

CALIFORNIA APPRENTICESHIP COUNCIL

**INITIAL STATEMENT OF REASONS FOR
PROPOSED ACTION TO REPEAL EXISTING
CALIFORNIA CODE OF REGULATIONS,**

**TITLE 8, SECTION 232
AND TO ADOPT
TITLE 8, SECTIONS 232.01 - 232.70**

Prepared by:

Julian O. Standen
Deputy Attorney General
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102
(415) 703-5535

**NOTICE OF PROPOSED ADOPTION OF REGULATIONS BY THE CALIFORNIA
APPRENTICESHIP COUNCIL TO ESTABLISH HEARING PROCEDURES FOR
APPEALS FROM APPRENTICESHIP PUBLIC WORKS DETERMINATIONS**

INITIAL STATEMENT OF REASONS

The California Apprenticeship Council ("Council") proposes to repeal existing California Code of Regulations, title 8, section 232 and to adopt regulations setting forth the procedures for the review of determinations of civil penalty or debarment under Labor Code section 1777.7 for violations of Labor Code Section 1777.5, relating to the employment of apprentices employed on public works. The Council proposes to adopt these regulations as section 232.01 - 232.70 of Title 8 of the California Code of Regulations.

GENERAL INFORMATION

Section 1777.5 requires that apprentices employed on public works shall be paid the prevailing rate of per diem wages for apprentices and shall only be employed in the trade for which the apprentice is registered. Among other things, Section 1777.5 also requires contractors on public works to employ apprentices at a specified ratio (unless the contractor qualifies for an exemption to the ratio), to provide specified information to applicable apprenticeship programs that can supply apprentices, and to make contributions to the Council in the same amount that the Director of Industrial Relations ("Director") has determined is the prevailing amount of apprenticeship training contributions in the area of the public works site.

Section 1777.7 imposes on a contractor who knowingly violates Section 1777.5 a civil penalty of no more than \$100 for each day of noncompliance. A second or subsequent violation of Section 1777.5 within a three year period is subject to a penalty of no more than \$300 for each day of

noncompliance. Section 1777.7 also provides that, if the Administrator of Apprenticeship ("Administrator") determines that a contractor has knowingly violated section 1777.5, the Administrator shall deny the contractor the right to bid on a public works contract for a period of up to one year for a first violation and for a period of up to three years for a second or subsequent violation.

Section 1777.7 also provides that within specified time limits an affected contractor may request a hearing to review of a penalty or debarment. The hearing shall be heard by a person designated by the Administrator possessing the qualifications of an administrative law judge pursuant to Government Code section 11502. A contractor seeking review of a decision by the Administrator following a hearing may do so by a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5.

Section 1777.7 (f) provides that the interpretation and enforcement of Section 1777.7 and Section 1777.7 shall be in accordance with regulations promulgated by the Council. The purpose of this rulemaking is to carry out that mandate and set forth appropriate procedures that give effect to specific statutory requirements and afford due process to the parties involved in these proceedings.

By these proposed regulations, the Council intends to provide a complete set of rules governing public works determinations from issuance of the determination through the preparation of a record following the decision of the Administrator. Some repetition of statutory language was necessary to make these rules the most coherent and accessible guide for parties who become involved in these cases. The Council anticipates that some participants in these cases will be non-lawyers who will find it easier to follow regulations that set out the procedures completely rather than having to go back and forth between the statute and rules.

Consideration was given to the alternatives of either incorporating these hearings into one of the Council's preexisting administrative hearing systems or just adopting the hearing rules of the Administrative Procedure Act (found at Government Code section 11500 and following) for these proceedings. However, in light of the peculiar requirements of Section 1777.5 and section 1777.7, particularly the short time limits for commencing the hearing (90 days after receipt of a request for review) and making a decision (45 days after the hearing), neither alternative seemed feasible. A further justification for these regulations is that they mirror regulations recently promulgated by the Department of Industrial Relations concerning prevailing wage determinations (CCR, title 8, subchapter 4, sections 187.01 - 187.70). For convenience, the Council's regulations have the same numbering as the Department's regulations.

