



Alameda County Employees' Retirement Association
BOARD OF RETIREMENT

GOVERNANCE COMMITTEE/BOARD MEETING
NOTICE and AGENDA

THIS MEETING WILL BE CONDUCTED VIA TELECONFERENCE [SEE EXECUTIVE ORDER N-29-20 ATTACHED AT THE END OF THIS AGENDA]

ACERA MISSION:

To provide ACERA members and employers with flexible, cost-effective, participant-oriented benefits through prudent investment management and superior member services.

September 17, 2020
1:00 P.M.

ZOOM INSTRUCTIONS	COMMITTEE MEMBERS	
The public can view the Teleconference and comment via audio during the meeting. To join this Teleconference, please click on the link below. https://us02web.zoom.us/j/82166007758?pwd=RMWYWGJPAS9KAITJMEOYNLVUEVRVDz09 PASSCODE: 906714 OR TELEPHONE: DIAL(FOR HIGHER QUALITY, DIAL A NUMBER BASED ON YOUR CURRENT LOCATION): US: +1 669 900 6833 OR +1 253 215 8782 OR +1 346 248 7799 OR +1 312 626 6799 OR +1 929 205 6099 OR +1 301 715 8592 WEBINAR ID: 821 6600 7758 PASSCODE: 906714NYHNH	OPHELIA BASGAL, CHAIR	APPOINTED
	HENRY LEVY, VICE CHAIR	TREASURER
	DALE AMARAL	ELECTED SAFETY
	JAIME GODFREY	APPOINTED
	ELIZABETH ROGERS	ELECTED GENERAL

This is a meeting of the Governance Committee if a quorum of the Governance Committee attends and it is a meeting of the Board if a quorum of the Board attends. This is a joint meeting of the Governance Committee and the Board if a quorum of each attends.

The order of agenda items is subject to change without notice. Board and Committee agendas and minutes are available online at www.acera.org.

Note regarding public comments: Public comments are limited to four (4) minutes per person in total.

Note regarding accommodations: The Board of Retirement will provide reasonable accommodations for persons with special needs of accessibility who plan to attend Board meetings. Please contact ACERA at (510) 628-3000 to arrange for accommodation.

Note regarding Public Records: All writings that distributed to a majority of members of the Board and/or the Governance Committee in connection with this meeting are posted at www.acera.org.

GOVERNANCE COMMITTEE / BOARD MEETING

NOTICE and AGENDA, Page 2 of 3 – September 17, 2020

Call to Order

Roll Call

Public Input

Action Items: Matters for Discussion and Possible Motion by the Committee

1. Motion to affirm the Administrative Hearing Policy with revisions.

Recommendation

Staff recommends that the Governance Committee recommend to the Board of Retirement to:

1. Affirm the existing Policy with the revisions shown in the attached redline, and
2. Find that:
 - This Policy is necessary and continues to address the recurring need for effective operation of the Board.
 - This Policy continues to address the risk of inconsistent resolution of recurring issues and the unnecessary proliferation of policies.
 - The issues addressed by this Policy continue to be within the Board's responsibility to effectively administer the pension plan and to mitigate risk to ACERA.
 - This Policy continues to be appropriate in meeting the needs of ACERA, and does not overlap with other existing Board policies.

– Jeff Rieger

2. Motion to affirm the Felony Forfeiture Policy with revisions.

Recommendation

Staff recommends that the Governance Committee recommend to the Board of Retirement to:

1. Affirm the existing Policy with the revisions shown in the attached redline, and
2. Find that:
 - This Policy is necessary and continues to address the recurring need for effective operation of the Board.
 - This Policy continues to address the risk of inconsistent resolution of recurring issues and the unnecessary proliferation of policies.
 - The issues addressed by this Policy continue to be within the Board's responsibility to effectively administer the pension plan and to mitigate risk to ACERA.

GOVERNANCE COMMITTEE / BOARD MEETING

NOTICE and AGENDA, Page 3 of 3 – September 17, 2020

- This Policy continues to be appropriate in meeting the needs of ACERA, and does not overlap with other existing Board policies.

– Jeff Rieger

3. Motion to affirm the Error Correction Policy with revisions.

Recommendation

Staff recommends that the Governance Committee recommend to the Board of Retirement to:

1. Affirm the existing Policy with the revisions shown in the attached redline, and
2. Find that:
 - This Policy is necessary and continues to address the recurring need for effective operation of the Board.
 - This Policy continues to address the risk of inconsistent resolution of recurring issues and the unnecessary proliferation of policies.
 - The issues addressed by this Policy continue to be within the Board's responsibility to effectively administer the pension plan and to mitigate risk to ACERA.
 - This Policy continues to be appropriate in meeting the needs of ACERA, and does not overlap with other existing Board policies.

– Jeff Rieger

Trustee Remarks

Future Discussion Items

Establishment of Next Meeting Date

Adjournment

**EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA**

EXECUTIVE ORDER N-29-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, the virus continues to spread and is impacting nearly all sectors of California; and

WHEREAS the threat of COVID-19 has resulted in serious and ongoing economic harms, in particular to some of the most vulnerable Californians; and

WHEREAS time bound eligibility redeterminations are required for Medi-Cal, CalFresh, CalWORKs, Cash Assistance Program for Immigrants, California Food Assistance Program, and In Home Supportive Services beneficiaries to continue their benefits, in accordance with processes established by the Department of Social Services, the Department of Health Care Services, and the Federal Government; and

WHEREAS social distancing recommendations or Orders as well as a statewide imperative for critical employees to focus on health needs may prevent Medi-Cal, CalFresh, CalWORKs, Cash Assistance Program for Immigrants, California Food Assistance Program, and In Home Supportive Services beneficiaries from obtaining in-person eligibility redeterminations; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567 and 8571, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. As to individuals currently eligible for benefits under Medi-Cal, CalFresh, CalWORKs, the Cash Assistance Program for Immigrants, the California Food Assistance Program, or In Home Supportive Services benefits, and to the extent necessary to allow such individuals to maintain eligibility for such benefits, any state law, including but not limited to California Code of Regulations, Title 22, section 50189(a) and Welfare and Institutions Code sections 18940 and 11265, that would require redetermination of such benefits is suspended for a period of 90 days from the date of this Order. This Order shall be construed to be consistent with applicable federal laws, including but not limited to Code of Federal Regulations, Title 42, section 435.912, subdivision (e), as interpreted by the Centers for Medicare and Medicaid Services (in guidance issued on January 30, 2018) to permit the extension of

otherwise-applicable Medicaid time limits in emergency situations.

2. Through June 17, 2020, any month or partial month in which California Work Opportunity and Responsibility to Kids (CalWORKs) aid or services are received pursuant to Welfare and Institutions Code Section 11200 et seq. shall not be counted for purposes of the 48-month time limit set forth in Welfare and Institutions Code Section 11454. Any waiver of this time limit shall not be applied if it will exceed the federal time limits set forth in Code of Federal Regulations, Title 45, section 264.1.
3. Paragraph 11 of Executive Order N-25-20 (March 12, 2020) is withdrawn and superseded by the following text:

Notwithstanding any other provision of state or local law (including, but not limited to, the Bagley-Keene Act or the Brown Act), and subject to the notice and accessibility requirements set forth below, a local legislative body or state body is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the local legislative body or state body. All requirements in both the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived.

