

PROPOSED AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTIONS 640 – 646

As Submitted by California Victim Compensation Board on April 1, 2022

§ 640. Presentation of Claim.

~~(a) Claims on behalf of persons erroneously convicted of felonies shall be filed on an “Erroneously Convicted Person Claim Form,” Rev. September 2011~~Rev. March 2022, hereby incorporated by reference, and provided by the Board or obtained on the Board’s website.

~~(a) Claimants must include an original and one copy of the following:~~

- ~~(1) completed claim form with a detailed factual summary signed under penalty of perjury, and;~~
- ~~(2) supporting documentation.~~

~~(b) The claim and supporting documentation may be submitted in electronic format as a PDF attachment to the Board’s designated email address. Claims emailed after business hours will be deemed received the next regular business day. Alternatively, the claim and supporting documentation may be sent by mail to the Board’s physical address and will be deemed received upon the date of arrival within the Board’s Legal Division. If the claim and supporting documentation are submitted in hardcopy only, an original and one copy are required.~~

~~(c) The supporting documentation must confirm the claimant was convicted of a felony in a California court, for which they served a term of imprisonment in either a state prison or county jail pursuant to subdivision (h) of Penal Code section 1170, and the claimant is no longer incarcerated for that felony conviction. The supporting documentation must also confirm the claim was timely submitted under Penal Code section 4901.~~

~~(d) Once received, a hearing officer will review the claim to determine whether all requisite elements for jurisdiction are satisfied and, upon such a determination, deem the claim filed.~~

~~(e) Upon receipt of a claim filing, the Board will provide the forward a complete copy of the claim and one (1) copy of the supporting evidence and documentation to the California Attorney General in either hardcopy or electronic PDF format. The Attorney General may offer evidence in support of or in opposition to the claim. If the Attorney General provides any evidence to the Board, it shall also provide a copy to the Claimant.~~

~~(1) Unless the automatic recommendation provision in either Penal Code section 851.865 or Penal Code section 1485.55 applies, the Board will request a response from the Attorney General. The response may offer evidence in support of or in opposition to the claim. The Attorney General’s response shall be submitted to both the Board and the claimant in hardcopy form with an electronic version in PDF format.~~

~~(2) The automatic recommendation provisions in section 851.865 and section 1485.55 do not apply if the claimant lacks a court finding of factual innocence for each and every conviction underlying their incarceration. A court finding of factual innocence for any individual conviction is binding upon the Board.~~

~~(e) Pecuniary injury may be established by showing that, the claimant was gainfully employed prior to being incarcerated; the claimant could have been gainfully employed if not for being incarcerated; or by other evidence showing that, as a result of being incarcerated, the claimant suffered a monetary loss but for the erroneous conviction, the claimant would not have been in custody.~~

Note: Authority cited: Section 13920, Government Code, Section 4906, Penal Code. Reference: Sections 851.865, 1485.55, 4900-49064904, Penal Code.

§ 641. Admissible Evidence in Support of Claim.

~~(a) In reaching its determination of the merits of the claim, claimant’s denial of the commission of the crime; reversal of the judgment of conviction; acquittal of claimant on retrial; or, the decision of the prosecuting authority not to retry claimant for the crime, may be considered by the Board but will not be deemed sufficient evidence to warrant the Board’s recommendation that claimant be indemnified in the absence of substantial independent corroborating evidence that claimant is innocent of the crime~~

charged.

(b) The Board may consider as substantive evidence the prior testimony of witnesses claimant had an opportunity to cross-examine, and evidence admitted in prior proceedings for which claimant had an opportunity to object.

(c) All relevant evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the claim.

(d) Evidence that qualifies under subdivision (c) may be admitted even though there is a common law or statutory rule which might make its admission improper over objection in any other proceeding.

(e) Objections to and arguments about evidence may be considered when determining the weight to be given to the evidence.

(f) The Board may also consider any other information that it deems relevant to the issue before it.

Note: Authority cited: Section 13920, Government Code-, Section 4906, Penal Code. Reference: Sections 4900-4906~~4904~~, Penal Code-, Section 210, Evidence Code.

§ 642. Rejection of Claim.

(a) Claims that are untimely or are otherwise not in compliance with Penal Code sections 4900 and 4901 will be rejected for lack of jurisdiction and will not be heard or considered by the Board.

(1) Successive or duplicative claims are not in compliance with Penal Code section 4900 or 4901. The Board will consider on the merits only a single claim by a claimant challenging the same underlying conviction.

(2) A claim solely based upon a vacated conviction pursuant to Penal Code section 1170.95 is not in compliance with Penal Code section 4900 or 4901. To be cognizable, the claim must allege that the claimant was erroneously convicted under the law in effect at the time the charged crime occurred.

