

ACERA DISABILITY RETIREMENT PROCEDURES

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1. GENERAL PROVISIONS

1.1 Purpose.

These Disability Retirement Procedures of the Alameda County Employees' Retirement Association ("ACERA") govern the filing of and proceedings, decisions, and review of decisions relating to Applications for disability retirement under the County Employees Retirement Law of 1937 ("CERL '37"). The ACERA Board of Retirement shall secure medical, investigatory and other services and advice necessary to carry out the purpose of the CERL '37.¹

1.2 Resolution of Conflicting Provisions.

ACERA is governed by the CERL '37. If a conflict should arise between these procedures and the CERL '37, the CERL '37 will prevail.

1.3 Disability Procedures and Amendments.

These Disability Retirement Procedures became effective November 1, 2006, at which time all prior procedures for disability retirement applications, whether written, formal, or informal, were repealed. Amendments to these Procedures were adopted by the Board on December 18, 2008 and shall be effective on January 1, 2009, including retroactively applying to all current and pending applications on January 1, 2009.

1.4 Amendments to Disability Retirement Procedures.

These Disability Retirement Procedures may be amended at any regular or specially noticed meeting of the Alameda County Employees' Retirement Association Board of Retirement ("Board") by a majority vote of the Board.

In order to facilitate the orderly and efficient implementation of these procedures, the Board hereby delegates to the Chief Executive Officer the authority to approve amendments of a minor, non-substantive nature that do not alter the fundamental rights and responsibilities of any parties in the disability retirement process. The scope of this delegation of authority includes, but is not limited to, typographical errors, format revisions, conforming terminology, revision of forms, and similar types of amendments.

1.5 Definitions.

"Accommodation" means modified work conditions or work environment to permit a Member to substantially perform the usual duties of his or her job classification consistent with any limitations reasonably required by medical condition, including, but not limited to, the establishment of a permanent light duty position for that purpose.

¹ Gov. Code § 31732.

“Agency/Department Statement” means the form provided by the D.U. to the Employer that requests information needed from the Member’s Department. The *Agency/Department Statement* shall list all actions and efforts undertaken to accommodate the Member or find alternative employment within the capacity of the Member to perform, and the results of such action and efforts, or a detailed explanation as to why such efforts were not undertaken.

“Applicant” means the person or entity filing the Application for disability retirement benefits under the CERL ’37, including a Member of the Alameda County Employees’ Retirement Association, the Employer, the Board or its agents, or any other person on the Member’s behalf entitled to claim disability retirement benefits on behalf of a Member.²

“Application Date” means the date an Application meeting all requirements of a Completed Application is filed and accepted by ACERA.

“Application Form” means the form obtainable through the ACERA office. Once an Application is submitted to ACERA, it becomes one of the following types of applications:

- a. **“Application (Submitted)”** refers to an Application and associated documents that have been submitted to ACERA.
- b. **“Amended Application”** refers to a Completed Application to which changes have been made. The filing date for an Amended Application is determined by the Disability Unit (“D.U.”) or the Hearing Officer. The filing date for an Amended Application is either the date the Amended Application is deemed complete, or the date the original Completed Application was filed, after review and determination by the D.U.
- c. **“Completed Application”** refers to an Application that has been reviewed and determined by the Disability Unit to include all necessary attachments and information. The filing of a Completed Application triggers the administrative process and all applicable deadlines. To be considered a **“Completed Application,”** the following requirements must be met:
 - i. all pages must be intact and in order;
 - ii. all questions must be answered and all responses to questions must be legible;
 - iii. the Member’s claim for disability retirement must be clearly set forth in detail;
 - iv. all requested reports and documents must be included per **Section 2.5**. All reports and documents must be legible. All relevant medical documents must be attached per **Section 2.5b**, including at least one report stating the Member’s condition is permanently incapacitating;
 - v. a copy of the Member’s most recent *Description of Employee’s Essential Job Functions* (“EFJA”) must be attached (the EFJA is obtainable through the Employer’s Human Resources Department);
 - vi. the *Designation of Right to Legal Representation* Form must be completed if an attorney is representing the Member;
 - vii. the *Authorization to Obtain and Release Records and Information* must be fully completed, dated and signed by the Member; and

² Gov. Code § 31721.

viii. one original Application with all attachments responsive to **Sections 2.5 a. – 2.5 d.** must be submitted to ACERA.³

- d. “Employer Application”** refers to an Application submitted by an Employer on behalf of the Member.
- e. “Expedited Application”** refers to a Completed Application that has been reviewed and approved for expedited administrative review. Under rare circumstances, the Application is entitled to expedited administrative review. [See **Section 3, infra.**] Only ACERA Chief Counsel can designate an Expedited Application.

“Application Process” means the process of reviewing and making a determination on the Completed Application. The Application Process begins once a Submitted Application is designated a Completed Application, and continues until the D.U. provides written notification of the Board’s decision.

“Association” means the Alameda County Employees’ Retirement Association (“ACERA”).

“Beneficiary” means a person or entity that is designated to receive something as a result of a legal arrangement or instrument.

“Board” means the Board of Retirement of the Alameda County Employees’ Retirement Association.

“Board Consideration Date” means the date on which the Completed Application, Disability Packet, Medical Advisor’s Recommendation, any Hearing Officer decision, and the administrative report of the D.U. are presented to the Board for consideration and decision.

“CERL ‘37” means the County Employees Retirement Law of 1937 at California Government Code Sections 31450 - 31898.

“Chief Counsel” or **“ACERA Chief Counsel”** means the in-house attorney working for and representing ACERA. Duties of ACERA Chief Counsel may be delegated to an ACERA Associate Counsel.

“Chief Executive Officer” (C.E.O.) means the person appointed by the Board as executive for the management of the Alameda County Employees’ Retirement Association.

“Comment Paper” means the document that may be prepared by each Party, prior to the Disability Packet being sent to the Medical Advisor, setting forth that Party’s position or comments related to the Disability Packet.

“Contested” refers to a decision and/or recommendation that is objected to or opposed by a Party.

³ Gov. Code §§ 31721, 31722.

“County Counsel” means the Office of the County Counsel of Alameda County, which represents certain Employers, including Alameda County, in disability retirement proceedings.

“Days” means calendar days. When “days” is intended to refer to business days, it is noted in these Procedures.

“Deny or dismiss the Application “with prejudice” means the Application is denied and the Applicant and/or Member may not re-file another disability application based on the same injury or impairment.

“Deny or dismiss the Application “without prejudice” means the Application is denied and the Applicant and/or Member may later refile a disability application based on the same injury or impairment, if all procedural and legal requirements are met.

“Department” means the office, division, or department in which the Member was last employed. The person responding for the Department may include the Department Representative or Department Manager.

“Department Manager” or “Department Representative” means the person designated to address and respond to disability retirement issues within the office, division or department in which the Member was last employed.

“Deposition” means testimony taken under oath, subject to cross-examination, and preserved in writing.

“Description of Employee’s Essential Job Functions” (EFJA) means an Employer’s summary of the Duties and requirements of any particular job, which includes mental and physical demands. This document is provided to the Medical Adviser and used to determine whether an employee is capable of performing his or her job.

“Disability” or “Disabled,” for purposes of disability retirement, means permanent incapacity (physical or mental) for the performance of duty.⁴ “Incapacitated for the performance of duty” means the substantial inability of the Applicant to perform his usual Duties.⁵ If a Member is awaiting surgery related to the injury or impairment on which the disability application is based, the Member may not be “permanently incapacitated,” and therefore may need to wait to file the Application until post-surgery recovery is completed.

“Disability Coordinator” (D.C.) means an ACERA Retirement Specialist staff member appointed to handle the processing of disability matters.

“Disability Manager” (D.M.) means the ACERA Manager appointed by the C.E.O. to oversee the Disability Unit, the Disability Coordinators, and the processing of all disability matters.

“Disability Packet” means the Completed Application and all relevant documentation received during the Application Process, including information from the Employer. [See **Section 2.10 a.**]

⁴ Gov. Code § 31724.

⁵ See *Mansperger v Public Employees’ Retirement System* (1970) 6 Cal.App. 3d 873, 876.

“Disability Unit” (D.U.) means the group of ACERA employees that handles the processing of all disability matters. The D.U. includes the Disability Coordinators, and the Disability Manager.

“Duties” means the usual duties of a position that the individual who holds the position must be able to perform, with or without reasonable accommodations.

“Earlier Effective Date” means the date a disability retirement allowance begins if earlier than the Completed Application date. An earlier effective date may only be granted upon a showing that the filing of the Member’s Completed Application was delayed by administrative oversight or by inability to ascertain the permanency of the Member’s incapacity until after the date following the day for which the member last received regular compensation.

“Effective Date” means the date a disability retirement allowance begins, if the Application is granted. This is the date a Completed Application is filed, but not earlier than the day following the last day for which the Member last received regular compensation.

“Employer” means the public agency, including the County of Alameda or district,⁶ by which the Member is employed at the time that, or immediately before, the Application is submitted to ACERA. Districts include: (1) First 5, Alameda County; (2) Livermore Area Recreation and Park District; (3) Housing Authority of Alameda County; (4) Alameda County Medical Center; (5) Superintendent of Schools; and (6) Alameda County Superior Court.

“Employer Representative” means the Department or individual identified by the Employer as responsible for coordinating the handling of disability retirement applications for the Employer, such as the risk management or human resources department.⁷

“Expedited Administrative Review” is an expedited procedure for the processing of an Application when extenuating circumstances exist. Extenuating circumstances may exist when a Member has suffered a sudden and catastrophic injury that results in a permanent incapacity of the Member to perform his Duties, or when a Member is terminally ill. [See Section 3.]

“He, him, his, Chairman” are terms used for convenience. It is intended that each gender be given exactly equal respect and treatment throughout.

“Hearing Officer” (H.O.) means the person who conducts administrative hearings on the Board Medical Advisor’s recommendation or other issues related to an application for disability retirement. A Hearing Officer must be a current member of the State Bar of California whose name is contained on the approved Hearing Officer panel, or a member of the Board of Retirement.⁸

⁶ Gov. Code § 31478.

⁷ For disability retirement applications submitted by ACERA employees other than the ACERA C.E.O., the ACERA C.E.O. shall be deemed the “Employer Representative.” Should a Disability Application be submitted by the ACERA C.E.O, the ACERA Board shall be deemed the “Employer Representative.”

⁸ Gov. Code § 31533.

“Independent Medical Evaluation” (I.M.E.) means an examination of Member by a physician, psychologist, or specialist with expertise relative to the medical condition identified in the Completed Application. [See Section 5.]

“Job Description” means the current description of a Member’s position as provided by the Employer, usually on a *Description of Employee’s Essential Job Functions* form.

“Job Specification” means the current description of the general job duties, minimum qualifications, required knowledge and abilities, salary, and benefits, of a Member’s position as provided by the Employer.

“Legal Department” means the in-house attorneys working for and representing ACERA. The Legal Department includes the Chief Counsel, Associate Counsels, and Legal Assistants.

“Medical Advisor” (M.A.) means the physician(s) advising the Board on medical matters pertaining to disabilities.

“Medical Witness” means any witness testifying in a Hearing as to the medical condition, past, present or future, of the Member. Generally, a Medical Witness is a physician, surgeon, a person holding an M.D. or D.O. degree, a psychologist, optometrist, dentist, podiatrist, or chiropractic practitioner, licensed by the State of California.

“Member” means a member of the Alameda County Employees’ Retirement Association.

“Non-Service-Connected Disability Retirement” (NSCD) means a type of disability retirement awarded to a Member of ACERA who becomes permanently incapacitated from performing his usual duties from a cause that is not found related to the Member’s employment. The Member must have completed five (5) years of service and must not have waived retirement in respect to the particular incapacity or aggravation to qualify for a Non-Service-Connected Disability Retirement.⁹

“Original Hearing Date” means the first date set with a Hearing Officer for hearing on a Completed Application. The Original Hearing Date is the trigger for calculating and setting future dates. Only Completed Applications that are contested and for which a hearing is requested will have hearing dates.

“Party” means the Member who is the subject of the application, the person preparing and submitting the application (Applicant), and the Employer.

“Permanent Incapacity for the Performance of Duty” means an impairment of the Member’s body and/or mind which causes the Member to be substantially unable to perform those usual duties of the position last held by the Member. A Member need not be able to perform each and every duty of the Member’s position. A Member is not permanently incapacitated if the duties can be performed with accommodation. A Member is not considered permanently incapacitated when the Member unreasonably refuses medical treatment (including surgery) or other remedial treatment available in California if the probabilities are substantial that such treatment will restore the Member to capacity within a reasonable period of time and the risk of harm from such treatment would not deter a reasonable person from submitting to the same.¹⁰

⁹ Gov. Code §§ 31009, 31720.

¹⁰ See *Reynolds v City of San Carlos* (1981) 126 Cal.App.3d 208, 216.

“Prehearing Statement” means the *Prehearing Statement Form* that each Party must complete and serve on the Hearing Officer and all other Parties, and which must contain: (1) a statement of the contested issues and the position of the Party; (2) information concerning witnesses and their testimony; and (3) any documentary evidence being offered that is not included in the Disability Packet. [See **Section 6.11.**] Parties may attach a legal brief to the required *Prehearing Statement Form*.

“Procedures” means the ACERA Disability Retirement Procedures set forth herein, which govern the filing of, and proceedings, decisions, and review of decisions relating to an application for disability retirement under the CERL ‘37.

“Reciprocal Systems” mean those retirement systems which have established reciprocity with ACERA for the provision of retirement benefits. Reciprocal Systems are the CERL ‘37 Counties, the Public Employees’ Retirement Systems (“PERS”), the State Teachers’ Retirement System, the Judges’ Retirement System, and retirement systems of any other public agency of the State of California that have established reciprocity with PERS subject to the conditions of Government Code § 31840.2.¹¹

“Regular Compensation” means the regular remuneration paid in cash out of Employer funds, including regular salary or wages, vacation, and sick leave taken during the period of employment.¹²

“Service-Connected Disability Retirement” (SCD) means the type of disability retirement awarded to a Member of ACERA who becomes permanently incapacitated from performing his usual Duties and whose incapacity is a result of injury or disease arising out of and in the course of the Member’s employment, and such employment contributed substantially to such incapacity. The Member must not have waived retirement in respect to the particular incapacity or aggravation to qualify for a Service-Connected Disability Retirement.¹³

“Subpoena” means an order issued by the Board or Hearing Officer directed to a person, which requires the person’s attendance at a particular time and place to testify as a witness.¹⁴

“Subpoena duces tecum” means a subpoena that requires the person to whom the subpoena is directed to bring to hearing any books, documents, or other things under the person’s control that are pertinent to the issues presented in the disability retirement case.¹⁵

“Uncontested” refers to a decision and/or recommendation that is not objected to or opposed. When a decision and/or recommendation is referred to as “uncontested,” it does not necessarily mean that all Parties are in agreement with the decision and/or recommendation. The Board retains the discretion to grant or deny an uncontested recommendation at its discretion.

