

Subject: Proposed Rules for Pay-for-Performance

Thank you for this opportunity to offer comments concerning the proposal.

1. Increases in pay that are called "cost of living" increases should be based on the fact that inflation has caused our paycheck to actually purchase less. When the amount of the salary range increases it has been my understanding that the change is generally made in order to keep up with the changes in the economy and to maintain the public employee salary on a parity with those in the private sector in similar positions. If these proposals are approved, it would be best if no longer referred to them as "cost of living" based changes.

2. It is of great interest to me what plans are being made to apply similar changes to the non-supervisory staff that comprised the bulk of our work force. Are they to continue to receive across the board changes due to the increasing "cost of living" that seems unfair. I would suggest we put all state employees under a payment for performance system or none. I am concerned that you are taking advantage of the fact that the managers and supervisors are unrepresented or have no bargaining unit to protect them. To establish two seperate systems for managers and non-managers is likely to discourage managers.

3. Proposed Rule 599.799.1 indicates in section (f) that this rule will take effect for managers on January 1, 1994. This seems quite unfair in that the proposal is just now being presented and hearings have not been held. If the rule is adopted it would appear much more equitable if the effective date were January 1, 1995, as it is proposed in Rule 599.799.2 (f) which pertains to supervisors.

Sincerely,

William M. Jemison L.C.S.W.
Adoption Supervisor

E-9

Department of Personnel Administration
Policy Development Office
1515 S. St. North Bldg. Suite 400
Sacramento, Ca 95814-7243

Regarding the proposed rules for " pay for Performance "

First off I would like to say how hard it is to criticise a proposal that holds itself out as creating a system that will finally reward only employees that perform well by giving only these emlpoyees increases in their salary. It implies that those non-performing employees will, once and for all, not receive extra money as they have all these years leaching off the taxpayers while watching the clock. On the surface it's untouchable...like attacking the flag.

However, I have grave concerns as to how this approach will ultimately allow politics into the decisions affecting civil servants pay. The civil service system was created to insulate non- political appointed employees of the buracracy from the desires of the administration of the moment. Under the name of pay for performance this protection could be circumvented. Many supervisors and managers in state departments perform jobs that are not easily measured in terms of performance. Not all jobs entail a production of a product. The measurement of the performance of most State jobs is a subjective matter. Often success is measured, in the eyes of the " appointing Power " in how well the employee is able to enact the wishes of the politically appointed managers and thereby the administration currently in power. Are we to believe that under these guidelines that individuals would not be judged by the persons, who are expected to develop the performance evaluations upon which the salary adjustments will be deceided, in light of their ability to please the administration? Would such a judgement be considered " Improper political activity "? Or, more likely, would it be proper political activity? Any savy CEA will know how to couch the language on a performance evaluation to not make it sound political but could still make their judgements purely for political reasons.

Admittedly not all, or many or possibly even very few of the evaluations may be made in such a manner, but who is to tell? Likely these individuals will not be punished to the extent of demotion for their political leanings, but they are likely to be frozen in their salaries. The appeal process for evaluations that are

done improperly is designed to keep this sort of thing from happening, and I am sure will be argued by the individuals that may respond to this testimony, but as hard as it is to prove an allegation it is equally as hard to disprove it as well.

To allow this change to occurr as written invites the wolf into the house. All employees should have the opportunity to be rewarded for job performance that exceeds standards. A bonus program that goes beyond cost of living increases, though subject to the same potential for abuse, would not negatively impact employees financially as this proposal may. Employees who are not performing currently can have their salaries frozen, receive dicipline, and/or be terminated. Poor performance is addressed in the current civil service system along with proper appeal procedures. This proposal is a destructive ploy to save State money when it comes to cost of living adjustments while rewarding only the favored few loyal to whoever is in power.

I am cynical enough to realize that this letter will do no good to persuade anyone to stop this policy from being enacted. This opportunity to present comments is a sham; the decision has been made and the requirement of holding a hearing, as required by law, will be met. This one will be an easy win for the administration. The next one, enacting a similar program for rank and file, hopefully will not be so easy.

William Schmidt

3940 L. ST.
SACRAMENTO, CA 95816

E-10

STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION AND HOUSING AGENCY PETE WILSON, Governor

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT**
**DIVISION OF COMMUNITY AFFAIRS**
1800 THIRD STREET
P.O. BOX 952054
SACRAMENTO, CA 94252-2054
(916) 322-1560 FAX (916) 327-6660

August 25, 1994

Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243

Attention: Richard Leijonflycht

Dear Mr. Leijonflycht:

I would like to express my reservations about the proposed regulations which would implement the Pay for Performance system initially introduced in January, 1994. Although adoption of these regulations with the ability to apply them retroactively to January, 1994 would permit the Department of Housing and Community Development (HCD) to correct its earlier, overly narrow interpretation of the Pay for Performance system, potentially for my benefit, I am not confident that HCD can fairly administer such a program.

Last January, HCD restricted the award of the 5% pay increase to only one manager per Division based upon outstanding performance. My Division of Community Affairs employed four Housing and Community Development Manager III's, and therefore, only one manager received the increase. I was assured that my increase would be awarded in April. Unfortunately, the Department's authority to award the pay increase was withdrawn in April. It is my understanding that only if the proposed regulations containing the retroactivity clause go into effect will I be awarded the increase.

HCD's criteria for award was overly narrow. Department of Personnel Administration (DPA) guidelines suggested that the criteria for award should be based upon successful, not necessarily outstanding job performance. Furthermore, DPA's guidance memo of December 10 was clearly critical of the earlier managerial appraisal system which contained a competitive feature. Through adoption of these proposed regulations with the ability to award increases retroactively, the Department would be able to redesign its January, 1994 criteria to more closely reflect DPA guidance, but there is no assurance that it will do so.

In closing, I would urge DPA to issue explicit implementation guidance to departments

and to monitor the resultant systems. Personally, I would favor pay for performance systems and have worked successfully under several at the local government level. However, DPA must recognize that there is a grave potential for favoritism, discrimination and general mean-mindedness in these times of budget constraints unless there are solid guidelines governing the implementation of the system. As an additional indication that HCD may not be able to handle the responsibility envisioned by the proposed regulations, as of this date, it has not distributed the proposed regulations or any information about the Pay for Performance proposal. The HCD managers and supervisors have not been informed of Tuesday's hearing nor their right to comment on the regulations.

The current proposed regulations do not contain DPA guidelines nor oversight and until there is adequate provision, HCD managers and supervisors will be disenfranchised.

Sincerely,

Carol J. Smith

Carol J. Smith
Housing and Community Development Manager III
Federal Programs Unit

August 26, 1994

Department of Personnel Administration
Policy Development Officer
1515 "S" Street, North Bldg., Suite 400
Sacramento, CA

ATTN: Richard Leijonflycht

In response to letter, subject: Pay-for-Performance (PFP) Rules for Managers and Supervisors, dated June 24, 1994, and received on August 17, 1994, from the appointing authority, the following is submitted:

599.799.1 (b) (1) To direct that standards of performance will be developed without any guidance for minimal requirements does not contribute to fair standards for those subject to these rules. These standards, when developed, should be able to withstand a review by representative authority higher than the appointing activity at least for the initial implementation. This is essential to achieve the stated objective of the rule and to make it a credible system to encourage productivity, optimize objectivity and fairness and promote positive rather than negative reinforcement.

The appeal process should have the same administrative level of review as any grievance procedure and may transcend the Departmental appointing activity.

As to making these rules as stated retroactive to January 1, 1994, without standards is neither fair or appropriate.

In my particular case, I was denied the raise authorized on January 1, 1994. I was not informed of this denial until it came to light with the DPA Director's letter in May, 1994, stating that the court invalidated the practice since there were no standards or system at the time of implementation.

It was my understanding that none of the managers from our Department would receive the raise and it would be based on exemplary performance. When I found out that some had received raises, I was informed that it was felt that I was not due the raise because of poor or substandard performance on some administrative issues. There was and is not documentation or even specific verbal information available to justify such denial.

I have been informed that the decision stands and my performance will be reviewed when the rule is implemented by DPA.

Whatever rule is approved, I encourage you to include a provision to correct this type of situation. For the period January 1, 1994, to January 1, 1995, when the procedure was invalidated and there are no compelling reasons such as disciplinary actions supported with written documentation, the raise will be implemented retroactively and automatically.

Respectfully,

JOHN MIROLLA
691 Highland Drive
Los Osos, CA 93402
(Phone) 805/528-8269

E12

July 21, 1994

Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street North Building, Suite 400
Sacramento, CA 95814-7243

Dear Mr. Leijonflycht:

I have read through the proposed rule on Pay for Performance for Managers and Supervisors. The proposal is pure bull! The intent is not to have manager and supervisors perform better, the intent is to save the State money. Because of that, it will not work. If you want to reward an employee for superior performance than you should have a true bonus program available to everyone.

You can't use studies from private industry to develop pay-for-performance under civil service rules. I, as a supervisor, do not have the same tools available to me that supervisors in private industry have. A supervisor is only as good as his employees. If you can't truly fire and incompetent employee, you can't improvement the work of your unit. I know you will tell me that I can discipline an employee but that's not the real world. As an example, we spent 2 years documenting an incompetent employee. What did we get for our effort? The employee was reduced in pay 5 percent for 3 months. The employee is still incompetent and back to full salary. It's just not worth the effort.

The problem with the pay-for-performance idea is that money for pay increases are only available when rank-and-file gets a raise through the collective bargaining process. Under your rules, the supervisor of those employees would get a raise only if the appointing authority wants to give managers and supervisors a raise. It has nothing to do with performance! The appeal process is a joke. You can't get past the appointing authority.

I still feel cost-of-living raises should not be based on performance. Performance should be rewarded with a once or twice a year bonus program available to all managers and supervisors. The current system is not. A small hand full of available bonuses for an entire department becomes "Who You Know" not "How You Perform".

I realize it doesn't matter what I say or anyone else says because it's what the Governor wants and he will get what he wants. He is only interested in reelection, looking good to the voters, and not in improving State Government.

I would be interested in having a copy of the information you have on the States that have implemented Pay-For-Performance programs. Please send me copies of that information as well as the information from the Federal Governments program. I am not interested in the surveys from private companies since that information is not relevant to state government.

Sincerely,

Robert Horton

Robert Horton
Audit Manager
Milk Pooling Branch
1220 N Street, Room A-221
Sacramento, CA 95814

E-14



DEPARTMENT OF CORPORATIONS
San Diego, California
July 22, 1994

IN REPLY REFER TO:
FILE NO: ALPHA

Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

RE: PAY-FOR-PERFORMANCE RULES FOR MANAGERS AND SUPERVISORS

Dear Mr. Leijonflycht:

As a supervisor for the State of California I am concerned about the proposed pay-for-performance (PFP) rules for managers and supervisors. The plan says the "salary increases shall only be granted upon the appointing power's certification that the employee's job performance is successful". It does not define "successful". It is my concern that employees who are evaluated under this plan may not be treated fairly or may not be subject to the same standards that are used to evaluate all other supervisors and managers throughout the state. If there were some safeguards in the plan to insure that all supervisors and managers throughout the state were evaluated using the same criteria for determining their "success", I would feel better about the plan.

Included with the PFP package I received from my department was a seven page document called "Initial Statement of Reasons" for proposed rules 599.799.1 and 599.799.2. Page 5 of this document says rule 599.799.2 would establish generally similar provisions for supervisors that rule 599.799.1 would establish for managers. It goes on to say that rule 599.799.2 does not contain provisions for the individual supervisor's review of proposed performance standards and appraisal systems, since this would be accomplished under the meet and confer rights accorded to supervisors in section 3533 of the Government Code. Does this mean that supervisors such as myself will not be evaluated using the "job performance is successful" criteria noted above? If this is the case, what criteria will be used and will it be applied fairly and uniformly by all agencies statewide?

Thank you for the opportunity to express my concerns about this plan. I think that a PFP plan is a desirable goal as long as it is fair and is uniformly applied across the board by all state agencies.

Sincerely,

Donald D. Kelly

Donald D. Kelly
Senior Examiner
(619) 525-4335

The proposed Pay-for-Performance guidelines allow the "appointing authority" to entirely define good. Good becomes what is in the eye of the beholder i.e. political party in power. Our Deputy Director recently established uniform guidelines for rating all supervisors/managers in the Disability Evaluation Division/Dept of Social Services. There are 4 criteria: 2 of which are strictly "party-line" ratings. So 50% of my rating is now what I mouth (See Soviet Union) not what my real performance to the citizens of the State of California is. This is a crock!!

Larry Sullivan
DESA I
DED/CDSS

Social Services
Disab. Eval. Div.
LA ~~West~~ North Branch
5757 Wilshire Blvd, Rm 370
LA 90036

EO-1

Coalition of Communications Supervisors
5276 Floral Drive
Ventura, CA 93001
805-648-7139

August 10, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

Reference: 599.799.2 Supervisory Performance Appraisal and Compensation

Dear Mr. Leijonflycht:

The Coalition of Communications Supervisors (CCS) represents California Highway Patrol Communications Supervisor I and II's (CS's). Obviously, the addition of this proposed code will result in a change in the terms and conditions of their employment and may have a significant impact on our members.

Of concern to our members is the process or procedures which will be developed to implement this new pay for performance program. Section (b) (3) and (4) discusses the annual performance appraisal system; however, it does not address several issues:

- What happens if a supervisor has not had a performance appraisal in over a year?
- At what time during the year will the supervisor be notified that their performance will or will not result in a pay increase?
- Will the supervisor have adequate notice of problems, or a chance to remedy any deficiencies prior to a decision being made about their salary increase?
- Will there be documentation of progressive discipline and/or plans of action to improve deficient performance which will support the ratings on the performance appraisal that prevent a salary increase? If it doesn't exist, will the salary increase be granted?

These items are of particular concern because we believe employees should be provided with a plan of action to improve their performance if it is deemed sufficiently deficient to deny a pay increase. The employee also should have had enough advance notice of any problems to take steps to rectify them.

Our members generally agree with the concept of basing salary increases on job performance; however, there is a concern that the evaluations may not always be objective nor fairly rate the current job performance. The system should have the following safeguards:

- o Clear and objective performance standards
- o Prompt notice to the employee of performance deficiencies
- o A plan to assist the employee in meeting performance standards when problems are identified
- o An appeal process which ensures these procedures are followed

We appreciate the opportunity to express our concerns on the proposed code addition.

Sincerely,

Jan Carr

JAN CARR, President

cc: CHP Office of Employee Relations

E.O. 2

# CALIFORNIA STATE MANAGERS AND SUPERVISORS ASSOCIATION

10235 Fair Oaks Boulevard, Suite 200
Fair Oaks, California 95628
(916) 97-CSMSA (27672)
FAX (916) 965-6201



August 26, 1994

Department of Personnel Administration
Policy Development Office
1515 S Street -- North Building Ste. 400
Attn: Richard Leijonflycht
Sacramento, Ca. 95814-7243

Re: Response to Proposed Regulations for "Pay for Performance Program"; §§599.799.1, 599.799.2

Dear Mr. Leijonflycht,

This is the response by the California State Managers and Supervisors Association to the above referenced proposed regulations.

These comments are intended to address substantive points as well as those raised by Government Code §§11349 et seq. As you know, Government Code §§11349 et seq require review of all proposed regulations for (1) necessity, (2) authority, (3) clarity, (4) consistency, (5) reference and (6) nonduplication.

CSMSA has serious concerns regarding the lack of apparent authority to implement these regulations. Moreover, CSMSA strongly disagrees with the basic presumptions of the PFP. Much recent debate regarding the efficacy of programs such as PFP for both the private and public sectors discloses the undesirability of setting up an adversarial work environment and, instead, encourages team work and team goals. Indeed, many state departments have spent thousands of tax dollars on Total Quality

Management (TQM) projects which are the antithesis of the proposed PFP. The current PFP creates an "every man for himself" atmosphere. On the contrary, many state departments, including DPA, is embracing the TQM views of team work and common goals.

In view of these concerns and requirements, CSMSA wishes to express the following serious concerns regarding the proposed regulations.[1]

1. Cost of Living Adjustments (COLAS) are essentially eliminated for managers and supervisors while rank and file employees (those managed and supervised by CSMSA members) will retain the ability to negotiate for such increases.[2] The concern is simple. The state, through DPA, may recognize the appropriateness of a COLA for state employees and implement such through the collective bargaining process for rank and file. At the same time, state managers and supervisors are guaranteed no equal treatment (though the appropriateness of the COLA is undisputed) because the pay for performance program (PFP) de facto replaces COLAs for managers and supervisors;

2. The regulations do no affirmatively state that only performance related factors (occurring during the pertinent time frame) shall be considered by state agencies/departments in determining participation in the PFP. CSMSA members have been denied participation in the former PFP for a variety of non-performance related reasons such as misclassification and budget shortage. Also, out-dated factors (i.e. those occurring several years before the pertinent PFP period) were used to deny PFP participation;

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[1] CSMSA's comments come after lengthy and informative meetings with DPA staff. Conclusions regarding DPA's application of the proposed regulations are based upon these meetings. CSMSA wishes to express its gratitude for the cooperation and assistance of DPA staff.

[2] DPA, in the earlier PFP and now this version, has consistently confused the concepts of a COLA and a PFP. COLAs provide no increase in salary but simply maintain parity with the cost of living; a PFP allows an increase for reaching a specified goal.

3. The regulations are intended to have retroactive application with no provision for re-evaluation of persons who were not permitted to participate in the PFP. No recourse is offered to anyone who improperly denied participation in PFP. Retroactivity is only meaningful if it permits employees wrongfully denied PFP participation to obtain a "fresh start" in the process;

4. DPA improperly relies on Government Code §§19992.8 et seq. for it's authority to promulgate the proposed regulations. These statutes create the existing management incentive program, not the PFP. DPA's current PFP was not contemplated by the Legislature when it enacted sections 19992.8 et seq. This existing "bonus" program has been ignored by DPA even though DPA has already promulgated regulations to implement the pre-existing "bonus" program. The pre-existing "bonus" program has been consistently unfunded in the last few fiscal years. It has not worked because in has not been funded;

5. There is no guarantee of uniformity in state government. Each department will separately develop it's own standards. This is contrary to the merit principle set forth in the California Constitution and the Government Code;

6. There is no appeal from a denial of PFP participation. The only appeal available must be based upon unlawful discrimination, not for improper or inaccurate application or utilization of the PFP. This is inadequate because it fails to account for departments misapplying the PFP. The PFP evaluations are to be retained for three years and denial of PFP participation will cause DPA to make a disciplinary referral regarding the employee to his or her department head (see #9 below);

7. The lack of clarity of impact on such things as transfer between state departments and the lack of direction regarding such things as whether or not hiring departments will have access to an employee's PFP evaluations render the proposed regulations fatally flawed.

8. The expectations of the PFP are unclear. Merit Salary Adjustments (MSAs) are awarded for satisfactory performance; PFP participation is based upon successful performance, are these the same? If different, how are they different? What is the statutory authority for the difference?[3]

9. Will lack of PFP participation automatically trigger discipline? DPA advised that it contemplates a referral to the department of an employee who has not participated in the PFP for three consecutive years. In view of having different and unclear standards department-to-department, this practice could cause very diverse disciplinary standards in state service. This is also contrary to the merit principle.

10. The issues of Necessity, Authority, Clarity, Consistency and Nonduplication have already been raised above, however other concerns remain; (a) CSMSA was advised by DPA that the current MSA system doesn't work and the PFP is intended to cure that problem. The MSA system is a creature of statute which has been functioning for a long period of time. If DPA feels the MSA system is too lax, then curing the current system, not inventing a entirely new regulatory system (not contemplated by any statute), is a more plausible response; (b) the current statutory managerial bonus program (Government Code §§19992.8 et seq) is simply not addressed. DPA does not even address it's own regulations regarding the system. The program has been routinely denied funding over the last few years, it was not inefficient, it was ignored. This statutorily created and sanctioned program is obviated by the proposed PFP for no stated reason. Simply, isn't the PFP duplicative of statutorily created programs already in existence?

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[3] MSAs are a creature of statute (Government Code section 19832).

This is not an exhaustive itemization, rather, it expresses the ongoing concern of CSMSA regarding the proposed PFP.

Thank you for your consideration of these concerns.

Sincerely,

Clyde B. Creel

Clyde B. Creel,
President, CSMSA

E. O. # 3

**PROFESSIONAL ENGINEERS**

**IN CALIFORNIA GOVERNMENT**

**PRESENTATION BY JOHN BAILEY,**
**STATEWIDE VICE PRESIDENT, SUPERVISORY**
**ON**
**DPA PAY-FOR-PERFORMANCE PROPOSAL**
**August 30, 1994**

Good Morning! My name is John Bailey. I am an Associate Transportation Engineer, Supervisor in District 2 of Caltrans. I have been employed by Caltrans for 37 years. I am also a member of Professional Engineers in California Government and am currently the Vice President, Supervisory. PECG represents over 2600 Supervisors and Managers in California State Service.

I am here to speak against the pay-for-performance program proposed by DPA Rules 599.799.1 and 599.799.2. As a start, I feel that hearings should also be held in the major cities of the state to give more employees the opportunity to comment on the proposed changes.

My concern is that the proposed system will lead to favoritism and cronyism in the management of state agencies. The new rules contemplate management control of supervisor and manager wages, without appeal beyond the department. A denied cost-of-living raise to the working person is as much a form of discipline as a wage cut, demotion or suspension. Each of these actions means less money to the employee than he/she would otherwise be entitled to.

Yet, the state appeal process for discipline or a wage cut, demotion or suspension requires that the State Personnel Board concur with the adverse action before it is effective. A manager who punishes or retaliates against an employee for exposing the failings of the manager, or corruption in the department, or speaks out where he or she feels the best interests of the State's taxpayers or employees are not being served can currently appeal that discipline to the State Personnel Board and prevail. Under the proposed regulations, the same rights are not available if the punishment or retaliation takes the form of a denied raise. This factor will have a stifling impact on many employees. They will look the other way when the state's or taxpayers' interest conflicts with the interest of the people that give out

HEADQUARTERS: 660 J Street, Suite 445, Sacramento, CA 95814 • (916) 446-0400
LOS ANGELES: 505 N. Brand Boulevard, Suite 780, Glendale, CA 91203 • (818) 500-9941
SAN FRANCISCO: 1390 Market Street, Suite 925, San Francisco, CA 94102 • (415) 861-5720
TELEFAX: Headquarters (916) 446-0489; Los Angeles (818) 247-2348; San Francisco (415) 861-5360

the raises. The adage "Don't bite the hand that feeds you" will necessarily force employees to serve their immediate supervisor's idiosyncrasies rather than the state's interest when the two conflict.

Another concern I have is that friendships and favoritism will become a major factor where merit should control. The proposed system lends itself to management conduct in which a decision is made that only a certain number of managers and supervisors will get full raises, and the raise givers will make decisions between equally qualified subordinates on factors other than performance, friendships and favoritism will become decisive.

Our staff has contacted nine departments about the status of their developing the performance criteria, which will be used to evaluate supervisors and managers performance, for their pay raise in January 1995. These departments reported that they are still working on the criteria or, in most cases, no work has been done on it.

Departments contacted on the status of Performance Criteria for Pay-for-Performance Program:

- Caltrans - still being worked on.
- Parks and Recreation - No criteria
- Energy Commission - No criteria
- Cal/EPA - still being worked on.
  - Air Resources
  - Department of Pesticides
  - Department of Toxics
  - Waste Management Board
  - Water Resources Control Board
  - Office of Environmental Health Hazard Assessment

The voters of California voted to eliminate the "spoils" system of public service when, what is now Article VII of the Constitution was adopted. The merit system has worked and continues to work well. The system contemplated by the proposed rules marks a return to the "spoils." Please do not allow it to happen.

file PECG John Bailey 08/30/94 PFP Hearing EO# 3

Dennis F. Moss - State Bar #77512
505 North Brand Boulevard, Suite 780
Glendale, California 91203
(818) 247-0458

Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

BEFORE THE DEPARTMENT OF PERSONNEL ADMINISTRATION

POLICY DEVELOPMENT OFFICE

| | |
|---|---|
| In the Matter of Proposed Regulations:<br><br>599.799.1 and 599.799.2 | COMMENTS AND OBJECTIONS OF ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT |

TO: DEPARTMENT OF PERSONNEL ADMINISTRATION
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Richard Leijonflycht

COMES NOW, ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, and PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, and submits the following comments and objections to proposed regulations 599.799.1 and 599.799.2:

## INTRODUCTION

DPA has proposed a radical change in the discipline process of the state's managers and supervisors through proposal of

Regulations 599.799.1 and 599.799.2. Disguised as a pay system, the regulations are, in substance, no more than a discipline system for supervisors and managers in which they are denied appeal rights to the SPB, rights that the California Constitution and applicable statutory authority, afford them.

The proposed regulations provide that DPA can change the pay ranges of supervisory and managerial employees, and appointing authorities can either provide or refuse increases in any amount up to the full amount of the range change based on "successful" job performance. Bottom step supervisors and managers are treated slightly differently. The rule contemplates that bottom step employees will be given the raise but will be subject to discipline for their poor performance (see the text of the proposals). There are no appeal rights contemplated by the proposed regulations beyond the supervisors' or managers' department. There is no opportunity for an employee punished by a denied raise, to appeal his punishment to the disinterested SPB.

## ARGUMENT

1. THE PROPOSED RULES UNCONSTITUTIONALLY IMPINGE ON THE RIGHTS OF SUPERVISORS AND MANAGERS TO APPEAL DISCIPLINE.

Article 7, Section 3 of the California Constitution provides:

> "(a) The [State Personnel] board shall enforce the civil service statutes...and review disciplinary actions."

The statutes governing discipline include, as grounds for discipline, incompetency, inefficiency, inexcusable neglect of

duty, and a variety of other performance based criteria. Government Code Section 19572 (applied to managers pursuant to Government Code Section 19590).

An adverse action is defined as:

> "...dismissal, demotion, suspension, or other disciplinary action." Government Code Section 19570. (Emphasis added.)

Clearly, denying a person a raise or full raise on the basis of a failure to "successfully" perform duties, or reach the top level of success, is a form of "disciplinary action". Denial of an available raise for poor performance is clearly as punitive as a suspension without pay. In both cases, punishment in the form of a withholding on money is the result. The SPB regularly hears disciplinary cases that arise from reductions in pay based on performance deficiencies. The denial of an available raise on the basis of performance deficiencies is no less disciplinary, no less a reduction in pay.

With jurisdiction over discipline residing in the State Personnel Board, DPA is without authority to adopt a regulation that provides for discipline, especially when the proposed regulation deprives the employee of a right to appeal the discipline to the SPB, pursuant to Article VII of the Constitution.

DPA only has the authority to adopt regulations affecting the purposes, responsibilities, and jurisdiction of DPA, and to do so consistent with the law when necessary for personnel administration. Government Code Section 19815.4. Here, DPA has crossed the line, encroaching on a disciplinary system exclusively within the jurisdiction of the SPB.

A useful analogy arise from the context of parental discipline. Parents could tell their children, "All the children who behaved this year will go to Disneyland tomorrow", and then deny the child who didn't behave the benefit of the Disneyland trip. On the other hand, the parents could take all the children to Disneyland and punish the child who didn't behave, by denying his/her allowance for a week. In either case, there is discipline for improper behavior.

Here, DPA would deny appeal rights if the discipline took the form of a denied future benefit (Raise/Trip to Disneyland). Such an approach clearly undermines SPB's jurisdiction over the disciplinary process.

2. GOVERNMENT CODE SECTION 19826 DOES NOT PERMIT A SCHEME WHEREIN APPOINTING AUTHORITIES CAN PAY EACH PERSON IN A CLASSIFICATION A CUSTOM RATE BASED ON PERFORMANCE.

Among the authorities cited by DPA to justify the proposed regulations is Government Code Section 19826. This Code clearly limits DPA's authority in the administration of salary range changes. It provides in part:

> **"§ 19826. Salary ranges; establishment and adjustment; exclusive representation by employee organization; conflict with memorandum of understanding.**
>
> (a) The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business."

Clearly 19826 is limited to salary range setting for classifications of positions. It does not permit DPA to set salaries for individuals within classes on the basis of performance. The ranges contemplated by 19826 have intermediate steps between minimum and maximum salary limits. Government Code Section 19829. The intermediate steps by law must be as close to five percent (5%) as the State Personnel Board determines to be practicable. Government Code Section 18807.

The proposed regulations contemplate as many "performance" steps as there are employees in the class, and the steps can be well under 5%. For example, assume the following: the classification of Supervising Widget Maker with a salary range that has a bottom step of $1000, a second step of $1050, a third step of $1102.50 and a top step of $1157.75. Then assume that DPA changes the salary range so the bottom step is $1500. By operation of the law as it currently exists, the second step would be $1575, the third step $2353.75, and the top step $2,471.43. (The law would actually round off to the nearest dollar.) Each intermediate step in the range, as set forth above is 5% greater than the prior step, in compliance with Government Code Section 18807.

Currently there are employees with pay rates between steps; however, they are in those positions by virtue of the application of laws regarding transfers and promotions, not on the basis of performance judgments. Historically, the wages of employees earning rates between steps would increase in an amount commensurate with the range change decided upon by DPA. The regulations proposed by DPA allow for intermediate

performance steps at all rates between the bottom step and the top step. The raises of employees are not to be determined by the range change, but rather by performance judgment.

Proposed 599.799.1 and proposed 599.799.2 each provide at (c)(1):

> "Notwithstanding Section 599.589, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range; provided, that these salary increases shall only be granted upon the appointing power's certification that the employee's job performance is successful."

Whether someone advances to a particular step, or skips steps within the range is left up to the appointing authorities. An appointing authority, under the proposed rules, can increase salaries in any amount up to the amount of the salary range increase, or give an employee no raise so long as he or she does not fall below the bottom step.

Clearly Government Code Section 19826 does not contemplate the monster that DPA would create. If it had, it would have clearly referenced that range changes developed by DPA do not have to be granted to employees at the appointing power's discretion.

3. WAGE SETTING ON THE BASIS OF MERIT IS LIMITED TO MERIT SALARY ADJUSTMENTS CONTEMPLATED BY GOVERNMENT CODE SECTION 19832.

Government Code Section 19826 provides that in establishing ranges for classes of positions, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. This rule does not permit

consideration of the performance of individuals within a class to determine the wage rate of the individual.

The Legislature has occupied the field of raises based on an employee's merit in Government Code Section 19832.

Government Code Section 19832 limits wage adjustments based on merit to the issue of whether an employee may move between established intermediate steps.

Performance based raises are limited by 19832 to a one intermediate step, 5% per year, raise. (G.C. 18807) The proposed regulations, with absolute management discretion to determine the existence or amount of raises based on performance whenever DPA changes ranges, is clearly defying the intent of the Legislature to limit the issue of performance based raises to the annual merit salary adjustments set forth in Government Code Section 19832. By occupying the field of merit based wage adjustments in Government Code Section 19832, DPA is necessarily precluded from legislating through regulations that all raises within certain classes must be merit based.

4. GOVERNMENT CODE SECTION 19829 DOES NOT AUTHORIZE THE PROPOSED REGULATIONS.

DPA attempts to justify the proposed regulations on the basis of Government Code Section 19829. Government Code Section 19829 allows adoption of more than one salary range or rate or method of compensation within a class only when the classes and positions have unusual conditions or hours of work or where "necessary to meet...prevailing rates and practices for comparable services in other public employment and in private

business..."

Supervisory and managerial classes do not have unusual conditions or hours of work, and the system contemplated by the proposed regulations is not necessary to meet prevailing rates and practices for comparable services in other public employment and in private business.

