



# Board of Retirement Regular Meeting

## Sacramento County Employees' Retirement System

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### Agenda Item 13

**MEETING DATE:** June 20, 2018

**SUBJECT:** Disability Retirement Procedures – Proposed Revisions

**SUBMITTED FOR:** \_\_\_ Consent        X   **Deliberation and Action**      \_\_\_ **Receive and File**

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### **RECOMMENDATION**

Staff recommends that the Board approve revisions to SCERS' Disability Retirement Procedures (DRPs).

### **PURPOSE**

The Board of Supervisors approved SCERS Bylaw changes on February 27, 2018, that removed an outdated and prescriptive set of rules about the disability retirement process, and instead gave the Board of Retirement the flexibility to adopt and implement administrative rules. The proposed DRPs are designed to improve the timeliness of disability decisions by clarifying application timelines and processes, while continuing to protect members' ability to appeal decisions.

### **DISCUSSION**

For three years, Staff has been discussing, drafting, and presenting versions of DRPs and Bylaw amendments. This requested Board action represents the end of that process and the beginning of a more efficient one for members, employers, and SCERS.

SCERS Staff spent significant time and effort drafting and editing the revised DRPs. Attorneys from the County Counsel's office and Nossaman, LLP, who serve as counsel for SCERS disability matters, all provided valuable input and revisions to the DRPs. Former Chapter 5 of SCERS Bylaws was also reviewed, and any provisions supporting SCERS current practices and processes were incorporated into these proposed revisions.

The DRPs include the following significant changes to current practices:

- **Application Process**

The DRPs significantly improve the instructions to the applicant for application submission. The DRPs now include a comprehensive set of definitions, instructions, procedures, and guidelines about what documents and medical reports need to be submitted for SCERS to designate the application as complete, and identify timeframes and evidence requirements needed to support a successful amendment to an application. These detailed procedures should prove helpful to applicants and minimize delays.

- **Medical Advisor**

In 2016, Staff requested and the Board provided authority to retain a Medical Advisor. As a result, an external Medical Advisor now reviews the medical records for every disability application and provides an opinion as to whether the medical evidence demonstrates that an injury or illness exists, the injury or illness is incapacitating and permanent, and, where applicable, the injury or illness was caused by the job. Previously, about half of Board disability recommendations were developed by a Staff review of medical records. Experience has demonstrated that the Medical Advisor provides a more consistent and reliable approach for all Board actions to be based on expert opinion. The DRPs include the Medical Advisor role.

- **Staff-Level Denials**

Under the previous disability Bylaws, denying a disability application required a substantial expenditure of time and resources by SCERS because every denial was automatically referred to an independent referee (administrative law judge) for hearing and a proposed decision. The DRPs now provide that if the SCERS Medical Advisor recommends denying the application, Staff will provide the Medical Advisor's report and recommendation to the applicant. The applicant will have 20 days to request a hearing. Failure to request a hearing will result in Staff recommending to the Board that the application be denied. This step should alleviate the significant time and cost of holding administrative hearings for every denial.

- **Administrative Withdrawals**

It is not uncommon for a disability application to linger due to the applicant's inability or refusal to pursue his or her case. These cases can remain in the system for several years. Currently, there is no procedural avenue by which SCERS can administratively terminate these cases. The DRPs contain an administrative withdrawal option. They set forth the consequences when an Applicant files an application and then fails to participate. Administrative withdrawal provides Staff with a tool to remove such cases from the queue and permit Staff resources to be devoted to cases that are actively progressing.

- **Hearing and Record Review Procedures**

Based on counsels' input, significant revisions were made to the provisions for administrative hearings on disability matters. Under the DRPs, an applicant must make a timely request for a hearing, or a review on the record in lieu of a hearing, if staff is recommending the Board deny the application. In the past, every proposed denial was set for hearing. A review on the record in lieu of a hearing offers the applicant a more streamlined and time-efficient process for a hearing officer to evaluate the documentation and written briefs, and issue a proposed decision without conducting an evidentiary hearing. When a hearing is requested, the revised DRPs reorganize and clarify the purpose, timelines, content, and process for the pre-hearing conference, prehearing conference statement, statement of issues, and the hearing procedures over which the administrative law judge has jurisdiction.

- **Member Communications**

One of the challenges in administering disability retirement benefits is the complexity of a topic in which most members have little knowledge or experience. For example, members may not understand the burden of proof to receive a disability benefit or how the disability determination is different from a Social Security or a Workers' Compensation determination. This knowledge gap can lead to delays, misunderstanding, unrealistic expectations, and frustration on the part of the member. It can also add to the time, resources, and ultimately the cost that SCERS must expend to make the disability determination. To assist SCERS members in understanding and navigating the disability process, SCERS is preparing a Disability Handbook that will be finalized upon approval of the underlying DRPs. Additionally, there are a number of steps throughout the process where SCERS must provide written notice to the applicant. These proposed revisions establish a clear title or name for each of these notices for easier reference by members and SCERS staff. Upon approval of the revised DRPs, Staff will finalize the new Disability Retirement Application form that has been drafted, and revise and update its forms, notices, and other communications related to the disability retirement process.

- **Future Changes**

Inevitably, unforeseen or new procedural issues will emerge that will require timely remedy. The Board of Retirement now has the authority—and flexibility—to make those administrative changes by revising the DRPs at a regular Board meeting instead of pursuing Bylaw amendments through the Board of Supervisors.

**ATTACHMENTS**

- Outline of Disability Retirement Procedures Timelines
- Disability Retirement Procedures with Proposed Revisions

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# **Outline of Disability Retirement Procedures TIMELINES**

6/20/18

## **Application Submitted to SCERS:**

- Within 30 days, SCERS sends Notice of Application Designation

## **Notice of Application Designation issued by SCERS:**

### **If designated “Incomplete”:**

- Applicant has 60 days to:
  - o Ensure all medical records and other forms are submitted to SCERS
  - o Amend the Application without consequence
- If not completed within 6 months of application date due to Applicant's noncooperation or failure to show good cause for the delay, application will be dismissed without prejudice

### **If designated “complete”:**

- Applicant has 60 days to amend the Application without consequence
- Within 30 days, SCERS requests Workers' Compensation records
- After 60-day amendment period concludes, SCERS assembles Medical Advisor Catalog and sends to Member for review
  - o OR Applicant can waive 60-day amendment period and have SCERS proceed to assemble MA Catalog sooner
- Member has 30 days thereafter to augment Medical Advisor Catalog

## **Employer Application Submitted:**

- Within 10 days, SCERS sends Notice of Employer Application to Member

## **Referral to Medical Advisor / IME:**

- Within 30 days after 30-day catalog augmentation window ends, SCERS refers Disability Catalog to Medical Advisor for review
- Within 45 days of receipt, Medical Advisor completes review and provides a Report and Recommendation or determines if an IME is needed
- Within 30 days of notice from Medical Advisor that IME is needed, SCERS issues Notice of Referral for IME with appointment date and time, etc.
- If necessary, Member must notify SCERS of need to cancel IME at Least 10 days prior to scheduled appointment.
- Within 45 days of IME appointment, IM Examiner issues report to SCERS
- Within 30 days of receipt of Medical Advisor/IM Examiner report, SCERS sends copies to all parties with a Notice of Recommended Decision and Request for Hearing or Record Review form

## **Notice of Noncooperation issued by SCERS if member does not cooperate in scheduling/attending IME:**

- Member has 30 days to agree to IME date.
- If Member fails to attend a scheduled IME appointment within 120 days, application will be submitted for dismissal

**Notice of Recommended Decision issued by SCERS:**

- Within 20 days a Party may submit Request for Hearing or Record Review form, or request one 15-day extension of time to submit a Request for Hearing or Record Review form

**If no Request for Hearing or Record Review is submitted to SCERS, set for Board Consideration:**

- Not less than 25 days after SCERS sends Notice of Board Consideration Date (unless notice is waived by the Member)

**Within 30 days of SCERS' receipt of a Request for Hearing or Record Review:**

**SCERS issues a Notice of Referral to Hearing:**

- With a copy of Disability Catalog to all Parties
- Parties have 30 days after the notice date to submit supplemental documentary evidence
- At least 30 days after notice date, SCERS counsel coordinates mutually acceptable hearing dates
- Within 60 days of the notice date, SCERS counsel files a Request to Set Hearing form and Statement of Issues with the Office of Administrative Hearings (OAH) and serves copies on all other parties.

**Request to Set Hearing and Statement of Issues filed with OAH:**

- Hearing must be held no later than 120 days thereafter
- OAH notifies parties of the dates, times, and locations of the prehearing conference and hearing
- Within 10 days of receipt of OAH notice, SCERS serves Notice of Hearing to all other parties

**Prehearing Conference Date:**

- At least 3 calendar days prior, Parties file a Prehearing Conference Statement with OAH and serve copies on the other parties

**Hearing Date:**

- All depositions of witnesses, if any, completed at least 10 business days prior
- All subpoenas / witnesses shall be served at least 15 calendar days prior
- May not be extended past 120 calendar days from the date Request to Set was filed with OAH, unless a later time is approved by SCERS in writing

**Hearing is Closed:**

- If made in writing, summary and closing statements due from all parties to ALJ within 60 days
- Parties have 15 days after than to file briefs in reply to a party's closing brief

**Record is closed and Case submitted for ruling:**

- Within 30 days, ALJ issues Proposed Findings of Fact and Recommended Decision
- Jurisdiction of ALJ shall not exceed 200 days after the date the Request to Set was submitted to OAH, unless a later time is approved by SCERS in writing

**OR**

**SCERS issues a Notice of Referral for Record Review:**

- With a copy of Disability Catalog
- Parties have 30 days after the notice date within which to submit supplemental documentary evidence
- At least 30 days after notice date, SCERS Counsel coordinates mutually acceptable briefing schedule
- Within 60 days of the notice date, SCERS counsel files a Request for Record Review and Statement of Issues with OAH and serves copies on all other parties.