~~(b) Prior to denying a hearing rejecting for failure to timely file a claim or for failure to state facts constituting a claim under~~ comply with the jurisdictional requirements of Penal Code sections 4900 and 4901, the claimant shall be:

(1) notified of the reason for rejecting the claim and,

(2) given thirty (30) calendar days to present evidence that will overcome the rejection.

(c) If the claimant's response provides sufficient evidence to prove that the claim was timely filed submitted and is otherwise compliant with the requirements of Penal Code sections 4900 and 4901, the claim will be ~~timely scheduled for a hearing~~ deemed filed as of the date the additional evidence was received.

(d) If the claimant's response does not provide sufficient evidence to prove that the claim was timely filed submitted and is otherwise compliant with the requirements of Penal Code sections 4900 and 4901, the claim will be rejected without a hearing and will not be considered by the Board.

Note: Authority cited: Section 13920, Government Code-, Section 4906, Penal Code. Reference: Sections 1170.95, 4900-4906~~4904~~, Penal Code.

§ 643. Pre-Hearing Conference Procedure.

(a) At the discretion of the hearing officer, the parties may submit a pre-hearing brief addressing the merits of the claim. The parties shall receive reasonable notice of the time to submit a pre-hearing brief. Either party may waive submission of a pre-hearing brief.

(b) Each party shall submit a pre-hearing statement that discloses (1) the name of every person the party intends to call as a witness at the hearing, (2) any exhibits to be proffered as evidence at the hearing, and (3) an estimate of the amount of time needed by the party to present their case at the hearing. The pre-hearing statement must be submitted at least seven days before the hearing or as otherwise directed by the hearing officer.

(ac) The hearing officer may conduct a pre-hearing conference in person or by electronic means.

- (bd) The parties shall receive reasonable notice of the time and location of a pre-hearing conference.
- (ee) A pre-hearing conference may address any of the following:
- (1) clarification of issues;
 - (2) identity of witnesses;
 - (3) exchange of witness lists;
 - (4) limitation of the number of witnesses;
 - (5) limitation of the scope of a witness' testimony;
 - (6) limitation of time allocated to a party's presentation of evidence;
 - (7) limitation of time allocated to a party's cross-examination of witnesses;
 - (8) exchange of exhibits;
 - (9) objections to evidence;
 - (10) order of presentation of evidence;
 - (11) order of cross-examination of witnesses;
 - (12) stipulations;
 - (13) pre-hearing motions; and
 - (14) any other matters that will promote the orderly and efficient conduct of the hearing.

Note: Authority cited: Section 13920, Government Code-, Section 4906, Penal Code. Reference: Sections 4900-49064904, Penal Code.

§ 644. Conduct of Hearing Before Hearing Officer.

(a) Upon receipt of a response from the Attorney General, a hearing on the claim will be scheduled, taking into consideration the availability of the parties, witnesses, and hearing officer. The hearing officer shall provide at least 15 days' notice to the parties of the date and location of the hearing. The claimant may waive the hearing and elect to proceed on the written record. For claims proceeding under subdivision (b) of Penal Code section 4900, the hearing may be waived only if both the claimant and Attorney General agree to proceed on the written record.

(ab) Hearings shall be open to public observation, unless otherwise provided by law.

(bc) Hearings will be conducted in Sacramento unless the Board the hearing officer agrees to an alternative location or appearance by electronic means.

(cd) The Except for claims proceeding under subdivision (b) of Penal Code section 4900, the claimant has the burden of proof on all issues necessary to establish eligibility, including innocence and injury.

(1) The standard of proof is a preponderance of the evidence.

(d2) The parties shall present evidence in the following order:

(1A) the claimant;

(2B) the Attorney General;

(3C) the claimant, if he or she they desires to offer any evidence or testimony to rebut the Attorney General's evidence or argument.

(e) For claims proceeding under subdivision (b) of Penal Code section 4900, the Attorney General has the burden of proof, by clear and convincing evidence, to prove the claimant committed the acts constituting the offense for which the claimant was convicted. The claimant continues to bear the burden to prove injury by a preponderance of the evidence.

(1) The parties shall present evidence in the following order:

(A) the Attorney General;

(B) the claimant;

(C) the Attorney General, if they desire to offer any evidence or testimony to rebut the claimant's evidence or argument.

(D) the claimant, if they desire to offer any evidence or testimony on the issue of injury.

