

**FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (FCERA)  
DISABILITY RETIREMENT POLICY**

## **I. Purpose**

This policy provides a framework for assisting the Board in making factual findings regarding disability retirement claims necessary to administer FCERA in compliance with law, and to resolve claims by members or beneficiaries, in a manner that is timely, transparent and efficient and that provides impacted parties a fair opportunity to be heard, before the Board makes its final decision.

The Disability provisions of the County Employees Retirement Law of 1937 ("CERL") are found primarily in CERL Article 10 (Section 31720 et seq.).

This policy is not intended to circumvent the governing provisions of CERL, but rather to assist FCERA and its members in carrying out the letter and spirit of CERL and other applicable law. In the event any provision of this policy conflicts with provisions of CERL or other applicable law, CERL and applicable law shall govern.

## **II. Definitions**

1. See Appendix A

## **III. Disability Process**

1. Communication to Membership
  - i. FCERA staff shall make all reasonable efforts to inform FCERA members of disability retirement information.
2. Application process
  - i. All Disability Applications will be processed pursuant to FCERA policies and procedures
  - ii. FCERA staff may assist FCERA members in completing the application process but cannot provide legal advice.
  - iii. The application will not be accepted for processing unless a licensed physician has completed and signed the Treating Physician's Statement section of the disability application or sufficient medical evidence prepared by a licensed physician is submitted with the application that clearly states the Applicant is **permanently incapacitated** from performing his/her job duties.
  - iv. An applicant for disability retirement benefits shall execute and deliver to the Administrator, in the form provided, written consent for release of medical, psychological, and workers' compensation reports and additional consent as may be requested by designated FCERA staff to obtain employment and military records, investigatory records, vocational rehabilitation records, and any other records or information §which FCERA believes reasonably may lead to relevant information. All requested records as determined by FCERA, irrespective of whether or not the member believes the records are relevant, shall be provided by Applicant to FCERA.

### 3. Medical Review/Exams

- i. If deemed necessary, a licensed physician will be retained, at no cost to the Applicant, to review the Applicant's medical records and/or evaluate the Applicant for claimed disability.
- ii. The Applicant shall submit to any examination required by the Administrator. Refusal of any Applicant to submit to an examination may result in the termination of the application.

### 4. Presentation to the Board

- i. After the relevant records have been gathered and reviewed and any physician review or examination deemed necessary is conducted, the application will be presented to the Board. The Board shall hear the application in a manner consistent with the Ralph M. Brown Act. At that time, the Board shall take one of the following actions:
  1. Approve the disability retirement applied for based on the evidence collected during the application process, or
    - A. Once approved, a member may change positions or seek a new position through a rehabilitation program. See Gov't Code § § 31725.5 and 31725.6
  2. Request additional information before the Board renders its decision, or
  3. Find the Applicant is permanently disabled but not agree with the type (service connected or non-service connected disability) and grant a disability benefit that is different than the disability type specified on the application, or
  4. Reject (deny) the application, subject to the Applicant's right to request a hearing for disability benefits.

The Applicant may have up to five minutes to address the Board regarding his or her application, but shall not be present for the Board's deliberation in closed session.

### 5. Notice of Board's Initial Action and Right to Request a Hearing

- i. Within ten (10) days after the Board's action, the Administrator shall notify the Applicant in writing, by certified mail, at the latest address shown in the application, of the Board's action. If the Board denies in whole or in part any benefit sought in the application, the notice shall advise the Applicant of his or her right to request a hearing.
- ii. An Applicant may request a hearing by filing with the Administrator a Request for Hearing ("Request"), the form for which shall be included with the notice noted in section 5 (i). The Request shall be in writing and must be personally signed by the Applicant or Applicant's attorney. To be timely, a Request must be received by the Administrator no later than thirty (30) days after the date the notice is mailed to the Applicant.
- iii. If the Applicant fails to request a hearing, the Board's action described in 4(iv) to deny benefits shall be deemed final as of the deadline for the Applicant to file the Request. The Administrator shall then promptly mail notice of the decision to the employer as provided in Government Code section §31725.

## 6. Closure of Application

- i. If an Applicant fails to cooperate with the application or hearing process, FCERA staff reserves the right to terminate the application.