¹¹ Gov. Code § 31831.

¹² *Katosh v. Sonoma County Employees’ Retirement Association* (2008) 163 Cal App. 4th 56; (see also Gov. Code § 31460.)

¹³ Gov. Code § 31720(a).

¹⁴ Gov. Code § 31535, Code Civ. Proc. § 1985.

¹⁵ Gov. Code § 31535, Code Civ. Proc. § 1985.

1.6 Quorum and Voting Requirements.

Five (5) Board members shall constitute a quorum for a decision by the Board pursuant to the provisions of these Procedures. With respect to any such decision after a hearing, no findings of fact or decision by the Board shall be valid or effective without the votes of a majority of all Board members present. In any disability matter, any Board member who has not reviewed the record which was provided to the entire Board for consideration shall not vote.

1.7 Representation by Counsel.

Any Party is entitled, at the Party's expense, to be represented by an attorney at any and all stages of the disability retirement process. A Party must file with the D.U. a written notice of hiring, changing, or dismissal of an attorney. Once written notification is received by the D.U. that a Party has obtained an attorney, all notices and documents shall be sent to that attorney. Absent such written designation, the D.U. is not obligated to recognize any attorney claiming to represent a Party.

No Applicant or Member is required to have an attorney at any time.

Should a Party choose to be represented by an attorney, the attorney must be licensed by the California State Bar and currently in good standing.¹⁶

1.8 Communication with Individual Board Members.

The Board is the decision-maker for all disability retirement applications. As such, communications concerning the merits or substance of an Application between any Board member and Parties or their representatives are forbidden until such time as the Board issues its decision. Violations of this rule may result in the Board member being found ineligible to participate in any discussion regarding the Application, or vote on the Application.

1.9 Stipulations to Award Disability Retirement Benefits.

No stipulation or agreement, either written or verbal, or formal or informal, which agrees to the denial or granting of disability benefits, is binding on ACERA, the Board, or the D.U. or other representative, unless approved by the Board.¹⁷

1.10 Waiver and Modification of Requirements under Disability Retirement Procedures.

Upon the stipulation of all Parties and ACERA Chief Counsel, any provision of these Procedures, in whole or in part, may be waived or modified. After a Hearing Officer has been appointed, the Hearing Officer must also approve any new stipulation if he/she has not yet issued Findings of Fact and Recommended Decision.

¹⁶ Bus. & Prof. Code § 6125.

¹⁷ See *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 736; *McCoy v Board of Retirement* (1986) 183 Cal.App.3d 1044, 1048, fn.2, 1055; *Traub v Board of Retirement* (1983) 34 Cal.3d 793; *Summerford v Board of Retirement* (1977) 72 Cal.App.3d 128, 132; *Harmon v Board of Retirement* (1976) 62 Cal.App.3d 689, 697; *Grant v Board of Retirement* (1967) 253 Cal.App.2d 1020, 1021; *Flaherty v Board of Retirement* (1961) 198 Cal.App.2d 397, 406.

1.11 Confidential Records.

All individual records of Members (including, but not limited to, reports, sworn statements, medical reports and records, applications, notices, orders, and findings and decisions relating to an application for disability retirement) are confidential and shall not be disclosed by ACERA to anyone except as set forth in these Procedures or upon order of a court of competent jurisdiction, or upon written authorization by the Member.¹⁸

1.12 Closed Sessions.

Substantive discussion by the Board related to an application for disability retirement shall be held in closed session.¹⁹ The general public is excluded during closed sessions, but the Parties may be present.²⁰

The Member may make a written request to have the Board consider an application for disability retirement in open session.

1.13 Forms.

The Board or its Chief Counsel shall approve all forms required under these Procedures. Whenever forms are available for use, unless otherwise directed, they shall be used by all Parties.

1.14 Access to Board Records.

Prior to the Board Consideration Date, a Party or a Party's counsel may request a copy of all administrative reports, Medical Advisor Recommendations, Hearing Officer *Findings of Facts and Recommended Decision*, and medical records, which are presented by the D.U to the Board for its consideration of the Completed Application.

1.15 Service of Documents.

- a. When a provision of these Procedures requires that Parties be served, service shall be made upon the D.U., counsel for the Employer, and all Parties who are participating in the proceedings.
- b. If the Party to be served has an identified attorney of record, service shall be made upon the attorney of record in accordance with this Section.
- c. Unless otherwise provided in these Procedures, service may be made either personally or by mail in accordance with this Section. Service may be made by fax, if previously agreed to by the Party to be served. Any document served by fax must also be sent by regular US mail with first class postage fully prepaid.

¹⁸ Gov. Code § 31532.

¹⁹ Gov. Code §§ 31532, 54957(b)(1), 54957.1(a)(5), 54956.9; See also 88 Ops. Cal. Atty. Gen. 16 (2005)

²⁰ See 88 Ops. Cal. Atty. Gen. 16 (2005); See also Gov. Code §§ 31532, 54957(b)(1), 54957.1(a)(5) and 54956.9.

- d. Service by mail is completed by sealing the item to be served in an envelope properly addressed to the Party to be served, and depositing the envelope in the United States mail, with first class postage fully prepaid. Service by mail shall extend applicable time limitations by three (3) calendar days. A deadline for service of documents that falls on a weekend or County holiday shall be extended to the next business day. For purposes of determining the effectiveness of service upon a Member, a mailing shall be deemed “properly addressed” if it bears the address specified on the Application, or, if the Application has been amended, the address specified on the most recently filed Amended Application, or listed on any change of address made in writing with copies to all Parties.
- e. It is the responsibility of the Member to notify the D.U. and all Parties of any change of address.
- f. Anytime service is required on the Board, it shall be done by service on ACERA Chief Counsel.

1.16 Penalties for Failure to Comply with Disability Retirement Procedures.

- a. All Parties.
Failure of any Party to comply with these Procedures or any direct order of the Board or Hearing Officer may be grounds for sanctions, as set forth in **Section 1.17**, below.
- b. Member or Applicant.
Failure of the Member or Applicant to comply with these Procedures may be treated as non-cooperation and may result in sanctions and/or dismissal of the Application with prejudice (see Section 1.17, below and **Section 2.12(b)(iii)**.) Failure to comply includes, but is not limited to, failure to submit to medical examinations (**Sections 4.2, 5**), failure to submit documents requested by the D.U., failure to cooperate in completing the formal hearing record, failure to follow any order of the Board or Hearing Officer, and failure to comply with the requirements set forth in these Procedures.

The D.U. may withdraw an Application with or without prejudice due to but not limited to an Applicant’s failure to comply with these Procedures, to submit required documents, to cooperate, or to timely respond to requests for information, as provided by **Section 2.12(b)(iii)**.

- c. Employer.
Failure of the Employer and/or its agents to comply with these Procedures may be treated as non-cooperation and may result in sanctions (see Section 1.17, below.) Failure to comply includes, but is not limited to, failure to submit documents requested by the D.U., failure to cooperate in completing the formal hearing record, failure to follow any order of the Board or Hearing Officer, and failure to comply with the requirements set forth in these Procedures.

1.17 **Sanctions.**

Upon a motion brought pursuant to **Section 1.18**, the Board or Hearing Officer may impose evidentiary sanctions against any Party on any grounds that would support such sanctions in a superior court civil matter.

The Hearing Officer may recommend to the Board that an Application be withdrawn with or without prejudice as a sanction.

At the Board Consideration Date, the Board may, with or without the recommendation of a Hearing Officer, withdraw an Application with or without prejudice.

1.18 **Motions.**

Any Party may move, in writing, for an order to compel any other Party to comply with the requirements of these Procedures, or the CERL '37. The moving party shall be deemed the "Filing Party," and the responding party shall be deemed the "Respondent Party." The motion shall be submitted to the Hearing Officer, or, if no Hearing Officer has been assigned, to the Board through its Chief Counsel. The Chief Counsel may, at its discretion, refer the matter to be assigned to a Hearing Officer. Prior to submitting a motion under this section, the Filing Party shall first attempt to resolve the issue with the Respondent Party. A motion, which may be made in the form of a letter, shall include the following:

- a. A summary of all relevant facts, including a description of efforts made to resolve the dispute informally, and the reasons given by the Respondent Party for non-compliance;
- b. A clear statement of the relief sought;
- c. Legal or factual support for the motion, such as points and authorities; and
- d. An affidavit or certificate of service upon all Parties (or their attorney), ACERA Chief Counsel, and the D.U.

The Respondent Party, and any other Party, shall have **ten (10) days (or the amount of time as determined by the Hearing Officer)** from the date the motion is served to submit written opposition or support. Such opposition or support shall be served on all Parties (or their attorney), ACERA Chief Counsel, and any Hearing Officer.

Upon the expiration of the time allowed for opposition, the Hearing Officer, or the Board if no Hearing Officer has been assigned, shall either grant or deny the motion without a hearing, or set a hearing on the motion.

2. APPLICATION FOR DISABILITY RETIREMENT

2.1 Basis for Application.

A disability retirement Application must be based upon permanent physical or psychological incapacity, or a combination of both. The Application and supporting documentation must clearly identify the exact nature of the incapacity that is the basis for the Application. A disability retirement shall not be granted except for those incapacities stated in the Completed or Amended Application and proven to the satisfaction of the Board.

2.2 Minimum Eligibility Requirements for Disability Retirement.

For a Member to be considered eligible for disability retirement, each of the following minimum requirements must be met:

- a. A Completed Application is timely filed.²¹ [See also Section 2.4 below.]
- b. The Member is permanently incapacitated either physically and/or mentally for the substantial performance of duty.²²
- c. The Member has (i) a service-connected disability, or (ii) a non-service connected disability. In the case of a non-service-connected disability, the Member must be credited with at least five years of service.²³
- d. The Member must purchase or redeposit any available service years needed to achieve eligibility prior to submitting the disability retirement application.²⁴
- e. The Member must not have waived disability retirement with respect to the particular incapacity or aggravation thereof.²⁵
- f. The Member must comply with requests for medical documentation of the incapacity, including submission to any medical examinations.

If a Member has been terminated for cause he may be ineligible for disability retirement.²⁶

2.3 Making the Application and Subsequent Amendments.

- a. Application.
Upon request, the D.U. shall furnish an Application Form for disability retirement benefits to any person authorized to file an Application. The Applicant must complete the Application Form in accordance with these Procedures and the instructions provided with the Application Form. The Application shall be signed by the Applicant under penalty of perjury.

²¹ Gov. Code § 31722.

²² Gov. Code § 31724.

²³ Gov. Code § 31720.

²⁴ Gov. Code §§ 31641.1, 31652(a), 31720(b).

²⁵ Gov. Code § 31720(c).

²⁶ See *Haywood v American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297; *approved and explained*, *Smith v City of Napa* (2004) 120 Cal.App.4th 194, 203.

An Application must include the Member and Applicant's home address and telephone number, even if the Applicant is represented by an attorney. It is the responsibility of the Applicant and the Applicant's attorney, if the Applicant is represented, to notify the D.U. and other Parties of any change of address and/or telephone number.

An Application Form, or document filed in support thereof, that is incomplete or illegible may be rejected for filing or, if filed, may be summarily rejected by the D.U. at a later time as an incomplete or illegible Application without further action. A submitted Application does not become a Completed Application until a full review by the D.U. If an Application is rejected as incomplete or illegible, it is not considered a Completed Application, and the date it is resubmitted will be considered the Application Date if it is thereafter deemed a Completed Application.

b. Amendments.

An Applicant may amend his Completed Application to include additional items or change existing items. Amendments to Completed Applications shall be governed by **Section 2.4c.**

2.4 **Filing Date and Time Requirements.**

a. Completed Application.

An Application for disability retirement shall not be deemed filed until the date on which a Completed Application, including all required documents (see Section 2.5), is received by ACERA.

The Application is dated upon receipt by ACERA. The date of receipt becomes the Application Date, if the Application is a Completed Application meeting all requirements and containing all necessary information and attachments.

b. Rejected Application.

If an Application is rejected as incomplete, it is treated as if it was never filed. The D.U. may, at the sole discretion of the D.M., not reject an Application and allow **up to 30 days** to correct any omission in order to make the Application a Completed Application and retain the same Application Filing Date.

c. Amended Application.

It is at the discretion of the D.U. to accept an Amended Application. After the DU has determined the Completed Amended Application Date, the DU shall determine the filing date for an Amended Application or in its discretion, delegate the determination of the filing date to the Hearing Officer. The filing date for the Amended Application may be: (i) the date the Amended Application was deemed complete; (ii) the date the original Completed Application was filed; or (iii) a combination of (i) or (ii).

d. Time Requirements.

The Completed Application must be made within the following timeframes:

- i. While the Member is in service;
- ii. Within 4 months after the Member's discontinuance of service;

- iii. Within 4 months after the expiration of any period during which a presumption is extended beyond the Member's discontinuance of service; or
- iv. Another date provided that, from the date of discontinuance of service to the time of the Completed Application, the Member is continuously physically or mentally incapacitated to perform his Duties.²⁷ The Applicant shall have the burden to demonstrate by a preponderance of the evidence that any disability was continuous.

2.5 Required Documents for Application.

The documents and reports listed in **Sections 2.5 a – 2.5 d**, below, shall be completed or furnished by the Applicant or Member in connection with the Application Form. An Application for a disability retirement shall not be considered "filed," and will be rejected, unless it contains all of the documentation listed in **Sections 2.5 a. – 2.5 d.** A signed Application with all its attached documents becomes the Completed Application after it is reviewed and confirmed to contain each of the following:

a. Disability Application Forms.

- i. Completed Application for Disability Retirement, containing all information requested therein and signed under penalty of perjury by Applicant.

Additional information may be required during the Application Process, and must be supplied by the Applicant if a request for information is made by the D.U. Failure to supply information requested by the D.U. may result in rejection of the Application.

- ii. Completed Authorization to Obtain and Release Records and Information ("Release.") This Release authorizes the release of all medical and/or psychological and/or psychiatric records, as well as miscellaneous information and records, such as personnel and military records, vocational rehabilitation records, and any other records or information which reasonably may lead to relevant information needed for a full and complete evaluation of the Application, including Workers' Compensation files. Additional and supplemental *Releases* may be required during the Application Process. Failure to complete *Releases* requested by the D.U. may result in dismissal of the Application.

Failure to supply the *Releases* as required may constitute grounds for dismissal of the Application, after **thirty (30) days** notice by the D.U.

- iii. Medical Provider Statement completed by the Member's physician and mailed directly from the physician to the D.U. An **EFJA** must be reviewed by the Member's physician prior to completion of the *Medical Provider Statement*.