**Request to Set Record Review Submitted to OAH:**

- Within 90 days written briefing by the parties to be completed

**Written Briefing Completed:**

- Within 30 days, ALJ issues Proposed Findings of Fact and Recommended Decision

**SCERS Receives ALJ Proposed Decision:**

- Within 10 days, SCERS issues a copy of ALJ Proposed Decision, a Notice of Period for Filing Objections, and a Notice of Board Consideration Date (if no objections are filed)

**SCERS Serves Proposed Decision and Notice of Period for Filing Objections to all parties:**

- Within 10 days, a party may file written objections
- Within 10 days thereafter, the other party(ies) may serve a written response to the objections

**After period for objections concludes, set for Board Consideration:**

- Not less than 25 days after SCERS sends Notice of Board Consideration Date (unless notice is waived by the Member)

**Board Consideration Date – Board takes action on the Application:**

- Within 10 days, SCERS issues Notice of Board Decision to all parties

**Date of Notice of Board Decision (Final Administrative Action):**

- A party has 90 days to file a request for judicial review (writ of administrative mandamus) with superior court



**SCERS**

SACRAMENTO COUNTY  
EMPLOYEES' RETIREMENT SYSTEM

# **DISABILITY RETIREMENT PROCEDURES**

**With Proposed Revisions for  
Retirement Board Consideration**

**June 20, 2018**



**SACRAMENTO COUNTY EMPLOYEES' RETIREMENT SYSTEM  
DISABILITY RETIREMENT PROCEDURES**

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# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE I

### GENERAL PROVISIONS

#### Sec. 1. Purpose

These Disability Retirement Procedures (Procedures) of the Sacramento County Employees' Retirement System (SCERS) govern the submission, review and evaluation of Applications; the adjudication of Contested Applications; and the Board's decisions on Applications and judicial review thereof, in accordance with the County Employees' Retirement Law of 1937 (Government Code Sections 31450 et seq.) (CERL), applicable case law, and SCERS Bylaws.

#### Sec. 2. Applicability

Upon approval by the Board, the provisions of these Procedures shall become effective on July 1, 2018, shall be applicable to all Applications submitted on or after the effective date, and to all Applications that are pending and have not been set for Hearing as of the effective date of these Procedures.

#### Sec. 3. Repeal of Existing Rules

Any and all previously adopted rules and procedures for the acceptance, processing or disposition of Applications are superseded and replaced in their entirety by these Procedures. However, the provisions of Chapter 5, Articles I through XIV inclusive, of SCERS Bylaws in effect on December 31, 2017, shall continue to apply to all Applications that are pending and have been set for Hearing as of the effective date of these Procedures, unless otherwise agreed by the Applicant.

#### Sec. 4. Definitions

Unless the context indicates otherwise, the following terms, as used in these Procedures, shall be defined as follows. Defined terms are capitalized when used in these Procedures.

***“Accommodation”*** means any appropriate and reasonable measure that would allow the Member to perform the essential functions of his or her job, based on an individualized assessment of both the job and the physical or mental limitations of the Member, as substantiated by medical documentation.

***“Applicant”*** means a Member of SCERS, a Participating Employer or its agents, a Member's relative, or any other person who submits an Application for disability retirement benefits under the CERL as or on behalf of a Member.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

**“Application”** means the Disability Retirement Application submitted to SCERS by or on behalf of a Member. Once an Application is received by SCERS, it becomes one of the following types of applications:

- a. **“Submitted Application”** means a completed and signed Application form, with or without associated documents, that has been received by SCERS.
- b. **“Completed Application”** means an Application for which all necessary medical records, documents, and other information has been received by SCERS. Once SCERS designates an Application a “Completed Application,” the Application, if eligible, may proceed to the next steps in the evaluation and decision process.
- c. **“Amended Application”** means an Application to which changes have been made, including changing, deleting, or adding a Claimed Injury or Disease, or changing the request for Service-Connected or Nonservice-Connected Disability Retirement, at any time within sixty (60) calendar days of the date SCERS issues a *Notice of Application Designation*, or upon a showing of good cause that the Applicant could not, with the exercise of reasonable diligence, have included the substance of the amendment on the Application Date of the original Application.
- d. **“Employer Application”** means an Application submitted on behalf of a Member by the Member’s Participating Employer.

**“Application Date”** means the date a Submitted Application is received by SCERS.

**“Application Process”** means the process of reviewing, evaluating and making a decision on a Completed Application.

**“Board”** means the Board of Retirement of the Sacramento County Employees’ Retirement System.

**“Board Catalog”** means the collection of documents prepared for the Board in connection with its consideration of an Application, which may include the Application, relevant correspondence between SCERS and the Applicant, the medical records referred to in the staff recommendation, and/or the Hearing Officer’s *Proposed Findings of Fact and Recommended Decision*.

**“Board Consideration Date”** means the date on which a recommended decision on an Application is submitted to the Board for action.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

**“Burden of Proof”** means the Applicant’s obligation to prove, by a preponderance of the evidence, each affirmative issue on which the Application depends. The Applicant bears both the initial burden of presenting evidence, and the burden of persuasion by a preponderance of the evidence. Proof by a preponderance of the evidence means that the existence or nonexistence of a fact in dispute is more likely than not.

**“CERL”** means the County Employees’ Retirement Law of 1937 beginning at California Government Code Section 31450.

**“Claimed Injury(ies) or Disease(s)”** means any physical or mental condition identified in an Application as causing a Member to be Permanently Incapacitated for the Performance of Duties.

**“Contested”** means an issue, recommendation, and/or decision that is opposed by a Party.

**“Counsel”** means the Office of the County Counsel of Sacramento County or outside private attorneys hired by SCERS to represent the Retirement Fund in disability retirement proceedings.

**“County Service”** means the employment of a person by Sacramento County, the Superior Court in Sacramento County, or other special district within Sacramento County that provides SCERS benefits to its eligible employees.

**“Deposition”** means the taking of a statement of a witness or a Party, either orally or in writing, under oath before hearing.

**“Disability Catalog”** means the collection of documents relating to an Application, including, but not limited to, the Application, other forms, medical records, communications with SCERS, received or generated during the Application Process, that constitutes the written record for the Completed Application and all subsequent stages of the process. Depending on the stage of the Application Process, the Disability Catalog may be termed a “Medical Advisor Catalog” or a “Hearing Catalog.”

**“Discontinuation of Service”** means the last date for which a Member earned Regular Compensation from a Participating Employer from which retirement contributions were deducted by SCERS.

**“Dismissed with Prejudice”** means an Application dismissed by the Board in its sole discretion for which the later submission of an Application, based on the same Claimed Injury(ies) or Disease(s) is precluded.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

***“Dismissed without Prejudice”*** means an Application dismissed by the Board in its sole discretion for which the later submission of an Application, based on the same Claimed Injury(ies) or Disease(s), is allowed as a new Application provided all the requirements, including timely submission, are met.

***“Duty or Duties”*** means the usual and essential functions of the position last held by the Member.

***“Earlier Effective Date”*** means an Effective Date that is earlier than the Application Date, or earlier than the day after Discontinuation of Service, which the Applicant may request by completing the appropriate section of the Application and attaching documentation showing 1) when the Member discontinued service, 2) an inability to ascertain the permanency of the Member’s incapacity at the time service was discontinued, and 3) that the Member has been continuously incapacitated since service was discontinued.

***“Effective Date”*** means the date the Member’s disability retirement allowance commences for an Application granted by the Board, which is the later of the Application Date or the day after Discontinuation of Service, unless an Earlier Effective Date is requested and granted.

***“Examining Physician”*** means a licensed physician who is treating, or has treated, the Member for the Claimed Injury(ies) or Disease(s) claimed in the Application to incapacitate the Member.

***“Ex-Parte Communication”*** occurs when a Party, or someone associated with a Party, communicates orally or in writing with the Hearing Officer assigned to the matter or with one or more members of the Board without all other Parties’ participation.

***“Final Administrative Action”*** means a decision by the Board, for which the Board will make a written record of its findings of fact and conclusion of law, to grant or deny an Application pursuant to Government Code Section 31534, or a decision by the Board to dismiss an Application for failure to comply with the requirements of these Procedures, which is subject to judicial review under Code of Civil Procedure Section 1094.6 and Sacramento County Code Section 1.06.020, as provided in Article VIII.

***“Forensic Physician”*** means a medical doctor retained by the Applicant, at the Applicant’s expense, to review the medical history and condition of a Member. The Forensic Physician will typically review several years of medical records and may examine the Member if the Member chooses. The Forensic Physician will render an opinion as to the existence of any injury(ies) or disease(s), including whether the Claimed Injury(ies) or Disease(s) is or are Permanent, and if applicable, whether the Claimed

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

Injury(ies) or Disease(s) arose out of and in the course of the Member's employment.

**"General Counsel"** means the in-house attorney employed by SCERS who, among other things, advises the Board on disability retirement matters.

**"Hearing"** means an administrative proceeding during which evidence, including oral testimony, is presented to a Hearing Officer, and after which the Hearing Officer prepares a *Proposed Findings of Fact and Recommended Decision*.

**"Hearing Officer"** means a current member of the State Bar of California, retained with the State Office of Administrative Hearings (OAH), who conducts a Hearing.

**"Independent Medical Evaluation" (IME)** means a medical record review and examination conducted at SCERS' request and expense by one or more physicians with expertise in the Claimed Injury(ies) or Disease(s) identified in the Application that a Member may be required to submit to in order for SCERS to complete its evaluation of the Application.

**"Independent Medical Examiner" (IM Examiner)** means a physician with expertise in the Claimed Injury(ies) or Disease(s) who is retained by SCERS to conduct a medical record review and examination of the Member at SCERS' request and expense.

**"Job Description"** means the current class specification or job specification for a Member's position as provided by the Participating Employer that lists the essential usual, and/or general job duties, physical requirements, minimum qualifications, required knowledge and abilities, salary, and/or and benefits.

**"Medical Advisor"** means the physician(s) advising the Board on medical matters for Applications.

**"Medical Provider"** means generally any physician, healthcare provider, or medical facility that has provided treatment to the Member, including an Examining Physician.

**"Medical Witness"** means any witness testifying as an expert at a Hearing or at a Deposition as to the Member's past, present, or future Claimed Injury(ies) or Disease(s).

**"Member"** means, for purposes of these Procedures, a person who is enrolled as a participant in the SCERS and who submitted, or on whose behalf was submitted, an Application.



## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

***“Nonservice-Connected Disability Retirement” (NSCDR)*** means a type of retirement granted by the Board to a Member with at least five (5) years of service credit when it is proven that a Member is eligible to receive a disability retirement, the Member is Permanently Incapacitated for the Performance of Duty, and the incapacity is not a result of injury(ies) or disease(s) arising out of or in the course of the Member’s employment and such employment does not or did not Substantially Contribute to the incapacity.

***“Office of Administrative Hearings” (OAH)*** means the quasi-judicial tribunal within California State Government that provides a neutral forum for independent resolution of administrative matters.

***“Participating Employer”*** means the County of Sacramento, the Superior Court in Sacramento County, or other public agency special district within Sacramento County limits that provides SCERS benefits to its eligible employees and by which the Member is employed at the time, or before, an Application is submitted to SCERS.

***“Party” or “Parties”*** means any one or more of the following: the Member who is the subject of the Application, the Applicant if other than the Member, the Participating Employer that employs or did employ the Member in the position from which it is claimed the Member is incapacitated, and the Retirement Fund.

***“Permanent” or “Permanently”*** mean that the Claimed Injury(ies) or Disease(s) is or are expected to continue for an extended and uncertain duration of time based on competent medical evidence.

***“Permanent Incapacity” or “Permanently Incapacitated for the Performance of Duty”*** means the Member’s Permanent inability to substantially perform the Duties of the job classification last held by the Member. A Member need not be unable to perform each and every Duty of the job classification, but only the usual Duties. A Member is not Permanently Incapacitated if the Duties of the job classification can be performed with Accommodation by the Participating Employer, or if the Member unreasonably refuses medical treatment (including surgery), if there is a probability that such treatment would restore the Member to capacity within a reasonable period of time and the risk of harm from such treatment would not deter a reasonable person from consenting to such treatment. The Applicant has the Burden of Proof to establish Permanent Incapacity based on a preponderance of competent medical evidence.

***“Prehearing Conference Statement”*** means the pleading that each Party must complete and serve on the Hearing Officer and all other Parties, pursuant to the prehearing conference order issued by the State Office of Administrative Hearing in the matter (see Article V, Sec. 10).

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

**“Procedures”** means the SCERS Disability Retirement Procedures set forth herein and approved by the Board.

**“Proposed Findings of Fact and Recommended Decision”** means the Hearing Officer’s written opinion on an Application following a Hearing or Record Review, which summarizes the evidence, makes findings of fact and legal conclusions, and makes a recommendation to the Board to grant or deny the Application.

**“Reciprocal System(s)”** means the public retirement systems in California that, by law or otherwise, have a reciprocal service agreement with SCERS. This includes the California counties that operate under the CERL, the California Public Employees’ Retirement System (CalPERS), the State Teachers’ Retirement System (CalSTRS), the Judges’ Retirement System, and retirement systems of any other public agency of the State of California that have established reciprocity with CalPERS subject to the conditions of Government Code Section 31840.2.

**“Record Review”** means a review by a Hearing Officer based solely on the records, including the Hearing Catalogue and any supplemental documents timely submitted by the Parties, and consideration of any written briefs submitted by the Parties.

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

**“Report and Recommendation”** means the written analysis, report, medical opinion, and recommendation prepared by a Medical Advisor who has reviewed and evaluated the Completed Application and Disability Catalog and that is provided to assist the Board in making a decision on the Application.

**“Retirement Fund”** means the Sacramento County Employees’ Retirement Fund, a trust fund created and administered in accordance with the CERL solely for the benefit of the members of SCERS and their survivors and beneficiaries.

**“Service-Connected Disability Retirement” (SCDR)** means a type of retirement granted by the Board when it is proven that the Member is eligible to receive a disability retirement, the Member is Permanently Incapacitated for the Performance of Duty, and the incapacity is a result of injury(ies) or disease(s) arising out of and in the course of the Member’s employment and such employment Substantially Contributes(ed) to the Permanent Incapacity, or where a Statutory Presumption applies.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

**“Statutory Presumption”** means certain illnesses or diseases specified in the CERL that, under specified conditions, are presumed to arise out of and in the course of a safety Member’s employment. A Statutory Presumption of service connection is rebuttable by other evidence.

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

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

**“Substantially Contribute”** means there is a real and measurable causal connection between the Member’s employment and the Claimed Injury(ies) or Disease(s) which is more than infinitesimal or inconsequential.

**“Withdrawal with Prejudice”** as deemed by SCERS means an Application withdrawn by the Applicant after the Application is set for Hearing and for which the later submission of an Application based on the same Claimed Injury(ies) or Disease(s) is precluded.

**“Withdrawal without Prejudice”** as deemed by SCERS means an Application withdrawn by the Applicant at any time before the Application is set for Hearing and for which the later submission of an Application based on the same Claimed Injury(ies) or Disease(s) is allowed as a new Application provided all the requirements, including timely submission, are met.

### **Sec. 5. Right to Legal Representation**

Any Applicant is entitled, at his/her expense, to be represented by an attorney at any or all stages of the Application Process. The attorney must be licensed to practice law in the State of California.

Before an attorney appears on behalf of a Member or Applicant, a written notice of representation shall be submitted to SCERS and served on all Parties. After a written notice of representation is received by SCERS and served on all Parties, all future notices, pleadings and correspondence shall be served upon that attorney, unless a *Notice of Withdrawal* is filed with the OAH and served on all Parties. If the attorney withdraws before a Hearing is set, the *Notice of Withdrawal* must be submitted to SCERS and served on all Parties.

The Retirement Fund is entitled to be represented by Counsel at all times related to matters in these Procedures.

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## **Sec. 6. Effect of Final Administrative Action**

When the Board grants or denies an Application, or rules on a Member's failure to comply with the requirements of these Procedures as specified in Article I, Sec. 8, it is a Final Administrative Action and the Board's jurisdiction over the Application ends, but the matter may still be subject to judicial review.

Judicial review of a Final Administrative Action by the Board shall be subject to Code of Civil Procedure Section 1094.6, as provided by Sacramento County Code Section 1.06.020 and these Procedures. Following each Final Administrative Action, SCERS shall send to the Applicant, or the attorney therefor, *Notice of Board Decision* and information regarding the time frame for seeking judicial review.

## **Sec. 7. Modification or Waiver of Procedures**

The Board, in its sole discretion, on a case-by-case basis and upon a showing of good cause, may modify or waive the requirements of these Procedures if the Board determines, based on the record in open session and based upon findings of fact and conclusions of law, that it is appropriate or necessary to modify or waive the requirements of these Procedures in a particular case.

## **Sec. 8. Failure to Comply with Requirements of Procedures**

Unless a showing of good cause is made excusing a Party's failure to comply with the requirements of these Procedures, the following will apply:

- a. If the Board determines that an Applicant has submitted an incomplete Application and has failed to complete the Application pursuant to Article II within six (6) months of submitting an Application to SCERS, the Application may be Dismissed without Prejudice.
- b. If the Board determines that an Applicant failed or refused to cooperate in completing the Application and providing supporting documentation as required in Article II, the Application may be Dismissed with Prejudice.
- c. Failure of the Member to submit to medical examinations by one or more IM Examiners selected by SCERS, as prescribed in Article IV, shall be treated as noncooperation and the Application may be Dismissed with Prejudice.
- d. Failure of a Party to raise an issue in the *Prehearing Conference Statement*, as prescribed in Article V below, shall be treated as a waiver of that issue for further consideration by the Hearing Officer and/or the Board.
- e. Failure of a Party to serve a Subpoena on a witness at least fifteen (15) calendar days before the Hearing and/or to pay the witness fee as prescribed by Government Code Section 68093 shall be treated by the

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Hearing Officer and the Board as a waiver of the right to compel the attendance of that witness to the Hearing.

- f. Failure of a Party to pay the expert and Medical Witness fees, consistent with Government Code Section 68092.5 shall be treated by the Hearing Officer and the Board as a waiver of the right to compel the attendance of that expert witness to the Hearing.
- g. No testimony of a witness or documentary evidence not identified by the Parties prior to the Hearing shall be allowed into evidence at the Hearing, except as prescribed in Article V of these Procedures.
- h. Failure of the Applicant to comply with the requirements set forth in these Procedures shall be treated as non-cooperation. In that event, no Hearing shall be scheduled or conducted and the Application will be returned to the Board. If the Board subsequently determines that the Applicant did not cooperate with these Procedures, the Application may be Dismissed with Prejudice.

Before applying any of the consequences described herein, the Board will make a written record of its findings of fact and conclusions of law, which support the imposition of any consequences. Any consequences imposed pursuant to this section shall be a Final Administrative Action subject to judicial review, as provided in Article VIII.

ARTICLE II

APPLICATION AND SUPPORTING DOCUMENTATION

Sec. 1. Overview

- a. **Application** – The processing of a request for disability retirement benefits requires that the Member, or other individual on behalf of the Member, first submit an Application that satisfies the requirements of Article II, Sec. 2. Application forms and related materials may be obtained by visiting SCERS website at [www.scers.org](http://www.scers.org) or contacting SCERS by phone, mail, or in person.
- b. **Additional Medical Records from the Applicant** – After the Application is submitted to SCERS, it is the Applicant's responsibility to arrange for the medical records and reports that SCERS requires in making a decision on the Application to be submitted to SCERS directly by the keeper or custodian of such records (Article II, Sec. 10).
- c. **Forms and Records from the Participating Employer** – After the Application is submitted to SCERS, SCERS will request that the Participating Employer submit the Job Description applicable to the Member and an assessment of whether any limitations prescribed for the Member by a physician can be accommodated by the Participating Employer.
- d. **Other Medical Records Obtained by SCERS** – After the Application is submitted to SCERS, SCERS will receive and/or obtain medical records from the Member's Medical Providers, Participating Employer, and Workers' Compensation files. When SCERS has deemed the Application a Completed Application, SCERS may request a Medical Advisor review the medical records and provide a *Report and Recommendation* to the SCERS Board. In certain circumstances, in order to assist the Medical Advisor in making a *Report and Recommendation*, the Medical Advisor may request that the Member submit to one or more IMEs.

