



**ACERA ADMINISTRATIVE PROCEDURES**

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## 1. GENERAL PROVISIONS

### 1.1 Purpose.

These Administrative Procedures of the Alameda County Employees' Retirement Association ("ACERA") govern the filing of and proceedings, decisions, and review of decisions relating to objections to staff determinations and the conduct of evidentiary hearings to carry out the purposes of Government Code §§ 31461, 31542, and 7522.34.

### 1.2 Resolution of Conflicting Provisions.

ACERA is governed by the County Employees' Retirement Law of 1937 as amended, and the California Public Employees' Pension Reform Act, AB 340 (2012), and other applicable state and federal laws. If a conflict should arise between these procedures and the law, the law will prevail.

### 1.3 Administrative Procedures and Amendments.

These Procedures become effective on the date they are adopted by the ACERA Board of Retirement ("Board"), at which time all prior procedures for determinations based on duties imposed by Gov. Code Sec. 31461, 31542 and 7522.34, whether written, formal, or informal, are repealed. Amendments to these Procedures may be adopted by the Board thereafter as prescribed below.

### 1.4 Amendments to Administrative Procedures.

These Procedures may be amended at any regular or specially noticed meeting of the 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 ACERA 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 administrative 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.

- A. **"Agency/Department Statement"** means the form provided by ACERA to the Employer that requests information needed from the Member's Employing Department. The *Agency/Department Statement* shall include but not be limited to, information concerning the employment status of the member, and a list of all pay items earned and or paid to the member, and a detailed explanation of each pay item earned and or paid to the member in the final average salary period.
- B. **"Objection Date"** means the date a timely objection is filed and designated by ACERA as "Complete."

- C. **“Objection Form”** means the form obtainable through the ACERA office. Once a timely objection is submitted to ACERA, it becomes Complete on the date all supporting and associated documents have been submitted to ACERA. The filing of a Completed objection triggers the administrative process and all applicable deadlines. To be considered a **“Completed Objection,”** (hereinafter called “Objection”) the following requirements must be met:
1. Member is eligible for retirement benefits (i.e., member has requisite years of service credit and met age requirement, or deferred member has not withdrawn accumulated contributions, etc.).
  2. All pages must be intact and in order;
  3. All questions must be answered and all responses to questions must be legible;
  4. The Member’s claim and evidentiary and factual basis for claim must be clearly set forth in detail;
  5. Any and all documents ACERA has requested member submit must be included. All reports and documents must be legible;
  6. The *Designation of Rights to Legal Representation Form* must be completed if an attorney is representing the Member; and
  7. The *Authorization to Obtain and Release Records and Information* must be fully completed, dated and signed by the Member.
- D. **“Employer Objection”** refers to an Objection submitted by the Member’s Employer.
- E. **“Objection Process”** means the process of reviewing and making a determination on the Completed Objection. The Objection Process begins once a submitted objection is designated as Complete, and continues until ACERA’s Benefits Manager or designee provides written notification of the agency’s final determination (i.e., Board Determination).
- F. **“Association”** means the Alameda County Employees’ Retirement Association (“ACERA”).
- G. **“Beneficiary”** means a person or entity that is designated to receive something as a result of legally sufficient document or instrument.
- H. **“Board”** means the Board of Retirement of the Alameda County Employees’ Retirement Association.
- I. **“Board Consideration Date”** means the date on which the Completed Objection, any Hearing Officer decision, and the administrative report of the Association are presented to the Board for final agency consideration and decision.

- J. **“CERL ’37”** means the County Employees Retirement Law of 1937 beginning at California Government Code § 31450.
- K. **“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.
- L. **“Chief Executive Officer” (CEO) or ACERA CEO** means the person appointed by the Board as administrator for the management of the Alameda County Employees’ Retirement Association, pursuant to CERL ’37 § 31522.2.
- M. **“Contested”** refers to a decision and/or recommendation that is objected to or opposed by a Party.
- N. **“Days”** means calendar days. When “days” is intended to refer to business days, it is noted in these Procedures.
- O. **“Deny Objection”** means the Board of Retirement denied an Objection and the Member and/or Member may not re-file another Objection based on the same contested pay items.
- P. **“Department”** means the office, division, or department of the Employer in which the Member was last employed. The person responding for the Department may include the Department Representative or Department Manager.
- Q. **“Department Manager”** or **“Department Representative”** means the person designated to address and respond to issues raised by member in the Objection, within the Department in which the Member was last employed.
- R. **“Deposition”** means pre-hearing testimony taken under oath, subject to cross-examination, and preserved in writing.
- S. **“Description of Member’s Job Duties”** means an Employer’s summary of the essential, usual, customary, and/or general duties and requirements of the member’s job, which includes mental and physical demands. The member’s job classification may be submitted to describe the member’s job duties.
- T. **“Employer or Contesting Party”** means the public agency by which the member is employed during the final average salary period,, including the County of Alameda or any of the following Participating Employers<sup>1</sup>, (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) Office of Education; and (7) Alameda County Superior Court.