(2) The claimant's burden to prove injury is satisfied upon a showing that each and every conviction underlying their incarceration was vacated by either a writ of habeas corpus or motion pursuant to Penal Code section 1473.6 or subdivision (a)(2) of section 1473.7, and all charges were subsequently dismissed or ended in acquittal without any new conviction for a lesser offense. If the claimant sustained a new conviction upon remand for a lesser offense,

then the claimant's injury is presumptively calculated as the difference in length between the sentence served for the original conviction and the sentence imposed for the new conviction.

- (ef) The hearing officer may determine the amount of time allotted to present a claim for compensation. The determination made under this subsection shall be based on the following factors:
- (1) complexity of legal or factual issues;
 - (2) necessity to evaluate credibility of witnesses for a proper determination of issues;
 - (3) parties' representation by legal counsel;
 - (4) necessity of witnesses being subject to cross examination for the proper determination of issues; and
 - (5) any other factor likely to affect a just and proper determination of issues.
- (fg) If a claimant fails to appear at the hearing or fails to proceed, the Board may base its decision on previously submitted evidence.
- (gh) A party that requests that all or part of a hearing be conducted by electronic means under California Code of Regulations section 617.4 may be responsible for providing, operating, and paying for all necessary equipment.
- (hi) The hearing will be recorded by electronic means at the expense of the Board.
- (ij) Any party may request the Board to arrange for the preparation of a hearing transcript. The party requesting the preparation of a hearing transcript shall bear all costs for its preparation and shall provide one copy of the transcript to the Board at no cost to the Board.
- (jk) The hearing officer may allow or request the parties to submit post-hearing briefs.
- (1) Post-hearing briefs shall be limited to legal and factual arguments related to relevant issues under section Penal Code sections 4900 et seq. or identified by the hearing officer.
 - (2) The hearing officer shall inform the parties of the deadline for the submission of a post-hearing brief.
- (kl) In a hearing in which post-hearing briefs were not allowed or permitted, the hearing record shall be closed upon the conclusion of testimony and presentation of any oral argument by the parties, unless the hearing officer orders otherwise.
- (lm) In a hearing in which post-hearing briefs were allowed or permitted, the hearing record shall close at the deadline for the submission of post-hearing briefs, unless the hearing officer orders otherwise or grants an extension.
- (mn) No argument will be considered by the hearing officer after the close of the hearing record, except as allowed in California Code of Regulations section 619.4, unless the hearing officer orders otherwise.
- (no) The hearing officer retains the discretion to reopen the hearing record for good cause.
- (op) The formal hearing provision of the Administrative Procedure Act (Government Code §§ 11500-11529) do not apply.
- (pq) If there is any inconsistency or conflict between the provisions of California Code of Regulations Article 2.5 and this article, the provisions of this article shall apply.
- (qr) At the request of the claimant, the Attorney General, or other interested party, the Board will provide information about the hearing rules and procedures.

Note: Authority cited: Section 13920, Government Code, Section 4906, Penal Code. Reference: Sections 4900-49064904, Penal Code; Diola v. Board of Control (1982) 135 Cal.App.3d 580, 588, fn 7; and Tennison v. Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164.

§ 645. Proposed Decision by Hearing Officer.

- (a) The hearing officer shall take the matter under submission ~~at the conclusion of the hearing~~ once the administrative record is closed.
- (b) The hearing officer shall prepare a proposed decision that is written and contains a statement of the factual and legal bases for the proposed decision.
- (c) If the factual basis for the proposed decision includes a determination based substantially on the credibility of a witness, the proposed decision shall identify specific evidence that supports the credibility determination, which may include but is not limited to demeanor, manner or attitude.

(d) The proposed decision shall be based on evidence in the hearing record and on matters subject to official notice under California Code of Regulations section 617.8.

(e) The hearing officer may use relevant experience, technical competence and specialized knowledge to evaluate the evidence.

(f) The proposed decision may not deny a claim solely because the claimant failed to obtain a court finding of factual innocence.

Note: Authority cited: Section 13920, Government Code-, Section 4906, Penal Code. Reference: Sections 1485.55, 4900-4906~~4904~~, Penal Code.

§ 646 Contempt and Sanctions.

(a) Any party, representative, or witness in a proceeding under Penal Code section 4900 may be subject to a contempt sanction as set forth in California Code of Regulations section 618.3. A contempt sanction may be based upon any threat of violence directed toward any participant in the proceeding under section 4900, including the hearing officer, Board, or any other staff member, whether made during or after the proceeding has concluded.

(b) Any party, representative, or witness in a proceeding under Penal Code section 4900 may be subject to sanctions as set forth in California Code of Regulations section 618.4.

Note: Authority cited: Section 13920, Government Code, Section 4906, Penal Code. Reference: Sections 11455.10, 11455.20, 11455.30, Government Code.