



BOARD OF RETIREMENT

Staff Report

File #: 19-421.2

Agenda Date: 11/7/2019

Agenda #: 27.

FROM: Barbara Hannah, Chief Counsel

SUBJECT: Disability Retirement Procedures

RECOMMENDATION:

Approve and adopt the proposed changes to the *Procedures for Disability Retirement Applications and Formal Hearings*.

BACKGROUND:

Staff has been programmatically evaluating its disability processes, metrics regarding processing times, and opportunities for improvement in the member service experience. Staff will provide a high-level overview of efforts and results to date to the Committee; attached as Exhibit "B" is a summary slide deck which discusses personnel and other programmatic changes which have taken place in the last year.

As a part of the programmatic review process, staff identified a series of opportunities to make changes in the process, which are further identified and discussed below. SBCERA 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. On July 18, 2019, the Administrative Committee reviewed and provided input on a series of potential changes to the Rules, and directed that staff bring those changes back in a redlined version of the Rules for consideration by the Committee and ultimately, by the Board.

Accordingly, attached as Exhibit "A" is a redlined version of the Rules which incorporates the edits discussed in the July 18, 2019 Administrative Committee meeting as well as other non-substantive edits. In summary, the substantive edits are as follows:

A. Formal Hearing - Expand the Subject Matter Jurisdiction. (Rule 5)

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. (Delete Rule 10A (1))

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. (Rule 10(b))

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. (Rule 11(g) and Rule 16)

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. (Rule 11A (e))

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. (Rule 27 (g))

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. (Rule 11 (f))

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. (Rule 29)

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 the formal hearing.

J. Effective Date of Applications. (Rule 4 (a))

At present, the Rules state that applications will not be accepted and deemed filed unless and until the application is complete and timely. The effective date of the application is when the application is accepted and filed by SBCERA. This means that an applicant who attempted to file an application

which was rejected would lose his/her initial filing date as the effective date, and could create issues of timeliness. Staff proposes revising the Rules to state that applicants will have a thirty (30) day period to perfect a rejected application, and will be entitled to maintain the earlier date of the attempted filing as the effective date of the application.

K. Dismissal for Failure to Complete. (Rule 33 (r))

At present, the Rules set forth the grounds on which the Board may dismiss a claim for a failure to complete an administrative appeal. Staff proposes adding that the applicant's failure to appear at the administrative hearing results in dismissal with prejudice. If the applicant is represented, the case will be dismissed if both the applicant and his/her attorney fail to appear. To reverse the dismissal, the applicant will have to show good cause for his/her absence to the Board in any appeal.

L. Closed Session: Designated Support Person. (Rule 10 (c))

A request was made for the Board to discuss whether allowing a non-attorney (i.e. spouse, friend, relative, or other support person) in closed session for a disability retirement case. As a general rule, closed sessions may involve only the membership of the body in question plus any support staff which may be [necessary for consideration of the matter that is the subject of the closed session, with very limited exceptions for adversaries or witnesses with official role in particular types of hearings.] (46 Ops.Cal.Atty.Gen 34, 35 (1965)) Hence, persons without an "official role" in the meeting must be excluded from closed sessions. (*Id.*) Inclusion would result in a "semi-closed" meeting, which is not permitted by the Brown Act.

BUDGET IMPACT:

None.

STRATEGIC PLANNING GOAL/OBJECTIVE:

Operational Excellence & Efficiency

COMMITTEE REVIEW:

This item was reviewed by the Administrative Committee at its July 18, 2019, meeting and recommended that this item be returned to the Administrative Committee for further discussion and review of the proposed changes to the procedures.

As instructed by the Administrative Committee this item returned to the Administrative Committee on October 17, 2019 for discussion and a recommendation. The Committee discussed in length the proposed changes to the procedures and recommended that this item go to the full Board for review, discussion and approval, with the following issues to discuss and determine as a full Board:

- (1) Time requirement for Disability Applicants to present during closed session (discussed in subsection C. above).
- (2) Closed Session - Designated Support Person (discussed in subsection L. above). The Committee requested that a poll be taken to obtain information from other CERL Systems to determine the procedure used in regard to having a support person. The results of the Survey is attached hereto as Exhibit D.

- (3) Additionally, a minor language change was suggested to the title in subsection K, to provide a clearer narrative on the intent of the additional language proposed.

In regard to the Committee's approval of proposed changes, including the additional items to discuss at the Board level, the Committee voted 2 to 1 for approval of the proposed Procedures. Trustee Bracco was absent from the meeting.

STAFF CONTACT:

Barbara Hannah
David Lantzer

ATTACHMENTS:

- Exhibit A: Procedures for Disability Retirement Applications and Formal Hearings - (Redline)
- Exhibit B: Disability Retirement Process Update
- Exhibit C: Flowchart - Disability Process Overview
- Exhibit D: Survey Results - CERL Systems Closed Disability Sessions