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<sup>1</sup> Gov. Code § 31478

- U.** ***“Final Average Salary Period”*** means the average compensation the Member earned during the either the highest 12 consecutive pay periods or 12 months of pay, depending on payroll cycles (equivalent to 1 year); or the 78 highest consecutive pay periods or highest consecutive 36 months of pay, depending on payroll cycles (equivalent to three years). Tier of membership is the determining factor.
- V.** ***“He, him, his, Chairman”*** are terms used for convenience. It is intended that each gender be given exactly equal respect and treatment throughout.
- W.** ***“Hearing Officer” or “H.O.”*** means the person appointed to conduct an administrative evidentiary hearing on issues in dispute concerning Completed Objections which have been duly considered by ACERA’s Benefits Manager or his or her designee. Hearings may be conducted on Completed Objections. A Hearing Officer must be a current active member of the State Bar of California in good standing whose name is contained on the ACERA approved Hearing Officer panel.
- X.** ***“Legal Department”*** means the in-house attorneys working for and representing ACERA. The Legal Department includes the Chief Counsel, Associate Counsels, and Legal Assistants.
- Y.** ***“Member”*** means an ACERA member filing an objection to the agency’s administrative decision which was provided to the member in writing and signed by the ACERA Benefits Manager, or other designee of the Benefits Manager. ACERA’s Benefits Manager may designate the Assistant CEO, Chief Counsel, or the ACERA CEO.
- Z.** ***“Original Hearing Date”*** means the first date set with a Hearing Officer for hearing on a Completed Objection. The Original Hearing Date is the trigger for calculating and setting future dates. Only Completed Objections that are contested and for which a hearing is requested will have a hearing date.
- AA.** ***“Party”*** means the Association, Member who has filed an objection, and/or Employer.
- AB.** ***“Pensionable Compensation”*** means:
1. ***“Pensionable compensation”*** of a new member of any public retirement system means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.
  2. Compensation that has been deferred shall be deemed pensionable compensation when earned rather than when paid.
  3. ***“Pensionable compensation”*** does not include the following:
    - i. Any compensation determined by the board to have been paid to increase a member's retirement benefit under that system.

- ii. Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member and which was converted to and received by the member in the form of a cash payment.
- iii. Any one-time or ad hoc payments made to a member.
- iv. Severance or any other payment that is granted or awarded to a member in connection with or in anticipation of a separation from employment, but is received by the member while employed.
- v. Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, regardless of when reported or paid.
- vi. Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
- vii. Any employer-provided allowance, reimbursement, or payment, including, but not limited to, one made for housing, vehicle, or uniforms.
- viii. Compensation for overtime work, other than as defined in Section 207(k) of Title 29 of the United States Code.
- ix. Employer contributions to deferred compensation or defined contribution plans.
- x. Any bonus paid in addition to the compensation described in subdivision (a).
- xi. Any other form of compensation a public retirement board determines is inconsistent with the requirements of subdivision (a).
- xii. Any other form of compensation a public retirement board determines should not be pensionable compensation.

**AC.** **“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 Objection. Parties may attach a legal brief to the required *Prehearing Statement Form*.

**AD.** **“Procedures”** means the ACERA Administrative Procedures set forth herein, which govern the filing of, and proceedings, determinations, and review of determinations relating to an Objection.



**AE.** ***“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 (“STRS”), the Judges’ Retirement Systems I and II, 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<sup>2</sup>.

**AF.** ***“Compensation Earnable”*** means

1. *“Compensation earnable”* by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Government Code § 31460, that has been deferred shall be deemed “compensation earnable” when earned, rather than when paid.
2. *“Compensation earnable”* does not include, in any case, the following:
  - i. Any compensation determined by the board to have been paid to enhance a member's retirement benefit under that system. That compensation may include:
    - a. Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period.
    - b. Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member's grade or class.
    - c. Any payment that is made solely due to the termination of the member's employment, but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid.
  - ii. Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.