"Meeting" prevailing rates and practices is a necessity where the state cannot hire or retain employees because prevailing rates or practices pay better than the state. If, for example, the state needs nurses in San Francisco and Bay Area nurses get $3 more per hour than the state rate, and state nurses are abandoning state jobs, there is a necessity to meet prevailing rates and practices, and 19829 authorizes DPA to establish a separate rate. Here, it has not been shown to be "necessary" to establish potentially different rates for everyone in the supervisorial and managerial classes; therefore, pursuant to Government Code Section 19829, DPA cannot adopt regulations that would have that impact.

5. GOVERNMENT CODE SECTIONS 19992.8 - 19992.14 DO NOT AUTHORIZE THE SALARY SYSTEM CONTEMPLATED BY THE PROPOSED REGULATIONS.

The Authority cited by DPA to support the proposed regulations include Government Code Sections 19992.8 - 19992.14. These Code Sections address Performance Reports for Managerial Employees.

As a preliminary matter, it should be noted that these sections do not deal with supervisors and to the extent the Legislature has given DPA any powers in these sections regarding

managers, it is axiomatic that similar powers were not provided DPA in regards to supervisors.

Government Code Sections 19992.8 - 19992.14 do not give any authority to DPA to create regulations providing individual raises to managers when ranges are increased. Section 19992.11 indicates that performance reports shall be considered for a number of reasons including "in determining salary increases and decreases", and 19992.14 refers to the use of performance appraisal reports for merit salary increases.

Neither of these sections suggest the elimination of the pay range system with its 5% intermediate steps, nor do they suggest that employee performance must be judged for all raises. By describing use of performance reports in "awarding merit salary increases", rather than all raises, 19992.14 makes clear that other range change raises must continue to occur without regard to performance appraisal reports.

6. GOVERNMENT CODE SECTION 19825 ARGUES THAT THE SALARY SETTING CONTEMPLATED BY THE PROPOSED REGULATIONS CAN ONLY OCCUR WHEN STATUTORILY AUTHORIZED

The proposed regulations give authority to state agencies to fix the compensation of managerial and supervisory employees. Government Code Section 19825 contemplates that state agencies can have this authority "whenever authorized by special or general statute to fix the salary or compensation of an employee..." It is clear that, but for merit salary adjustments contemplated by Government Code Section 19832, the Legislature has not given salary setting authority to any agency other than DPA the limited range setting authority given in Government Code

Section 19826. The Legislature has not authorized, by special or general statute, salary fixing by the various state agencies. To the extent the proposed regulations give state agencies powers over salaries that the Legislature never contemplated, they are invalid. Government Code Section 19825. Examples of where the Legislature decided to give agencies salary setting authority include the PUC and FPPC.

In fact, the Legislature has made clear that salary determination is exclusively DPA's job. Government Code Section 19816 gives DPA the duty to administer salaries. The regulations improperly delegate administration of salaries to the state agencies.

> "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion, are in the nature of public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." [cites omitted] Civil Service Association v. Redevelopment Agency (1985) 166 Cal.App.3d 1222, 1225

7. THE PROPOSED REGULATIONS CREATE A RETURN TO THE SPOILS SYSTEM.

Article VII of the California Constitution, creating a merit system in state employment, was intended, in part, to eliminate spoils in state employment practices (favoritism, political considerations, and friendship controlling employment decisions, rather than merit):

> "A second purpose of article VII and its predecessor was to eliminate the 'spoils system' of political patronage by establishing a merit system whereby appointments to public service positions are based upon demonstrated fitness rather than political considerations." California State Employees' Ass'n v. State of California (1988) 149 Cal.App.3d 840, 847.

A key element in the elimination of spoils is the fact that no lesser authority than the California Constitution provides that a disinterested third party, the SPB, will review all discipline. This process limits the possibility of "spoils" because an agency head's decision to discipline must be justified to the SPB. An agency cannot discipline an employee for failing to go along with shoddy management practices, for failing to make his manager look good in the face of incompetence, or for speaking up where top management's agenda and the public interest clash.

If a department attempted to discharge, suspend, or give a disciplinary wage cut to a manager or supervisor who "did not go along with the program" in the above scenarios, appeal to the SPB assures an impartial fair hearing.

With the proposed regulations a manager and/or supervisor will be left without recourse. The regulations afford management the opportunity to reward loyal soldiers with raises while denying raises to managers and supervisors who have the public's interest at heart.

With no appeal beyond the Department head, the regulations are going to force good managers and supervisors to put on blinders to the incompetence, corruption, and mistakes of those who control their fates. These regulations will silence discourse when it comes to policy issues. Innovative, thoughtful managers and supervisors are going to be afraid to be outspoken where it is called for out of fear that they will be denied a full raise. Managers' and supervisors' performance will be driven by spoils considerations not merit considerations

where these two collide.

Evaluating supervisory and management performance is subjective enough. Without appeal beyond top department management, possible denial of a raise will be a cloud that will chill the judgment of even the most dedicated employees.

8. GOVERNMENT CODE SECTION 19826 CONTEMPLATES COMPARABILITY OF PAY BASED ON DUTIES AND RESPONSIBILITIES NOT PERFORMANCE.

Government Code Section 19826 requires DPA, in establishing salary ranges, to base the ranges on the principle that like salaries shall be paid for comparable duties and responsibilities. The proposed rules do not adhere to the statutorily declared principle. Employees with like duties and responsibilities will be paid different wages than their cohorts, under the proposed regulations, because performance will be determinative of pay rates. Comparable pay based on duties and responsibilities is not possible when quality of work, not duties and responsibilities control wage determination.

## CONCLUSION

DPA, through proposed regulations, is taking a step that only the Legislature can take. Salary setting and the salary setting process are legislative acts. The Legislature has not authorized the performance pay salary setting process that the proposed rules contemplate. For the reasons stated herein, DPA does not have the authority or right to substitute its judgment for the Legislature's judgment, and thereby effect a radical

change in the compensation system of the state's managers and supervisors.

Date: 8-30-94

Respectfully submitted,

DENNIS F. MOSS, Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

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Association of
**CALIFORNIA STATE SUPERVISORS, INC.**
1108 "O" Street • Sacramento, CA 95814 • (916) 326-4257 • (800) 624-2137 • FAX (916) 326-4364
An Affiliate of the California State Employees Association

August 16, 1994

Mr. Richard Leijonflycht
Policy Development Office
Department of Personnel Administration
1515 S Street, North Building, #400
Sacramento, CA 95814-7243

RE: Request To Appear And To Be Placed Near The Top Of Agenda; Hearing On Pay-For-Performance, August 30, 1994

Dear Mr. Leijonflycht:

Thank you for your assistance during our review of documents that DPA is relying upon while proposing a new regulation on the subject of pay-for-performance.

To follow up on our verbal request of August 12, 1994, we would appreciate it if you would place our organization, The Association of California State Supervisors (ACSS), as close to the top of the agenda as possible for the hearing scheduled on August 30, 1994 at 10:00 a.m.

ACSS has almost 8,000 dues paying members who are supervisors and managers directly affected by the subject of this hearing. We enlisted the services of a private independent research firm to conduct an objective opinion poll of our members, former members and nonmembers and therefore we feel confident that our testimony reflects the attitudes prevailing among approximately 23,000 state supervisors and managers. We are, of course, the largest organization that exclusively represents supervisors, managers and confidentials in state service.

We request one-half hour of hearing time to complete our presentation.

Thank you for your cooperation.

Sincerely,

Al Riolo

Al Riolo
Supervisory Representative

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Rcvd 8/30/94 PFP Hearing

E04

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CALIFORNIA STATE SUPERVISORS, INC.
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# PAY FOR PERFORMANCE
# A PRESENTATION BY
# THE ASSOCIATION OF CALIFORNIA STATE SUPERVISORS (ACSS)
# AUGUST 30, 1994

## SUMMARY OF FINDINGS

1. On April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's original "Pay for Performance (PFP)" regulation illegal and he restrained DPA from further implementation.

2. Substantive portions of DPA's revised regulations, as proposed for the August 30, 1994 regulatory hearing, are also illegal.

3. The paramount public policy issue is not whether a 3% pay adjustment is unreasonably too high; but rather, how to evaluate the degree of efficiency, that state employees demonstrate, when performing their duties and responsibilities, everyday.

4. The Department of Personnel Administration (DPA) has failed to effectively administer the report of performance system already prescribed in law; DPA's proposed regulations that confuse this issue with pay, merely make matters worse. Until this fact is acknowledged by the administration, clouding the central issue of DPA's responsibility, under current law, with pay actually hampers true performance evaluation reform.

5. A study by the Legislative Analyst concludes that Governor Wilson's actions confuse basic concepts of performance, merit, COLA and prevailing rates of pay. DPA is trying to do more with its regulations than permitted by law; the administration is infringing on legislative authority and true pay reform requires legislation to recast state laws.

6. Rather than committing a series of illegal acts that are devastating to employee morale and sending the wrong message, the administration should withdraw these proposed regulations in favor of introducing legislation in 1995 to establish proper public policy.

7. In the meantime, the Department of Personnel Administration, (not merely individual departments) must fulfill legal responsibilities, under existing laws, for establishing standards of performance and distributing a work performance rating form (or forms) based on fundamental criteria:

   - The rating form must describe essential factors to be rated that are directly related to work efficiency.

- The factors must be appropriate to duties and responsibilities contained in class specifications and job duty statements in order to prevent favoritism and recognize merit.

- The factors must express clear work expectations with a guarantee they have been known and discussed by rater and rated at least six months before any rating report is due.

- When quantitative expectations will be evaluated, they must be stated in advance; objective standards for measurement must be clearly identified. How much will be done by when? By what standard of measurement?

- When qualitative expectations will be evaluated, they must be stated in advance using objective measures of thoroughness, accuracy, degree of usefulness, timeliness and effectiveness. How useful is the task? By what measurement of effectiveness?

- The rating form must be uncomplicated, easy to use and self explanatory; paperwork must be kept to a responsible minimum.

- During the review period, frequent informal conversations about work progress, strengths and weaknesses and any change in expectations must be guaranteed to occur so there will never be any surprises at the end of the review period.

- The rating method must be simple, rapid, valid and applied uniformly; it must be an inexpensive system to use that conforms to merit principles contained in the State Civil Service Act.

- DPA must meet its legal responsibility for central administration of the system and serve as a neutral agency in appeals permitting use of the grievance process. This assures that the performance evaluation procedure and rating form have been utilized, both by rater and rated, as intended.

- The performance evaluation must never be used as punishment, but serve to acknowledge level of efficiency as accurately and objectively as possible and used to plan how aspects of performance could be improved.

8. Language which the California Legislature intentionally inserted in the final Budget Act (SB 2120) specifically prohibits any amount less than 3%, contained in collective bargaining Memoranda of Understanding for other state workers, to be paid to state managers and supervisors effective on the same date as rank and file pay increases.

BACKGROUND - NEW LEGITIMATE PAY SYSTEM OR POLITICAL PLOY?

After three years with no pay increases, including a five (5) percent salary decrease in 1991, the California Legislature earmarked cost-of-living adjustments (COLA) for state employees limited to five (5) percent in 1994 and three (3) percent in 1995 (tied specifically to a rise in the Consumer Price Index (CPI).

Governor Pete Wilson forbid use of funds for COLA purposes. Instead, on December 8, 1993, he ordered immediate imposition of a "performance-based pay system" to impact state managers on January 1, 1994, impact state supervisors on January 1, 1995 and impact state rank and file employees in future collective bargaining negotiations. Timing of this sudden departure from legislative intent, appeared to be politically motivated as Wilson faced a tough election year.

Acting on the governor's command, on December 10, 1993, the Department of Personnel Administration (DPA) issued Management Memo 93-80 containing an underground regulation. It authorized department directors to award a pay raise of up to five (5) percent in 1994 and up to three (3) percent in 1995 to managers and supervisors certified as performing their jobs "successfully", a term that remains undefined.

DPA renounced responsibility for development, installation, regulation and evaluation of a new uniform statewide performance appraisal system linked with pay. Essentially, DPA notified departments to devise their own "pay for performance" methods.

DPA refused to establish any objective performance standards or offer a valid appraisal report form and system of performance ratings required by Government Code Sections 19992 - 19992.3 and Government Code Sections 19992.8 - 19992.l4.

By this abdication, DPA nullified and violated state laws requiring coordinative control over performance evaluation and related pay by a central agency to secure fair and uniform treatment.

DPA's impulsive act created disruption and confusion among state supervisors and managers; their morale plummeted to a new all time low (as determined from surveys conducted by an independent opinion research company, Meta Information Services).

Employee organizations representing state supervisors and managers responded by filing several lawsuits.

The State of California has the largest state civil service workforce in the world,

comprised of about 4,000 managers, almost 20,000 supervisors and more than 140,000 rank and file employees. It's doubtful that any respected practitioner of sound personnel administration would advise installing a true performance pay program, covering this huge workforce, in a slipshod and illegal manner. Personnel experts know the importance of establishing an atmosphere of trust combined with effective communication and training before adopting new performance evaluation methods and redirection of pay. In stark contrast, the near certainty of creating more disenchantment than incentive, from a system conceived and imposed outside the rule of law, provides clear evidence of defective public policy. To a large extent, this issue involves credibility and reinforces distrust of DPA.

SUPERIOR COURT RULES DPA ACTION ILLEGAL

On April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's "Pay for Performance (PFP)" regulation illegal and he restrained DPA from further implementation.

The judge reasoned that DPA, acting on Wilson's order, had violated the rule of law requiring regulations to be promulgated in compliance with the Administrative Procedure Act. DPA also violated Government Code Sections 19826 and 19829 dealing with salary ranges and pay steps.

The court deferred judgement on the legality of other elements within PFP, construing these issues moot upon throwing out DPA's entire underground regulation.

By this ruling, however, the court delivered a strong message that the end does not justify illegal means when determining public personnel policy. The public interest is not served when operations of government, with unique responsibility to citizens in general and taxpayers in particular, are not conducted in a planned, systematic manner and when legal procedures are not logically or equitably applied. Successful public personnel administration demands fully meeting the intent of existing laws and regulations, not abusing or violating them.

In contrast, what kind of message is delivered by a state governor and his central personnel agency to employees and the public when those in charge of government violate the rule of law and appear to do so intentionally? Do they act as models for successful and efficient performance? Or is it simply a matter of "do as I say, not as I do"?

The soundness of personnel policies and the effectiveness of procedural methods to reach worthwhile objectives for this state depends on the present condition of the personnel system, its history, evolution and the impact from suffering a decade of neglect and budget deficits.

The state's employees have suffered enough from knee-jerk governance. What they need is sound planning, proven tools of personnel administration for recruiting, retaining, classifying promoting, training, paying and evaluating the performance efficiency of the work force.

Exactly what does pay for performance mean? How does it differ from existing State Government Code and Regulations that already legally define "skill", "effort", "responsibility", "salary", "performance appraisal reports", "merit salary adjustments" and incentive pay through "managerial bonuses" and "supervisor performance awards"? And what is the legal definition of "successful"? Isn't the singular issue in this matter the degree of efficiency with which an employee performs the duties and responsibilities of a position when clear and reasonable expectations are known?

DPA's underground regulation did not clarify these personnel practices and terms - it confused them more.

Under the circumstances, it is easy to see why elements of the PFP are every bit as illegal as the process DPA used when attempting to establish it illegally.

Governor Wilson and DPA officials are guilty of a violation of the public trust; their performance has been irresponsible because it has been declared illegal as determined by a court of law. They are <u>not performing</u> their jobs "successfully". They need to recognize that individual actions without sound planning, proper program development, advance employee communication, lead time to implement with adjustments, training of personnel and trial runs are merely political expedients. Arrogant governance is undesirable and unacceptable.

Public personnel policies and procedures affecting the state workforce should be supportable by logic and facts in light of the history and broad considerations of state civil service, its people and its merit system as a whole.

In the management of California state personnel affairs, fair treatment, equality under the law, merit principles, reasonable remedies, speedy appeals and safeguard from favoritism require uniform procedures and objective criteria.

DPA is making a serious mistake by stubbornly insisting on promulgating a regulation on "pay for performance", at this time, in view of these recent legislative, budgetary and legal developments.

<u>DPA DECIDES TO PRESS ON WITH DEFECTIVE REGULATIONS</u>

On July 1, 1994, DPA published notice of regulatory action to promulgate essentially the same "pay for performance" regulations that Sacramento Superior Court

had ruled illegal on April 1, 1994.

Proposed Regulation 599.799.1 purports to cover Managerial Performance Appraisal and Compensation. Proposed Regulation 599.799.2 purports to cover Supervisory Performance Appraisal and Compensation. Neither comply with Government Code Sections 19992 - 19992.3 and Government Code Sections 19992.8 - 19992.14. These laws require DPA to itself ". . .provide a system of performance rating. . .designed to permit as accurately and fairly as is reasonably possible, the evaluation. . .of each employee's performance of his or her duties"; not turn these functions over to departments willy-nilly.

Through these proposed regulations, DPA is abrogating its own legal accountability to administer a uniform merit system under the law for assuring state employees - and the public - that evaluation of work performance will be objectively job related, valid and fair.

LEGAL DEFECTS IN THESE PROPOSED REGULATIONS ARE MANY; VIRTUES ARE FEW

Generally, in violation of laws, these regulations substitute subjective judgement in place of merit and fail to provide a uniform rating process for evaluating ". . .the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day. . ." as required by Government Code Section 19992(a). Also DPA renounces its role under the law for establishing standards of performance for each class of position, exercising coordinative control, investigating administration of the system and enforcing adherence to objective standards as required by Government Code Section 19992.1(a). Finally, DPA renounces any responsibility for hearing appeals concerning departmental compliance with its own regulations and the laws of the state. In short, these regulations sanction pay by personal opinion rather than pay based on merit principles with assurances of due process.

If these regulations are adopted, results affecting pay can be predicted to be as widely varied as the personal opinions of those doing the rating. Without predetermined uniform criteria and a standardized system of performance ratings, that performance which will be considered "successful" by some will be rated "unsuccessful" by others. (The term "successful" used in these regulations is undefined.)

Evidence of this conclusion is supported by actual experience with the illegal regulation that DPA implemented on January 1, 1994. While DPA reports that about 88 percent of all eligible managers received a full five (5) percent pay raise with this process, another 418 managers did not - and DPA has refused all appeals.

As tangible evidence of this gross deficiency, today at this hearing, we have a copy of a draft lawsuit that the Association of California State Supervisors is preparing to file on behalf of six managers employed at the Teale Data Center because they were denied a pay increase and were not given a written report of performance. When we filed a grievance, neither the data center, nor DPA permitted any recourse to this injustice. If these same regulations are adopted, the state may be deluged with hundreds of such lawsuits. Do these proposed regulations represent an acceptable administrative process for resolving employment practices disputes. Or do they return us to the 1930s, before the California Civil Service Act, when our only way to get fair treatment was to go to court?

We have ample evidence from among the 418 managers who were denied a pay raise that exemplary performance was actually documented in written reports of performance issued both before and after January 1, 1994, yet a pay raise was denied by the department director based on personal opinions unrelated to performance of duties. When this occurs under these proposed regulations, there is no reasonable recourse because nothing in the regulations provide a means of enforcement or appeal; to a neutral agency such as the State Personnel Board.

Of all the defects with these regulations, the chief objection is that when an employee is inappropriately harmed, nothing can be done to correct the injustice but proceed to a court of law.

Without a fair and effective appeal process, California has no merit system. Without a merit system, California has a system of favoritism in violation of the California State Civil Service Act. Abdication of responsibility for establishing quantitative and qualitative standards, investigating administration of the system, enforcing adherence to objective standards and hearing appeals is unacceptable public policy.

PROPOSED REGULATIONS CONTAIN NUMEROUS VIOLATIONS OF STATE LAW

On April 1, 1994, Sacramento Superior Court declared DPA's "Pay for Performance" underground regulation illegal largely due to promulgation defects. The court deferred judgement on the legality of other elements contained in the regulation construing these issues moot while DPA is restrained from implementation.

DPA has cured promulgation defects by publishing notice and holding a hearing on these proposed regulations. However, the regulations themselves contain numerous violations of law as follows:

1. Government Code 19992(a) clearly assigns responsibility to DPA to administer the state's performance evaluation process and according to law, DPA ". . .shall

provide a system of performance ratings. . ." DPA is in violation of this law by refusing to provide a system of performance ratings for use by departments covered by civil service. Proposed regulations 599.799.1 and 599.799.2, sections (b) (1) are in violation of this law by stating, "It shall be the responsibility of each appointing power to ensure that written standards of performance are developed. . ." According to Government Code 19992(a) the law assigns responsibility to DPA to ". . .provide a system of performance ratings. . ." The law does not assign this responsibility to appointing powers and without a system of performance ratings, appointing powers are left without the key ingredient necessary to develop uniform written standards of performance in accordance with law and the civil service merit system.

2. Section (b)(1) of both proposed regulations requires individual departments to develop standards". . .based on individual and organizational requirements." While this language is consistent with Government code 19992.8 covering managers, the same language is a violation of Government Code 19992 (a) covering supervisors which requires mandatory standards ". . .on the basis of the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day."

3. Proposed regulation 599.799.2 covering supervisors violates Government Code 19992.1(a) which states, "The evaluation shall be set forth in a performance report, the form for which shall be prescribed or approved by (DPA)." Yet DPA has failed to prescribe any performance report form to use for implementing in this proposed regulation. Moreover, the regulation fails to set forth procedures for obtaining DPA approval of any other performance report form, leading to abrogation of responsibility that Government Code 19992.1(a) clearly assigns to DPA.

4. Abrogation of responsibility by DPA, in violation of law is even more pervasive concerning administration of the performance system, enforcement and appeals. While Government code 19992.1(a) and 19992.9 contain the permissive word "may investigate administration of the system and enforce adherence to appropriate standards," language contained in section (e) of both regulations effectively removes DPA entirely from the process, thus voiding responsibility clearly assigned to DPA by law. Where section (e) of both proposed regulations contain the mandatory words "appointing power shall specify the process (for) appeals regarding performance appraisals. . .and (e)(2) appointing power shall be the final level of review for these appeals. . ." this language, illegally, nullifies responsibility for performance system administration, enforcement and appeal placed squarely on DPA by law. Government Code 19815.4(e) states that the DPA Director, "shall hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning <u>all</u> matters relating to (DPA's) jurisdiction."

5. Both proposed regulations violate Government Code 19992.3(a) and 19992.11 because they represent a veiled attempt to promulgate department rules containing illegal acts that are cited above. While there is no question that these laws authorize DPA to prescribe certain things by department rule, DPA has no right to prescribe illegal acts or procedures merely by prescribing them in a department rule. In short, DPA has no legal right to act illegally by prescribing an illegal department rule. To the contrary, Government Code 19815.4 requires that the Director of the Department of Personnel Administration ". . .shall (b) Administer and enforce the laws pertaining to personnel (and). . .formulate, adopt, amend, or repeal rules, regulations, and general policies. . .which are consistent with the law. . ." Therefore, DPA is also violating Government Code 19815.4(e) by renouncing responsibility it has under the law to ". . .Hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to the department's jurisdiction."

6. On April 1, 1994, Sacramento Superior court Judge Roger K. Warren declared DPA's Pay for Performance regulation illegal , in part because it violated Government Code 19826 concerning salary ranges. DPA's newly proposed regulations 599.799.1 and 599.799.2 also violate this section of the law as ruled by Judge Warren.

7. Additionally, on April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's Pay for Performance regulation illegal, in part because it violated Government Code 19829 concerning pay steps. DPA's newly proposed regulations 599.799.1 and 599.799.2 also violate this section of the law as ruled by Judge Warren.

8. Government Code Section 19827.2(c) defines terms used in connection with pay administration. "Skill" includes the intellectual or physical skill required in the performance of work. "Effort" includes the intellectual or physical effort required in the performance of work. "Responsibility" means the responsibility required in the performance of the work, including the extent to which the employer relies on the employee to perform the work, the importance of the duties, and the accountability of the employee for the work of others and for resources. "Salary" means the amount of money or credit received as compensation for services rendered (by employees who exert effort, demonstrate skill and carry out their duties and responsibilities for the benefit of their employer, the State of California). Section (c)(1) in both of DPA's proposed regulations use new terms that are not defined including "successful performance", "certification" by appointing power and others. What do these terms mean? Neither is "pay for performance" defined . Without an accurate definition of these key terms, DPA's proposed regulations are confusing, subject to intense controversy and unintelligible.

9. Both proposed regulations violate Government Code 19832 (a) governing Merit Salary Adjustments. As stated above in 4 and 5, DPA has no legal right to abrogate its responsibility under the law or to prescribe an illegal department rule. DPA has failed to define the term "successful" or to provide a "system of performance ratings" required by Government code 19992(a) and thereby both proposed regulations are devoid of a description of "standards of efficiency" which Government Code 19832(a) mandatorily requires DPA to prescribe.

10. Section (e) of both proposed regulations violates several state laws contained in the Government Code, including but not limited to Government Code Sections 19828(a), 19834(a), 19835(a), 3528, 3530 and 3532. All of these statutes prescribe due process and appeal rights guaranteed by law which DPA is seeking to eliminate by drafting illegal regulations, which in turn is a violation of Government Code 19815.4(b) and (d). Hereby is a detailed description of these violations of law.

    A. Section (e) of both regulations seeks to give each appointing power mandatory and final authority to hear appeals and then places severe limitations on grounds for appeal concerning salary increases. This language violates Government Code 19828(a) which requires DPA to provide a "reasonable opportunity to be heard to any employee affected by a change in his or her salary range." The word "heard" is clarified in Government Code 19815.4(e) meaning that it is DPA's responsibility under the law to "hold hearings, subpoena witnesses, administer oaths and conduct investigations concerning all matters relating to the department's (DPA's) jurisdiction." Doing otherwise would defeat the state's merit system principles and deny due process since the only available appeal would be to the same appointing power who created need for appeal by withholding a salary increase that is authorized by the California State Legislature. If language in Section (e) of the proposed regulations is permitted to stand, it is reasonable to conclude that the state will be inundated by hundreds of lawsuits each time that a change in salary range occurs but pay is withheld by the appointing power.

    B. Government Code 19834(a) states, "Automatic salary adjustments shall be made for employees in the state civil service in accordance with this chapter. . .(when funds are authorized by the California State Legislature). Government Code 19835(a) states, "The right of an employee to automatic salary adjustment is cumulative for a period not to exceed two years and he or she shall not, in the event of such an insufficiency of appropriation, lose his or her right to such adjustments for the intermediate steps. . ." Thus, it is illegal for DPA to deny, by regulation, automatic increases funded by the Legislature. This power is reserved to

the California Legislature and may only be revised by passing a new law.

C. Section (e) of both proposed regulations seeks to place unreasonable restrictions on matters subject to the grievance procedure in violation of state law. Government Code 3530 authorized grievances by supervisors and managers (excluded employee organizations representing their excluded members in their employment relations). And Government code 3532 prescribes, "The scope of representation. . .shall include all matters relating to employment conditions. . .including wages, hours and other terms and conditions of employment." And, moreover, Government Code 3528 requires, ". . .the objective consideration of issues raised between excluded employees and their employer "both in grievances and on matters for which they have a right to be heard. Therefore, these statutes prohibit appointing powers from being the final authority on matters within the jurisdiction of the Department of Personnel Administration.

The point of this analysis is that, on orders from Governor Wilson, DPA is trying to revamp the entire pay structure of the State of California using illegal regulations rather than legislation. Sacramento Superior Court has already declared DPA's first attempt illegal. If Governor Wilson wants a true pay for performance system - and widespread acceptance - he shouldn't abuse the regulatory authority of DPA; he should seek changes the proper way, by introducing legislation to establish clear public policy.

PAY THEORY - WHAT OTHER EMPLOYERS DO

All employers, whether public sector or private industry, use one of three basic compensation systems and more often use combinations or variations of all three. These are:

1. All major employers establish a schedule of base pay rates, ranges or grades, normally with an eye to the competitive labor market, determined by salary surveys. From time to time, both private employers and public jurisdictions raise their entire base salary schedule in reaction to labor conditions and inflation (includes cost of living adjustments - COLA). Consideration is also given to competitive occupational supply and demand forces as well as internal "like pay for like work" pay principles. Information and data on base salary levels paid by employers is readily available from surveys conducted by compensation consulting firms. These consultants also report on amounts that base salaries are rising and amounts that compensation budgets are projecting for future base salary increases. For example, in May 1994, Hewitt Associates reported that base salary increases are averaging three (3) percent and, in August 1994, The Wyatt Company reported that compensation budgets for next year are projecting an average 4.2 percent increase in base pay. Similar survey results are

available from William Mercer Incorporated, The U.S. Bureau of Labor Statistics, the American Compensation Association and many others. A three (3) percent increase in base pay rates authorized by the California Legislature effective January 1, 1995 for all California state civil service employees is reasonable by these comparisons.

2. All major employers establish a method of salary progression within ranges (not including promotions), normally with consideration given to performance, merit, experience, time in grade or some combination. All major private and public employers use classification and pay structures to accommodate virtual annual pay increases within predetermined salary ranges of various lengths, often established at 40 to 60 percent from bottom to top of the range. Progression methods within these ranges are commonly called performance raises or merit increases among other terms. Some employers specifically link the amount of individual progression to performance evaluation and reports of performance, while others make no such direct connection. Private firms commonly permit individual progression by different levels of increase. Hewitt Associates' most recent survey reported in May 1994 that performance/merit pay increases are averaging about seven (7) percent in private companies. In contrast, public employers commonly establish a predetermined amount of salary progression, generally five (5) percent, titled merit increases, available to all employees below the maximum of the salary range, provided that performance is standard or better. However, salary ranges are generally less than 30%. The State of California already has a similar system established by State law. However, features of the California system are subject to modification and when necessary such modifications must properly be done by legislation, not, merely DPA regulation.

3. Some major employers establish a method of special incentive pay, not permanently attached to base pay such as, stock options, sales commissions, special bonuses, or other pay often tied to a specific measurable objective. All too familiar are reports published in the Wall Street Journal, Business Week and other business publications about outrageous levels of compensation paid to private industry executives, often in the form of incentives combined with base pay and extremely generous perks. Last year, median total compensation for Fortune 500 CEOs was a record $3.8 million, including salary, bonuses, long-term incentives and stock options. Another pay study of executive staff below CEOs reported median total compensation of $1,776, 168, the highest since the survey began in 1989, of which $593, 382 was stock options, bonuses and other incentives. Individually, Michael Eisner of Walt Disney was paid $203 million, most of the amount from stock options. This amount of pay for one business executive is about one and one-half times the total amount needed to cover a 3% pay increase for all state employees. Sanford Weill of Travelers Inc., got

$52.6 million while Roberto Goizueta of Coca-Cola Co. got $14.5 million including $9.48 million from stock options and another $2.2 million bonus. David Whitwam of Whirlpool Corporation took home $11.8 million including $6.3 million from stock options and $3.4 million from various incentives. The highest paid woman executive is Turi Josefsen of U.S. Surgical who got $26.7 million total compensation including special incentives. Closer to home, Daniel Crowley of Foundation Health Corporation got $1,040,759 including a bonus of $570,010 and incentives of $110,896 plus another $1,251,200 from stock options. Erwin Potts, CEO of McClatchy Newspapers Inc. publisher of The Sacramento Bee captured $1,040,759 including a $570,010 bonus and $110,896 in other incentives plus stock options valued at $134,687 while Gregory Favre,Vice President of News for McClatchy Newspapers, Inc. collected $297,361 including a $42,829 bonus and $59,532 in other incentives plus stock options valued at $83,793. State employees help pay for all of these lavish salaries with their purchases at the cash register. In striking contrast, California Governor Pete Wilson's entire annual salary is only $114,000 (reduced 5% voluntarily from $120,000 authorized by law); or looked at another way, Michael Eisner of Walt Disney gets 1,691 times the pay of Governor Wilson. Which of the two are being paid for performance? Annual salaries of California's State Constitutional Officers such as Treasurer and Controller, is set by law at only $90,000. These elected officials of the nations most populous state - that employs more workers than any California private corporation, with a $54 billion budget and who oversee an economy that is eighth largest in the world - are also allotted $40,000 from a special Constitutional officers fund. State legislators are currently paid $52,500 annually which will increase to $72,000 in 1995 plus an average $21,200 a year for living expenses and an expense free automobile. The annual salary of a Superior Court Judge is $114,000 with no stock options, no bonuses and no other special incentives. As an incentive to state employed middle managers, California once had a Managerial Performance bonus Program ranging from $750 to $5,000 lump sum for a very limited number of state executives and a Supervisor Performance Award Program ranging from $250 to $750 lump sum for a very limited number of middle managers. Both of these pay for performance programs have been suspended or repealed.

