

**ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA**

**REGULAR MEETING
Tuesday, February 21, 2023
9:30 A.M.**

Pursuant to Assembly Bill 361, signed into law on September 16, 2021 as urgency legislation; Governor Newsom’s Proclamation of a State of Emergency on March 4, 2020, which Proclamation is still in effect; and Board of Retirement Resolution 2023-01, this meeting will be conducted by video/teleconference, in compliance with Government Code section 54953 as amended by Assembly Bill 361. In addition, members of the Board and the public are welcome to participate in the meeting via Zoom from the OCERS Boardroom located at 2223 E. Wellington Ave., Santa Ana, CA. However, none of the other locations from which the Board members participate by teleconference will be open to the public.

Members of the public who wish to observe and/or participate in the meeting may do so (1) from the OCERS Boardroom or (2) via the Zoom app or telephone from any location. Members of the public who wish to provide comment during the meeting may do so by “raising your hand” in the Zoom app, or if joining by telephone, by pressing * 9 on your telephone keypad. Members of the public who participate in the meeting from the OCERS Boardroom and who wish to provide comment during the meeting may do so from the podium located in the OCERS Boardroom.

OCERS Zoom Video/Teleconference information	
<p>Join Using Zoom App (Video & Audio)</p> <p>https://ocers.zoom.us/j/87315102686</p> <p>Meeting ID: 873 1510 2686 Passcode: 353034</p> <p>Go to https://www.zoom.us/download to download Zoom app before meeting Go to https://zoom.us to connect online using any browser.</p>	<p>Join by Telephone (Audio Only)</p> <p>Dial by your location</p> <ul style="list-style-type: none"> +1 669 900 6833 US (San Jose) +1 346 248 7799 US (Houston) +1 253 215 8782 US +1 301 715 8592 US +1 312 626 6799 US (Chicago) +1 929 436 2866 US (New York) <p>Meeting ID: 873 1510 2686 Passcode: 353034</p>
<p>A Zoom Meeting Participant Guide is available on OCERS website Board & Committee meetings page</p>	

AGENDA

The Orange County Board of Retirement welcomes you to this meeting. This agenda contains a brief general description of each item to be considered. The Board of Retirement may take action on any item included in the following agenda; however, except as otherwise provided by law, no action shall be taken on any item not appearing on the agenda. The Board of Retirement may consider matters included on the agenda in any order, and not necessarily in the order listed.

CALL MEETING TO ORDER AND ROLL CALL

PLEDGE OF ALLEGIANCE

PUBLIC COMMENTS

At this time, members of the public may comment on (1) matters not included on the agenda, provided that the matter is within the subject matter jurisdiction of the Board; and (2) any matter appearing on the Consent Agenda. Members of the public who wish to provide comment at this time may do so by “raising your hand” in the Zoom app, or if joining by telephone, by pressing * 9 on your telephone keypad. Persons attending the meeting in person and wishing to provide comment at this time should fill out a speaker card located at the back of the Boardroom and deposit it in the Recording Secretary’s box located near the back counter. When addressing the Board, please state your name for the record prior to providing your comments. Speakers will be limited to three (3) minutes.

In addition, public comment on matters listed on this agenda will be taken at the time the item is addressed.

CONSENT AGENDA

All matters on the Consent Agenda are to be approved by one action unless a Board Member requests separate action on a specific item.

BENEFITS

C-1 OPTION 4 RETIREMENT ELECTION

Recommendation: Grant election of retirement benefit payment, Option 4, based on Segal Consulting’s actuarial report.

- Lewis, Demetra
- Rozenberg, Monica

ADMINISTRATION

C-2 BOARD MEETING MINUTES

Regular Board Meeting Minutes

January 17, 2023

Recommendation: Approve minutes.

C-3 AMEND OCERS CONFLICT OF INTEREST CODE TO ADD TWO POSITIONS AS FORM 700 FILERS

Recommendation: Approve amendments to the OCERS Conflict of Interest Code to designate the Director of Member Services and the Senior Manager of Facilities and Operations as positions required to file a Form 700.

DISABILITY/MEMBER BENEFITS AGENDA

9:30 AM

NOTE: WHEN CONSIDERING DISABILITY RETIREMENT APPLICATIONS OR MEMBER APPEALS OF DISABILITY RETIREMENT DETERMINATIONS, THE BOARD MAY ADJOURN TO CLOSED SESSION TO DISCUSS MATTERS RELATING TO THE MEMBER’S APPLICATION OR APPEAL PURSUANT TO GOVERNMENT CODE SECTIONS 54957 OR 54956.9. IF THE MATTER IS A DISABILITY APPLICATION UNDER SECTION 54957, THE MEMBER MAY REQUEST THAT THE DISCUSSION BE IN PUBLIC.

OPEN SESSION

CONSENT ITEMS

All matters on the Consent Agenda are to be approved by one action unless a Board member requires separate action on a specific item. If separate action is requested, the item will be discussed in closed session during agenda item DA-1.

DC-1: MICHAEL BAKER

Heavy Equipment Technician II, Orange County Fire Authority (General Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as May 6, 2022.

DC-2: ROBERT BIALOBRESKI

Fire Captain, Orange County Fire Authority (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as May 3, 2022.

DC-3: KENNETH BLOCK

Investigator, Orange County District Attorney’s Office (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant non-service connected disability retirement.
- Set the effective date as June 5, 2020.
- Deny service connected disability retirement due to insufficient evidence of job causation.

DC-4: JUANITA BRACAMONTES

Deputy Juvenile Correctional Officer II, Orange County Probation Department (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as February 12, 2021.
- Find the Applicant is capable of performing other duties in the service of the County of Orange pursuant to Government Code Section 31725.65.
- Grant a supplemental pay allowance effective March 12, 2021.

DC-5: GARRETT DEGIORGIO

Captain, Orange County Sheriff's Department (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as March 11, 2022.

DC-6: CHRISTOPHER ESPOSITO

Firefighter/Paramedic, Orange County Fire Authority (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as March 25, 2022.

DC-7: ANTHONY MILLER

Sheriff Deputy II, Orange County Sheriff's Department (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as the day after last day of compensation.

DC-8: PEDRO PEREZ-ESTRADA

Deputy Sheriff II, Orange County Sheriff's Department (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as March 25, 2022.

DC-9: GREGORY RISKO

Investigator, Orange County Sheriff's Department (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as the day after the last date of regular compensation.

DC-10: STEVEN WELCH

Fire Captain, Orange County Fire Authority (Safety Member)

Recommendation: Disability Committee recommends that the Board:

- Grant service connected disability retirement.
- Set the effective date as March 25, 2022.

CLOSED SESSION

Government Code section 54957

Adjourn to Closed Session under Government Code section 54957 to consider member disability applications and to discuss member medical records submitted in connection therewith. The applicant may waive confidentiality and request his or her disability application to be considered in Open Session.

DA-1: INDIVIDUAL ACTION ON ANY ITEM TRAILED FROM THE DISABILITY/MEMBER BENEFITS CONSENT AGENDA

DA-2: EDNA HERNANDEZ

Coach Operator, Orange County Transportation Authority

Recommendation: Disability Committee recommends that the Board:

- Approve and adopt the findings and recommendations of the Hearing Officer as set forth in the Findings and Decisions in an OCERS Service-Connected Disability Retirement Case, dated December 18, 2022 (Recommendation) wherein the Hearing Officer recommended that the Board grant the Applicant (Edna Hernandez) service-connected disability retirement.

OPEN SESSION

REPORT OF ACTIONS TAKEN IN CLOSED SESSION

ACTION ITEMS

NOTE: Public comment on matters listed in this agenda will be taken at the time the item is addressed, prior to the Board’s discussion of the item. **Members of the public who wish to provide comment in connection with any matter listed in this agenda may do so by “raising your hand” in the Zoom app, or if joining by telephone, by pressing * 9, at the time the item is called. Persons attending the meeting in person and wishing to provide comment on a matter listed on the agenda should fill out a speaker card located at the back of the Boardroom and deposit it in the Recording Secretary’s box located near the back counter.**

A-1 INDIVIDUAL ACTION ON ANY ITEM TRAILED FROM THE CONSENT AGENDA

A-2 SUPERIOR COURT NEW PLAN FORMULA – CONTRIBUTION RATE CHANGE FOR FY2023/2024

Presentation by Suzanne Jenike, Assistant CEO, OCERS and Segal

Recommendation: Approve and adopt updated employer and employee contribution rates for the FY2023/2024 based on the December 31, 2021 actuarial valuation applicable to rate group 2 Plan U and T based on Superior Court’s benefit enhancement effective July 1, 2023.

A-3 DELEGATING DISABILITY GRANTS PROCESS TO OCERS CEO

Presentation by Steve Delaney, Chief Executive Officer, OCERS

Recommendation: Delegate to the OCERS CEO the responsibility to fully develop Disability Benefit grant recommendations for the OCERS Board’s consideration and approval.

A-4 2023 COST OF LIVING ADJUSTMENT

Presentation by Suzanne Jenike, Assistant CEO of External Operations, OCERS; Andy Yeung, and Paul Angelo, Segal

Recommendation: Adjust all applicable benefit allowances by 3% effective April 1, 2023, and bank 4.5%, in accordance with Government Code section 31870.1, resulting from the 7.45% change to CPI in calendar year 2022 (rounded to 7.5%).

A-5 BOARD APPROVAL OF SELECTION AND ENGAGEMENT OF HEARING OFFICERS

Presentation by Manuel Serpa, Deputy General Counsel, OCERS

Recommendation: On behalf of the Hearing Officer Selection Panel, staff recommends the Board approve the appointment of and the award of a contract (subject to negotiation of satisfactory contract terms) with, the following individuals to serve as OCERS hearing officers for a term of seven years beginning March 1, 2023.

- Stephen Biersmith
- Michael Dilberto
- Robert Snider
- Deborah Wissley

A-6 SACRS BOARD OF DIRECTORS ELECTIONS 2023-2024

Presentation by Manuel Serpa, Deputy General Counsel, OCERS

Recommendation: Identify one or more nominees for the SACRS Board of Directors election to be conducted on May 12, 2023; and direct staff to submit the nomination(s) to the SACRS Nominating Committee on or before March 1, 2023.

A-7 DIRECTOR OF DISABILITY - 2023 STAFFING PLAN CHANGE

Presentation by Steve Delaney, Chief Executive Officer, Suzanne Jenike, Assistant CEO, OCERS

Recommendation: Staff recommends that the Board of Retirement approve the addition of a Director of Disability to the 2023 Staffing Plan and drop the position of Disability Supervisor.

INFORMATION ITEMS

R-11 2022 POLICY COMPLIANCE REPORT

Written Report

CLOSED SESSION ITEMS

**E-1 CONFERENCE REGARDING LITIGATION THAT HAS BEEN INITIATED
(GOVERNMENT CODE SECTION 54956.9(d)(1))**

Adjourn pursuant to Government Code section 54956.9(d)(1).

Nicholas Casson v. OCERS; California Court of Appeal, 4th Appellate District, Case No. G060950

Recommendation: Take appropriate action.

CHIEF EXECUTIVE OFFICER/STAFF COMMENTS

COUNSEL COMMENTS

BOARD MEMBER COMMENTS

**ADJOURNMENT: (IN MEMORY OF THE ACTIVE MEMBERS, RETIRED MEMBERS, AND SURVIVING
SPOUSES WHO PASSED AWAY THIS PAST MONTH)**

NOTICE OF NEXT MEETINGS

INVESTMENT COMMITTEE MEETING

February 22, 2023

9:00 A.M.

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

2223 E. WELLINGTON AVENUE, SUITE 100

SANTA ANA, CA 92701

DISABILITY COMMITTEE MEETING

March 20, 2023

8:30 A.M.

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

2223 E. WELLINGTON AVENUE, SUITE 100

SANTA ANA, CA 92701

REGULAR BOARD MEETING

March 20, 2023

9:30 A.M.

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

2223 E. WELLINGTON AVENUE, SUITE 100

SANTA ANA, CA 92701

AVAILABILITY OF AGENDA MATERIALS - Documents and other materials that are non-exempt public records distributed to all or a majority of the members of the OCERS Board or Committee of the Board in connection with a matter subject to discussion or consideration at an open meeting of the Board or Committee of the Board are available at the OCERS' website: <https://www.ocers.org/board-committee-meetings>. If such materials are distributed to members of the Board or Committee of the Board less than 72 hours prior to the meeting, they will be made available on the OCERS' website at the same time as they are distributed to the Board or Committee members. Non-exempt materials distributed during an open meeting of the Board or Committee of the Board will be made available on the OCERS' website as soon as practicable and will be available promptly upon request.

It is OCERS' intention to comply with the Americans with Disabilities Act ("ADA") in all respects. If, as an attendee or participant at this meeting, you will need any special assistance beyond that normally provided, OCERS will attempt to accommodate your needs in a reasonable manner. Please contact OCERS via email at adminsupport@ocers.org or call 714-558-6200 as soon as possible prior to the meeting to tell us about your needs and to determine if accommodation is feasible. We would appreciate at least 48 hours' notice, if possible. Please also advise us if you plan to attend meetings on a regular basis.



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Jonathea Tallase, Member Services Manager
SUBJECT: **OPTION 4 RETIREMENT ELECTION – DEMETRA LEWIS**

Recommendation

Grant election of retirement benefit payment, Option 4, based on Segal Consulting’s actuarial report.

Background/Discussion

This member elected Option 4 as the benefit payment option for his service retirement allowance as required by his Domestic Relations Order (DRO), effective October 4, 2022. The Orange County Employees Retirement System (OCERS) was joined in the member’s dissolution of marriage and under the terms of the DRO, the member’s ex-spouse was awarded a lifetime continuance as a percentage of the member’s allowance.

The approval of Option 4 will not increase OCERS liability because the cost of this Option 4 benefit is proportional to the cost of the other benefit plans. Segal Consulting has calculated the member’s monthly allowance as indicated in the attached letter, as well as the allowance payable to the member’s ex-spouse.

Submitted by:



J. T. – APPROVED

Jonathea Tallase
Member Services Manager



Molly Calcagno, ASA, MAAA, EA
Actuary
T 415.263.8254
mcalcagno@segalco.com

180 Howard Street, Suite 1100
San Francisco, CA 94105-6147
segalco.com

Personal and Confidential

February 2, 2023

Jonathea Tallase
Member Services Manager
Orange County Employees Retirement System
2223 Wellington Avenue
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System (OCERS)
Option 4 Calculation for Demetra Lewis**

Dear Jonathea:

Pursuant to your request, we have determined the Option 4 benefits payable to Demetra Lewis and her ex-spouse based on the unmodified benefit and other information provided in the System’s request dated January 30, 2023.

The monthly benefits payable to the member and the ex-spouse and the data we used for our calculations are as follows:

Member’s Date of Birth	
Ex-Spouse’s Date of Birth	
Date of Retirement	October 4, 2022
Plan of Membership	General Plan J
Monthly Unmodified Benefit	\$5,925.53
Ex-Spouse’s Share of Monthly Unmodified Benefit	21.65%
Retirement Type	Service Retirement

Jonathea Tallase
February 2, 2023
Page 2

We calculated the adjustment to the member's unmodified benefit to provide a 21.65% continuance to the ex-spouse. As instructed by OCERS, the cost to provide the continuance benefit to the ex-spouse is paid for entirely by the ex-spouse.

	Payable while the Member is Alive	Payable after the Member's Death
Monthly benefit payable to member		
Annuity:	\$1,787.62	
Pension:	<u>2,855.03</u>	
Total:	\$4,642.65	\$0.00
Monthly benefit payable to ex-spouse¹	\$1,170.14	\$1,170.14

Actuarial Assumptions

We have calculated the Option 4 benefits based on the following actuarial assumptions:

Interest: Effective interest rate of 4.136253% per year, which is calculated using an investment return assumption of 7.00% per year together with a cost-of-living adjustment assumption of 2.75% per year.

Mortality Table: Pub-2010 General Healthy Retiree Amount-Weighted Above-Median Mortality Table with rates increased by 5%, projected generationally with the two-dimensional mortality improvement scale MP-2019 associated with a retirement year of 2024, weighted 40% male and 60% female for members.

Pub-2010 General Contingent Survivor Amount-Weighted Above-Median Mortality Table with rates increased by 5%, projected generationally with the two-dimensional mortality improvement scale MP-2019 associated with a retirement year of 2024, weighted 60% male and 40% female for beneficiaries.

¹ This is equal to 21.65% of the member's unmodified benefit (i.e., 21.65% * \$5,925.53 or \$1,282.88) adjusted further to provide a benefit payable over the ex-spouse's lifetime or to the estate of the ex-spouse if the ex-spouse pre-deceases the member.

Jonathea Tallase
February 2, 2023
Page 3

The actuarial calculations contained in this letter were prepared under my supervision. I am a member of the American Academy of Actuaries and meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion herein.

Please let us know if you have any comments or questions. As in all matters pertaining to the interpretation and application of the law, Plan, or individual Option 4 Calculation provisions, you should be guided by the advice of the Plan's Legal Counsel.

Sincerely,



Molly Calcagno, ASA, MAAA, EA
Actuary

JY/bbf



February 15, 2023

Demetra Lewis

Re: Retirement Election Confirmation – Option 4

Dear Ms. LEWIS:

You have elected Option 4 as your retirement option. This option will provide a 21.65% of your monthly benefit for the life of the benefit, to:

JAMES LEWIS

This designation is irrevocable; you will not be allowed to change your retirement option or designated beneficiary.

Please complete this form and return to OCERS as soon as possible.

I understand that my retirement option is irrevocable; by choosing Option 4 I will take a monthly reduction in order to provide a continuance to JAMES LEWIS.

Demetra Lewis
Member Signature/Date

Sincerely,

Aileen Daag

Aileen Daag
Retirement Program Specialist

PO Box 1229, Santa Ana, CA 92702 • Telephone (714) 558-6200 • www.ocers.org
"We provide secure retirement and disability benefits with the highest standards of excellence."



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Jonathea Tallase, Member Services Manager
SUBJECT: **OPTION 4 RETIREMENT ELECTION – MONICA ROZENBERG**

Recommendation

Grant election of retirement benefit payment, Option 4, based on Segal Consulting’s actuarial report.

Background/Discussion

This member elected Option 4 as the benefit payment option for his service retirement allowance as required by his Domestic Relations Order (DRO), effective November 18, 2022. The Orange County Employees Retirement System (OCERS) was joined in the member’s dissolution of marriage and under the terms of the DRO, the member’s ex-spouse was awarded a lifetime continuance as a percentage of the member’s allowance.

The approval of Option 4 will not increase OCERS liability because the cost of this Option 4 benefit is proportional to the cost of the other benefit plans. Segal Consulting has calculated the member’s monthly allowance as indicated in the attached letter, as well as the allowance payable to the member’s ex-spouse.

Submitted by:



J. T. – APPROVED

Jonathea Tallase
Member Services Manager



February 6, 2023

Monica Rozenberg

Re: Retirement Election Confirmation – Option 4

Dear Ms. ROZENBERG:

You have elected Option 4 as your retirement option. This option will provide a 22.73% of your monthly benefit, for the life of the benefit, to:

Richard Miranda Jr.

This designation is irrevocable; you will not be allowed to change your retirement option or designated beneficiary.

Please complete this form and return to OCERS as soon as possible.

() I understand that my retirement option is irrevocable; by choosing Option 4 I will take a monthly reduction in order to provide a 22.73% continuance to Richard Miranda Jr.


Member Signature/Date

2/6/23

Sincerely,

David Viramontes
Retirement Program Specialist



February 3, 2022

Monica Rozenberg

Re: Retirement Option 4 Information Request for Account Number ###-##-8778

As requested by my DRO, I must elect **Benefit Payment Option 4** upon retirement, to leave for the benefit of my **ex-spouse**, Richard Miranda Jr.

Along with the calculations for my monthly benefit amount, I would also like to have the following named beneficiaries receive a survivorship of my benefit based on the following percentage(s):

Name: _____
Relationship: _____
Percentage Amount: _____ %

Name: _____
Relationship: _____
Percentage Amount: _____ %

Name: _____
Relationship: _____
Percentage Amount: _____ %

Upon receipt of the above information, I will make an election providing OCERS with the percentage that my beneficiary(ies) are to receive of my benefit payment after my death.

[Signature]
Member Signature

2/6/23
Date



Molly Calcagno, ASA, MAAA, EA
Actuary
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mcalcagno@segalco.com

180 Howard Street, Suite 1100
San Francisco, CA 94105-6147
segalco.com

Personal and Confidential

January 24, 2023

Jonathea Tallase
Member Services Manager
Orange County Employees Retirement System
2223 Wellington Avenue
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System (OCERS)
Option 4 Calculation for Monica Rozenberg**

Dear Jonathea:

Pursuant to your request, we have determined the Option 4 benefits payable to Monica Rozenberg, her ex-spouse, and her current spouse and two children, based on the unmodified benefit and other information provided in the System’s request to Segal on January 20, 2023.

The monthly benefits payable to the member, ex-spouse, current spouse, and two children and the data we used for our calculations are as follows:

Member’s Date of Birth	
Ex-Spouse’s Date of Birth	
Date of Retirement	November 18, 2022
Plan of Membership	General Plan J
Monthly Unmodified Benefit	\$6,564.28
Ex-Spouse’s Share of Monthly Unmodified Benefit	22.73%
Retirement Type	Service Retirement
Current Spouse’s Date of Birth	
Older Child’s Date of Birth	
Younger Child’s Date of Birth	

Jonathea Tallase
January 24, 2023
Page 2

We have been requested to calculate an Option 4 benefit under three scenarios:

Scenario 1:	Provides a 22.73% continuance to the ex-spouse with no additional beneficiaries. As instructed by OCERS, the cost to provide the continuance benefit to the ex-spouse is paid for entirely by the ex-spouse.
Scenario 2:	In addition to the ex-spouse in Scenario 1, provides a 50% continuance to the current spouse as the primary beneficiary. In addition, the cost to provide this continuance benefit would be paid for entirely by the member.
Scenario 3	In addition to the ex-Spouse in Scenario 1, provides a 25% continuance to each of the current spouse, older child, and younger child, with no reversion to the beneficiaries upon the death of the other beneficiaries. In addition, the cost to provide this continuance benefit would be paid for entirely by the member.

Benefit Amounts

Scenario #1 – Option 4 Benefit without any current beneficiaries

	Payable while the Member is Alive	Payable after the Member's Death
Monthly benefit payable to member		
Annuity:	\$1,437.97	
Pension:	<u>3,634.25</u>	
Total:	\$5,072.22	\$0.00
Monthly benefit payable to ex-spouse ¹	\$1,397.95	\$1,397.95

Scenario #2 – Option 4 Benefit with continuance to Current Spouse

	Payable while the Member is Alive	Payable after the Member's Death
Monthly benefit payable to member		
Annuity:	\$1,317.10	
Pension:	<u>3,328.78</u>	
Total:	\$4,645.88	\$0.00
Monthly benefit payable to current spouse	\$0.00	\$2,322.94
Monthly benefit payable to ex-spouse ¹	\$1,397.95	\$1,397.95

¹ This is equal to 22.73% of the member's unmodified benefit (i.e., 22.73% * \$6,564.28 or \$1,492.06) adjusted further to provide a benefit payable over the ex-spouse's lifetime or to the estate of the ex-spouse if the ex-spouse pre-deceases the member.

Jonathea Tallase
January 24, 2023
Page 3

Scenario #3 – Option 4 Benefit with continuance to Current Spouse and Two Children

	Payable while the Member is Alive	Payable after the Member's Death
Monthly benefit payable to member		
Annuity:	\$1,234.29	
Pension:	<u>3,119.48</u>	
Total:	\$4,353.77	\$0.00
Monthly benefit payable to current spouse	\$0.00	\$1,088.44
Monthly benefit payable to older child	\$0.00	\$1,088.44
Monthly benefit payable to younger child	\$0.00	\$1,088.44
Monthly benefit payable to ex-spouse ²	\$1,397.95	\$1,397.95

Actuarial Assumptions

We have calculated the Option 4 benefits based on the following actuarial assumptions:

Interest: Effective interest rate of 4.136253% per year, which is calculated using an investment return assumption of 7.00% per year together with a cost-of-living adjustment assumption of 2.75% per year.

Mortality Table: Pub-2010 General Healthy Retiree Amount-Weighted Above-Median Mortality Table with rates increased by 5%, projected generationally with the two-dimensional mortality improvement scale MP-2019 associated with a retirement year of 2024, weighted 40% male and 60% female for members.

Pub-2010 General Contingent Survivor Amount-Weighted Above-Median Mortality Table with rates increased by 5%, projected generationally with the two-dimensional mortality improvement scale MP-2019 associated with a retirement year of 2024, weighted 60% male and 40% female for beneficiaries.

² This is equal to 22.73% of the member's unmodified benefit (i.e., 22.73% * \$6,564.28 or \$1,492.06) adjusted further to provide a benefit payable over the ex-spouse's lifetime or to the estate of the ex-spouse if the ex-spouse pre-deceases the member.

Jonathea Tallase
January 24, 2023
Page 4

The actuarial calculations contained in this letter were prepared under my supervision. I am a member of the American Academy of Actuaries and meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion herein.

Please let us know if you have any comments or questions. As in all matters pertaining to the interpretation and application of the law, Plan, or individual Option 4 Calculation provisions, you should be guided by the advice of the Plan's Legal Counsel.

Sincerely,



Molly Calcagno, ASA, MAAA, EA
Actuary

JY/elf

**ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
BOARD OF RETIREMENT
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA**

**REGULAR MEETING
Tuesday, January 17, 2023
9:30 A.M.**

MINUTES

Chair Dewane called the meeting to order at 9:30 a.m.

Recording Secretary administered the Roll Call attendance.

Attendance was as follows:

Present in Person: Frank Eley, Chair; Shawn Dewane, Vice Chair; Adele Tagaloa, Charles Packard, Chris Prevatt, Richard Oates, Arthur Hidalgo, Shari Freidenrich, Jeremy Vallone, Wayne Lindholm

Also Present: Steve Delaney, Chief Executive Officer; Brenda Shott, Assistant CEO, Internal Operations; Suzanne Jenike, Assistant CEO, External Operations; Molly Murphy, Chief Investments Officer; Gina Ratto, General Counsel; David Kim, Director of Internal Audit; Tracy Bowman, Director of Finance; Jeff Lamberson, Director of Member Services; Silviu Ardeleanu, Director of Member Services; Matt Eakin, Director of Information Security; Anthony Beltran, Audio-Visual Technician; Carolyn Nih, Recording Secretary

Guests: Harvey Leiderman, ReedSmith; Andy Yeung, Segal; Paul Angelo, Segal

Absent:

OATH OF OFFICE – ADELE TAGALOA, SHAWN DEWANE, ARTHUR HIDALGO, CHARLES PACKARD, ROGER HILTON

Administered by Orange County Clerk-Recorder Hugh Nguyen

CONSENT AGENDA

BENEFITS

C-1 OPTION 4 RETIREMENT ELECTION

Recommendation: Grant election of retirement benefit payment, Option 4, based on Segal Consulting's actuarial report.

- Σ Enriquez, Consuelo
- Σ Fung, Brian
- Σ Richards, Danny

ADMINISTRATION

C-2 BOARD MEETING MINUTES

Regular Board Meeting Minutes December 12, 2022

Recommendation: Approve minutes.

C-3 CLASSIFICATION AND COMPENSATION STUDY – COST INCREASE

Recommendation: Approve the total cost of a Classification and Compensation study for the County level job classification for an amount not to exceed \$65,000.

MOTION by Mr. Packard, **SECONDED** by Ms. Tagaloa, to approve the Consent Agenda items, C-1 through C-3, except for the pulled C-1 Option 4 application for Mr. Danny Richards.

The motion passed **unanimously**.

DISABILITY/MEMBER BENEFITS AGENDA

CONSENT ITEMS

DC-1: LARRY COSTA

Deputy Sheriff II, Orange County Sheriff’s Department (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- ∑ Deny service and non-service connected disability retirement, without prejudice, because the member has opted not to join in on the employer filed application.

DC-2: BILL D. CROW

Firefighter/Paramedic, Orange County Fire Authority (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- ∑ Grant service connected disability retirement per Government Code Section 31720.5.
- ∑ Set the effective date as February 17, 2022.

DC-3: ANTHONY DUCHI

Fire Captain, Orange County Fire Authority (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- ∑ Grant service connected disability retirement.
- ∑ Set the effective date as March 11, 2022.

DC-4: AUGUSTINE C. ESTRADA

Fire Apparatus Engineer, Orange County Fire Authority (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Grant service connected disability retirement.
- Σ Set the effective date as April 12, 2022.

DC-5: TRACY J. HARRIS

Captain, Orange County Sheriff's Department (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Grant service connected disability retirement.
- Σ Set the effective date as the day after the last day of regular compensation.

DC-6: WENDY NORWOOD

Fire Captain/Paramedic, Orange County Fire Authority (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Grant service connected disability retirement.
- Σ Set the effective date as March 25, 2022.

DC-7: STEPHEN J. STEWART

Fire Captain/Paramedic, Orange County Fire Authority (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Grant service connected disability retirement.
- Σ Set the effective date as March 25, 2022.

DC-8: JONATHON TOMER - PULLED

Deputy Sheriff II, Orange County Sheriff's Department (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Deny service and non-service connected disability retirement, without prejudice, because the member has opted not to join in on the employer filed application.

DC-9: JULIAN VALENCIA - PULLED

Deputy Sheriff II, Orange County Sheriff's Department (Safety Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Deny service and non-service connected disability retirement, without prejudice, because the member has opted not to join in on the employer filed application.

DC-10: REBECCA VARGAS

Employment and Eligibility Specialist, Orange County Social Services Agency (General Member)

Recommendation: The Disability Committee recommends that the Board:

- Σ Deny service connected disability retirement, due to insufficient evidence of permanent incapacity.

MOTION by Mr. Oates, **SECONDED** by Mr. Lindholm, to approve items, DC-1 through DC-7 and DC-10, with DC-8 and DC-9 pulled on the Disability Consent Agenda.

The motion passed unanimously.

END OF DISABILITY/MEMBER BENEFITS AGENDA

ACTION ITEMS

A-5 DELEGATING DISABILITY GRANTS TO OCERS CEO

Presentation by Steve Delaney, Chief Executive Officer, Suzanne Jenike, Assistant CEO, and Gina Ratto, General Counsel, OCERS

Recommendation: Delegate to the OCERS CEO the responsibility to fully develop Disability Benefit grant recommendations for the OCERS Board’s consideration and approval.

Board Chair instructed staff to bring this item back to a future Board Meeting with more details.

A-2 BOARD FINDINGS PURSUANT TO GOVERNMENT CODE § 54953, AS AMENDED BY AB 361, AND ADOPTION OF BOARD RESOLUTION 2023-01

Presentation by Gina Ratto, General Counsel, OCERS

Recommendation: That the Board:

- (1) Reconsider the circumstances of the state of emergency resulting from the COVID-19 pandemic and determine whether:
 - i. The state of emergency continues to directly impact the ability of the members of the Board to meet safely in person; **and/or**
 - ii. State or local officials continue to impose or recommend measures to promote social distancing; and
- (2) If the Board so determines, adopt Board of Retirement Resolution 2023-01 to reflect such findings pursuant to Government Code section 54953, as amended by AB 361.

MOTION by Mr. Lindholm, **SECONDED** by Mr. Packard, to adopt Board Resolution 2023-01.

The motion passed unanimously.

A-3 DISCUSSION AND ACTION ON RECOMMENDATIONS REGARDING COUNTY RESOLUTION AFFECTING MEMBERS’ RETIREMENT ALLOWANCES SUBJECT TO OCERS’ COMPENSATION EARNABLE POLICY

Presentation by Steve Delaney, Chief Executive Officer, Gina Ratto, General Counsel, OCERS, and Harvey Leiderman, Fiduciary Counsel, ReedSmith

Recommendation: Staff and the Board’s Fiduciary Counsel recommend that the Board direct Staff to:

- (1) Accept the County’s Resolution as authoritative;
- (2) Confer with their counterparts in County administration, the Sheriffs’ Office and AOCDS to obtain the necessary data to enable OCERS to reexamine whether affected law enforcement retirees and employees may now qualify for the inclusion of some or all of their on-call and canine handler maintenance pay as part of the “compensation earnable” on which their retirement allowances are calculated; and
- (3) Provide to the Board at its meeting on March 20, 2023 Staff’s plan for re-adjusting affected members’ benefits consistent with the Compensation Earnable Policy, and a projected timetable for accomplishing those adjustments.

We note that this recommendation does not require the Board to take any formal action by motion at this time; rather, this direction to Staff will be sufficient.

Board consensus was to allow staff to proceed with all recommendations, adding to strike the term “of some or all” in recommendation (2), and return to the board on March 20, 2023 with more information.

A-4 SUPERIOR COURT NEW PLAN FORMULA – CONTRIBUTION RATE CHANGE FOR FY2023/2024
Presentation by Suzanne Jenike, Assistant CEO, and Segal

Recommendation: Approve and adopt updated employer and employee contribution rates for the FY2023/2024 based on the December 31, 2021 actuarial valuation applicable to rate group 2 Plan U and T based on Superior Court’s benefit enhancement effective July 1, 2023.

Pulled by staff to give various sponsors the more time to respond.

The Board recessed for break at 10:30 a.m.

The Board reconvened from break at 10:46 a.m.

Recording Secretary administered the Roll Call attendance.

INFORMATION ITEMS

Each of the following informational items will be presented to the Board for discussion.

Presentations

I-1 2022 OCERS INNOVATIONS AND PROCESS IMPROVEMENTS
Presentation by Steve Delaney, Chief Executive Officer, and OCERS Management Team

OCERS Management Team shared about the 2022 innovations and process improvements in 100% Accuracy, Administrative Improvements, Automation, and Risk Reduction.

I-2 COVID-19 UPDATE

Presentation by Steve Delaney, Chief Executive Officer, OCERS

CEO Delaney shared about the OCERS approach to COVID-19, with staff continuing a hybrid attendance program.

WRITTEN REPORTS

The following are written reports that will not be discussed unless a member of the Board requests discussion.

R-1 MEMBER MATERIALS DISTRIBUTED

Written Report

Application Notices

January 17, 2023

Death Notices

January 17, 2023

R-2 COMMITTEE MEETING MINUTES

- October 2022- Audit Committee Minutes

R-3 CEO FUTURE AGENDAS AND 2023 OCERS BOARD WORK PLAN

Written Report

R-4 QUIET PERIOD – NON-INVESTMENT CONTRACTS

Written Report

R-5 BOARD COMMUNICATIONS

Written Report

R-6 COMMUNICATION POLICY FACT SHEET

Written Report

R-7 FORM 700 FILING REQUIREMENTS

Written Report

R-8 STATUS OF BOARD EDUCATION HOURS FOR 2022

Written Report

R-9 2022 DISABILITY STATISTICS

Written Report

R-10 ANNUAL PREVIEW OF “YEAR IN REVIEW”: COMMUNICATION PLAN

Written Report

R-11 QUARTERLY TRAVEL AND TRAINING EXPENSE REPORT

Written Report

R-12 CONTRACT STATUS FOR NAMED SERVICES PROVIDERS

Written Report

R-4 pulled for discussion by Ms. Freidenrich regarding the re-release of an RFP. Upon clarification by Ms. Shott, the meeting continued.

CIO COMMENTS- The market is currently digesting a good amount of economic data this week in addition to the Davos meetings and speeches from Federal Reserve governors. We are starting to see the public markets price in the end of rate hikes and better forward market conditions. Within private markets, it will take another six months or more before we experience all of the marks and new asset prices.

CHIEF EXECUTIVE OFFICER/STAFF COMMENTS- Mr. Delaney thanked the Board for returning to in person attendance.

COUNSEL COMMENTS- Counsel reminded the Board that Form 700 will be due April 3rd.

BOARD MEMBER COMMENTS- Mr. Oates was thrilled and thanks the staff for their efforts on I-1. Ms. Freidenrich congratulated the newly sworn in board members. Mr. Hilton thanked the Board for welcoming him back to the Board.

Meeting **ADJOURNED** at 11:42am in memory of active members, retired members, and surviving spouses who passed away this passed month.

Submitted by:

Approved by:

Steve Delaney
Secretary to the Board

Shawn Dewane
Chairman



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina M. Ratto, General Counsel
SUBJECT: AMEND OCERS CONFLICT OF INTEREST CODE TO ADD TWO POSITIONS AS FORM 700 FILERS

Recommendation

Approve amendments to the OCERS Conflict of Interest Code to designate the Director of Member Services and the Senior Manager of Facilities and Operations as positions required to file a Form 700.

Background

The Political Reform Act of 1974, Government Code sections 81000, *et. seq.* (the "Act"), requires certain local public agencies, including OCERS, to adopt conflict of interest codes that identify the officials of the agency who must file financial disclosures. The Act is enforced by the Fair Political Practices Commission (the "FPPC"). The requirements of a conflict of interest code are set out in FPPC Regulation 18730, which contains the elements of a standard model code. Section 18730 may be adopted by reference and supplemented by a listing of the designated agency officials who are subject to the code and the categories of economic interests that the officials must disclose. In addition, section 87200 of the Act contains special disclosure requirements for officials who manage public investments. Officials subject to section 87200 are not technically subject to the OCERS Conflict of Interest Code ("OCERS Code"), but agency codes typically identify those officials for informational purposes.

According to section 82011(b) of the Act, the Orange County Board of Supervisors serves as the code reviewing body for OCERS; and the County has established certain disclosure categories for the agencies whose codes it reviews and approves. The Act requires an agency's conflict of interest code to be reviewed biennially and updated when titles and positions of the agency are added or changed. The OCERS Code was last reviewed and updated in 2020.

Since OCERS last updated the OCERS Code, the position of Senior Manager of Facilities and Operations was added to the OCERS organizational chart. The OCERS Contracts, Risk & Performance Manager reports to the Senior Manager of Facilities and Operations and is already listed in the OCERS Code as a position that must file a Form 700. In light of the responsibilities of the Senior Manager of Facilities and Operations over OCERS' contracting activities and OCERS' facilities, the Senior Manager of Facilities and Operations should be added to the OCERS Code.

In addition, given that the OCERS Procurement and Contracting Policy provides that a "Director" can be one of the two required signatories to contracts with a value of up to \$99,999, it is appropriate for the Director of Member Services position to be added to the OCERS Code as a designated filer.

Proposed Revisions

Staff recommends that the following positions be added to the OCERS Code as "Designated Filers:"

- Σ Senior Manager of Facilities and Operations
- Σ Director of Member Services

A copy of the OCERS Code, with the proposed revisions indicated in underlined/strikeout text, is attached; and the bases for the staff's recommendations are more fully set forth below.

Designated Filer Positions

The Act requires that every position within OCERS that makes, participates in making, or influences, governmental decisions be designated in the OCERS Code. Persons holding the positions designated in the code ("Designated Filers") are required to disclose their financial interests. Guidance from the FPPC for developing a list of Designated Filers indicates that an agency should include in the code the broad policy/decision makers and eliminate positions whose duties are clerical, secretarial, ministerial, or manual. The agency should then review the duty statements of everyone between these two levels, looking closely at how many levels of substantive review these positions have.

Section 18700 of the FPPC regulations set forth the basic rule on conflict of interest as follows:

A public official at any level of state or local government has a prohibited conflict of interest and may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows or has reason to know he or she has a disqualifying financial interest. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any financial interest described in subdivision (c)(6)(A-F) herein.

Section 18704 defines making and participating in making a governmental decision as follows:

(a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.

(b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

Examples of making a decision include:

- ∑ Voting on a matter
- ∑ Approving the budget
- ∑ Adopting policy
- ∑ Making purchasing decisions
- ∑ Entering into contracts

Examples of participating in a decision include:

- ∑ Negotiating the terms of a contract
- ∑ Writing the specifications of a bid
- ∑ Advising or making recommendations to the decision-maker or governing body without significant intervening substantive review

The OCERS Code currently designates the following positions as Designated Filers because they make, participate in making, or influence governmental decisions and who are therefore required to disclose their financial interests¹:

- ∑ Assistant Chief Executive Officer, External Operations
- ∑ Assistant Chief Executive Officer, Internal Operations
- ∑ General Counsel
- ∑ Deputy General Counsel
- ∑ Director of Internal Audit
- ∑ Director of Finance
- ∑ Director of Administrative Services
- ∑ Director of Information Technology
- ∑ Director of Information Security
- ∑ Contracts, Risk & Performance Manager
- ∑ Investment Officer/Senior Investment Officer
- ∑ Investment Analyst/Senior Investment Analyst
- ∑ Consultant

Staff has conducted a review of OCERS' titles and duty statements, and recommends that the following OCERS-direct employees be added to the list of Designated Filers in the OCERS Code:

- ∑ Director of Member Services
- ∑ Senior Manager of Facilities and Operations

According to the job descriptions of these positions, the person either has delegated decision-making authority or participates in negotiating the terms of a contract, writing the specifications of a bid, or advising or making recommendations to the decision-maker or governing body without significant intervening substantive review.

In addition, the Director of Administrative Services position has been changed to its current title of Director of Human Resources.

Conclusion

If the Board adopts the recommended amendments to the OCERS Code, the amendments will be forwarded to the County Board of Supervisors, and once approved by the Board of Supervisors the amendments will become effective and part of the OCERS Code.

Submitted by:



GMR- Approved

Gina M. Ratto
General Counsel

¹ The members of the Board, the Chief Executive Officer, the Chief Investment Officer, the Managing Director of Investments, the Director of Investments and Consultants Who Manage Public Investments are listed in the OCERS Code as officials who manage public investments under section 87200 of the Political Reform Act.

**CONFLICT OF INTEREST CODE FOR THE
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM**

The Political Reform Act, Government Code Sections 81000, et seq. (the "Act"), requires state and local government agencies to adopt and promulgate Conflict of Interest Codes. The Fair Political Practices Commission ("FPPC") has adopted a regulation (2 Cal. Code of Regs. Section 18730; "Section 18730") that contains the terms of a standard Conflict of Interest Code, which may be incorporated by reference in an agency's code. After public notice and hearing, the FPPC may amend Section 18730 to conform to amendments in the Act. Therefore, the terms of Section 18730 and any amendments thereto, along with the attached Exhibits A and B designating positions and establishing disclosure categories, are hereby incorporated by reference, and shall constitute the Conflict of Interest Code of the Orange County Employees Retirement System ("OCERS").

DESIGNATED POSITIONS

OCERS employees whose positions are listed in Exhibit A hereto shall file statements of economic interests with the office of the Clerk of the Orange County Board of Supervisors, which will make the statements available for public inspection and reproduction (Gov. Code Sec. 81008). All statements will be retained by the Clerk of the Orange County Board of Supervisors. ~~The applicable Disclosure Category for each Designated Position is set forth in Exhibit A; and the Disclosure Categories are described in Exhibit B.~~ Consultants designated in Exhibit A will file statements of economic interests with the OCERS Chief Executive Officer, who will retain the original statements for seven years and make them available for public inspection and reproduction (Gov. Code Sec. 81008). ~~The applicable Disclosure Category for each Designated Position is set forth in Exhibit A; and the Disclosure Categories are described in Exhibit B.~~

OFFICIALS WHO MANAGE PUBLIC INVESTMENTS

Officials who manage public investments, as defined by 2 Cal. Code of Regs. § 18700.3.(b), are not subject to OCERS' Conflict of Interest Code but are listed here for informational purposes. Unlike the Designated Positions, the reporting obligations of these officials are not limited by reference to a disclosure category. It has been determined that the positions listed below are the OCERS officials who manage public investments:

- Members of the Board of Retirement including the Alternate Member
- Chief Executive Officer
- Chief Investment Officer
- Managing Director of Investments
- Director of Investments
- Consultants Who Manage Public Investments

~~Consultants Who Manage Public Investments will forward statements of economic interests to the OCERS Chief Executive Officer, who shall retain the original statements for seven years. All other Officials who manage public investments shall file statements of economic interests with the Clerk of the Orange County Board of Supervisors who is the filing officer for these positions.~~

~~The disclosure categories and requirements for these positions are set forth in Article 2 of Chapter 7 of the Political Reform Act, Government Code Section 87200 et seq. They generally require the disclosure of~~

interests in real property in the agency's jurisdiction, as well as investments, business positions, and sources of income (including gifts, loans, and travel payments).

EXHIBIT A

ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM LIST OF DESIGNATED POSITIONS

Position	Disclosure Category
Assistant Chief Executive Officer, External Operations	OC-01
Assistant Chief Executive Officer, Internal Operations	OC-01
General Counsel	OC-01
Director of Internal Audit	OC-01
Director of Finance	OC-01
Director of Administrative Services <u>Human Resources</u>	OC-11
Director of Information Technology	OC-08
Director of Information Security	OC-08
<u>Director of Member Services</u>	<u>OC-06</u>
Deputy General Counsel	OC-01
Investment Officer/Senior Investment Officer	OC-01
Contracts, Risk & Performance Manager	OC-06
Investment Analyst/Senior Investment Analyst	OC-01
Consultant	OC-30
<u>Senior Manager of Facilities and Operations</u>	<u>OC-06</u>

OFFICIALS WHO MANAGE PUBLIC INVESTMENTS

Officials who manage public investments, as defined by 2 Cal. Code of Regs. § 18700.3.(b), are NOT subject to the System's code, but are subject to the disclosure requirements of the Act (Government Code Section 87200 et seq., Regs. §18730(b)(3)). These positions are listed here for informational purposes only.

Position	Disclosure Category
Board Member/Alternate Board Member	87200 Filer
Chief Executive Officer	87200 Filer
Chief Investment Officer	87200 Filer

Managing Director of Investments	87200 Filer
Director of Investments	87200 Filer
Consultants Who Manage Public Investments	87200 Filer

EXHIBIT B

**ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
DISCLOSURE CATEGORIES/DESCRIPTIONS**

Disclosure Category	Disclosure Description
OC-01	All interests in real property in Orange County, as well as investments, business positions and sources of income (including gifts, loans, and travel payments).
OC-06	All investments in, business positions with and income (including gifts, loans, and travel payments) from sources that provide leased facilities and goods, supplies, equipment, vehicles, machinery, or services (including training and consulting services) of the types used by OCERS.
OC-08	All investments in, business positions with and income (including gifts, loans and travel payments) from sources that develop or provide computer hardware/software, voice data communications, or data processing goods, supplies, equipment, or services (including training and consulting services) used by OCERS.
OC-11	All interests in real property in Orange County, as well as investments in, business positions with and income (including gifts, loans, and travel payments) from sources that are engaged in the supply of equipment or services related to recruitment, employment search & marketing, classification, training, or negotiation with personnel; employee benefits, and health and welfare benefits.
OC-30	Consultants shall be included in the list of designated employees and shall disclose pursuant to the broadest category in the code subject to the following limitation: The CEO may determine that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure required. The determination of disclosure is a public record and shall be filed with the Form 700 and retained by the Filing Officer for public inspection.



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Suzanne Jenike, Assistant CEO, External Operations
SUBJECT: **SUPERIOR COURT BENEFIT ENHANCEMENT – CONTRIBUTION RATES FY2023/2024 APPLICABLE TO RATE GROUP 2 PLAN U AND PLAN T**

Staff Recommendation

Approve and adopt updated employer and employee contribution rates for the FY2023/2024 based on the updated December 31, 2021 actuarial valuation applicable to Rate Group 2 Plans U and T to reflect Superior Court’s future service benefit enhancement effective July 1, 2023.

Background

With the implementation of PEPRAs, new Superior Court employees/members entering public agency employment and public retirement system membership for the first time on or after January 1, 2013 were enrolled in Plan T (1.62% @ 65). In 2019 the Superior Court began exploring the feasibility of implementing an enhanced benefit formula for PEPRAs eligible employees. As a result of 2022 negotiations between the Superior Court and OCEA, the Court has agreed to adopt Plan U on a go forward basis for all existing employees (represented and unrepresented) in Plan T and any future PEPRAs eligible employees with an anticipated effective date on or around June 30, 2023.

Effective Date

A question has arisen as to when this increase in the benefit formula for all current and future PEPRAs members should be reflected in employee and employer contributions, especially with the Superior Court joining Rate Group 2, as this benefit increase could impact the costs paid by other employers and their employees in Rate Group 2, such as the County of Orange, and even OCERS.

The OCERS Board’s ACTUARIAL FUNDING POLICY(Policy) states the following under the heading “Other Policy Considerations”:

- b. Any change in contribution rate requirement that results from a plan amendment is generally implemented as of the effective date of the plan amendment or as soon as administratively feasible.

<https://www.ocers.org/sites/main/files/file-attachments/actuarialfundingpolicy.pdf?1670025722>

Accordingly, under the Policy, the contribution rates for the Superior Court should be implemented July 1, 2023, or as soon thereafter as administratively feasible. OCERS has been asked if this change couldn’t simply be addressed as part of the upcoming December 31, 2022 actuarial valuation, with rate changes to be effective July 1, 2024?

The attached January 6, 2023 letter from Segal states on Page 2 that delaying the effective date to July 1, 2024 would add \$1,366,000 to the Rate Group 2 UAAL, of which \$683,000 would be member liabilities being shifted to the employer.

Because of the OCERS Board's Policy, as well as recognizing the liability impact noted by Segal were the effective date to be delayed, OCERS staff believes the change in contribution rates should be effective July 1, 2023 as reflected in the recommendation above.

As a reminder, this item was on the OCERS Board's January 17, 2023 agenda, but moved to February 21 at the direction of OCERS Board Chair Dewane, in response to a request by the Orange County Employees Association (OCEA) seeking more time to consider this topic.

Submitted by:



SJ-Approved

Suzanne Jenike
Assistant CEO, External Operations

Attachments

Final Tentative Agreement between Orange County Superior Court and OCEA
Plan U cost study Segal
OCERS Board Actuarial Funding policy

TENTATIVE AGREEMENT
Orange County Superior Court
and
Orange County Employees Association

October 21, 2022

The Court and OCEA tentatively agree as follows for successor labor agreements for the General Unit, Court Clerk Unit, and Supervisor Unit MOUs

1. **Term:** Three-year term from October 28, 2022 through October 30, 2025
2. **Compensation:**
 - Base Increase**
 - Effective as of the first day of the full pay period following ratification by both parties, all classes shall receive a general salary increase of six percent (6%) to base pay
 - Effective November 3, 2023, all classes shall receive a general salary increase of three percent (3%) to base pay
 - Effective November 1, 2024, all classes shall receive a general salary increase of two percent (2%) to base pay
3. **Retirement:** Replace OCERS Plan T with Plan U
4. **Side Letters:** Extend the Furlough side letter amended as agreed on 10/21/2022.
5. **Sick Leave:** Amend Article IV amended as agreed on 10/21/2022.
6. **Court Paid Steward Training:** Amend Article IV, Section 7.E:
 - E. Once each year, the Court shall provide unpaid release time for up to five designated employee representatives per bargaining unit (total of fifteen) to attend two (2) days (up to sixteen (16) hours) of steward training. Depending upon Court staffing needs, the Court may decline to permit a specific employee to attend on a specific date. If the Court's staffing needs do not permit a designated employee representative to attend, OCEA may designate an alternative to attend. Designated employee representatives may, but shall not be required to, substitute vacation or compensatory time for the unpaid release time. Upon request, OCEA shall provide a written syllabus of the training to the Court.
7. **Telecommuting:** Amend Article I, Section 1.F as follows:
 - F. This Section shall not prevent an employee or group of employees from requesting a modified work schedule or alternate work arrangement (e.g. telework). Any denial of such a request is not subject to appeal under the grievance procedure.

All TAs already signed:

- Bereavement Leave
- Catastrophic Leave
- Court Reporter Folio Rate
- Court Reporter Salary Advancement

- Probation on Reassignment
- Retiree Medical Re-Opener
- Side Letters:
 - CJC Parking Agreement
 - Pilot Educational and Professional Reimbursement Program
 - Voluntary Furlough
- Temporary Assignment
- OCEA Clean Up Language
- OCSC Clean Up Language – Appendix A

The parties agree to recommend this Tentative Agreement to their respective constituents.

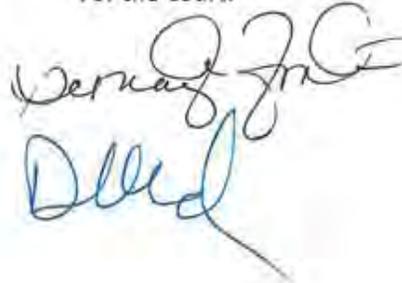
So Agreed.
October 21, 2022

For OCEA:



Handwritten signatures for OCEA: Judge Bowling and Charles B. [unclear]

For the Court:



Handwritten signatures for the Court: Vernon J. [unclear] and [unclear]



180 Howard Street, Suite 1100
San Francisco, CA 94105-6147
segalco.com

Via Email

January 6, 2023

Mr. Steve Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 Wellington Avenue
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System (OCERS)
Cost Group #2 Superior Court Plan U Benefit Improvement and Timing of Implementing
Revised Contribution Rates**

Dear Steve:

In the attached letter dated July 5, 2022, we provided the employer and the employee costs required for the Superior Court (Court) to improve benefits for future service only from Plan T (1.62% @ 65) to Plan U (2.5% @ 67) assuming the improvement would become effective July 1, 2023. As we pointed out in that letter, we understand that all Court and County employees receiving the same benefit have to pay the same normal cost rate (and possibly the same unfunded actuarial accrued liability, or UAAL, rate) pursuant to Section 71624(b) of the Government Code. We also indicated in that letter that we would need guidance from OCERS regarding the timing of implementing the revised employer and employee cost rates as the Board had previously adopted contribution rates for FY 2023-2024 in our December 31, 2021 valuation calculated without the Court's Plan U improvement.

We have been requested by your office to provide discussion from an actuarial perspective related to whether the revised employer and employee normal cost rates¹ provided in our July 5, 2022 letter should be adopted by the Board to replace those previously adopted for FY 2023-2024, or to delay their implementation until FY 2024-2025.

Timing of Implementing Revised Contribution Rates

First note that we are not aware of any Actuarial Standards of Practice that would require the Board to adopt the revised (higher) contribution rates when the Court grants Plan U benefit effective July 1, 2023. However, the Board could decide to adopt the new contribution rates effective July 1, 2023 based on the following provision found in the "Other Policy Considerations" Section of the Board's Actuarial Funding Policy:

¹ We note in our July 5, 2022 study that the UAAL rate for FY 2023-2024 (as determined in our December 31, 2021 valuation) would remain unchanged as a result of the Court's Plan U improvement.

Mr. Steve Delaney
January 6, 2023
Page 2

- b. Any change in contribution rate requirement that results from a plan amendment is generally implemented as of the effective date of the plan amendment or as soon as administratively feasible;

Note that if the Board decides to adopt revised normal cost rates, both employer and member rates were provided in our July 5, 2022 letter. However, as employee rates at only sample entry ages were provided in our July 5, 2022 letter, we have included the full set of employee rates as an Attachment to this letter.

From an actuarial perspective, another reason to adopt the new contribution rates effective July 1, 2023 is that, if the Board chooses not to adopt new contribution rates until FY 2024-2025, there will be an increase in the UAAL that was not calculated in our July 5, 2022 letter because that letter was prepared under the presumption that new contribution rates would be adopted by the Board for FY 2023-2024. That occurs because if the increase in normal cost due to the benefit increase is not funded during FY 2023-2024, it gets added to the UAAL.

We estimate that an additional UAAL of about \$1,366,000 would result from such a one year delay in collecting the higher normal cost contributions from both the employer and the members. Of that amount, half (or about \$683,000) would be due to the under-collection of member contributions for that one year, which when added to the UAAL would in effect transfer that amount of cost from the members to the employer. In contrast the under-collection of employer contributions for that one year would shift that same amount (\$683,000) from employer normal cost to UAAL. That amount would still be funded by the employer but (with interest) over the 20-year UAAL amortization period, rather than in the current year.

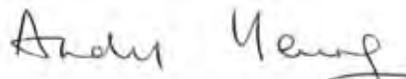
We are members of the American Academy of Actuaries and we meet the qualification requirements to render the actuarial opinion contained herein.

Please let us know if you have any questions or comments.

Sincerely,



Paul Angelo, FSA, MAAA, FCA, EA
Senior Vice President & Actuary



Andy Yeung, ASA, MAAA, FCA, EA
Vice President & Actuary

JY/jl
Enclosures

cc: Suzanne Jenike
Brenda Shott

Rate Group #2: Member Contribution Rates for Plans T and U
To Reflect Enhancing Plan T to Plan U Formula For Court Employees Effective July 1, 2023

Entry Age	Plan T		Plan U	
	Normal	Total	Normal	Total
15	3.76%	5.04%	5.52%	7.49%
16	3.76%	5.04%	5.52%	7.49%
17	3.83%	5.13%	5.28%	7.16%
18	3.90%	5.22%	5.02%	6.81%
19	3.97%	5.32%	5.11%	6.93%
20	4.04%	5.41%	5.20%	7.06%
21	4.11%	5.51%	5.30%	7.18%
22	4.18%	5.60%	5.39%	7.31%
23	4.25%	5.70%	5.49%	7.44%
24	4.33%	5.80%	5.58%	7.58%
25	4.41%	5.91%	5.68%	7.71%
26	4.48%	6.01%	5.79%	7.85%
27	4.56%	6.12%	5.89%	7.99%
28	4.64%	6.22%	5.99%	8.13%
29	4.73%	6.33%	6.10%	8.27%
30	4.81%	6.45%	6.21%	8.42%
31	4.90%	6.56%	6.32%	8.57%
32	4.98%	6.68%	6.43%	8.72%
33	5.07%	6.80%	6.54%	8.87%
34	5.16%	6.92%	6.66%	9.03%
35	5.26%	7.04%	6.77%	9.19%
36	5.35%	7.17%	6.89%	9.35%
37	5.45%	7.30%	7.02%	9.52%
38	5.55%	7.44%	7.14%	9.69%
39	5.65%	7.57%	7.27%	9.86%
40	5.76%	7.72%	7.40%	10.04%
41	5.87%	7.86%	7.53%	10.22%

Attachment A (continued)

Cost Group #2: Member Contribution Rates for Plans T and U
To Reflect Enhancing Plan T to Plan U Formula For Court Employees Effective July 1, 2023

Entry Age	Plan T		Plan U	
	Normal	Total	Normal	Total
42	5.98%	8.01%	7.67%	10.40%
43	6.09%	8.16%	7.80%	10.59%
44	6.19%	8.30%	7.95%	10.78%
45	6.29%	8.44%	8.09%	10.98%
46	6.40%	8.57%	8.24%	11.18%
47	6.50%	8.72%	8.40%	11.39%
48	6.61%	8.86%	8.56%	11.61%
49	6.73%	9.01%	8.72%	11.83%
50	6.83%	9.15%	8.88%	12.04%
51	6.93%	9.28%	9.03%	12.25%
52	7.00%	9.38%	9.18%	12.46%
53	7.04%	9.44%	9.33%	12.66%
54	7.06%	9.46%	9.49%	12.87%
55	7.03%	9.42%	9.64%	13.08%
56	6.96%	9.33%	9.81%	13.31%
57	6.86%	9.19%	9.96%	13.52%
58	7.08%	9.49%	10.10%	13.70%
59	7.31%	9.80%	10.21%	13.85%
60	7.31%	9.80%	10.28%	13.94%
61	7.31%	9.80%	10.29%	13.96%
62	7.31%	9.80%	10.25%	13.91%
63	7.31%	9.80%	10.15%	13.77%
64	7.31%	9.80%	10.00%	13.57%
65	7.31%	9.80%	10.32%	14.01%
66 & Over	7.31%	9.80%	10.67%	14.47%
COLA Loading:		34.03%		35.67%

Attachment A (continued)

Cost Group #2: Member Contribution Rates for Plans T and U

To Reflect Enhancing Plan T to Plan U Formula For Court Employees Effective July 1, 2023

Interest:	7.00% per annum
COLA:	2.75% per annum
Mortality:	See December 31, 2021 Valuation Report <i>Section 4, Exhibit 1</i>
Salary Increase:	Inflation (2.50%) + Across-the-Board Increase (0.50%) + Merit and Promotion (See December 31, 2021 Valuation Report <i>Section 4, Exhibit 1</i>)

It is our understanding that in the determination of pension benefits under the CalPEPRA 2.5% at 67 formula, the compensation that can be taken into account for 2022 is equal to \$161,969 (reference: Section 7522.10). These amounts should be adjusted for changes to the Consumer Price Index for All Urban Consumers after 2022 (reference: Section 7522.10(d)).



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San Francisco, CA 94105-6147
segalco.com

Via Email

July 5, 2022

Mr. Steve Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 Wellington Avenue, Suite 100
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System (OCERS)
Cost Study of Enhancing Superior Court Members in Rate Group #2 from Plan T
(1.62% @ 65) Formula to Plan U (2.5% @ 67) Formula based on December 31, 2021
Valuation**

Dear Steve:

As requested by OCERS on behalf of the Superior Court (Court), Segal has updated our letter dated June 25, 2020 with the cost impact of providing an enhanced benefit on a prospective¹ basis for the Court's current active members in Rate Group #2 by going from the Plan T (1.62% @ 65) formula to the Plan U (2.5% @ 67) formula based on the December 31, 2021 valuation.² It is also our understanding that the Court's future employees would be enrolled in Plan U. Our calculation is based on the membership information, assumptions and results from the December 31, 2021 valuation. The results of that valuation have been approved for use in setting employer and member contribution rates for FY 23-24.

Background

For the purpose of determining the contribution rates in the ongoing valuation, employers that offer the same plan of benefit have generally been assigned to the same rate group. This should result in more stable contribution rates (especially for the smaller employers) as the actual experience from a larger group of members would be pooled in establishing the contribution rate requirements. This is the case for the Court in Rate Group #2 which includes the County attorneys, OCERS (as an employer) and three other employers. Furthermore, it is our understanding, after confirmation by OCERS, that all Court and County employees receiving the same benefit have to pay the same normal cost rate (and possibly the same unfunded actuarial accrued liability (UAAL) rate) pursuant to Section 71624(b) of the Government code.

¹ Consistent with our understanding of the provisions included in California Public Employees' Pension Reform Act of 2013, no past service would be enhanced under the Court's proposal.

² The cost impact provided in our letter dated June 25, 2020 was based on the December 31, 2019 valuation.

Mr. Steve Delaney
 July 5, 2022
 Page 2

In the table below, we compare the demographic profiles of the active employees in Rate Group #2 enrolled in Plans U and T before and after enhancing the benefits for the Court's active employees. Note that the Court Plan T members have a higher average entry age than the current Plan U members, and this age gap has widened since our last study dated June 25, 2020.

	Plan U Actives Before Including Court Actives Currently in Plan T	Court Actives Currently in Plan T	Plan U Actives After Including Court Actives Currently in Plan T
Number of Actives	335	546	881
Entry Age	32.4	34.4	33.6
Attained Age	36.6	38.4	37.7

	Plan T Actives Before Excluding Court Actives Currently in Plan T	Court Actives Currently in Plan T	Plan T Actives After Excluding Court Actives Currently in Plan T
Number of Actives	5,874	546	5,328
Entry Age	34.5	34.4	34.5
Attained Age	38.8	38.4	38.9

Result

The normal cost rates for both Plan T and Plan U set based on the demographic profiles of the active members enrolled in those Plans before and after reflecting the enhancement for the Court's active members are provided in the table below.

	Before Enhancement for Court Members		After Enhancement for Court Members	
	<u>Plan T</u>	<u>Plan U</u>	<u>Plan T</u>	<u>Plan U</u>
Employer Normal Cost Rate ³	7.11%	8.27%	7.09%	9.17%
Member Normal Cost Rate ⁴	7.11%	8.27%	7.09%	9.17%

Relative to the normal cost rates calculated in the December 31, 2021 valuation that have previously been approved by the Board for FY 23-24, there would be an increase in the employer and the member normal cost rates for Plan U due to the inclusion of the Court active members with a higher average entry age. There would be a slight decrease in the employer and member normal cost rates for Plan T due to the exclusion of the Court active members.

³ Besides the normal cost rate, the employer also has to pay a UAAL rate of 26.14% of payroll as calculated in the December 31, 2021 valuation.

⁴ A comparison of the member rates at sample entry ages is provided in the Attachment.

Mr. Steve Delaney
 July 5, 2022
 Page 3

Other Considerations

Effective Date of Implementing Employer and Member Contribution Rates in this Study

We would need guidance from OCERS regarding the timing of implementation of the revised normal cost rate to the affected employers in Plans U and T in Rate Group #2. In the past, OCERS has implemented new employer and member contribution rates upon the effective date of a benefit enhancement. However, in the case of the Court's enhancement, implementing the higher rate for the Court would have the impact of changing the contribution rates that had previously been approved by the Board in the December 31, 2021 valuation for FY 23-24 for the other employers with members enrolled under Plans U and T.

Rather than changing the contribution rates starting in FY 23-24, the Board may consider putting off revising the contribution rates until after the plan information (for the Court's members reflecting the new Plan U) is reported in the census data for the next actuarial valuation (i.e., December 31, 2022). However, under that scenario, there would be some actuarial losses in Rate Group #2 as the higher employer and member normal cost rates will not be paid immediately.

Decrease in UAAL

There is a technical issue associated with providing a future service only Plan U benefit for the Court's current active employees. Based on the Entry Age funding method, we calculated the normal cost rates assuming that all service (past and future) would be enhanced under Plan U. When that higher normal cost is used to split the present value of future benefit for an active member into future normal cost and past actuarial accrued liability, it results in a higher allocation to the future normal cost and a lower allocation to the actuarial accrued liability. This will reduce the UAAL by \$36,000⁵ and reduce the UAAL contribution rate for Rate Group #2 by 0.00%⁶ (when rounded), even though the improvement is only with respect to future service.

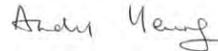
We are members of the American Academy of Actuaries and we meet the qualification requirements to render the actuarial opinion contained herein.

Please let us know if you have any questions and we look forward to discussing these results with you.

Sincerely,



Paul Angelo, FSA, MAAA, FCA, EA
 Senior Vice President & Actuary



Andy Yeung, ASA, MAAA, FCA, EA
 Vice President & Actuary

JY/bbf
 Enclosures

cc: Suzanne Jenike
 Brenda Shott

⁵ In our last study dated June 25, 2020, the reduction in the UAAL was \$857,000.

⁶ In our last study dated June 25, 2020, the reduction in the UAAL contribution rate was 0.01%.

Comparison of Member Normal Cost Rates at Sample Entry Ages

Entry Age	Before Enhancement for Court Members		After Enhancement for Court Members	
	<u>Plan T</u>	<u>Plan U</u>	<u>Plan T</u>	<u>Plan U</u>
30	6.45%	7.87%	6.45%	8.42%
35	7.05%	8.59%	7.04%	9.19%
40	7.73%	9.38%	7.72%	10.04%



OCERS Board Policy Actuarial Funding Policy

Purpose and Background

The Orange County Employees Retirement System (OCERS) is charged with administering defined benefit plans for its members. Administering the system includes establishing systematic funding of current and future benefit payments for members of OCERS. In doing so, the Board of Retirement engages the services of an actuary to assist in establishing contributions that will fully fund the System's liabilities, and that, as a percentage of payroll, will remain as level as possible for each generation of active members. In order for the actuary to perform the requested services, the Board must approve specific funding objectives, methods, and assumptions to be used in the actuarial valuation for the purpose of funding member benefits.

Policy Objectives

- Achieve long-term full funding of the cost of benefits provided by OCERS;
- Seek reasonable and equitable allocation of the cost of benefits over time;
- Minimize volatility of the plan sponsor's contribution to the extent reasonably possible, consistent with other policy goals; and,
- Support the general public policy goals of accountability and transparency by being clear as to both intent and effect, allowing for an assessment of how and when plan sponsors will meet the funding requirements of the plan.