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<sup>2</sup> Gov. Code § 31831

- iii. Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
  - iv. Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
3. The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in *Salus v. San Diego County Employees Retirement Association* (2004) 117 Cal.App.4th 734<sup>1</sup> and *In re Retirement Cases* (2003)110 Cal.App.4th 426<sup>2</sup>.

**AG.** **“Subpoena”** means an order issued by the Secretary of the Board of Retirement, the Board of Retirement, or Hearing Officer directed to a person, which requires the person’s attendance at a particular time and place to testify as a witness<sup>3</sup>. Subpoenas will not be issued in instances where an Objection has not been deemed Complete.

**AH.** **“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 Objection process<sup>4</sup>.

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

**AJ.** “Precedential Decision” means a final decision on a contested matter that the Board designates as “Precedential,” and has determined that the rule determined in such matter will be followed in all other similar situations.

## 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 matter being considered under these Procedures, any Board member who states that he has not reviewed the record which was provided to the entire Board for consideration shall not vote.

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<sup>3</sup> Gov. Code § 31535, Code Civ. Proc. § 1985

<sup>4</sup> Gov. Code § 31535, Code Civ. Proc. § 1985

### **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 Objection Process. A Party must file with ACERA a written notice of hiring, changing, or dismissal of an attorney. Once written notification is received by ACERA that a Party has obtained an attorney, all notices and documents shall be sent to that attorney. Absent such written designation, ACERA is not obligated to recognize any attorney claiming to represent a Party.

No member or party is required to have an attorney at any time.

Should a Party choose to be represented by an attorney, the attorney must be a current, active member of the California State Bar in good standing<sup>5</sup>.

### **1.8 Communication with Individual Board Members.**

The Board is the decision-maker for all final agency determinations connected with these Administrative Procedures and Completed Objections. As such, ex parte communications concerning the merits or substance of an Objection 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 Objection, or vote on the Objection.

### **1.9 Stipulations to Determinations.**

No stipulation or agreement, either written or verbal, or formal or informal, which agrees to the denial or granting of Objections and associated retirement benefits, is binding on ACERA, the Board, the agency staff, Employer, or other representative.

### **1.10 Waiver and Modification of Requirements under Administrative Procedures.**

After establishing good cause including but not limited to prejudice or irreparable harm, and upon the stipulation of all Parties, any provision of these Procedures, in whole or in part, may be waived or modified with written approval stating the basis for such waiver or modification by ACERA's Chief Counsel. However, if a Hearing Officer has been appointed under these Procedures, only the Hearing Officer has authority to approve any new stipulation if he/she has not yet issued Findings of Fact and Recommended Decision.

### **1.11 Confidential Records.**

All individual records of Members (including, but not limited to, reports, sworn statements, medical reports and records, Objections, notices, orders, and findings and decisions relating to an Objection for retirement) are confidential pursuant to CERL '37 § 31532 and shall not be disclosed by ACERA to anyone except as authorized or required by law, by these Procedures, upon order of a court of competent jurisdiction, or upon written authorization by the Member<sup>6</sup>.

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<sup>5</sup> Bus. & Prof. Code § 6125

<sup>6</sup> Gov. Code § 31532

**1.12 Open Sessions.**

Substantive discussion by the Board related to an Objection shall be held in open session. The parties and general public are granted access during open sessions.

**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.**

If prior to the Board Consideration Date, a Party or a Party's counsel requests copies of the documents which are a part of the Objection Process and which have previously been provided to the requesting party, a reasonable administrative charge may be assessed and must be paid prior to providing the requested duplicate copies.

Upon receipt of a written request of a party or party's counsel, for a copy of the above described documents, ACERA will provide the copy in either electronic form or hard copy/paper upon receipt of the payment of \$0.15 per page. ACERA will provide the requested copy within 7 business days of the written request, provided payment has been received by the time the documents are delivered.

**1.15 Service of Documents.**

- A. When a provision of these Procedures requires that Parties be served, service shall be made upon ACERA, and all parties, and the Hearing Officer appointed.
- 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 simultaneously by regular US mail with first class postage fully prepaid.
- 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. 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 Objection, 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 ACERA and all Parties of any change of address.