PAY PRACTICES OF THE STATE CALIFORNIA

1. California has a salary range base pay system similar to common practice of other public jurisdictions, and private employers with far shorter salary ranges than is common in the private sector from bottom to top.

The intent of state law, Government Code 19826, is to permit periodic salary adjustments to remain competitive in the labor market and reflect inflation just as other major employers adjust their entire schedules from time to time. According to

Government Code 19826(a):

> "The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. . ."

In recent years, political and budget problems have relegated this law inoperable. State employee salaries have fallen far below prevailing rates. The legislature has barely been able to fund minimal cost of living increases of five (5) percent effective January 1, 1994 and three (3) percent effective January 1, 1995. What is most troubling is the disparity between enormous amounts captured by business executives whose performance is perceived to be linked with pay, over the actual take home pay of state supervisors for the work they perform. For example, the pay of an office Service Supervisor I, a basic supervisory class in all departments, is $1,979 - $2,406 per month. <u>After a full three (3) percent pay raise, this state supervisor will be lucky to clear additional take home pay of $50 per month after taxes and deductions.</u> A Caltrans Maintenance Supervisor is paid $2,708 - $3,259 for work performed and responsibility for supervising highway workers, sometimes under the worst possible conditions of nature and society. Governor Wilson's effort to place illegal restrictions on availability of this small three (3) percent increase in pay, implies all are paid too much. Yet the gap, has widened between what state managers are paid, and what business executives get, who are perceived to be paid for performance, to the point that the average business executive captures an incredible 157 times the average pay of state managers and supervisors. And the gap continues to get progressively worse as the state experiences budget deficits year after year to pay for services, such as prisons, that California can no longer afford. Until the state can afford to pay prevailing rates, it appears to be quite inappropriate to impose the election year euphemism of "pay for performance" on an otherwise, beaten down civil service pay structure.

2. <u>California civil service also has an established method of progression within salary ranges</u> (not including promotions) that is based on merit authorized by Government Code 19832(a). The state system is very similar to that of other large employers whenever existing laws prescribing performance evaluations and reports of performance are enforced. DPA has a very poor record of performance evaluation enforcement, not due to inadequate laws, rather due to insufficient staff resources from slashed budgets. One major weakness in the state's salary progression method is unavailability of longer salary ranges from bottom to top. Another serious weakness is the very severe compaction of one

range upon another. No illegal "pay for performance" gimmick will correct these extremely serious defects. Disingenuous "pay for performance," merely will make a bad situation even worse.

3. California civil service has no special incentive pay method even close to business use of stock options, generous commissions, extravagant bonuses, lavish perks or other bounteous special incentives to reward exceptional performance. Governor Wilson and DPA are fooling noone into believing that by hijacking a three (3) percent increase, intended by the legislature clearly as a cost of living adjustment based on CPI that, by some sort of magic, all the state's problems will be solved.

PERFORMANCE EVALUATION THEORY

All major employers, whether private business or public jurisdictions, have some method for performance evaluation and reports of performance in their personnel policy manuals. Most performance evaluation programs are only as good as management's sincere commitment to establish an atmosphere of trust, clarify job related expectations, open feedback channels, provide objective enforcement of the system with assistance and standards that make sense and provide an objective appeal process. Management consultants offer a myriad of both standardized and custom performance evaluation systems. The newest methods attempt to link employee performance to bottom line organization and financial objectives.

STATE OF CALIFORNIA PERFORMANCE EVALUATION PRACTICE

California already has a performance evaluation system prescribed in law. Government Code Sections 19992 - 19992.14 already mandate the Department of Personnel Administration, ". . .to establish standards of performance for each class of position and shall provide a system of performance ratings. Such standards shall insofar as practicable be established on the basis of the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day." Government Code 19992.1(a) states:

> The system of performance reports shall be designed to permit as accurately and fairly as is reasonably possible, the evaluation by his or her appointing power of each employee's performance of his or her duties. The evaluation shall be set forth in a performance report, the form for which shall be prescribed or approved by the department. The department may investigate administration of the system and enforce adherence to appropriate standards."

One of the first comprehensive performance evaluation systems for state civil service was established on April 1, 1939. Many others have followed.

The chief weakness of the state's current performance evaluation process is that DPA has neglected it and permitted it to fall into serious disrepair. This neglect by DPA has nothing to do with "pay for performance"; it has everything to do with lack of enforcement. DPA has been deficient in establishing current and relevant standards of performance that are job related; DPA is not currently providing a uniform system of performance ratings linked to clear and unambiguous performance expectations. Experience with DPA's "pay for performance" regulation which Sacramento Superior Court ruled illegal demonstrates that DPA is not likely to do any better job of investigating administration of the system and enforcing adherence to appropriate standards, as required by law, with its proposed new "pay for performance" regulations. As described above, these proposed regulations are more likely to produce hundreds of lawsuits because they permit DPA to abrogate responsibility for objective administration and hearing appeals, in violation of law.

LEGISLATIVE ANALYST'S CONCLUSIONS

After studying the various legislative, budgetary and legal developments that have an impact on implementation of a "pay for performance" concept, in a March 1994 report, Legislative Analyst Elizabeth Hill published these conclusions:

1. The governor's late and sudden redirection of pay appropriations towards an undefined "pay for performance" program "raises issues of basic fairness. Given that the purpose of the general salary increase was to adjust employees salaries for inflation, it is unfair to deny it to managers and grant it to everyone else."

2. "The policy does not adequately reward excellence. . .it sends the wrong message. . .a policy designed to reward and encourage excellence should at least provide salary increases greater than those given to other employees. . .and should guard against the possibility of supervised employees making more than their manager."

3. "Actions confuse the purposes of a general salary increase related to inflation and a merit increase. There are two basic types of pay increase - one intended to compensate for inflation and one intended to reward meritorious performance. The 5 percent salary increase negotiated by the DPA for represented employees and previously authorized for nonrepresented employees (including managers) was specifically for a COLA to compensate employees for inflation. In fact, the salary increase effective January 1, 1995 is set at 3 percent to 5 percent, dependent on a cost-of-living index. Since inflation equally affects all, across-the-board COLAS make sense. Whether or not a COLA should be granted to state employees under current fiscal circumstances is a valid issue. Objections to a COLA because of its across-the-board nature, however, misread its purpose."

4. Governor Wilson's unilateral action infringes on the legislature's appropriation authority. If true pay reform is wanted and needed, "it will require the involvement of the legislature and the administration to recast the laws (as well as) regulations and practices surrounding merit pay."

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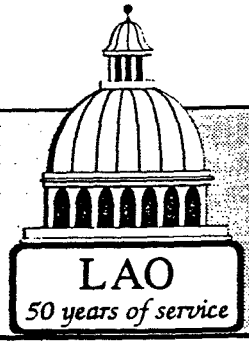


*Reprint*

FROM *THE ANALYSIS OF THE 1994-95 BUDGET BILL*

# STATE EMPLOYEE COMPENSATION ISSUES FOR 1994-95

**Elizabeth G. Hill**
*Legislative Analyst*

March 1994

# STATE EMPLOYEE COMPENSATION ISSUES FOR 1994-95

## What Issues Does the Governor's Budget Present in the Area of State Employee Compensation?

### Summary

*A major portion of state government expenditures is for compensation of state employees. Expenditures for state employee compensation (excluding higher education employees) will approach $10 billion in 1994-95.*

*There are three major initiatives in the area of employee compensation in the Governor's Budget for 1994-95:*

- *The budget assumes a 10 percent reduction in the number of managers and supervisors in state government.*
- *The budget assumes the institution of a "pay-for-performance" policy for managers in lieu of previously authorized cost-of-living adjustment (COLA) increases.*
- *The budget proposes additional funds for approximately $73 million of the $133 million cost of the employee salary COLA increase scheduled for January 1995. The balance of these costs would be absorbed within the operating budgets of most state departments.*

*Each of the above initiatives raises significant issues for the Legislature. In this reprint from the* ***Analysis of the 1994-95 Budget Bill****, we discuss these issues and options the Legislature should consider in enacting a Budget for 1994-95.*

As mentioned above, the budget assumes savings of $150 million ($75 million General Fund) in 1994-95 by reducing the number of managers and supervisors in state government by 10 percent. According to the Department of Personnel Administration (DPA), there are currently about 28,500 supervisors and managers overseeing the work of 140,000 full-time and part-time civil service workers. To accomplish this "downsizing" task, the DPA has imposed a freeze on appointments to management and supervisor positions in civil service, and has asked all state departments to submit plans to reduce manager/supervisor positions by 5, 10, and 15 percent. The plans are to be submitted to the DPA and the Department of Finance by March 1, 1994.

The $150 million savings estimate used in the budget is equivalent to approximately 10.5 months of the average salaries and benefits of existing manager/supervisor positions, applied to 10 percent of those positions. This is an optimistic savings projection. The sheer number of managers and supervisors involved in this proposal, combined with the elaborate nature of the civil service process, means that the 10 percent reduction may not be completed before September (as assumed by the budget totals). Moreover, many of those "demoted" to nonmanager/supervisory positions may be entitled under civil service laws to be paid at or very near their current salary levels, in which case assumed salary savings would be overstated. Finally, the initiative's success will depend to a great extent on receiving support, rather than resistance, from the departments and agencies that actually will be called upon to implement the reductions in their own organizations.

As a general concept, we believe reducing layers of management in California state government has merit. In actual implementation, however, legitimate concerns could arise regarding the pace and manner in which the reductions proceed, and consequent fiscal and program impacts. Given these potential concerns, we believe the Legislature should review the administration's department–by–department implementation plan. This information should be available for the Legislature's review well before the May Revision submittals, given the March 1 due date for departmental proposals to the DPA and the Department of Finance. Accordingly, we recommend that the DPA and the Department of Finance provide to the fiscal committees the implementation plans for reducing manager/supervisor positions well in advance of May Revision letters.

## Pay-for-Performance Policy for Managers

***We recommend that the DPA and the Department of Finance, prior to budget hearings, address concerns about the pay-for-performance policy for state managers. These concerns include (1) possible infringe-***

have the following concerns, however, with the specific actions taken by the administration.

***The Actions Infringe on the Legislature's Appropriation Authority.*** The Legislature appropriated funds under Item 9800 of the 1993 Budget Act with the clear understanding that the purpose was for general salary increases for all state employees, including managers. Changing to a performance-based criteria for the increase for managers may be within the legal prerogatives of the DPA. In our view, however, the administration's budgetary actions infringe on the Legislature's appropriation authority in the following two respects:

- The 1993 Budget Act includes provisions stating that the funds appropriated for augmentation of employee compensation are to be allocated by the Department of Finance ". . . in such amounts as will make sufficient money available for each state officer or employee in the state service . . . to receive any such increases provided on or after July 1, 1993, by the Department of Personnel Administration . . .". The Governor, however, intends not to spend the funds appropriated for manager pay increases and instead to require departments to absorb pay-for-performance increases within existing resources.

- By requiring departments to absorb the costs of the current-year pay-for-performance program within existing resources, the budget redirects funds appropriated by the Legislature for a variety of programs to a new, and unrelated, pay program never authorized by the Legislature.

***The Actions Confuse the Purposes of a General Salary Increase Related to Inflation and a Merit Increase.*** There are two basic types of pay increase—one intended to compensate for inflation and one intended to reward meritorious performance. The 5 percent salary increase negotiated by the DPA for represented employees and previously authorized for nonrepresented employees (including managers) was specifically for a COLA to compensate employees for inflation. In fact, the salary increase effective January 1, 1995 is set at 3 percent to 5 percent, dependent on a cost-of-living index. Since inflation equally affects all, across-the-board COLAS make sense. Whether or not a COLA should be granted to state employees under current fiscal circumstances is a valid issue. Objections to a COLA because of its across-the-board nature, however, misread its purpose.

The state's practice for giving "merit" salary increases is another matter. Under state law, there is a completely separate process for the granting of "merit" pay increases to state employees. In theory, this process recognizes meritorious work and provides for appropriate

- That the administration violated the constitutional separation of powers by diverting funds appropriated by the Legislature.
- That the imposition of the pay-for-performance program violates existing statutes regarding a manager bonus program, merit salary increases, and salary ranges.

The Superior Court in Sacramento has ordered the DPA to show cause why the pay-for-performance program should continue in lieu of a general salary increase for managers. At the time this *Analysis* was prepared the case was scheduled to be heard April 1, 1994.

As a result, the budget overstates the likely cost of the January 1995 increase. The budget assumes that the 1994-95 cost of the pay (and related benefits) increase for all state employees will be approximately $158 million. Using instead the 3 percent inflation factor, the 1994-95 costs will be approximately $133 million. (In our estimate we also assume a lower factor for those benefit costs that are tied to salary/wage increase than assumed by the administration.)

## The Budget Forces Most, But Not All, Departments to Absorb the Pay Increase

Although projecting total costs for the 1995 pay increase of $158 million on the basis of a 3.5 percent raise, the budget includes only $72.7 million ($50.9 million General Fund) to fund the increase under Item 9800.

Departments do not have discretion to deny the pay increase to represented employees, except for managerial staff (another issue discussed below). Therefore, the fact that the budget does not fully fund the costs of the raises means that most departments must absorb the unfunded portion within existing resources. Under the administration's approach not all departments and programs are to be treated alike. The budget states that Item 9800 funds will be allocated only for pay increases for employees who ". . . provide direct public safety, 24-hour care services or are major revenue producers."

According to Department of Finance staff, funds will be allocated to only 14 departments, to the extent that they have employees meeting this definition. Figure 1 lists these departments and the estimated amounts that would be allocated.

Approximately $21.3 million of the total amount not provided for the January 1995 pay increase is related to pay increases for managers, a special case under the administration's proposal that we discuss below.

## The Budget Deletes Funds for Pay Increases for Managers

On December 8, 1993, the Governor announced a new compensation policy for the approximately 4,000 managers in state government. On

In 1994-95, the budget assumes savings of $21.3 million ($11 million General Fund) from cancellation of the COLA for managers and the requirement that most departments absorb pay-for-performance increases within existing resources.

## Options for the Legislature Regarding Employee Pay Increases

***The Legislature has four basic options in approaching employee COLA pay increases in 1994-95: (1) approve as budgeted, (2) fully fund the pay increases, (3) require all departments to absorb the pay increases, and (4) cancel or reduce the size of the pay increase. Given the state's current fiscal situation, and the consequent pressures on the provision of program services to the public, we believe the last of these options is the most appropriate.***

The Legislature has four basic options in approaching COLA pay increases in 1994-95. We discuss each option below.

*Approve as Budgeted.* We believe the approach taken in the budget is flawed in several respects, as follows:

- *Fairness.* Denying a COLA to managers and granting it to all other state employees raises an issue of basic fairness. Also, it is inevitable under the budget approach that excellent managers in "poor" departments will not receive pay-for-performance increases while mediocre managers in "rich" departments will.
- *Hidden Program Impacts.* All but 14 departments must absorb the COLA for nonmanagerial employees within existing resources. In addition, all departments must absorb pay increases that may be granted to managers. We estimate that the amount that would have to be absorbed across state government would range from $52 million to $56 million, depending on the extent to which manager pay raises are granted. Given all the other costs that departments have had to absorb in recent years, this additional requirement is bound to have impacts on the delivery of program services to the public.

*If* the Legislature wishes to proceed with the funding approach proposed in the budget, we would recommend that the Legislature reduce Item 9800 by a total of $9.6 million ($7 million General Fund) to account for the likely 3 percent pay increase (rather than the 3.5 percent rate assumed in the budget) and a lower factor for benefits.

*Fully Fund Employee Pay Increases.* This approach would require augmenting the budget. In the present fiscal context, this would mean making reductions elsewhere. We estimate that an additional

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## Recent Reports

*Reform of Categorical Education Programs—Principles and Recommendations* (April 1993), Report No. 93-2.

*Cal Facts—California's Economy and Budget in Perspective,* (May 1993). This booklet is a graphically oriented reference document answering frequently asked questions concerning the state.

*State Spending Plan for 1993-94—The Budget Act and Related Legislation* (September 1993), Report No. 93-3. This report summarizes the fiscal effect of the 1993 Budget Act and related legislation.

*Common Cents* (October 1993). This is a graphically oriented booklet that provides basic information on state and local government finances in California.

*Crime in California* (January 1994). This is a graphically oriented booklet that provides basic information on trends in crime and policy implications of the available data.

*California K-12 Report Card* (February 1994). This booklet compares the performance of California students with those in other states.

*School-to-Work Transition: Improving High School Career Programs* (February 1994). This report provides information on "school-to-work" programs and makes recommendations to the Legislature on how best to implement such programs in California.

*Analysis of the 1994-95 Budget Bill* (February 1994). This report presents the results of our detailed examination of the Governor's Budget for 1994-95.

*The 1994-95 Budget: Perspectives & Issues* (February 1994). This report provides perspectives on the state's fiscal condition and the budget proposed by the Governor for 1994-95, and identifies some of the major issues facing the Legislature.

## Recent Policy Briefs and Issue Papers

*Making Government Make Sense* (February 1993).

*Making Government Make Sense: Applying the Concept in 1993-94* (May 1993).

*Overview of the May Revision* (May 1993).

*Status Check—Local Sales Taxes—What Role Can They Play in the 1993-94 State Budget?* (June 1993).

*Focus—Budget 1993* (July 1993).

*Performance Budgeting—Reshaping the State's Budget Process* (October 25, 1993).

*The President's Health Care Reform Proposal—A Review of Its Implications for California* (December 9, 1993).

*Bonds and the 1994 Ballots* (January 6, 1994).

*An Overview of the 1994-95 Governor's Budget* (January 18, 1994).

Copies of these reports can be obtained by contacting the Legislative Analyst's Office, 925 L Street, Suite 1000, Sacramento, California 95814, (916) 445-4656.

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**TESTIMONY ON DPA PROPOSED REGULATIONS**
**CONCERNING PERFORMANCE PAY**
**AUGUST 30, 1994**
**by**
**RON FRANKLIN, PRESIDENT**
**ASSOCIATION OF CALIFORNIA STATE SUPERVISORS**

My name is Ron Franklin and I am a Unit Supervisor at Sonoma Developmental Center.

I am also President of the Association of California State Supervisors, an employee organization that exclusively represents almost 8,000 state supervisors, managers and confidentials who are dues paying members. We appreciate the opportunity to share our views on this subject.

We retain Meta Information Services, an independent research polling company
to conduct objective opinion surveys among our members, former members and nonmembers. Therefore, we have confidence that information we convey reflects the opinions of most of the 20,000 supervisors and 4,000 managers in state service.

First, state supervisors and managers want to convey the clear message that we favor an effective performance evaluation process - and to be effective, it must be valid, objective and fair. We don't know if this is what DPA means by "pay for performance" because the proposed regulations do not define that term.

If DPA does not provide an effective evaluation process, then how can DPA justify withholding pay that the legislature authorized?

The California State Legislature long ago passed laws making DPA responsible for developing and administering a formal system of performance appraisal, together with a valid rating form (G.C. 19992.1).

Frankly, our experience is that DPA has been, at best, lethargic in the way it has administered these laws. Long before the term "pay for performance" became politically popular, the legislature said, "here DPA are the tools you need to develop and enforce an effective performance evaluation system." DPA has simply failed to use the tools that the California Legislature has provided. And these proposed regulations fail to demonstrate any improvement. In fact, they appear to say to the legislature, "we don't want anything to do with these tools; we'll just turn this headache over to the departments."

Second, evaluating employee performance is one of a supervisor's toughest jobs. It is also one of the most important. Without a valid performance rating form, an employee has nothing containing the expectations that a pay increase will be based upon. Yet, an unfair person can say that you are "unsuccessful" - which is not defined - and, in effect, dock your pay. And there is no meaningful recourse because these regulations wipe out objective appeals. What happened to due process? This has already happened to managers that we represent.

Third, emphasis on performance evaluation has to be done within a sincere atmosphere of trust - so that supervisors know that the employer really understands what they do and cares about them. The legislature authorized a small increase of only three percent based on movement of the Consumer Price Index (CPI). If CPI had come in at a higher five percent, the legislature was prepared to authorize that amount based on collective bargaining contracts.

Suddenly, the governor changed the rules unilaterally and, through DPA, tried to impose his "pay for performance" plan illegally. What message does that convey about trust?

Perpetual budget deficits have caused abandonment of prevailing pay rates that state law intended to promise when I first came to work for the state. So, employee organizations and the legislature agreed to make do with a COLA because money is so tight. If CPI came in at only three percent rather than five percent, we made a commitment to live with that. Now, somebody speaking for our employer has broken a commitment to live by the same agreement. What message does that convey about trust?

The California Civil Service Act promises fair treatment and due process for state employees based on merit. Everyone in this room has been told that merit

principles are the cornerstone of California's personnel management system. Application of merit principles is a form of contract between the public generally, the state as an employer, and state employees. Merit principles have been placed in law to establish fundamental guarantees to protect the public interest and employees' rights. Now, DPA illegally issues an order to abolish a long standing appeal and grievance procedure concerning merit raises and other forms of pay loss. What message does that convey about trust?

Finally, the prevailing view of state supervisors and managers is that these proposed regulations have far too many legal defects. We urge DPA to withdraw them in favor of introducing legislation next year so that we have an opportunity to involve the California State Legislature in establishing public policy on this subject.

This concludes my comments.

8/30/94
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TESTIMONY ON DPA PROPOSED REGULATIONS
CONCERNING PERFORMANCE PAY
AUGUST 30, 1994
by
TOM CONSIDINE, VICE PRESIDENT
ASSOCIATION OF CALIFORNIA STATE SUPERVISORS, INC.

My name is Tom considine and I am a Unit Supervisor at Camarillo Developmental Center. I am also Vice President of the Association of California State Supervisors.

I am here today to cover three issues:

1. Will this program be applied uniformly?
2. Whatever happened to the prevailing pay rate system?
3. Shouldn't the state pay for performance system pay an amount over and above basic prevailing pay rates?

Will This Program Be Applied Uniformly?

Everybody I know who reads these regulations is confused about how performance will be determined as "unsuccessful" in contrast to "successful". It seems that these proposed regulations are incomplete and arbitrary. There doesn't seem to be any uniform criteria.

These regulations seem to turn DPA's administration and control responsibility over to individual departments so there is no neutral agency or body to appeal to in case of unfair treatment.

This system does not seem to contain sound policy development forethought. It doesn't seem to confirm the basic principles of the State Civil Service Merit System because there are no uniform standards of performance. And this brings me to my second concern.

Whatever Happened To The Prevailing Pay Rate System?

When I came to work for the state, I was told that I was entering into a form of contract between the public, the state and employees such as me. That in return for doing my work the very best that I can every day, with dedication to the services I render, that the state had a policy of paying prevailing rates based on objective salary surveys. The state dosen't pay prevailing rates anymore.

Now, on top of that, after the legislature approved a small cost of living raise of only 3 percent, the governor and DPA are threatening to take even this COLA away from me too. Somehow all of these kinds of changes resulting in takeaways seem to be a disincentive. Is that sound public policy?

I hear about "pay for performance" systems used by other employers and they seem to provide performance incentives up to 20 - 30 percent on top of prevailing pay rates. In comparison, this system by DPA seems to be a gimmick to make me think I'm getting more than I can buy groceries with; am I missing something about this program? And that brings me to my third concern.

Shouldn't The State Performance Pay System Provide Meaningful Incentives Paid Over and Above Basic Prevailing Pay Rates?

I am not opposed to a concept of pay over and above prevailing rates that is linked to credible criteria for outstanding performance. But, after credible criteria is established, the dollar amount of pay has also got to be credible. Pay must be far greater than merely restoring my minimum three percent cost of living increase hat has already been cut back due to state budget problems.

If you want me to trust you and believe in the system, the state must do far better than this. And until DPA comes up with far more money, this does not seem to be a true or legitimate "pay for performance" system - It is something else that is very strange.

The people that I represent urge DPA to withdraw these proposed regulations in favor of introducing legislation in 1995 so we can work together to develop sound public policy covering performance pay.

This concludes my presentation.

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# TESTIMONY ON DPA PROPOSED REGULATIONS CONCERNING PERFORMANCE PAY
AUGUST 30, 1994
by TIM BEHRENS, DIRECTOR AT LARGE
ASSOCIATION OF CALIFORNIA STATE SUPERVISORS, INC.

My name is Tim Behrens and I am a Unit Supervisor at Porterville Developmental Center. I am also Director at Large of the Association of California State Supervisors.

I am here today to cover three issues:

1. What does "pay for performance" really mean?
2. Has the governor and DPA established an atmosphere of trust?
3. Does the state have uniform performance standards to assure basic equity?

## What Does "Pay for Performance" Really Mean?

Everyone I talk with seems to have a different idea of what "pay for performance" means to them.

When I referred to DPA's proposed regulations, I couldn't find any definition. Then I noticed that performance had to be certified as "successful". But then I couldn't find any definition of the word "successful" either.

So, it seems the more I talk with other supervisors, people don't want to be opposed to the concept of "pay for performance", but nobody can tell you what "pay for performance" really is. What assurance is there that this system will be administered with fairness and objectivity? How do we know the DPA is doing this legally? And that brings me to my second point.

## Has The Governor and DPA Established An Atmosphere of Trust?

Every performance evaluation system I have ever been involved with had to be established where there was an atmosphere of trust or it isn't worth the paper it is written on.

In this case, does the state really want to provide incentive pay above what everybody else gets if I exceed expectations, or is the state actually looking for a way to punish me? Is the state really trying to tell me that if I don't meet bare minimum standards, I won't get a pay increase? If so, I don't see how this program can be called "pay for performance".

For more than two years, I was told by DPA that I would get a COLA of three percent effective January 1, 1995. I was told that the legislature already approved this minimum increase based on CPI.

Then the governor announced that he was going to prohibit this very small raise. Overnight, he and DPA appeared to break every commitment that I understood was made to supervisors and managers. Is this what the governor and DPA believe establishes trust?

I get the message that the administration isn't interested in building relationships and isn't interested in the point of view of the state's supervisors serving as management's representative in the workplace.

And then DPA tried to go with an illegal reguiation. What kind of positive reinforcement is that? And that brings me to my third point.

Does The State Have Uuiform Performance Standards To Assure Basic Equity?

The greatest weakness' that I see with DPA's regulations are:

- There is no objective performance criteria.
- There is no evidence that ratings will be based on valid job related factors.
- There is no assurance that essential performance expectations will be communicated before being evaluated.
- There is no protection from subjective favoritism.
- There is no clear definition of terms such as "successful".
- No one is required to give you any reason for withholding your pay and there isn't a darn thing you can do about it. Is this fair?

My request is that DPA withdraw these proposed regulations and seek legislation in 1995 so we can develop a better system.

This concludes my comments.

Rec'd 8/30/94 PFP hearing

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# California Department of Forestry Employees Association

924 ENTERPRISE DRIVE • SACRAMENTO, CALIFORNIA 95825
(916) 641-2096 FAX (916) 641-1508

August 30, 1994

Department of Personnel Administration
Policy Development Office
1515 S Street, North Bldg., Suite 400
Sacramento, CA 95814-7243

Attention: Richard Leijonflycht

Re: Opposition to Supervisor/Manager Pay-for-Performance Program

Dear Mr. Leijonflycht:

The California Department of Forestry Employees Association (CDFEA) represents approximately 800+ Supervisors and Managers.

CDFEA is opposed to the regulatory change of establishing a Pay-for-Performance Program. The current Merit Salary Adjustment Program has been used very effectively for many years. During the first year of service in a supervisor's career, his/her supervisor can ensure proper performance through the Merit Steps (5 steps for Supervisors, 3 for Managers). If an employee does not produce worthy job performance, his/her supervisor can easily deny merit step increases until a satisfactory work level has been reached.

Trying to eliminate annual cost-of-living increases is just that. When the Legislature enacts cost-of-living increases, it is to ensure that its (State) employees continue to have a salary commensurate with the general cost-of-living within the state, not as a reward for doing what the boss tells them.

The proposed Pay-for-Performance is nothing but a Reward/Punishment system for those employees who do/do not do what the "boss" tells them to do, regardless of whether the instructions are for the betterment of the State of California. Also, the Punishment Phase of this can be highly unfair. Should an employee's supervisor change, the entire system of Reward/Punishment can change immediately.

The old adage "If it ain't broke, don't fix it" surely applies in a change from the Merit Salary Adjustment Program to a "Supervisor/Manager Pay-for-Performance Program".

For these reasons, CDFEA strongly objects to the proposed regulatory changes.

Sincerely,

Sunnie Fronek

SUNNIE FRONEK
State Supervisorial Representative

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California Correctional
Peace Officers
Association
CCPOA

755 Riverpoint Dr Ste 200, West Sacramento, CA 95605-1634 (916) 372-6060

**CCPOA FAX TRANSMITTAL**

**DATE:** 8-29-94

**TO:** Richard Leijonflycht

**COMPANY:** DPA

**FAX NUMBER:** 324-0524

**TOTAL PAGES:** 3

**FROM:** Suzanne Branine

*California Correctional Peace Officers Association*
*755 Riverpoint Drive, Suite 200*
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***Telephone:*** *(916) 372-6060*
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**MESSAGE:** Please accept this transmission in lieu of my first. I noticed some typographical errors. Sorry!

**CONFIDENTIALITY NOTICE**

**COMMENTS ON PROPOSED RULES FOR PERFORMANCE PAY FOR SUPERVISORS AND MANAGERS-PROPOSED REGULATIONS 599.799.1 AND 599.799.2**

**SUBMITTED BY CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION**

**DATE: August 29, 1994**

The California Correctional Peace Officers Association has among its dues paying members both managers and supervisors who work in various classifications within the California Department of Corrections and the California Youth Authority. Although CCPOA's managerial and supervisory members do not enjoy the collective bargaining rights that CCPOA's rank and file members do, CCPOA's managerial and supervisorial members have enjoyed some of the same benefits as the rank and file has enjoyed in the past. The proposed regulations put two of these benefits in jeopardy, namely general salary increases and merit salary increases. For that reason, CCPOA is strongly opposed to the implementation of the proposed regulations.

DPA has tried to implement this system on a prior occasion. On April 1, 1994, Judge Roger Warren of the Sacramento County Superior Court, determined that a memorandum and pay letter issued by DPA implementing a similar pay for performance system for managers was invalid for several reasons. Failure to comply with Administrative Procedure Act requirements was one basis for the court's rejection of the pay for performance system. DPA attempts to remedy this inequity through its rule making action. However, several other serious deficiencies in the pay for performance system which were brought forward in April by the moving parties are still present in the proposed system.

In the form presented, the proposed regulations do away with general salary range cost of living increases which effectively now raise the wages of all managers and supervisors. Instead, the regulations propose to base cost of living increases on a certification by the appointing power that each individual employee's job performance is "successful." The regulations provide no guidance as to what "successful" is. This ambiguity will allow for different appointing powers to impose different standards. In the Department of Corrections, for example, each warden will be able to set different standards for his or her managers and supervisors. A successful supervisor at one prison may not be performing at the same level as a supervisor at another prison in this state.