Definitions

1. **Actuarial Accrued Liability (AAL)** – The portion of the present value of projected benefits that is attributed to past service by the actuarial funding method.
2. **Actuarial Funding Method** – A process used to allocate present value of projected benefits among past and future periods of service.
3. **Actuarial Gains and Losses** – The changes in unfunded actuarial accrued liability or surplus due to actual experience different from what is assumed in the actuarial valuation. For example, if during a given year the assets earn more than the investment return assumption, the amount of earnings above the assumption will cause an unexpected reduction in unfunded actuarial accrued liability, or "actuarial gain" as of the next valuation.
4. **Actuarial Surplus** – The positive difference, if any, between the Valuation Value of Assets and the Actuarial Accrued Liability
5. **Actuarial Value of Assets (AVA)** – The market value of assets less or plus the net deferred investment gains or losses not yet recognized by the asset smoothing method.



OCERS Board Policy

Actuarial Funding Policy

6. **Entry Age Method** – An actuarial cost method designed to fund a member's total plan benefit over the course of his or her career. This method is designed to produce stable employer and employee contributions in amounts that increase at the same rate as the members' payroll (i.e., level % of payroll).
7. **Market Value of Assets (MVA)** – The fair value of assets of the plan as reported under generally accepted accounting principles.
8. **Normal Cost** – The portion of the present value of projected benefits that is attributed to current service by the actuarial funding method.
9. **Unfunded Actuarial Accrued Liability (UAAL)** – The portion of the Actuarial Accrued Liability that is not currently covered by plan assets. It is calculated by subtracting the Valuation Value of Assets from the Actuarial Accrued Liability.
10. **Valuation Value of Assets (VVA)** – The value of assets used in the actuarial valuation to determine contribution rate requirements. It is equal to the Actuarial Value of Assets reduced by the value of any non-valuation reserves.
11. **Valuation Period** – The year for which the actuarial valuation is being performed, which is the calendar year preceding the December 31 actuarial valuation date.

Policy Guidelines

OCERS annual funding requirement is comprised of a payment of the Normal Cost and a payment on the Unfunded Actuarial Accrued Liability (UAAL). The Normal Cost and the amount of payment on UAAL are determined by the following three components of this funding policy

- a. Actuarial Cost Method: the process used to allocate the total present value of future benefits to each year (Normal Cost), and all past years (Actuarial Accrued Liability);
- b. Asset Smoothing Method: the process used that spreads the recognition of investment gains or losses over a period of time for the purposes of determining the Actuarial Value of Assets used in the actuarial valuation process; and
- c. Amortization Policy: the decisions on how, in terms of duration and pattern, to reduce the difference between the Actuarial Accrued Liability and the Valuation Value of Assets in a systematic manner.

Actuarial Cost Method

The Entry Age cost method with Normal Cost developed as a level percentage of pay shall be applied to each member's retirement benefit in determining the Normal Cost and the Actuarial Accrued Liability.



OCERS Board Policy

Actuarial Funding Policy

Asset Smoothing Method

The investment gains or losses of each Valuation Period, as a result of comparing the actual return on the Market Value of Assets at the end of the period with what the expected return on the Market Value of Assets would have been if the assumed rate of return on assets was realized during the period, shall be recognized in a level amount over a fixed five (5) years in calculating the Actuarial Value of Assets.

This policy anticipates that future circumstances may warrant adjustments to change the pattern of the recognition of the net deferred investment gains or losses after a period of significant market change followed by a period of market correction, upon receiving an analysis from OCERS' actuary. Such adjustments would be appropriate when the net deferred investment gains or losses are relatively small (i.e., the actuarial and market values are very close together), but the recognition of that net deferred amount is markedly non-level. Any such adjustment would be made subject to the following conditions:

- The net deferred investment gains or losses are unchanged as of the date of the adjustment; and,
- The period over which the net deferred investment gains and losses are fully recognized is unchanged as of the date of the adjustment.

Amortization Policy

- a. The Unfunded Actuarial Accrued Liability, the difference between the Actuarial Accrued Liability and the Valuation Value of Assets, shall be amortized over various periods of time, depending on how the unfunded liability arose;
- b. The total Unfunded Actuarial Accrued Liability as of December 31, 2013 (which consists of the outstanding balance of the UAAL from the December 31, 2012 valuation and any new actuarial gains or losses from calendar year 2013) shall be amortized over twenty (20) years;
- c. Actuarial Gains or Losses incurred in a single year shall be amortized over twenty (20) years;
- d. Changes in actuarial assumptions and cost methods shall be amortized over twenty (20) years;
- e. Plan amendments other than Early Retirement Incentives shall be amortized over fifteen (15) years;
- f. Early Retirement Incentives shall be amortized over a period not to exceed five (5) years;
- g. Unfunded Actuarial Accrued Liabilities shall be amortized in multiple layers by source over "closed" amortization periods;
- h. Unfunded Actuarial Accrued Liabilities shall be amortized as a level percentage of payroll so that the amortization amount in each year during the amortization period shall be expected to be a level percentage of covered payroll, taking into consideration the current assumption for general payroll increase;
- i. If an overfunding or "surplus" exists (i.e., the Valuation Value of Assets is greater than the Actuarial Accrued Liability) and the amount of such surplus is in excess of 20% of the AAL and the other conditions of Section 7522.52 of the California Public Employee's Pension Reform Act are met, such actuarial surplus in excess of 20% of the AAL and any subsequent such surpluses will be amortized



OCERS Board Policy

Actuarial Funding Policy

over an “open” amortization period of 30 years. Any prior UAAL amortization layers will be considered fully amortized, and any subsequent UAAL will be amortized as the first of a new series of amortization layers, using the above amortization periods.

- j. These amortization policy components will generally apply separately to each of OCERS’ UAAL rate groups with the exception that the conditions of Section 7522.52 apply to the total plan.

Other Policy Considerations

- a. In order to allow Plan Sponsors to more accurately budget for pension contributions and other practical considerations, the contribution rates determined in each actuarial valuation (as of December 31) will generally apply to the fiscal year beginning eighteen months after the Actuarial Valuation date. The UAAL contribution rates in the current actuarial valuation are adjusted to account for any shortfall or excess contributions as a result of the implementation lag;
- b. Any change in contribution rate requirement that results from a plan amendment is generally implemented as of the effective date of the plan amendment or as soon as administratively feasible;
- c. When calculating both employer and member contribution rates (basic and COLA portions) for Legacy members, the actuary shall include an assumption for the additional cash out of accumulated annual leave, sick leave or compensatory leave both earned and permitted to be cashed out during the final average measuring period, applied on a pooled basis (General, Safety-Probation, Safety-Law and Safety-Fire).
- d. The actuarial assumptions adopted by the Board for use in the actuarial valuation affect only the timing of contributions; the ultimate contribution level is determined by the benefits and the expense actually paid offset by actual investment returns. To the extent that actual experience deviates from the assumptions, experience gains and losses will occur. These gains (or losses) then serve to reduce (or increase) the future contribution requirements.

Actuarial assumptions are generally grouped into two major categories:

- Demographic assumptions – including rates of withdrawal, service retirement, disability retirement, mortality, etc.
- Economic assumptions – including price inflation, wage inflation, investment return, salary increase, etc.

The actuarial assumptions represent the Board’s best estimate of anticipated experience under OCERS and are intended to be long term in nature. Therefore, in developing the actuarial assumptions, the Board considers not only past experience but also trends, external forces and future expectations. The Board will review all assumptions triennially. The current assumptions used by the actuary can be found in the latest actuarial valuation report available on OCERS’ website..



OCERS Board Policy Actuarial Funding Policy

Policy Review

The Board of Retirement will review this policy every three years or more frequently if recommended by the actuary to ensure that it remains relevant and appropriate.

Policy History

The Board adopted this policy on January 21, 2014. This policy was revised on December 15, 2014, April 18, 2018, and November 14, 2022.

Secretary's Certificate

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this Policy.

A handwritten signature in blue ink that reads "Steve Delaney". The signature is written in a cursive style and is contained within a rectangular box.

Steve Delaney
Secretary of the Board

11/14/2022

Date



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina M. Ratto, General Counsel
SUBJECT: **DELEGATING TO THE CEO RESPONSIBILITY TO FULLY DEVELOP DISABILITY GRANTS FOR CONSIDERATION BY THE BOARD**

Recommendation

Delegate to the OCERS CEO the responsibility to fully develop Disability Benefit grant recommendations for the OCERS Board’s consideration and approval.

Background

The proposed action to delegate to the CEO the responsibility to review and fully develop recommendations to the Board to grant disability retirement applications was discussed with the Board at its meeting last month. The Board asked for additional information regarding the proposed action.

Current Process

The current flow of the disability retirement application process is depicted in the first slide attached.

All applications for disability retirement are received by the Disability Unit. The Disability Unit processes the application, investigates the basis for the application including ordering appropriate medical examinations of the member and reviewing the employer’s records, and meets with lawyers in the Legal Division to determine whether, based on all the information collected, staff believes the member has met the legal standards such that their application should be granted.

1. All disability retirement applications are then presented to the Disability Committee with staff’s recommendation to grant or deny the application.
2. Where the **staff recommends that the Disability Committee grant** the application:
 - a. If the **Disability Committee concurs with staff’s recommendation to grant** the application, the matter is presented to the Board on its consent agenda at the Board’s next meeting.
 - i. If the Board concurs with the recommendation of the Disability Committee to grant the application, the application is granted and the matter is concluded.
 - ii. If the Board does not concur with the recommendation of the Disability Committee to grant the application, the Board refers the case to a hearing.
 - b. If the **Disability Committee does not concur with staff’s recommendation to grant** the application, the Disability Committee recommends that the application should be denied, and the member is given 90 days to request an administrative hearing.

- i. If the member does not timely request an administrative hearing, the matter is presented to the Board on its consent agenda at the Board’s next meeting.
 - ii. If the member requests an administrative hearing, the matter is heard by one of OCERS hearing officers and once the hearing is concluded, the hearing officer’s recommendations are presented to the Board. The Board can then adopt the hearing officer’s recommendations; consider the transcript of the hearing and other evidence and take such action at the Board in its opinion is indicated by such evidence; refer the matter back to the hearing officer for further proceedings; or set the matter for a hearing before the Board.

- 3. Where the **staff recommends that the Disability Committee deny** the application:
 - a. If the **Disability Committee concurs with staff’s recommendation to deny** the application, the Disability Committee will recommend that the application should be denied, and the member is given 90 days to request an administrative hearing.
 - i. If the member does not timely request an administrative hearing, the matter is presented to the Board on its consent agenda at the Board’s next meeting.
 - ii. If the member requests an administrative hearing, the matter is heard by one of OCERS hearing officers and once the hearing is concluded, the hearing officer’s recommendations are presented to the Board. The Board can then adopt the hearing officer’s recommendations; consider the transcript of the hearing and other evidence and take such action at the Board in its opinion is indicated by such evidence; refer the matter back to the hearing officer for further proceedings; or set the matter for a hearing before the Board.
 - b. If the **Disability Committee does not concur with staff’s recommendation to deny** the application, the Disability Committee sends the matter to the Board with a recommendation that the Board grant the application. The matter is presented to the Board on its consent agenda at the Board’s next meeting.
 - i. If the Board concurs with the recommendation of the Disability Committee to grant the application, the application is granted and the matter is concluded.
 - ii. If the Board does not concur with the recommendation of the Disability Committee to grant the application, the Board refers the case to a hearing.

Proposed Process

The proposed flow of the disability retirement application process is depicted in the second slide attached and explained below. Differences between the Proposed Process and the Current Process are set forth in [blue text and underlined](#).

All applications for disability retirement are received by the Disability Unit. The Disability Unit processes the application, investigates the basis for the application including ordering appropriate medical examinations of the member and reviewing the employer’s records, and meets with lawyers in the Legal Division to determine whether, based on all the information collected, staff believes the member has met the legal standards such that their application should be granted.

1. Where the **staff recommends that the application should be granted**, the application with all of the background material and bases for staff's recommendation to grant will be presented to the CEO (instead of the Disability Committee in the current process).
 - a. If the **CEO concurs with staff's recommendation to grant** the application, the matter is presented to the Board on its consent agenda at the Board's next meeting.
 - i. If the Board concurs with the recommendation of the CEO to grant the application, the application is granted and the matter is concluded.
 - ii. If the Board does not concur with the recommendation of the CEO to grant the application, the Board will refer the matter to the Disability Committee, and the matter will proceed as in Paragraph 2 below (similar to staff recommendations to the Disability Committee to deny the application).
 - b. If the **CEO does not concur with staff's recommendation to grant** the application, the matter will be referred to the Disability Committee, and the matter will proceed as in Paragraph 2 below (similar to staff recommendations to the Disability Committee to deny the application).

2. Where the **staff recommends that the Disability Committee deny** the application¹:
 - a. If the **Disability Committee concurs with staff's recommendation to deny** the application, the Disability Committee will recommend that the application should be denied, and the member is given 90 days to request an administrative hearing.
 - i. If the member does not timely request an administrative hearing, the matter is presented to the Board on its consent agenda at the Board's next meeting.
 - ii. If the member requests an administrative hearing, the matter is heard by one of OCERS hearing officers and once the hearing is concluded, the hearing officer's recommendations are presented to the Board. The Board can then adopt the hearing officer's recommendations; consider the transcript of the hearing and other evidence and take such action at the Board in its opinion is indicated by such evidence; refer the matter back to the hearing officer for further proceedings; or set the matter for a hearing before the Board.
 - b. If the **Disability Committee does not concur with staff's recommendation to deny** the application, the Disability Committee sends the matter to the Board with a recommendation that the Board grant the application. The matter is presented to the Board on its consent agenda at the Board's next meeting.
 - i. If the Board concurs with the recommendation of the Disability Committee to grant the application, the application is granted and the matter is concluded.
 - ii. If the Board does not concur with the recommendation of the Disability Committee to grant the application, the Board refers the case to a hearing.

Accordingly, the proposed new process would apply ONLY to applications for disability retirement for which the OCERS disability staff, in consultation with the Legal Division, recommends that the application be granted. For

¹ Or where the Board refers the matter to the Disability Committee under Paragraph 1.a.ii., above; or where the CEO refers that matter to the Disability Committee under Paragraph 1.b., above.

these applications, rather than requiring the Disability Committee to continue to consider in depth each of the disability applications where staff's recommendation is to grant the disability benefit, the CEO would assume the responsibilities of the Disability Committee in connection with these applications.

The CEO would undertake that same in-depth review of staff's recommendations to grant, including review of all of the medical information and other back up material upon which staff bases its recommendation to grant. If, after evaluation of all of the materials, the CEO concurs in staff's recommendation that the application for disability benefits should be granted, the matter would be placed on the Board's monthly Consent Agenda with a recommendation from the CEO that the Board grant the disability benefit. If the CEO does not concur in staff's recommendation, the matter would be referred to the Disability Committee.

The materials presented to the Board would include a memorandum explaining the basis for the recommendation and would provide at least the same level of information and detail as is currently presented to the Board in connection with recommended grants from the Disability Committee. All of the supporting documentation (e.g., complete medical reports, employer statement and records, etc.) for each item on the Consent Agenda would be placed in a folder on Diligent marked "CEO Disability Recommendations – MONTH/YEAR" and available to the Board for its review.

If any Board member had questions or concerns about any matter, the matter could be pulled for discussion in Closed Session just as we currently do. If the Board were to disagree with the CEO's recommendation to grant a disability benefit, the matter would be referred to the Disability Committee and would proceed similarly to staff recommendations to deny the application.

It is important to emphasize that the CEO will not APPROVE grants of disability benefit. That authority remains with the Board in accordance with the law.² In addition, the proposed process would not require a revision to the CEO Charter as the charter currently states, in Section 8.c., that the CEO will, "[i]n consultation with medical evaluators and legal counsel, recommend disability applications to the Board and the Disability Committee for each of their consideration."

As noted in January, the number of disability benefit claims presented to the Disability Committee each month continues to rise with the growth of system membership. In 2022, OCERS received 113 applications for disability retirement; and the Disability Committee in turn reviewed and forwarded to the OCERS Board 80 recommendations to grant the disability benefit. Under the proposed process, the Disability Committee would no longer need to review applications for which the recommendation is to grant. We expect that these members would obtain their benefits in a more timely manner, and the Disability Committee could focus its

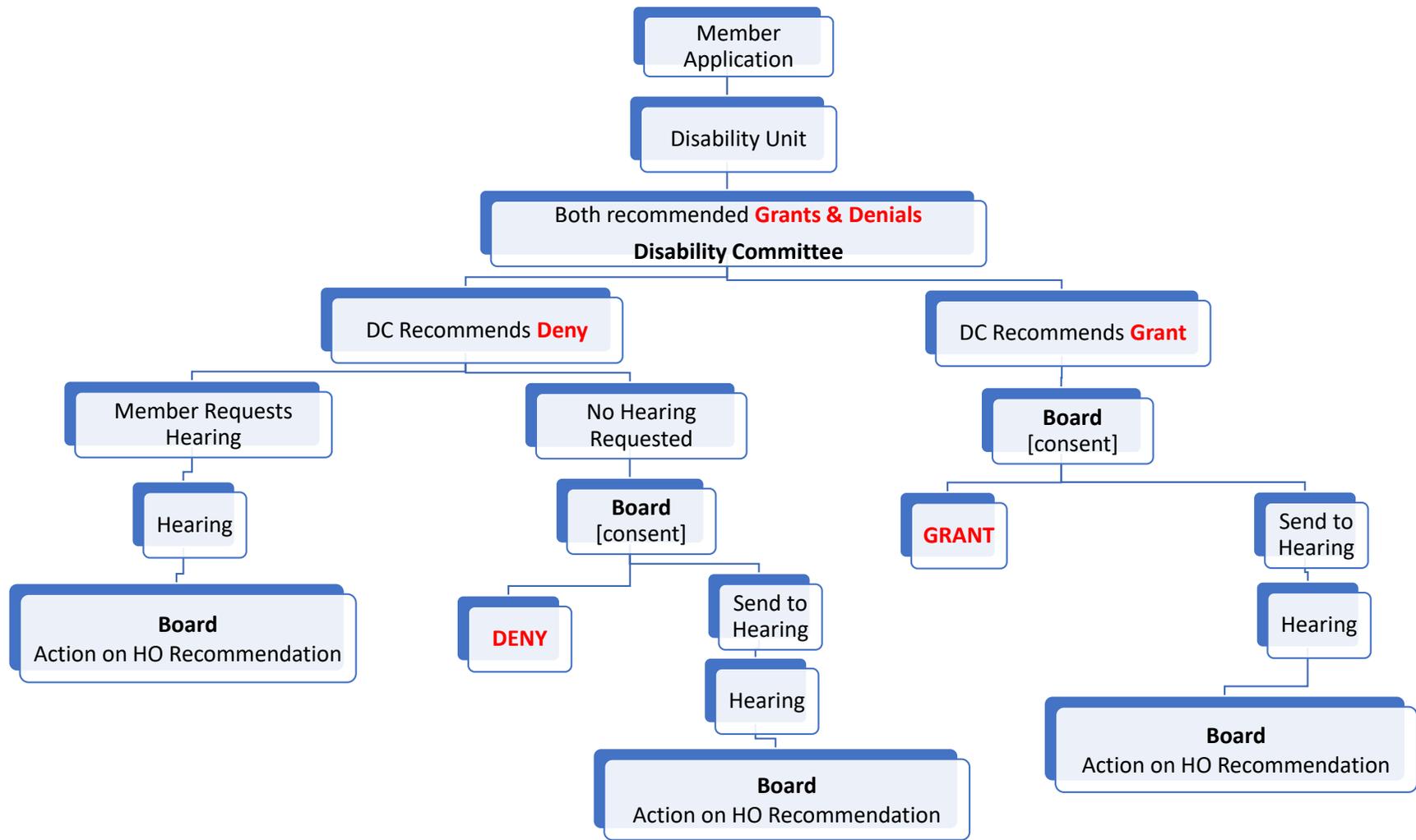
² The CERL (Gov't Code § 31725) states that "[p]ermanent incapacity for the performance of duty shall in all cases be determined by the board" and that "[i]f the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him ..." (Gov't Code § 31724).

time and attention on claims for disability benefits that staff has determined do not meet the proof standards set by the law and the OCERS Board.

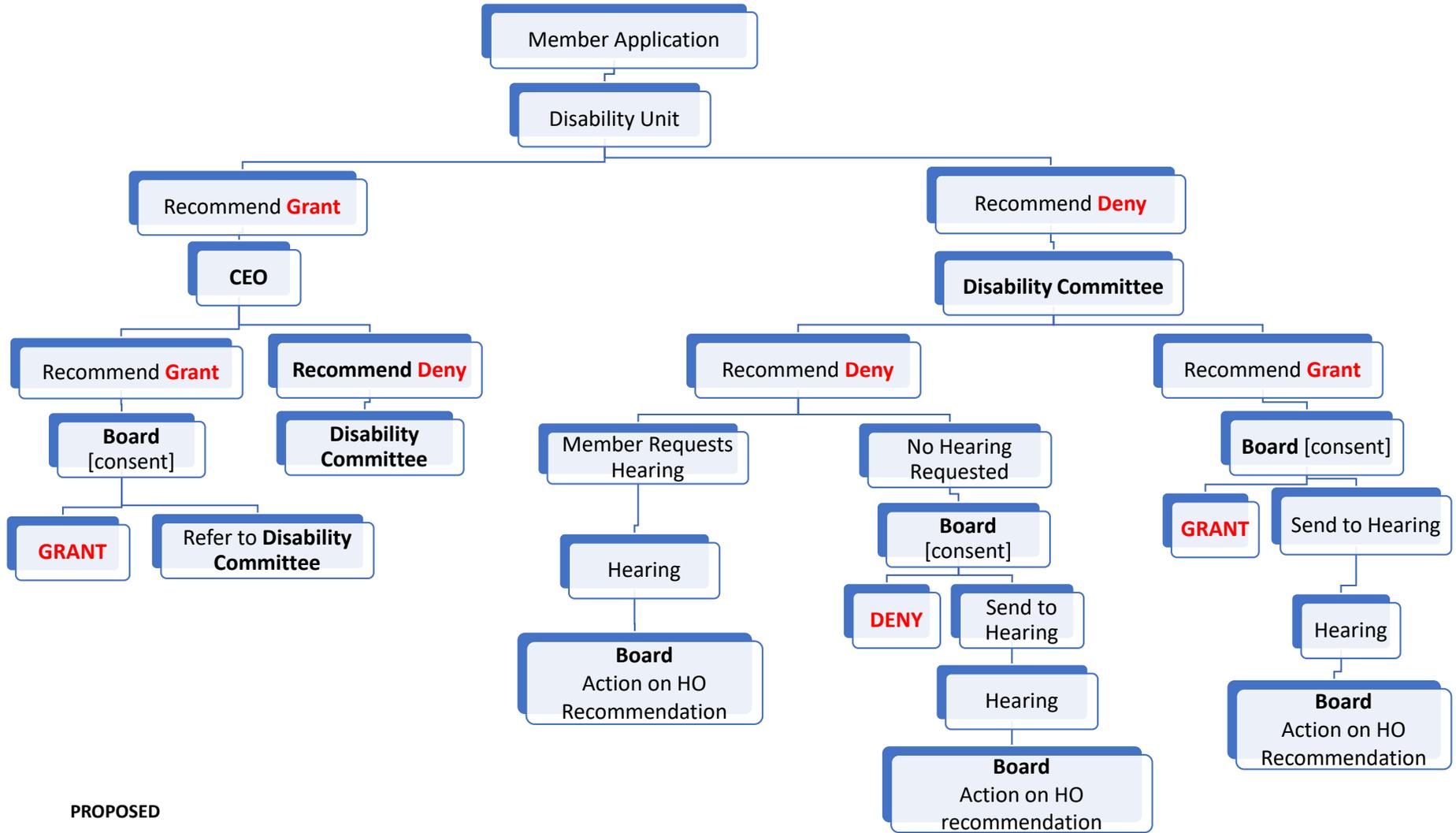
Submitted by:



Gina M. Ratto
General Counsel



CURRENT



PROPOSED



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Suzanne Jenike, Assistant CEO, External Operations
SUBJECT: 2023 COST OF LIVING ADJUSTMENT

Recommendation

Adjust all applicable benefit allowances by 3% effective April 1, 2023, and bank 4.5%, in accordance with Government Code section 31870.1, resulting from the 7.45% change to CPI in calendar year 2022 (rounded to 7.5%).

Background/Discussion

Per Government Code section 31870.1, the OCERS Board of Retirement is required to annually adjust the benefit allowances relative to the increase or decrease in the Consumer Price Index (CPI). This adjustment, known as a Cost of Living Adjustment (COLA), is effective April 1st of each year. This year, there was an increase in the CPI for year-end 2022 of 7.45%. To determine the change in CPI, Segal compares the Bureau of Labor Statistics' annual average CPI for All Urban Consumers for the Los Angeles-Long Beach-Anaheim area for each of the past two years and derives the percentage change between the two. This is done in accordance with Government Code section 31870.1, which is the COLA section operative in Orange County. That section also states that any increase or decrease in the CPI is to be rounded to the nearest one-half of one percent (7.45% rounded to 7.5%) and provides that a maximum COLA of 3% shall be granted on every retirement allowance, optional death allowance, or annual death allowance payable to or on account of any member of the system. For years in which the COLA exceeds 3%, the amount over 3% is banked for future years when the COLA is less than 3%.

For all benefit recipients, who began or will begin receiving benefits on or before April 1, 2023, this adjustment will increase their allowances by 3% with the remaining 4.5% added to the COLA Bank.

Submitted by:



S. J. – APPROVED

Suzanne Jenike
 Assistant CEO, External Operations



Andy Yeung, ASA, MAAA, FCA, EA
Vice President & Actuary
T 415.263.8283
ayeung@segalco.com

180 Howard Street
Suite 1100
San Francisco, CA 94105-6147
segalco.com

Via Email

January 20, 2023

Mr. Steve Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 Wellington Avenue
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System
Cost-of-Living Adjustments (COLA) as of April 1, 2023**

Dear Steve:

We have determined the cost-of-living adjustments for the System in accordance with Section 31870.1, as provided in the enclosed exhibit.

Pursuant to Section 31870.1, the cost-of-living factor to be used by the System on April 1, 2023 is determined by comparing the annual average CPI for All Urban Consumers for the Los Angeles-Long Beach-Anaheim Area (with 1982-84 as the base period), as published by the Bureau of Labor Statistics, in each of the past two years. The ratio of the past two annual indices, 310.782 in 2022 and 289.244 in 2021, is 1.0745. The County Law section cited above indicates that the resulting percentage change of 7.45% should be rounded to the nearest one-half percent, which is 7.5%.

Please note the above cost-of-living adjustment calculated using established procedures for OCERS may result in adjustments different from those calculated using alternative procedures by other systems.

The actual cost-of-living adjustment is independent of the date of retirement. The CPI adjustment to be applied on April 1, 2023 is provided in Column (4) of the enclosed exhibit. The COLA bank on April 1, 2023 is provided in Column (5).

Please give us a call if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Andy Yeung".

Andy Yeung, ASA, MAAA, FCA, EA
Vice President & Actuary

bts/elf
Enclosure

cc: Suzanne Jenike
Brenda M. Shott, CPA

Orange County Employees Retirement System
 Cost-Of-Living Adjustment
 As of April 1, 2023

Retirement Date	(1)	(2)	(3)	(4)	(5)
	April 1, 2022 Accumulated Carry-over Bank	2023 CPI Change*	2023 CPI Rounded**	2023 CPI Used***	April 1, 2023 Accumulated Carry-over Bank****
All Members					
Section 31870.1					
Maximum Annual COLA	3.0%				
On or Before 4/1/1972	47.5%	7.45%	7.5%	3.0%	52.0%
04/02/1972 to 04/01/1974	47.0%	7.45%	7.5%	3.0%	51.5%
04/02/1974 to 04/01/1975	46.5%	7.45%	7.5%	3.0%	51.0%
04/02/1975 to 04/01/1976	41.0%	7.45%	7.5%	3.0%	45.5%
04/02/1976 to 04/01/1977	35.5%	7.45%	7.5%	3.0%	40.0%
04/02/1977 to 04/01/1978	32.0%	7.45%	7.5%	3.0%	36.5%
04/02/1978 to 04/01/1979	28.0%	7.45%	7.5%	3.0%	32.5%
04/02/1979 to 04/01/1980	23.0%	7.45%	7.5%	3.0%	27.5%
04/02/1980 to 04/01/1981	15.5%	7.45%	7.5%	3.0%	20.0%
04/02/1981 to 04/01/1982	5.0%	7.45%	7.5%	3.0%	9.5%
04/02/1982 to 04/01/2022	1.0%	7.45%	7.5%	3.0%	5.5%
04/02/2022 to 04/01/2023		7.45%	7.5%	3.0%	4.5%

* Based on ratio of 2022 annual average CPI to 2021 annual average CPI for the Los Angeles - Long Beach - Anaheim Area.

** Based on CPI change rounded to nearest one-half percent.

*** These are the cost-of-living adjustment factors to be applied on April 1, 2023.

**** These are the carry-over of the cost-of-living adjustments that have not been used on April 1, 2023.

§31870.1. Determination; maximum annual change of three percent in allowances; limitation on reduction

The board shall before April 1 of each year determine whether there has been an increase or decrease in the cost of living as provided in this section. Notwithstanding Section 31481 or any other provision of this chapter (commencing with Section 31450), every retirement allowance, optional death allowance, or annual death allowance payable to or on account of any member, of this system or superseded system who retires or dies or who has retired or died shall, as of April 1st of each year, be increased or decreased by a percentage of the total allowance then being received found by the board to approximate to the nearest one-half of 1 percent, the percentage of annual increase or decrease in the cost of living as of January 1st of each year as shown by the then current Bureau of Labor Statistics Consumer Price Index for All Urban Consumers for the area in which the county seat is situated, but such change shall not exceed 3 percent per year; however, the amount of any cost-of-living increase or decrease in any year which is not met by the maximum annual change of 3 percent in allowances shall be accumulated to be met by increases or decreases in allowance in future years; except that no decrease shall reduce the allowance below the amount being received by the member or his beneficiary on the effective date of the allowance or the application of this article, whichever is later.

(Amended by Stats. 1978, Ch. 900, Sec. 11)



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina Ratto, General Counsel
SUBJECT: BOARD APPROVAL OF SELECTION AND ENGAGEMENT OF HEARING OFFICERS

Recommendation

On behalf of the Hearing Officer Selection Panel, staff recommends the Board approve the appointment of and the award of a contract (subject to negotiation of satisfactory contract terms) with, the following individuals to serve as OCERS hearing officers for a term of seven years beginning March 1, 2023.

- ∑ Stephen Biersmith
- ∑ Michael Dilberto
- ∑ Robert Snider
- ∑ Deborah Wissley

Background

Pursuant to Government Code section 31533, the Board is authorized to appoint one of its members or a member of the State Bar of California to serve as a referee (commonly referred to as a hearing officer) to hold hearings and issue proposed findings of fact and recommended decisions in connection with the determination of member applications for disability retirement and other pension benefits. On April 17, 2000, the Board adopted a Hearing Officer Selection and Retention Policy (Policy). The Policy was revised on April 19, 2021.

The Policy outlines the roles and responsibilities of the Board in appointing hearing officers. The Policy also establishes a Hearing Officer Selection Panel (Panel) consisting of the CEO; the General Counsel; either the Assistant CEO for External Operations or the Director of Member Services; and either the Disability Committee Chair or Vice Chair. The Panel is responsible for interviewing and recommending to the Board for its approval competent and qualified hearing officers; evaluating the performance of hearing officers; and maintaining a list of hearing officers sufficient in number to meet OCERS' needs.

OCERS has traditionally maintained two groups or panels of hearing officers, with approximately three or four hearing officers in each panel. The two panels have seven-year, staggered terms. The contract terms for one panel will expire on March 1, 2023, leaving OCERS with only one panel of three hearing officers with contracts expiring on July 1, 2026.

Under the Policy, when the General Counsel determines that it is necessary to add additional hearing officers in order to maintain a sufficient number of them, the Panel will initiate a Request for Proposal (RFP). Based upon

the number of member appeals that OCERS handles each year, the General Counsel determined that a second panel of hearing officers was needed; and on October 3, 2022, OCERS issued an RFP for Administrative Hearing Officer Services to fill the second, soon to be vacant, panel of hearing officers. Candidates had until December 1, 2022 to submit their proposals in response to the RFP. OCERS advertised the RFP on the OCERS website, in the Daily Journal (legal publication), on Twitter, at various law schools such as UCLA School of Law and Chapman University and on the CALAPRS, SACRS and the National Association of Hearing Officers (NAHO) websites for the duration of the proposal period. OCERS received five responses to the RFP.

Discussion

The Policy sets forth hearing officer qualifications and the selection and retention procedures. Consistent with these procedures, the Panel reviewed all five proposals, which included answers to specific questions and requests for information, writing samples and references. Based on the review, the Panel determined that all candidates met the minimum qualifications of the RFP, and selected all five candidates for formal interviews. Interviews were conducted on January 20, 2023. Of the five candidates, the Panel selected its top four candidates as finalists.

Staff checked references on the four finalists and was satisfied with all of the responses. Consistent with the Policy, staff then submitted the list of finalists to OCERS' employers and employee representation units to give each of them an opportunity to provide comments. Staff received no comments in response to this outreach.

Below is a brief background on the four finalists. Their proposals, including cover letters, resumes and writing samples, are attached.

- ∑ **Stephen M. Biersmith, Ventura, CA** – *Mr. Biersmith was admitted to the California State Bar in 1989. His practice has been limited to serving as an arbitrator, referee, and hearing officer for Federal, State, and local governments. He currently serves as a Hearing Officer/Referee for LACERA, SDCERA, and the L.A. County Short-term Disability Program. He served as a Hearing Officer for OCERS in the early 1990s and from 2005 to 2012.*
- ∑ **Michael R. Diliberto, Sherman Oaks, CA** – *Mr. Diliberto was admitted to the California State Bar in 1988. He currently serves as a Hearing Examiner for the Civil Service Commission and the Los Angeles Police Commission, Board of Rights Panel. He also serves as an Arbitrator for the Financial Industry Regulatory Authority (FINRA) and the Independent Film and Television Alliance (IFTA). He served as a Hearing Officer for OCERS from 2011 to 2018.*
- ∑ **Robert M. Snider, Palm Desert, CA** – *Mr. Snider was admitted to the California State Bar in 1978. He currently serves as a Hearing Officer for SBCERA, SDCERA, and the City of West Hollywood. He served as a Hearing Officer for OCERS from 2011 to 2018.*
- ∑ **Deborah Z. Wissley, Tijeras, NM** – *Ms. Wissley was admitted to the California State Bar in 1982. She currently serves as an Arbitrator for Kaiser Foundation Health (medical malpractice cases) and serves as a Hearing Officer for SBCERS, KCERA, SBCERA, VCERA, and LACERA. She served as a Hearing Officer for OCERS from 2011 to 2018.*

On behalf of the Panel, staff recommends the four finalists to the Board for its approval and for the award of a contract, subject to negotiation of satisfactory terms, with each.

Attachments

Candidate Proposals:

- Σ Stephen Biersmith
- Σ Michael Dilberto
- Σ Robert Snider
- Σ Deborah Wissley

Submitted by:



Gina M. Ratto
General Counsel

From: sbiersmith@aol.com
To: [William Singleton](#)
Subject: [EXTERNAL] OCERS Administrative Hearing Officer Proposal
Date: Sunday, October 30, 2022 7:14:49 PM
Attachments: [OCERS -Administrative Services Hearing Officer Proposal.docx](#)
[CA Bar Certificate of Good Standing.pdf](#)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Mr. Singleton:

In response to the current solicitation, attached is a completed proposal package to serve as an Administrative Hearing Officer for the Orange County Employee Retirement System (OCERS).

Back in the early 1990's I served a five (5) year term with OCERS in the same capacity. I found the experience to be very professionally rewarding and especially enjoyed working with the staff and the various advocates who appeared before me representing both OCERS and claimants.

I currently serve as one of three (3) hearing officers hearing appeals for the L.A. County's Short-term Disability Program as well as a referee for both LACERA and SDCERA. I began providing such services for the former was more than ten (10) years and the latter this past year.

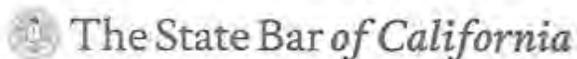
The opportunity to once again join your panel would be appreciated.

If you have any questions, feel free to call.

Sincerely,

Stephen M. Biersmith

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Stephen Michael Biersmith #144321

License Status: Active

Address: 5462 Rincon Beach Park, Ventura, CA 93001

Phone: 805-648-7242 | Fax: Not Available

Email: Not Available | Website: Not Available

More about This Attorney ▾

All changes of license status due to nondisciplinary administrative matters and disciplinary actions.

Date	License Status ⓘ	Discipline ⓘ	Administrative Action ⓘ
Present	Active		
12/13/1989	Admitted to the State Bar of California		

Additional Information:

- About the disciplinary system

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LAW OFFICE OF STEPHEN M. BIERSMITH
5462 Rincon Beach Park Drive
Ventura, CA. 93001
(805) 648-7242
sbiersmith@aol.com

via email (wsingleton@ocers.org)

October 31, 2022

Mr. Bill Singleton
Paralegal
OCERS
P. O. Box 1229
Santa Ana, CA. 927-2

Re: Administrative Hearing Officer Proposal

Dear Mr. Singleton:

In response to the current solicitation, attached is a completed proposal package to serve as an Administrative Hearing Officer for the Orange County Employee Retirement System (OCERS).

Back in the early 1990's I served a five (5) year term with OCERS in the same capacity. I found the experience to be very professionally rewarding and especially enjoyed working with the staff and the various advocates who appeared before me representing both OCERS and claimants.

I currently serve as one of three (3) hearing officers hearing appeals for the L.A. County's Short-term Disability Program as well as a referee for both LACERA and SDCERA. I began providing such services for the former was more than ten (10) years and the latter this past year.

The opportunity to once again join your panel would be appreciated.

If you have any questions, feel free to call.

Sincerely,

Stephen M. Biersmith

Re: Administrative Hearing office Services (Request for Proposal)

1. **A current Curriculum Vitae (see attached)**
2. **The respondent must provide an affirmative statement that if they are selected to serve as a Hearing Officer, they will be independent of OCERS and not related in any way to OCERS' business operations. The respondent should also provide an affirmative statement that they are not currently in litigation with OCERS or with the County of Orange.**

(See attached affirmation statements)

3. **The respondent must provide an affirmative statement that they have not given a gift or political campaign contribution to any officer, Board member, or employee of OCERS within the past twenty-four months.**

(See attached affirmation statements)

4. **The respondent must certify that they are an active member, in good standing, with the State Bar of California and must certify that they have been practicing law as a licensed member of the State Bar of California for a minimum of five (5) years. The respondent must provide their California State Bar number.**

CA. State Bar Number 144321 (See attached affirmation statements)

5. **The respondent must provide information sufficient to determine the nature and severity of any legal malpractice case or claim against them in the last five (5) years, any sanctions used by any court against them for the last five (5) years, and any discipline (either public or private) issued by the California Bar, or any jurisdiction, ever issued against the respondent.**

None (see attached verification from CA. State Bar)

6. **The respondent must provide as much information about their experiences as an adjudicator (e.g., judge, judge pro-tem, hearing officer, arbitrator, et. (In addition to any experience in CERL cases, other public agency retirement cases, disability, Social Security, or Workers Compensation law.**

For the last number of years my practice has been limited to serving as an arbitrator, referee, or hearing officer for Federal, State, and local governments which were almost exclusively limited to employment and disability matters. I have presided over approximately 350 of cases referred to my office from both the private and public sectors.

- 7. The respondent must list separately any prior work performed for OCERS. Please indicate the nature and scope of the work as well as the dates.**

Served as a Hearing Officer for OCERS for a seven (7) year term from 2005-2012

- 8. The respondent must detail any work performed for any other retirement system or pension plan.**

Currently serves as hearing officer/referee for LACERA and SDCERA and for the L.A. County Short-term Disability program

- 9. The respondent must detail any work performed in the field of workers compensation law.**

For a number of years, I served as a human resource professional and/or general counsel for several large corporations handling employment law matters. Disability and workers compensation administration and cases were part of my areas of responsibility during that period of time. There were numerous occasions when I appeared in front of the WCAB to adjudicate all sorts of matters in that forum including: temporary disability, permanent disability, vocational rehabilitation and discrimination matters. I have also handled and litigation administrative matters involving claims of disability discrimination in front of FEHA and the EEOC.

- 10. The respondent must detail any work performed as a judge, pro-tem arbitrator, referee or neutral.**

In addition to being a panel member for the American Arbitration Association hearing exclusively employment and labor cases, I serve as an arbitrator and hearing officer in a number of public and private sector including on the following panels:

National Mediation Board, CA. State Mediation and Conciliation Service, County of Los Angeles Civil Service Commission, City & County of San Francisco, Los Angeles Retirement System (LACERA), Oregon Employee Relations Board, Nevada EMRB, Montana Board of Personnel, City of Los Angeles Civil Service Commission, San Bernardino Civil Service Commission, ERCOM (LA), County of Santa Barbara, City of Long Beach, County of Fresno (FCERA), County of San Diego (SDCERA), PERB Virgin Islands, National Futures Assoc., AFGE Local 1406, SEIU Local 721, Edwards Air Force Base, Steelworkers, United Industrial Workers Seafarers, Teamsters #1932, and the Illinois Educational Labor Relations Board.

- 11. The respondent represent that they do not perform any work that would create a potential conflict of interest with the work to be performed for OCERS. Such work could include representation of OCERS” plan sponsors or retirement system member against OCERS**

(See attached affirmation statements)

12. The Respondent must submit writing samples for review that demonstrate the respondent's ability to full discuss the meris of legal issue and apply relevant legal standards. Writing sample submitted are subject to the California Public Records Act. Therefore, writing samples should be redacted appropriately.

(See attached)

13. Any of information that the respondent deems relevant to OCERS' selection process.

In addition to having earned two advance degrees in the field, I was a faculty member at the University of California Santa Barbara teaching business, human resource, and employment law courses for nearly ten years where disability law and practice was a small component.

My reputation throughout the labor and management advocacy community is of one who presides over matters in a fair and expeditious fashion, treating the process with respect and integrity. As an acknowledgment of the same, I have repeatedly been asked to serve over and over again by employee and employer advocates alike who had already appeared before me. The opportunity to join your panel and continue to do the same would be appreciated

STEPHEN M. BIERSMITH, Esq.

**5462 Rincon Beach Park
Ventura, CA. 93001**

Phone (805) 648-7242
sbiersmith@aol.com

COURTS OF ADMISSION

U.S. Supreme Court, U.S. Court of Appeals 9th Circuit, U.S. Tax Court, California Supreme Court, U.S. District of California (Eastern Northern & Central Districts, U.S. District Court for the District of Columbia, California Court of Appeals; and the U.S. District Court (Northern District of Illinois)

PERMANENT ARBITRATION/HEARING OFFICER PANELS

National Mediation Board, CA. State Mediation and Conciliation Service, County of Los Angeles Civil Service Commission, City and County of San Francisco, Los Angeles Retirement System (LACERA), Oregon Employee Relations Board, City of Los Angeles Civil Service Commission, San Diego Retirement Board (SDCERS) U.S. Postal Service, San Bernardino Civil Service Commission, ERCOM (LA), County of Santa Barbara, City of Long Beach, County of Fresno (FCERA), World Intellectual Property Organization, International Court of Arbitration, PERB Virgin Islands, National Futures Assoc., AFGE Local 1406, SEIU Local 721, Edwards Air Force Base, Teamsters #1932, and the Illinois Educational Labor Relations Board.

WORK HISTORY

Arbitrator/Hearing Officer (Law Offices of Stephen M. Biersmith, 1995 – present), Instructor (University of California at Santa Barbara, 1999 – 2011), General Counsel (Koosharem Corp. 1999 – 2014), Director of Human Resources (Pacific Offshore Pipeline Company, a subsidiary of SoCal Gas, 1984 – 1994), Employee Relations Manager (Getty Oil), 1981 – 1984), Employee Relations Rep. (Pullman Trailmobile, 1979 - 1981)

EDUCATION

Marquette University (B.A. Political Science -1975), University of Missouri (M.B.A. Labor & Employee Relations – 1979), Santa Barbara College of Law (J.D. – 1989)

ARBITRATION EXPERIENCE

Industries

Aerospace, agriculture, automotive, banking, chemicals, communications, construction, K-12 education, defense, engineering entertainment, food processing, fabrication, government, health care, higher education, hospitality, manufacturing, medical technology, oil and gas, police and fire, railroads, securities, steel transportation, trucking, utilities, and warehousing

Issues

Attendance, arbitrability, bargaining unit work, benefits, conduct, contracts, disability, discipline, discrimination (age, national origin, pregnancy, religion, sex, and ADA) drug and alcohol testing, fraud, health & safety, interest arbitration, jurisdiction, pension, promotability, subcontracting, theft, wages & working conditions.

BAR MEMBERSHIPS/PROFESSIONAL ASSOCIATIONS

Member of the Bar in California and the District of Columbia.
American Arbitration Association (AAA), National Association of Railroad Referees and the Labor & Employment Relations Association (LERA)

AFFIRMATIONS

I, Stephen M. Biersmith, the following are true and correct to the best of my knowledge:

- 1) If selected to serve as a Hearing Officer, I will be independent of OCERS and not related in any way to OCERS' business operations;
- 2) I am not currently in litigation with OCERS or with the County of Orange.
- 3) I have not given a gift or political campaign contribution to any officer, Board member, or employee of OCERS within the past twenty-four months.
- 4) I am an active member, in good standing, with the State Bar of California.
- 5) I have been practicing law as a licensed member of the State Bar of California for a minimum of five (5) years. My CA. State Bar Number is 144321.
- 6) The respondent represent that they do not perform any work that would create a potential conflict of interest with the work to be performed for OCERS. Such work could include representation of OCERS' plan sponsors or retirement system member against OCERS

Dated: October 31, 2022

ss/Stephen M. Biersmith, Esq

WRITING SAMPLE NO. 1

ARBITRATION OPINION AND DECISION

In the Matter of the Arbitration)	
)	
between	)	PRE-ARBITRATION RULING
	)	MOTION TO DISMISS GRIEVANCE
UNITED STEELWORKERS, on behalf of	)	FOR LACK OF ARBITRABILITY
Xxxxxxxxxxx)	
	)	Grievance No. LH-2018-006
Grievant,	)	Issue: Return Employee to Bargaining
	)	Unit
vs.)	
)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
DEPARTMENT OF EDUCATION)	
)	
Respondents.)	

APPEARANCES

For the Charging Party:

Mr. Gerald Jackson
 Staff Representative
 United Steelworkers
 P. O. Box 5972 Sunny Isle
 Christiansted, St. Croix, 00823-5972

For the Respondents:

Ms. Zuleyma M. Chapman, Esq.
 Asst. Attorney General
 Government of the Virgin Islands
 5001 Chandler’s Wharf, Suite #10
 Gallows Bay, St. Croix VI. 00820

PROCEDURAL MATTERS

After the parties mutually agreed to the selection of the arbitrator, the matter was scheduled to be heard on March 3, 2022. On February 14, 2022 the Department of Education for the Government of the Virgin Islands (hereafter “Government”) emailed a “Motion to Dismiss” (“Motion”) to the arbitrator and others. On February 23, 2012 the United Steelworkers Union

("Union"), representing _____ ("Grievant"), responded. Having received no additional moving papers or responses the issue stands submitted.

CONTENTIONS OF THE PARTIES

It is the Government's position that the Arbitrator does not have the authority under the Collective Bargaining Agreement to make a determination as to whether a position should or should not be included in the bargaining unit. It argued that 24 V.I.C. 365 and 24 V.I.C. 370 (a) gave the determinative authority in such matters to Public Employees Relation Board ("PERB"). In support of the same several prior rulings from that body were attached to the Motion. They appeared to indicate the PERB had already ruled that the Personnel Relations Administrator was a position excluded from the bargaining unit.

In its written opposition the Union raised a number of counter arguments. Among them was the assertion the Motion relied entirely on facts and documents not yet in evidence. In addition, the point was made the request was submitted without obtaining the "Union's consent or after the presentation of factual stipulations." As such, it was the Union's position the Motion was *ex parte* and inappropriate.

The Union noted there have been occasions in the past when these same parties submitted joint exhibits or agreed to a stipulation of the facts, but that did not occur in this case. They argued it never waived their right to object to the introduction of documents and/or put on witnesses to support its position on the grievance. Given these objections, the Union requested the Motion be denied and that it be given the opportunity to introduce evidence and complete the record.

DISCUSSION

As to the Union's assertion the Motion filed by the Government was *ex parte*, the arbitrator was unaware of any prohibition to decide on a dispositive motion which sought a ruling on the legal sufficiency. In addition, there did not appear to be any contractual obligation or procedural rule which required either side to fully argue their case prior to the actual arbitration itself. If such a motion were to be granted based on just what was presented, the case would end before an evidentiary hearing could be held.

There was some case law support for the Union's assertion where it was held that a grievance or complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Matheson v. Virgin Island Community Bank et al.* 297 F.Supp.2d 819 (2003). The question then then was not whether the Grievant was correct, but whether she was entitled to offer evidence to support the claim of an improper removal from the bargaining unit. If such information was already submitted, through say the introductions of joint exhibits or other stipulations, the record might then be sufficient to allow an informed decision on the law. Such was not the case here.

Up until now the only information the arbitrator received in this case was the June 3, 2021 appointment request, the Motion, and the Union response. There was not much in the way of facts in either those documents or the "Grievance Report" dated May 1, 2018 beyond citing which CBA articles the Union believed were violated.

In ruling on dispositive motions the evidence is to be taken in light most favorable to the non-moving party. With so little to go on at this juncture, that was difficult. As an example, there was little in the way of knowing whether the facts presented in the cited PERB cases were sufficiently similar to allow one to competently draw a similar conclusion in this case. There

was not even a confirmation if the Grievant held the same job title as noted in the attached PERB decisions.

Although there is the real possibility based on various V.I. C. code sections referenced in the Motion that the Government will ultimately prevail, to move forward at this point which such a slim evidentiary record would be premature.

ARBITRATOR’S RULING

- 1) The Motion to Dismiss is denied and the parties are to proceed to arbitration on March 3, 2022.
- 2) Prior to the hearing the parties are asked to meet and confer to see if they can agree to a set of stipulated facts.

Dated: February 24, 2022

_____ *Stephen Biersmith* _____

Stephen M. Biersmith, Esq.

WRITING SAMPLE 2

PUBLIC LAW BOARD NO. _____

UNION)	
(on behalf of XXXXX Benn, Claimant))	
	)	Findings of Fact and Award
)	
vs.	)	Case No. _____
	)	Organization Case No. _____
NEWS Railway Company	)	Carrier File No. _____
_____)	

Statement of Claim:

Claim on behalf of XXXXXXXX, for any mention of this matter removed from his personal record, account Carrier violated the current Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level 2, 30-day record suspension, with a 3-year review period to the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on February 13, 2017.

Findings:

The arbitrator was granted jurisdiction of this case by agreement of the parties. It was alleged the Claimant violated rule _____ when he failed to position the Hy-Rail Limits Compliance System (HLCS) thumbwheel to indicate the correct track on which his equipment was authorized to occupy on January 16, 2017.

NEWS received first knowledge of this alleged violation on January 17, 2017. In a letter dated January 26, 2017, the Carrier notified the Claimant it had scheduled an investigation meeting for January 30, 2017. After a postponement, one was then held on February 13, 2017 where both parties were given the opportunity to present evidence and witnesses in support of their respective positions.

After reviewing the transcript and all of the documents, the Hearing Officer, Jen Mimms, determined that the Claimant violated Rule 6.5. when he failed to activate the vehicle’s HLCS equipment and place the HLCS thumbwheel in the appropriate setting. In a letter dated January 29, 2018, the Organization reaffirmed its position and refuted several statements made in Carrier’s denial and reiterated that the Claimant’s actions reflected the instructions listed on the HLCS decal inside his work vehicle and the Rule training that he received from Carrier officials.

In a letter dated March 10, 2017, Carrier informed the Claimant it was assessing a Level 2, 30-Day Record Suspension for his failure to position the HLCS thumbwheel to indicate the

correct track on which his equipment was authorized to occupy on the Chicago Subdivision January 16, 2017. In addition, there was to be a Three (3) Year Review Period that commences on March 10, 2017. On May 9, 2017 the Claimant appealed that determination.

On August 2, 2017, a conference was held with the parties. On August 16, 2017 General Director Labor Relations for the Carrier sent a letter confirming the positions of the parties remained unchanged (Carrier's Ex. 6).

The HLCS is a safety system designed to monitor the position of on-track equipment in relation to their authorities using global positioning systems (GPS). Its purpose was to add another level of safety and protect employs and/or equipment on the line from being struck by a train using the same track. It was designed to give visual and audible warnings to the holder of an authority if they are near or outside their limits of that authority. Again, this is done to protect the employee and add another level of safety. As a result, Carrier utilizes HLCS as a safety overlay to protect employees.

By not properly setting the HLCS system the Carrier alleged the Claimant violated the following Rule 6.5 which stated:

“6.5 Hy-Rail The Hy-Rail Limits Compliance System (HLCS) is a safety system designed to monitor the position of HLCS equipped on-track equipment.

On subdivisions where HLCS is in effect, all HLCS equipped on-track equipment fouling or occupying the track authorized by Track and Time, Track Warrant or Track Permit must be associated with the authority and the system must be activated. The HLCS thumbwheel must be set to indicate the authorized track when the equipment is fouling that track.”

A number of the facts presented during the Investigation meeting were undisputed. On January 17, 2017 the Claimant, was assigned to the position of Signalman in Carrier's Signal Department. He was operating Carrier Vehicle #23372 with Mr. Ben _____, who was a passenger and fellow employee. On that same day, Mr. Nan Willis, General Construction Supervisor, received an email from Carrier's remote audit team that #23372 was on main track with track authority but without its Hy-Rail Limits Compliance System (HLCS) unit activated.

A “Track Authority” was the primary means for an employee, whether on foot, in a truck or machine, or on a train, to occupy a particular track. The proper use of an authority was required to prevent trains from hitting maintenance/signal employees or other trains. Although the Claimant had such authority per Form B and track and time to be on that track at that point, it was subsequently learned he had set the HLCS thumbwheel at “N/A”. There was no indication either the vehicle or device was malfunctioning or inoperable.

The parties disagreed as to whether such a setting was the proper procedure. It was the Carrier's position the nonfeasance or inaction on part of the Claimant in this instance violated

Rule 6.5. They argued enforcement of that directive was necessary in that it had an obligation to do everything in its power to create a safe work environment. To ensure the same the HLCS thumbwheel needed to be set to the appropriate track they are on so that other trains, work groups, equipment, or people can know precisely their location and which track they were to avoid to avoid a potential accident.

The Claimant contended the facts put forth by the Carrier in support of the suspension were unsubstantiated and, therefore, the discipline assessed was either excessive and/or unwarranted. During to and subsequent to the Investigation, the Claimant continued to maintain he did not violate Rule 6.5 in that he was working under a Form B track protection and following the instruction decal located in his work vehicle. The latter stated, "N/A = Industry track, Yard Track or when a Form B is used as authority." In addition, the Claimant believed the setting he chose was job consistent with the training he and others received on how to implement the same rule.

As to the Carrier's claim the instruction was inconsistent with the policy's language, it was their position the instructor referred to by the Claimant may have been misinterpreted or responding to a different set of facts when discussing the rule. The latter was supported by the record but not the former. Ben _____, who did not operate the vehicle but was present that day, testified his understanding of the rule was similar to that of the Claimant. Although they did not testify, the Claimant named and introduced statements from three other employees, including a General Construction Supervisor, who also represented they were taught the same. Both the Claimant, his co-worker and these three others recently attended an annual Maintenance of Way Operating Rule (Rule) Certification Class. During that training they were instructed by a Carrier official that while occupying a main track under Form B protection the HLCS thumbwheel must be placed in the N/A position in order to allow signals to be lined up to the limits of the Form B and prevent interference with signal indication.

Consistent with this understanding both the Claimant and Ben _____ engaged in a job briefing prior to setting on the tracks which included noting the decal located in the work vehicle, which stated "N/A = Industry track, Yard Track or when a Form B is used as authority." (See Transcript p. 88 and Exhibit No. 8).

Confusion as to how to interpret the Rule was widespread and after this incident the Carrier appeared to acknowledge the same. To increase awareness, a stand down" conference call was ordered for the group by the Carrier which included the supervisor to review the rule. The Carrier was aware that the decal relied on the Claimant that day could be misinterpreted. As such and prior to the incident, a new one with revised and clearer language had been ordered but there was some difficulty in getting them for all of the vehicles (Ex 10). There was some electronic correspondence back and forth which confirmed there was some delay in securing an adequate number of the new decals to replace the old (Ex 9).

It was the Carrier's position that despite the older decal being on the vehicle that day and whatever training he had received regarding implementing the verbiage presented in the policy, it was clear as to what was required. They noted the Claimant admitted to the requirement that all policies and procedures were to be followed. When faced with the question during the

investigation as to which he should adhere to, his response was “both” (_____). There was then some question as to whether this was even possible, and if not, which avenue should he have taken. The Claimant presented sufficient justification for choosing the path he took on the day in question.

The Claimant also disagreed the incident created a safety concern in that there were already two forms of protection in place which were Form B as well as track and time and that the policy was just an added protection. The Carrier had the right to establish safety policies to protect its employees, equipment, and the general, but those requirements must be clear to the employees before they can be held responsible for non-compliance.

Under the "substantial evidence" rule, therefore, Carrier need only show that a reasonable person might conclude from the facts of this case that Claimant violated the rules as charged. In this case, the Carrier fell short in that regard.

The Carrier’s decision to assess a Level 2, 30-day record suspension with a 3-year review period to an employee to an employee who had good reason to believe he was acting consistent with rule 6.5. was arbitrary and an abuse of discretion. Additional training and/or clarification, which was provided after the January 16, 2017 incident, would have been more appropriate as a corrective action to prevent such incidents in the future.

Award

The grievance is sustained. Consistent with Rule 54(g), within 30 days of receipt of this award the Carrier is to remove the disciplinary entry from the Claimant’s personnel record and compensate him for all pay and benefits associated with the 30-day suspension assessed by the Carrier.

Order

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made.

Dated: October 13, 2022

Stephen M. Biersmith, Esq.
Arbitrator

Michael R. Diliberto
Advantage Arbitration and Mediation Services, Inc.
P.O. Box 5594
Sherman Oaks, California 91413
Phone: (310) 557-0043
Michael@DilibertoADR.com

November 30, 2022

Via Email: wsingleton@ocers.org

Bill Singleton
Orange County Employees Retirement System (OCERS)
2223 E. Wellington Avenue, Suite 100
Santa Ana, California 92701

Re: Response to Request for Proposal – Hearing Officer

Dear Mr. Singleton,

This is my Response to the Request for Proposal for an Administrative Hearing Officer.

1. My current Curriculum Vitae is attached.
2. If I am selected to serve as a Hearing Officer, I will be independent of OCERS and not related in any way to OCERS' business operations. I am not currently in litigation with OCERS or the County of Orange.
3. I have not given a gift or political campaign contribution to any officer, Board member, or employee of OCERS within the past twenty-four (24) months.
4. I certify that I am an active member, in good standing, with the State Bar of California and that I have been practicing law as a licensed member of the State Bar of California for a minimum of five (5) years. My California State Bar number is 139029.
5. I have not had any legal malpractice case or legal malpractice claim against me in the last five (5) years, any sanctions issued by any court against me for the last five (5) years, or any discipline (either public or private) issued by the California Bar, or the Bar of any other jurisdiction, ever issued against me.
6. The following is a summary of my experience as an adjudicator (e.g., judge, judge pro-tem, hearing officer, arbitrator, etc.):
 - (a) ADR Services, Inc. (September 1, 2007 to the present): Arbitrator, Mediator, Hearing Officer and Discovery Referee. I preside over a variety of civil cases, including employment, business and commercial, real estate, intellectual property, entertainment,

and personal injury matters. I resolve cutting-edge legal and social justice employment cases with "Me-Too" issues involving sexual harassment, sexual orientation, transgender issues in the workplace, racial discrimination, and worker status of employees and independent contractors. I have resolved more than 3000 matters.

(b) American Arbitration Association (AAA) (January 1, 2015 to the present): Arbitrator and Mediator. Counsel select me to serve as an arbitrator for their cases, most of which are employment cases. The cases involve plaintiffs who allege that an employer has wrongfully terminated, retaliated, or discriminated against them or harassed them based upon their race, color, religion, sex (pregnancy or gender), sexual orientation, marital status, national origin, mental and physical disability and medical condition. In addition to employment arbitrations, I have also resolved serious injury and wrongful death claims made against various companies on behalf of employees who were injured by asbestos-containing products, and business and entertainment matters.

(c) City of Los Angeles Civil Service Commission (June 1, 2013 to the present): I serve as a Hearing Examiner for the Civil Service Commission, and I do so as a W-2 employee of the City of Los Angeles. I conduct hearings for public employees who are appealing discipline imposed by their department. The employees have been terminated or suspended from their jobs at various departments, such as non-sworn employees of the Los Angeles Police Department, the Department of Water and Power, the Department of Transportation, Los Angeles World Airports, and other departments. My role as the Hearing Examiner is to conduct evidentiary hearings to determine whether or not the discipline imposed on the employee is appropriate, after considering the facts, the employee's conduct, and each agency's policies and procedures. My proposed decision is submitted to the Civil Service Commission for their final review. At hearing, I inquire to determine whether the employees have learned from the experience, or rehabilitated themselves, and discern whether they have accepted responsibility for their conduct, making it less likely that the conduct will be repeated in the future. Depending on the facts, I recommend affirming a termination or suspension, or I allow the employee to return to his or her job. I make a complete record at the hearing, and I review the record to make detailed findings of fact and conclusions of law with my recommended decision.

(d) Hearing Examiner for the Los Angeles Police Commission, Board of Rights Panel (January 1, 2007 to the present): I serve as a Hearing Examiner for the Los Angeles Police Commission, and I do so as a W-2 civilian employee of the Los Angeles Police Department, Serial No. N4156. I conduct Board of Rights hearings for appeals involving alleged police misconduct and excessive force matters. When I began my service, I sat on "sworn boards," three-member Board of Rights panels comprised of myself as the civilian member and two police captains. In 2017, the voters approved Charter Amendment C, which gave police officers the option to appear before an all civilian Board. I am honored to have made history by serving on the first all-civilian Board of Rights panel to go to hearing. (Previously, all Board of Rights hearings were conducted by "sworn boards.") The Board makes factual findings, followed by disciplinary findings. Our Board decision is sent to the Los Angeles

Chief of Police, who cannot increase the discipline determined by the Board. My service on Board of Rights panels puts me on the front line of the issues that we often see in the news that are highlighted by social justice movements concerning interactions between police officers and members of the public.

(e) Arbitrator for the Financial Industry Regulatory Authority (FINRA) (January 1, 2010 to the present): As a FINRA Arbitrator, I conduct hearings involving individual investors who bring claims against their brokers for alleged violations of securities laws, and brokers who are defending their jobs and reputation.

(f) Arbitrator for the Independent Film and Television Alliance (IFTA) (January 1 2009 to the present): As an IFTA arbitrator, I conduct hearings for international and domestic arbitrations. The majority of cases involve breach of contract cases brought by United States based movie studios suing a foreign distribution company over non-payment of a minimum guarantee for the right to distribute a film in foreign territories. Other issues involve disputes between producers and directors over budget issues, and employment disputes.

(g) Administrative Law Judge, pro tem - Special Education (October 15, 2009 to January 1, 2021): Mediated cases filed in the Los Angeles Unified School District and other school districts relating to a proposal or refusal to initiate or change the identification, evaluation or educational placement of a child or the provision of a free appropriate public education (FAPE) for a child. I work with counsel representing the child (or pro per parents), and the due process specialists representing the District.

(h) Administrative Law Judge, pro tem (December 5, 2007 to December 31, 2014): Rule on motions, objections and evidence; Admonish participants re conduct; Take notes of evidence, testimony and witness demeanor; Issue subpoenas; Instruct participants regarding rights and responsibilities for the hearing process; Question witnesses as necessary to complete the record; Establish schedules; Prepare Proposed Decisions containing detailed findings of fact and conclusions of law involving various agencies of the State of California, including the Bureau of Real Estate, Department of Insurance, Department of Motor Vehicles, Department of Social Services, Secretary of State, and other agencies. The persons who appear before me are attorneys for various state agencies, attorneys for the Respondents, or Respondents appearing in pro per.

(i) City of Santa Monica Personnel Board (January 1, 2006 to December 21, 2012): Hearing Officer conducting administrative hearings for public employee termination appeals, as well as cases involving code and nuisance violations. The persons who appear before me are the attorneys for the parties, or Respondents appearing in pro per.

7. The following is a summary of my work performed for OCERS:

(a) Hearing Officer for the Orange County Employees Retirement System (OCERS) (June 1, 2011 to August 17, 2020): As a Hearing Officer, I conduct hearings for public employees who allege a physical or psychological permanent incapacity that prevents

them from performing their usual job duties. The hearing before me is an appeal from an earlier denial by the OCERS Board. OCERS is represented by counsel, but many of the employees appear at the hearing without representation by counsel. I advise the employees that if any questions come up during the hearing, they may raise those questions with me, and although I cannot offer any specific legal advice, I can give the employees instructions and guidance on hearing procedures. I also ask questions of the employees at the hearing to make sure that I have a complete record and to cover the relevant issues that I need to make my Proposed Decision. My original contract term with OCERS began on June 1, 2011 until June 1, 2018. Pursuant to an OCERS contract dated June 20, 2018, my seven-year term was extended to allow me to complete all open cases assigned by OCERS. My last Proposed Decision was for Applicant Lynn H. Hong, dated August 17, 2020.

8. My work performed for any other retirement system or pension plan is as follows:

City of Santa Monica Personnel Board (January 1, 2006 to December 21, 2012):
Hearing Officer conducting administrative hearings for public employee termination appeals, as well as cases involving code and nuisance violations. The persons who appear before me are the attorneys for the parties, or Respondents appearing in pro per.

9. My experience in the field of workers compensation law involves related issues in OCERS cases, and related issues in employment arbitrations and mediations.

10. Please see paragraphs 6 and 7 above for my work performed as a judge, judge pro-tem, arbitrator, referee, or neutral. In addition, I served as a temporary judge for the Superior Court, County of Los Angeles, presiding over small claims matters and traffic cases.

11. I represent that I do not perform any work that would create a potential conflict of interest with the work to be performed for OCERS. Such work could include representation of OCERS' plan sponsors or retirement system members in actions against OCERS.

12. Two of my Proposed Decisions submitted to OCERS are attached as writing samples: Applicant Lynn H. Hong and Applicant Carol L. Thompson. The Proposed Decisions are not redacted, because they were previously submitted to OCERS.

Very truly yours,

Michael R. Diliberto

Michael R. Diliberto

Attachments



MICHAEL R. DILIBERTO, ESQ.

Mediator • Arbitrator



Your Partner in Resolution

Michael@DilibertoADR.com

www.DilibertoADR.com

Michael R. Diliberto, Esq. is an internationally recognized mediator and arbitrator. Since 2003, he has settled thousands of cases with complex facts and legal issues, earning a reputation as an accomplished mediator who can resolve even the most difficult cases. He skillfully helps the parties engage in respectful and tactful conversations and works hard to keep that dialogue moving forward in a constructive manner along the bumpy road to a settlement agreement.

Mr. Diliberto has the skills of a diplomat who can reframe issues to avoid impasse, the experience of a trial lawyer who has walked the same path with similar clients, and the evaluation skills of a trial judge who has seen it all. His professional and life experiences (including work that enabled him to travel around the world and interact with various cultures), allow him to serve as a trusted neutral who can connect with the parties in a meaningful manner and find creative ways to settle disputes.