²⁷ Gov. Code § 31722.

The *Medical Provider Statement* shall address whether, in the physician's opinion, the Member is permanently incapacitated from performing the Duties of his position. The *Medical Provider Statement* shall also include, or the doctor may attach, any and all other relevant evidence in the form of written medical reports, certificates, or other documents that the Member wishes the Board to consider in support of the Application.

It is recommended that a more detailed *Treating Physician Narrative* also be included at the time the Application is submitted, but a *Treating Physician Narrative* is not required.

- iv. Completed *Delayed Disability Application Affidavit Form* if the Application is not submitted within four (4) months of discontinuation of service.

b. Medical Records Relating to Application.

- i. The Member shall provide a list of all physicians seen by the Member during the five-year period prior to the Application Date.
- ii. The Member shall provide copies of all medical reports and records related to the injury/illness(es) listed on the Disability Application.
- iii. The D.U. may request, and the Member must provide, any other records deemed necessary to process the Application.

c. Prior and/or Subsequent Employment Records.

- i. The Member must supply, if requested, employment records for any job (paid or unpaid) that the Member held in the ten (10) years prior to any injury claimed through the Application Process.
- ii. The Member has an ongoing obligation to notify the D.U. of any job the Member obtains, or returns to, during the Application Process.
- iii. The Applicant must attach a Description of Employee's Essential Job Functions ("EFJA"). If no EFJA was available from the Employer or Department when the Applicant applied, then:
 - 1. ACERA shall request an EFJA from the Employer or Department;
 - 2. If an EFJA is not provided after 30 days written notice to the Employer or Department, ACERA may provide a list of contractors that can, with input from the Department, draft an EFJA for Applicant's position. The EFJA drafted by the contractor must be reviewed and approved by the Employer or Department prior to formal submission to ACERA.

d. Workers' Compensation Documents.

The Applicant must attach copies of any and all Workers' Compensation documents in his/her possession pertaining to the injury or illness set forth in the Application.

2.5.1 Receipt and Filing.

An Application will not be accepted for filing by the D.U. for purposes of Government Code Sections 31721 through 31724, inclusive, or otherwise, until it complies at a minimum with the requirements of **Section 2.5**. The D.U. will receive any Application tendered for filing, but for purposes of review only, noting the date of receipt. If the D.U. determines that the Application is complete it shall deem the Application a Completed Application. But, if the D.U. determines that the Application is not complete it shall so-notify the prospective Applicant, specifically identify the deficiencies, and inform the Applicant that the Application will not be filed until completed as required under **Section 2.5** and is rejected until the deficiencies identified are corrected.

2.6 Furnishing Copy of the ACERA Disability Retirement Procedures.

A complete copy of these Procedures is available online at www.ACERA.org, and will be provided upon request.

2.7 Where to File.

Application forms and related materials may be obtained from the ACERA offices at 475 14th Street, Suite 1000, Oakland, California 94612-1900. Information is also available online at www.ACERA.org. Telephone inquiries should be made to (510) 628-3000 or toll free at (800) 838-1932.

All Applications, including completed forms and required documents shall be returned to the ACERA offices unless otherwise specified.

2.8 Employer Notification of Application.

The Employer shall be provided notice of the filing of a Completed Application. A copy of the Completed Application with supporting documentation will be forwarded to the Employer's counsel.

2.9 Information from Employer.

- a. At the time a Completed Application is received by the D.U., or anytime thereafter, the Board, or the D.U., may make a request of the Member's Employer, Employer Representative, Department Representative, supervisors, and/or co-workers for information regarding the Member's job duties, illness or injury, and other pertinent data. Such request may include a request for a *Pre-Employment Examination* or an *Essential Job Functions Analysis*. The Employer shall provide, or direct the provision of, the requested information within **thirty (30) days** of receipt of the request. The Employer may also supply information without a request at any time after notice of the filing of a Completed Application.

- b. At the time a Completed Application is received by the D.U., the D.U. shall forward a blank *Agency/Department Statement* Form to the Member's Department Representative with directions to provide, or arrange for the provision of, the necessary data in written form to the D.U. within **thirty (30) days** of receipt of the request. The *Agency/Department Statement* shall include information regarding all actions and efforts undertaken to accommodate the Member or find alternative employment within the capacity of the Member to perform, and the results of such action and efforts, or a detailed explanation as to why such efforts were not undertaken.
- c. At the time a Completed Application is received by the D.U., or anytime thereafter, the Board, or the D.U., may request that the Employer Representative provide copies of all claims and medical reports related to any Workers' Compensation claim for the Member. The Employer Representative shall provide, or direct the provision of, the necessary data in written form to the D.U. within **thirty (30) days** of receipt of the request.

2.10 **Disability Packet.**

a. Distribution of Completed Disability Packet.

The Completed Application [**Section 2.5**] and all additional relevant information received [**Section 2.9**] will be sent to the Employer and the Member for review. This packet shall be referenced as the "Disability Packet." The D.U. will include in the Disability Packet **an estimate** of the Member's qualifying years of service.

b. Demand for Additional Information From Member.

At any time during the Application Process, the Board or D.U. may, by written notice to the Member, require that the Member serve additional documentation within **thirty (30) days**. The Employer may also make a request for additional documentation through the D.U. The additional information received will be made part of the Disability Packet. Additional information may include:

- i. Copies of records, reports, notes, statements, documents, photographs, or other writings²⁸;
- ii. A *Treating Physician Narrative* or other written report of the Member's current medical condition from any or all of the health care professionals that have provided treatment or conducted examinations of the Member;
- iii. Written responses, under penalty of perjury, to written inquiries concerning any matter that is either relevant to the case or is reasonably calculated to lead to the discovery of evidence that is relevant to the case.

If the Member fails or refuses to comply with any demand made pursuant to this section, the D.U., or any Party, may make a motion to the Board or Hearing Officer as set forth in **Section 1.18** of these Procedures. As a penalty for failure to comply, the Application may be withdrawn with prejudice.

²⁸ See Evidence Code § 250.

In addition, the Applicant shall cooperate with the ACERA in obtaining any and all medical records and reports independently requested by the D.U. in its sole discretion, by subpoena or otherwise. [See **Section 6.20** for additional information regarding subpoenas.]

c. Additional Information Received After Distribution of Disability Packet.

Once the Disability Packet is created and distributed by the D.U. a written request must be made to include any additional information as exhibits.

Additional information received prior to the Medical Advisor's (MA) review will be exhibited and become part of the Disability Packet. Both parties will be given fourteen (14) days to review the additional information prior to the MA's review, as explained in **Section 2.10(d)**.

If the MA has already reviewed the Disability Packet, the hearing officer shall determine if the additional information will be made part of the Disability Packet and constituted evidence at hearing. Additional documents received by the D.U. after MA review, shall be marked as "Proposed Evidence" and exhibited for identification purposes. All "Proposed Evidence" shall be distributed to the parties and the Hearing Officer no later than one week prior to the first due date for *Prehearing Statements*. "Proposed Evidence" submitted with *Prehearing Statements* will be exhibited for identification purposes and an updated exhibit list will be available at hearing.

d. Review Period and Comment Papers.

Upon receipt of the Disability Packet, the Parties shall have **thirty (30) days** to review the record contained in the Disability Packet before it is submitted to the MA. Parties may submit any additional information relevant to the Application during the thirty (30) day review period. Both Parties will be given at least **fourteen (14) days** to review any such additional information before the D.U. forwards the Disability Packet to the MA.

The Employer and/or Applicant may submit to the D.U. a Comment Paper commenting on the contents of the Disability Packet. The purpose of the Comment Paper is to give each Party an opportunity to highlight documents that they feel are especially important for the MA to review. Assertions of fact must be supported by citations to exhibits contained in the Disability Packet. Argument and unsupported assertions are inappropriate for a Comment Paper. The D.U. reserves the right to require amendment of and/or reject any Comment Paper that does not comply with this section.

Comment Papers shall be served, by the Party submitting it, on all other Parties and the D.U. within **thirty (30) days** of date of mailing of the Disability Packet. If the Employer requests that the Applicant submit to an independent medical examination pursuant to **Section 5**, a Comment Paper need not be submitted until **30 days** after receipt of the written results of the independent medical examination.

Comment Papers are not required, are optional, and may or may not be submitted solely at the discretion of the Party. If no Comment Papers are received within **thirty (30) day** time period, the D.U. will forward the Disability Packet to the Medical Advisor.

Any Comment Papers submitted shall be identified and included in the Disability Packet.

e. Delivery to M.A.

The Disability Packet shall be forwarded to the M.A. **thirty (30) days** after distribution to the Parties if no additional information is submitted or requested, including any IME.

2.11 **Burden Of Proof.**

The Applicant has the burden of proving, by a preponderance of the evidence, that the Member meets the criteria for a disability retirement, including that he has a permanent incapacity (physical or mental) for the performance of duty. [See **Section 6.21.**] “Incapacitated for the performance of duty” means the substantial inability of the Member to perform his usual Duties.

- a. In applying for non-service-connected disability retirement, the burden rests with the Applicant to prove that the Member is permanently incapacitated from substantially performing the regularly assigned Duties of his job. The burden of proof shall be by a preponderance of the evidence.
- b. In applying for a service-connected disability retirement, the burden rests with the Applicant to prove that the Member is permanently incapacitated from substantially performing the regularly assigned Duties of his job and that the employment contributed substantially to the disability. The burden of proof shall be by a preponderance of the evidence.
- c. For Safety Members who have completed five (5) or more years of service and have certain specified diseases/disabilities (e.g. heart trouble, cancer, blood-borne infectious disease, exposure to biochemical substances), such diseases/disabilities are presumed to arise out of and in the course of employment.²⁹ When such a presumption exists, the burden of proof shifts to the Employer to show that the disease/disability was not work-related. This does not relieve Applicant of the burden of proving that the Member is permanently incapacitated from substantially performing the regularly assigned Duties of his job.
- d. The burden set forth in **Section 2.11(a)**, above, shall include the burden with the Applicant or Member to prove that the particular incapacity was not the result of intemperate use of alcohol or drugs, willful misconduct, or violation of law on his or her part, where such an issue arises.
- e. The burden is on the Applicant to prove he timely filed all documents. [See **Section 2.4.**]

²⁹ See Gov. Code §§ 31720.5, 31720.6, 31720.7, 31720.9. The five years service requirement does not apply in cases involving exposure to biochemical substances [See Gov. Code § 31720.9.]

2.12 Application Withdrawal.

a. Timing.

An Application may be withdrawn at any time before the Board makes a final determination on the Completed Application. Any withdrawal of an Application after assignment of a hearing officer is deemed a withdrawal with prejudice.

b. Type and Effect.

- i. Withdrawal without Prejudice. An Application withdrawn without prejudice is treated as though it was never submitted. If an Application is withdrawn without prejudice, any subsequent Application, including resubmission of the withdrawn Application, is considered a new Application and must meet all requirements, including timely filing requirements.
- ii. Withdrawal with Prejudice. An Application withdrawn with prejudice precludes the filing of any future Application based on the same disability, injury or disease.
- iii. Administrative Withdrawal. When an Applicant fails to comply with these Procedures, fails to submit required documents, fails to cooperate, or fails to timely respond to requests for information, the D.U. may withdraw an Application with or without prejudice.

If, at any time, the D.U. obtains information that a Member does not meet the minimum criteria of eligibility for a disability retirement under the '37 Act, the D.U. will notify all Parties of that information. The D.U. may administratively withdraw any such Application or make a recommendation to the Board to deny the Application.

3. EXPEDITED REVIEW

3.1 **Purpose.**

Any Party may request Expedited Administrative Review of a Completed Application. The goal of Expedited Administrative Review is completion of the Application Process in less than six months. For an Application to qualify for Expedited Administrative Review, extenuating circumstances must exist, *e.g.*, the Member has suffered a sudden and catastrophic injury that resulted in a permanent incapacity to perform his Duties, or the Member is terminally ill.

Whether to grant the request for Expedited Administrative Review is within the sole discretion of ACERA Chief Counsel.

3.2 **Request by Applicant.**

A Party may seek Expedited Administrative Review of the Completed Application by requesting such review in the Application and clearly setting forth the basis for the request.

3.3 **Review by ACERA Chief Counsel.**

Once a Request for Expedited Administrative Review is submitted, it will be reviewed by ACERA Chief Counsel to determine if there is sufficient justification for expedited handling. This internal review shall be completed within **fifteen (15) days** of submission of the Completed Application and request to ACERA Chief Counsel.

If additional information is required, the Application is found to be incomplete, or the basis for the request is insufficient, the request will be denied. There will be one opportunity to resubmit the request for Expedited Administrative Review. The review of any resubmission will be complete within **fifteen (15) days** of submission to the Chief Counsel's Office.

3.4 **Additional Information from Employer and Applicant.**

If ACERA Chief Counsel determines that the matter warrants expedited handling, the Application shall be considered an Expedited Application and it will be returned to the D.U. for processing. The D.U. will request any additional information from the Employer (see **Section 2.9**), and then forward the Disability Packet to the Employer and Applicant for review and comment (see **Section 2.10(d)**).

3.5 **Expedited Review Granted.**

When ACERA Chief Counsel approves Expedited Administrative Review of an Application, the Application will be granted preference for M.A. review and the scheduling of hearing dates.

4. MEDICAL ADVISOR

4.1 Medical Advisor Evaluation.

After the time periods for submission of any additional information and Comment Papers have concluded or earlier if written or email notice is received that no Comment Papers will be submitted, the D.U will send the Disability Packet, including any Comment Papers and any IME reports to the Medical Advisor (M.A.), for review and recommendation.

Within **forty five (45) business days** of receipt of the file, the M.A. will review the file and provide a written *Report and Recommendation* to ACERA with a recommendation for granting or denying the Application. The *Report and Recommendation* shall address the following issues:

1. Whether the Member is physically or mentally incapacitated from substantially performing the usual Duties of his job with or without accommodation.
2. Whether the incapacity is permanent.
3. Whether the incapacity is service-connected (if applicable).
4. Whether the Member is able to perform other job duties based on restrictions imposed by his condition(s).
5. Whether the Member was continuously physically or mentally incapacitated to perform his duties from the date of discontinuance of service to the time his Completed Application was filed.
6. If the Member is found permanently incapacitated, whether annual medical examinations should be required.
7. If the Applicant requested an Earlier Effective Date (*Application for Disability Retirement*, p. 3, question 5), if possible, identify the approximate date the Member knew or should have known his incapacity was permanent and the basis for that assessment.

The M.A. may request additional documents/information from the D.U. The M.A. may also make referrals for the Member to be examined by specialized physicians or other health care providers. A referral for consultation or other information will be cause for an extension of time for the M.A.'s written report. Any referral by the M.A. does not relieve the Applicant of the burden of proof.

