



San Bernardino County Employees'  
Retirement Association

## San Bernardino County Employees' Retirement Association

# PROCEDURES FOR DISABILITY RETIREMENT APPLICATIONS AND FORMAL HEARINGS

March 4, 2021

THE FOUNDATION FOR A SECURE RETIREMENT

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# PROCEDURES FOR SBCERA DISABILITY RETIREMENT APPLICATIONS AND FORMAL HEARINGS

These Procedures for SBCERA Disability Retirement Applications and Formal Hearings (“Rules”) are enacted to provide procedures for submitting and acting upon applications for disability retirement benefits under the County Employees' Retirement Law of 1937, so that Applications can be fairly and efficiently processed. All proceedings for disability retirement shall be conducted in accordance with the following Rules.

## **RULE 1. DEFINITIONS**

In these Rules, unless the context or subject matter otherwise requires:

- (a) **“Administrative Review”** or **“Administrative Review of Initial Hearings”** an expedited review or Formal Hearing requested by an Applicant to appeal the Board’s decision made at an initial Hearing.
- (b) **“Amended Application”** means an Application to which changes have been made, including changing, deleting, or adding a Claimed Injury or Disease, or changing the request for Service-Connected or Nonservice-Connected Disability Retirement, including adding a basis of not being capable of Gainful Employment (Supplemental Retirement Allowance).
- (c) **“Applicant”** means a Member of the San Bernardino County Employees' Retirement Association claiming disability retirement benefits under the CERL, or any person or persons who file an Application on behalf of such Member pursuant to Rule 7, or any person or persons entitled to claim such benefits as a result of the death of

a member, or any attorney acting on behalf of such Member.

- (d) **“Application”** means an executed and filed Disability Retirement Application, which includes an Applicant’s Statement of Facts and Circumstances; a Physician’s Report, completed by an attending or forensic physician documenting each Claimed Injury or Disease as required by Rule 4; and fully executed Release(s) of Medical Information.
- (e) **“Application Date”** means the date an Application is deemed complete by SBCERA for processing in accordance with the Rules.
- (f) **“Board”** means the Board of Retirement of the San Bernardino County Employees’ Retirement Association.
- (g) **“CERL”** means the County Employees’ Retirement Law of 1937 beginning at California Government Code Section 31450.
- (h) **“Chief Executive Officer”** or **“CEO”** means the person appointed by the Board as its Chief Executive Officer or such persons he/she may designate to perform the responsibilities of the CEO noted herein.
- (i) **“Claimed Injury(ies) or Disease(s)”** means any physical or mental condition identified in an Application as causing an Applicant to be Permanently Incapacitated for the Performance of Duty.
- (j) **“Deposition”** means the taking of a statement of a witness or a Party, either orally or in writing, under oath before hearing.
- (k) **“Disability”** or **“Disabled”**, whether used singly or in combination with other words, means Permanent Incapacity for performance of duty.
- (l) **“Discontinuation of Service”** means the last date for which a Member earned Regular Compensation from a Participating Employer from which retirement contributions were deducted by SBCERA.

- (m) **“Dismissed with Prejudice”** means the Application is denied and the Applicant will not be allowed to refile a disability Application as to that Claimed Injury or Disease.
- (n) **“Dismissed without Prejudice”** means the Application is denied and the Applicant will be allowed to refile a disability Application as to that Claimed Injury or Disease.
- (o) **“Duty”** or **“Duties”** means the essential functions of the job that the individual who holds the position must be able to perform, with or without reasonable accommodations.
- (p) **“Effective Date”** means the date the Member’s disability retirement allowance commences for an Application granted by the Board, which is the later of the Application Date or the day after Discontinuation of Service, unless an Earlier Effective Date is requested and granted.
- (q) **“Gainful Employment”** as defined in the SBCERA By-Laws Article IV and used herein, means the performance of any service for compensation with the exception of service as a juror or witness in a court proceeding or service as an election official.
- (r) **“Hearing”** means an administrative proceeding during which evidence, including oral testimony, is presented to a Hearing Officer, and after which the Hearing Officer prepares a Proposed Findings of Fact and Recommended Decision.
- (s) **“Hearing Officer”** means a current member of the State Bar of California who conducts a Hearing.
- (t) **“Independent Medical Evaluation”** or **“Independent Medical Examination”** (IME) means a medical record review and examination conducted at SBCERA’s request and expense by one or more physicians with expertise in the Claimed Injury(ies) or Disease(s) identified in the Application that a Member may be required to submit to in order for SBCERA to complete its evaluation of the Application.

- (u) **“Independent Medical Examiner”** (IM Examiner) means a physician with expertise in the Claimed Injury(ies) or Disease(s) who is retained by SBCERA to conduct a medical record review and examination of the Member at SBCERA’s request and expense.
- (v) **“Job Description”** means the current class specification or job specification for a Member’s position as provided by the Participating Employer that lists the essential usual, and/or general job duties, physical requirements, minimum qualifications, required knowledge and abilities, salary, and/or and benefits.
- (w) **“Medical Advisor”** means the physician(s) advising the Board on medical matters for Applications.
- (x) **“Member”** is synonymous with Applicant. See Applicant.
- (y) **“Nonservice-Connected Disability Retirement”** (NSCDR) means Permanent Incapacity is not a result of a Claimed Injury or Disease arising out of Applicant’s employment. Applicant must have at least five (5) years of service credit to be considered for a Nonservice-Connected Disability Retirement. Approved service credit in a system with reciprocity does count toward the required five years.
- (z) **“Participating Employer”** means the County of San Bernardino, the Superior Court in San Bernardino County, public agency within San Bernardino County limits that provides SBCERA benefits to its eligible employees and by which the Member is employed at the time, or before, an Application is submitted to SBCERA.
- (aa) **“Permanent Incapacity”** or **“Permanently Incapacitated for the Performance of Duty”** means an impairment of the Applicant's body and/or mind that causes the Applicant to be unable to perform the essential duties of the job classification last held by the Applicant or the duties of a permanent light duty position within the

Applicant's abilities and within the Applicant's department or a successor department when it is determined by competent medical evidence that the impairment is permanent or of such prolonged and uncertain duration as to be considered permanent. An Applicant need not be able to perform each and every duty of the Applicant's position, but if the Applicant is permanently unable to perform any essential duty of the former classification, the Applicant shall be deemed to be incapacitated. An Applicant is not Permanently Incapacitated when the Applicant unreasonably refuses available medical treatment (including surgery) or other remedial treatment if the probabilities are great that such treatment will restore the Applicant to capacity within a reasonable period of time and the risk of harm from such treatment would not deter a reasonable person from submitting to the treatment.

(bb) “**Presumption**” as used on the Application means certain illnesses or diseases specified in the CERL that, under specified conditions, are presumed to arise out of and in the course of a Safety Applicant’s employment.

(cc) “**Regular Compensation**” means the regular remuneration earned by a Member from a Participating Employer including, but not limited, to regular salary or wages, pay for use of accrued vacation or sick leave, and payments pursuant to Labor Code Section 4850 during the Member’s employment.

(dd) “**SBCERA Counsel**” means the attorney acting as an advocate for the maintenance of the Board’s initial decision, or otherwise opposing the Applicant’s request for benefits, in a Formal Hearing, and shall exclude the Chief Counsel or designee whose duties involve the rendering of neutral legal advice to the Board in a particular case.

(ee) “**Service**” means uninterrupted employment for which deductions are made from

a Member's earnable compensation from the Participating Employer for such service while he/she is a Member of the retirement association as defined by the CERL.

(ff) “**Service-Connected Disability Retirement**” (SCDR) means Permanent Incapacity must be a result of a Claimed Injury or Disease arising out of Applicant's employment.

(gg) “**Subpoena**” means an order issued by the Board Chair, SBCERA's Chief Executive Officer, an attorney representing a Party, or the Hearing Officer directed to a person that requires that person's attendance at a particular time and place to testify as a witness.

(hh) “**Subpoena Duces Tecum**” means a Subpoena that requires the person to whom the Subpoena is directed to bring to Hearing any documents, hard-copy or electronic, or other things under the person's control that are pertinent to the issues presented in the disability retirement case.

(ii) “**Substantially Contributes**” means there is a real and measurable connection between the Applicant's employment and the Claimed Injury(ies) or Disease(s).

**DISCLAIMER:**

“Definitions” to reference words that are not specifically defined in the Procedures shall be defined in accordance with the definition as listed in: (a) Government Code sections in the CERL adopted by SBCERA; (b) PEPRA; (c) SBCERA Amended By-Laws; (d) similar statutes and/or (e) SBCERA Board Policies. If the definition is not provided in any of the above-mentioned resources, the definition shall default to the definition as listed in the Meriam-Webster Dictionary in effect at the time of the required interpretation of the definition.

