

**TULARE COUNTY
EMPLOYEES'
RETIREMENT
ASSOCIATION
(TCERA)**

DISABILITY RETIREMENT PROCEDURES

**Approved by the Board of Trustees on September 28, 2016
Amendments: May 10, 2017, May 13, 2020**

**TULARE COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
(TCERA)
DISABILITY RETIREMENT PROCEDURES
(Effective May 13, 2020)**

PART I. GENERAL PROVISIONS

1. GENERAL PROVISIONS

1.1. Purpose

The purpose of these Procedures is to provide an equitable, fair and impartial method for acting upon applications for rights, benefits and privileges under the County Employees Retirement Law of 1937 (Gov. Code, § 31450 et seq.), to the end that applications may be expeditiously processed.

1.2. Definitions

In these Procedures, unless the context or subject matter otherwise requires:

- a. "Accommodations" means an agreement by the County or other participating employer to modify the regularly assigned duties and/or work environment of the member as necessary to allow the member to perform his/her regularly assigned duties, as modified, within his/her current job classification and within the limitations established by medical evidence.
- b. "Administrative record" means the record prepared by TCERA staff for proceedings in court, pursuant to Code of Civil Procedure section 1094.6.
- c. "Applicant" means: (1) a member of TCERA claiming benefits, rights, or privileges under the County Employees Retirement Law of 1937, (2) any person claiming such benefits, rights or privileges through a member, or (3) the County of Tulare or other participating employer in TCERA.
- d. "Association" or "TCERA" means the Tulare County Employees' Retirement Association.
- e. "Board" means the Board of Retirement.
- f. "Brief" means a written legal argument explaining why that side should win the case. References to factual matters contained in the record must include a citation to the volume and page of the exhibits where this information is shown.

- g. “County health officer” means the county health officer appointed by the Board of Supervisors pursuant to Health and Safety Code section 101000 et seq. (Pursuant to Gov. Code, § 24100, this term also includes any deputy.)
- h. “Day” means calendar day. The time to take an action specified under these Procedures shall be governed by general California law (see Code Civ. Proc., § 10 et seq.). For example, if the last day to file a document with the Association is a date when the Association office is closed prior to the end of regular business hours, or for the entire day (on a weekend or holiday or for some other reason), then the time period is extended to the next business day.
- i. “Disability” or “disabled” means permanent physical and/or psychological inability to substantially perform the regularly assigned duties of the job, with or without accommodations.
- j. “Effective date” of a disability retirement allowance means the date calculated pursuant to Government Code section 31724. As of the last date of amendment of these Procedures, this statute provides that the effective date of a disability retirement allowance can be:
 - 1) The date the disability retirement application is filed with the Board;
 - 2) Not earlier than the day following the last day for which the member received regular compensation;
 - 3) After the expiration of any sick leave with compensation, unless the member agrees to retirement at an earlier date; or
 - 4) After the expiration of any leave of absence with compensation paid by the employer pursuant to Labor Code section 3201 et seq., unless the member agrees to retirement at an earlier date.

The statute also provides that when it has been demonstrated to the satisfaction of the Board that the filing of the member’s application was delayed by administrative oversight or by inability to ascertain the permanency of the member’s incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

- k. “Filed” means actually received by TCERA during regular business hours.
- l. “Formal hearing” means a hearing with live testimony by sworn witnesses, in addition to the hearing exhibits. Compare “hearing on the record.”
- m. “Health care provider” means any person or entity which has provided medical or mental health care or treatment and has records which may be relevant to the disability retirement application, including but not limited to a physician, dentist,

psychologist, chiropractor, optometrist, physical therapist, acupuncturist, counselor, hospital, medical clinic, or laboratory.

- n. “Hearing exhibits” means the documents prepared by TCERA, plus those submitted by the parties, for a hearing.
- o. “Hearing officer” means an active member of the State Bar of California appointed by the Board pursuant to Government Code section 31533 to independently review the evidence and provide proposed findings of fact and recommendations to the Board, pursuant to the provisions of law and these Procedures.
- p. “Hearing on the record” means a procedure in which the hearing officer makes his/her recommendation based only on the hearing exhibits and any written legal arguments submitted by the parties (i.e., without live testimony). Compare “formal hearing.”
- q. “Legal counsel” means an attorney who is an active member of the State Bar of California.
- r. “Member” means a member of TCERA.
- s. “Party” means any person disclosed by the records of the Association or by the application to have an interest in the subject matter of an application. Where appropriate within the context of the provision, this term may be limited to mean only the official participants in a hearing.
- t. “Pending” means the period from the time an application has been accepted as complete and ready for processing, through the final decision of the Board.
- u. “Permanent incapacity for performance of duty” means a permanent disability that precludes a member from substantially performing the regularly assigned duties of his/her job classification, even with accommodations.
- v. “Physician” means:
 - 1) A person holding a valid and unrevoked physician’s and surgeon’s certificate or certificate to practice medicine and surgery, issued by the Medical Board of California or the Osteopathic Medical Board of California; or
 - 2) A person with a doctoral degree in psychology, to whom a license has been issued pursuant to the provisions of California law, which license is in force and has not been suspended or revoked.
- w. “Retirement Administrator” means the individual employed as the Retirement Administrator by TCERA. The term includes a designee acting as Retirement

Administrator in the absence of the incumbent Administrator, as well as an Acting or Interim Retirement Administrator if the position of Retirement Administrator is vacant.

- x. “Service” in certain contexts in these Procedures means that period of time for which deductions are made from a member’s earnable compensation from the county or district. The “last day of service” is the last day of the last pay period for which retirement contributions are deducted. A member is considered to have discontinued service after this date.

For a member in a tier in which contributions end after thirty years of retirement service credit (Tiers 1-3), the “last day of service” may instead be the last day of the last pay period for which retirement contributions would have been deducted if the member did not have thirty years of retirement service credit. A member is considered to have discontinued service after this date.

- y. “Service” in other contexts in these Procedures means formally sending a document under these Procedures. “Proof of service” means a document certifying that a related document has been properly served on the required recipient(s) under these Procedures. Proper service means delivery of a document by one of the following methods:

- 1) In person.
- 2) Depositing the document in first-class mail, postage pre-paid, addressed to the recipient at the address last known to the sender. Delivery is deemed complete when the document is mailed.
- 3) Between TCERA and an employer which participates in the County interoffice mail system, by interoffice mail. Delivery is deemed complete when the document is picked up by the courier.
- 4) With the written consent of the recipient, by email, facsimile, or other electronic means. Delivery is deemed complete when the document is sent, provided the sender does not receive notice that the document was not sent. (Note: TCERA has consented in these Procedures to receive electronic notice from the employer regarding counsel for the employer. See section 1.6.a.)
- 5) Any document that is sent electronically after the close of business on that day shall be deemed to have been sent on the next business day.

- z. “Subrogation” means TCERA’s right to recover retirement benefits paid to a member from a third party who caused the permanent incapacity of the member.

1.3. Burden of Proof

- a. In an application for non-service connected disability retirement, the burden rests with the applicant to prove that he/she is permanently disabled from substantially performing the regularly assigned duties of his/her job.

Whenever an issue of drug or alcohol abuse is presented by the evidence, the burden set forth in this subdivision shall include the burden to prove that the particular incapacity was not the result of the alcohol or drug abuse.

- b. In an application for service-connected disability retirement, the burden rests with the applicant to prove that he/she is permanently disabled from substantially performing the regularly assigned duties of his/her job **and** that the employment contributed substantially to the disability.
- c. See Article 13 for the burden of proof rules where the employer is the applicant.

1.4. Communication with Individual Board Members

The Board acts as judge and jury regarding all disability retirement applications. As such, once an application for disability benefits has been filed, all communications between individual Board members and interested parties or their representatives regarding the application are forbidden until such time as the Board issues its **written** decision. Applicants are advised that any violation of this rule may result in the Board member being found ineligible to participate in any discussion regarding the application, or to influence the Board's decision, or to vote on the disability application.