4.2 Required Medical Examinations and Referrals By Medical Advisor.

- a. ACERA, acting through its D.U, may, on one or more occasions, and as deemed necessary, require the Member to submit to examination(s) by a physician, psychologist or specialist with expertise relative to the medical condition identified in the Completed Application. The costs of such examination(s) shall be borne by ACERA. The D.U. shall serve the Member with written notice of the referral and the name, address and phone number of the medical provider who is to perform the examination(s). The Member shall have **ten (10) days** from receipt of the referral letter to schedule an appointment with the medical provider and notify the D.U. of the date, time, and place of examination. If the Member is unable to keep the examination appointment, the Member or the Member's attorney shall notify the D.U. at least **ten (10) days** prior to the scheduled examination so as to avoid any cancellation fees. Any cancellation fees will be charged to the Member.

If the place of examination is neither in Alameda County, nor the County in California in which the Member currently resides, the Member may request, in writing to the D.U., that ACERA reimburse the Member for reasonable travel expenses, including meals and mileage, in amounts paid at prevailing rates established by the Employer, and which the D.M., in its sole discretion, may grant or deny all or part of such request.

The records and reports of the examining physician shall become part of the Disability Packet and shall be confidential and not subject to disclosure except to the Parties and in accordance with these Procedures.

- b. If the Member fails or refuses to comply with any demand for medical examination made by ACERA or the M.A., fails or refuses to cooperate fully with the examiner or to submit to all reasonable tests required by the examiner, or fails to notify the D.U. of an inability to attend the appointment, the D.U. or any Party may take any of the following actions:
 - i. Seek to compel compliance with the requirement that the Member submit to an examination by making a motion per **Section 1.18** of these Procedures. Such a motion may include a request for sanctions pursuant to **Section 1.17**.
 - ii. In the event that the Member refuses to comply with an order issued pursuant to paragraph (i) within **thirty (30) days** thereafter, and further provided that there is an absence of good cause for the failure, the Application may be dismissed or withdrawn **with prejudice**.

4.3 Notice of Medical Advisor Recommendation and Request for Hearing.

Within **ten (10) days of** receipt of the Medical Advisor's written Report and Recommendation, the D.U. will send a copy of the M.A. Report and Recommendation to all Parties along with a *Request for Hearing* Form. The D.U. will also send separate notification to the Department in which the Applicant was last employed that does not include a copy of the M.A.'s Report and Recommendation. Should any Party wish to request a hearing before a Hearing Officer, he or she must do so within **fourteen (14) days** of service of the M.A. Report and Recommendation. Any request for a hearing must be in writing on the provided *Request for Hearing* Form and must be signed by the Party requesting the hearing. Parties may request one extension of time to submit the completed Request for Hearing Form. Thereafter, if any Party fails to submit the completed Request for Hearing Form, the D.U. will place the matter on the calendar for the next available Board Meeting.

If no request for hearing is received by the D.U. within the time allowed, the D.U. will place the matter on the calendar for the next available Board meeting, with at least **fifteen (15) days** notice to the Parties of the Board Consideration Date. The Disability Packet and all subsequent documentation will be submitted to the Board for consideration along with an Administrative Report. (See Section 7.)

4.4 Medical Advisor Review of Additional Information Received After Recommendation Issued.

Once the M.A. has made a written *Report and Recommendation*, a request for the M.A. to review additional information may be made only once by any Party, and it is at the discretion of the D.U., or, if the matter has been assigned to a Hearing Officer, at the discretion of the Hearing Officer, to grant the request. There must be good cause for the M.A. to review additional evidence. The D.U. or H.O. may require that copies of any additional information be provided to them prior to consideration of the request and failure to provide copies of the additional information may result in denial of the request.

If the D.U. or Hearing Officer determines that good cause exists for sending the additional information to the M.A., all such information and documentation must be submitted to the D.U. within **ten (10) days** of the good cause determination. The D.U. will forward copies of the additional information to all Parties, who will have **twenty (20) days** to review and submit supplemental Comment Papers in response to the additional information before it is reviewed by the M.A.

5. INDEPENDENT MEDICAL EXAMINATION (“IME”) BY EMPLOYER

5.1 IME at Employer’s Request.

The Employer may require that the Member submit to one Independent Medical Examination (“IME”) by a physician, psychologist, or specialist with expertise relative to the medical condition identified in the Completed Application. The Employer may choose the physician, psychologist, or specialist to conduct the IME. This IME shall be at no cost to the Applicant. If there are multiple medical conditions identified, the Employer may request a physician, psychologist or specialist evaluation for each identified condition. The D.U. shall determine if multiple exams are appropriate when there are multiple conditions.

5.2 Timing of IME Conducted at Employer’s Request.

The Employer may demand an IME prior to the M.A. Recommendation and may request that the M.A. not review the Disability Packet until the written IME results are received.

The Employer may demand an IME after the M.A. Recommendation if it has not done so previously.

If the IME is not requested at least **sixty (60) days** prior to the Original Hearing Date, however, the Hearing Officer or Board must approve the request and any continuance of the Original Hearing Date.

5.3 Notice to Member of IME.

- a. The Member will be given notice by the Employer at least **fifteen (15) days** before the appointment date, with the date, time and place of examination, unless the Member agrees to shortened notice. If the Member is unable to keep the scheduled examination appointment, the Member must notify the D.U., the Employer, and other Parties at least **ten (10) days** prior to the scheduled examination.
- b. If the Member fails or refuses to comply with any demand for medical examination made per subsection (a) of this Section, fails or refuses to cooperate fully with the examiner or to submit to all reasonable tests required by the examiner, or fails to timely notify the D.U. and Parties of an inability to attend the appointment, the D.U. or Employer may take any of the following actions:
 - i. Seek to compel compliance with the requirement that the Member submit to an examination by making a motion per **Section 1.18** of these Procedures. Such a motion may include a request for sanctions pursuant to **Section 1.17** of these Procedures.
 - ii. In the event that the Member refuses to comply with an order issued pursuant to paragraph (i) within **thirty (30) days** thereafter, and further provided that there is an absence of good cause for the failure, the Board may dismiss the Application **with prejudice**.

5.4 Service of Written IME Report.

The written IME report must be delivered to the D.U. **within thirty (30) days** of the date it is received by the Employer, or it may not be considered by the Medical Advisor, the Board, or the Hearing Officer. The D.U. shall serve all Parties and, if assigned, the Hearing Officer, with a copy of the IME report. After service of the IME report, the report shall be referred back to the M.A. for consideration and further recommendation. After the M.A.'s supplemental recommendation in the matter, either party may request a hearing before a Hearing Officer. If no such requests are made, the D.U. shall send a letter advising all Parties that they have **ten (10) days** to request a hearing or the matter will be placed before the Board for decision.

If a Hearing Officer has been assigned to the Application, the Hearing Officer must approve the request for the M.A. to reconsider the Application.

5.5 Depositions.

Any party to the proceeding may cause the depositions of lay witnesses, including the applicant, to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state. Attendance of lay witnesses and the production of records in regard to depositions may be required and appropriate subpoenas may be issued. The parties shall bear their own costs for such depositions.

In the case of the deposition of the Member, Applicant, or a person designated by the Employer as a managing agent or supervisor, the Employer or the Applicant may schedule and take such a deposition by mailing a written notice of deposition (herein "notice of deposition") to the proposed deponent and sending a copy of that notice of deposition to ACERA and to the other Party or that Party's designated legal representative or attorney, if any. The notice of deposition shall provide a minimum of 14 days notice and designate the date, time and location for the deposition. All depositions shall be held at ACERA's offices or on County premises.

Depositions of witnesses must be scheduled and completed before the hearing. Transcripts of depositions must be provided to all Parties and ACERA before the scheduled Hearing Date. Depositions of Medical Witnesses shall be governed by **Section 6.13.**

Disputes regarding depositions or notices of depositions shall be heard and decided by the Hearing Officer before the scheduled Hearing Date.

6. HEARINGS BEFORE A HEARING OFFICER

6.1 Purpose.

The purpose of this Section is to establish rules for proceeding to hearing, the presentation of evidence to a Hearing Officer, and the process by which Hearing Officers submit *Proposed Findings of Fact and Recommended Decisions* on legal and factual issues, including credibility, for consideration by the Board.

6.2 Right to a Hearing.

Upon timely written request made pursuant to **Section 4.3**, any Party shall be entitled to a hearing on the Completed Application. The Board may also refer the matter for the setting of a hearing.

The Board may hold a hearing itself, or it may delegate the matter to a Hearing Officer. If a Hearing Officer holds the hearing, he shall transmit to the Board, in writing, the *Proposed Findings of Fact and Recommended Decision*.³⁰

Hearings are not open to the public. Witnesses are generally not permitted to be present during the hearing except when testifying. A Party may request that a Hearing Officer allow third parties to be present, however, other Parties may object to such a request and the Hearing Officer shall determine if such third parties may attend.

6.3 Presiding Officer.

The Chair of the Board or the Hearing Officer shall preside over a hearing. He shall exercise reasonable control over the proceedings. In addition to other duties, the Chair or Hearing Officer shall rule on the admissibility of evidence and shall control the presentation of evidence and argument in a fair and equitable manner.

6.4 Appointment of Hearing Officer.

a. Panel

The Board has designated an approved panel of Hearing Officers, and may on occasion revise that panel. Hearing Officers are obtained for the panel from an independent arbitration system, such as the American Arbitration Association.

b. Assignment of Hearings

New hearings are assigned to the Hearing Officers under a neutral system of rotating order.³¹ When a timely request for a hearing is filed by a Party, written *Notice of Proposed Hearing Officer*, stating the next Hearing Officer in rotation, shall be sent by ACERA Chief Counsel to the Parties.

³⁰ Gov. Code §§ 31533, 31534.

³¹ See *Haas v County of San Bernardino* (2002) 27 Cal.4th 1017, 1037, fn.22; *McIntyre v Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735-736.

c. Challenge of Hearing Officer.

The Parties have **ten (10) days** from service of the *Notice of Proposed Hearing Officer* to exercise, in writing, a peremptory or specific challenge to the named Hearing Officer by serving written notice upon ACERA Chief Counsel. If a Party exercises a challenge, the next Hearing Officer in rotation shall be assigned to the case and the other Party will then have **ten (10) days** from the service of the notice of the new assignment to exercise, in writing, a challenge.

i. Peremptory Challenge. Only one peremptory challenge may be exercised by a Party.³²

ii. Specific Challenge. A Hearing Officer may be challenged and/or disqualified by a showing of conflict of interest or some other specific reason for disqualification. The burden of establishing a disqualifying interest rests on the Party making the assertion.³³ A determination on the challenge shall be made by ACERA Chief Counsel.

If there is no challenge, the selection becomes final **fifteen (15) days** after the *Notice of Proposed Hearing Officer* is sent. The Hearing Officer will be notified of the selection once it is final.

6.5 Setting of and Time to Complete Hearing.

a. Original Hearing Date.

Once selection of a Hearing Officer is final, ACERA Chief Counsel shall offer to all Parties an option of three hearing dates within the next **ninety (90) days**. Once the hearing date has been selected, that hearing date shall be considered the “**Original Hearing Date.**” The Original Hearing Date is the trigger for calculating and setting future dates. ACERA Chief Counsel shall issue a *Notice of Original Hearing Date* to the Parties and the Hearing Officer, stating the time and place of the hearing. ACERA shall arrange for a stenographic reporter and use of a hearing room.

b. Hearing and Receipt of Evidence.

The Hearing Officer has **ninety (90) days** from the Original Hearing Date to receive all of the evidence, both testimonial and documentary, complete the hearing (including any closing arguments and final briefing) and close the record. Once the record is closed, the Hearing Officer shall submit a *Hearing Officer’s Notice of Closed Record* or similar notice to the D.U.

If the Hearing Officer does not hold a hearing within **ninety (90) days** from the date the selection is final, unless there is authorization for a delayed hearing date from ACERA Chief Counsel, the appointment of the Hearing Officer shall be vacated and a new Hearing Officer shall be appointed.

³² Code Civ. Proc. § 170.6.

³³ See *Schweiker v. McClure* (1982) 456 U.S. 188, 195-196; *McIntyre v Santa Barbara County Employees’ Retirement System* (2001) 91 Cal.App.4th 730, 735-736.

c. Prehearing Matters.

The Hearing Officer will set the cut-off date for requests to subpoena witnesses, consistent with **Section 6.20**. All matters, including requests for extensions, continuances, and consideration of additional documents must be submitted in writing to, and decided by, the Hearing Officer, and written or electronic mail notice of the request must be sent to all Parties and the D.U.

Where the Applicant does not have legal counsel, a Prehearing Conference will be automatically scheduled. [See **Section 6.19.**]

d. Adjusting of Time Intervals.

Nothing in these Procedures is to be construed as preventing the Parties from stipulating to lesser time intervals than those prescribed above. The Hearing Officer may, for good cause shown, and after giving all Parties an opportunity to be heard, shorten or lengthen the times specified above, except when the approval of ACERA Chief Counsel is required. When the approval of ACERA Chief Counsel is required, changes in time intervals may only be made with the approval of the ACERA Chief Counsel.

e. Decision.

In the event a Hearing Officer does not render a decision within **forty-five (45) days** of closing the record after a hearing, either or both of the following may occur: (1) the Hearing Officer will not receive any compensation for the time he or she has spent unless the Hearing Officer has received an extension from ACERA Chief Counsel; (2) the Hearing Officer shall be removed from the ACERA panel until all outstanding decisions have been received by the D.U. A Hearing Officer removed from the panel may apply to ACERA Chief Counsel for reinstatement on the panel, even though he or she may have decisions that have not yet been rendered. An application for reinstatement on the panel must include an explanation of any special circumstance which may exist and an expected date for decision on any and all outstanding decisions.

6.6 Continuances.

The Original Hearing Date may be continued by the Hearing Officer, at the request of either Party. Any continuance beyond **sixty (60) days** from the Original Hearing Date must be agreed to by all Parties, the Hearing Officer and ACERA Chief Counsel. If a continuance is granted, failure of the Applicant to complete a Hearing within **six (6) months** of the Original Hearing Date may be cause for dismissal of the Application with prejudice.

The party requesting a cancellation or continuance may be required to reimburse the Hearing Officer for cancellations and continuances made less than thirty (30) days prior to hearing in an amount equal to 4 hours of the agreed upon hourly rate.

6.7 Time and Place of Hearing.

Unless the Parties and the Hearing Officer agree otherwise, a hearing shall be set for one full day, consisting of a morning session and an afternoon session. Morning sessions shall begin at 9:30 A.M. and end at 12:00 P.M., and afternoon sessions shall begin at 1:30 P.M. and end at 5:00 P.M, unless otherwise set by the Hearing Officer. Hearings that are not concluded within either the full day session, or whatever other time period to which there has been a stipulation, shall be continued to the next agreeable hearing date. But, in no instances shall the hearing date extend past **sixty (60) days** from the Original Hearing Date, unless stipulated to by all Parties and ACERA Chief Counsel.