## **RULE 2. FORMS**

All forms used in proceedings under these Rules shall be approved by the CEO or designee prior to use. Whenever forms are available for use, they shall, insofar as possible, be used by all interested parties.

## **RULE 3. FILING OF APPLICATION**

The Applicant has the burden to file an Application that meets the requirements of these procedures. A disability retirement Application shall be submitted in a timely manner as provided by the CERL, specifically Government Code section 31722, and Rule 5. An Applicant who applies for refund of accumulated retirement contributions shall be advised, in writing, at the time of the Application for refund of their ineligibility to apply for disability retirement after membership is terminated.

The CEO shall furnish Application forms for disability retirement benefits and a copy of these Rules to any person upon request. An Application will not be accepted for filing until all forms, as described in these Rules, have been: (1) completely filled out in accordance with these Rules and the instructions stated in the Application forms; and (2) submitted to the CEO. Any attempt to file an Application or document in support thereof, as required by Rules 4 and 5 below, that is incomplete or illegible shall not be accepted by the CEO.

An Application must include the Applicant's mailing address, telephone number, and personal e-mail address. If represented by an attorney, the Applicant shall disclose the attorney's name, attorney's address, telephone number, and/or e-mail address. . It is the responsibility of the Applicant to notify SBCERA of any change of address, telephone number, and/or personal e-mail address. The CEO will also not accept an Application for filing unless it is timely pursuant to Rule 5.

**RULE 4. ADMINISTRATIVE PROCESSING**

At the time of providing an Application to the Applicant, the CEO shall notify the Applicant of the following requirements:

**(a) Disability Retirement Application.**

The Applicant is required to obtain and to file an Application. Other relevant evidence that the Applicant wishes the Board to consider in support of his/her Application in the form of written medical reports, certificates or other documents may be submitted at the time the Application is filed. Processing the Application will not commence until the Application is both complete and timely, and has been properly filed as described in Rule 5 as determined by the CEO. The Application shall be in a format prescribed by SBCERA

Disability Retirement Application includes:

(1) Applicant's Statement of Facts and Circumstances.

Applicant shall complete an Applicant's Statement of Facts and Circumstances, which sets forth the type of disability retirement being sought, description of each Claimed Injury or Disease, dates and circumstances of each Claimed Injury or Disease, the duties Applicant is unable to perform, Effective Date of Disability and the basis for the Effective Date, and other information pertinent to all claim(s).

(2) Attending or Forensic Physician's Report.

The Applicant, at his/her own expense, shall obtain a medical examination by a duly licensed physician: limited to a medical doctor, doctor of osteopathy, doctor of podiatric medicine, dentist, or doctorate level psychologist of Applicant's choice. A Physician's Report shall be completed for each Claimed Injury or Disease. When SBCERA notifies the Applicant of the requirements set forth in Rule 4, it shall

concurrently furnish the Applicant with the following documents to be delivered by the Applicant to his/her physician as follows:

- (i) "Attending or Forensic Physician's Report" form;
- (ii) Letter of instruction to physicians for Applicant;
- (iii) Job Description from the human resources department of the Applicant's employer for the position held by Applicant.

(3) Authorization for Release of Records Forms.

Applicant shall authorize the release of records, including but not limited to release of medical reports and personnel employment records. See Rule 4(c).

Once the Application is complete and deemed timely, the date of Application shall be the date the Application is received by SBCERA unless deemed filed earlier under the CERL. Upon acceptance of the Application, SBCERA shall notify the Applicant by mail that the Application has been accepted. Within 30 (thirty) days of the date of mailing of the notice letter, the Applicant shall contact SBCERA staff to either (1) schedule a disability consultation with an SBCERA Disability Unit staff member, or (2) return the completed checklist to SBCERA with a written waiver of the consultation. Failure by the Applicant to contact SBCERA or return the completed checklist within 30 days of the claim acceptance notice, may result in the dismissal of the Application for failure to cooperate as prescribed under Rule 33.

**(b) Independent Medical Examinations.**

The Applicant is required to report at times and places specified by the CEO for one (1) or more medical examination(s) by a physician or physicians selected by the Board or the CEO. Each Applicant shall, upon request of the CEO, submit to one or more medical

examination(s) based on the accepted Claimed Injury(ies) or Disease(s). The Applicant will mail any additional records or documents so as to reach SBCERA no later than five (5) business days before the scheduled Independent Medical Examination appointment(s), which will provide the IME sufficient time to review the records ahead of the scheduled appointment. The Applicant will not send additional records and documents directly to the Independent Medical Examiner. SBCERA will forward the Applicant's additional records or documents to the Independent Medical Examiner.

**(c) Release of Medical Records**

(1) Each Applicant for disability shall authorize the release of all medical information relating to the course of all treatments, consultations or evaluations with respect to any and all physical or mental Claimed Injury or Disease of Applicant and shall waive any physician-psychotherapist/patient privilege. The Applicant shall also authorize SBCERA to obtain all records potentially related to the Applicant's employment from the Participating Employer.

(2) Each Applicant for disability shall also authorize the release of all medical information relating to all Workers' Compensation claims and the award of any disability retirement benefits from other retirement systems. Authorizations and waivers shall be given on forms promulgated by SBCERA, and all information received by SBCERA shall be treated as confidential and not be released to anyone except insofar as may be necessary for the administration of the retirement system or upon an order of a court of competent jurisdiction.

(3) Applicant shall submit a complete listing of all physicians and hospitals unless CEO finds the Application can be processed without such submission.

SBCERA is interested in receiving and reviewing all competent and relevant evidence, including medical reports filed by physicians in Workers' Compensation proceedings. However, it is emphasized that in light of the different considerations involved in retirement proceedings as distinguished from Workers' Compensation proceedings, the Board and its Hearing Officer are not bound or precluded in any way by Workers' Compensation evidence, admissions, stipulations, findings or conclusions.

**(d) Department's Statement of Facts and Circumstances**

The CEO shall: (1) forward a "Department Statement of Facts and Circumstances" to the Applicant's employer for completion; (2) request, from the personnel services department of the Applicant's employer, copies of all claims and medical reports filed by the Applicant for Workers' Compensation benefits; and (3) obtain, from the human resources department of the Applicant's employer, verification of the Applicant's employment status, pay status, accrued vacation and sick leave entitlement. The Department Statement of Facts and Circumstances ("Department Statement of Facts") shall include a detailed statement of all actions and efforts undertaken to find alternative employment for the employee within the department within the capacity of the employee to perform, and the results of such action and efforts, or a detailed explanation as to why such efforts were not undertaken.

A completed Department Statement of Facts shall be provided by the Participating Employer and shall accompany each disability retirement Application. As part of the Department's Statement of Facts, the department will certify that no reasonable accommodations can be made to permit the Applicant to remain employed. The format shall be as prescribed by the Board or its designee, and shall include, in addition to that information required by this paragraph, such other information as may be deemed

necessary and appropriate for the proper processing of the Application.

**RULE 5. TIMELY APPLICATIONS**

The CEO shall accept all Applications subject to rejection. If it is found that an Application does not meet the requirements set forth in these Rules, the Application will be rejected. Any Application filed more than four (4) months after an Applicant's Discontinuance of Service must include a statement by the Applicant's attending physician on the Attending or Forensic Physician's Report that indicates the Applicant has been continuously physically or mentally incapacitated to perform his or her duties since the date of the Applicant's Discontinuance of Service to the time of the Application.

(a) **Complete and Timely** –

The CEO will accept and process an Application that is complete, as determined by the CEO, and timely filed, as defined by the CERL. The CEO will reject any Application that is incomplete or is not timely filed as defined by the CERL. In the event the Application is not timely and/or complete and is rejected on that basis, the Applicant shall have 30 days to revise the rejected application in order to maintain the date of the attempted filing as the Effective Date of the Application.

(b) **Untimely Application** –

Greater than Four (4) months from Discontinuance of Service

(1) **Additional Information Required If Greater than Four (4) Months from Discontinuance of Service** - The Board has determined that Applications that are not timely filed may prejudice SBCERA's ability to provide the Applicant due process and to make a fair decision on the benefit request. Therefore, if the Application is not timely filed, then the Applicant must supply additional information

with his or her Application in the form of one of the following options:

(i) Option 1: The Applicant must include with the Application the following:

- A statement(s) by the Applicant's attending (treating) physician(s) on the Attending Physician's Report(s) indicating that the Applicant has been continuously physically or mentally incapacitated to perform his or her duties during the period of time from the Discontinuance of Service to the date the Application was filed. The entire period of time from the Discontinuance of Service to the date the Application was filed must be covered by one or more Attending Physician's Reports.