- a. If a Board member receives a communication in violation of this provision, the Board member shall immediately take one of the following steps:
 - 1) If the communication is written, the Board member shall immediately provide to the Retirement Administrator a copy of the writing and any written response by the Board member to the communication.
 - 2) If the communication is oral, the Board member shall immediately send an email to the Retirement Administrator, stating the substance of the communication, any response made by the Board member, and the identity of each person from whom the Board member received the communication.
- b. The Retirement Administrator shall include the information provided by the Board member in the materials presented to the Board, and in the record. The Retirement Administrator shall notify the parties that the communication has been made part of the record.
- c. If a party requests an opportunity to address the Board regarding the communication within 10 days after the date of the notice from the Retirement Administrator, the Board may allow the party to do so.

1.5. Requirements for Board Member Participation

Any board member who has not reviewed the record that was provided to the entire Board for consideration shall not vote.

1.6. Right to Counsel

- a. An applicant is entitled, at his/her expense, to be represented by legal counsel (as defined in section 1.2.q). An applicant may not be represented by a person who does not meet this definition.

Where the member is the applicant, the Association will recognize legal counsel as the representative of an applicant only upon receipt of a document signed by the applicant which lists the contact information for the attorney, including the attorney's California state bar number. Where the County is the applicant, the Association will recognize the appropriate team within the County Counsel's office as the representative of the applicant without documentation, or will recognize another legal counsel as the representative of an employer applicant upon receipt of any form of written notice from the employer (including an email) which lists the contact information for the attorney, including the attorney's California state bar number.

The Association reserves the right to contact the applicant directly in addition to or in lieu of contacting the applicant's legal counsel.

- b. The Association is entitled to be represented by legal counsel, and shall be deemed to be represented by the appropriate team within the County Counsel's Office, unless otherwise designated by the Board.

1.7. Effect of Stipulations by Employer

The Board is not bound by any stipulation, agreement, understanding, act, or omission on behalf of the County of Tulare or other participating employer in TCERA by an officer, employee or agent of the County of Tulare or other participating employer in TCERA, in a workers' compensation or any other proceeding to which neither this Board nor the Association is a party, insofar as such stipulation, agreement, understanding, act, or omission may be asserted to relate to disability retirement or the disposition of a particular application for disability retirement.

1.8. Waiver of Procedures

- a. The Board may waive or modify any provision of these Procedures, in whole or in part, to ensure the fairness of these Procedures for all parties, including the Association.

- b. During an emergency which has been officially declared by an appropriate state official (as provided in Gov. Code, § 8680 et seq.), or by an appropriate County official (as provided in Tulare Co. Ord. Code, § 1-15-1000 et seq.), any party may request, and the Retirement Administrator may approve, an extension of any deadline in these Procedures until a reasonable period of time after the next scheduled meeting of the Board. If the Board is unable to take action at the next meeting as provided in section 1.8.a. for any reason (for example, losing a quorum or having a tie vote), or if the next meeting cannot be held until after the extension expires, the Retirement Administrator may continue to approve requests for extension until the Board is able to act. Both the requests and the approvals shall be in writing (email is acceptable).

1.9. Denial Due to Fraud or Willful Misrepresentation

If the applicant engages in any of the following actions, the application shall be denied with prejudice. Actions leading to denial on this ground include, but are not limited to:

- a. Willfully misrepresenting any fact or omitting relevant information in order to obtain disability retirement benefits.
- b. Presenting or causing to be presented any knowingly false or fraudulent written or oral statement in support of an application for disability retirement. For the purposes of this provision, the term “statement” includes records submitted to support the application.

1.10. Withdrawal

- a. An applicant may withdraw an application at any time prior to the initial decision of the Board.
- b. An applicant may withdraw a request for hearing at any time between the initial decision of the Board and the final decision of the Board.
 - 1) The withdrawal must be in writing and must be filed with the Association.
 - 2) The withdrawal is irrevocable once filed, and makes the initial decision of the Board the final decision. The decision cannot be appealed to court because without a hearing the applicant has not exhausted administrative remedies.

1.11. No Additional Time for Mailed Documents

The extension of time provided by Code of Civil Procedure section 1013 when a document is served by mail does **not** apply to any deadlines set by these Procedures.

PART II. APPLICATION THROUGH INITIAL BOARD DECISION

2. APPLICATION FILED BY MEMBER¹

2.1. Furnishing Copy of Procedures

The Association shall include a copy of these Procedures in the packet provided to anyone wishing to file an application. The Association shall also provide a copy to any member of the public on request, or, if these Procedures are posted on the TCERA website, may direct the requesting person to the website.

2.2. Filing Application

The Association shall furnish application forms for disability retirement benefits upon request to any person authorized to file an application. The applicant shall fully complete the application forms in accordance with these Procedures and the instructions stated on the application forms, and shall sign and verify the completed forms under penalty of perjury.

The completed application shall be filed with the Association. Any application or document filed in support thereof that is incomplete or illegible shall not be accepted for filing, but instead shall be returned to the applicant.

2.3. Documents to Be Included in Application

The following documents and reports shall be completed or furnished by the applicant in connection with the initial application. All documents must be legible and capable of being photocopied legibly.

- a. Completed Application for Disability Retirement.
- b. Responses to Disability Retirement Questionnaire, signed under penalty of perjury. (See section 1.9 regarding misrepresentation or omission of relevant information.)

The applicant shall list **all** health care providers seen by the applicant beginning with the date which is five (5) years prior to the date of the injury, diagnosis, or other disabling condition, and continuing through the date of application. The applicant shall also list all providers seen earlier than this five (5)-year date regarding the same or a similar injury, diagnosis, or condition, and shall include the approximate dates seen.

The applicant shall sign and attach to his/her responses the signature page which the Association provides with the Questionnaire which includes the declaration under penalty of perjury. If the responses are not returned with the appropriate

¹ See Article 13 for provisions regarding employer-filed applications.

signature page they shall be deemed not to have been filed and shall be returned to the applicant with additional instructions.

- c. Completed release forms to enable the Association to obtain the Applicant's medical and personnel records.
- d. Completed Treating Physician Statement(s).

The Treating Physician Statement (TPS) must state that the member is permanently incapacitated for the performance of the duties of his/her position, and, if the application is for service-connected disability retirement, that the member's employment contributed substantially to such incapacity. The TPS must be signed by a physician (as defined in these Procedures) with expertise in the type of disability claimed by the member.

If the TPS does not state that the member's employment contributed substantially to the incapacity, the application will be treated as one for non-service-connected disability retirement, even if the applicant has stated in the application that he/she believes the disability is directly related to employment with an employer participating in TCERA.

- e. Additional and supplemental Releases and Questionnaires may be required in the course of review of the application.

2.4. Basis for Application

A disability retirement application shall be based upon a permanent medical condition which constitutes a physical or psychological incapacity, or a combination of both. The documents on file must clearly identify the exact nature of the incapacity that forms the basis for the disability application. A disability retirement will not be granted except for those incapacities stated in the application on file and proven by the applicant to the satisfaction of the Board.

2.5. Time Limit for Filing

- a. An application for disability retirement shall not be deemed effective or filed within the meaning of Government Code sections 31721 through 31724, inclusive, until the date on which it is received by the Association at the office indicated in Section 2.6. An amended application shall be deemed filed, within the meaning of these statutes, on the date it is received by the Association. It is the applicant's responsibility to obtain such documents and the Association shall not process any disability retirement application until all the information required in Section 2.3 has been furnished, at which time the application shall be deemed complete and ready for processing.
- b. The burden rests with the applicant to establish timeliness of filing. As required by Government Code section 31722, the application must be filed:

- 1) While a member is in service;
- 2) Within four months after the member's discontinuance of service;
- 3) Within four months after the expiration of any period during which a presumption is extended beyond the member's discontinuance of service;
or
- 4) While, from the date of discontinuance of service to the time of the application, the member is continuously physically or mentally incapacitated to perform his/her duties.

Applicants should note that if the application is filed under this ground, the applicant has an additional burden regarding timeliness (proving continuous disability) which does not apply to the first three grounds.