Mr. Diliberto recognizes that mediation presents the unique opportunity to solidify relationships between attorneys and their clients, repair and restore relationships between the parties when applicable, and help parties make wise choices to untangle themselves from conflict and move on with their lives. He is adept at gracefully guiding the parties towards an agreement, instead of strong-arming a settlement at all costs.

AREAS OF EXPERTISE

Business/Commercial: Breach of contract and commercial agreements; partnership and corporate matters; dissolution and winding up of partnerships and corporations; buy-sell agreements; joint venture and franchise disputes; attorney/client fee disputes; professional malpractice claims; insurance coverage and bad faith claims. Mr. Diliberto also conducts arbitrations for securities violations claims brought before the Financial Industry Regulatory Authority (FINRA).

Employment: Wrongful termination; discrimination (FEHA, Title VII, ADEA, and ADA); sexual harassment; whistleblower and retaliation; individual and PAGA claims for wage and hour violations; executive and personal services contracts; and ERISA. Mr. Diliberto conducts administrative hearings for public employee termination appeals for the City of Los Angeles Civil Service Commission, and retirement benefits appeals for the Orange County Employees Retirement System. Mr. Diliberto also conducts Board of Rights hearings for police officer use of force, officer-involved shootings, and other disciplinary matters for the Los Angeles Police Department.

Entertainment: Motion picture, television, music, advertising, internet, new media, and publishing disputes; copyright and trademark infringement; idea submission; misappropriation of name and likeness; First Amendment; defamation; rights of publicity; licensing agreements; royalty accounting; and profit participation. Mr. Diliberto also conducts international motion picture arbitrations involving production agreements, financing agreements, film exhibition agreements, royalties, and above-the-line employment issues brought before the Independent Film & Television Alliance (IFTA).

Intellectual Property: Copyright, trademark, trade dress, and patent infringement; rights of publicity, trade secrets, unfair competition, and domain name disputes.

Michael R. Diliberto, Esq.
Page 2 of 2

Real Estate: Residential and commercial purchase and sale contracts; homeowners associations; partnership disputes; breach of fiduciary duty claims; design and construction defects; boundary lines and easement rights; premises liability; and environmental matters.

LITIGATION AND TRIAL EXPERIENCE

- Kleinberg & Lerner, LLP, Partner, Los Angeles, California, 1993-2003
- Sheldon & Mak, LLP, Associate, Los Angeles, California, 1990-1993
- Allen, Allen & Hemsley - Solicitors, Sydney, Australia, 1989
- Diliberto, Booth, Sibley & Guttieres, Associate, Miami, Florida, 1987-1989

EDUCATION

- J.D., University of Miami School of Law, 1987
- Temple University School of Law, Summer Session, Rome, Italy, 1985
- B.A., University of Miami, 1981

SELECTED PROFESSIONAL AFFILIATIONS

- Secretary, Los Angeles Lawyer Editorial Board, Los Angeles County Bar Association
- Appointed Member, Los Angeles County Bar Association Delegation to Conference of California Bar Associations
- Member, Los Angeles Copyright Society
- Past President, Italian American Lawyers Association
- Fulbright Senior Specialist, Council for International Exchange of Scholars
- Administrative Law Judge Pro Tem, Office of Administrative Hearings

SELECTED SPEAKER ENGAGEMENTS

- Adjunct Professor, Loyola Law School, Los Angeles, California
- Visiting Professor, Elon University School of Law, Greensboro, North Carolina
- Continuing Education of the Bar, Los Angeles, California
- U.S. Department of State, Washington D.C.
- Academy for Training of Judges and Prosecutors of the Republic of Macedonia, Skopje, Macedonia
- Corte Provincial de Justicia, Loja, Ecuador
- Universidad Técnica Particular de Loja, Loja, Ecuador

SELECTED PROFESSIONAL RECOGNITIONS

- Mediator Profile: "Pursuing Harmony," Daily Journal, Verdicts & Settlements [Feb. 7, 2020]
- Southern California Super Lawyers: Alternative Dispute Resolution
- Mediator Profile: "In Tune at the Table," Daily Journal, Verdicts & Settlements [Nov. 25, 2011]
- Mediator Profile: Daily Journal, Extra [April 19, 2004]

LANGUAGES

- Fluent in Spanish

BEFORE THE
BOARD OF RETIREMENT OF THE
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement:

LYNN H. HONG,

Applicant.

PROPOSED DECISION

Michael R. Diliberto, Hearing Officer, Orange County Employees Retirement System, heard this matter on May 13, 2019, August 5, 2019, and March 9, 2020 in Santa Ana, California.

Danny T. Polhamus, Esq., Cantrell Green, represented Lynn H. Hong (Applicant), who appeared at hearing.

Keith R. Dobyms, Esq., Woodruff, Spradlin & Smart, APC, represented the Orange County Transportation Authority (OCTA).

Dawn M. Matsuo, Esq. represented the Board of Retirement of the Orange County Employees Retirement System (OCERS and/or Board).

The record was held open until June 18, 2020 to enable the parties to receive the hearing transcript and submit closing briefs. Applicant and OCTA served their closing briefs on April 24, 2020 and Respondent served its closing brief on May 29, 2020. Applicant and OCTA served reply briefs on June 18, 2020. Oral and documentary evidence was received and the matter was submitted for decision on June 18, 2020. The hearing officer makes his factual findings, legal conclusions and recommendation as follows.

SUMMARY OF ADMINISTRATIVE RECORD

The administrative record (AR) consisted of exhibit pages 1 through 264. The following exhibits were offered by the parties and received into evidence:

Disability Retirement Application and Correspondence

(10/23/13) Application for Disability Retirement (Applicant): Applicant’s application for service-connected disability and nonservice-connected disability filed by the Orange County Transportation Authority. (AR, p. 1.)

(11/27/13) Letter (OCERS): Confirmation of receipt of Applicant's application for service and non-service connected disability retirement filed by the Orange County Transportation Authority. (AR, p. 2.)

(1/27/14) Letter (OCERS): Confirmation of receipt of Applicant's application for service and non-service connected disability retirement filed by the Orange County Transportation Authority and request for Applicant's response. (AR, p. 3.)

(2/19/14) Letter (OCERS): Confirmation of receipt of Applicant's application for service and non-service connected disability retirement filed by the Orange County Transportation Authority and request for Applicant's response. (AR, p. 4.)

(4/28/14) Letter (OCERS): Confirmation of receipt of Applicant's application for service and non-service connected disability retirement filed by the Orange County Transportation Authority and request for Applicant's response. (AR, p. 5.)

(6/17/14) Application for Disability Retirement (Applicant): Applicant's application for service-connected disability filed by Applicant. (AR, p. 6.)

(6/17/14) Authorization for Disclosure and Use of Protected Health Information (Applicant): Applicant's authorization for disclosure and use of protected health information. (AR, pp. 7 and 8.)

(6/17/14) Letter (Applicant): Applicant's notice to OCERS of designation of attorney of record. (AR, p. 9.)

(6/17/14) Employee's Statement of Disability (Applicant): Applicant's statement of disability for "both upper extremities/myofascial pain syndrome; lumbar pain. Symptoms began on December 11, 2008 for the right shoulder and July 14, 2012 for the left shoulder. Applicant became unable to perform the duties of her position on July 14, 2012 and is unable to perform duties that require lifting over 10 pounds, repetitive bending, stooping or squatting, or repetitive pushing or pulling. (AR, pp. 10-12.)

(5/6/14) Physician's Statement of Disability (Navid Ghalambor, M.D.): Primary diagnosis: Left shoulder impingement. Secondary diagnosis: Left shoulder medial [illegible] myofascial pain syndrome. Applicant is permanently disabled for the duties of her occupation. (AR, pp. 13-16.)

(6/26/14) Letter (OCERS): Confirmation of receipt of Applicant's application for service-connected disability retirement. (AR, p. 17.)

(6/26/14) Letter (OCERS): Request to Applicant's employer for Applicant's medical records and the entire department personnel file. (AR, p. 18.)

(1/9/15) Letter (OCERS): Second request to Applicant's employer for Applicant's medical records and the entire department personnel file. (AR, p. 19.)

(3/29/13) Employer's Statement of Disability (OCERS): Statement summarizing Applicant's work related injuries, work restrictions and work duties. (AR, pp. 20-26.)

(Undated) Job Description (Orange County Transportation Authority): Job description for the Service Worker II position. (AR, pp. 27 and 28.)

(1/23/15) Workers' Compensation Information Request (OCERS): Request for information about workers' compensation claims filed by Applicant. (AR, p. 29.)

(4/6/15) Letter (OCERS): Notice to Applicant with enclosed list of medical records received to date regarding application for disability retirement. (AR, pp. 30 and 31.)

(7/7/15) Letter (OCERS): Letter to Timothy K. Ross, M.D. scheduling examination with Applicant. (AR, pp. 32-37.)

(7/7/15) Letter (OCERS): Letter to Applicant scheduling examination with Timothy K. Ross, M.D. (AR, p. 38.)

(7/13/15) Letter (OCERS): Letter to Applicant with enclosed Orthopedic Independent Medical Evaluation report Timothy K. Ross, M.D. (AR, p. 39.)

(10/9/14) Letter (OCERS): Notice to Applicant of the Board of Retirement's recommendation to deny service and non-service connected disability retirement due to insufficient evidence of permanent incapacity and job causation. (AR, pp. 40 and 41.)

(10/19/15) Minutes (OCERS): OCERS regular board meeting minutes with staff recommendation to deny service and non-service connected disability retirement due to insufficient evidence of permanent incapacity and job causation. (AR, p. 42.)

(10/19/15) Board Release (OCERS): OCERS board release with recommendation to deny service and non-service connected disability retirement due to insufficient evidence of permanent incapacity and job causation. (AR, p. 43.)

(10/23/15) Letter (OCERS): Notice to Applicant of OCERS board denying service connected disability retirement due to insufficient evidence of permanent incapacity and job causation. (AR, pp. 44 and 45.)

(11/16/15) Letter (Applicant): Notice to OCERS of Applicant's appeal of the OCERS board's denial of Applicant's disability retirement application. (AR, p. 46.)

(11/23/15) Letter (OCERS): Notice to Applicant of assignment of appeal to Referee Michael Diliberto. (AR, p. 47.)

(11/23/15) Letter (OCERS): Notice to Applicant's attorneys of record of OCER's attorneys of record. (AR, p. 48.)

(12/21/15) Letter (Orange County Transportation Authority): Notice to OCERS of Orange County Transportation Authority's attorneys of record. (AR, p. 49.)

(1/20/16) Letter (OCERS): Notice to Orange County Transportation Authority of status of Applicant's pending appeal. (AR, p. 50.)

Medical Reports and Related Documents

(12/16/08) Doctor's First Report of Occupational Injury or Illness (Emerson S. Mann, M.D.): Applicant described December 11, 2008 injury as "[Applicant] was mopping the floor and [Applicant] developed pain in [her] right shoulder. Applicant can return to work on December 12, 2008 with restrictions of no lifting over 10 pounds, no pushing and/or pulling over 10 pounds of force, no reaching above shoulders, and limited use of right arm. (AR, p. 51.)

(12/29/08) Primary Treating Physician's Progress Report (Rebecca M. Steinberg, M.D.): Diagnosis: Sprain of unspecified site of shoulder and upper arm and trapezius/rhomboid strain. Applicant can return to modified work on December 29, 2008. (AR, p. 52.)

(1/5/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain, and shoulder impingement. Applicant can return to modified work on January 5, 2009. (AR, p. 53.)

(1/12/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain, and shoulder impingement. Applicant can return to modified work on January 12, 2009. (AR, pp. 54-56.)

(2/3/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain, and shoulder impingement. Applicant can return to modified work on February 4, 2009. (AR, pp. 57 and 58.)

(2/17/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain, and shoulder impingement. Applicant can return to modified work on February 17, 2009. (AR, pp. 59 and 60.)

(3/17/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain,

and shoulder impingement. Applicant can return to modified work on March 17, 2009. (AR, pp. 61 and 62.)

(5/7/09) Primary Treating Physician's Progress Report (Emerson S. Mann, M.D.): Diagnosis: Sprain of unspecified site of shoulder, upper arm and trapezius/rhomboid strain, and shoulder impingement. Applicant can return to modified work on May 7, 2009. (AR, pp. 63 and 64.)

(5/26/09) MRI of the Right Shoulder (Mark G. Stein, M.D.): Impression: Supraspinatus tendinopathy with a type II acromion. (AR, p. 65.)

(6/25/09) Permanent and Stationary Report (Sanjay Deshmukh, M.D.): Impression: Right trapezius/rhomboid strain, resolved. (AR, pp. 66-68.)

(2/9/10) Qualified Medical Examiner's Report (Bert W. Schweitz, M.D.): Diagnoses: Tendinitis of the supporting structures of the right shoulder as confirmed by MRI studies, and strains and sprains to the supporting structures of the right shoulder and upper back. (AR, pp. 69-75.)

(10/5/04) Doctor's First Report of Occupational Injury or Illness (Herbert D. Jennings, M.D.): Diagnosis: sprains/strains of the neck, and right shoulder and upper arm. Applicant is not able to perform usual work. (AR, pp. 76 and 77.)

(8/30/10) MRI of Cervical Spine Without Contrast (Joel Levine, M.D.): Impression: Mild to moderate cervical hyperlordosis, mild multilevel disc desiccation without disc protrusion in the cervical spine, and normal spinal cord. (AR, p. 78.)

(9/22/10) Primary Treating Physician's Permanent and Stationary Report (Herbert D. Jennings, M.D.): Diagnosis: All diagnoses, resolved. Applicant was released to full duty with no limitations or restrictions. AR, pp. 79-85.)

(1/4/11) Qualified Medical Examiner's Re-Evaluation and Report (Bert W. Schweitz, M.D.): Diagnoses: Tendinitis of the supporting structures of the right shoulder as confirmed by MRI studies, and strains and sprains to the supporting structures of the right shoulder and upper back. (AR, pp. 86-91.)

(5/9/11) Job Analysis Report (The Rehabilitation Group LLC): Job analysis report for the Service Worker position at the Orange County Transportation Authority, Garden Grove Base. (AR, pp. 92-96.)

(5/15/11) Job Analysis Review Form (The Rehabilitation Group LLC): Applicant can return to her position of Service Worker with the following restrictions: No overhead reaching, lifting, pushing, pulling; no heavy lifting (more than 25 pounds), no repetitive lifting of the fuel line. (AR, p. 97.)

(6/14/11) Qualified Medical Examiner's Re-Evaluation of January 4, 2011 (Bert W. Schweitz, M.D.): Diagnoses: Lumbar discogenic disease secondary to the Applicant's injury of December 11, 2008, strains and sprains to the supporting structures of the right shoulder caused by the injury of December 11, 2008, and strains and sprains to the supporting structures of the dorsal spine caused by the injury of December 11, 2008. (AR, pp. 98-100.)

(7/14/12) Occurrences Report (Risk Management): Applicant injured her shoulder pulling the farebox vault. (AR, p. 101.)

(7/14/12) Report of Injury (Orange County Transportation Authority): On July 14, 2012, Applicant strained her left shoulder by removing the heavy cashbox from the fare box while servicing a bus. Days away from work are expected. (AR, pp. 102 and 103.)

(7/16/12) Primary Treating Physician's Progress Report (D. Winston Cheshire, M.D.): Diagnosis: Limitations/restrictions: Avoid repetitive awkward positions of the left shoulder. No overhead work. Cannot operate coach. (AR, pp. 104 and 105.)

(7/16/12) Work Status Form (D. Winston Cheshire, M.D., QME): Activity restrictions: Avoid repetitive awkward positions of the left shoulder and no repetitive bending or motions of the left shoulder. (AR, p. 106.)

(7/31/12) Work Status Form (D. Winston Cheshire, M.D., QME): Activity restrictions: Avoid repetitive awkward positions of the left shoulder and no repetitive bending or motions of the left shoulder. (AR, p. 107.)

(8/7/12) Work Status Form (D. Winston Cheshire, M.D., QME): Activity restrictions: Avoid repetitive awkward positions of the left shoulder and no repetitive bending or motions of the left shoulder. (AR, p. 108.)

(8/21/12) Physical Medicine Consultation and Electromyography/Nerve Conduction Studies (Patricia Meredith, M.D., PhD): Impression: Normal EMG of the upper limbs. No cervical nerve root impingement bilateral C5-T1, and normal nerve conduction studies of the upper limbs without electrophysiological findings for nerve entrapments, neuropathy, or plexopathy. (AR, pp. 109-113.)

(8/30/12) Primary Treating Physician's Progress Report (Herbert D. Jennings, M.D.): Diagnoses: Sprains/strains of the neck and unspecified site of shoulder and upper arm, and lumbar strain. (AR, p. 114.)

(8/30/12) Work Status Form (Herbert D. Jennings, M.D., QME): Activity restrictions: Avoid repetitive awkward positions of the left shoulder and no repetitive bending or motions of the left shoulder. (AR, p. 115.)

(9/6/12) Work Status Form (Herbert D. Jennings, M.D., QME): Activity restrictions: Off the balance of shift on September 6, 2012; return to regular work on September 7, 2012. (AR, p. 116.)

(9/6/12) Qualified Medical Examiner's Re-Evaluation and Report (Bert W. Schweitz, M.D.): Final Diagnoses: Sprains/strains of the right shoulder and left shoulder, and lumbar strain. Applicant is permanent and stationary as of September 6, 2012. Applicant should not return to her usual and customary occupation because it will probably cause recurrence of her symptomatology and physical findings. Applicant is susceptible to progressive changes in her shoulders, including traumatic arthritis. (AR, pp. 117-121.)

(9/11/12) Qualified Examiner's Review of Additional Medical Records (Bert W. Schweitz, M.D.): Summary of additional medical records reviewed. (AR, pp. 122-124.)

(9/20/12) Comprehensive Workers' Compensation Consultation by an Orthopaedic Surgeon. (Bert W. Schweitz, M.D.): Summary of additional medical records reviewed. (AR, pp. 125-133.)

(9/27/12) Work Status Form (Herbert D. Jennings, M.D., QME): Activity restrictions: No lifting or carrying: Not permitted to lift, carry, push or pull more than 10 pounds and no repetitive, awkward positions. Must avoid repetitive bending or motions of the left upper extremity. (AR, p. 134.)

(10/9/12) MRI of the Left Shoulder (Herbert D. Jennings, M.D., QME): Impression: Possible atrophy of the supraspinatus muscle and mild tendinosis of the supraspinatus muscle. (AR, pp. 135 and 136.)

(10/15/12) Primary Treating Physician's Progress Report (Herbert D. Jennings, M.D.): Diagnoses: Sprains/strains of the neck and unspecified site of shoulder, and upper arm, and lumbar strain. (AR, p. 137.)

(11/5/12) Utilization Review (James Scalone, D.O.): UR Determination: After review of the available information for Applicant with December 11, 2008 injury date, certification is not recommended for the requested treatment plan. (AR, pp. 138-143.)

(11/4/12) Qualified Examiner's Review of Additional Medical Records Received on November 4, 2012 (Bert W. Schweitz, M.D.): Summary of additional medical records reviewed. (AR, pp. 144-149.)

(12/7/12) Utilization Review (James Scalone, D.O.): UR Determination: After review of the available information for Applicant with December 1, 2008 injury date, certification is recommended for a modified treatment plan, including left shoulder arthroscopy. (AR, pp. 150-156.)

(12/7/12) Workers' Compensation Supplemental/Change of Status Report by an Orthopaedic Surgeon. (Navid Ghalambor, M.D., QME): Diagnosis: Left shoulder impingement syndrome superimposed on rotator cuff tendinosis. (AR, pp. 157-160.)

(12/12/12) Operative Report (Navid Ghalambor, M.D.): Operative report for December 12, 2012 surgery for left shoulder impingement syndrome. (AR, pp. 161-163.)

(1/23/13) Prescription (Jennifer Judelson, PA-C): Physical therapy prescription for the left shoulder. (AR, p. 164.)

(1/31/13) Letter (Shannon Le, Intercare): Approval for physical therapy for shoulders. (AR, p. 165.)

(2/28/13) Letter (Shannon Le, Intercare): Approval for physical therapy for shoulders. (AR, p. 166.)

(5/9/13) Workers' Compensation Permanent and Stationary Evaluation/Report by an Orthopaedic Surgeon. (Navid Ghalambor, M.D., QME): Diagnosis: Status post left shoulder arthroscopic subacromial decompression/partial acromioplasty on December 12, 2012 and left shoulder medial scapular myofascial pain syndrome. Disability status for the left shoulder: Applicant is precluded from lifting more than 10 pounds with the left arm. (AR, pp. 167-171.)

(4/19/13) Prescription (Jennifer Judelson, PA-C): Prescription for home TENS unit for left shoulder pain. (AR, p. 172.)

(6/6/13) Qualified Medical Examiner's Permanent and Stationary Evaluation (Bert W. Schweitz, M.D.): Left shoulder: 100 percent of impairment is apportioned to the July 14, 2012 injury; Right shoulder: 100 percent of impairment is apportioned to the December 11, 2008 injury; Low back: 50 percent of impairment is apportioned to the July 14, 2012 injury. Applicant cannot return to her usual and customary occupation and should be given lighter job duties. (AR, pp. 173-178.)

(7/5/13) Qualified Medical Evaluator's Findings Summary Form (Bert W. Schweitz, M.D.): Final diagnosis: Supraspinatus tendinopathy with a Type II acromion. (AR, p. 179.)

(7/27/15) Orthopedic Independent Evaluation (Timothy K. Ross, M.D.): There is insufficient objective evidence to support a permanent restriction for Applicant's employment for the Orange County Transportation Authority. There is insufficient objective evidence to preclude Applicant from the usual and customary duties of her county job position. (AR, pp. 180-198.)

Workers' Compensation Records

(12/12/08) Workers' Compensation Claim Form (Applicant): Claim for December 11, 2008 injury to right shoulder, back, internal, depression and sleep issues. (AR, p. 199.)

(7/14/12) Workers' Compensation Claim Form, Amended (Applicant): Claim for July 14, 2012 injury to right shoulder, back, internal, depression, sleep and cognitive issues. (AR, p. 200.)

(12/18/13) Employer's Report of Occupational Injury or Illness (Jennifer Costes, Intercare): On July 14, 2012, Applicant reported strain to her left shoulder after removing the cash box from the fare box while servicing buses at the Garden Grove Base. (AR, p. 201.)

(10/29/12) Notice Regarding Permanent Disability Benefits, Permanent Disability Advice (Shannon Le, Intercare): Status of disability benefits for Applicant's workers' compensation for December 11, 2008 injury. (AR, pp. 202 and 203.)

(10/29/12) Notice Regarding Permanent Disability Benefits, Payment Termination (Shannon Le, Intercare): Applicant's workers' compensation payments are ending for December 11, 2008 injury because Panel Qualified Evaluator Bert W. Schweitz, M.D. declared that Applicant reached maximum medical improvement as of September 6, 2012. (AR, pp. 204 and 205.)

Personnel Records

(7/14/12) Leave of Absence Request (Applicant): Applicant's request for leave of absence for medical appointment on July 15, 2012. (AR, pp. 206 and 207.)

(11/5/12) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 24 work days from July 14, 2012, returning on November 28, 2012. (AR, pp. 208 and 209.)

(12/4/12) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 20 work days from November 28, 2012, returning on December 26, 2012. (AR, pp. 210 and 211.)

(12/23/13) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 20 work days from December 26, 2012, returning on February 20, 2013. (AR, pp. 212 and 213.)

(2/20/13) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 20 work days from February 21, 2013, returning on March 21, 2013. (AR, pp. 214 and 215.)

(3/22/13) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 20 work days from March 22, 2013, returning on April 19, 2013. (AR, pp. 216 and 217.)

(4/19/13) Leave of Absence Request (Applicant): Applicant's request for leave of absence for 16 work days from April 19, 2013, returning on May 9, 2013. (AR, pp. 218 and 219.)

(5/9/13) Protected Leave of Absence Request (Applicant): Applicant's leave of absence request for a medical appointment on May 9, 2013. (AR, pp. 220 and 221.)

(10/24/17) Disability and Retirement Assessment and Report (Ronald E. Glousman, M.D.): Applicant is not capable of returning to her usual and customary job activities as a service worker for the Orange County Transportation Authority without restrictions. Shoulder restrictions: No overhead activities or lifting over 25 pounds, bilaterally. Cervical spine restrictions: No lifting more than 10 pounds. Lumbar spine: No heavy lifting over 25 pounds or repetitive bending activities. (AR, pp. 222-237.)

[AR p. 238 is intentionally omitted.]

(1/2/18) Supplemental Orthopedic IME Report (Timothy K. Ross, M.D.): After reviewing Dr. Glousman's October 24, 2017 report, Dr. Ross' office chart and prior IME report in this matter, Dr. Ross finds that his prior report functional determination is historically, clinically and objectively supported. (AR, pp. 239-245.)

(1/16/18) Supplemental Disability and Retirement Assessment and Report (Ronald E. Glousman, M.D.): Applicant's cervical spine pain is industrial related. It is medically probable that Applicant's symptoms from 2010 to today have increased as a result of her work activities and work duties. (AR, pp. 246-248.)

(Undated) Physician's Statement of Disability (Ronald E. Glousman, M.D.): Primary diagnosis regarding December 11, 2008 accident: Left shoulder chronic impingement, distal clavical arthrosis pending surgery, right shoulder impingement/cervical sprain/strain. Secondary diagnosis: Lumbar sprain/strain. Applicant is permanently disabled for the duties or her occupation. Applicant is not capable of performing the following: Bilateral shoulders: no repetitive work. Neck: no lifting over 10 pounds. Lumbar spine: No repetitive bending or lifting over 25 pounds. (AR, pp. 249-252.)

(2/7/18) Amended Application for Disability Retirement (Applicant): Applicant's application for service-connected disability. (AR, p. 253.)

(Undated) Employee's Statement of Disability (Applicant): Applicant's statement of disability for "both upper extremities/myofascial pain syndrome; lumbar pain. Symptoms began on December 11, 2008 for the right shoulder and July 14, 2012 for the left shoulder. Applicant became unable to perform the duties of her position on July 14, 2012 and is unable to perform duties that require lifting over 10 pounds, repetitive bending, stooping or squatting, or repetitive pushing or pulling. (AR, pp. 254 and 255.)

(March 29, 2018) Supplemental Orthopedic IME Report (Timothy K. Ross, M.D.): After review of medical records, there is no objective basis for disability retirement for Applicant's cervical and lumbar symptomatology, as well as the new claim for Applicant's neck. The only objective examination finding is shoulder arthroscopy scars. (AR, pp. 256-264.)

FACTUAL FINDINGS

Background

1. Applicant was employed by the OCTA as a bus Service Worker starting on January 11, 2000 until her last work day on July 14, 2012. (AR, p. 182.) Applicant's last day of compensation was October 6, 2012. (AR, p. 43.) On October 28, 2013, OCTA filed an application for service-connected and nonservice-connected disability retirement on behalf of Applicant. (AR, p. 1.) On June 17, 2014, Applicant filed her application for service-connected disability retirement with the Board claiming injury to her bilateral shoulders, myofascial pain syndrome and lumbar spine. Applicant claimed that she injured her right shoulder on December 11, 2008 while mopping the floor of a bus (AR, p. 51), and injured her left shoulder on July 14, 2012, when she removed a cashbox from a bus farebox. (AR, pp. 10, 21, and 101.) Applicant stated that she first became unable to perform the duties of her position on July 14, 2012. (AR, p. 10.)

2. The Physician's Statement submitted by Navid Ghalambor, M.D., noted that Applicant was unable to lift more than 10 pounds with her left arm and could not perform prolonged overhead work. (AR, p. 16.) On October 19, 2015, the Board denied Applicant's application for service-connected disability retirement benefits "due to insufficient evidence of permanent incapacity and job causation." (AR, p. 44.) On November 16, 2015, Applicant filed her request for hearing on the Board's decision. (AR, p. 46.) On December 21, 2015, OCTA requested an administrative appeal of the Board's decision. (AR, p. 49.)

3. Applicant also asserts that she injured her low back in 2008 when she fell while trying to close the engine door at the rear of a bus. (HT 180:14-182:5; 231:18-25; 239:13-16.)¹ Applicant returned to work later that year and experienced sharp pain in her right shoulder while mopping the bus floor. (HT 231:24-232:4; 240:5-241:3.) She stated that the pain originated in her right shoulder and ran down her right wrist (HT 101:12-18) with pain like "pins and needles poking into the bone" of her lower back. (HT 104:5-105:3.) Due to her injury, Applicant was kept off of work for approximately three months. (HT 103:3-9.) Applicant returned to work and eventually worked full duty with no restrictions. (HT 233:21-234:1.)

4. Applicant claims that she began compensating for her right arm pain by using her left arm more (HT 105:18-23) which caused numbness in her left arm. (HT 105:23-106:6.) In 2012, Applicant experienced pain in her hands and arms while reaching to clean handrails on the bus. (HT 101:1-5.) She was taken off work due to the pain and numbness.

¹ "HT" refers to the transcript of proceedings and the referenced page and line.

(HT 107:3-9.) On December 12, 2012, Applicant had surgery to repair her left shoulder. (HT 107:14-25; AR, p. 12.) Applicant did not return to work post-surgery. (HT 133:17-19.) After the surgery, Applicant was advised to avoid heavy lifting. (HT 108:4-11.) Applicant believes that she cannot perform her job duties because the heavy lifting and repetitive bending causes numbness in her arms. (HT 116:18-117:2.) Applicant claims that she is unable to lift the mop to complete her mopping duties. (HT 123:7-12.) Applicant also claims that she cannot squeegee the exterior windows because she cannot lift the squeegee over her head. (HT 124:12-16.)

5. The issues on appeal are (a) whether Applicant is permanently incapacitated from substantially performing the usual and customary duties of her position; (b) whether any permanent incapacity arose out of and in the course of her employment with the OCTA; and (c) the effective date of any disability retirement benefits Applicant may be entitled to receive.

Applicant's Usual and Customary Job Duties

6. The OCTA job description for the Service Worker II position lists nine representative duties, including (a) Inspects vehicles for appropriate level of fuel, oil, water, air, battery water, and replenishes as needed; (b) Performs minor bus cleaning duties such as cleaning interior and exterior of vehicles; (c) Lifts fare boxes and other sizable equipment; and (d) Parks and delivers motor vehicles. (AR, p. 27.)

Leonard Cruz

7. Leonard Cruz (Cruz) is the Santa Ana Base Maintenance manager and has been employed by OCTA for over 30 years. (HT 9:15-20.) Cruz served as the Santa Ana Base Manager for approximately 12 years overseeing the operations of the maintenance program, including maintaining and servicing the vehicles. (HT 9:21-10:11.) Cruz also served as a Service Worker early in his OCTA career. (HT 10:15-17; 11: 4-7.) According to Cruz, the OCTA maintenance Department is responsible for providing safe, reliable, and clean buses for the bus operators and the general public. (HT 11:18-21.) Cruz never worked directly with Applicant, but he supervised her between 2000 and 2003. (HT 44:19-45:7.) Cruz managed the Garden Grove base from 2014 to 2017. (HT 66:13-16.)

8. Cruz described a Service Worker's usual duties. The Service Worker conducts safety inspections of each bus and drives the bus to the service island. The worker removes the cash box from the fare box, and puts it into the vault to empty the cash box. (HT 13:25-14:25.) The Service Worker takes the bus to the fueling station and checks the fluids. (HT 15:1-4.) While the bus is fueled by a designated "fuel person" (HT 61:1-23) the Service Worker vacuums the bus, which does not require heavy lifting. (HT 15:5-12; 22:1-3.) The Service Worker wipes the handrails, the seatbacks, each window, and everything inside of the bus. (HT 15:9-12.)

9. The Service Worker then moves the bus to the cleaning area and mops the bus floor and runs the bus through the automatic wash. (HT 15:13-21.) The mop weighs about seven to eight pounds when wet. (72:12-20.) The Service Worker returns the bus to the parking stall, and squeegees the exterior windows (HT 22-16:1) which are approximately nine feet above ground level. (HT 63:18-21.) Cleaning inside of the bus requires repetitive bending. (HT 23:1-10.) Inspecting the bus requires overhead reaching to dust the handrails inside the bus. (HT 17:24-18:11.) The Service Worker also reaches overhead to squeegee the outside windows of the bus with a relatively light weight squeegee. (HT 18:11-13; 36:9-12; AR, pp. 15-16.)

10. Cruz claimed that as of 2012, OCTA employed approximately eight to ten Service Workers servicing around 160 buses each night, averaging 20 buses per worker. (HT 13:3-21.) Service Workers generally worked from 6:00 p.m. to 2:30 a.m. (HT 12:22-24.) The workers were expected to service the 20 buses within the eight-hour shift (HT 16:3-20), spending on average 15 to 17 minutes per bus. (HT 16:25-17: 5.) If a Service Worker took longer than 17 minutes to service a bus or failed to complete the 20-bus average within the eight-hour shift, OCTA would take the unfinished buses out of service or pay employees overtime to finish the Service Worker's job. (HT 17:6-16.)

11. Cruz acknowledged that he was not the manager of the Garden Grove base when Applicant worked there in 2010 to 2012, and he did not know how many buses the Service Workers at Garden Grove had to clean during their shift between 2010 to 2012. (HT 66:19-22; 68:18-20; 69:2-21.) His testimony regarding the number of workers and the number of buses to be cleaned was based on his information regarding the Santa Ana base he supervised, not the Garden Grove base. (HT 68:3-16; 70:21-71:1)²

12. Cruz stated that the physical demands of the job require Service Workers to reach overhead to clean the handrails and to squeegee the windows clean to give the drivers a clear view. (HT 18:4-13; 21: 4-7; 24: 2-17; 25: 4-7.) They also have to be able to lift 25 pounds or more to service and clean the wheelchair area. (HT 18:24-19:10.) Service Workers have to lift the flip-up seats in the wheelchair stations and clean them. Approximately 17 to 20 pounds of force is required to lift the seats. (HT 18:24-19:10.) Service Workers must remove the cash and coins from the fare box. (HT 19:14-17; 42:13-16.)

13. Cruz initially estimated that the cash box weighs approximately 50 to 70 pounds when full, and 17 to 25 pounds when empty. (HT 19: 14-17; 52: 7-15; 110: 18-19.) The Service Worker pulls the farebox out of the bus, brings it to the vault station, flips it over, and places it in the vault. (HT 19: 18-24.) This process is repeated 17 to 20 times per shift. (HT 19:25-20: 5.) Cruz later acknowledged that without weighing each box, he did not know how much each cash box weighed, or how many weighed more than or less than 50 pounds. (HT 54:11-17; 56:24-57:9.) Cruz never served as a bus driver. (HT 55:14-15.)

² By comparison, Cruz stated that currently there were 137 buses at the Garden Grove base. (HT 89:19-21.)

14. The Service Worker mops the inside floors of the bus, and removes gum and other objects stuck to the floor. (HT 15:17-18.) Repetitive bending and stooping is required to reach the gum and scrape it off the floor (HT 23:6-10.) OCTA does not have additional staff on hand to assist Service Workers who cannot lift the heavy objects, reach overhead, or stoop repetitively. (HT 25:23-25.)

The Rehabilitation Group LLC

15. The Rehabilitation Group LLC prepared a Job Analysis Report for the position of Service Worker at the Garden Grove base, dated May 9, 2011. Oscar Moreno (Moreno) was listed as the contact person for the report. (AR, pp. 92-96.) Cruz stated that Moreno worked with OCTA for almost 40 years. Moreno started as a supervisor, became an assistant base manager for approximately eight years, and ultimately served as a base manager for over 25 years. Moreno served as Applicant's base manager. Cruz believed that Moreno was very familiar with the job duties for a Service Worker II position. (HT 93:1-94:17.) The job analysis indicated that a Service Worker would be required to frequently reach overhead (34 to 66 percent of the workday), occasionally lift or carry objects weighing 11 to 25 pounds (17 to 33 percent of the workday), and would not be required to lift or carry more than 25 pounds. (AR, pp. 93- 94.)

16. On May 15, 2011, The Rehabilitation Group LLC prepared a Job Analysis Review Form which stated that Applicant can return to her position of Service Worker with the following restrictions: No overhead reaching, no lifting, pushing, or pulling, no heavy lifting more than 25 pounds, and no repetitive lifting of the fuel line. (AR, p. 97.)

Physicians' Evaluations and Testimony about Applicant's Condition³

Applicant's Right Shoulder

17. On December 11, 2008, Applicant sustained an injury to her right shoulder. The Employer's Statement of Disability indicated that Applicant reported that she experienced "[r]ight shoulder strain from removing cashbox farebox." (AR, p. 21.) She treated the next day with Emerson S. Mann, M.D. who reported that "[Applicant] was mopping the floor and [Applicant] developed pain in [Applicant's] right shoulder." Dr. Mann diagnosed Applicant with "Sprain of Unspecified Site of Shoulder and Upper Arm." (AR, p. 51.)

³ Pursuant to Rule 12 of the Orange County Employees Retirement System Board of Retirement Policy for Administrative Hearings (last revised December 14, 2015) (OCERS Rules), the physicians' evaluations and testimony was presented through documentary evidence in the form of written medical reports and related documentary evidence identified in the summary of administrative record above.

18. Applicant was released to return to work on December 12, 2008 with restrictions of “No lifting over 10 lbs.- No pushing and/or pulling over 10 lbs. of force - No reaching above shoulders - Limited use of right arm.” (AR, p. 51.) On December 29, 2008, Applicant presented to Rebecca M. Steinberg, M.D. whose diagnoses listed a sprain to Applicant’s Shoulder, Upper Arm and Trapezius/Rhomboid strain. (AR, p. 52.)

19. Applicant presented to Dr. Mann again on January 5, 2009 and January 12, 2009. Dr. Mann’s diagnoses again listed a sprain to Applicant’s Shoulder, Upper Arm and Trapezius/Rhomboid strain, along with Shoulder Impingement. (AR, pp. 53-55.) Dr. Mann’s progress note for the January 12, 2008 examination indicates that Applicant “feels the pattern of symptoms is improving and feels better.” Applicant also “admits having mild pain or sore [right] arm for 2-3 months prior to presenting here but would improve with rest.” Applicant took four days off work to allow her right arm to rest, and “was able to tolerate until the day of her injury.” (AR, p. 55.) She was referred for additional therapy and a physiatrist for consultation. (AR, p. 56.)

20. Applicant treated with Sanjay V. Deshmukh, M.D., a physiatrist, from February 3, 2009 through June 25, 2009. (AR, pp. 57-64 and 66-68.) As of February 17, 2009, Applicant’s right trapezius and rhomboid strain/sprain was improving. (AR, p. 60.) As of a March 17, 2009 examination with Dr. Deshmukh, Applicant had already returned to work, but reported that on the first day back “[Applicant] was lifting a spare [sic] box approximately 70 pounds. When doing so, [Applicant] felt of a cramp pain in her right trapezius [and] right rhomboid. [Applicant] reported the symptoms and came back to Concentra.” (AR, p. 62.)

21. On June 25 2009, Dr. Deshmukh determined Applicant was permanent and stationary and released Applicant to regular duty. (AR, pp. 66-68.) Dr. Deshmukh noted that Applicant’s right trapezius/rhomboid strain was resolved resulting in a “resolution of her symptoms.” “[Applicant] has been doing her regular job duties with no symptoms.” Regarding causation, Dr. Deshmukh stated that “In the absence of any medical records addressing the current injury, based on the patient history, as well her subjective complaints, the strain to the trapezius and rhombo appears to be industrial in nature.” Applicant had full range of motion in the right upper extremity, no muscle atrophy and zero percent whole person impairment. Applicant was advised to continue her home exercise program and use over-the-counter analgesics for flare ups and exacerbation. (AR, p. 66.)

22. On February 9, 2010, Applicant presented to Bert W. Schweitz, M.D., for a comprehensive medical/legal orthopedic evaluation. Dr. Schweitz prepared a qualified medical examiner’s report (AR, pp. 69-75) where he listed the date of injury as December 11, 2008. Applicant’s history indicated that she is “only [five feet] tall” which required her to reach over her head to use the fuel pump and to wash the bus windows with a sponge on a long pole. (AR, p. 69.)

23. Dr. Schweitz recorded Applicant’s statement that on the date of the injury “while refueling a bus, [Applicant] slipped and fell to the cement pavement, striking

[Applicant's] right shoulder and low back. [] [Applicant] began experiencing severe pain in her right shoulder and low back." (AR, p. 70.) He attributed Applicant's disability status "entirely to [Applicant's] injury of December 11, 2008." (AR, p. 74.) Dr. Schweitz noted Applicant's complaint of "frequent pain in her right shoulder and intermittent low back pain." This appears to be the first time Applicant mentioned that she slipped while fueling the bus, and the first complaint of low back pain.⁴ (AR, pp. 69-70.) Dr. Schweitz also noted that after six months, Applicant returned to work "but no longer has to refuel buses." (AR, p. 70.)

24. Dr. Schweitz referred to reports by Glen Halverson, M.D., dated January 14, 2009 which indicated that Dr. Halverson treated Applicant based on a referral from Dr. Mann.⁵ (AR, p. 70.) Applicant stated to Dr. Halverson that while lifting a heavy money box on December 11, 2008, she "felt a pulling sensation in her right shoulder blade." The diagnosis was a right scapular thoracic strain. (AR, p. 71.) Dr. Schweitz's physical findings were localized to the cervical spine, right shoulder, and upper back. Range of motion of the right shoulder was within normal limits, although painful. (AR, p. 72.)

25. Dr. Schweitz noted that Applicant complained of frequent pain in her right shoulder with overhead activities, and that she "no longer does refueling of the buses and does not have to reach overhead with the right upper extremity." Applicant had a moderate pain-related impairment score of 35, and Dr. Schweitz believed that Applicant's "credibility with her complaints of pain is [plus] 10 (very high)." (AR, p. 73.) Vocational rehabilitation was not prescribed because "[Applicant's] job duties were modified so that she no longer has to use her right upper extremity repetitively in the overhead position." (AR, p. 74.)

26. Applicant presented to Dr. Schweitz again on January 4, 2011. (AR, pp. 86-90.) Although Applicant complained of pain in her low back, both shoulders and neck, Dr. Schweitz's diagnoses was limited to Applicant's right shoulder and upper back. (AR, pp. 87-88.) Applicant reported working heavy work two or three days per week (consisting of lifting and carrying a fare box weighing up to 70 pounds, lifting a heavy fuel line above head level to refuel the buses and lifting a squeegee attached to a long stick to clean the upper windows of the bus), and light work the remaining days. Dr. Schweitz noted that the physical findings since her February 9, 2010 examination were unchanged. Range of motion for Applicant's cervical spine and right shoulder were within normal limits. (AR, p. 87.) Dr. Schweitz's recommendations included the following:

[Applicant] does light work activities quickly and efficiently. [Applicant] is a good worker and would be a more valuable employee for this company if she could completely avoid all heavy work activities such as lifting and carrying the heavy fare boxes, lifting the fuel line, and repetitive overhead activities

⁴ In the Employer's Statement of Disability, OCTA did not list Applicant's back injury as a reported injury that occurred on December 11, 2008, or in any report of a work-related injury. (AR, pp. 20-21.)

⁵ Dr. Halverson's report is not in the Administrative Record.

with her right shoulder such as use of the squeegee (sponge) on a long handle to clean the upper windows of the bus. (AR, p. 89.)

27. On July 16, 2012, Applicant presented to D. Winston Cheshire, M.D., QME, with complaints about left shoulder pain. Dr. Cheshire's objective findings for shoulder range of motion in degrees indicated that in all six categories tested, Applicant's right shoulder was normal. (AR, p. 105.) On August 21, 2012, Applicant presented to Patricia Meredith, M.D., Ph.D. for electrodiagnostic studies of the upper limbs. Dr. Meredith's studies indicated normal EMG and normal nerve conduction of the upper limbs. AR, pp. 109-110.)

28. On September 6, 2012, Applicant presented to Dr. Schweitz who noted that she was "no longer experiencing pain in either shoulder. [Applicant] states that her treating physician, Dr. Jennings, released [Applicant] to return to work with no restrictions." There was no pain to palpation or muscle spasms over the supporting structures of both shoulders. (AR, p. 118.) Range of motion of both shoulders was normal. There was slight weakness on manual muscle examination of abduction of the right shoulder. (AR, p. 119.)

29. Dr. Schweitz noted that manual muscle examination for the shoulder was a 4, which is rated "good," meaning that she had complete active range of motion against gravity with some resistance. (AR, p. 119.) Applicant had mild pain in both shoulders after repetitive heavy lifting and overhead activities. "Today's examination shows the patient has significantly improved since her previous examinations in my office." However, Dr. Schweitz concluded that Applicant should not return to her usual and customary occupation "since it will probably cause recurrence of her symptomatology and physical findings" because Applicant "is susceptible to progressive changes in her shoulders, including traumatic arthritis." (AR, p. 120.) On September 20, 2012, Applicant told Dr. Ghalambor that she was ready to return to her regular work duties. Dr. Ghalambor released Applicant to return to regular duties on a trial basis. (AR, p. 131.)

Applicant's Low Back

30. On June 14, 2011, Dr. Schweitz issued an Addendum to Qualified Examiners Re-Evaluation of January 4, 2011. (AR, pp. 98-100.) In the addendum, Dr. Schweitz focused on the description of Applicant's injury in his January 4, 2011 report: "The injury of December 11, 2008 occurred while [Applicant] was refueling a bus. [Applicant] slipped and fell to the cement pavement, striking her right shoulder and low back." (AR, p. 98.) He explained that "[Applicant] states that she mentioned low back problems on both of [the February 9, 2010 and January 4, 2011] examinations although I did not include these diagnoses in my report." (AR, p. 98.) Dr. Schweitz stated that his longhand notes of February 9, 2010 mentioned that Applicant hurt her right shoulder and low back when she fell, and she was off work for about six months. (AR, p. 99.)

31. On June 14, 2011, Applicant informed Dr. Schweitz that she had an MRI scan of the low back three or four years ago while employed at OCTA. Dr. Schweitz had not seen

the MRI, and stated he “would appreciate the advantage of being able to review this MRI.” He advised Applicant to “undergo another MRI of the low back at this time so comparison could be made.” (AR, p. 99.) Dr. Schweitz’s June 14, 2011 diagnoses included his comment that “[Applicant] also informs me that the weight of the 75-pound fare box (when filled with coins) had been reduced to 25 pounds. This information would allow [Applicant] to return to work with no restrictions.” (AR, p. 99.)

32. On June 6, 2013, Applicant presented to Dr. Schweitz for an evaluation that included her lower back. “On examination of the low back, there is some muscle guarding and muscle spasms over the lumbar paravertebral musculature and a positive straight leg-raising test at 70 degrees on the left with pain radiating into the left buttock and corresponding low back area.” His final diagnosis is “sprains/strains of the lumbar spine.” (AR, p. 175.) Applicant’s subjective complaints included intermittent slight to moderate pain in her low back. Dr. Schweitz opined that it was “medically probable that [Applicant’s] low back pain will not improve over the next month or the next year.” (AR, p. 175.) He gave Applicant a five percent whole person impairment for the lumbar spine. (AR, p. 176.)

33. Dr. Schweitz further stated that “[a] program of active orthopedic treatment for [Applicant’s] lumbar spine will not give her any permanent improvement of her present condition. Applicant should be instructed in the use of a TENS unit, moist heat, and appropriate exercises that can be carried out at home.” (AR, p. 177.) Dr. Schweitz completed the Qualified Medical Evaluator’s Findings Summary Form on July 5, 2013 and recorded his subjective findings as follows: “[Applicant’s] present symptomology has improved. Applicant does not have any symptoms in her right shoulder, left shoulder or low back.” (AR, p. 179.)

34. Ronald E. Glousman, M.D. prepared a report dated October 24, 2017, in which he noted that an MRI of Applicant’s lumbar spine on April 22, 2017 was “noted to be unremarkable.” (AR, p. 228.) Dr. Glousman stated in the Physician’s Statement of Disability, (which referenced his October 24, 2017 report) that Applicant is permanently disabled. He issued restrictions for the shoulders of no repetitive work with bilateral shoulders; for the neck, no lifting over 10 pounds; and for the lumbar spine, no repetitive bending or lifting over 25 pounds. (AR, p. 252.)

Applicant’s Left Shoulder

35. Applicant testified that she injured her left shoulder on July 14, 2012 while attempting to clean an interior bus handrail. She reached up with her left arm while holding a cleaning towel and felt “excruciating” pain in her left shoulder. Applicant felt the pain at the top of her shoulder near her neck, with pain radiating down her arm. She also felt some numbness. (HT 153:16-154:2; 154:21-25; 155:2-15; 171:23-172:2.) The pain in her left shoulder caused her to sit down and cry. (HT 165:5-7; 171:18-22.) Before she attempted to clean the handrail, Applicant emptied the bus cash boxes and felt some pain in her left shoulder when she lifted the boxes. She does not recall how many boxes she serviced that day. (HT 172:16-173:5.)

36. A passing co-worker checked on her and asked if she wanted pain medication, which Applicant declined. Applicant then walked to the main office to make a report. The supervisor arranged for Applicant to be driven to a clinic, ProCare Work Injury Center. (AR, p. 101.) The clinic applied ice packs to her left shoulder and neck, pain ointment to her left shoulder, and provided ibuprofen for pain. X-rays were taken. (HT 164:13-169:15.) No medical documentation was provided for this clinic visit.

37. Applicant presented to Dr. Cheshire on July 16, 2012, two days after she injured her left shoulder. (AR, pp. 104-105.) Applicant complained that her shoulder pain had worsened since her last office visit, which prevented her from sleeping on her left side. Dr. Cheshire noted that he reviewed her medical history and performed a review of systems. “[Applicant] reports no significant changes except as noted below.” Dr. Cheshire diagnosed Applicant with sprains/strains neck, unspecified site of shoulder and upper arm and lumbar strain. (AR, p. 104.) His restrictions advised Applicant to avoid repetitive awkward positions of the left shoulder, no overhead work, and no operating a coach. Dr. Cheshire conducted range of motion tests. Applicant’s right shoulder was normal on all tests, and the left shoulder was below normal on all tests except the adduction test. (AR, p. 105.)

38. Applicant was scheduled to meet with Herbert D. Jennings, M.D., QME, on August 16, 2012 (AR, p. 108), September 6, 2012 (AR, p. 115), and September 27, 2012 (AR, p. 116), and presented to Dr. Jennings on August 30, 2012. (AR, p. 114.) It appears that as of September 6, 2012, Dr. Jennings released Applicant to return to work on September 7, 2012 with no restrictions. (AR, pp. 115, 118 and 120.) Applicant presented to Dr. Schweitz on September 6, 2012, whose report notes that he received “no reports from Dr. Jennings and would appreciate the advantage of being able to review any of his medical records.” (AR, p. 120.) He also noted that on September 6, 2012, Applicant stated she was “no longer experiencing pain in either shoulder.” (AR, p. 118.)

39. Dr. Schweitz examined Applicant on September 6, 2012 and found “no evidence of pain to palpation or muscle spasms over the cervical paravertebral musculature or the supporting structures of both shoulders. Range of motion of both shoulders is normal [with] slight weakness on manual muscle examination of abduction of the right and left shoulders.” Range of motion of the lumbar spine was within normal limits. Applicant did not “complain of pain over her shoulders or lumbar spine,” and “[r]ange of motion of [Applicant’s] back is within normal limits and is not painful.” Applicant was declared permanent and stationary. (AR, p. 119.)

40. Dr. Schweitz described Applicant as “significantly improved.” (AR, p. 120.) Dr. Schweitz ultimately concluded that Applicant should not return to her usual and customary duties “since it will probably cause recurrence of her symptomatology and physical findings. (AR, p. 120.) He hoped that OCTA could find work for Applicant that did not involve repetitive overhead activities and heavy lifting. (AR, p. 121.)

41. On September 20, 2012, Applicant presented to Navid Ghalambor, M.D., QME, who prepared a Comprehensive Workers’ Compensation Consultation by an

Orthopaedic Surgeon. (AR, pp. 125-133.) Dr. Ghalambor evaluated Applicant's left shoulder and cervical spine. (AR, p. 125.) Applicant reported to him that on July 14, 2012, as she lifted a fare box that weighed 40-50 pounds, she felt pain in the left upper trapezial area. (AR, p. 125.)

42. Applicant was seen at ProCare Work Injury Clinic, underwent 12 sessions of physical therapy and electrodiagnostic studies were ordered. Applicant was currently given modified work restrictions. (AR, pp. 125-126.) Regarding disability status, Dr. Ghalambor noted that Applicant believed she could "return back to her regular work duties. Therefore, she can return back to her regular work duties on a trial basis." (AR, p. 131.) On October 9, 2012, Applicant presented for an MRI of her left shoulder due to "[l]eft shoulder pain radiating down arm, decreased range of motion." (AR, pp. 135-136.) MRI results showed "[p]ossible atrophy of the supraspinatus muscle [and] [m]ild tendinosis of the supraspinatus muscle." (AR, p. 135.)

43. On December 12, 2012, Applicant presented to Dr. Ghalambor for an operation for left shoulder impingement syndrome.⁶ The operative procedure was left shoulder arthroscopic subacromial decompression/partial acromioplasty. (AR, pp. 161-163.) Dr. Ghalambor's notes indicate that Applicant was noted to have "extensive subacromial bursitis with inflamed [coraco-acromial] ligament." After the partial bursectomy was performed, the coraco-acromial ligament was noted to be "quite inflamed." (AR, p. 162.)

44. Applicant presented to Dr. Ghalambor on May 9, 2013 for a Workers' Compensation Permanent and Stationary Evaluation/Report by an Orthopaedic Surgeon. (AR, pp. 167-171.) Applicant stated that her left shoulder symptoms had improved since her left shoulder surgery on December 12, 2012, with "some residual pain along the medial aspect of [Applicant's] left scapula." She declined steroid injections, and complained of difficulty lifting more than 10 pounds with the left arm. (AR, p. 167.)

45. Dr. Ghalambor found that Applicant's "condition has plateaued with therapy." Applicant has a "trigger point along the medial border of her left scapula" and is permanent and stationary.⁷ Dr. Ghalambor noted that motor strength measurements are valid only after a year or more has passed since the time of injury or surgery. Applicant has zero upper extremity impairment and zero impairment of the whole person. Dr. Ghalambor precluded Applicant from lifting more than 10 pounds with the left arm. (AR, pp. 169-170.) On June 6,

⁶ "Supraspinatus syndrome" (impingement syndrome) is defined as "pain on elevating arm and tenderness on deep pressure over the supraspinatus tendon; due to pressure of an injured or inflamed tendon or inflamed subacromial bursa coming into contact with the overlying acromial process when the arm is elevated over the shoulder level. SYN: impingement syndrome, painful arc syndrome." (Source: Stedman's Medical Dictionary, Database updated November 2014.)

⁷ A trigger point is defined as "a specific point or area where stimulation by touch, pain, or pressure induces a painful response." (Source: Stedman's Medical Dictionary, Database updated November 2014.)

2013, Dr. Schweitz determined that 100 percent of the left shoulder impingement should be apportioned to the injury of July 14, 2012. (AR, p. 176.)

Timothy K. Ross, M.D.

46. At the request of OCERS, Timothy K. Ross, M.D. conducted an Orthopedic Independent Medical Evaluation of Applicant on July 27, 2015. (AR pp. 180-198.) Dr. Ross conducted a physical examination of Applicant, and reviewed her medical records, starting with the December 12, 2008 Amended Workers' Compensation Claim Form through a Workers' Compensation Information Request Form dated January 23, 2015. (AR, pp. 186-193.) Applicant presented with complaints of left shoulder symptoms and neck and lower back pain. (AR, p. 194.) Dr. Ross noted that Applicant was a "suboptimal historian" and that her husband provided assistance with her history. (AR, p. 181.) Dr. Ross discussed his findings:

Nevertheless, clinically, [Applicant's] only objective findings are those with relation to left shoulder arthroscopy scars. A nonorganic process was readily identified, noting positive Waddell's signs. Suboptimal effort was rendered on motion assessment of her neck, back and left shoulder. There was no spasm nor evidence of a radiculopathy. There was no anatomic finding of a tendinopathy nor was there evidence of subacromial symptomatology relating to her history of impingement syndrome. Corresponding x-rays to her statedly symptomatic body parts are rather unremarkable. (AR, p. 195.)

47. Dr. Ross noted Dr. Ghalambor's report of undertaking routine left shoulder arthroscopic subacromial surgery on December 12, 2012. Dr. Ghalambor's May 9, 2013 Permanent and Stationary Report listed symmetric mobility of both shoulders, with no finding of any AMA impairment. "However, evidently based upon [Applicant's] symptom reporting, he precluded [Applicant] from lifting greater than 10 pounds." Dr. Ghalambor submitted an additional restriction of preclusion from prolonged overhead work. (AR, p. 195.)

48. Applicant's October 9, 2012 MRI displayed fairly insignificant findings, to include an acromial spur and mild tendinosis. (AR, p. 196.) X-rays taken by Dr. Ross showed that the spur was "adequately operatively addressed." An electrodiagnostic test of Dr. Meredith was "associated with a normal interpretation." (AR, p. 196.) Dr. Ross criticized Dr. Schweitz's impairment rating for Applicant:

Within Dr. Schweitz' reporting, he applies AMA impairment ratings to three different body parts, namely [Applicant's] lower back and both of her shoulders (June 6, 2013). Dr. Schweitz spoke of his awareness of Dr. Ghalambor's findings of a 0% AMA impairment rating. He nevertheless implicitly disagreed, and instead applied a 14% whole person impairment rating.

Curiously, despite Dr. Schweitz' impairment commentary with respect to her right shoulder, [Applicant] contradicts that opinion. Today she unequivocally stated that her right shoulder has been asymptomatic for quite some time, and her right shoulder physical examination is completely normal. (AR, p. 196.)

49. Dr. Ross described Applicant's work limitations of no lifting more than 10 pounds and no overhead use of her left arm as "only subjectively applied." (AR, pp. 196-197.) Dr. Ross noted that Applicant' left shoulder surgery appeared to be successful:

Dr. Ghalambor described mobility matters at the time of his treatment release, for which he stated that [Applicant's] shoulder motion bilaterally was symmetric, and that impingement testing was negative (i.e., surgical success). There is no reference to any internal derangement within her shoulder, again noting the preoperative MRI to display fairly mild changes.

50. Dr. Ross concluded by stating:

Taking all available information into consideration, I do not find sufficient objective evidence to support a permanent restriction in conjunction with [Applicant's] employment for the Orange County Transit Authority. I do not find objective evidence to permanently preclude her from the usual and customary duties of her county job position. (AR, p. 197.)

51. On October 24, 2017, Applicant presented to Dr. Glousman which was memorialized in a Disability and Retirement Assessment and Report. (AR, pp. 222-237.) Applicant complained of ongoing pain in the left shoulder, right shoulder, and cervical and lumbar spine. (AR, p. 223.) Dr. Glousman noted that Dr. Ghalambor performed arthroscopic surgery on Applicant's left shoulder on December 12, 2012, Applicant completed a rehabilitation program and was discharged on May 9, 2013. At that time, Dr. Ghalambor recommended left shoulder permanent work restrictions of no lifting of more than 10 pounds with the left arm. (AR, p. 223.)

52. Dr. Glousman noted Dr. Schweitz's recommendation in his report dated June 6, 2013 that Applicant "have light work and not return back to her usual and customary job activities without restrictions. (AR, p. 223.) Dr. Glousman concluded that Applicant was not capable of returning to her usual and customary job activities without restrictions, and recommended shoulder restrictions of no overhead activities or lifting over 25 pounds, bilaterally; neck restrictions of no lifting more than 10 pounds; and lumbar spine restrictions of no heavy lifting over 25 pounds or repetitive activities. (AR, pp. 236-237.)

53. On January 2, 2018, Dr. Ross responded to Dr. Glousman's October 24, 2017 report in a Supplemental Orthopedic IME Report. (AR, pp. 239- 245.) Dr. Ross noted that Dr. Glousman's report did not indicate whether he is Board Certified in orthopedic surgery or any other specialty. Dr. Glousman had recommended a second surgery for Applicant's left shoulder, which was denied. Dr. Ross then addressed Dr. Glousman's "purportedly positive

physical examination findings,” noting that each of his opinions were “subjectively ascertained, and are inconsistent with the fact that corresponding diagnostic testing has been rather unremarkable.” (AR, pp. 243-244.)

54. Dr. Ross criticized Dr. Glousman’s reporting, noting that a March 28, 2017 left shoulder MRI was interpreted to display incidental changes, without mention of acromioclavicular joint arthrosis, pursuant to one of his diagnoses; Dr. Glousman did not detail the undertaking of Waddell’s signs, nor nonphysiologic examination findings Dr. Ross set forth, including lack of anatomic tenderness; and Dr. Glousman failed to note the “implausible metastasis of [Applicant’s] symptom reporting” while treating, without provocative employment activity.” (AR, p. 244.)

55. Dr. Ross referred to his July 27, 2015 report, and found:

Within the pain diagram that [Applicant] completed and signed in my office on July 27, 2015, she listed absolutely no right shoulder symptoms. With respect to her left shoulder, only left-sided paracervical and left parascapular pain was reported. Distally, her lower back and left posterior thigh were statedly symptomatic, and she listed no radicular upper or lower extremity symptomatology. Despite such self-reporting, the Workers’ Compensation physicians have opined as to the application of work restrictions, to include to variably reported subjectively symptomatic bodily regions. Dr. Glousman buttresses his opinions on reporting of other Workers’ Compensation clinicians. The Workers’ Compensation system is well known to generously afford the benefit of the doubt on such topics, oftentimes quite excessively (such as in this case). It is incumbent upon me to assess one’s functional abilities utilizing the totality of the available evidence, most importantly objectivity.

Dr. Ross concluded that there is no reason to alter his prior opinions that Applicant can perform her usual and customary duties as a Service Worker. (AR, p. 244.)

LEGAL CONCLUSIONS

Applicable Law

1. Government Code section 31720 provides in relevant part:

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

(a) The member’s incapacity is a result of injury or disease arising out of and in the course of the member’s employment, and such employment contributes substantially to such incapacity

2. “[A]n ‘infinitesimal’ or ‘inconsequential’ connection between employment

and disability would be insufficient for a service-connected disability retirement. Instead, . . . ‘while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job.’ (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578); *DePuy v. Board of Retirement* (1978) 87 Cal.App.3d 392, 398-399). “Substantial evidence has been defined as ‘relevant evidence that a reasonable mind might accept as adequate to support a conclusion,’” (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307.)

3. Government Code section 31720.3 states: “[i]n determining whether a member is eligible to retire for disability, the board shall not consider medical opinion unless it is deemed competent”

4. The Applicant has the burden of proof to prove the incapacity and its relationship to the job by a preponderance of the evidence. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332) (“[L]iberal construction [of pension legislation] cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence”); *Rau v. Sacramento County Retirement Bd.* (1966) 247 Cal.App.2d 234, 238 (“[T]he burden of proving an incapacitating condition is on the applicant for a disability retirement, and it is not necessary for the agency to show the negative of the issues when the positive is not proved”); (*Lindsay v. County of San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 160-162.).

5. Government Code section 31721, subdivision (a) states in relevant part:

A member may be retired for disability upon the application of the member, the head of the office or department in which he is or was last employed, the board or its agents, or any other person on his behalf, except that an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any eligible member believed to be disabled

6. Government Code section 31724 states in relevant part:

If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation. Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation When it has been demonstrated to the satisfaction of the board that the filing of the member’s application was delayed by administrative oversight or by inability

to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

7. "Incapacitated for the performance of duty," means the "substantial inability of the applicant to perform his usual duties," as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873,877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

Whether Applicant is Permanently Incapacitated

8. Applicant has established that she is permanently incapacitated in regards to her left shoulder injury sustained on July 14, 2012. Applicant has not established that she is permanently incapacitated in regards to her right shoulder injury or lower back injury sustained on December 11, 2008.

Applicant's Right Shoulder and Lower Back

9. On December 11, 2008, Applicant injured her right shoulder. The Employer's Statement of Disability indicated that Applicant reported that she experienced "[r]ight shoulder strain from removing cashbox farebox." The day after the injury, Applicant treated with Dr. Mann who reported that "[Applicant] was mopping the floor and [Applicant] developed pain in [Applicant's] right shoulder." Applicant also claims that she injured her lower back on December 11, 2008 while refueling a bus. Dr. Mann's report did not record any complaint of pain in Applicant's lower back. Applicant was released to return to work that same day with restrictions of no lifting, pushing or pulling over 10 pounds, no reaching above shoulders, and limited use of right arm. (Factual Findings 1, 17, 18 and 30.)

10. On January 12, 2009, approximately one month later, Applicant reported to Dr. Mann that her symptoms were improving and she felt better. She had mild pain in her right arm for about two to three months before presenting for this examination, which improved with rest. After four days of rest, Applicant "was able to tolerate until the day of her injury." Applicant treated with physiatrist Dr. Deshmukh in early 2009 for just over four months. On June 25, 2009, Dr. Deshmukh noted that Applicant's symptoms were resolved, as "[Applicant] has been doing her regular job duties with no symptoms." He released Applicant to regular duty. Applicant did not report low back pain and was not treated for low back pain at her appointments with Dr. Mann or Dr. Deshmukh. (Factual Findings 19, 20 and 21.)

11. It appears that Applicant first complained of low back pain from a work injury over one year later during a February 9, 2010 examination by Dr. Schweitz, when she stated that she fell on December 11, 2008 while fueling a bus. Dr. Schweitz reviewed reports by Dr. Halverson (whose reports are not in the record), prepared less than one month after the December 11, 2008 injury, which indicate that Applicant described a pulling sensation in her

right shoulder blade while lifting a bus fare box. Dr. Halverson did not record any complaints about Applicant's low back. (Factual Findings 17-24 and 30.)

12. At Dr. Schweitz's February 9, 2010 examination, Applicant complained of frequent pain in her right shoulder with overhead activities, but Dr. Schweitz did not prescribe vocational rehabilitation because Applicant's job duties were modified so that she no longer had to refuel the buses and no longer had to use her right upper extremity in the overhead position. Applicant returned to Dr. Schweitz almost one year later with complaints of pain in her low back, both shoulders and neck, and claimed she was still carrying heavy fare boxes, lifting fuel lines and lifting squeegees overhead. Dr. Schweitz noted that Applicant's range of motion for her cervical spine and right shoulder were within normal limits. He recommended that Applicant avoid heavy and repetitive overhead work activities. (Factual Findings 23, 25 and 26.)

13. On June 14, 2011, Applicant informed Dr. Schweitz that she had an MRI scan of her low back in 2007 or 2008. Dr. Schweitz did not see that MRI, and advised her to undergo another MRI to compare both results. It appears that Dr. Schweitz was not provided the opportunity to make a comparison of the two MRIs he requested for Applicant's low back. He also noted that the weight of the fare box had been reduced to 25 pounds, which would allow Applicant to return to work without restrictions. Two years later, On June 6, 2013, Dr. Schweitz noted that Applicant's symptomology had improved, with no symptoms in her right or left shoulder or low back. (Factual Findings 31-33.)

14. On July 16, 2012, Dr. Cheshire found Applicant's right shoulder was normal. On August 21, 2012, Dr. Meredith's studies indicated normal EMG and normal nerve conduction of the upper limbs. By September 6, 2012, Dr. Schweitz noted that Applicant no longer experienced pain in either shoulder. Applicant's treating physician Dr. Jennings released Applicant to return to work on September 7, 2012 with no restrictions. Dr. Schweitz was not provided the opportunity to review Dr. Jennings' medical records. (Factual Findings 27 and 38.)

15. On September 6, 2012, Dr. Schweitz concluded that Applicant should not return to her usual and customary occupation because it will "probably cause recurrence of her symptomatology and physical findings" because she "is susceptible to progressive changes in her shoulders, including traumatic arthritis." Two weeks later, on September 20, 2012, Applicant told Dr. Ghalambor that she was ready to return to her regular work duties. Dr. Ghalambor released Applicant to return to regular duties on a trial basis. (Factual Findings 28 and 29.)