(ii) Option 2: The Applicant must include with the Application the following:

- A statement by a forensic (examining) physician or attending physician, who started treating the Applicant more than four (4) months after the date of Discontinuance of Service. The physician(s) shall attest that he or she has examined the Applicant and reviewed the Applicant's medical records covering the period of time from the day after the Applicant's Discontinuance of Service to the date the Application was filed and that the Applicant has been continuously physically or mentally incapacitated to perform his or her duties throughout the period of time from the Discontinuance of Service to the date the Application was filed.

**and**

- Copies of all medical records that the physician(s) relied upon to render such an opinion.

**(c) Lack of Information**

If the information in Option 1 or Option 2 is provided, the Application is otherwise complete pursuant to the Rules, and, in the determination of the CEO, the delay or lack of information provided in the Application does not prejudice the Board's ability to provide due process and to make a fair decision on the benefit request, then the Application will be accepted and processed. If not, the Application will be rejected.

**(d) Amending An Application**

If, after the filing of the original Application, an Applicant may amend an Application for purposes of changing, deleting, or adding a Claimed Injury or Disease, or to change the request for Service-Connected or Nonservice-Connected Disability Retirement, by submitting an Amended Application at any time within sixty (60) calendar days of the date SBCERA issues notice of acceptance of the original disability retirement Application for processing as complete and timely (Gov. Code § 31722 and Procedures Rule 5). The amendment to the Application must include a Physician's Report for each new or different Claimed injury or Disease.

No Amended Application submitted more than sixty (60) calendar days after the date of acceptance of the original Application for processing shall be accepted by SBCERA, except that the Applicant may appeal to the Board. The Applicant has the burden of proof to show good cause as to why the Applicant could not, with the exercise of reasonable diligence, have included the substance of the Amendment on the

Application Date of the original Application.

If the Board determines that there is good cause for the late submission, the Amended Application will be accepted so long as other requirements are met as prescribed herein. Otherwise, the Amended Application will be rejected by the Board, and may be Dismissed with Prejudice, and the original Application will be processed without amendment.

In any case, when SBCERA accepts an Amended Application, the Amended Application shall be processed in accordance with these Procedures as if it were submitted on the original Application Date.

**(e) Rejecting Applications**

If the CEO has rejected the Application or amended Application pursuant to subsections (b) or (c) above and the Applicant objects to the rejection, then the matter will be referred to an Administrative Review, specifically a Formal Hearing (Rule 10A (b)(2)) in accordance with the Formal Hearing Rules herein, except that the Hearing on the limited issue of timeliness shall be completed within 180 days of referral. The Hearing Officer's recommendation shall be submitted to the Board in accordance with Rule 30.

**RULE 6. TERMINATED FOR CAUSE OR RESIGNED IN LIEU OF TERMINATION**

When an Applicant is terminated for cause by the Participating Employer or enters into a settlement agreement with the Participating Employer to resign in lieu of termination, such Applicant is not eligible to apply for a disability retirement and the Application shall be rejected for processing.

In such cases, the CEO shall refer the matter to an Administrative Review subject to the Rules governing a Formal Hearing.

The issues to be addressed during the Administrative Review are:

(1) Is there substantial evidence of a mature claim for Disability prior to the termination for cause or resignation in lieu of termination?

(2) Is there substantial evidence that the termination for cause or resignation in lieu of termination was related to any mature claim for Disability?

The Applicant shall authorize the release of records in accordance to the Rules. The procedural aspects of this Administrative Review shall be governed by Rule 11, Rule 12, Rule 13, and include all other Rules governing Formal Hearings under these Rules.

**RULE 7. APPLICATION FILED ON BEHALF OF AN APPLICANT**

An Application may be filed on behalf of an Applicant by any other person, including the head of the department or office employing the Applicant or as permitted by law.

The person filing on behalf of the Applicant has the burden of proving that the Applicant is Permanently Incapacitated for the Performance of his or her job Duties. Thereafter, the Applicant has the burden of proving job causation. The procedures governing Applications made by persons other than the Applicant and on behalf of the Applicant are set forth herein. For purposes of this Rule, "Applicant" shall mean the SBCERA member on whose behalf disability retirement benefits are claimed by the person filing the Application.

(a) Upon receipt of an Application filed on behalf of an Applicant by any person other than the Applicant, the CEO shall, within five (5) calendar days, mail a copy of the Application to the Applicant at the Applicant's home address on file with SBCERA. The CEO shall include with the Application a statement advising the Applicant of the procedures that will be followed in processing the Application and further advising the Applicant of his or her rights, including:

(1) The right to provide medical and other evidence contesting the assertion that the Applicant is Permanently Incapacitated for the Performance of his or her job Duties; and

(2) The right to provide medical and other evidence showing that, if the Board determines that the Applicant is Permanently Incapacitated, the Disability arose out of and in the course of his or her job duties. The Applicant shall be advised that it is his or her burden to prove job causation.

(3) If a Physician's Report is received from any person other than the Applicant, SBCERA will forward a copy of the Physician's Report to the Applicant unless the report falls under the guidelines of cautionary admonition.

The CEO may require the Applicant to be examined by an Independent Medical Examiner appointed by SBCERA; provided, however, that in the event that the Applicant refuses or fails to be examined, the Board may make its determination based on those medical reports provided by the person filing on behalf of the Applicant and/or the Applicant. After consideration of the available evidence, the Board may deny the Application and Dismiss with Prejudice in accordance with Rule 33.

(b) It shall be the responsibility of the person filing the Application to provide to the Board medical reports supporting the Application. At the request of the person filing the Application, the Secretary to the Board shall issue Subpoenas or Subpoena Duces Tecum pursuant to Government Code section 31535 and Rule 14.

(c) The Applicant on whose behalf benefits are claimed shall be advised of the time and place of the Board's Hearing on the Application and of their right to appear and be heard. The person filing the Application or his/her designee must be present, if requested,

at the meeting at which the Application will be considered by the Board. Upon making a finding that the Applicant has been advised of the time and place of the Hearing and of his or her right to present evidence showing continued capacity to perform the essential duties or his or her job, the Board may proceed with the Hearing in the absence of the Applicant and may either approve or deny the award of a disability benefit to the Applicant. If a disability benefit is awarded, the Board will determine it to be either service or nonservice-connected. Hearings on Applications filed pursuant to this Rule shall be held in closed session unless the Applicant requests a public Hearing.

(d) Within five (5) calendar days after the Board action on the Application, the CEO shall notify the person filing the Application and the Applicant on whose behalf disability retirement benefits are claimed of the Board action. Both the person filing the Application and the Applicant shall have the right to request a Hearing as provided in Rule 11.

**RULE 8. DISABILITY RETIREMENT CONSULTATION**

Applicant is required to report at the time and place specified by SBCERA for an interview, in person, by telephone, or video conferencing, to review the Application. The Applicant may waive, in writing, this requirement.

**RULE 9. STAFF RECOMMENDATION**

After receipt and review of all requested documents, the CEO shall make a written staff recommendation to the Board. A copy of the recommendation shall be mailed to the Applicant not less than five (5) calendar days prior to the date of Hearing.

If the Applicant or the Applicant's attorney does not appear at the initial Hearing in reliance on the recommendation and the recommendation is not followed by the Board, the

Applicant may have the Application reconsidered by the Board at its next regular meeting by requesting such reconsideration in writing within five (5) calendar days of the date of mailing of notice of the original decision.

**RULE 10. BOARD ADMINISTRATIVE ACTION**

(a) The Board shall make the following four determinations, based on the evidence presented.

(1) Determination of whether the Applicant is Permanently Incapacitated for the Performance of the Applicant's usual Duties, and, if so, the Claimed Injury or Disease that gives rise to the Permanent Incapacity. If Permanent Incapacity is not found, the Application shall be denied.

(2) Determination of whether the incapacity is a result of Claimed Injury or Disease arising out of and in the course of the Applicant's employment for the Participating Employer.

(3) Determination of whether the Disability is such that the Applicant is incapable of Gainful Employment. This determination shall be made only for "General" members.

(4) Determination of the Effective Date of disability retirement.

(b) Time Requirement for Presentation to the Board. The Applicant shall have the opportunity to be heard by the Board at the initial Hearing to present his/her case including any evidence already considered by the Independent Medical Examiner, if applicable, and the Medical Advisor.

Under this Rule, the Applicant shall have not more than three (3) minutes to present and provide comment to the Board. The time requirement does not include any response to the Board during the Board's questioning of the Applicant. The Board Chair has the

discretion to increase the time requirement beyond the three (3) minutes; however, under no circumstances shall the time requirement exceed ten (10) minutes.

