



ADMINISTRATIVE COMMITTEE

Staff Report

File #: 19-421

Agenda Date: 7/18/2019

Agenda #: 2.

FROM: Barbara Hannah, Chief Counsel

SUBJECT: Disability Retirement Procedures

RECOMMENDATION:

Recommend that the Committee provide guidance on potential changes to the *Procedures for Disability Retirement Applications and Formal Hearings*.

BACKGROUND:

San Bernardino County Employees Retirement Association adopted the *Procedures for Disability Retirement Applications and Formal Hearings* ("Rules") to govern the disability retirement process. Since the last update in September 2016, there are matters that have arisen which are not addressed in the Rules, specific Rules that may require an update, and requests from the Board to revisit specific Rules, such as the time limits for presentations. Staff requests that the Committee provide guidance to Staff to inform a redlined proposed update to the Rules for consideration by the Board at a future meeting date.

A. Formal Hearing - Expand the Subject Matter Jurisdiction.

Currently, the formal hearing is reserved exclusively for matters in which the Board has denied a benefit request by a disability retirement applicant. However, the formal hearing process could be expanded to be used for other subject matters. Specifically, staff believes that the formal hearing may be used to determine the eligibility of an applicant to apply for disability retirement where an applicant (1) has been terminated for cause or resigned in lieu of termination, or (2) in matters where the applicant has filed an untimely application.

At present, the process for rejected applications requires staff to place a staff recommendation in front of the Board for consideration of whether to adopt the staff's determination that the member is ineligible to apply for a disability retirement. The Board's decision in these cases is the final administrative decision. Staff believes, that whether an applicant has been terminated for cause or has filed an untimely application are both questions of fact, which require the presentation and consideration of evidence by a neutral party. By expanding the subject matter jurisdiction of the formal hearing process, the applicant and SBCERA have the opportunity to submit evidence and call witnesses, while at the same time allowing a hearing officer to weigh the evidence.

In addition, staff proposes to refer the matter to a formal hearing within 15 days of the staff's determination that a member is ineligible to apply. Under updated Rules, an abbreviated formal hearing with the limited subject matter jurisdiction could be conducted and completed within 60 days of the referral. The proposed change would result in an Applicant receiving a timely determination of his or her eligibility to apply for a disability retirement. As with the current formal hearing process,

staff would submit the hearing officer's recommendation to the Board for consideration and a final decision.

The formal hearing process could also be effectively used for benefit determinations. The evidence and argument presented at the hearing would provide the foundation for the court's decision if the applicant files a Petition for Writ of Mandamus in Superior Court. If the formal hearing process gathers all of the relevant evidence, discovery and motion time and costs would be substantially reduced in the trial.

B. Reconsideration Process.

Where the Board has denied the requested benefit in part or in total, the applicant may request reconsideration. The applicant has six months from the initial decision to provide additional information for the Board to consider. In the event the applicant fails to submit additional information, the Board maintains its initial decision of the denied benefit request, and the applicant may appeal to an expedited review or formal hearing.

From 2014 through April 2019, there were 48 reconsideration cases heard by the Board. In five of the 48 reconsideration cases, the Board reconsidered its initial decision and granted the requested benefit. Based on the history of reconsideration, it appears the reconsideration process further delays the member receiving a final determination of the benefit request without providing substantial benefit to members. Staff believes that there are opportunities to improve operational efficiencies by removing the reconsideration process, and instead including other administrative remedies, such as a formal hearing or an expedited review, for the applicant to appeal the Board's decision. Due process would be preserved, but on a basis that is more efficient and member service-oriented.

SBCERA is one of only four out of 12 CERL systems surveyed that allows reconsideration. One system, Contra Costa County Employees' Retirement Association (CCERA) allows reconsideration only on showing of irregularity in the initial Board action. Fresno County Employees' Retirement Association (FCERA) allows reconsideration only upon showing of good cause.

C. Time Requirement for Disability Applicants to Present During Closed Session.

The Rules do not address the time in which a disability retirement applicant may present his or her case to the Board in closed session. Currently, the three-minute rule is mirrored after the time limit provided to those who provide public comment. The Board has previously expressed a desire to revisit whether this limitation is appropriate. Staff requests the Committee discuss the current limitation and determine if adjustments are appropriate to the time the applicant should be allowed to present in closed session.

D. Attorney Representation.

An attorney may represent an applicant at a formal hearing. Recently, there was a request for a Social Security disability advocate to represent an Applicant at a formal hearing. However, the Rules do not address whether a person who is not an attorney may represent the Applicant. Given the complex nature of the laws surrounding disability retirement and the process being dissimilar to that of Social Security, staff proposes that the Rules limit any type of representation to an attorney licensed in the State of California.

F. Shortened Timeframe for the Hearing Officer to Submit Recommendation.

In both the Expedited Review and Formal Hearing process, the hearing officer has 60 days to submit a recommendation. However, staff would propose 30 days is more efficient and similar to the period in which the SBCERA medical advisors are required to review a case and return a report.

G. Page Limitations on Briefs.

In some cases, briefs are unnecessarily long and repetitive. Writ cases in Superior Court limit briefs to 10 pages or to 20 pages with permission from the court. Staff recommends that the Rules include a limitation on the length of briefs submitted by the parties in both expedited and formal hearings. Staff proposes to incorporate a limit of 20 pages, and recommends that the Rules specify that the briefs be double spaced and use a reasonable font size such as 12 point.

H. Use of an Interpreter.

Staff proposes to incorporate a provision in the Rules for the use of an interpreter when the Applicant or a witness is unable to communicate effectively in English. Interpreters in formal hearings should have the same qualifications as interpreters who are authorized to work in the courts. Staff proposes that SBCERA provide the interpreter at no cost to the applicant, as is the case with the use of court reporter,.

I. Responses to Objections.

Currently, the Rules do not have any provision for a party to respond to objections made by the other party to the hearing officer's recommendation. Staff proposes to incorporate a provision in the Rules that would allow responses to objections by the other party in order to ensure that all parties receive due process in expedited and formal hearings.

J. Supplemental Retirement Allowance

At the time of application for a disability retirement benefit, the member must make an affirmative statement of whether he/she is or is not capable of gainful employment. Currently, staff processes the application in reliance on the member's statement. For example, if a member indicates that he is capable of gainful employment, then staff accepts the member's statement and the supplemental retirement allowance is not put at issue.

The Board has expressed concerns that the member may not understand fully the consequences of the statement that he/she is capable of gainful employment and therefore be unable to apply for this benefit at a future date. Staff proposes a two-fold approach to addressing this concern:

- a. The question on the Application concerning the Supplement Retirement Allowance will incorporate a waiver informing the member that if the Supplemental Retirement Allowance is not applied for at the time of Application, then the member waives any right to apply at a future date; and
- b. Where the member makes an affirmative statement that he/she is capable of gainful

employment, but the applicant's treating physician states that the applicant is not capable, staff would direct that the Independent Medical Examiner (IME) and Medical Advisor (MA) to address the issue of gainful employment in their respective reports to the Board.

BUDGET IMPACT:

None.

STRATEGIC PLANNING GOAL/OBJECTIVE:

Operational Excellence & Efficiency

STAFF CONTACT:

Barbara Hannah

ATTACHMENTS:

None.