- F. Anytime service is required on the Board, it shall be done by service on ACERA's Chief Counsel.

**1.16 Failure to Comply with Administrative Procedures.**

- A. Member or Party. Failure of the Member or Party to demonstrate eligibility for the benefit requested, and or failure to comply with these Procedures and or follow a directive or instruction of ACERA may be treated as non-cooperation and may result in dismissal with or without prejudice, rejection with or without prejudice. Failure to comply includes, but is not limited to, failure to cooperate, or failure to timely respond to requests for information, failure submit documents requested by ACERA, 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.

**2. OBJECTION TO AGENCY DETERMINATION**

**2.1 Basis for Objection.**

Government Code §§ 31461, 31542, and 7522.34 require ACERA to make determinations concerning compensation earnable and pensionable compensation. After members have identified their final average salary period, ACERA will give members written notice of the Benefits Manager's determination regarding compensation earnable and pensionable compensation.

If a member objects to the Benefits Manager's (or designee) determination, member shall submit a written Notice of Objection Form.

**2.2 Making the Objection.**

- A. Objection. Upon request, ACERA shall furnish an Objection Form to member or Employer. The Form must be completed in accordance with these Procedures. The Objection Form shall be signed under penalty of perjury.

An Objection must include the member's home address and telephone number, even if the member is represented by an attorney. It is the responsibility of the member and the member's attorney, if the member is represented, to notify ACERA and other Parties of any change of address and/or telephone number.

An Objection Form, or document filed in support thereof, that is incomplete or illegible may be rejected for filing or, if filed, may be summarily rejected or withdrawn by ACERA at a later time as incomplete or illegible.

**2.3 Filing Date and Time Requirements.**

- A. Completed Objection. An Objection to the ACERA Benefits Manager's (or designee) determination shall not be deemed filed until the date on which a Completed Objection, including all required documents, is received by ACERA.

B. Time Requirements. The Completed Objection must be made within the following timeframes:

1. While the Member is in service;
2. Within 180 days after the Member's retirement date.

## 2.4 Required Documents for Objection.

The documents and reports listed below, shall be completed or furnished by the Member or party in connection with the Objection Form. An Objection shall not be accepted, reviewed, or considered for determination of completeness and will not be reviewed or considered by the Board of Retirement, unless it contains all of the documentation listed below. A signed Objection with all its attached documents becomes a Completed Objection after it is reviewed and confirmed to contain each of the following:

A. Notice of Objection Form.

1. Completed Notice of Objection Form, containing all information requested therein and signed under penalty of perjury by member or contesting party.

Additional information may be required during the Objection Process, and must be supplied by the member or contesting party if a request for information is made by ACERA. Failure to supply information requested by ACERA within **forty-five (45) days** of the date of the request may result in rejection of the Objection. No more than one **thirty (30) day** extension may be requested or granted to provide information ACERA requests.

2. Completed Authorization to Obtain and Release Records and Information ("Release.") This Release authorizes the release of all records, including but not limited to personnel and any other records or information which reasonably may lead to relevant information needed for a full and complete evaluation of the Objection.

Additional and supplemental *Releases* may be required during the Objection Process. Failure to complete Releases requested by ACERA may result in dismissal with or without prejudice of the Objection.

B. Receipt and Filing.

An Objection will not be accepted for review and consideration by ACERA until it complies at a minimum with the requirements listed above. ACERA may receive any Objection tendered for filing, but for purposes of review only, noting the date of receipt. If ACERA determines that the Objection is complete it shall deem the Objection to be a Completed Objection, and so notify the member or contesting party. If ACERA determines that the Objection is not complete it shall so notify the member or contesting party, specifically identify the deficiencies, and inform the member or contesting party that the Objection will not be reviewed further until completed as required under the Procedures, and is therefore deemed rejected until the deficiencies identified are corrected.

## **2.5 Furnishing Copy of the ACERA Administrative Procedures.**

A complete copy of these Procedures is available online at [www.acera.org](http://www.acera.org). Where a member or contesting party does not have internet access, ACERA may provide the Administrative Procedures upon request.

## **2.6 Where to File.**

Objection forms and related materials may be obtained from the ACERA offices at 475 14th Street, Suite 1000, Oakland, CA 94612-1916. Information is also available online at [www.acera.org](http://www.acera.org). Telephone inquiries should be made to (510) 628-3000 or toll free at (800) 838-1932.