All hearings will take place at the ACERA Offices located at 475 14th Street, Suite 1000, Oakland, California 94612-1900, unless otherwise indicated in the *Notice of Original Hearing Date* served on all Parties. In instances where applicant may need reasonable accommodation, ACERA will comply with state and federal laws. Videographic recording and telephonic appearance of parties or witnesses at hearings is not permitted without the express written authorization and approval of hearing officer.

All witnesses must be available and ready to testify at 9:30 A.M. unless another time is agreed to by all Parties and the Hearing Officer or ordered by the Hearing Officer, over any objections.

The hearing or any proceeding with respect to the Completed Application may proceed in the absence of the Member who, after due notice, fails to be present or obtain a continuance. A decision on the Completed Application shall not be based solely upon the absence of the Member.

6.8 Reporter.

All hearings before a Hearing Officer shall be reported by a stenographic reporter. The *per diem* cost of the reporter and the cost of the original transcript shall be borne solely by ACERA. Any Party may request a copy of the transcript from ACERA.

In addition to stenographic reporting, any Party may request that a videotape of all or part of the proceedings be made by a certified court reporting firm, and, if so, that Party shall pay the cost thereof. All Parties must be given **ten (10) days** advance notice, in writing, of the intent to videotape any proceedings and the Hearing Officer must approve such request.

6.9 Representation by Counsel.

A Party is entitled to be represented by legal counsel during the Application Process, including any hearing. Before an attorney appears on behalf of a Party, a written authorization (*Designation of Legal Representation Form*) from the Party must be filed with the D.U. After an attorney appears on behalf of a Party pursuant to the written authorization of representation, all notices and evidence shall thereafter be served upon the attorney. Substitution or dismissal of an attorney shall be made in the manner provided by Code of Civil Procedure, Sections 284, 285, and 286.

6.10 Issues at Hearing.

At a hearing on the Completed Application, the Hearing Officer shall make findings and recommendations on the following issues, as applicable:

- a. Whether the Member is physically or mentally incapable of substantially performing the usual Duties of his job with or without accommodation.³⁴ Whether the inability to perform a duty that is a remote or uncommon occurrence is a substantial inability to perform the usual Duties of the job.³⁵
- b. Whether the incapacity is permanent.³⁶ The concept of “permanent and stationary” in Workers’ Compensation Law is not the equivalent of permanency of incapacity for disability retirement purposes. The need for further medical treatment is not incompatible with the status of permanent disability.³⁷ The unreasonable refusal of remedial medical treatment, however, can defeat “permanent” disability.³⁸
- c. If the Member is incapacitated, whether the incapacity is service-connected.
- d. If the incapacity is non-service-connected, whether the Member completed five qualifying years of service. Confirmation by the D.U. is sufficient to make this finding.
- e. Whether the Effective Date for the Disability Allowance should be the date of filing of the Completed Application, the date following the last day for which the Member last received regular compensation, or another date.
- f. If the Member is found permanently incapacitated, whether annual medical examinations should be required.

6.11 Prehearing Statements.

Each Party must file a completed *Prehearing Statement Form*. A hearing brief may be submitted in addition to the Prehearing Statement. A blank *Prehearing Statement Form* is supplied to all Parties prior to the hearing date.

The *Prehearing Statement*, including any attached briefs, shall contain the following:

- a. A statement of the contested issues and the position of the Party;
- b. A list of all documentary evidence not included in the Disability Packet that the Party will offer into evidence, and copies of such documents;

³⁴ Gov. Code § 31724; *Harmon v Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 694-696; *Schrier v San Mateo County Employees’ Retirement Association* (1983) 142 Cal.App.3d 957; *Curtis v Board of Retirement* (1986) 177 Cal.App.3d 293.

³⁵ *See Mansperger v PERS* (1970) 6 Cal.App.3d 873, 877.

³⁶ Gov. Code § 31720.

³⁷ *See Subsequent Injuries Fund v Industrial Acc. Com.* (1964) 226 Cal.App.2d 136, 144.

³⁸ *See Reynolds v City of San Carlos* (1981) 126 Cal.App.3d 208, 216; *Montgomery v Board of Retirement* (1973) 33 Cal.App.3d 447, 450 – 451.

- c. A copy of any affidavit that the Party proposes to introduce into evidence, with the name, business address and telephone number of the person making the affidavit;
- d. The names, business addresses, and telephone numbers of any witnesses whose testimony the Party intends to call for oral testimony at the hearing (including Medical Witnesses) and a summary of the expected testimony of each witness, including a curriculum vitae for professional or expert witnesses;
- e. The names, business addresses, and telephone numbers of any witnesses the Party has or intends to depose in lieu of hearing testimony, and the dates of such deposition(s).

Parties shall not submit and ACERA shall not accept or receive medical records, reports, statements, summaries, or other medical evidence except for medical records, reports, statements, summaries, or other medical evidence already included in the disability packet as part of or enclosure or attachment to its *Prehearing Statement*.

The Party requesting the hearing shall serve upon the Hearing Officer and all other Parties a *Prehearing Statement* no later than **twenty (20) days** before the date of the hearing.

Any other Party must serve upon the Hearing Officer and all other Parties a *Prehearing Statement* no later than **ten (10) days** before the hearing date. Any Party may file a reply due **five (5) days** before the hearing date.

A request for an extension of time to submit any *Prehearing Statement* may be granted only by the Hearing Officer upon a showing of good cause, and may not be granted for more than **five (5) days**. A request for an extension of time must be served on the Hearing Officer and all Parties.

Failure of the Party requesting a hearing to raise an issue in the *Prehearing Statement*, *Reply Brief* or *Hearing Brief* may be treated as a waiver of that issue for further consideration by the Hearing Officer. Testimony of a witness or documentary evidence not identified in a *Prehearing Statement*, *Reply Brief* or *Hearing Brief* may not be allowed into evidence at the hearing, except as prescribed in **Sections 6.12, 6.14, 6.17 and 6.19**.

6.12 Written Medical Reports as Evidence.

a. Medical Reports.

A written medical report bearing the signature of a Medical Witness may be admissible in evidence as the author's direct testimony and may support findings made by the Board or the Hearing Officer. Such medical reports shall not be inadmissible on the basis that they constitute hearsay, but each Party shall have the right to cross-examine the authors of medical reports. Such medical reports, when offered as expert opinions, shall not be inadmissible on the basis that the author of the medical report did not attend the hearing or was called as a percipient witness and not as an expert witness.

- b. Submission after MA Review.
If the MA has already reviewed the Disability Packet, the Hearing Officer shall determine if the additional information will constitute evidence at hearing.

Documents or other evidence received by the D.U. after MA review shall be marked as "Proposed Evidence" and exhibited for identification purposes. Such "Proposed Evidence" shall be distributed to the Parties and the Hearing Officer prior to the first due date for *Prehearing Statements*.

Documents or other evidence submitted with *Prehearing Statements* will be marked for identification purposes.

- c. Late Submission of Medical Reports.
Submission of a medical report subsequent to the M.A. review shall be allowed by the Hearing Officer only upon a showing of good cause as provided in Section 4.4 above. The Party requesting submission of such a medical report shall make the request to the Hearing Officer assigned to the case and send a copy of the request to the D.U. and all Parties or their counsel if they are represented. The request shall state the reason the medical report was not timely produced.

6.13 Oral Testimony of Medical Witnesses.

- a. Hearings.
Oral testimony of a Medical Witness may also be taken at hearing.
- b. Depositions.
Oral testimony of a Medical Witness on direct or cross-examination, for purpose of the hearing, may be taken at a deposition set at a reasonable time and place. If the Parties and the Hearing Officer so agree, the Hearing Officer need not attend such a deposition and the Hearing Officer shall consider the transcript of the testimony of a Medical Witness as evidence in reaching the recommended decision.

Depositions of Medical Witnesses for any purpose shall be noticed at least **10 days** prior to and completed by the Original Hearing Date.
- c. Subpoenas and Fees.
Issuance of a subpoena for a Medical Witness' attendance at hearing or deposition shall be contingent on the requesting Party accepting the obligation to pay the Medical Witness. Before the Board or Hearing Officer issues any subpoena, proof of payment arrangements for the Medical Witness may be required. Service of the subpoena is the responsibility of the requesting Party.
 - i. The Party requesting oral testimony of a treating physician shall advance to the treating physician such fees and mileage as Gov. Code § 68093 prescribes for ordinary, non-expert witnesses in superior court. If the Party requesting oral testimony of a treating physician intends to question the physician as to the physician's expert opinion, the Party requesting the oral testimony shall advance to the Medical Witness an expert witness fee.

- ii. The Party requesting the oral testimony of a Medical Witness that is not the Applicant's treating physician shall in all cases arrange in advance to pay the Medical Witness an expert witness fee. The witness shall be entitled to claim an expert witness fee on the same conditions that such a witness would be entitled to claim under Gov. Code § 68092.5 if subpoenaed to testify in a civil action or proceeding.
- iii. When payment of an expert witness fee is required. The Party requesting the oral testimony shall contact the office of the Medical Witness and determine the witness' reasonable and customary hourly fee and shall advise the office of the Medical Witness of the anticipated length of the deposition or hearing as to hours in duration. An agreement on the Medical Witness's fee, based on the witness's reasonable customary rate and anticipated length of the testimony, shall be entered into with the Medical Witness at least **ten (10) days** in advance of the deposition or hearing. If a balance is due following the testimony, the Party requesting the oral testimony shall pay the balance upon receipt of an itemized statement. Disputes as to fees between the Medical Witness and the Party requesting the oral testimony shall be resolved by the Hearing Officer.
- iv. Failure to serve a subpoena and/or pay the prescribed witness fee in advance may be treated by the Hearing Officer as a waiver of the right to question such witness.

6.14 Testimony of Witnesses Not Listed In Prehearing Statement.

Upon written request made to the Hearing Officer with a copy sent to opposing counsel, or, if no counsel, then to the opposing Party, a witness not listed in the *Prehearing Statement* may be called to testify provided the Party making the request presents a summary of the expected testimony and a showing that this witness will testify to matters the Party did not know about or could not have reasonably known about at the time the *Prehearing Statement* was due.

The Hearing Officer shall have the sole discretion to grant the request. If the witness is allowed to testify, the adverse Party shall have the right to a continuance to obtain rebuttal evidence and/or to cross-examine the witness. The Party originally calling the witness to testify shall bear the responsibility of insuring the witness' attendance at a further hearing set for the witness' cross-examination. If the witness fails to attend any further hearing date, the Hearing Officer can strike all of that witness' testimony. But even if a continuance is granted, the hearing must be completed **sixty (60) days** from the Original Hearing Date unless a longer continuance is agreed to by all Parties, the Hearing Officer and ACERA Chief Counsel.

6.15 Depositions of Witnesses.

Any Party to the proceeding may cause the depositions of witnesses to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state. Attendance of witnesses and the production of records in regard to depositions may be required, and appropriate subpoenas will be issued by the Board, or the Hearing Officer. The Parties shall bear their own costs for such depositions. **[See Section 5.5]**

6.16 Refusal to Testify.

Refusal of a Party's witness to take the oath or affirmation or to answer questions during a hearing may preclude a Party or Applicant from meeting its burden of proof, which may result in an unfavorable decision (including withdrawal of the Application with prejudice.)

6.17 Resolution of Disputes Regarding Information and Hearing Procedure.

Disputes in regard to depositions, testimony, evidence, requests for information, and hearing procedure shall be resolved by the Hearing Officer.

The Hearing Officer shall notify the Parties and the witness involved of the Hearing Officer's resolution of the dispute within **ten (10) days** of receipt of the request for resolution of the dispute.

6.18 Enforcement of Right to Information, Compelling Testimony, and the Application Process.

If a deponent or witness refuses to appear at a deposition or hearing, refuses to answer questions or otherwise obstructs the Application Process, contrary to a subpoena or orders made by the Hearing Officer, upon their own motion or the request of either Party, and upon the Hearing Officer's determination that good cause has been shown therefore, the Hearing Officer shall refer the matter to the Board with a recommendation that the deponent or witness be held in contempt and that a report of the fact be made by the chairman to a judge of the superior court.³⁹

The Hearing Officer shall serve his recommendation on the Parties and the deponent or witness. The deponent or witness shall be personally served with a subpoena to attend the hearing before the Board in regard to contempt, a copy of the request of the moving Party, the Hearing Officer's recommendation, and a notice that the Board will consider the Hearing Officer's recommendation following the deponent or witness being given an opportunity to be heard.

6.19 Prehearing Conferences.

If any Party or the Hearing Officer desires, there may be a Prehearing Conference in person or by telephone. The Prehearing Conference may include the Hearing Officer's consideration and ruling on a dispute as to the admissibility or inadmissibility of evidence. The Hearing Officer shall give all Parties and ACERA **seven (7) days** notice of the time and place of any scheduled Prehearing Conference, unless such notice is waived by all Parties and the ACERA Chief Counsel, on behalf of ACERA.

Where Applicant is not represented by legal counsel, a Prehearing Conference shall be scheduled. Suggested items for discussion at such Prehearing Conferences include the following:

- The injuries/illnesses upon which the *Application for Disability Retirement* is based.
- Contested Issues.
- Confirmation that the Disability Packet contains all relevant medical records.

³⁹ Gov. Code §§ 31535, 25170 - 25175.

- Timelines for filing the *Prehearing Statement Form* (see ACERA Disability Retirement Procedures § 6.11).
- Potential witnesses, depositions, and/or affidavits.
- Approximate length of hearing.
- Applicant's right to retain legal counsel.

This list is not intended to be exhaustive and any questions the Applicant may have about the process can be discussed.

6.20 Subpoenas to Third Parties.

a. Authority to Issue Subpoenas.

The Board and its designees, have authority to issue subpoenas. The Board, by appointment of a Hearing Officer, delegates to the Hearing Officer the Board's subpoena power.⁴⁰

b. Subpoena Requests.

Requests for subpoenas must be made in writing to the ACERA Legal Department no later than **twenty (20) days** prior to the hearing date, using the *ACERA Request for Subpoena Form*. Serving of the subpoena is the responsibility of the requesting Party and must be made at least **ten (10) days** before the hearing, unless the witness waives this notice. Failure to timely request a subpoena or pay fees (as prescribed by Gov Code § 68093) shall be treated by the Hearing Officer as a waiver of presentation of that witness or evidence.

Subpoenas are not to be used for requesting records from another Party. Any dispute regarding the exchange of records between the Parties should be resolved by a motion made pursuant to **Section 1.18**.

c. Motion to Quash.