(c) An appeal for a request for Administrative Review must be made not later than the thirtieth (30th) day following the initial decision of the Board. An initial decision of the Board shall be final on the thirty-first (31st) day after it is made, except when the person filing on behalf of Applicant or Applicant requests Administrative Review, whether expedited review or Formal Hearing before the initial Hearing decision becomes final. If the person filing on behalf of Applicant or Applicant makes a timely request for Administrative Review the initial decision shall never become final and shall instead be void and of no force or effect unless the Administrative Review is dismissed pursuant to Rule 33 or due to the person filing on behalf of Applicant or Applicant's withdrawal from the Administrative Review process.

(d) Within three (3) calendar days after the initial Board action on the Application, the CEO shall notify the Applicant at the address shown in the Application of the Board action, and, if the Board denies in whole or part any of the benefits sought in the Application, the notice shall advise the Applicant of his/her right to request an appeal as provided in these Rules.

(e) Upon receipt of a request for Administrative Review, staff shall either recommend granting the benefit or schedule an Administration Review.

## **RULE 10A ADMINISTRATIVE REVIEW OF INITIAL HEARINGS**

### **(a) Introduction.**

The person filing on behalf of Applicant or the Applicant may seek administrative review, as defined in Rule 1(a), of disability retirement and supplemental disability

retirement decisions made by the Board at an initial Hearing by filing a request for Administrative Review with the Board not later than the thirtieth (30th) day following the initial decision of the Board. Such request must be in writing and contain a statement indicating the retirement benefit(s) the person filing on behalf of Applicant or the Applicant is seeking to obtain through the Administrative Review process. Notice of the decision the Board made at Hearing, together with notice of the Applicant's right to seek Administrative Review, shall be addressed to the Applicant's last known address and placed in the U.S. mail, postage prepaid, not later than five (5) working days following the decision of the Board. If the Applicant is represented by an attorney, a copy of the notice shall be sent to the office of the attorney.

**(b) Types of Administrative Review**

(1) Expedited Administrative Review (Rule 11A)

An Applicant may request an "Expedited Administrative Review" as described in Rule 11A in lieu of the Formal Hearing processes described in these Rules. An election in writing by an Applicant to apply for the "Expedited Administrative Review" is an irrevocable waiver of the Applicant's right to the Formal Hearing process described in Rule 11. The goal of this program is to complete the Administrative Review process in less than six months. Whether or not to choose the "Expedited Administrative Review" is a decision of the Applicant. It may be appropriate in cases where the Applicant wants to avoid the lengthy Formal Hearing process described in Rule 11, the legal issues are not complicated, a fair and just determination by an independent Hearing Officer can be reached through a careful review of records and documents, and there is no need for the

confrontational process of cross-examination of live witnesses.

(2) Formal Hearing (Rule 11)

A Formal Hearing is a complete Hearing, which includes presentation of testimony, evidence, and arguments. A Hearing Officer is appointed, as prescribed in Rule 11, to consider the relevant evidence to make a recommendation to the Board regarding the person filing on behalf of Applicant or Applicant's benefit request.

(3) Referred Benefit Appeal (Benefit Policy No. 025)

The rules for Administrative Review of Initial Hearings located in Rules 10A and following shall also be applicable to matters in which the Board of Retirement refers an Applicant benefit determination to an administrative Hearing pursuant to SBCERA Benefits Policy 025 – Requests and Appeals for Pension Benefits. Benefit determinations shall include, but not be limited to, final compensation calculations, inclusion of certain pay items in final compensation, service credit calculations, service purchase eligibility, survivor benefit eligibility, and retirement tier placement.

**RULE 11. FORMAL HEARINGS**

When requested by an Applicant, Formal Hearings shall be scheduled and conducted in the following manner:

(a) **Request by Applicant.** An Applicant may seek Administrative Review of disability retirement and supplemental disability retirement decisions made by the Board at an initial Hearing by filing a request for Administrative Review with the Board not later than the thirtieth (30th) day following the decision of the Board. Such request must be in writing

and contain a statement indicating the retirement benefit(s) which the person filing on behalf of Applicant or the Applicant is seeking to obtain through the Administrative Review process. Notice of the decision of the Board made at an initial Hearing, together with notice of the Applicant's right to seek Administrative Review, shall be addressed to the Applicant's last known address and placed in the U.S. mail, postage prepaid, not later than five (5) calendar days following the decision of the Board.

**(b) Selection of Hearing Officer.** The Board will designate a panel of Hearing Officers at the beginning of each calendar year. New cases are assigned to the Hearing Officers on a rotational basis. When a timely request for a Hearing is filed by an Applicant and the case is ready for Formal Hearing as determined by SBCERA's Counsel, written notice of the Hearing Officer assignment, from the predetermined panel, shall be sent by the Board, to SBCERA's Counsel and to the Applicant's attorney, or the Applicant if not represented by counsel. The Applicant and SBCERA's Counsel shall have ten (10) calendar days from the date of mailing of the notice of the Hearing Officer assignment to exercise, in writing, a peremptory challenge. If either party exercises its challenge, the Hearing Officer shall be placed at the back of the rotation and the Hearing Officer whose turn is next shall be assigned the case. The other party will then have ten (10) calendar days from the date of mailing of the notice of the new assignment to exercise, in writing, a peremptory challenge. Only one peremptory challenge may be exercised by a party. When the Hearing Officer selection is finally made the Hearing Officer will be notified of his/her selection. The Hearing Officer will then be placed in the back of the queue.

This section does not apply to cases that are returned by a Hearing Officer to the Board for failure to complete the record as described below in subparagraph (c). Selection of Hearing Officers in the latter situation will be made at the discretion of the Board.

(c) **Setting of Hearing Date.** The Hearing Officer has 180 calendar days from the date of notification of selection as Hearing Officer to hold and complete the Formal Hearing. This means that the Hearing Officer has 180 days to receive all of the evidence, both testimonial and documentary, and close the record. The Hearing Officer's jurisdiction to hold a Hearing and complete the record expires 180 days after notification of selection as Hearing Officer, and the case will be returned to the Board for reassignment to another Hearing Officer or Hearing by the Board itself. The Hearing Officer will coordinate the Hearing date with all parties and set the dates when the prehearing statements are due, consistent with Rules 12 and 13, and set the cut-off date for requests to Subpoena witnesses, consistent with Rule 14.

(d) **Continuances.** Once a Hearing date has been set by the Hearing Officer, any request for a continuance must be in writing to the Hearing Officer. All written requests shall be sent to the Board, which will forward them on to the Hearing Officer and to opposing counsel, or, if no opposing counsel, then to the opposing party. Even if a continuance is granted, the Hearing Officer's jurisdiction to hear and complete the case will not extend past 180 days from the notification of selection as Hearing Officer. A ruling on a request for continuance by a Hearing Officer is not subject to further review or appeal.

(e) **Reporter.** The proceedings of all Hearings shall be reported by a stenographic reporter who is duly licensed as a court reporter by the Court Reporters Board of California. SBCERA will bear the cost of the court reporter's initial fees to report the proceedings. The stenographic report of the proceedings shall be transcribed and SBCERA shall bear the cost of the transcription.

(f) **Interpreters.** If an Applicant or witness does not speak or understand English sufficiently to participate in the proceedings or provide testimony, an interpreter

certified to provide interpretation services in administrative Hearings shall be provided to that Applicant or witness at SBCERA's expense. An Applicant or witness who requires interpreting services shall provide SBCERA with reasonable notice of the need for an interpreter and the language the Applicant or witness will use during the proceedings so that SBCERA has sufficient time to locate and contract with an interpreter. All interpreters in SBCERA Hearings shall be certified to provide interpreting services in administrative Hearings pursuant to Government Code section 11435.30. The interpreter shall not have had any involvement in the issues of the case prior to the Hearing and may not be an employee, family member, friend, or acquaintance of the Applicant, member, or witness.

**(g) Representation by Counsel.** An Applicant shall be entitled to be represented by legal counsel at any Hearing. In order to appear in an SBCERA Hearing, counsel must be an attorney licensed by and in good standing with the California State Bar. Before an attorney appears on behalf of an Applicant, a written authorization from the Applicant shall be filed with the CEO. After an attorney appears on behalf of an Applicant pursuant to the written authorization of representation, all notices and evidence shall thereafter be served upon such counsel. Substitution or dismissal of attorney shall be made in the manner provided in sections 284, 285 and 286 of the Code of Civil Procedure.

**(h) De Novo Hearings.** Hearings shall be conducted de novo before a Hearing Officer appointed by the Board. The Board's initial decision shall have no force or effect in the Hearing.