PROPOSED REGULATIONS

The Council proposes to adopt sections 232.01 -232.70 as set forth below. The following statements apply to all of the proposed regulations unless otherwise indicated.

The Council did not rely upon technical, theoretical, or empirical studies, reports, or similar documents in making these proposals. The Council did consult legal authorities (case law, statutes, regulations, and legislative and regulatory histories) to identify suggested language, formats, and procedures, and to make sure that these proposals meet applicable legal standards. Citations to legal authorities that were consulted or construed are found in Reference notes and comments following the text of each proposed regulation as well as in the Notice of Proposed

Rulemaking.

Except as noted in the General Information above or as specified under an individual proposal below, no reasonable alternatives were identified by the Council nor have any reasonable alternatives been identified and brought to the attention of the Council at the time these regulations were proposed. The alternatives considered were in the nature of different regulatory schemes or for different language or standards for particular regulations. However, it was decided to model these regulations on recently promulgated by the Department of Industrial Relations concerning prevailing wage determinations (CCR, title 8, subchapter 4, sections 187.01 - 187.70). Because Section 1777.7 requires the Council to adopt regulations setting forth hearing procedures, alternatives to adopting regulations were not considered.

None of the proposals mandates the use of specific technologies or equipment.

These proposals impact only those parties who choose to participate in public works projects, and the Council believes that these proposals impose no significant mandates, costs, or savings that are different or distinct from what the Legislature has required by statute. The administrative hearing system created by the statute and these proposed regulations will likely result either in no greater cost or in some savings for the parties compared to the old system requiring direct court review.

The purpose of section 232.01 is to set forth the scope and application of the entire body of proposed regulations. The reason and necessity for this rule is to show what types of appeals are governed by these rules and what sorts of related proceedings are not governed by these rules. Subpart (c) clarifies that these rules do not preclude other authorized remedies for violations of the Labor Code.

The purpose of section 232.02 is to provide definitions of the following terms as those terms are used in these proposed hearing regulations: "Affected contractor;" "Administrator", "Debarment;" "Awarding body;" "Chief, DAS", "DAS", "Department;" "Director;" "Division;" "Hearing Officer;" "Joint Labor-Management Committee", "Party;" "Person;" "Representative;" "Responsible Officer", "Settlement Officer", "Surety;" and "Working Day."

The reason and necessity for these definitions is twofold: (1) to provide shorthand terms in place of cumbersome statutory language, similar to how certain defined terms are used in Court Form Interrogatories; and (2) to provide specific meanings for words or terms that might have multiple statutory or common usage meanings derived from other sources. It is not the intent of this regulation to redefine or provide additional substantive meaning to any statutory definition.

The purpose of section 232.03 is to provide rules for computing deadlines, including applicable extensions of time to respond or act when documents are served by mail. The reason and necessity for the rule is that time computation issues come up repeatedly in short deadline procedures such as this one; and it easier and more convenient for parties, especially non-lawyers, to explain when and how such rules apply rather than to require reference to a separate body of law under the Code of Civil Procedure.

The purpose of section 232.04 is to explain how Hearing Officers will be appointed, from what staff they will be obtained, what the minimum qualifications for appointment are (by reference to Government Code section 11502(b)), and what will preclude service in a given case (by reference to Government Code section 11425.30). The purpose of subpart (d) is to delegate the

Administrator's complete authority to appoint Hearing Officers to the Chief Counsel of the Office of the Director of Industrial Relations. The reason and necessity for the rule is to inform the parties how Hearing Officers will be selected and to allow for informed challenges should anyone question the propriety of a given appointment. The reason and necessity for subpart (d) to relieve the Administrator from the ministerial duty of signing off on appointments made by the Chief Counsel from the Chief Counsel's own staff. The Chief Counsel in effect will exercise the administrative duties of a presiding judge.