Additionally, under current Title 2 of the California Code of Regulations section 599.683 the appointing authority must give an employee who is not at the top step of his or her salary range a merit salary adjustment equal to one step in that employee's salary range, if that employee has met the standards of efficiency required for that position. Is a successful employee under the proposed regulation different from an efficient employee under section 599.683? This very important issue is left completely to the discretion of the appointing authorities. Some appointing authorities may interpret these concepts as analogous, while some appointing authorities may decide that "successful" is a much more rigorous standard. This issue is unresolved by the proposed regulation.

More importantly, however, is the result of the imposition of the pay for performance system on COLA increases. If, as DPA asserts, most managers and supervisors are at the top of their salary ranges, and through the implementation of this program, some will be denied a COLA increase, then persons in the same classification in state service will be receiving different salaries notwithstanding the fact that the employees have the same duties and responsibilities. This very fact scenario is prohibited by the express language of Government Code section 19826. Additionally, in changing the ranges, Section 19826 requires DPA to consider prevailing rates for comparable service in other public employment and private business. Taken together, these two aspects of Section 19826 strongly demonstrated that the Legislature intended that salary range increases would be given across the board to all employees, not on a selective individual basis. DPA has ignored this statutory mandate which is inconsistent with this pay for performance idea, as it did when it tried to implement the pay for performance system previously.

Finally, the proposed regulation removes from managers and supervisors the minimal rights they had for review of denial of MSAs under Regulation 599.684. Under this regulation, employees at least were able to appeal to the DPA the decision of their own appointing authority as to an MSA. The proposed regulation allows appeal only to the appointing authority who made the original decision regarding the salary increase or MSA. It is not illogical to note that the appointing authority will have a vested interest in insuring that its decision is upheld, whether from a budgetary standpoint or a psychological one. This portion of the proposed regulation will greatly injure morale within the supervisorial and managerial ranks.

In summary, DPA does not possess proper legislative authority to implement the proposed pay for performance system, and the proposed regulations, if implemented, will result in a system which varies greatly in its application and fairness. The implementation of this system will hurt morale and tempt appointing authorities to use their employees as budgetary tools. For these reasons, the California Correctional Peace Officers Association strongly opposes these regulations.

LA 9290

from John Sikora / ACSA
8/30/94 PFP hearing

LEO #7

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Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

BEFORE THE DEPARTMENT OF PERSONNEL ADMINISTRATION

POLICY DEVELOPMENT OFFICE

| | |
|---|---|
| In the Matter of Proposed Regulations:<br><br>599.799.1 and 599.799.2 | COMMENTS AND OBJECTIONS OF ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT |

TO: DEPARTMENT OF PERSONNEL ADMINISTRATION
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Richard Leijonflycht

COMES NOW, ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, and PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, and submits the following comments and objections to proposed regulations 599.799.1 and 599.799.2:

## INTRODUCTION

DPA has proposed a radical change in the discipline process of the state's managers and supervisors through proposal of

Regulations 599.799.1 and 599.799.2. Disguised as a pay system, the regulations are, in substance, no more than a discipline system for supervisors and managers in which they are denied appeal rights to the SPB, rights that the California Constitution and applicable statutory authority, afford them.

The proposed regulations provide that DPA can change the pay ranges of supervisory and managerial employees, and appointing authorities can either provide or refuse increases in any amount up to the full amount of the range change based on "successful" job performance. Bottom step supervisors and managers are treated slightly differently. The rule contemplates that bottom step employees will be given the raise but will be subject to discipline for their poor performance (see the text of the proposals). There are no appeal rights contemplated by the proposed regulations beyond the supervisors' or managers' department. There is no opportunity for an employee punished by a denied raise, to appeal his punishment to the disinterested SPB.

## ARGUMENT

1. THE PROPOSED RULES UNCONSTITUTIONALLY IMPINGE ON THE RIGHTS OF SUPERVISORS AND MANAGERS TO APPEAL DISCIPLINE.

Article 7, Section 3 of the California Constitution provides:

> "(a) The [State Personnel] board shall enforce the civil service statutes...and review disciplinary actions."

The statutes governing discipline include, as grounds for discipline, incompetency, inefficiency, inexcusable neglect of

duty, and a variety of other performance based criteria. Government Code Section 19572 (applied to managers pursuant to Government Code Section 19590).

An adverse action is defined as:

"...dismissal, demotion, suspension, or other disciplinary action." Government Code Section 19570. (Emphasis added.)

Clearly, denying a person a raise or full raise on the basis of a failure to "successfully" perform duties, or reach the top level of success, is a form of "disciplinary action". Denial of an available raise for poor performance is clearly as punitive as a suspension without pay. In both cases, punishment in the form of a withholding on money is the result. The SPB regularly hears disciplinary cases that arise from reductions in pay based on performance deficiencies. The denial of an available raise on the basis of performance deficiencies is no less disciplinary, no less a reduction in pay.

With jurisdiction over discipline residing in the State Personnel Board, DPA is without authority to adopt a regulation that provides for discipline, especially when the proposed regulation deprives the employee of a right to appeal the discipline to the SPB, pursuant to Article VII of the Constitution.

DPA only has the authority to adopt regulations affecting the purposes, responsibilities, and jurisdiction of DPA, and to do so consistent with the law when necessary for personnel administration. Government Code Section 19815.4. Here, DPA has crossed the line, encroaching on a disciplinary system exclusively within the jurisdiction of the SPB.

A useful analogy arise from the context of parental discipline. Parents could tell their children, "All the children who behaved this year will go to Disneyland tomorrow", and then deny the child who didn't behave the benefit of the Disneyland trip. On the other hand, the parents could take all the children to Disneyland and punish the child who didn't behave, by denying his/her allowance for a week. In either case, there is discipline for improper behavior.

Here, DPA would deny appeal rights if the discipline took the form of a denied future benefit (Raise/Trip to Disneyland). Such an approach clearly undermines SPB's jurisdiction over the disciplinary process.

2. GOVERNMENT CODE SECTION 19826 DOES NOT PERMIT A SCHEME WHEREIN APPOINTING AUTHORITIES CAN PAY EACH PERSON IN A CLASSIFICATION A CUSTOM RATE BASED ON PERFORMANCE.

Among the authorities cited by DPA to justify the proposed regulations is Government Code Section 19826. This Code clearly limits DPA's authority in the administration of salary range changes. It provides in part:

> **"§ 19826. Salary ranges; establishment and adjustment; exclusive representation by employee organization; conflict with memorandum of understanding.**
>
> (a) The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business."

Clearly 19826 is limited to salary range setting for classifications of positions. It does not permit DPA to set salaries for individuals within classes on the basis of performance. The ranges contemplated by 19826 have intermediate steps between minimum and maximum salary limits. Government Code Section 19829. The intermediate steps by law must be as close to five percent (5%) as the State Personnel Board determines to be practicable. Government Code Section 18807.

The proposed regulations contemplate as many "performance" steps as there are employees in the class, and the steps can be well under 5%. For example, assume the following: the classification of Supervising Widget Maker with a salary range that has a bottom step of $1000, a second step of $1050, a third step of $1102.50 and a top step of $1157.75. Then assume that DPA changes the salary range so the bottom step is $1500. By operation of the law as it currently exists, the second step would be $1575, the third step $2353.75, and the top step $2,471.43. (The law would actually round off to the nearest dollar.) Each intermediate step in the range, as set forth above is 5% greater than the prior step, in compliance with Government Code Section 18807.

Currently there are employees with pay rates between steps, however, they are in those positions by virtue of the application of laws regarding transfers and promotions, not on the basis of performance judgments. Historically, the wages of employees earning rates between steps would increase in an amount commensurate with the range change decided upon by DPA. The regulations proposed by DPA allow for intermediate

performance steps at all rates between the bottom step and the top step. The raises of employees are not to be determined by the range change, but rather by performance judgment.

Proposed 599.799.1 and proposed 599.799.2 each provide at (c)(1):

> "Notwithstanding Section 599.589, when the salary range for a classification containing positions covered by this rule is increased, the employees serving in these positions shall be eligible for a salary increase in an amount up to, but not exceeding, the amount of the salary range; provided, that these salary increases shall only be granted upon the appointing power's certification that the employee's job performance is successful."

Whether someone advances to a particular step, or skips steps within the range is left up to the appointing authorities. An appointing authority, under the proposed rules, can increase salaries in any amount up to the amount of the salary range increase, or give an employee no raise so long as he or she does not fall below the bottom step.

Clearly Government Code Section 19826 does not contemplate the monster that DPA would create. If it had, it would have clearly referenced that range changes developed by DPA do not have to be granted to employees at the appointing power's discretion.

3. WAGE SETTING ON THE BASIS OF MERIT IS LIMITED TO MERIT SALARY ADJUSTMENTS CONTEMPLATED BY GOVERNMENT CODE SECTION 19832.

Government Code Section 19826 provides that in establishing ranges for classes of positions, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. This rule does not permit

consideration of the performance of individuals within a class to determine the wage rate of the individual.

The Legislature has occupied the field of raises based on an employee's merit in Government Code Section 19832.

Government Code Section 19832 limits wage adjustments based on merit to the issue of whether an employee may move between established intermediate steps.

Performance based raises are limited by 19832 to a one intermediate step, 5% per year, raise. (G.C. 18807) The proposed regulations, with absolute management discretion to determine the existence or amount of raises based on performance whenever DPA changes ranges, is clearly defying the intent of the Legislature to limit the issue of performance based raises to the annual merit salary adjustments set forth in Government Code Section 19832. By occupying the field of merit based wage adjustments in Government Code Section 19832, DPA is necessarily precluded from legislating through regulations that all raises within certain classes must be merit based.

4. GOVERNMENT CODE SECTION 19829 DOES NOT AUTHORIZE THE PROPOSED REGULATIONS.

DPA attempts to justify the proposed regulations on the basis of Government Code Section 19829. Government Code Section 19829 allows adoption of more than one salary range or rate or method of compensation within a class only when the classes and positions have unusual conditions or hours of work or where "necessary to meet...prevailing rates and practices for comparable services in other public employment and in private

business..."

Supervisory and managerial classes do not have unusual conditions or hours of work, and the system contemplated by the proposed regulations is not necessary to meet prevailing rates and practices for comparable services in other public employment and in private business.

"Meeting" prevailing rates and practices is a necessity where the state cannot hire or retain employees because prevailing rates or practices pay better than the state. If, for example, the state needs nurses in San Francisco and Bay Area nurses get $3 more per hour than the state rate, and state nurses are abandoning state jobs, there is a necessity to meet prevailing rates and practices, and 19829 authorizes DPA to establish a separate rate. Here, it has not been shown to be "necessary" to establish potentially different rates for everyone in the supervisorial and managerial classes; therefore, pursuant to Government Code Section 19829, DPA cannot adopt regulations that would have that impact.

5. GOVERNMENT CODE SECTIONS 19992.8 - 19992.14 DO NOT AUTHORIZE THE SALARY SYSTEM CONTEMPLATED BY THE PROPOSED REGULATIONS.

The Authority cited by DPA to support the proposed regulations include Government Code Sections 19992.8 - 19992.14. These Code Sections address Performance Reports for Managerial Employees.

As a preliminary matter, it should be noted that these sections do not deal with supervisors and to the extent the Legislature has given DPA any powers in these sections regarding

managers, it is axiomatic that similar powers were not provided DPA in regards to supervisors.

Government Code Sections 19992.8 - 19992.14 do not give any authority to DPA to create regulations providing individual raises to managers when ranges are increased. Section 19992.11 indicates that performance reports shall be considered for a number of reasons including "in determining salary increases and decreases", and 19992.14 refers to the use of performance appraisal reports for merit salary increases.

Neither of these sections suggest the elimination of the pay range system with its 5% intermediate steps, nor do they suggest that employee performance must be judged for all raises. By describing use of performance reports in "awarding merit salary increases", rather than all raises, 19992.14 makes clear that other range change raises must continue to occur without regard to performance appraisal reports.

6. GOVERNMENT CODE SECTION 19825 ARGUES THAT THE SALARY SETTING CONTEMPLATED BY THE PROPOSED REGULATIONS CAN ONLY OCCUR WHEN STATUTORILY AUTHORIZED

The proposed regulations give authority to state agencies to fix the compensation of managerial and supervisory employees. Government Code Section 19825 contemplates that state agencies can have this authority "whenever authorized by special or general statute to fix the salary or compensation of an employee..." It is clear that, but for merit salary adjustments contemplated by Government Code Section 19832, the Legislature has not given salary setting authority to any agency other than DPA the limited range setting authority given in Government Code

Section 19826. The Legislature has not authorized, by special or general statute, salary fixing by the various state agencies. To the extent the proposed regulations give state agencies powers over salaries that the Legislature never contemplated, they are invalid. Government Code Section 19825. Examples of where the Legislature decided to give agencies salary setting authority include the PUC and FPPC.

In fact, the Legislature has made clear that salary determination is exclusively DPA's job. Government Code Section 19816 gives DPA the duty to administer salaries. The regulations improperly delegate administration of salaries to the state agencies.

> "As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion, are in the nature of public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." [cites omitted] Civil Service Association v. Redevelopment Agency (1985) 166 Cal.App.3d 1222, 1225

7. THE PROPOSED REGULATIONS CREATE A RETURN TO THE SPOILS SYSTEM.

Article VII of the California Constitution, creating a merit system in state employment, was intended, in part, to eliminate spoils in state employment practices (favoritism, political considerations, and friendship controlling employment decisions, rather than merit):

> "A second purpose of article VII and its predecessor was to eliminate the 'spoils system' of political patronage by establishing a merit system whereby appointments to public service positions are based upon demonstrated fitness rather than political considerations." California State Employees' Ass'n v. State of California (1988) 149 Cal.App.3d 840, 847.

A key element in the elimination of spoils is the fact that no lesser authority than the California Constitution provides that a disinterested third party, the SPB, will review all discipline. This process limits the possibility of "spoils" because an agency head's decision to discipline must be justified to the SPB. An agency cannot discipline an employee for failing to go along with shoddy management practices, for failing to make his manager look good in the face of incompetence, or for speaking up where top management's agenda and the public interest clash.

If a department attempted to discharge, suspend, or give a disciplinary wage cut to a manager or supervisor who "did not go along with the program" in the above scenarios, appeal to the SPB assures an impartial fair hearing.

With the proposed regulations a manager and/or supervisor will be left without recourse. The regulations afford management the opportunity to reward loyal soldiers with raises while denying raises to managers and supervisors who have the public's interest at heart.

With no appeal beyond the Department head, the regulations are going to force good managers and supervisors to put on blinders to the incompetence, corruption, and mistakes of those who control their fates. These regulations will silence discourse when it comes to policy issues. Innovative, thoughtful managers and supervisors are going to be afraid to be outspoken where it is called for out of fear that they will be denied a full raise. Managers' and supervisors' performance will be driven by spoils considerations not merit considerations

where these two collide.

Evaluating supervisory and management performance is subjective enough. Without appeal beyond top department management, possible denial of a raise will be a cloud that will chill the judgment of even the most dedicated employees.

8. GOVERNMENT CODE SECTION 19826 CONTEMPLATES COMPARABILITY OF PAY BASED ON DUTIES AND RESPONSIBILITIES NOT PERFORMANCE.

Government Code Section 19826 requires DPA, in establishing salary ranges, to base the ranges on the principle that like salaries shall be paid for comparable duties and responsibilities. The proposed rules do not adhere to the statutorily declared principle. Employees with like duties and responsibilities will be paid different wages than their cohorts, under the proposed regulations, because performance will be determinative of pay rates. Comparable pay based on duties and responsibilities is not possible when quality of work, not duties and responsibilities control wage determination.

## CONCLUSION

DPA, through proposed regulations, is taking a step that only the Legislature can take. Salary setting and the salary setting process are legislative acts. The Legislature has not authorized the performance pay salary setting process that the proposed rules contemplate. For the reasons stated herein, DPA does not have the authority or right to substitute its judgment for the Legislature's judgment, and thereby effect a radical

change in the compensation system of the state's managers and supervisors.

Date: 8-30-94

Respectfully submitted,

DENNIS F. MOSS, Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

# Commenter Response Log
# Period End October 12, 1994

**COMMENT PERIOD**
**ENDING OCTOBER 12, 1994**

| EXHIBIT # | NAME OF STATE AGENCY | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED * |
|---|---|---|
| AA-101 | Corrections | 13, 21, 30 |
| AA-102 | Corrections (Chuckawalla Valley State Prison) | 13, 16, 30 |
| AA-103 | Transportation | 2, 6, 13, 15, 16, 17, 30 |

* See response to comments section of Final Statement of Reasons

**COMMENT PERIOD**
**ENDING OCTOBER 12, 1994**

| EXHIBIT # | NAME OF PERSON | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| E-101 | Joseph R. Symkowick | 9, 15 |
| E-102 | Larry Nash | 1, 2, 14, 16, 24, 32 |
| E-103 | Gene Whitter | 24 |
| E-104 | Jon Leber | 2, 15, 17, 19, 24, 27, 30, 33 |
| E-105 | Robert Cummings | 10 |
| E-106 | Om P. Gulati | 24 |
| E-107 | Roger Dupunis | 24 |
| E-108 | Nat Chauhan | 13 |
| E-109 | Matt Szabo | 2, 6, 27, 33 |
| E-110 | Janet Nishioka Nozaki | 5, 24 |
| E-111 | Ardess Lilly | 31 |
| E-112 | Gordon Boggs | 19, 24, 27, 30, 33 |
| E-113 | Elizabeth Babcock | 2, 9, 10, 13, 17, 30 |
| E-114 | Phillip Tom | 15, 23, 24 |
| E-115 | H. Paul Lillebo | 6, 27, 33 |
| E-116 | Michael F. Silver | 2, 8, 16, 17, 30 |
| E-117 | Louisa Broudy | 24 |
| E-118 | Gordon Boggs | 19, 24, 27, 30, 33 |
| E-119 | A. Alexander | 6 |
| E-120 | Ann Horn | 2, 17, 30 |
| E-121 | Phillip Shearer | 15 |
| E-122 | Martha Lawler | 5, 6 |
| E-123 | Teri Barthels | 17, 24 |
| E-124 | Alan S. Weinger | 2, 21, 24, 30 |

COMMENT PERIOD
ENDING OCTOBER 12, 1994
(Continued)

| EXHIBIT # | NAME OF PERSON | NUMBER OF RESPONES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| E-125 | Comments from State Water Resources Control Board and Regional Board's Employees | 1, 2, 14, 16, 24, 32 |
| E-126 | W. E. Hunter | 17, 31 |
| E-127 | Barbara Carr | 24, 33 |

**COMMENT PERIOD**
**ENDING OCTOBER 12, 1994**

| EXHIBIT # | NAME OF EMPLOYEE ORGANIZATION | NUMBER OF RESPONSES WHERE COMMENTS ARE ANSWERED |
|---|---|---|
| EO-101 | California State Supervisors | 2, 10, 16, 21, 24, 29 |
| EO-102 | California Association of Highway Patrolmen | 6, 10, 28, 33 |
| EO-103 | California Correctional Peace Officers Association | 2, 17, 27 |
| EO-104 | Professional Engineers in State Government | 2, 9, 10, 13, 17, 30, 32 |
| EO-105 | Association of California State Attorneys and Administrative Law Judges/California Association of Professional Scientists/Professional Engineers in State Government | 2, 4, 9, 10, 30 |
| EO-106 | California State Managers and Supervisors Association | 2, 10, 13, 17, 27, 29 |

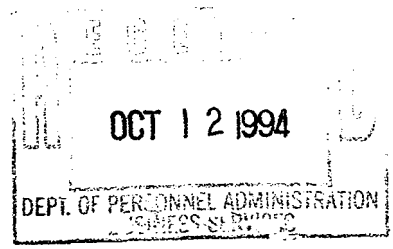
Comments Received Period
End October 12, 1994

AA-101

State of California

Department of Corrections

# Memorandum




Date : October 12, 1994

To : Richard Leijonflycht
Department of Personnel Administration
Policy Development Office

Subject : **PROPOSED RULES 599.799.1 AND 599.799.2 - PAY FOR PERFORMANCE**

Several of the issues we raised in our August 17, 1994 review of the proposed rules for the managerial and supervisory Pay-For-Performance (PFP) Programs are addressed in the revised text of September 15, 1994. However, the following comments address outstanding questions and issues identified by the California Department of Corrections (CDC):

***RULE 599.799.1 and 599.799.2***

1. **(c) Salary range increases (3)**
   Does this provision allow an employee who did not receive an increase during one salary range change period to receive the amount of that range change plus the amount of the current range change when successful job performance is attained?

2. **(d) Merit salary adjustments (MSAs) (2)**
   This provision provides for the possibility that an employee's anniversary date could be "MAX" while their salary rate is, in fact, below the maximum salary rate for the classification. Therefore, documentation and tracking procedures should be developed with the State Controller's Office to ensure that MSAs are not generated for employees who are not at the salary range maximum rate due to denial of a PFP increase.

3. An additional area that needs to be addressed, either in the regulations or in subsequent policy memoranda from the Department of Personnel Administration, is the effect of movement between classifications within and between supervisory/managerial designations. For example:

   a. A supervisory employee is denied a PFP increase on January 1, 1995 and moves to a different supervisory classification on May 1, 1995. Based on successful performance in the new classification, is this employee eligible for a PFP increase? In this case, no increase was received in the previous classification and the employee was a supervisory employee at the time the supervisory salary ranges were changed. This question also applies to managerial employees moving from one managerial classification to another.

b. A supervisory employee is denied a PFP increase on January 1, 1995 and is promoted to a managerial classification (perhaps in a different department) on August 1, 1995. Based on successful performance in the managerial classification, is this employee eligible for a PFP increase? No increase was received in the supervisory classification and all excluded classifications had a range change of 5 percent on January 1, 1995.

c. A managerial employee is denied a PFP increase on January 1, 1995 and demotes (voluntarily or through adverse action) to a supervisory position on April 1, 1995. Based on successful performance in the supervisory classification, is this employee eligible for a PFP increase? Again, no increase was received in the managerial classification and all excluded classifications had a range change of 5 percent on January 1, 1995.

***RULE 599.799.1 - MANAGERIAL***

Section (c) Salary range increases (1) states that when the salary range changes, managers who are certified as successful shall receive a salary increase equal to the amount of the salary range increase. Does this mean that employees who received a "partial" increase on January 1, 1994 will retroactively receive the difference to provide them with a full 5 percent increase on January 1, 1994?

If you have questions regarding our concerns, please contact Carol Birtchet, Manager, Personnel Liaison, at 324-6986 or Karen Vierra, Manager, Personnel Operations, at 323-5109.

Karen A. Vierra for
JAMES E. LIBONATI
Assistant Deputy Director
Office of Personnel Management

cc: James E. Tilton

AA-102 ✓

State of California

Department of Corrections

# Memorandum

Date : September 26, 1994

To : Richard Leijonflycht
Department of Personnel Administration

Subject: PAY FOR PERFORMANCE - COMMENTS

After review of the proposed Managerial/Supervisory Performance Evaluation Criteria, we would like to submit the comments listed below for your review.

(1) It appears that a manager/supervisor would receive an annual evaluation at the time of the Pay-for-Performance. If each manager/supervisor receives an evaluation effective, for instance, January 1, 1995, this would create massive stacks of evaluations due at the same time each year. A possible solution to this issue would be to complete the Pay-for-Performance form when the normal annual evaluation is complete. If an employee receives less than the full five percent (5%), the supervisor could then continue to evaluate the employee's performance, perhaps completing additional forms to request up to a maximum of five percent. This would mean only one transaction would be necessary per year, per employee.

Also, this affects the Merit Salary Adjustment (MSA) increases. Since the Pay-for-Performance is already affected by the annual evaluation, should the MSA be similarly affected? This appears to be double-jeopardy for the employee.

(2) The issue of additional salary increases throughout the fiscal year has not been addressed. For instance, in 1993 rank-and-file Unit 6 employees received a general salary increase effective July 1, 1993. All other rank-and-file employees and supervisory staff were required to wait until January 1, 1994. If special salary increases continue to be negotiated, effect on managerial/supervisory pay should be indicated.

(3) The Pay-for-Performance rates appear to be permanent salary increases. If this is the case, methods for computing salary determinations (moving from class to class, etc.) need to be addressed.

(4) Managers have already been a part of this process (effective January 1, 1994). Language should be included that addresses the effect of the 'old' Pay-for-Performance versus the new (i.e. in respect to salary determinations, etc.).

Further discussion of these issues may be addressed to our Institutional Personnel Officer, Cheryl Ann McDonell. Her telephone number is (619) 922-9713.

Richard Early

JULIAN S. MARQUEZ
Warden

AA-103

State of California

Business, Transportation and Housing Agency

# Memorandum

To: MR. RICHARD LEIJONFLYCHT
Department of Personnel Administration
Policy Development Office
1515 S Street, Bldg., Suite 400
Sacramento, CA 95814-7243

Date : October 12, 1994

File No. :

From : **DEPARTMENT OF TRANSPORTATION**
**Division of Human Resource Related Services**

Subject: Pay-for-Performance (PFP) Rules for Managers and Supervisors

This is in response to PML 94-51 requesting comments on DPA's proposed rules to establish a PFP program for State managers and supervisors. We have had an opportunity to review the proposed changes with appropriate personnel, and the following provides you with comments and recommendations.

Section 599.799.1 (b) (2)

Under this section, department would be required to give all managers the opportunity to review and comment on the performance appraisal system before it is implemented. We propose that this language be modified to limit the number of managers that would be given the opportunity to review and comment on the system.

Section 599.799.1 (c) (3) and 599.799.2 (c) (3)

The proposed language in these sections would allow an employee, who does not receive the salary increase, an indefinite amount of time to receive the increase upon his/her certification of successful job performance. It is our recommendation that the proposed language be modified to include time restrictions.

Sections 599.799.1 (d) (1) and 599.799.2 (d) (1)

These two sections appear to impose a permanent penalty on an employee who does not receive a merit salary adjustment (MSA), even though his/her performance may improve in subsequent years. Is it also your intent to allow an employee, who does not receive an MSA, an indefinite amount of time to receive the MSA upon his/her certification of successful job performance?

Section 599.799.1 (b) & (c) and 599.799.2 (b) & (c)

These sections require clarification as to job performance that may be impacted as a result of an employee's extended absence due to an injury, disability and/or the use of leave credits (vacation, personal/annual leave).

OTHER MAJOR COMMENTS

1. What incentive does a manager/supervisor have if he/she is at the top of the his/her salary range and the Governor does not approve a salary increase in subsequent years? Why

should a manager/supervisor keep up a superior level of performance if he/she will not be rewarded for it? The proposed rules do not address the possibility of a manager/supervisor being paid anything over his/her existing salary range.

2. Management should be given the flexibility to grant variable salary increases based on a performance rating system. This way, the high performers are rewarded and the average performers have something to work towards.

3. If everyone performing at minimum acceptable levels receives the salary increase, there is no incentive to excel.

4. Basic premise of taking cost-of-living dollars and converting to PFP was received from almost everyone. The objection was that the cost-of-living should cover the base amount only and the PFP dollars should be on top of base pay.

5. It should be clear that no cap is to be placed on the amount of dollars available so that the appointing powers are not forced to make an artificial selection of persons to receive a PFP salary increase when all of the managers/supervisors are meeting the performance standards.

6. All of the sections severely restrict the ability of someone to review the decision for fairness and whether it was based on solid facts, etc. To limit the right to appeal only when it was abuse, harassing, or discriminatory opens all managers to be personally held for liability and sued. A review process should be included that allows for the manager/supervisor to appeal the decision by their immediate supervisor including additional areas other than the "abuse, harassment and discrimination" criteria.

7. In the private sector PFP places no limits on the salary range. True PFP should adopt the same philosophy and remove limits on salary ranges. In the private sector, you negotiate your worth and no limits are put on it. In the proposed rules you are saying yes, we want to award good work but are saying that it is only worth so much. Why change the system, it is essentially the same.

8. The proposed rules could be construed as the traditional approach to the State's compensation program.

If you have any questions regarding our comments, please contact Ray Hernandez at (916) 653-4578.

Ray Hernandez for

DAVE BRUBAKER, Chief
Office of Labor Relations

E-101

**CALIFORNIA DEPARTMENT OF EDUCATION**
721 Capitol Mall: P.O. Box 944272
Sacramento, CA 94244-2720

October 11, 1994

TO: Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243
(via FAX: 324-0524)

FROM: Joseph R. Symkowick
General Counsel (916) 657-2453

SUBJECT: Comments on Proposed Department of Personnel Administration (DPA) Rules On Pay For Performance Program

My comments relating to the proposed rules will be brief. In my opinion, the rules should be called "Punishment For Non-Performance" rather than "Pay For Performance." I will explain my reasoning and point out how these rules, when applied, will constitute discipline without the appropriate process due under the civil service system.

DPA's Rulemaking File contains two surveys -- one from the public sector and one from the private. Interestingly, neither of those surveys described a system similar to the one contained in DPA's proposed rules. Even though DPA has the statutory authority to grant bonuses and other benefits to managers and supervisors, it has in effect taken away the bonuses and the vacation buy-back that was initiated during Governor Deukmejian's term of office. The proposed rules do not reinstate any benefits. Instead, they define MSAs and COLAs as the pay that managers and supervisors get for performance equivalent to that of a "well-qualified manager." In other words, managers can't even possibly get more than what other employees would normally get. The system is totally capped. Thus, there are no incentives for excellence.

The proposed DPA rules are not like other public and private sector pay for performance rules. The other sectors' rules, as I understand them, range from zero percent to well beyond normal COLA in what managers can receive for their performance rating. Thus, DPA's proposed rules are not valid pay for performance rules. Instead, as I will explain, they can only be applied in a disciplinary fashion. Thus, they violate civil service due process requirements. Civil service manager and supervisor salaries are oftentimes compacted. In the professional classifications, many employees are at the top of their ranges and can only expect COLAs when they are given to the entire workforce. To deny a COLA or a series of COLAs to a manager or supervisor could result in that manager or supervisor actually making less than the professionals that he or she is supposed to manage or supervise. Career executives can avoid the adverse impact and stigma by simply resigning their assignment. Civil service managers and supervisors do not have that option. Civil service managers and supervisors instead would have to voluntarily demote. In effect, the refusal to grant the COLA would cause the voluntary demotion and would have the same effect as an involuntary demotion. However, an involuntary demotion automatically gives rise to due process before a hearing officer assigned by the State Personnel Board. It also places the burden of proof upon the appointing authority. Under the proposed rules, you place the burden upon the employee and limit the grounds for appeal. Because the action will be equivalent to involuntary demotion, DPA does not have authority to alter statutory rights by rule.

In short, the proposed rules are totally negative and very anti-management.

A true pay for performance system would cause managers to strive for excellence by having positive incentives. Only such a system can also justify negative incentives. Your proposed system cannot. Instead, it will cause many managers and supervisors to think hard about why they want the job.

Thank you.

JRS:jm

E-102

**MEMORANDUM**

**Date:** 11 October 1994

**From:** LARRY F. NASH, CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD

**To:** SHERYL BROOKS, STATE WATER RESOURCES CONTROL BOARD
FAX 654-3810

**Subject:** REQUEST FOR COMMENTS - PAY FOR PERFORMANCE , PROPOSED RULES 599,799.1 AND 599.799.2

---

Today at 1:30 p.m. I received a copy of a September 15, 1994 letter and package from DPA (reference code 94-51) asking for my comments by tomorrow a.m. . I offer the following comments:

1. The time allowed for comments is unreasonable. Why did it take three weeks to "share these proposed revisions".

2. Annual performance appraisals are insufficient to evaluate pay for performance. Appraisals should be quarterly so that an employee has an opportunity to correct inadequacies, receive feedback , and achieve successful performance. Quarterly appraisals should at least be mandatory for employees who have been denied a salary range or MSA increase.