In particular, any otherwise-applicable requirements that

- (i) state and local bodies notice each teleconference location from which a member will be participating in a public meeting;
- (ii) each teleconference location be accessible to the public;
- (iii) members of the public may address the body at each teleconference conference location;
- (iv) state and local bodies post agendas at all teleconference locations;
- (v) at least one member of the state body be physically present at the location specified in the notice of the meeting; and
- (vi) during teleconference meetings, at least a quorum of the members of the local body participate from locations within the boundaries of the territory over which the local body exercises jurisdiction

are hereby suspended.

A local legislative body or state body that holds a meeting via teleconferencing and allows members of the public to observe and address the meeting telephonically or otherwise electronically, consistent with the notice and accessibility requirements set forth below, shall have satisfied any requirement that the body allow

members of the public to attend the meeting and offer public comment. Such a body need not make available any physical location from which members of the public may observe the meeting and offer public comment.

Accessibility Requirements: If a local legislative body or state body holds a meeting via teleconferencing and allows members of the public to observe and address the meeting telephonically or otherwise electronically, the body shall also:

- (i) Implement a procedure for receiving and swiftly resolving requests for reasonable modification or accommodation from individuals with disabilities, consistent with the Americans with Disabilities Act and resolving any doubt whatsoever in favor of accessibility; and
- (ii) Advertise that procedure each time notice is given of the means by which members of the public may observe the meeting and offer public comment, pursuant to subparagraph (ii) of the Notice Requirements below.

Notice Requirements: Except to the extent this Order expressly provides otherwise, each local legislative body and state body shall:

- (i) Give advance notice of the time of, and post the agenda for, each public meeting according to the timeframes otherwise prescribed by the Bagley-Keene Act or the Brown Act, and using the means otherwise prescribed by the Bagley-Keene Act or the Brown Act, as applicable; and
- (ii) In each instance in which notice of the time of the meeting is otherwise given or the agenda for the meeting is otherwise posted, also give notice of the means by which members of the public may observe the meeting and offer public comment. As to any instance in which there is a change in such means of public observation and comment, or any instance prior to the issuance of this Order in which the time of the meeting has been noticed or the agenda for the meeting has been posted without also including notice of such means, a body may satisfy this requirement by advertising such means using "the most rapid means of communication available at the time" within the meaning of Government Code, section 54954, subdivision (e); this shall include, but need not be limited to, posting such means on the body's Internet website.

All of the foregoing provisions concerning the conduct of public meetings shall apply only during the period in which state or local public health officials have imposed or recommended social distancing measures.

All state and local bodies are urged to use sound discretion and to make reasonable efforts to adhere as closely as reasonably possible to the provisions of the Bagley-Keene Act and the Brown Act, and other applicable local laws regulating the conduct of public meetings, in order to maximize transparency and provide the public access to their meetings.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have
hereunto set my hand and caused
the Great Seal of the State of
California to be affixed this 17th day
of March 2020.



GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State



MEMORANDUM TO THE GOVERNANCE COMMITTEE

DATE: September 17, 2020

TO: Members of the Governance Committee

FROM: Jeff Rieger, Chief Counsel

SUBJECT: **Administrative Hearing Policy**

A handwritten signature in dark ink, appearing to be "JR", is written over the "FROM" line.

Introduction

The *Administrative Hearing Policy* ("Policy") addresses how the Board handles non-disability appeals from Staff decisions. It is up for review based on the Board's review schedule.

Proposed Revisions

Exhibit A shows the proposed revisions. Most revisions are for clarification purposes only and none is intended to fundamentally change the Policy. I will respond to any questions at the Governance Committee meeting, but here I highlight the three most significant proposed revisions:

- CEO discretion to allow untimely appeal: The CEO may determine that it is best to give the Board a chance to review a Staff decision, even if the member/beneficiary does not timely seek such review. This proposed revision make clear that the CEO has that option.
- Board authority to alter or truncate procedures: In some cases, some of the procedures in the Policy may be inefficient or unnecessary. The Board is not required to implement procedures that are inefficient or unnecessary. This proposed revision explicitly states the Board's existing implicit authority to deviate from its own Policy when it determines that doing so is in the interests of justice and efficiency.
- Standard of review in court: There are two different standards of review in court depending upon whether an administrative "hearing" is required by law. This proposed revision makes clear that the "hearings" under his Policy are not required by law. This will help the Board assert that the more deferential standard of review under C.C.P. § 1085 applies (as opposed to C.C.P. § 1094.5) if a member/beneficiary challenges a Board decision in court.

Recommendation

Affirm the Administrative Hearing Policy, with the proposed revisions set forth in Exhibit A and Exhibit B.

Attachments: Exhibit A: Redline comparing proposed Policy to existing Policy
Exhibit B: Proposed Administrative Hearing Policy (Clean)

Exhibit A



Administrative Hearing Policy

I. Purpose

This policy provides a procedure ~~for the Board to review ACERA Staff decisions to be used in administrative review of decisions made by the Board of Retirement pursuant to the County Employees Retirement Law of 1937, ("CERL")~~ except for disability matters.

Hearings on disability matters are governed by the Disability Retirement Procedures. The objective of this policy is to ensure a fair and efficient consideration of member, survivor and beneficiary matters.

II. Definitions

- A. Applicant: A member, survivor, or beneficiary of ACERA.
- B. Board: The ACERA Board of Retirement.
- C. Day: Calendar day.
- D. Hearing: The presentation of sworn testimony, other evidence, and legal argument before the Board or Hearing Officer.
- E. Hearing Officer: Person who conducts an administrative hearing on issues related to a matter referred to that person and who provides Findings of Law and Fact to the Board and a Proposed Recommendation. Government Code section 31533 provides who may be a Hearing Officer.
- F. CEO: Chief Executive Officer of ACERA.

III. Guidelines and Procedures

- A. Filing a Timely Appeal

1. An applicant may appeal ACERA staff's decision in writing to the CEO within 30 calendar days of the date of staff's notification to the applicant of the decision. The CEO will respond in writing with a decision either supporting the position taken by ACERA staff or modifying or overturning that decision.
2. The Board delegates to the CEO full authority to make all initial determinations regarding claims by applicants and participating employers. The CEO will consult with appropriate advisers as the CEO deems necessary.
3. If the applicant does not agree with the decision of the CEO, the applicant may appeal the decision in writing to the Board within 30 calendar days of the date on the CEO's notification to the applicant of the decision.
4. Appeals to the Board from administrative decisions will ordinarily be placed on the Board's agenda for open session at a regularly scheduled Board meeting. The CEO may place the matter on the Board's closed session agenda if the matters to be discussed are protected from public disclosure pursuant to the Brown Act.
5. Failure to file a timely appeal will constitute a waiver of the right to have the appeal heard, although the CEO may allow an untimely appeal to proceed to the Board, in the CEO's sole discretion.

B. Date and Notice of Hearing:

1. The Board may hear the matter directly or refer it to a ~~H~~hearing ~~o~~fficer for a recommendation to the Board for final decision. (Govt. C. 31533).
- ~~2.~~ If the Board hears the matter directly, the hearing shall be set by the office of the CEO at the earliest mutually agreeable date and the office of the CEO shall deliver by US mail and email (if available), a notice of hearing to the applicant and all other parties at least 30 days before the hearing, unless the parties agree to a shorter notice period. ACERA shall provide a copy of this hearing policy and any applicable regulations regarding the administrative hearings.
- ~~2-3.~~ When the Board hears a matter directly, the Board may alter or truncate the procedures described in this Policy when it determines that doing so is in the interests of justice and efficiency.

