

DISABILITY RETIREMENT APPLICATION AND HEARING POLICY

Adopted 9/5/07

1. GENERAL PROCEDURES

1.1 Purpose.

The purpose of these procedures is to provide for the fair, efficient, and equitable processing and consideration of applications for disability retirement made by members of the Contra Costa County Employees' Retirement Association under the County Employees Retirement Law of 1937 (Government Code section 31450 *et.seq.*).

1.2 Amendments.

These procedures may be amended at any regular or specially noticed meeting of the Contra Costa County Employees' Retirement Association Board of Retirement ("Board") by a majority vote of the Board.

In order to facilitate the orderly and efficient implementation of these procedures, the Board hereby delegates to the Chief Executive Officer the authority to approve amendments of a minor, non-substantive nature that do not alter the fundamental rights and responsibilities of any parties in the disability retirement process. The scope of this delegation of authority includes, but is not limited to, typographical errors, format revisions, conforming terminology, revision of forms, and similar types of amendments.

1.3 Definitions.

"Applicant" means the person or entity-filing the application for disability retirement benefits under the County Employees Retirement Law of 1937, which may include the member or any other person or entity entitled to file an application pursuant to Government Code section 31721.

"Application Date" means the date an application meeting all requirements is filed and accepted by the Contra Costa County Employees' Retirement Association.

"Association" or **"Retirement Association"** means the Contra Costa County Employees' Retirement Association ("CCCERA").

"Board" means the Board of Retirement of the Contra Costa County Employees' Retirement Association.

"Day" means calendar day. When "day" is intended to refer to business day, it is noted in these procedures.

"Disability" or "Disabled," for members of the Tier I and Safety Plan, means the permanent incapacity for the performance of duty, defined as the substantial inability of the applicant to perform his or her usual duties: (California Government Code section 31720)

"Disability" or "Disabled," for members of the Tier II and Tier III Plan, means the permanent incapacity to engage in any substantial gainful employment (as defined in "Substantial Gainful Employment" below). (Government Code section 31720.1)

"Hearing Officer" means the person who conducts administrative hearings on issues related to an application for disability retirement and provides a Proposed Recommendation including proposed Findings of Law and Fact to the Board. A Hearing Officer must be a qualified member of the State Bar of California appointed by the Board pursuant to the provisions of Government Code section 31533, including an Administrative Law Judge designated by the state Office of Administrative Hearings.

"Member" means a member of the Contra Costa County Employees' Retirement Association.

"Non-Service Connected Disability Retirement" means a type of disability retirement awarded to a member who becomes permanently incapacitated from a cause that does not arise out of and in the course of his or her employment in accordance with the statutory and case law describing the requirements for finding "service connection." The Tier I or Safety member must have completed five years of service and the Tier II or Tier III member must have completed 10 years of service.

"Service-Connected Disability Retirement" means the type of disability retirement awarded to a member of CCCERA who becomes permanently incapacitated and whose incapacity is the result of an injury or a disease arising out of and in the course of the member's employment. The employment must have contributed substantially to the incapacity, in accordance with the statutory and case law describing the requirements for determining "service connection."

"Substantial Gainful Employment" shall be determined by application of the following criteria, as adopted by the Board on April 16, 1991:

1. *"Substantial employment"* is work activity that involves physical or mental effort, regardless of the time spent.
2. *"Gainful employment"* is work activity that is done for pay or profit, whether or not a profit is realized, including work as a self-employed individual.

In general, employment will be considered gainful if the monthly salary from that employment is equal to or exceeds the greater of either: (a) \$300 a month, or (b) the initial monthly disability retirement benefit that would otherwise be payable.

In general, self-employment will be considered gainful, without regard to income, if the activity is comparable to that of unimpaired individuals who are in the same or similar business as their means of livelihood.

3. Inability will be determined using the following factors:
 - a. Previous work experience
 - b. Education or training whether formally obtained through schooling or informally obtained through work experience.
 - c. Transferability of knowledge, skills and abilities to perform other work.
 - d. The extent to which chronological age affects the ability to adapt to a new work setting.
 - e. The existence of jobs in one or more occupations, having requirements that the member is able to meet and that lie within a 100 mile radius of the member's residence, regardless of whether a specific job vacancy exists, or whether the member would be hired if he or she applied, or whether the member wishes to do a particular job.