- c. See definition of "service" in section 1.2.x.
- d. The applicant may show that the member is entitled to an effective date of disability retirement earlier than the date of the application, pursuant to Government Code section 31724. (See definition of "effective date" in section 1.2.j.)

2.6. Where to File

Application forms and related materials such as these Procedures may be obtained from the Association, 136 North Akers Street, Visalia, California 93291. All forms and documents shall be filed in hard copy at this location unless otherwise specified. All telephone inquiries should be made to (559) 713-2900.

2.7. Amendment of Application

- a. An applicant may amend his/her application at any time before the Board's initial decision. The new information shall be added to the staff review and recommendation to the Board.
- b. After the Board's initial decision, an application may not be amended. The applicant must instead file a new application, which will be held without investigation until the pending application has been finally decided, and may then file a new application. The effective date of benefits pursuant to the new application shall be determined as if no prior application had been filed.

3. STAFF REVIEW AND RECOMMENDATION

3.1. Review of Application

Once all required information has been submitted and the application is deemed complete and ready for processing, the Association shall process the application as set forth below.

3.2. Records in Support of Claim

- a. The applicant shall make arrangements for **all** medical records from the health care providers listed in the responses to the questionnaire to be sent directly to the Association by the physician, medical clinic, hospital, or other health care provider. Records submitted directly by the applicant will be rejected, unless the health care provider seals the records in a manner acceptable to the Association.
- b. The applicant may submit a written request to the Association to be excused from providing particular records, for good cause. The request shall be signed under penalty of perjury. The Association in its sole discretion may grant or deny the request, and the response shall also be in writing. The Association may provide a form for the request.
- c. The Association at any time may demand that the applicant arrange for additional records which the Association believes may be relevant to the application to be provided to the Association. Disputes regarding such records may be referred to the Retirement Administrator. The Association may also require the Applicant to provide additional and supplemental releases and responses to questions in the course of review of the application.

3.3. Medical Examinations

- a. A member may be required to submit to medical examinations by a physician or other expert identified by the Association. The Association shall pay for the cost of any such examination. Refusal of any applicant to submit to such medical examination shall be grounds for considering that the results of such examination would be unfavorable to the applicant, and such refusal shall result in denying the application with prejudice. The cost for an Independent Medical Examination or review estimated to exceed the amount set from time to time by the Board shall be approved in advance by the Board.
- b. The Association will reimburse vehicle mileage to and from a medical examination outside Tulare County, as well as reasonable lodging and meals at a rate not greater than the County per diem amount, and as authorized by the County reimbursement policy, **only** when the medical examination has been at the request of the Association. Mileage reimbursement will be made at the County mileage rate after the member has attended the appointment, for the number of miles from the member's residence directly to the examination location, as determined by Association staff from a mapping service on the Internet, rounded to the nearest

whole mile. Reimbursement for meal costs may also include those for a companion where one is needed to transport the applicant to the site of the medical examination, but only when approved in advance by the Association.

- c. **If the applicant fails without sufficient excuse to attend an examination scheduled at the request of the Association, the applicant shall reimburse the Association for any missed appointment fee charged by the examining physician.** The determination of what constitutes a sufficient excuse shall be within the sole discretion of the Board. Failure to pay the reimbursement in full, or to make acceptable arrangements to pay it in installments, shall constitute cause to dismiss the application, with or without prejudice as determined by the Board.
- d. All costs incurred for any and all medical examinations, medical reports and other charges which are undertaken or prepared at **the request of the member** shall be borne solely by the member.

3.4. Other Investigation

The Association may hire third parties, including but not limited to a private investigator, to investigate the issues and/or claims made by a disability retirement applicant that relate to his/her entitlement to receive disability benefits.

3.5. Information from Employer

At any time during the review process, the Association may request that the applicant's employer provide information regarding the member's job duties, illness or injury, accommodations, or other pertinent data. Additional reasonable requests may be made at any time as deemed necessary by the Association. Requests shall include a release by the applicant or other appropriate documentation. A participating employer shall provide the underlying data, or a response if requested by the Association, in writing, no later than 30 days after the date of the request. The Retirement Administrator may grant an extension of time of up to 10 additional days to respond upon a showing of good cause by the employer.

3.6. Submittal to Board

After obtaining all information deemed to be relevant and necessary, staff shall submit the matter to the Board.

4. INITIAL BOARD DECISION

4.1. Advice from County Health Officer

As provided in Government Code section 31530, the Board may seek advice from the county health officer at any time, and, if requested by the Board, the county health officer shall attend the Board's meetings.

4.2. Board's Options

Upon review of an application for disability retirement, the Board may do any of the following:

- a. Grant the benefit applied for.
- b. If the applicant has applied for service-connected disability retirement, and is eligible for non-service-connected disability retirement, grant a non-service-connected disability retirement, and:
 - 1) Deny the application for service-connected disability retirement, and direct staff to inform the applicant of his/her right to request a hearing on the issue of service connection, or
 - 2) Refer the issue of service connection to a hearing for a determination.
- c. Refer the entire matter to a hearing for a determination on any or all issues presented.
- d. Deny the application in its entirety and direct staff to inform the applicant of his/her right to request a hearing.
- e. Refer the matter back to staff with instructions.
- f. Dismiss the application without prejudice.
- g. Dismiss the application with prejudice.

4.3. Board Decision

Each decision shall be made by and shall be the decision of the Board. Each such decision shall be based upon all of the information presented to the Board.

In the event the Board is unable to act, in whole or in part, due to lack of a majority vote in accordance with the Board's bylaws, the minutes shall indicate that pursuant to these Procedures, the inability to take action is deemed an action to bring the matter back at the next regular meeting. If the Board is still unable to act at the second meeting, the minutes shall indicate that the inability to take action is deemed an action to deny the application, in whole or in part as applicable, pursuant to these Procedures.

PART III.

HEARING PROCESS AND FINAL BOARD DECISION

5. PROCEDURES APPLICABLE TO ALL HEARINGS

5.1. Referral by Board to Hearing for Determination

- a. If the Board's decision is to refer the matter to a hearing for a recommendation, the Board shall assign the matter to a hearing officer. The applicant and the applicant's employer shall be notified within ten (10) days of the Board's action. The Association's counsel shall be concurrently notified by copy of said notice.
- b. The notice shall advise that the matter will be determined by a hearing on the record, unless a formal hearing is requested by any party.
- c. A written request for a formal hearing may be filed by any party within ten (10) days after the date of the notice. (See section 5.2.c. regarding requirements for requesting a formal hearing; see also section 1.11 regarding no extension of time if a document is mailed.)

5.2. Request for Hearing after Denial of Application by Board

- a. If the Board's decision is to deny the application in whole or in part, the member, and the member's employer, shall be notified within ten (10) days of the Board's decision. The applicant and the Association shall have the right to request a hearing. The party requesting a hearing may request either a hearing on the record, as provided in Article 6, or a formal hearing, as provided in Article 7. A formal hearing will be scheduled if requested by any party.
- b. A request for hearing **must** be filed with TCERA not later than ten (10) days after the date of the notice of denial. (See section 1.11 regarding no extension of time if a document is mailed.)
- c. If the request is for a formal hearing, the party **must** indicate on the included calendar any dates which are unacceptable for a hearing. The party **must** also indicate the expected number of hearing days required to hear the matter. When a request for a formal hearing has been received, the Association shall immediately forward a copy to the non-requesting party, who shall within ten (10) days after the date of the notice indicate on the included hearing calendar any unacceptable dates. The parties are responsible for clearing calendars for any medical or other witnesses prior to the time that the responsive calendar is submitted. See section 7.3.c. (disallowed grounds for postponement or continuance).

If the applicant desires legal counsel, it is the applicant's responsibility to obtain counsel sufficiently in advance of the hearing date to allow counsel

adequate time to prepare for the hearing. See section 7.3.c (disallowed grounds for postponement or continuance).

A failure of any party to submit a calendar indicating the dates not acceptable for hearing shall be deemed consent to set the hearing on any weekday indicated to be available on the calendars that were sent to both parties.