## 7. Continuation of Disability Status

- i. The Board may require any disability beneficiary under the age of 55 to undergo medical examination as provided in Government Code §31729. In such event, the Board shall determine whether or not the disability beneficiary continues to be physically or mentally incapacitated for service and whether or not the position held by the beneficiary when retired for disability is available.
- ii. If the Board determines that the beneficiary is not incapacitated, and his or her employer offers to reinstate that beneficiary, his or her retirement allowance shall be canceled forthwith, and he or she shall be reinstated in the county service, See Government Code §31730.
- iii. Refusal to submit to an examination shall result in the discontinuation of the disability benefit until the withdrawal of such refusal, and if the refusal continues for longer than one year, that member's retirement allowance shall be cancelled. See Government Code §31731.

## IV. Procedures and Rules for Disability Hearings

### 1. Hearing Forum

- i. The Board, in its sole discretion, may hold a hearing itself or it may delegate the matter to a Hearing Officer. See Gov't Code § 31533.
- ii. A Hearing Officer must be either a Board member or an active member of the State Bar of California. The Hearing Officer shall set the rules for the hearing in a manner consistent with this policy. In the event that the hearing officer allows for closing briefs after the hearing, such briefs shall be supplied to the Hearing Officer within 10 days. If a Hearing Officer holds the hearing, no more than 45 days after the hearing or receipt of hearing transcripts, if applicable, the Hearing Officer shall transmit to the Board, in writing, his or her proposed findings of fact and recommended decision. See Gov't Code § 31534. Upon receiving the proposed findings of fact and the recommendations of the Hearing Officer, the Board shall take one of the following actions:
  1. Approve and adopt the proposed findings and the recommendations of the Hearing Officer; or
  2. Direct the preparation of a transcript or summary of all the testimony. Upon review thereof, plus all other evidence received by the Hearing Officer, the Board shall take such action as in its opinion is indicated by such evidence; or
  3. Refer the matter back to the Hearing Officer with instructions for further proceedings; or
  4. 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.

## 2. Records

- i. Each hearing shall be listed in the records of the Board under the name of the member, beneficiary or participating employer, for or through whom benefits, rights, and privileges are claimed, whether or not such person or entity is the Applicant. Reference to the hearing shall be by the name of the Applicant.

## 3. Representation by Legal Counsel

- i. Any party, including the Applicant, shall be entitled to be represented by an attorney duly licensed to practice in the State of California at any hearing, at the sole expense of the party. After an attorney appears at a hearing on behalf of a party, or after the filing of written notice that the attorney is appearing on behalf of the party, all notices and other papers shall thereafter be served solely upon the attorney

## 4. Stipulations

- i. No stipulation, agreement, understanding, act or omission on behalf of the County of Fresno or any member District, or by an officer, employee or agent of the County of Fresno or any member District in a proceeding to which neither the Board nor the Association is a party, shall be binding upon the Board or the Association, unless the stipulation, agreement, understanding, act or omission has been approved by the Board through a duly adopted motion which has been recorded in the official minutes of the Board

## 5. Notice of Hearing

- i. The hearing shall be set by the Administrator at the earliest mutually agreeable date and the Administrator shall deliver or mail, by certified mail, return receipt requested, a notice of hearing to all other parties at least 45 days prior to the hearing, unless the parties agree to a shorter notice period.
- ii. Absent a timely agreement for a hearing date, FCERA may subject all parties to appear by subpoena or Notice to Appear.

## 6. Postponements

- i. The Administrator may, for good cause, postpone a hearing to a later date with the consent of all parties. In the event all parties do not consent to a postponement, the Administrator shall refer the matter to the Board or Hearing Officer for its, his, or her decision. If the Board is holding the hearing and a Board meeting is not scheduled prior to the hearing, the Administrator shall refer the matter to the Chair for a decision. Good cause shall include, but not be limited to, a lack of quorum by the Board or the inability by the Hearing Officer to be available for the hearing.
- ii. If the postponement is granted (if applicable), the party requesting the cancellation is responsible for cancellation fees for hearing office and witnesses, if any, and for any non-refundable costs incurred (i.e. travel expenses such as airfare).

## 7. Recording of Hearing

- i. The proceedings of all hearings shall be recorded by audio recording or by a certified shorthand reporter. The costs associated with the recording or reporter shall be borne by FCERA. The cost of a copy of the permanent record or transcription is paid by the requesting party.