1.4 Quorum and Voting Requirements.

Whenever the Board considers any action in a disability matter, a quorum is required. A quorum shall consist of a majority of the entire Board. No motion may be passed in any disability matter without at least five affirmative votes.

1.5 Communication with Board Members.

The Board is the decision-maker for all disability retirement applications. As such, any *ex parte* communications between any Board member and any interested parties or their representatives concerning the merits or substance of an application are forbidden until all proceedings with respect to the application have been concluded. Violations of this rule may result in the Board member being found ineligible to participate in any discussion regarding the application or to vote on the application.

1.6 Representation by Counsel.

Any applicant is entitled, at his or her expense, to be represented by an attorney during the disability retirement process. The party must file with the Retirement Association written notice designating counsel and providing the counsel's name, an address, and telephone number. Absent such written notice, the Retirement Association is not obligated to recognize any attorney claiming to represent a party. After notification of representation, all notices and documents shall be sent to that attorney. No applicant or member is required to have an attorney at any time.

1.7 Stipulations.

No stipulation, agreement, or understanding of the employer or of any other party to a proceeding in a workers' compensation or any other proceeding in which neither the Board nor the Retirement Association is a party, shall be binding upon this Board or Association insofar as it asserts to relate to or affect a disability retirement application or matter of a CCCERA member.

1.8 Service of Documents.

When a provision of these procedures requires that parties be served, service shall be made upon all parties who are participating in the proceedings. If the party to be served has an identified attorney of record, service shall be made upon the attorney of record.

Unless otherwise provided in these procedures, service may be made either personally or by mail in accordance with this section. Service may be made by fax, if previously agreed to by the party to be served. Any document served by fax must also be sent by regular U.S. Mail with first class postage fully prepaid.

Service by mail is completed by depositing the envelope in the U.S. Mail with first class postage fully prepaid, properly addressed to the party to be served at the address latest on file with the Retirement Association. Service by mail shall extend applicable time limitations in the manner prescribed in Code of Civil Procedure § 1013. It is the responsibility of the member to notify the Retirement Association and all parties of any change of address.

1.9 Penalties for Failure to Comply with Disability Retirement Procedures.

Failure of the member or applicant to comply with these procedures may be treated as non-cooperation and may result in dismissal of the application with or without prejudice. Failure to comply includes, but is not limited to, failure to submit to medical examinations, failure to submit documents requested by the Association, failure to cooperate in the formal hearing process, failure to follow any order of the Board or Hearing Officer, and failure to comply with the requirements set forth in these procedures.

1.10 Burden Of Proof.

The applicant has the burden of proving, by a preponderance of the evidence, that the member meets the criteria for a disability retirement, including that she or he has a permanent incapacity in accordance with the statutory standards of the County Employees Retirement Law of 1937 and the standards for Tier I, Tier II, Tier III, or Safety members of the Association as defined in section 1.3 above.

With regard to an application for service connected disability retirement, the burden rests with the applicant to prove by a preponderance of the evidence that the member's permanent incapacity arose out of and in the course of his or her employment, and that the employment contributed substantially to the disability.

For Safety Members who have completed five (5) or more years of service and have certain specified diseases as defined in Government Code sections 31720.5, 31720.6, 31720.7, and 31720.9, such diseases are presumed to arise out of and in the course of employment. When such a presumption exists, the burden of proof shifts to the Retirement Association to show that the disease and resultant disability was not work-related.

2. APPLICATION PROCESS

2.1 Making Application for Disability Retirement:

The Retirement Association shall furnish application forms to any person upon request, including a copy of the regulations and policies which govern disability retirement applications and hearings. The applicant shall complete the forms fully and in accordance with these procedures, and shall sign and verify under oath or penalty of perjury. The application shall be deemed filed the day it is received by the Retirement Association. An application shall not be accepted for filing unless it is complete and includes copies of the following documents to be furnished by the applicant:

- a. Application for Disability Retirement
- b. Authorization and Release of Medical Information if the applicant is the member.
- c. All medical reports upon which the applicant relies to support the application.
- d. All other medical reports or other information relevant to the application within the possession of the applicant or his or her agent.