C. Appointment of Hearing Officer

1. If the Board refers the matter to a ~~H~~earing ~~O~~fficer, the process will be as follows:
 - a. The Board will refer the matter to the Legal Department for assignment of a ~~H~~earing ~~O~~fficer from a ~~rotating~~ list of approved ~~H~~earing ~~O~~fficers.
 - b. The Legal Department will provide the first name on the ~~rotating~~ list to the parties.
 - c. Either party may challenge a ~~H~~earing ~~O~~fficer for cause by filing a written objection with the Legal Department with 10 calendar days of the date of the notice of the list. A challenge for cause is an allegation that the ~~H~~earing ~~O~~fficer cannot be fair and impartial. The Legal Department shall review the challenge for cause and, if sustained, select another name from the list of ~~H~~earing ~~O~~fficers and advise the parties accordingly. If circumstances giving rise to a challenge for cause arise or are discovered after appointment of the ~~H~~earing ~~O~~fficer, and the ~~H~~earing ~~O~~fficer does not recuse him or herself, the party challenging the ~~H~~earing ~~O~~fficer may make a record of the circumstances and present them to the Board as part of a hearing before the Board pursuant to section F(1)-(B)(4) below.
2. The ~~H~~earing ~~O~~fficer will set the date of the hearing in conjunction with the schedules of the parties.

D. Conduct of Hearing

1. The Board Chair or ~~H~~earing ~~O~~fficer shall preside over the hearing.
2. The Chair or ~~H~~earing ~~O~~fficer shall make all rulings necessary for fair and efficient proceedings, including the admissibility of evidence, conduct of witnesses and parties and scheduling.
3. Parties (~~including ACERA Staff~~) and their counsel are prohibited from having communications with Board members or ~~H~~earing ~~O~~fficers regarding matters related to the hearing without the presence or knowledge of the other ~~side~~party.

E. Hearing Process

1. All parties are entitled to representation by an attorney licensed to practice in the State of California at any hearing at the sole expense of that party. Once ACERA has notice that an attorney is representing an applicant, all notices and other papers shall be served on the attorney.
2. The party seeking relief from ACERA has the burden of proof and shall present their case first, followed by ACERA staff. In all cases, the presentation may include:
 - a. Opening statement;
 - b. Testimony of witnesses and presentation of documentary evidence;
 - c. Cross examination of witnesses;
 - d. Rebuttal evidence;
 - e. Closing statements
3. Both ACERA staff and the applicant are entitled to submit written evidence or argument to the Board or Hearing Officer. Each side will provide copies of the materials proposed to be offered at the hearing to the other side at least 10 days before the hearing is held.
4. Evidence
 - a. Witnesses must testify under oath or affirmation administered by the Hearing Officer or the Board Chair.
 - b. Each party is responsible for obtaining those subpoenas it deems necessary for the presentation of its evidence at hearing. All subpoenas are to be issued in accordance with Government Code section 31535.
 - c. The hearing need not be conducted accordingly to technical rules relating to evidence and witnesses. Any relevant evidence shall 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 the hearing.

- d. The ~~H~~earing ~~O~~fficer or Board Chair has discretion to admit relevant and reliable evidence to or exclude irrelevant or repetitious evidence.
- e. The record shall be closed to new evidence at the conclusion of the final day if hearing unless each party stipulates to leave the record open.

F. Board Consideration and Action

1. Hearing Officer Findings of Fact, Conclusion of Law and Recommended Decision

- a. Following a hearing by a ~~H~~earing ~~O~~fficer, ~~the H~~earing ~~O~~fficer shall transmit to the Board written proposed findings of fact, conclusions of law, and recommendations.
- b. Upon receiving proposed findings of fact and recommendations, the Board may do one of the following:
 - 1) Approve and adopt the proposed findings and recommendations; or
 - 2) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon receipt thereof the Board shall take such action in its opinion is indicated by such evidence; or
 - 3) Refer the matter back to the hearing office with instructions for further proceedings; or
 - 4) 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 ~~H~~earing ~~O~~fficer.
- c. Staff will notify the applicant in writing of the Board's determination within 10 days of the hearing.

2. Board Hearing

- a. Following the hearing, the Board will deliberate and vote on the matter and instruct staff to notify the applicant in writing of the Board's determination within 10 days. The determination may, but need not, include a statement of decision.
- b. A Board member who did not attend all portions of a Board hearing may not participate in the Board's deliberations and vote, unless all the following conditions are met:
 - 1) A quorum of members who attended the full hearing is not available;
 - 2) The member has read the transcript (or listened to the audio recording) of that portion of the hearing during which he or she was not in attendance; and
 - 3) The member has stated on the record that he or she has undertaken and completed such review.

G. Review of the Board's Decision: The Board has exercised its discretion to establish the procedures outlined in this Policy. The procedures outlined in this Policy are not required by law. Board decisions made pursuant to this Policy are reviewable by ordinary mandamus under Code of Civil Procedure section 1085.

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IV. Policy Review

The Operations Committee shall review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

V. Policy History

The Board adopted this policy on July 19, 2018¹.

The Board reviewed and affirmed this policy, with revisions on September 17, 2020.

¹ The Board adopted the Administrative Hearing Policy on July 19, 2018. The Board adopted the Administrative Appeals Procedures on September 17, 2015. The Board reviewed and affirmed the Administrative Appeals, with revisions, May 19, 2016.

Exhibit B

Administrative Hearing Policy

I. Purpose

This policy provides a procedure for the Board to review ACERA Staff decisions, except for disability matters. Hearings on disability matters are governed by the Disability Retirement Procedures. The objective of this policy is to ensure a fair and efficient consideration of member, survivor and beneficiary matters.

II. Definitions

- A. Applicant: A member, survivor, or beneficiary of ACERA.
- B. Board: The ACERA Board of Retirement.
- C. Day: Calendar day.
- D. Hearing: The presentation of sworn testimony, other evidence, and legal argument before the Board or Hearing Officer.
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- F. CEO: Chief Executive Officer of ACERA.

III. Guidelines and Procedures

- A. Filing a Timely Appeal
 - 1. An applicant may appeal ACERA staff's decision in writing to the CEO within 30 calendar days of the date of staff's notification to the applicant of the decision. The

CEO will respond in writing with a decision either supporting the position taken by ACERA staff or modifying or overturning that decision.

2. The Board delegates to the CEO full authority to make all initial determinations regarding claims by applicants and participating employers. The CEO will consult with appropriate advisers as the CEO deems necessary.
3. If the applicant does not agree with the decision of the CEO, the applicant may appeal the decision in writing to the Board within 30 calendar days of the date on the CEO's notification to the applicant of the decision.
4. Appeals to the Board from administrative decisions will ordinarily be placed on the Board's agenda for open session at a regularly scheduled Board meeting. The CEO may place the matter on the Board's closed session agenda if the matters to be discussed are protected from public disclosure pursuant to the Brown Act.
5. Failure to file a timely appeal will constitute a waiver of the right to have the appeal heard, although the CEO may allow an untimely appeal to proceed to the Board, in the CEO's sole discretion.

B. Date and Notice of Hearing:

1. The Board may hear the matter directly or refer it to a Hearing Officer for a recommendation to the Board for final decision. (Govt. C. 31533).
2. If the Board hears the matter directly, the hearing shall be set by the office of the CEO at the earliest mutually agreeable date and the office of the CEO shall deliver by US mail and email (if available), a notice of hearing to the applicant and all other parties at least 30 days before the hearing, unless the parties agree to a shorter notice period. ACERA shall provide a copy of this hearing policy and any applicable regulations regarding the administrative hearings.
3. When the Board hears a matter directly, the Board may alter or truncate the procedures described in this Policy when it determines that doing so is in the interests of justice and efficiency.