16. On October 24, 2017, Dr. Glousman's report noted that an MRI of Applicant's lumbar spine on April 22, 2017 was "unremarkable." He prepared a Physician's Statement of Disability which stated that Applicant is permanently disabled. He issued restrictions for the shoulders of no repetitive work for both shoulders, and for the lumbar spine, no repetitive bending or lifting over 25 pounds. (Factual Finding 34.)

17. Regarding Applicant's right shoulder injury claim, as of September 2012, Dr. Jennings and Dr. Ghalambor released Applicant to return to her regular work duties, yet for reasons not explained, Applicant never returned to her job. Dr. Schweitz noted in 2010 that Applicant's job duties were modified to avoid refueling the buses or using her right upper extremity in the overhead position. Dr. Schweitz noted a 2011 work modification which reduced the weight of the fare box to 25 pounds, which Dr. Schweitz believed would allow Applicant to return to work without restrictions. (Factual Findings 23, 25, 29, 31 and 38.)

18. Dr. Ross's examination of Applicant on July 27, 2015 contradicted Dr. Schweitz's impairment findings. At that examination, Applicant candidly stated that her "right shoulder has been asymptomatic for quite some time." Dr. Ross examined Applicant's right shoulder and concluded it was "completely normal." Taking into consideration the totality of the evidence, including the fact that Applicant was medically cleared by Dr. Jennings and Dr. Ghalambor to return to her regular duties, and Dr. Schweitz believed that Applicant's modified work duties would allow Applicant to return to work without restrictions, Applicant's appeal for service-connected and non-service connected disability retirement for her right shoulder must be denied. (Factual Findings 23, 25, 29, 31 and 46-50.)

19. Regarding Applicant's low back injury claim, the evidence indicates that Applicant did not report a back injury to Dr. Mann during an examination conducted one day after the injury, or at another examination he conducted one month later. Applicant did not report a back injury to Dr. Deshmukh, nor was she treated for a back injury during the four months he treated Applicant in early 2009. Dr. Schweitz reviewed Dr. Halverson's report prepared approximately one month after the December 11, 2008 injury, which did not record any complaints about Applicant's low back. It appears that Applicant first reported her back injury to Dr. Schweitz more than one year later on February 9, 2010. (Factual Findings 17-24.)

20. In June 2011, approximately two and one-half years after her fall in 2008, Applicant informed Dr. Schweitz about a low back MRI scan taken in 2007 or 2008, presumably before her fall. Dr. Schweitz never saw that MRI, and was unable to compare the medical condition of Applicant's back after her fall with that MRI scan taken before her fall, as he had requested. On June 6, 2013, Dr. Schweitz opined that it was "medically probable" that Applicant's low back pain will not improve over the next month or the next year. One month later, Dr. Schweitz noted in a Qualified Medical Evaluator's Findings Summary Form that Applicant's symptomology had improved, and that she had no symptoms in her low back. In October 2017, Dr. Glousman noted that an MRI of Applicant's lumbar spine on April 22, 2017 was "unremarkable." (Factual Findings 31-34.)

21. Based upon the totality of the evidence, including Applicant's 14-month delay in reporting a back injury to her treating doctors, the fact that Dr. Schweitz did not have the benefit of reviewing relevant medical records pertaining to Applicant's low back before her fall, and the fact that Applicant ultimately was determined to have no symptoms in her low back, Applicant's appeal for service-connected and non-service connected disability retirement for her low back must be denied. (Factual Findings 17-34.)

Applicant's Left Shoulder

22. Applicant testified that she injured her left shoulder on July 14, 2012. She initially felt pain in her left shoulder that day when she lifted the bus cash boxes. After emptying the cash boxes, Applicant reached up with her left arm to clean an interior bus handrail with a cleaning towel and felt "excruciating" pain in her left shoulder. She was unable to sleep on her left side due to pain. Tests conducted two days later by Dr. Cheshire showed that Applicant's left shoulder performed below normal on all but one test. On September 6, 2012, Dr. Schweitz noted that Applicant no longer had pain in either shoulder, yet he did not authorize Applicant to return to work. (Factual Findings 1, and 35-39.)

23. An October 9, 2012 MRI scan showed possible atrophy of the supraspinatus muscle and mild tendinosis of the supraspinatus muscle. On December 12, 2012, Dr. Ghalambor performed an operation for left shoulder impingement syndrome. Applicant had "extensive subacromial bursitis with inflamed [coraco-acromial] ligament." The coraco-acromial ligament was noted to be "quite inflamed. (Factual Findings 41-43.)

24. A follow up examination with Dr. Ghalambor on May 9, 2013 indicated residual pain along the medial aspect of Applicant's left scapula and a "trigger point" along the medial border of Applicant's left scapula. Applicant also complained of difficulty in lifting more than 10 pounds with the left arm. Dr. Ghalambor precluded Applicant from lifting more than 10 pounds with the left arm and prolonged overhead work. (Factual Findings 42-44 and 47.)

25. Dr. Ross' July 27, 2015 report criticized Dr. Ghalambor's May 9, 2013 report, stating that the restrictions imposed were based on Applicant's subjective symptom reporting. Dr. Ross believed that the October 9, 2012 MRI results contained "insignificant findings," but noted that the MRI showed an acromial spur and mild tendinosis. Applicant candidly reported to Dr. Ross that her right shoulder had been asymptomatic for some time. Applicant also reported left shoulder pain. Dr. Ross did not discuss how Applicant would be able to perform her work duties despite the permanent left shoulder restrictions imposed by Dr. Ghalambor, apparently because Dr. Ross believed that the operation on the left shoulder was successful. (Factual Findings 47-49, 51 and 55.)

26. In discerning the medical opinions of Dr. Ghalambor and Dr. Ross, the hearing officer allocates greater weight to the operating surgeon, Dr. Ghalambor, who opined that Applicant should be permanently restricted from lifting more than 10 pounds with her left arm, and should refrain from prolonged overhead work. The Job Analysis Report prepared by The Rehabilitation group, LLC, with the assistance of Moreno, Applicant's base manager, indicated that the position of Service Worker requires frequent overhead reaching (34 to 66 percent of the workday) and occasional lifting or carrying of objects weighing 11 to 25 pounds (17 to 33 percent of the workday). (Factual Findings 15-16, and 41-51.)

27. It appears that Applicant's employer attempted to accommodate her medical restrictions. As of February 9, 2010, Applicant's job duties were modified to avoid refueling

the buses and overhead reaching with her right arm. As of June 14, 2011, the weight of the fare boxes was reduced to 25 pounds. The task of lifting 25-pound fare boxes or 25-pound flip-up seats in the wheelchair area would violate Dr. Ghalambor's permanent 10-pound lifting restrictions for the left arm. Applicant's employer, OCTA, believed that Applicant was unable to perform her work duties, and filed for service and non-service connected disability retirement on behalf of Applicant.

28. The hearing officer reasonably infers that OCTA filed for service and non-service connected disability retirement on behalf of Applicant because OCTA determined that it could not accommodate Applicant's medical restrictions. OCTA's determination that it could not accommodate Applicant's restrictions, with no offer of alternative employment, provides additional support to find that Applicant is permanently incapacitated. (*Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 924) (Employee would have basis for asserting termination on grounds of permanent disability if County Hospital informed her it was unable to accommodate permanent work restrictions with no indication of alternative employment).

29. Taking into consideration the totality of the evidence, including the permanent weight restrictions imposed by Dr. Ghalambor, the treating doctor who performed the surgery on Applicant's left shoulder, and the fact that OCTA was unable to accommodate Applicant's medical restrictions, the hearing officer concludes that Applicant has established that the orthopedic condition of her left shoulder renders her permanently incapacitated and unable to perform her usual and customary work duties. (Factual Findings 1, 12, 15-16, 23, 25, 35-44, 47, and 51.)

Whether Applicant's Permanent Incapacity is Service Related

30. Applicant has established that she is entitled to service-connected disability retirement, in that Applicant established by a preponderance of the evidence that her permanent incapacity based upon the orthopedic condition of her left shoulder arose out of and in the course of her employment with OCTA. The injury was accepted by OCTA as work-related, and occurred while Applicant was performing her job to remove a cashbox from a farebox in a bus. Dr. Schweitz treated Applicant since February 9, 2010, and found that 100 percent of the left shoulder impingement was apportioned to the July 14, 2012 injury.

31. The hearing officer finds that Applicant is unable to perform her usual job duties, rendering her permanently incapacitated for the performance of her duties as a bus Service Worker. Applicant has established a real and measurable connection between Applicant's permanent incapacity for her left shoulder and her work duties. (Factual Findings 1, 20, 22-26, 28-33 and 35-51; Legal Conclusions 1 and 2.)

The Effective Date of Service-Connected Disability Retirement

32. Government Code section 31724 provides that a disability retirement allowance shall be effective as of the date such application was filed with the Board. On October 28, 2013, OCTA filed an application for service-connected and nonservice-connected disability retirement on behalf of Applicant. On June 17, 2014, Applicant filed her application for service-connected disability retirement with the Board. The hearing officer finds that the effective date of Applicant's service-connected disability retirement benefits for her left shoulder orthopedic claim is October 28, 2013, the date such application was filed on her behalf by OCTA. (Factual Finding 1; Legal Conclusions 5 and 6.)

RECOMMENDATION

1. The appeal of Applicant Lynn H. Hong for service-connected disability retirement for the orthopedic injury to her left shoulder is granted. The effective date of Applicant's service-connected disability retirement benefits is October 28, 2013.

2. The appeal of Applicant Lynn H. Hong for service-connected and nonservice-connected disability retirement for her orthopedic injuries to her right shoulder and lumbar spine is denied.

DATED: August 17, 2020



MICHAEL R. DILIBERTO
Hearing Officer
Board of Retirement, Orange County
Employees Retirement System

BEFORE THE
BOARD OF RETIREMENT OF THE
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Application for
Disability Retirement:

CAROL L. THOMPSON,

Applicant.

PROPOSED DECISION

Michael R. Diliberto, Hearing Officer, Orange County Employees Retirement System, heard this matter on June 8, 2018, in Santa Ana, California.

Steven R. Pingel and William H. Shibley, Esq., Law Offices of Steven R. Pingel, and Steven R. Rosales, Law Offices of Steven R. Rosales, represented Carol L. Thompson (Applicant), who appeared at hearing.¹

Jerry A. Weissburg and Dawn M. Matsuo, Esq. represented the Board of Retirement of the Orange County Employees Retirement System (OCERS and/or Board).

The record was held open until February 8, 2019 to provide time for the parties to receive the hearing transcript and submit closing briefs. Applicant served her closing brief on October 10, 2018 and Respondent served its closing brief on December 11, 2018. Applicant served her reply brief via email on February 8, 2019, and sent via regular mail a condensed transcript for Applicant’s March 2, 2005 deposition in her case before the Workers’ Compensation Appeals Board, identified as Exhibit 1, and an April 29, 2009 letter from OCERS to Applicant, identified as Exhibit 2. OCERS did not file an objection, and the March 2, 2005 transcript and April 29, 2009 letter were admitted into evidence. Oral and documentary evidence was received and the matter was submitted for decision on February 8, 2019. The hearing officer makes his factual findings, legal conclusions and recommendation as follows.

SUMMARY OF ADMINISTRATIVE RECORD

The administrative record (AR) consisted of exhibit pages 1 through 515. The following exhibits were offered by the parties and received into evidence:²

¹ On or about January 3, 2019, Steven R. Rosales, Esq. substituted in as Applicant’s sole attorney of record.

² Pursuant to stipulation of counsel, AR pages 252 through 343 were withdrawn at

Disability Retirement Application and Correspondence

(10/29/12) Application for Disability Retirement (Applicant): Applicant's application for service-connected disability and nonservice-connected disability. (AR, p. 1.)

(10/29/12) Employee's Statement of Disability (Applicant): Applicant's statement of disability for "a rupture of the achilles tendon, right foot, ankle, calf, [and] back injury." Symptoms began in August 2004 due to long period on feet. Applicant's Achilles ruptured on September 29, 2004 while pushing a food cart up a ramp. Applicant became unable to perform the duties of her position on September 29, 2004 due to inability to stand, walk, squat, lift heavy objects, or lift overhead for long periods. (AR, pp. 2 through 6.)

(10/29/12) Authorization for Disclosure and Use of Protected Health Information (Applicant): Applicant's authorization for disclosure and use of protected health information. (AR, p. 7.)

(10/11/12) Physician's Statement of Disability (Soheil Aval, M.D.): Primary diagnosis: Partial tear of right achilles tendon. Secondary diagnosis: Lumbar strain; Spondylosis; Bilateral Knee Contusions. Applicant is permanently disabled for the duties of her occupation. (AR, pp. 8 through 11.)

(2/20/13) Letter (OCERS): Confirmation of receipt of Applicant's application for service and non-service connected disability retirement. (AR, p. 12.)

(2/20/13) Memorandum (OCERS): Request for Applicant's entire department personnel file. (AR, p. 13.)

(2/20/13) Memorandum (OCERS): Request for Applicant's entire department personnel file. (AR, p. 14.)

(2/20/13) Memorandum (OCERS): Request for Applicant's medical records. (AR, p. 15.)

(2/18/13) Workers' Compensation Information Request (OCERS): Request for information about workers' compensation claims filed by Applicant. (AR, p. 16.)

(2/27/13) Supervisor Statement (OCERS): Applicant's usual and customary job duties as a cook include "prepare meals for minors/staff, assist senior cook in all food preparations, diets and cleanliness of kitchen area." (AR, p. 17.)

(3/29/13) Employer's Statement of Disability (OCERS): Statement summarizing Applicant's work related injuries, work restrictions and work duties. (AR, pp. 18 through 27.)

hearing and replaced with AR pages 432 through 515.

(9/10/13) Letter (OCERS): Notice to Applicant with enclosed list of medical records received to date regarding application for disability retirement. (AR, pp. 28 through 31.)

(9/17/13) Letter (OCERS): Letter to Applicant scheduling examination with A. Michael Moheimani, M.D. (AR, p. 32.)

(9/17/13) Letter (OCERS): Letter to A. Michael Moheimani, M.D. scheduling examination with Applicant. (AR, pp. 33 through 39.)

(11/12/13) Letter (OCERS): Letter to Applicant with enclosed Independent Medical Examination report from A. Michael Moheimani, M.D. (AR, p. 40.)

(2/4/14) Letter (OCERS): Letter notice to Applicant of staff recommendation to grant non-service connected disability retirement with an effective date of October 29, 2012, and deny service-connected disability retirement due to insufficient evidence of job causation. (AR, pp. 41 and 42.)

(2/18/14) Minutes (OCERS): OCERS board minutes approving staff recommendation to grant non-service connected disability retirement with an effective date of October 29, 2012, and deny service-connected disability retirement due to insufficient evidence of job causation. (AR, pp. 43 and 44.)

(2/18/14) Board Release (OCERS): OCERS board release with recommendation to grant non-service connected disability retirement with an effective date of October 29, 2012, and deny service-connected disability retirement due to insufficient evidence of job causation. (AR, p. 45.)

(2/19/14) Letter (OCERS): Letter notice to Applicant of OCERS board granting non-service connected disability retirement with an effective date of October 29, 2012, and denying service-connected disability retirement due to insufficient evidence of job causation. (AR, pp. 46 and 47.)

(5/21/14) Letter (OCERS): Notice to Applicant of assignment of appeal to Referee Michael Diliberto. (AR, p. 48.)

(5/21/14) Letter (OCERS): Letter notice to Applicant of overview of the administrative hearing process. (AR, pp. 49 through 76.)

Medical Reports and Related Documents

(5/20/04) Authorization (Applicant): Authorization for left toe operation. (AR, p. 77.)

(5/20/04) Operative Report (Victoria M. Foley, D.P.M.): Operative report for avulsion left hallux procedure. (AR, p. 78.)

(5/25/04) Disability Certificate (Victoria M. Foley, D.P.M.): Disability certificate relating to infected toe, resulting in Applicant being “[t]otally incapacitated of usual job description or physical education.” (AR, p. 79.)

(9/1/04) Medical Report (Peter Kurzweil, M.D.): Impression: Severe Achilles tendinitis with possible partial tearing. Applicant may return to sedentary work only, with physical therapy. (AR, pp. 80 and 81.)

(10/5/04) Prescription (Victoria M. Foley, D.P.M.): Referral for magnetic resonance imaging for right ankle and right Achilles tendon. (AR, p. 82.)

(10/5/04) Doctor’s First Report of Occupational Injury or Illness (Applicant): Applicant described September 29, 2004 accident as “[Applicant] was pushing carts, it snapped in my calf on the right side, ankle has been sore since.” September 29, 2004 was last date worked. (AR, p. 83.)

(10/7/04) Special Incident Report (Orange County Probation Department): Scott Lee, Acting Senior cook, reported that he worked with Applicant up to the time she stopped working, but he had no knowledge of Applicant suffering a work injury or of a report taken because of an injury. Applicant complained from time to time of aches and pains of different sorts, but Mr. Lee did not know that Applicant was out because of an injury. (AR, pp. 84 and 85.)

(10/13/04) Report of Occupational Injury/Illness (Alex Ceja, Supervisor): On October 7, 2004, Applicant reported she was experiencing pain in her right foot. Since mid-August, Applicant attributes pain in right foot to excessive walking up and down kit hen trailer ramp. (AR, p. 86.)

(10/15/04) Email (Sandra Martinez Assistant Division Director): Report of alleged statements made by Applicant to co-worker. (AR, p. 87.)

(10/21/04) Doctor’s First Report of Occupational Injury or Illness (Gary Ohashi, M.D.): On August 1, 2004, Applicant was pushing a cart and heard a pop. Diagnosis: Sprain/strain, ankle, other. (AR, p. 88.)

(10/25/04) Radiologist’s Report of Findings (Carol L. Andrews, M.D.): Impression: Extensive delaminating tear of the mid Achilles tendon substance with adjacent kager’s fat pad edema. (AR, pp. 89-90.)

(10/31/04) Attending Physician’s Report (Gary Ohashi, M.D.): Right Achilles tear. May return to work light/modified duties, sedentary work only. Condition permanent and stationary. (AR, p. 91.)

(11/16/04) Ankle Evaluation/Care Plan/Discharge Plan (Physical Therapist): Treatment plan for right ankle and right Achilles tendon. (AR, p. 92.)

(12/6/04) Physical Therapy Progress Note (Memorial Prompt Care, Physical Therapy Department): Applicant has pain in right heel and right Achilles and tenderness. Poor activity tolerance. Conservative approach based on Applicant's pain response. (AR, p. 93.)

(12/22/04) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Diagnosis: Partial tear of Achilles tendon. (AR, pp. 94 through 104.)

(12/22/04 Prescription (Soheil M. Aval, M.D.): Prescription for right heel lifts, one-half inch. (AR, p. 105.)

(1/28/05) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Diagnosis: Partial tear of right Achilles tendon. (AR, p. 106.)

(2/10/05) MRI Right Ankle (Gary Kitching, M.D.): Impression: Fifty percent tear of the Achilles tendon; evidence of tenosynovitis in the peroneus longus tendon sheath; evidence of fluid signal seen in the hallux valgus tendon sheath. (AR, p. 107.)

(3/8/05) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Applicant continues to experience pain in her right foot, ankle and heel. Authorization requested for physical therapy two times per week for four weeks. (AR, pp. 108 and 109.)

(3/10/05) Orthopedic Consultation Defense AOE/COE Determination (Stanley G. Robboy, M.D.): Diagnosis: Partial tear of the right Achilles tendon. Applicant is permanent and stationary. Due to right Achilles condition, Applicant should avoid occupations requiring prolonged walking or standing and repetitive ascending or descending of ladders, ramps, or stairs. (AR, pp. 110 through 125.)

(9/2/05) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Diagnosis: Partial tear of right Achilles tendon. Applicant to remain off-work until September 2, 2005. (AR, p. 126.)

(9/2/05) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Diagnosis: Lumbar strain, with underlying degenerative spondylosis; Bilateral knee contusions; and Partial tear, right Achilles tendon. (AR, pp. 127 through 136.)

(9/23/05) Primary Treating Physician's Progress Report (Soheil M. Aval, M.D.):
Examinations indicate tenderness to palpation over the anterolateral ankle and posterior Achilles tendon with prominence. Applicant ambulates with an antalgic gait, with decreased range of motion. Applicant is not yet permanent and stationary, and remains Temporarily Totally Disabled. (AR, pp. 137 through 141.)

(10/25/05 Prescription (Soheil M. Aval, M.D.): Prescription for physical therapy for low back and right ankle tear, Achilles tendon, right lumbar sprain/strain. (AR, p. 142.)

(11/17/05) Orthopedic Medical-Legal Re-Evaluation (Stanley G. Robboy, M.D.):

Diagnosis: Partial tear of the right Achilles tendon; Acute lumbosacral myofascial strain-resolved; Status post contusions sustained to both knees-resolved; and Chronic sprain of the medical aspect of the right ankle. Applicant is permanent and stationary. Due to right heel cord condition, Applicant should avoid occupations requiring prolonged walking or standing and repetitive ascending or descending of ladders, ramps, or stairs. (AR, pp. 143 through 156.)

(11/17/05) Medical Report (Stanley G. Robboy, M.D.): Response to claims examiner regarding denial of claim for right Achilles tendon. (AR, p. 157.)

(11/17/05) Medical Report (Stanley G. Robboy, M.D.): Applicant experienced an industrial injury to right lower extremity in the form of a partial rupture (and chronic tendinitis) of the right Achilles tendon. Applicant did not sustain an industrial related injury to her right ankle, right foot, right knee, left knee, and back. Applicant's right Achilles tendon problem is an incapacitating industrially related injury. (AR, pp. 158 through 160.)

(11/29/05) Primary Treating Physician's Final Report (Soheil M. Aval, M.D.): Diagnosis: Lumbar strain with underlying degenerative spondylosis; Bilateral knee contusions; and Partial tear of the right Achilles tendon. Applicant has reached Maximum Medical Improvement. For the lumbar spine, avoid heavy lifting and repetitive bending and stooping. For the right ankle, avoid weightbearing more than two hours in an eight hour work day. Avoid kneeling squatting, crawling, climbing, and waling on uneven surfaces. (AR, pp. 161 through 171.)

(12/26/05) Agreed Medical Examination (Ray L. Craemer, M.D.): Diagnoses includes partial rupture of right Achilles tendon, bilateral ankle capsular swelling, exacerbation of right ankle Achilles tendinitis, ligamentous low back sprain remaining symptomatic, ligamentous low back sprain. (AR, pp. 172 through 196.)

(3/6/06) Notice of Permanent Restrictions (Abigel Hernandez): Permanent work restrictions as of December 26, 2005: Right Ankle: No heavy lifting, prolonged weight bearing, no climbing, walking over uneven ground, squatting, kneeling, crouching, crawling, and pivoting, or other activities involving comparable physical effort. Low Back: No very heavy lifting and heaving bending and stooping. Left Ankle and Knee: None. Neither modified nor alternative work is available. (AR, p. 197.)

(10/2/13) Independent Medical Evaluation (A. Michael Moheimani, M.D.): Diagnostic Impressions: History of partial tear in the right Achilles tendon, and lumbosacral strain with degenerative disc disease. (AR, pp. 198 through 211.)

Workers' Compensation Records

(10/9/04) Workers' Compensation Claim Form (Applicant): Claim for ruptured or torn right Achilles tendon occurring in August 2004. (AR, p. 212.)

(10/15/04) Employer's Report of Occupational Injury or Illness (Donna Inouye): On October 7, 2004, Applicant reported she was experiencing pain in her right foot since mid-August 2004, and attributes it to excessive walking up and down the kitchen trailer ramp. (AR, p. 213.)

(1/3/05) Employer's Report of Occupational Injury or Illness (Donna Inouye): On October 7, 2004, Applicant was hired on January 16, 1998. Date of injury to right ankle/foot/knee/lower extremity was September 1, 2004. (AR, p. 214.)

Personnel Records

(1/15/98) Notice (OCERS): Notice that County of Orange employees will become a member of OCERS, eligible to receive retirement benefits. (AR, p. 215.)

(4/27/12) Employee Termination Notice (OCERS): Applicant's last day on pay was March 3, 2005. The effective date of separation was October 5, 2011. (AR, p. 216.)

(11/13/09) Transcript of Ray L. Craemer, M.D. (Carroll Sells Court Reporting Service): Deposition transcript of Ray L. Craemer, M.D. (AR, pp 217 through 229.)

(11/9/04) Medical Report (Peter R. Kurzweil, M.D.): Impression: Severe Achilles tendinitis with possible partial tearing. Disability status: Applicant may return to work if doing sedentary work only and physical therapy. (AR, pp. 230 and 231.)

(11/9/04) Orthopedic Evaluation (Memorial Prompt Care Medical Group, Inc.): Injury described as gradual build up started in August, popped sometime in the first two weeks of September at Juvenile Hall, construction cooking trailer. (AR, pp. 232 and 233.)

(7/1/10) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. On April 6, 2006, the Department determined that it could not accommodate Applicant's permanent work restrictions in her current position of Institutional Cook. (AR, p. 224.)

(1/24/11) Letter (Orange County Probation): Letter acknowledging the Department's receipt of Applicant's permanent work restrictions for the right ankle and low back. (AR, p. 235.)

(10/5/11) Release of All Claims and Settlement Agreement (Applicant and the County of Orange): Release of All Claims and Settlement Agreement relating to Orange County Superior Court Case Carol Thompson v. Orange County Probation Department, et al., Case No. 30-2010-00343328. (AR, pp. 236 through 242.)

(1/10/06) Letter (Orange County Probation): Letter acknowledging the Department's receipt of Applicant's current work restrictions and request for a meeting to explore a work position to accommodate Applicant's work restrictions. (AR, p. 243.)

(1/30/07) Letter (Orange County Probation): Letter confirming an interactive meeting with the Department's and Applicant. (AR, p. 244.)

(2/27/09) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. The Department could not accommodate Applicant's permanent work restrictions and is filing for Service-Connected and nonservice-connected Disability Retirement on Applicant's behalf. (AR, p. 245.)

(3/27/09) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. On April 6, 2006, the Department determined that it could not accommodate Applicant's permanent work restrictions in her current position of Institutional Cook. (AR, p. 246.)

(8/26/09) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. On April 6, 2006, the Department determined that it could not accommodate Applicant's permanent work restrictions in her current position of Institutional Cook. (AR, p. 247.)

(11/17/09) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. On April 6, 2006, the Department determined that it could not accommodate Applicant's permanent work restrictions in her current position of Institutional Cook. (AR, p. 248.)

(3/29/10) Letter (Orange County Probation): On March 6, 2006, the Department received notice of Applicant's permanent work restrictions for the right ankle and low back. On April 6, 2006, the Department determined that it could not accommodate Applicant's permanent work restrictions in her current position of Institutional Cook. (AR, p. 249.)

Supplemental Administrative Record (AR, pp. 250 through 515)

(10/27/15) Letter (OCERS) Letter informing hearing officer that the Board voted to grant Applicant non-service connected disability retirement, effective October 29, 2012, and denied Applicant's application for service-connected disability retirement due to insufficient evidence of job causation. (AR, p. 250.)

(2/27/15) Letter (OCERS) Letter informing hearing officer that the Board voted to grant Applicant non-service connected disability retirement, effective October 29, 2012, and denied Applicant's application for service-connected disability retirement due to insufficient evidence of job causation. (AR, p. 251.)

(8/3/16) Physician's Statement of Disability (Ted R. Greenzang, M.D.): Applicant is now permanently disabled for the duties or her occupation. The following accommodations are necessary for Applicant to resume the duties or her occupation: Must avoid emotional

stress, and work requiring close deadlines, precision and attention to detail under distracting conditions. (AR, pp. 251A through 251G.)

(2/9/07) Qualified Medical Examination in Psychiatry (Ted R. Greenzang, M.D.): Diagnostic Impression includes depressive disorder not otherwise specified, and dependent and obsessive compulsory personality traits. Applicant is not permanent and stationary from a psychiatric standpoint. (AR, pp. 252 through 275.)

(3/5/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): There is nothing based upon a review of additional medical records which causes Dr. Greenzang to alter any conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint. (AR, pp. 276 through 284.)

(4/10/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): There is nothing based upon a review of additional medical records which causes Dr. Greenzang to alter any conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint. (AR, pp. 285 through 302.)

(8/6/07) Qualified Medical Examination in Psychiatry (Ted R. Greenzang, M.D.): The combination of Applicant's dysphoric symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms referable to Applicant's right ankle preclude her from a psychiatric standpoint from returning to her usual and customary employment for the County of Orange. (AR, pp. 303 through 330.)

(9/24/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): There is nothing based upon a review of additional medical records which causes Dr. Greenzang to alter any conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint. (AR, pp. 331 through 335.)

(3/24/08) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): There is nothing based upon the report of Dr. Kimmel which causes Dr. Greenzang to alter any conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint. (AR, pp. 336 through 343.)

(5/9/17) Letter (Dr. Kimberly Arsi, DO): Letter of incompetency stating that Applicant is not able to make decisions about her health, medications, or finances. (AR, p. 344.)

(7/5/17) Letter (Monquen Huang, M.D.): Letter of incompetency stating that Applicant has dementia, and is unable to care for herself and her condition will continue to progress and deteriorate. (AR, p. 345.)

(5/21/17 Neuropsychological Evaluation Report (Johnny H. Wen, Ph.D.): Testing for neurocognitive function indicates significant impairment with memory functions and variable executive functions ranging from severe impairment to average. The information indicates concern for Applicant's ability to live independently, due to significant cognitive impairment and paranoia. (AR, pp. 346 through 355.)

(11/23/16) Letter (OCERS): Letter to Dr. Perry Maloff with physician guidelines for evaluating applicants for disability retirement. (AR, pp. 356 through 361.)

(11/23/16) Letter (OCERS): Notice to Applicant of appointment scheduled with Dr. Perry Maloff. (AR, p. 362.)

(1/16/17) Independent Medical Evaluation in the Field of Psychiatry (Perry Maloff, M.D.): Applicant appears to have had the capacity to continuously remain employed as an institutional cook for Orange County after the date of injury up through the present time despite suffering from delusional, persecutory type. Applicant acknowledges she is capable of performing her job duties on the date of examination but chooses not to work because she has become older. I would expect Applicant's psychiatric condition to continue in the same fashion, there being times when persecutory delusions are more severe and interfere with effective communication and her capacity to work, and other times when her condition is less severe. There is no evidence to indicate that at any time Applicant was unable to perform the essential duties of her job while employed at Orange County due to any mental condition. (AR, pp. 363 through 414.)

(3/9/17) Letter (OCERS): Letter to Applicant's attorneys with copy of medical report from Perry Maloff, M.D. dated January 16, 2017. (AR, p. 415.)

(4/4/17) Letter (OCERS): Notice to Applicant of the Board's recommendation to deny service-connected disability retirement due to insufficient evidence of job causation. (AR, pp. 416 through 419.)

(4/18/17) Letter (OCERS): Notice of the Board's denial of Applicant's application for service-connected disability retirement due to insufficient evidence of job causation. (AR, pp. 420 and 421.)

(5/24/18) Independent Medical Reevaluation in the Field of Psychiatry (Perry Maloff, M.D.): Whether or not the Applicant suffers from dementia, which impacts her ability to perform the essential duties of her job is unknown by this examiner. There is no evidence in the neuropsychological evaluation performed by Dr. Wen to suggest that there has been any deterioration in the Applicant's Axis I condition. (AR, pp. 422 through 430.)

(2/9/07) Qualified Medical Examination in Psychiatry (Ted R. Greenzang, M.D.):

Applicant remains partially temporarily disabled psychiatrically due to dysphoric symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms referable to her right ankle. Applicant has been partially temporarily disabled psychiatrically due to dysphoric symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms referable to her right ankle subsequent to the date on which she last worked for County of Orange in September 2004, and Applicant remains partially temporarily disabled psychiatrically at the current time. (AR, pp. 432 through 454.)

(3/5/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): All conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint remain as indicated in my report dated February 9, 2009 pertaining to Applicant. (AR, pp. 455 through 468.)

(4/10/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): Applicant's history and presentation indicate that she began to manifest dysphoric symptoms, symptoms of anxiety, and an emotional handicap secondary to physical symptoms referable to her right ankle which impacted her ability to perform the duties of her usual and customary employment for County of Orange or to compete in the open labor market from a psychiatric standpoint and which rendered her partially temporarily disabled psychiatrically subsequent to the time that she was taken off work by Dr. Kushner in late September 2004. Applicant became partially temporarily disabled psychiatrically subsequent to that time. (AR, pp. 487 through 511.)

(9/24/07) Review of Enclosed Medical Records and Report (Ted R. Greenzang, M.D.): All conclusions concerning psychiatric diagnosis, causation, disability, apportionment, need for psychiatric treatment, and need for vocational rehabilitation from a psychiatric standpoint remain as indicated in my prior reports pertaining to Applicant. (AR, pp. 512 through 515.)

FACTUAL FINDINGS

1. The factual findings are derived from the AR. Applicant's testimony at hearing indicated that she could not recall specific facts concerning her injuries at issue in this proceeding. (RT 42:16-24; 45:3-19; 48:9-24; 51:3-52:6; 56:12-58:13; 59:4-10.) Applicant's son, Randy Thompson (R. Thompson), testified and indicated that Applicant's testimony at hearing about the current status of her injuries and work status was not accurate.³ R.

³ For example, Applicant stated at hearing that her right foot is no longer injured (RT 50:9-18) and that she currently works 40 hours per week as a cook at the nursing home where she lives. (RT 51: 3-52:6.) R. Thompson testified that he lived with Applicant in the family home from 1997 to 2008, and saw her almost every week after he moved out. (RT 75:21-76:18.) Applicant moved to an assisted living home in September 2017 (RT 78:1-3), and later moved to a nursing home where she now resides. According to R. Thompson, Applicant did not work again after sustaining the Achilles tendon injury in 2004. (RT 79:1-

Thompson believed that Applicant's memory worsened after she had heart surgery in November 2011. (RT 75:9-76:3; 77:4-81:14; 83:24-85:9.)

2. Applicant was employed by the County of Orange (County) Probation Department (Department) as an institutional cook starting on October 31, 1997 until Dr. Kushner, took her off work for stress on September 29, 2004. (AR, pp. 6, 119 and 139.) Her leave of absence was extended until November 1, 2004. (AR pp. 184-185.) Soon after Dr. Kushner took Applicant off work, Applicant presented to Dr. Foley and reported right ankle pain. Applicant received treatment for a partial torn Achilles tendon for years and in or about 2007 sought evaluation for her psychiatric condition. The Board determined that Applicant's last day of compensation was May 10, 2012. (AR, pp. 45 and 419.)⁴ Applicant separated from County service effective October 5, 2011. (AR, pp. 21 and 24.)

3. On October 29, 2012, Applicant filed her application for service-connected and nonservice-connected disability retirement with the Board for a claimed orthopedic work injury. Applicant's Statement of Disability identified her injuries as "[a] rupture of the Achilles tendon, right foot, ankle calf [and] back injury," which made her "unable to stand very long [and] unable to lift heavy objects." Applicant's orthopedic symptoms first appeared in August 2004 due to "long periods on feet." Applicant claimed that by September 29, 2004, she was unable to perform the duties of her position. Applicant stated that by September 29, 2004, due to construction, a trailer was used as a kitchen, and Applicant's Achilles ruptured in the process of pushing a food cart up the ramp to the trailer. (AR, pp. 1-2.)

4. The Employer's Statement of Disability dated March 29, 2013 states that "[o]n October 7, 2004, [Applicant] reported that she was experiencing pain in her right foot since mid-August 2014. [Applicant] attributes pain to excessive walking up and down the kitchen trailer ramp." (AR, p. 22.) The Department indicated that it was able to accommodate Applicant's sedentary work only restrictions from October 26, 2004 through January 5, 2006.

5. On March 6, 2006, the Department received Applicant's permanent work restrictions: Right ankle-Precluding heavy lifting, prolonged weight bearing, climbing, walking over uneven ground, squatting, kneeling, crouching, crawling, and pivoting or other activities involving comparable physical effort. Low back-Precluding very heavy lifting and heavy bending and stooping. The Department was not able to accommodate these permanent work restrictions, because with these restrictions, Applicant no longer met the physical requirements of the position. (AR, p. 23.)

6. The Employer's Statement of Disability stated that the Department engaged in the interactive process with Applicant on seven occasions from April 6, 2006 through March 15, 2011. Applicant's resume was sent to all Human Resource Managers within the County

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⁴ Applicant stated in her application that she was "last paid" on May 8, 2007. (AR, p.

6.)

for review and consideration on three occasions between May 9, 2006 through March 18, 2011. “Since the Department was no[t] able to find a position that met [Applicant’s] qualifications while reasonably accommodating her work restrictions, the Department filed for Service and Non-service Connected Disability Retirement on behalf of the [Applicant].” (AR, p. 24.) It appears that the Department filed the application on behalf of Applicant on February 27, 2009. (Applicant’s Reply Brief, Exhibit 2.)

7. On February 18, 2014, the Board granted Applicant’s application for nonservice-connected disability retirement, setting October 29, 2012 as the effective date. The Board denied her application for a service-connected disability “due to insufficient evidence of job causation.” (AR, pp. 45-47.) Applicant timely filed her request for hearing on the Board’s decision. On October 29, 2012, Applicant amended her application for service-connected and nonservice-connected disability retirement to include alleged psychiatric injuries. (AR, pp. 251A-251G.) On April 17, 2017, the Board denied Applicant’s amended application for service-connected disability based upon her psychiatric condition “due to insufficient evidence to warrant service connected disability.” (AR, p. 419.)

8. The Board determined that Applicant is permanently incapacitated from substantially performing the usual and customary duties of her position as an Institutional Cook based upon her right ankle condition, as a nonservice connected disability. The Board also determined that Applicant was permanently incapacitated as of 2018 from substantially performing the usual and customary duties of her position as an Institutional Cook based upon her psychiatric condition, as a nonservice-connected disability.

9. The issues on appeal are (a) whether Applicant’s permanent incapacity due to her orthopedic and/or psychiatric condition arose out of and in the course of her employment with the County; and (b) whether Applicant is entitled to an effective date to receive disability retirement benefits that is earlier than the October 29, 2012 effective date set by the Board.

Applicant’s Usual and Customary Job Duties

10. An Institutional Cook is expected to “[u]nder supervision, to assist a Senior Institutional Cook in preparing and cooking food at a County-operated institution; and to do other work as required.” (AR, p. 25.) The duties include food preparation, loading steam tables and carts with food, and maintaining a clean kitchen. (AR, p. 25.) Related duties include lifting heavy boxes of meats/produce of 25 to 50 pounds and dry stores for food preparation, receiving food shipments, cleaning areas including restrooms, exhaust hoods, ovens, and grills, and filling in for the senior cook when necessary. (AR, p. 27.)

History of Applicant’s Orthopedic Condition

11. A. Michael Moheimani, M.D. reviewed Applicant’s medical records and noted that Applicant presented to Dr. Foley on May 20, 2004 and was totally temporarily disabled due to an infected toe. The left great toe had a total avulsion. The doctor on May 20, 2004

excised the left hallux avulsion from distal to proximal using a nail forceps. Applicant had recently smashed her left toe when she dropped a shelf on it at home. “[Applicant’s] past history was positive for cramping of the legs and swelling in her ankles and feet when she took too much salt. [] [Applicant] took Vicodin, and has diabetes and thyroid conditions.” (AR, p. 188.) Stanley G. Robboy, M.D. reviewed Applicant’s medical records and noted that on August 3, 2004, Applicant reported to Dr. Foley that her “[r]ight great toe changed color and became painful.” (AR, p. 114.)

12. Applicant’s last day of work was on September 29, 2004. That same day, she presented to Pamela Kushner, M.D. Dr. Kushner’s examination report is not in the record, but Stanley G. Robboy, M.D. reviewed the report and summarized that examination:

9-29-04, signature illegible, Handwritten notes. In hostile work environment. Having to push large food carts. Complained of arm and shoulder pain and problem with legs being constantly sore. [Applicant] felt she was being sexually harassed and has contacted a lawyer and will file a grievance. Exam was performed. Diagnosis included stress. (AR, p. 115.)

13. On October 7, 2004, Applicant reported to her Department that she had pain in her right foot since mid-August 2004, which she attributed to “excessive walking up and down the kitchen trailer ramp.” (AR, pp. 18 and 22.) Sopheil M. Aval, M.D., summarized portions of Applicant’s testimony in her workers’ compensation deposition conducted on March 2, 2005. (AR, pp. 139-140.) Applicant stated that her right ankle became sore in mid-August, with swelling, with no symptoms in either leg, knee, or foot before that time. Applicant claimed that her right ankle and foot started swelling at the end of the work day, beginning in August 2004. She believes that the swelling was caused by having to push the food carts further to a trailer while the kitchen was being remodeled in August 2004. (AR, p. 139.)

14. During Applicant’s March 2, 2005 deposition she stated that her right ankle became sore for one month starting in the middle of August, which she attributed to having to push more food carts farther than before due to the remodeling of the kitchen. The transfer of equipment started in August 2004, and they officially moved into the trailer in the middle of September 2004. (Depo Transcript, pp. 26-29, Applicant’s Reply Brief, Exhibit 1.) Between the middle of August 2004 and the middle of September 2004, Applicant’s leg popped (the calf). Applicant believes the injury occurred on September 29, 2004, the same day she presented to Dr. Kushner for a regular visit. The following week Applicant presented to Dr. Foley, who treated the foot by placing it in a soft cast. (Depo Transcript, pp. 30-31, Applicant’s Reply Brief, Exhibit 1.)

15. On October 7, 2004, Scott Lee, Acting Senior Cook wrote the following statement:

On 10-7-04 Chief Cook Alex Ceja had asked me, Scott Lee, to make this report based on any knowledge of any work related injury for [Applicant]. Ms.

Thompson called me here at work around 9 am this morning. I asked her what's going on? And how she was doing? She told me that she had hurt her foot back in August and that going up and down the ramp on the trailer probably made it worse. She also said that the doctors have her foot in a cast. She said she tried to call Alex, but he wasn't in at the time. I took this message and then informed Alex when he came in that she had called.

I then called Jaime Fernandez whom is currently at home with a real foot injury. He told me that a while back [Applicant] had taken some time off because of an injury that had happened at home. No work injury report was taken.

I worked with Carol right up till the time she has taken off and have no knowledge of any work injury or any report taken because of an injury.

She has complained from time to time of aches and pains of different sorts but I did not know that she was out because of injury. (AR, p. 85.)

16. On or about October 13, 2004, a Report of Occupational Injury/Illness was completed by Applicant's supervisor, which noted that on October 7, 2004, Applicant reported that she was experiencing pain in her right foot since mid-August, which Applicant attributed to walking up and down the kitchen trailer ramp. Applicant notified her employer about this injury on October 7, 2004. (AR, p. 86.)

17. On October 20, 2004, Applicant presented to Gary Ohashi, M.D. for an August 1, 2004 injury described as "pushing cart in August heard pop." Dr. Ohashi noted a right heel injury, that Applicant had seen a podiatrist, an MRI was ordered, and Applicant has been in a boot for two weeks. Dr. Ohashi noted swelling in the right heel, a limp right Achilles tendon injury, and possible tear. He diagnosed Applicant with "Sprain/strain, Ankle, Other" and recommended "sedentary work only." The report indicated that the injury was first examined or treated on October 20, 2004. (AR, p. 88.)

18. On November 9, 2004, Applicant presented to Peter R. Kurzweil, M.D. for an "orthopedic evaluation of the injury [Applicant] sustained to her right heel and ankle while at work." His report identified the date of injury as August 1, 2004. Dr. Kurzweil noted that Applicant's duties include sometimes pushing heavy carts or prams to temporary trailers. (AR, p. 80.) Applicant reported that there was a gradual buildup, which she thinks started in August 2001. Applicant told Dr. Kurzweil that she was pushing a heavy cart and reported to her supervisor that "it just pops." Dr. Kurzweil concluded that an MRI scan was "definitely abnormal as there was extensive delaminating and intrasubstance tearing at the distal aspect of the Achilles insertions to calcaneus." Dr. Kurzweil diagnosed Applicant with "Severe Achilles tendinitis with possible partial tearing." He recommended sedentary work only, physical therapy, anti-inflammatory medication, and wearing a heel insert to raise the foot into a slightly dorsiflexed position while walking. (AR, pp. 80-81.)

19. On December 22, 2004, Soheil M. Aval, M.D. conducted an orthopedic evaluation and prepared a Primary Treating Physician's Initial Report (AR, pp. 94-104.) Applicant told Dr. Aval that in mid-August 2004, she started experiencing right ankle pain, which she attributed to extra walking at work. She stated that her supervisor knew about her right ankle pain, but she was not referred for medical treatment. Applicant further stated that in September 2004, she was pushing a food cart with a co-worker, and she felt a "pop" with pain in her right calf. "[Applicant] notified her co-worker/supervisor, Scott, however, continued working the rest of the shift and through September 30, 2004 with about the same pain." (AR, p. 95.)

20. Dr. Aval noted that an MRI scan of Applicant's right ankle and leg showed a "ruptured Achilles tendon" (AR, p. 96) and that following the date of the injury, Applicant continued working regular duties until approximately September 30, 2004, when Dr. Kushner placed her off work due to stress. (AR, p. 97.) Dr. Aval's diagnosis was "partial tear of right Achilles tendon" (AR, p. 101) and Applicant was deemed "temporarily totally disabled." (AR, p. 102.)

21. On March 10, 2005, Applicant presented to Stanley G. Robboy, M.D. for a comprehensive evaluation. Dr. Robboy noted in relevant part:

[Applicant] recalls having had prior episodes of swelling in her right Achilles tendon which she attributes to prolongs standing and walking. On August 4, 2004, [Applicant] sustained an industrial injury to her right Achilles tendon. She noted a "pop" while pushing a cart up a ramp at work. At that time she was consulted (sic) a podiatrist, Victoria Foley, D.P.M., of Long Beach, for toenail problems. [Applicant] mentioned her Achilles tendon problem to Dr. Foley on October 5th or October 6th, 2004. She was placed in a cast boot and given Celebrex. Eventually the [Applicant] received permission from her workers' compensation carrier to consult a physician. [Applicant] elected to go to "Memorial Prompt Medical Care" in Westminster. A physician, whose name she no longer recalls, ordered x-rays and then an MRI. [Applicant] states that this revealed a partial tear. (AR, p. 112.)

22. On December 26, 2005, Ray L. Craemer, M.D. recorded Dr. Kushner's notes of the September 29, 2004 examination:

On 9-29-04, the [Applicant] reported being in a hospital work environment working in a trailer because the kitchen was being remodeled. [Applicant] reported having to push a large cart. (AR, p. 189.)

23. At her March 2, 2005 deposition, Applicant claimed that her symptoms got worse between mid-August and mid-September of 2004, her calf popped one time and that she may have seen Dr. Kushner on the same day on September 29, 2004. Applicant does not believe she mentioned the popping to Dr. Kushner "because it was just a regular visit." (AR,

p. 139.) She also testified in March 2005 that the Department did not officially move the kitchen to the trailer until mid-September 2004. (AR, p. 139.)

24. On March 10, 2005, Stanley G. Robboy, M.D. conducted a comprehensive medical-legal evaluation and prepared an Orthopedic Consultation Defense AOE/COE Determination (AR, pp. 110-124.) Applicant reported having prior episodes of swelling in her right Achilles tendon which she attributes to prolonged standing and walking. “On August 4, 2004, she sustained an industrial injury to her right Achilles tendon. She noted a “pop” while pushing a cart up a ramp at work.” (AR, p. 112.) Applicant reported a history of asthma, diabetes, liver disease, migraine headaches, stomach ulcers, allergic rhinitis, and high cholesterol. (AR, p. 117.) Dr. Robboy’s diagnosis was “partial tear of the right Achilles tendon.” (AR, p. 122.) He recommended no prolonged walking or standing or repetitive ascending or descending of ladders, ramps, or stairs. (AR, p. 123.)

25. Applicant presented to Ray L. Craemer, M.D. on December 26, 2005 for an Agreed Medical Examination. Applicant told Dr. Cramer that in early August 2004, she treated with Dr. Foley, a podiatrist, for a fungal infection on her right toes. “She was not having any pain in the right foot. In general, [Applicant] was working her regular duties prior to [August 2004] and was not losing anytime from work due to any right foot problem.” Applicant also stated that her work duties changed in August 2004. The kitchen was closed for construction, and the cooking facility was moved to a semitrailer. (AR, pp. 174-175.)

26. Applicant told Dr. Craemer that “[o]n approximately [September 29, 2004], she was working, pushing a cart with another worker up the ramp, this was the acting supervisor, he was pulling and she was pushing. [] She was pushing hard to restart it and that was when she felt a pop in her right calf. She notified her coworker, supervisor, Scott and continued working.” (AR, pp. 176-177.) Applicant explained to Dr. Craemer that she met with Dr. Foley about one week after September 29, 2004. Dr. Foley diagnosed Applicant with a partial Achilles tendon rupture, took Applicant off work and placed her in a soft-cast boot. (AR, pp. 176-177.)

27. On October 2, 2013, A. Michael Moheimani, M.D. was retained by OCERs to conduct an Independent Medical Evaluation and prepare a report. (AR, pp. 198-211.) During the examination, Applicant stated that “on August 1, 2004, in the course of her work duties, [Applicant] was pushing a cart of fruit with her supervisor on the ramp into the trailer. As [Applicant] pushed, she heard a pop in her right leg and noted onset of pain. The cart weighed approximately 60 to 80 pounds.” (AR, p. 198.)

Applicant’s Performance Reviews

28. On April 10, 2007, Ted. R. Greenzang, M.D., reviewed medical records and reports, as noted in his report. (AR, pp. 469-486.) Dr. Greenzang’s report summarized Applicant’s work performance reviews. Applicant’s August 10, 2001 review indicates “[Applicant] meets performance objectives. She received a merit step increase. [Applicant] is rated outstanding in progress. She is rated above standard in adaptability, personal relations,

work habits, quality, and quantity. [Applicant] has become a great asse[t] to the kitchen in juvenile hall. Her professionalism and dedication is evident to her co-workers and supervisors. [Applicant] is thanked for a job well done. (AR, p. 473.)

29. Applicant's July 15, 2004 work performance review was conducted about two and one-half months before Applicant took a leave of absence from the Department. The review stated that "[Applicant] meets performance objectives. [Applicant] met all areas of her goal while maintaining a positive attitude toward her duties and responsibilities. [Applicant] is thanked for an excellent job." (AR, p. 473.) Another evaluation dated July 15, year illegible, rated Applicant "above standard in quality and quantity. [Applicant] is standard in work habits, personal relations, adaptability, and progress." Suggested areas of improvement were "helping the senior cook and food service workers when help is needed as well as answering the phone, accepting constructive criticism, and offering to help fill out special requests." (AR, p. 474.)

30. In July 11, 2002, Applicant received a merit step increase. On July 21, 2003, Applicant received another performance evaluation which states that "There is no salary adjustment. [Applicant] is at the top step of the range. During the period from July 12, 2002 to July 11, 2003 she took part in a variety of changes. She is a dedicated and responsible employee. She was involved in a couple of human resource issues. She started to overcome those issues with a positive attitude. She has applied skills and techniques she learned through her certification as a dietetic service supervisor. She was to provide training and food service to the kitchen staff of juvenile hall. She successfully achieved the goal. She met all areas of her goal while maintaining a positive attitude. She is thanked for an excellent job." (AR, p. 479.)

Physicians' Evaluations and Testimony about Applicant's Condition⁵

31. On December 22, 2004, Applicant presented to Soheil M. Aval, M.D., who prepared a Primary Treating Physician's Initial Report for an injury dated November 1, 1997-September 30, 2004 and September 2004. (AR, pp. 94-104.) He recorded the history of Applicant's injury, as related by Applicant:

The [Applicant] began working for the above-named employer on November 1, 1997. At the time of the injury, her job duties consisted of cooking meals. She would prepare meals for 600 kids in the juvenile hall. [Applicant] would sometimes serve breakfast and lunch, and other times dinner. She would chop vegetables, slice meat, and used ovens, deep fryers, steam trays, etc. She lifted pots, pans, and cans. [Applicant] would lift up to approximately fifty pounds.

⁵ Pursuant to Rule 12 of the Orange County Employees Retirement System Board of Retirement Policy for Administrative Hearings (last revised June 18, 2012) (OCERS Rules), the physicians' evaluations and testimony was presented through documentary evidence in the form of written medical reports and related documentary evidence identified in the summary of administrative record above.

She was standing for most of her shift. The [Applicant] worked eight hours a day, five days a week. She did have a pre-employment physical. The [Applicant] denies having any concurrent employment.

In mid-August of 2004, the [Applicant] started experiencing right ankle pain, which she attributed to extra walking required at work. Due to construction that was taking place, she started to push carts a further distance and had to push more carts as they were short handed. She stated Scott and Jaime knew about her right ankle pain, however, she was not referred for medical treatment. Her ankle would become swollen at night. [Applicant] self-treated her symptoms at home with mineral ice and a wrap. She even tried two new pairs of shoes and an insert.

In September of 2004, the [Applicant] states the kitchen area was under construction for remodeling and they were placed in a semi-trailer. This required her to go up and down a ramp to get in or out when brining in supplies. [Applicant] states it was a total readjustment as the equipment was at a different height, and supplies had to be brought over from the warehouse and freezer/walk-in.

On the day of the accident, the [Applicant] loaded a food cart with four cases of baked beans, along with fresh vegetables and rice. [Applicant] was pushing the cart with a co-worker. She notes there is a “stop section” on the ramp designed so the cart will not run away downhill, however, it is not good for going up the ramp. Her co-worker/acting supervisor, was pulling the cart up and the [Applicant] was pushing. [Applicant] felt a “pop,” with pain, in her right calf while doing this. [Applicant] notified her co-worker/supervisor, Scott, however, continued working the rest of her shift, and through September 30, 2004, with about the same pain. [Applicant] wrapped it and applied topical ointments during that time. This incident did not increase her right ankle pain, however, this pain did continue. (AR, p. 95.)

Around late September of 2004, the [Applicant] had an appointment with Dr. Kushner, her personal physician, and was taken off work for “stress’ after being examined. [Applicant] was given a prescription for massage of her neck for the general stress at work. The [Applicant] is still off work through Dr. Kushner for stress.

A few days later, the [Applicant] went to her podiatrist, Dr. Vickie Foley, for her routine visit. The [Applicant] is diabetic with a fungal infection. [Applicant] asked her doctor about her right ankle and was given Celebrex. [Applicant] was placed in a soft cast and gave (sic) a prescription for an MRI scan. [Applicant] was placed off work on approximately September 20, 2004. [Applicant’s] injury was found to be work related and Dr. Foley was not able to treat her. The MRI scan was not authorized through Dr. Foley.

Once the insurance company gave her authorization, the [Applicant] presented to a company clinic on October 20, 2004. [Applicant] was examined, x-rays were obtained, and she was continued on Celebrex. The doctor did not feel she needed the MRI scan at first, however, since she already had the prescription, it was authorized. The [Applicant] was placed on modified duties, however, none were available, so she remained off work.

In late October of 2004, the [Applicant] underwent an MRI scan of her right ankle and leg, which showed a “ruptured Achilles tendon.” The company clinic doctor referred the [Applicant] to an orthopedist, Dr. Peter Kurzweil.

In November of 2004, the [Applicant] was examined by Dr. Kurzweil, and referred for physical therapy two to three times per week. [Applicant] states the physical therapy increased the pain and she stopped the therapy after five weeks of treatment. [Applicant] was given a prescription for Tylenol with Codeine and phoresis. [Applicant] was given an inch heel raiser for the right shoe. The soft cast was discontinued, as it began to hurt her back, hip and right knee.

The [Applicant] went to refill the prescription after a week and was changed to generic Vicodin. [Applicant] had an allergic reaction to the Vicodin, and upon returning to the doctor that gave her Codeine, he cut her Tylenol with Codeine in half as she did not think she needed that much medication. (AR, p. 96.)

The [Applicant] states that with the physical therapy last week, she thinks something might have torn as her right ankle area is very sore and it usually does not last that long.

The [Applicant] denies seeing any other doctors and has not sustained any new or further injuries. (AR, p. 97.)

32. Dr. Aval’s diagnosis was “[p]artial tear of right Achilles tendon” and Applicant was deemed temporarily totally disabled. Regarding causation, Dr. Aval concluded: the cause of [Applicant’s] current symptomology is the continuous trauma injury from November 1, 1997 through September 30, 2004, as well as the injury of September of 2004, while working for the above-stated company as a cook. (AR, pp. 102-103.) Dr. Aval concluded “[i]t is my opinion that the [Applicant] will have some permanent disability at the conclusion of her treatment. All factors of permanent disability will be outlined when [Applicant] reaches permanent and stationary status.” (AR, p. 102.)

33. On November 29, 2005, Applicant presented to Soheil M. Aval, M.D., who prepared a Primary Treating Physician’s Final Report. (AR, pp. 161-171.) The injury was described as cumulative trauma on November 1, 1997 to September 30, 2004 and September 2004. (AR, p. 161.) He diagnosed lumbar strain secondary to #3 with underlying degenerative spondylosis; bilateral knee contusions secondary to #3; and partial tear of the

right Achilles tendon. (AR, p. 164.) Dr. Aval issued permanent restrictions for Applicant's lumbar spine, to avoid heavy lifting and repetitive bending and stooping, and for Applicant's right ankle, avoid weightbearing more than two hours in an eight hour work day, avoid kneeling, squatting, crawling, climbing, and walking on uneven surfaces.

34. Dr. Aval concluded that if the work restrictions cannot be accommodated, Applicant is entitled to a voucher. (AR, p. 169.)⁶ Dr. Aval stated the following regarding causation: "The cause of the [Applicant's] current symptomology is the continuous trauma injury from November 1, 1997 through September 30, 2004, as well as the injury of September 2004 while working for the above-stated company as a cook." (AR, p. 170.) Dr. Aval stated the following regarding apportionment:

With regard to the [Applicant's] right ankle, the [Applicant] denies any prior injury to her right foot/ankle. She denies systemic illness which could contribute to her present orthopedic impairment. The [Applicant] has no evidence of degenerative changes on x-ray examination. Therefore, it is my opinion that 100% of the [Applicant's] current symptomology is the result of the specific injury of September 2004, while working for the above-stated company as a cook. (AR, p. 170.)

35. On December 26, 2005, Applicant presented to Ray L. Craemer, M.D. for an Agreed Medical Examination (AR 172-196.) Dr. Craemer reviewed Applicant's medical records, starting with a June 16, 2003 visit through Applicant's March 2, 2005 deposition. (AR, pp. 184-190.) Dr. Cramer diagnosed Applicant with:

1. Right Achilles tendon, partial rupture, (845.09, [Date of Injury: September 29, 2004].
 - a. MRI, right ankle, 0-25-04: Extensive delaminating tear at mid Achilles tendon substance.
 - b. MRI, right ankle, 2-10-05: Fifty percent tear at Achilles tendon. Evidence of tenosynovitis peroneus longus tendon.
2. Bilateral ankle capsular swelling, right greater than left [Date of Injury: CT to August 2004].
 - a. Occurred while moving to temporary kitchen.
3. Exacerbation of right ankle Achilles tendinitis, [Date of Injury: May 3, 2005.

⁶ In Workers' Compensation law, a "voucher" may be given to a worker whose injury causes permanent partial disability and is unable to return to work within a certain timeframe. The voucher is a benefit that can be used to pay for education-related retraining or skill enhancement, or both. (Source: https://www.dir.ca.gov/dwc/sjdb/SJDB_FAQ.html).

- a. Trip at home over dog blanket.
4. Injury (when the right ankle gave out), [Date of Injury: May 7, 2005, industrial]. (AR, p. 190.)
 - a. Bilateral knee contusions resolved.
 - b. Low back sprain superimposed on lumbar degenerative disc disease, (847.20).
5. Ligamentous low back sprain remaining symptomatic, D/I: 1998.
 - a. Industrial injury in probation period.
6. Left foot osteotomy, D/S: 12-13-96.
7. Left great toe nail excision, secondary to contusion, D/S: 5-20-04.
8. Diabetes mellitus.
9. Varicose veins right calf, status post sclerotherapy, 6-03.
10. Ligamentous low back sprain, D/I: CT to last day worked. (AR, p. 191.)

36. Dr. Craemer issued work restrictions for the right ankle and calf, finding that “[Applicant] has a disability precluding heavy lifting, prolonged weight bearing, and precluding climbing, walking over uneven ground, squatting, kneeling, crouching, crawling and pivoting or other activities involving comparable physical effort.” [] “Apportionment is 100 percent to the September 29, 2005 injury.” (AR, p. 193.)⁷

37. On October 11, 2012 Dr. Aval completed the Physician’s Statement of Disability (AR pp. 8-11) for symptoms of cumulative trauma that occurred on November 1, 1997 to September 20, 2004 and April 2004. He diagnosed Applicant with a partial tear of the right Achilles tendon, and lumbar sprain and underlying degenerative spondylosis and bilateral knee contusions. (AR, p. 8.) Dr. Aval concluded that Applicant is permanently disabled for the duties of her occupation and should avoid heavy lifting, repetitive bending and stooping, weightbearing more than two hours in an eight-hour workday, kneeling, squatting, sprawling, climbing and walking on uneven surfaces. (AR, p. 11.)

⁷ Dr. Cramer stated in his report that “[Applicant] injured the Achilles tendon in the specific injury of 9-29-04 in the course of her work duties.” (AR, p. 191.) It appears that Dr. Craemer stated the wrong year (2005 instead of 2004) in his injury apportionment conclusion for the right ankle and calf. (AR, p. 193.)

38. On October 2, 2013, Applicant present to A. Michael Moheimani, M.D., a doctor retained by OCERS to conduct an independent medical evaluation. Dr. Moheimani prepared a report. (AR, pp. 198-211.) Dr. Moheimani reviewed Applicant’s medical records, starting with the Progress Notes from White Memorial Hospital, through the Employer’s Statement of Disability dated March 29, 2013. (AR pp. 203-209.) Applicant reported that on August 1, 2004 she was pushing a cart of fruit with her supervisor on the ramp into the trailer and as she pushed she heard a pop in her right leg and noted onset of pain. (AR, p. 198.) Dr. Moheimani’s diagnostic impressions were “[h]istory of partial tear in the right Achilles tendon” and “[l]umbosacral strain with degenerative disc disease, L4-L5 and L5-S1.” (AR, p. 209.) Dr. Moheimani concluded:

In summary, this lady suffered from a partial Achilles tendon injury and a lumbosacral strain. Both of these injuries would be normally expected to fully recover. Most of the limitations given by the treating doctors appear to have been based on subjective complaint by the patient and little in the way of objective findings. Present limitations regarding heavy lifting, bending, and stooping are based on the [Applicant’s] age of 65 and MRI findings secondary to age. I am not certain if these restrictions would be necessary based on a simple lumbosacral strain for which she should have long recovered from. Therefore, although it is my opinion that she can work at this time with no restrictions regarding walking or standing, but should certainly avoid lifting more than 20 pounds and should [not] repetitively bend and stoop. These restrictions are based on her age and present physical condition, and not related to her industrial injury. Therefore, I do not find the real and measurable connection between her county employment and her present work capacity. (AR, p. 210.)

39. On January 16, 2017, Perry Maloff, M.D. conducted an examination and prepared an Independent Medical Examination in the Field of Psychiatry report. (AR, pp. 363-414.) Applicant stated, in part:

[Applicant] reports that she no longer has any difficulties with her Achilles tendon, low back, or any orthopedic or medical problem. [Applicant] claims that over time her Achilles tendon appears to have healed. [Applicant] claims that she is not hindered in any way by any orthopedic difficulty. [Applicant] is able to walk, climb stairs and ladders, and press on a gas pedal and brake. [Applicant] is able to go grocery shopping and do all of her chores without any difficulty or assistance. (AR, p. 404.)

[¶] . . . [¶]

[Applicant] indicates that she does not suffer from any mental illness nor any medical or orthopedic problems. [Applicant was asked why she has applied for disability retirement if in fact she does not suffer from any medical condition that would cause her to be unable to work. [Applicant] responded, “I’m

actually very healthy. What stops me from working is old age. Besides, I don't want to work. I've earned the opportunity not to have to work. I have had medical problems in the past, but I am now healthy, and none of them limit my ability to work." She added, "My leg now is fine." (AR, p. 405.)

Applicant's Psychiatric Condition

40. On February 9, 2007, Ted R. Greenzang, M.D. conducted a qualified medical examination in psychiatry and prepared a report. (AR, pp. 432-454.) It appears that Dr. Greenzang learned about the history of Applicant's injury based upon Applicant's statements to him, as he does not refer to any medical records reviewed.⁸ (AR, pp. 433-437.) Dr. Greenzang noted the incident as an injury to Applicant's right heel in September, 2004: Applicant was pushing a cart up a ramp at work and felt and heard a pop in her right calf. She was pushing the cart with the acting supervisor, Scott Lee. She told Mr. Lee what occurred and completed her work shift. She had an appointment to see her family physician Dr. Kushner that day, who took her off work. Applicant saw Dr. Foley, a podiatrist, within two days, who placed her in a soft cast. Dr. Greenberg's report noted Dr. Kushner's statement that Applicant was experiencing emotional stress, as follows:

[Applicant] believed that her co-worker, Scott Lee, had turned her boss, Jaime Fernandez, against her. She stated for one month Mr. Fernandez had been making her leave breaks early. He would check her recipes. He would give her additional work. She stated she had been called into an office one week prior to Lee and Jaime Fernandez told Alex that she was not doing her fair share of the work. She felt the charges were unjust. She had been feeling distressed as a consequence of those actions prior to her having injured her right heel in the course of her employment. (AR, p. 434.)

41. Dr. Greenzang concluded that Applicant was "partially temporarily disabled psychiatrically due to dysphoric symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms referable to her right ankle subsequent to the date on which she last worked for County of Orange in September, 2004 and she remains partially temporarily disabled psychiatrically at the current time.: (AR, p. 448.)

42. On August 6, 2007, Dr. Greenzang conducted a qualified medical examination in psychiatry and prepared a report. (AR, pp. 487-511.) In discussing causation, Dr.

⁸ Dr. Greenzang's March 5, 2007 report indicates that he reviewed medical records beginning with Dr. Aval's January 21, 2005 report, through Dr. Craemer's December 26, 2005 report, all of which dealt with Applicant's orthopedic ankle injury. (AR, pp. 463-468.) On April 10, 2007, Dr. Greenzang reviewed three notes from 1998 and additional reports from 2001 through 2004, which mostly refer to Applicant's orthopedic ankle condition. (AR, pp. 469-484.) On September 24, 2007, Dr. Greenzang reviewed an April 27, 2007 report of James Lineback, M.D., which noted Applicant's ankle injury and depressive anxiety, among other conditions. (AR, pp. 512-515.)

Greenzang noted that “[Applicant] has received fairly extensive psychiatric treatment in the past:

When [Applicant] was 39 years old she was hospitalized at Long Beach Memorial Hospital. She experienced psychotic symptoms. She remained hospitalized for two months. She subsequently received outpatient treatment which included the use of anti-psychotic medication for several years. [Applicant] experienced a relapse in 1991 and she had another psychiatric hospitalization. She took medication for more than one month. She subsequently received outpatient treatment until the mid 1990’s. As she was going through a divorce in approximately 1995 she began to see a therapist. Subsequent to that time she began to receive psychiatric treatment and she continued in that treatment for many years. She saw Dr. Zimmerli. She took Celexa and Risperdal. In my opinion she has a prior history of having experienced emotional difficulties and of having developed dysphoric symptoms for which she received both in and outpatient psychiatric treatment, psychotherapy, and treatment with psychotropic medications. In my opinion those emotional difficulties arose in response to constitutional and developmental factors which predated her employment for County of Orange.