## 8. Witness Fees

- i. Witness fees, mileage and expenses shall be determined between the calling party and the witness, and shall be paid by the calling party in accordance with applicable law. See Gov. Code, § 31535.
- ii. If agreed upon by all parties in advance, including the Chair or Hearing Officer, a witness may testify by video conferencing method, if such technology is approved, at least 30 days in advance, by FCERA.
- iii. Absent an agreement by all parties to allow video conferencing, each party must arrange for in person witness testimony. No medical reports, reports or other similar items will be admitted into exhibits without the ability for parties to cross-examine the doctor or author of such report or record without a minimum of 30-day's notice and pre-approval.
- iv. Scheduling of video testimony must be confirmed at least 30 days in advance. A test video conference between the witness and FCERA is required to ensure the parties have minimum acceptable equipment and systems to facilitate video conferencing. Absent acceptable testing, the calling party is required to have the witness attend in person.

## 9. Presiding Officer

- i. The Chair of the Board, if the Board holds the hearing, or Hearing Officer, shall preside over the hearing and shall exercise reasonable control over the proceedings. In addition to other duties, the Chair or Hearing Officer shall rule on the admissibility of evidence and shall order a party to yield the floor when the allotted time has been consumed or when the orderly and expeditious conduct of the hearing requires it. The Chair or Hearing Officer may permit such questioning and other participation in the proceedings by the Board members or others as will best serve the purposes of the hearing.

## 10. Subpoenas

- i. Upon the application of any party to a hearing for the issuance of a subpoena to appear and testify, or a subpoena duces tecum, in accordance with the provisions of Government Code section 31535, the Chair or Board Secretary is authorized to issue and shall issue the subpoena in the name of the Board. The cost shall be borne by the requesting party.
- ii. When a Hearing Officer conducts a hearing, the Hearing Officer shall have full delegation of the Board's subpoena power. See Gov't Code §§ 31533 and 31535.
- iii. In lieu of a subpoena, an Applicant or other party to a proceeding may be required to appear and/or produce documents at the hearing through service of a notice to that effect upon the Applicant or other party, or their respective attorney(s).

- iv. Any opposition to the production of the records requested in a subpoena must be made in writing to the Chair or Hearing Officer and delivered prior to the return date of the subpoena, based on one or more of the following grounds with supporting statements under oath or affirmation:
  - 1. Compliance will be unduly burdensome or against public policy.
  - 2. The items or testimony subpoenaed are privileged by law.
  - 3. The items or testimony subpoenaed are not relevant or material to the proceedings.
  - 4. The items subpoenaed have not been described with sufficient clarity to enable the witness to comply.

The Chair or Hearing Officer, as the case may be, shall rule on any such opposition before ruling on continuing or beginning a proceeding.

## 11. Burden of Proof and of Producing Evidence

- iii. In all cases, the party applying for disability retirement benefits shall have the burden of proof and the burden of producing evidence at the hearing.

## 12. Rules of Evidence

- i. The hearing need not be conducted according to technical rules of evidence 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 the evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
- ii. Oral evidence shall be taken only upon oath or affirmation.
- iii. Each party shall have the right to call and examine witnesses, to introduce exhibits and to cross-examine opposing witnesses in any matter relevant to the issues, as reasonably permitted by the Chair or the Hearing Officer, as the case may be. If the applicant or any other party does not testify on his or her own behalf, he or she may be called and examined by another party as if under cross-examination.
- iv. The party submitting a physician's report shall at his, her or its own expense cause the physician to be present at the hearing for cross-examination, unless the Hearing Officer (if the hearing is before a Hearing Officer) or the Board (if the hearing is before the Board) determines that good cause exists to excuse the party from this rule. If a party seeks an exemption from the requirement of the physician's personal appearance, it must request that exemption at least 30 days in advance of the hearing to allow for argument and a decision by the Hearing Officer or the Board in advance of the hearing. The Board or the Hearing Officer may, but need not, condition any such exemption on the physician submitting to a deposition. See Gov't Code §31535.