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

## **2.7 Employer Notification of Objection.**

ACERA shall notify the Employer of the filing of a Completed Objection.

## **2.8 Information from Employer.**

- A. At the time a Completed Objection is received by ACERA, or anytime thereafter, ACERA may make a request of the Member's Employer, Employer Representative, Department Representative or supervisors for information regarding pay items, compensation earnable, pensionable compensation, member's job duties, or other pertinent data. 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 Objection. No more than one extension 30 day may be requested or granted to provide information ACERA requests.
- B. Review Period and Comment Papers. Upon receipt of the information provided to ACERA by the member, Employer and or contesting parties, ACERA shall provide a copy of the complete file ("Objection Packet") to the parties. The Parties shall have **thirty (30) days** to review the record contained in the Objection Packet before it is reviewed by the ACERA Benefits Manager for reconsideration and issuance of a written determination.

During the 30 day review period, parties may submit a Comment Paper commenting on the contents of the Objection 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 Benefits Manager to review. Assertions of fact must be supported by citations to exhibits contained in the Objection Packet. Argument and unsupported assertions are inappropriate for a Comment Paper. No additional comment period is allowed or will be granted.

Comment Papers submitted by parties shall be served, by the Party submitting it, on all other Parties and ACERA simultaneously and within **thirty (30) days** of date of ACERA's mailing of the Objection Packet.

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, ACERA's Benefits Manager will render a written determination to the parties within 30 days, following the expiration of the comment paper period.

## **2.9 Burden Of Proof.**

The member or contesting party has the burden of proof to establish with the preponderance of the evidence that the pay item(s) at issue are compensation earnable, pensionable compensation, or not paid to enhance the retirement benefit.

## **2.10 Objection Withdrawal.**

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

**B. Type and Effect.**

1. Withdrawal without Prejudice. An Objection withdrawn without prejudice is treated as though it was never submitted. If an Objection is withdrawn without prejudice, any subsequent Objection, including resubmission of the withdrawn Objection, is considered a new Objection and must meet all requirements, including timely filing requirements.
2. Withdrawal with Prejudice. An Objection withdrawn with prejudice precludes the filing of any future Objection based on the same pay items (remuneration).
3. Administrative Withdrawal. When an Member fails to comply with these Procedures, fails to submit required documents, fails to cooperate, or fails to timely respond to requests for information, ACERA may withdraw an Objection with or without prejudice.

## **3. HEARINGS BEFORE A HEARING OFFICER**

### **3.1 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 final determination by the Board.



### 3.2 Right to a Hearing.

Upon timely written request made pursuant these Procedures any objecting member or contesting party shall be entitled to a hearing on the Completed Objection. 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*.

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.

### 3.3 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.

### 3.4 Appointment of Hearing Officer.

- A. Panel. The ACERA Board authorizes the use of an approved panel of Hearing Officers. The panel may be revised on occasion as determined by ACERA Chief Counsel. Hearing Officers may be obtained for the panel from an independent arbitration administrator, such as the American Arbitration Association, or from the California Office of Administrative Hearings, or from other sources.
- B. Assignment of Hearings. New hearings are assigned to the Hearing Officers under a neutral system of rotating order. When a hearing is to be conducted, written *Notice of Proposed Hearing Officer*, stating the next Hearing Officer in rotation, shall be sent by ACERA Chief Counsel to the Parties.
- C. Challenge of Hearing Officer. The Parties shall have **ten (10) days** from service of the *Notice of Proposed Hearing Officer* to exercise, in writing, a peremptory or “for cause” 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 “for cause” challenge.

1. Peremptory Challenge. Only one peremptory challenge may be exercised by a Party<sup>7</sup>.
2. “For Cause” 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<sup>8</sup>. A determination on the challenge shall be made by ACERA Chief Counsel.

If there is no challenge, the selection becomes final **ten (10) days** after the *Notice of Proposed Hearing Officer* is sent. The Hearing Officer will be notified of the selection once it is final.

### 3.5 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 **sixty (60) days**. Once the hearing date has been selected, the 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 **sixty (60) 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 ACERA.
- C. Prehearing Matters. The Hearing Officer will set the cut-off date for requests to subpoena witnesses, consistent with these Procedures. 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 ACERA.
- 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.