5.3. Changing Type of Hearing after Initial Selection

- a. A party who has requested a hearing on the record may not request that the matter be changed to a formal hearing.
- b. A party who has requested a formal hearing may request changing to a hearing on the record. Provided the other party has not requested a formal hearing, and/or stipulates to changing to a hearing on the record, the Retirement Administrator may grant the request.

The request must be filed with the Association not later than 30 days before the date the formal hearing is initially scheduled to begin.

If the Retirement Administrator grants the request, the triggering event for purposes of the 30-day period to file briefs as provided in section 6.2 shall be either the date of service of the approval, or the date set forth in section 6.2, whichever is later.

5.4. Assignment of Hearing Officer

- a. Once a hearing has been requested or ordered, the Association shall assign the next available hearing officer in the rotation to the hearing. The Association shall notify the parties promptly when a hearing officer has been assigned.
- b. Each party shall be entitled to request reassignment of the hearing to another hearing officer without cause. Each party shall be entitled to make only one (1) such request.
 - 1) The request must be in writing and must be filed with the Association no later than 10 days after service of the notice of assignment of hearing officer.
 - 2) A party which did not request reassignment the first time may file its own request for reassignment as described above after the notice of assignment of the second hearing officer is served.
- c. At any time, a party may request reassignment to another hearing officer for good cause.
 - 1) The reassignment request shall be supported by a declaration under penalty of perjury, and shall be made in the form provided in Appendix A.

- 2) Upon the filing of a request for reassignment in accordance with the provisions of this section 5.4.c., without any further act or proof, the Association shall reassign the case to the next available hearing officer in the rotation.
- 3) Upon reassignment, a new notice of assignment of hearing officer shall be served on the parties. If there are no available hearing officers left in the rotation, the Association shall take such steps as are appropriate under the circumstances, which may include contracting with the Office of Administrative Hearings to provide an administrative law judge.

5.5. Authority of Hearing Officer

The hearing officer may require the parties to hold teleconferences as needed.

The hearing officer may also make any procedural rulings needed, and, upon the stipulation of all parties, the hearing officer may waive or modify any provision of the rules in Article 6 or 7 for that type of hearing, in whole or in part, except for the time limits in section 7.3.

The hearing officer shall not engage in ex parte communications with a party. Discussions with one party about scheduling the hearing do not constitute ex parte communications.

5.6. Initial Exhibit Packet

For all hearings, the Association shall prepare the initial exhibit packet as follows.

a. Assembly of Packet

Within 45 days after the notice of initial assignment of the hearing officer, the Association shall prepare and serve a consecutively numbered, tabbed exhibit packet consisting of all records provided by the applicant or the applicant's representative and/or the employer or employer's representative, and all records obtained by the Association in the application process. The initial exhibit packet shall consist only of those records in the Association's possession as of the date of the initial Board decision.

b. Service of Packet

The Association shall provide electronic copies of the initial exhibit packet to all parties, with a proof of service indicating the date of distribution. The Association shall also provide hard copies for the hearing officer and TCERA's counsel at no charge, and shall provide a hard copy for the applicant on request upon payment of the fee for preparation of a hard copy.

5.7. Supplemental Exhibit Packet

The Association shall provide a supplemental exhibit packet (if any), or a notice of no supplemental exhibit packet, as follows:

- a. Within 45 days after the date of service of the initial exhibit packet, a party shall do one of the following:
 - 1) Advise the Association in writing that the party will not submit any additional records for a supplemental exhibit packet.
 - 2) Advise the Association in writing that the party may wish to submit additional records for a supplemental exhibit packet.

This notice may include a written request to the Association to issue subpoenas for records to be provided directly to the Association, in circumstances where the party is legally barred from obtaining the records, or where the party shows the Association that reasonable efforts to obtain the records have been unsuccessful.

Neither notice needs to be served on the other party or parties.

- b. If a party wishes to submit additional records for a supplemental exhibit packet, that party must arrange for the additional records, whether subpoenaed or not, to be provided directly to the Association not later than 135 days after the date of service of the initial exhibit packet as described in section 5.6.b. (i.e., not later than 90 days after the deadline in section 5.7.a.).
- c. If all parties advise pursuant to section 5.7.a.1. that no additional records will be submitted, then, within 15 days after the date of receipt of the last notice, or the date in section 5.7.a., whichever is earlier, the Association shall notify the parties, with a proof of service, that no supplemental exhibit packet will be provided.
- d. If one or more parties advise the Association that additional records may be submitted, then within 15 days after the deadline in section 5.7.b., the Association shall prepare a consecutively numbered, tabbed supplemental exhibit packet consisting of all records provided by the deadline to the Association, and shall provide it to all parties and the hearing officer, with a proof of service indicating the date of distribution, in the same manner as in section 5.6.b.

5.8. Objections to Records in Packets

All records in the initial exhibit packet and the supplemental exhibit packet, if any, shall be deemed to be properly authenticated, and shall not be treated as hearsay unless the objecting party, not later than thirty (30) days after delivery of the initial or supplemental exhibit packet, files with the hearing officer, with a proof of service on the other party or parties, a request to exclude certain records, with a description detailing the basis for the

objection with sufficient specificity. Nothing in this rule precludes a party from arguing about the substance of, or challenging the truth of, any material contained in the exhibit packet or packets as prepared by the Association. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

5.9. Submittal of Additional Records

- a. No additional records may be submitted to the Association after the date of service of the supplemental exhibit packet, or notice of no supplemental exhibit packet, as described in section 5.7.
- b. The hearing officer may allow additional medical reports or other documents to be submitted directly to the hearing officer after the date in section 5.7. The requesting party must show that such records are directly relevant to an issue in dispute, and that the evidence is not cumulative. The hearing officer must permit submission in any of the following circumstances:
 - 1) Where records that were *timely* subpoenaed were not received by the Association in time to be included in the supplemental exhibit packet.
 - 2) Where records *which predate the date in section 5.7.a.* are discovered which the party neither knew about nor should have known about, in the exercise of reasonable diligence, and where the party proposing to submit such records provides notice to the other party or parties within 24 hours after learning of the existence of such records, and provides copies to the other party or all other parties within 24 hours after obtaining the additional records.
 - 3) With the consent of the Retirement Administrator.
- c. If the hearing officer permits submission under section 5.9.b., the party shall provide copies at no cost to the hearing officer and all other parties. The hearing officer may determine timelines for submission of documents not covered by section 5.9.b.2., and/or may set or reset other deadlines in Article 6 or 7 as needed, except those in section 7.3.
- d. In a hearing on the record, the hearing officer must reject any documents which do not meet the criteria in section 5.9.b.
- e. In a formal hearing, the hearing officer may permit submission of documents which do not meet the criteria in section 5.9.b. See section 7.12 (Submittal of Additional Records at Hearing).

5.10. Additional Facts Arising Before Hearing

If facts which could have affected the Board's initial decision, but were not known at the time of that decision, come to light before the hearing commences, any party, or staff, may

bring these facts to the attention of the Retirement Administrator. The Retirement Administrator may determine that these facts are material enough that they should be presented to the Retirement Board.

If that determination is made, the Retirement Administrator shall cancel any hearing process and shall return the matter to the Board for further review pursuant to Article 4 (Initial Board Decision). If the Board again denies the application, in whole or in part, the applicant may again request a hearing.

If a new request for hearing is submitted, the matter will be heard by the same hearing officer as assigned earlier, unless he/she is not available, in which case all procedures in section 5.4 (Assignment of Hearing Officer) will be followed.

6. HEARING ON THE RECORD

6.1. Exhibit Packet

The rules for the exhibit packet are set forth in Article 5. As noted in section 5.9.d., the hearing officer must reject any supplemental documents which do not meet the criteria set forth in section 5.9.b.