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## **RULE 11A. EXPEDITED ADMINISTRATIVE REVIEW**

(a) **Request by Applicant.** An Applicant may seek an "Expedited Administrative Review" of the disability and supplemental disability retirement decisions made by the Board at an initial Hearing by filing a "Request for an Expedited Administrative Review and Waiver of Formal Hearing" with the Board not later than the thirtieth (30th) day from the date of the mailing of the notice of the decision of the Board. Such request and waiver must be in writing and contain a statement indicating the retirement benefit(s) which person filing on behalf of Applicant or the Applicant is seeking to obtain through the "Expedited Administrative Review" process.

(b) **Selection of Hearing Officer.** The Board will designate a panel of Hearing Officers at the beginning of each calendar year. New cases are assigned to Hearing Officers on a rotating basis. When an Applicant elects the "Expedited Administrative Review" under this Rule and waives the longer administrative review process under Rule 11, written notice of the Hearing Officer assignment from the predetermined panel shall be sent by SBCERA to the Applicant. Under this expedited Hearing process, the Applicant does not have a right to file a peremptory challenge of the assigned Hearing Officer. The Hearing Officer has 120 calendar days from the date of notification of selection as hearing officer to complete the Expedited Administrative Review proceeding.

(c) **Submission of Records.** Concurrent with written notice of the Hearing Officer assignment, the Applicant will be given written notice that all records and documents must be submitted to the Hearing Officer for evaluation no later than thirty (30) days from the date of mailing of the notice of the Hearing Officer assignment. SBCERA will mail a copy of records and documents in SBCERA's possession to the Applicant and to the Hearing Officer no later than fifteen (15) days after the Hearing

Officer selection has been made. The Applicant will mail any additional records or documents so as to reach SBCERA no later than thirty (30) days after the Hearing Officer assignment has been made. The Applicant will not send additional records and documents directly to the Hearing Officer. SBCERA will forward the Applicant's additional records or documents on to the Hearing Officer. Should applicant submit additional records or documents to the Board beyond the 30 day assignment of the Hearing Officer, the Applicant shall be required to provide to the Board a statement showing unusually good cause as to the reason for the delay of submission of the documents. In this instance, Applicant's statement regarding unusually good cause will be provided to the Hearing Officer for consideration. The Hearing Officer shall issue a Minute Order within five (5) days of receipt of the request and render a decision determining if Applicant met the threshold of good cause and, if applicable, provide a deadline as to the submission of such additional evidence. Absent a showing of unusually good cause, any records or documents received by SBCERA more than thirty (30) days after the Hearing Officer assignment will not be forwarded to the Hearing Officer and the Applicant waives any consideration of this evidence by the Hearing Officer. For purposes of this Rule, "unusually good cause" means that the documents did not exist prior to deadline for submission or the Applicant, through no fault of his or her own, could not obtain the documents prior to the deadline for submission despite evidence of repeated good faith attempts to obtain the documents.

**(d) Evidence Considered by the Hearing Officer.** The Applicant and SBCERA may submit, pursuant to sub-section (c) above, any relevant evidence to the Hearing Officer 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 such evidence over objection in civil actions. Relevant evidence includes, but is not limited to: medical records, medical reports prepared by treating and examining physicians, relevant affidavits from witnesses, any documents that were before the Board when it made its initial decision, and relevant employee personnel records. No live testimony will be taken by the Hearing Officer in the "Expedited Administrative Review." The Applicant may and is encouraged to submit his or her own written affidavit or declaration. Neither the Applicant nor SBCERA's Counsel will appear before the Hearing Officer during the "Expedited Administrative Review". While an Applicant may obtain help from an attorney in order to prepare an affidavit or declaration, the Hearing Officer will not consider any legal briefs, written arguments or summaries of evidence prepared by an attorney representing the Applicant or SBCERA.

(e) **Hearing Officer's Findings and Recommendations.** The Hearing Officer will address only those issues raised by the Applicant. The Hearing Officer will submit his or her findings and recommendations to the Board no later than 60 days after the date of the Hearing Officer assignment. In the event the Hearing Officer requests an extension to submit his or her recommendation, CEO or designee may approve such extension, but the extension must not be longer than 30 days. The Board will serve the findings and recommendations on the Applicant. The Applicant has ten (10) calendar days, from the date of mailing of the proposed findings and recommendations to submit written objections to the Board.

**(f) Action by the Board.** Upon receipt of the proposed findings of fact and recommended decision, the Board may:

(1) Approve and adopt the proposed findings and the recommendations of the Hearing Officer; or

(2) Require a summary of all the evidence, plus all other evidence received by the Hearing Officer. Upon receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence; or

(3) Refer the matter back with or without instructions to the Hearing Officer 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.

**RULE 12. FORMAL HEARING - BOARD OF RETIREMENT'S PREHEARING STATEMENT**

The SBCERA's Counsel shall serve upon the Hearing Officer and the Applicant, or Applicant's counsel, if appropriate, a prehearing statement no later than sixty (60) calendar days before the date of the Hearing (postmarked). The prehearing statement shall contain the following:

(a) A statement of the contested issues;

(b) A list and copies of all documentary evidence that SBCERA will offer into evidence;

(c) The names, business addresses and telephone numbers of any lay witnesses whose testimony SBCERA intends to present at the Hearing, and nature of the expected testimony of each witness;

(d) The names of any medical witnesses SBCERA's Counsel intends to call for oral testimony at a Hearing or Hearings and a synopsis of the expected testimony pursuant to Rule 18;

(e) The names of any medical witnesses SBCERA's Counsel intends to depose, consistent with Rule 18.

If Applicant's prehearing statement, as described below in Rule 13A, raises issues or identifies witnesses not in SBCERA's Counsel's prehearing statement, SBCERA's Counsel shall then serve upon the Hearing Officer and the Applicant a supplemental prehearing statement no later than thirty (30) days before the Hearing (postmarked)) in the format prescribed above.

A request for an extension of time to submit a prehearing statement or a supplemental prehearing statement should only be granted upon a showing of good cause and should be granted for no more than five (5) calendar days. A request for an extension of time should be served on the Hearing Officer and opposing counsel, or, if no counsel, then served on the opposing party.

**RULE 13A. FORMAL HEARING - APPLICANT'S PREHEARING STATEMENT**

The Applicant shall serve upon the Hearing Officer and SBCERA's Counsel a prehearing statement no later than forty-five (45) days before the Hearing (postmarked).

The prehearing statement shall contain the following:

- (a) A statement of the contested issues;
- (b) A list and copies of all documentary evidence that Applicant will offer into evidence;
- (c) The names, business addresses and telephone numbers of any lay witnesses whose testimony the Applicant intends to present at the Hearing, and the nature of expected

testimony of each witness;

(d) The names of any medical witnesses the Applicant intends to call for oral testimony at a Hearing or Hearings and a synopsis of the expected testimony;

(e) The names of any medical witnesses the Applicant intends to depose, consistent with Rule 18.

A request for an extension of time to submit a prehearing statement should only be granted upon a showing of good cause and should be granted for no more than five (5) calendar days. A request for an extension of time shall be served on the Hearing Officer and SBCERA's counsel.

#### **RULE 13B. FORMAL HEARING - ALLEGATION OF NEW INJURY OR DISEASE**

If the Applicant alleges in the prehearing statement or at any time during the administrative appeal process that the incapacity is the result of an injury or disease not listed on the Application submitted to the Board, or if listed, upon which the Applicant submitted no medical evidence for the Board's review when it considered the Application, the administrative appeal shall be suspended, the allegation shall be treated as a preliminary amendment to the Application subject to the filing of an amended Application, which meets the complete and timely requirements set forth herein. The Hearing Officer's jurisdiction shall terminate upon suspension of the administrative appeal. If the Board does not grant the disability retirement based on the new condition or evidence, the matter will be referred back to a Formal Hearing immediately with a new Hearing Officer assigned.

The Applicant shall file an amendment to the initial Application, including a Physician's Report within sixty (60) days of the notice of suspension of the administrative appeal. If no amendment is filed within the time prescribed, SBCERA shall notify the

Applicant, within ten (10) days after the sixty (60) day period described above that the initial Application is being returned to the Formal Hearing process and a new Hearing Officer shall be assigned consistent with Rule 11.

In all other respects an Application returned to the Board shall be processed in accordance with these Rules, as if it were a new Application consistent with the scheduling and prehearing statement requirements of Rules 11, 12, 13 and 14.

**RULE 14. FORMAL HEARING - SUBPOENA CUT-OFF DATE**

Any party may request that SBCERA issue a Subpoena for a witness, but such requests must be made in writing, consistent with Rule 24. Written requests for Subpoenas must be received by SBCERA no less than thirty (30) calendar days before the date of the Hearing. No Subpoena will be issued upon a request received after this date. All Subpoenas shall be served upon the prospective witness no later than fifteen (15) calendar days before the Hearing. The party subpoenaing the witness is responsible for the cost of service and all witness fees. Any disputes regarding witness fees shall be adjudicated in superior court and not in the SBCERA administrative review venue.