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<sup>7</sup> Code Civ. Proc. § 170.6

<sup>8</sup> 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

- E. Decision. In the event a Hearing Officer does not render a decision **within thirty (30) 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 ACERA. 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 Objection 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.

### 3.6 Continuances.

At the request of a party with notice to the other party, and upon a showing of good cause, the Original Hearing Date may be continued by the Hearing Officer. The Hearing Officer shall consider written objections to such a request, if any, from the other party before ruling on the request. Any continuance beyond thirty (30) days from the Original Hearing Date must be agreed to in writing by all Parties, the Hearing Officer and ACERA Chief Counsel. If a request for continuance is granted, failure of the Member to complete a Hearing within three (3) months of the Original Hearing Date may be cause for dismissal of the Objection with prejudice.

### 3.7 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 thirty (30) days from the Original Hearing Date.

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.

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 Objection may proceed in the absence of the member and or contesting party who, after due notice, fails to be present or obtain a continuance. A decision on the Completed Objection shall not be based solely upon the absence of the Member.

### **3.8 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. If the member or contesting party requests a copy of the hearing transcript, that copy shall be secured by the member or contesting party at his or her own expense directly from the stenographic reporter.

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.

### **3.9 Representation by Counsel.**

A Party is entitled to be represented by legal counsel, at his/her/its own expense, during the Objection 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 ACERA. 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 §§ 284, 285, and 286.

### **3.10 Issues at Hearing.**

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

- A. Whether the pay item(s) at issue are compensation earnable of the Member.
- B. Whether the pay item(s) at issue is pensionable compensation of the Member.
- C. Whether the pay item(s) at issue was paid to enhance the Member's retirement benefit.

### **3.11 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 Objection Packet that the Party will offer into evidence, and copies of such documents.

- C. A copy of any declaration or 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 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).

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 no later than **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 only be allowed into evidence at the hearing, based on a finding by the Hearing Officer as to admissibility and prejudice.

### **3.12 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, ACERA or the contesting party may request a continuance of not more than **five (5) business days** to obtain and present 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 and not consider such 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.

### **3.13 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 Secretary of the Board, the Board, or the Hearing Officer. The Parties shall bear their own costs for such depositions. Depositions of witnesses must be scheduled and completed before the hearing. A failure of a witness to appear as noticed, shall mean the witness' testimony may not be admitted at the hearing, whether in person or through declaration or affidavit.

### **3.14 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 member from meeting its burden of proof, which may result in an unfavorable decision (including withdrawal of the Objection with prejudice.)

### **3.15 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 **five (5) days** of receipt of the request for resolution of the dispute.

### **3.16 Subpoenas to Third Parties.**

- A. Authority to Issue Subpoenas. The Secretary to the Board, or the Board of Retirement may issue subpoenas and subpoena duces tecum. The authority to issue subpoenas rests with the Board Chair or Secretary<sup>9</sup>.
- 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*. Requests for subpoenas prior to the time a party has requested an evidentiary hearing, must be made not less than **fifteen (15) days** before the last day a Comment Paper may be filed.

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<sup>9</sup> Gov. Code § 31535

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 in writing. Failure to timely request a subpoena or pay fees (as prescribed by Government 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.

### **3.17 Burden Of Proof.**

- A. Member or Contesting Party Burden of Proof. Member has the burden of proving, by a preponderance of the evidence, that the pay item(s) at issue are compensation earnable, or pensionable compensation, or was not paid to enhance the Members retirement benefit. Member must prove, by a preponderance of the evidence, that the Member is entitled to the requested benefit<sup>10</sup>.

### **3.18 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;
  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 Objection.
- 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.

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<sup>10</sup> 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

- E. Rules of Evidence. The hearing need not be conducted according to technical rules relating to evidence and witnesses<sup>11</sup>. 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.
- F. Affidavits. A Party may include as part of the Party's *Prehearing Statement* a copy of any declaration or affidavit which the Party proposes to introduce in evidence. The declaration or affidavit, if introduced in evidence, shall be given the same effect as if the declarant or affiant had testified orally. If an opportunity to cross-examine a declarant or affiant is not afforded after timely notice is provided, the Hearing Officer can refuse to accept the declaration or affidavit, or it may be introduced in evidence, but shall be given only the same effect as other hearsay evidence. The Party offering the declaration or affidavit has the obligation to produce the declarant or 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<sup>12</sup>.
- H. Government Records. Certified copies (as declared under penalty of perjury by Custodian of Records) of the reports or records created in the ordinary course or business of any governmental agency, division, or bureau shall be accepted as evidence in lieu of the originals thereof.