6.2. Briefs

Not later than thirty (30) days after the date of service of the supplemental exhibit packet, or notice of no supplemental exhibit packet, as described in section 5.7, the parties may file simultaneous written briefs (as defined in section 1.2.f.) with the Association, with a proof of service on the hearing officer and the other party or parties, which identifies issues, evidence, and relevant law, and presents arguments. (For help in writing a brief, parties may search the Internet for “how to write a legal argument in a court case.”) If a brief claims that something is in the record, the brief must identify the volume and page of the record where the item appears.

One original of each brief must be filed in hard copy with the Association. The parties may stipulate to serve solely electronic copies on each other, and the hearing officer may consent to be served solely with an electronic copy.

The hearing officer may, for good cause, grant a request to extend time for the parties to file their simultaneous briefs. The request must be made no later than seven (7) days before the original deadline, and the new deadline shall be no later than 15 days after the original deadline. The hearing officer shall notify the Association and the parties in writing whether the request for an extension has been granted or denied. If the request is granted, the deadline for the hearing officer’s proposed findings of fact and recommendations pursuant to section 6.3 below shall be extended accordingly.

6.3. Hearing Officer's Recommended Decision

The hearing officer shall review the record and any briefs, and shall submit his/her proposed Findings of Fact and Recommendations to the Board of Retirement, with a proof of service on the parties, no later than 30 days after the date the briefs were filed or due, as described in section 6.2.

The hearing officer shall include in his/her recommended decision a notice to the parties that they have ten (10) days from the date of service of the recommended decision to submit written objections, with a proof of service on the other parties, to the Board.

6.4. Objections to Hearing Officer's Recommended Decision

Pursuant to Government Code section 31534, the parties shall have ten (10) days from the date of service of the hearing officer's proposed Findings of Fact and Recommendations to submit written objections, with a proof of service on the other parties, to the Board. (The objections are **not** served on the hearing officer.) These objections shall be incorporated in the record to be considered by the Board when it considers the proposed decision.

7. FORMAL HEARING

7.1. Initial Scheduling of Hearing

The hearing must initially be scheduled to commence within one hundred eighty (180) days after the date of service of the initial exhibit packet, as described in section 5.6.

The Association or its counsel shall initiate the scheduling process. The parties are expected to cooperate in setting the hearing date or dates. The hearing officer shall settle disputes regarding the initial scheduling of hearing dates.

The hearing may be postponed as provided in section 7.3.

Hearings that are not concluded on the date set may be continued to any future date agreed to by all parties, provided the new date meets the requirements of section 7.3.

7.2. Notice of Hearing

Once the initial hearing date has been established, the Association shall promptly issue a formal notice of hearing to each party describing the time and place of the hearing. Such notice shall be provided not later than forty-five (45) days prior to the initial hearing date.

7.3. Postponements and Continuances

a. Definitions

- 1) “Postponement” means delaying the beginning of a hearing prior to the submission of any formal evidence or testimony.
- 2) “Continuance” means delaying resumption of a hearing after the hearing has begun, i.e., after some formal evidence and/or testimony has been received from one or more of the parties.

b. Limitations

- 1) The hearing officer may grant one request by each party to postpone the hearing for good cause, and may also grant one request by each party to continue the hearing for good cause. Any request for postponement or continuance shall be made not later than fifteen (15) days in advance of the next scheduled date of the hearing, except when the basis for the postponement or continuance is not known fifteen (15) days in advance. The hearing officer shall promptly grant or deny any request.
- 2) Only the Retirement Administrator may grant additional requests by a party for postponement or continuance for good cause. The Retirement Administrator must also approve treating a postponement or continuance as not charged to any party, such as when the hearing officer requests a postponement or continuance on his/her own behalf.
- 3) Any postponement or continuance must be to a date certain which is within 45 days after the then currently scheduled date, or the most recent date on which the hearing was actually held, as applicable.
- 4) If the request is granted, the hearing officer shall indicate in writing whether the postponement or continuance is charged to a party, and, if yes, which party or parties have used their requests and which still have a request available.

c. Good cause

Good cause shall be within the discretion of the hearing officer or Retirement Administrator, as applicable. However, the following shall **not** constitute good cause for postponement or continuance of a hearing:

- 1) The desire to await the outcome of an application for workers’ compensation or to exhaust benefits under Labor Code section 4850 and/or long term disability pay.

- 2) The need to permit a condition to stabilize in order to determine whether the disability is permanent.
- 3) **Failure to obtain legal counsel, if so desired, sufficiently in advance of the hearing date to allow counsel adequate time to prepare for the hearing.**
- 4) Conflicting schedule of a witness, where that conflict was known at the time the hearing calendar was submitted.

d. Hearing officer's authority

The hearing officer shall settle disputes regarding the scheduling of postponed or continued hearing dates.

7.4. No Discovery

No discovery requests to other parties are allowed, including depositions, requests for production of documents, requests for admission, and all other discovery permitted in civil cases, except as expressly permitted in these Procedures.

7.5. Submission of Witness Lists

Not later than thirty (30) days before the scheduled hearing date, all parties or their counsel shall submit to the hearing officer, with a proof of service on the other party or parties, a list of the names of any physicians or other witnesses who will or may be called to testify.

If the hearing is postponed or continued, the hearing officer may require a supplemental list to be submitted with such deadlines and other requirements as the hearing officer may set.

7.6. Independent Medical Examination

Not later than thirty (30) days before the scheduled hearing date, a party may request, or the parties may stipulate to request, that the Retirement Administrator authorize an independent medical examination. The request must be in writing and must show good cause to grant the request. The Retirement Administrator may grant the request if good cause is shown.

7.7. Subpoenas for Attendance of Witnesses at Hearing

It shall be the responsibility of each party to obtain those subpoenas for witnesses to appear at the hearing that he/she deems necessary for the presentation of his/her respective portion of the case. The party requesting the subpoenas must submit to the Association a written request with the name of each person to be subpoenaed. The parties are strongly advised to request subpoenas as soon as the party knows the witness will be called.

The Association shall provide the completed subpoena forms within **five (5) working days** after such request. Subpoenas shall be signed by the Chair of the Board, the Retirement Administrator, or the hearing officer.

Neither the Board nor the Association is responsible for the service of subpoenas, the cost of service, or the payment of witness fees. All subpoenas are to be issued in accordance with Government Code section 31535. The parties and their counsel are responsible for complying with all legal requirements regarding the request for and service of subpoenas and regarding any other laws which may impact such subpoenas.

7.8. Affidavits

a. At any time twenty (20) or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit that he/she proposes to introduce, as set forth below. Unless the opposing party, within ten (10) days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his/her right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit shall be excluded.

b. The notice referred to in subdivision a. shall be substantially in the following form:

The accompanying affidavit of (here *insert name and contact information of affiant*) will be introduced as evidence at the hearing in (here *insert title of proceeding*). (Here *insert name of affiant*) will not be called to testify orally and you will not be entitled to question him/her unless you notify (here *insert name of proponent or his/her attorney*) at (here *insert address*) that you wish to cross-examine him/her. To be effective your request must be mailed or delivered to (here *insert name of proponent or his/her attorney*) on or before (here *insert a date 10 days after the date of mailing or delivering the affidavit to the opposing party*).

7.9. Pre-Hearing Briefs

A party may, but is not required to, submit a pre-hearing brief. (This is most often done when a case presents a technical, often legal, issue.) A party wishing to submit a pre-hearing brief shall notify the hearing officer and other parties no later than 14 days prior to the scheduled date of the hearing of the party's intent to submit a pre-hearing brief. One original of a pre-hearing brief must be filed in hard copy with the Association. Copies must be served on the hearing officer and the other party or parties in such a manner that they receive it no later than two (2) days prior to the hearing, unless otherwise ordered by the hearing officer. The other party or parties and the hearing officer may consent to be served solely with an electronic copy.

7.10. Stenographic Reporter

The Association shall arrange for a certified shorthand reporter to record the hearing at the expense of the Association.

7.11. Rights of Parties

Oral evidence shall be taken only on oath or affirmation. Each party shall have these rights: to call and examine witnesses; to request that additional records be accepted; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him/her to testify; and to rebut the evidence against him/her. If the applicant does not testify, he/she may be called and examined as if under cross-examination. At the request of any party, witnesses may be excluded from the hearing, except while testifying.