C. Appointment of Hearing Officer

1. If the Board refers the matter to a Hearing Officer, the process will be as follows:

- a. The Board will refer the matter to the Legal Department for assignment of a Hearing Officer from a rotating list of approved Hearing Officers.
 - b. The Legal Department will provide the first name on the rotating list to the parties.
 - c. Either party may challenge a Hearing Officer for cause by filing a written objection with the Legal Department with 10 calendar days of the date of the notice of the list. A challenge for cause is an allegation that the Hearing Officer cannot be fair and impartial. The Legal Department shall review the challenge for cause and, if sustained, select another name from the list of Hearing Officers and advise the parties accordingly. If circumstances giving rise to a challenge for cause arise or are discovered after appointment of the Hearing Officer, and the Hearing Officer does not recuse him or herself, the party challenging the Hearing Officer may make a record of the circumstances and present them to the Board as part of a hearing before the Board pursuant to section F(1)(b)(4) below.
2. The Hearing Officer will set the date of the hearing in conjunction with the schedules of the parties.

D. Conduct of Hearing

1. The Board Chair or Hearing Officer shall preside over the hearing.
2. The Chair or Hearing Officer shall make all rulings necessary for fair and efficient proceedings, including the admissibility of evidence, conduct of witnesses and parties and scheduling.
3. Parties (including ACERA Staff) and their counsel are prohibited from having communications with Board members or Hearing Officers regarding matters related to the hearing without the presence or knowledge of the other party.

E. Hearing Process

1. All parties are entitled to representation by an attorney licensed to practice in the State of California at any hearing at the sole expense of that party. Once ACERA

has notice that an attorney is representing an applicant, all notices and other papers shall be served on the attorney.

2. The party seeking relief from ACERA has the burden of proof and shall present their case first, followed by ACERA staff. In all cases, the presentation may include:
 - a. Opening statement;
 - b. Testimony of witnesses and presentation of documentary evidence;
 - c. Cross examination of witnesses;
 - d. Rebuttal evidence;
 - e. Closing statements
3. Both ACERA staff and the applicant are entitled to submit written evidence or argument to the Board or Hearing Officer. Each side will provide copies of the materials proposed to be offered at the hearing to the other side at least 10 days before the hearing is held.
4. Evidence
 - a. Witnesses must testify under oath or affirmation administered by the Hearing Officer or the Board Chair.
 - b. Each party is responsible for obtaining those subpoenas it deems necessary for the presentation of its evidence at hearing. All subpoenas are to be issued in accordance with Government Code section 31535.
 - c. The hearing need not be conducted accordingly to technical rules relating to evidence and witnesses. Any relevant evidence shall 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 the hearing.

- d. The Hearing Officer or Board Chair has discretion to admit relevant and reliable evidence to or exclude irrelevant or repetitious evidence.
- e. The record shall be closed to new evidence at the conclusion of the final day if hearing unless each party stipulates to leave the record open.

F. Board Consideration and Action

1. Hearing Officer Findings of Fact, Conclusion of Law and Recommended Decision

- a. Following a hearing by a Hearing Officer, the Hearing Officer shall transmit to the Board written proposed findings of fact, conclusions of law, and recommendations.
- b. Upon receiving proposed findings of fact and recommendations, the Board may do one of the following:
 - 1) Approve and adopt the proposed findings and recommendations; or
 - 2) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon receipt thereof the Board shall take such action in its opinion is indicated by such evidence; or
 - 3) Refer the matter back to the hearing office with instructions for further proceedings; or
 - 4) 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.
- c. Staff will notify the applicant in writing of the Board's determination within 10 days of the hearing.

2. Board Hearing

- a. Following the hearing, the Board will deliberate and vote on the matter and instruct staff to notify the applicant in writing of the Board's determination within 10 days. The determination may, but need not, include a statement of decision.

b. A Board member who did not attend all portions of a Board hearing may not participate in the Board's deliberations and vote, unless all the following conditions are met:

- 1) A quorum of members who attended the full hearing is not available;
- 2) The member has read the transcript (or listened to the audio recording) of that portion of the hearing during which he or she was not in attendance; and
- 3) The member has stated on the record that he or she has undertaken and completed such review.

G. Review of the Board's Decision: The Board has exercised its discretion to establish the procedures outlined in this Policy. The procedures outlined in this Policy are not required by law. Board decisions made pursuant to this Policy are reviewable by ordinary mandamus under Code of Civil Procedure section 1085.

IV. Policy Review

The Operations Committee shall review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

V. Policy History

The Board adopted this policy on July 19, 2018¹.

The Board reviewed and affirmed this policy, with revisions on September 17, 2020.


¹ The Board adopted the Administrative Hearing Policy on July 19, 2018. The Board adopted the Administrative Appeals Procedures on September 17, 2015. The Board reviewed and affirmed the Administrative Appeals, with revisions, May 19, 2016.



MEMORANDUM TO THE GOVERNANCE COMMITTEE

DATE: September 17, 2020

TO: Members of the Governance Committee

FROM: Jeff Rieger, Chief Counsel 

SUBJECT: **Felony Forfeiture Policy**

Introduction

The *Felony Forfeiture Policy* ("Policy") addresses how ACERA applies the statutes mandating the forfeiture of public pensions (or portions thereof) by employees who are convicted of certain crimes. It is up for review based on the Board's review schedule.

Proposed Revisions

Exhibit A shows the two proposed revisions. The first proposed revision states that ACERA will inform the member about the amount of contributions that ACERA will refund to the member due to the forfeiture. The second proposed revision deletes an unnecessary sentence that I do not believe adds anything to the Policy. I will respond to any questions at the Governance Committee meeting.

Recommendation

Affirm the Felony Forfeiture Policy, with the proposed revisions set forth in Exhibit A and Exhibit B.

Attachments: **Exhibit A:** Redline comparing proposed Policy to existing Policy
Exhibit B: Proposed Felony Forfeiture Policy (Clean)

Exhibit A



Felony Forfeiture Policy

I. Purpose

This Policy is to provide guidance on how to handle felony forfeitures. The Public Employees' Pension Reform Act of 2013 ("PEPRA") added two forfeiture statutes applicable to all public employees convicted of felonies on or after January 1, 2013¹. The law took effect January 1, 2013, and the relevant Government Code sections are 7522.72 for employees hired before January 1, 2013, and 7522.74 for employees hired after January 1, 2013².

II. Objectives

- A. The felony forfeiture statutes provide that "if a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member ... and shall not accrue further benefits in that public retirement system, effective on the date of the conviction."³
- B. The felony forfeiture statutes further provide that "if a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member

¹ Felony forfeiture laws applicable to public retirement benefits originally applied only to elected public officers who took public office, or were re-elected to public office on or after January 1, 2006. (Gov. Code §7522.20, formerly Gov. Code §1234.) PEPRA further provided that the pre-existing narrower felony forfeiture statute would not apply in any instance where the newly enacted felony forfeiture statute applied.

² Gov. Code §7522.72 applies to public employees who were first employed, appointed, or elected before January 1, 2013 and Gov. Code §7522.74 applies to those who were first employed, appointed, or elected on or after January 1, 2013.

³ Gov. Code §§7522.72(b)(1); 7522.74(b)(1).