- v. Nothing in this rule shall preclude a party from introducing a medical or other business record solely for impeachment purposes, or for refreshing a witness' recollection, without producing the author of the record for cross-examination. Impeachment may be allowed under this special provision only to contradict a witness' testimony about a fact, event, condition, etc.; refreshment may be allowed to help establish a fact, event, condition, etc., to which a witness testifies he or she cannot recall.
- vi. Any exhibits that either party is planning on presenting as evidence at the hearing shall be exchanged by the parties a minimum of 10 business days prior to the hearing. This will allow for preparation of any objections prior to commencement of the hearing.
- vii. Each party shall be responsible for organizing and labeling all exhibits with tabs. A table of contents shall precede the exhibits and clearly indicate what each item is.
- viii. Each party shall be responsible for producing a minimum of 5 complete copies of the exhibits to accommodate the Hearing Officer, Applicant, FCERA's Counsel, the witness seat, and the Administrative Record.

### 13. Order of Business for Hearing

- i. Reconsideration by the Board
  - 1. For good cause shown, the Administrator, prior to the start of the hearing, may bring the application back to the Board for reconsideration.
- ii. Unless the Chair or Hearing Officer rules that it is not necessary to so proceed in a particular hearing, all hearings shall proceed in the following manner:
- iii. The Chair or Hearing Officer shall read the title of the case, state the relief sought and ask for appearances for all parties. If the Board is holding the hearing, this information shall be recorded in the minutes of the Board. The Chair or Hearing Officer shall inquire if all parties are ready to proceed.
- iv. If all parties are ready to proceed, the Chair or Hearing Officer shall mark for identification all proposed items and exhibits in the official file of the hearing. Any objections to a proposed item/exhibit/ testimony shall be made at this time, but shall not limit a party's ability to object to an item throughout the course of the hearing.
- v. The parties will be given the opportunity to make opening statements.
- vi. The person or entity seeking disability retirement benefits shall present his, her or its evidence, and thereupon rest its case.
- vii. Each other party shall then present his, her, or its evidence, in the order determined by the Chair or Hearing Officer, as the case may be, and thereupon rest its case.
- viii. Each party shall be allowed to cross-examine witnesses.
- ix. Each party shall be entitled to present rebuttal evidence.
- x. Upon the conclusion of all testimony, the Chair or Hearing Officer shall inquire if all parties are ready to submit the matter for decision. The representative for each party shall be permitted to briefly summarize the evidence.
- xi. The hearing shall then be closed and the matter submitted for decision. If further documentary evidence is to be filed, the Chair or Hearing Officer may allow time for filing and serving the documentary evidence, and may order that the matter will be deemed

submitted after such period unless any party objects to the documentary evidence within ten days after it is filed. Copies of the documentary evidence shall be served on all parties who appeared at the hearing. The Chair or Hearing Officer may, but need not, set a schedule for closing briefing, if any party requests such briefing, or the Chair or Hearing Officer believes that such briefing is appropriate. Closing briefs shall be due 14 calendar days from the date of the hearing, or receipt of transcripts (if applicable). If the parties file closing briefs, the matter will be considered submitted upon the receipt of such briefs or, if any party fails to file a brief, the date on which such briefs were due.

#### 14. Service of Notice

- i. Any notice shall be deemed sufficient when it is delivered in person to the person or persons to whom it is directed, or when mailed by certified mail, return receipt requested, addressed to the last known address of the addressee or addressees.

#### 15. Continuances by the Board or Hearing Officer

- i. The Board or a Hearing Officer, as the case may be, may on its, his, or her own motion continue a hearing to another time and place, order additional evidence to be presented, order additional examinations of the member, or allow other evidence to be gathered and presented, as it, he or she deems appropriate. Provided, however, that if such an order by a Hearing Officer continues the hearing by more than 30 days or requires the expenditure of funds by FCERA, the Hearing Officer's order shall be placed on the Board's next open meeting agenda for the Board's consideration, in which case the Board may overrule the Hearing Officer's order, in its sole discretion. If a Board meeting is not scheduled prior to the hearing date, the Administrator shall refer the matter to the Board Chair for a decision.

#### 16. Determinations at Hearing

- i. After a hearing for disability retirement, the Board or Hearing Officer shall make the following determinations:
  1. First, the Board or Hearing Officer shall determine whether the Applicant is permanently incapacitated for the performance of duty.
  2. Second, if a service-connected disability is sought, the Board or Hearing Officer shall determine whether any such permanent incapacity is a result of injury or disease arising out of and in the course of his or her employment, and such employment contributed substantially to the incapacity.
  3. Third, if a service-connected disability is sought based upon the operation of a statutory presumption, the Board or Hearing Officer shall determine whether such presumption applies and whether that presumption has been rebutted.
  4. Fourth, if there is a dispute regarding the effective date of retirement, the Board or Hearing Officer shall determine the effective date of retirement.
- iv. If the hearing is held by a Hearing Officer, the Hearing Officer shall submit his or her proposed findings of fact and recommended decision to the Board within 45 days after the matter is submitted. The Hearing Officer shall serve copies of the proposed findings



of fact and recommendations on the parties, who shall have 10 calendar days to submit written objections thereto. The parties' written objections, if any, shall be included in the record to be submitted to the Board.