7.12. Submittal of Additional Records at Hearing

- a. The hearing officer may permit additional records to be submitted at the hearing. The requesting party must show why the records should be permitted despite not meeting the criteria in section 5.9.b.
- b. Should the hearing officer permit submission of records, he/she shall condition the submission upon such terms as he/she deems fair, including without limitation: permitting the non-submitting party to submit additional records; permitting the non-submitting party to subsequently file a declaration of other witnesses regarding the newly submitted evidence; permitting the non-submitting party to call the witness who authored the evidence at the expense of the submitting party; permitting the non-submitting party to depose the witness at the expense of the submitting party and have the transcript submitted as evidence; and/or continuing the hearing to permit time to properly respond to the new records, which, if granted, shall not be counted as the non-submitting party's one allowable request to the hearing officer. Additionally, the hearing officer may consider the records as offered but afford them only weight as uncorroborated hearsay.

Prior to ruling on the admissibility of any belatedly presented records, in order for the submitting party to determine if he/she wishes to pursue the issue, the hearing officer shall advise the submitting party of the possible conditions to admissibility which might be imposed. If the submitting party does pursue submission and the evidence is later admitted, it shall be conclusively presumed that the submitting party consents to the conditions identified by the hearing officer regarding the admission of the evidence.

- c. A party wishing to submit additional documents shall bring enough copies to the hearing to assure that the hearing officer and all parties receive a copy.

- d. The hearing officer shall ensure that any documents submitted are marked as additional exhibits, whether admitted into evidence or not, and shall forward the hearing officer's copies to the Association after the hearing for inclusion in the record as required by Code of Civil Procedure sec. 1094.6 ("Such record shall include ... all rejected exhibits in the possession of the local agency or its commission, board, officer, or agent").

7.13. Rules of Evidence

- a. Formal rules of evidence do not apply, but evidence may be admitted only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. Hearsay evidence alone shall be insufficient to support a decision. As provided in section 5.8, records included in the exhibit packet(s) prepared by the Association are not hearsay unless a timely objection is made.
- b. Any objections to the admissibility or relevance of evidence other than evidence admitted pursuant to section 5.9.b. shall be determined by the hearing officer. Notwithstanding this rule, any party may object at the hearing that such documents are, in whole or in part, irrelevant.
- c. The hearing officer shall retain the right to exclude evidence which is not relevant or which is cumulative, or otherwise found not probative.
- d. Any party may request that the hearing officer take official notice of those matters provided for in Evidence Code sections 451 through 453.
- e. Other than rebuttal witnesses, neither party may call as a witness any physician or other witness whose name has not been disclosed to the other party pursuant to the provisions of section 7.5 (Submission of Witness Lists), except as provided in section 7.12.b. (possible conditions for submission of additional records at hearing).

7.14. No Additional Records after Conclusion of Hearing

No additional records may be submitted after the conclusion of the hearing. The hearing concludes when all testimony and other evidence has been received; any allowances for post-hearing briefs before the matter is deemed submitted to the hearing officer do not extend this time.

7.15. Transcript of Hearing

- a. The Association shall order a transcript of the hearing for the hearing officer's use. The costs shall be paid by the Association.
- b. If a copy of the transcript is ordered at the request of the applicant or the applicant's attorney, the costs shall be paid by the applicant.

- c. The costs of a copy ordered by any party after the original transcript has been prepared shall be borne by the party ordering the copy.

7.16. Post-Hearing Briefs

Not later than thirty (30) days after the conclusion of the hearing, the parties may file simultaneous written briefs with the Association. The hearing officer may extend this deadline for good cause to 45 days. Alternatively, the parties may stipulate to, or the hearing officer may require, opening, opposing, and reply briefs, on a schedule to be determined by the parties, with the written description of the schedule to be provided promptly to the Association.

Any party which wishes to file a written brief shall file an original with the Association, with a proof of service on the hearing officer and the other party or parties, which sets forth the issues and contentions of the party and a summary of the evidence, and discusses applicable law. (For help in writing a brief, parties may search the Internet for “how to write a legal argument in a court case.”) References to factual matters contained in the record must include a citation to the volume and page of the exhibits where this information is shown.

One original of each brief must be filed in hard copy with the Association. The parties may stipulate to serve solely electronic copies on each other, and the hearing officer may consent to be served solely with an electronic copy.

The matter shall be deemed submitted on the day the post-hearing briefs are, or the reply brief is, due. If the parties waive the filing of post-hearing briefs, the matter shall be deemed submitted at the conclusion of the hearing.

7.17. Failure to Pursue Application

If, as a result of the applicant’s failure to comply with the procedures specified above, **including but not limited to failure to cooperate in scheduling the hearing, or unwarranted requests to postpone or continue a hearing**, the hearing is not concluded within nine (9) months after a request or referral for a formal hearing, the case shall be dismissed with prejudice. This remedy pertains to a matter that has already been sent to a hearing and does not supersede the dismissal without prejudice provided for in section 2.5 (time limit for filing application).

7.18. Findings of Fact and Recommendations

- a. Not later than thirty (30) days after the date the matter is deemed submitted, as provided in section 7.16, the hearing officer shall serve his/her proposed Findings of Fact and Recommendations on the parties and file them with the Board. The hearing officer may file with the Association a written request for one 30-day extension for submission of the recommended decision, which request shall be granted or denied by the Retirement Administrator.

One original of the proposed Findings of Fact and Recommendations must be filed in hard copy with the Association. The parties may stipulate to allow the hearing officer to serve solely an electronic copy on them.

The hearing officer shall include in his/her recommended decision a notice to the parties that they have ten (10) days from the date of service of the recommended decision to submit written objections, with a proof of service on the other parties, to the Board.

- b. Pursuant to Government Code section 31534, the parties shall have ten (10) days from the date of service of the hearing officer's proposed Findings of Fact and Recommendations to file written objections, with a proof of service on the other party or parties, with the Association. (The objections are **not** served on the hearing officer.) These objections shall be incorporated in the record to be considered by the Board when it reviews the proposed decision.

One original of any objections must be filed in hard copy with the Association. The party receiving any objections may consent to be served solely with an electronic copy.

7.19. Shortening Time Periods

Nothing in these Procedures is to be construed as preventing the parties from stipulating to lesser intervals than those prescribed above. The hearing officer may also, for good cause shown, after giving both parties an opportunity to be heard, shorten the times specified in this Article. (See also section 5.5 regarding hearing officer's authority to waive or modify some procedures.)

8. BOARD DECISION AFTER HEARING

8.1. Board's Options

Upon receipt of the hearing officer's proposed Findings of Fact and Recommendations and considering the record, including any objections submitted by the parties, the Board may, in accordance with Government Code section 31534:

- a. Approve and adopt the proposed findings and the recommendations of the hearing officer;
- b. Require a transcript, plus all other evidence received by the hearing officer and, upon the receipt thereof, take such action as in its opinion is indicated by such evidence;
- c. Refer the matter back with or without instructions to the hearing officer for further proceedings; or

- d. Set the matter for hearing before itself. At such hearing the Board shall hear and decide the matter as if it had not been referred to the hearing officer.

8.2. Referral Back to Hearing Officer

If the Board refers the matter back to the hearing officer with a request to amend the proposed decision, the hearing officer shall submit the revised proposed decision within 30 days after the date of the request from the Board.

If the Board refers the matter back to the hearing officer with instructions for further proceedings, the Board shall include in its instructions a deadline for completion of the additional proceedings.

8.3. Findings and Conclusions by the Board

In any case where the Board sets the matter for hearing before itself, the Board shall adopt such findings of fact and conclusions of law as it deems appropriate.

8.4. Notice of Decision

The Association shall give written notice of the Board's decision to all parties and their representatives within ten (10) days. Said notice shall include the decision and the date it was rendered.