3. The proposal to implement these rules effective 1 January 1995 is unreasonable. Since "performance standards", "performance appraisal systems", and performance appraisal report forms" have not been developed, the employees cannot know the basis of their appraisals.

4. Does section (f) Multiple appointing powers apply to the State Board/Regional Board organizational structure? Will all Regional Boards and the State Board use the same standards, system, and forms?

cc:Richard Leijonflycht
DPA Policy Development Office
FAX (916) 324-0524

California Regional Water Quality Control Board
Central Valley Region

3443 Routier Road, Suite A
Phone: (916) 255-3000

Sacramento, CA 95827-3098
FAX: (916) 255-3015

# FAX TRANSMITTAL PAGE

Date: 10/12/94

To: Richard Leinfelt

From: Carry Nash Rg 5

Sender's Phone: (916) 255-3058 Or CALNET 8-494-_____

Number of Pages (including cover): 2

Subject: Pay for Performance Contracts

Comments: _____

If any problems occur in receiving, please call one of the numbers listed above.

E-103

Gene Whitten
3200 Graybrook Lane
Hydesville, CA 95547

Attn: Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento CA 95814-7243
FAX 916-324-0524

October 12, 1994

Dear Mr. Leijonflycht:

I have a proposed rule package for pay-for-performance for all state supervisors and managers which your agency distributed, which is dated 9-15-94. A letter of forwarding to field locations from Santa Rosa was dated 10-3-94, and I received a copy of this only yesterday, with comments due no later than today at 5 p.m.

The relatively short period of time that this is in the hands of those who will be regulated by it seems a bit contrived. I can't see how the people can possibly have time to discuss these issues and provide you any realistic input, as some of them haven't even seen this because it's still in the mail to them.

I wonder how this situation, applied to those under the pay-for-performance rules, would affect someone's pay? Would just sending out items with 30 days notice of a deadline be adequate, or rather would the standard be that everyone have equal and full opportunity for input? Hard questions if your paycheck depends on it.

Sincerely,

Gene Whitten

Gene Whitten

faxed 10/12/94
14:50 hrs

E-104

October 11, 1994

Reply to: Jon Leber
3657 Tolenas Court
Sacramento, CA 95864-2857

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243

Dear Mr. Leijonflycht:

Following are comments on the Department of Personnel Administration proposed rules 599.799.1 and 599.799.2 -- Pay for Performance. Since the wording of each of these rules is similar my comments are similar on each rule. The following comments on each subsection therefore apply to both rules.

**Comments on Section (b)(1) of proposed rules 599.799.1 and 599.799.2**

The proposed rule is ambiguous when it uses the terms *normally, well qualified, and reasonable,* all terms that are not well defined. For the supervisory employee there is no requirement to consider or include any information from supervisory or other employees in deciding the performance standards for rating the supervisor.

**Comments on Section (b)(2) of proposed rules 599.799.1 and 599.799.2**

The criteria that *affected managers shall have a reasonable opportunity to review and comment on the system, and any changes to it, before they are implemented* is likely to lead to setting arbitrary rules if the appointing power is not required to negotiate with the manager about the criteria. If an appointing power sets some unreasonable criteria, there should be a mechanism of recourse for the manager such as an independent arbitrator.

For supervisors there is no mention of having the supervisor participate in any fashion in deciding on the standards of performance. In many state agencies, the turnover of appointing powers and of managers far exceeds that of supervisors and rank and file. Often appointing powers are persons appointed as a result of support in a campaign for election. In these instances the appointing power often has much less knowledge about the work performed by the organization, the needs of the public, and how to plan, budget, and administer those programs than the supervisors and rank and file, and yet the proposed rule implies that the appointing

power, who doesn't know what needs to be done, is somehow going to decide how to judge the persons who are doing the job without those persons participating in developing the criteria. This is an arbitrary method of determining performance likely to result in increased costs to the state for the benefits that are received.

**Comments on Section (c)(1) of proposed rules 599.799.1 and 599.799.2**

Salary ranges are normally only increased when there has been inflation resulting in decreased purchasing power for the dollar and an effective decrease in pay for employees. Linking pay for cost of living to a performance evaluation results in an unnecessary and arbitrary regulation of state employees and potentially increases state costs without corresponding benefit to the state.

Requiring an action from appointing powers to certify that employees are performing successfully at the time of a range increase assumes that employees were not performing successfully without this certification. This is an arbitrary assumption. There is no evidence to show that the majority of managers and supervisors are performing unsatisfactorily. If there is no evidence that the majority of managers and supervisors are performing unsatisfactorily, then there is no need for this constraint in the regulation. There is evidence that over 95 percent of managers and supervisors are performing satisfactorily. The proposed regulation will increase state costs by requiring action and unnecessary paperwork for all these managers and supervisors.

**Comments on Section (d)(2) of proposed rules 599.799.1 and 599.799.2**

Since this section refers to section (c)(1) the same issues raised in the comments on section (c)(1) apply.

**Comments on Supporting Surveys Added to Rulemaking File**

Conceptually many people can agree that compensation should be linked to performance. The William Mercer Co. survey of the private sector and the public sector performance pay practice clearly show this. However, there are two critical elements that are left out of these surveys. First, the surveys only show that organizations have instituted some system, they do not show that the system was beneficial or optimal to the organization. Secondly, the terms used in the surveys are ambiguous.

The importance of the first issue is critical in governmental organizations and leads to an ambiguous rule.. In private industries, the measure of success is usually measured in some terms of profit. Since government is not a profit business, the measure is much more qualitative and performance measures are much more difficult to develop. This difficulty often leads to written standards of performance that encourage increased public costs with reduced productivity. There is some information coming from federal agencies that is showing this aberration. I am not aware of formal studies that have shown the written standards of performance for governmental management and supervision positions are either beneficial or detrimental to

accomplishing programs more effectively. There is substantial risk that pay for performance can turn into a paper generation exercise where competing managers and supervisors spend substantial effort proving productivity, while causing actual productivity to go down.

The second issue points out an area in which the data may not be applicable to the proposed rule. There are three distinct types of pay increases found in various private industries. 1) bonuses that are provided when a company does exceptionally well, 2) annual pay increases for becoming a more valuable company employee as the employee becomes more knowledgeable about the tasks and provides increased value to the company, 3) cost of living increases that are an attempt to continue to pay the same real value to a person independent of any changes in performance.

The State does not provide any compensation for alternative 1) no matter how productive an employee may be. In private industry this bonus is often 10% of the annual income. The proposed rule does not include any option for bonuses. The State provides for alternative 2) in its current system of merit pay increases. Currently the state makes disapproving the increase more difficult than approving the increase. The State limits the increase to 5% annually with a cap of 25%. Private industry often provides an 8% to 15% annual increase with no specifically defined cap. The State has historically provided pay increases for alternative 3). According to the survey, about half of private industry surveyed appeared to automatically provide this increase. It is not clear if the half of industries that do not provide pay increases use this as a systematic way to reduce costs independent of how well the manager or supervisor is performing.

Although these studies provide some useful information about the use of pay for performance, they do not show that pay for performance is beneficial nor do they identify the critical parameters that make a pay for performance program beneficial. Some lesson may be taken from private industry in the structuring of their pay for performance, where substantial pay increases are available (the carrot) for those who perform well, and pay decreases -usually in termination of employment instead of a decrease in pay- for performance that is unacceptable (the stick). The proposed rule strongly suggest using the stick approach (although not as rigorous as termination) but ignores the issue of providing carrots that would provide substantial latitude for appointing powers to provide a variety of rewards for managers and supervisors who show devotion to duty and expend extraordinary efforts to meet the goals and objectives of an agency on the desired schedule.

**Recommendations**

The proposed rules 599.799.1 and 599.799.2 should be amended to accomplish the following:

- Sections (b)(1) - Supervisors, managers, and rank and file should participate in developing written standards of performance with the appointing power for supervisors and managers, and, if there is disagreement about the criteria, an independent arbitrator mutually acceptable to all parties should be used to resolve the dispute.

- Sections (b)(2) - Supervisors, managers, and rank and file should participate in developing a performance approval system and, if there is disagreement about the system, an independent arbitrator mutually acceptable to all parties should be used to resolve the dispute.

- Sections (c)(1) - The appointing power should certify those managers and supervisors who were not performing satisfactorily at their last performance appraisal, and those managers and supervisors should not receive a salary increase corresponding to the salary range increase. [Alternatively delete all of sections (c)(1)].

- Sections (d)(2) - If sections (c)(1) are amended as shown above, keep this section as worded. If sections (c)(1) are not amended, delete all of section (d)(2).

- Add an additional section to the proposed rule that allows the appointing power to flexibly provide additional compensation for superior performance of managers and supervisors in the form of MSAs greater than one step, increased range of steps from the bottom to the top of the class, monetary bonuses, additional time off or other innovative methods.

- Expand the *Scope and purpose* sections to include the underlying goal that the state is trying to achieve by instituting a pay for performance program. State agencies can use this purpose as guidance in developing written standards. I suggest the following sentences be used to replace the last sentence of sections (a).

  > Its purpose is to increase the productivity, effectiveness and efficiency of government by encouraging managers (supervisors) to strive to perform their best. This rule specifies the manner in which performance in managerial (supervisorial) positions is appraised and establishes a program for determining managers' (supervisors') salary increases based on their job performance, rather than through automatic, general adjustments.

I apologize for not commenting earlier. I hope these comments are helpful toward your developing a rule that achieves the most benefit for the state's taxpayers.

Sincerely,

Jon Leber

E-105 rec'd 10/12/94

To: DPA

Subj: Hearing regarding Pay for Performance

DPA interprets Sections 19992.8 through 19992.14 as authority to regulate salaries of supervisory personnel. This is an arbitrary and capricious interpretation. The chapter title of these sections address performance of "managerial" employees. All of these sections make reference only to "managerial" employees. Nothing in Sections 19826 or 19829 provides DPA with this regulatory authority over supervisor classes. While the Government Code does not define managerial or supervisory employees, administrative policies and guidelines clearly establish supervisors as being distinct and separate from managers or managerial personnel.

In the 1980s when collective bargaining was implemented for rank and file employees, the Administration identified the need to reduce the number of employees classified as "managers.: As a result, agricultural program supervisors in the Department of Food and Agriculture were reclassified from managers to supervisors, although their 4C classification did not change. When bonus awards were implemented, there was a clear distinction between managers and supervisors with managers being awarded greater dollar amounts. Managers benefit from a greater paid life insurance plan than provided for supervisors.

With the administrative differences in these classes, the above sections can hardly be construed as being applicable to supervisory personnel. DPA does not have regulatory authority for pay for performance over supervisory classes without a change in the Government Code; therefore, supervisory classes should be deleted from the proposed regulations.

Please send me a copy of your final statement of reasons in this matter.

Robert Cummings 10/3/94

Robert Cummings
6424 Villa Drive
Sacramento, CA 95842

E-106

# facsimile cover sheet
TRANSMITTAL

**From:** Om P. Gulati
Chief, Applications Unit #2
Division of Water Rights
State Water Resources Control Board
Phone # (916) 657-1370 Fax # (916) 657-1485

**Date:** October 12, 1994

**To: Richard Leijonflycht**

**Fax #: (916) 324- 0524**

**Re: Proposed Rules about pay for performance( 599.799.2)**

**Pages:** 2 page(s) total, including this cover sheet

If you have any questions regarding this transmission please contact Om Gulati at (916) 657-1370.

From the desk of...

user

SWRCB
901 P
SACRAMENTO, CA. 95418

tel:
fax:

# Memorandum

To : Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

Date: October 12, 1994

O. P. Gulati, Senior WRC Engineer
Division of Water Rights
From : STATE WATER RESOURCES CONTROL BOARD
901 P Street Sacramento, CA 95814
Mail Code G-8

Subject: PROPOSED RULE 599.799.2 DATED SEPTEMBER 15, 1994--
PAY FOR PERFORMANCE

Copies of the proposed rule were furnished to supervisors of the State Water Resources Control Board (SWRCB) on October 11, 1994. I note that subsection (g) of the proposed rule states that the effective date of the rule shall apply to salary range increases for Supervisor classifications to take effect on or after January 1, 1995. Subsection (b)(1) states that clear, job-related written standards of performance must be developed for supervisory positions within each appointing power. Additionally, subsection (b)(2) states that each appointing power shall have a performance appraisal system, and that affected supervisors shall be provided with a description of the system.

The intent to develop standards and evaluate employee performance seems admirable. However, it will only improve efficiency of state government functions when adequate time is spent to develop methods and procedures for implementing them in a fair manner and not subjectively. Because of lack of crosschecks to avoid the latter, many time standards are developed and then abandoned before implementation.

Since the proposed rule was distributed to supervisors of the SWRCB on October 11, 1994 with comments due to DPA by October 12, 1994, and since the standards of performance and the appointing power appraisal system for supervisors have not yet been provided to the SWRCB supervisors, if even developed, and since there are only eleven weeks to the proposed effective date of January 1, 1995, it would be grossly unfair to supervisors to have any general pay range increase due on January 1, 1995 based on standards of performance under a rule not even in existence so close to implementation.

Supervisors employed by the State should be given at least a full year after standards of performance are made known before ratings against such standards are used for something as important as an individual's salary. If the proposed rule is implemented for general salary increases due on January 1, 1995, this would be another in a series of unilateral declaration with no opportunity for supervisors to conform to after-the-fact standards.

bcc: Murt Lininger
Professional Engineer in California
Government (PECG)

OPGulati:pminer:10-12-94 o:opg:proprule

STATE OF CALIFORNIA
PETE WILSON, Governor

**STATE WATER RESOURCES CONTROL BOARD**
THE PAUL R. BONDERSON BUILDING
901 P STREET
SACRAMENTO, CA 95814

Mailing Address
**DIVISION OF WATER RIGHTS**
P.O. BOX 2000, Sacramento, CA 95812-2000

E-107

FAX: (916) 657-1485

# FAX COVER SHEET

DATE: 10-12-94 TIME: 2.15 pm

RECIPIENT: Richard Leijonflycht

RECIPIENT'S FAX NUMBER: (916) 324-0524

SENDER: Roger Dupuis

DOCUMENTS SENT: Proposed Rules for Pay for Performance (599-799-2)

NUMBER OF PAGES: Two
(INCLUDING COVER SHEET)

SPECIAL INSTRUCTION:

PLEASE CALL THE SENDER IF THERE ARE PROBLEMS OR ERRORS

SENDERS TELEPHONE NUMBER:

E-107

# Memorandum

To : Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

Date: October 12, 1994

Roger E. Dupuis

Roger E. Dupuis, Senior Engineer
Division of Water Rights
From : STATE WATER RESOURCES CONTROL BOARD
901 P Street Sacramento, CA 95814
Mail Code G-8

Subject: PROPOSED RULE 599.799.2 (REVISED TEST SEPTEMBER 15, 1994)

Copies of the proposed rule were furnished to supervisors of the State Water Resources Control Board (SWRCB) on October 11, 1994. I note that subsection (g) of the proposed rule states that the effective date of the rule shall apply to salary range increases for Supervisor classifications to take effect on or after January 1, 1995. Subsection (b)(1) states that clear, job-related written standards of performance must be developed for supervisory positions within each appointing power. Additionally, subsection (b)(2) states that each appointing power shall have a performance appraisal system, and that affected supervisors shall be provided with a description of the system.

Since the proposed rule was distributed to supervisors of the SWRCB on October 11, 1994 with comments due to DPA by October 12, 1994, and since the standards of performance and the appointing power appraisal system for supervisors have not yet been provided to the SWRCB supervisors, if even developed, and since there are only eleven weeks to the proposed effective date of January 1, 1995, it would be patently unfair to supervisors to have any general pay range increase due on January 1, 1995 based on unbeknownst phantom standards of performance under a rule not even in existence so close to implementation.

Supervisors employed by the State should be given at least a full year after standards of performance are made known before ratings against such standards are used for something as important as an individual's salary. If the proposed rule is implemented for general salary increases due on January 1, 1995, this would be another in a series of unilateral edicts with no opportunity for employees to conform to after-the-fact standards.

Office of the State Architect
[illegible] Howard St., Ste. 400
[illegible] cisco, CA 94105
(415) 396-9500

E-108

**TELFAX**

DATE: 10/12/94

TO: R. Lipsonfeycht

FROM: N. Cranham/ORS/OSA

SUBJECT: DPA Policy

TOTAL PAGES, INCLUDING THE TRANSMITTAL 2

PLEASE NOTIFY Tanya

AT ( 8 ) 531-9505 IMMEDIATELY IF ANY PAGES ARE MISSING

FOR YOUR RECORDS, THE STATE ARCHITECTS STRUCTURAL SAFETY SECTION, SAN FRANCISCO
TELEFAX NUMBER IS (415) 396-9542, ATSS NUMBER IS (8) 531-9542

E-108

State of California

M E M O R A N D U M

To: Richard Leijonflycht
Dept. of Personnel Admin.
Policy Development Office

Date: Oct. 12, 1994

From: Department of General Services - DSA/ORS

Subject: Comments regarding DPA Policies

Following is my comment, to Section (d) (2).

As long as the manager improves his/hers performance, he/she should be able to catch-up with the top salary range by receiving MSA at a later date.

Nat Chauhan
Principal Structural Engineer

NC:tv

E-109

Richard Leijonflycht
Dept. of Personnel Administration
Policy Development Office

1515 S. St., North Building, Suite 400
Sacramento, CA 95814-7243

October 12, 1994

RE: Pay-for-Performance Proposed Rules

Dear Mr. Leijonflycht:

I have great reservations and doubts about the "Pay-for-Performance" proposal, as written, for the following reasons:

1. I doubt that it will work without creating a lot of controversy and ill will among those who see this as the end of the civil service system concept.

2. It's justification that it will work because the system is already implemented and working in other public agencies and private companies, lacks adequate reasoning and support, because:

   a. The number of "sampled" public agencies is small and the few States included in the sample are all Eastern States, which have entirely different traditions, problems, and practices, than Western States.

   b. It is heavily weighted by reference to private companies which will always be quite different than the public sector, and as such, the two are uncomparable.

3. As the "Mercer" survey also concluded: The structure of performance appraisal is primarily top-down, authoritarian, with the immediate boss retaining the most influence; formal appeals mechanisms appear relatively weak or non-existent.

I believe, this is what is needed to improve these deficiencies:

1. "Cost-of- Living" increases should not be subjected to pay-for-performance considerations.

2. There should be a meaningful appeals process to allow conflict resolutions by the Agency's supervising body, or the State Personnel Board.

3. While pay increases should be granted only for standard or higher performance, there should be no pay cut for those with less than standard performance. However, the denial of a pay increase to those appear appropriate. If needed, existing disciplinary actions can also be used.

As a general comment, I also want to address the additional time which will have to be spent on the evaluation process. Since there will be individually tailored performance standards and goals established for each supervisory or management position, the added time, and associated costs thereof, State-wide, may be too costly to administer.

Overall, it appears the proposed system will be controversial, expensive, and hard to administer.

These comments are respectfully submitted,

Matt J. Szabo
Senior Examiner/Supervisor
8-677-3938 (ATSS)

DEPARTMENT OF CORPORATIONS

# FAX TRANSMITTAL

IN REPLY REFER TO:
FILE NO: _____

Date: 10-12-9X

Total number of pages, including this cover sheet: 3

TO: RICHARD LEISONFLYCHT / FAX NO. 9-1-916-324-0524

COMPANY/AGENCY: DEPT. OF PERSONNEL ADMIN., POLICY DEV. OFFICE

FROM: MATT J. SZABO TELEPHONE NO: ATSS: 8-677-3938

FAX NO: (213) 736-2120

SUBJECT/REFERENCE: PAY-FOR PERFORMANCE PROPOSED RULES — COMMENTS THEREOF

( ) URGENT (X) ROUTINE

( ) ROUTE TO ADDRESSEE

( ) TELEPHONE ADDRESSEE FOR PICK-UP

( ) TELEPHONE SENDER WHEN RECEIVED

COMMENTS:

SEE COMMENTS ON THE ATTACHED TWO (2) PAGES.

10-12-9X

LOS ANGELES 90010-3001
3700 WILSHIRE BOULEVARD
(213) 736-2741

SACRAMENTO 95814-2980
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SAN DIEGO 92101-3847
1350 FRONT STREET
(619) 525-4233

SAN FRANCISCO 94102-5303
1390 MARKET STREET
(415) 557-3787

DEPARTMENT OF CORPORATIONS

# FAX TRANSMITTAL

IN REPLY REFER TO:
FILE NO: _____

Date: 10-12-94

E-110

Total number of pages, including this cover sheet: 2

TO: Richard Leijonflycht / FAX NO. (916) 324-0524

COMPANY/AGENCY: Dept. of Personnel Administration

FROM: Janet Nozaki TELEPHONE NO: (213) 736-3491

FAX NO: (213) 736-2120

SUBJECT/REFERENCE: Pay-for-Performance Proposed Rules

(X) URGENT ( ) ROUTINE

( ) ROUTE TO ADDRESSEE

( ) TELEPHONE ADDRESSEE FOR PICK-UP

( ) TELEPHONE SENDER WHEN RECEIVED

COMMENTS: _____

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SAN FRANCISCO 94102-4313
390 MARKET STREET
(415) 557-3787

October 12, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 "S" Street., North Building, Suite 400
Sacramento, CA 95814-7243

Re: Proposed Rule 599.799.1

Dear Mr. Leijonflycht:

Thank you for the opportunity to comment on the Department of Personnel Administration's (DPA) proposed rules for the State's Pay-for-Performance Program.

I do not object to the pay-for-performance concept. However, I do object to the effective date of proposed Rule 599.799.1 when the requirements for the performance standards and appraisal have not been established.

I feel that DPA has not acted in good faith by implementing a State's Pay-for-Performance Program, retroactive to January 1, 1994, when there are no "clear, job-related, written standards of performance" established.

I believe that in fairness the rule should apply to salary range increases for managerial classifications that take effect on or after January 1, 1995 provided that written performance standards and appraisal have been established.

Sincerely,

Janet Nishioka Nozaki

JANET NISHIOKA NOZAKI
Supervising Examiner
(213) 736-3491

E-111

STATE OF CALIFORNIA—RESOURCES AGENCY PETE WILSON, *Governor*

CALIFORNIA CONSERVATION CORPS
730 CAPITOL AVENUE, SACRAMENTO, CA 95814
(916) 445-8183

October 11, 1994

Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 "S" Street, North Building, Suite 400
Sacramento, CA 95814-7243

Dear Mr. Leijonflycht;

There are issues relating to the Managerial Pay for Performance Differentials that are troubling to me. They are the issues of pay equity between Managers, supervisors and rank and file employees (salary compaction) and of salary realignment in certain departments, like the Department of the California Conservation Corps.

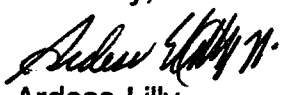
For years there has been an on going debate in State government about what the separation in salary should be between the Managerial classes and those classes that are supervised by them. My understanding of the decision was that the separation between those who supervise and those who are being supervised should be at least fifteen percent (15%). That being the case, this compaction problem should be remedied first.

The larger field issue, for me, is that of the California Conservation Corps realignment of salaries for filed managers. This realignment needs to be effective retroactive to January 1, 1990 - the effective date of realignment for many of the other Managerial classes. The Department of Personnel Administration has already made a policy decision "to implement a special salary adjustment for Conservation Administrator one's and two's (CAI and CAII), as soon as funds are available to do so. Well, funds are obviously available now. Failure to grant to CAI's and CAII's what other classifications already have obtained is a discriminatory practice. It is a violation of several state and federal laws and rules which are applicable to equal pay for equal work, prevailing wages and comparable worth. The issues that I have raised herein need to be effectively resolved prior to implementing other measures, like pay for performance differentials, which will cost the State a great deal more to implement than our equity and realignment issues.

My response is not offered in total opposition to the Managerial Pay for Performance Differentials. It is a protest, however, against adding another expensive program system wide when the programs already in place are going begging. Ours is a high performance agency. Managers in the California Conservation Corps are used to being highly productive and highly scrutinized. Now, the California Conservation Corps "Field Managers", are seeking justice and equity first! Then we can move on.

Thank you in advance for your attention to these issues. If I can add anything further to the debate, please don't hesitate to contact me.

Sincerely,



Ardess Lilly,
District Director
(909) 862-2600
Cal Net 8-670-4547
670-4548

AL:dmn

cc: Walt Hughes, Regional Deputy Director
Kathy Noia, Director of Administrative Services

E-112

# MEMORANDUM

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD • CENTRAL VALLEY REGION**
3443 Routier Road, Suite A
Sacramento, California 95827-3098
Phone: (916) 361-5600
CALNET: 8-495-5600

**TO:** Sheryl Brooks
DAS
SWRCB

**FROM:** Gordon Lee Boggs
Underground Tank
Program Coordinator

**DATE:** 12 October 1994

**SIGNATURE:** _____

**SUBJECT:** **REQUEST FOR COMMENTS ON DPA NEW "PAY FOR PERFORMANCE" RULES FOR NON REPRESENTED EMPLOYEES**

Considering that a general salary range increase has been established for 1 January 1995, it seems inappropriate for the DPA to require a new procedure which would preclude managers and supervisors from receiving the increase until the DPA performance forms are approved, completed by the Departments and Boards, and submitted to DPA for review and approval. Therefore, for this general salary range increase, it seems more appropriate to delay implementing the new procedures until 2 January 1995, thereby allowing people to receive the increase for this one time. (If it is not moved, is the pay retroactive to 1 January 1995?)

The DPA has submitted evidence from "30 jurisdictions responding to our survey". This hardly seems representative. Also, the rule making file memo states that only 18 currently have "performance based pay" that covers "from 5 to 100 percent of their nonrepresented employees". Actually the statement of percent coverage is contradicted in the "Coverage" section where the maximum performance based pay is for 66% of the nonrepresented employees. This hardly seems like an overwhelming endorsement or mandate for California's plan to cover 100% of their nonrepresented employees.

The Mercer letter refers to sales oriented, profit making private enterprises. Perhaps they have incentive programs to develop sales or produce a substantial profit. As with the above survey, there is no discussion of the purpose or philosophy for the pay for performance process.

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 4

| | |
|---|---|
| To Rebecca | From GLB 6665 |
| Co. KEISOLFLIGHT | Co. |
| Dept. | Phone # 755-3139. |
| Fax # | Fax # |

E-44
113

October 12, 1994
545 Rutgers Drive
Davis, CA 95616

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

SENT VIA FACSIMILE

Mr. Leijonflycht:

COMMENTS ON DPA PROPOSED RULES 599.799.1 AND 599.799.2 -- PAY FOR PERFORMANCE

I offer the following comments on the proposed rules.

Necessity

I question the necessity of this rulemaking. The regulations describe a "denial of pay for non-performance". This rulemaking does not address pay for performance. There is a disciplinary process for non-performance which should be followed to address those issues. Regardless of the title of the rulemaking, this rule sets out the manner in which the cost of living increase given historically to supervisors and managers, and currently to rank and file employees will be withheld for non-performance.

Authority

In my limited review of the statutory mandates of DPA, I have seen nothing that suggests that it is the intent of the Legislature that this type of rule be adopted by DPA.

Clarity

599.799.1(b)(1) & 599.799.2(b)(1):

It is unclear whether each manager and supervisor will be held to different standards. For instance, will an employee with more complicated, non-routine activities, and more staff be held to the same standards as an employee with less complicated, routine activities and less staff?

A "well-qualified" manager or supervisor is irrelevant, i.e. well-qualified to do what? The term "well-qualified" should be struck, because the performance standard is already stated at the end of the sentence.

(c)(3): This section does not clearly state that all previous salary increases will be given to the employee beginning at the date of successful performance. It says "the salary increase", which simple reading means the increase for that current year.

Because this rule vacates the MSA rule, there is no discussion of if, how, and when a previously denied MSA would be given to an employee.

(e)(2)(B): What is "a clear and compelling disparity"?

(e)(3): It is unclear whether the supervisor (employee) or the employee's supervisor has the burden of proving the case.

This section makes the employee "guilty" so to speak and needing to prove "innocence", which seems to conflict with typical disciplinary processes.

Thank you for your attention to these comments.

cc: Dennis Alexander, PECG

Sincerely,

Elizabeth Babcock

Elizabeth Babcock
Supervising Engineering Geologist

JOURNAL

OCT. 12. 1994 5:03 PM

| NO. | OTHER FACSIMILE | START TIME | USAGE TIME | TX PAGES | RX PAGES | RESULT |
|---|---|---|---|---|---|---|
| 01 | 6195716972 | OCT. 11 4:20PM | 03'38 | 02 | 00 | NG(04) |
| 02 | 916 544 2271 | OCT. 11 4:26PM | 02'57 | 04 | 00 | OK |
| 03 | 6195716972 | OCT. 11 4:29PM | 01'40 | 01 | 00 | NG(04) |
| 04 | 916 324 3107 | OCT. 12 8:34AM | 02'15 | 00 | 03 | OK |
| 05 | 4155435480 | OCT. 12 10:01AM | 05'46 | 00 | 09 | OK |
| 06 | 914088665532 | OCT. 12 2:48PM | 01'31 | 01 | 00 | OK |
| 07 | 9163729065 | OCT. 12 3:15PM | 01'30 | 00 | 02 | OK |
| 08 | 619 338 2377 | OCT. 12 4:27PM | 01'40 | 00 | 02 | OK |
| 09 | 9163240524 | OCT. 12 4:57PM | 01'25 | 02 | 00 | OK |

~~E114~~
E114

State of California

M E M O R A N D U M

Date: October 12, 1994

To: Mr. Richard Leijonflycht
Department of Personnel Adminstration
Policy Development Office
Sacramento, CA

From: Philip J. Tom, Supervising Structural Engineer
Department of General Services
Division of the State Architect
Office of Regulation Services
301 Howard Streeet, 4th Floor
San Francisco, CA

Subject: Pay for Performance - Memo of 9/26/94

This is in response to the memo we received to-day from our headquaters in Sacremento with regard to the above DPA memo on Pay for Performance.

Due to the limited time available, the following comments only represent a small fraction of ideas that have come across my mind, and I value this opportunity to express them to you.

Here is a little background on myself. I have worked in the private industry for twenty years, and this is my eighth years with the State. I have always worked hard for my employers, and my efforts were always recognized. I have performed the same for the State, but the recognition is very different.

In private industry, the difference in pay between the supervisor and his subordinates usually exceeds twenty percent. In this office, the difference is five and ten percent depending on the classfication.

Again in private industry, at time of understaffing due to sudden increase in workload, the extra effort by the supervisor and his team will be fully recognized and properly rewarded. In this office, at one time, we were short of at least four engineers due to retirements, the extra effort performed by the acting supervisor/ manager in maintaining a smooth operation was not rewarded. Compensation time off was not even offered.

The performance appraisal reports under this pay-for-performance rule should include certain participations by the subordinates, the other office staff, and the clients. This would eliminate possible biased and unfair evaluations by one or two indivduals. The appeal process available is usually impractical and time consuming, and definitely unproductive. It creates ill feeling between the two parties involved in the dispute. After all, the difference is less than five percent.

When this rule change was initiated, the feedback from managers and supervisors were not solicited. I certainly hope our voice can be heard, and we will be given more opportunity such as this to express ideas. Thank you very much for your time.