#### 17. Time for Decision of the Board

- i. If the Board holds the hearing itself, the Board shall render its decision by the second regular meeting after the matter is submitted.
- ii. If a Hearing Officer holds the hearing, the Board shall render its decision by the second regular meeting after the Hearing Officer submits his or her proposed findings of fact and recommended decision, subject to time to receive of written objection.
- iii. Disability matters shall be deliberated in closed session.

#### 18. Separation of Advocacy and Counseling Functions and Avoidance of Conflicts.

If the Board is hearing the matter, or if a Board member is serving as Hearing Officer, the Agency counsel may serve as counsel to the Board or Hearing Officer, and any legal advice received by the Board or Hearing Officer shall be privileged. No attorney may represent both the Board and the Association with respect to the Application concurrently.

- i. No attorney shall serve as the advocate for FCERA staff's position at a hearing (whether before the Board or a Hearing Officer) and also serve as advice counsel to the Board, with respect to that matter.
- ii. No Hearing Officer or Board member may participate in the adjudication of a claim, if he or she has a material financial interest in the outcome of that claim or any other conflict of interest that would compromise the impartiality of such Board member or Hearing Officer.
- iii. If any party to a hearing believes that a Hearing Officer or Board member is unable to be impartial, that party must raise its objection to that Board member or Hearing Officer's participation in the adjudication of the claim at the earliest possible time, for consideration by the Hearing Officer or the Board, as appropriate. If not raised before the commencement of the hearing, the objection shall be deemed waived.
- iv. Board members shall seek guidance of counsel if they believe there is any question whether they have a material financial interest in the outcome of the claim or any other conflict of interest that might compromise their impartiality.

#### 19. Prohibition of Ex Parte Contacts

- i. No party (including the Administrator or any other FCERA staff member) to a hearing, or that party's counsel, may engage in any ex parte contact with any Board member, a Hearing Officer or the Board's advice counsel, regarding the substantive matter(s) pending before the Board or the Hearing Officer.

#### 20. Notice of Decision

- i. Written notice of the decision of the Board shall be delivered or mailed to the applicant by certified mail, return receipt requested, and to each other party, and their respective attorneys, at his, her, or its last known address within 10 days following the date the

decision is rendered. Notice of Decision of a disability application shall also be mailed to the appointing authority.

### 21. Petition for Rehearing

- i. For good cause shown, the Board may grant a petition for rehearing upon motion for rehearing made by any party within 10 days after the decision of the Board is served on the party.

### 22. Judicial Review

- i. Judicial review of the Board's decision shall be governed by Code of Civil Procedure section 1094.5. Any petition for judicial review must be filed no later than the ninetieth (90th) day following the date on which the Board's decision becomes final. If no petition for rehearing is filed within ten (10) days after the Board's decision is served on the party, the decision of the Board becomes final at the close of business on the tenth (10th) day after such service. If a timely petition for a rehearing is filed, the Board's decision becomes final on the date that the Board denies a petition for rehearing. The time for filing a petition for judicial review shall be extended under the provisions of Code of Civil Procedure section 1094.6, subdivision (d), if the petitioner files a timely request for the record.

### 23. Record of Proceedings: Charges and Content

- i. Upon written request by any party and that party's written agreement for payment of the fee for the reporter's transcript, plus costs as determined by the Administrator for preparing and certifying other portions of the record, the Administrator shall have prepared and delivered to the requesting party the complete record of the proceedings. Payment must be made by cash, check or money order at the time the record is made available, unless applicant has been granted status as an indigent litigant.

## V. Policy Review

The Board shall review this policy at least every three years to ensure that it remains relevant and appropriate. The Board of Retirement may modify this policy at any time by majority vote of the Board.

#### IV. Secretary's Certificate

I, Donald C. Kendig, the duly appointed Secretary of the Fresno County Employees' Retirement Association, hereby certify the adoption of this Policy.