**RULE 15. FORMAL HEARING - TIME AND PLACE OF HEARINGS**

All Hearings shall be held in-person at SBCERA offices located at 348 W. Hospitality Lane, City of San Bernardino, State of California, unless SBCERA has determined that a video conference Hearing should be held in lieu of an in-person meeting or as agreed to by the parties and the Hearing Officer that the location should be changed.

Unless the parties and the Hearing Officer agree otherwise, a Hearing shall be deemed set for one full day (i.e., a morning session and an afternoon session). Morning

sessions shall begin at 9:30 A.M. and end at 12:00 noon, and afternoon sessions shall begin at 1:30 P.M. and end at 5:00 P.M. Hearings that are not concluded within either the full day (i.e. a morning and an afternoon) session, or whatever other time period to which there has been a stipulation, shall be continued to the next agreeable hearing date. The continued date must be within the 180-day jurisdiction of the Hearing Officer. When the hearing date and time have been selected, SBCERA staff shall arrange for a court reporter and use of a hearing room (either in-person or video conference hearing) and shall notify the parties and the Hearing Officer in writing of the time and place of the Hearing. In the instance the Hearing is held via video conference, SBCERA staff shall arrange the video conference set-up and provide the parties with the log-in information to participate. In the event it is impracticable to continue the date within the 180-day jurisdiction of the Hearing Officer, then a new Hearing Officer shall be assigned and all issues shall be heard anew.

**RULE 16. INITIAL HEARING OR FORMAL HEARING – REPRESENTATION**

Under these Rules, there is no requirement for an Applicant to be represented by an attorney of his or her selection. An Applicant has the right to self-represent herself or himself in an initial Hearing or Formal Hearing. However, under no circumstances shall a person, who is not the Applicant nor an attorney, represent the Applicant at the initial Hearing or Formal Hearing.

Attorney, for purposes of representing the Applicant in an initial Hearing or Formal Hearing, shall be an active member of the California State Bar, in good standing.

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**RULE 17. FORMAL HEARING - WRITTEN MEDICAL REPORTS AS EVIDENCE**

(a) **Statement of Policy:** It is policy of the Board that production of medical evidence shall be in the form of written medical reports attached to the parties' prehearing statements. A written medical report bearing the physical or electronic signature of the medical witness shall be admissible in evidence as the author's direct testimony and shall 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. In addition, such medical reports, when offered as expert opinions, shall not be inadmissible on the basis that the author of the medical report was called as a percipient witness and not as an expert witness and did not attend the Hearing.

(b) **"Medical Witness" Defined:** A medical witness is a person who by profession is a physician or surgeon, holding an M.D. or D.O. degree, psychologist, optometrist, dentist, or podiatrist., licensed by the State of California or within the jurisdiction where the person practices.

(c) **Late Submission of Medical Reports:** Medical reports submitted subsequent to the filing of the party's prehearing statement but still within the 180 day jurisdiction shall be admitted and considered by the Hearing Officer only upon a showing of good cause. The party requesting admission of such a medical report shall address the request to the Hearing Officer assigned to the case and send a copy of the request to opposing counsel, or, if no counsel, then to the opposing party. The request shall state the reason the medical report was not timely produced. The Hearing Officer shall have the power to rule on such a request.

"Good Cause" may be established by a medical witness comment in the late

submitted report or in a subsequent written report or in testimony produced at a Hearing.

If a late submitted medical report is admitted into evidence, the other party shall have the right to a continuance to engage in further discovery, obtain rebuttal medical evidence, and/or cross-examine the medical witness. If a continuance is beyond the 180-day jurisdiction of the Hearing Officer, then a new Hearing Officer shall be assigned and all issues will be heard anew.

**RULE 18. FORMAL HEARING - ORAL TESTIMONY OF MEDICAL WITNESSES**

(a) **Hearings:** Oral testimony of a medical witness on direct or cross-examination, for purpose of the Formal Hearing, shall be taken at a Hearing set at a reasonable time as requested by the medical witness in the office of the medical witness, or such other reasonable place requested by the medical witness. If the parties and the Hearing Officer so agree, the Hearing Officer need not attend such a Hearing and the Hearing Officer shall consider the transcript of the testimony of a medical witness as evidence in reaching the recommended decision. Hearings for oral testimony of medical witnesses for any purpose shall take place before the first day of the Formal Hearing.

(b) **Depositions:** Prior to the scheduled Formal Hearing, the Deposition of a medical witness may be taken before the Hearing Officer. The Deposition shall be scheduled at a reasonable time as requested by the medical witness. The Deposition shall take place in the office of the medical witness, or such other reasonable place as requested by the medical witness. If the parties and the Hearing Officer so agree, the Hearing Officer need not be present at such a Deposition. Depositions of medical witnesses for any purpose shall be taken before the first day of the Formal Hearing.

(c) **Subpoenas and Fees:** Issuance of a Subpoena for a medical witness's attendance at a Hearing or Deposition shall be contingent on the party accepting the

obligation to pay the medical witness.

(1) The party requesting oral testimony of a treating physician shall advance to the treating physician such fees and mileage as Government Code Section 68093 prescribes for ordinary, non-expert witnesses in superior court. If the party requesting oral testimony of a treating physician intends to question the physician as to the physician's expert opinion, the party requesting the oral testimony shall advance to the medical witness an expert witness fee.

(2) The party requesting the oral testimony of a medical witness that is not the Applicant's treating physician shall in all cases arrange in advance to pay the medical witness an expert witness fee. The witness shall be entitled to claim an expert witness fee on the same conditions that such a witness would be entitled to claim under Government Code Section 68092.5 if subpoenaed to testify in a civil action or proceeding.

(3) When Payment of an Expert Witness Fee is Required. The party requesting the oral testimony shall contact the office of the medical witness and determine the witness's reasonable and customary hourly fee and shall advise the office of the medical witness of the anticipated length of the Deposition or Hearing as to hours in duration. An agreement on the medical witness's fee, based on the witness's reasonable customary rate and anticipated length of the testimony, shall be entered into with the medical witness at least ten (10) days in advance of the Deposition or Hearing. If a balance is due following the testimony, the party requesting the oral testimony shall pay the balance upon receipt of an itemized statement.

(4) Failure to Serve Subpoena. Failure to serve a Subpoena and/or pay

the prescribed witness fee in advance may be treated by the Hearing Officer and Board as a waiver of the right to question such witness. Failure to enter into an advance agreement to pay to an expert witness fee will be deemed a waiver of the right to question the expert witness or to require the expert witness's appearance at the Deposition or Hearing and any Subpoena which may have been issued to compel the expert witness's attendance shall be canceled and shall be of no further force or effect. Service of the Subpoena and payment of the fee may be made by mail if the witness so agrees.

(5) Disputes. Any fee disputes between a witness and the requesting party is independent from any proceeding between the Applicant and SBCERA. Those fee disputes shall be resolved by the requesting party and the witness in the California courts, not in this forum. The Hearing Officer has no authority or jurisdiction to hear evidence about, or decide any such dispute.

**RULE 19. FORMAL HEARING - TESTIMONY OF WITNESSES WITHOUT NOTICE**

Upon written request made to the Hearing Officer with a copy sent to opposing counsel, or, if no counsel, then to the opposing party, a witness not listed in the prehearing statement may be called to testify provided the party making the request presents the nature of the expected testimony and a showing that this witness will testify to matters the party did not know about or could not have reasonably known about at the time the prehearing statement was due.

The Hearing Officer shall have the power to rule on the request. If the witness is allowed to testify, the adverse party shall have the right to a continuance to obtain rebuttal evidence and/or to cross examine the witness. The party originally calling the witness to testify shall bear the responsibility of insuring the witness's attendance at a further Hearing

set for the witness's cross-examination. If a continuance is granted, the Hearing Officer's jurisdiction to hear and complete the case will not extend past 180 days from the notification of selection as Hearing Officer. In the event it is impracticable to continue the date within the 180-day jurisdiction of the Hearing Officer, a new Hearing Officer shall be assigned and all issues shall be heard anew.

**RULE 20. FORMAL HEARING - DEPOSITIONS OF LAY WITNESSES**

Any party to the proceeding may cause the Depositions of lay witnesses to be taken in the manner prescribed by law for Depositions in civil actions in the superior courts of this state. Attendance of lay witnesses and the production of records may be required, and appropriate subpoenas will be issued by the Board. The parties shall bear their own costs for such Depositions. Depositions of lay witnesses must be scheduled and taken before the Formal Hearing. Depositions of medical witnesses shall be governed by Rule 18.