[¶] . . . [¶]

In my opinion [Applicant] has dependent and obsessive compulsive personality traits which arose in response to a combination of constitutional and developmental factors which predated her employment for County of Orange. In my opinion her preexisting personality traits impacted upon how she reacted to the stressful circumstances which she experienced in the course of her employment for County of Orange as well as how she reacted to her having become symptomatic referable to her right ankle in the course of that employment. (AR, pp. 501-502.)

43. Dr. Greenzang discussed apportionment:

In my opinion approximately eighty percent of the residual permanent psychiatric disability currently being manifested by [Applicant] has been precipitated by her emotional reaction to stressful events and circumstances which she experienced in the course of her employment for County of Orange, by her emotional reaction to her having injured her right ankle in the course of that employment, by her emotional reaction to her having experienced ongoing physical symptoms and limitations in function referable to her right ankle subsequent to that time, by her emotional reaction to her reporting that she injured her lower back when her right foot gave way in 2005, and by her emotional reaction to altered life circumstances which have resulted from physical symptoms and limitations in function referable to her right ankle. In light of the fairly extensive history of prior psychiatric treatment which [Applicant] received preceding her employment for County of Orange in

conjunction with her preexisting dependent and obsessive compulsive personality traits, i[n] my opinion it would be reasonable to attribute approximately twenty percent of the residual permanent psychiatric disability currently being manifested by [Applicant] to having precipitated by events and circumstances unrelated to her employment for County of Orange including her preexisting personality traits, her emotional reaction to her prior divorce, and preexisting emotional vulnerabilities which resulted in the inpatient and outpatient psychiatric treatment and treatment with psychotropic medications which she had received prior to her employment for County of Orange. (AR, pp. 506-507.)

[¶] . . . [¶]

From a psychiatric standpoint, [Applicant] continues to experience self-doubt. At times she loses her train of thought. She is forgetful. She fatigues more easily. She isolates herself from others. She remains at an emotional handicap due to physical symptoms referable to her right ankle. In my opinion the combination of her dysphoric symptoms, symptoms of anxiety, and the emotional handicap precipitated by physical symptoms referable to her right ankle preclude her from a psychiatric standpoint from returning to her usual and customary employment for County of Orange. (AR, p. 507.)

44. On March 24, 2008, Dr. Greenzang prepared a report where he noted that “[Applicant’s] first breakdown had some manic sounding features and somewhere along the line she acquired the label of bipolar disorder. [Applicant] has elements of bipolar disorder as well as recurrent unipolar major depression. She told Dr. Greenzang that in 1987 she thought she could fly and the television was talking to her. [Applicant] suffers from recurrent flare-ups of paranoid delusions. [Applicant] had another major paranoid episode in 1991 while having marital problems. [Applicant] began psychotherapy when her marriage broke up in 1995. [Applicant] was taking psychiatric medication when she began work in juvenile hall as a cook.” (AR, p. 463.)

45. Dr. Greenzang’s March 24, 2008 report indicated that he reviewed a report of Peter Kimmel, M.D, dated February 13, 2008. Dr. Kimmel stated:

[Applicant’s] psychotic depressive disorder began and developed on a predominantly nonindustrial basis independent of and unrelated to work events from November 1, 1997 to September 30, 2004. [] [Applicant] is in good shape psychologically considering her recent re-broken lower extremity and temporary move to an assisted living facility. [] The claimed psychiatric injury is not an industrial injury. Apportionment of psychiatric disability is at least seventy percent due to a nonindustrial delusional depressive disorder. There was twenty percent stress contribution from coping with the August 2004 through September 2004 specific orthopedic injury. That was at most ten percent of permanent disability causation flowing from the alleged stress

related internal work injury. There was zero percent causation from cumulative work stress. There is no reason to preclude [Applicant] from stress or excessive stress in the work place. [Applicant] needs regular psychiatric supervision. She does not require any psychiatric work modification or restriction on the open labor market. Psychiatrically [Applicant] can return to full-time work as a cook at juvenile hall or elsewhere. (AR, pp. 464-465.)

46. Dr. Greenzang issued reports for Applicant's psychiatric condition on February 9, 2007 (AR, pp. 432-454) and August 6, 2007 (AR pp. 487-511.) He issued reports on his review of records on March 5, 2007 (AR pp. 455-462), April 10, 2007 (AR pp. 469-486, March 24, 2008 (AR pp. 463-468) and September 24, 2007 (AR pp. 512-515.) After his review of the records Dr. Greenzang stated that the records did not change his initial opinions. (AR, pp. 461, 467, 485 and 515.)

47. On August 3, 2016, Dr. Greenzang prepared a Physician's Statement of Disability (AR, pp. 251C-251G.) Dr. Greenzang noted that Applicant's symptoms first appeared in September 2004. He noted that Applicant received psychiatric treatment during the 1990s, and was hospitalized at age 39 for psychotic symptoms, and again in 1991. Applicant's present conditions were described as "weak, distracted, forgetful, useless [and] worried." Dr. Greenzang's primary diagnosis was "depressive disorder not otherwise specified." (AR, p. 251D.) Dr. Greenzang treated Applicant for six months, from February 2, 2007 to August 6, 2007. (AR, p. 251E.) He concluded that Applicant is permanently disabled for the duties of her occupation, and recommended the following accommodation: "Must avoid emotional stress [and] not work under close deadlines [and] not perform work requiring precision and attention to detail under distracting conditions, [and] not deal [with] exacerbating members of public." (AR, p. 251G.)

48. Applicant treated with Dr. Bronco between 1991 and 1995. She saw a psychiatrist about every two months. (AR, p. 437.) In 1995 during her divorce Applicant started treatment with a therapist, Ann Konigsberg, and continued treatment with her until 2005. (AR, p. 437.) Applicant also saw a psychiatrist, Dr. Zimmerli in 1995 on a monthly basis until 2004 or 2005. (AR, pp. 437 and 446.)

49. On January 16, 2017, Perry Maloff, M.D. conducted an examination and prepared an Independent Medical Examination in the Field of Psychiatry report. (AR, pp. 363-414.) Dr. Maloff concluded:

It is clear that [Applicant] functioned at her job as an institutional cook from 1997 until she injured her Achilles tendon in 2004. There is evidence of persecutory delusions throughout her employment for Orange County. She appears to have been caustic, made racially insensitive remarks, and has at various times believed coworkers sabotaged her recipe, poisoned her water, moved her jacket, and stole her purse. Nonetheless, [Applicant] appears to have functioned at work, feeling victimized but generally able to perform her usual job duties. She has chronic feelings of discontent as a result of believing

she is subject to more harsh rules than others and that she works harder than others who are excused from the same obligations she fulfills on the basis of racial prejudices. Nonetheless, she has regularly performed the essential functions of her job duties throughout the period of time she was employed by Orange County. She appears to have had the capacity to continuously remain employed as an institutional cook for Orange County after the date of injury up through the present time despite suffering from delusional disorder, persecutory type. The [Applicant] acknowledges she is capable of performing her job duties on the date of examination but chooses not to work because she has become older. I would expect [Applicant’s] psychiatric condition to continue in the same fashion, there being times when persecutory delusions are more severe and interfere with effective communication and her capacity to work, and other times when her condition is less severe. There is no evidence to indicate that at any time [Applicant] was unable to perform the essential duties of her job while employed at Orange County due to any mental condition. (AR p. 414.)

LEGAL CONCLUSIONS

Applicable Law

- 1. Government Code section 31720 provides in relevant part:

Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if:

(a) The member’s incapacity is a result of injury or disease arising out of and in the course of the member’s employment, and such employment contributes substantially to such incapacity

2. “[A]n ‘infinitesimal’ or ‘inconsequential’ connection between employment and disability would be insufficient for a service-connected disability retirement. Instead, . . . ‘while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job.’” (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578); *DePuy v. Board of Retirement* (1978) 87 Cal.App.3d 392, 398-399). “Substantial evidence has been defined as ‘relevant evidence that a reasonable mind might accept as adequate to support a conclusion,’” (*Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307.)

3. Government Code section 31720.3 states: “[i]n determining whether a member is eligible to retire for disability, the board shall not consider medical opinion unless it is deemed competent”

4. The Applicant has the burden of proof to prove the incapacity and its relationship to the job by a preponderance of the evidence. (*Glover v. Board of Retirement*

(1989) 214 Cal.App.3d 1327, 1332) (“[L]iberal construction [of pension legislation] cannot be used as an evidentiary device. It does not relieve a party of meeting the burden of proof by a preponderance of the evidence”); *Rau v. Sacramento County Retirement Bd.* (1966) 247 Cal.App.2d 234, 238 (“[T]he burden of proving an incapacitating condition is on the applicant for a disability retirement, and it is not necessary for the agency to show the negative of the issues when the positive is not proved”); (*Lindsay v. County of San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 160-162.).

5. Government Code section 31721, subdivision (a) states in relevant part:

A member may be retired for disability upon the application of the member, the head of the office or department in which he is or was last employed, the board or its agents, or any other person on his behalf, except that an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any eligible member believed to be disabled

6. Government Code section 31724 states in relevant part:

If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it shall retire him His disability retirement allowance shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation. Notwithstanding any other provision of this article, the retirement of a member who has been granted or is entitled to sick leave shall not become effective until the expiration of such sick leave with compensation When it has been demonstrated to the satisfaction of the board that the filing of the member’s application was delayed by administrative oversight or by inability to ascertain the permanency of the member’s incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

7. “Incapacitated for the performance of duty,” means the “substantial inability of the applicant to perform his usual duties,” as opposed to mere discomfort or difficulty. (*Mansperger v. Public Employees’ Retirement System* (1970) 6 Cal.App.3d 873,877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 859-860.)

Whether Applicant is Permanently Incapacitated - Orthopedic Injury

8. Applicant has established that she is permanently incapacitated, in that the Board previously granted Applicant’s application for non-service connected disability retirement benefits on February 18, 2014 for Applicant’s orthopedic condition. (AR, pp. 45-47.) In addition, Dr. Craemer, the Qualified Medical Examiner, diagnosed Applicant with

partial rupture of the right Achilles tendon, which precluded her from activities such as prolonged weight bearing and walking over uneven ground. (AR, pp. 190 and 193.) Dr. Aval found that Applicant's partial tear of the right Achilles tendon made her permanently disabled for the duties of her occupation. (AR, p. 11.) (Factual Findings 7, 8, and 35-37.)

9. The Employer's Statement of Disability stated that the Department engaged in the interactive process with Applicant on seven occasions from April 6, 2006 through March 15, 2011. Applicant's resume was sent to all Human Resource Managers within the County for review and consideration on three occasions between May 9, 2006 through March 18, 2011. The Department determined that it could not accommodate Applicant's permanent work restrictions and no modified or alternative work was offered. The Department filed for service-connected and non-service connected disability retirement benefits on behalf of Applicant. (AR, p. 24.) An April 29, 2009 letter from OCERS to Applicant indicates that it filed an application for service-connected disability retirement on behalf of Applicant on February 27, 2009. (Applicant's Reply Brief, Exhibit 2.) (Factual Finding 6.)

10. The Department's determination that it could not accommodate Applicant's permanent work restrictions, with no offer of alternative employment, indicates that Applicant is permanently incapacitated. (*Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 924) (Employee would have basis for asserting termination on grounds of permanent disability if County Hospital informed her it was unable to accommodate permanent work restrictions with no indication of alternative employment). (Factual Findings 6-8.)

Whether Applicant's Permanent Incapacity is Service Related

11. Applicant has established that she is entitled to service-connected disability retirement, in that Applicant established by a preponderance of the evidence that her permanent incapacity based upon the orthopedic condition of her ankle arose out of and in the course of her employment with the County.

12. Applicant worked as an institutional cook for the County for approximately seven years, where her duties included preparing food and loading tables and carts with food. In mid-August 2004, Applicant experienced pain and swelling in her right foot, which she attributed to having to push food carts further and up a ramp to a trailer kitchen while the regular kitchen was being remodeled. It appears that the equipment was transferred to the kitchen starting in August 2004, and the move to the trailer was completed by the middle of September 2004. Between mid-August and mid-September 2004, Applicant felt a "pop" in her right calf while pushing a cart with food up the ramp to the trailer/kitchen. Applicant believes that the injury occurred on September 29, 2004, the same day she saw her personal physician, Dr. Kushner, for a regular visit. Dr. Kushner took Applicant off work for symptoms that included stress. The following week, Applicant presented to Dr. Foley, her podiatrist, who treated the injury by placing Applicant's right foot in a cast boot. (Factual Findings 2, 10, 14, 21 and 31.)

13. Applicant's primary treating physician, Dr. Aval, noted in his December 22, 2004 initial report that in late October 2004, Applicant underwent an MRI scan of her right ankle and leg, which showed a "ruptured Achilles tendon." Dr. Aval diagnosed Applicant with "[p]artial tear of right Achilles tendon" and concluded that the cause of Applicant's right ankle symptomology was a continuous trauma injury from November 1, 1997 through September 30, 2004, as well as the September 2004 injury, while working for the County as a cook. (Factual Findings 19 and 20.)

14. Dr. Aval also concluded that Applicant will have some permanent disability at the conclusion of her treatment. In his final report dated November 29, 2005, he maintained his conclusion that Applicant's ankle injury was caused by performing her work duties for the County as a cook. He issued permanent restrictions for Applicant's right ankle to limit weightbearing to two hours in an eight hour work day, and no kneeling, squatting, crawling, climbing, and walking on uneven surfaces. (Factual Findings 31-34.)

15. On December 26, 2005, Dr. Craemer, the Qualified Medical Examiner, examined Applicant and reviewed Applicant's medical records beginning in 2003 through Applicant's March 2, 2005 deposition. He identified Applicant's injury as "[r]ight Achilles tendon, partial rupture, on September 29, 2004," issued work restrictions for the right ankle and calf that precluded heavy lifting, prolonged weight bearing, and no climbing, walking over uneven ground, squatting, kneeling, crouching, crawling, and pivoting or other activities involving comparable physical effort. Dr. Craemer apportioned one-hundred percent to the September 29, 2004 injury. (Factual Findings 35 and 36.)

16. On October 11, 2012, Dr. Aval completed the Physician's Statement of Disability for symptoms of cumulative trauma that occurred on November 1, 1997 to September 20, 2004 and April 2004. His diagnosis included partial tear of the right Achilles tendon, and he concluded that Applicant is permanently disabled for the duties of her occupation. He issued restrictions of no heavy lifting, repetitive bending and stooping, weightbearing more than two hours in an eight-hour workday, kneeling, squatting, sprawling, climbing and walking on uneven surfaces. (AR, p. 11.) (Factual Finding 37.)

17. Dr. Moheimani evaluated Applicant on October 2, 2013 and noted her history of partial tear in the right Achilles tendon. He concluded that the partial Achilles tendon injury would normally be expected to fully recover, and that Applicant's physical limitations and MRI findings were age related. Applicant was 65 years old as of the evaluation date. Dr. Moheimani determined that Applicant could work with no restrictions regarding walking or standing, but agreed with the restrictions of no lifting more than 20 pounds and no repetitive bending and stooping, which he deemed age related, not related to her industrial injury. Dr. Moheimani found no real and measurable connection between Applicant's County employment and her present work capacity. (Factual Finding 38.)

18. In discerning the medical opinions offered in this matter, the hearing officer allocates greater weight to Dr. Craemer, the Qualified Medical Examiner, and Dr. Aval, the primary treating physician, both of whom imposed restrictions that precluded Applicant from

performing her usual job duties. On the issue of a real and measurable connection between Applicant's disability and her job, Dr. Aval treated Applicant since December 2004, and determined that Applicant's injuries and disability are a direct result of the September 29, 2004 injury to her right Achilles tendon sustained during her employment with the County. In light of the objective medical findings, Dr. Moheimani's opinion is not persuasive in determining whether Applicant's injury is service-connected. (Factual Findings 1-39.)

19. OCERS asserts that Applicant's testimony about her ankle injury is not credible, because on her last day of work on September 29, 2004, Applicant did not mention her ankle injury to Dr. Kushner, and Applicant has been inconsistent regarding the actual date of her ankle injury. Regarding the visit to Dr. Kushner, the record shows that Dr. Kusher was Applicant's family physician who took Applicant off work for stress on September 29, 2004. Applicant's right ankle was examined by Dr. Foley, her podiatrist, the following week. Dr. Foley prescribed medication for pain and swelling, a soft cast for the right foot, and ordered an MRI scan. It appears that Applicant preferred to present her right foot concerns to a foot specialist, Dr. Foley, instead of her family physician, Dr. Kushner. Dr. Kushner's actual report is not in the record, so the complete scope of their discussion is not available. (Factual Findings 2, 11, 12, 14, 20, 21, 23, 25, 26, and 31.)

20. OCERS is correct that Applicant's various doctors have not recorded the same date for her ankle injury, as their notes indicate that the injury occurred on either August 1, 2004, August 4, 2004, mid-August 2004, or September 29, 2004. However, the record shows that Applicant has been consistent in her recollection that the right foot pain and swelling began in August 2014 while moving equipment to the temporary kitchen in the trailer, and that the Achilles tendon injury, which Applicant described as a "pop" in her right ankle or calf, occurred between mid-August and mid-September while pushing a food cart up a ramp to the kitchen/trailer. The hearing officer concludes that the overlap in the injury time frame provided by Applicant and her doctors allows the hearing officer to accept Applicant's testimony as credible evidence. (Factual Findings 3, 13, 14, 16, 17, 18, 19, 21, 23, 26, 24, 27, 31, 32, 33, 34, 35, 36 and 38.)

21. The Hearing Officer finds that Applicant is unable to perform her usual job duties, rendering her permanently incapacitated for the performance of her duties as an institutional cook. Applicant has established a real and measurable connection between Applicant's permanent incapacity for her right ankle for her work duties. (Factual Findings 1 through 39; Legal Conclusions 1 and 2.)

Whether Applicant is Permanently Incapacitated - Psychiatric Injury

22. The Board previously granted Applicant's application for non-service connected disability retirement benefits on February 18, 2014, which may have included Applicant's psychiatric condition in addition to the orthopedic injury.⁹ The record shows that

⁹ The Board's recommendation did not distinguish between Applicant's orthopedic and psychiatric claims. (AR, pp. 45-47.)

Applicant had psychiatric concerns beginning as early as 1987 when she was hospitalized for psychotic symptoms, which included a belief that she could fly and that the television was talking to her. Applicant was hospitalized for psychotic symptoms again in 1991. Applicant treated with psychiatrists and therapists between 1991 and approximately 2005. (Factual Findings 7 and 40-49.)

23. Applicant treated with Dr. Greenzang for six months during 2007, and ultimately concluded that Applicant is permanently disabled for the duties of her occupation. He recommended the following accommodations to enable Applicant to resume the duties of her occupation: “Must avoid emotional stress [and] not work under close deadlines [and] not perform work requiring precision and attention to detail under distracting conditions, [and] not deal [with] exacerbating members of public.” (AR, p. 251G.) Dr. Greenzang’s conclusion appears to indicate that, psychiatrically, Applicant may continue to perform her work duties, with accommodations. (Factual Finding 47.)

24. Dr. Kimmel’s February 13, 2008 report noted that Applicant needs regular psychiatric supervision, but found no reason to preclude Applicant from stress or excessive stress in the work place. Dr. Kimmel believed that psychiatrically, Applicant can return to full-time work as a cook at juvenile hall or elsewhere. On January 16, 2017, Dr. Maloff noted that despite having “persecutory delusions throughout [Applicant’s] employment for Orange County . . . [Applicant] appears to have functioned at work, feeling victimized but generally able to perform her usual job duties.” Dr. Maloff found “no evidence to indicate that at any time [Applicant] was unable to perform the essential duties of her job while employed at Orange County due to any mental condition.” (Factual Findings 45 and 49.)

25. Dr. Kimmel and Dr. Maloff’s conclusions that Applicant was able to perform the essential duties of her job appear to be supported by Applicant’s recent performance reviews during her employment with the County. Applicant’s July 15, 2004 performance review, conducted only two and one-half months before Applicant took her leave of absence on September 29, 2004, stated, “[Applicant] meets performance objectives. [Applicant] met all areas of her goal while maintaining a positive attitude toward her duties and responsibilities. [Applicant] is thanked for an excellent job.”

26. A July 21, 2003 review indicated that Applicant is at the top step of the salary range. The review for the period of July 12, 2002 to July 1, 2003 described Applicant as a “dedicated and responsible employee” who “met all areas of her goal while maintaining a positive attitude” and “is thanked for an excellent job.” An August 10, 2001 review indicates that Applicant “meets performance objectives” “received a merit step increase” and “is rated outstanding in progress.” (Factual Findings 28-30.)

27. Taking into consideration the totality of the evidence, including Applicant’s performance reviews close in time to her last day of work in 2004 which appear to corroborate the findings of Dr. Kimmel and Dr. Maloff, the hearing officer concludes that Applicant has not established that her psychiatric condition renders her permanently

incapacitated and unable to perform her usual and customary work duties.¹⁰ (Factual Findings 40-49.)

The Effective Date of Service-Connected Disability Retirement

28. Government Code section 31724 provides that when an application is delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity, the day after the last day of regular compensation is deemed to be the date the application was filed. Applicant filed her disability application on October 29, 2012 (AR, p. 1.) OCERS' April 29, 2009 letter to Applicant indicates that it filed an application for service-connected disability retirement on behalf of Applicant on February 27, 2009. (Applicant's Reply Brief, Exhibit 2.) (Factual Findings 3, 6 and 7.)

29. The parties disagree on the date of Applicant's last day of regular compensation. OCERS asserts that day was May 10, 2012, as stated in the Board release with its recommendation to grant non-service connected disability retirement. (AR, pp. 45 and 419.) Applicant claims that her last day of regular compensation was March 3, 2005, as stated in the April 27, 2012 termination notice from OCERS which identifies March 3, 2005 as Applicant's "Last Day on Pay. (AR, p. 216.) Applicant stated in her application that she was "last paid" on May 8, 2007. (AR, p. 6.) (Factual Finding 2.)

30. Applicant argues that the May 10, 2012 date adopted by the Board represents payment in the form of "lump sum payments in anticipation of permanent separation or payments of workers compensation benefits which are not considered 'regular compensation.'" The workers' compensation claims adjuster listed Applicant's last day of pay as "[November 29, 2005] for TD." (AR, p. 16.) Applicant asserts that temporary disability pay is not regular compensation. Applicant further asserts that "regular compensation" includes the regular salary or wages that the employee receives when taking sick leave or vacation during the period of employment, but termination pay consisting of one-time cash payments to employees upon retirement for accrued but unused compensatory time, sick leave time, and vacation or holiday time would not constitute "regular compensation," citing *Katosh v. Sonoma County Employees' Retirement Assn.* (2008) 163 Cal.App.4th 56 (Katosh).

31. The court of appeal in *Katosh* noted a distinction between a lump sum termination payment as part of retirement, versus being returned to "in pay status" to allow the employee to receive regular pay when she used her sick leave before her retirement. (*Id.* at pp. 337-338.) The court held that "'regular compensation' in section 31724 includes compensation received for sick leave and vacation time when taken by the employee as time off." (*Id.* at p. 343.) Neither party has presented sufficient evidence to demonstrate whether payment for Applicant's "last day of pay" represents a lump sum termination payment or regular compensation, or the specific date for that payment.

¹⁰ Having found no permanent psychiatric incapacity, the issue of service connectedness is moot.

32. Government Code section 31724 provides that the disability retirement allowance for a member found to be permanently incapacitated for the performance of her duties “shall be effective as of the date such application is filed with the board, but not earlier than the day following the last day for which he received regular compensation.” To ensure the accuracy of determining the effective date of disability retirement, the hearing officer recommends that the effective date of Applicant’s service-connected disability retirement benefits for her orthopedic claim be determined administratively by OCERS. (Factual Findings, 2; Legal Conclusion 6.)

RECOMMENDATION

1. The appeal of Applicant Carol L. Thompson for service-connected disability retirement for the orthopedic injury to her right ankle is granted. The effective date of Applicant’s service-connected disability retirement benefits shall be determined administratively by OCERS.

2. The appeal of Applicant Carol L. Thompson for service-connected disability retirement for her psychiatric injuries is denied.

DATED: April 8, 2019


MICHAEL R. DILIBERTO
Hearing Officer
Board of Retirement, Orange County
Employees Retirement System

RESPONSE TO REQUEST FOR PROPOSAL

TO PROVIDE HEARING OFFICER SERVICES

FOR THE ORANGE COUNTY EMPLOYEES

RETIREMENT SYSTEM

SUBMITTED BY ROBERT M. SNIDER

OCTOBER 24, 2022

ROBERT M. SNIDER, Attorney at Law

Post Office Box 11243
Palm Desert, California 92255-1141

(760) 636-4432
bobsnider58@gmail.com

October 24, 2022

Mr. Bill Singleton, Paralegal
Orange County Employees Retirement System
Post Office Box 1229
Santa Ana, California 92702-1201

Dear Mr. Singleton:

Please accept the enclosed response to OCERS' request for proposals for administrative hearing officer services.

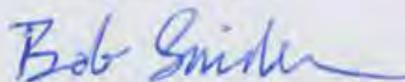
I served as an OCERS hearing officer from 2011 until 2018. In 2018, when input was solicited on proposed changes to the Administrative Hearing Rules and on the creation of a Disability Committee and Adjudication Policy, I drafted a memorandum with a number of suggestions that were adopted by the Board of Retirement.

In 2019, I retired from three decades of full-time employment as a California Deputy Attorney General. As a result, I have more availability for hearing officer engagements than was the case previously.

I've chosen to include two writing samples and the names of references from the retirement associations that currently employ me. In recognition of the Quiet Period, I haven't contacted as references any current or retired OCERS employees, but I invite your inquiry regarding their appraisal.

Thank you for your consideration. I hope that we'll have the opportunity to work together again in the near future.

Very truly yours,



ROBERT M. SNIDER

ROBERT M. SNIDER

bobsnider58@gmail.com

For your consideration regarding appointment as an OCERS Administrative Hearing Officer.

HEARING OFFICER EXPERIENCE

San Bernardino County Employees Retirement Association, 2015-present; San Diego County Employees Retirement Association, 2012-present; Orange County Employees Retirement System, 2011-2018.

I hear testimony and take evidence from applicants for disability retirement or larger benefit allowances. Then I research and write findings of fact and conclusions of law in recommendations to the local Board of Retirement.

Hearing Officer, City of West Hollywood, 2019-present.

I hear landlord-tenant disputes under the City's rent control ordinance, appeals from a host of administrative citations, and challenges to vehicle impoundments. I have issued more than 300 written decisions to date.

OTHER PROFESSIONAL EXPERIENCE

Deputy Attorney General, California Department of Justice, 1988-2019.

Trial supervisor for four-county Los Angeles region, in charge of confidential investigations and conflict matters; advocate, Victim Compensation and Government Claims Board; Examiner, Commission on Judicial Performance.

Deputy City Attorney, Los Angeles City Attorney's Office, 1981-1988.

PROFESSIONAL AFFILIATIONS

Member, State Bar of California. Member of the bar, United States Supreme Court; Ninth Circuit U.S. Court of Appeals; U.S. District Court for the Central District of California. Member, National Association of Hearing Officials.

EDUCATION

B.A., University of Pennsylvania, with Honors in Urban Studies major. J.D., New York University School of Law. Fellow in Public Affairs, Coro Foundation.

PROFESSIONAL DISTINCTIONS

William James Award, California District Attorneys Association, 2018.
Counsel of Record, *Johnson v. Lee*, United States Supreme Court, 2016.
Attorney General's Award for Excellence (Anna Nicole Smith case), 2009.
Attorney General's Award for Sustained Superior Accomplishment, 2003.

Post Office Box 11243

Palm Desert, California 92255-1141

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SECTION 7: PROPOSAL REQUIREMENTS

Affirmative statements
(items 2 & 3)

I am not related in any way to OCERS’ business operations.
I am not currently in litigation with OCERS or Orange County.
I have never given any OCERS officer, Board member, or employee a gift or political contribution.

Certification
(item 4)

I have been practicing law for well over five years as a licensed member of the State Bar of California (no. 84879). I am an active State Bar member in good standing.

Sanctions
(item 5)

No legal malpractice case or claim has ever been filed against me.
No court sanctions have ever been imposed on me. No public or private discipline has ever been administered to me by the State Bar of California or the bar of any other jurisdiction.

Conflicts
(item 11)

I perform no work that would create a potential conflict of interest with the activities of OCERS.

References
(Section 8)

Brant C. Will, Esq. General Counsel, SDCERA BWill@sdcera.org 619-515-6804 or 917-981-0172	Barbara M. A. Hannah, Esq. Chief Counsel, SBCERA bhannah@sbcera.org 909-915-2039 or 909-723-7639
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Impartiality
(Section 3)

I will be and will remain fair and impartial. I will comply with the applicable State Bar Rules of Professional Conduct, the Orange County Bar Association’s Civility Guidelines, and the California Code of Judicial Ethics, Canon 6, subdivision D.

PRIOR WORK UNDERTAKEN FOR OCERS

In response to Section 7, item 7, the list below reflects administrative hearings conducted in disability retirement and benefit allowance matters. Initials have been substituted for applicants' names in order to protect their privacy under the California Public Records Act.

<u>Applicant</u>	<u>Hearing Date</u>
C.M.	10/17/12
R.J.	3/28/13
D.K.	6/4/13
S.D.	7/16/13
D.M.	10/18/13
J.D.	11/14/13
K.M.	12/9/13
J.D.	12/17/13
P.D.	1/24/14
D.M.	2/24/14
G.U.	2/13/15
G.U.	3/9/15
J.G.	7/13/15
R.C.	12/13/16
M.B.	3/22/17
J.M.	5/5/17
M.B.	5/22/17
J.D.	10/12/17
D.R.	6/4/18
K.W.	7/2/18
L.O.	8/10/18

EXPERIENCE AS AN ADMINISTRATIVE HEARING OFFICER

in response to Section 7, items 6, 8, and 10

San Diego County Employees Retirement Association.

I have served continuously as a hearing officer for SDCERA since 2012. The duties are identical to those at OCERS, such as determining the admissibility of evidence, conducting hearings, performing legal research, and writing recommended decisions. During my tenure, I was selected to conduct a videotaped hearing that, with the parties' consent, was shown to new Board of Retirement members for their orientation.

San Bernardino County Employees' Retirement Association.

I have served continuously as a hearing officer for SBCERA since 2015, in the same capacity as at OCERS and SDCERA. In addition to hearings, this agency authorizes expedited administrative reviews, which entail my analyzing medical records and writing a report and recommendation. SBCERA also requires a decision on the availability of a supplemental disability allowance under Government Code section 31740.

City of West Hollywood.

Since 2019, I have served as a hearing officer in rent control, code compliance, and vehicle impoundment matters. The parties, who are sometimes represented, present their positions after submitting evidence and occasionally briefing. I then research the relevant state laws and municipal code sections before producing a written decision. I work as an independent contractor and carry all relevant insurance, including professional liability.

Other Agencies.

This year I conducted an administrative hearing for the City of Arcadia on a serious code violation matter and issued a written decision. In past years, I was approved to handle administrative citations for the City of Long Beach as a hearing officer, and I was retained to decide wireless communication facility disputes for the City of Malibu.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION

**In the Matter of : _____, a Member
of the Orange County Employees Retirement System,
for a Recalculated Benefit Allowance**

November 29, 2018

PURSUANT TO GOVERNMENT CODE sections 31533 and 31724, a hearing was conducted on March 26, 2018, into the benefit appeal of : _____ (“Applicant”), a member of the Orange County Employees Retirement System. Applicant appeared in propria persona. OCERS (“Respondent”) was represented by Dawn M. Matsuo, staff attorney. Under former rules 16 and 18 of the Board of Retirement’s Policy for Administrative Hearings,¹ the following report and recommendation is submitted.

I. PROCEDURAL HISTORY

On May 28, 1991, Applicant began work as a tree trimmer with the Orange County Department of Public Works. (AR [Administrative Record] 67, 378, 383, 412.) On March 11, 2013, he applied for service-connected and non-service-connected disability retirement, alleging that he had a C7-T1 discectomy on the left side, radicular symptoms at L7-C8, and bilateral Tinel and Phalen’s syndromes. (AR 362.) OCERS accepted the application for filing on March 13. (AR 361.)

On March 27, 2013, Applicant’s then-attorney asked OCERS to adjust the effective date of his disability retirement. Counsel alleged that Applicant was unable to ascertain the permanency of his disability until after he was last paid and that he was not made aware of the need to file for disability retirement immediately. (AR 377.)

In June 2014, OCERS staff recommended that Applicant be granted service-connected disability retirement with an effective date of March 13, 2013. (AR 409, 412.) On June 16, the Board of Retirement adopted that recommendation. (AR 411.) In a letter to OCERS staff, counsel for Applicant reasserted that Applicant’s medical condition did not become permanent until after he last worked for regular compensation. (AR 413.)

OCERS’s disability coordinator responded in an undated letter that Applicant’s last day of regular compensation was November 1, 2012, and that he had been able to ascertain the permanency of his disability on November 15, 2011. (AR 417.) The letter concluded that the

¹ The superseded rules govern this matter, as the current rules were not adopted until June 1, 2018.

"application was not delayed by his inability to ascertain the permanency of his incapacity." (AR 418.)

On August 14, 2014, counsel for Applicant appealed the Board's decision as to the effective date only. (AR 415.) Sometime thereafter, Applicant began to represent himself. On January 17, 2017, the Hearing Officer was notified of his assignment, which had actually occurred on September 5, 2014. (AR 416.)

To set the pre-hearing conference required by former rule 10(d) of the Board's Policy for Administrative Hearings, the Hearing Officer sent letters to the parties on January 20, February 10, and April 11, 2017, but Applicant did not respond. Ultimately, the pre-hearing conference was conducted by telephone on July 5, 2017. (1RT 2, 4.)² With the parties' agreement, the administrative hearing was calendared for October 30, 2017. (1RT 17, 23.)

Under former rule 6, pre-hearing statements were due from Applicant on August 31 and from Respondent on October 2, 2017. (1RT 20-21.) When Applicant did not submit a pre-hearing statement, the Hearing Officer took the matter off calendar on October 26, 2017, pursuant to rule 9. Applicant nevertheless asked to proceed with the administrative hearing, which request was granted.

The hearing was recalendared for December 11, 2017, but on December 5, Applicant requested a continuance due to a death in the family. That continuance was granted and the matter was reset for March 26, 2018.

Applicant did not appear for the March 26 hearing. (2RT 4-5.) It was rescheduled again for July 2, 2018, and took place that morning. (3RT 2, 5.) At the hearing, two witnesses testified: Applicant on his own behalf, and Alexandrina Bercaru for Respondent. (3RT 4, 12, 41.) The 420-page administrative record was admitted in evidence. (3RT.4, 8.) Respondent submitted a closing brief on October 1, 2018; Applicant declined to file a closing brief or a reply brief. The matter is now ready for recommended decision.

II. SUMMARY OF THE EVIDENCE

Applicant is currently 52 years old. (AR 284, 288.) On May 28, 1991, he became employed as a tree trimmer with the County's Department of Public Works and entered the retirement system. (3RT 16, 18; AR 67, 378, 383, 412.)

² The three-volume reporter's transcript is designated "1RT" for the July 5, 2017 proceedings, "2RT" for the March 26, 2018 proceedings, and "3RT" for the July 2, 2018 proceedings.

Applicant trimmed trees daily on his work schedule, which consisted of 10 hours per day over a four-day week. (AR 45, 339; 3RT 30.) His more strenuous duties included trimming and removing dead, diseased, or overhanging limbs or branches with power or hand tools; climbing trees by using hooks, ropes and cables; and occasionally felling and removing entire trees, including their roots. (AR 67, 278, 389; 3RT 21.)

Applicant characterized his work as "very physical." (3RT 21.) According to his supervisor, the physical requirements frequently involved pushing, pulling, lifting, carrying, reaching overhead, bending, and kneeling. (AR 383.) Applicant testified that he had to raise his hands above his shoulders, pull himself up by a rope, bend constantly, lift and carry up to 30 pounds of equipment and, three times per week for about two hours, lift up to 100 pounds of tree material. (3RT 22-24.) He would hold a 14-foot-long pole pruner all day. (3RT 32.)

"You really had to be in shape to be a tree trimmer," Applicant commented. (3RT 33.) By the time he applied for disability retirement, Applicant was no longer able to climb trees or hold heavy equipment to trim branches. (AR 362.)

On July 8, 2009, Applicant was unrolling some fencing when his foot slipped as he stepped back and turned. He slid 10 to 16 feet down the channel and, upon reaching the bottom, fell face-first and struck his head on the channel's concrete lining. (AR 16, 68, 107, 145, 339, 358, 362, 383; 3RT 19.)³ Applicant injured his back and neck. (3RT 18.) He was unable to open his left hand. (3RT 26.) It was difficult for him to sit or stand for too long. (3RT 36-37.)

As early as October 2, 2009, Applicant was notified that his employer initially would not accommodate his restrictions. (AR 5.) By April 23, 2010, though, the County was able to do so. (AR 27.) Applicant returned to work on modified duty in early May. (AR 46, 77.) For the next year or so, he worked full-time in the yard on light duty, which is reserved for employees with temporary limitations or restrictions. (3RT 24-25, 33; AR 339, 363, 389.) He supervised trustee inmate crews and other individuals referred by the court system. (3RT 25-26; AR 389.)

Applicant's physician, Dr. Jeffrey Deckey, recommended that he have cervical spine surgery. (AR 70, 98.) On September 30, 2010, he wrote in a workers' compensation orthopedic report that the delay in treating Applicant was causing him irreparable damage. (AR 72-73.) Dr. Deckey assessed him as temporarily totally disabled. (AR 73.) Applicant returned to work on November 30, 2010, but without success. (AR 145.)

³ Some records list the date of Applicant's injury as August 12, 2009, when he pulled his back muscles in hoisting himself onto the rear of a truck. (AR 36-37, 45, 67.) Applicant was taken to a hospital by ambulance at that time. (AR 324.)

On March 15, 2011, Dr. Deckey performed a foraminotomy and discectomy for a herniation at the C7-T1 disc and C8 radiculopathy, both on the left side. (AR 114, 413; 3RT 26, 36.) Applicant testified that his neck was reconstructed with titanium. (3RT 26.)

Applicant stopped working on March 14, 2011, and never returned. (AR 363; 3RT 25-27.) He was limited in squatting, kneeling, twisting, bending, and climbing stairs, and he was precluded altogether from pushing, pulling, reaching, and using his arms overhead. (AR 385.) Applicant could not lift any weight with his left arm. (AR 385.) Dr. Deckey told him that if he continued to trim trees, he could reinjure his back. (3RT 31.)

Around the time of the surgery, Applicant's supervisor advised him that the County was unwilling or unable to risk reemploying him by accommodating his severe injuries. (3RT 34-36; AR 377.) The injuries prevented the County from employing him. (3RT 27.) Due to his extensive restrictions, Applicant was unable to perform the essential functions of the tree trimmer position. (AR 387.)

In a progress report dated April 26, 2011, Dr Deckey continued to deem Applicant temporarily totally disabled, but he anticipated that Applicant's condition would become permanent and stationary within the next six weeks. (AR 127-129, 146, 340, 413.) In progress reports dated June 7 and July 19, Dr. Deckey predicted that Applicant would "reach a plateau within the next few months and will be able to be rated permanent and stationary" for workers' compensation purposes. (AR 141-142, 151-152.) On August 25, he advised Applicant to complete physical therapy in order to approach permanent and stationary status. (AR 164-165.) Applicant was hoping to return to his job, which he loved. (3RT 28, 37-38.)

On October 7, 2011, Dr. Deckey opined that Applicant's symptoms had "plateaued with regard to his cervical spine," with only minimal improvement from physical therapy. (AR 171-172.) Applicant informed a pain management physician, Dr. Michael Lowenstein, that Dr. Deckey had declared him permanent and stationary. (AR 182, 184.) All of Applicant's pain management physicians told him that he could no longer work as a tree trimmer. (3RT 31-32.) In the fall of 2011, he twice reported for work, but he was sent home due to his permanent restrictions. (AR 182, 185, 387.)

On November 17, 2011, Dr. Deckey reaffirmed that Applicant's cervical spine condition had reached a plateau; he declared Applicant's restrictions permanent. (AR 186, 195, 413, 417.) Dr. Deckey wrote: "If [Applicant's] work cannot accommodate the restrictions noted in his permanent and stationary report, he should then be considered off work." (AR 186, 195.)

Throughout 2012, Applicant continued to have neck pain radiating into his left arm and numbness in his left hand, as well as low back pain. (AR 200, 204, 207, 246, 256, 259.) On February 29, 2012, Dr. Edward Balbas diagnosed Applicant with a chronic left polyradiculopathy in his lumbar spine, at L4-L5. (AR 206, 210-211.)

On March 13, 2012, Dr. Albert Simpkins, the agreed medical examiner in Applicant's workers' compensation case, found Applicant to be "a candidate for future medical care in regard to his lumbar spine." (AR 223, 231.) Applicant had by then undergone 40 sessions of post-operative physical therapy. (AR 348.) Dr. Simpkins wrote: "Although [Applicant] is not a considered to be a candidate for lumbar spine surgery at this time, this may become a possibility in the future should his condition deteriorate." (AR 239.) Dr. Simpkins assigned Applicant a rating of 22 percent whole-person impairment for workers' compensation purposes. (AR 234, 238.) He precluded Applicant from lifting, pushing, or pulling more than 25 pounds and noted: "Should the patient's employer be unable to accommodate these restrictions, he would be unable to return to his prior occupation." (AR 238, 271.)⁴

Throughout 2012, Applicant reported that he continued to have intermittent low back pain that was exacerbated by heavy lifting. (AR 248, 256, 259, 272.) On August 10, Dr. Lowenstein recommended that Applicant attend 12 sessions of physical therapy for left arm and increased neck pain. (AR 260.) Upon beginning six sessions on October 3, Applicant stated that his past flare-ups of neck pain were not as intense as the one he was experiencing that day. (AR 272-273.)

On September 14, 2012, Dr. Lowenstein's reevaluation of Applicant did not reflect any back pain, but it had recurred by October 12. (AR 267, 273.) On October 29, Dr. Thomas Phillips, an orthopedic spine surgeon and qualified medical evaluator, noted that according to his primary treatment physician, Applicant had reached maximum medical improvement. (AR 281.) Nevertheless, Dr. Phillips remarked that Applicant continued to suffer from neck pain that had lasted more than four to six weeks. (AR 290.) He requested authorization for magnetic resonance imaging to rule out herniated nucleus pulposus. (AR 290.)

According to Alexandrina Bercaru, an OCERS member service manager, November 1, 2012 was Applicant's last day on the payroll. (3RT 46-47; AR 419.) He was paid every two weeks from March 11, 2011, through November 1, 2012. (3RT 21, 41-44.)⁵ Applicant received 80 hours of pay for the period from October 5 through 18, 2012 and 15 hours of pay for the period from

⁴ Applicant testified that he was prohibited from lifting more than five or ten pounds. (3RT 26.)

⁵ An unsourced payroll chart submitted by Respondent, however, indicates that Applicant was not paid between April 8 and November 3, 2011; November 18 and December 1, 2011; February 24 and March 22, 2012; June 1 and July 26, 2012; and August 10 and October 4, 2012. (AR 420.)

October 19 through November 1, 2012. (3RT 43-44; AR 419-420.) After his retirement contributions were deducted, his benefit was computed based on his salary and his 19.14 years of service credit. (3RT 44-45; AR 412.)

Reevaluating Applicant on November 28, 2012, Dr. Lowenstein observed that Applicant "continu[ed] to be symptomatic in his neck with radicular symptoms into his left shoulder and left upper extremity." (AR 292.) Dr. Lowenstein made the same observations after evaluating Applicant on January 11, February 19, March 22, May 1, and June 12, 2013. (AR 302, 308, 315, 318, 321.)

On July 13, 2013, Dr. James Rho, a pain management specialist, first evaluated Applicant for interventional pain. Applicant's pain had increased because his medications had not been reauthorized. (AR 324.) Dr. Rho prescribed new medications, but on August 20, Applicant's condition was unchanged. (AR 328, 330.) Dr. Rho noted on September 26, 2013, that Applicant still had cervical pain. (AR 334.)

On February 26, 2014, Dr. Michael Moheimani, an orthopedic surgeon, conducted an independent medical evaluation of Applicant for OCERS. (AR 338, 406.) He observed that Applicant had a "significant functional deficit with loss of range of motion and weakness" and "clearly cannot return to his previous work activities based on his current disability." (AR 359.) Finding the disability to be service-connected, Dr. Moheimani concluded that Applicant

is permanent[ly] incapacitated from doing his usual and customary work duties and cannot return to his previous job activities. He would be capable of only doing very sedentary work activities, and even this would be limited due to the high use of narcotics which would limit his concentration and thinking ability. [¶] The connection between his disability and his permanent impairment is real and measurable.

(AR 359.)

By the time of the hearing, Applicant's "massive headaches" had disappeared, but he testified that he was unable to look the to the left without moving his body. (3RT 24, 37.) He said he still had a lot of pain through his shoulder, extending to his hand. (3RT 37.) He was "putting up with the pain" rather than taking a lot of medication. (3RT 18.) Applicant experienced substantial depression because of his inability to work. (3RT 27.)

III. ANALYSIS

This matter presents no dispute over whether Applicant is incapacitated from his former employment, or whether that job was substantially a contributing cause of his incapacity. Both parties agree that Applicant can no longer work as a tree trimmer and that the reason is his fall in the course of working. Applicant presently receives a disability retirement allowance. The question is whether it was correctly calculated from the date he applied for it, or whether he is entitled to a retroactive benefit under the law.

Government Code section 31720 provides that "any member permanently incapacitated for the performance of duty shall be retired for disability." Section 31722 further provides that the disability retirement application

shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

Thus, disability retirement applications filed within four months of termination of service are timely. (Weissman v. Los Angeles County Employees Retirement Assn. (1989) 211 Cal.App.3d 40, 46.) So are later applications, provided that the member is continuously incapacitated. Applicant filed for disability retirement two years after his last day of work, but his application is timely because in between those time points, he was continuously incapacitated physically. The issue for the Board is whether Applicant's pension benefit should begin when he filed his application or when he was last paid, a difference of about four-and-a-half months.

As a general rule, a disability retirement allowance is effective on the date the application is filed, so long as the effective date is "not earlier than the day following the last day for which [the member] received regular compensation," including paid sick leave. (Gov. Code, § 31724.) The second paragraph of the statute, though, delineates an exception to the general rule:

When it has been demonstrated to the satisfaction of the board [of retirement] that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

(Gov. Code, § 31724.)

Applicant was permanently incapacitated well before his last day of compensation.

Unless Applicant can show he was unaware of the permanency of his incapacity when his pay ceased, he is consigned to a pension commencement date of March 13, 2013, the day his application was filed. In this instance, there is no claim of delay by administrative oversight. Applicant instead appears to contend that his disability retirement allowance should be effective as of his last day on the payroll, because he was unable to determine his incapacity until after that time. Unfortunately for Applicant, the evidence does not support this view.

As a preliminary observation, various OCERS forms in the record supply conflicting dates for Applicant's last day of actual work. One, signed by a workers' compensation claim examiner, incorrectly states that Applicant's last day of work was August 12, 2009. (AR 378.) Another OCERS form, signed by an employer representative, shows Applicant's last day of work as November 8, 2011 (AR 388), which also appears to be incorrect. In the disability retirement application, Applicant stated that his last day of work was March 14, 2011. (AR 363.)

The Hearing Officer credits Applicant's first-person account but notes that under Government Code section 31724, the relevant date is "the day for which the member last received regular compensation." Based on the documents presented, the Hearing Officer is persuaded that Applicant's last day of compensation was November 1, 2012. The day after that date governs the start of his benefit allowance – but, again, only if Applicant did not know that his condition was permanent. The weight of the evidence strongly suggests the contrary, in three respects.

First, Dr. Deckey put Applicant on notice that his incapacity might become permanent as early as one month after his March 2011 surgery. Although Applicant was totally disabled only temporarily at that time, Dr. Deckey foresaw that he would reach a plateau by the summer. It took longer than that, but by October 7, 2011, Applicant was gaining only minimal improvement from physical therapy. Dr. Deckey declared Applicant's work restrictions permanent on October 7 and November 17, 2011.

Second, Applicant's own testimony establishes that he was aware of the permanency of his condition. Before performing Applicant's neck surgery, Dr. Deckey told him he would be unable to go back to work as a tree trimmer. (3RT 28-32.) The disability was permanent, Dr. Deckey said, in that Applicant would not improve enough to return. (3RT 34.) "He told me that I wouldn't be able to do that work no more," Applicant acknowledged. "He said my back was limited on what I can do." (3RT 28.) According to Applicant, Dr. Deckey "stated that with the injury that I have, there's no way that I would be able to like hold the pole pruner . . . out, and extend it. My body wouldn't allow it. It would give out." (3RT 32.) Indeed, recalled Applicant, all of his pain management

physicians told him he could no longer work as a tree trimmer.

Third, Applicant's condition remained permanent the following year. In an agreed supplemental evaluation for workers' compensation on October 12, 2012, Dr. Simpkins commented:

As noted in my final report dated March 13, 2012, the patient was given a permanent work restriction precluding him from lifting, pushing or pulling greater than 25 pounds. The Job Description I received did not list the number of pounds the patient is expected to lift, push or pull in this occupation. However, given that he is required to trim and lift tree limbs or branches and occasionally remove tree roots, it appears this occupation would exceed his given restrictions.

(AR 278.)

Interestingly, the administrative record contains some evidence that the status of Applicant's lumbar spine may not be stable. He reported intermittent back pain throughout 2012, and Dr. Simpkins opined that year that future surgery might be a possibility. But a lumbar condition is not part of Applicant's statement of disability, which is limited to cervical issues; and even if it were, permanent incapacity is not defeated by the presence of continued pain.

His former counsel contended that Applicant's last day of compensation was March 14, 2011, presumably because that was his last day on the job. (AR 377, 413.) Government Code section 31724, however, measures regular compensation simply according to when it is received, not according to whether the member was actually working. The term "regular compensation includes sick leave and vacation when taken as time off instead of a lump-sum payment. (Katosh v. Sonoma County Employees' Retirement Association, supra, 163 Cal.App.4th at p. 78.)

As the moving party, Applicant has the burden of proof on the issue of permanence of incapacity. (Rau v. Sacramento County Ret. Bd. (1966) 247 Cal.App.2d 234, 238.) An employee meets his burden of proof by establishing facts by a preponderance of the evidence (Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1332); the evidence deemed to preponderate must amount to "substantial evidence" (Weiser v. Board of Retirement (1984) 152 Cal.App.3d 775, 783). "Substantial" evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302, 307.)

In this case, falling short of his burden of proof, Applicant displayed some confusion about his position. He did not testify to any inability to ascertain, until after his last day paid, the

permanency of his incapacity. Instead, he stated that he was "kind of lost on this." (3RT 11, 41, 48.) "The bottom line," he testified, "is I'm just trying to find out, do I have more coming or do I not." (3RT 38, 49.) "I'm just here to see if I do or if I don't." (3RT 46, 48.)⁶

Here, the evidence supporting an effective date of March 13, 2013 is more than preponderant, it is overwhelming. Moreover, even if Applicant had an inability to ascertain the permanence of his incapacity, he has not demonstrated that this inability actually delayed his disability retirement application, as required by Government Code section 31724. For these reasons, Applicant's claim for an earlier retirement date is unavailing.

IV. FINDINGS OF FACT; CONCLUSIONS OF LAW

Based on the foregoing review and analysis, the Hearing Officer finds as matters of fact:

1. Applicant worked as a tree trimmer for the Orange County Department of Public Works beginning May 28, 1991.
2. The more physical duties of an Orange County tree trimmer include climbing trees, pulling oneself up by a rope, bending constantly, carrying up to 30 pounds of equipment, and lifting up to 100 pounds of tree material.
3. On July 8, 2009, Applicant suffered a disabling cervical injury when he fell 10 to 16 feet while working and struck his head on a concrete channel. Five weeks later, his injury was aggravated at work when he hoisted himself onto the rear of a truck.
4. Applicant spent at least the next year on light duty, supervising inmate crews in the yard.
5. On March 15, 2011, Applicant underwent a foraminotomy and discectomy in his cervical spine with Dr. Jeffrey Deckey. He took extensive physical therapy, but his condition improved only minimally.
6. By the fall of 2011, Dr. Deckey deemed Applicant permanently incapacitated for employment as a tree trimmer. Other physicians who evaluated Applicant, including Dr. Michael Lowenstein, Dr. Albert Simpkins, and Dr. Michael Moheimani, concurred.

⁶ For reasons not disclosed in the record, Applicant's counsel stopped representing him sometime after 2014. (3RT 13.) This left Applicant in the unfortunate posture of arguing a position he did not fully understand. "I'm just going by what they had told me, these attorneys," he testified. (3RT 13, 38, 46, 48.) "I didn't know where to go with this. . . . I'm confused, to be honest with you." (3RT 15.) Applicant said that the documentation he sent to his attorneys had never been returned to him. (3RT 40, 46.)

7. Applicant was ultimately precluded from lifting, pushing, or pulling more than 25 pounds in his employment. The Department of Public Works was unable to accommodate these work restrictions and could no longer employ him.

8. Applicant's last day of compensation was November 1, 2012. By that date, Applicant knew or, based on information conveyed to him, should have known that his incapacity from work as a tree trimmer was permanent.

9. Applicant signed his disability retirement application on March 11, 2013, and it was filed with OCERS two days later.

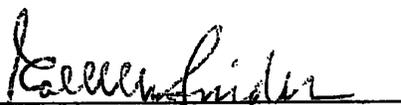
Based on the above findings, Applicant is entitled as a matter of law to a disability retirement pension effective as of March 13, 2013, the date his application was filed, but he is not entitled to a pension retroactive to November 1, 2012, or any earlier date.

V. RECOMMENDATION

Accordingly, IT IS RECOMMENDED that Applicant's benefit allowance remain unchanged from the calculation based on his March 13, 2013, application for service-connected disability retirement, and that Applicant's appeal from the Board's 2014 determination be denied.

Dated: November 29, 2018.

Respectfully submitted,



ROBERT M. SNIDER
Hearing Officer

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION

**In the Matter of the Application of
a Member of the Orange County Employees Retirement System,
for Service-Connected Disability Retirement**

January 19, 2018

PURSUANT TO GOVERNMENT CODE section 31533, a hearing was conducted on March 22 and May 22, 2017, into the application of _____ for disability retirement. ("Applicant") appeared in propria persona. The Orange County Employees Retirement System ("Respondent") was represented by Staff Attorney Jerry A. Weissburg. Pursuant to Rule 16 of the Board of Retirement's Policy for Administrative Hearings, the following Proposed Findings of Fact, Conclusions of Law, and Recommended Decision are submitted.

I. PROCEDURAL HISTORY

On July 1, 1993, Applicant was appointed a Deputy Sheriff I. (AR 311, 313.) She served in that position as a corrections officer. (AR 314.) Applicant originally applied for service-connected disability retirement based on orthopedic and cardiac conditions. On April 16, 2012, the Board of Retirement denied the application due to insufficient evidence of permanent incapacity and job causation. Applicant declined to appeal the Board's decision. (AR 1.)¹

Applicant's last day of work was June 12, 2013. (RT 47; AR 7.) On June 18, she reapplied for service-connected disability retirement. (AR 1, 6, 342.) Her statement of disability alleged "lower and mid back, both wrists, heart[,] herniated disks, carpal tunnel, hypertension [and] high blood pressure." (AR 6.)

OCERS staff accepted the renewed application on the basis that her employer's ability to accommodate Applicant's restrictions had changed. (AR 342.) On June 15, 2015, the Board of Retirement followed the staff's recommendation to deny the application, again due to insufficient evidence of permanent incapacity and job causation. (AR 60, 62, 323.) On July 7, 2015, Applicant appealed that decision. (AR 64.)

The Hearing Officer, assigned as of July 10, 2015, was notified of his appointment on October 6, 2016. (AR 65, 324.) On November 7, 2016, the pre-hearing conference mandated by Rule 10(d) of the Policy for Administrative Hearings was conducted telephonically, with

¹ "AR" denotes the Administrative Record in this matter. "RT" denotes the Reporter's Transcript of the hearing.

participating from Colorado. Applicant and Respondent timely submitted their pre-hearing statements on January 21 and February 21, 2017, respectively.

The administrative hearing commenced on March 22, 2017, and continued on May 22, 2017, to its conclusion. (AR 7, 83.) Applicant testified in her own behalf. (AR 33-76.) Adina Berbaru, OCERS's member services manager, testified for Respondent. (AR 98-109.) In the hearing, Respondent's unopposed motion to exclude evidence of Applicant's non-orthopedic conditions, meaning hypertension and high blood pressure was granted. (RT 87-94.) The 343-page administrative record was then received into evidence. (RT 112, 114.)

Post-hearing briefing consisted of Applicant's closing brief, received August 23, 2017; Respondent's closing brief, received October 12, 2017; and Applicant's reply brief, received November 20, 2017. The matter is now ready for decision.

II. SUMMARY OF THE MATERIAL FACTS

A. Applicant's Employment Before 2004

Applicant was born on April 21, 1968. (AR 273.) From May 1992 through September 1998, except for seven months at the Training Academy, she served as a Sheriff Special Officer and Deputy Sheriff I in the Corrections Division, James Musick Facility. (RT 50-51; AR 314.)² As a jail officer, Applicant's job included occasional heavy lifting of and fighting with inmates. She used a computer for about half of her shift and had to turn keys repetitively. (AR 176.)

Applicant's first set of work limitations was imposed on June 27, 1996, when she was pregnant. (AR 340.) She was restricted from having inmate contact, including restraints and altercations, and from carrying, pulling, or pushing more than 25 pounds until her return from maternity leave. (AR 279a.) Applicant was allowed to return to work without restrictions as of April 25, 1997. (AR 341.)

In September 1998, Applicant began working at the Intake Release Center. (RT 50-51; AR 314.) On February 4, 2000, she suffered a work-related injury or illness, but she was permitted to return to unrestricted duty three days later. (RT 93.) In 2001 or 2002, on her way to work, Applicant injured her neck in a motor vehicle collision. (AR 163, 177.) She lost no time from her job, however, and made a full recovery after a few weeks of chiropractic treatment. (AR 163.)

² Applicant was also a Deputy Sheriff Trainee at the Training Academy for the first six months of 1993. (AR 314.)

On January 7, 2003, Applicant was awarded an Advanced Certificate by the Commission on Peace Officer Standards and Training (POST). (AR 312.)³ By January 31, 2003, she had another set of work restrictions owing to her pregnancy. (AR 337-339.)

Resuming work in 2004, Applicant performed keyboarding for about three-fourths of her shift. (AR 176.) At the time of her 2004 injury, her duties in Jail Operations required her to sit for three hours, stand for four hours, and walk for three hours. (AR 107.) She bent, stooped, pushed and pulled continuously, balanced and reached above shoulder level frequently, and occasionally squatted, crawled, climbed, crouched, knelt, and lifted up to at least 100 pounds. (AR 107, 128.)

B. Applicant's 2004 Injury and Treatment

On June 14, 2004, Applicant injured herself while trying to control an uncooperative inmate. (AR 292.) She used force to take the female inmate to the floor, handcuff her, and lift her off the ground. (AR 106, 294.) At home one week later, Applicant turned quickly to tell her husband something and immediately experienced a sharp pain in her lower back, which radiated to her upper back and neck and dropped her to her knees. (AR 137, 189.)

Several days later, Applicant reported lower back and mid-back pain to the Division of Worker's Compensation. (AR 106, 293.) She also complained of neck and upper back pain, though a June 22 X-ray revealed no abnormalities. (AR 95, 113.)⁴ She stopped working. (AR 106.) A July 9, 2004, workers' compensation examination by Dr. Sunil Mapara showed decreased range of motion in Applicant's cervical and thoracic spine. (AR 11, 95.) Dr. Mapara restricted her from lifting, pushing, or pulling more than 10 pounds. (AR 95.)

Between June 22, 2004, and January 23, 2005, Dr. John Sullivan, a chiropractor, deemed Applicant totally incapacitated and temporarily totally disabled over a number of periods, ultimately monthly. (AR 94, 98, 100, 102-104.) He diagnosed a thoracic/lumbar sprain or strain. (AR 99, 101.) In addition to chiropractic manipulation, Dr. Sullivan treated Applicant with physical therapy. (AR 97, 99.) He saw her daily for two weeks, then thrice weekly and twice weekly until early 2005. (AR 106, 137.)

On January 19, 2005, Applicant underwent an initial orthopedic evaluation by Dr. Edward Bestard for worker's compensation. (AR 106, 127.) She complained of constant low back and occasional left leg pain radiating down her thigh, with the pain aggravated by prolonged standing,

³ Applicant remained POST-certified as of the date she stopped working and the hearing date. (RT 66-67.)

⁴ The current application does not identify any neck disability, and no factual findings are made in that regard. (AR 6.)

sitting, driving, and other activities. (AR 106.) Dr. Bestard concluded that Applicant had a chronic lumbar strain and sciatic nerve pain. (AR 127.) He recommended magnetic resonance imaging and physical therapy with rehabilitative exercises. (AR 109.)

Applicant consulted Dr. Bestard on February 2, February 16, and March 2, 2005; he continued to recommend physical therapy. (AR 113, 115, 117.) On March 16, Dr. Rachael Gordon, a radiologist, found that Applicant's L5-S1 intervertebral disc was normal, although Applicant had bilateral facet arthropathy. (AR 120-121, 127.) Dr. Bestard serially kept her off work as temporarily totally disabled until June 22, 2005. (AR 112, 114, 116, 118, 121-125.) He deemed her condition work-related. (AR 110, 131, 138.)

By July 20, 2005, Applicant had regained full range of motion with no tenderness, albeit with occasional slight pain. (AR 126, 130.) Dr. Bestard determined that her condition was permanent and stationary; he recommended rest, medication, short-term physical therapy, and a return to her previous job activities but with a limitation on very heavy lifting. (AR 126-127, 130-131, 138.) After receiving a permanent restriction, Applicant resumed working on September 9, 2005. (AR 135.) As of October 10, 2005, however, she was still complaining of pain in her lumbar and thoracic spine. (AR 137.)

C. Applicant's 2006 Injury and Treatment

On July 10, 2006, Applicant became involved in another altercation with a combative inmate at the Intake Release Center, and again injured her back and neck while wrestling the inmate. (AR 142, 236, 295, 328-329, 332.) She was received the next day at the University of California, Irvine's occupational clinic and was prescribed Motrin and Flexeril. (AR 142, 159, 195.) Applicant began treatment that day with Dr. April Lopez, a chiropractor, who placed her on temporary total disability. (AR 159, 330.) Applicant's last day of work was July 11, 2006. (AR 227.)

Dr. Lopez initially treated Applicant semiweekly for three weeks, finding her unable to return to work before August 23, 2006. (AR 143.) On August 18, magnetic resonance imaging revealed a one-millimeter bulge in the spaces between Applicant's L4-L5 and L5-S1 discs. (AR 144-145.) Dr. Lopez kept Applicant off work until September 22 and then October 22 due to cervical and thoracolumbar strains or sprains. (AR 146-147.)

In an October 18, 2006, impairment rating report, Dr. Richard Woods, an orthopedic surgeon, determined that Applicant had reached maximum medical improvement as to her wrist and shoulder strains. (AR 148, 157, 173.) He calculated her whole-person impairment at 3

percent. (AR 148, 175.)

Dr. Lopez continued to deem Applicant unable to return to work on October 22 and November 27, 2006. (AR 152-153.) She referred Applicant to Dr. Jeffrey Deckey, an orthopedic surgeon. (AR 153, 156.) In an initial orthopedic consultation on December 5, 2006, Dr. Deckey recommended for Applicant continued chiropractic care with aggressive physical therapy, but he eschewed surgery or epidural injections for her. (AR 154-155, 214.)

On December 6, 2006, Dr. Woods conducted an agreed medical examination for the Workers' Compensation Appeals Board. (AR 157.) Applicant complained of intermittent pain in her neck, both shoulders, and both wrists and constant pain in her lower back. (AR 160-161.) She told Dr. Woods that she was not capable of performing her customary jail duties of prolonged standing, walking, lifting, and bending. (AR 162.)

Dr. Woods diagnosed Applicant with chronic cervical and lumbar strains, finding her temporarily partially disabled on that basis, and mild carpal tunnel syndrome. (AR 173.) The carpal tunnel finding was based on nerve conduction studies six weeks earlier by Dr. Andrew Schreiber. (AR 178, 221.) Dr. Woods adjudged Applicant able to work if heavy tasks and very repetitive forceful grasping were precluded. (AR 173-174.)

D. Applicant's Continued Treatment in 2007

Dr. Lopez saw Applicant again on December 21, 2006, deeming her temporarily totally disabled and still unable to return to work. (AR 198.) Dr. Lopez reevaluated her on January 22, 2007, with the same result. (AR 199, 201.) Applicant complained of constant moderate to severe pain in the neck and upper trapezius. (AR 199.) As of December and January, Dr. Lopez assessed Applicant's strain or sprain as acute. (AR 198, 202.)

On February 21, 2007, Dr. Lopez reevaluated Applicant, who was continued on temporary total disability until March 21, 2007. (AR 203-206.) Subsequent work status reports indicated that she remained temporarily totally disabled until April 23, May 21, June 23, and July 25, 2007. (AR 207, 211-212, 231.)

On April 20, 2007, Dr. Woods opined that as to her cervical and lumbar conditions, Applicant had reached maximum medical improvement. (AR 208-209.) She expressed having difficulty with typing, discriminating objects by touch, lifting, walking, sitting, standing, bathing, combing her hair, sleeping restfully, and driving. (AR 210.) Dr. Woods assigned a total whole-person impairment rating of 14 percent. (AR 208.)

On June 7, 2007, Dr. Woods conducted another agreed medical examination. (AR 213.) Applicant continued to complain of pain in her neck, lower back, and both wrists. (AR 215.) Dr. Woods maintained Applicant's 14 percent impairment rating and imposed work restrictions prohibiting very heavy lifting and very heavy work because of, respectively, her cervical and lumbar spine. (AR 223-224.)

On July 16, 2007, the Sheriff's Department acknowledged Applicant's permanent preclusions from very heavy lifting because of her cervical spine, and from very heavy work because of her lumbar spine – suggesting that she had lost about 25 percent of her pre-injury capacity to bend, stoop, lift, push, pull, climb, or engage in other activities involving comparable effort. (AR 297-298.) The department listed its options as accommodating Applicant's restrictions and letting her continue to work; continuing to seek accommodation for her; filing for her retirement if her restrictions could not be accommodated; or offering her a different job within the department or county. (AR 298.)

One month later, the Sheriff's Department decided to "[a]ccommodate the restrictions as listed." A supervisor noted, "The above restrictions do not prohibit her from doing a full range of duties for a peace officer. The restrictions only reduce by 25% what her previous physical capabilities were." (AR 298.)

E. Applicant's Employment in 2007 and Thereafter

On August 22, 2007, Applicant returned to working regular but light duty at the Intake Release Center. (RT 56, 61; AR 232.) She was assigned to Main Control. (RT 62.) Initially she worked off and on as a module deputy; opening and closing individual cell doors and logging entries. (RT 56-57, 61.) Applicant would log the transportation of inmates and open and close cell doors for them by turning knobs. (RT 61-62.)

Following her service as a module deputy, Applicant worked light duty in the housing guard station. (RT 57, 62.) Sometimes she would slide open cell window covers to check on inmates in solitary confinement and would make a record entry. (RT 59-60.)