Any Motion to Quash shall be made in writing to the Hearing Officer or, if a Hearing Officer has not been appointed, to the Board. Any motions made to the Board must be served on ACERA's Chief Counsel. A Motion to Quash may be based on one or more of the following grounds, with supporting declarations:

- Compliance will be unduly burdensome or against public policy.
- The things or testimony subpoenaed are privileged by law.
- The things or testimony subpoenaed are not relevant or material to the proceedings.
- The things subpoenaed have not been described with sufficient clarity to enable the witness to comply.

The Board or Hearing Officer shall rule on any pending Motion to Quash before continuing or beginning a proceeding.

⁴⁰ Gov. Code § 31535.

6.21 Burden Of Proof.

- a. Applicant Burden of Proof.
Applicant has the burden of proving, by a preponderance of the evidence, both incapacity and, if relevant, service-connection. Applicant must prove, by a preponderance of the evidence, that the Member is entitled to the requested benefit.⁴¹
- b. Employer Burden of Proof.
The Employer has the burden of proving any affirmative defenses. These include, but are not limited to:
 - i. Application is barred by statute of limitations;⁴²
 - ii. Application is barred by laches (Applicant's unreasonable delay in asserting his rights to disability retirement);
 - iii. Disability is the result of an unreasonable refusal of medical treatment;
 - iv. The Member knowingly and intelligently waived a statutory right to apply for disability retirement prior to withdrawing funds;⁴³
 - v. That a permanent modified assignment is available;
 - vi. In the case of a Member who has already been granted a disability retirement allowance, that the Member is no longer incapacitated for the position he held when he retired for disability and his Employer offers to reinstate him;⁴⁴
 - vii. In the case of a Safety Member, where presumption has arisen that heart trouble is service-connected, that the heart trouble is due to contemporaneous nonindustrial exertion or otherwise does not arise out of and in the course of employment;⁴⁵
 - viii. In the case of a Safety Member, where a presumption has arisen that cancer is service-connected and the primary site of the cancer is known, that there is no reasonable link between the cancer and the Member's exposure to a known carcinogen in the workplace;⁴⁶
 - ix. In the case of a Safety Member, where a presumption has arisen that disability caused by a blood-borne disease is service-connected, that the disease did not arise out of and occur in the course of employment;⁴⁷

⁴¹ See *Rau v Sacramento County Ret. Bd.* (1966) 247 Cal.App.2d 234; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332, 1337; *McCoy v Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.

⁴² Gov. Code §31722.

⁴³ See *Hittle v Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374.

⁴⁴ Gov. Code §§ 31729, 31730.

⁴⁵ Gov. Code § 31720.5.

⁴⁶ Gov. Code § 31720.6.

⁴⁷ Gov. Code § 31720.7.

- x. In the case of a Peace Officer Member, as defined in Sections 830.1 to 830.5, inclusive, of the Penal Code, where a presumption has arisen that illness due to exposure to biochemical substance is service-connected, that the illness or death did not arise out of and in the course of employment.⁴⁸

6.22 **Evidence.**

- a. **Oral Evidence.**
Oral evidence shall be taken only on oath or affirmation, except as otherwise provided herein.
- b. **Parties' Rights.**
Each Party, subject to the requirements in these Procedures, shall have the following rights:
 - 1. To call and examine witnesses;
 - 2. To introduce exhibits;
 - 3. To include reports and depositions of Medical Witnesses;
 - 4. To cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;
 - 5. To impeach any witness regardless of which Party first called the witness to Testify; and
 - 6. To rebut adverse evidence.
- c. **Member Testimony.**
If the Member does not testify, the Member may be called and examined as if under cross-examination. Refusal of any Member to submit to examination for the purpose of answering relevant questions may result in a denial or an administrative withdrawal of the Completed Application.
- d. **Hearsay Evidence.**
Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. This section shall not be applicable to written medical reports received into evidence pursuant to **Section 6.12.**
- e. **Rules of Evidence.**
The hearing need not be conducted according to technical rules relating to evidence and witnesses.⁴⁹ Any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at hearing. Irrelevant and unduly repetitious evidence shall be excluded.

⁴⁸ Gov. Code § 31720.9.

⁴⁹ See *McCoy v Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054.

- f. Affidavits.
A Party may include as part of the Party's *Prehearing Statement* a copy of any affidavit which the Party proposes to introduce in evidence. The affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after timely notice is provided, the Hearing Officer can refuse to accept the affidavit, or it may be introduced in evidence, but shall be given only the same effect as other hearsay evidence. The Party offering the affidavit has the obligation to produce the affiant if requested by any Party or the Hearing Officer and pay any fees or costs to the affiant/witness.
- g. Judicial Notice.
In reaching a decision, the Hearing Officer may take official notice as set forth in the California Evidence Code.⁵⁰
- h. Government Records.
Certified copies of the reports or records of any governmental agency, division, or bureau shall be accepted as evidence in lieu of the originals thereof.

6.23 Hearing Procedures.

Unless the Hearing Officer determines that it is unnecessary, all hearings shall proceed as follows:

- a. The Hearing Officer shall call the case and ask for appearances by or for all Parties.
- b. The Hearing Officer will describe, for the hearing record, the documentary file offered as evidence at the hearing, before hearing testimony on the merits of the Application, and will determine if all Parties present have copies of documents offered as evidence.
- c. All Medical Advisor's Reports and Recommendations and the Disability Packet reviewed by the Medical Advisor shall be introduced as evidence.
- d. The Parties may make opening statements, orally or in writing, except the Employer may delay its opening statement until after Applicant's presentation of evidence.
- e. Applicant's case shall be presented first, including any witness testimony. During this presentation, the Hearing Officer and other Parties, or their counsel, have the right to ask questions.
- f. Employer's full presentation, including any witness testimony, is to be given next. During this presentation, the Hearing Officer and counsel have the right to ask questions.
- g. Applicant, and then Employer, may offer rebuttal evidence.

⁵⁰ See Evid. Code §§ 451, 452, and 453.

- h. Applicant may make a closing statement followed by Employer's closing statement. Upon the request of either Party, the Hearing Officer may require that closing statements and/or supplemental briefing be made in writing and submitted by all Parties to the Hearing Officer, according to a schedule approved by the Hearing Officer.

6.24 Hearing Officer's Proposed Findings of Fact and Recommended Decision.

After the hearing is concluded and the record closed, the Hearing Officer will, within **forty-five (45) days**, send a written report to the D.U. summarizing the evidence, findings of fact, and making a recommendation to the Board.⁵¹ Upon a showing of good cause, ACERA Chief Counsel may extend the time in which the Hearing Officer must submit a written report upon the written request of the Hearing Officer. The Hearing Officer's *Proposed Findings of Fact and Recommended Decision* shall meet the requirements of a civil administrative decision.⁵² Each of the following issues shall be addressed in the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*, if applicable:

- a. Whether the Member is physically or mentally incapacitated for substantially performing the usual Duties of his job with or without Accommodation.
- b. Whether the incapacity is permanent.
- c. Whether the incapacity is service-connected.
- d. Whether the Member is able to perform other job duties based on restrictions imposed by his condition(s)
- e. Whether the Member was continuously physically or mentally incapacitated to perform his duties from the date of discontinuance of service to the time his Completed Application was filed.
- f. If the Member is found permanently incapacitated, whether annual medical examinations should be required.
- g. If an Earlier Effective Date is requested, whether the Applicant is entitled to such under Gov. Code 31724.

The D.U. shall serve all Parties with a *Notice of Hearing Officer Recommendation* attaching the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*.

Any Hearing Officer who has not issued a decision on any matter within **forty-five (45) days** of closing of the record shall be removed from the ACERA Hearing Officer Panel until the outstanding decisions for all matters assigned to that Hearing Officer have been received by the D.U. Any H.O. may apply to ACERA Chief Counsel with an explanation of any special circumstances and a request to be placed back on the panel for assignment even though he or she may have decisions that have not yet been issued.

⁵¹ Gov. Code §§ 31533, 31534.

⁵² Code Civ. Proc. § 1094.5(c); See also *Topanga Assn. for a Scenic Community v County of Los Angeles* (1974) 11 Cal.3d 506, 515.

6.25 Objections to Hearing Officer's Proposed Findings of Fact and Recommended Decision.

Any Party objecting to a Hearing Officer's *Proposed Findings of Fact and Recommended Decision* has **ten (10) days** after service of the *Proposed Findings of Fact and Recommended Decision* to submit written objections to the D.U. The D.U. will send any objections to the other Parties and provide a courtesy copy to the Hearing Officer.⁵³ The other Parties have **five (5) days** to respond to such objections. No further written objections or written responses will be accepted, however, nothing in this section shall be construed to prohibit any verbal comments at the Board Meeting.

It is within the sole discretion of ACERA Chief Counsel to return the matter back to the Hearing Officer for consideration of the objections and modification to the *Proposed Findings of Fact and Recommended Decision* prior to the Board Consideration Date.

The written objections and any responses thereto, shall then be incorporated into the record to be considered by the Board.

Late objections will be rejected; however, the Parties may raise such objections orally at the Board Meeting.

⁵³ Gov. Code § 31534.

7. ADMINISTRATIVE REPORTS

7.1 Administrative Reports and Recommendations to the Board.

- a. Before a Completed Application goes to the Board for a decision, the Disability Unit shall review the file and prepare a written report to the Board addressing the following issues, as applicable:
 - i. Permanent incapacity. Whether the M.A. Recommendation(s) and any Hearing Officer *Proposed Findings of Fact and Recommended Decision* determined that the Completed Application is sufficient to support a decision by the Board that the Member is permanently incapacitated physically and/or psychologically from the substantial performance of his regularly assigned Duties.
 - ii. Service-connected disability retirement. In the case of an Application for a service-connected disability, whether the M.A. Recommendation(s) and any Hearing Officer *Proposed Findings of Fact and Recommended Decision* determined that the Completed Application and any other evidence substantiate that the incapacity was the result of an injury or disease arising out of and in the course of employment.
 - iii. Non-service-connected disability retirement. In the case of an Application for non-service-connected disability retirement, whether or not the Member has five (5) years or more of retirement service credit to be eligible for non-service-connected disability retirement, and a summary of the M.A. recommendation(s) and any Hearing Officer *Proposed Findings of Fact and Recommended Decision* regarding whether the disability was not service-connected. This summary may also include a discussion as to whether the disability was due to intemperate use of alcoholic liquor or drugs, willful misconduct or violation of law, and for individuals who become Members of the system on or after January 1, 1988, that the disability is not due to conviction of a felony or criminal activity which caused or resulted in the Member's disability.⁵⁴
 - iv. Return to Work. Whether it appears that an opportunity for accommodation and/or returning the Member to work exists under the circumstances presented by Gov. Code §§ 31725.5, 31725.6, and 31725.65.
 - v. Annual Examinations. For Members under age 55, whether the M.A. Recommendation(s) and any Hearing Officer *Proposed Findings of Fact and Recommended Decision* determined that annual medical examinations following disability retirement should be required.
 - vi. Effective Date of Disability. Recommendation as to the effective date of disability retirement, if applicable.⁵⁵

⁵⁴ Gov. Code §§ 31726, 31726.5.

⁵⁵ Gov. Code § 31724.

- vii. Insufficient or Conflicting Evidence. If, from the medical reports and other documents submitted or otherwise obtained, it is determined that the records are in conflict or that the records present issues regarding permanent incapacity, service connection to the incapacity, alcohol or drug use, refusals to accept reasonable accommodations, refusals to pursue treatment and/or appropriate medical care, or misrepresentations by an Applicant in the Application Process or to care providers. Then, it may be recommended that the Application be denied for lack of sufficient evidence, or that the matter be referred to a Hearing Officer for a determination as provided by these rules.

- b. A copy of all M.A. Recommendations and any Hearing Officer *Proposed Findings of Fact and Recommended Decision*, hearing transcripts, prehearing briefs, objections to the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*, and any relevant correspondence shall be attached to the D.U.'s written report.

8. BOARD ACTION

8.1 Presentation to the Board – Consent Calendar Items.

Board action may include action taken via the Consent Calendar. Disability Applications may be placed on the Board's Consent Calendar on the date noticed to all Parties ("Board Consideration Date") when the Parties do not dispute the action recommended to the Board. Consent items are voted on at the beginning of the Board agenda and require a single vote of the Board for approval or denial of all Consent items. Any Consent item may be pulled by a Board member who may have questions or concerns about the item. The Application will then be deliberated at the following month's Board meeting as a Regular Calendar item. In this event, all Parties will be notified and provided the option to attend the Board Consideration Date.

Upon receipt of the administrative report of the D.U., the Board may take one of the following actions on consent items:

- a. Accept Medical Advisor or Hearing Officer's Recommendation; or,
- b. Refer Case to Regular Calendar; or,
- c. Take Any Other Actions Which May Assist the Board in Making a Decision on the Completed Application.

8.2 Presentation to the Board – Regular Calendar Items.

ACERA Staff will present the matter to the Board on the date noticed to all Parties ("Board Consideration Date.") The Board may immediately vote and take an action,⁵⁶ or may request that any Party or ACERA staff or the M.A. respond to questions. Any Party or their counsel may request the opportunity to make an oral presentation to the Board on the Board Consideration Date; it is at the sole discretion of the Board to grant such a request. Any oral presentation shall be limited to ten (10) minutes, and any other Party shall have an opportunity to immediately orally respond and make comments. The responding Party shall have a time limit of five (5) minutes. The Board, in its sole discretion, may allow additional time for any oral presentation or answering of questions.

No new evidence or witness testimony may be heard or received by the Board. The Board may, however, allow oral argument in its discretion.

Upon receiving the *Proposed Findings of Fact and Recommended Decision* of a Hearing Officer, the Board may take any of the following actions:

- a. Approve and Adopt H.O. Findings.
Approve and adopt the *Proposed Findings of Fact and Recommended Decision* of the Hearing Officer;⁵⁷ or,

⁵⁷ Gov. Code § 31534(a).

- b. Refer to H.O.
Refer the matter back with or without instructions to the Hearing Officer for further proceedings;⁵⁸ or,
- c. Independent Review of the Evidence.
Receive and review all evidence considered by the Hearing Officer (including transcripts and affidavits, if any) and make a decision based on its own independent review of the testimony and evidence.⁵⁹ The Board may reject the credibility determinations of the Hearing Officer and make its own credibility determinations⁶⁰; or
- d. Conduct a Board Hearing.
Set the matter for hearing before itself. At such hearing, the Board shall hear and decide the matter as if it had not been referred to the Hearing Officer.⁶¹ If the Board holds the hearing itself, the Board shall render its decision by the second regular meeting after the matter is submitted. For purposes of evidentiary hearings before the Board, a tie vote results in a failure to find in favor of the Applicant and constitutes a denial of the Application, or that portion of the Application on which the vote is taken.

In cases where there is no *Proposed Findings of Fact and Recommended Decision* of a Hearing Officer, the Board may take any action listed in **Section 8.2**, above.