... and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.”⁴

- C. When the felony is for conduct described in either of the above provisions, the member “shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.”⁵
- D. The employee and prosecuting agency shall notify the employer within 60 days of the felony conviction including the date of conviction and date of the first known commission of the felony⁶. The member and the employer who employs or employed the member are required to notify ACERA within 90 days of the conviction⁷.
- E. If this Policy conflicts with any statutory provisions or case law, the statutory provisions or case law will govern.

III. Policy Guidelines

A. Investigation

Upon receipt of notification from any source of a felony conviction of an ACERA member, ACERA Staff (“Staff”) will investigate the matter including obtaining the criminal record. Staff will determine (1) the earliest date of the commission of the felony; (2) the conviction date; and (3) whether the conviction falls within the felony forfeiture statutes.

⁴ Gov. Code §§7522.72(b)(2); 7522.74(b)(2).

⁵ Gov. Code §§7522.72(c); 7522.74(c).

⁶ Gov. Code §§7522.72(e); 7522.74(e).

⁷ Gov. Code §§7522.72(f); 7522.74(f).

B. Notifying the Member

Following the notice of conviction, Staff will inform the member of ACERA's determination including:

1. The felony forfeiture statute that applies to his/her benefits;
2. Supporting documentation that the felony forfeiture statute applies; and
3. The amount forfeited, ~~and how it that amount~~ was calculated and the amount of contributions that ACERA will refund to the member.

C. Member Appeal Rights

The member has the right to appeal the matter to the Board at a regularly scheduled Board meeting. Staff will inform the member of the appeal process. The Board shall have the discretion to hear the matter directly or refer it to a hearing officer for a recommendation, in which case the hearing officer's recommendation shall be made to the full Board for final decision⁸.

D. Forfeited Benefits

1. Computing Forfeited Benefits

Staff will follow the legal requirements to determine the amount of the benefit forfeited. The member is entitled to a return of his or her member paid contributions, without interest, made during the forfeited period⁹. Staff will reverse the member paid contributions and service credit for the forfeited period. Any paid contributions will be applied to an overpayment owed to ACERA first. ~~The law specifies rules for active/deferred members and retired members.~~

2. Notification to the Court and District Attorney

⁸ Gov. Code §§31533, 31534.

⁹ Gov. Code §§7522.72((d)(1); 7522.74(d)(1).

ACERA is required to notify the court and district attorney at least three business days prior to refund of the money to the member¹⁰.

3. Benefits Not Forfeited

Rights and benefits attributable to service performed before the date of the first commission of the felony for which the member was convicted shall not be forfeited¹¹.

4. Reversal of Conviction

If a member's conviction is reversed and that decision is final, the employee can either recover the forfeited rights and benefits as adjusted for the contributions received or redeposit those contributions and interest that would have accrued during the forfeiture period, as determined by the system actuary, and then recover the full amount of the forfeited rights and benefits¹².

5. Returning to an ACERA Employer

After forfeiture of benefits, a member cannot return to employment with an ACERA employer and accrue further benefits in ACERA¹³.

IV. Policy Review

The Operations Committee shall review the Felony Forfeiture Policy at least every three (3) years to ensure that it remains relevant and appropriate.

V. Policy History

A. The Board adopted this policy on December 21, 2017.

A.B. ~~The Board reviewed and affirmed this policy, with revisions on September 17, 2020.~~

¹⁰ Gov. Code §§7522.72(d)(2); 7522.74(d)(2).

¹¹ Gov. Code §§7522.72(c)(1); 7522.74(c)(1).

¹² Gov. Code §§7522.72(h); 7522.74(h).

¹³ Gov. Code §§7522.72(b)(1), (2); 7522.74(b)(1), (2).

Exhibit B

Felony Forfeiture Policy

I. Purpose

This Policy is to provide guidance on how to handle felony forfeitures. The Public Employees' Pension Reform Act of 2013 ("PEPRA") added two forfeiture statutes applicable to all public employees convicted of felonies on or after January 1, 2013¹. The law took effect January 1, 2013, and the relevant Government Code sections are 7522.72 for employees hired before January 1, 2013, and 7522.74 for employees hired after January 1, 2013².

II. Objectives

- A. The felony forfeiture statutes provide that "if a public employee is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability retirement, service retirement, or other benefits, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member ... and shall not accrue further benefits in that public retirement system, effective on the date of the conviction."³
- B. The felony forfeiture statutes further provide that "if a public employee who has contact with children as part of his or her official duties is convicted of a felony that was committed within the scope of his or her official duties against or involving a child who he or she has contact with as part of his or her official duties, he or she shall forfeit all accrued rights and benefits in any public retirement system in which he or she is a member

¹ Felony forfeiture laws applicable to public retirement benefits originally applied only to elected public officers who took public office, or were re elected to public office on or after January 1, 2006. (Gov. Code §7522.20, formerly Gov. Code §1234.) PEPRA further provided that the pre existing narrower felony forfeiture statute would not apply in any instance where the newly enacted felony forfeiture statute applied.

² Gov. Code §7522.72 applies to public employees who were first employed, appointed, or elected before January 1, 2013 and Gov. Code §7522.74 applies to those who were first employed, appointed, or elected on or after January 1, 2013.

³ Gov. Code §§7522.72(b)(1); 7522.74(b)(1).

... and shall not accrue further benefits in that public retirement system, effective on the date of the conviction.”⁴

- C. When the felony is for conduct described in either of the above provisions, the member “shall forfeit all the rights and benefits earned or accrued from the earliest date of the commission of any felony described in subdivision (b) to the forfeiture date, inclusive. The rights and benefits shall remain forfeited notwithstanding any reduction in sentence or expungement of the conviction following the date of the member's conviction. Rights and benefits attributable to service performed prior to the date of the first commission of the felony for which the member was convicted shall not be forfeited as a result of this section.”⁵
- D. The employee and prosecuting agency shall notify the employer within 60 days of the felony conviction including the date of conviction and date of the first known commission of the felony⁶. The member and the employer who employs or employed the member are required to notify ACERA within 90 days of the conviction⁷.
- E. If this Policy conflicts with any statutory provisions or case law, the statutory provisions or case law will govern.

III. Policy Guidelines

A. Investigation

Upon receipt of notification from any source of a felony conviction of an ACERA member, ACERA Staff (“Staff”) will investigate the matter including obtaining the criminal record. Staff will determine (1) the earliest date of the commission of the felony; (2) the conviction date; and (3) whether the conviction falls within the felony forfeiture statutes.

⁴ Gov. Code §§7522.72(b)(2); 7522.74(b)(2).

⁵ Gov. Code §§7522.72(c); 7522.74(c).

⁶ Gov. Code §§7522.72(e); 7522.74(e).

⁷ Gov. Code §§7522.72(f); 7522.74(f).

B. Notifying the Member

Following the notice of conviction, Staff will inform the member of ACERA's determination including:

1. The felony forfeiture statute that applies to his/her benefits;
2. Supporting documentation that the felony forfeiture statute applies; and
3. The amount forfeited, how that amount was calculated and the amount of contributions that ACERA will refund to the member.

C. Member Appeal Rights

The member has the right to appeal the matter to the Board at a regularly scheduled Board meeting. Staff will inform the member of the appeal process. The Board shall have the discretion to hear the matter directly or refer it to a hearing officer for a recommendation, in which case the hearing officer's recommendation shall be made to the full Board for final decision⁸.