If all supporting documents are not filed within 30 days of the application, the application will be returned.

2.2 Withdrawal of Application.

A member may withdraw an application at any time. If an application has been withdrawn without prejudice, any subsequent application, including resubmission of the withdrawn application, is considered a new application and must meet all requirements, including timely filing requirements. Any withdrawal of an application after assignment to a hearing officer is deemed a withdrawal with prejudice. An application withdrawn with prejudice precludes the filing of any future application based on the same disability, injury, or disease.

2.3 Medical Examinations.

The Retirement Association may require a member to undergo a medical examination by a physician who is a specialist in the appropriate field of medicine, for which the Association shall pay. Refusal of any member applicant to submit to a medical examination shall result in the denial of the application.

2.4 Review of Application.

When the application file is complete, all documents will be reviewed by the Board's Medical Advisor, who will make a preliminary recommendation, summarizing the evidence or absence of evidence supporting the recommendation. If the recommendation is to grant the application, the matter will be placed on the agenda for Board consideration of the recommendation.

If the Medical Advisor cannot recommend granting the application based on the evidence submitted, the Retirement Association staff shall advise the applicant that she or he may: 1) submit additional medical or other evidence in support of the application, which shall be transmitted to the Medical Advisor for additional review and recommendation; or 2) request a hearing before a Hearing Officer within six months of the date of the letter informing the member that the Medical Advisor is unable to recommend granting the application.

3. HEARINGS BEFORE A HEARING OFFICER 3.1

Purpose.

The purpose of this Section is to establish rules for the presentation of evidence to a Hearing Officer, and to establish rules governing the process by which Hearing Officers submit *Proposed Findings of Fact and Recommended Decisions* on legal and factual issues, including credibility, for consideration by the Board.

3.2 Right to Hearing.

Upon timely written request, any party shall be entitled to a hearing on his or her application. The Board may also refer the matter for the setting of a hearing.

The Board may hold a hearing itself, or it may delegate the matter to a Hearing Officer. If a Hearing Officer holds the hearing, he shall transmit to the Board, in writing, the Proposed Findings of Fact and Recommended Decision.

3.3 Discovery.

Discovery shall be only as provided in Government Code section 11507.6, except that for good cause shown, the Hearing Officer, on his or her own motion or on the written noticed motion of a party, may make appropriate orders concerning discovery. Whenever possible, informal discovery and exchange of information between the parties is encouraged.

3.4 Subpoenas.

Each party is responsible for obtaining those subpoenas it seems necessary for the presentation of its evidence. Applications for subpoenas may be made to the Retirement Association. All subpoenas are to be issued in accordance with Government Code section 31535. Issuance of a subpoena for **medical** witness' attendance at hearing or deposition shall be contingent on the requesting party accepting the obligation to pay the medical witness. Before the Board or Hearing Officer issues any subpoena, proof of payment arrangements for the medical witness may be required. Service of the subpoena is the responsibility of the requesting party.

3.5 Notice of Hearing before Hearing Officer.

After the applicant has requested a hearing, the Retirement Association shall notify applicant within 30 days that the matter has been referred to counsel, and shall provide a copy of the hearing policy and regulations. Upon notification by both parties that the matter is ready to proceed to hearing, the Retirement Association shall notify all parties of the date of the hearing and the name and address of the person or entity assigned to be the Hearing Officer.

3.6 Scheduling the Hearing

The applicant and, if represented, his or her attorney and the counsel for the Retirement Association shall arrive at a mutually agreeable hearing date. The Retirement Association will arrange for a certified reporter and notify all parties of the date, time, and location of the hearing. If an applicant fails to respond to the Association's reasonable requests to set a hearing date, the Association may either set a hearing date or notify the applicant that continued failure to respond to requests to set a hearing date may result in dismissal of the application.

3.7 Submission of Proposed Evidence.

The parties shall submit all proposed evidence to the Hearing Officer and to the other party no later than fourteen (14) days before the scheduled hearing date, unless the parties mutually agree to a different schedule. The parties will exchange information regarding proposed witnesses (if any) no later than seven days before the hearing, unless they mutually agree to a different schedule.