To protect the privacy interests, any substantive discussion concerning the merits of an application for disability retirement shall be held in closed session. Any Party shall have the right to attend that closed session. Closed session items are reviewed at the end of the Board Meeting and the general public is excluded from the room. However, a Member has the right to request that the hearing be conducted in open session.

8.3 Decision on Completed Application.

The determination on a Completed Application, including any finding of disability and of service-connection, shall be made by and shall be the decision of the Board. Each such decision shall be based upon all of the admissible evidence presented to the Board, including but not limited to the Medical Advisor's Recommendation and Hearing Officer's *Proposed Findings of Fact and Recommended Decision*. The administrative report of the D.U. alone shall not be deemed by the Board to be evidence.

The decision of the Board shall become final on the date the *Notice of Board Decision* is served on the Parties.⁶² When the decision of the Board becomes final, its findings shall be conclusive for all purposes in connection with both service-connected and non-service-connected disability retirement, except as otherwise provided in the CERL '37.

⁵⁸ Gov. Code § 31534(c).

⁵⁹ Gov. Code § 31534(b); See also *Keith v San Bernardino County Retirement Board* (1990) 222 C.A.3d 411, 415; *Travelers Indemnity Co. v Gillespie* (1990) 50 Cal.3d 82, 103.

⁶⁰ See *Mixon v Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1310, fn. 2.

⁶¹ Gov. Code § 31534(d).

⁶² Code of Civ. Proc. § 1094.6(b).

8.4 **Notice of Board's Action.**

The D.U. shall notify the Parties and their representatives of the Board's decision within **ten (10) days** of the Board Consideration Date. The *Notice of Board Decision* shall include the decision, the date the decision was rendered, and notice of the right to judicial review.⁶³

⁶³ Code of Civ. Proc. § 1094.6.

9. JUDICIAL REVIEW OF BOARD DECISION

9.1 Judicial Review of the Board Decision.

A Party may obtain judicial review of the Board's decision by filing a Petition for Writ of Mandate ("Petition") with the Superior Court of Alameda County ("Superior Court") no later than the **ninetieth (90th) day** following the date on which the Board's decision becomes final.⁶⁴ **[See Section 8.3.]** The time for filing a Petition shall be extended if the Petitioner files a request for the record within **ten (10) days** of the date the Board renders its decision.⁶⁵

A copy of any Petition filed must be served on all Parties and ACERA Chief Counsel.

The Employer may obtain judicial review of the Board's denial of a disability retirement pension by filing a Petition or by joining or intervening in a Petition filed by the Member.⁶⁶ If such Petition is not filed or the Superior Court enters judgment denying the Petition, and the Employer has dismissed the Member for disability, the Employer shall reinstate the Member to his employment, effective as of the day following the effective date of the dismissal.⁶⁷

If the Superior Court reverses a denial by the Board of an Application for a disability retirement allowance, the superior court in its discretion may award reasonable attorneys' fees as costs to the Member or beneficiary of the Member who successfully appealed the denial of such Application. Such costs shall be assessed against the Board, shall be considered a cost of administration, and shall in no event become a personal liability of any member of the Board.⁶⁸

9.2 Request for Preparation of Administrative Record.

Any request for the preparation of the administrative record pursuant to Code of Civil Procedure § 1094.6 shall be made in writing and filed with the D.U. The D.U. shall, within **ten (10) days** of receiving such a request, notify the requesting Party of the estimated cost of preparing the record. Any requesting Party other than the Employer or ACERA shall, within **ten (10) days** of receiving such notification, deposit with the D.U. an amount sufficient to cover the estimated cost. If the cost of preparing the record exceeds the amount deposited, the Party requesting the record shall pay the excess. If the amount deposited exceeds the cost, the difference shall be returned to the Party requesting such record. Upon receiving the required deposit, the D.U. shall promptly prepare the record, and shall include the transcript of the proceedings, all pleadings, all notices and orders, the final decision, all admitted exhibits, all rejected exhibits in the possession of the Board, all written evidence, and any other papers in the case.

⁶⁴ Code of Civ. Proc. §§ 1094.5, 1094.6(a.)

⁶⁵ Code of Civ. Proc. § 1094.6(d).

⁶⁶ Gov. Code § 31725; *See also County of Alameda v Board of Retirement (Carnes)* (1988) 46 C.3d 902.

⁶⁷ Gov. Code § 31725; *See also McGriff v County of Los Angeles* (1973) 33 Cal.App.3d 394, 398 -

399; *Tapia v County of San Bernardino* (1994) 29 Cal.App.4th 375, 382-384; *Raygoza v County*

of Los Angeles (1993) 17 Cal.App.4th 1240, 1247; *Phillips v County of Fresno* (1990) 225

Cal.App.3d 1240, 1257-1258; *Hanna v Los Angeles County Sheriff's Department* (2002) 102 Cal.App.4th 887, 894-895.

⁶⁸ Gov. Code § 31536.

9.3 Non-Service-Connected Disability Retirement Pending Review of Right to Service-Connected Disability Benefits.

If a Member is determined by the Board to be entitled to a non-service-connected disability retirement, he may apply for, and the Board in its discretion may grant, a **non-service-connected disability retirement allowance** while he is pursuing any service-connected disability retirement.⁶⁹

If it is later determined that the Member has a service-connected disability, appropriate adjustments shall be made to the Member's retirement allowance retroactive to the effective date of his disability retirement.⁷⁰

⁶⁹ Gov. Code § 31725.8.

⁷⁰ Gov. Code § 31725.8.

10. REEXAMINATIONS

10.1 Disability Beneficiaries: Records Review and Medical Exams.

a. Annual Reviews and Medical Examinations .

If a disability retirement is granted to any Member under age 55, the Board may require the Member to undergo annual reviews and medical examinations. Annual Reviews and Medical Examinations may be required upon granting the disability retirement allowance or anytime thereafter. Such examinations will be at ACERA's expense.⁷¹ As part of this review, the Member will be required to complete a *Continuing Disability Questionnaire*.

The Member shall be required to submit recent medical records and may be required to attend and participate in a physical or psychological examination. These examinations and records shall be reviewed by the Medical Advisor who shall make a recommendation to the Board regarding whether the Member is still permanently incapacitated for the performance of duty. Based on the review of medical records and any examination(s), the Board will determine if the Member is still physically or mentally unable to perform the Duties of the position held by him at the time the disability retirement was granted.⁷² The Employer's ability to accommodate a Member's disability shall be taken into consideration in the Board's determination of whether the Member is still permanently incapacitated for the performance of duty.

The D.U. or Board may additionally, or in the alternative, arrange for a review of the circumstances relating to the Member's entitlement to receive disability benefits.⁷³

b. Execution of Release(s).

The Board may require, at any time, that a Member receiving disability retirement benefits execute and deliver to ACERA, a written *Authorization to Obtain and Release Records and Information* for release of medical and/or psychological records, military records, vocational rehabilitation records, employment records, and any other records or information which reasonably may lead to relevant information.

c. Reinstatement.

If, from records received and medical review/examination, the Board determines that a Member that has been granted a disability retirement is no longer incapacitated for duty, and his Employer offers to reinstate the Member, his disability retirement allowance shall be canceled immediately, and he shall be reinstated into service pursuant to the regulations of the Employer for reemployment of personnel.⁷⁴ The Member has the right to refuse reinstatement; however, the Member's disability retirement allowance shall be discontinued. The Member may apply for a regular service retirement, if eligible.

⁷¹ Gov. Code § 31729.

⁷² Gov. Code § 31729.

⁷³ Gov. Code § 31732.

⁷⁴ Gov. Code § 31730; See also *Schrier v San Mateo County Employees' Retirement Association* (1983) 142 Cal.App.3d 957, 963.

- d. Refusal to Submit to Review/Examination and Execute Release.
If any Member under age 55 who has been granted disability retirement benefits refuses to submit to a medical examination, supply requested information or provide any release forms requested, his disability retirement allowance shall be discontinued until he withdraws his refusal. If the refusal continues for a period of one year, the retirement allowance shall be cancelled.⁷⁵

⁷⁵ Gov. Code § 31731.

11. EMPLOYER APPLICATIONS

11.1 General.

Where an Application is filed for the Member by the Employer, the burden of proving permanent incapacity from service shall remain with the Applicant, in this case, the Employer.

The filing requirements and timeframes for an Employer Application are set forth in this **Section 11**. To the extent the requirements and timeframes set forth in this section may conflict with any of those set forth in **Section 2**, this section shall control those disability applications generated by the Employer and all Parties must abide by the timeframes and filing requirements set forth below in **Sections 11.2 – 11.6**.

11.2 Application Contents.

An Employer-generated Application shall consist of each and all of the following:

- a. Completed Employer Application.
Including a written statement signed by the Department Representative or its authorized agent, which states the basis for the Application, including why the Member is disabled in a manner which permanently incapacitates the Member from the substantial performance of his Duties, describes the nature and extent of the disability, states whether the disability is asserted to be service-connected, and identifies the effect which the disability has had upon performance by the Member of his Duties.
- b. Written Physician Statement.
A written statement signed by a physician which indicates that the Member is permanently disabled from the substantial performance of his Duties or an explanation for why there is no such written statement, and copies of any letters that have requested such a statement be obtained by the Member.
- c. Cover Letter from the Attorney Representing the Employer.
- d. Workers' Compensation Documents.
- e. EFJA.

11.3 Notice of Employer Application.

The D.U. shall, not later than **ten (10) days** after the date the Employer Application is filed, personally, or by certified mail, serve upon the Member the following:

- a. A copy of the *ACERA Disability Retirement Procedures*.
- b. A copy of the *Employer Application*.
- c. An *Authorization to Obtain and Release Records and Information Form*.

- d. A written *Notice of Employer Application* which informs the Member:
 - i. of the *Employer Application* and the date of its filing;
 - ii. of the Member's right to either support or oppose the *Employer Application* and to be represented by legal counsel at his expense;
 - iii. that the Member may amend the *Employer Application* from a non-service Application, to a service-connected disability retirement Application, or may amend the Employer Application in any other way;
 - iv. that the Member may file one or more medical reports relating to the Employer Application.
- e. Delayed Application Form – signed off by treating physician.

11.4 **Requests for Documentation.**

a. Information from Employer.

- i. Supporting Documentation. The Employer shall have **thirty (30) days** from the date of service of the *Notice of Employer Application* to forward all records which have been designated by the Employer to supplement and support the Employer Application.

At the time an Employer Application is received, or anytime thereafter, the Board, or the D.U., may make a request of the Member's Employer, Employer Representative, Department Representative, supervisors or co-workers for information regarding the Member's job duties, illness or injury and other pertinent data.

A *Department/Agency Statement* does not need to be sent to the Department and completed as that information is to be supplied in the Employer Application [**See Employer Application, questions 9 and 12.**]

- ii. Workers' Compensation Documents. At the time an Employer Application is received by the D.U., or anytime thereafter, the Board, or the D.U., may request that the Employer Representative provide copies of all claims and medical reports related to any Workers' Compensation claim for the Member. The Employer Representative shall provide, or direct the provision of, the necessary data in written form to the D.U. within **thirty (30) days** of receipt of said request.

b. Information from Employee.

At the time an Employer Application is received by the D.U., or anytime thereafter, the Board or the D.U. may make a request for information, response or documents from the Member who shall have **sixty (60) days** to respond.

11.5 Processing of Employer Application.

At the end of the **sixty (60) day period** for collection of records, the D.U. shall prepare a Disability Packet with a copy of the Employer Application and any additional documents submitted per **Section 11.4**. The D.U. will then proceed with distribution of the Disability Packet as set forth in these Procedures. (See Sections 4 et seq.)

11.6 Costs.

All physicians, medical, and other costs incurred for any and all examinations and medical reports undertaken or prepared at the request of the Member, shall be borne solely by the Member.

12. DISABILITY BENEFITS

12.1 Service Retirement Allowance Pending Determination of Disability Retirement.

A Member may, if eligible, apply for, and the Board in its discretion may grant, a regular service retirement allowance pending the determination on any application for disability retirement. If the Member is found to be eligible for disability retirement, appropriate adjustments shall be made in his retirement allowance retroactive to the Effective Date of his disability retirement.⁷⁶

In the event a Member granted regular service retirement is found not to be entitled to disability retirement, he shall not be entitled to return to his job.⁷⁷

A Member (or Member's beneficiaries) may not receive more than one type of retirement allowance for the same period of time.⁷⁸

12.2 Advanced Disability Pension Payments for Safety Members.

ACERA shall deduct the amount of any advanced disability allowance payments made to a safety Member under Labor Code §§ 4850.3 or 4850.4 from the Member's retroactive disability pension payments.⁷⁹ If the retroactive disability allowance is not sufficient to reimburse the total advanced disability pension payments, an amount no greater than 10% of the Member's monthly disability allowance shall be deducted and reimbursed to ACERA until the total advance disability pension payments have been repaid. ACERA and the Member (or Successor-in-Interest) may agree to another schedule.

12.3 Effective Date of Disability Retirement.

Once granted, a Member's disability retirement allowance shall become effective as of the Application Date of the Completed Application, subject to the following exceptions, but not earlier than the day following the last day for which the Member received regular compensation.⁸⁰

- a. The Member shall not be retired until the expiration date of any leave of absence with compensation to which he shall become entitled under the provisions of Division 4 (commencing with Section 3201) of the Labor Code, unless the Member consents to retirement prior to the expiration of such leave of absence with compensation.
- b. The retirement of a Member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation unless the Member consents to his retirement at an earlier date.

⁷⁶ Gov. Code §§ 31724, 31725.7 (a).

⁷⁷ Gov. Code §§ 31725, 31725.7(b).

⁷⁸ Gov. Code § 31725.7(b).

⁷⁹ Gov. Code § 31897.6.

⁸⁰ Gov. Code § 31724.

- c. If the Board finds that the filing of the Member's Completed Application was delayed by administrative oversight, the Completed Application Date may be deemed to be the day following the day for which Applicant last received regular compensation. [See **Section 12.3 a.**]

If Applicant demonstrates that a Completed Application was delayed by administrative oversight until after the last day of regular compensation, the Completed Application shall be deemed filed the day after the last day of regular compensation. [See **Section 12.3 a.**]

- d. If the Board finds that the filing of the Member's Completed Application was delayed by an inability to ascertain the permanency of the Member's incapacity until the date following the day for which the Member last received regular compensation, the Completed Application Date may be deemed to be the date following the day for which the Member last received regular compensation.⁸¹

If Applicant demonstrates that a Completed Application was delayed by inability to determine the permanency of the **Member's** incapacity until after the last day of regular compensation, the Completed Application should be deemed filed the day after the last day of regular compensation.