Philip J Tom

State of California

# Memorandum

To : All Designated Supervisors & Managers

Date : October 11, 1994

File No.:

From : Department of General Services - Division of the State Architect
Office of Regulation Services

Subject: **PAY FOR PERFORMANCE - MEMO OF 9/26/94 FROM DGS**

The attached memo was received by me only yesterday (10/11/94). It is being sent to you for review and information.

Since the time is extremely limited (end of day 10/12/94), please send your comments directly to DPA.

Vilas Mujumdar, Chief
Office of Regulation Services
Division of the State Architect

VM:mt

Post-it™ Fax Note 7671 | Date 10/12 | # of pages 20
To RSE's | From Vilas Mujumdar
Co./Dept. ORS | Co. ORS
Phone # Please distribut | Phone # 323-3272
Fax # to Managers & Sups | Fax #

DEPARTMENT OF GENERAL SERVICES • STATE OF CALIFORNIA • PETE WILSON, GOVERNOR

Office of the State Architect

301 Howard St., Ste. 400
San Francisco, CA 94105

TELFAX 916-324-0524

DATE: 10-12-99

TO: MR. RICHARD LEIJONFLYCHT

FROM: PHILIP TOM

SUBJECT: PAY-FOR-PERFORMANCE

TOTAL PAGES, INCLUDING THE TRANSMITTAL 4

PLEASE NOTIFY P TOM

AT( 415 ) 396-9510 IMMEDIATELY IF ANY PAGES ARE MISSING.

FOR YOUR RECORDS, THE STATE ARCHITECTS STRUCTURAL SAFETY SECTION, SAN FRANCISCO
TELEFAX NUMBER IS (415) 396-9542, ATSS NUMBER IS (8) 531-9542

ATTACHED PLEASE FIND MY COMMENTS ON THE ABOVE SUBJECT.

E-115

Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Bldg, Suite 400

Dear Mr. Leijonflycht,

I am a supervisor employed by the State of California, and am strongly opposed to the new proposed rules (599.799.1 and 459.799.2) dealing with "Pay for Performance" for the following reasons.

1. AN ADEQUATE PAY-FOR-PERFORMANCE SYSTEM IS IN PLACE.

The existing Merit Salary Adjustment (MSA) is a performance-based pay-raise system which ties managers, supervisors, and others to evaluation-based raises for the first several years after appointment to any higher-paying position. This period of time is more than adequate to assure that the employee does satisfactory work. If this system is thought to be underutilized, tighten it. In fact, it is not underutilized.

2. NO NEED HAS BEEN DEMONSTRATED.

The State has not demonstrated that a problem exists which requires the drastic measure of making every manager and supervisor's pay hinge on the whims of higher management. The overwhelming majority of State managers and supervisors are conscientious, hard-working, and skilled. Instituting this system, while offensive to all, would only affect a trivial number of managers and supervisors. It is doubtful that any money would be saved with this measure, considering the cost of implementation, and the undoubted negative morale impact.

3. COST-OF-LIVING ADJUSTMENTS (COLA) ARE NOT PAY RAISES.

COLA's are adjustments to ensure that an employee's salary remains constant in an inflationary economy. Salaries are not properly measured in dollars, which represent an inconstant medium of exchange, but in the goods and services which may be exchanged for the dollars. To treat COLA as a salary increase is a gross injustice to the employee. Denial of COLA is a reduction in pay, and should only be resorted to through the disciplary process.

4. THE SURVEY DOES NOT SUPPORT THIS MEASURE FOR SUPERVISORS.

The Mercer survey of Public Sector practices shows that five of thirty respondents (17 percent) of respondents apply performance-based criteria to base pay increases for supervisors. Clearly this is not a prevailing practice in the public sector.

Thank you, H.Paul Lillebo, Environmental Specialist IV (Superv.)
State Water Resources Control Board. (916) 657-1031

H Paul Lillebo

**CALIFORNIA DEPARTMENT OF EDUCATION**
*721 Capitol Mall: P.O. Box 944272*
*Sacramento, CA 94244-2720*

E-116

October 11, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento CA 95814-7243
VIA FAX: (916) 324-0524

Dear Mr. Leijonflycht: RE: Proposed Rules--Pay for Performance

I am responding independently as a designated Supervisor to Proposed Rules 599.799.1 and 599.799.2, as distributed to managers and supervisors via PML 94-51.

The Rules Lack Critical Definitions

Both of the Proposed Rules contain a number of terms which are not defined, and which I believe are open to widely varying interpretations by thoughtful managers and supervisors. These terms include:

- Well-qualified
- reasonable degree (as in, "performs his/her duties with a reasonable degree of....")
- industry
- initiative
- responsibility
- as appropriate

Since these terms can be so widely interpreted, I believe that DPA should be required to provide *operational definitions* for each. Appointing powers, managers, and supervisors need real-life examples of each of these terms in order to have a standard that is able to be consistently applied.

E-116



On the other hand, if such definitions are not provided, DPA should have a mechanism in place to demonstrate that there is general agreement among appointing powers, managers, and supervisors as to the definitions of these terms.

The Rules Lack Necessary Evaluation Components

Both of the Proposed Rules lack an evaluation component by which DPA can determine whether these new rules are achieving their intended affect; namely, the improvement of managerial and supervisory performance. What kinds of data will be collected statewide to demonstrate whether the rules are effective? By when? How will DPA determine whether the process being proposed is in fact carried out consistently between appointing powers, between managers, and between supervisors?

Broad Performance Standards Should Be Developed by DPA

Both of the Proposed Rules call for performance standards that are both specific and broad: "...shall be based on the specific requirements of individual positions, as well as more general organizational requirements." I agree that the specific performance standards should be left to appointing powers. The broad standards ("more general organizational requirements"), however, should by their nature cut across Department lines, and for consistency, should be developed by DPA with significant involvement of supervisors and managers. Broad standards that are consistent statewide will contribute to the goal of statewide managerial/supervisorial performance improvement; and involvement of supervisors in the process will facilitate their commitment to the process.

Both Rules Erroneously Specify a Form over Process, and Lack Necessary Criteria -- Section (b)(3)

In Section (b) (3) of both Proposed Rules, appraisals are required "...using a form approved by the Department of Personnel Administration." This requirement has nothing to connect it with the stated purpose of the overall Rule. Instead of specifying approval of a form, the Proposed Rules should specify the process by which such a form is created by appointing powers. DPA should provide the criteria by which appointing powers should create a form that is consistent with the intended outcome; and it should specify the criteria by which it will evaluate such forms submitted to it for approval.

Ambiguity in Section (b) (3)

In the last sentence of this section in both Proposed Rules, "As appropriate" should be deleted. What does this mean? In whose judgment?

Ambiguity in Section (b) (4)

In both Proposed Rules, there is a provision that if there is lack of agreement with the appraisal, "...he/she shall be entitled to discuss it with the appointing power...." To what end? Is there any obligation on the part of the appointing power to take an action? Provide a statement in writing as to whether it concurs or does not concur with the appraisal? Presumably the appointing power has the authority to modify the appraisal but this is not stated.

Sections (e) (2) (A) and (e) (2) (B)

In these sections of both Proposed Rules there are provisions which should be deleted as they are overly broad and not specified.

In (A), the phrase "or other substantive performance feedback" should be stricken. The Proposed Rules mandate an annual performance appraisal. Such an appraisal, with its accompanying requirements regarding pre-determined performance standards, use of a standard form, and so on, provides the sole record upon which salary decisions are documented. Therefore, failure to receive such a performance appraisal should be grounds for appeal in and of itself. Appointing powers should not have the ability to violate this requirement of the Rule and then deny an MSA or a salary increase.

In (B), the phrase "and/or other performance feedback" should be stricken for the same reason.

Thank you for the opportunity to comment on these Proposed Rules.

Yours truly,

Michael F. Silver

Michael F. Silver
Education Administrator I
State Special Schools & Services Division
(916) 327-3868

E-117 ✓

State of California — Business, Transportation and Housing Agency

**M E M O R A N D U M**

To: Richard Leijonflycht
Department of Personnel Administration
Public Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-9350

Date: October 12, 1994

File No: ALPHA

Subject: Proposed Rules-
Pay for Performance

From: Department of Corporations
Louisa A. Broudy
Assistant Commissioner

In response to the draft of proposed rules for the State's Pay-for-Performance Program, I have the following question;

Since clear, job related, written standards of performance are required pursuant to rule 599.799.1(b)(1), how will it be determined whether a manager met his/her performance standards and related work expectations for 1994 when standards were not available to the employee as of January 1994?

17

STATE OF CALIFORNIA – BUSINESS, TRANSPORTATION AND HOUSING AGENCY

DEPARTMENT OF CORPORATIONS

# FAX TRANSMITTAL

IN REPLY REFER TO:
FILE NO: _____

Date: 10-12-94

Total number of pages, including this cover sheet: 2

TO: B. Leijonflycht / FAX NO. 84540524

COMPANY/AGENCY: DPA

FROM: L. Braudy TELEPHONE NO: 213 736-3462

FAX NO: (213) 736-2120

SUBJECT/REFERENCE: Pay for Performance

---

(✓) URGENT ( ) ROUTINE

( ) ROUTE TO ADDRESSEE

( ) TELEPHONE ADDRESSEE FOR PICK-UP

( ) TELEPHONE SENDER WHEN RECEIVED

COMMENTS: _____

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1350 FRONT STREET
(619) 525-4233

SAN FRANCISCO 94102-3115
1390 MARKET STREET
(415) 557-3787

E-118

# MEMORANDUM

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD • CENTRAL VALLEY REGION**
3443 Routier Road, Suite A
Sacramento, California 95827-3098
Phone: (916) 361-5600
CALNET: 8-495-5600

**TO:** Sheryl Brooks
DAS
SWRCB

**FROM:** Gordon Lee Boggs
Underground Tank
Program Coordinator

**DATE:** 12 October 1994

**SIGNATURE:** _____

**SUBJECT:** **REQUEST FOR COMMENTS ON DPA NEW "PAY FOR PERFORMANCE" RULES FOR NON REPRESENTED EMPLOYEES**

Considering that a general salary range increase has been established for 1 January 1995, it seems inappropriate for the DPA to require a new procedure which would preclude managers and supervisors from receiving the increase until the DPA performance forms are approved, completed by the Departments and Boards, and submitted to DPA for review and approval. Therefore, for this general salary range increase, it seems more appropriate to delay implementing the new procedures until 2 January 1995, thereby allowing people to receive the increase for this one time. (If it is not moved, is the pay retroactive to 1 January 1995?)

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| Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1 |
|---|---|
| To Sheryl Brooks | From G.L. BOGGS |
| Co. | Co. |
| Dept. | Phone # 255-3139 |
| Fax # | Fax # 255-3815 |

✓

E-119

**COMMENTS:**

The proposed Pay for Performance for managers and supervisors seems to have the same intent as Merit Salary Adjustments originally had. Effectuating MSA's for all staff has become too easy and too automated and employee performance is not evaluated as thoroughly as it should be when granting MSA's. The proposed process for granting MSA's via the pay for performance process is a solid proposal as written and appears to have the necessary mechanisms to ensure fair, equitable and deserving pay increases. However, salary range increases, also known as General Salary Increases, should be left simply as cost of living increases and should not be directly tied to an employee's performance.

Alexander

State of California

Department of Corrections

# Memorandum

Date : October 12, 1994

To : Richard Leijonflycht
Department of Personnel Administration
Policy Development Office

Subject : PAY FOR PERFORMANCE

In response to the memorandum from Verlene Hiatt dated 9-23-94, please find attached comments regarding the Pay for Performance proposed rules.

R. ALEXANDER
Warden (A)
Correctional Training Facility

Attachment (1)

# Teletype Transmittal

DATE: 10/12/94

TIME: 3:30 pm

TO: Richard Heyerflycht

PHONE: 4-9350

FROM: A. Alexander
Warden (A)
CTC

PHONE: 408-675-2411
X 2111

NUMBER OF PAGES SENT: 3

INCLUDING COVER SHEET

ANY PROBLEM WITH TRANSMITTAL BEING RECEIVED CONTACT:

NAME: Carolyn

PHONE: 408-675-2411
X-2122

E-120

Comments on the Proposed Pay-for-Performance Rules for Supervisors

1. Section 599.799.2(c)(1) states "For the purposes of this rule, a supervisor's performance is successful if he/she has substantially met his/her appointing power's performance standards and related work expectations." The regulations need to define "substantially". Does it mean 50 percent, 80 percent, 90 percent, 2 out of 5 of the standards, etc.?

2. What happens if the Department in which an employee works does not develop written standards of performance before January 1, 1995? Will employees still receive the salary increase or will they have to wait until the standards of performance are developed?

3. When an employee transfers to another division in the same department or to another department, how will it be determined if the employee has "performed successfully" and is entitled to a salary range increase?

4. My department has recently begun using the Leadership Development System (LDS) as performance standards. Under the proposed regulations will the LDS be acceptable since it does not have individual performance standards?

5. The grounds for appealing a decision to not give an employee the salary increase include failure to receive a performance appraisal or other substantive performance feedback during the past twelve months. This should be amended to require that the appraisal and feedback need to be in writing.

6. Who in the department will develop performance standards for each individual position? The regulations only state the appointing power is to ensure that standards are developed.

Ann Horn

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY PETE WILSON, Governor

DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS
1700 K STREET
SACRAMENTO, CA 95814-1037
(916) 445-1943

# FAX COVER SHEET

Date: 10/12/94 Number of Pages: 2

To: Richard Leijonflycht From: Ann Horn

DPA Alcohol & Drug Programs

Policy Development Office

FAX #: 324-0524 FAX #: 323-0659 (916) 323-5873

Personal comments

SPECIAL INSTRUCTIONS

- ☐ Urgent
- ☐ Please Reply
- ☑ For your information

327-1880

MESSAGE:

If not received correctly, please call:

E-121
✓

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office 1515 S Street, North Building, Suite 400
Sacramento CA 95814-7243

Dear Richard

I have read the proposed rules on pay for performance for managers and supervisors and frankly don't understand how pay raises can be based on performance, if the maximum increase in pay that can be received cannot exceed that which everyone else gets automatically. If the plan is to pay the managers for their actual performance, there should be no cap. they should get a raise equal to the work they perform(ie 0% or 100%). The way its proposed now, the best the managers/supervisors can do is get a raise equal to what everybody else gets automatically. This is insulting. If we are going to do this, lets really pay the managers/supervisors for what they are worth.

Sincerely,

Philip R Shearer
Manager, Office of Local Assistance
Department of General Services
445-2704

Rec 10-11-94

E-122

October 5, 1994

Richard Leijonflycht
DPA
Policy Development Office
1515 S Street, North Building
Suite 400
Sacramento, CA 95814-7243

Dear Mr. Leijonflycht:

I have reviewed the proposed rules for pay for performance for managers and supervisors and have the following comments:

In general, I think pay for performance is a good idea. However, the way it will be implemented for State of California Management (which I define to be both managers and supervisors) is grossly unfair.

Salary Range Increases are totally automatic for represented employees, regardless of their competence. In fact, Salary Range Increases have nothing at all to do with competence. They have to do with the cost of living. Merit Salary Adjustments (which are supposed to be tied to competence) are, for all practical purposes, automatic as well, since it is far easier to grant the increase than jump through the hoops needed to deny one.

Given that these adjustments will continue to be automatic for line staff and given the trivial pay differential between Management and the people they supervise, it is entirely possible (and probable) that a manager or supervisor will make less money than the people he/she supervises.

Being part of State Management is already a thankless task. Supervising people making more money than you but having less responsibility is not acceptable for any reason. Particularly if these people are less than competent.

Pay for performance should not be implemented at all in connection with Salary Range Increases. If it is implemented for Merit Salary Adjustments, a substantial pay differential should be implemented at the same time. A decent pay differential between Management and Line Staff would compensate Management for the much greater responsibility they have in their job duties. Not only would this make a difficult job more rewarding, but it should eliminate the possibility of a manager or supervisor making less money than those he/she supervises.

Martha Lawler

Martha Lawler
Senior Programmer/Analyst Supervisor
Department of Rehabilitation
830 K Street, Room 410
Sacramento, CA 95814
322-4609

Rcd 10-10-94 E-123

STATE OF CALIFORNIA-HEALTH AND WELFARE AGENCY PETE WILSON, *Governor*


**DEPARTMENT OF HEALTH SERVICES**
14/744 P STREET
O. Box 942732
SACRAMENTO, CALIFORNIA 94234-7320
(916) 657-2992


October 6, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

Dear Mr. Leijonflycht:

I have reviewed proposed rules 599.799.1 and 599.799.2 as revised September 15, 1994. My comments are provided below.

A sentence has been added to subsection (b)(1) of both rules to provide that the standards used to evaluate performance "shall reflect the level of job performance that can normally be expected from a well-qualified [manager][supervisor] who performs his/her duties with a reasonable degree of industry, initiative, and responsibility." I find no definition of "well-qualified" included with the proposed rules. I am concerned that the standard for granting what have historically been cost-of-living salary increases may be used to preclude salary range increases to individuals who met the minimum qualifications for the positions they accepted, legally qualified for appointment to the positions, and perform their duties with a reasonable degree of industry, initiative, and responsibility. The use of the term "well-qualified" implies that more than this is required, that a manager or supervisor who is merely "qualified" to be a manager or supervisor would not be eligible for an increase, even though his/her performance is satisfactory. I suggest deleting the word "well-qualified".

Subsection (d)(1) of both rules provides that merit salary adjustments (MSAs) must be awarded based on the new appraisal process beginning January 1, 1995. The rules do not specify whether the effective date refers to the beginning of the evaluation period for the MSA or to the MSA anniversary date. I suggest that the rules be amended to make it clear that they apply to MSA evaluation periods, not to anniversary dates. It seems unreasonable that an MSA due January 1, 1995 could be denied based on an appraisal system that is just getting underway. Although affected managers and supervisors may be successful on appeal on the grounds of "failure to receive a performance appraisal or other substantive performance feedback during the past twelve months" (subsection (e)(2)(A) of both rules), I believe it is an unreasonable burden to place on managers and supervisors, who will in essence be defending themselves against a retroactive rule change.

Thank you for the opportunity to comment. If you have questions, please call me at 657-2992.

Sincerely,

Teri Barthels, Chief
Managed Care Initiatives Section
Medi-Cal Managed Care Division

E-124 ✓

State of California — Business, Transportation and Housing Agency

**M E M O R A N D U M**

To: Richard Leijonflycht
Department of Personnel Administration
Public Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-9350

Date: September 28, 1994

File No: ALPHA

From: Department of Corporations
Alan S. Weinger
Supervising Counsel

**SUBJECT:** Proposed Rules 599.799.1 and 599.799.2 -- Pay for Performance

I had previously submitted a memo to you dated July 28, 1994, in which I commented on the Pay for Performance (PFP) Rules for Managers and Supervisors. It is heartening to see that a number of changes have been made to make the proposed system fairer.

The following are some concerns that I still have with the proposal.

1. How are the pay raises given in January, 1994, going to be reevaluated in light of their not being any clear, job related, written standards of performance at the time? What mechanism will be set up and what is the time frame for the reevaluation? Since it appears pursuant to 599.799.1(c)(1) that the system is going to be changed to where a successful employee will receive an amount equal to the amount of the salary range increase (which was 5% in January, 1994), are those of us who received ratings of 3, 4, or 5 (i.e., who received less than 5% increases) going to have our salaries readjusted upwards to 5% ? Would you suppose a rating of 4 or 5 out of 5 by the rater, should correspond to "performing successfully" ? Are we going to receive the pay increase retroactively?

2. Since clear, job related, written standards of performance as required by § 599.799.1(b)(1) were not in place as of January, 1994, how can it be determined with any certainty whether a manager met his/her appointing power's performance standards and related work expectations? How can a manager therefore receive less than the amount of the salary range increase of 5% ? Also, since it is now September, 1994, and there are no clear, job related, written standards of performance in place, how can managers be rated for the January, 1995, salary range increase of 3%-5% ?

3. Pursuant to § 599.799.1(c)(3) there should be a mechanism set up to allow a manager to receive an increase that he/she did not previously receive. Otherwise, it can be anticipated that a number of managers who improve their performance to "successful" will fall through the cracks and not receive their increase when it is due.

4. As to the appeals process for a denial of MSA or salary range increase, I would suggest that the following be added to § 599.799.1(e)(2)(A) as grounds for appeal: "Failure to receive **clear, job-related, written tandards of performance** or a performance appraisal or other substantive

performance feedback during the past twelve months."

In closing, it appears that the major problems that remain in the September 15, 1994, draft of the proposed rules are 1) how to correct the January, 1994, PFP salary increases or lack thereof which could not have been based on clear, job-related, written standards of performance, because none were given to the managers, as required by the new rule and 2) how to implement the PFP for January, 1995, when it is already September, 1994, and there are no clear, job-related, written standards in place. My suggestion to implement this system fairly and honestly is to retroactively to January, 1994, give all managers the full amount of the salary increase given (5%), and give all managers in January, 1995, the full amount of the salary increase given (3-5%). It appears that the system is running two years behind since the January, 1994, pay increase was for the period of January 1, 1993-December 31, 1993. This system can only legitimately and fairly start effective January 1, 1995, and only if clear, job-related, written standards are in place in time for managers to be able to conform to those standards.

State of California

# Memorandum

E-125 ✓

To : Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Bldg., Suite 400
Sacramento, CA 95814-7243

Date: October 12, 1994

Sheryl Brooks
Personnel Officer

From : **STATE WATER RESOURCES CONTROL BOARD**
901 P Street Sacramento, CA 95814
Mail Code G-8

**Subject** : RESPONSES TO PROPOSED RULES 599.799.1 AND 599.799.2

The following comments regarding proposed rules 599.799.1 and 599.799.2 were received from State and Regional Board employees.

1. Re: 599.799.2 (a): Does "in the Department of Education" modify "all civil service employees"? That's the way it reads. Please define "automatic, general adjustments"; do they include COLAs?

2. Re: 599.799.2 (e)(1): The only grounds stated are abuse, harass, discriminate. Please include "if the appraisal was arbitrary and capricious".

3. Re: 599.799.2 (e)(3): Why is burden of proof on the supervisor? What does "substantially proving" mean? The rules should require the burden of proof to shift to the appointing power once a prima facie case has been made.

4. Will similar rules be developed for political appointees?

5. Annual performance appraisals are insufficient to evaluate pay for performance. Appraisals should be quarterly so that an employee has an opportunity to correct inadequacies, receive feedback, and achieve successful performance. Quarterly appraisals should at least be mandatory for employees who have been denied a salary range or MSA increase.

6. The proposal to implement these rules effective 1 January 1995 is unreasonable. Since "performance standards", "performance appraisal systems", and "performance appraisal report forms" have not been developed, the employees cannot know the basis of their appraisals.

7. Does section (f) Multiple Appointing Powers apply to the State Board/Regional Board organizational structure? Will all Regional Boards and the State Board use the same standards, system, and forms?

STATE OF CALIFORNIA — THE RESOURCES AGENCY PETE WILSON, *Governor*

**CALIFORNIA CONSERVATION CORPS**
San Diego Service District
1 Mata Way
San Marcos, CA 92069
(619) 736-0294 FAX (619) 736-9983

E-128
1/26

October 5, 1994

Mr. Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 "S" Street, North Building, Suite 400
Sacramento, CA 95814-7243

Dear Sir:

Please accept the following comments concerning the Pay for Performance Program for State managers and supervisors. While I have no real concern about the adoption of a Pay for Performance Program, I am concerned about the issue that there are current managers in our Headquarters Units that have salary levels above those of Field managers who have greater responsibility.

If manager levels are going to be brought in line, then as a Field manager with the California Conservation Corps, I first would like for my salary to be brought in line with the responsibility of my duties as it relates to those of other managers in our Headquarters Units. (While your department has said that we should receive these increases, you have not approved this increase because of funding issues.) Second, there needs to be some effort made toward bringing the field manager's position in the CCC in line with like classifications in our Headquarters Unit and other state departments.

Besides the above, I think something needs to be said about the relationship of the manager's performance for pay with the budget process. It is very hard to do some tasks without having the necessary funding to do the task at hand. The process should start with the development of the department's budget. What the manager will be graded on should be a part of the budget process. If I, as a District Director, have established as one of my performance standards, to place 20% of my corpsmembers in post-employment, I cannot accomplish this without having the funds to support this effort. In line with the above, the proposed text does not discuss the issue of adjusting standards during the performance period because of issues such as budgets, and the appointing powers changing direction.

Considering the development of the Pay for Performance differentials, I think a closer look needs to be taken of all managers in the California Conservation Corps

Thank you for allowing me the opportunity to provide the above input into the process.

Yours in service,

W. E. Hunter
District Director
San Diego Service District

WEH:df
cc: Walter Hughes

E-123
E-127

September 26, 1994

Richard Leijonflycht
Department of Personne Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

This is to comment on the revision to the proposed regulations relating to a new Pay for Performance program.

Although I believe the amendments to the package have made some significant improvements, I still have a concern, which is even somewhat exacerbated by the studies now included as support for the regulation package.

The studies demonstrate that a good many entities use pay for performance programs. They also show, however, that these entities use a variety of other pay practices not utilized by the state. There is nothing to show that it is specifically the pay for performance feature that makes these plans successful. It is possible that greater success could be linked, for example, to the bonus aspects of their pay plans, or to the supervisory differentials allowed in pay or benefits, or to the long term incentives. It seems unreasonable to assume that it is this one feature that creates the success to which the state aspires. One might as reasonably assume the success of the plans is tied to a combination of features, or other features entirely. Since the goal of the program is to improve the state's managerial and supervisory performance, it seems essential to have data which supports the assumption used. Lacking such support, it may turn out that the program is designed using faulty logic, and implementation could result in an unsuccessful effort to improve performance, or even a diminishment in performance through loss of morale.

It is also of interest that surveys show that of government jurisdictions using any type of pay for performance, only six apply the program to two thirds or more of their non-represented staff. Only five apply such a plan to base pay adjustments for supervisors. It is especially noteworthy that the federal governmnet dropped lower levels from its plan and applies it only to senior executives. California is proposing to apply its program to all supervisors and managers. This is fairly close to 100% of non-represented staff. The basis for this specific decision, which differs broadly from the practices of other agencies surveyed is unclear.

In light of the "mixed reviews" on applying pay for performance to ALL supervisors and managers, perhaps a pilot approach is merited, trying the program first on higher level managers and then, if successful, moving it down in the organization. This test, however, to be effective, cannot be the "retroactive" effective date currently proposed for managers. This retroactive period does not allow for an accurate evaluation of the program's impact. A future planned test could also address some of the alternate pay practices mentioned above, testing those for effectiveness and further implementation.

I appreciate the efforts that DPA has made to improve the regulatory package and look forward to further modifications to enhance its value even more.

Barbara V. Carr
1344 3rd Avenue
Sacramento, CA 95818

✓ mc'd 10/12/94 0730 RW

EO-101

Association of
**CALIFORNIA STATE SUPERVISORS, INC.**
1108 "O" Street • Sacramento, CA 95814 • (916) 326-4257 • (800) 624-2137 • FAX (916) 326-4364
An Affiliate of the California State Employees Association

October 11, 1994

Richard Leijonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, CA 95814-7243

RE: Comment Regarding Revisions to Proposed DPA Regulations 599.799.1 and 599.799.2

Dear Mr. Leijonflycht:

Please consider these comments an augmentation of our prior written comments and oral presentation that we furnished on August 30, 1994 concerning the subject of Performance Appraisal and Compensation.

1. We recognize that DPA's proposed revisions are a substantial departure from the originally announced "Pay for Performance" program. In many ways, concepts in these revisions vastly improve the acceptance of how compensation may be more closely linked with performance expectations.

2. Nevertheless many substantive portions of these revised regulations remain illegal, for the very same reasons that we cited in our August 30, 1994 testimony (please refer to the attached written comprehensive presentation).

3. In addition, 418 managers are currently working without the cost of living increase that the California Legislature specifically authorized on January 1, 1994 because DPA implemented illegal procedures. These revised regulations do not solve this serious problem. DPA must move the effective date of any regulations on this subject to July 1, 1995 or force 418 appeals and perhaps 418 lawsuits to correct these inequities. Evidence of this fact is attached in the form of a lawsuit we have already filed on behalf of six Data Processing Managers employed at the Teale Data Center. We urge DPA to resolve this crisis by withdrawing the effective date contained in any previous illegal regulations. A fresh new start effective July 1, 1995 is the only way to avoid more appeals and more lawsuits resulting from the ill conceived prior program implementation.

4. The numerous state departments have not had sufficient lead time to develop a system of performance ratings consistent with these proposed regulations. DPA is putting the cart before the horse by requiring departments to apply criteria before final regulations are legally adopted. Premature directives by DPA are forcing departments to use performance rating forms not yet formally approved by DPA, in violation of Government Code 19992.

5. We stand by our previous recommendation that DPA develop and require use of only one performance rating form to assure consistent application and uniform evaluation practices statewide. Otherwise, employees in one department risk being evaluated far differently than in another department, though they hold status in the very same classification.

6. We oppose separate appeal procedures for performance appraisal and appeal of salary increase denial. We also oppose proposed limitations for appealing performance appraisal. Two appeal procedures in the same regulation is already causing widespread confusion among employees and those who will be administering these regulations. We favor using the appeal language contained in the salary increase denial appeal and elimination of the limited grounds for appeal contained in the performance appraisal appeal.

7. We desperately need to solve the serious problem concerning those 418 managers who are currently trapped by DPA's premature and illegal program implementation. Together we can resolve the remaining problems and produce a successful outcome if we are not burdened by the necessity of more appeals and lawsuits to overcome DPA's past mistakes. We urge that DPA cooperate with us by using an effective date of July 1, 1995 so that a worthwhile program has a better chance of acceptance.

Sincerely,

Al Riolo

Al Riolo
Senior Labor Relations Representative
Association of California State Supervisors, Inc.
1108 O Street
Sacramento, CA 95814
Phone (916) 326-3274

cv

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CALIFORNIA STATE SUPERVISORS, INC.
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An Affiliate of the California State Employees Association

# PAY FOR PERFORMANCE
## A PRESENTATION BY
## THE ASSOCIATION OF CALIFORNIA STATE SUPERVISORS (ACSS)
## AUGUST 30, 1994

## SUMMARY OF FINDINGS

1. On April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's original "Pay for Performance (PFP)" regulation illegal and he restrained DPA from further implementation.

2. Substantive portions of DPA's revised regulations, as proposed for the August 30, 1994 regulatory hearing, are also illegal.

3. The paramount public policy issue is not whether a 3% pay adjustment is unreasonably too high; but rather, how to evaluate the degree of efficiency, that state employees demonstrate, when performing their duties and responsibilities, everyday.

4. The Department of Personnel Administration (DPA) has failed to effectively administer the report of performance system already prescribed in law; DPA's proposed regulations that confuse this issue with pay, merely make matters worse. Until this fact is acknowledged by the administration, clouding the central issue of DPA's responsibility, under current law, with pay actually hampers true performance evaluation reform.

5. A study by the Legislative Analyst concludes that Governor Wilson's actions confuse basic concepts of performance, merit, COLA and prevailing rates of pay. DPA is trying to do more with its regulations than permitted by law; the administration is infringing on legislative authority and true pay reform requires legislation to recast state laws.

6. Rather than committing a series of illegal acts that are devastating to employee morale and sending the wrong message, the administration should withdraw these proposed regulations in favor of introducing legislation in 1995 to establish proper public policy.

7. In the meantime, the Department of Personnel Administration, (not merely individual departments) must fulfill legal responsibilities, under existing laws, for establishing standards of performance and distributing a work performance rating form (or forms) based on fundamental criteria:

   - The rating form must describe essential factors to be rated that are directly related to work efficiency.

- The factors must be appropriate to duties and responsibilities contained in class specifications and job duty statements in order to prevent favoritism and recognize merit.