The purpose of section 232.05 is to set forth the general authority of Hearing Officers as well as to limit the Administrator's involvement to making or reconsidering a final decision. The reason and necessity for this rule is to inform parties of the scope of the Hearing Officer's authority as well as when and how matters will be presented to the Administrator. The alternative of giving the Administrator more supervisory authority during the course of the proceeding was rejected as being incompatible with the statutory time limits and the Administrator's other responsibilities.

The purpose of section 232.06 is to specify that hearing case records are public records. The reason and necessity for this rule is to avoid any dispute over the public's right of access to such records.

The purpose of section 232.07 is to set forth rules governing ex parte communications between parties and the Hearing Officer or the Administrator. The rule specifies what kinds of ex parte communications are or are not permissible and what procedures govern situations of uncertain effect or when an improper communication is received. The purpose of subpart (g) of this section is to set forth interpretive guidelines for ex parte communications with the Administrator. The reason and necessity for this rule is that the Administrative Adjudication Bill of Rights (Government Code sections 11425.10 and following) requires these kinds of hearing procedures to incorporate such standards, and this rule answers likely questions about what is or is not a proper communication and how certain situations will be handled. The reason and necessity for subpart (g) is to answer inevitable questions regarding how discussions of public works apprenticeship issues by the Administrator and the Chief, DAS and representatives of contractors or affected labor unions will be treated. The alternative of trying to completely insulate the Administrator from any related policy issue discussion during the entire pendency of any case appears to be neither feasible, nor required by law, nor compatible with the Administrator's role as a cabinet level officer.

The purpose of section 232.08 is to clarify a bonding company's or surety's right to intervene in a hearing on a determination and to specify how other non-parties may intervene or participate in a proceeding. Bonding companies and sureties may intervene as parties. An employee, labor union or joint labor-management committee that submitted the complaint that led to the determination may intervene, provided that there is no good cause to deny the intervention. Any other interested party may be allowed to intervene upon a showing of good cause. The reason and necessity for this rule is that the statute provides only an incomplete expression of how persons with some interest in a proceeding may obtain notice or assert their interest. (Such interested persons might include a non-appealing contractor, a bonding company or surety, or the affected employees or their union.) The Administrative Procedure Act permits but does not require an intervention rule. See *Lujan v. G & G Fire Sprinklers, Inc.*, 121 S.Ct. 1446 (2001).

The purpose of section 232.09 is to specify the right of a party to appear through an authorized representative who may be a non-lawyer, to clarify the role of the representative consistent in terms of receiving notices and controlling the party's case, and to set forth the duty of parties and representatives to keep all others informed of their current address and telephone number. The reason and necessity for this rule is to clarify that a party may be represented by a non-lawyer and that notices must go through the authorized representative. A copy of a proposed form Authorization For Representation By Non-Attorney is attached to this statement.

The purpose of section 232.10 is to sets forth rules for serving documents and providing a Proof of Service. The reason and necessity for the rule is that questions and issues related to the proper service of documents arise frequently, and are difficult for non-lawyers. This rule is simpler and more accessible than the alternative of requiring parties in all cases to refer to applicable sections of the Code of Civil Procedure.

The purpose of section 232.11 is to give the Hearing Officer discretion to authorize fax or e-mail service and filing in individual cases. The reason and necessity for the rule is to permit and encourage the use of such technology but not allow for their blanket use at this time. The Council recognizes that not everyone has access to the latest technology and that superior resources and technology can be used in ways that unduly burden or even abuse opposing parties. The Administrator also still needs to determine what systems and resources it will need to receive and manage case filings by fax or e-mail.

The purpose of section 232.12 is to indicate that required provisions of the Administrative Adjudication Bill of Rights apply to these proceedings and that the formal hearing rules of the Administrative Procedure Act do not apply. The reason and necessity for the rule is to assist parties in identifying how Administrative Procedure Act rules interrelate with these provisions. With regard to the APA's formal hearing rules, Government Code section 11425.10(a)(2) requires that parties be notified whether or not those rules are applicable.