8.5. Finality of Decision

Except as otherwise provided in Article 10 (judicial review), action by the Board granting or denying in whole or in part any application for disability retirement shall be deemed to be a final and conclusive determination of any and all issues raised by the application which were either presented to the Board or could with the exercise of reasonable diligence have been presented to the Board. No employee whose application for disability retirement has been denied by the Board, and who thereafter returns to service with a participating employer, shall be precluded from filing a new application which asserts as a basis for the application circumstances existing or known at the time of denial of the first application, in combination with circumstances which have arisen or become known after denial of the first application. Such new application shall not, however, relate back to the date of an original application that was denied, and any entitlement to benefits shall be effective as of the date of filing of the new application.

PART IV.

MISCELLANEOUS

9. CHANGE OF POSITION IN LIEU OF DISABILITY RETIREMENT ALLOWANCE

As required by Government Code sections 31725.5 and/or 31725.65, if a disability applicant is found disabled and returns to County or other participating employer service in a position which pays less than the position from which he/she became disabled, the Association shall pay, in lieu of a disability retirement allowance, the difference between the member's former salary and current salary. Members should also note that if a safety member is placed in a general position, the member retains safety status.

10. JUDICIAL REVIEW

10.1. Judicial Review

In those cases where a party is entitled to judicial review of the proceedings, the petition to the court shall be filed in accordance with Code of Civil Procedure section 1094.5. Notice of the right to review under section 1094.5, and the time limits for filing for such review under Code of Civil Procedure section 1094.6, shall accompany the written notice of the Board's decision.

If the member's application was denied on the ground that the medical examination and other available information did not show to the satisfaction of the Board that the member was incapacitated physically or mentally for the performance of his/her duties, the notice to the employer shall advise the employer that the employer's time limit for obtaining judicial review is governed by Government Code section 31725, which requires the employer to obtain judicial review of the Board's action by filing a petition for writ of mandate within 30 days after the mailing of the notice. If the employer's application was denied on this ground, the notice shall advise the employer that this deadline **may** apply.

10.2. Preparation of Administrative Record

Pursuant to Code of Civil Procedure section 1094.6, TCERA staff shall prepare the administrative record for court upon written request by the petitioner. The petitioner must pay the cost of preparing the original of the administrative record in hard copy for the court. The petitioner must pay the estimated cost of preparation before TCERA prepares the administrative record. If the litigation is abandoned or dismissed before TCERA has completed preparation of the administrative record, or if the deposit exceeds the preparation cost, TCERA will refund any portion of the deposit exceeding the preparation cost actually incurred.

Pursuant to Code of Civil Procedure section 1094.5, the petitioner may ask the court to find that the petitioner cannot afford to pay any court costs, including the cost of the administrative record. If the court issues an order finding the petitioner to be indigent, and the petitioner provides a copy

of the signed order to TCERA, TCERA shall then pay the cost of providing the original of the administrative record in hard copy for the court. (This cost is recoverable as court costs if TCERA prevails in the litigation.) TCERA shall file the original with the court.

TCERA will provide a hard copy of the administrative record to its counsel at no charge. Any party other than TCERA must pay a fee to obtain a copy, and may choose what type of copy to receive: only an electronic copy (minimal fee), only a hard copy (higher fee), or both. If the petitioner obtains a court order of indigency, the procedure set forth above for the original of the administrative record (which is submitted to the court) shall also apply to the copy for the petitioner.

11. RE-EXAMINATIONS

The Board may, pursuant to Government Code section 31729, require any disability retiree under age 55 to undergo medical examination. The examination shall be made by a physician appointed by the Board. Upon the basis of the examination the Board shall determine whether the disability retiree is still physically or mentally incapacitated for service in the job classification held by him/her when retired for disability. The Board may additionally, or in the alternative, arrange for an investigation of the circumstances pertaining to such retiree that relate to his/her entitlement to receive disability benefits.

In the event that the examination or investigation shows that the retiree may not be incapacitated, the Board shall thereupon notify the retiree, at his/her last known address, of said recommendation of the medical advisor and advise the retiree that the Board will meet to reconsider his/her disability retirement status. If the Board's decision is to refer the matter to a hearing officer for a determination, the rules as set forth in Articles 5 through 7 (prehearing procedures, hearing on the record procedures, and formal hearing procedures), to the extent applicable, shall apply. Said notice shall inform the retiree of his/her right to request a formal hearing, provided said request is submitted in writing no later than fifteen (15) days after the date of the notice.

12. SUBROGATION

Disability applicants are hereby notified that the 1937 Act provides for subrogation of benefits. (See Gov. Code, § 31820 et seq.) This means that if the Association is paying benefits in a situation where someone other than the employer is responsible for the injury, the Association may seek to obtain partial reimbursement from that person of the benefits paid. In doing so, the Association may join with the employer or the employer's workers' compensation carrier in any proceeding, or may file its own action or a claim in an action filed by the employee.

PART V.

EMPLOYER-FILED APPLICATIONS

13. EMPLOYER-FILED APPLICATION

13.1. Applicability

The provisions of this Article shall be in accordance with Government Code section 31721. This statute provides that an employer may not separate because of disability a member otherwise eligible to retire for disability, but shall apply for disability retirement of any eligible member believed to be disabled. The Association shall provide appropriate information to the employer regarding eligibility of a member for disability retirement upon request by the employer.

All provisions of these Procedures shall be applicable, substituting the employer-applicant for the member-applicant, except as provided below.

13.2. Application

The application for disability retirement shall consist of each and all of the following:

- a. A completed Application for Disability Retirement;
- b. A written statement signed by the department head or his/her authorized agent which asserts that a member of the Association is disabled in a manner which permanently incapacitates the member from the substantial performance of his/her duties, describes the nature and extent of the disability, and identifies the effect which the disability has had upon performance by the member of his/her duties; and
- c. A written statement which is as close as the employer can come to the equivalent of the treating physician's statement, which indicates that the member is permanently incapacitated for the performance of his/her duties.
 - 1) If the employer has independent subpoena power (such as the Board of Supervisors' power under Gov. Code, § 25170 et seq.), and the employer is unable to obtain a written statement from the member's treating physician, this statement shall consist of, at a minimum, a written opinion from a physician who has reviewed the medical records obtained by the employer pursuant to its subpoena power.
 - 2) If the employer does not have independent subpoena power, and the employer is unable to obtain a written statement from the member's treating physician, the Association may accept the application without complete information, provided the written statement by the employer sufficiently

shows why the employer believes the member is permanently incapacitated, or may reject the application until the employer provides more information supporting its belief that the member is permanently incapacitated. If the Association accepts the application, the Association shall then (notwithstanding section 7.4 prohibiting discovery during the hearing stage) provide to the employer such deposition and other subpoenas as requested by the employer during the investigation stage, so that the employer may have medical records sent to TCERA, and may then make arrangements with TCERA to have a physician review the medical records and provide a written opinion based on the records to the Association regarding whether the member is permanently incapacitated, and if yes whether on a service-connected basis or not.

- d. The application will be assumed to be on a non-service basis unless the employer affirmatively states that the employer believes the incapacity is service-connected. As set forth in section 13.3.d., the member may later assert that the incapacity is service-connected.

13.3. Notice

The Association shall, not later than ten (10) days after the date of the application is filed, personally, or by certified mail, serve on the member the following:

- a. A copy of these Procedures.
- b. A copy of the employer's application.
- c. The Disability Retirement Questionnaire and the release forms to enable the Association to obtain the Applicant's medical and personnel records.
- d. A written notice which informs the member:
 - 1) Of the application and the date of its filing;
 - 2) Of the member's right to either support or oppose the application and to be represented by legal counsel at the member's expense;
 - 3) Of the member's right to provide one or more medical reports pertaining to the application to the Association, at the member's expense.
 - 4) Of the member's right to amend the application to become the applicant, and that, if the member does so, the member may also amend the application for non-service-connected disability retirement to apply for service-connected disability retirement, or that, alternatively, the member may **file a new application** for service-connected retirement after the employer has shown that the member is permanently incapacitated.

- 5) Of the requirement that, if the member becomes the applicant, the member shall provide all information required as described in Article 2.
- 6) That, unless the member becomes the applicant, the employer shall have sole control of any decisions normally made by the applicant.
- 7) That any communications between the Association and the member shall not be deemed to substitute for any communications between the employer and the member.