D. Forfeited Benefits

1. Computing Forfeited Benefits

Staff will follow the legal requirements to determine the amount of the benefit forfeited. The member is entitled to a return of his or her member paid contributions, without interest, made during the forfeited period⁹. Staff will reverse the member paid contributions and service credit for the forfeited period. Any paid contributions will be applied to an overpayment owed to ACERA first.

2. Notification to the Court and District Attorney

ACERA is required to notify the court and district attorney at least three business days prior to refund of the money to the member¹⁰.

⁸ Gov. Code §§31533, 31534.

⁹ Gov. Code §§7522.72((d)(1); 7522.74(d)(1).

¹⁰ Gov. Code §§7522.72(d)(2); 7522.74(d)(2).

3. Benefits Not Forfeited

Rights and benefits attributable to service performed before the date of the first commission of the felony for which the member was convicted shall not be forfeited¹¹.

4. Reversal of Conviction

If a member's conviction is reversed and that decision is final, the employee can either recover the forfeited rights and benefits as adjusted for the contributions received or redeposit those contributions and interest that would have accrued during the forfeiture period, as determined by the system actuary, and then recover the full amount of the forfeited rights and benefits¹².

5. Returning to an ACERA Employer

After forfeiture of benefits, a member cannot return to employment with an ACERA employer and accrue further benefits in ACERA¹³.

IV. Policy Review

The Operations Committee shall review the Felony Forfeiture Policy at least every three (3) years to ensure that it remains relevant and appropriate.

V. Policy History

A. The Board adopted this policy on December 21, 2017.

B. The Board reviewed and affirmed this policy, with revisions on September 17, 2020.

¹¹ Gov. Code §§7522.72(c)(1); 7522.74(c)(1).

¹² Gov. Code §§7522.72(h); 7522.74(h).


¹³ Gov. Code §§7522.72(b)(1), (2); 7522.74(b)(1), (2).



MEMORANDUM TO THE GOVERNANCE COMMITTEE

DATE: September 17, 2020

TO: Members of the Governance Committee

FROM: Jeff Rieger, Chief Counsel 

SUBJECT: Error Correction Policy

Introduction

The *Error Correction Policy* ("Policy") addresses how ACERA handles overpayment or underpayment of benefits and underpayment of member contributions. It is up for review based on the Board's review schedule.

Proposed Revisions

Exhibit A shows the proposed revisions. Most revisions are for clarification purposes only and none is intended to fundamentally change the Policy. I will respond to any questions at the Governance Committee meeting, but here I highlight the two most significant proposed revisions:

- Deletion of the definition of "error": I do not believe this definition adds anything to the policy and I believe that this kind of unnecessary content can result in unintended consequences. If the Committee and Board believe the definition of "error" serves a purpose in this Policy, I have no objection to leaving it in the Policy, but my recommendation is to delete it.
- Addition of 30-day notice period: I recommend this change in order to avoid potential due process claims. Due process is a flexible concept that turns on the circumstances of a case. It ordinarily requires at least notification and a reasonable amount of time for a member to correct any possible errors in ACERA's analysis before ACERA reduces a benefit. In some cases, however, it is difficult to recover money ACERA pays out in error (e.g., no future payments that can be offset), so I recommend allowing some flexibility when ACERA's Chief Counsel determines that less than 30-day notice satisfies due process requirements in a particular case.

Recommendation

Affirm the Error Correction Policy, with the proposed revisions set forth in Exhibit A and Exhibit B.

Attachments: **Exhibit A:** Redline comparing proposed Policy to existing Policy
Exhibit B: Proposed Error Correction Policy (Clean)

Exhibit A



Error Correction Policy

I. Purpose

This Policy establishes standards and procedures for recovery or resolution of ~~overoverpayments~~ or underpayments of ~~member~~-benefits and ~~underpayment~~~~underpayments~~ of member contributions. ~~This policy does not apply to overpayments~~ of member contributions, ~~which are resolved according to IRS requirements.~~¹

II. Objectives

- A. To meet the Board's fiduciary obligation to conserve fund assets and protect the integrity of the fund for the benefit of the members and beneficiaries.
- B. ~~To make reasonable efforts to~~ restore the Plan to the position it would have been in had no ~~overpayment or underpayment error~~ occurred ~~by recovering from a member, or others, when reasonable and feasible, any overpayment of benefits or underpayment of contributions.~~
- C. To maintain the tax-qualified status of the pension plan and avoid making any gift of public funds.

III. Assumptions

- A. The procedures and outcomes are intended to comply with applicable requirements of the Internal Revenue Code (IRC) and Internal Revenue Service (IRS) regulations, including the IRS Employee Plans Compliance Resolution System (EPCRS). If there is a conflict between applicable law and this policy, the law shall govern.

~~B. For purposes of this policy, the term "error" shall refer to any situation in which:~~

¹ ~~In general, employers refund overpaid member contributions to active members and ACERA refunds overpaid member contributions to inactive or retired members.~~

Style Definition: H1 List: Outline numbered + Level: 1
+ Numbering Style: I, II, III, ... + Start at: 1 + Alignment: Left + Aligned at: 0" + Indent at: 0.5"

Style Definition: H2 List: Outline numbered + Level: 2
+ Numbering Style: A, B, C, ... + Start at: 1 + Alignment: Left + Aligned at: 0.5" + Indent at: 0.95"

Style Definition: H3 List: Outline numbered + Level: 3
+ Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0.95" + Indent at: 1.4"

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- ~~1. A member or other beneficiary receives, for any reason, a benefit or other payment in excess of the amount otherwise due under the Plan or receives such payment at an inappropriate time; or~~
- ~~2. A member fails, for any reason, to make the full amount of employee contribution that such member is required to otherwise make under the Plan.~~
- ~~3. Error amounts shall be the amount of overpayment of benefits or underpayment of contributions prior to the calculation of applicable interest.~~

G.B. This policy ~~is designed for use~~applies when ~~the overpayment an error~~ affects an individual member's ~~or beneficiary's~~ benefits or contributions. In the event of a system-wide error that affects multiple members' ~~/beneficiaries'~~ benefits ~~or contributions~~, the Board may implement a system-wide correction process that it determines appropriate under the circumstances.

IV. Guidelines & Procedures

A. Investigation and Reporting.

1. Investigation: When an error is identified, Staff shall promptly notify the CEO ~~2~~ (or designee), who shall ensure that an appropriate and timely investigation is undertaken into the facts and circumstances surrounding the error and that all necessary corrective actions are taken.
2. Reporting: The CEO shall make periodic reports to the Board on errors and corrections results at least annually.
3. Overpayment based upon fraud:
 - a. Staff shall be vigilant for any indications of fraud as a cause for overpayment, whether by the payee or a third party.
 - b. In the event that fraud is suspected, Staff shall immediately notify the Legal Department and the CEO who will investigate whether evidence of fraud exists.

- c. Further investigation may include retention of a private investigator or other outside resources as may be deemed appropriate under the circumstances.
 - d. Based on the evidence uncovered, Staff and the Legal Department may notify law enforcement and pursue criminal action.
 - e. If justified and reasonable, Staff and the Legal Department may undertake civil action to recover fraudulently obtained ACERA funds.
- B. Overpaid Benefits and Underpaid Contributions: Correction of Error and Recovery of Funds:
 - 1. As soon as possible after an error is discovered, ACERA staff shall determine:
 - a. The appropriate date of correction; ~~and~~
 - b. The amount of the correct benefit or contribution amount starting from the date of correction; ~~and~~
 - c. The amount of the error starting from the beginning of the erroneous payment to the date of correction; ~~and~~;
 - d. The "~~the~~ appropriate interest" related to the error as defined below.
 - 2. ACERA shall promptly notify the member/~~beneficiary~~ in writing of the following:
 - a. The amount and starting date of any prospective adjustment to ~~the member's payment~~benefits or ~~contribution~~contributions reflecting the corrected amount. The starting date must be no less than 30 days after ACERA sends the notice to the member/beneficiary, unless ACERA's Chief Counsel determines that there is good cause to make the correction sooner.
 - b. The circumstances of the error and the means used to calculate the corrected amount.