### 3.19 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 Objection, and will determine if all Parties present have copies of documents offered as evidence.
- C. The Objection Packet shall be introduced as evidence.
- D. The Parties may make opening statements, orally or in writing, except ACERA may delay its opening statement until after member's presentation of evidence.

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<sup>11</sup> See *McCoy v Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054

<sup>12</sup> See Evid. Code §§ 451, 452, and 453



- E. Member'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, if any, including any witness testimony, is to be given next. During this presentation, the Hearing Officer and counsel have the right to ask questions.
- G. ACERA'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.
- H. Member, and then the Employer and then ACERA may offer rebuttal evidence.
- I. Member may make a closing statement followed by ACERA'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.

### **3.20 Hearing Officer's Proposed Findings of Fact and Recommended Decision.**

After the hearing is concluded and the record closed, the Hearing Officer will, **within thirty (30) days**, send a written report to ACERA summarizing the evidence, findings of fact, and making a recommendation to the Board.<sup>13</sup> 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<sup>14</sup>. 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 pay item(s) at issue are compensation earnable of the Member.
- B. Whether the pay item(s) at issue is pensionable compensation of the Member.
- C. Whether the pay item(s) at issue was paid to enhance the Member's retirement benefit.

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

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<sup>13</sup> Gov. Code §§ 31533, 31534

<sup>14</sup> 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

**3.21 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 five (5) days after service of the *Proposed Findings of Fact and Recommended Decision* to submit written objections to ACERA. ACERA will send any objections to the other Parties and provide a courtesy copy to the Hearing Officer<sup>15</sup>. 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.

**4. ADMINISTRATIVE REPORTS**

**4.1 Administrative Reports and Recommendations to the Board.**

- A. When a Completed Objection goes to the Board for a decision, ACERA shall review the file and prepare a written report to the Board addressing the following issues, as applicable:
- B. Whether the pay item(s) at issue are compensation earnable of the Member.
- C. Whether the pay item(s) at issue is pensionable compensation of the Member.
- D. Whether the pay item(s) at issue was paid to enhance the Member’s retirement benefit.
- E. Insufficient or Conflicting Evidence. If it is determined from the reports or records submitted or otherwise obtained are insufficient or in conflict, or misrepresentations by an member or contesting party in the Objection Process, to ACERA, or in the hearing record, it may be recommended that the Objection be denied due to the lack of sufficient evidence or conflict, or that the matter be referred to a Hearing Officer for a determination as provided by these rules.

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<sup>15</sup> Gov. Code § 31534

## 5. BOARD ACTION

### 5.1 Presentation to the Board – Consent Calendar Items.

Board action may include action taken via the Consent Calendar. Objections 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, the Member, an Employer, or any member of the public who may have questions or concerns about the item. The Objection 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 ACERA staff, the Board may take one of the following actions:

- A. Deny the Objection or,
- B. Approve the Objection: Approve the Objection and find the pay item(s) at issue are compensation earnable of the Member, pensionable compensation of the Member, or not paid to enhance the Member's retirement benefit, or,
- C. Refer to ACERA staff: Refer the matter back to the ACERA Benefits Manager (or designee) with instructions, including instructions to:
  - 1. Assign the next available Hearing Officer, if the matter has not been heard before a Hearing Officer, with specific instructions to the Hearing Officer to consider all or limited issues; or,
  - 2. Take any other actions which may assist the Board in making a decision on the Objection.
- D. Hearing Officer: Where the *Proposed Findings of Fact and Recommended Decision* of a Hearing Officer is under consideration, the Board may take any action listed in **Section 5.2**, below.

### 5.2 Presentation to the Board – Regular Calendar Items.

The Completed Objection, Objection Packet, Hearing Officer's *Proposed Findings of Fact and Recommended Decision* (if any), and ACERA staff report shall be presented to the Board on the date noticed to all Parties ("Board Consideration Date.") The Board may immediately vote and take an action. 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 regulated by the Board, and any other Party shall have an opportunity to immediately orally respond and make comments. The oral presentation of the responding Party shall be regulated by the Board. 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 presented by the Parties or others addressing the Board on Board Consideration Date. No new evidence shall be heard or received by the Board on Board Consideration Date. The Board may, however, allow oral argument in its discretion.