- e. If the Member receives compensation for service in an alternate position after the Completed Application Date, the Member is entitled to the approved retirement allowance for the period his Completed Application was pending, rather than only from the date of approval of the Completed Application (e.g., where the Member takes a lower-paying job pending the resolution of his disability application.) ACERA's pension payment obligation will be offset by compensation received for the lower-paying job while his Completed Application was pending before Board.⁸²

12.4 Non-Service-Connected Disability: Benefits.

- a. Members **age 65 or over** who are retired for non-service-connected disability shall receive their service retirement allowance.⁸³
- b. Members **under age 65** who are retired for non-service-connected disability and who are not simultaneously retired as a Member on deferred retirement of PERS or another CERL '37 System shall receive a **disability retirement allowance** which shall be the greater of the following:
 - i. The sum to which the Member would be entitled as service retirement.
 - ii. A sum which shall consist of any of the following:
 - 1. An annuity which is the actuarial equivalent of the Member's accumulated contributions at the time of the Member's retirement.

⁸¹ Gov. Code § 31724.

⁸² See *Puckett v Orange County Board of Retirement* (1988) 201 Cal.App.3d 1075.

⁸³ Gov. Code § 31726.

2. If, in the opinion of the Board, the Member's disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the Member, a disability retirement pension purchased by Employer contributions.
 3. If the Member has joined the system on or after January 1, 1988, and, in the opinion of the Board, the Member's disability is not due to conviction of a felony or criminal activity which caused or resulted in the Member's disability, a disability retirement pension purchased by Employer contributions.
- c. **Safety Members age 55 and over** who retire for non-service-connected disability shall receive their service retirement allowance.⁸⁴
- d. **Safety Members under age 55** who retire for non-service-connected disability and who are not simultaneously retired as a Member on deferred retirement of PERS or another '37 System shall receive a disability retirement allowance which shall be the greater of:
- i. The sum to which the Member would be entitled to as service retirement⁸⁵; or,
 - ii. A sum which shall consist of:
 1. An annuity which is the actuarial equivalent of the Member's accumulated contributions at the time of his retirement.⁸⁶
 2. If, in the opinion of the Board, the Member's disability is not due to intemperate use of alcoholic liquor or drugs, willful misconduct, or violation of law on the part of the Member, a disability retirement pension purchased by Employer contributions.⁸⁷
 3. If the Member has joined the system on or after January 1, 1988, and, in the opinion of the Board, the Member's disability is not due to conviction of a felony or criminal activity which caused or resulted in the Member's disability, a disability retirement pension purchased by Employer contributions.⁸⁸

12.5 **Non-Service-Connected Disability: Calculations.**

The non-service-connected disability retirement pension shall be such an amount as with that portion of the Member's annuity provided by his accumulated normal contributions will make his disability retirement allowance, exclusive of the annuity provided by his accumulated additional contributions, equal:

⁸⁴ Gov. Code § 31726.5.

⁸⁵ Gov. Code § 31726.5(a).

⁸⁶ Gov. Code § 31726.5(b)(1).

⁸⁷ Gov. Code § 31726.5(b)(2); See also *Keith v San Bernardino County Retirement Board* (1990) 222 Cal.App.3d 411, 417.

⁸⁸ Gov.Code § 31726.5(b)(3).

- a. 90% of 1/60 of the Member's final compensation multiplied by the number of years of service credited to him, if (1) the Member must rely upon service in another retirement system in order to be eligible to retire or (2) such disability retirement allowance exceeds 1/3 of his final compensation.
- b. If the Member is eligible to retire without relying upon service in another retirement system, and the disability retirement allowance computed under (a) does not exceed 1/3 of his final compensation, 90% of 1/60 of his final compensation multiplied by the number of years of service which would be creditable to him were his service to continue until attainment by him of age 65, but in such case the retirement allowance shall not exceed 1/3 of his final compensation.⁸⁹

12.6 Service-Connected Disability: Calculations.

Upon retirement of any Member for service-connected disability, he shall receive an annual retirement allowance payable in monthly installments, equal to one-half (50%) of his final compensation.⁹⁰ Or, if qualified for a service retirement, he shall receive his service retirement allowance if such allowance is greater but in no event shall it exceed the limitation set forth in Cal. Gov. Code § 31676.1.⁹¹

12.7 Cost of Living Payments.

Cost of living payments apply to Members who retire for disability on the same basis and to the same extent as those Members who have regular service retirement.⁹²

12.8 Prohibition on Assignment of Benefits.

Under California Government Code § 31452, a retirement allowance is unassignable, except as specifically provided by statute. The assignment of retirement benefits for payment of attorney's fees is not permitted. Examples of permitted assignments include withholdings for family related orders permitted by section 704.110 of the California Code of Civil Procedure and as permitted in Government Code § 31452.5 for specific charitable and insurance deductions approved by the Board.

⁸⁹ Gov. Code § 31727.

⁹⁰ Gov. Code § 31727.4.

⁹¹ Gov. Code § 31727.4.

⁹² Gov. Code §§ 31681.8, 31739.5.

13. MEMBER DEATH PRIOR TO COMPLETION OF DISABILITY RETIREMENT PROCESS

13.1 Continuation of Disability Retirement Application Process After Death.

The person or entity entitled to pursue a Member's pending disability retirement process after the Member's death is the Beneficiary designated by the Member.

If there is no designated Beneficiary, the person or entity entitled to pursue the disability process will be the deceased Member's personal representative, or, if none, Successor-in-Interest as determined under current California law.

13.2 Beneficiary May Continue Disability Retirement Application Process.

If a Member should die before the Board makes a final determination on his Completed Application for disability retirement and/or before his *Election of Disability Retirement Allowance* is executed, his Beneficiary, personal representative, or Successor-in-Interest may elect to continue the pending Application Process on his behalf.⁹³

A fully completed and executed *Continuation of Disability Retirement Application Process After Death* Form must be received by ACERA within **ninety (90) days** of the death of the Member in order to continue the Application Process. Upon a showing of good cause, the D.U. may accept such a designation after **ninety (90) days**, however, in all cases where no *Continuation of Disability Retirement Application* Form has been received, the Application will be deemed withdrawn with prejudice **six (6) months** after the date of death of the Member.

If a deceased Member's *Application for Disability Retirement* is continued by a Beneficiary or Successor-in-Interest and granted by the Board of retirement, all Beneficiaries or Successors-in-Interest shall be entitled to receive their share of the available benefits, regardless of which Beneficiary or Successor-in-Interest continued the Application Process on behalf of the deceased Member.

13.3 Retired Member Death: Allowance Selected in Service Retirement Contract.

If a Member is granted a regular service retirement allowance pending the determination of his entitlement to disability retirement should die before a final determination is made concerning entitlement to disability retirement, the rights of the Beneficiary may be as selected by the Member at the time of retirement for service, or as if the member had selected an unmodified allowance. The optional or unmodified type of allowance selected by the Member at the time of retirement for service shall not be binding as to the type of allowance the Member receives if the Member is awarded a disability retirement. This applies only to members who retire on or after January 1, 1999.⁹⁴

⁹³ Gov. Code § 31721, 31725.7(c), (d).

⁹⁴ Gov. Code § 31725.7(d).

13.4 Member Death After Electing to Receive Non-Service-Connected Disability Pending a Decision on the Right to Service-Connected Disability Retirement.

If any Member dies after being granted non-service-connected disability retirement by the Board, while his Application for service-connected disability retirement is being processed but before a decision by the Board on his entitlement to service-connected disability, the rights of his beneficiary shall be those selected by the Member at the time he elected to receive non-service-connected disability retirement.⁹⁵

⁹⁵ Gov. Code § 31725.8.

14. REEMPLOYMENT AND REHABILITATION

14.1 Return to Work in Lieu of Disability Retirement.

A Member retired for non-service-connected or service-connected disabilities may return to work with the same Employer in a new position with duties within his capacity to perform with his disability (a transfer, reassignment or other change of position.) The procedural requirements for such reemployment in lieu of disability retirement may be set forth by ACERA in accordance with statutory requirements found at Gov. Code §§ 31725.5, 31725.6 and 31725.65.

a. Alternate Employment if Eligible for Non-Service-Connected Disability Retirement.

Government Code § 31725.5 allows a member retired for non-service-connected disability to return to county service under certain conditions. The Employer may offer, and the member may accept, a transfer, reassignment, or other change to a position with duties within the Member's capacity to perform with his disability. The member is under no duty to accept an offer of alternative employment with the Employer. If such an offer is made by the Employer and accepted by the Member, the disability retirement allowance will be cancelled and possibly replaced with the supplemental allowance described in **Section 14.2**.

b. Alternate Employment if Eligible for Service-Connected Disability Retirement.

Government Code §§ 31725.6 and 31725.65 allow members retired for service-connected disability to return to county service under certain conditions. Section 31725.6 applies only to members who were incapacitated for the performance of their duties prior to January 1, 2004.⁹⁶ Section 31725.65 applies to members who are incapacitated for the performance of their duties on or after January 1, 2004.

Under 31725.65, when the Board finds, based on medical advice, that a member in county service is incapacitated for the performance of the member's duties, and the Board determines, based on that medical advice, that the member may be capable of performing other duties, the Board shall notify the appropriate agency in county service of its findings. Upon receipt of that notice, the agency shall immediately inform the Member of any vacant county positions that may be suitable for the member, consistent with his or her disability, and shall consult with the member in an effort to develop a reemployment plan as provided in section 31725.65. Upon commencement of service by the Member in a position specified in the approved reemployment plan, the Member's disability retirement allowance shall be terminated or supplemented as provided in section 31725.65.

⁹⁶ Because Gov. Code § 31725.6 refers to a rehabilitation program under Labor Code § 139.5, which was repealed in 2003, these procedures only discuss the process for returning to work after a service-connected disability under Gov. Code § 31725.65.

c. Members Previously Retired for Service.

Members who retired for service prior to receiving their disability retirement allowance may not return to work under the provisions of this section. However, there are other provisions of the CERL '37 that may allow a retired Member to return to service on a limited basis.⁹⁷

14.2 Supplemental Disability Allowance.

The Board may pay a Supplemental Disability Allowance in lieu of the full disability allowance to any Member who has been granted a disability retirement and who accepts alternate work with lower pay from any ACERA Employer.⁹⁸ Under such circumstances, the amount of the Supplemental Disability Allowance is equal to the difference between the Member's salary for the former position and the salary of the new position. The maximum Supplemental Disability Allowance is the amount of the disability retirement allowance the Member would have received had the Member not returned to work.

No COLA adjustments are applied to a Supplemental Disability Allowance until the Member retires from employment.

⁹⁷ Gov. Code §§ 31680, 31680.01, 31680.1, 31680.2, 31680.6,

⁹⁸ Gov. Code §§ 31725.5, 31725.6 and 31725.65.

15. RECIPROCAL DISABILITY BENEFITS PROCESSING

15.1 Policy.

It is the intent of CERL '37 provisions on reciprocal benefits to encourage career public service by granting reciprocal retirement benefits to Members who are entitled to retirement rights or benefits from two or more public retirement systems.⁹⁹ Accordingly, there is reciprocity in disability retirement benefits amongst Reciprocal Systems, e.g., the CERL '37 Counties, the Public Employees' Retirement System ("PERS"), the State Teachers' Retirement System, the Judges' Retirement System, and the retirement systems of any other public agency of the State of California that has established reciprocity with PERS subject to the conditions of Government Code § 31840.2.¹⁰⁰

15.2 Benefit Formula.

Each Reciprocal System shall calculate its respective obligations based upon a Member's service with that entity and each shall adjust its payment on a pro rata basis.¹⁰¹ No retirement system or political entity shall be liable for more than its just financial obligation.¹⁰²

15.3 Limitation on Disability Allowances.

- a. Service-Connected Disability Allowances: Member Joined Second Agency Before January 1, 1984.
No limitations.
- b. Service-Connected Disability Allowances: Member Joined Second Agency After January 1, 1984.
For those ACERA members who, after being employed with another county or an entity within the PERS, became a member of ACERA on or after January 1, 1984, any service-connected disability allowance shall be limited. Such members may not receive an amount from one Reciprocal System that, when combined with any amount from another Reciprocal System, results in a disability allowance greater than the amount the member would have received had all the member's service been with only one entity.¹⁰³
- c. Non-Service-Connected Disability Allowances.
No Member may receive a disability retirement allowance from one Reciprocal System that, when combined with any amount from another Reciprocal System, results in a disability retirement allowance greater than the amount the member would have received had all the member's service been with only one entity.¹⁰⁴

⁹⁹ Gov. Code § 31830.

¹⁰⁰ Gov. Code §§ 31830, 31840.2.

¹⁰¹ Gov. Code § 31838.5.

¹⁰² Gov. Code § 31830.

¹⁰³ Gov. Code § 31838.5.

¹⁰⁴ Gov. Code § 31838.5.

16. TAXABILITY OF DISABILITY BENEFITS

16.1 Taxability of Disability Retirement Allowance.

Disability Retirement benefits are subject to rules and regulations by the US Treasury.¹⁰⁵ While some disability retirement benefits are considered taxable income, some are not.

- a. Disability Retirement Allowance payments for a Non-Service-Connected Disability Retirement are considered taxable income.
- b. Disability Retirement Allowance payments for a Service-Connected Disability Retirement that are equal to 50% or less of the Member's final average salary, are not considered taxable income.
- c. If a disabled Member receives a service retirement allowance higher than 50% of the Member's final average salary but is eligible for Service-Connected Disability Retirement, the difference between the service retirement allowance and the 50% of final average salary is taxable, but the remainder of the benefit (*i.e.*, the 50% of final average salary) is not. Service-connected disability benefits are excluded from taxable income, but service retirement benefits are not.¹⁰⁶

16.2 Taxability of Service-Connected Disability Retirement Allowance When Disability Presumed Work-Related.

When a service-connected disability retirement is granted based on a statutory presumption that such disability is work-related,¹⁰⁷ the disability retirement allowance is reported as taxable by ACERA, except in the case of the presumption for heart trouble.¹⁰⁸ When a service-connected disability retirement is granted based on the presumption for heart trouble,¹⁰⁹ the disability retirement allowance is reported the same as if the Member received a Service-Connected Disability Retirement.¹¹⁰

¹⁰⁵ Treasury Regulation 1.104-1(b).

¹⁰⁶ Treasury Regulation 1.104-1(b).

¹⁰⁷ See Gov. Code § 31720.6 (cancer), Gov. Code § 31720.7 (blood-borne disease), and Gov. Code § 31720.9 (exposure to a biochemical substance),

¹⁰⁸ See *Take v Commissioner* (9th Circuit 1986) 804 F.2d 553.

¹⁰⁹ See Gov. Code § 31720.5.

¹¹⁰ See IRS Private Letter Ruling 133074-07; *Pellerin v. KCERA* (2006) 145 Cal. App. 4th 1099, 1106.

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