

**FRESNO COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (FCERA)
ADMINISTRATIVE PROCEEDINGS AND APPEALS TO THE BOARD POLICY**

I. Purpose

- 1) Assuring that FCERA members and beneficiaries receive the correct benefits due to them under the law often requires the Board of Retirement (the "Board") to make certain findings of fact and decisions.

Members, beneficiaries or participating employers may question the Board or FCERA staff's determination of the law and seek the Board's review of that determination.

- 2) This Policy provides an administrative framework for assisting the Board in making the factual findings necessary to administer FCERA in compliance with law, and to resolve claims by members, beneficiaries or participating employers, in a manner that is transparent and efficient and that provides the impacted parties a fair opportunity to be heard, before the Board makes its final decision.
- 3) Appeals arising from a determination of eligibility to apply for and be granted disability retirement benefits are subject to the FCERA Disability Retirement Policy. If, and when, such benefits are granted, disputes regarding disability retirement benefits payable from FCERA are subject to this policy.
- 4) This Policy is designed to be consistent with applicable law, but in the event there is any inconsistency between this Policy and the law, the law shall govern.

II. Exhaustion of Administrative Remedies

- 1) Parties seeking relief from FCERA must comply with the procedures described in this Policy before filing any legal action in court, unless the Board, in its sole discretion, excuses that party from the requirements of the Policy.

III. Initial Determination and Appeal Process

- 1) Initial Determinations by the Administrator
 - a) Delegation of Authority to Administrator. The Board delegates to the Administrator full authority to make all initial determinations regarding claims by members, beneficiaries or participating employers. The Administrator shall consult with appropriate outside advisors as the Administrator deems necessary.
 - b) Notifying Impacted Parties. If the Administrator anticipates that the relief sought by a party will impact the rights of another party or parties, the Administrator will make reasonable efforts to notify such potentially impacted parties regarding the relief sought.

- c) Granting Relief in Matters with \$25,000 or Less at Issue. If the Administrator determines that a member, beneficiary or participating employer is entitled to the relief they seek and the amount at issue is \$25,000 or less, or the claim may be resolved for \$25,000 or less, the Administrator is delegated authority to grant that relief. The terms of the Administrator's determination shall be set forth in writing and shall be timely reported to the Board. If no person requests Board review within 30 days after the issuance of the Administrator's written determination, then the Administrator's determination shall be deemed final.
 - d) Granting Relief in Matters with More than \$25,000 at Issue. If the Administrator determines that a member, beneficiary or participating employer is entitled to the relief they seek and the amount at issue is greater than \$25,000, or a compromise would be greater than \$25,000, the Administrator shall present his or her recommendation to the Board at a regularly scheduled Board meeting, for discussion and appropriate action by the Board. The Board may then take any appropriate action within its authority. The terms of the Board's determination shall be set forth in writing.
 - e) Denying Relief – Any Amount. If the Administrator determines that a member, beneficiary or participating employer is not entitled to the relief they seek, the member, beneficiary or participating employer may either accept the determination or appeal that determination to the Board, by submitting a written request for Board review to the Administrator within 30 days after the issuance of the written determination.
- 2) Board Consideration of Appeals from Administrative Determinations
- a) Appeals as Agenda Items. Appeals to the Board from administrative determinations ordinarily will be placed on the open session agenda at a regularly scheduled Board meeting. If the matters to be discussed are expected to include information that is protected from public disclosure by Government Code section 31532, or other applicable law, the Administrator may place the matter on a closed session agenda. Further, nothing in this Policy shall be construed to limit the Board's ability to hold any other closed session that is authorized by the Ralph M. Brown Act, Government Code sections 54950 *et seq.*
 - b) Legal Issues. In the event, that the Board determines, in consultation with the Administrator and counsel, that the issues raised by the appeal either (a) raise purely questions of statutory construction, or (b) there are no material factual disputes, the Board may make a decision on the appeal without developing any factual record, beyond the documents and oral presentations submitted by the Administrator and the appealing party.