March 20, 2019

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***Date of Action:***

Donald C. Kendig

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***By: Retirement Administrator***

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## APPENDIX A – DEFINITIONS

**ACCOMMODATION**- The department or employer is able to provide the Applicant a work environment and duties based on the restrictions imposed by the Applicant’s Treating Physician.

**Advanced Disability Retirement Payments (ADRP)** – A member (typically those in the Safety classification), who has an application for Service Connected Disability accepted for processing, may contact Employee Benefits to apply for an advancement of their estimated disability benefits (see GC 4850). Any ADRP received by the member must be paid back to the Employer regardless if they are granted or denied disability benefits by the Board of Retirement (see GC 31897.6 and GC 4850.4). Program administered by the Employer.

**APPLICANT** - The permanently incapacitated employee who is applying for the disability retirement.

**APPLICATION** – The Application for Disability Retirement is 12 pages long that must be completed in full. It includes release of information forms, supplemental questions that detail the injury, and the Treating Physician’s Statement (which must be completed by a licensed physician who has treated the applicant for the claimed incapacity).

**SUBMITTED** – When the application is supplied to FCERA for review. Note: Not all applications submitted to FCERA will meet the requirements set forth by Administration and the CERL.

**ACCEPTED** - The FCERA staff has reviewed and deemed that the Application met the requirements to progress to the next steps of the disability process.

**APPLICATION DATE** - The date that FCERA physically receives the disability application. FCERA staff will stamp the application as “Received” with the current date.

**BOARD** - Shortened for the Board of Retirement, which consists of 9 members from the general and safety classifications, a medical professional, and a financial professional. They are elected by the active members of the FCERA, appointed by the Board of Supervisors, and elected by the retired members of FCERA.

**BURDEN OF PROOF** - The responsibility of the Applicant to supply FCERA with all important and relevant information to prove their case. FCERA will only collect records from the Applicant’s department, Personnel, Worker’s Compensation, and the medical providers that the Applicant lists on the application.

**CERL** - The County Employees Retirement Law of 1937, also known as the 1937 ACT or ’37 ACT. These are the laws that FCERA must adhere to in administering the plan. To view the CERL, click *here*.

**CHAIR** – Chair shall mean the Chair of the Board of Retirement.

**DISCONTINUANCE OF SERVICE** - The day the Applicant goes into unpaid status and continues to not receive any compensation from their employer (i.e. unpaid medical leave of absence, termination of employment). This will be the day following the last day paid from the employer.

**DISMISSED WITH PREJUDICE** - The disability application is closed and Applicant does not have the opportunity to apply for the same injury or illness in the future. This may be due to the Applicant not cooperating, a denial of application, or permanency of incapacity cannot be determined.

**DUTY OR DUTIES** - The responsibility that an individual has. This may include the actual work that the Applicant is assigned to do. The duties can be found under the Essential Functions or Job Specifications for a job title on the Department of Human Resources website. This may also refer to the responsibility that the Applicant has in the disability process. Refer to Burden of Proof.

**EX-PARTE COMMUNICATION** - any communication between a judge or referee and a party to a legal proceeding or any other person about the case, outside of the presence of the opposing party or the opposing party's attorney.

**HEARING** – A disability applicant has the ability to request a hearing to appeal the Board of Retirement's decision to deny benefits or to appeal the granting of a NSCD in lieu of a SCD. All rules, procedures, and applicable laws pertaining to disability hearings is outlined FCERA's Disability Policy.

**HEARING OFFICER** – The “referee” of the hearing, who must be either a Board member or an active member of the State Bar of California. The Hearing Officer sets the rules for the hearing in a manner consistent with the FCERA disability policy.

**INDEPENDENT MEDICAL EVALUATION (IME)** – A physical examination of the applicant performed by a third party licensed medical expert specializing in the field of the claimed injury (orthopedic, neurologic, psychiatric, etc.). This also includes a review of pertinent records gathered (see Independent Medical Records review). Once completed the doctor will prepare a report which will be sent to FCERA, then in most cases FCERA forwards a copy to the applicant.

**INDEPENDENT MEDICAL RECORDS REVIEW** – A review of all medical, personnel, departmental, workers compensation, and any other pertinent records pertaining to the applicant and their claimed incapacity. The review is performed by a third party medical expert specializing in the field of the claimed injury (orthopedic, neurologic, psychiatric, etc.). Once completed the doctor will prepare a report which will be sent to FCERA, then in most cases FCERA forwards a copy to the applicant.