- c. The amount of any overpaid benefits or underpaid contributions plus the amount of appropriate interest.
 - d. Repayment options, which may include a lump sum payment, installment payments or an offset against future benefits; and
 - e. The right of the member ~~or~~ beneficiary to appeal the ACERA staff determination. ACERA will make the necessary adjustments on a going-forward basis regardless of whether an appeal is filed. If the staff determination is overturned, the ACERA Board may direct staff to refund any amounts withheld during the appeal process.
- 3. Appropriate Interest
 - a. Interest on the outstanding amount due is compounded twice annually during the period where the benefit was overpaid and during any repayment period.
 - b. If the evidence shows that the benefit overpayment or contribution underpayment resulted from fraud or dishonest conduct by the member/payee/beneficiary or because the member/payee/beneficiary provided, or caused to be provided, inaccurate information to ACERA or the member's employer, then "appropriate interest" will be as follows:
 - 1) ~~The ACERA's~~ earned interest rate on its investments from the time of the error until discovery of the error; (investment losses will not result in any reduction to the amount the member owes ACERA).
 - 2) The assumed rate of return from the time of discovery until such amounts are fully repaid.
 - c. If the benefit overpayment or contribution underpayment was solely the result of an error by ACERA or the member's employer, then "appropriate interest" will be as follows:

- 1) No interest shall be charged from the time of the error until discovery of the error. Any liability created by this action shall be assumed as unfunded liability.
- 2) The assumed rate of return from the time of discovery until such amounts are fully repaid.
4. In structuring a repayment methodology, ACERA staff shall take into consideration the financial circumstances of the member ~~or~~ beneficiary affecting their ability to make payments. The repayment schedule will not exceed 10 years except in cases of extreme hardship as defined below.
5. In the event of the death of the member ~~or~~ beneficiary before full repayment has been made, ACERA shall use all reasonable efforts to recover the unpaid amount from the member ~~or~~ beneficiary's estate or trust, survivors, heirs, and/or beneficiaries.
6. If no agreement can be reached with the member ~~or~~ beneficiary for repayment, or if the member ~~or~~ beneficiary fails to respond to communications from ACERA staff, ACERA staff may ~~initiate involuntary actions for recovery~~ take unilateral action to recover of the unpaid amount, including reductions ~~from~~ future benefit payments, subject to approval by the Board.

C. Compromise & Settlement.

1. In some circumstances, ACERA may agree to receive less than the full amount in repayment. The recovery options may include:
 - a. Using a discounted interest rate;
 - b. Waiving interest altogether; or
 - c. Accepting less than full repayment of the principal.

2. Factors to be considered in compromising any recovery shall include, but not limited to:
 - a. The likelihood of collection;~~s~~
 - b. The cost of collection;~~s~~
 - ~~c.~~ c. The amount of possible recovery;~~s~~
 - ~~d.~~ d. The relative fault of the member/beneficiary, ACERA and employer; and
 - ~~e.~~ e. Extreme hardship to the member~~-or-~~/beneficiary or to his/her estate or heirs.
3. For purposes of this policy, “extreme hardship” will be determined as follows:
 - a. The member bears the burden of establishing any claimed “extreme hardship.”
 - b. “Extreme hardship” is not a bright line test, and a finding of “extreme hardship” depends on the facts and circumstances presented by the member.
 - c. ACERA will consider the following factors in determining whether the member has established an “extreme hardship” justifying compromise of the amount owed by the member:
 - 1) Net worth of member and spouse.
 - 2) Amounts and sources of all income to the member and spouse. In general, ACERA will consider that an “extreme hardship” is established if the member’s gross income is no more than 400% of the current federal poverty level based on the member’s household composition of single, married or family.
 - 3) Monthly expenses.
 - 4) Existence and value of real estate and personal assets.
 - 5) Divorce or legal separation.

- 6) Current or pending catastrophic financial events.
 - 7) Other factors presented by the member.
4. If the member's gross income is no more than 400% of the federal poverty level as defined above, ACERA will not collect more than 15% of the member's gross income.
 5. In consultation with the Chief Counsel the CEO is authorized to compromise recovery of error amounts of \$10,000.00 or less, excluding interest. The CEO shall apply the standards for compromise set forth in this Section. The CEO is also authorized to waive recovery of claims of ~~\$100,300.00~~ or less. All other compromises must be approved by the Board.
 6. ACERA shall maintain a record of all error corrections, payments, collection efforts and compromises and releases related to those errors.

~~D. Underpayments~~

~~+D.~~ Underpayment of ~~benefits~~ Benefits

- ~~d.1.~~ When ACERA has underpaid benefits to the member, the member shall be entitled to a prospective adjustment to his or her retirement benefits necessary to correct the error, as well as a lump sum payment for all past amounts owed as a result of the error.
- ~~e.2.~~ If the member who was underpaid dies before payment of the lump sum amount due, the payment will be made in accordance with ACERA's process for paying residual amounts following the death of the member.

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E. Underpayment of Contributions:

~~+~~ ~~For underpaid member~~ contributions:

~~When a member has underpaid contributions,~~ ACERA will follow the procedures outlined in the Membership Policy for members who are currently employed, ~~or with a participating employer, and will follow the procedure outlined in this Policy at section~~ Sections IV-(B) and (C) for members ~~who are~~ no longer employed by a participating employer.

~~B.F.~~ Appeals/Due Process.

The member ~~or~~ /beneficiary may appeal any staff decision regarding corrective actions consistent with the Board Administrative Appeals Policy.

V. Policy Review

The Operations Committee shall review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

VI. Policy History

A. The Board adopted this policy on September 17, 2015.

~~B.~~ The Board reviewed and affirmed this policy, with revisions on June 21, 2018².

~~B.C.~~ The Board reviewed and affirmed this policy, with revisions on September 17, 2020.

² The Board adopted the Recovery of Overpayment of Member Benefits & Underpayment of Member Contributions Policy on September 17, 2015. The Board reviewed and affirmed, with revisions, May 19, 2016, and June 21, 2018.

Exhibit B

Error Correction Policy

I. Purpose

This Policy establishes standards and procedures for recovery or resolution of overpayments or underpayments of benefits and underpayments of member contributions. This policy does not apply to overpayments of member contributions, which are resolved according to IRS requirements.¹

II. Objectives

- A. To meet the Board's fiduciary obligation to conserve fund assets and protect the integrity of the fund for the benefit of the members and beneficiaries.
- B. To make reasonable efforts to restore the Plan to the position it would have been in had no error occurred.
- C. To maintain the tax-qualified status of the pension plan and avoid making any gift of public funds.

III. Assumptions

- A. The procedures and outcomes are intended to comply with applicable requirements of the Internal Revenue Code (IRC) and Internal Revenue Service (IRS) regulations, including the IRS Employee Plans Compliance Resolution System (EPCRS). If there is a conflict between applicable law and this policy, the law shall govern.
- B. This policy applies when an error affects an individual member's or beneficiary's benefits or contributions. In the event of a system-wide error that affects multiple

¹ In general, employers refund overpaid member contributions to active members and ACERA refunds overpaid member contributions to inactive or retired members.

members'/beneficiaries' benefits or contributions, the Board may implement a system-wide correction process that it determines appropriate under the circumstances.