The purpose of section 232.20 is to state the requirements for the contents and service of the determination of civil penalty or debarment. The reason and necessity for this rule is to put this information in one place without need for reference back to the statute and to clarify what information must be included so that an affected contractor or subcontractor is provided clear notice of what claims are at issue, where a Request for Review must be sent, and what the consequences are for not filing a timely Request for Review.

The purpose of section 232.21 is to set forth the right and requirements for an early settlement meeting between the affected contractor or subcontractor and the Chief, DAS. The purpose of subpart (c) is to clarify that the statutory right to an early settlement meeting does not preclude later settlement talks. The purpose of subpart (d) is to clarify that the deadline for filing a Request for Review is not extended by the process of requesting or conducting an early settlement meeting nor by the failure of the Chief, DAS to make this opportunity available. The reason and necessity for this rule is to expand upon and clarify rights and requirements set forth in Labor Code section 1777.7 and to clarify that this process neither limits nor expands other procedural rights or duties.

The purpose of section 232.22 is to specify that a Request for Review may be deemed filed on the

date of mailing and to clarify where to send and what information to provide in the Request for Review, which is the appeal document in these proceedings. The reason and necessity for this rule is to establish a date of filing for purposes of resolving timeliness questions and to specify that the Request must be served on the Administrator. The requirements as to the contents of the Request are needed to facilitate the Hearing Officer's ability to schedule a hearing of appropriate length within the time limits provided by the statute.

The purpose of section 232.23 is to establish a deadline and requirements for the Chief, DAS to transmit an appeal file to the Office of the Director. The reason and necessity for this rule is to provide a link between the filing of the Request for Review with the Chief, DAS and the transfer of the case to the Office of the Director, which then must schedule and conduct a hearing. Any significant delay in this transmittal would compromise the statutory intent for a prompt hearing.

The purpose of section 232.24 is to expand upon the Chief, DAS's statutory duty to disclose the evidence it intends to use at the hearing including by (1) providing a safe harbor for compliance [subpart (b)]; (2) specifying how witness information must be disclosed [subpart (c)]; setting forth an exclusionary rule [subpart (d)]; and providing limited exceptions to that exclusionary rule [subpart (e)]. The reason and necessity for this rule is to resolve questions and areas of dispute that are likely to arise with respect to the Chief, DAS' compliance with the statutory deadline for disclosing evidence.

The purpose of section 232.25 is to permit an affected contractor or subcontractor to withdraw a Request for Review and to provide procedures and time limits for seeking to reinstate a withdrawn Request. The reason and necessity for this rule is to address specifically the latter circumstance of a party wishing to reinstate a withdrawn request and to establish standards and limits for making that request.

The purpose of section 232.26 is to address the dismissal or amendment of a determination of civil penalty or debarment by the Chief, DAS. The proposal provides that a dismissal or amendment that reduces the sums at stake will usually be granted on notice; the purpose of the notice is to provide a "cooling off period" in which the chief, DAS may change its mind or another party may show that its rights will be compromised by the dismissal or amendment. To amend the claims upward, the Chief, DAS must establish "good cause" based upon new information; the purpose of this standard is to permit amendments when warranted but not allow them as a means to circumvent statutory rights. The reason and necessity for this rule is to address another inevitable procedural issue by recognizing and limiting the Chief, DAS' otherwise implied authority to dismiss or amend a determination..

The purpose of section 232.27 is to provide an early dismissal procedure where it appears on the face of an determination or a Request for Review that one or the other may not have been served or filed within the statutory time limits. The reason and necessity for the rule is to avoid the time and cost required for a hearing on the merits of a Request for Review where it appears obvious that the Administrator lacks jurisdiction to hear the case because either the determination or the Request for Review was untimely.

The purpose of section 232.28 is to clarify that a determination of civil penalty or debarment that has not been appealed is a "final order" within the meaning of the statute. The purpose of

subpart (b) is to set forth the continuing duty of Chief, DAS to retain penalties when an appeal remains pending as to at least one affected contractor or subcontractor. The reason and necessity for the rule is because certain enforcement rights attach to a final order, and the statute implies but does expressly state that a "final order" includes a determination that has not been appealed. Subpart (b) is needed to avoid premature dispersal of withheld contract payments when a determination has become final as to at least one but not every affected contractor or subcontractor.