13.4. Burden of Proof

Where the employer has filed the application, the employer has the burden of showing permanent incapacity. However, as provided in section 13.3.d.4., the member may either amend an employer-filed application to become the applicant, or wait and file a new application. The burden of proof and the procedures shall therefore be as follows.

- a. Unless and until the member amends the application to become the applicant, the employer shall have the burden of proof to show permanent incapacity and, if applicable, service-connectedness.
- b. If the member amends the application to become the applicant, the member shall have the burden of proof to show permanent incapacity and, if applicable, service-connectedness.
- c. The member's right to amend the application to become the applicant shall expire when the Board makes its initial decision as described in section 13.7 below. After that date, the member must file a new application for any type of disability not granted by the Board in the initial decision, within the time provided in this Article.

13.5. Costs

Even if the employer is the applicant, all physician, medical, and other costs incurred for any and all examinations and medical reports undertaken or prepared **at the request of the member** shall be borne solely by the member. The employer and member may agree that the costs of any examination or medical report will be paid by the employer.

13.6. Review of Application

Review of an employer-filed application shall be in the same manner as a member-filed application, except that where the member is not cooperating in the review process, the Association will not schedule a medical examination to be paid for by the Association.

13.7. Initial Decision of Board Where Member Has Not Amended Employer's Application to Become Applicant

The initial decision by the Board shall be in accordance with Article 4, except that the actions described below shall result in the following procedures:

a. Decision to grant employer's application for non-service connected disability retirement

- 1) The employer and member shall be notified within 10 days of the decision of the Board. The notice to the member shall include information regarding the member's right to request a hearing in the event the employee is in disagreement with the decision of the Board. The employee must file the request for hearing within 10 days from the date of the notice, in the same manner as where the member is the applicant, except that the hearing shall not consider the issue of service connection.
- 2) At the close of the 10-day period for the member to request a hearing, the Association shall notify the employer whether the member has filed a request for hearing regarding the decision of the Board.
- 3) If the member does not file a request for hearing, the Board's decision as to permanent incapacity shall be final. The member shall then be sent a notice stating that the member has 10 days from the date of the notice to file a **new** application for service-connected disability retirement.
- 4) At the close of this second 10-day period, the Association shall notify the employer whether the member has filed a new application for service-connected disability retirement. If no new application is filed, the Association shall notify the parties that the matter is final.

b. Decision to deny employer's application for non-service-connected disability retirement

- 1) The employer and member shall be notified within 10 days of the decision of the Board.
- 2) The notice shall include information regarding the employer's right to request a hearing in the event that the employer is in disagreement with the decision of the Board. The notice to the employer shall include the information that failure to request a hearing shall result in the member being reinstated to his/her employment, in accordance with Government Code section 31725. The employer must file the request for hearing within 10 days after the date of the notice, in the same manner as where the member is the applicant, except that the hearing shall not consider the issue of service connection. A member who has not amended the application to become the applicant may not request a hearing.

- 3) If the employer files a request for hearing, the matter shall proceed as described in Articles 5-7.
- 4) If the employer does not request a hearing, the Board's decision shall be final, and the Association shall so notify the employer and member.
- 5) If the employer originally requests a hearing, and then later requests to withdraw the application before the hearing, the hearing will be vacated and the decision denying the application shall be final. (A **new** application may be filed thereafter by any party.)

c. Decision to grant employer's application for service-connected disability retirement

- 1) The parties shall be notified within 10 days of the decision of the Board. The notice to the member shall include information regarding the member's right to request a hearing in the event the member is in disagreement with the decision of the Board. The employee must file the request for hearing within 10 days after the date of the notice, in the same manner as where the member is the applicant.
- 2) At the close of the 10-day period for the member to request a hearing, the Association shall notify the employer whether the member has requested a hearing regarding the decision of the Board.
- 3) If the member does not file a request for hearing, the Board's decision shall be final, and the Association shall so notify the parties.

d. Decision to grant non-service-connected disability retirement, but to deny employer's application as to service connection

- 1) The employer and member shall be notified within 10 days of the decision of the Board. The notice shall inform the employer that the employer may request a hearing on the question of service connection, and shall inform the member that the member may request a hearing on the question of permanent incapacity. Either request must be filed within 10 days from the date of the notice.
- 2) If any party files a request for hearing, the matter shall proceed as described in Articles 5-7, except that if the member is the only party who requests a hearing, the hearing shall not include the issue of service connection. If one party requests a formal hearing and the other party requests a hearing on the record, the procedures for a formal hearing shall apply.

- 3) If no party requests a hearing, the Board's decision shall be final, and the Association shall so notify the parties.
- 4) If the employer requests a hearing, but later withdraws the request for hearing, the member shall then be sent a notice stating that the member's request for hearing shall continue, in the form of hearing requested by the member, but only on the question of permanent incapacity, and that if the member wishes to reinstate the issue of service connection, the member has 10 days to file a **new** application for service-connected disability retirement.

e. Decision to deny employer's application for service-connected disability retirement

- 1) The employer and member shall be notified within 10 days of the decision of the Board. The notice shall include information regarding the employer's right to request a hearing in the event that the employer is in disagreement with the decision of the Board. The notice to the employer shall include the information that failure to request a hearing shall result in the member being reinstated to his/her employment effective as of the day following the effective date of dismissal, in accordance with Government Code section 31725. The employer must file a request for hearing within 10 days from the date of the notice.
- 2) If the employer requests a hearing, the matter shall proceed as described in Articles 5-7.
- 3) If the employer does not request a hearing, the Board's decision shall be final.
- 4) If the employer originally requests a hearing, and then later withdraws the request for hearing, the hearing will be vacated, and the decision denying the application shall be final. (A new application may be filed thereafter by any party, with a new effective date if granted.)

f. Decision to dismiss application without prejudice

- 1) The employer and member shall be notified within 10 days of the decision of the Board. The notice shall provide information regarding the employer's and member's rights to re-apply for a disability retirement.
- 2) Should the employer or member re-apply for a disability retirement, the effective date of disability retirement, if granted, will relate to the date of the re-application as required by statute.

13.8. Initial Decision of Board Where Member Has Amended Employer's Application to Become Applicant

Where the employer has applied for disability retirement, but the member has amended the application to become the applicant, with or without adding a request for service-connected disability retirement, if applicable, the initial decision of the Board shall be in accordance with Article 4.

13.9. Hearing Procedure

The hearing procedure shall be the same for an employer-filed application as for an application filed by a member, except that the member and his/her legal counsel shall also have the opportunity to participate, and shall have all the same rights and duties as the employer-applicant and its legal counsel and the Association and its legal counsel.

The hearing officer may make any rulings and/or modify the hearing process, except for the time limits provided in section 7.3, as needed to provide a fair hearing involving a third party.

13.10. Board Decision after Hearing

Where the employer remains the applicant, the decision of the Board after a hearing shall generally be made as provided in Article 8, with "employer" substituted for "member" where appropriate.

However, where the employer applied only for non-service-connected disability retirement, and the Board approves a recommendation by the hearing officer to grant the application, the initial notice of the Board's decision under section 8.3 shall not state that the decision of the Board is final. Instead, the notice shall state that the member has 10 days to file a **new** application for service-connected disability retirement.

If no new application for service-connected disability retirement is filed, at the close of this 10-day period the Association shall notify the parties that the matter is final.

If a new application for service-connected disability retirement is filed, the Association shall inform the employer of this fact, and shall advise the parties that the matter will not be final until the Board reaches a decision on the question of service connection.

The new application for service-connected disability retirement shall be deemed timely if the employer's application was filed within the time limits in Government Code section 31722, as described in section 2.5 of these Procedures. The new application shall be processed and decided upon as provided in these Procedures, except that the additional materials normally required to be included with an application by a member need not be provided at the same time, but instead may be provided within 30 days after the application is filed.

13.11. Judicial Review

The opportunity to obtain judicial review shall be as set forth in Article 9.

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