At some point, Applicant became a Deputy Sheriff II. (AR 47.) A Deputy Sheriff II, according to a 1991 County class bulletin, conducts patrols, serves as a desk officer, and works with and transports prisoners. (AR 26.) As relevant here, a Deputy Sheriff II's duties include operating security door consoles, controlling the movement of prisoners and others, keeping

records, reviewing forms and court documents, and verifying prisoners' identities. (AR 26.)⁵

Applicant worked light duty from August or September 2007 until June 12, 2013, forgoing no salary or employee benefits during that period. (RT 54, 56, 64-65; AR 7.) Computer work, organizing things, and paperwork comprised her job tasks, which involved occasional stretching, reaching, squatting, and stooping. (AR 237.) On a few occasions, she wore a back brace and a brace for her wrists. (RT 69-70.)

In her last year or year-and-a-half of employment, Applicant worked in the jail's main control area. (RT 55.) She controlled and issued all the keys for the first-floor intake area. (RT 52.) Applicant's duties included using a computer to keep a log for the facility, which occupied up to 50 percent of her working hours, and opening and closing interior and exterior doors by turning various knobs on a panel. (RT 51-54.) In a typical 12-hour shift, she would turn knobs 50 to 100 times a day. (RT 53.)

F. Applicant's Condition in 2011 and 2012

Dr. Michael Moheimani, an orthopedic surgeon, conducted a workers' compensation evaluation of Applicant on March 2, 2011. (AR 233-235.) She reported a stabbing sensation in her lower back, a burning sensation in her neck, and wrist pain aggravated by typing. (AR 236.) In Dr. Moheimani's view, Applicant's injuries were work-related. (AR 242.) He recommended that she not lift more than 20 pounds, avoid bending and stooping, and sit or stand as needed to alleviate pain. (AR 243, 245.)

On May 2, 2011, Dr. Moheimani reevaluated Applicant, who was experiencing frequent cervical spine pain. (AR 246, 249.) Based partly on magnetic resonance imaging taken one week earlier, Dr. Moheimani diagnosed a cervical spine disc bulge between the C6 and C7 discs, a lumbar spine bulge between the L3 and L4 discs, mild bilateral carpal tunnel syndrome, and bilateral wrist pain. He continued Applicant's work restrictions. (AR 247.)

For the next 30 days, Applicant's temporary work restrictions consisted of not lifting more than 20 pounds, avoiding bending or stooping, and sitting or standing as needed to alleviate pain. (AR 299.) Each time that the restrictions continued for periods beginning May 31, July 21, and August 29, 2011, Sheriff's Department officials said the restrictions could be accommodated. (AR 300-302.)

⁵ According to a 2013 County job application posting, a Deputy Sheriff II in Field Operations patrols areas, enforces traffic laws, and investigates accidents. (AR 29-30.) Applicant's experience as a deputy sheriff, however, consisted almost entirely of work at inmate facilities.

On October 10, 2011, Applicant saw Dr. Moheimani again. (AR 251.) In addition to her spinal complaints, she reported that her right wrist was stiff, a new condition. Dr. Moheimani recommended complete acupuncture treatment. (AR 252.) He authorized Applicant's return to modified work, with no forceful pushing, pulling, or lifting over 20 pounds and sitting or standing as needed. (AR 253.) With those restrictions in place and able to be accommodated, Applicant was approved to return to work on December 18, 2011. (AR 255, 303.) Sheriff's officials continued to accommodate her restrictions, which were further extended to January 20 and February 24, 2012. (AR 304-305.)

On February 21, 2012, Dr. Moheimani examined Applicant, diagnosed degenerative disc disease in her cervical and lumbar spine, and maintained her work restrictions until April 24, 2012. (AR 256-258, 306-307.) On April 27, Dr. Moheimani observed in his primary treating physician's progress report that Applicant was responding very favorably to acupuncture treatment. (AR 260, 262.) Dr. Woods, the agreed medical examiner for workers' compensation, opined that Applicant's condition was permanent and stationary. (AR 262, 265-266.) The Sheriff's Department continued to accommodate Dr. Moheimani's restrictions through June 27, 2012. (AR 308.)

On July 27, 2012, Dr. Moheimani reexamined Applicant, who continued to report ongoing neck and lower back pain. (AR 264-265.) He extended the duration of her work restrictions. (AR 268.) After more than a year of treatment, Applicant's condition had not improved significantly. (AR 274.)

Dr. Moheimani's last available progress report was executed on December 3, 2012. (AR 269.) Applicant reported having less lumbar spine and neck pain, owing to acupuncture and prescription pain medication. (AR 270.) Her temporary work restrictions through March 8 and then April 10, 2013, were accommodated by Sheriff's Department officers, but only temporarily. (AR 7, 309-310.)

G. Applicant's Status in 2013 and Afterward

Still seeing Dr. Moheimani when she applied for disability retirement, Applicant remained prohibited from pushing, pulling, or lifting more than 20 pounds or doing overhead work, and she was permitted to sit or stand as needed. (RT 65; AR 7-8, 15.) Nonetheless, she was able to perform all her assignments while complying with those restrictions. (RT 65, 69.)

Applicant stopped working on June 12, 2013, after five or six hours. (RT 47, 53, 74; AR 7.) That was the last day she was paid. (RT 48; AR 7.) A lieutenant told her she would have to go home because the department could no longer accommodate her work restrictions. (RT 72-74.)

The temporary restrictions had become permanent. (RT 72, 74; AR 35, 37, 288.)

Applicant retired from County employment on June 20, 2013. (AR 274.)⁶ In her final performance evaluation for the year ending July 26, 2013, her supervisor rated her competent, the highest rating available, in all categories observed, and he added compliments. (AR 315-318.) By September 18, 2013, Applicant was no longer receiving workers' compensation. (AR 319, 322.)

According to Adina Bercaru, a member services manager for OCERS, payroll hours are compressed for some disability benefits in order to advance their effective date. (RT 98-101.) OCERS's salary compression policy governs the process. (RT 101; AR 325-326.) Under the policy, Applicant's salary, which included the value of donated catastrophic leave, was compressed so that the effective date of her benefit became October 4, 2013. (RT 102-103, 106; AR 327.) Without compression, Applicant's service retirement benefit would not have started until February 2014. (RT 105.)

On January 30, 2015, Dr. Jason Chiu, a board-certified orthopedic surgeon, evaluated Applicant at OCERS's request. (AR 49-50, 55, 273.) She told him that she had stiffness in her lower back and, with activity, frequent sharp and burning pain. (AR 289.) She also complained of pain in her wrists that traveled toward her shoulders, a tight and swollen feeling in her hands, and numbness and tingling in her two outermost fingers on each hand. (AR 289.)

Dr. Chiu opined that Applicant's work limitations were overly restrictive, based mostly on subjective complaints and based on prophylactic needs rather than actual permanent incapacities. In his view, Applicant's degenerative changes in her cervical and lumbar spine were part of the normal aging process. (AR 290.) Dr. Chiu also maintained that Applicant exhibited no clinical or objective signs of carpal tunnel syndrome, as opposed to mild bilateral disease. (AR 290a.)

Dr. Chiu further opined that Applicant had "the strength, flexibility and endurance to perform the essential job functions of a deputy sheriff," including sustained work activities, although her deconditioning had reduced her capacity. Consequently, Dr. Chiu concluded that Applicant had no permanent incapacity in her thoracic or cervical spine, hands, or wrists that prevented her from doing the usual and customary duties of a deputy sheriff. (AR 290a.)

Although Applicant had ceased her athletic activities, she remained able to carry out the activities of daily living unassisted. (AR 274a.) Nevertheless, she testified that she has lived with daily pain since her injuries. (RT 34.) She has become unable to take pain medication because it

⁶ Having completed five years of County service, Applicant was eligible for service retirement. (Gov. Code, §31720, subds. (a) & (b).)

causes her stomach problems. (RT 34, 37.) At the time of the hearing, Applicant was undergoing physical therapy for her back. She also was scheduled for a wrist consultation for possible carpal tunnel surgery. (RT 34.)

III. ANALYSIS

A. Applicant's Contentions

Applicant's statement of disability, filed June 26, 2013, cited her lower and mid-back, herniated discs, both wrists, and carpal tunnel. (AR 6.) Because of her June 2004 and July 2006 injuries, Applicant states, she is limited in sitting, standing, bending, and lifting heavy weights and is precluded from wearing a gun belt, bending, standing for long periods, conducting searches, or engaging in physical altercations. (AR 6.) Applicant told the Sheriff's Department, and her physician told OCERS, that she is precluded from pushing, pulling, lifting more than 20 pounds or doing overhead work, but should sit or stand as needed to alleviate pain. (AR 7, 17.)

In a physician's statement of disability that accompanied the application, Dr. Moheimani reiterated his diagnosis of degenerative disc disease in Applicant's lumbar and cervical spine, with corresponding protrusions at L3-L4 and C6-C7. (AR 14.) He also stated that carpal tunnel syndrome affected Applicant's work abilities. (AR 14.) Dr. Moheimani further noted Applicant's limited range of neck and lower back motions, accompanied by pain. (AR 15.) He deemed her permanently disabled from the duties of her occupation. (AR 17.)⁷

B. Meaning of Permanent Incapacity

Government Code section 31720 provides that any County employee permanently incapacitated from the performance of duty shall be retired from duty, regardless of age, if her incapacity is the result of injury or disease arising out of and in the course of employment and if that employment contributes substantially to the incapacity. The California Court of Appeal has construed "permanently incapacitated" to mean "the substantial inability of the applicant to perform his or her usual duties." (Harmon v. Board of Retirement (1976) 62 Cal.App.3d 689, 694-696; Mansperger v. Public Employees Retirement System (1970) 6 Cal.App.3d 873, 876.)

As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of

⁷ Applicant tenders additional evidence in her reply brief filed November 17, 2017, but pursuant to Rule 15(f) of the Board's Policy for Administrative Hearings, the Hearing Officer is not allowed to consider such evidence absent a stipulation between the parties.

persuasion by a preponderance of the evidence. (McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Thus, it is Applicant's burden to prove that she is substantially incapacitated for her usual duties. (Rau v. Sacramento County Ret. Bd. (1966) 247 Cal.App.2d 234, 238.)

The Hearing Officer has reviewed the allegation of carpal tunnel syndrome and finds the evidence insufficient to establish that Applicant is preponderantly incapacitated. Dr. Woods diagnosed mild carpal tunnel syndrome at the end of 2006; Dr. Moheimani still assessed the condition as mild in 2011. Moreover, Dr. Moheimani's summary statement in 2013 that carpal tunnel syndrome affected Applicant's work abilities (AR 14) deserves minimal weight: "when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimately conclusion, that opinion has no evidentiary value." (Jennings v. Palomar Pomerado Health Systems, Inc., et al. (2003) 114 Cal.App.4th 1108, 1120.)

Furthermore, other than choosing to wear a wrist brace at work on a few occasions, Applicant has not had specific remediation for carpal tunnel syndrome. Dr. Chiu's 2016 findings that Applicant exhibited no clinical or objective signs of carpal tunnel syndrome, as opposed to mild bilateral disease, appear to be well taken.

On the other hand, Applicant's neck and back pain have been extensively treated over the years and are well documented. In the Hearing Officer's view, however, this case illustrates the difference between disability and incapacity under the County Employees Retirement Law. The preponderant evidence demonstrates that the condition of Applicant's back and neck was causing her impairment when she stopped working and applied for disability retirement; moreover, these conditions continue to disable her today. Applicant testified credibly that she has daily pain and still undergoes physical therapy. Yet medical disability is not the same as incapacity for a County position. Whether Applicant is permanently incapacitated from her usual and customary duties as a Deputy Sheriff II turns on the actual nature of her work.

C. Applicant's Job Duties

Deputy sheriffs are required to perform all classes of law enforcement work, including but not limited to guarding and supervising inmates in a correctional facility. (AR 35.) The physical attributes of a Deputy Sheriff II include the ability to lift up to 50 pounds, drag a 165-pound mannequin for 45 feet, stoop, bend, and sit and stand for prolonged periods. (AR 30.)

According to one supervisor, Applicant was unable to perform all classes of law

enforcement work due to her work restrictions. The supervisor observed, however, that up until her last day on the job, Applicant was performing her usual and customary job duties in limited functions not requiring direct inmate contact. (AR 35.) The same observation can be made about Applicant's employment activities dating back to the summer of 2007.

As a module deputy on light duty, Applicant's duties consisted largely of opening and closing cell doors by turning knobs repeatedly, and logging in the computer entries such as the transportation of inmates. In the housing guard station, still on light duty, Applicant would have occasion to slide open the window covers of cells belonging to inmates in solitary confinement and to make a record of her observations. And in the jail's main control area, where she worked during her last year or more, Applicant controlled and issued keys, kept a facility log in the computer, and opened and closed interior and exterior doors by turning knobs.

D. Relevance to Disability Retirement

In 2007, faced with several options, the Sheriff's Department chose to accommodate Applicant's permanent limitations on very heavy work, including lifting, which had been imposed by Dr. Woods. Subsequent restrictions imposed early in 2011 by Dr. Moheimani prohibited Applicant from doing overhead work or from pushing, pulling, or lifting more than 20 pounds. When those restrictions were deemed temporary, the Sheriff's Department continued to accommodate Applicant with light duty for the next two-plus years. Only after the restrictions were deemed permanent did the department decide that Applicant's condition could not be accommodated.

Until then, the Sheriff's Department employed Applicant in light duty for almost six years, from August 2007 to June 2013. Concededly, the position of Deputy Sheriff II is generally defined as having physical requirements, including lifting up to 50 pounds, dragging up to 165 pounds when necessary, stooping, bending, and sitting and standing for long periods. The difficulty with Applicant's contentions is that those were not her usual and customary duties.

As discussed above, Applicant's primary responsibilities were turning various knobs, opening and closing cell window covers, controlling and issuing keys, and entering data in a computer. Importantly, nothing in the record, Applicant's testimony included, suggests that she had any difficulty performing those tasks. When employees can perform modified duties in their assignments, they are not disabled, even if they cannot perform the full range of that assignment's duties. (Schrier v. San Mateo County Employees' Retirement Association (1983) 142 Cal.App.3d 957, 959.) Indeed, were the Sheriff's Department able to offer Applicant her former light duty position today, the weight of the evidence indicates that Applicant could fulfill it even under her

longstanding limitations.⁸

E. Service Connection

Having determined that Applicant was not incapacitated from what became her usual and customary duties, the Hearing Officer need not reach the issue of whether any disability is service-connected. Because further review is a possibility, however, it is noted that Applicant's condition did by and large arise out of and in the course of County employment. And there is a real and measurable, material and traceable connection between that employment and the trauma that ultimately caused her departure. (See Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 577-579; see also Hoffman v. Board of Retirement (1986) 42 Cal.3d 590, 593.)

Applicant testified that before her two inmate altercations, she had no problems with her back or wrists. (RT 34; AR 128.) The available medical records corroborate this claim. Applicant did injure her neck in a 2001 or 2002 motor vehicle collision, but she lost no time from work and made a full recovery after a few weeks. (AR 163.) The preponderance of the evidence establishes that Applicant's altercations in 2004 and 2006 were a substantial cause of her spine problems. In this regard, the Hearing Officer respectfully disagrees with Dr. Chiu, who relied on the normal aging process to explain Applicant's degenerative spinal changes. Applicant was only 47 years old when she was examined, seemingly quite young to incur the sort of spinal pain she was experiencing.

As explained above, however, the service-related nature of her difficulties does not render Applicant permanently incapacitated from her job's usual and customary duties, as is mandated by statutory and case law. Usual duties are those done commonly, frequently, and normally. (Hosford v. Board of Administration (1978) 76 Cal.App.3d 854, 860-861.) Here, Applicant's job responsibilities were not physically arduous. The Sheriff's Department maintained Applicant on light duty for so long, almost six years, that she was no longer required to engage in the more physical aspects of the Deputy Sheriff II position.

It is unclear to the Hearing Officer why Applicant's employment restrictions could repeatedly be accommodated when they were temporary, and yet not accommodated when they became permanent. The resulting termination seems unfair to Applicant. But as interpreted by the courts, the County Employees Retirement Law compels the conclusion that Applicant is not permanently incapacitated under these circumstances, and that her application was correctly denied.

⁸ In her disability retirement application, Applicant stated that she would not consider rehabilitation in other County employment. (AR 7.)

IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the foregoing review and analysis, the Hearing Officer finds as matters of fact:

A. Proposed Findings of Fact

1. Applicant became a Deputy Sheriff in July 1993, serving almost entirely in County jails during her career.

2. Applicant hurt her back in the course of an altercation with a female inmate in June 2004. She was treated by several medical professionals and did not return to work until September 2005.

3. In July 2006, Applicant again hurt her back during an altercation with a female inmate. Several medical professionals treated her before she resumed working in August 2007.

4. Because of the condition of her spine, Applicant received permanent restrictions prohibiting very heavy lifting and very heavy work.

5. The Sheriff's Department chose to accommodate Applicant's restrictions and, beginning in August 2007, reinstated her in a series of light-duty assignments.

6. For the next several years, Applicant's usual and customary duties consisted largely of recordkeeping on a computer or on paper, and opening and closing various doors by turning knobs.

7. Beginning in 2011, Applicant received a series of additional temporary restrictions that she not lift more than 20 pounds, avoid bending and stooping, and sit or stand as needed to alleviate pain.

8. When her restrictions became permanent, the Sheriff's Department terminated Applicant from her light-duty position on June 12, 2013.

9. Notwithstanding her work restrictions, Applicant remained able to execute the usual and customary duties that were assigned to her by meeting her assignment's physical demands.

B. Proposed Conclusions of Law

Based on the foregoing review and analysis, the Hearing Officer concludes as a matter of law:

1. Within the meaning of Government Code section 31720, Applicant was not orthopedically incapacitated from the performance of her usual and customary duties as a Deputy Sheriff II when she retired and when she submitted her disability retirement application.
2. Therefore, Applicant is not entitled to a disability retirement allowance.

V. RECOMMENDED DECISION

Accordingly, IT IS RECOMMENDED, pursuant to Government Code section 31720, that Applicant be denied service-connected disability retirement.

Dated: January 19, 2018.

Respectfully submitted,



ROBERT M. SNIDER
Hearing Officer

RESPONSE TO REQUEST FOR PROPOSAL

Respondent: Deborah Z. Wissley
Address: wissley@hotmail.com
Tel: (818) 642-2091

1. My current Curriculum Vitae is attached.
2. If selected to serve as a Hearing Officer, I will be independent of OCERS and not related in any way to OCERS' business operations. I am not currently in litigation with OCERS or the County of Orange.
3. I have not given a gift or political campaign contribution to any officer, Board member, or employee of OCERS within the past twenty-four (24) months.
4. I certify that I am an active member, in good standing, with the State Bar of California and I also certify that I have been practicing law as a licensed member of the State Bar of California for in excess of five (5) years. My California State Bar number is 102954.
5. I have had no legal malpractice case or claim against me in the last five (5) years. I have had no sanctions used by any court against me in the last five (5) years. I have had no discipline (either public or private) issued by the California Bar, or the Bar of any other jurisdiction, ever issued against me.
6. My experience as an adjudicator, is as follows:
Arbitrator, 1990 - 2000, Los Angeles Superior/Municipal Courts (personal injury cases);
Arbitrator, 1999 - present, Kaiser Foundation Health (medical malpractice cases);
Referee/Hearing Officer, 2004 - present, SBCERS (CERL cases);
Referee/Hearing Officer, 2006 - 2021, KCERA (CERL cases);
Referee/Hearing Officer, 2008 - present, SBCERA (CERL cases);
Referee/ Hearing Officer, 2008 - present, VCERA (CERL cases);
Referee/Hearing Officer, 2010 - present, LACERA (CERL cases);
Hearing Officer, 2011 - 2018, OCERS (CERL cases);
Examiner, 2013 - present, City of Los Angeles Civil Service Commission (Appeals);
Referee/Hearing Officer, 2017 - present, SLOCPT (CERL cases); and
City of Santa Barbara, 2019 (CALPERS Hearing)
7. I performed prior work for OCERS as a Hearing Officer from 2011 to 2018. The scope of the work included reviewing, analyzing and summarizing documentary evidence, conducting hearings, summarizing testimonial evidence, weighing the evidence, determining/recommending findings of fact and law in relation to the case's issues, and making a recommendation to the Board.
8. During the past eighteen years, as indicated in Item 6, above, I have performed work

as a Hearing Officer/Referee for eight different retirement systems or pension plans. They are: SBCERS, KCERA, SBCERA, VCERA, LACERA, OCERS, SLOCPT and City of Santa Barbara. The work included reviewing, analyzing and summarizing documentary evidence, conducting hearings, summarizing testimonial evidence, weighing the evidence, determining/recommending findings of fact and law in relation to the case's issues, and making a recommendation to the Board.

9. I have performed no work in the field of workers compensation law.

10. My work performed as a judge, judge pro tem, arbitrator, referee or neutral is: Arbitrator, 1990 - 2000, Los Angeles Superior/Municipal Courts (personal injury); Neutral Arbitrator, 1999 - present, Kaiser Foundation Health (medical malpractice); Referee/Hearing Officer, 2004 - present, SBCERS (CERL cases); Referee/Hearing Officer, 2006 - 2021, KCERA (CERL cases); Referee/Hearing Officer, 2008 - present, SBCERA (CERL cases); Referee/Hearing Officer, 2008 - present, VCERA (CERL cases); Referee/Hearing Officer, 2010 - present, LACERA (CERL cases); Hearing Officer, 2011 - 2018, OCERS (CERL cases); Examiner, 2013 - present, City of Los Angeles Civil Service Commission (Appeals); Referee/Hearing Officer, 2017 - present, SLOCPT (CERL cases); and City of Santa Barbara, 2019 (CALPERS Hearing).

The work included reviewing, analyzing and summarizing documentary evidence, conducting hearings, summarizing testimonial evidence, weighing the evidence, determining/recommending findings of fact and law in relation to the case's issues, and making a recommendation to the Board/Commission/Trust. Kaiser cases routinely involve hearing and resolving numerous motions, and my rulings and arbitration awards were/are binding.

11. I do not perform any work that would create a potential conflict of interest with the work to be performed for OCERS, and I do not represent OCERS' plan sponsors or retirement system members in actions against OCERS.

12. Redacted writing samples for review are attached.

13. Other information relevant to OCERS' selection process:

I served a seven year term as a Hearing Officer for OCERS between 2011 and 2018. CEO Steve Delaney extended my term to July 2019 to complete two pending cases. I then "sat out" more than two years, in compliance with OCERS' Hearing Officer Selection Policy.

With regard to references, I have no objection to OCERS contacting any of the staff or management of the organizations for whom I have served as an adjudicator.

Dated: October 4, 2022


DEBORAH Z. WISSLEY

CURRICULUM VITAE

Deborah Z. Wissley
wissley@hotmail.com
(818) 642-2091

Education:

J.D., U.C. California, Davis 1981
B.A., Phi Beta Kappa, Mills College, 1978

Court Admissions:

California, SBN 102954
Federal: Central, Southern, Eastern Dist. Courts; 9th Circ. Court of Appeals

Arbitrator/Hearing Officer/Referee/Examiner Positions:

Los Angeles Superior and Municipal Courts	1990 - 2000
Kaiser Foundation Health	1999 - present
Santa Barbara County Employees' Retirement System:	2004 - present
Kern County Employees' Retirement Association:	2006 - 2021
San Bernardino Employees' Retirement System:	2008 - present
Ventura County Employees' Retirement Association:	2008 - present
Los Angeles County Employees' Retirement Association:	2010 - present
Orange County Employees' Retirement System:	2011 - 2018
City of Los Angeles Civil Service Commission	2013 - present
San Luis Obispo County Pension Trust	2017 - present
City of Santa Barbara (CALPERS Hearing)	2019

Litigation/Appellate Experience:

Partner, Cooper, Phillips & Peterson, LLP, 2004 - 2007
Associate, Veatch, Carlson, Grogan & Nelson, 2001 - 2002.
Associate, Albright, Yee & Schmit, LLP, 2000 - 2001
Principal, Law Offices of Deborah Z. Wissley, 1989 - 2000.
Principal, Spray, Gould & Bowers, 1986-1989
Associate, Spray, Gould & Bowers, 1984-1986
Associate, Law Offices of John G. Kerr, 1983-1984
Associate, Helphand & Rich, 1982
Judicial Extern, California Court of Appeal, 2nd District, Div. 1, 1981

rev 10/2022

1 Deborah Z. Wissley, Hearing Officer

REDACTED WRITING SAMPLE

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----- COUNTY

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EMPLOYEES' RETIREMENT ASSOCIATION

9

10 In the Matter of the Application for)
Disability Retirement of:)

SUMMARY OF EVIDENCE,
SUGGESTED FINDINGS OF FACT AND
CONCLUSIONS OF LAW, AND
RECOMMENDATION

11)

12 JOHN DOE,)

Applicant.)

13 _____)

14 **INTRODUCTION**

15 The above captioned matter came on regularly for hearing before Deborah Z. Wissley, duly
16 appointed Hearing Officer, on December 2, 2011. The Applicant was self-represented and
17 Respondent, ----- County Employees' Retirement Association Board of Retirement was
18 represented by -----, County Counsel, by -----, Deputy.

19 Evidence was introduced, both oral and documentary, and the Hearing Officer, having been
20 duly advised in the matter, now submits her Summary of Evidence, Suggested Findings of Fact and
21 Conclusions of Law, and Recommendation.

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SUMMARY OF EVIDENCE¹

EXHIBITS SUBMITTED WITH THE NOTICE OF HEARING (Exhibits 1 - 5; 8 - 10; and 12)

Exhibit 1 06/24/2011 Health Officer’s Report

P. C., M.D.; record review. Concludes Applicant is permanently incapacitated to perform his work duties as a Road Maintenance Worker II on a non-service-connected basis. *Chest pain* occurred during *non-working hours*; the episode *after heavy labor was not cardiac in origin*; and Applicant has a number of *non-work related risk factors*, including strong family history, hypercholesterolemia and obesity. Bilateral *chest ache unrelated to activity continued after retirement*.

Exhibit 2 07/08/2010 Application

Filing date: 7/20/2010. DOB -1/3/59. Road Maintenance Worker II. Seeks service-connected disability retirement.

Employed 7/97 - 3/11/02. Non-safety worker. Requests earlier effective date - permanence date, per medical documentation. Last day worked, 5/20/10. Currently on regular sick leave. Heart condition/pacemaker. First experienced symptoms 3/4/07. Became disabled 5/20/10. *Feels heavy lifting and heat experienced on the job contributed to his condition*. Duties required heavy manual labor; *light duty unavailable*.

Exhibit 3 07/15/2010 Attending Physician’s Report

K.D., M.D. Permanently disabled. “Patient had *heart attack doing heavy labor*”; “*is service-connected*”. Atherosclerotic heart disease, brachycardia, sleep apnea. Continuously disabled last day worked to application. Cannot lift more than 20 lbs, must avoid extremes of weather and jarring movement.

Exhibit 4 08/10/2010 Department/Job Description

7/8/11 - Applicant felt a sharp back/chest pain while lifting a heavy machine at work. Department Statement of Facts: Claimed as non-service-connected. No accommodation available.

Frequent lifting of over 30 lbs., occasionally up to 75 lbs. Heavy manual labor. Per supervisor

¹ All exhibits were reviewed and considered; those pertinent to this recommendation have been summarized. Additionally, summarized exhibits may appear here in chronological, rather than numerical, order.

1 J. B., should be retired for medical disability.

2 **Exhibit 5 11/30/2010 Consultant Physician's Medical Report**

3 J.C. M.D. Examination and record review. Diagnoses: Coronary artery disease; Inferior
4 myocardial infarction 3/7/07; angioplasty and right coronary artery stent 3/7/07. Residual three-
5 vessel coronary artery disease (\leq 60% blockages). Pacemaker implanted 3/07.

6 Restricted from vigorous exertion such as carrying 20 lbs more than 5 minutes, lifting more
7 than 50 lbs overhead work, extreme heat (more than 90 degrees), continuous standing more than one
8 hour without a 10 minute break, and working near arc welding. *Cause unknown*. Risk factors listed.

9 **Exhibit 8 08/31/2006 - 07/07/2011 Treating Physician Medical Records**

10 8/31/06 - J. M. H., M.D. - Right shoulder tendinitis, hypercholesterolemia. Familial history
11 of heart disease and hypertension. No prior hospitalizations.

12 2/16/07 - Dr. H. - History entry: 3/4/07 acute inferior MI at heart hospital.

13 3/15/07 - K. D., M.D. (Cardiologist) - 3/4/07 MI, emergency angioplasty and stents right
14 coronary artery, brachycardia, at M. Hospital. Pacemaker implanted 3/7/07. Sleep apnea. TTD for
15 six weeks.

16 3/22/07 - Dr. H. - Stable. Should avoid heavy lifting for at least three months.

17 4/25/07 - Dr. D. - Diagnoses: atherosclerotic heart disease; previous stent and pacemaker.
18 May RTW 4/30, 2007 without any restriction.

19 9/14/07 - Dr. H. - Doing well. Now back to full time work, shoveling and all.

20 10/25/07 - Dr. D. - six month follow up. Walks 14 mi/wk; lost weight, feels much better.

21 4/10/2008 - Dr. D.- recent abdominal CT revealed evidence of abdominal and iliac
22 atherosclerosis. CT angiogram of coronaries advised to rule out further progression of coronary
23 artery disease.

24 1/28/09 - Dr. D. - divorcing; very stressed. Chest discomfort in December. Stable.

25 3/24/09 - Dr. H. - doing well, exercising daily; stable.

26 7/24/09 - Dr. D. - does construction work, but no longer does heavy work.

27 12/9/09 - Dr. D. - summer months had difficulty working - weak, dizzy, chest pain - cannot
28 operate chain saw nor wheel loaders due to pacemaker; cannot lift asphalt bags nor drain lids due

1 to chest pain/pacemaker strain; and unable to hand patch roads by himself, nor can he stand for long
2 periods of flagging, due to dizziness. Advised to apply for permanent medical disability, as he is
3 unable to do his job.

4 5/18/2010 - B. M. Hospital ER - Possible acute cardiac syndrome or pulled pectoral
5 muscle/costochondritis.

6 5/21/2010 - Dr. D. - reported he was lifting 350 lbs at work, later became diaphoretic
7 (sweaty) and had chest pain. ER visit to Memorial Hospital, released. Re-advised to apply for
8 disability. Testing re possible coronary angiography.

9 7/6/2010 - Dr. D. - Feeling ok, has not yet applied for disability, reports supervisor suggested
10 that he apply for work-related disability.

11 10/6/10 - Dr. D. - Physical Residual Functional Capacity Questionnaire. Can stand not more
12 than 30 minutes at one time; can stand/walk not more than two hours in an eight hour day; he cannot
13 lift 50 lbs.; can only rarely lift 20 lbs.; can occasionally lift 10 lbs.; and must avoid extreme
14 temperatures, dust, fumes and gases.

15 7/7/2011 - Dr. D. - Cardiac Residual Functional Capacity Questionnaire. Diagnosis:
16 Atherosclerosis. Class 2 & 4. Stable, no improvement expected. Same disabilities.

17 **Exhibit 9 03/04/2007 - 05/18/10 Diagnostic/Lab Reports**

18 3/4/07 - B. M. Hospital - Cardiology consultation, Dr. D. - 5:30 p.m. chest pain. Acute
19 inferior wall myocardial infarction. History of hyperlipidemia. Angiography. Angioplasty. Stent
20 implantation.

21 3/7/07 - B. M./Dr. D. - Sick sinus syndrome, post MI/multi-stent angioplasty, sleep apnea,
22 brachycardia. Pacemaker implanted.

23 4/2/2010 - J. C., M.D. - EKG - abnormal.

24 5/18/2010 - I. M. B., M.D. - Chest X-ray - near upper limits of normal borderline heart size.

25 11/29/2010 - Dr. C. - treadmill stress echo test - normal.

26 **Exhibit 10 06/20/1997 - 09/02/2010 Personnel Records**

27 6/26/97 - W. B. C., M.D. - passed pre-employment physical for Road Maintenance Worker

28 I.

- 1 7/7/97 - Hired as Extra Help, Road Maintenance Worker I.
- 2 10/31/97 - Extra Help Appointment terminated.
- 3 7/8/98 - Dr. C. - passed pre-employment physical for Road Maintenance Worker.
- 4 7/15/98 - Hired as Extra Help, Road Maintenance Worker I.
- 5 4/15/99 - Extra Help Appointment terminated.
- 6 2/14/2000 - Dr. C. - passed pre-employment physical for Road Maintenance Worker.
- 7 2/22/2000 - Hired as Extra Help, Road Maintenance Worker I.
- 8 10/23/2000 - Extra Help Appointment terminated.
- 9 1/22/2001 - Hired as Extra Help, Road Maintenance Worker II.
- 10 10/11/2001 - Extra Help Appointment terminated.
- 11 2/3/2002 - Dr. C. - passed pre-employment physical for Road maintenance Worker, heavy
- 12 work and lifting up to 99 lbs.
- 13 3/11/02 - Hired as Extra Help, Road Maintenance Worker II.
- 14 11/8/2002 - Extra Help Appointment terminated; probationary appointment to begin 11/11/02
- 15 with no break in service.
- 16 11/11/02 - Hired as Road Maintenance Worker II.
- 17 11/02 - 5/03 - EPRs- standard and above.
- 18 6/5/03 - 6/16/03 - TTD eye surgery.
- 19 6/18/2003 - became permanent employee.
- 20 5/03 - 5/05 - EPRs - standard and above.
- 21 4/19/2006 - 4/22/2006 - TTD, work injury.
- 22 3/26/2007 - Dr. D. - 6 - 8 week TTD slip, post surgery.
- 23 4/25/2007 - Dr. D. - RTW w/o restrictions slip.
- 24 5/06 - 5/09 - EPRs - standard and above.
- 25 5/21/2010 - Dr. D. - TTD for six months.
- 26 5/09 - 5/2010 - EPR - standard and above; supervisor concerned about pacemaker.
- 27 5/24/2010 - 11/29/2010 - Leave of absence; non-job related illness or disability.

28 **Exhibit 12 07/28/2010 Member Documents/Miscellaneous**

1 7/28/2010 - -CERA request to Risk Management for any worker’s comp file related to heart
2 condition.

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4 **EXHIBITS SUBMITTED BY APPLICANT:** None.

5
6 **EXHIBITS SUBMITTED BY RESPONDENT:** None

7
8 **SUMMARY OF TESTIMONY**

9
10 **Testimony of Applicant, John Doe**

11 [Applicant rested without presenting direct testimony.]

12 Examination by Respondent:

13 Applicant started working for the County in 1995 as a temporary laborer in the Roads
14 Department - he shoveled, patched, trimmed trees and flagged traffic.

15 Before working for County, he worked for the City for one year, but did so over the course
16 of two summers. He did the same type of work, and it was heavy work.

17 Applicant worked in heavy labor since age 18, beginning in 1978. He worked for lumber
18 yards for 14 years - drove forklifts, loaded, ran saws. He worked for a printing business, where he
19 unloaded cardboard for 2-1/2 years (R. Company) - to 1993. He then worked for City of ----- 1 - 2
20 years.

21 Applicant became a permanent County employee in 2002, in the Roads Department. He
22 drove trucks, plowed snow, shoveled, and performed various other physical work from 2002 to
23 2010.

24 In 2007, he had a heart attack. Before that, in the 1990's, he’d learned that he had high
25 cholesterol, but not high blood pressure. He wasn’t told before his heart attack that he had heart
26 disease.

27 His *heart attack took place on a Sunday*. The week before, his work might have been
28 flagging, driving a dump truck or unloading materials.

1 After his heart attack, he was off for six weeks. He was restricted from heavy lifting and
2 vibrating machinery, but his doctor did not give him a note. ***His department told him there was no***
3 ***light duty.***

4 He talked his doctor into letting him go back to work, but in 2010, he was back in the
5 hospital. He had been ***working on a Friday with a vibrator plate on asphalt, lifting its 350 lb.***
6 ***weight*** and placing it down repeatedly. A few days later, on a Monday, he reported to his supervisor
7 that he'd hurt his back. His supervisor told him he shouldn't have been lifting the vibrator plate. On
8 Wednesday, he began having chest pain and went to the hospital. He was ***diagnosed with a probable***
9 ***pulled muscle*** and also advised to follow up with his heart doctor. Two days later, he went to his
10 cardiologist, who told him that he shouldn't have lifted the vibrating plate. He was then taken off
11 work in May of 2010 because his doctor knew he'd ***continue to disregard his lifting restrictions,***
12 ***and could thereby dislodge his pacemaker.***

13 See Ex. 4A.1 – the handwriting is his niece's, who assisted him, but the signature is his. It
14 gives a *date of injury as 5/4/2010. This was when he did the heavy lifting & experienced the back*
15 *and chest pain.* He thought he went to the hospital the following week, not 5/18. He filled the form
16 out on 7/11/2010.

17 See Exhibit 8B.3 (ER report of B. Hospital). The date he presented, 5/18/10, per the report,
18 is now what he recalls as accurate.

19 See Exhibit 8B.1 (B. Hospital Report dictated 5/18/10). The history of: *two weeks ago*
20 *picking up a heavy machine* is accurate.

21 Applicant recalls that he went to this hospital the same morning that he experienced chest
22 pain (i.e., two weeks after picking up the vibrator plate).

23 His parents have both had heart disease, but at an older age.

24 Dr. D. is his only non - ER cardiologist. Dr. H. is his primary doctor.

25 Dr. D. advised him after his heart attack that he should watch what he eats, exercise and take
26 his medications - for the purpose of lowering his cholesterol and preventing further plaque build-up.
27 He also advised him not to work out in the heat and not to lift heavy weight. After his heart attack,
28 Applicant had ankle swelling and chills when he worked out in the heat.

1 Dr. H. gave him the same advice, and said it would be hard because of his hereditary
2 component, and that his hereditary component was a significant reason for being proactive in taking
3 care of his heart.

4 See Exhibit 5.3. Dr. D. restricted him from heavy labor.

5

6 **ISSUES FOR REVIEW**

7 1. Is the Applicant permanently incapacitated from the performance of his duties
8 as a Road Maintenance Worker II?

9 2. If the Applicant is permanently incapacitated from the performance of his duties,
10 is the incapacity a result of injury or disease which arose out of and in the course
11 of his employment, and if so, did the employment contribute substantially
12 to the incapacity?

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14

15 **DISCUSSION**

16 1. Is the Applicant permanently incapacitated from the performance of his duties as a Road
17 Maintenance Worker II?

18 The evidence supporting incapacity is undisputed. Drs. C. and D. explicitly agree on this
19 point (Exhibits 1 and 3). Dr. C. implicitly agrees through the recommendation of restrictions
20 incompatible with Applicant’s usual duties. (Exhibit 5)

21

22 2. If the Applicant is permanently incapacitated from the performance of his duties, is the incapacity
23 a result of injury or disease which arose out of and in the course of her employment, and if so, did
24 the employment contribute substantially to the incapacity?

25 *California Government Code Section 31720* provides in pertinent part:

26 “Any member permanently incapacitated for the performance of duty shall be retired
27 for disability regardless of age if, and only if:

28 (a) The member’s incapacity is a result of injury or disease arising out of and in the

1 course of the member’s employment, and such employment contributes substantially
2 to such incapacity...”

3 Here, Applicant was not a safety member and no presumption applies with respect to the
4 cause of his heart trouble. (Exhibits 2 and 10; *Government Code 31720.5.*)

5 Applicant has the burden of proving that his disabling injury or illness arose out of his
6 employment, and that the employment contributes substantially to the incapacity. (See, *Lindsay v.*
7 *County of San Diego Retirement Board* (1964) 231 Cal. App. 2d 156, 160.) “Contributes
8 substantially” refers to a causal contribution that is less than the principal cause, but exceeds the
9 infinitesimal and the inconsequential, i.e., it must exceed “any” causal factor, no matter how small
10 or remote; “[W]hile the causal connection between the [job]... and the disability may be a small part
11 of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence
12 of some connection between the disability and the job.” (*Bowen v. Board of Retirement* (1986) 42
13 Cal. 3d 572, 578; see also, *Lundak v. Board of Retirement* (1983) 142 Cal. App. 3d 1040, 1046 and
14 *Gatewood v. Board of Retirement* (1985) 175 Cal. App. 3d 311, 318.)

15 The occurrence of an injury during the course of an employment does not mean that the
16 injury necessarily arises out of or due to that employment. (See, *City & County of San Francisco v.*
17 *Ind. Acc. Comm.* () 117 Cal. App. 2d 455, 458, 256 P.2d 81.) The employment must be more than
18 a stage for the employee’s injury or a mere passive element upon which a non-industrial injury has
19 focused. (See, *Albertson’s, Inc. v. Worker’s Comp. Appeals Bd.* (1982) 131 Cal. App. 3d 308, 316,
20 90 Cal. Rptr. 424.)

21 Where a previously non-incapacitating condition is exacerbated by the employment and
22 *thereby becomes incapacitating, service connection exists: “If the resultant disability is ... due to*
23 *the industrial injury lighting up the previously dormant condition, then the employer is liable for the*
24 *disability ...”* (*Place v. Workmen’s Comp. App. Bd.* (1970) 3 Cal. 3d 372, 375 - 376, *fn 2*; See also,
25 *Smith v. Workmen’s Compensation App. Bd.* (1968) 71 Cal. 2d 588, 78 Cal. Rptr. 718.)

26 Normally, service connection must be established by a medical opinion from a physician.
27 (*City and County of San Francisco v. Industrial Acc. Comm.* (1953) 117 Cal. App. 2d 455, 256 P.2d

28

1 81.) The trier of fact must look to the underlying basis of a medical opinion to determine whether
2 or not that opinion constitutes substantial evidence. (*Hegglin v. WCAB* (1971) 4 Cal. 3d 162, 170.)
3 Medical opinion not supported by a reasoned explanation does not constitute substantial evidence.
4 (See, *Insurance Company of North America v. WCAB* (1981) 122 Cal. App. 3d 905 and *Pacific Gas*
5 *and Electric Co. V. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1135-11.) Further, opinion based
6 upon incorrect medical data is unreliable and therefore is not “substantial evidence”. (See, *Rosas v.*
7 *WCAB* (1993) 16 Cal. App. 4th 1692, 1701; *Hegglin v. WCAB* (1971) 4 Cal. 3d 162, 169; *Zemke v.*
8 *WCAB* (1968) 68 Cal. 2d 794, 798; and *PG&E v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1135.)
9 36; and *Turner v. Workman’s Comp. Appeals Bd.* (1974) 42 Cal. App. 3d 1036, 1044.)

10 Here, Applicant had a known history of hypercholesterolemia. (Exhibit 8; R.T., page 12, lines
11 12 - 21.) In March of 2007, he had a heart attack on a non-work day (R.T., page 14, lines 1 - 3.) that
12 resulted in an angioplasty and the implantation of a stent and a pacemaker. (Exhibit 8.) After his
13 heart attack, Applicant was off for six weeks and, per the documentary evidence, Applicant was then
14 returned to work with no restrictions. (Exhibits 8 and 10.) However, per Applicant’s testimony,
15 Applicant’s physician restricted him from heavy lifting and working with vibrating machinery, but
16 his doctor did not give him a note. (R.T., page 15, lines 18 - 23; page 16, lines 7 - 15.)

17 Applicant was diagnosed with atherosclerotic heart disease (Exhibit 8 [Dr. D.] and Exhibit
18 5 [Dr. C.], as well as sleep apnea and, in 2008, atherosclerotic abdominal and iliac artery disease
19 (Exhibit 8). In April of 2008, Dr. D. recommended a CT angiogram of the coronary arteries to rule
20 out further progression of coronary artery disease. (Exhibit 8.) The record is silent as to any
21 angiogram having been conducted.

22 In December of 2009, Dr. D. concluded that Applicant was unable to perform his job;
23 Applicant had reported that during the summer months he’d had difficulty working and had
24 experienced weakness, dizziness and chest pain. Dr. D. concluded that Applicant could not operate
25 a chain saw nor wheel loaders due to his pacemaker; could not lift asphalt bags nor drain lids due
26 to chest pain/pacemaker strain; was unable to hand patch roads by himself; and could not stand for
27 long periods of flagging, due to dizziness. Dr. D. advised Applicant to apply for permanent medical
28 disability, as he was unable to do his job. (Exhibit 8.)

1 However, Applicant kept working. On a Friday, in early May of 2010, and while taking part
2 in lifting a 350 lb. vibrator plate at work, Applicant felt a “back pressure”. (Exhibit 8B.1; R.T., page
3 17, lines 3 - 18.) On Monday, he told his supervisor that he’d hurt his back. (R.T., page 17, lines 19
4 - 25.) Approximately two weeks after the incident, he awoke with chest pain and went to B. M.
5 Hospital’s E.R. (Exhibit 8B.1; R.T., page 23, line 1 - page 24, line 25.) There, he was initially
6 diagnosed with either a pulled pectoral muscle or an acute cardiac incident. (Exhibit 8.) However,
7 the discharge diagnosis was a probable pulled muscle. (R.T., page 20, lines 7 - 13.)

8 Applicant stopped working as of May 20, 2010. (R.T., page 22, lines 12 - 21.) From May 24,
9 2010 to November 29, 2010, Applicant took a leave of absence for non-job related illness or
10 disability. (Exhibit 10.) Applicant’s physician removed him from work for fear that he’d continue
11 to disregard his lifting restriction and that he’d thereby dislodge his pacemaker. (R.T., page 20, line
12 20 - page 21, line 16.)

13 Per Dr. C., a Board cardiology consultant, the “cause” of Applicant’s coronary artery disease
14 is unknown. (Exhibit 5.) He simply notes risk factors: cigarette smoking; hypertension; high
15 cholesterol; diabetes; advancing age; obesity; physical inactivity; family history; ethnic
16 characteristics; and stress.

17 Per Dr. C., a Board consultant, Applicant’s incapacity is non-service connected, based upon:
18 Applicant’s 2007 heart attack having occurred at the end of a non-working Sunday; his May 2010
19 injury having been non-cardiac in origin; his non-work related risk factors, including a strong family
20 history of heart disease, hypercholesterolemia; and obesity; and Applicant’s post retirement bilateral
21 chest ache unrelated to activity.

22 Per Applicant’s treating cardiologist, Dr. D., Applicant’s disability is service connected
23 because “ [he] had heart attack doing heavy labour.” (Exhibit 3.5, paragraph 1.) With respect to a
24 description of any and all contributing factors, Dr. D. stated, “None.” (Ibid.)

25 Dr. D.’s given basis for his opinion of service connection is factually incorrect; the evidence
26 does not support there having been a “heart attack doing heavy labour”. Rather, the evidence
27 indicates a 2007 heart attack while off work and a 2010 probable pectoral muscle pull. Nor does the
28 record contain any other reasoning or explanation by Dr. D. in support of his opinion of service-

1 connection. As such, the law requires that Dr. D.'s opinion be regarded as not constituting substantial
2 evidence.

3 The record contains no other medical opinion on the issue of service-connection.

4 In summary, Applicant failed to produce evidence and failed to show by a preponderance of
5 the evidence that his incapacity is the result of injury or disease which arose out of and in the course
6 of his employment, and that his employment contributed substantially to his incapacity.

7 The weight of the substantial evidence indicates that Applicant's atherosclerosis caused his
8 2007 heart attack, which in turn necessitated his pacemaker implantation, which in turn resulted in
9 an ignored advisement against heavy lifting (so as to preclude pacemaker dislodgement), and that
10 this was the reason why Applicant ultimately stopped working. As to whether Applicant's
11 employment contributed to his development of atherosclerosis or whether it accelerated or
12 aggravated it, no substantial evidence was produced.

13

14 **FINDINGS OF FACT**

- 15 1. The Applicant began his employment with the County as a temp in 1995, and became a permanent
- 16 employee in 2002.
- 17 2. The Applicant's last day of work with the County was May 20, 2010, at which time the Applicant
- 18 was employed as a Road Maintenance Worker II.
- 19 3. The Applicant is permanently incapacitated from the performance of his duties as a Road
- 20 Maintenance Worker II.
- 21 4. Applicant's incapacity did not arise out of and was not in the course of his employment with the
- 22 County, and such employment did not contribute substantially to the incapacity.

23

24 **CONCLUSION OF LAW**

- 25 1. The Applicant is not entitled to a service-connected disability retirement.
- 26 2. The Applicant is entitled to a non-service-connected disability retirement.

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RECOMMENDATION

- 1. Since the Applicant is not entitled to a service-connected disability retirement, I recommend that it be denied.
- 2. Since the Applicant is entitled to a non-service-connected disability retirement, I recommend that it be granted.

Respectfully submitted,

DATED: February 6, 2012

DEBORAH Z. WISSLEY, Hearing Officer

1 Deborah Z. Wissley, Hearing Officer

REDACTED WRITING SAMPLE

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----- COUNTY

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EMPLOYEES' RETIREMENT ASSOCIATION

9

10 In the Matter of the Application for)
Disability Retirement of:)

SUMMARY OF EVIDENCE,
SUGGESTED FINDINGS OF FACT AND
CONCLUSIONS OF LAW, AND
RECOMMENDATION

11)

12)

Linda DOE,

13)

Applicant.)

14

INTRODUCTION

15

The above captioned matter came on regularly for hearing before Deborah Z. Wissley, duly appointed Hearing Officer, on December 1, 2011. The Applicant was self-represented and Respondent, ----- County Employees' Retirement Association Board of Retirement was represented by -----, County Counsel, by -----, Deputy.

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Evidence was introduced, both oral and documentary, and the Hearing Officer, having been duly advised in the matter, now submits her Summary of Evidence, Suggested Findings of Fact and Conclusions of Law, and Recommendation.

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SUMMARY OF EVIDENCE¹

EXHIBITS SUBMITTED WITH THE NOTICE OF HEARING (Exhibits 1 - 4 and 8 - 12)

Exhibit 1 12/27/2010 Report of P. C., M.D. (Deputy Public Health Officer, Public Health Services Dept., County of ----)

Medical record review. Notes neck pain dating back to 2001 and possibly earlier; the pre-surgery restrictions of Dr. M. and that Applicant was improving post surgery; the temporarily totally disabled (TTD) conclusions of both Drs. D. and G. The fact that Applicant was to return to work post surgery, but did not due to Dr. K.'s office's assessment of non-orthopedic conditions - and that Dr. K. then wrote an attending physician's report opining permanent incapacity due, in part, to neck and shoulder pain exacerbated by work.

Dr. C. therefore concluded that Applicant is not permanently incapacitated.

Exhibit 2 01/12/2010 Application for Disability Retirement

DOB 01/29/1957. Seeks service-connected disability retirement. Associate Dietary Aide in Support Services Department since July 2008. Service retirement 1/12/2010. Not requesting effective date earlier than application date. Last day worked: 1/14/2009.

Injury attributed to repetitive trauma (bending, squatting, lifting and prolonged standing or walking) at Medical Center kitchen: severe neck and bilateral shoulder pain. Prior work injury to knees. Accommodation refused by J. B./K. D.

Exhibit 3 12/31/2009 Attending Physician's Report

C. K., M.D. Diagnoses: severe cervicalgia; moderate shortness of breath; severe fatigue; severe lower leg pain and weakness; and history of atherosclerosis, DVT and TIAs. *Permanent. Restrictions not accommodated and probably would not have been effective.* Work exacerbates her neck pain, leg pain, shortness of breath and fatigue.

Exhibit 4 01/28/2010 Department/Job Description

Support Services Aide - Dietary. Working on patient tray line; office work; visiting patient rooms for menu preferences. Applicant complained about working the tray line and stated that it

¹ All admitted exhibits were reviewed and considered, and those pertinent to this recommendation have been summarized. Additionally, summarized exhibits may appear here in chronological, rather than numerical, order.

1 exacerbated a pre-existing neck condition. Essential duties include **frequent lifting and carrying**
2 **of 1 - 15 lbs; frequent bending**, kneeling, **squatting**, stooping, twisting, and **reaching at and above**
3 **shoulder level**; frequent moving of machinery and meal carts; and four hours per eight of standing
4 and walking. Accommodation not possible.

5 **Exhibit 8 03/03/2006 - 11/05/2010 Treating Physician Medical Records**

6 03/03/2006 - [page 8A.41] - V. A., PA-C for C. K., M.D. - Diagnoses: Pain Neck/Cervical;
7 and Meniere's Syndrome. Ordered cervical x-rays. 3/10/06 - Right sided radiculitis, neck pain.

8 12/08/06 - L.M., M.D. Neck pain and stiffness; worried may be related to MVA two years
9 prior. Diagnosis: Neck sprain.

10 04/09/2007 - L. M., M.D. - right sided radiculopathy; degenerative disc disease.

11 08/10/2007 - Dr. M. - left hand ganglion of tendon and carpal tunnel.

12 03/28/2008 - W. M., M.D. - symptoms consistent with chronic neck pain and degenerated
13 disk at C5-6.

14 05/29/2008 - K. C., FNP-C - polydipsia; chest pressure; anxiety disorder.

15 7/10/2008 - W. M., M.D. - Cervicalgia, degenerative disk changes. TTD through 7/13/08.
16 Plan: cervical collar and physical therapy. RTW with restrictions of no lifting over 25 lbs, no
17 bending, no squatting and no kitchen work. Temporarily accommodated in the Communications
18 Office.

19 9/11/2008 - Dr. M. - C6 - C7 radiculopathy due to narrowing. Restrictions renewed.

20 12/4/2008 - six months light duty; Flexeril and Norco prescriptions.

21 4/10/2009 - County Medical Center / R. A., M.D./Dr. M.; admitted with C6 and C7
22 radiculopathy, with large anterior osteophytes at both levels and secondary swallowing disorder.
23 Underwent anterior discectomy and fusion at C5-6 and C6 -7; takedown of severe large anterior
24 osteophytes at both levels; and structural allograft at both levels.

25 4/13/2009 - L. M., M.D. - Diagnoses: hypertension; degenerative disc disease; and
26 fibromyalgia.

27 4/25/2009 - County Medical Center ER - deep vein thrombosis, right leg.

28 4/28/2009 - Dr. M. - TTD through 7/12/09.

1 4/30/2009 - Dr. M. - Assurant disability benefits questionnaire. C6 & C7 radiculopathies
2 since 11/2005. First treated 11/15/07.

3 5/6/2009 - County Medical Center - DVT (deep vein thrombosis) and pneumonia.

4 5/21/2009 - Dr. M. - post-surgery evaluation; good improvement with normalization of her
5 hand numbness/tingling; neck is nontender. Shoulder trigger points; left shoulder suggestive of
6 deltoid bursitis.

7 6/18/2009 - County Medical Center - new complaint of onset of shoulder pain over weekend;
8 possible deltoid bursitis.

9 6/27/09 - K. C, FNP-C - seen for complaints of blood clot in leg, inability to raise arm.
10 Assessment: pain shoulder joint; DVT; ***Pain neck/cervical***; and HTN. "***[H]er neck pain is resolved***
11 ***from surgery.***" (Page 8.83.)

12 8/10/09 - County Medical Center - Sleep study; diagnosed with apnea. Reported shortness
13 of breath, both at rest and on exertion. (Exhibit 8.66.)

14 8/21/09 - Dr. K's FNP-C, K. C. - Patient is supposed to be going back to work, but just
15 *doesn't feel she can go do it due to respiratory problems with severe shortness of breath, ... blood*
16 *clot to leg ... pneumonia. Still having the left shoulder pain.* Assessment: HTN; DVT; hyperglycemia;
17 hypothyroidism; and pain shoulder joint. (Exhibit 8.69.)

18 10/12/2009 - Dr. K's FNP-C, K. C. - Breaking out into cold sweats. Exhausted. Needs to go
19 back to work or will lose job. Assessment: Fatigue/malaise; hypertension; deep vein thrombosis;
20 diabetes mellitus, type II; and anemia. ***On examination, neck supple, normal range of motion of***
21 ***extremities. RTW 10/22/09, restricted to four hours per day and no lifting. Diagnoses:***
22 ***fatigue/malaise; hypertension; DVT; diabetes; and anemia.***

23 2009 - K. C., FNP-C; same diagnoses, less anemia, plus hyperlipidemia and hypothyroidism.

24 12/31/2009 - K. C., FNP-C- seen for a cold. Findings include some palpable tenderness of
25 the posterior neck and loss of range of motion, degree unspecified. Pharyngitis is the primary
26 diagnosis, and fibromyalgia and degenerative disc disease are listed as the fifth and sixth diagnoses.
27 (Page 8.38)

28 01/07/2010 - C. D., M.D. - primary treating physician's initial evaluation report. Neck and

1 left shoulder exam. History of *2006 MVA neck injury with no full recovery*. Diagnoses: cervical
2 discopathy with disc displacement, status post fusion (x-ray); cervical radiculopathy; and left
3 shoulder impingement syndrome. *History of cumulative trauma* while employed at County Medical
4 Center; *no apportionment to any previous accidents or injuries*. TTD.

5 03/10/2010 - Dr. D. - *Left shoulder MRI: Mild degenerative changes* and AC joint with
6 inferiorly directed osteophytes both from the joint and the inferior acromion process, which findings
7 *could contribute to impingement*. Cervical MRI: status post anterior fusion at C5 - C7; *mild to*
8 *moderate cervical spondylosis* significant at C5-C6 with uncovertebral spurs measuring 5 mm to the
9 right causing mild foraminal stenosis at C5-C6. Diagnoses include:

10 Cervical discopathy with disc displacement status post cervical fusion; and
11 Left shoulder impingement syndrome.

12 04/13/2010 - [page 8A.17] Doctor's first report of occupational injury or illness, report to
13 follow; signature illegible.

14 04/14/2010 - Dr. D. - same diagnoses; TTD; Plan: cervical CT and physical therapy.

15 09/30/2010 - M. G., M.D. - *chronic cervical spine strain; cervical spondylosis; status post*
16 *anterior cervical fusion, C5 - 7; bilateral cervical radiculopathy, nonverified; and probable bilateral*
17 *shoulder impingement. TTD. Retired. 100% caused by continuing trauma at ----- County absent*
18 *information to the contrary. (No MVA history noted; prior nonindustrial accidents or injuries*
19 *denied; page 8B.14.)*

20 10/20/2010 - Dr. G. - Plan: acupuncture, Motrin, Norco. TTD *if not retired*.

21 **Exhibit 9 03/19/1997 - 09/10/2010 Diagnostic/Lab Reports**

22 11/30/2001- R. T. P., M.D. - Cervical x-ray: anterior osteophytes and disc space narrowing,
23 particularly at C5-C6.

24 12/26/2004 - D. M., M.D. - Cervical and lumbar x-rays - C3 - T1 disc space narrowing,
25 degenerative spondylitic changes, most prominent at C5-C6; L3-4 mild narrowing, mild degenerative
26 spondylitic changes, most prominent at L3-4. Chronic changes, no acute findings.

27 03/03/2006 - T. D., M.D. - cervical x-ray: spondylosis; disc narrowing; foraminal narrowing;
28 and arthritic change.

1 01/17/2007 - D. F., M.D. - cervical MRI - degenerative spondylosis , most prominent C4 -
2 C7, particularly C5-C6 with mild canal stenosis and high grade bilateral foraminal stenosis.
3 Foraminal changes secondary to degenerative disease of the uncovertebral joints. Moderate left sided
4 foraminal stenosis at C6-C7 secondary to degenerative disease of the uncovertebral joint at this level.
5 No apparent disc material extrusion.

6 10/10/2007 - Dr. F. - left shoulder x-ray (?) - mild changes of osteoarthritis of the AC joint.
7 [Pages 9.130-131 and 9.196 - 9.230 - do not pertain to Applicant; withdrawn by Respondent.]

8 04/06/2009 - J. J., M.D. - Chest x-ray - degenerative changes of the thoracic spine with mild
9 compression deformity of the mid thoracic vertebrae.

10 04/14/2009 - E. R., D.O. - cervical MRI: T3-4 2 mm bulge; T4 facet joint spur. Cervical
11 fusion hardware. No evidence of cord impingement nor intra spinal hematoma; normal cord; post-op
12 appearance, lower cervical spine.

13 07/03/2009 -D. Y., M.D. - Left shoulder MRI - mild AC joint hypertrophy with moderate
14 impression on the underlying supraspinous tendon and muscle.

15 06/10/2008 - A. C., M.D. - Electrodiagnostic Consultation Report - normal EMG and
16 *abnormal NCS.*

17 **Exhibit 10 02/04/94 - 01/13/2010 Personnel Records**

18 Hired 03/31/94, Extra Help, Food Service Worker I. Resigned 01/04/95, end of extra help
19 employment period. EPR standard 04/94 - 01/04/95.

20 Hired 10/27/97, Dietary Assistant at County Medical Center - Nutritional Services, part time.
21 Passed pre-employment physical and deemed fit to work without restrictions.

22 EPR 10/97 - 1/98: improvement needed in 3 of 27 categories; above standard in 4.

23 EPR 10/97 - 10/98: improvement needed in 4 categories; above standard in 2.

24 6/24/99 - 7/22/99 Leave of absence due to stroke.

25 10/26/99 - 12/7/99 Leave of absence due to non-work related gynecological surgery.

26 RTW 1/3/2000, no limitations.

27 EPR 2/99 - 2/00, improvement needed in 2 categories, above standard in 1.

28 EPR 2/00 - 2/01, improvement needed in 3 categories, above standard in 3.

1 12/13/01 - 1/4/02 Leave of absence due to surgery.
2 EPR 2/01 - 2/02, improvement needed in 5 categories, remainder standard.
3 6/19/02 - 6/23/02 Leave of absence - illness.
4 EPR 2/02 - 2/03, above standard in 5 categories, remainder standard.
5 EPR 2/03 - 2/04 improvement needed in 1 category, above standard in 1, remainder standard.
6 EPR 2/04 - 2/05 above standard in 1 category, standard in remainder.
7 EPR 2/05 - 2/06 improvement needed in 1 category, above standard in 4.
8 EPR 2/07 - 2/08 above standard in 4 categories, remainder standard.
9 Dr. M.; TTD 7/10/08 -7/14/08. ***RTW 7/14/08 with no heavy lifting, bending, kitchen work,***
10 ***squatting, lifting or carrying over 25 lbs. Re-issued 9/11/08 - 1/8/09; TTD 1/15/09 - 4/25/09 (leave***
11 ***of absence for “non-job related illness or disability”; surgery).***
12 Dr. M.; TTD 4/28/09 - 7/12/09; recovering from cervical surgery.
13 K. C., FNP-C; TTD 7/10 - 8/14/09.
14 Leave of absence - *non-work related* 7/13 - 8/14/09. Extended through 8/21/09; 9/20/09;
15 9/29/09; 10/20/09; 11/9/09; 12/6/09. On paid medical leave through 2/28/09; on unpaid leave
16 thereafter. (Pages 10.34 - 10.35, et seq.)
17 12/2/09 Supervisor’s Investigation Report. No longer works here. Details unknown.
18 1/13/2010 - Retired 1/12/2010. Last day at County Medical Center 1/11/2010.

19 **Exhibit 11 12/22/2009 Investigator’s Report**

20 12/22/09 - Transcribed recorded interview of C. L.; Registered diet tech at County Medical
21 Center since 10/92. Worked with Applicant in “Diet Office” approximately ten years. One to two
22 years ago, diet aides took over loading food carts. Previously food service workers had done it for
23 about five years. Applicant complained about her neck and shoulder, saw Drs. M. and K.; did not
24 relate it to any pre-existing injury, nor mention a prior MVA. *Bending and loading trays seemed to*
25 *exacerbate the pain of several workers that had neck problems.*

26 12/22/09 - Transcribed recorded interview of T. J.; Contract office manager at County
27 Medical Center since 2/2000. Temporary file clerk, 12/99. In same office as Applicant three weeks
28 and thereafter only saw her in passing. Remembers Applicant complained about her neck and

1 stiffness, and recalls her stretching; possibly due to a car accident.

2 12/22/09 - Transcribed recorded interview of W. P.; Contract clinical nutrition manager at
3 County Medical Center since 5/2004. Dietetic intern 2002. Per diem dietician 2003. Frequent
4 interaction with Applicant starting in 2004. Learned from D. D. and C. L. that Applicant had had a
5 car accident, TIAs and neck/back pain prior to P.'s arrival. Circa Summer 2008, she approached
6 Applicant about working on the tray line and learned about her neck issues. Applicant declined after
7 1 - 2 times. No recall as to reported cause of Applicant's neck pain, but Applicant felt tray line made
8 it worse. Believes heard Applicant's neck was injured ten years prior, and also that she'd been out
9 dancing even after complaining of neck pain and refusing to work the tray line.

10 **Exhibit 12 07/29/1999 Member Documents/Miscellaneous**

11 Claim form for disability benefits for 5/14/99 - 7/27/99. Transient ischemic attack,
12 hypertension. Restrictions ended 7/27/99. P. C. N., M.D.

13 **EXHIBITS SUBMITTED BY APPLICANT**

14 None.

15 **EXHIBITS SUBMITTED BY RESPONDENT**

16 None.

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18 **SUMMARY OF TESTIMONY**

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20 **Testimony of Applicant, Linda Doe**

21 While she was off work, her job description was changed. She'd been working in the Diet
22 Office for ten years, but had to go back into the cafeteria, where the *work was heavier*. Her doctor
23 said that the heavy work *aggravated the pain in her neck*. She went off work, and was scheduled for
24 surgery that was then postponed due to hospital staffing. She *then had surgery in 4/09*.

25 After her surgery, she felt that she experienced the loss of her job.

26 She disputes the witness statement of C. L. as false. L. has no accurate knowledge regarding
27 Applicant's living situation. Nor has Applicant gone to casinos for years. Applicant feels that Ms.
28 L.'s supposed knowledge of Applicant's medical history is derived from unreliable, second-hand

1 sources.

2 [Cross-examination]:

3 Applicant started working for the County at County Medical Center in 1994. She did more
4 than one stint as Extra Help, and then was eventually hired as a permanent employee.

5 Applicant has 10.7392 years of service.

6 See Exhibit 10.147. October 1997 was when she was permanently hired. She was hired in
7 the kitchen for part time work (20-21 hours per week), but sometimes worked up to 40 hours, and
8 she would help out in the office when she had periods of free time. She eventually transitioned into
9 the Diet Office, but can't remember when; it may have been 2001, but she thinks it was earlier.

10 On 1/12/2010, she took a service retirement.

11 1/14/09 was her last day of work. She was full time.

12 Prior to 1994, she had worked for the school district (F.). She made salads and bread, washed
13 dishes, and worked on the food line. She worked solely at that job two hours per day for ten years.
14 Before that, she worked for V. C. Home, in the laundry facility, for two years.

15 As Extra Help in 1994, she washed dishes and helped out wherever she could.

16 See Exhibit 10.93 (attendance calendar); Applicant does not recall it. In 1999, L. J. was her
17 name, but she does not believe the handwriting is hers. However, she was off work in June and July
18 of 1999, as the calendar indicates, due to a stroke. She was also off work in November and
19 December of 1999, as the calendar indicates, due to gynecological surgery. Applicant agrees that the
20 calendar is probably accurate regarding the hours that she worked, and that she did not work full time
21 in 1999.

22 From 1997 to the point that she transferred to the Office, she made formulas and salads, and
23 worked the tray line. Working the tray line meant that she filled trays from refrigerators behind the
24 line for one hour or sometimes more, two times per day. When she filled in at the Office, she'd do
25 computer entry concerning patient foods/snacks.

26 She was able to get a position in the Diet Office because she'd obtained the requisite
27 experience by filling in. Her duties changed; she wore a lab coat, interviewed patients regarding food
28 preferences, sometimes opened the office, reviewed faxes/ diet messages, created a card or pulled

1 patient cards, input the data into the computer, and answered phones. The work was clerical, but she
2 also went to patient floors. Sometimes, she also prepared the menus. Her shifts were 5:00 A.M. to
3 1:30 pm (opening shift) or the closing shift.

4 In *July of 2008*, she had to go *back into kitchen to work the tray line* due to staff cutbacks.
5 She did it a few times only, because *it aggravated the pain in her neck and the numbness in her*
6 *hands and arms*.