Sec. 2. Form and Content of Completed Disability Retirement Application

An Application must be based upon a Member's claimed Permanent Incapacity for the Performance of Duty. The Completed Application and supporting documentation must identify the nature of the Claimed Injury(ies) or Disease(s) that is or are the basis for the Application.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

An Application will not be designated a Completed Application by SCERS unless and until it includes all of the following documentation, legibly completed, signed and delivered as instructed on the forms identified and provided by SCERS:

**a. Disability Retirement Application Form** (Provided by SCERS)

The Applicant must submit the following types of information on SCERS *Disability Retirement Application* form:

1. Member Information – to identify the Member’s records and communicate with the Member regarding the Application.
2. Disability Retirement Type – whether applying for Service-Connected and/or Nonservice-Connected Disability Retirement.
3. Reciprocal Systems – if the Member is a member of another public retirement system in California.
4. Employment Information – to identify the Member’s current employment or retirement status.
5. Claimed Injury(ies) or Disease(s) – description of the physical or mental condition(s) the Applicant claims cause the Member to be Permanently Incapacitated for the Performance of Duty, a description of the Duties the Member can no longer perform, and a description of the Duties the Member is still able to perform.
6. Service Connection – if applicable, explanation of why the Applicant believes the Member’s employment substantially caused or exacerbated the Claimed Injury(ies) or Disease(s).
7. Other Claims – information about whether the Claimed Injury(ies) or Disease(s) are the result of actions of a third party other than the Participating Employer, and whether the Member has made any other claims (such as for Workers’ Compensation, State disability, Social Security disability, etc.).
8. Medical Treatment Providers – a list and contact information of the medical professionals or facilities from which the Member received treatment in the last five years for the Claimed Injury(ies) or Disease(s) identified in the Application.
9. Member’s Acknowledgments, Representations and Declarations – several statements the Member Applicant must read and initial regarding the Member’s responsibilities, rights, and obligations.

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10. Signature – Declaration of Applicant, signed under penalty of perjury, that the information contained in the Application is true and correct.

### **b. Member's Examining Physician Report**

Required elements, without limitation:

1. History of any Claimed Injury(ies) or Disease(s), including current subjective problems;
2. Findings upon examination;
3. Pertinent laboratory and diagnostic procedures and findings;
4. History of treatment, including current and proposed therapy;
5. Verification that the Examining Physician has reviewed and considered the Job Description and any other information provided by SCERS as to the physical and mental requirements for the Member's position;
6. Description of the exact nature and extent of any Claimed Injury(ies) or Disease(s) of the Member and whether such limit the Member's ability to substantially perform the Duties;
7. Opinion regarding whether the Member is Permanently Incapacitated for Performance of Duty based upon one or more of the Claimed Injury(ies) or Disease(s);
8. If applicable, opinion as to whether the Claimed Injury(ies) or Disease(s) arise out of and in the course of the Member's employment, and to which such employment substantially contributed;
9. Opinion as to the date upon which the Member became continuously Permanently Incapacitated for Performance of Duty based upon one or more of the Claimed Injury(ies) or Disease(s);
10. Opinion as to whether the Claimed Injury(ies) or Disease(s) are attributable to the intemperate use of drugs or alcohol or willful misconduct;
11. If the Member's Examining Physician Report is dated more than four (4) months after Discontinuation of Service, then an assertion that the preparer of the report is either the Member's Examining Physician or is a Forensic Examiner who has reviewed medical



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records from the Member's Examining Physician as required by Article II, Sec. 3;

12. If this report is prepared by a Forensic Physician, copies of all of the Member's medical records that were reviewed by the Forensic Physician in making any opinions expressed in the report must be attached to the report; and,
13. Signed and dated no more than six (6) months before the Application Date and submitted directly from the Examining Physician or Forensic Physician to SCERS.

Medical records included in a Member's Workers' Compensation file(s) will not be accepted in lieu of the forms or reports otherwise required under this paragraph.

**c. Authorization for Release of Medical and Other Information Form (Provided by SCERS)**

The Applicant is required to provide a current *Authorization for Release of Medical and Other Information* form signed by the Member and to execute additional forms as may be needed to process the Application. Subject to the conditions listed in Article I, the Applicant/Member must cooperate with SCERS in obtaining medical records, including psychiatric and mental health treatment records, and related documents for processing the Application.

**Sec. 3. Minimum Eligibility Requirements for Submitting an Application**

**a. Timeliness of Application**

An Application must be submitted:

1. While the Member is in service;
2. Within four (4) months after Discontinuation of Service;
3. Within four (4) months after the expiration of any period during which a Statutory Presumption is extended beyond the Discontinuation of Service; or,
4. More than four (4) months after the Discontinuation of Service if competent medical evidence substantiates that the Member has been continuously physically and/or mentally incapacitated to substantially perform the Member's Duties from Discontinuation of Service to the Application Date.

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### **b. Applications Submitted More than Four (4) Months after Discontinuation of Service**

The Board has determined that Applications submitted more than four (4) months from Discontinuation of Service may prejudice the Board's ability to provide the Applicant due process and to make a fair decision on the Application. Therefore, if the Application Date is more than four (4) months after Discontinuation of Service or more than four (4) months after the expiration of any period during which a Statutory Presumption is extended beyond the Discontinuation of Service, then the Applicant must supply additional information with the Application in the form of one of the options below. SCERS will not accept any Application that is submitted more than four (4) months after Discontinuation of Service that fails to provide this additional information.

1. Option 1 – Examining Physician – A statement by the Member's Examining Physician indicating that the Examining Physician has continuously treated the Member from Discontinuation of Service to the Application Date. The statement must indicate that the Member has been continuously physically and/or mentally incapacitated for the performance of Duty from Discontinuation of Service to the Application Date. Copies of all of the Examining Physician's records of medical treatment for the Member during the time period must be provided, and the medical records must demonstrate the Examining Physician treated the Member for the entire period from Discontinuation of Service to the Application Date.
2. Option 2 – Forensic Physician – A statement by a Forensic Physician that the Forensic Physician has examined the Member and reviewed the Member's medical records from Discontinuation of Service to the Application Date, and the Forensic Physician's opinion that the Member has been continuously physically and/or mentally incapacitated for the performance of Duty during that period. Copies of all medical records that the Forensic Physician relied upon to render such an opinion must be provided with the statement.

### **c. Termination for Cause or Withdrawal of Contributions**

Termination of a Member's employment for cause or a Member's informed decision to withdraw the Member's accumulated contributions from SCERS prior to submitting an Application extinguishes that Member's right to claim or receive a disability retirement benefit from SCERS.

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### **Sec. 4. Request for Expedited Administrative Review**

An Applicant may submit a *Request for Expedited Administrative Review* along with the Application where there are certain extenuating, circumstances, such as the Member has suffered a catastrophic disabling event or has been medically diagnosed with a terminal illness. The *Request for Expedited Administrative Review* must include the specific grounds and supporting medical evidence for the request.

SCERS' Chief Benefits Officer, in consultation with General Counsel and the Medical Advisor, shall review the request and have discretion to act in his or her discretion to expedite review and disposition of the Application as he or she determines is appropriate, including without limitation recommending the Board grant the Application.

### **Sec. 5. SCERS Notice of Application Designation**

An Application will not be accepted by SCERS for purposes of Government Code Sections 31721 through 31724, inclusive, or otherwise, until it complies, at a minimum, with the requirements of this Article II.

#### **a. Submitted Application**

SCERS will receive any Application submitted, but for purposes of review only, noting the date of receipt. If SCERS determines that the Submitted Application is not complete, then SCERS will issue a *Notice of Application Designation* as "incomplete" to the Applicant within thirty (30) calendar days the Application Date.

The notice will specifically identify the deficiencies in the Submitted Application which must be resolved by the Applicant within sixty (60) days. A Submitted Application will be dismissed in part as to any Claimed Injury(ies) or Disease(s) not specifically supported by an Examining Physician or Forensic Physician report. In that case, SCERS will evaluate the Application based solely upon the Claimed Injury(ies) or Disease(s) that are supported.

#### **b. Completed Application**

If SCERS determines that the Submitted Application is complete, SCERS will issue a *Notice of Application Designation* as "complete" to the Applicant within thirty (30) calendar days specifying the Claimed Injury(ies) or Disease(s) that form the basis of the Application and that will be evaluated in making a determination to grant or deny the Application.

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To be considered a Completed Application, the following requirements must be met:

1. Member is eligible for disability retirement benefits (e.g., the Application was timely submitted, the Member has not been terminated for cause, and the Member has not withdrawn accumulated contributions);
2. All pages of the Application are legible, intact and in order;
3. All Application questions are answered and all responses to questions are legible;
4. The Applicant's claim for disability retirement is stated clearly in sufficient detail;
5. All required reports, forms, and documents are included, completed legibly, and signed if required. All relevant medical documents, as determined by SCERS, are included, with at least one report from an Examining Physician or Forensic Physician reviewing the Member's medical records and stating that the Member is Permanently Incapacitated for the Performance of Duty;
6. The *Authorization and Release of Medical and Other Information* form completed, dated, and signed by the Member is included.

### **c. Accepting or Dismissing Applications**

SCERS will accept and process an Application that is submitted within the time period(s) specified in Article II, Sec. 3(a), if complete as determined by these Procedures, and not barred as specified in Article II, Sec. 3(c). SCERS will reject any Application that is not submitted timely, that is barred, or for which the additional information required is not timely received by SCERS.

If the deficiencies of a Submitted Application are not cured by the Applicant within six (6) months of the Application Date, whether due to the Applicant's noncooperation or failure to demonstrate good cause for delay as determined by SCERS in its sole discretion, the Application will be submitted to the Board with a staff recommendation. If the Board determines in its sole discretion that the Application is incomplete, the Application will be Dismissed without Prejudice in its entirety.

A dismissal by the Board is a Final Administrative Action subject to

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judicial review, as provided in Article VIII.

If the Board determines that the Application is complete and that there is no prejudice to the Board's ability to provide due process and make a decision on the Application, then the Application will be accepted and processed.

### **Sec. 6. Amending an Application**

An Applicant may amend an Application for purposes of changing, deleting, or adding a Claimed Injury or Disease, or to change the request for Service-Connected or Nonservice-Connected Disability Retirement, by submitting an Amended Application at any time within sixty (60) calendar days of the date SCERS issues the *Notice of Application Designation*. If the notice designates the Application as "complete," the Applicant may waive the sixty (60) calendar day amendment period, and SCERS will proceed to assemble the Medical Advisor catalog pursuant to Article II, Sec. 12.