Upon receiving the *Proposed Findings of Fact and Recommended Decision* of a Hearing Officer and ACERA staff report, the Board may take one 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<sup>16</sup>; or,
- B. Refer to H.O. Refer the matter back with or without instructions to the Hearing Officer for further proceedings<sup>17</sup>; 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<sup>18</sup>, and issue written statement of findings of fact and decision. The Board may reject the credibility determinations of the Hearing Officer and make its own credibility determinations<sup>19</sup>; or
- D. Conduct a Board Hearing. Set the matter for hearing before the Board. At such hearing, the Board shall hear and decide the matter as if it had not been referred to the Hearing Officer.<sup>20</sup> If the Board holds the hearing itself, the Board shall render its decision by the second regular meeting after the matter is submitted, and issue a written statement of findings of fact and decision. For purposes of evidentiary hearings before the Board, a tie vote results in a failure to find in favor of the member and constitutes a denial of the Objection, or that portion of the Objection 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 5.1**, above.

### **5.3 Decision on Completed Objection.**

The final agency determination on a Completed Objection 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 Hearing Officer's *Proposed Findings of Fact and Recommended Decision*. The ACERA staff report alone shall not be deemed by the Board to be evidence.

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<sup>16</sup> Gov. Code § 31534(a)

<sup>17</sup> Gov. Code § 31534(c)

<sup>18</sup> 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

<sup>19</sup> See *Mixon v Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1310, fn. 2

<sup>20</sup> Gov. Code § 31534(d)

The decision of the Board shall become final on the date the *Notice of Board Decision* is served on the Parties<sup>21</sup>. When the decision of the Board becomes final, its findings shall be conclusive for all purposes.

#### **5.4 Notice of Board's Action.**

ACERA 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.<sup>22</sup>

### **6. JUDICIAL REVIEW OF BOARD DECISION**

#### **6.1 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<sup>23</sup>. A copy of any Petition filed must be served on all Parties and ACERA Chief Counsel.

The Employer or contesting party may obtain judicial review of the Board's decision by filing a Petition or by joining or intervening in a Petition filed by the Member<sup>24</sup>.

If the Superior Court reverses a denial by the Board of an Objection, the superior court in its discretion may award reasonable attorneys' fees as costs to the member who successfully appealed the denial of such Objection. 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<sup>25</sup>.

#### **6.2 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 ACERA. ACERA staff shall notify the requesting Party of the estimated cost of preparing the record. Prior to the release of the prepared record, the requesting Party shall, deliver to ACERA an amount sufficient to cover the cost of preparation of the record., Upon receipt by ACERA of payment of the required costs, ACERA shall promptly provide 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, and all written evidence in the case.

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<sup>21</sup> Code of Civ. Proc. § 1094.6(b).

<sup>22</sup> Code of Civ. Proc. § 1094.6.

<sup>23</sup> Code of Civ. Proc. §§ 1094.5, 1094.6(a.)

<sup>24</sup> Gov. Code § 31725; See also *County of Alameda v Board of Retirement (Carnes)* (1988) 46 C.3d 902.

<sup>25</sup> Gov. Code § 31536.

### **6.3 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 California Code of Civil Procedure § 704.110 and as permitted in Government Code § 31452.5 for specific charitable and insurance deductions approved by the Board.

## **7. RECIPROCAL BENEFITS PROCESSING**

### **7.1 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<sup>26</sup>. Accordingly, there is reciprocity in 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<sup>27</sup>.

### **7.2 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<sup>28</sup>. No retirement system or political entity shall be liable for more than its just financial obligation.<sup>29</sup>

The items of compensation that ACERA shall include in its calculation of compensation earnable and pensionable compensation for a member who has established or is eligible to establish reciprocity includes only those items of compensation that are permitted to be included in final compensation determination under CERL and by ACERA.<sup>30</sup>

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<sup>26</sup> Gov. Code § 31830.

<sup>27</sup> Gov. Code §§ 31830, 31840.2.

<sup>28</sup> Gov. Code § 31838.5.

<sup>29</sup> Gov. Code § 31830.

<sup>30</sup> *Stillman v. Board of Retirement* (2011) 198 Cal.App.4th 1355