Section 232.29 has been intentionally left blank. See Notice of Proposed Action.

The purpose of section 232.30 is to set standards for the scheduling of hearings and for the granting of continuances. The reason and necessity for this rule is to set standards for enforcement of the statute's 90 day deadline for starting the hearing that can be applied against inevitable requests for postponements. The tolling rule set forth in the final subpart is also needed to address circumstances beyond the Hearing Officer's control that per force will prevent the Hearing Officer from starting the hearing within the statutory deadline.

The purpose of section 232.31 is to provide for an optional prehearing conference procedure. The reason and necessity for this rule is to provide a standard mechanism for discussion and resolution of prehearing issues in order to facilitate the scheduling of the hearing on the merits and minimize any potential need to delay the hearing on the merits.

The purpose of section 232.32 is to permit multiple cases involving the same parties or issues to be consolidated and to permit consolidated matters to be severed. The reason and necessity for a consolidation rule is to conserve resources by permitting like matters to be considered together. Where significant issues of broad impact are involved, consolidation also brings the viewpoints of more parties along with a greater understanding of potential impacts to the table.

The purpose of section 232.33 is to set forth standards governing prehearing motions. The purpose of subpart (c) is to specify that such motions will usually be determined on paper, and the purpose of subpart (d) is to discourage prehearing motions going to the merits of the case. The reason and necessity for this rule is to set standards and limitations that allow for prehearing motions without impeding with the ability to proceed to the hearing on the merits.

The purpose of section 232.34 is to provide a procedure for the introduction of written testimony in lieu of having every witness testify in person. The reason and necessity for this rule is to provide for less costly and less time-consuming presentation of evidence, and to specify who bears the burden of producing the witness if another party requests the opportunity to cross-examine.

The purpose of section 232.35 is to authorize the issuance of subpoenas and subpoenas duces tecum. The reason and necessity for the rule is to provide a customary means through which a party to an administrative adjudication may exercise its due process right to confront witnesses.

The purpose of section 232.36 is to authorize the use of a Notice to Appear in lieu of a subpoena to compel the attendance of another party. The reason and necessity for the rule is to provide a legally recognized less costly alternative for compelling the attendance of party witnesses.

The purpose of section 232.37 is to limit circumstances under which parties will be permitted to conduct depositions and to preclude other forms of civil discovery. The reason and necessity for the rule is that the statute contemplates that most relevant evidence will have been investigated and disclosed either before or within 20 days after the Request for Review is filed. This appears to be the only discovery contemplated by the statute, and a rule that would permit other investigative discovery appears to be incompatible with the statutory 90 day deadline for starting the hearing.

The purpose of section 232.40 is to specify how parties will be notified of the appointment of a Hearing Officer and what procedures apply if a party objects to the person appointed. The reason and necessity for this rule is to provide a mechanism through which parties may enforce the standards governing who may serve as a Hearing Officer.

The purpose of section 232.41 is to state where hearings will be scheduled, how that location can be changed, and what constitutes a suitable location. The reason and necessity for this rule is to give parties notice of where their hearings will be scheduled as well an opportunity to identify and have the hearing moved to a more convenient location.

The purpose of section 232.42 is to set forth customary legal standards for the holding of an open adjudicative hearing by a Hearing Officer. The reason and necessity for this rule is to specify that these proceedings will be governed by these customary legal standards.

The purpose of section 232.43 is to set forth due process and other customary legal standards for the general conduct of an adjudicative hearing by a Hearing Officer. The reason and necessity for this rule is to specify that these proceedings will be governed by these customary legal standards.

The purpose of section 232.44 is to set forth how the rules of evidence and particularly how the hearsay rule will be applied in these proceedings. The reason and necessity for this rule is to specify that these proceedings will be governed by the customary legal standards concerning the admissibility of evidence in administrative hearings.