No Amended Application submitted more than sixty (60) calendar days after the *Notice of Application Designation* is issued shall be accepted by SCERS, except for good cause by finding that the Applicant could not, with the exercise of reasonable diligence, have included the substance of the Amendment on the Application Date of the original Application.

SCERS may reject for lack of good cause an Amended Application submitted to SCERS more than sixty (60) calendar days after the *Notice of Application Designation* is issued. The Applicant may appeal SCERS' decision to the Board. The Applicant has the burden of proving by a preponderance of the evidence good cause for the late submission of the Amended Application. If the Board determines that there is good cause for the late submission, the Amended Application will be accepted. Otherwise, the Amended Application will be rejected by the Board, and may be Dismissed with Prejudice, and the original Application will be processed without amendment.

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

### **Sec. 7. Application Withdrawal**

An Applicant may withdraw an Application at any time before the Board takes a Final Administrative Action on the Completed Application.

If an Application is withdrawn before the Application is set for Hearing, it is deemed a Withdrawal without Prejudice.

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If an Application is withdrawn after the Application is set for Hearing, it is deemed a Withdrawal with Prejudice, which means that all rights attached to the Application, including the right to a Hearing and the right to judicial review, are forfeited, and that the Application cannot be reinstated and is irrevocably waived. When an Applicant or Member fails to comply with these Procedures, fails to submit required documents, fails to cooperate, or fails to respond timely to requests for information, the Application may be administratively Dismissed with or without Prejudice as provided by these Procedures.

### **Sec. 8. Continuation of Application After Member's Death**

In the event a Member with a pending Application dies before a final decision on the Application is made, the Member's surviving spouse or, if none, the guardian of the Member's minor children, if any, may continue the Application by notifying SCERS in writing within ninety (90) calendar days of the date of the Member's death. If no written notice is filed timely with SCERS, the Application will be Dismissed with Prejudice.

### **Sec. 9. Application Process: SCERS' Role; Applicant Communications**

SCERS serves as the administrator of the Application Process. SCERS' Disability Retirement Unit staff will meet with an Applicant in person or by telephone to review the Application form, process, requirements, and instructions; respond to Applicant questions; monitor and follow-up on the status of SCERS' receipt of medical records and the review and evaluation of the Application; and ensure the process is completed in accordance with applicable law, SCERS Bylaws, policies, and these Procedures.

SCERS may require an Applicant to respond to SCERS' requests for additional information or documents at any time during the Application Process. Communication between SCERS and the Applicant may be an in-person meeting, by telephone, by written letter, or by electronic mail.

### **Sec. 10. Medical Records and Reports**

#### **a. Provided by Applicant**

Unless otherwise instructed by SCERS, the Applicant shall arrange for copies of any and all medical records and reports from all Medical Providers, including all Examining Physicians, which pre-date and were prepared within five (5) years of the Submitted Application Date, or within five (5) years of Discontinuation of Service through the Application Date, whichever is longer in time, to be sent directly by the Medical Providers to SCERS at the Applicant's expense. Such records and reports need not include any medical records contained in any file resulting from any claim filed by the Applicant or Member for Workers' Compensation if otherwise made available to SCERS. Medical

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records and reports required to be provided by the Applicant must be received by SCERS no later than sixty (60) calendar days after the *Notice of Application Designation* is issued, or the Application may be Dismissed without Prejudice.

The Applicant shall also arrange for any and all medical records and reports prepared by any Medical Provider from which the Member receives a consultation, diagnosis, or treatment after SCERS issues a *Notice of Application Designation as "complete."* The medical records and reports are to be sent directly by the Medical Provider to SCERS at the Applicant's expense.

In addition, the Applicant shall cooperate with SCERS in obtaining any and all medical records and reports independently requested by SCERS in its sole discretion, by Subpoena or otherwise, at SCERS' expense.

### **b. Obtained by SCERS**

Based upon the *Authorization and Release of Medical and Other Information* form signed by the Member, SCERS may obtain other medical records, Workers' Compensation records, and Participating Employer records related to the Member's Claimed Injury(ies) or Disease(s). Any medical and related records so obtained will be included in the Disability Catalog for the Application.

### **Sec. 11. Participating Employer Forms and Records**

Within thirty (30) calendar days of issuing a *Notice of Application Designation as "complete,"* SCERS will request from the Participating Employer any relevant Workers' Compensation records applicable to the Member's position and the Claimed Injury(ies) or Disease(s).

### **Sec. 12. Disability Catalog (or "Medical Advisor Catalog")**

At this stage of the process, the Disability Catalog may also be referred to as the "Medical Advisor Catalog" and will include, but is not limited to, the Completed Application and the documents described in Article II.

### **Sec. 13. Augmenting the Disability Catalog**

One the sixty (60) calendar day period for amending the Application concludes, or earlier if the amendment period is waived in writing by the Applicant, SCERS will assemble the Medical Advisor Catalog and send a copy to the Member for review. The Member will have thirty (30) calendar days to augment the Medical Advisor Catalog if desired.

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### **Sec. 14. Medical Advisor Report**

SCERS may retain a Medical Advisor to review the Disability Catalog and provide a written *Report and Recommendation* on the Application to the Board.

### **Sec. 15. Independent Medical Examiner Report**

The Medical Advisor may recommend, or SCERS may directly require, the Member submit to one or more IMEs. The subsequent *IM Examiner Report*, if any, will be included in the Disability Catalog.



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## ARTICLE III

### APPLICATION BY A PARTICIPATING EMPLOYER

#### Sec. 1. Applicability

The head of the agency, district, department or office of a Participating Employer by which a Member is currently or was last employed, or such person's designee, may submit an Application on behalf of a SCERS Member.

#### Sec. 2. Application Requirements

An Application submitted by the Participating Employer must meet all of the requirements of, and will be processed according to, these Procedures.

#### Sec. 3. Notice of Employer Application

SCERS shall send a *Notice of Employer Application* to the Member within ten (10) calendar days after the Application Date that states:

- a. The date the Application was submitted on the Member's behalf;
- b. The Member has the right to either support or oppose the Application, or any part of the Application, and to have legal representation at the Member's expense;
- c. The Member must, at the Member's expense, arrange for copies of one or more medical records, medical reports or other documentary evidence from Medical Providers to be sent directly to SCERS by the keeper or custodian of the records for consideration in the evaluation of the Application within sixty (60) calendar days of the date SCERS issues the *Notice of Application Designation*;
- d. Any medical records, medical reports or other documentary evidence submitted by the Applicant or Member later than the sixtieth (60<sup>th</sup>) calendar day after the *Notice of Application Designation* may be rejected by SCERS in its sole discretion;
- e. The Member is required to complete and return the *Authorization and Release of Medical and Other Information* to assist SCERS in reviewing and making a decision on the Application;
- f. Copies of all notices in the proceedings will be sent to the Member's address on file with SCERS unless the Member notifies SCERS in writing of a different address; and
- g. The Member may submit his or her own Application, in which case the Application submitted by the Participating Employer on behalf of the

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Member will be combined with and processed as the Member's Application according to these Procedures.

- h. And that includes:
  - 1. A copy of these Procedures;
  - 2. A copy of the Application prepared and submitted by the Participating Employer;
  - 3. An *Authorization and Release of Medical and Other Information* form.

An affidavit or proof of service shall be executed by the person who serves the notice on the Member and shall be included in the SCERS records for the Application.

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## ARTICLE IV MEDICAL REVIEW AND EVALUATION

### Sec. 1. Medical Advisor

The Board may appoint one or more Medical Advisors to assist on medical matters related to Applications. Medical Advisors appointed by the Board shall be medical doctors or doctors of osteopathy with a current, valid license to practice in the State of California.

### Sec. 2. Medical Advisor Review

After SCERS issues a *Notice of Completed Application*, the Disability Catalog may be submitted to a Medical Advisor for review.

Within forty-five (45) calendar days of receipt of the Disability Catalog, which time limit may be reasonably extended by SCERS for good cause, the Medical Advisor will either:

- a. Complete a review of the Disability Catalog and provide a *Report and Recommendation* to SCERS that addresses the following issues, as applicable, in recommending a decision on the Application:
  1. Whether the Member is physically and/or mentally incapacitated for the performance of Duty, with or without Accommodation, due to the Claimed Injury(ies) or Disease(s).
  2. Whether the Member's incapacity is Permanent.
  3. Whether the Member's incapacity is service-connected, if applicable.
  4. Whether the Member is able to perform other Duties based on restrictions imposed by the Member's Claimed Injury(ies) or Disease(s).
  5. Whether the Member is able to perform other work in the County Service.
  6. Whether the Member's Claimed Injury(ies) or Disease(s) resulted from the Member's intemperate use of alcohol or drugs or willful misconduct.
  7. If the Application Date is more than four (4) months after the Discontinuation of Service, whether the Member was continuously physically and/or mentally incapacitated for the performance of Duty from the Discontinuation of Service to the Application Date.

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or

- b. Determine if the opinion of an IM Examiner is needed to assist the Medical Advisor in evaluating the Application.