- The factors must express clear work expectations with a guarantee they have been known and discussed by rater and rated at least six months before any rating report is due.

- When quantitative expectations will be evaluated, they must be stated in advance; objective standards for measurement must be clearly identified. How much will be done by when? By what standard of measurement?

- When qualitative expectations will be evaluated, they must be stated in advance using objective measures of thoroughness, accuracy, degree of usefulness, timeliness and effectiveness. How useful is the task? By what measurement of effectiveness?

- The rating form must be uncomplicated, easy to use and self explanatory; paperwork must be kept to a responsible minimum.

- During the review period, frequent informal conversations about work progress, strengths and weaknesses and any change in expectations must be guaranteed to occur so there will never be any surprises at the end of the review period.

- The rating method must be simple, rapid, valid and applied uniformly; it must be an inexpensive system to use that conforms to merit principles contained in the State Civil Service Act.

- DPA must meet its legal responsibility for central administration of the system and serve as a neutral agency in appeals permitting use of the grievance process. This assures that the performance evaluation procedure and rating form have been utilized, both by rater and rated, as intended.

- The performance evaluation must never be used as punishment, but serve to acknowledge level of efficiency as accurately and objectively as possible and used to plan how aspects of performance could be improved.

8. Language which the California Legislature intentionally inserted in the final Budget Act (SB 2120) specifically prohibits any amount less than 3%, contained in collective bargaining Memoranda of Understanding for other state workers, to be paid to state managers and supervisors effective on the same date as rank and file pay increases.

BACKGROUND - NEW LEGITIMATE PAY SYSTEM OR POLITICAL PLOY?

After three years with no pay increases, including a five (5) percent salary decrease in 1991, the California Legislature earmarked cost-of-living adjustments (COLA) for state employees limited to five (5) percent in 1994 and three (3) percent in 1995 (tied specifically to a rise in the Consumer Price Index (CPI).

Governor Pete Wilson forbid use of funds for COLA purposes. Instead, on December 8, 1993, he ordered immediate imposition of a "performance-based pay system" to impact state managers on January 1, 1994, impact state supervisors on January 1, 1995 and impact state rank and file employees in future collective bargaining negotiations. Timing of this sudden departure from legislative intent, appeared to be politically motivated as Wilson faced a tough election year.

Acting on the governor's command, on December 10, 1993, the Department of Personnel Administration (DPA) issued Management Memo 93-80 containing an underground regulation. It authorized department directors to award a pay raise of up to five (5) percent in 1994 and up to three (3) percent in 1995 to managers and supervisors certified as performing their jobs "successfully", a term that remains undefined.

DPA renounced responsibility for development, installation, regulation and evaluation of a new uniform statewide performance appraisal system linked with pay. Essentially, DPA notified departments to devise their own "pay for performance" methods.

DPA refused to establish any objective performance standards or offer a valid appraisal report form and system of performance ratings required by Government Code Sections 19992 - 19992.3 and Government Code Sections 19992.8 - 19992.l4.

By this abdication, DPA nullified and violated state laws requiring coordinative control over performance evaluation and related pay by a central agency to secure fair and uniform treatment.

DPA's impulsive act created disruption and confusion among state supervisors and managers; their morale plummeted to a new all time low (as determined from surveys conducted by an independent opinion research company, Meta Information Services).

Employee organizations representing state supervisors and managers responded by filing several lawsuits.

The State of California has the largest state civil service workforce in the world,

comprised of about 4,000 managers, almost 20,000 supervisors and more than 140,000 rank and file employees. It's doubtful that any respected practitioner of sound personnel administration would advise installing a true performance pay program, covering this huge workforce, in a slipshod and illegal manner. Personnel experts know the importance of establishing an atmosphere of trust combined with effective communication and training before adopting new performance evaluation methods and redirection of pay. In stark contrast, the near certainty of creating more disenchantment than incentive, from a system conceived and imposed outside the rule of law, provides clear evidence of defective public policy. To a large extent, this issue involves credibility and reinforces distrust of DPA.

SUPERIOR COURT RULES DPA ACTION ILLEGAL

On April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's "Pay for Performance (PFP)" regulation illegal and he restrained DPA from further implementation.

The judge reasoned that DPA, acting on Wilson's order, had violated the rule of law requiring regulations to be promulgated in compliance with the Administrative Procedure Act. DPA also violated Government Code Sections 19826 and 19829 dealing with salary ranges and pay steps.

The court deferred judgement on the legality of other elements within PFP, construing these issues moot upon throwing out DPA's entire underground regulation.

By this ruling, however, the court delivered a strong message that the end does not justify illegal means when determining public personnel policy. The public interest is not served when operations of government, with unique responsibility to citizens in general and taxpayers in particular, are not conducted in a planned, systematic manner and when legal procedures are not logically or equitably applied. Successful public personnel administration demands fully meeting the intent of existing laws and regulations, not abusing or violating them.

In contrast, what kind of message is delivered by a state governor and his central personnel agency to employees and the public when those in charge of government violate the rule of law and appear to do so intentionally? Do they act as models for successful and efficient performance? Or is it simply a matter of "do as I say, not as I do"?

The soundness of personnel policies and the effectiveness of procedural methods to reach worthwhile objectives for this state depends on the present condition of the personnel system, its history, evolution and the impact from suffering a decade of neglect and budget deficits.

The state's employees have suffered enough from knee-jerk governance. What they need is sound planning, proven tools of personnel administration for recruiting, retaining, classifying promoting, training, paying and evaluating the performance efficiency of the work force.

Exactly what does pay for performance mean? How does it differ from existing State Government Code and Regulations that already legally define "skill", "effort", "responsibility", "salary", "performance appraisal reports", "merit salary adjustments" and incentive pay through "managerial bonuses" and "supervisor performance awards"? And what is the legal definition of "successful"? Isn't the singular issue in this matter the degree of efficiency with which an employee performs the duties and responsibilities of a position when clear and reasonable expectations are known?

DPA's underground regulation did not clarify these personnel practices and terms - it confused them more.

Under the circumstances, it is easy to see why elements of the PFP are every bit as illegal as the process DPA used when attempting to establish it illegally.

Governor Wilson and DPA officials are guilty of a violation of the public trust; their performance has been irresponsible because it has been declared illegal as determined by a court of law. They are <u>not performing</u> their jobs "successfully". They need to recognize that individual actions without sound planning, proper program development, advance employee communication, lead time to implement with adjustments, training of personnel and trial runs are merely political expedients. Arrogant governance is undesirable and unacceptable.

Public personnel policies and procedures affecting the state workforce should be supportable by logic and facts in light of the history and broad considerations of state civil service, its people and its merit system as a whole.

In the management of California state personnel affairs, fair treatment, equality under the law, merit principles, reasonable remedies, speedy appeals and safeguard from favoritism require uniform procedures and objective criteria.

DPA is making a serious mistake by stubbornly insisting on promulgating a regulation on "pay for performance", at this time, in view of these recent legislative, budgetary and legal developments.

<u>DPA DECIDES TO PRESS ON WITH DEFECTIVE REGULATIONS</u>

On July 1, 1994, DPA published notice of regulatory action to promulgate essentially the same "pay for performance" regulations that Sacramento Superior Court

had ruled illegal on April 1, 1994.

Proposed Regulation 599.799.1 purports to cover Managerial Performance Appraisal and Compensation. Proposed Regulation 599.799.2 purports to cover Supervisory Performance Appraisal and Compensation. Neither comply with Government Code Sections 19992 - 19992.3 and Government Code Sections 19992.8 - 19992.14. These laws require DPA to itself ". . .provide a system of performance rating. . .designed to permit as accurately and fairly as is reasonably possible, the evaluation. . .of each employee's performance of his or her duties"; not turn these functions over to departments willy-nilly.

Through these proposed regulations, DPA is abrogating its own legal accountability to administer a uniform merit system under the law for assuring state employees - and the public - that evaluation of work performance will be objectively job related, valid and fair.

LEGAL DEFECTS IN THESE PROPOSED REGULATIONS ARE MANY; VIRTUES ARE FEW

Generally, in violation of laws, these regulations substitute subjective judgement in place of merit and fail to provide a uniform rating process for evaluating ". . .the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day. . ." as required by Government Code Section 19992(a). Also DPA renounces its role under the law for establishing standards of performance for each class of position, exercising coordinative control, investigating administration of the system and enforcing adherence to objective standards as required by Government Code Section 19992.1(a). Finally, DPA renounces any responsibility for hearing appeals concerning departmental compliance with its own regulations and the laws of the state. In short, these regulations sanction pay by personal opinion rather than pay based on merit principles with assurances of due process.

If these regulations are adopted, results affecting pay can be predicted to be as widely varied as the personal opinions of those doing the rating. Without predetermined uniform criteria and a standardized system of performance ratings, that performance which will be considered "successful" by some will be rated "unsuccessful" by others. (The term "successful" used in these regulations is undefined.)

Evidence of this conclusion is supported by actual experience with the illegal regulation that DPA implemented on January 1, 1994. While DPA reports that about 88 percent of all eligible managers received a full five (5) percent pay raise with this process, another 418 managers did not - and DPA has refused all appeals.

As tangible evidence of this gross deficiency, today at this hearing, we have a copy of a draft lawsuit that the Association of California State Supervisors is preparing to file on behalf of six managers employed at the Teale Data Center because they were denied a pay increase and were not given a written report of performance. When we filed a grievance, neither the data center, nor DPA permitted any recourse to this injustice. If these same regulations are adopted, the state may be deluged with hundreds of such lawsuits. Do these proposed regulations represent an acceptable administrative process for resolving employment practices disputes. Or do they return us to the 1930s, before the California Civil Service Act, when our only way to get fair treatment was to go to court?

We have ample evidence from among the 418 managers who were denied a pay raise that exemplary performance was actually documented in written reports of performance issued both before and after January 1, 1994, yet a pay raise was denied by the department director based on personal opinions unrelated to performance of duties. When this occurs under these proposed regulations, there is no reasonable recourse because nothing in the regulations provide a means of enforcement or appeal; to a neutral agency such as the State Personnel Board.

Of all the defects with these regulations, the chief objection is that when an employee is inappropriately harmed, nothing can be done to correct the injustice but proceed to a court of law.

Without a fair and effective appeal process, California has no merit system. Without a merit system, California has a system of favoritism in violation of the California State Civil Service Act. Abdication of responsibility for establishing quantitative and qualitative standards, investigating administration of the system, enforcing adherence to objective standards and hearing appeals is unacceptable public policy.

PROPOSED REGULATIONS CONTAIN NUMEROUS VIOLATIONS OF STATE LAW

On April 1, 1994, Sacramento Superior Court declared DPA's "Pay for Performance" underground regulation illegal largely due to promulgation defects. The court deferred judgement on the legality of other elements contained in the regulation construing these issues moot while DPA is restrained from implementation.

DPA has cured promulgation defects by publishing notice and holding a hearing on these proposed regulations. However, the regulations themselves contain numerous violations of law as follows:

1. Government Code 19992(a) clearly assigns responsibility to DPA to administer the state's performance evaluation process and according to law, DPA ". . .shall

provide a system of performance ratings. . ." DPA is in violation of this law by refusing to provide a system of performance ratings for use by departments covered by civil service. Proposed regulations 599.799.1 and 599.799.2, sections (b) (1) are in violation of this law by stating, "It shall be the responsibility of each appointing power to ensure that written standards of performance are developed. . ." According to Government Code 19992(a) the law assigns responsibility to DPA to ". . .provide a system of performance ratings. . ." The law does not assign this responsibility to appointing powers and without a system of performance ratings, appointing powers are left without the key ingredient necessary to develop uniform written standards of performance in accordance with law and the civil service merit system.

2. Section (b)(1) of both proposed regulations requires individual departments to develop standards". . .based on individual and organizational requirements." While this language is consistent with Government code 19992.8 covering managers, the same language is a violation of Government Code 19992 (a) covering supervisors which requires mandatory standards ". . .on the basis of the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day."

3. Proposed regulation 599.799.2 covering supervisors violates Government Code 19992.1(a) which states, "The evaluation shall be set forth in a performance report, the form for which shall be prescribed or approved by (DPA)." Yet DPA has failed to prescribe any performance report form to use for implementing in this proposed regulation. Moreover, the regulation fails to set forth procedures for obtaining DPA approval of any other performance report form, leading to abrogation of responsibility that Government Code 19992.1(a) clearly assigns to DPA.

4. Abrogation of responsibility by DPA, in violation of law is even more pervasive concerning administration of the performance system, enforcement and appeals. While Government code 19992.1(a) and 19992.9 contain the permissive word "may investigate administration of the system and enforce adherence to appropriate standards," language contained in section (e) of both regulations effectively removes DPA entirely from the process, thus voiding responsibility clearly assigned to DPA by law. Where section (e) of both proposed regulations contain the mandatory words "appointing power shall specify the process (for) appeals regarding performance appraisals. . .and (e)(2) appointing power shall be the final level of review for these appeals. . ." this language, illegally, nullifies responsibility for performance system administration, enforcement and appeal placed squarely on DPA by law. Government Code 19815.4(e) states that the DPA Director, "shall hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning <u>all</u> matters relating to (DPA's) jurisdiction."

5. Both proposed regulations violate Government Code 19992.3(a) and 19992.11 because they represent a veiled attempt to promulgate department rules containing illegal acts that are cited above. While there is no question that these laws authorize DPA to prescribe certain things by department rule, DPA has no right to prescribe illegal acts or procedures merely by prescribing them in a department rule. In short, DPA has no legal right to act illegally by prescribing an illegal department rule. To the contrary, Government Code 19815.4 requires that the Director of the Department of Personnel Administration ". . .shall (b) Administer and enforce the laws pertaining to personnel (and). . .formulate, adopt, amend, or repeal rules, regulations, and general policies. . .which are consistent with the law. . ." Therefore, DPA is also violating Government Code 19815.4(e) by renouncing responsibility it has under the law to ". . .Hold hearings, subpoena witnesses, administer oaths, and conduct investigations concerning all matters relating to the department's jurisdiction."

6. On April 1, 1994, Sacramento Superior court Judge Roger K. Warren declared DPA's Pay for Performance regulation illegal , in part because it violated Government Code 19826 concerning salary ranges. DPA's newly proposed regulations 599.799.1 and 599.799.2 also violate this section of the law as ruled by Judge Warren.

7. Additionally, on April 1, 1994, Sacramento Superior Court Judge Roger K. Warren declared DPA's Pay for Performance regulation illegal, in part because it violated Government Code 19829 concerning pay steps. DPA's newly proposed regulations 599.799.1 and 599.799.2 also violate this section of the law as ruled by Judge Warren.

8. Government Code Section 19827.2(c) defines terms used in connection with pay administration. "Skill" includes the intellectual or physical skill required in the performance of work. "Effort" includes the intellectual or physical effort required in the performance of work. "Responsibility" means the responsibility required in the performance of the work, including the extent to which the employer relies on the employee to perform the work, the importance of the duties, and the accountability of the employee for the work of others and for resources. "Salary" means the amount of money or credit received as compensation for services rendered (by employees who exert effort, demonstrate skill and carry out their duties and responsibilities for the benefit of their employer, the State of California). Section (c)(1) in both of DPA's proposed regulations use new terms that are not defined including "successful performance", "certification" by appointing power and others. What do these terms mean? Neither is "pay for performance" defined . Without an accurate definition of these key terms, DPA's proposed regulations are confusing, subject to intense controversy and unintelligible.

9. Both proposed regulations violate Government Code 19832 (a) governing Merit Salary Adjustments. As stated above in 4 and 5, DPA has no legal right to abrogate its responsibility under the law or to prescribe an illegal department rule. DPA has failed to define the term "successful" or to provide a "system of performance ratings" required by Government code 19992(a) and thereby both proposed regulations are devoid of a description of "standards of efficiency" which Government Code 19832(a) mandatorily requires DPA to prescribe.

10. Section (e) of both proposed regulations violates several state laws contained in the Government Code, including but not limited to Government Code Sections 19828(a), 19834(a), 19835(a), 3528, 3530 and 3532. All of these statutes prescribe due process and appeal rights guaranteed by law which DPA is seeking to eliminate by drafting illegal regulations, which in turn is a violation of Government Code 19815.4(b) and (d). Hereby is a detailed description of these violations of law.

    A. Section (e) of both regulations seeks to give each appointing power mandatory and final authority to hear appeals and then places severe limitations on grounds for appeal concerning salary increases. This language violates Government Code 19828(a) which requires DPA to provide a "reasonable opportunity to be heard to any employee affected by a change in his or her salary range." The word "heard" is clarified in Government Code 19815.4(e) meaning that it is DPA's responsibility under the law to "hold hearings, subpoena witnesses, administer oaths and conduct investigations concerning all matters relating to the department's (DPA's) jurisdiction." Doing otherwise would defeat the state's merit system principles and deny due process since the only available appeal would be to the same appointing power who created need for appeal by withholding a salary increase that is authorized by the California State Legislature. If language in Section (e) of the proposed regulations is permitted to stand, it is reasonable to conclude that the state will be inundated by hundreds of lawsuits each time that a change in salary range occurs but pay is withheld by the appointing power.

    B. Government Code 19834(a) states, "Automatic salary adjustments shall be made for employees in the state civil service in accordance with this chapter. . .(when funds are authorized by the California State Legislature). Government Code 19835(a) states, "The right of an employee to automatic salary adjustment is cumulative for a period not to exceed two years and he or she shall not, in the event of such an insufficiency of appropriation, lose his or her right to such adjustments for the intermediate steps. . ." Thus, it is illegal for DPA to deny, by regulation, automatic increases funded by the Legislature. This power is reserved to

the California Legislature and may only be revised by passing a new law.

C. Section (e) of both proposed regulations seeks to place unreasonable restrictions on matters subject to the grievance procedure in violation of state law. Government Code 3530 authorized grievances by supervisors and managers (excluded employee organizations representing their excluded members in their employment relations). And Government code 3532 prescribes, "The scope of representation. . .shall include all matters relating to employment conditions. . .including wages, hours and other terms and conditions of employment." And, moreover, Government Code 3528 requires, ". . .the objective consideration of issues raised between excluded employees and their employer "both in grievances and on matters for which they have a right to be heard. Therefore, these statutes prohibit appointing powers from being the final authority on matters within the jurisdiction of the Department of Personnel Administration.

The point of this analysis is that, on orders from Governor Wilson, DPA is trying to revamp the entire pay structure of the State of California using illegal regulations rather than legislation. Sacramento Superior Court has already declared DPA's first attempt illegal. If Governor Wilson wants a true pay for performance system - and widespread acceptance - he shouldn't abuse the regulatory authority of DPA; he should seek changes the proper way, by introducing legislation to establish clear public policy.

PAY THEORY - WHAT OTHER EMPLOYERS DO

All employers, whether public sector or private industry, use one of three basic compensation systems and more often use combinations or variations of all three. These are:

1. All major employers establish a schedule of base pay rates, ranges or grades, normally with an eye to the competitive labor market, determined by salary surveys. From time to time, both private employers and public jurisdictions raise their entire base salary schedule in reaction to labor conditions and inflation (includes cost of living adjustments - COLA). Consideration is also given to competitive occupational supply and demand forces as well as internal "like pay for like work" pay principles. Information and data on base salary levels paid by employers is readily available from surveys conducted by compensation consulting firms. These consultants also report on amounts that base salaries are rising and amounts that compensation budgets are projecting for future base salary increases. For example, in May 1994, Hewitt Associates reported that base salary increases are averaging three (3) percent and, in August 1994, The Wyatt Company reported that compensation budgets for next year are projecting an average 4.2 percent increase in base pay. Similar survey results are

available from William Mercer Incorporated, The U.S. Bureau of Labor Statistics, the American Compensation Association and many others. A three (3) percent increase in base pay rates authorized by the California Legislature effective January 1, 1995 for all California state civil service employees is reasonable by these comparisons.

2. All major employers establish a method of salary progression within ranges (not including promotions), normally with consideration given to performance, merit, experience, time in grade or some combination. All major private and public employers use classification and pay structures to accommodate virtual annual pay increases within predetermined salary ranges of various lengths, often established at 40 to 60 percent from bottom to top of the range. Progression methods within these ranges are commonly called performance raises or merit increases among other terms. Some employers specifically link the amount of individual progression to performance evaluation and reports of performance, while others make no such direct connection. Private firms commonly permit individual progression by different levels of increase. Hewitt Associates' most recent survey reported in May 1994 that performance/merit pay increases are averaging about seven (7) percent in private companies. In contrast, public employers commonly establish a predetermined amount of salary progression, generally five (5) percent, titled merit increases, available to all employees below the maximum of the salary range, provided that performance is standard or better. However, salary ranges are generally less than 30%. The State of California already has a similar system established by State law. However, features of the California system are subject to modification and when necessary such modifications must properly be done by legislation, not, merely DPA regulation.

3. Some major employers establish a method of special incentive pay, not permanently attached to base pay such as, stock options, sales commissions, special bonuses, or other pay often tied to a specific measurable objective. All too familiar are reports published in the Wall Street Journal, Business Week and other business publications about outrageous levels of compensation paid to private industry executives, often in the form of incentives combined with base pay and extremely generous perks. Last year, median total compensation for Fortune 500 CEOs was a record $3.8 million, including salary, bonuses, long-term incentives and stock options. Another pay study of executive staff below CEOs reported median total compensation of $1,776, 168, the highest since the survey began in 1989, of which $593, 382 was stock options, bonuses and other incentives. Individually, Michael Eisner of Walt Disney was paid $203 million, most of the amount from stock options. This amount of pay for one business executive is about one and one-half times the total amount needed to cover a 3% pay increase for all state employees. Sanford Weill of Travelers Inc., got

$52.6 million while Roberto Goizueta of Coca-Cola Co. got $14.5 million including $9.48 million from stock options and another $2.2 million bonus. David Whitwam of Whirlpool Corporation took home $11.8 million including $6.3 million from stock options and $3.4 million from various incentives. The highest paid woman executive is Turi Josefsen of U.S. Surgical who got $26.7 million total compensation including special incentives. Closer to home, Daniel Crowley of Foundation Health Corporation got $1,040,759 including a bonus of $570,010 and incentives of $110,896 plus another $1,251,200 from stock options. Erwin Potts, CEO of McClatchy Newspapers Inc. publisher of The Sacramento Bee captured $1,040,759 including a $570,010 bonus and $110,896 in other incentives plus stock options valued at $134,687 while Gregory Favre,Vice President of News for McClatchy Newspapers, Inc. collected $297,361 including a $42,829 bonus and $59,532 in other incentives plus stock options valued at $83,793. State employees help pay for all of these lavish salaries with their purchases at the cash register. In striking contrast, California Governor Pete Wilson's entire annual salary is only $114,000 (reduced 5% voluntarily from $120,000 authorized by law); or looked at another way, Michael Eisner of Walt Disney gets 1,691 times the pay of Governor Wilson. Which of the two are being paid for performance? Annual salaries of California's State Constitutional Officers such as Treasurer and Controller, is set by law at only $90,000. These elected officials of the nations most populous state - that employs more workers than any California private corporation, with a $54 billion budget and who oversee an economy that is eighth largest in the world - are also allotted $40,000 from a special Constitutional officers fund. State legislators are currently paid $52,500 annually which will increase to $72,000 in 1995 plus an average $21,200 a year for living expenses and an expense free automobile. The annual salary of a Superior Court Judge is $114,000 with no stock options, no bonuses and no other special incentives. As an incentive to state employed middle managers, California once had a Managerial Performance bonus Program ranging from $750 to $5,000 lump sum for a very limited number of state executives and a Supervisor Performance Award Program ranging from $250 to $750 lump sum for a very limited number of middle managers. Both of these pay for performance programs have been suspended or repealed.

PAY PRACTICES OF THE STATE CALIFORNIA

1. California has a salary range base pay system similar to common practice of other public jurisdictions, and private employers with far shorter salary ranges than is common in the private sector from bottom to top.

The intent of state law, Government Code 19826, is to permit periodic salary adjustments to remain competitive in the labor market and reflect inflation just as other major employers adjust their entire schedules from time to time. According to

Government Code 19826(a):

> "The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. . ."

In recent years, political and budget problems have relegated this law inoperable. State employee salaries have fallen far below prevailing rates. The legislature has barely been able to fund minimal cost of living increases of five (5) percent effective January 1, 1994 and three (3) percent effective January 1, 1995. What is most troubling is the disparity between enormous amounts captured by business executives whose performance is perceived to be linked with pay, over the actual take home pay of state supervisors for the work they perform. For example, the pay of an office Service Supervisor I, a basic supervisory class in all departments, is $1,979 - $2,406 per month. After a full three (3) percent pay raise, this state supervisor will be lucky to clear additional take home pay of $50 per month after taxes and deductions. A Caltrans Maintenance Supervisor is paid $2,708 - $3,259 for work performed and responsibility for supervising highway workers, sometimes under the worst possible conditions of nature and society. Governor Wilson's effort to place illegal restrictions on availability of this small three (3) percent increase in pay, implies all are paid too much. Yet the gap, has widened between what state managers are paid, and what business executives get, who are perceived to be paid for performance, to the point that the average business executive captures an incredible 157 times the average pay of state managers and supervisors. And the gap continues to get progressively worse as the state experiences budget deficits year after year to pay for services, such as prisons, that California can no longer afford. Until the state can afford to pay prevailing rates, it appears to be quite inappropriate to impose the election year euphemism of "pay for performance" on an otherwise, beaten down civil service pay structure.

2. California civil service also has an established method of progression within salary ranges (not including promotions) that is based on merit authorized by Government Code 19832(a). The state system is very similar to that of other large employers whenever existing laws prescribing performance evaluations and reports of performance are enforced. DPA has a very poor record of performance evaluation enforcement, not due to inadequate laws, rather due to insufficient staff resources from slashed budgets. One major weakness in the state's salary progression method is unavailability of longer salary ranges from bottom to top. Another serious weakness is the very severe compaction of one

range upon another. No illegal "pay for performance" gimmick will correct these extremely serious defects. Disingenuous "pay for performance," merely will make a bad situation even worse.

3. California civil service has no special incentive pay method even close to business use of stock options, generous commissions, extravagant bonuses, lavish perks or other bounteous special incentives to reward exceptional performance. Governor Wilson and DPA are fooling noone into believing that by hijacking a three (3) percent increase, intended by the legislature clearly as a cost of living adjustment based on CPI that, by some sort of magic, all the state's problems will be solved.

PERFORMANCE EVALUATION THEORY

All major employers, whether private business or public jurisdictions, have some method for performance evaluation and reports of performance in their personnel policy manuals. Most performance evaluation programs are only as good as management's sincere commitment to establish an atmosphere of trust, clarify job related expectations, open feedback channels, provide objective enforcement of the system with assistance and standards that make sense and provide an objective appeal process. Management consultants offer a myriad of both standardized and custom performance evaluation systems. The newest methods attempt to link employee performance to bottom line organization and financial objectives.

STATE OF CALIFORNIA PERFORMANCE EVALUATION PRACTICE

California already has a performance evaluation system prescribed in law. Government Code Sections 19992 - 19992.14 already mandate the Department of Personnel Administration, ". . .to establish standards of performance for each class of position and shall provide a system of performance ratings. Such standards shall insofar as practicable be established on the basis of the quantity and quality of work which the average person thoroughly trained and industriously engaged can turn out in a day." Government Code 19992.1(a) states:

> The system of performance reports shall be designed to permit as accurately and fairly as is reasonably possible, the evaluation by his or her appointing power of each employee's performance of his or her duties. The evaluation shall be set forth in a performance report, the form for which shall be prescribed or approved by the department. The department may investigate administration of the system and enforce adherence to appropriate standards."

One of the first comprehensive performance evaluation systems for state civil service was established on April 1, 1939. Many others have followed.

The chief weakness of the state's current performance evaluation process is that DPA has neglected it and permitted it to fall into serious disrepair. This neglect by DPA has nothing to do with "pay for performance"; it has everything to do with lack of enforcement. DPA has been deficient in establishing current and relevant standards of performance that are job related; DPA is not currently providing a uniform system of performance ratings linked to clear and unambiguous performance expectations. Experience with DPA's "pay for performance" regulation which Sacramento Superior Court ruled illegal demonstrates that DPA is not likely to do any better job of investigating administration of the system and enforcing adherence to appropriate standards, as required by law, with its proposed new "pay for performance" regulations. As described above, these proposed regulations are more likely to produce hundreds of lawsuits because they permit DPA to abrogate responsibility for objective administration and hearing appeals, in violation of law.

LEGISLATIVE ANALYST'S CONCLUSIONS

After studying the various legislative, budgetary and legal developments that have an impact on implementation of a "pay for performance" concept, in a March 1994 report, Legislative Analyst Elizabeth Hill published these conclusions:

1. The governor's late and sudden redirection of pay appropriations towards an undefined "pay for performance" program "raises issues of basic fairness. Given that the purpose of the general salary increase was to adjust employees salaries for inflation, it is unfair to deny it to managers and grant it to everyone else."

2. "The policy does not adequately reward excellence. . .it sends the wrong message. . .a policy designed to reward and encourage excellence should at least provide salary increases greater than those given to other employees. . .and should guard against the possibility of supervised employees making more than their manager."

3. "Actions confuse the purposes of a general salary increase related to inflation and a merit increase. There are two basic types of pay increase - one intended to compensate for inflation and one intended to reward meritorious performance. The 5 percent salary increase negotiated by the DPA for represented employees and previously authorized for nonrepresented employees (including managers) was specifically for a COLA to compensate employees for inflation. In fact, the salary increase effective January 1, 1995 is set at 3 percent to 5 percent, dependent on a cost-of-living index. Since inflation equally affects all, across-the-board COLAS make sense. Whether or not a COLA should be granted to state employees under current fiscal circumstances is a valid issue. Objections to a COLA because of its across-the-board nature, however, misread its purpose."

4. Governor Wilson's unilateral action infringes on the legislature's appropriation authority. If true pay reform is wanted and needed, "it will require the involvement of the legislature and the administration to recast the laws (as well as) regulations and practices surrounding merit pay."

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EO 102

# CALIFORNIA ASSOCIATION of HIGHWAY PATROLMEN

October 11, 1994

Mr. Richard Leijonflycht
Department of Personnel
Administration
Policy Development Office
1515 S Street, North Building
Suite 400
Sacramento, CA 95814-7243

HAND DELIVERED

Dear Mr. Leijonflycht:

This letter is in response to the September 15, 1994 Pay for Performance memorandum signed by Wendell M. Coon.

The California Association of Highway Patrolmen represents all ranks of sworn members within the California Highway Patrol. The CAHP believes the Pay for Performance (PFP) program, proposed rule 599.799.1, including the newly revised edition, is still contrary to existing law and as such would be an illegal regulation if DPA proceeds to implement these proposed rule changes.

Specifically, the CAHP holds that the Pay for Performance Program is contrary to the Legislature's direction and desires, is not supported by the Government Code and still violates the rights of peace officers pursuant to the Peace Officer's Procedural Bill of Rights (POBR). In addition, we have numerous questions relating to the "study" of "prevailing practices" conducted by William M. Mercer, Incorporated.

For the sake of brevity, and in light of previous public testimony and legal challenges relating to the Pay for Performance Program being contrary to legislative intent and pertinent Government Code Sections, I will only address the third and fourth issues of the above paragraph.

The revised rules relating to PFP contains an appeal procedure for managers and supervisors who are denied their Pay for Performance raises. The appeal process identifies the procedure and "grounds" under by such an appeal can be made. Pursuant to the Peace Officer's Procedural Bill of Rights and related court decisions, including but not limited to, White v. County of Sacramento, a public safety officer has a right to an administrative hearing for any action by an employer that results in the loss of compensation. There are no restrictions which limit the public safety officer's right to a hearing. The "grounds" referenced in DPA's revised rule places restrictions under which an appeal may be made and is therefore in violation of POBR.