**NON-SERVICE CONNENTED DISABILITY (NSCD)** – Disability retirement benefits for members who have become permanently incapacitated from the performance of their regular job duties. The injury does not have to be work related. The member must have a minimum of 5 complete years of credited service in the retirement system in order to apply these benefits. It is calculated at up to 1/3 of your Final Compensation or your service retirement, whichever is greater. There is no minimum age required to apply for these benefits.

**PERMANENTLY DISABLED** – When a person has been injured, sought treatment for that injury, and did not make a full recovery to pre-injury status. This usually results in permanent restrictions as order by a treating physician for that injury. A permanent disability does not automatically mean that a person is permanently incapacitated. If accommodations are available for a person with a permanent disability, then they are not considered permanently incapacitated.

**PERMANENT INCAPACITY** – The member can no longer perform the usual duties of the position they held when the injury occurred. Also when an injured member is given restrictions that cannot be accommodated by the employer. All medical treatment that could potentially return the member back to work have been exhausted, also known as reaching maximum medical improvement or permanent and stationary.

**PRO PER (in propria persona)** - acting on one's own behalf, generally used to identify a person who is acting as his/her own attorney in a lawsuit. The popular abbreviation is "in pro per." In the filed legal documents (pleadings), the party's name, address and telephone number are written where the name, address and telephone number of the attorney would normally be stated. The words "in propria persona" or "in pro per" are typed where normally it would say "attorney for plaintiff."

**SERVICE CONNECTED DISABILITY (SCD)** – Disability retirement benefits for those members who's permanent incapacity arose from an on the job injury or a pre-existing injury that was exacerbated (made worse) by the job. There is no minimum years of service or age required to apply for these benefits. It is calculated at 50% of Final Compensation or the member's service retirement, whichever is greater.

**4850, 4850.3, 4850.4** – This is the series of government code sections pertaining to the payment of disability benefits prior to be granted disability retirement to qualifying employees (typically safety members). (see code sections attached herein)

## **Referenced Code Sections**

### **California Labor Code 4850**

#### **§4850**

(a) Whenever any person listed in subdivision (b), who is employed on a regular, full-time basis, and is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, he or she shall become entitled, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments, if any, that would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments, or advanced disability pension payments pursuant to Section 4850.3.

(b) The persons eligible under subdivision (a) include all of the following:

- (1) City police officers.
- (2) City, county, or district firefighters.
- (3) Sheriffs.
- (4) Officers or employees of any sheriff's offices.
- (5) Inspectors, investigators, detectives, or personnel with comparable titles in any district attorney's office.
- (6) County probation officers, group counselors, or juvenile services officers.
- (7) Officers or employees of a probation office.

(8) Peace officers under Section 830.31 of the Penal Code employed on a regular, full-time basis by a county of the first class.

(9) Lifeguards employed year round on a regular, full-time basis by a county of the first class or by the City of San Diego.

(10) Airport law enforcement officers under subdivision (d) of Section 830.33 of the Penal Code.

(11) Harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of Section 830.1 or subdivision (b) of Section 830.33 of the Penal Code.

(12) Police officers of the Los Angeles Unified School District.

(c) This section shall apply only to persons listed in subdivision (b) who meet the requirements of subdivision (a), and shall not include any of the following:

(1) Employees of a police department whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active law enforcement service.

(2) Employees of a county sheriff's office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(3) Employees of a county probation office whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly come within the scope of active law enforcement service.

(4) Employees of a city fire department, county fire department, or fire district whose principal duties are those of a telephone operator, clerk, stenographer, machinist, mechanic, or otherwise, and whose functions do not clearly fall within the scope of active firefighting and prevention service.

(d) If the employer is insured, the payments that, except for this section, the insurer would be obligated to make as disability indemnity to the injured, the insurer may pay to the insured.

(e) No leave of absence taken pursuant to this section by a peace officer, as defined by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, or by a city, county, or district firefighter, shall be deemed to constitute family care and medical leave, as defined in Section 12945.2 of the Government Code, or to reduce the time authorized for family care and medical leave by Section 12945.2 of the Government Code.

(f) This section shall not apply to any persons described in paragraph (1) or (2) of subdivision (b) who are employees of the City and County of San Francisco.