### **Sec. 3. Independent Medical Evaluation (IME)**

- a. SCERS may require the Member to submit to one or more IMEs on one or more occasions by a physician with expertise in the Claimed Injury(ies) or Disease(s). The costs of any such examination(s) and/or reviews of medical records shall be borne by SCERS.
- b. SCERS shall send to the Applicant, and the Member if other than the Applicant, a *Notice of Referral for IME* containing the name, address, phone number and date of the Member's appointment with an IM Examiner. If the Member is unable to keep an IME appointment, the Applicant, or the Member if other than the Applicant, shall notify SCERS at least ten (10) calendar days prior to the scheduled IME appointment so as to avoid any cancellation fees. Failure to do so may result in the Member being assessed cancellation fees, as determined by the assigned IM Examiner's fee schedule.
- c. If the location of the IME is neither in Sacramento County, nor the county in which the Member currently resides, the Applicant may submit a written request to SCERS that SCERS reimburse the Member for reasonable travel expenses. SCERS, in its sole discretion, may grant or deny all or part of such a request. The Member shall not be entitled to reimbursement unless the Applicant provides to SCERS adequate written documentation (such as original receipts for expenses) establishing expenses actually incurred by the Member for which reimbursement is sought.
- d. The records and reports of the IM Examiner shall become part of the Disability Catalog and are confidential and not subject to disclosure except to the Parties and their attorneys and in accordance with California law and these Procedures.
- e. If the Member fails or refuses to:
  - 1. Comply with any demand by SCERS for any IME;
  - 2. Cooperate fully with an IM Examiner;
  - 3. Submit to all reasonable tests required by the IM Examiner; or
  - 4. Notify SCERS in advance of the Member's inability to attend an IME appointment;

Then SCERS will send the Applicant a *Notice of Noncooperation* advising that the Member's failure to submit to IME(s) as required by

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SCERS shall be treated as noncooperation and, unless resolved, the Application will be Dismissed, potentially with prejudice, by the Board.

The Member then will have thirty (30) calendar days from the date the *Notice of Noncooperation* is issued to agree to an examination date for the IME(s). If the Member fails to attend the scheduled IME(s) within one hundred twenty (120) calendar days of the date the *Notice of Noncooperation* is issued, then staff will recommend the Application be Dismissed, potentially with prejudice, by the Board at its next regularly scheduled meeting.

### **Sec. 4. IM Examiner's Report**

Within forty-five (45) calendar days after the date of the Member's IME, the IM Examiner will provide a report to SCERS that addresses the following issues in recommending a decision on the Application:

1. Whether the Member is physically and/or mentally incapacitated for the performance of Duty, with or without Accommodation, due to the Claimed Injury(ies) or Disease(s).
2. Whether the Member's incapacity is Permanent.
3. Whether the Member's incapacity is service-connected, if applicable.
4. Whether the Member is able to perform other Duties based on restrictions imposed by the Member's Claimed Injury(ies) or Disease(s).
5. Whether the Member is able to perform other work in the County Service.
6. Whether the Member's Claimed Injury(ies) or Disease(s) resulted from the Member's intemperate use of alcohol or drugs or willful misconduct.
7. If the Application Date is more than four (4) months after the Discontinuation of Service, whether the Member was continuously physically and/or mentally incapacitated for the performance of Duty from the Discontinuation of Service to the Application Date.

### **Sec. 5. Distribution of Reports**

Following receipt of the Medical Advisor's *Report and Recommendation* and/or any *IM Examiner's Report*, SCERS will issue to the Member, and the Applicant if other than the Member, a *Notice of Recommended Decision* stating staff's

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recommendation to the Board to either grant or deny the Application on the basis of the report, and include a copy of the report. A copy of the notice will be provided to all Parties.

If staff recommends that an Application be denied on the basis of the report received, a Party may request a Hearing or Record Review as provided in Sec. 6 below.

The Member shall be entitled to receive copies of any and all records provided to the Board for the purpose of making a determination on the Application, except that in the case of psychiatric or psychological records of a sensitive nature where a treating Medical Provider, a Medical Advisor, or IM Examiner so advises, SCERS will not provide such records directly to the Member, but shall provide them to the Member's attorney or, if the Member is not represented, to the Member's treating Medical Provider and inform the member in writing.

### **Sec. 6. Request for Hearing or Record Review**

Should any Party wish to contest the recommendation and request a Hearing before, or alternatively a Record Review in lieu of a Hearing by, a Hearing Officer, that Party must complete, sign, and submit a *Request for Hearing or Record Review* form to SCERS within twenty (20) calendar days of the date the *Notice of Recommended Decision* is issued to the Parties.

If the Party is requesting a Record Review, the Party must acknowledge that he or she is irrevocably waiving the right to a Hearing by requesting a Record Review. The Party may request one extension of time of not more than fifteen (15) calendar days to submit the completed *Request for Hearing or Record Review* form to SCERS.

### **Sec. 7. Notice of Board Consideration Date**

If no *Request for Hearing or Record Review* form or request for extension is received by SCERS within twenty (20) calendar days, the matter will be submitted to the Board with a recommended decision on the Application based on the Medical Advisor's *Report and Recommendation* and/or the *IM Examiner's Report* at an upcoming regularly scheduled Board meeting that is at least twenty-five (25) calendar days in the future. The Board Catalog will include the Medical Advisor's *Report and Recommendation* and the *IM Examiner's Report*, if any. SCERS will send a *Notice of Board Consideration Date* to the Member, and to the Applicant if other than the Member, or to the attorney(s) therefor, not less than twenty-five (25) calendar days prior to the Board Consideration Date, unless the Applicant submits a *Waiver of Notice for Board Consideration* to SCERS.

# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE V PREHEARING PROCEDURES

### **Sec. 1. Applicability**

If a Party makes a timely request for a Hearing or a Record Review pursuant to Article IV, Sec. 6, or if the Board directs that the Application be reviewed by a Hearing Officer, then the following prehearing procedures shall apply.

### **Sec. 2. Notice of Referral to Hearing or Record Review and the Hearing Catalog**

Within thirty (30) calendar days of a timely request for a Hearing or Record Review, SCERS shall provide a *Notice of Referral to Hearing or Record Review* to each Party along with a copy of the Disability Catalog. At this stage of the process the Disability Catalog is referred to as the "Hearing Catalog" and includes any additional documents created or received since the referral of the Application to the MA.

The Member shall be entitled to receive copies of any and all records provided to the Board for the purpose of making a determination on the Application, except that in the case of psychiatric or psychological records of a sensitive nature where a treating Medical Provider, a Medical Advisor, or IM Examiner so advises, SCERS will not provide such records directly to the Member, but shall provide them to the Member's attorney or, if the Member is not represented, to the Member's treating Medical Provider and inform the member in writing.

### **Sec. 3. Supplementing the Hearing Catalog**

Within thirty (30) calendar days of the date SCERS issues a *Notice of Referral to Hearing or Record Review* to the Parties or their attorneys, each Party may submit supplemental documentary evidence by delivering any additional documents to SCERS, and copies to the other Parties or their attorneys.

No additional documents will be accepted by SCERS after the thirty (30) day period, except as permitted by the Hearing Officer for good cause, namely, that the substance of the evidence was not known, or could not have reasonably been known, at the time it was required to be delivered to SCERS, and a showing that the evidence is relevant, material and not simply cumulative. If supplemental documents are timely received, or allowed late upon a showing of good cause, SCERS will appropriately identify the supplemental documents, include them in the final Hearing Catalog, and distribute an updated index and copies of any supplemental documents to the Parties. SCERS will also distribute a copy of the final Hearing Catalog to OAH.

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### **Sec. 4. Request to Set Hearing and Statement of Issues**

No sooner than thirty (30) calendar days after SCERS issues the *Notice of Referral to Hearing*, Counsel for the Retirement Fund shall make a reasonable effort to coordinate mutually acceptable Hearing dates with the Member, and the Applicant, if other than the Member, or the attorney(s) therefor.

Within sixty (60) calendar days after SCERS issues the *Notice of Referral to Hearing*, Counsel for the Retirement Fund will file:

- a. A *Request to Set Hearing* form with the OAH to request that a prehearing conference and a Hearing be scheduled for an Application; and
- b. A *Statement of Issues* with OAH setting forth the Contested legal and/or factual issues to be addressed at Hearing.

The *Request to Set Hearing* and *Statement of Issues* will be served on all Parties or their attorneys.

The hearing must be held no later than one hundred twenty (120) calendar days after the date that the *Request to Set Hearing* is filed with OAH, unless a later date is approved by SCERS' Chief Benefits Officer upon receiving a written request and a showing of good cause for an extension of time.

### **Sec. 5. Request for Record Review in Lieu of a Hearing and Statement of Issues**

Not less than thirty (30) calendar days after SCERS issues the *Notice of Referral to Record Review*, Counsel for the Retirement Fund will make a reasonable effort to coordinate a mutually acceptable written briefing schedule.

Within sixty (60) calendar days after SCERS issues the *Notice of Referral to Record Review*, Counsel for the Retirement Fund will file a *Request to Set Record Review* with OAH to request a review of the records in lieu of a Hearing, and will inform OAH of the briefing schedule. Counsel for the Retirement Fund will also file a *Statement of Issues* with OAH setting forth the legal and/or factual issues to be addressed in the Record Review, which will be served on all Parties or their attorneys.

In a Record Review, the Applicant will submit the first written brief; SCERS will then submit its written response; and, the Applicant will submit the final written brief. The written briefing by the Parties must be completed within ninety (90) calendar days after the *Request to Set Record Review* is filed with OAH, unless a later date is approved by SCERS' Chief Benefits Officer upon receiving a written request and a showing of good cause for an extension of time.



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The Hearing Officer assigned to conduct the Record Review shall issue a *Proposed Findings of Fact and Recommended Decision* to the Board no later than thirty (30) calendar days after the final written brief is submitted to OAH and the record is closed.

In the *Proposed Findings of Fact and Recommended Decision*, the Hearing Officer shall make findings and recommendations on the Contested issues set out in the Statement of Issues.

### **Sec. 6. Protective Order Sealing Confidential Records**

Pursuant to Government Code section 31532, Member records are confidential. Therefore, Counsel for the Retirement Fund will contact and advise the Applicant of the availability of seeking a protective order.

After the prehearing and Hearing dates, or written briefing schedule for a Record Review, have been set, and in no case less than three (3) calendar days before the prehearing conference or the date for submission of an Applicant's opening brief in a Record Review, Counsel for the Retirement Fund will submit a Request for Protective Order Sealing Confidential Records and a proposed Protective Order Sealing Confidential Records to OAH.

### **Sec. 7. Hearing Officers**

If a Hearing or Record Review is requested, a Hearing Officer, as assigned by OAH, shall conduct the Hearing or Record Review in substantial compliance with SCERS' Bylaws and these Procedures.

### **Sec. 8. Assignment of Hearing Officers**

The Board herein authorizes the use of the OAH as its independent adjudication administrator. The OAH shall provide Hearing Officers to oversee Hearings and Record Reviews upon request by SCERS. SCERS takes no part in selecting or assigning Hearing Officers.