7 Working the tray line meant getting trays; reading menus to the cook; getting dishes from the
8 cook; turning and placing hot food onto trays; obtaining cold foods from the fridge if they were not
9 already on the trays; and placing trays on a 4' high cart. She would have to *prepare about 100 trays*
10 *for hot items and place* them in a cart. The carts held 20 and more trays. She loaded 5 - 6 carts.
11 When done, she'd return to the office and do the same clerical office duties as before.

12 She only worked the tray line three times, for one hour each time, during the breakfast meal.
13 She completed the tray line on each of the three occasions. Her *doctor told her she shouldn't have*
14 *done it*, because it *could* hurt her. *Each tray weighed about up to 5 lbs*.

15 She was upset about moving from clerical duties to manual labor - because it's dirty, hard
16 work that *hurt her neck*.

17 *Dr. M.* took her off work for a few days, then returned her to *light duty* (still in 7/08). The
18 *restrictions were still in effect 7/08 and basically restricted her from working in the kitchen - all the*
19 *way up to her surgery*.

20 After her surgery, she returned to work, on light duty, in Operator Booth. She stayed there
21 until January of 2009. She answered phone calls and dispatched wheelchairs, gurneys, and lab
22 specimen pick ups.

23 She was *taken off work by Dr. M. in January of 2009 for surgery* that was then *postponed*
24 *due to Dr. M.'s schedule. In April of 2009, she then had the rescheduled surgery*.

25 See Exhibits 10.71 and 10.73. Applicant was off work for 2001 orthopedic surgery, due to
26 a previous slip and fall that injured her knees. The surgery was exploratory; she believes nothing was
27 found.

28 She was in a motor vehicle accident, but cannot recall the year. See Exhibit 8.26 (Dr. D.'s

1 *1/2010 note indicating a motor vehicle accident four years prior). She doesn't know if it is accurate.*

2 During her motor vehicle accident, her vehicle was rear ended, and she *injured her neck*. She
3 followed up with Dr. K., her primary doctor, who did not treat her. She was already working in the
4 Diet Office. The *MVA worsened her pre-existing arthritis*. Dr. L. treated her before Dr. M. He
5 *recommended surgery, but she declined*. However, she *couldn't continue to decline* it after working
6 *the tray line exacerbated her discomfort*.

7 Applicant started having neck pain a long time ago. See Exhibit 3.2 (Dr. K.'s indication that
8 Applicant *started having neck pain in 2001*). She agrees this is accurate. She just recalls that she had
9 neck pain when working in Diet Office, but then it *became horrific when required to work in kitchen*
10 *and do heavy, manual work*. The HR assessment was only for a few trays - but doing it for an *hour,*
11 *day in and day out, is like doing heavy exercise*.

12 Dr. M. took her off the kitchen duties right away, without her asking him to.

13 See Exhibit 9.296 (*cervical and knee x-ray report of 11/30/2001 taken due to trauma*).
14 Applicant doesn't recall why she had those taken. It could have been when she slipped and fell. She
15 cannot recall if she had such x-rays after the motor vehicle accident.

16 Applicant learned that she had arthritis in her neck, possibly from Dr. M. or her primary, but
17 she cannot recall the year.

18 See Exhibit 8A.37. (*12/8/06 K. note that references a motor vehicle accident 2 yrs prior*). It
19 may possibly be accurate. She did have residual neck problems from her motor vehicle accident. It
20 just got worse as time went on. She was told she had arthritis. She *also had numbness* that her
21 *doctors related to a mild stroke at age forty. Her orthopedic doctors have not told her that her*
22 *hand/arm numbness is related to her neck*.

23 Dr. K. returned her to work restricted to 4 hrs/day because she wanted to go back to work,
24 but HR (J. B.) said that they could not extend her time off, and that she'd have to quit her job - i.e.,
25 come back or quit. They were *not willing to accommodate her restriction that she not work kitchen*
26 *duty*. Instead, they put A. in her position, on light duty.

27 She was able to do her duties in the Diet Office. The *only thing she could not do was work*
28 *the tray line*.

1 After her neck surgery, she felt better, but then her pain started up again. Dr. D. told her that
2 she'd have to have a repeat surgery because screws hadn't been correctly placed by Dr. M. She does
3 not want to have further surgery because she had several complications from the first surgery, and
4 recuperation was very painful and uncomfortable.

5 *Circa 10/2009, Dr. M. thought she should return to work, but it could have been when she*
6 *was having complications, including a leg clot. She was also having shortness of breath and seeing*
7 *doctors weekly.*

8 She went back to work when able, but the *County, through J. B. of HR, wouldn't let her*
9 *return on a 4 hour per day schedule, as ordered by her doctor.* She was told, "You're going to have
10 to quit."

11 *Either Dr. K. or Dr. M. had written the 4 hour restriction.*

12 She did not file a worker's comp claim when her neck was exacerbated by being returned to
13 the tray line.

14 She changed to Dr. D., a worker's comp doctor - and filed a claim in 2010, when she learned
15 that she wouldn't be allowed to return to work on a 4 hour per day restriction. *Kitchen work, which*
16 *was strenuous, had made her pre-existing pain unbearable. Dr. M. knew those duties only lasted 1*
17 *hour per day.*

18 Wheeled carts were very heavy and had to be pushed a few feet, out of the way.

19 She was referred to Dr. G. through worker's comp. She has seen him a few times.

20 She is currently receiving no treatment. But, she still has neck and shoulder pain, with
21 numbness in her hands.

22 She obtained treatment through her worker's comp case, and the case is still pending. She
23 was last treated for her neck approximately eight to nine months ago, though she has tried to obtain
24 an appointment. She was receiving pain medications and balm.

25 Regarding the witness statements in evidence, she did not go out dancing toward the end of
26 her County work and did not go after her neck surgery.

27 She does not now work and hasn't since her retirement. Now, she watches television and
28 reads, but is not active. She doesn't market, nor take care of her father. She does drive and has a

1 handicap permit.

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ISSUES FOR REVIEW²

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1. Is the Applicant permanently incapacitated from the performance of her duties as a Support Services Assistant?

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2. If the Applicant is permanently incapacitated from the performance of her duties, is the incapacity a result of injury or disease which arose out of and in the course of her employment, and if so, did the employment contribute substantially to the incapacity?

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DISCUSSION

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1. Is the Applicant permanently incapacitated from the performance of her duties as a Support Services Assistant?

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The Applicant has the burden of proving by a preponderance of substantial evidence that she is permanently incapacitated from the substantial performance of her duties. (See, *McCoy v. Board of Retirement* (1986) 183 Cal. App. 3d 1044, 1051; *Harmon v. Board of Retirement of San Mateo County* (1976) 62 Cal. App. 3d 689; *Glover v. Board of Retirement* (1989) 214 Cal. App. 3d 327, 1337; and *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal. App. 2d 156, 161.) The evidence in support of permanent incapacity must be substantial, real and measurable to be considered; when in conflict with other evidence, its probative force must be weighed and found to have more convincing force and the greater probability of truth before an Applicant can prevail on this issue. (*Ibid*; *Bowen v. Board of Retirement* (1986) 42 Cal. 3d 572, 578.)

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The Applicant began her employment with the County in 1994 as Extra Help, and then was hired for a permanent position in October of 1997. The Applicant's last day of work with the County was January 14, 2009. She accumulated over ten years of service. Her last position was that of a

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² Respondent's closing brief argues that the Application is barred as untimely filed, citing Government Code 31722. However, this contention was not raised in Respondent's pre-hearing statement, as required by Rule 13(a). Inasmuch as Applicant was not so placed on notice of Respondent's contention, the matter was not litigated and therefore is not addressed here.

28

1 Support Services Aide - Dietary at County Medical Center.

2 A Support Services Aide - Dietary works on a patient tray line; performs office work; and
3 visits patient rooms for menu preferences. Essential duties include frequent lifting and carrying of
4 1 - 15 lbs; frequent bending, kneeling, squatting, stooping, twisting, and reaching at and above
5 shoulder level; frequent moving of machinery and meal carts; and four hours per eight of standing
6 and walking.

7 Per the Application, which was filed 1/12/2010, Applicant's disability is due to:
8 "excruciating pain to neck and shoulders; neck has paravertebral tenderness: still with spasms and
9 constant pain." (AR 2.5)

10 Per Dr. K.'s 12/31/2009 Attending Physician's Report in support of the Application, the body
11 parts that form the basis of the application are the lungs, legs, hands and back (AR 3.1) There is no
12 specific indication as to whether "back" is meant to include "neck". Shortness of breath, fatigue, leg
13 pain, back pain and hand pain are listed as the Applicant's complaints. (AR 3.2.) Degenerative disc
14 disease is identified as one of six medical conditions that may have contributed to the claimed
15 disability. (AR 3.2) Severe cervicgia is included in the seven diagnoses related to the claimed
16 disability. (AR 3.3) An examination performed on 12/31/09 yielded findings pertaining to the neck
17 as follows: some palpable tenderness and loss of range of motion. (AR 3.3 and 8.38) The record
18 contains no specifics, such as degree of ranges of motion, as to these findings.

19 As of the date Applicant discontinued service (1/14/2009), Applicant's physician-issued
20 work restrictions in place and relating to Applicant's neck were: no heavy lifting, bending, kitchen
21 work, squatting, lifting or carrying over 25 lbs. Accommodation of Applicant's physician's
22 restrictions was not possible. Dr. W. J. M. then certified Applicant temporarily totally disabled
23 through 4/25/09, as Applicant underwent an anterior discectomy and fusion at C5-6 and C6-7, with
24 a takedown of severe large anterior osteophytes and a structural allograft at both levels.

25 On 5/21/2009, Dr. M. performed a post-surgery evaluation. He noted that Applicant's neck
26 was nontender and that her hand numbness and tingling had normalized. He also noted left shoulder
27 pain suggestive of deltoid bursitis. (AR 8.91)

28 On 6/27/09, Dr. K.'s nurse-practitioner, K. C., FNP-C saw Applicant for complaints of a

1 blood clot in her leg and an inability to raise her (left) arm. On examination, Applicant’s neck was
2 supple. Under “Assessment”, pain shoulder joint, DVT, pain neck/cervical, and hypertension are
3 listed. However, this is followed by, “[H]er neck pain is resolved from surgery.” (AR 8.83)

4 On 7/9/09, Dr. M. examined Applicant and opined that he would release her back to work,
5 except for the fact that she had pneumonia and a recent deep vein thrombosis in her right leg. (AR
6 8.76)

7 On 8/21/09, Ms. C. noted that Applicant was supposed to be going back to work, but “just
8 doesn’t feel she can go do it due to respiratory problems with severe shortness of breath, ... blood
9 clot to leg ...pneumonia. Still having the left shoulder pain.” On examination, Applicant’s neck was
10 supple. Ms. C.’s assessment did not include any reference to the neck, but rather was hypertension,
11 DVT; hyperglycemia; hypothyroidism; and pain shoulder joint. (Exhibit 8.69.)

12 On 10/12/2009, Ms. C. noted that Applicant was exhausted, breaking out into cold sweats,
13 and needed to go back to work or she would lose her job. On examination, Applicant’s neck was
14 supple and there was a normal range of motion of the extremities. Ms. C.’s assessment again did not
15 include any reference to the neck; it was instead fatigue/malaise; hypertension; deep vein thrombosis;
16 diabetes mellitus, type II; and anemia. Applicant was returned to work as of 10/22/09 and was
17 restricted to four hours per day and no lifting. (AR 8.56 - 8.57)

18 On 10/22/2009, Ms. C. again examined Applicant, whose complaints pertained only to
19 fatigue and foot/leg numbness. On examination, Applicant’s neck was supple. Ms. C.’s assessment
20 again did not include any reference to the neck; it was instead fatigue/malaise; hypertension; deep
21 vein thrombosis; diabetes mellitus, type II; hyperlipidemia and hypothyroidism. (AR 8.51 - 8.52)

22 On 12/31/2009, Applicant saw Ms. C. for a cold. Findings included “some” palpable
23 tenderness of the posterior neck and loss of range of motion, degree unspecified. Pharyngitis is the
24 primary diagnosis. Degenerative disc disease is listed as the sixth diagnosis. (AR 8.38) Ms. C. and
25 Dr. K. prepared the attending physician report (AR 3.1 - 3.5) on this same date, citing, among other
26 problems, stenosis and neck pain (“severe cervicalgia”) as incapacitating. Clearly, the attending
27 physician report represents an abrupt reversal from Applicant’s post surgical evaluations over the
28 previous seven month period - without any explanation as to why and without any citation to any

1 specific testing results.

2 A trier of fact is required to look to the underlying basis of a medical opinion to determine
3 whether or not that opinion constitutes substantial evidence. (*Hegglin v. WCAB* (1971) 4 Cal. 3d 162,
4 170.) A medical opinion must be supported by a reasoned explanation, and if it isn't, it does not
5 constitute substantial evidence. (See, *Insurance Company of North America v. WCAB* (1981) 122
6 Cal. App. 3d 905 and *Pacific Gas and Electric Co. V. Zuckerman* (1987) 189 Cal. App. 3d 1113,
7 1135-1136; and *Turner v. Workman's Comp. Appeals Bd.* (1974) 42 Cal. App. 3d 1036, 1044.)

8 Dr. K.'s attending physician report (Exhibit 3) lacks a reasoned explanation as to why
9 Applicant's post-surgery neck pain was deemed permanently incapacitating after seven months of
10 improvement and resolution, as documented by Dr. M., Ms. C. and Dr. K. himself (who must have
11 reviewed and adopted his nurse practitioner's record). The treating physician's records indicate that,
12 following neck surgery, Applicant's other serious medical conditions intervened and were
13 responsible for her remaining off work.

14 On 1/7/2010, C. D., M.D. examined Applicant's neck and left shoulder exam and issued a
15 worker's comp primary treating physician's initial evaluation report. On examination he found
16 cervical tenderness to palpation, spasms, guarding, significant reduction of range of motion on
17 flexion, extension, lateral bending and rotation. He diagnosed: cervical discopathy with disc
18 displacement, status post fusion (x-ray); cervical radiculopathy; and left shoulder impingement
19 syndrome. Dr. D. notes a history of 2006 motor vehicle accident neck injury with no full recovery
20 and a history of cumulative trauma while employed at County Medical Center, but attributes no
21 apportionment to any previous accidents or injuries. He placed Applicant on temporary total
22 disability. (AR 8.22 - 8.31)

23 Dr. D. continued Applicant's temporary total disability status on 2/13/10, 3/10/10, 4/14/10,
24 and 5/26/10. (AR 8.13; 8.4; 8A.12 and 8A.4) The record contains no opinion from Dr. D. on the
25 issue of permanent incapacity.

26 Applicant next apparently transferred her primary care in the worker's comp matter from Dr.
27 D. to M. G., M.D. On 9/10/10, Dr. G. examined Applicant and opined that she had "not stabilized
28 to the point where residual permanent disability is evident." (AR 8B.21) On 10/20/2010, Dr. G. again

1 examined Applicant and opined that “if she were not retired, she would be considered temporarily
2 totally disabled through November 5, 2010.” The record contains no opinion from Dr. Greenspan
3 on the issue of permanent incapacity.

4 Because Dr. K.’s attending physician report lacks a reasoned explanation, it does not
5 constitute substantial evidence of permanent incapacity. Because Dr. D.’s and Dr. G.’s reports do
6 not address the issue of permanent incapacity, they are of no assistance. As such, the only conclusion
7 possible is that the Applicant has failed to carry her burden of proving by a preponderance of
8 substantial evidence that she is permanently incapacitated from the substantial performance of her
9 duties.

10

11 2. If the Applicant is permanently incapacitated from the performance of her duties, is the incapacity
12 a result of injury or disease which arose out of and in the course of her employment, and if so, did
13 the employment contribute substantially to the incapacity? – Not reached.

14

15 **FINDINGS OF FACT**

16 1. The Applicant began her employment with the County in 1994 as Extra Help, and then was hired
17 for a permanent position in October of 1997. She accumulated over ten years of service.

18 2. The Applicant’s last day of work with the County was January 14, 2009, at which time the
19 Applicant was employed as a Support Services Assistant.

20 3. Applicant was on paid medical leave through 2/28/09 and was on unpaid leave thereafter.

21 4. Applicant both began a service retirement and filed for a disability retirement on January 12, 2010.

22 5. As of the date Applicant discontinued service, Applicant’s physician-issued work restrictions in
23 place and relating to Applicant’s neck were: no heavy lifting, bending, kitchen work, squatting,
24 lifting or carrying over 25 lbs. Accommodation of Applicant’s physician’s restrictions was not
25 possible. Dr. M. then certified Applicant temporarily totally disabled through 4/25/09, as Applicant
26 underwent a neck surgery.

27 9. Thereafter, Applicant’s neck pain improved and was noted to have resolved. However, she
28 developed additional, unrelated conditions - deep vein thrombosis, pneumonia, possible deltoid

1 bursitis, apnea and shortness of breath, both at rest and on exertion - that prevented what otherwise
2 would have been a post-surgery return to work.

3 10. Applicant was returned to work as of 10/22/09, and was restricted to four hours per day and no
4 lifting - a restriction not predicated upon neck pain, bilateral shoulder pain, paravertebral cervical
5 tenderness, and spasms; degenerative disc disease; nor severe cervicalgia.

6 11. The Applicant is not permanently incapacitated from the performance of her duties as a Support
7 Services Assistant based on neck pain, bilateral shoulder pain, paravertebral cervical tenderness, and
8 spasms; degenerative disc disease; nor severe cervicalgia.

9

10 **CONCLUSION OF LAW**

11 1. The Applicant is not entitled to a service-connected disability retirement.

12

13 **RECOMMENDATION**

14 1. Since the Applicant is not entitled to a service-connected disability retirement, I recommend that
15 it be denied.

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16 Respectfully submitted,

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18 DATED: March 6, 2012

DEBORAH Z. WISSLEY, Hearing Officer

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Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina M. Ratto, General Counsel
SUBJECT: SACRS BOARD OF DIRECTORS ELECTIONS 2023-2024

Recommendation

Identify one or more nominees for the SACRS Board of Directors election to be conducted on May 12, 2023; and direct staff to submit the nomination(s) to the SACRS Nominating Committee on or before March 1, 2023.

Background/Discussion

At the May 12, 2023 SACRS business meeting, SACRS will conduct the election for the SACRS Board of Directors for 2023-2024. The Board of Directors is comprised of the following positions:

- President
- Vice President
- Treasurer
- Secretary
- Two (2) Regular Members
- Immediate Past President

Attached is the timeline for the upcoming election.

As a regular member of SACRS, OCERS may submit nominations for the election of the SACRS Directors. Such nominations are to be submitted to the SACRS Nominating Committee, and must be received by the Nominating Committee prior to the first business day after March 1 of each calendar year.

The purpose of this agenda item is for the Board to discuss and identify one or more nominees for the SACRS Board of Directors election to be conducted on May 12, 2023, and to direct staff to submit the nomination(s) to the SACRS Nominating Committee on or before March 1.

In addition, individuals interested in serving on the SACRS Board of Directors may indicate their interest by completing and submitting the attached SACRS Nomination Submission Form, with a letter of intent. The form and the letter of intent must be submitted to the Nominating Committee no later than March 1, 2023.

Prior to March 25, the Nominating Committee will report a final ballot to each regular member County Retirement System. Staff will present the final ballot to the OCERS Board at its April 17, 2023 meeting so that the Board can give direction to the OCERS Voting Delegate on how to vote OCERS' proxy in the SACRS election.

Attachments

- (1) SACRS Board of Directors Election 2023-2024 Information and Timeline
- (2) SACRS Nomination Submission Form

Submitted by:

Gina M. Ratto
General Counsel



January 1, 2023

To: SACRS Trustees & SACRS Administrators/CEO's
 From: Dan McAllister, SACRS Immediate Past President, Nominating Committee Chair
 SACRS Nominating Committee
 Re: SACRS Board of Director Elections 2023-2024 - Elections Notice

SACRS BOD 2023-2024 election process will begin January 1, 2023. Please provide this election notice to your Board of Trustees and Voting Delegates.

DEADLINE	DESCRIPTION
March 1, 2023	Any regular member may submit nominations for the election of a Director to the Nominating Committee, provided the Nominating Committee receives those nominations no later than noon on March 1 of each calendar year regardless of whether March 1 is a Business Day. Each candidate may run for only one office. Write-in candidates for the final ballot, and nominations from the floor on the day of the election, shall not be accepted.
March 25, 2023	The Nominating Committee will report a final ballot to each regular member County Retirement System prior to March 25
May 13, 2023	Nomination Committee to conduct elections during the SACRS Business Meeting at the Spring Conference
May 15, 2023	Board of Directors take office for 1 year

Per SACRS Bylaws, Article VIII, Section 1. Board of Director and Section 2. Elections of Directors:

Section 1. Board of Directors. The Board shall consist of the officers of SACRS as described in Article VI, Section 1, the immediate Past President, and two (2) regular members

A. Immediate Past President. *The immediate Past President, while he or she is a regular member of SACRS, shall also be a member of the Board. In the event the immediate Past President is unable to serve on the Board, the most recent Past President who qualifies shall serve as a member of the Board.*

B. Two (2) Regular Members. *Two (2) regular members shall also be members of the Board with full voting rights.*

Section 2. Elections of Directors. *Any regular member may submit nominations for the election of a Director to the Nominating Committee, provided the Nominating Committee receives those nominations no later than noon on March 1 of each calendar year regardless of whether March 1 is a Business Day. Each candidate may run for only one office. Write-in candidates for the final ballot, and nominations from the floor on the day of the election, shall not be accepted.*

The Nominating Committee will report its suggested slate, along with a list of the names of all members who had been nominated, to each regular member County Retirement System prior to March 25.

The Administrator of each regular member County Retirement System shall be responsible for communicating the Nominating Committee's suggested slate to each trustee and placing the election of SACRS Directors on



his or her board agenda. The Administrator shall acknowledge the completion of these responsibilities with the Nominating Committee.

Director elections shall take place during the first regular meeting of each calendar year. The election shall be conducted by an open roll call vote, and shall conform to Article V, Sections 6 and 7 of these Bylaws.

Newly elected Directors shall assume their duties at the conclusion of the meeting at which they are elected, with the exception of the office of Treasurer. The incumbent Treasurer shall co-serve with the newly elected Treasurer through the completion of the current fiscal year.

The elections will be held at the SACRS Spring Conference May 9-12, 2023. Elections will be held during the Annual Business meeting on Friday, May 12, 2023, in San Diego at Paradise Point Hotel and Resort.

If you have any questions, please contact Dan McAllister, Dan.McAllister@sdcounty.ca.gov

Thank you for your prompt attention to this timely matter.

Sincerely,

Dan McAllister

Dan McAllister, San Diego CERA Trustee & San Diego County Treasurer Tax Collector
SACRS Nominating Committee Chair

CC: SACRS Board of Directors
SACRS Nominating Committee Members
Sulema H. Peterson, SACRS Executive Director



**SACRS Nomination Submission Form
SACRS Board of Directors Elections 2023-2024**

All interested candidates must complete this form and submit along with a letter of intent. **Both the form and the letter of intent must be submitted no later than March 1, 2023.** Please submit to the Nominating Committee Chair at Dan.McAllister@sdcountry.ca.gov AND to SACRS at sulema@sacrs.org. If you have any questions, please feel free to contact Sulema Peterson at SACRS at (916) 701-5158.

Name of Candidate	Name:
Candidate Contact Information (Please include – Phone Number, Email Address and Mailing Address)	Mailing Address: Email Address: Phone:
Name of Retirement System Candidate Currently Serves On	System Name:
List Your Current Position on Retirement Board (Chair, Alternate, Retiree, General Elected, Etc)	<input type="radio"/> Chair <input type="radio"/> Alternate <input type="radio"/> General Elected <input type="radio"/> Retiree <input type="radio"/> Other _____
Applying for SACRS Board of Directors Position (select only one)	<input type="radio"/> President <input type="radio"/> Vice President <input type="radio"/> Treasurer <input type="radio"/> Secretary <input type="radio"/> Regular Member
Brief Bio in Paragraph Format	



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **DIRECTOR OF DISABILITY - 2023 STAFFING PLAN CHANGE**

Recommendation

Staff recommends that the Board of Retirement approve the addition of a Director of Disability to the 2023 Staffing Plan and drop the position of Disability Supervisor.

Background/Discussion

The Director of Disability will be responsible for oversight of the Disability Department which includes the disability retirement process from intake to initial decision, development of the annual budget and strategic plan initiatives, management of staff and presenting cases to the Disability Committee and Board of Retirement. Ms. Jenike is the Senior Executive responsible for this area and she has struggled to recruit a qualified individual at the level of Supervisor. Ms. Jenike’s justification memo reflects additional details of the position requirements.

We believe that the position of Director is needed to meet the needs of the agency and ensure we recruit and retain a diverse and high performing workforce.

The budget impact is anticipated to begin in the first quarter of 2023.

In summary, I am requesting the Board change the 2023 staffing plan by Adding a Director of Disability and dropping a Disability Supervisor position in the Disability department (no change to headcount).

Attachement:

- Justification Memo

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer



Memorandum

DATE: February 1, 2023
TO: Steve Delaney, Chief Executive Officer
FROM: Suzanne Jenike, Asst. CEO, External Operations
SUBJECT: Director of Disability – 2023 Staffing Plan Change

Request

Add a Director of Disability to the 2023 staffing plan and drop current position of Disability Supervisor (previously Manager).

Background/Discussion

As you know there has been a significant amount of recruiting and reorganization going on in External Operations the last several years. When Ms. Marie Wood resigned in May 2022 I underfilled her Sr. Retirement Analyst position as a Manager and transferred her quality assurance duties to Mr. Mike Persi. This created a need in Member Services for a Manager to oversee the call center and customer service teams within the department. In late 2022 I transferred Ms. Megan Cortez from Disability Manager to Member Services Manager to provide that oversight. At that time I underfilled Ms. Cortez's Manager position as a Supervisor to provide a promotional opportunity for a staff person who had excelled in the Next Level Leadership program and who was ready for advancement. Immediately after his promotion to Supervisor he accepted a higher paying position with the State and left OCERS employment. Subsequently, we have been actively recruiting to fill the vacant Disability Supervisor position and made two job offers. Both candidates declined; the first for a promotional opportunity within their current County department, and the other for a significant pay increase with one of OCERS Employers.

Oversight of the Disability Department is a significant responsibility and I believe that a Director position is warranted at this time. We need a seasoned professional to oversee the department, train the two new Disability Investigators and fully develop the cases for presentation to the Disability Committee and ultimately the Board. We have had a Manager in the oversight position for a number of years and only downgraded it to provide a long term employee with a promotional opportunity. Given the challenge of hiring a supervisor from outside of OCERS with the skills needed to successfully manage the Disability Team I respectfully request to DROP the position of Supervisor and ADD a Director.

1. Title of Position being requested (OCERS direct or County) – Director of Disability – OCERS Direct
 - a. This will be an ADD/DROP, no addition to head count
 - b. Existing classification is Disability Supervisor (formerly Manager)
2. Justification for need
 - a. What new work will be done – The Director will be expected to recruit new panel physicians to expand the pool of doctors doing independent medical examinations. They will work on enhancing the working relationship with representatives of our Employers. They will provide regular trainings to the Board and Disability Committee, and evaluate the application process for potential improvements.
 - b. What growth in workload is anticipated – OCERS Disability team processed 113 new disability retirement applications in 2022 (compared to 66 in 2021, January 17, 2023 Board of Retirement agenda item R-9) and if we receive a large number of service retirement applications again this

year we can expect to see the same high number of disability applications. The Department has two brand new Disability Investigators who need training and significant oversight.

- c. Is there any savings that will be achieved (eliminate temp/contractor or avoid hiring new contractor/vendor) – We are currently contracting with the former Disability Manager from San Diego County Employees Retirement Association (SDCERA) for assistance with training and process review. If a Director is hired the contractor would no longer be needed.
 - d. Will the position do work that will eliminate current risks? If so what and how? – N/A
3. Proposed organization chart that incorporates new position – since this is an add/drop there are not any organizational chart changes
 4. Estimated hiring salary – Director range is \$139,292 - \$215,903. Compensation will be determined based on qualifications. We believe that the cost will be covered within the current budget but will monitor it closely and if necessary, come back to the Board with a budget amendment.
 5. Timing of when the position is anticipated to be filled if approved – Open Recruitment as soon as Board approves the position to be filled in the first quarter 2023.

Positions Title (ADD/DROP Classification)	Department	Position Type	Position Salary Range	2023 Budget Impact 2023 (Salary and Benefits)
ADD Director of Disability	Disability	OCERS	\$139,292 - \$215,903	\$266,395
DROP Disability Supervisor	Disability	County	\$56,721 - \$75,982	(\$113,973)

Submitted by:



SJ-APPROVED

Suzanne Jenike
Asst. CEO, External Operations



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **2022 EMPLOYEE, MANAGER AND INNOVATOR OF THE YEAR**

Presentation

Background/Discussion

At the close of each year the OCERS Senior Executive team seeks nominations from the entire OCERS team to help choose our Employee of the Year, our Manager of the Year, and so important to an agency striving for continuous improvement, our Innovator of the Year.

On February 21 I will share our 2022 winners, as chosen by the OCERS Senior Executive team from among our many nominees.

For **EMPLOYEE OF THE YEAR**, Mr. John T Nguyen.

Some highlights from the various nominating memos submitted regarding on Mr. Nguyen:

John never backs down from a challenge. He is always willing to help and does so with a smile on his face and in the most positive and upbeat manner. His attitude truly is infectious! He is extremely conscientious and consistently gives 100% to the tasks at hand. He asks great questions, which has only contributed to further developing his knowledge of HR.

His consistently positive attitude and willingness to help as well as his desire to learn and grow in his role should be commended.

For **MANAGER OF THE YEAR**, Mr. Manuel Serpa.

Some highlights from the various nominating memos submitted regarding on Mr. Serpa:

Due to Manuel's expertise and quick legal advice, OCERS was able to manage Covid decision-making in what many employees may believe was effortless. The entire Crisis Management Team depended on Manuel to provide guidance through Cal OSHA's constantly changing regulations. To provide clarity to the heavy lifting Manuel had to do, he had to advise OCERS through many covid related notifications which resulted in closing the OCERS headquarters three times this year to keep employees safe. Manuel was always confident in his recommendations and would quickly review the regulations to ensure nothing changed while no one was watching.

Manuel is Engaged, Dedicated, Reliable, and Accurate in his advice.

For **INNOVATOR OF THE YEAR**, Mr. Duc Nguyen.

Some highlights from the various nominating memos submitted regarding on Mr. Nguyen:

Duc Nguyen had been generating a bi-monthly Flash Report since 2020; the flash report forecasts returns for each individual asset class and Total Fund based on public market comps. This report has been extremely important for Board Communication as it allows the CIO to share return estimates in real time.

Duc noticed an opportunity to improve upon this process and he signed up to take the “Python For Managers” class at Columbia Business School to learn the fundamentals of coding in Python with a focus on practical business applications.

The programming logic relies on Python codes to loop through OCERS historical data, pull live market data from Bloomberg using BQuant, and match various line items with appropriate benchmarks, and then to also visualize the results.

This process is now allowing Duc to calculate estimated returns of OCERS portfolio on any given day, within minutes. Duc is also able to estimate 3Y and 5Y returns that he was unable to do with Excel. Also, most importantly, it has reduced the forecasting tracking error by a few basis points.

I will have the privilege of introducing each of our winners to the Board in person on February 21.

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina M. Ratto, General Counsel
SUBJECT: FUTURE BOARD AND COMMITTEE MEETINGS UNDER AB 2449

Presentation

Since October 2021, the meetings of the Board and its committees have been conducted via Zoom in accordance with the relaxed teleconference meeting provisions that were made available to local agencies by Assembly Bill 361. AB 361 amended the Brown Act to add new provisions for abbreviated teleconferencing procedures during a proclaimed state of emergency that deviated from the traditional teleconferencing procedures, subject to certain requirements specified in the statute. With the end of the COVID-19 State of Emergency on February 28, 2023, these abbreviated teleconference meeting provisions will no longer be available to the Board.

At the end of last year, however, AB 2449 was signed into law, effective January 1, 2023. AB 2449 provides new authority to local public agencies to use teleconferencing under new requirements. Although the requirements under AB 2449 are more restrictive than under AB 361 (see below), they do provide additional authority for a member of the Board to participate in a meeting via Zoom subject to conditions that may in some circumstances be preferable to the general teleconferencing requirements of the Brown Act¹.

Under AB 2449, if a member of the Board makes a request to participate in the meeting under the AB 2449 procedures, then the Board member must appear via Zoom or similar technology; Zoom must also be available to the public; and the agenda for the meeting must include the Zoom call-in information. AB 2449 permits the Board member's request to participate in the meeting to be made as late as the beginning of the meeting. For requests that are made within 72 hours of the beginning of the meeting, it will be impossible to include Zoom call-in information on a timely posted meeting agenda as there is no authority in the Brown Act to amend an agenda within 72 hours of the meeting on this basis.

A possible solution that the Board may want to consider is continuing to make Zoom available to the public for all meetings of the Board (regardless of whether a member of the Board wishes to participate under the AB 2449 procedures) and include Zoom call-in information on all agendas. In this way, the requirement of AB 2449 to include the Zoom call-in information on the meeting agenda will be met even for last minute Board member

¹ Among other requirements, the general teleconference meeting requirements of the Brown Act require that the Board member participating in a meeting by teleconference must participate from a location that is open to the public, the address of the location must be stated in the notice and agenda for the meeting, and the public must be able to address the Board from that location.

requests to participate in the meeting under the AB 2449 procedures. In addition, having Zoom available would have the ancillary benefit of making it more convenient and less expensive for long distance speakers or presenters to participate in the meetings. The Covid-19 pandemic demonstrated that OCERS is able to conduct Board and committee meetings efficiently and effectively without every person being physically present in the boardroom. Holding meetings via Zoom made board and committee meetings more convenient for OCERS employers, members and their counsel and more accessible to members of the public; and the initial fear that meetings would be disrupted or usurped by unruly interlopers was never realized.

The Requirements of AB 2449

Under AB 2449, a Board member may participate by teleconference in a meeting of the Board if (1) at least a quorum of the Board is present together physically at a place within Orange County, and (2) the Board member establishes “just cause”² or an “emergency circumstance”³ that justifies their attendance via teleconference.

Among other requirements under AB 2449, there are timing requirements and limitations on the number of meetings a Board member may participate by teleconference⁴. Under an emergency circumstance, **the Board member must make a request**⁵ that the Board allow them to participate in the meeting remotely due to emergency circumstances and the Board must take formal action to approve the request. The Board must require a general description of the circumstances relating to the Board member’s need to appear remotely at the given meeting⁶ and the board must by majority vote affirm that an “emergency circumstance” situation does exist. **The Board is required to take action on a request** to participate remotely at the earliest opportunity; and if the request does not allow sufficient time to place the proposed action on such a request on the posted agenda for the meeting for which the request is made, **the Board may take action on the request at the beginning of the meeting.**

² Just cause is restricted to the following: (1) a childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, spouse or domestic partner that requires them to participate remotely; (2) a contagious illness that prevents a member from attending in person; (3) a need related to a physical or mental disability, as defined; or (4) travel while on official business of OCERS or another state or local agency.

³ Emergency circumstance is defined as “a physical or family medical emergency that prevents a member from attending in person.”

⁴ Teleconference rules cannot be invoked by any board member for more than three consecutive months or 20 percent of the regular meetings of the Board within a calendar year if the board meets at least 10 times per calendar year (this is in addition to the limitation on “just cause” exceptions invoked by a Board member to no more than two meetings per calendar year).

⁵ The request to participate remotely must be made as soon as possible; and a separate request is required for each meeting in which they seek to participate remotely.

⁶ A general description of an item generally need not exceed 20 words and shall not require the member to disclose any medical diagnosis or disability or any personal medical information that is already exempt under existing law.

Under the just cause exception, the Board member must ***notify the Board*** at the earliest opportunity possible, ***including at the start of a regular meeting***; and must provide a general description of the circumstances relating to their need to appear remotely at the given meeting. Action by the Board to approve that just cause circumstances are met is ***not required***.

Under both just cause and emergency circumstances, the Board member must participate through both audio and visual technology (i.e., must be both audible and visible to those attending). In addition, the Board must provide at least one of the following means by which the public may remotely hear and visually observe the meeting and remotely address the board, either a two-way audiovisual platform or a two-way telephonic service and a live webcasting of the meeting. (Zoom would satisfy all these requirements.) Finally, the agenda for the meeting where a Board member is participating under the authority of AB 2449 must identify and include an opportunity for all persons to attend and address the board directly via a call-in option, via an internet-based service option and at the in-person location of the meeting.

Submitted by:



Gina M. Ratto
General Counsel



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **COVID-19 UPDATE**

Presentation

I will provide a verbal update of any timely COVID-related information items to the Board on February 21.

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer



Retirement Board Meeting

February 21, 2023

Application Notices

MEMBER NAME	AGENCY/EMPLOYER	RETIREMENT DATE
Aguilar-Rodriguez, Sonia	Probation	12/23/2022
Aguilera, John R	OCWR	11/18/2022
Alluin, Alexander	Social Services Agency	12/14/2022
Bogue, Sally	District Attorney	12/2/2022
Brine, Antony	OC Public Works	12/16/2022
Burgos-Johnson, Nancy	Child Support Services	12/2/2022
Butsko, Sophia	Superior Court	12/16/2022
Caillouette, Eunice	Auditor Controller	12/16/2022
Cioban, Eugen	Sheriff's Dept	12/21/2022
Clark, Bret	Fire Authority (OCFA)	12/16/2022
Corlett, Blanca	Social Services Agency	12/2/2022
Coughlin, Maritza	Social Services Agency	12/9/2022
Cross, Lora Mae	OCTA	12/16/2022
Enriquez, Consuelo	Child Support Services	11/18/2022
Esquivel, Abel	Social Services Agency	12/16/2022
Fung, Brian	Health Care Agency	11/1/2022
Garcia-Beltran, Jessie	Social Services Agency	11/30/2022
Gaxiola, Veronica	Probation	12/16/2022
Geiser, Daniel	OCTA	12/18/2022
Godinez, Alejandro	Sheriff's Dept	12/16/2022
Hinnant, Jonathan	Sheriff's Dept	12/23/2022
Johnson, Donna	Child Support Services	12/16/2022
Johnson, Joseph	Fire Authority (OCFA)	12/16/2022
Johnson, Samuel	Transportation Corridor Agency (TCA)	12/23/2022
Kerbrat, Timothy	Fire Authority (OCFA)	12/2/2022
Le, Joseph	Sheriff's Dept	11/24/2022
Leon, Sophia	Public Defender	12/10/2022
Lockhart, Corina	Probation	12/16/2022
Longnecker, Sandra	Sheriff's Dept	12/16/2022
Mao, William	OCTA	12/18/2022
Marston, David	Public Defender	12/16/2022
Martinez, Alvaro	OCTA	12/4/2022
Mason, Susan	Social Services Agency	12/1/2022
Monsoor, David	District Attorney	12/2/2022
Moree, Richard	Sheriff's Dept	12/16/2022
Nguyen, Hugh	County Clerk/Recorder	12/16/2022
Nguyen, Kenneth	OCTA	11/18/2022
Pawasarat Horn, Nancy	Fire Authority (OCFA)	11/25/2022



Retirement Board Meeting

February 21, 2023

Application Notices

Peralta, Helen	OC Public Works	12/30/2022
Perez, Diana	Health Care Agency	12/16/2022
Pham, Kathlyn	Superior Court	12/2/2022
Reynolds, Michael	District Attorney	12/2/2022
Ruiz, Carmen	Social Services Agency	12/2/2022
Runge, Helen	Sheriff's Dept	11/19/2022
Santiago, Lazaro	Social Services Agency	12/16/2022
Sardella, Vincent	Sanitation District	10/21/2022
Scott, Kathleen	Child Support Services	12/20/2022
Serafico, Raymund	OC Public Works	12/2/2022
Sierra, Adolfo	Social Services Agency	12/2/2022
Soria, Jeanette	Probation	12/2/2022
Stempniak, David	Social Services Agency	12/1/2022
Sterkel, Cindy	Health Care Agency	12/2/2022
Stieler, Christian	OC Public Works	12/2/2022
Stone, Sidney	OC Community Resources	12/5/2022
Sullivan-Cudal, Susan	Social Services Agency	12/16/2022
Ta, Thien	Social Services Agency	12/15/2022
Taylor, Darin	Sheriff's Dept	12/5/2022
Tunque, Brian	Sheriff's Dept	12/16/2022
Vesga, Alma	Health Care Agency	12/16/2022
Vienna, Ronald	OC Public Works	12/17/2022



Retirement Board Meeting
February 21, 2023
Death Notices

ACTIVE DEATHS	AGENCY/EMPLOYER
Blair, Elliot	Public Defender
Hernandez, Edward	OCTA
Ibrahim, Sabine	OC Community Resources
Matias-Schammahorn	Health Care Agency
Moreau, Paulette	Social Services Agency
Nooner, Robert	OCTA
Rentz, Theresa	Social Services Agency
Tooley, Michael	Fire Authority (OCFA)

RETIRED MEMBERS	AGENCY/EMPLOYER
Aguilera, Raul	Child Support Services
Arkyns, Dolores	Probation
Bailey, Arlene	Superior Court
Baldrige, Lonnie	Fire Authority (OCFA)
Brook, Barbara	OC Community Resources
Brotherton, Barbara	Law Library
Calderon, Carol	Superior Court
Chappell, Rose	Assessor
Connolly, Dorothy	Health Care Agency
Crabtree, Laurie	Probation
Davis, Robert	OC Public Works
Dominguez, Lupe	Social Services Agency
Donahue, Frederick	Social Services Agency
Downs, John	Child Support Services
Drehmer, Judy	OC Community Resources
Earney, Carole	Child Support Services
Gould, Richard	Child Support Services
Hackenberg, Donald	Health Care Agency
Hanzich, Catherine	Child Support Services
Hare, Mary	Sheriff's Dept
Hartung, Gary	OCTA
Hempel, Daniel	Treasurer - Tax Collector
Horton, Gerald	Sheriff's Dept
Howard, Helen	Department of Education
Inigo, Merylyn	Social Services Agency
Johnson, William	Superior Court
Kennedy, David	Health Care Agency
Kovacs, Steven	Sanitation District
Laipple, Richard	Public Defender
Lane, Stella	County Clerk/Recorder



Retirement Board Meeting
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Death Notices

Lawson, Don	OCTA
Marquez, Sofie	OC Community Resources
Matherly, Robert	Superior Court
May, Cheryl	Sheriff's Dept
Mc Cormick	OC Public Works
Messig, Patricia	UCI
Miller, Randall	Sheriff's Dept
Morrison, Carol	District Attorney
Munguia, Robert	OCTA
Novello, Nina	OC Public Works
Palomares, Alicia	UCI
Pointer, Richard	OC Public Works
Popescu, Mihaela	Sheriff's Dept
Reis, Carith	Child Support Services
Runge, Helen	Sheriff's Dept
Scott, Kathleen	Child Support Services
Semple, Rita	County Executive Office (CEO)
Shack-Lappin	Health Care Agency
Shimahara, Helen	Auditor Controller
Silvkoff, Lydia	Fire Authority (OCFA)
Steiner, William	Social Services Agency
Stephan, Beverly	OCTA
Stephenson, Janet	Auditor Controller
Then, Sie	Superior Court
Torres, Judy	Child Support Services
Trebil, Donald	Sheriff's Dept
Walsh, Clyde	Sheriff's Dept
White, Ruby	Child Support Services
Wynn, Leslie	Health Care Agency
Young, Joan	Child Support Services

SURVIVING SPOUSES	
Castelo, Samuel	
Diltz, Roxada	
Foster, William	
Harding, Margie	
Hiller, Emily	
Lazenby, Olive	
Maresh, Laverne	
Novello, Nina	
Ochiai, Clyde	



Retirement Board Meeting
February 21, 2023
Death Notices

Riesefeld, Cyla	
Schumacher, Carolyn	
Van Foeken	
Welton, Barbara	

**ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM
2223 E. WELLINGTON AVENUE, SUITE 100
SANTA ANA, CALIFORNIA**

**AUDIT COMMITTEE MEETING
December 15, 2022
9:30 A.M.**

MINUTES

OPEN SESSION

Chair Eley called the meeting to order at 9:30 a.m.

Recording Secretary administered the Roll Call attendance.

Attendance was as follows:

Present: Frank Eley, Chair; Sheri Freidenrich, Vice Chair; Richard Oats; Charles Packard

Also Present: Steve Delaney, Chief Executive Officer; Suzanne Jenike, Assistant CEO, External Operations; Brenda Shott, Assistant CEO, Internal Operations; Gina Ratto, General Counsel; Tracy Bowman, Director of Finance; David Kim, Director of Internal Audit; Jeff Lamberson, Director of Member Services; Jenny Sadoski, Director of Information Technology; Mark Adviento, Internal Auditor; Esther Hong, Internal Auditor; Jenny Davey, Internal Auditor; Carolyn Nih, Recording Secretary; Anthony Beltran, Audio Visual Technician.

PUBLIC COMMENT

None.

C-1 APPROVE AUDIT COMMITTEE MEETING MINUTES

Audit Committee Meeting Minutes

October 3, 2022

MOTION by Mr. Packard, **seconded** by Mr. Oates, to approve the Minutes.

The motion passed **unanimously**

CLOSED SESSION ITEMS

Adjourned to closed session at 9:33 a.m.

E-1 PUBLIC EMPLOYEE PERFORMANCE EVALUATION (GOVERNMENT CODE §54957(b))

Title: Director of Internal Audit

Adjourn pursuant to Government Code section 54957(b) to evaluate the performance of the Director of Internal Audit

Orange County Employees Retirement System
December 15, 2022
Audit Committee Meeting

Recommendation: Take appropriate action.

Returned to open session at 10:55 a.m.

No reportable action taken

The Board recessed for break at 10:55 a.m.

Ms. Freidenrich left the meeting at 11:05 a.m.

The Board reconvened from break at 11:07 a.m.

Recording Secretary administered the Roll Call attendance.

A-2 CONSIDERATION OF 2023 RISK ASSESSMENT AND 2023 AUDIT PLAN

Presentation by David Kim, Director of Internal Audit

Mr. Kim noted that the number of proposed assurance audits have nearly doubled from the prior year.

Recommendation: Receive and file.

MOTION by Mr. Oates, **SECONDED** by Mr. Packard to adopt staff's recommendation.

The motion passed **unanimously.**

A-3 CONTINUOUS AUDIT OF FINAL AVERAGE SALARY CALCULATIONS (Q3 2022)

Presentation by Mark Adviento, Internal Auditor and David Kim, Director of Internal Audit

Internal Audit noted there were no errors in the quarter. Chair Eley acknowledged all the hard work of Member Services to achieve 100% accuracy for the quarter.

Recommendation: Receive and file

MOTION by Mr. Oates, **SECONDED** by Mr. Packard to adopt staff's recommendation.

The motion passed **unanimously.**

I-1 PROPOSED FINAL AVERAGE SALARY CALCULATIONS AUDIT REPORT EXAMPLE

Presentation by David Kim, Director of Internal Audit

Mr. Kim presented an example of the *Continuous Audit of Final Average Salary Calculations Report*, in which the \$10.00 reportable threshold was implemented. Chair Eley noted the reportable errors will not include the errors that are under \$10.00. Mr. Kim confirmed errors under \$10.00 would not be discussed at the Audit Committee meetings unless they are

Orange County Employees Retirement System
December 15, 2022
Audit Committee Meeting

systematic or there is an increase in the number of errors. However, the errors under the reportable threshold will be included in the audit report as an appendix. Ms. Jenike noted all errors are corrected, even if they are below the reportable threshold.

A-4 REPORTABLE THRESHOLD FOR BENEFIT CALCULATIONS

Presentation by Suzanne Jenike, Assistant CEO of External Operations and Jeff Lamberson, Director of Member Services

Recommendation: Staff recommends the Audit Committee approve the establishment of a Reportable Threshold of \$10.00 or more for reporting errors found during the Final Average Salary audits.

MOTION by Mr. Packard, **SECONDED** by Mr. Oates to adopt staff's recommendation.

The motion passed **unanimously**.

A-5 MANAGEMENT RESPONSE TO PROCUREMENT AND CONTRACTING AUDIT

Presentation by Steve Delaney, CEO

CEO reviewed with the team and confirmed that an electronic checklist will be used for compliance with the Policy.

Recommendation: Receive and file

MOTION by Mr. Packard, **SECONDED** by Mr. Oates to adopt staff's recommendation.

The motion passed **unanimously**.

I-2 PROPOSED INTERNAL AUDIT KEY PERFORMANCE INDICATORS

Presentation by David Kim, Director of Internal Audit

Mr. Kim presented 5 key performance indicators (KPIs) to be used to measure Internal Audit staff performance. The KPIs will be monitored by the Director of Internal Audit and presented to the Audit Committee on an annual basis.

WRITTEN REPORTS

R-1 MANAGEMENT ACTION PLAN VERIFICATION

Written Report

R-2 STATUS UPDATE OF 2022 AUDIT PLAN

Written Report

Orange County Employees Retirement System
December 15, 2022
Audit Committee Meeting

COMMITTEE MEMBER COMMENTS

Chair Eley thanked the Committee for a great year and is looking forward to great things from Mr. Kim and the Audit Team. Chair Eley also thanked staff for their hard work.

STAFF COMMENTS

None

CHIEF EXECUTIVE OFFICER

Mr. Delaney, on behalf of the Board and staff, thanked Chair Eley for his many years of service.

COUNSEL COMMENTS

None

ADJOURNMENT

Chair Eley adjourned the meeting at 11:34 a.m.

Submitted by:

Approved by:

Steve Delaney
Secretary to the Board

Richard Oates
Chair



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **CEO FUTURE AGENDAS AND 2023 OCERS BOARD WORK PLAN**

Written Report

AGENDA TOPICS FOR THE OCERS BOARD OF RETIREMENT

MARCH

- STAR COLA Final Approval
- Quarterly 2023-2025 Strategic Plan Review
- Semi Annual Business Continuity Disaster Recovery Updates
- Quarterly Unaudited Financial Statements
- Quarterly Budget vs Actual Report
- CIO Comments

APRIL

- Harassment Prevention Training
- SACRS Board of Directors Election
- Quarterly Travel and Training Expense Report
- Form 700 Due

MAY

- Annual Fiduciary Training
- Preliminary December 31, 2022 Valuation
- Review of OCERS Multiple Plans
- Quarterly Unaudited Financial Statements
- Quarterly Budget vs Actual Report

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer

OCERS RETIREMENT BOARD - 2023 Work Plan

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep (Offsite)	Oct	Nov	Dec
System Oversight	Receive Quality of Member Services Report (I)	STAR COLA Posting (I)	Approve 2023 STAR COLA (A)	SACRS Board of Directors Election (A)	Preliminary December 31, 2022 Valuation (I)	Mid-Year Review of 2023 Business Plan Progress (I)	Approve Early Payment Rates for Fiscal Year 2023-25 (A)	Review 2nd Quarter Budget to Actuals Financial Report (I)	Strategic Planning Workshop (I)	Approve 2024-2026 Strategic Plan (A)	Review 3rd Quarter Budget to Actuals Financial Report (I)	
	Receive OCERS Innovation Report (I)	Approve 2023 COLA (A)	Quarterly 2023-2025 Strategic Plan Review (A)			Approve December 31, 2022 Actuarial Valuation & Funded Status of OCERS (A)	Approve Actuarial Experience Study 2020-2022 (A)	Receive OCERS by the Numbers (I)	Annual OCERS Employer Review (I)	Approve 2024 Business Plan (A)	Approve 2024 Administrative (Operating) Budget (A)	
						Approve 2022 Comprehensive Annual Financial Report (A)		Receive Evolution of the UAAL (I)	State of OCERS (I)	Employer & Employee Pension Cost Comparison (I)	Annual CEO Performance Review and Compensation (A)	
						Quarterly 2023-2025 Strategic Plan Review (A)						
											Adopt 2024 Board Meeting Calendar (A)	
Board Governance												Adopt Annual Work Plan for 2024 (A)
												Vice-Chair Election (A)
												Receive 2024 Board Committee Assignments (A)
Regulation / Policies	Communication Policy Fact Sheet (I)											
Compliance	Status of Board Education Hours for 2022 (I)			Form 700 Due (A)		Receive Financial Audit (I)						

(A) = Action (I) = Information



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Jim Doezie, Contracts, Risk and Performance Administrator
SUBJECT: QUIET PERIOD – NON-INVESTMENT CONTRACTS

Written Report Background/Discussion

1. **Quiet Period Policy Guidelines**

The following guidelines established by the Quiet Period Policy, section 3.c, will govern a search process for any contract to be awarded by OCERS:

“...Board Members and OCERS staff shall not knowingly communicate with any party financially interested in any prospective contract with OCERS regarding the contract, the services to be provided under the contract or the selection process;”

2. **Quiet Period Guidelines**

In addition, the following language is included in all distributed RFP's:

“From the date of issuance of this RFP until the selection of one or more respondents is completed and announced, respondents are not permitted to communicate with any OCERS staff member or Board Members regarding this procurement, except through the Point of Contact named herein. Respondents violating the communications prohibition may be disqualified at OCERS’ discretion. Respondents having current business with OCERS must limit their communications to the subject of such business.”

Distributed RFP's

The RFP's noted below are subject to the quiet period until such time as a contract is finalized.

- Σ An RFP for employee Classification and Compensation Review was released in July. This is to provide benchmarking to compare employee's total compensation versus similar internal and external positions. A final vendor was selected, and we are in contract negotiations at this time.
- Σ We sent out an RFP for Consulting Actuary Services in August. This RFP is to hire a qualified firm as a Consulting Actuary as our current contract with Segal has reached its maximum six-year term. We received four (4) proposals are currently evaluating those responses. A final vendor was selected and we are currently in contract negotiations.
- Σ We sent out an RFP for a Robotic Process Automation platform and associated services in September. This RFP is to hire a qualified firm to provide software and services to automate processes to increase productivity, efficiency, and accuracy. We received eight Proposals. A final vendor was selected, and we are currently in contract negotiations.
- Σ An RFP for Administrative Hearing Officer Services was released in October. Contracts for some of our current Hearing Officers are set to expire and so we must bid-out these services. We received five (5) proposals that are currently being evaluated.



Memorandum

- Σ We distributed an RFP in early January for Securities Litigation Monitoring Services. Our current contracts with three firms are set to expire in July 2023. This RFP is to select firms to provide the needed services. Twenty Proposals were received that are currently being evaluated.
- Σ A Request for Qualification (RFQ) is planned to be distributed in February to select three to five qualified firms that will receive an invitation to bid to become OCERS Building Representative/Program Manager related to the planning and construction of a new OCERS headquarters building.
- Σ We plan to distribute and RFP for an Executive Recruiting Firm in February. This service is needed in the event OCERS wants to use an Executive Recruiting firm for upcoming position vacancies.

Submitted by:



JD - Approved

Jim Doezie
Contracts, Risk and Performance Administrator



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: BOARD COMMUNICATIONS

Written Report

Background/Discussion

To ensure that the public has free and open access to those items that could have bearing on the decisions of the Trustees of the Board of Retirement, the OCERS Board has directed that all written communications to the entire Board during the interim between regular Board meetings be included in a monthly communications summary.

News Links

The following news and informational item was provided by the CEO for distribution to the entire Board:

From Steve Delaney:

- ∑ NASRA News Clips

From Robert Kinsler:

- ∑ The Orange County Register has posted an article written by reporter Teri Sforza titled "Orange County's Pension Hole is Shrinking, But at What Cost?" <https://www.ocregister.com/2023/01/16/orange-countys-pension-hole-is-shrinking-but-at-what-cost/>
- ∑ "Court Rejects 'Offset' to Injured Firefighter's Disability Retirement" on WorkersCompensation.com https://www.workerscompensation.com/news_read.php?id=42570
- ∑ "Untangling the Web of County Employees Retirement Law Rules on Disability Retirement and Reciprocity" on JD Supra <https://www.jdsupra.com/legalnews/untangling-the-web-of-county-employees-4795133/>

Other Items: (See Attached)

1. Monthly summary of OCERS staff activities and updates, starting with an overview of key customer service metrics, for the month of DECEMBER 2022.

Submitted by:



SD - Approved

Steve Delaney
 Chief Executive Officer



Monthly Team Status

December 2022

To the members of the OCERS Board of Retirement,

The following is my regular monthly summary of OCERS' team activity, starting with an overview of key customer service statistics as well as activity highlights followed by updates for December.

MEMBER SERVICES MONTHLY METRICS

Retirement Applications Received					2022 Customer Service Statistics						
Month	2019	2020	2021	2022	Month	Unplanned Recalculations	Member Satisfaction Approval Rate	Calls Received via Call Center	Calls Direct to Extension	Calls Received by Operator	Total Calls (monthly)
Jan	265	240	117	346	January	0	98%	3,004	5,402	1,060	9,466
Feb	193	152	91	151	February	0	98%	2,972	5,577	1,271	9,820
Mar	112	95	51	120	March	1	98%	2,666	4,951	845	8,462
Apr	41	37	39	47	April	0	98%	2,828	4,868	966	8,662
May	41	43	52	65	May	0	98%	2,313	4,414	776	7,503
Jun	50	59	49	73	June	1	98%	1,988	4,169	757	6,914
Jul	52	262	64	54	July	0	98%	2,098	3,977	652	6,727
Aug	61	190	59	58	August	0	98%	1,945	4,210	894	7,049
Sep	42	117	70	42	September	0	98%	1,554	3,755	537	5,846
Oct	59	51	67	70	October	0	98%	1,182	3,301	510	4,993
Nov	49	48	95	78	November	0	98%	1,033	3,037	365	4,435
Dec	68	66	93	86	December	0	98%	1,017	2,820	552	4,389
Grand Total	1033	1360	847	1190	Grand Total	2	98%	24,600	50,481	9,185	84,266

MEMBER SURVEY RESPONSE

"I wanted to thank you for all your help, I had a productive meeting with one of your customer representatives and they were excellent in navigating me through the process. With their help, I believe I have all the information that I need to finalize my retirement."

December 2022

"Thank you for all your help, I had a productive meeting with one of your customer support representatives and they excellent in navigating me through the process. I believe I have all the information that I need to finalize my retirement."

November 2022

"Your customer support team has done a wonderful job providing me with outstanding customer service and with great detail. They are truly an asset to OCERS organization."

October 2022



Monthly Team Status

December 2022

ACTIVITIES

INVESTMENT DIVISION PREPARES TO REORGANIZE

The Investment Division will undergo a restructuring of its organizational chart effective January 1, 2023. Given legislative changes that now allow for investment team members, other than the CIO, to assume supervisory responsibilities, Ms. Murphy is creating a public markets group under the leadership of Ms. Shanta Chary and a private markets group under the leadership of Mr. David Beeson. Additionally, each officer and director position will have a dedicated asset class assignment, allowing for deeper subject matter expertise. With the reorganization, investment analysts will rotate through all six of the OCERS' asset classes on one year assignments. All investment personnel will be required to attain 20 hours of annual continuing education in the five asset classes away from their own mandate. Overall, the goal of this new organizational structure are: 1) to deepen our subject matter expertise; 2) to maintain a generalist culture which will ensure a resilient investment team; and 3) to provide supervisory experience beneath the CIO to facilitate succession planning.

HOLIDAYS AT OCERS



Building management put on a fun morning serenade of holiday songs and hot chocolate and accompanying sweets. The effort was appreciated by all tenants of our building!



Monthly Team Status

December 2022

ACTIVITY 3

(insert update)

UPDATES

STAFFING

Ms. Hockless provides this report on OCERS staffing as the year came to an end:

At the November 14, 2022, Board Meeting, the OCERS Board of Retirement approved an increase to the budgeted headcount by fourteen (14) new positions. In 2023, the budgeted headcount will increase from 113 to 127. OCERS Executive Office will add one (1) Director of Enterprise Project Management Office position, at the Director level. The Legal department will add three (3) new positions. One (1) Chief Compliance Officer, one (1) Staff Attorney, and one (1) Executive Secretary I. The Investments department will add one (1) Investment Officer position. The Member Services department will add three (3) Retirement Program Specialist positions. Information Security will add one (1) Information Security Analyst. The Information Technology department will add three (3) new positions. One (1) Testing Coordinator, one (1) Automation Developer, and one (1) Systems Technician. The Human Resources department will add two (2) new positions. One (1), Human Resources Analyst (Recruiter) and one (1) HR Staff Assistant. The Board also approved a total of three career ladders that do not increase the headcount. Two (2) in the Finance department and one (1) in the Internal Audit department.

The Human Resources department extended offers and onboarded a total of four (4) new employees. The positions filled are: one (1) Sr. Manager of Facilities & Operations Support Services, one (1) Executive Secretary I, one (1) IT Supervisor, and one (1) Retirement Program Specialist.

At the time of this report, the department has received, reviewed, and processed over 2,180 applications. **The HR department extended employment offers to a total of thirty (30) new employees and fifteen (15) promoted employees.** OCERS closed the year with 113 budgeted positions. OCERS has a total of one hundred and five (105) employees on payroll and eight (8) vacancies. A total of sixteen (16) employees have separated from the agency. The year-to-date **turnover rate is estimated at 15.24%**. The turnover rate is the number of separated employees divided by the number of employees on payroll, multiplied by 100. The current **vacancy rate is 7.08%**. The vacancy rate is calculated by taking the number of vacant positions, multiplying that number by 100, and dividing that result by the total number of budgeted positions.



Monthly Team Status

December 2022

INVESTMENTS

Mr. Beeson reports on December activities in the Investment Division:

As of November 30, 2022, the portfolio year-to-date is down 5.9% net of fees, while the one-year return is down 3.1%. The fund value now stands at \$21.0 billion. The OCERS Investment Team re-upped with two private equity funds and one multifamily real estate fund during December. OCERS' Investment Team, together with the OCERS Finance Team, continued reviewing responses for the Global Custody Services RFP in December. The OCERS Investment Team developed the 2023 Investment Committee work plan during the month. Finally, OCERS' Investment Team continued to monitor the pacing plans for the private market asset classes and the liquidity of the portfolio given the declines in the public markets.

VISION 2030

Mr. Eakin shares an update on our efforts to begin Robotic Process Automation (RPA):

OCERS released an RFP for Robotic Process Automation (RPA) services in September 2022. After careful consideration and review, in early December our evaluation committee selected UiPath as our preferred RPA platform, with Roboyo as the Business Partner set forth by UiPath to provide consulting for the implementation. We expect to commence contract negotiations with Roboyo in January 2023, with the implementation anticipated to start in Q1 2023



As a reminder, you will see this memo included with the BOARD COMMUNICATIONS document as part of the informational agenda for the FEBRUARY 21 meeting of the OCERS Board of Retirement.



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Gina M. Ratto, General Counsel
SUBJECT: LEGISLATIVE UPDATE

Written Report

State Legislative Update

The California Legislature reconvened on January 4, 2023, for the first year of the 2023 – 24 Legislative Session. The last day to introduce new bills was February 17th.

As of the date this update was prepared, there were only three bills of interest that staff is monitoring. The bills are summarized below, and we have not attached the typical longer list of pending bills to this memo.

SACRS Sponsored Bills

None to report.

Bills That Would Amend the CERL or Other Laws That Apply to OCERS

None to report.

Other Bills of Interest

SB 265 (Hurtado, Umberg)

Existing law requires the California Office of Emergency Services (Cal OES) to establish the California Cybersecurity Integration Center (Cal-CSIC) with the primary mission of reducing the likelihood and severity of cyber incidents that could damage California's economy, its critical infrastructure, or public and private sector computer networks in the state. Existing law requires Cal-CSIC to provide warnings of cyberattacks to government agencies and nongovernmental partners, coordinate information sharing among these entities, assess risks to critical infrastructure information networks, enable cross-sector coordination and sharing of best practices and security measures, and support certain cybersecurity assessments, audits, and accountability programs. Existing law also requires Cal-CSIC to develop a statewide cybersecurity strategy to improve how cyber threats are identified, understood and shared in order to reduce threats to California government, businesses and consumers, and to strengthen cyber emergency preparedness and response and expand cybersecurity awareness and public education.

This bill would require Cal OES to direct Cal-CSIC to prepare, and Cal OES to submit to the Legislature on or before January 1, 2025, a strategic, multiyear outreach plan to assist critical infrastructure sectors, as defined, in their efforts to improve cybersecurity and an evaluation of options for providing grants or alternative forms of funding to, and potential voluntary actions that do not require funding and that assist, that sector in their efforts to improve cybersecurity preparedness. The bill would make related findings and declarations.

(STATUS: Introduced; read first time; referred to Com. on RLS for assignment on 01/31/23.)

Bills that Apply to CalPERS and/or CalSTRS Only

SB 300 (Seyarto)

This bill would require any bill, introduced on or after January 1, 2024, that is referred to the Senate Labor, Public Employment and Retirement Committee and relates to CalPERS to include a fiscal impact analysis from the Legislative Analyst's Office that describes the fiscal impact of the bill on CalPERS and what the outcome of the bill would be if implemented.

(STATUS: Introduced; read first time; referred to Com. on RLS for assignment on 02/02/23.)

Divestment Proposals (CalPERS and CalSTRS Only)

SB 252 (Gonzalez, Stern, and Weiner)

Existing law prohibits the boards of CalPERS and CalSTRS from making new investments or renewing existing investments of public employee retirement funds in a thermal coal company, as defined. Existing law requires the boards to liquidate investments in thermal coal companies on or before July 1, 2017, and requires the boards, in making a determination to liquidate investments, to constructively engage with thermal coal companies to establish whether the companies are transitioning their business models to adapt to clean energy generation. Existing law provides that it does not require a board to take any action unless the board determines in good faith that the action is consistent with the board's fiduciary responsibilities established in the California Constitution.

This bill would prohibit the boards of CalPERS and CalSTRS from making new investments or renewing existing investments of public employee retirement funds in a fossil fuel company, as defined. The bill would require the boards to liquidate investments in a fossil fuel company on or before July 1, 2030. The bill would temporarily suspend the above-described liquidation provision upon a good faith determination by the board that certain conditions materially impact normal market mechanisms for pricing assets, as specified, and would make this suspension provision inoperative on January 1, 2035. The bill would provide that it does not require a board to take any action unless the board determines in good faith that the action is consistent with the board's fiduciary responsibilities established in the California Constitution.

This bill would require the boards, commencing February 1, 2025, and annually thereafter, to file a report with the Legislature and the Governor, containing specified information, including a list of fossil fuel companies of which the board has liquidated their investments. The bill would provide that board members and other officers

and employees shall be held harmless and be eligible for indemnification in connection with actions taken pursuant to the bill's requirements, as specified.

(STATUS: Introduced; read first time; referred to Com. on RLS for assignment on 01/30/23.)

Federal Legislative Update

At the end of 2022, Congress passed the Consolidated Appropriations Act of 2023, which includes the SECURE 2.0 Act of 2022 ("SECURE 2.0"). SECURE 2.0 includes many significant changes for retirement plans. Set forth below are the main changes impacting governmental defined benefit plans:

Required Minimum Distributions (RMD)

- ∑ Section 107 increases the RMD age to: (i) 73 for a person who attains age 72 after December 31, 2022 and age 73 before January 1, 2033; and (ii) 75 for an individual who attains age 74 after December 31, 2032. It is effective for distributions made after December 31, 2022, for individuals who attain age 72 after that date.
- ∑ Section 302 reduces the excise tax for failure to take RMDs from 50% of the shortfall to 25%. It further reduces the excise tax to 10% if the individual corrects the shortfall during a two-year correction window. It is effective for taxable years beginning after the date of enactment.
- ∑ Section 327 allows a spousal beneficiary to irrevocably elect to be treated as the employee for RMD purposes, and if the spouse is the employee's sole designated beneficiary, the applicable distribution period after the participant's year of death is determined under the uniform life table. It is effective for calendar years beginning after December 31, 2023.