Factual Determinations. If the Board determines that the appeal raises material factual issues, the Board may, in consultation with the Administrator and counsel, determine a fair process for developing a factual record. Such processes may include, but are not limited to: (1) referring the matter to a referee to conduct an evidentiary hearing and make recommendations to the Board, as the Board requests, (2) holding an evidentiary hearing before the Board, or (3) taking evidence in a more informal process (e.g., receiving sworn declarations), when such an informal process is deemed appropriate by the Board, under all existing circumstances.

- c) **Joinder of Parties.** In the event a decision is expected to impact more than just the appealing party, all other impacted parties shall be given a reasonable opportunity to participate in the decision-making process, to the extent practicable.
- d) **Quorum.** Pursuant to FCERA's Bylaws, five members of the Board constitute a quorum, and a majority vote of the quorum present at the time of voting shall govern the decisions on appeals to the Board, unless otherwise provided by law, FCERA's Regulations or Policies, or the Board's Bylaws. A tie vote results in a failure to find in favor of the applicant and constitutes a denial of the appeal, or that portion of the appeal on which the vote is taken.

IV. Procedures and Rules for All Evidentiary Hearings

1) Hearing Forum

- a) The Board, in its sole discretion, may hold a hearing itself or it may delegate the matter to a referee. *See Gov. Code § 31533.*
- b) A referee must be either a Board member or an active member of the State Bar of California. If a referee holds the hearing, after the hearing the referee shall transmit to the Board, in writing, his or her proposed findings of fact and recommended decision. *See Gov. Code § 31534.* Upon receiving the proposed findings of fact and the recommendations of the referee, the Board shall take one of the following actions:
 - i. Approve and adopt the proposed findings and the recommendations of the referee; or
 - ii. Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon the receipt thereof the Board shall take such action as in its opinion is indicated by such evidence; or
 - iii. Refer the matter back with instructions to the referee for further proceedings; or
 - iv. 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 referee.

2) Board Members' Participation in Decision

- a) A member of the Board not in attendance during all portions of a hearing held by the Board shall not participate in the determination by the Board unless the member meets all of the following conditions: (1) a quorum of members who attended the full hearing is not available, (2) the member has read a transcript (or listened to an audio recording) of that portion of the hearing during which he or she was not in attendance, and (3) the member has stated on the record that he or she has undertaken and completed such review.

3) Records

- a) 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 such person or entity is the applicant or not. Reference to the hearing shall be by the name of the appellant.

4) Representation by Legal Counsel

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

5) Stipulations

- a) No stipulation, agreement, understanding, 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.

6) Notice of Hearing

- a) 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 the applicant and all other parties at least 45 days prior to the hearing, unless the parties agree to a shorter notice period.

7) Postponements

- a) 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 referee 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.

8) Recording of Hearing

- a) The proceedings of all hearings shall be recorded by audio recording or by a Licensed Court Reporter, the cost of which shall be borne by FCERA. Unless and until a transcript is ordered by FCERA or the Board of Retirement as set forth in item 23 below, the cost of any transcript shall be borne by the party requesting the transcript.

9) Witness Fees

- a) 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.

10) Presiding Officer

- a) The Chair or referee shall preside over the hearing and shall exercise reasonable control over the proceedings. In addition to other duties, the Chair or referee 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 referee 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.

11) Subpoenas

- a) 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 the subpoena in the name of the Board. The cost shall be borne by the requesting party.
- b) When a referee conducts a hearing, the referee shall have full delegation of the Board's subpoena power. See Gov. Code §§ 31533 and 31535.
- c) 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).

- d) Any opposition to the production of the records requested in a subpoena must be made in writing to the Chair or referee 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:
 - i. Compliance will be unduly burdensome or against public policy.
 - ii. The items or testimony subpoenaed are privileged by law.
 - iii. The items or testimony subpoenaed are not relevant or material to the proceedings.
 - iv. The items subpoenaed have not been described with sufficient clarity to enable the witness to comply.
- e) The Chair or referee shall rule on any such opposition before ruling on continuing or beginning a proceeding.

12) Burden of Proof and of Producing Evidence

- a) In all cases, the party seeking relief from FCERA shall have the burden of proof and the burden of producing evidence at the hearing.