3.8 Prehearing Conference.

At the request of any party or on his or her motion, the Hearing Officer may order a prehearing conference for the purpose of resolving or clarifying disputed hearing issues or the admissibility of disputed evidence.

3.9 Hearing Brief.

Either party may submit a hearing brief prior to the hearing.

3.10 Rules of Evidence.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of various affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

3.11 Written Medical Reports as Evidence.

A written medical report bearing the signature of a medical witness may be admissible in evidence as the author's direct testimony and may support findings made by the Board or the Hearing Officer. Such medical reports shall not be inadmissible on the basis that they constitute hearsay, but each party shall have the right to cross-examine the authors of medical reports.

Submission of a medical report less than 10 days before the hearing may be allowed by the Hearing Officer upon a showing of good cause. The party requesting submission of such a medical report shall make the request to the Hearing Officer assigned to the case and send a copy of the request to counsel for the Retirement Association and all other parties. The request shall state the reason the medical report was not timely produced.

3.12 Oral Testimony of Medical Witnesses.

Oral testimony of a medical witness may also be taken at hearing. However, whenever possible, the Retirement Association encourages the presentation of medical evidence by way of sworn written report.

3.13 Affidavits.

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 which he or she proposes to introduce at the hearing. Unless the opposing party, within ten days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his or 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 therefore is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence. The notice referred to above shall be substantially in the following form:

The accompanying affidavit of (here *insert name 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 or her unless you notify (here *insert name of proponent or his/her attorney*) at (here *insert address*) that you wish to cross-examine him or 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 ten days after the date of mailing or delivering the affidavit to the opposing party*).

3.14 Continuances.

The original hearing date may be continued by the Hearing Officer, at the request of either Party. Any continuance beyond sixty (60) days from the original hearing date must be agreed to by all parties and the Hearing Officer. If the hearing is scheduled before an Administrative Law Judge with the Office of Administrative Hearings, the party seeking the continuance will comply with any procedures required by the Office of Administrative Hearings.

3.15 Time and Place of Hearing.

The hearing will be set at a time and place determined by the Retirement Administration, and a Notice of Hearing with all pertinent information will be sent to all parties.

The hearing or any proceeding with respect to the application may proceed in the absence of the member who, after due notice, fails to be present or obtain a continuance. A decision on the application shall not be based solely upon the absence of the Member.

3.16 Reporter.

All hearings before a Hearing Officer shall be reported by a stenographic reporter, whose presence will be arranged by the Association. The *per diem* cost of the reporter shall be borne by the Retirement Association. The cost of a transcript copy, including an e-version copy, ordered by a Party shall be borne by the Party requesting the transcript. Requests for transcripts must be made directly to the stenographic reporter.

3.17 Issues at Hearing.

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

- a. Tier I or Safety Member: Whether the member is permanently incapacitated from performing the usual duties of his or her job, and if service connection is sought, whether the incapacity arose out of and in the course of his or her employment. If the application is not requesting service connection, then whether the member has completed five years of service.
- b. Tier II or Tier III Member: Whether the applicant is permanently incapacitated from performing any "substantial gainful employment" (as defined in section 1.3 above) **and either** a) the member's incapacity is substantially caused by injury or disease arising out of his or her employment, *or* b) the member has completed a total of ten years of service.

3.18 Order of Business of Hearings.

Unless the Hearing Officer otherwise rules, all hearings shall proceed in the following manner:

- a. The Hearing Officer shall call the case and ask for appearances by all parties.
- b. Relevant documents shall be marked for identification.
- c. The parties may be offered an opportunity to make an oral opening argument or statements.
- d. The applicant shall present his or her evidence.

- e. The Retirement Association shall then present its evidence
- f. Rebuttal evidence may then be presented in the same order
- g. The Hearing Officer may allow oral and/or written argument.

3.19 Close of Record.

The record of the proceedings shall be closed and the matter submitted at the conclusion of the formal hearing, unless further documentary evidence is to be received. If such further evidence is to be received, the Hearing Officer shall allow such time as deemed necessary for filing and serving copies on all parties. The matter shall be deemed submitted upon such final filing or upon rulings on any objections to the evidence thus filed.