The purpose of section 232.45 is to authorize the Hearing Officer to take official notice (similar to judicial notice) of certain facts and information, including technical facts within the special expertise of the Department. The reason and necessity for this rule is to specify that these proceedings will include this conventional method for obtaining evidence.

The purpose of section 232.46 is to set forth the Hearing Officer's authority in the event of a party's failure to appear as well as the procedures through which a party may seek relief from the consequences of its failure to appear. The reason and necessity for this rule is to have an objective standard for handling party defaults that likely will occur from time to time.

The purpose of section 232.47 is to set forth the authority and procedures through which the Hearing Officer may certify a person for being in contempt or sanction a party for bad faith or frivolous tactics. The reason and necessity for this rule is to provide the Hearing Officer with the necessary means to control the proceedings and enforce the rules governing these proceedings.

The purpose of section 232.48 is to set forth standards and procedures for obtaining the services of an interpreter. The reason and necessity for this rule is that it is required by the Administrative Procedure Act and protects the rights and abilities of parties and witnesses who speak other languages, or who are hearing impaired, to both understand the proceedings and be understood.

The purpose of section 232.49 is to establish the Hearing Officer's control over the maintenance of the hearing record and to provide that hearings will be tape recorded unless a party requests and procures a court reporter or other means for recording the proceedings or unless no parties appear. The reason and necessity to provide parties with notice how the proceedings will be recorded as well as an opportunity to request and provide an alternative means for recording the proceedings.

The purpose of section 232.50 is to set forth the parties' respective burdens of coming forward with evidence and burdens of proof in a hearing. The reason and necessity for this rule is to recognize and clarify the differing burdens imposed by the statute for particular findings and determinations.

Section 232.51 intentionally has been left blank. See Notice of Proposed Action..

The purpose of section 232.52 is to specify how parties may present written and oral arguments. The reason and purpose for this rule is to acknowledge a customary due process right but allow for specific and customary controls and procedures that will assist the Hearing Officer in preparing a correct and prompt recommended decision.

The purpose of section 232.53 is to specify when the hearing is deemed concluded, particularly when additional filings are authorized after the end of taking testimony. The necessity and reason for the rule is to establish when the Administrator's statutory 45 day deadline for issuing a decision starts to run.

The purpose of section 232.60 is to set forth the statutory requirements for the contents and service of the Decision of the Administrator. The reason and necessity for this rule is to provide this information alongside the other rules for easy reference. Subpart (b) also harmonizes the statute and other rules by requiring that the Decision of the Administrator be served directly on a represented party as well as on that party's authorized representative.

The purpose of section 232.61 is to highlight and clarify the very limited time frame allowed by statute for the Administrator to reconsider a Decision. The purpose of subpart (d) is to specify that an application for Reconsideration is neither a prerequisite for seeking court review nor does it extend the time limit for seeking court review. The reason and necessity for this rule is to clarify the very limited scope of the Administrator reconsideration authority under Labor Code section 1777.7(b). The statutory language does not appear to allow for alternatives that would give the parties a greater opportunity to seek reconsideration or provide the Administrator with more time and flexibility to reconsider a Decision.

The purpose of section 232.62 is to specify what constitutes the Administrator's final decision for purposes of seeking court review and to further specify that the deadline for seeking court review

runs from the date of service of the Decision, including any applicable extension of time for service by mail. The reason and necessity for this rule is to clarify how to determine the deadline for seeking court review. The inclusion of an extension of time for service by mail is consistent with the statutory language requiring mail service of the Decision of the Administrator in accordance with Code of Civil Procedure section 1013.

The purpose of section 232.63 is to set forth and clarify the obligation of a party seeking court review to designate and pay for preparation of the hearing record. The reason and purpose for this rule is to incorporate and advise parties of a customary legal standard for having a record prepared for purposes of judicial review.

The purpose of section 232.70 is to provide a statute of limitations for violations of Labor Code section 1777.5.