**RULE 21. FORMAL HEARING - RESOLUTION OF DISPUTES IN REGARD TO DISCOVERY AND HEARING PROCEDURE**

Disputes in regard to Depositions and other discovery and Hearing procedures, except witness fee disputes, shall be resolved by the Hearing Officer. If not made at a Hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the Deposition transcript if appropriate, a memorandum of points and authorities, and a proposed resolution. A request for resolution shall be served on the witness and other party. The other party and the witness involved shall have ten (10) calendar days from the date of the mailing of such a request in which to respond. The response may be accompanied by declarations, a copy of the Deposition transcript if appropriate, a memorandum of points and authorities, and a proposed resolution.

The Hearing Officer shall notify the parties and the witness involved of the Hearing Officer's resolution of the dispute within twenty (20) calendar days from the date of mailing of the request for resolution of the dispute.

**RULE 22. FORMAL HEARING - ENFORCEMENT OF RIGHT OF DISCOVERY AND COMPELLING TESTIMONY**

If a deponent or witness refuses to appear at a Deposition or Hearing, refuses to answer questions or otherwise obstructs discovery contrary to the resolution made by the Hearing Officer, upon the request of either party supported by a declaration as to the facts with proof of service on the adverse parties and the deponent or witness, and upon the Hearing Officer's determination that good cause has been shown therefore, the Hearing Officer shall refer the matter to the Board with a recommendation that the deponent or witness be held in contempt and that a report of the fact be made by the chairman to a judge of the superior court under the provisions of California Government Code sections 31535 and 25170 - 25175. The Hearing Officer shall serve his/her recommendation on the parties and the deponent or witness. The deponent or witness shall be personally served with a subpoena to attend the Hearing before the Board in regard to contempt, a copy of the request of the moving party, the Hearing Officer's recommendation, and a notice that the Board will consider the Hearing Officer's recommendation following the deponent or witness being given an opportunity to be heard.

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**RULE 23. FORMAL HEARING - PREHEARING CONFERENCES - UNREPRESENTED APPLICANTS**

Where the Applicant is not represented by counsel, SBCERA's Counsel, the Applicant and the Hearing Officer will have a prehearing conference in person or by telephone for the purpose of conducting a general discussion of the Formal Hearing procedures, and attempting a resolution of any procedural disputes.

**RULE 24. FORMAL HEARING - SUBPOENAS**

The Chair of the Board and the CEO are hereby authorized to issue and sign Subpoenas for attendance at Hearings on disability retirement Applications, upon request of the Applicant, the Applicant's attorney, or the person filing on behalf of the Applicant pursuant to Rule 7, and SBCERA's Counsel.

**RULE 25. FURTHER MEDICAL AND LAY EVIDENCE ON BEHALF OF RESPONDENT**

At the request of SBCERA's Counsel and with concurrence of the CEO, the Board staff may obtain Independent Medical Examinations and/or investigations. The fees for these medical examinations and/or investigations shall be paid by the Board.

The Applicant shall submit to examinations by physicians appointed by the Board's staff. Such examinations shall be scheduled with due consideration to the Applicant's convenience and ability to attend.

**RULE 26. FORMAL HEARING - EVIDENCE**

(a) An Applicant has the burden of going forward and the burden of proving, by a preponderance of the evidence, that the Applicant is entitled to the requested benefit.

(b) Oral evidence shall be taken only on oath or affirmation.

(c) Each party shall have these rights: (1) to call and examine witnesses; to introduce exhibits, to include reports and Depositions of medical witnesses; (2) to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; (3) to impeach any witness regardless of which party first called the witness to testify; and (4) to rebut adverse evidence. If the Applicant does not testify, the Applicant may be called and examined as if under cross-examination. Refusal of any Applicant to submit to examination for the purpose of answering relevant questions shall be grounds for dismissing the Application with prejudice.

(d) 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 serious 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. Arguments regarding admissibility may be considered by the Hearing Officer when evaluating the weight of any evidence admitted. 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.

(e) Affidavits. A party wishing to introduce an affidavit into evidence shall include as part of the party's prehearing statement a copy of such affidavit. 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 timely Subpoena is requested and served as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(f) Official Notice. In reaching a decision, the Hearing Officer shall take official notice of those matters which must be judicially noticed pursuant to section 451 of the California Evidence Code, may take official notice of those matters which may be judicially noticed pursuant to section 452 of the California Evidence Code, and shall take official notice of any matter specified in said section 452 if the provisions of the California Evidence Code section 453 are complied with by a party.

**RULE 27. FORMAL HEARING - ORDER OF BUSINESS FOR HEARINGS**

Unless the Hearing Officer rules, all Hearings shall be recorded and/or transcribed and shall proceed as follows:

(a) The Hearing Officer shall call the case and ask for appearances by or for all parties. After all of the appearances are made, the parties may make opening statements, orally or in writing, except SBCERA may delay its opening statement until after the Applicant's presentation of evidence.

(b) If the parties are ready to proceed, the Hearing Officer will describe the documentary file before the Hearing and ensure that all parties have identical document sets.

(c) The Applicant's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and the SBCERA's Counsel have the right to ask questions.

(d) SBCERA Counsel's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and the Applicant have the right to ask questions.

(e) Rebuttal evidence may then be presented in the same order.

(f) The closing briefs shall be submitted according to the following schedule, the

timeline will be calculated from the due date of the Reporter's Transcript and will commence thereafter as follows:

(1) Applicant's Closing Brief – Due 30 days after due date of Reporter's Transcript (postmarked)

(2) SBCERA's Counsel's Closing Brief – due 30 days after due date of Applicant's Closing Brief (postmarked)

(3) Applicant's Reply Brief – due 15 days after due date of SBCERA's Counsel's Closing Brief (postmarked)

(g) Closing briefs should be typed or prepared in a word processing program. Briefs should double spaced and written in at least 12 point of a standard font type. The Applicant's Closing Brief and SBCERA's Closing Brief may not exceed 20 pages. The Applicant's reply brief may not exceed 10 pages. The Hearing Officer may elect not to consider material that is presented in briefs after the page limit has been reached.

**RULE 28. FORMAL HEARING - SERVICE OF PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION**

At the conclusion of the Hearing, proposed findings of fact and recommendations of the Hearing Officer shall be sent to the Board by the Hearing Officer who presided at the Hearing, no later than sixty (60) calendar days after the submission of the summary and closing statements. SBCERA will serve the findings and recommendations on the parties.

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**RULE 29. FORMAL HEARING - OBJECTIONS TO PROPOSED FINDINGS OF FACT AND RECOMMENDED DECISION**

Any party objecting to the proposed findings of fact and recommended decision has ten (10) calendar days from the date of mailing of the proposed finding of fact and recommended decision to submit written objections to SBCERA which will send them to the Hearing Officer and the other party. The opposing party may, within ten (10) days of the date of the objections, submit a reply to the objections to the Hearing Officer with service of the reply on the opposing party. Within thirty (30) calendar days from the date of mailing the reply to the Hearing Officer, or the time for filing objections expires, whichever is earlier, the Hearing Officer shall:

- (a) Adopt the proposed findings and recommended decision originally submitted,
- or
- (b) Make such changes in the proposed findings and recommended decision as the Hearing Officer deems appropriate in light of the evidence, the objections submitted by the unsuccessful party, and any response, or
- (c) Serve notice of the final proposed findings and recommended decision of the Board, together with a summary of the evidence, the pleadings of the parties, and their attachments.

**RULE 30. ACTION BY THE BOARD**

(a) The Hearing Officer's Proposed Findings of Fact and Recommended Decision on an Application for disability retirement benefits are not in support of the requested benefit, the matter shall be heard in closed session providing the following time limits to present to the Board, based on the respective Administrative Review process:

(1) Expedited Administrative Review:

The Applicant shall have four (4) minutes for oral argument. Further argument and discussion shall be at the Board Chair's discretion.

(2) Formal Hearing:

The order and time of oral argument shall be as follows:

(a) Each side shall have four (4) minutes of oral argument.

(b) The party requesting oral argument may reserve one (1) minute for rebuttal.

(c) Further argument and discussion shall be at the Board Chair's discretion.

(b) Upon receipt of the Proposed Findings of Fact and Recommended Decision, the Board shall:

(1) Approve and adopt the proposed findings and the recommendations of the Hearing Officer, or

(2) Require a transcript or summary of all the testimony, plus all other evidence received by the Hearing Officer. Upon the receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence, or

(3) Refer the matter back with or without instructions to the Hearing Officer for further proceedings.

(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.