IV. Guidelines & Procedures

A. Investigation and Reporting.

1. Investigation: When an error is identified, Staff shall promptly notify the CEO (or designee), who shall ensure that an appropriate and timely investigation is undertaken into the facts and circumstances surrounding the error and that all necessary corrective actions are taken.
2. Reporting: The CEO shall make periodic reports to the Board on errors and corrections results at least annually.
3. Overpayment based upon fraud:
 - a. Staff shall be vigilant for any indications of fraud as a cause for overpayment, whether by the payee or a third party.
 - b. In the event that fraud is suspected, Staff shall immediately notify the Legal Department and the CEO who will investigate whether evidence of fraud exists.
 - c. Further investigation may include retention of a private investigator or other outside resources as may be deemed appropriate under the circumstances.
 - d. Based on the evidence uncovered, Staff and the Legal Department may notify law enforcement and pursue criminal action.
 - e. If justified and reasonable, Staff and the Legal Department may undertake civil action to recover fraudulently obtained ACERA funds.

B. Overpaid Benefits and Underpaid Contributions: Correction and Recovery

1. As soon as possible after an error is discovered, ACERA staff shall determine:
 - a. The appropriate date of correction;

- b. The amount of the correct benefit or contribution amount starting from the date of correction;
 - c. The amount of the error starting from the beginning of the erroneous payment to the date of correction;
 - d. The “appropriate interest” related to the error as defined below.
- 2. ACERA shall promptly notify the member/beneficiary in writing of the following:
 - a. The amount and starting date of any prospective adjustment to benefits or contributions reflecting the corrected amount. The starting date must be no less than 30 days after ACERA sends the notice to the member/beneficiary, unless ACERA’s Chief Counsel determines that there is good cause to make the correction sooner.
 - b. The circumstances of the error and the means used to calculate the corrected amount.
 - c. The amount of any overpaid benefits or underpaid contributions plus the amount of appropriate interest.
 - d. Repayment options, which may include a lump sum payment, installment payments or an offset against future benefits; and
 - e. The right of the member/beneficiary to appeal the ACERA staff determination. ACERA will make the necessary adjustments on a going-forward basis regardless of whether an appeal is filed. If the staff determination is overturned, the ACERA Board may direct staff to refund any amounts withheld during the appeal process.
- 3. Appropriate Interest
 - a. Interest on the outstanding amount due is compounded twice annually during the period where the benefit was overpaid and during any repayment period.
 - b. If the evidence shows that the benefit overpayment or contribution underpayment resulted from fraud or dishonest conduct by the member/beneficiary or because the member/beneficiary provided, or caused to

be provided, inaccurate information to ACERA or the member's employer, then "appropriate interest" will be as follows:

- 1) ACERA's earned interest rate on its investments from the time of the error until discovery of the error (investment losses will not result in any reduction to the amount the member owes ACERA).
 - 2) The assumed rate of return from the time of discovery until such amounts are fully repaid.
- c. If the benefit overpayment or contribution underpayment was solely the result of an error by ACERA or the member's employer, then "appropriate interest" will be as follows:
- 1) No interest shall be charged from the time of the error until discovery of the error. Any liability created by this action shall be assumed as unfunded liability.
 - 2) The assumed rate of return from the time of discovery until such amounts are fully repaid.
4. In structuring a repayment methodology, ACERA staff shall take into consideration the financial circumstances of the member/beneficiary affecting their ability to make payments. The repayment schedule will not exceed 10 years except in cases of extreme hardship as defined below.
5. In the event of the death of the member/beneficiary before full repayment has been made, ACERA shall use all reasonable efforts to recover the unpaid amount from the member/beneficiary's estate or trust, survivors, heirs, and/or beneficiaries.
6. If no agreement can be reached with the member/beneficiary for repayment, or if the member/beneficiary fails to respond to communications from ACERA staff, ACERA staff may take unilateral action to recover of the unpaid amount, including reductions to future benefit payments, subject to approval by the Board.

C. Compromise & Settlement.

1. In some circumstances, ACERA may agree to receive less than the full amount in repayment. The recovery options may include:
 - a. Using a discounted interest rate;
 - b. Waiving interest altogether; or
 - c. Accepting less than full repayment of the principal.
2. Factors to be considered in compromising any recovery shall include, but not limited to:
 - a. The likelihood of collection;
 - b. The cost of collection;
 - c. The amount of possible recovery;
 - d. The relative fault of the member/beneficiary, ACERA and employer; and
 - e. Extreme hardship to the member/beneficiary or to his/her estate or heirs.
3. For purposes of this policy, “extreme hardship” will be determined as follows:
 - a. The member bears the burden of establishing any claimed “extreme hardship.”
 - b. “Extreme hardship” is not a bright line test, and a finding of “extreme hardship” depends on the facts and circumstances presented by the member.
 - c. ACERA will consider the following factors in determining whether the member has established an “extreme hardship” justifying compromise of the amount owed by the member:
 - 1) Net worth of member and spouse.
 - 2) Amounts and sources of all income to the member and spouse. In general, ACERA will consider that an “extreme hardship” is established if the member’s gross income is no more than 400% of the

current federal poverty level based on the member's household composition of single, married or family.

- 3) Monthly expenses.
 - 4) Existence and value of real estate and personal assets.
 - 5) Divorce or legal separation.
 - 6) Current or pending catastrophic financial events.
 - 7) Other factors presented by the member.
4. If the member's gross income is no more than 400% of the federal poverty level as defined above, ACERA will not collect more than 15% of the member's gross income.
 5. In consultation with the Chief Counsel the CEO is authorized to compromise recovery of error amounts of \$10,000.00 or less, excluding interest. The CEO shall apply the standards for compromise set forth in this Section. The CEO is also authorized to waive recovery of claims of \$300.00 or less. All other compromises must be approved by the Board.
 6. ACERA shall maintain a record of all error corrections, payments, collection efforts and compromises and releases related to those errors.

D. Underpayment of Benefits

1. When ACERA has underpaid benefits to the member, the member shall be entitled to a prospective adjustment to his or her retirement benefits necessary to correct the error, as well as a lump sum payment for all past amounts owed as a result of the error.
2. If the member who was underpaid dies before payment of the lump sum amount due, the payment will be made in accordance with ACERA's process for paying residual amounts following the death of the member.

E. Underpayment of Contributions:

For underpaid member contributions, ACERA will follow the procedures outlined in the Membership Policy for members who are currently employed with a participating employer, and will follow the procedure outlined in Sections IV(B) and (C) for members who are no longer employed by a participating employer.

F. Appeals/Due Process.

The member/beneficiary may appeal any staff decision regarding corrective actions consistent with the Board Administrative Appeals Policy.

V. Policy Review

The Operations Committee shall review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

VI. Policy History

- A. The Board adopted this policy on September 17, 2015.
- B. The Board reviewed and affirmed this policy, with revisions on June 21, 2018²
- C. The Board reviewed and affirmed this policy, with revisions on September 17, 2020.

² The Board adopted the Recovery of Overpayment of Member Benefits & Underpayment of Member Contributions Policy on September 17, 2015. The Board reviewed and affirmed, with revisions, May 19, 2016, and June 21, 2018.