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Furthermore, DPA's appeal process clearly states that the impacted supervisor or manager has the burden of proof in a subsequent appeal. The CAHP totally disagrees with this qualification and once again directs DPA's attention to POBR and court decisions which have clearly defined any loss in compensation as "punitive per se" and clearly saddling the employer has the burden of proof.

The CAHP's second concern focuses on the "prevailing practices" study conducted by DPA and William M. Mercer. Our questions are narrow in scope because the study and/or information provided in your latest memorandum appears somewhat limited. However, we would still appreciate answers to the following questions and a greater understanding of whether Pay for Performance is actually a prevailing practice, especially in public service and specifically as it relates to law enforcement.

1. When the original Pay for Performance Program was implemented in December, 1993, DPA claimed that the program was consistent with prevailing practices. This was a very important and critical point considering the parameters DPA has in relation to Government Code Section 19829. DPA's memorandum and Mercer's letter are both dated August 31, 1994. When were both of these surveys conducted and completed?

2. How many surveys were sent out by DPA? How many by Mercer?

3. Is it possible that the governmental agencies or private business were more likely to respond if they had some form of performance based pay than those who did not?

4. If question number three is a possibility, would it not skew the results of both surveys?

5. The survey results did clarify the level of performance pay. For example, were survey respondents specifically asked whether performance pay was in replacement of cost of living raises? Are cost of living raises which are not tied to performance allowed under any circumstances?

6. Would the state not currently qualify as having some type of performance based pay? Are the state's merit salary adjustments based on performance? Is the State's bonus award program based on performance?

7. We have contacted a few public and private entities in regard to performance type of pay systems and have determined that the Pay for Performance Program being proposed by the State is far more encompassing than the "prevailing practices" referenced in Government Code section 19829. Do you have evidence that the state's plan is not more encompassing?

8. Sworn members of the CHP have a specific pay statute (Government Code Section 19827) which specifically identifies the agencies which are used for compensation comparison. There are five law enforcement agencies utilized for comparison in this statute. Has DPA specifically checked to determine what their "prevailing practices" are in regard to performance type of pay systems?

The prevailing practice survey is very important as it relates to DPA's requirements pursuant to Government Code Section 19829. However, survey can be worded in such a way as to taint or contaminate the survey results. The "prevailing practices" survey ultimately means very little in relation to Government Code Section 19829 without some better understanding. We appreciate your assistance in addressing these concerns.

If you have any questions, please do not hesitate to call.

Sincerely,

Jim Magrann
CAHP Supervisory Director

Jon Hamm
CAHP Executive Manager

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EO-103

**COMMENTS ON PROPOSED RULES FOR PERFORMANCE PAY FOR SUPERVISORS AND MANAGERS-PROPOSED REVISED REGULATIONS 599.799.1 AND 599.799.2**

**SUBMITTED BY CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION**

**DATE: October 11, 1994**

The California Correctional Peace Officers Association (CCPOA) submitted comments in opposition to prior versions of proposed regulations 599.799.1 and 599.799.2 on August 29, 1994. Once again, CCPOA must oppose these proposed regulations for the reasons stated in the comments submitted on August 29, 1994, as well as for the reasons stated below.

Although the current language has modified mandates which require each appointing power to develop "clear, job-related, written standards of performance," the proposed regulations still do nothing to ensure that performance standards will be judged in a similar fashion on a state-wide basis. Under these regulations neither DPA nor any other state agency performs a qualitative review of the appointing powers' various performance standards to bring about equality for all employees in each classification. Under the revised regulations, a "successful" supervisor at one prison may still not be performing at the same true performance level as a "successful" supervisor at another prison in this state.

Additionally, the proposed regulations still do not allow meaningful review of denial of salary increases. An employee appealing the denial of a salary increase should not required to bear the burden of proof in these appeals. Currently, in an appeal of a denial of a merit salary increase (MSA) under Title 2 of the California Code of regulations 599.684, the appointing power must prove that denial of the MSA is supported by substantial evidence. This protection is removed for managers and supervisors in the proposed regulations for both MSAs and general salary increases. The employer should be required to bear the burden of supporting its action with evidence, as it is the employer that is supposed to keep and enforce "clear, job-related written standards of performance."

Finally, the imposition of these regulations will result in a rapid and irreversible decline in morale among managers and supervisors, as these employees watch the unfair and unpredictable application of the "pay-for-performance system." The systems already in place for employee bonuses and MSAs can accomplish the ends which this system claims to strive for, without the harmful effects.

For these reason, as well as those expressed by CCPOA in its comments of August 29, 1994, CCPOA urges that these regulations not be adopted.

LA 9290

CCPOA

**COMMENTS ON PROPOSED RULES FOR PERFORMANCE PAY FOR SUPERVISORS AND MANAGERS-PROPOSED REGULATIONS 599.799.1 AND 599.799.2**

**SUBMITTED BY CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION**

**DATE: August 29, 1994**

The California Correctional Peace Officers Association has among its dues paying members both managers and supervisors who work in various classifications within the California Department of Corrections and the California Youth Authority. Although CCPOA's managerial and supervisory members do not enjoy the collective bargaining rights that CCPOA's rank and file members do, CCPOA's managerial and supervisorial members have enjoyed some of the same benefits as the rank and file has enjoyed in the past. The proposed regulations put two of these benefits in jeopardy, namely general salary increases and merit salary increases. For that reason, CCPOA is strongly opposed to the implementation of the proposed regulations.

DPA has tried to implement this system on a prior occasion. On April 1, 1994, Judge Roger Warren of the Sacramento County Superior Court, determined that a memorandum and pay letter issued by DPA implementing a similar pay for performance system for managers was invalid for several reasons. Failure to comply with Administrative Procedure Act requirements was one basis for the court's rejection of the pay for performance system. DPA attempts to remedy this inequity through its rule making action. However, several other serious deficiencies in the pay for performance system which were brought forward in April by the moving parties are still present in the proposed system.

In the form presented, the proposed regulations do away with general salary range cost of living increases which effectively now raise the wages of all managers and supervisors. Instead, the regulations propose to base cost of living increases on a certification by the appointing power that each individual employee's job performance is "successful." The regulations provide no guidance as to what "successful" is. This ambiguity will allow for different appointing powers to impose different standards. In the Department of Corrections, for example, each warden will be able to set different standards for his or her managers and supervisors. A successful supervisor at one prison may not be performing at the same level as a supervisor at another prison in this state.

Additionally, under current Title 2 of the California Code of Regulations section 599.683 the appointing authority must give an employee who is not at the top step of his or her salary range a merit salary adjustment equal to one step in that employee's salary range, if that employee has met the standards of efficiency required for that position. Is a successful employee under the proposed regulation different from an efficient employee under section 599.683? This very important issue is left completely to the discretion of the appointing authorities. Some appointing authorities may interpret these concepts as analogous, while some appointing authorities may decide that "successful" is a much more rigorous standard. This issue is unresolved by the proposed regulation.

More importantly, however, is the result of the imposition of the pay for performance system on COLA increases. If, as DPA asserts, most managers and supervisors are at the top of their salary ranges, and through the implementation of this program, some will be denied a COLA increase, then persons in the same classification in state service will be receiving different salaries notwithstanding the fact that the employees have the same duties and responsibilities. This very fact scenario is prohibited by the express language of Government Code section 19826. Additionally, in changing the ranges, Section 19826 requires DPA to consider prevailing rates for comparable service in other public employment and private business. Taken together, these two aspects of Section 19826 strongly demonstrated that the Legislature intended that salary range increases would be given across the board to all employees, not on a selective individual basis. DPA has ignored this statutory mandate which is inconsistent with this pay for performance idea, as it did when it tried to implement the pay for performance system previously.

Finally, the proposed regulation removes from managers and supervisors the minimal rights they had for review of denial of MSAs under Regulation 599.684. Under this regulation, employees at least were able to appeal to the DPA the decision of their own appointing authority as to an MSA. The proposed regulation allows appeal only to the appointing authority who made the original decision regarding the salary increase or MSA. It is not illogical to note that the appointing authority will have a vested interest in insuring that its decision is upheld, whether from a budgetary standpoint or a psychological one. This portion of the proposed regulation will greatly injure morale within the supervisorial and managerial ranks.

In summary, DPA does not possess proper legislative authority to implement the proposed pay for performance system, and the proposed regulations, if implemented, will result in a system which varies greatly in its application and fairness. The implementation of this system will hurt morale and tempt appointing authorities to use their employees as budgetary tools. For these reasons, the California Correctional Peace Officers Association strongly opposes these regulations.

LA 9290

California Correctional
Peace Officers
Association
CCPOA

755 Riverpoint Dr Ste 200, West Sacramento, CA 95605-1634 (916) 372-6060

## CCPOA FAX TRANSMITTAL

**DATE:** 10-11-94

**TO:** Richard Leijonflycht

**COMPANY:** DPA

**FAX NUMBER:** 324-0524

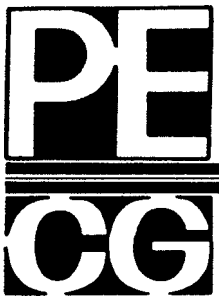
**TOTAL PAGES:** 4

**FROM:** Suzanne Bronine

*California Correctional Peace Officers Association*
*755 Riverpoint Drive, Suite 200*
*West Sacramento, California 95605-1634*
*Telephone: (916) 372-6060*
*Facsimile: (916) 372-9805*

**MESSAGE:** Please accept these comments on proposed regulations 599.799.1 and 599.799.2. A copy of CCPOA's prior comments is attached as well. Thank you.

EO 104 ✓



**PROFESSIONAL ENGINEERS**

**IN CALIFORNIA GOVERNMENT**

October 12, 1994

Richard Lejonflycht
Department of Personnel Administration
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento CA 95814-7243

Re: Proposed Rules 599.799.1 and 599.799.2 - Pay for Performance

Dear Mr. Lejonflycht:

This letter will serve as a follow up with the concerns and questions we discussed at the Supervisors Meet and Confer session held on October 6, 1994, regarding the above-referenced proposed rules. Although we are responding to proposed Rule 599.799.2, our comments are also intended for Rule 599.799.1 since they are nearly identical. These comments are in addition to the comments and objections filed by PECG Attorney, Dennis Moss.

For **Paragraph (a)**, we suggest eliminating the word "all" in the first sentence. This change is necessary so that there is no confusion that these rules apply only to civil service employees in supervisory or managerial positions.

In **Paragraph (b)(1)**, we suggest retaining the word "each" in the first sentence. This is necessary so that each appointing power ensures that clear job-related written standards are developed and kept current for every supervisory and managerial position.

In the **third sentence of Paragraph (b)(1)**, the terms "well qualified," and "reasonable degree" are used but are not defined. We strongly urge that you remove them or define these terms.

In **Paragraph (c)(1)**, the second sentence of the proposed rule provides that "Supervisors who are certified as successful shall receive a salary increase equal to the amount of the salary range increase." Our question is what occurs when a supervisor has

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performed successfully but his/her supervisor fails to prepare the certification. Will the supervisor still receive the salary range increase?

It is our understanding that the performance appraisal process specified in this proposed rule shall also be the basis for awarding Merit Salary Adjustments (MSA's). However, the third sentence of Paragraph (C)(1) appears to conflict with Government Code Section 19832. This sentence indicates that "...a supervisor's performance is successful if he/she has substantially met his/her appointing power's performance standards and related work expectations." Section 19832(a) specifies that....each employee shall receive a merit salary adjustment....when he or she meets such standards of efficiency as the department (referring to DPA) by rule shall prescribe.

**Paragraph (c)(2)**, to impose disciplinary action against an employee solely because he or she happens to be at the bottom step of a pay range appears to violate principles of equal treatment and just cause.

**Paragraph (e) Appeals** is confusing and severely limits the grounds on which appeals may be filed. Paragraph(e)(1) notes that a supervisor may appeal his/her performance appraisal using only the excluded employee-grievance procedure prescribed in Section 599.859 and only on the grounds that the appraisal was used to abuse, harass, or discriminate against the supervisor. However, Paragraph(b)(4) states that "If a supervisor does not agree with the appraisal, he/she shall be entitled to discuss it with the appointing power or his/her designee, unless the rater is the appointing power, in which case no further discussion shall be required." These paragraphs seem to conflict and are confusing. This needs to be clarified. What happens if the rules are not followed, performance standards do not exist or are not communicated or followed, etc. Does an employee have a right-to-appeal on these grounds?

Currently, Section 599.859 allows a grievance to be filed when there is a dispute of one or more excluded employees involving the application or interpretation of a statue, regulation, policy or practice which falls under the jurisdiction of DPA. Thus, DPA's proposed rules severely limits the grounds for filing a grievance.

Additionally, the terms "clear" and "compelling" in **Paragraph (e)(2)(B)** should be defined in order to understand what clear and compelling disparities involve.

**Paragraph (e)(3)** states that the supervisor shall have the burden of substantially proving his/her case within the grounds specified. This paragraph also indicates that this appeal process shall replace the process prescribed for denials of MSA's. Several conflicts arise between this paragraph and Rule 599.684 Appeal from Merit Salary Adjustment Action.

First, Rule 599.684 provides that the employee whose MSA will not be recommended shall be informed of the reasons for such action before certification is made by the supervisor. Proposed Rule 599.799.2 does not provide that the employee be informed of the reasons before certification is made. Secondly, Rule 599.684 requires the supervisor to prove the employee has not met the standards of efficiency, when denying an MSA. Proposed Rule 599.799.2 puts the burden of proof on the employee to prove that the denial of his/her MSA is unjustified. Third, Rule 599.684 allows the supervisor to consider granting the MSA in three months or less. The proposed rule makes no provision for reconsideration of the denial of an employee's MSA.

Another point related to these rules that we questioned at our meeting was the potential situation in which a supervisor and/or manager is denied several range changes over a period of time and falls to the minimum step of the salary range for his/her class. You admitted that this was possible. As noted at our meeting, we consider this salary reduction to be a form of discipline without appeal rights to the State Personnel Board as required by the California Constitution and applicable statutory authority.

Furthermore, we noted in our meeting that our recent inquiry of many of the State Departments, Boards and Commissions revealed that they have not completed their performance evaluation criteria, and have not shared the criteria with their supervisory and/or managerial staff. However, supervisors and managers are supposed to be evaluated on this criteria for all of 1994 to determine if they will receive a salary increase in January 1995. We also agreed that each Department, Board and Commission is required to Meet and Confer on their proposed evaluation form before its implementation.

As you will recall, the PECG Team also vehemently objected to DPA's threat that if the proposed rules are not in place before January 1995, there will be no salary increase for supervisors or managers. DPA must reconsider this position and not hold supervisors and/or managers salary increase hostage until DPA can obtain approval of these proposed rules by the Office of Administrative Law.

Historically and by law, when a range change is implemented all employees in the range are entitled to the increase. These proposed rules appear to conflict with both the historical practice, as well as, the law.

I believe this letter accurately recalls the concerns raised and agreements reached at the October 6, 1994 Meet and Confer. Additionally, we are again requesting copies of all written materials considered by DPA in this rule-making process in accordance with the Public Records Act.

If you have any questions about this response, contact me at 446-0400.

Sincerely,

Dennis Alexander
Labor Relations Consultant

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E0105

Dennis F. Moss - State Bar #77512
505 North Brand Boulevard, Suite 780
Glendale, California 91203
(818) 247-0458

Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

BEFORE THE DEPARTMENT OF PERSONNEL ADMINISTRATION

POLICY DEVELOPMENT OFFICE

| | |
|---|---|
| In the Matter of Proposed Regulations:<br><br>599.799.1 and 599.799.2 | COMMENTS AND OBJECTIONS OF ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT |

TO: DEPARTMENT OF PERSONNEL ADMINISTRATION
Policy Development Office
1515 S Street, North Building, Suite 400
Sacramento, California 95814-7243
Attention: Richard Leijonflycht

COMES NOW, ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, and PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, and submits the following comments and objections to proposed regulations 599.799.1 and 599.799.2, as those proposed regulations were modified subsequent to August 30, 1994.

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## INTRODUCTION

DPA has proposed a radical change in the discipline process of the state's managers and supervisors through proposal of Regulations 599.799.1 and 599.799.2. Disguised as a pay system, the regulations are, in substance, no more than a discipline system for supervisors and managers in which they are denied appeal rights to the SPB, rights that the California Constitution and applicable statutory authority, afford them.

The proposed regulations provide that DPA can change the pay ranges of supervisory and managerial employees, and appointing authorities can either provide or refuse increases on the basis of "successful" job performance. Bottom step supervisors and managers are treated differently. The rule contemplates that bottom step employees will be given the raise but will be subject to discipline for their poor performance (see the text of the proposals). There is no opportunity for an employee punished by a denied raise, to appeal his punishment to the SPB, as required by the Constitution, and the grounds provided in the proposed Regulations for appeal to the DPA are far more limited than the grounds for appeal of discipline to the SPB.

The proposed regulations also conflict with statutory authority regarding the salary setting function. The law does not contemplate DPA involvement in performance based salary schemes other than in regards to the limited area of Merit Salary Adjustments.

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## ARGUMENT

1. THE PROPOSED RULES UNCONSTITUTIONALLY IMPINGE ON THE RIGHTS OF SUPERVISORS AND MANAGERS TO APPEAL DISCIPLINE.

Article 7, Section 3 of the California Constitution provides:

> "(a) The [State Personnel] board shall enforce the civil service statutes...and review disciplinary actions."

The statutes governing discipline include, as grounds for discipline, incompetency, inefficiency, inexcusable neglect of duty, and a variety of other performance based criteria. Government Code Section 19572 (applied to managers pursuant to Government Code Section 19590).

An adverse action is defined as:

> "...dismissal, demotion, suspension, or <u>other disciplinary action</u>." Government Code Section 19570. (Emphasis added.)

Clearly, denying a person a raise on the basis of a failure to "successfully" perform duties, or reach the top level of success, is a form of "disciplinary action". Denial of an available raise for poor performance is clearly as punitive as a suspension without pay. In both cases, punishment in the form of a withholding of money is the result. The SPB regularly hears disciplinary cases that arise from reductions in pay based on performance deficiencies. The denial of an available raise on the basis of performance deficiencies is no less disciplinary, no less a reduction in pay.

With jurisdiction over discipline residing in the State Personnel Board, DPA is without authority to adopt a regulation that provides for discipline, especially when the proposed

regulation deprives the employee of the Constitutional right to appeal the discipline to the SPB. (Article VII of the California Constitution)

DPA only has the authority to adopt regulations affecting the purposes, responsibilities, and jurisdiction of DPA, and to do so consistent with the law when necessary for personnel administration. Government Code Section 19815.4. Here, DPA has crossed the line, encroaching on a disciplinary system exclusively within the jurisdiction of the SPB. The difference in substantive grounds for appeal between statutory discipline and appeal of a denied raise are substantial.

If a supervisor or manager is formally disciplined for incompetency, inefficiency, or inexcusable neglect of duty, he/she can prevail on appeal if it can be proven that the charges are not supported by the facts.

Under the proposed regulations, if the appointing power merely believes the employee is incompetent, inefficient, and/or negligent, the employee cannot prevail on appeal even if competency, efficiency and great performance is proven, and even if it is proven that the factual basis for the beliefs of management are completely erroneous.

The proposed regulations state that the only grounds for appealing a denied raised are a failure to receive an appraisal or substantive feedback; a disparity between the employer's appraisal/substantive feedback and the failure to provide the raise; and/or circumstances clearly indicating that the appointing power's salary action was determined by factors other than performance.

In other words, under the rules, a manager or supervisor can suffer a denied wage rate increase (that may also effect pension payments), on the basis of an erroneous conclusion about his performance, and the employee will have absolutely no recourse. Even if the evaluators conclusions are clearly erroneous, and appear to be motivated by non-performance based factors, the employee who suffers the discipline under the proposed regulations could not get the discipline reversed. The employee would need to establish "circumstances clearly indicating that the salary action was determined by factors other than performance."

2. GOVERNMENT CODE SECTION 19826 DOES NOT PERMIT A SCHEME WHEREIN APPOINTING AUTHORITIES CAN PAY EACH PERSON IN A CLASSIFICATION A CUSTOM RATE BASED ON PERFORMANCE.

Among the authorities cited by DPA to justify the proposed regulations is Government Code Section 19826. This Code clearly limits DPA's authority in the administration of salary range changes. It provides in part:

> **"§ 19826. Salary ranges; establishment and adjustment; exclusive representation by employee organization; conflict with memorandum of understanding.**
>
> (a) The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business."

Clearly 19826 is limited to salary range setting for classifications of positions; and clearly the only factors DPA

can consider in range setting are "duties", "responsibilities", and "prevailing rates". NOWHERE, in 19826, is DPA given authority to consider quality of individual performance in setting ranges. Yet, that is exactly what DPA is attempting to do through the new regulations. Assume the following:

On December 31, 1994 the supervising astronaut classification in the state service had the following salary range per month:

| | A | B | C | D |
|---|---|---|---|---|
| Supervising Astronaut | 5000 | 5250 | 5512 | 5788 |

Then assume that based on 19826 criteria of duties, responsibilities, and prevailing rates, DPA determines that on January 1, 1994, all the rates should go up by 10%. Absent institution of the new regulations, the new rates would look like this:

| A | B | C | D |
|---|---|---|---|
| 5500 | 5775 | 6063 | 6366 |

If the regulations went into effect, the salary ranges for the position would look like this:

| A | B | C | D | E | F |
|---|---|---|---|---|---|
| 5500 | 5512 | 5775 | 5778 | 6063 | 6366 |

The reason for the expanded range, is the fact that rates based on unsuccessful performance ranges above Range "A" would be created. Given the TOTAL absence of "performance" criteria in Government Code Section 19826, the creation of performance based steps in the salary ranges are completely illegal.

Government Code Section 19826 does not permit DPA to set

salaries for individuals within classes on the basis of performance.

The ranges contemplated by 19826 have intermediate steps between minimum and maximum salary limits. Government Code Section 19829. The intermediate steps by law must be as close to five percent (5%) as the State Personnel Board determines to be practicable. The system contemplated by the regulations, creating intermediate performance steps would render the 5% gaps an impossibility. Government Code Section 18807.

3. WAGE SETTING ON THE BASIS OF PERFORMANCE IS LIMITED TO MERIT SALARY ADJUSTMENTS CONTEMPLATED BY GOVERNMENT CODE SECTION 19832.

The Legislature has occupied the field of raises based on an employee's performance in Government Code Section 19832.

Government Code Section 19832 limits wage adjustments based on merit to the issue of whether an employee may move on an annual basis between established intermediate steps. Performance based raises are limited by 19832 to a one intermediate step, 5% per year, raise. (G.C. 18807) By occupying the field of performance based wage adjustments in Government Code Section 19832, DPA is necessarily precluded from legislating through regulations that all raises within certain classes must be merit based.

4. GOVERNMENT CODE SECTION 19829 DOES NOT AUTHORIZE THE PROPOSED REGULATIONS.

DPA attempts to justify the proposed regulations on the basis of Government Code Section 19829. Government Code Section

19829 allows adoption of more than one salary range or rate or method of compensation within a class only when the classes and positions have unusual conditions or hours of work or where "necessary to meet...prevailing rates and practices for comparable services in other public employment and in private business..."

Supervisory and managerial classes do not have unusual conditions or hours of work, and the system contemplated by the proposed regulations is not necessary to meet prevailing rates and practices for comparable services in other public employment and in private business.

"Meeting" prevailing rates and practices is a necessity where the state cannot hire or retain employees because prevailing rates or practices pay better than the state. If, for example, the state needs nurses in San Francisco and Bay Area nurses get $3 more per hour than the state rate, and state nurses are abandoning state jobs, there is a necessity to meet prevailing rates and practices, and 19829 authorizes DPA to establish a separate rate. Here, it has not been shown to be "necessary" to establish performance based rates for everyone in the supervisorial and managerial classes; therefore, pursuant to Government Code Section 19829, DPA cannot adopt regulations that would have that impact.

5. GOVERNMENT CODE SECTIONS 19992.8 - 19992.14 DO NOT AUTHORIZE THE SALARY SYSTEM CONTEMPLATED BY THE PROPOSED REGULATIONS.

The Authority cited by DPA to support the proposed regulations include Government Code Sections 19992.8 - 19992.14.

These Code Sections address Performance Reports for Managerial Employees.

As a preliminary matter, it should be noted that these sections do not deal with supervisors and to the extent the Legislature has given DPA any powers in these sections regarding managers, it is axiomatic that similar powers were not provided DPA in regards to supervisors.

As to managers, Government Code Sections 19992.8 - 19992.14 do not give any authority to DPA to create regulations providing individual raises to managers when ranges are increased. Section 19992.11 indicates that performance reports shall be considered for a number of reasons including "in determining salary increases and decreases", and 19992.14 refers to the use of performance appraisal reports for merit salary increases.

Neither of these sections suggest the elimination of the pay range system with its 5% intermediate steps, nor do they suggest that employee performance must be judged for raises other than statutory Merit Salary Adjustments. By describing use of performance reports in "awarding merit salary increases", rather than all raises, 19992.14 makes clear that range change raises must continue to occur without regard to performance appraisal reports.

6. GOVERNMENT CODE SECTION 19825 ARGUES THAT THE SALARY SETTING CONTEMPLATED BY THE PROPOSED REGULATIONS CAN ONLY OCCUR WHEN STATUTORILY AUTHORIZED

The proposed regulations give authority to state agencies to fix the compensation of managerial and supervisory employees. Government Code Section 19825 contemplates that state agencies

can have this authority "whenever authorized by special or general statute to fix the salary or compensation of an employee..."

It is clear that but for merit salary adjustments contemplated by Government Code Section 19832, the Legislature has not given salary setting authority to most appointing authorities. The Legislature has not authorized, by special or general statute, salary fixing by almost all state agencies. To the extent the proposed regulations give state agencies powers over salaries that the Legislature never contemplated, they are invalid. Government Code Section 19825. Examples of where the Legislature decided to give agencies salary setting authority include the PUC and FPPC.

7. THE PROPOSED REGULATIONS CREATE A RETURN TO THE SPOILS SYSTEM.

Article VII of the California Constitution, creating a merit system in state employment, was intended, in part, to eliminate spoils in state employment practices (favoritism, political considerations, and friendship controlling employment decisions, rather than merit):

> "A second purpose of article VII and its predecessor was to eliminate the 'spoils system' of political patronage by establishing a merit system whereby appointments to public service positions are based upon demonstrated fitness rather than political considerations." California State Employees' Ass'n v. State of California (1988) 149 Cal.App.3d 840, 847.

A key element in the elimination of spoils is the fact that no lesser authority than the California Constitution provides that a disinterested third party, the SPB, will review all

discipline. This process limits the possibility of "spoils" because an agency head's decision to discipline must be justified to the SPB. An agency cannot discipline an employee for failing to go along with shoddy management practices, for failing to make his manager look good in the face of incompetence, or for speaking up where top management's agenda and the public interest clash.

If a department attempted to discharge, suspend, or give a disciplinary wage cut to a manager or supervisor who "did not go along with the program" in the above scenarios, appeal to the SPB assures an impartial fair hearing.

With the proposed regulations a manager and/or supervisor will be left without practical recourse. The regulations afford management the opportunity to reward loyal soldiers with raises while denying raises to managers and supervisors who have the public's interest at heart. All management has to do is claim that the employee's performance is unsuccessful. They don't have to prove it unless the employee can clearly show that other factors controlled the decision.

The regulations are going to force good managers and supervisors to put on blinders to the incompetence, corruption, and mistakes of those who control their fates. These regulations will silence discourse when it comes to policy issues. Innovative, thoughtful managers and supervisors are going to be afraid to be outspoken where it is called for because of fear that they will be denied their raise. Managers' and supervisors' performance will be driven by spoils considerations not merit considerations where merit

considerations and spoils considerations collide.

Evaluating supervisory and management performance is subjective enough. Without the right to appeal the factual underpinnings of a denied raise, the possible denial of a raise will be a cloud that will chill the judgment of even the most dedicated employees.

## CONCLUSION

DPA, through proposed regulations, is taking a step that only the Legislature can take. Salary setting and the salary setting process are legislative acts. The Legislature has not authorized the performance pay salary setting process that the proposed rules contemplate. For the reasons stated herein, DPA does not have the authority or right to substitute its judgment for the Legislature's judgment, and thereby effect a radical change in the compensation system of the state's managers and supervisors.

Date: 10/11/94

(rec'd by DPA 10/12/94)

Respectfully submitted,

DENNIS F. MOSS, Attorney for the Association of California State Attorneys and Administrative Law Judges, the California Association of Professional Scientists, and Professional Engineers in California Government

# CALIFORNIA STATE MANAGERS AND SUPERVISORS ASSOCIATION

E0-106

10235 Fair Oaks Boulevard, Suite 200
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(916) 97-CSMSA (27672)
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October 7, 1994



Department of Personnel Administration
Policy Development Office
1515 S Street -- North Building Ste. 400
Attn: Mr. Richard Leijonflycht
Sacramento, Ca. 95814-7243

Re: Response to Proposed Regulations for "Pay for Performance Program"; §§599.799.1, 599.799.2

Dear Mr. Leijonflycht,

This is in response to DPA Memorandum 94-51 regarding the modified proposed regulation package to be submitted to OAL.

CSMSA would like to reiterate it's concerns regarding the proposed regulations. CSMSA believes the proposed regulations remain in violation of Government Code §§11349 et seq. for the following reasons:

1. NECESSITY: The regulations affecting Merit Salary Adjustments (MSAs) are contrary to procedures provided by law. See, Physicians & Surgeons Laboratories, Inc. v. Dept. of Health Services (1992) 6 Cal.App.4th 968. The MSA statutes are clear. They are legislative mandates which cannot be amended without subsequent legislative action. These regulations attempt to alter by regulation a statutory scheme promulgated by the Legislature;

2. AUTHORITY: Throughout, DPA has attempted to amend or revoke legislative enactments by regulation. DPA's salary range setting authority does not extend to the ability to supplant or replace laws enacted by the Legislature. For example, a statutorily

enacted bonus incentive program already exists (Government Code §§ 19992.8 et seq.), why is it being replaced? DPA cannot replace the Legislature's enactments;

3. CLARITY: This is of particular concern. For example, the regulations use the term, "successful" as the standard by which one receives a MSA. The statute which promulgated the MSA program uses the term, "satisfactory" as the standard. Are they the same? If so, why use different terms? If not, how can a regulation change a standard enacted by law?

4. CONSISTENCY: This is the most egregious violation. Each department will establish it's own standards for participation in the PFP. DPA attempts to solve this problem by reviewing each department's program. This ignores the prevailing practice in state government that many different departments use the same job classifications. A Manager I in DMV will be judge differently than a Manager I in DOJ, and OAL and every other department. This hodge-podge is highly suspectable to abuse. Such a system is contrary to the percepts underlying the merit system. This is especially important since no real appeal process exists.

5. Fundamental due process requires review at some level by an impartial entity. DPA does not fulfill this requirement. DPA is the state employer. The various departments take their instructions regarding employment issues from DPA. DPA is a member of the Executive Branch, as are the various departments -- there simply is no impartial adjudicator to oversee appeals regarding denials of the PFP.

6. REFERENCE AND NONDUPLICATION: The proposed regulations duplicate and, in some cases, attempt to replace legislatively created programs.

In sum, CSMSA asserts the proposed regulations cannot survive review by OAL and should be further modified to satisfy the aforementioned six requirements.

Thank you for your consideration of this matter. If there are any questions, please do not hesitate to contact CSMSA.

Sincerely,

John W. Spittler