### **Sec. 9. Scheduling the Hearing**

Following submission of the *Request to Set Hearing and Statement of Issues* to OAH, OAH shall notify the Parties of the date(s), time(s) and location of the Hearing and prehearing conference. Within ten (10) calendar days of receipt of that notice, SCERS shall prepare and send to all other Parties or their attorneys a *Notice of Referral to Hearing* and file a proof of service of same with the OAH.

Any request to continue a scheduled Hearing shall be made in writing using the procedures established by OAH, and served on all other Parties or their attorneys. Any request for a continuance that is opposed will not be granted, except for good cause. Good cause may include, without limitation, the illness or other disability of any Party, material witness, attorney or close family member of

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same. Neither the failure to obtain an attorney for representation in the proceeding when afforded reasonable time to do so, nor the unavailability of a witness who has not been properly and timely subpoenaed, shall be considered good cause.

Any Party requesting a continuance may be ordered to bear any and all direct costs resulting from the grant of a continuance.

### **Sec. 10. Prehearing Conference Statements**

At least three (3) calendar days prior to the scheduled prehearing conference, each Party shall file a *Prehearing Conference Statement* with OAH pursuant to the Notice of Hearing and Prehearing Conference issued by OAH. *Prehearing Conference Statements* will generally include:

- a. The Party's estimate of the time necessary to try the matter;
- b. The names of any witnesses, including experts, a Party may call at Hearing and a description of the testimony that will be provided by each witness;
- c. The identity of any witness whose testimony will be presented by affidavit;
- d. Whether an interpreter or special accommodation is needed at Hearing;
- e. A list of the documentary exhibits and a description of any physical or demonstrative evidence;
- f. A statement of legal issues; and
- g. Any other information required by OAH.

Copies of the *Prehearing Conference Statement* must be concurrently served on the other Party(ies) or their attorney(s), and on SCERS.

Any Party intending to directly examine or cross-examine a physician disclosed in the Hearing Catalog or supplemental documents must include that intention in that Party's *Prehearing Conference Statement* or at the prehearing conference. It is then that Party's responsibility to assure the attendance of that physician at the Hearing by Subpoena or otherwise, or the right to examine or cross-examine that physician at Hearing shall be deemed to be waived, unless a showing of a good cause for the Party's failure to do so is found by the Hearing Officer.

The failure of a Party to identify any new evidence, or list any witness, in that Party's *Prehearing Conference Statement* shall preclude the introduction of that evidence at the Hearing, including any written medical report, unless permitted

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by the Hearing Officer on a showing of good cause; namely, that the substance of the evidence was not known, or could not have reasonably been known, at the time the *Prehearing Conference Statement* was filed, and a showing that the evidence is relevant, material and not simply cumulative.

If the Hearing Officer does permit the introduction of the new evidence, the Hearing Officer shall permit other Parties to rebut the new evidence with any other evidence, and/or, under extraordinary circumstances, continue the Hearing to permit other Parties to rebut the new evidence.

### **Sec. 11. Prehearing Conference**

OAH will schedule a prehearing conference and serve notice on all of the Parties. Prehearing conferences are mandatory. The prehearing conference may be conducted by telephone and shall be used to clarify any Contested issues, address any procedural questions, and explore possible factual stipulations as to facts in advance of the Hearing.

The Hearing Officer's discussion at the prehearing conference should include, but not necessarily be limited to the following issues:

- a. The identification of the Claimed Injury(ies) or Disease(s) upon which the Application is based;
- b. Contested legal Issues;
- c. Confirmation that all relevant documentary evidence has been identified and distributed to the Parties;
- d. Confirmation that all potential witnesses have been identified; and,
- e. Estimated length of the Hearing.

This list is not intended to be exhaustive and any questions the Parties may have about the process may be discussed.

**Notice:** This Sec. 11 is intended to ensure that all witnesses, exhibits, and legal issues be identified no later than the prehearing conference and that the Hearing Officer and the Board will not consider any evidence or issues not so identified before or during the prehearing conference.

### **Sec. 12. Depositions**

The Parties may depose witnesses prior to the Hearing, but are not required to do so. Depositions of witnesses for any purpose shall take place at least ten (10) business days before the Hearing, unless otherwise stipulated by the Parties. Issuance of a Subpoena for any witness' attendance at a Deposition shall be contingent on the Party accepting the obligation to pay the witness.

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- a. Lay Witnesses - The Parties may depose any witness, except as described below for Medical Witnesses, as provided in the Civil Discovery Act (Code of Civil Procedure Sections 2016.010 et seq.), or as otherwise stipulated by the Parties. The Party requesting the Deposition shall be responsible for payment of any and all costs. Attendance of witnesses and the production of records in regard to Depositions may be required, and appropriate Subpoenas will be issued by SCERS, an attorney representing a Party, or the Hearing Officer.
- b. Medical Witnesses – The Parties may depose a Medical Witness at a reasonable time as requested by the Medical Witness in his or her office or such other reasonable place requested by the Medical Witness.
  1. The Party requesting oral testimony of any healthcare provider is responsible for paying the deponent an expert witness fee on the same conditions that such a witness would be entitled to claim under Government Code Section 68092.5, if subpoenaed to testify in a civil action or proceeding.
  2. The Party requesting the oral testimony of a healthcare provider shall contact the healthcare provider's office and determine that person's reasonable and customary hourly fee and shall advise the Medical Witness' office of the anticipated length or duration in hours or portions thereof for the Deposition or Hearing.
  3. Failure to serve a Subpoena and/or pay the prescribed expert witness fee shall be treated by the Hearing Officer and Board as a waiver of the right to question such witness.

### **Sec. 13. Subpoenas and Service of Process**

Pursuant to SCERS Bylaws:

- a. The Board President, SCERS' Chief Executive Officer, or an attorney representing a Party are authorized to issue and sign Subpoenas relating to the investigation of any Application or the Hearing of any Application by the Board.
- b. Any Hearing Officer assigned to hear an Application is authorized to issue and sign Subpoenas relating to the adjudication of that Application.

Subpoena forms are available, and may be requested, from the Hearing Officer and/or OAH for that purpose.

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The Parties are responsible for properly serving Subpoenas, and service on witnesses shall be completed no later than fifteen (15) calendar days before the date that a Hearing is to commence. Proof of service of Subpoenas shall be made in compliance with applicable laws. If the witness so agrees, a Subpoena may be served electronically.

# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE VI HEARING PROCEDURES

### **Sec. 1. Purpose**

The purpose of this Article is to set the rules and procedures for Hearings.

### **Sec. 2. Time and Place of the Hearing**

The date, time and location of the Hearing will be set by OAH pursuant to the *Request to Set Hearing*, and notice thereof will be served on the Parties by OAH. Within ten (10) calendar days of receipt of that information, SCERS shall prepare and send to all other Parties or their attorneys a *Notice of Hearing* and file a proof of service of same with the OAH.

Unless approved by SCERS in writing, the Parties may not agree, nor the Hearing Officer order, that the Hearing date be extended past one hundred twenty (120) calendar days from the date the *Request to Set Hearing* was filed with OAH.

If an Applicant fails to attend the scheduled Hearing, the matter will proceed as a default Hearing and may result in a denial of the Application based on the documentary evidence contained in the Disability Catalog, or dismissal of the Application entirely for failure to prosecute.

### **Sec. 3. Record of the Hearing**

All Hearings before a Hearing Officer shall be audio recorded. A written transcript will be made upon the request of a Party. The cost of the transcript shall be paid by the requesting Party, or be shared equally by all requesting Parties.

### **Sec. 4. Jurisdiction of the Hearing Officer**

Upon assignment pursuant to Article V, the Hearing Officer shall have jurisdiction to rule on all issues related to the evidentiary proceeding; i.e., admissibility of evidence, witnesses, Depositions, Subpoenas, continuances, and prehearing matters, as long as such rulings are consistent with the requirements of these Procedures. However, the Hearing Officer may not extend the time to complete the Hearing and provide a Proposed Decision and Recommended Decision beyond two hundred (200) calendar days after the date the *Request to Set Hearing* form was submitted to OAH, unless a later date is approved by SCERS' Chief Benefits Officer upon receiving a written request and a showing of good cause for an extension of time.

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## **Sec. 5. Hearing Proceedings**

Unless otherwise ordered by the Hearing Officer, Hearings will generally proceed as follows:

- a. The Hearing Officer shall call the case and ask for appearances by or for all Parties, which shall be recorded. After all of the appearances are made, the Hearing Officer will describe the documentary file submitted as evidence for the Hearing and ensure that all Parties have identical document sets.
- b. The Hearing Officer will review issues, motions or objections regarding evidence, proposed witnesses, or any other matter that may have arisen since the prehearing conference. The Hearing Officer will invite argument from the Parties, and the Hearing Officer will rule on these matters as soon as practical.
- c. Once all preliminary matters have been addressed, the Parties may make opening statements, orally or in writing, except the Retirement Fund may delay its opening statement until after the Applicant's presentation of evidence.
- d. The Applicant's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and Counsel for the Retirement Fund have the right to cross-examine any testifying witnesses.
- e. The Retirement Fund's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and the Applicant have the right to cross-examine any testifying witnesses.
- f. Rebuttal evidence may then be presented in the same order.
- g. Applicant's closing arguments are made orally followed by the Retirement Fund's closing oral arguments. Upon the request of any Party or by order of the Hearing Officer, the closing arguments may be made in writing and submitted by all Parties concurrently to the Hearing Officer not later than sixty (60) calendar days after the close of the Hearing. Thereafter, the Parties will have fifteen (15) calendar days to file briefs in reply to the opposing Party's written closing arguments.

## **Sec. 6. Conduct of the Hearing**

- a. Parties' Rights - Each Party shall have the following rights:
  1. To call and examine witnesses identified;
  2. To introduce exhibits; and,

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3. To cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination.
- b. Applicant Testimony - If the Applicant does not testify, the Applicant may be called and examined as if under cross-examination. Refusal of the Applicant to submit to examination for the purpose of answering relevant questions may result in the Application being denied or dismissed.
- c. Exclusion of Witnesses/Observers - At the request of any Party, non-Party witnesses who are not designated as expert witnesses may be excluded from the Hearing, except while testifying. The Hearing shall be closed to the public to protect the confidentiality of the evidence presented unless the right to a closed Hearing is waived by the Member.