3.20 Cost of Transcript.

If ordered by the Retirement Association or the Hearing Officer, Association's counsel, or the Retirement Board, the Association shall pay the cost of a hearing transcript. If ordered by the applicant or the applicant's attorney, applicant shall pay the cost of a transcript. The applicant or applicant's attorney, and the Retirement Administrator may agree in writing to split the cost of a transcript when both parties agree to the preparation of a transcript.

4. DECISION

4.1 Hearing Officer's Proposed Findings of Fact and Recommended Decision.

After the hearing is concluded and the record closed, the Hearing Officer will send a written report to the Board within 30 days, summarizing the evidence, findings of fact, and making a recommendation to the Board. The Retirement Association shall serve all parties with the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*.

4.2 Objections to Hearing Officer's Proposed Findings of Fact and Recommended Decision.

Any party objecting to a Hearing Officer's *Findings of Fact and Recommended Decision* has ten days after service of the *Findings of Fact and Recommended Decision* to submit written objections to the Retirement Association, which will send copies of the objections to all parties and provide a courtesy copy to the Hearing Officer. The Association and any other parties may respond in writing to any objections. Any objections and the responses thereto shall be incorporated into the record to be considered by the Board.

4.3 Board Consideration and Action.

The Board will consider the Proposed Findings of Fact and Recommended Decision on a date noticed to all parties. Any party or his or her counsel may request the opportunity to make an oral presentation to the Board. No new evidence or witness testimony may be heard or received by the Board. The Board may:

1. Approve and adopt the proposed findings and recommendation of the Hearing Officer, or
2. Refer the matter back to the Hearing Officer for further proceedings with or without instructions, or
3. Require a transcript or summary of all the testimony, plus all other evidence received by the Hearing Officer, and after receipt thereof, the Board shall take such action as it determines is warranted by the evidence, 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.

4.4 Notice of Decision.

The Board shall give written notice of its decision to all parties and their representatives within five days of the date of its decision. Such notice shall be by first class mail and shall include the decision and the date it was rendered.

4.5 Reconsideration after Board Action on Proposed Decision.

No later than seven calendar days after service of the Notice of Decision, a party may file with the Board a written motion for reconsideration based on one of the following reasons:

1. Irregularity in the proceedings, or any order, or abuse of discretion, by which the party was prevented from having a fair hearing;
2. Accident or surprise; which reasonable diligence and prudence could not have guarded against;
3. The availability of material evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing;
4. Error of law.

When a party's motion is for a cause mentioned in paragraphs 1, 2, or 3 above, it must be made upon affidavit(s). The Board may on its own motion order reconsideration, but the order must be within seven calendar days of its original decision and on one or more of the causes listed above. If the Board does not rule on a party's motion for reconsideration by its next regular meeting, it shall be deemed denied. When reconsideration is granted, it suspends the original decision, and the Board shall proceed as though the matter were still pending before it for original decision, but the decision on reconsideration becomes final when made. The Retirement Association shall promptly mail copies to all parties.

4.6 Finality of Decision.

Except as otherwise provided in section 4.7 below entitled Judicial Review or section 4.5 entitled Reconsideration, action by this Board granting or denying in whole or in part any application for disability retirement shall be deemed to be final and conclusive with regard to any and all issues raised by the application which were either presented to the Board or could have, with the exercise of reasonable diligence, been presented.

4.7 Judicial Review.

Notice of the right to judicial review of the Board's decision pursuant to Code of Civil Procedure section 1094.6, and the time limits for filing such review, shall accompany the written notice of the Board's decision.

4.8 Request for Preparation of Administrative Record.

Any request for the preparation of the administrative record pursuant to Code of Civil Procedure § 1094.6 shall be made in writing and filed with the Retirement Association, which shall, within ten days of receiving such a request, notify the requesting party of the estimated cost of preparing the record.

The requesting party shall within ten days of receiving such notification, deposit with the Retirement Association an amount sufficient to cover the estimated cost. If the cost exceeds the amount deposited, the party shall pay the excess. If the amount deposited exceeds the cost, the difference shall be returned to the party. Upon receiving the required deposit, the Retirement Association shall promptly prepare the record, including the transcript of the proceedings, all pleadings, all notices and orders, the final decision, all admitted exhibits, all rejected exhibits in the possession of the Board, all written evidence, and any other papers in the case.