(g) Amendments to subdivision (f) made by the act adding this subdivision shall be applied retroactively to January 1, 2010.

*(Amended by Stats. 2013, Ch. 66, Sec. 1. (SB 527) Effective January 1, 2014. Note: Subdivision (g) was added by Stats. 2010, Ch. 74.)*

**§4850.3**

A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement System, may make advanced disability pension payments to any local safety officer who has qualified for benefits under Section 4850 and is approved for a disability allowance. The payments shall be no less than 50 percent of the estimated highest average annual compensation earnable by the local safety officer during the three consecutive years of employment immediately preceding the effective date of his or her disability retirement, unless the local safety officer chooses an optional settlement in the permanent disability retirement application process which would reduce the pension allowance below 50 percent. In the case where the local safety officer's choice lowers the disability pension allowance below 50 percent of average annual compensation as calculated, the advanced pension payments shall be set at an amount equal to the disability pension allowance. If a local agency has an adopted policy of paying for any accumulated sick leave after the safety officer is eligible for a disability allowance, the advanced disability pension payments under this section may only be made when the local safety officer has exhausted all sick leave payments. Advanced disability pension payments shall not be considered a salary under this or any other provision of law. All advanced disability pension payments made by a local agency with membership in the Public Employees' Retirement System shall be reimbursed by the Public Employees' Retirement System pursuant to Section 21293.1 of the Government Code.

*(Amended by Stats. 2000, Ch. 920, Sec. 2. Effective January 1, 2001.)*

**§4850.4**

(a) A city, county, special district, or harbor district that is a member of the Public Employees' Retirement System, is subject to the County Employees Retirement Law of 1937, or is subject to the Los Angeles City Employees' Retirement Systems, shall make advanced disability pension payments in accordance with Section 4850.3 unless any of the following is applicable:

- (1) After an examination of the employee by a physician, the physician determines that there is no discernable injury to, or illness of, the employee.
- (2) The employee was incontrovertibly outside the course of his or her employment duties when the injury occurred.
- (3) There is proof of fraud associated with the filing of the employee's claim.

(b) Any employer described in subdivision (a) who is required to make advanced disability pension payments, shall make the payments commencing no later than 30 days from the date of issuance of the last disbursed of the following:

- (1) The employee's last regular payment of wages or salary.
- (2) The employee's last payment of benefits under Section 4850.
- (3) The employee's last payment for sick leave.



(c) The advanced disability payments shall continue until the claimant is approved or disapproved for a disability allowance pursuant to final adjudication as provided by law.

(d) An employer described in subdivision (a) shall be required to make advanced disability pension payments only if the employee does all of the following:

(1) Files an application for disability retirement at least 60 days prior to the payment of benefits pursuant to subdivision (a).

(2) Fully cooperates in providing the employer with medical information and in attending all statutorily required medical examinations and evaluations set by the employer.

(3) Fully cooperates with the evaluation process established by the retirement plan.

(e) The 30-day period for the commencement of payments pursuant to subdivision (b) shall be tolled by whatever period of time is directly related to the employee's failure to comply with the provisions of subdivision (d).

(f) After final adjudication, if an employee's disability application is denied, the local agency and the employee shall arrange for the employee to repay any advanced disability pension payments received by the employee pursuant to this subdivision. The repayment plan shall take into account the employee's ability to repay the advanced disability payments received. Absent an agreement on repayment, the matter shall be submitted for a local agency administrative appeals remedy that includes an independent level of resolution to determine a reasonable repayment plan. If repayment is not made according to the repayment plan, the local agency may take reasonable steps, including litigation, to recover the payments advanced.

*(Amended (as added by Stats. 2002, Ch. 189) by Stats. 2002, Ch. 877, Sec. 3. Effective January 1, 2003.)*

## **County Employees Retirement Law (CERL) of 1937**

### **Section 31897.6**

The board shall deduct the amount of advanced disability pension payments made to a local safety member pursuant to Section 4850.3 or 4850.4 of the Labor Code from the member's retroactive disability pension payments. If the retroactive disability allowance is not sufficient to reimburse the total advanced disability pension payments, an amount no greater than 10 percent of the member's monthly disability allowance shall be deducted and reimbursed to the local agency until the total advanced disability pension payments have been repaid. The local safety member and this system may agree to any other arrangement or schedule for the member to repay the advanced disability pension payments.