



Board Governance Committee

Agenda Item 6a

September 24, 2018

Item Name: Process for Handling Harassment Allegations Against Board Members (Second Reading)

Program: Board Governance

Item Type: Action

Recommendation

Consider and discuss whether to approve the attached, revised draft policy for handling harassment allegations against Board members.

Executive Summary

At its August 2018 meeting, the Committee considered and discussed a draft policy for handling harassment allegations against Board members. The team has revised the policy in accordance with Committee feedback and has brought it back for the Committee's consideration and discussion.

Strategic Plan

This agenda item supports the 2017-2022 Strategic Plan's goal of cultivating a risk-intelligent organization.

Background and Analysis

In March 2018, the Board approved a revision to the Board Governance Policy explicitly applying CalPERS' Harassment, Discrimination, and Retaliation Prevention Policy (Attachment 1) to its own conduct, and emphasizing the responsibility of each Board member to vigorously and visibly promote a harassment-free and discrimination-free culture and work environment at CalPERS.¹ However, because the Board currently has no explicit process for handling such allegations against Board members (as opposed to team members), the Committee asked the team to research what other public agencies had done in this regard. Accordingly, at the May 2018 meeting, the Committee reviewed and discussed the only public agency policy the team was able

¹ Since one public commenter at the August 2018 meeting asserted that CalPERS has never had such a policy (the Harassment, Discrimination, and Retaliation Prevention Policy (HDRPP)) and one Board member requested a copy, the team has attached it to this agenda item. Hard copies of the HDRPP were distributed to all Board members shortly after it was revised in 2017. (Before being revised in May 2017, the policy was known simply as the Harassment Prevention Policy.)

to identify, which was the University of California Regents' Policy on Review of Allegations of Board Member Misconduct. (A copy of UC's policy is attached as Attachment 2.) UC's policy was an outgrowth of harassment allegations against a particular UC Regent, and UC had paid a highly-regarded national law firm to draft its policy. After reviewing UC's policy, the Committee asked the team to draft a policy modeled upon it.

At the Committee's August 2018 meeting, the team brought back such a draft policy based almost entirely on UC's policy. Committee members discussed several potential changes to the draft policy, and asked the team to return with a new draft reflecting, to the greatest extent possible, this discussion.

Since Committee members were not of one mind as to some of the suggested changes, this new draft (Attachment 3) presents options for the Committee to consider. As this would be the Board's policy, not the team's, the team makes no recommendation between these options.

The new draft is redlined to reflect the changes from the initial draft. The changes include:

- The original draft would have automatically constituted the advisory committee of two Board members, called the Review Panel, with the Board President and Vice President. The new draft assigns the President the responsibility to *appoint* the Review Panel, but does not dictate its membership.
- The original draft assigned the General Counsel responsibility to conduct the preliminary investigation and gave the General Counsel and the Review Panel the discretion to assign any formal investigation to an outside, non-CalPERS, investigator. The new draft *requires* that all investigations be assigned to an outside, non-CalPERS, investigator.
- The new draft contains language making explicit what was implicit with respect to the Board's inability to levy a sanction that would preclude a Board member from complying with her or his fiduciary duties.
- The new draft removes the requirement that upon a finding of a violation, the General Counsel, after consulting with the Review Panel, recommend an appropriate sanction to the Board. Instead, the Board will decide, in the first instance, the appropriate sanction, without a recommendation from the General Counsel.
- The new draft replaces the list of potential sanctions with the language from the Board Governance Policy regarding the sanctions that may be imposed for violating that policy. The new language is, "The types of sanctions that may be imposed on a Board member include, but are not limited to, admonishment, formal censure, temporary termination of a Board member's travel privileges, or the requirement of additional training." The Committee may wish to consider whether to add back any of the sanctions that have been deleted from the initial draft, which are: removal or suspension from a committee assignment, revocation of Board member privileges (i.e., language that is broader than the "temporary termination of a Board member's travel privileges" that is in the Governance Policy), and/or recusal from certain Board proceedings or decisions.
- The new draft contains language making even more explicit that any investigation should proceed with the utmost sensitivity to the privacy and other legitimate interests of both the complainant and the subject of the complaint.
- Since the initial draft contained multiple processes by which the subject of a complaint would be able to refute the allegations (see sections III(a), (b), and (c)) and since the

potential sanctions to be imposed under the policy are limited, the new draft does not add any additional processes. See, e.g., *Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 23-25 (holding that due process was satisfied where dentist suspected of fraudulent activity was provided with notice of, and an opportunity to respond in writing to, agency's decision to withhold payments for past and future billings).

Benefits and Risks

The benefit of adopting a policy creating a process for addressing harassment allegations against Board members is that in the event any such complaint arises, the Board would already have an efficient and effective process in place for handling it. In light of the recent rash of harassment allegations leveled against all manner of people in high places, putting such a policy in place now makes good sense and will help protect CalPERS' reputation in the event of a complaint.

The team has not identified any risk to adopting such a policy.

Attachments

Attachment 1 – CalPERS Harassment, Discrimination, and Retaliation Prevention Policy

Attachment 2 – University of California Regents Policy on Review of Allegations of Board Member Misconduct

Attachment 3 – (Revised) Draft Policy for Reviewing Allegations of Board Member Harassment

Matthew G. Jacobs
General Counsel