Correction and the IRS Employee Plans Compliance Resolution System (EPCRS)

- ∑ Section 301 provides that a 401(a), 403(a), 403(b), and governmental plan (but not including a 457(b) plan) will not fail to be a tax favored plan merely because the plan fails to recover an "inadvertent benefit overpayment" (a defined term in the bill) or otherwise amends the plan to permit this increased benefit. In certain cases, the overpayment is also treated as an eligible rollover distribution. It is effective upon enactment with certain retroactive relief for prior good faith interpretations of existing guidance.
- ∑ Section 305 allows any "eligible inadvertent failure" (a defined term in the bill) to be self-corrected under EPCRS at any time (regardless of whether the error is significant or insignificant) unless (i) the IRS identified the failure before self-corrective measures commenced, or (ii) the self-correction was not completed in a reasonable period after the failure was identified. It is effective upon enactment.

Tax Treatment of Distributions

- ∑ Section 328 amends the HELPS Act by allowing the plan to distribute funds to pay for qualified health insurance premiums (1) directly to the insurer or (2) directly to the participant (but the participant must

include a self-certification that such funds did not exceed the amount paid for premiums in the year of the distribution when filing the tax return for that year). It is effective for distributions made after the date of enactment.

- Σ Section 309 excludes service-connected, disability pension payments (from a 401(a), 403(a), governmental 457(b), or 403(b) plan) from gross income of first responders after reaching retirement age up to an annualized excludable disability amount. The term “qualified first responder service” means service as a law enforcement officer, firefighter, paramedic, or emergency medical technician. It is effective for plan years beginning after December 31, 2023.
- Σ Section 323 clarifies that the exception to the 10% tax on early distributions from tax-preferred retirement accounts for substantially equal periodic payments continues to apply after certain rollovers and for certain annuities. It is effective for transfers, rollovers, and exchanges after December 31, 2023, and effective for annuity distributions on or after the date of enactment.
- Σ Section 329 extends the age 50 exception to the 10% early withdrawal penalty to those qualified public safety employees who have separated from service and have attained age 50 or 25 years of service, whichever comes first. It is effective for distributions made after the date of enactment.
- Σ Section 330 expands the definition of qualified public safety employee to include certain corrections officers and forensic security employees, thus making them eligible for the age 50 exception to the 10% early withdrawal penalty. It is effective for distributions made after the date of enactment.

Amendment Deadlines

- Σ Section 501 allows plan amendments made pursuant to the bill to be made by the end of the 2027 plan year for governmental plans as long as the plan operates in accordance with such amendments as of the effective date of a legislative or regulatory requirement or amendment. If a plan operates as such and meets the amendment timeline and requirements of this bill, then the plan will be treated as being operated in accordance with its terms. It also extends the plan amendment deadlines under the SECURE Act, CARES Act, and Taxpayer Certainty and Disaster Relief Act of 2020 to these new remedial amendment period dates, as previously reflected in IRS notices. It is effective upon enactment.

Attachment:

2023 Tentative Legislative Calendar

Submitted by:



Gina M. Ratto
General Counsel

2023 TENTATIVE LEGISLATIVE CALENDAR

COMPILED BY THE OFFICE OF THE SECRETARY OF THE SENATE AND THE OFFICE OF THE ASSEMBLY CHIEF CLERK
Revised 11/4/2022

DEADLINES

JANUARY						
S	M	T	W	TH	F	S
<u>1</u>	2	3	<u>4</u>	5	6	7
8	9	<u>10</u>	11	12	13	14
15	<u>16</u>	17	18	19	<u>20</u>	21
22	23	24	25	26	27	28
29	30	31				

FEBRUARY						
S	M	T	W	TH	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	<u>17</u>	18
19	<u>20</u>	21	22	23	24	25
26	27	28				

MARCH						
S	M	T	W	TH	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	<u>30</u>	<u>31</u>	

APRIL						
S	M	T	W	TH	F	S
						1
2	3	4	5	6	7	8
9	<u>10</u>	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	<u>28</u>	29
30						

MAY						
S	M	T	W	TH	F	S
	1	2	3	4	<u>5</u>	6
7	8	9	10	11	<u>12</u>	13
14	15	16	17	18	<u>19</u>	20
21	22	23	24	25	26	27
28	<u>29</u>	<u>30</u>	<u>31</u>			

- [Jan. 1](#) Statutes take effect (Art. IV, Sec. 8(c)).
- [Jan. 4](#) Legislature reconvenes (J.R. 51(a)(1)).
- [Jan. 10](#) Budget must be submitted by Governor (Art. IV, Sec. 12(a)).
- [Jan. 16](#) Martin Luther King, Jr. Day
- [Jan. 20](#) Last day to submit **bill requests** to the Office of Legislative Counsel

- [Feb. 17](#) Last day for bills to **be introduced** (J.R. 61(a),(1)(J.R. 54(a)).
- [Feb. 20](#) Presidents' Day.

- [Mar. 30](#) **Spring recess** begins upon adjournment of this day's session (J.R. 51(a)(2)).

- [Mar. 31](#) Cesar Chavez Day.

- [Apr. 10](#) Legislature reconvenes from **Spring recess** (J.R. 51(a)(2)).

- [Apr. 28](#) Last day for **policy committees** to hear and report to **fiscal committees** **fiscal bills** introduced in their house (J.R. 61(a)(2)).

- [May 5](#) Last day for **policy committees** to hear and report to the floor **non-fiscal bills** introduced in their house (J.R. 61(a)(3)).

- [May 12](#) Last day for **policy committees** to meet prior to June 5 (J.R. 61(a)(4)).

- [May 19](#) Last day for **fiscal committees** to hear and report to the Floor bills introduced in their house (J.R. 61(a)(5)).

Last day for **fiscal committees** to meet prior to June 5 (J.R. 61(a)(6)).

- [May 29](#) Memorial Day.

- [May 30-June 2](#) **Floor Session Only**. No committees, other than conference or Rules committees, may meet for any purpose (J.R. 61(a)(7)).

*Holiday schedule subject to Senate Rules committee approval

2023 TENTATIVE LEGISLATIVE CALENDAR

COMPILED BY THE OFFICE OF THE SECRETARY OF THE SENATE AND THE OFFICE OF THE ASSEMBLY CHIEF CLERK
Revised 11/4/2022

JUNE						
S	M	T	W	TH	F	S
				<u>1</u>	<u>2</u>	3
4	<u>5</u>	6	7	8	9	10
11	12	13	14	<u>15</u>	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

June 2 Last day for each house to pass bills introduced in that house (J.R. 61(a)(8)).

June 5 Committee meetings may resume (J.R. 61(a)(9)).

June 15 Budget must be passed by **midnight** (Art. IV, Sec. 12(c)(3)).

JULY						
S	M	T	W	TH	F	S
						1
2	3	<u>4</u>	5	6	7	8
9	10	11	12	13	<u>14</u>	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

July 4 Independence Day.

July 14 Last day for **policy committees** to meet and report bills (J.R. 61(a)(10)).

Summer Recess begins upon adjournment of session provided Budget Bill has been passed (J.R. 51(a)(3)).

AUGUST						
S	M	T	W	TH	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	<u>14</u>	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Aug. 14 Legislature reconvenes from **Summer Recess** (J.R. 51(a)(3)).

SEPTEMBER						
S	M	T	W	TH	F	S
					<u>1</u>	2
3	<u>4</u>	<u>5</u>	<u>6</u>	<u>7</u>	<u>8</u>	9
10	<u>11</u>	<u>12</u>	<u>13</u>	<u>14</u>	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

Sept. 1 Last day for **fiscal committees** to meet and report bills to Floor (J.R. 61(a)(11)).

Sept. 4 Labor Day.

Sept. 5-14 **Floor session only.** No committees, other than conference or Rules committees, may meet for any purpose (J.R. 61(a)(12)).

Sept. 8 Last day to **amend** on the floor (J.R. 61(a)(13)).

Sept. 14 Last day for **each house to pass bills** (J.R. 61(a)(14)).

Interim Study Recess begins at the end of this day's session (J.R. 51(a)(4)).

*Holiday schedule subject to Senate Rules committee approval

IMPORTANT DATES OCCURRING DURING INTERIM STUDY RECESS

2023

Oct. 14

Last day for Governor to sign or veto bills passed by the Legislature on or before Sept. 14 and in his possession after Sept. 14 (Art. IV, Sec.10(b)(1)).

2024

Jan. 1

Statutes take effect (Art. IV, Sec. 8(c)).

Jan. 3

Legislature reconvenes (J.R. 51(a)(4)).



Memorandum

DATE: 02/08/2023
TO: Members of the Board of Retirement
FROM: Jeff Lamberson, Director of Member Services
SUBJECT: OVERPAID AND UNDERPAID PLAN BENEFITS – 2022 REPORT

Written Report

Background/Discussion

In accordance with the Board of Retirement Overpaid and Underpaid Plan Benefits Policy adopted by the Board on May 16, 2016, this memorandum serves as the annual report covering the calendar year 2022. Most Overpaid Benefits each year come from late reporting of payee deaths. In order to combat this, OCERS Member Services Team made changes in 2021 to our death reporting processes to help quickly identify active payees that may have recently passed away. This change in our process has reduced the number of the overpayments related to late reporting of a payee’s death to the OCERS organization. In 2023, we will be issuing an RFP for death reporting service providers due to our contract expiring with our current service provider. During this provider review, our main priority will be to ensure we continue to improve our processes and minimize late reporting for the OCERS plan.

Benefit Overpayments/Underpayments:

Benefit overpayments and repayments are tracked In the V3 pension software system. The Benefit Recoupment report in V3 displays all overpayments created in the system, the current balance, and the last recoupment payment date and amount. By using this report, OCERS monitors the status of overpayments, and to identify accounts that need additional action. Underpayments are less common, and those that occur, are paid to members in the form of one-time benefit adjustments upon discovery.

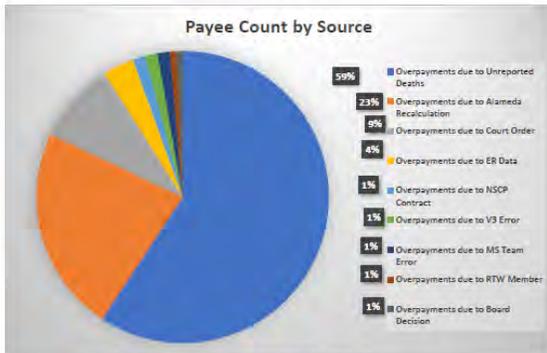
In 2022, among the over 20,000 monthly payees at OCERS, 145 benefit overpayments occurred. Of this number, 33 were attributable to the Alameda project recalculations and are currently on hold for recovery pending a board decision. We have fully recovered 68 overpayments; we are writing off 1 overpayment (\$45.00) due to a system error as per the Board approved write off policy and there are 5 overpayment accounts in the active repayment process via monthly benefit deductions. Efforts seeking repayment arrangements are underway for the remaining 71 accounts (24 deceased payees and 47 active payee).

This year 23% of the number of overpayments are attributable to the Alameda decision. The most significant number of benefit overpayments remains the late reporting of payee deaths at a little over 59%. The remaining 18% of overpayments were a result of a variety of account activities: court ordered recalculations, updated payroll information received post retirement, team member error or other changes. Over 47% of all overpayments in 2022 have been fully recouped.

Submitted by:



Source	Original Amt	Amount Paid	Current Balance	Amount Recouped	Payee Count	Paid in Full	Payment Plan Active	Collection Efforts Underway	Write Off
Overpayments due to Unreported Deaths	637,018.08	(169,705.93)	258,163.03	378,855.05	86	62	0	24	0
Overpayments due to Alameda Recalculation	2,741,155.82	-	2,694,755.23	46,400.59	33	0	0	33	0
Overpayments due to Court Order	87,795.86	(980.06)	37,961.37	49,834.49	13	2	1	10	0
Overpayments due to ER Data	2,539.85	(292.36)	2,247.49	292.36	5	1	0	4	0
Overpayments due to NSCP Contract	32,697.07	(3,814.65)	28,882.42	3,814.65	2	0	2	0	0
Overpayments due to V3 Error	573.77	(528.77)	45.00	528.77	2	1	0	0	1
Overpayments due to MS Team Error	2,157.96	(767.01)	1,390.95	767.01	2	1	1	0	0
Overpayments due to RTW Member	59,642.51	-	59,642.51	-	1	1	0	0	0
Overpayments due to Board Decision	52,063.40	(1,003.68)	51,059.72	1,003.68	1	0	1	0	0
Totals	3,615,644.32	(177,092.46)	3,134,147.72	481,496.60	145	68	5	71	1





OCERS Board Policy

Overpaid and Underpaid Plan Benefits Policy

Purpose and Background

1. The purpose of the Orange County Employees Retirement System (“OCERS,” “System,” or “Plan”) *Overpaid and Underpaid Plan Benefits Policy* (“policy”) is to provide a framework that the System can use as a basis for resolving erroneous payments of Plan benefits to members and their beneficiaries. In the event that an overpayment is the result of a felony conviction OCERS Administrative Procedure (OAP) *Felony Forfeitures* shall be used as a basis for resolution. The OCERS Board of Retirement (“Board”) is charged with the responsibility of administering the System in a manner that assures appropriate and prompt delivery of benefits and related services to members and their beneficiaries and of managing the assets in a prudent manner. The Internal Revenue Service (“IRS”) requires that operational failures be corrected in a prompt, reasonable, and consistent manner that attempts to place the retirement system in the position it would have been in had the erroneous payment not occurred.

Policy Objectives

2. Members and their beneficiaries (herein referred to as “members”) have a right to accurate retirement benefit payments. No member has the right to receive or retain retirement benefit payments that exceed the amounts to which a member is entitled, and no member may be deprived of any benefit payments that he or she is entitled to receive. Subject to all applicable laws and consistent with this policy and the procedures established by the Board, it shall be OCERS’ policy to make every reasonable effort to recover from a member the amount of any overpaid Plan benefits, and remit to a member the amount of any underpaid Plan benefits.

Policy Guidelines

3. After discovery of overpaid or underpaid benefits, and within a reasonable period of time after written notification to the affected member, OCERS will correct the benefit payment amount prospectively to prevent additional overpayments or underpayments, and will pay to the member in a lump sum, or collect from the member through lump sum or installment payments, the amounts to which the member or the Plan is entitled in accordance with this policy and applicable law.
4. These policies and procedures are designed for use when calculation and other errors affect an individual member’s retirement benefits. In the event of a system-wide error that affects multiple members’ benefits, the Board may implement a system-wide correction process that it determines is appropriate under the circumstances.
5. In the event of any inconsistency between applicable law (including IRS rules and guidance) and these policies and procedures, the law shall govern.



OCERS Board Policy

Overpaid and Underpaid Plan Benefits Policy

Policy Procedures for Overpaid Benefits

6. When an overpayment of Plan benefits is discovered more than ninety (90) days after the member/payee's initial benefit payment, OCERS will first adjust the benefit payment prospectively to reflect the correct benefit amount and to prevent additional overpayments. OCERS will also take all reasonable steps to recover the full amount of all overpayments, going back to the inception of the error, and recouping "appropriate interest," as defined in section 7 below, during the period in which the benefit overpayments were made and also during any repayment period (*i.e.*, applied to the outstanding amount due until fully repaid).
7. *Appropriate Interest*
 - a. "Appropriate interest" means an interest amount determined using the System's actuarially assumed rate of return as of the date OCERS sets for commencing repayment.
 - b. In cases where there is evidence that the benefit overpayment resulted from fraud or dishonest conduct by the member/payee or because the member/payee provided, or caused to be provided, inaccurate information to OCERS or the member's employer, then "appropriate interest" shall be recouped from the member/payee.
 - c. In cases other than those described above in Section 7.b, "appropriate interest" shall be recouped from the member's employer.
8. The Board believes that considerations of cost effectiveness make it prudent and reasonable to pursue recovery of overpaid benefits only where the cumulative total amount of overpaid benefits is \$250 or more. Accordingly, OCERS is authorized to not seek recovery of any such overpaid benefits where the total amount overpaid to the member is less than \$250.
9. *Time Period for Installment Payments.* When recovering benefit overpayments, the following apply:
 - a. *Director of Member Services:* When the total amount of such overpaid benefits, not including interest, is \$10,000 or less, the Director of Member Services shall have authority to agree to extend the time period for the member's installment payments to a period not exceeding the expected lifetime of the member as determined by the actuary.
 - b. *CEO:* Regardless of the amount of the Plan's claim against the member, the CEO shall have the authority to agree to extend the time period for the member's installment payments to a period not exceeding the expected lifetime of the member as determined by the actuary.
10. *Compromising claims:* The amount of the Plan's claim for overpaid benefits is the difference between the amounts actually paid to the member during the overpayment period and the amounts that should have been paid, together with "appropriate interest" from the dates of the actual overpayments to the date(s) the correction is effective. The likelihood of collection, the cost of collection, the amount of possible recovery and extreme hardship to the member will be considered by the CEO and/or the Board when determining whether to compromise a claim. Compromising a claim may include a different method of repayment than is otherwise provided



OCERS Board Policy

Overpaid and Underpaid Plan Benefits Policy

by this Policy and/or forgiveness or partial forgiveness of principal and/or interest, subject to applicable IRS rules and guidance.

- a. When the total amount of the Plan's claim against the member, not including interest, is \$1,000 or less, the CEO, on the advice of legal counsel, shall have the authority to compromise the claim.
- b. Only the Board may compromise claims in which the total amount of such overpaid benefits, not including interest, is greater than \$1,000.

11. The Board adopts the following procedures for accomplishing the recovery of overpaid Plan benefits:

- a. Upon discovery of the benefit overpayment, OCERS will send a letter by certified mail, return receipt requested, or by express delivery service, to the member/payee. Subject to the provisions of this Policy, the letter will provide the following information to the member/payee regarding the overpaid benefits:
 - i. Provide notice of the prospective adjustment to the benefit payment (to reflect the correct amount);
 - ii. Request payment to OCERS of the amount of overpaid benefits with appropriate interest as defined in section 7, above; and
 - iii. Unless otherwise determined by the Board, the CEO, or the Director of Member Services (see sections 9.a. and 9.b., above) or, if a repayment plan for a longer period is needed due to the limitation described in section 6, above, the letter will set a repayment plan with two options:
 - *Option 1* – equal installments deducted from the member/payee's monthly benefit over the same length of time that the overpaid benefits occurred, with "appropriate interest" (as that phrase is defined in section 7, above) applied during the repayment period; and
 - *Option 2* – lump sum payment to the Plan for the full amount overpaid, with "appropriate interest" (as that phrase is defined in section 7, above) applied during the overpayment period.
- b. Notwithstanding the above, any reduction in the member/payee's ongoing monthly benefit to recover overpayments will be limited to a maximum of 15% of the corrected gross monthly benefit unless the member/payee requests a higher reduction. The balance due will be paid over time, subject to this limitation.
- c. OCERS may pursue all legal remedies to collect such overpaid Plan benefits, including making a claim on an estate or trust. In addition, if the member dies before the full amount of principal and interest is paid, OCERS may recover the remaining principal and interest from any lump sum amount OCERS is obligated to pay to the member's estate or named beneficiaries of the member; provided, however, OCERS shall not seek to recover any such remaining amounts from any continuation payments made to a surviving spouse or an optional beneficiary of the member, unless an erroneous payment is made to the surviving spouse or optional beneficiary.



OCERS Board Policy

Overpaid and Underpaid Plan Benefits Policy

- d. OCERS will maintain a permanent record of all amounts of such overpaid Plan benefits and the repayment to OCERS of those overpaid benefits. Every year, for cases involving benefit overpayments, the Director of Member Services shall provide a report to the Board.
- e. To the extent OCERS is unable to recoup overpaid Plan benefits from the member/payee, any shortfall will be recouped from the employer as part of the annual actuarial valuation process.

Policy Procedures for Underpaid Benefits

12. When the Plan has underpaid benefits to the member, and the underpayment is discovered more than 90 days after the member/payee's initial benefit payment, the member shall be entitled to a prospective adjustment to his or her retirement benefits to reflect the correct benefit amount. In addition, except as provided in Section 14, below, the member will be entitled to a lump sum payment for all past amounts owed as a result of the error, with interest compounded annually at the rate of 3%. The payment shall be made as soon as administratively feasible.

13. If a member who was underpaid benefits has died prior to payment of the lump sum amount due, the payment, including interest, will be made according to OCERS' standard procedures for paying residual amounts following the death of the member (*e.g.*, to the designated beneficiary, estate, personal representative, trustee of the member trust, etc.).

- a. If, after following its standard procedures and applicable IRS guidance, Plan staff has not been able to locate a person entitled to payment, the Plan shall hold the funds on behalf of that person for five years. If the funds are not claimed within five years, the funds may be transferred into the System's pension reserve fund. If someone later appears to claim the funds, the Board or the CEO will consider such claims on a case-by-case basis.
- b. The Plan will maintain a permanent record of all amounts of outstanding refunds of underpaid benefits and any amounts that have been transferred into the pension reserve fund.

14. If the total amount that the Plan owes to the member, is \$75 or less, the Plan is not required to make the corrective distribution if, in the judgment of the CEO in consultation with legal counsel, the reasonable direct costs of processing and delivering the distribution to the member would exceed the amount of the distribution.

Administrative Review

15. A member/payee may request administrative review of any decision regarding corrective actions that the Plan takes with respect to recovering and/or returning over and underpayments of plan benefits.

The review process will generally follow the same pattern as the review process for benefit determinations pursuant to the Board's Administrative Review and Hearings Policy.

- a. Overpayment collection efforts will be stayed, but benefits will be prospectively adjusted to prevent additional overpayments, during the pendency of the administrative review process; provided, however, that the Board shall have the discretion to suspend implementing its



OCERS Board Policy Overpaid and Underpaid Plan Benefits Policy

recovery from the member in whole or in part during any ensuing court action. Interest will continue to accrue on all amounts owed to OCERS during the administrative review process and litigation.

Policy Review

- 16. The Board will review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

Policy History

- 17. This policy was adopted by the Board of Retirement on May 16, 2016 and amended on October 21, 2019 and November 15, 2021.

Secretary’s Certificate

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this policy.

Steve Delaney
Secretary of the Board

11-15-2021

Date



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Suzanne Jenike, Assistant CEO, External Operations
SUBJECT: 2023 STAR COLA COST POSTING

Written Report

Background/Discussion

In accordance with Government Code section 7507, a public meeting will occur on March 20, 2023, to consider the STAR COLA ad hoc adjustment to applicable retirement allowances.

STAR COLA stands for Supplemental Targeted Adjustment for Retirees, Cost of Living Adjustment. The purpose is to restore purchasing power for retirees who have lost more than 20% of their purchasing power since retirement, as measured by the accumulation in a retired member's COLA bank. The STAR COLA brings those individuals back to 80% of purchasing power. It applies to those retirees or their beneficiaries who began receiving a benefit on or before April 1, 1980, and is granted in accordance with Government Code section 31874.3(c).

Before the Board votes on whether to grant the STAR COLA, the costs must be posted at a separate public meeting, in accordance with Government Code Section 7507. As such, this item is providing the required notice that on March 22, 2023, the Board will consider the granting of the STAR COLA. The total cost is projected to be \$447,841 and applies to 141 payees.

- ∑ County of Orange \$443,676 -138 payees
- ∑ UCI \$1,042 - 1 payee
- ∑ Sanitation District \$3,123 - 2 payees

As in the past, the Board will provide each employer with STAR COLA recipients the opportunity to pay their share of the cost in a lump sum, over a period of 12 months or add it to the unfunded liability for that employer.

Submitted by:



S. J. – APPROVED

Suzanne Jenike
 Assistant CEO, External Operations



Andy Yeung, ASA, MAAA, FCA, EA
Vice President & Actuary
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San Francisco, CA 94105-6147
segalco.com

Via Email

February 9, 2023

Mr. Steve J. Delaney
Chief Executive Officer
Orange County Employees Retirement System
2223 Wellington Avenue
Santa Ana, CA 92701-3101

**Re: Orange County Employees Retirement System (OCERS)
Supplemental Targeted Adjustment for Retirees Cost-of-Living Adjustment
(STAR COLA) Payment Projections as of April 1, 2023**

Dear Steve:

As requested by the System, we have projected the cost of continuing the STAR COLA benefit over the next ten years from April 1, 2023.

BACKGROUND

The Retirement Board grants a STAR COLA benefit to maintain a minimum of 80% of a retiree's or beneficiary's purchasing power. The STAR COLA benefit is calculated by first taking the balance in a member's COLA bank that is in excess of 20% and multiplying that times the member's benefit.

The 1937 Act allows the Board either to advance fund the STAR COLA benefit subject to the availability of excess earnings above 1% of OCERS' assets or to grant this benefit on an annual basis. We understand that the Board's current practice has been to grant this benefit on an annual basis.

RESULTS AND ANALYSIS

On April 1, 2023, only those members who retired on or before April 1, 1980 have COLA banks in excess of 20%¹ and hence are eligible to receive the STAR COLA.

The attached Exhibit A shows a ten-year projection of the STAR COLA benefits, expressed as a percentage of the benefit payable effective April 1 of the next ten years. In Exhibit B, we show the annual benefit payment based on who is eligible for the STAR COLA benefit as of

¹ We note that members who retired from April 2, 1980 to April 1, 1981 have lost exactly 20% purchasing power and are not eligible for the STAR COLA as of April 1, 2023.

Mr. Steve J. Delaney
 February 9, 2023
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April 1, 2023 (i.e., members who retired on or before April 1, 1980) and those who may become eligible after April 1, 2023. In Exhibit C, we have included a schedule that provides the breakdown of the anticipated STAR COLA benefits from April 1, 2023 to March 31, 2024 based on members who retired from each employer.

Our projections are based on the following assumptions provided below.

1. The existing 80% purchasing power cap will remain unchanged.
2. In adjusting the purchasing power banks after April 1, 2023, we have used the assumed retiree COLA assumption of 2.75% previously adopted by the Board for the upcoming December 31, 2022 valuation. As OCERS provides a maximum annual COLA of 3.0%, the COLA banks will decrease in the future under the 2.75%² retiree COLA assumption (see attached Exhibit A) and thus no other additional members will be expected to become eligible.³ We assume that future STAR COLA benefits, adjusted to reflect inflation for the prior calendar year, will be paid commencing April 1 of the subsequent year.
3. Our projections were based on the latest membership data used in the valuation as of December 31, 2021, but updated through mid-January 2023 to exclude those members who have passed away and to include the associated beneficiary records, if applicable, since the prior valuation. For conservatism, we assumed no deaths would have occurred among retirees and beneficiaries from mid-January 2023 to April 1, 2023. Effective April 1, 2023, we applied the life expectancies previously adopted by the Board for the upcoming December 31, 2022 valuation in projecting members who will be entitled to payments in the ten-year period.
4. The projections are based on proprietary actuarial modeling software. Our Actuarial Technology and Systems unit, comprised of both actuaries and programmers, is responsible for the initial development and maintenance of these models. The models have a modular structure that allows for a high degree of accuracy, flexibility and user control. The client team programs the assumptions and the plan provisions, validates the models, and reviews test lives and results, under the supervision of the responsible actuary.

I'm a member of the American Academy of Actuaries and I meet the Qualification Standard of the American Academy of Actuaries to render the actuarial opinion herein.

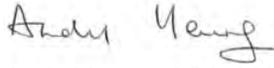
² It should be noted that 2.75% is assumed to be the average annual COLA during the next ten years. In practice, actual COLAs are granted annually in increments of 0.5% according to the 1937 Act.

³ It should be noted that in determining the liabilities for those retirees with COLA banks in the funding valuation, we have been assuming that a COLA of 3.00% would be paid on each April 1 following the date of the valuation until their COLA banks are depleted.

Mr. Steve J. Delaney
February 9, 2023
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Please give us a call if you have any questions.

Sincerely,



Andy Yeung, ASA, MAAA, FCA, EA
Vice President & Actuary

JY/bbf
Enclosures

cc: Suzanne Jenike
Brenda Shott

Exhibit A

Ten-Year Projection of STAR COLA Benefits

(Expressed as a Percent of the Benefit Payable Effective April 1 of the Year Indicated)

Date of Retirement	April 1, 2023	April 1, 2024	April 1, 2025	April 1, 2026	April 1, 2027	April 1, 2028	April 1, 2029	April 1, 2030	April 1, 2031	April 1, 2032
On or Before 04/01/1972	32.00%	31.75%	31.50%	31.25%	31.00%	30.75%	30.50%	30.25%	30.00%	29.75%
04/02/1972 to 04/01/1974	31.50%	31.25%	31.00%	30.75%	30.50%	30.25%	30.00%	29.75%	29.50%	29.25%
04/02/1974 to 04/01/1975	31.00%	30.75%	30.50%	30.25%	30.00%	29.75%	29.50%	29.25%	29.00%	28.75%
04/02/1975 to 04/01/1976	25.50%	25.25%	25.00%	24.75%	24.50%	24.25%	24.00%	23.75%	23.50%	23.25%
04/02/1976 to 04/01/1977	20.00%	19.75%	19.50%	19.25%	19.00%	18.75%	18.50%	18.25%	18.00%	17.75%
04/02/1977 to 04/01/1978	16.50%	16.25%	16.00%	15.75%	15.50%	15.25%	15.00%	14.75%	14.50%	14.25%
04/02/1978 to 04/01/1979	12.50%	12.25%	12.00%	11.75%	11.50%	11.25%	11.00%	10.75%	10.50%	10.25%
04/02/1979 to 04/01/1980	7.50%	7.25%	7.00%	6.75%	6.50%	6.25%	6.00%	5.75%	5.50%	5.25%

Based on the ten-year projection, members who retired after April 1, 1980 are not eligible for STAR COLA.

PROJECTED BENEFIT PAYMENTS

The expected benefit payments for the current and new STAR COLA recipients for the next ten years, commencing April 1, 2023, are provided in the following table:

	Benefit Payments		
	(1) Eligible for STAR COLA as of April 1, 2023	(2) Not Yet Eligible for STAR COLA as of April 1, 2023	(1) + (2)
1. April 1, 2023 - March 31, 2024	\$447,841	\$0	\$447,841
2. April 1, 2024 - March 31, 2025	411,979	0	411,979
3. April 1, 2025 - March 31, 2026	376,155	0	376,155
4. April 1, 2026 - March 31, 2027	341,726	0	341,726
5. April 1, 2027 - March 31, 2028	309,372	0	309,372
6. April 1, 2028 - March 31, 2029	279,372	0	279,372
7. April 1, 2029 - March 31, 2030	251,765	0	251,765
8. April 1, 2030 - March 31, 2031	226,465	0	226,465
9. April 1, 2031 - March 31, 2032	203,333	0	203,333
10. April 1, 2032 - March 31, 2033	<u>182,208</u>	<u>0</u>	<u>182,208</u>
Total Benefit Payments	\$3,030,216	\$0	\$3,030,216
Discounted Benefit Payments ⁴	\$2,320,596	\$0	\$2,320,596

⁴ At 7.00% annual investment return assumption.

PROJECTED BENEFIT PAYMENTS BY EMPLOYER

The expected benefit payments for the current STAR COLA recipients from April 1, 2023 to March 31, 2024 broken down by employer, are provided in the following table:

	Benefit Payments			
	Orange County	U.C.I. (Bi-weekly)	Sanitation District	Total
April 1, 2023 - March 31, 2024	\$443,676	\$1,042	\$3,123	\$447,841
Number of Recipients	138 ⁵	1	2	141

⁵ Includes 137 payees reported in the OCERS STAR COLA file plus one surviving spouse beneficiary of a recently deceased member.

§31874.3. Determination; application of excess to allowances; effect on subsequent increases

(a)(1) Whenever the percentage of annual increase in the cost of living as of January 1 of each year as shown by the Bureau of Labor Statistics Consumer Price Index for All Urban Consumers exceeds the maximum benefit increase provided in Section 31870, 31870.1, 31870.2, or 31870.3, whichever is applicable, the board of retirement may provide that all or part of the excess percentage increase shall be applied to the retirement allowances, optional death allowances, or annual death allowances increased in Section 31870, 31870.1, 31870.2, or 31870.3. The board shall determine the amount of the excess to be applied, which amount shall not exceed an amount that can be paid from earnings of the retirement fund that are in excess of the total interest credited to contributions and reserves plus 1 percent of the total assets of the retirement fund.

(2) The supplemental increases in excess of the increases applied to the retirement allowances, optional death allowances, or annual death allowances pursuant to Section 31870, 31870.1, 31870.2, or 31870.3 shall not become a part of the retirement allowances, optional death allowances, or annual death allowances to be increased by subsequent increases under Section 31870, 31870.1, 31870.2, or 31870.3.

(3) This subdivision shall be operative in any county that has elected by a majority vote of the board of supervisors to make either Section 31870, 31870.1, 31870.2, or 31870.3 applicable in that county.

(b)(1) The board of retirement may, instead of taking action pursuant to subdivision

(a), provide supplemental cost-of-living increases, effective on a date to be determined by the board, to the retirement allowances, optional death allowances, or annual death allowances increased in Section 31870, 31870.1, 31870.2, or 31870.3; provided however, that only those members shall be eligible for this increase whose accumulations established by Section 31870, 31870.1, 31870.2, or 31870.3 shall equal or exceed 20 percent as of January 1 of the year in which the board of retirement adopts an increase under this subdivision.

(2) The supplemental increases to the retirement allowances, optional death allowances or annual death allowances increased in Section 31870, 31870.1, 31870.2, or 31870.3 shall not become a part of the retirement allowances, optional death allowances or annual death allowances to be increased by subsequent increases under Section 31870, 31870.1, 31870.2, or 31870.3.

(3) This subdivision shall be operative in any county that has elected by a majority vote of the board of supervisors to make either Section 31870, 31870.1, 31870.2, or 31870.3 applicable in that county.

(c)(1) The board of retirement may, instead of taking action pursuant to subdivision (a) or (b), provide supplemental cost-of-living increases, on a prefunded basis and effective on a date to be determined by the board, to the retirement allowances, optional death allowances, or annual death allowances increased in Section 31870, 31870.1, 31870.2, or 31870.3; provided however, only those members shall be eligible for this increase whose accumulations established by Section 31870, 31870.1, 31870.2, or 31870.3 equal or exceed 20 percent as of January 1 of the year in which the board of retirement takes action pursuant to this subdivision.

(2) The supplemental increases to the retirement allowances, optional death allowances, or annual death allowances increased in Section 31870, 31870.1, 31870.2, or 31870.3 shall become a part of the retirement allowances, optional death allowances, or annual death allowances and shall serve to reduce the accumulations established by Section 31870, 31870.1, 31870.2, or 31870.3, as applicable, by the same percentage as the payment that is made pursuant to this Section.

(3) Before the board of retirement provides benefits pursuant to this subdivision, the costs of the benefits shall be determined by a qualified actuary and the board of retirement shall, with the advice of the actuary, provide for the full funding of the benefits utilizing funds in the reserve against deficiencies established pursuant to Section 31592.2, using surplus earnings that exceed 1 percent of the total assets of the retirement system.

(4) This subdivision shall be operative in any county that has elected by a majority vote of the board of supervisors to make either Section 31870, 31870.1, 31870.2, or 31870.3 applicable in that county.

(d) Upon adoption by any county providing benefits pursuant to this section, of Article 5.5 commencing with Section 31610) of this chapter, the board of retirement shall, instead, pay those benefits from the Supplemental Retiree Benefit Reserve established pursuant to Section 31618.

(Amended (as amended by Stats. 1983, Ch. 147, Sec. 2) by Stats. 1983, Ch. 886, Sec. 11)

(Amended by Stats. 2000, Ch. 317 (AB 2176), Sec. 4)

CA Govt Code § 7507 (2017)

(a) For the purpose of this section:

(1) "Actuary" means an actuary as defined in Section 7504.

(2) "Future annual costs" includes, but is not limited to, annual dollar changes, or the total dollar changes involved when available, as well as normal cost and any change in accrued liability.

(b) (1) Except as provided in paragraph (2), the Legislature and local legislative bodies, including community college district governing boards, when considering changes in retirement benefits or other postemployment benefits, shall secure the services of an actuary to provide a statement of the actuarial impact upon future annual costs, including normal cost and any additional accrued liability, before authorizing changes in public retirement plan benefits or other postemployment benefits.

(2) The requirements of this subdivision do not apply to:

(A) An annual increase in a premium that does not exceed 3 percent under a contract of insurance.

(B) A change in postemployment benefits, other than pension benefits, mandated by the state or federal government or made by an insurance carrier in connection with the renewal of a contract of insurance.

(c) (1) (A) With regard to local legislative bodies, including community college district governing boards, the future costs of changes in retirement benefits or other postemployment benefits, as determined by the actuary, shall be made public at a public meeting at least two weeks prior to the adoption of any changes in public retirement plan benefits or other postemployment benefits. If the future costs of the changes exceed one-half of 1 percent of the future annual costs, as defined in paragraph (2) of subdivision (a), of the existing benefits for the legislative body, an actuary shall be present to provide information as needed at the public meeting at which the adoption of a benefit change shall be considered. The adoption of any benefit to which this section applies shall not be placed on a consent calendar.

(B) The requirements of this paragraph do not apply to:

(i) An annual increase in a premium that does not exceed 3 percent under a contract of insurance.

(ii) A change in postemployment benefits, other than pension benefits, mandated by the state or federal government or made by an insurance carrier in connection with the renewal of a contract of insurance.

(2) With regard to the Legislature, the future costs as determined by the actuary shall be made public at the policy and fiscal committee hearings to consider the adoption of any changes in public retirement plan benefits or other postemployment benefits. The adoption of any benefit to which this section applies shall not be placed on a consent calendar.

(d) Upon the adoption of any benefit change to which this section applies, the person with the responsibilities of a chief executive officer in an entity providing the benefit, however that person is denominated, shall acknowledge in writing that he or she understands the current and future cost of the benefit as determined by the actuary. For the adoption of benefit changes by the state, this person shall be the Director of Human Resources.

(e) The requirements of this section do not apply to a school district or a county office of education, which shall instead comply with requirements regarding public notice of, and future cost determination for, benefit changes that have been enacted to regulate these entities. These requirements include, but are not limited to, those enacted by Chapter 1213 of the Statutes of 1991 and by Chapter 52 of the Statutes of 2004.

(Amended by Stats. 2016, Ch. 415, Sec. 4. (AB 2375) Effective January 1, 2017.)



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **2022 BUSINESS PLAN – END OF YEAR REPORT**

Presentation

Per Board policy, attached is an annual report outlining outcomes of the past year's (2022) Business Plan.

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer

Orange County Employees Retirement System
2223 East Wellington Avenue | Santa Ana | 92701

2022 BUSINESS PLAN



MISSION, VISION AND VALUES

MISSION STATEMENT:

We provide secure retirement and disability benefits with the highest standards of excellence.

VISION STATEMENT:

To be a trusted partner providing premier pension administration, distinguished by consistent, quality member experiences and prudent financial stewardship.

VALUES:

- **O**pen and Transparent
- **C**ommitment to Superior Service
- **E**ngaged and Dedicated Workforce
- **R**eliable and Accurate
- **S**ecure and Sustainable

2022-2024 STRATEGIC GOALS

- Fund Sustainability
- Excellent Service and Support
- Risk Management
- Talent Management
- Effective Governance

FUND SUSTAINABILITY

GOAL: STRENGTHEN THE LONG-TERM STABILITY OF THE PENSION FUND

Business Plan Initiatives

Objective A: Mitigate the Risk of Significant Investment Loss

Executive Lead – Molly Murphy

1. Complete Investment Consultants procurement process **COMPLETED**

Objective B: Prudent Use and Security of Resources

Executive Lead – Molly Murphy

1. Initiate Custodial Bank Services RFP preparation **In Process- scheduled to conclude by June 30, 2023**

EXCELLENT SERVICE AND SUPPORT

GOAL: ACHIEVE EXCELLENCE IN THE SERVICE AND SUPPORT WE PROVIDE TO OUR MEMBERS AND PLAN SPONSORS

Business Plan Initiatives

Objective A: Provide Accurate and Timely Benefits

Executive Lead – Suzanne Jenike

1. Create comprehensive overview of applicable Memorandum of Understandings (MOU) (\$25,000) **COMPLETED by 12/31/2022**
2. Continue to Enhance Cross Training for Member Services Team **In Process**
 - Σ We continue to cross train team members across the Member Services department to assist with new duties and backfill vacancies and support increased workloads.
 - Σ Completed – Training of contract resources to support Alameda recalculation project.
 - Σ In Progress – Training program development for Member Services new hires.
3. Continue Evaluation of Existing Forms & Letters – **In Process**
 - Σ Completed (updates to the Direct Deposit Authorization page of the “Request to Withdraw Form”
 - Σ Completed "Request to Withdraw Contributions / Elect Rollover / Direct Deposit Form"
 - Σ Completed – Alameda Refund Withdrawal Form
 - Σ Completed – W-4P and OCERS State Withholding Form

- Σ In Progress - Retirement Application Packet Update
- Σ Additional forms in process.

4. Investigate options of enhancing the online calculator to provide disability estimates. **Deferred until new Pension Administration System is implemented.**
5. Evaluate Options for New Imaging System for Member Document Repository and implement if appropriate (\$250,000) – **DEFERRED to 2023. To be considered in Q1 2023 with planning of new/updated pension administration system. (InfoTech)**

Objective B: Provide Education to our Members and Employers

Executive Lead – Suzanne Jenike

1. Update website to enhance disability related FAQs and include a white board video that counsels on the disability application process. **COMPLETED**
2. Investigate options for communication OCERS news via email. **In progress. Expected to complete in Q2 of 2023**
3. Continue to create videos, both in-house and white board (\$25,000) **COMPLETED**
4. Evaluate options for transition *At Your Service* newsletter to be electronic for active/deferred members and only send hard copies to retirees. **In progress, expected to complete in Q4 of 2023**

Objective C: Continuously Improve Business Processes and Procedures to be Efficient

and Effective

Executive Leads – Brenda Shott and Suzanne Jenike

1. Investigate options for enhanced member survey platform (\$10,000) **IN PROGRESS, expected to**

complete in Q4 of 2023

2. Investigate creating a triage process for disability applications allowing the independent medical examination to be foregone if allowable. **Q1 2023 anticipated completion**
3. Identify, develop and implement V3 Data Validation and Clean Up procedures (\$10,000) – **To Begin Q4 2022**
 - **Currently in the process of recruiting Member Services QA team who will be responsible for managing Data Validation cleanup efforts.**
 - **1/30/23 – Procedure document almost complete. Will be implemented in Q1 2023.**
4. Issue a RFP for next generation pension administration system (\$200,000) (InfoTech)– **Deferred to 2024. In 2023 Staff will issue an RFP for a consultant/implementation partner that will assist us in developing the next-generation pension administration system requirements that will be incorporated into the RFP for the new system.**
5. Execute a pilot project for the use of Robotic Process Automation to streamline routine task (\$350,000) **IN PROCESS, currently finalizing contract negotiations, project to start Q1 of 2023**
6. Complete implementation and post-implementation of new ERP/Accounting Software system (\$42,500) **COMPLETE. Went live with Accounting system on January 1, 2022 and expense management reporting in May 2022. Budgeting was completed in November 2022 and transitioned payment to vendors via ACH during Q12023.**

7. Conduct LEAN process on the investment reporting function (\$10,000) DEFERRED. Postponed conducting a formal LEAN training due to change in accounting system during 2022 and a potential change in custodian services in late 2023.
8. Procure and implement a new helpdesk solution for internal use (\$100,000) (InfoTech) In progress – implementation started, phase 1 roll-out expected to begin in Q1 of 2023

RISK MANAGEMENT

GOAL: CULTIVATE A RISK-INTELLIGENT ORGANIZATION

Business Plan Initiatives

Objective A: Enhance Governance of Technology Risks

Executive Leads – Brenda Shott, Matt Eakin & Jenny Sadoski

1. Continue implementation plan for security and operational best practice controls (multi-year) **(InfoSec) IN PROCESS**
2. Continue to develop and enhance information security policies (year two) **(InfoSec) IN PROCESS**
3. Develop and enhance information technology policies (year one of two) **(InfoTech) IN PROCESS**
4. Develop executive dashboard and security strategy document to enhance communication of Information Security program **(InfoSec) IN PROCESS**
5. Implement project management tools and best practices for use throughout the organization **IN PROGRESS – implementation started, testing of new project management module expected to begin in Q1 of 2023**

Objective B: Continuously Assess Technology Environment and Address Risks

Executive Leads – Brenda Shott, Matt Eakin & Jenny Sadoski

1. Replace Web Application Firewalls (\$180,000) (InfoSec) IN PROCESS, expected completion in Q1 of 2023
2. Continue Phased Implementation of Microsoft 365 (\$100,000) (InfoTech)– Phase 1 completion targeted for Q1 of 2023. Phase 2 expected to begin in Q2 of 2023

Objective C: Ensure Compliance with Industry Frameworks and Best Practices

Executive Leads – Brenda Shott, Matt Eakin & Jenny Sadoski

1. Implement an Information Security Governance, Risk & Compliance system (\$50,000) (InfoSec) Deferred to 2024
2. Complete a data classification study (year two) (\$100,000) (InfoTech) Cancelled. The team began preliminary planning work for completing a data classification study but determined that the cost-benefit did not exist to complete the intensive project. In lieu of a data classification study, it was determined that data maps will provide the team with the information that is needed. The data maps are in process of being drafted by the IT team.

Objective D: Provide a Robust Business Continuity Solution

Executive Leads – Brenda Shott, Matt Eakin & Jenny Sadoski

1. Review implementation of mail services using a 3rd party vendor (\$25,000) COMPLETED
2. Expand the Disaster Recovery and Business Continuity Plan and semi-annual exercise as it relates to remote data recovery IN PROGRESS - expected to execute revised test plan in Q3 of 2023

Objective E: Ensure a Safe and Secure Workplace and Public Service Facility

Executive Lead – Brenda Shott

1. Continue to investigate and evaluate long-term options for OCERS headquarters IN PROCESS

2. Replace Roof on Existing OCERS Headquarters (\$110,000)
COMPLETED

TALENT MANAGEMENT

GOAL: RECRUIT, RETAIN AND INSPIRE A HIGH-PERFORMING WORKFORCE

Business Plan Initiatives

Objective A: Recruit and Retain a Diverse High-Performing Workforce to Meet Organizational Priorities

Executive Leads – Steve Delaney and Cynthia Hockless

1. Review and rewrite where appropriate classification specifications and compensation ranges of County level team members (\$35,000)

In Process- Director of Human Relations, Ms. Hockless, is working on this project with assistance from the County of Orange HR Department. Gallagher Benefit Services, Inc has been hired. Goal is to bring County employees fully under OCERS.

Objective B: Develop and empower every member of the team

Executive Lead – Steve Delaney

1. Design and develop a comprehensive training program based on individual needs and career goals that embeds a talent management mindset and creates succession plans across the agency (\$50,000)
COMPLETED. OCERS University is in place.
2. Develop a comprehensive standardized library of business processes and procedure manuals across the organization

(\$330,000)

In Process. With key manager in place as coordinator, Orbis has been hired and the process moves into full execution in 2023.

Objective C: Cultivate a Collaborative, Inclusive and Creative Culture

Executive Lead – Steve Delaney

1. Continue to implement strategies that promote an inclusive workplace (\$47,000) This is an ongoing initiative. Important DEI efforts were completed in 2022.

EFFECTIVE GOVERNANCE

GOAL: IMPROVE THE EFFECTIVENESS AND EFFICIENCY OF THE BOARD AND STAFF BY CLARIFYING ROLES AND RESPONSIBILITIES, IMPROVING OVERSIGHT, CLARIFYING ACCOUNTABILITY AND IMPROVING DECISION MAKING

Objective A: Employ a Governance Structure that Supports a Dynamic System
Executive Lead – Steve Delaney

1. Delegated Authority with regard to Investments and the creation of the Board’s Personnel Committee have both been positive initiatives of Board Governance implemented in recent years. Possible Board review of overall best in class governance continues to be an issue for consideration, but likely in 2023 as I search for relevant courses that may assist The Board. **OCERS management will continue to look for opportunities to improve governance and will bring those to The Board for consideration as appropriate.**

Objective B: Improve the Governance and Management of OCERS’ Records (multi-year)
Executive Lead – Gina Ratto

1. Implement a Records Management Program that reflects best practices and identifies appropriate retention periods for each category of OCERS records **COMPLETED**
2. Establish, include within the Records Management Program, and implement (using Microsoft 365) the default rules for automated archival and automated destruction of electronic mail, with limited exceptions from the default rules (e.g., for

litigation holds) **COMPLETED**

3. Establish a process to export and save electronic mail in an alternative format (PDF preferably) for longer retention and in accordance with the retention period for underlying record category **COMPLETED**
4. Develop and adopt an Implementation Plan for the Records Management Program **COMPLETED**
5. Systematically bring each department within OCERS into compliance with the Records Management Program **COMPLETED:**
 - ∑ All Divisions certified compliance by the end of 2022, with the exception of the following Divisions, which were granted extensions as follows:
 - ∑ Member Services Division: extension until 3/31/2023
 - ∑ Executive Division: extension until 3/31/2023
6. Establish procedures to maintain and audit compliance with the Records Management Program **COMPLETED: Procedures in place for each Division to certify continued compliance with the Records Management Program at the end of every calendar year.**

Internal Audits will audit compliance (by checking for certifications and spot checking to verify record destruction in accordance with the Records Management Program) every five years.



ORANGE COUNTY EMPLOYEES RETIREMENT
SYSTEM
www.ocers.org



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Jim Doezie, Contracts, Risk and Performance Administrator
SUBJECT: ANNUAL REPORT OF CONTRACTS GREATER THAN \$100,000

Written Report

Background/Discussion

The Procurement & Contracting Policy (Section 1.C.4.xii) specifies that all contracts exceeding a value of \$100,000 will be reported to the Board annually.

“Report to the Board annually all contracts that exceed a Contract Value of \$100,000.”

The attached schedule includes a list of active contracts with an annual value greater than \$100,000 compared to the total amount incurred for each contract in 2022. In some circumstances, the spend amount is not a contracted value but rather the general terms and conditions are in place with the amounts based on Time and Materials (“T&M”). In these cases, the Procurement & Contracting Policy limits the spend amount to the approved budgeted amount.

Submitted by:



JD - Approved

Jim Doezie
Contracts, Risk and Performance Administrator

Orange County Employee Retirement System
Vendors Contracts Valued at more than \$100,000
For the Year Ended December 31, 2022

Vendor	Description	Contract Value - 2022	Amount Expensed in 2022	Difference between Contract Value and Amount Expensed	Contract Effective Date	Contract Expiration Date	Comments
Aksia LLC	Private equity and private real assets consulting services. Named Service Provider.	812,500	812,500	-	4/1/2022	3/31/2027	Contract \$1,150,000 per annum, reduced prorata to \$1,000,000 due to loss of key employee effective 9/1/2022
Aksia Torreycove Capital Partners LLC	Private equity and private real assets consulting services. Named Service Provider.	214,958	214,958	-	4/1/2021	4/1/2022	Final 3 months of 1 year contract extension. See Aksia LLC for new contract effective 4/1/2022.
Aksia Torreycove Capital Partners LLC	Co-Investments due diligence	\$34,500 per co-investment report	103,500	N/A	7/21/2021	4/1/2022	Co-investment pricing covered under the Special Projects provision in the consulting services contract above at an agreed upon price as of July 1, 2021 of \$34,500 per report.
Alliant Insurance Services, Inc.	Insurance services broker.	280,000	221,538	58,462	8/1/2022	7/31/2025	Contract values represent approved budget. Actual contract does not have a set contract value. Fees paid by OCERS are for insurance premiums related to coverage for property, liability, fiduciary and crime. Compensation to the broker for placement of insurance is paid by the carrier and based on negotiated fees between the broker and the carrier. Total annual cost for coverage is limited by approved budget.
American Solutions For Business	Provider of design-related work and printed materials (e.g. quarterly newsletter, Board election materials, annual report, letterhead, etc.).	121,798	121,798	-	12/1/2019	11/30/222	Contract value represents approved budget. Actual contract does not have a set contract value and is based on OCERS request for design-related work and printed materials, limited by approved budget.
Backstop Solutions Group, LLC	Contracts Relationship Management (CRM) solution for investments.	102,846	102,846	0	12/29/2020	12/29/2023	Master Agreement is multi-year. Annual Ordering agreement with a renewal term of three years beginning 12/29/2020. Subscription, Maintenance and Support Agreement can increase by 4% in second year and 3% in third year. Renewal in 2022 was \$100,710 for 10 users and a prorated charge of \$2,136 for additional user added in Q422.
Backstop Solutions Group, LLC	Backstop Intelx Addendum	15,000	15,000	-	2/12/2020	12/29/2023	Contract value \$15K per annum for Intelx addendum to above Backstop Master Agreement.
CDW Government, Inc.	Contracted supplier for hardware and software.	285,500	281,625	3,875	N/A	N/A	OCERS leverages pricing through the County of Orange's contract with CDW Government. Total annual costs are limited by approved budget for equipment and software and infrastructure maintenance support.
Foley & Lardner LLP	Legal (investment) counsel services	600,000	220,838	379,162	7/1/2018	6/30/2024	Contract based on time and material. Total annual costs for all legal providers are limited by approved budget.
Gartner Inc.	I.T. Security and Technology advisory consultants and research firm	261,820	261,820	-	7/1/2022	6/30/2023	Contract renews mid-year. Contract value represents prorata amount of 6 months of contract dated 7/1/2021 to 6/30/2022 of \$199,440 per annum and 6 months of contract renewed on 7/1/2022 through 6/30/2023 totaling \$324,200 per annum.
Jigsawtek	IT Programming consultant and Alameda support for Member Services	204,210	199,700	4,510	1/5/2022	12/31/2022	Amounts shown are for 2022 SOW's related to database administration and Member Services support related to Alameda recalculations.
Key Code Media, Inc.	Vendor for board room audio/visual upgrade	367,158	339,470	27,688	9/24/2021	9/24/2024	
Meketa Investment Group, Inc	General investments and total portfolio risk consulting. Named Service Provider.	851,745	851,745	-	4/1/2022	3/31/2027	Contract renewed mid-year. Contract value represents pro-rata amount of 3 months of contract ended 3/31/2022 in the annual amount of \$856,900 and 9 months of the new contract entered on 4/1/2022 at \$850,000 per annum.
Meketa Investment Group, Inc	Private credit reporting services	30,000	30,000	-	4/1/2022	3/31/2027	Private credit reporting included as a separate fee in the consulting services contract above at an agreed upon annual fee of \$40,000. Contract value represents pro rata amount of this fee as of the contract effective date of 4/1/2022.
Moss Adams LLP	Financial Auditor. Named Service Provider.	115,800	115,800	-	3/15/2022	3/15/2025	Contract value represents contract amount for audit of 12/31/2021 financial statements
National Disability Evaluations Inc	Medical examiner organization	510,000	457,104	52,896	2/14/2019	12/31/2023	Contract based on time and material. Total annual costs are limited by approved budget.
Nossaman LLP	Legal (investment) counsel services	600,000	162,925	437,076	7/1/2018	6/30/2024	Contract based on time and material. Total annual costs for all legal providers are limited by approved budget.
Nossaman LLP	Legal counsel services (administrative hearings and writ of mandate proceedings)	200,000	15,285	184,715	10/24/2022	10/25/2023	Contract based on time and material. Total annual costs for all legal providers are limited by approved budget.
Orange County Treasurer	Access to County VPN and reimbursement of election costs.	MOU	167,720	N/A	7/17/1995	N/A	MOU for services provided by County for OCERS employees.
Reed Smith LLP	Legal counsel services (fiduciary). Named Service Provider.	325,000	276,790	48,211	7/1/2021	6/30/2024	Contract based on time and material. Total annual costs for all legal providers are limited by approved budget.
Reed Smith LLP	Legal counsel services (Tax). Named Service Provider.	35,000	-	35,000	4/18/2018	4/18/2022	Contract for tax services is a separate agreement from fiduciary counsel legal services. Contract based on time and material. Total annual costs for all legal providers are limited by approved budget.
RSM US LLP	I.T. auditor for general controls and cyber security; consultant for ERP project.	187,040	171,778	15,262	6/1/2019	3/9/2023	Multiple contracts that overlap years. Internal Audit entered into MSA on 6/1/2019. Finance entered into a SOW for support hours for the new ERP based on time and material which will renew annually as of 3/9/2023 until SOW is cancelled or replaced. Total annual costs are limited by approved budget.

Orange County Employee Retirement System
Vendors Contracts Valued at more than \$100,000
For the Year Ended December 31, 2022

Sidepath, Inc.	Contracted Supplier IT equipment and support	382,000	243,458	138,542	7/15/2016	N/A	Total annual costs are limited by approved budget and include firewall replacement and data center maintenance.
State Street Corporation	Fund Custodian & Securities Lending Manager	575,000	575,000	-	7/1/2017	6/30/2023	Contract excludes \$5,000 for analytics purchased separately.
State Street Corporation	Investment Analytics	5,000	5,000	-	7/1/2017	6/30/2023	Contract value represents approved budget. This was an investments risk product add-on to the above custodian bank contract.
The Burgess Group LLC	Caissa platform subscription for investments portfolio management	165,000	165,000	-	8/7/2022	8/7/2023	Addendum to original agreement dated 8/7/2020 with Caissa. Caissa acquired by the Burgess Group on 9/21/2021. Renewal remained at \$165,000 per annum.
The Segal Company	Actuarial services. Named Service Provider.	375,000	338,603	36,397	1/1/2020	12/31/2022	Contract value represents approved budget. Actual contract includes scheduled costs of \$141,500 and negotiated rates for additional consulting as requested. Total annual cost is limited to approved budget.
Townsend Holdings LLC	Real Estate Investment Consultant. Named Service Provider.	296,804	296,804	-	4/1/2022	3/31/2027	Contract renewed Q22022. Contract value represents pro rata share of previous contract for 3 months based on \$293,215 per annum and 9 months for new contract based on \$298,000 per annum. Contract adjusted annually by CPI.
Vitech Systems Group, Inc.	Pension administration software provider & consultant	629,367	629,367	-	2/25/2016	1/11/2023	Multiple change orders that overlap years. Contract value represents 2022 change orders and licensing fees which increased from \$40,240/month to \$41,543/month effective 5/1/2022.



Memorandum

DATE: February 21, 2023
TO: Members of the Board of Retirement
FROM: Steve Delaney, Chief Executive Officer
SUBJECT: **2023 POLICY COMPLIANCE REPORT**

Written Report

Background/Discussion

Beginning in 2019, at the Board's request, OCERS' executive staff produces an annual report relating to Board policy compliance. Different from the triennial review process whereby every policy is considered for current applicability and possible update or modification, this report addresses whether OCERS staff has been compliant with each of the OCERS Board policies.

Attached is a list of each policy, and the executive manager assigned to determine compliance.

The OCERS executive team can here attest to agency compliance with all policies except one:

1. Placement Agent Policy

OCERS is not in full compliance with the Placement Agent policy regarding reports made to the Board. In 2023, OCERS will be researching the current language of applicable state laws and then building the database infrastructure to annually report as required.

Submitted by:



SD - Approved

Steve Delaney
Chief Executive Officer

02-21-2023 REGULAR BOARD MEETING - R-11 2022 POLICY COMPLIANCE REPORT

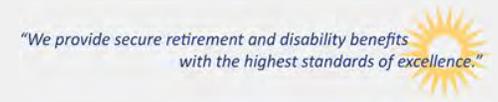


Board Policy Compliance Review Status Report

This report details the Status and Compliance of Board Policies and Charters.

Committee: **ALL**
Assigned To: **ALL**
Doc. Category: **BP - Board Policy**

From Date:
To Date:
No. of Records: **48**



DOCUMENT NAME	DOCUMENT CATEGORY	COMMITTEE	ASSIGNED TO	REVIEWER ROLE	LAST BOARD REVIEW DATE	NEXT BOARD REVIEW DATE	LAST INTERNAL AUDIT REVIEW DATE **	COMPLIANCE REVIEWED DATE	IN COMPLIANCE?
Actuarial Funding Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	11/14/2022	11/13/2025	11/14/2022	1/29/2023	Yes
Actuarial Valuation Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	8/17/2020	8/17/2023	11/14/2018	1/29/2023	Yes
Administrative Review and Hearing Policy (for cases filed on or after August 18, 2020)	BP - Board Policy	Disability	Gina Ratto	General Counsel	8/17/2020	8/17/2023		11/9/2022	Yes
Budget Approval Policy	BP - Board Policy	Governance	Tracy Bowman	Finance Director	4/20/2020	4/20/2023		11/9/2022	Yes
CEO Performance Evaluation Policy	BP - Board Policy	Personnel	Cynthia Hockless	Director of Human Resources	8/19/2019	8/18/2022		12/29/2022	Yes
Code of Ethics and Standards of Professional Conduct Policy	BP - Board Policy	Investments	Molly Murphy	CIO	1/24/2018	1/23/2021		12/15/2022	Yes
Communications Policy	BP - Board Policy	Governance	Robert Kinsler	Communications Manager	4/20/2020	4/20/2023		11/10/2022	Yes
Compensation Earnable Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	6/21/2021	6/20/2024		12/30/2022	Yes
Conflict of Interest Code	BP - Board Policy	Governance	Gina Ratto	General Counsel	8/21/2020	8/21/2023		11/9/2022	Yes
Cost Impacting Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	4/19/2021	4/18/2024		11/9/2022	Yes
Declining Employer Payroll Policy	BP - Board Policy	Unknown	Suzanne Jenike	Assistant CEO, External	11/14/2022	11/13/2025	11/14/2022	12/30/2022	Yes
Disability Retirement Reassignment Policy	BP - Board Policy	Disability	Megan Cortez	Disability Manager	4/19/2021	4/18/2024		1/3/2023	Yes
Disposition of Surplus Property Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	4/19/2021	4/18/2024		2/1/2023	Yes
Election Procedures	BP - Board Policy	Governance	Cynthia Hockless	Director of Human Resources	11/16/2020	11/16/2023		12/29/2022	Yes
Ethics Compliance and Fraud Hotline	BP - Board Policy	Audit	David Kim	Director of Internal Audit	5/18/2020	5/18/2023		12/15/2022	Yes
Extraordinary Expense Recovery Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	4/19/2021	4/18/2024		11/9/2022	Yes
Hearing Officer Selection and Retention Policy	BP - Board Policy	Disability	Suzanne Jenike	Assistant CEO, External	4/19/2021	4/18/2024		12/30/2022	Yes
Indemnity and Defense Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	6/20/2022	6/19/2025		11/9/2022	Yes
Investment Policy Statement	BP - Board Policy	Investments	Molly Murphy	CIO	11/16/2022	11/15/2025	11/16/2022	12/15/2022	Yes
Legislative Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	4/19/2021	4/18/2024		11/9/2022	Yes
Member Services Customer Service Policy	BP - Board Policy	Unknown	Jeff Lamberson		10/17/2022	10/16/2025	10/17/2022	12/30/2022	Yes
Membership Eligibility Requirements	BP - Board Policy	Governance	Jeff Lamberson	Director of Member Services	7/20/2020	7/20/2023	11/12/2018	12/30/2022	Yes
Monitoring and Reporting	BP - Board Policy	Governance	Steve Delaney	CEO	10/17/2022	10/16/2025	10/17/2022	2/14/2023	Yes
Operational Risk Policy	BP - Board Policy	Audit	Brenda Shott	Assistant CEO, Finance, and Internal Operations	2/19/2019	2/18/2022		1/29/2023	Yes
Overpaid and Underpaid Contributions Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	11/15/2021	11/14/2024	10/23/2018	12/30/2022	Yes
Overpaid and Underpaid Plan Benefits Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	11/15/2021	11/14/2024		12/30/2022	Yes
Pay Item Request and Approval Procedures for Employers	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	6/21/2021	6/20/2024		12/30/2022	Yes
Pay Item Review Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	6/20/2022	6/19/2025		12/30/2022	Yes
Pensionable Compensation Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	6/21/2021	6/20/2024		12/30/2022	Yes
Placement Agent Disclosure Policy	BP - Board Policy	Investments	Molly Murphy	CIO	1/24/2018	1/23/2021		12/15/2022	No
Planning Policy	BP - Board Policy	Governance	Steve Delaney	CEO	4/20/2020	4/20/2023		2/14/2023	Yes
Procurement and Contracting Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	10/15/2018	10/14/2021		1/29/2023	No
Protocol for Handling Workplace Complaints Against Board Members and Executives	BP - Board Policy	Governance	Gina Ratto	General Counsel	6/20/2022	6/19/2025		11/9/2022	Yes

Executed: 2/14/2023 11:49:24 AM
Executed By: OCERS\cmh

** Dates represent Internal Audit reports or Management Action Plan follow-ups in which portions of the policies/charters were reviewed. Does not confirm that the policy in its entirety was reviewed.

Doc. No. 0001-1090-R0001
Page 1 of 2

02-21-2023 REGULAR BOARD MEETING - R-11 2022 POLICY COMPLIANCE REPORT

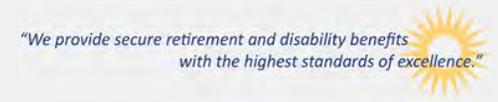


Board Policy Compliance Review Status Report

This report details the Status and Compliance of Board Policies and Charters.

Committee: **ALL**
 Assigned To: **ALL**
 Doc. Category: **BP - Board Policy**

From Date:
 To Date:
 No. of Records: **48**



DOCUMENT NAME	DOCUMENT CATEGORY	COMMITTEE	ASSIGNED TO	REVIEWER ROLE	LAST BOARD REVIEW DATE	NEXT BOARD REVIEW DATE	LAST INTERNAL AUDIT REVIEW DATE **	COMPLIANCE REVIEWED DATE	IN COMPLIANCE?
Proxy Voting	BP - Board Policy	Investments	Molly Murphy	CIO	1/24/2018	1/23/2021		12/15/2022	Yes
Public Records and Data Request Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	4/20/2020	4/20/2023		11/9/2022	Yes
Quiet Period Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	4/20/2020	4/20/2023		1/29/2023	Yes
Records Management Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel				1/31/2023	Yes
Reserves and Interest-Crediting Policy	BP - Board Policy	Governance	Brenda Shott	Assistant CEO, Internal	11/14/2022	11/13/2025	11/14/2022	1/29/2023	Yes
Retirement Enhancement Review Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	6/20/2022	6/19/2025		12/30/2022	Yes
SACRS Voting Authority Policy	BP - Board Policy	Governance	Steve Delaney	CEO	4/20/2020	4/20/2023		2/14/2023	Yes
Securities Litigation Policy	BP - Board Policy	Governance	Gina Ratto	General Counsel	8/17/2020	8/17/2023	8/24/2022	12/16/2022	Yes
Succession Policy	BP - Board Policy	Personnel	Steve Delaney	CEO	1/19/2016	1/18/2019		2/14/2023	Yes
Travel Policy	BP - Board Policy	Governance	Steve Delaney	General Counsel	11/14/2022	11/13/2025	11/14/2022	2/14/2023	Yes
Trustee Education Policy	BP - Board Policy	Governance	Cynthia Hockless	Director of Human Resources	10/17/2022	10/16/2025	10/17/2022	12/29/2022	Yes
Whistleblower Policy	BP - Board Policy	Governance	Cynthia Hockless	Director of Human Resources	6/20/2022	6/19/2025		12/29/2022	Yes
Withdrawing Employer Continuing Obligation Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	11/14/2022	11/13/2025	11/14/2022	12/30/2022	Yes
Withdrawing Employer Policy Fully Satisfied Obligation Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	11/14/2022	11/13/2025	11/14/2022	12/30/2022	Yes
Write Off Policy	BP - Board Policy	Governance	Suzanne Jenike	Assistant CEO, External	11/15/2021	11/14/2024	6/5/2019	12/30/2022	Yes