13) Rules of Evidence

- a) 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 on 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.
- b) Oral evidence shall be taken only on oath or affirmation.
- c) 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 Board or the referee. 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.

14) Order of Business for Hearing

- a) Unless the Chair or referee rules that it is not necessary to so proceed in a particular hearing, all hearings shall proceed in the following manner:

- i. The Chair or referee 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 referee shall inquire if all parties are ready to proceed.
- ii. If all parties are ready to proceed, the Chair or referee shall mark for identification all papers in the official file of the hearing, which should include:
 - The application for the benefit, right, privilege or claim.
 - The notice to the applicant of the date set for hearing, with proof of service.
 - Other documents in the official files of FCERA.
- iii. The parties will be given the opportunity to make opening statements.
- iv. The person or entity seeking relief from FCERA shall present his, her or its evidence, and thereupon rest its case.
- v. Each other party shall then present his, her, or its evidence, in the order determined by the Chair or referee, and thereupon rest its case.
- vi. Each party shall be allowed to cross-examine witnesses.
- vii. Each party shall be entitled to present rebuttal evidence.
- viii. Each party shall be entitled to present evidence in the form of documents and other tangible things. Any party seeking to admit such exhibits shall provide sufficient copies for the Board of Retirement or the referee, the witness and all parties to the matter being heard.
- ix. Upon the conclusion of all testimony, the Chair or referee 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.
- x. The hearing shall then be closed and the matter submitted for decision. No further documentary evidence can be entered after the hearing is closed and the matter submitted for decision. The Chair or referee may, but need not, set a schedule for closing briefing, if any party requests such briefing, or the Chair or referee believes that such briefing is appropriate.
- xi. If the matter is heard by a referee, that referee shall submit proposed findings of fact and a recommended decision within 45 days after the matter is deemed submitted.

15) Service of Notice

- a) 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.

16) Continuances by the Board or Referee

- a) The Board or a referee 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 referee continues the hearing by more than 30 days **or** requires the expenditure of funds by FCERA, the referee's order shall be placed on the Board's next open meeting agenda for the Board's consideration, or if a decision is required prior to the next regular scheduled board meeting the matter will be referred to the Chair, in which case the Board, or Chair, may overrule the referee's order, in its, his, or her sole discretion.

17) Time for Decision of the Board

- a) If the Board holds the hearing itself, the Board shall render its decision by the second regular meeting after the matter is submitted. If a referee holds the hearing, the Board shall render its decision by the second regular meeting after the referee submits his or her proposed findings of fact and recommended decision.
- b) The Board will ordinarily deliberate in open session, unless there is a basis to deliberate in closed session under the Ralph M. Brown Act, and the Board determines that such closed session deliberation is appropriate.

18) Separation of Advocacy and Counseling Functions and Avoidance of Conflicts

- a) No attorney shall serve as the advocate for FCERA staff's position at a hearing (whether before the Board or a referee) and also serve as advice counsel to the Board, with respect to that matter.
- b) No referee 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 referee.
- c) If any party to a hearing believes that a referee or Board member is unable to be impartial, that party must raise its objection to that Board member or referee's participation in the adjudication of the claim at the earliest possible time, for consideration by the referee or the Board, as appropriate. If not raised before the commencement of the hearing, the objection shall be deemed waived.

- d) 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

- a) 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 referee or the Board's advice counsel, regarding the merits of substantive matter(s) pending before the Board or the referee.

20) Notice of Decision

- a) 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, or their respective attorneys, at his, her, or its last known address within 10 days following the date the decision is rendered.

21) Petition for Rehearing

- a) 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

- a) 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

- a) 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 or certified check at the time the record is made available.

V. Policy Review

- 1) 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.

VI. Policy History

- 1) This policy was adopted by the Board on January 1, 2004.
- 2) This policy was reviewed and modified by the Board on August 18, 2004, December 15, 2010, October 7, 2015, March 20, 2019, and March 16, 2022.

VII. 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.

September 6, 2023

Date of Action:



By: Retirement Administrator