**RULE 31. BOARD'S DECISION AFTER REVIEW OF THE RECORD**

In any case where the Board makes a decision based upon a transcript or summary of all the testimony, plus all other evidence received by the Hearing Officer, the Board may

approve and adopt proposed findings and recommended decision or, the Board shall direct the prevailing party to prepare proposed findings of fact and conclusions of law consistent with its tentative decision. The proposed findings of fact and conclusions of law shall be served on the unsuccessful party who shall have ten (10) calendar days from the date of mailing of the proposed findings to serve and file written objections thereto. Thereafter, the Board shall consider such written objections, if any, and shall adopt such findings of fact and conclusions of law as it deems appropriate.

**RULE 32. ALTERATION OF TIME REQUIREMENTS**

Nothing in these procedures is to be construed as preventing the parties from stipulating to lesser intervals than those prescribed above. The Hearing Officer may for good cause shown, after giving both parties an opportunity to be heard, shorten or lengthen the times specified above, except that the Hearing Officer may not lengthen the one hundred eighty (180) days to close the record; the sixty (60) days to submit a recommended decision in a Formal Hearing or the thirty (30) days to submit a recommended decision in an Expedited Administrative Review, unless in the instance of the Expedited Administrative Review the Hearing Officer requested an extension to submit the recommendation, and the CEO or designee approved such extension pursuant to the guidelines listed in Rule 11A, section (c) above.

**RULE 33. DISMISSAL FOR LACK OF PROSECUTION**

(a) Failure of the Applicant to submit to medical examinations by a physician or physicians selected by the Board, as prescribed in Rule 4, shall be treated as noncooperation and will result in dismissal of the Application with prejudice.

(b) Failure of a party to raise an issue in the prehearing statement as prescribed

in Rules 12 and 13 shall be treated as a waiver of that issue for further consideration by the Hearing Officer and the Board.

(c) Failure of the Applicant to cooperate in completing the Formal Hearing record, consistent with Rules, including, but not limited to: submitting all testimonial and documentary evidence and closing the record within 180 days of the selection of the Hearing Officer, will result in the case being returned to the Board. If the Board subsequently determines that the Applicant did not cooperate in completing the Formal Hearing record, as described above, the Application will be Dismissed with Prejudice by the Board. This section shall also include dismissal for failure of the Applicant to cooperate in completing the Expedited Review record.

(d) Failure of a party to make a written request to Subpoena a witness no less than thirty (30) calendar days before the Hearing date, consistent with Rule 14, shall be treated as a waiver of the right to compel the attendance of that witness to the Hearing.

(e) Failure of a party to serve a Subpoena on a witness no later than fifteen (15) calendar days before the Hearing and/or to pay the witness fee in advance as prescribed by Government Code section 68093 shall be treated by the Hearing Officer and Board as a waiver of the right to compel the attendance of that witness to the Hearing.

(f) Failure of a party to advance the expert witness fee, consistent with Rule 18, shall be treated by the Hearing Officer and the Board as a waiver of the right to compel the attendance of that expert witness to the Hearing.

(g) Failure of the Applicant, after appeal from the Board's initial decision, to comply with the requirements set forth in these Rules as to time and discovery, shall be treated as non-cooperation. In that event, no Formal Hearing shall be scheduled or conducted and the Application will be returned to the Board. If the Board subsequently

determines that the Applicant did not cooperate in the appeal process, as described above, the Application will be Dismissed with prejudice by the Board.

(h) If testimony of a witness or documentary evidence has not been identified in a prehearing statement, such evidence shall not be allowed into evidence at the Formal Hearing, except as prescribed in Rules 12, 17 or 19.

(i) Failure of the Applicant to submit to an interview, submit requested documentation, as requested by SBCERA staff, as prescribed in Rule 4 above, shall be treated as non-cooperation, if the CEO determines that staff has made reasonable attempts to accommodate the Applicant, the CEO shall dismiss the Application with prejudice.

(j) Incomplete Application and Amended Application

(1) If the CEO determines that an Applicant has offered an incomplete Application or amended Application by failing to supply the information as requested in Rule 5 within 90 days of notice of the incomplete Application or amended Application, the CEO shall deem the Application or amended Application incomplete and dismiss the Application with prejudice. Staff shall send notice to the Applicant.

(2) If Applicant amends the Application pursuant to the Formal Hearing Rule 13B, and thereafter fails to provide a Physician's Report to support the additional claim(s) within 60 days, such ability to file an amended Application shall be waived by the Applicant and the Formal Hearing will proceed accordingly, subject to partial dismissal pursuant to this Rule.

(k) Failure to complete and submit all forms as prescribed in Rule 2 shall be treated as non-cooperation and will result in dismissal of the Application with prejudice. However, in the event the failure to complete and submit a physician's report is due to the member's inability to obtain one, then the member may submit an appeal request pursuant

to the requirements outlined in Benefits Policy No. 025.

(l) Failure to provide the names and locations of all physicians that have treated the Applicant for any medical reason, as prescribed in Rule 4(c), shall be treated as non-cooperation and will result in the Application being Dismissed with Prejudice by the CEO, if the CEO determines that the failure materially impairs SBCERA's ability to fairly and timely make a decision on the Application.

(m) If, as a result of the Applicant's failure to comply with the procedures specified above, the matter is not heard within two (2) years after a request for Hearing is granted by the Board, the case shall be returned to the Board for appropriate action which may include dismissal of those claims that were subject to the Hearing.

(n) Any failure, which in the judgment of the CEO, materially impairs SBCERA's ability to fairly and timely make a decision on the Application shall render the Application subject to dismissal by the CEO.

(o) Any action to dismiss an Application taken by the CEO under this Rule shall be subject to an administrative appeal to the Board. The CEO shall inform the Applicant of such action and provide written notice of such action and of Applicant's right to appeal. If the Applicant files such an appeal within 30 days of the notice, the appeal shall be heard by the Board at the next available regular Board meeting. If the Applicant fails to file a timely appeal, then the CEO's action shall be final.

(p) Any Application Dismissed with Prejudice by the Board pursuant to this Rule is a final administrative decision and subject to judicial review as proscribed in Rule 35.

(q) In any case where an Application is dismissed by CEO action and the deadline to appeal such action to the Board expires without an appeal being filed, the CEO shall inform the Board of the dismissal at the next regularly scheduled Board meeting at which

the item may be presented.

(r) In any event, Applicant's failure to appear at the Formal Hearing shall result in the Application and appeal Dismissed with Prejudice, unless the assigned Hearing Officer finds good cause to continue the Formal Hearing.

#### **RULE 34. SERVICE OF DOCUMENTS**

Unless otherwise provided, service of documents, except for a Petition of Writ or any other Court filings, provided for in these Rules may be made by mail, electronic service, or by personal service. The time requirements of California Code of Civil Procedure section 1013 shall govern all service by mail.

#### **RULE 35. JUDICIAL REVIEW**

Judicial review of final retirement decisions shall be subject to Code of Civil Procedure Section 1094.6. Following each final decision, the CEO shall send the Applicant or the Applicant's attorney written notice as follows:

"As required by Code of Civil Procedure 1094.6 (f), you are hereby notified that the time with which an action to seek judicial review of Board of Retirement decisions is governed by the provisions of Section 1094.6 of the Code of Civil Procedure of the State of California."

#### **RULE 36. ACCESS TO BOARD RECORDS**

(a) Prior to the Board's administrative action in Rule 10, the Applicant shall be given, at no cost to the Applicant, a copy of all the material, including administrative reports and medical records, which is presented by the CEO to the Board for its consideration of the Application.

(b) Pursuant to Rule 12 and Rule 11A, the Applicant shall be given, at no cost to the Applicant, a copy of all the Board's exhibits which are presented to the Hearing Officer.

(c) Prior to the Board's final decision on the Application under Rule 11A, Rule 30, or Rule 31, the Applicant shall be given, at no cost to the Applicant, a copy of all documents which are presented by the CEO to the Board for its final consideration of the Application.

(d) Due to the sensitive nature of psychiatric or psychological records, these records shall only be given to Applicant's attorney or treating physician, unless the physician authoring the record provides explicit written authorization to release the record directly to Applicant. If Applicant is in pro per, that is not represented by counsel, the CEO will send copies of the Applicant's psychiatric or psychological records to Applicant's treating physician. At no such time during this proceeding will SBCERA release the psychiatric or psychological records directly to Applicant.

(e) In addition to (a)-(c) above, the Applicant may, in writing, at any time request a copy of all the material in his or her retirement file at SBCERA. The Applicant will be charged for copying the file. All copying charges must be paid before the records are released. In the alternative, the Applicant may hire a copy service to make copies of part or all of his or her file.

### **RULE 37. AMENDMENT OF PROCEDURES**

The Procedures for SBCERA Disability Retirement Applications and Formal Hearings may be amended from time to time by the SBCERA Board, subject to the approval requirements of the CERL, or other applicable law. Any ruling or action holding any section of these procedures invalid shall not affect the remaining sections.

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