### **Sec. 7. Burden of Proof**

The Applicant, whether a Member of SCERS, a Participating Employer or its agents, a Member's relative, or any other person who submits an Application for disability retirement benefits has the obligation to prove, by a preponderance of the evidence, each affirmative issue on which the Application depends. The Applicant bears both the initial burden of presenting evidence, and the burden of persuasion by a preponderance of the evidence. Proof by a preponderance of the evidence means that the existence or nonexistence of a fact in dispute is more likely than not.

### **Sec. 8. Rules of Evidence**

The Hearing need not be conducted according to technical rules of evidence. Any relevant evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions. The rules of privilege shall apply to the extent that they are otherwise required by statute. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded.

- a. Hearsay – Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding, unless it would be admissible over objection in civil actions, except as otherwise provided in this Section.
- b. Judicial Notice – The Hearing Officer may take judicial notice of evidence as provided in the Evidence Code Sections 450 et seq.



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- c. Medical Reports – The use of written medical reports is favored. Any written medical report shall be admitted into evidence as if the witness had testified at the Hearing, subject to the right of any Party to cross-examine the witness.

It shall be the responsibility of any Party intending to cross-examine a physician to Subpoena, or otherwise arrange for the attendance of, that physician at a Deposition before the Hearing date, and to arrange to pay for any costs and fees required to be paid for such appearance at Hearing.

A written medical report bearing the signature of a Medical Provider may be admissible in evidence as the author's direct testimony and may support findings made by the Hearing Officer. Such medical reports shall not be inadmissible on the basis that they constitute hearsay. Such medical reports, when offered as expert opinions, shall not be inadmissible on the basis that the author of the medical report did not attend the Hearing or was called as a percipient witness and not as an expert witness. However, medical reports not identified in a Party's *Prehearing Conference Statements* will not be allowed into evidence at the Hearing.

- d. Depositions – Deposition testimony may be admissible in evidence.
- e. Affidavits – Affidavits or declarations under penalty of perjury shall be admitted into evidence as if the witness had testified at the Hearing, if copies have been provided to the Parties with the *Prehearing Conference Statement*. The witness must be produced at the Hearing for cross-examination if any Party so notifies the Party offering the affidavit or declaration at least ten (10) calendar days in advance of the Hearing date, or the affidavit or declaration shall be considered only as hearsay, except as otherwise provided in these Procedures.
- f. Stipulations – A stipulation, agreement, understanding, finding, order, act or omission on behalf of a Participating Employer, or by an officer, employee or agent thereof, in a Workers' Compensation or other proceeding to which neither the Board or SCERS is a party, may be offered into evidence but shall not be binding upon the Board or SCERS insofar as the stipulation, agreement, understanding, act or omission, may be asserted to relate to disability retirement or to the disposition of a particular Application for disability retirement, unless the stipulation, agreement, understanding, act or omission has been approved by the Board through a duly-adopted resolution or motion which has been recorded in the official minutes of the Board.

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- g. Testimony of Witnesses Not Listed In Prehearing Conference Statements – A witness not identified in a Party's *Prehearing Conference Statement* as a potential witness should not be allowed to testify at the Hearing, unless a showing of good cause is made by the Party calling the witness.
- h. Oral Evidence – Oral evidence shall be taken only upon oath or affirmation. The Hearing Officer may limit or exclude oral evidence that is irrelevant or unduly repetitious.

### **Sec. 9. Ex-Parte Communications Prohibited**

There shall be no Ex-Parte Communication between any Party, or any attorney therefor, and any member of the Board or the assigned Hearing Officer as to an Application while the Application is pending and before the Board's Final Administrative Action.

### **Sec. 10. Proposed Findings of Fact and Recommended Decision**

The Hearing Officer shall provide a *Proposed Findings of Fact and Recommended Decision* to the Board within thirty (30) calendar days after the date the record is closed and the case is submitted for ruling.

In the *Proposed Findings of Fact and Recommended Decision*, the Hearing Officer shall make findings and recommendations on the Contested issues set out in the *Statement of Issues*.

### **Sec. 11. Service of Proposed Findings of Fact and Recommended Decision and Notice of Period for Filing Objections**

Following SCERS' receipt of the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*, SCERS will issue to all other Parties:

- a. *The Proposed Findings of Fact and Recommended Decision*
- b. *A Notice of Period for Filing Objections*
- c. *A Notice of Board Consideration Date*

### **Sec. 12. Objections**

Each Party may serve written objections to the *Proposed Findings of Fact and Recommended Decision* to the Board within ten (10) calendar days of service of the *Proposed Decision* by SCERS. Copies of the objections shall be submitted to SCERS and served on the other Parties or their attorneys. The other Parties or their attorneys shall have ten (10) calendar days to submit and serve a written reply in the same manner. The objections and any replies shall be included in the Board Catalog. Late objections will not be accepted or incorporated in the record to be considered by the Board.

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## **Sec. 13. Notice of Board Consideration Date**

Not less than twenty-five (25) calendar days after SCERS's issues the *Notice of Board Consideration Date*, the Application will be submitted to the Board for consideration and action. The Board Catalog, as defined, will also include the Hearing Officer's *Proposed Findings of Fact and Recommended Decision*, along with written objections, if any, and written responses thereto, and a legal review prepared by General Counsel.

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## ARTICLE VII BOARD CONSIDERATION

### **Sec. 1. Purpose**

The purpose of this Article is to establish rules for the Board's consideration of a staff recommendation, a Medical Advisor's *Report and Recommendation*, an *IM Examiner's Report*, or a *Proposed Findings of Fact and Recommended Decision* from a Hearing Officer in making a decision on an Application.

### **Sec. 2. Scheduling**

If no timely *Request for Hearing or Record Review* form is received by SCERS as provided in Article IV, Sec. 6, the Medical Advisor's *Report and Recommendation* and/or *IM Examiner's Report* will be placed on the consent agenda for an upcoming regularly scheduled Board meeting that is at least twenty-five (25) calendar days in the future.

If the matter was assigned to a Hearing Officer, the *Proposed Findings of Fact and Recommend Decision* along with written objections, if any, and a legal review prepared by General Counsel will be included in the Board's consent agenda for an upcoming regularly scheduled meeting to be held after the time for filing written objections has passed.

SCERS will send a *Notice of Board Consideration Date* and a copy of the Board Catalog, excluding any attorney-client privileged writing, to the Member, and to the Applicant if other than the Member, or to the attorney(s) therefor, not less than twenty-five (25) calendar days prior to the Board Consideration Date, unless the Applicant submits a *Waiver of Notice for Board Consideration* to SCERS.

### **Sec. 3. Ex-Parte Communications Prohibited**

There shall be no Ex-Parte Communication between any Party, or any attorney therefor, and any member of the Board as to an Application while the Application is pending and before the Board's Final Administrative Action.

### **Sec. 4. Addressing the Board**

A Party or the Party's attorney may address the Board concerning the recommendation on the Application during the public comment period of the Board meeting, as provided in the Board's agenda, subject to any reasonable time limitations imposed by the Board President. A Party's or attorney's statements shall be made in open session, unless the Party or attorney requests a closed session for the purpose of protecting the confidentiality of any information to be provided to the Board. No new evidence may be presented or considered.

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### **Sec. 5. Board Deliberation in Closed Session**

Any member of the Board may request that an Application be removed from the Board's consent agenda for further deliberation in closed session with the Board's General Counsel. Deliberation in closed session shall not include any Party or any Party's attorney who was present or represented during the Hearing. Any decision of the Board made in closed session will be reported when the Board reconvenes in open session.

### **Sec. 6. Board's Disposition of Application**

- a. If the Board is considering a *Medical Advisor's Report and Recommendation* and/or an *IM Examiner's Report*, the Board shall:
  1. Approve and adopt the recommendation to grant or deny the Application; or
  2. Refer the matter back to the Medical Advisor and/or IM Examiner with instructions for further review; or
  3. Set the matter for a Hearing before a Hearing Officer.
- b. If the Board is considering a *Proposed Findings of Fact and Recommended Decision* of a Hearing Officer, along with written objections, if any, and written responses thereto, and a legal review prepared by General Counsel, the Board shall either:
  1. Approve and adopt the *Proposed Findings of Fact and Recommended Decision* of the Hearing Officer to grant or deny the Application;
  2. Refer the matter back to the Hearing Officer with instructions for further review and/or proceedings;
  3. Require a transcript or summary of all the testimony, plus all other evidence received by the Hearing Officer. Upon receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence; or,
  4. Set the matter for hearing before itself using the same procedures applicable to Hearings by a Hearing Officer insofar as possible. At such hearing the Board shall hear and decide the matter as if it had not been assigned to a Hearing Officer.

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### **Sec. 7. Notice of Board Decision**

SCERS will send a *Notice of Board Decision* on the Application to the Parties or their attorneys within ten (10) calendar days of the date the Board's decision was made or reported in open session. Such decision is a Final Administrative Action of the Board subject to judicial review as provided in Article VIII. The notice shall include the following statement regarding judicial review:

“Pursuant to the Board of Retirement's Disability Retirement Procedures, action to seek judicial review of this decision is governed by the provisions of Section 1094.6 of the Code of Civil Procedure of the State of California. You are advised that any such petition must be filed not later than the ninetieth (90th) calendar day following the date this written notice of the Board's decision was sent by SCERS.”

Included with this notice will be a copy of the text of California Code of Civil Procedure section 1094.6 and Chapter 1.06 of the Sacramento County Code related to the judicial review of administrative decisions, as required by Section 1.06.040 of the Sacramento County Code.

# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE VIII JUDICIAL REVIEW

### **Sec. 1. No Reconsideration of a Final Administrative Action**

Except as otherwise provided in this Article, the Board's decision to grant or deny, in whole or in part, any disability retirement Application shall be deemed a Final Administrative Action on any and all issues raised by the Application and presented to SCERS staff, to a Medical Advisor and/or IM Examiner, to a Hearing Officer, or to the Board, or that could have been presented with the exercise of reasonable diligence. There shall be no reconsideration of a Final Administrative Action.

### **Sec. 2. No Renewed Application**

If the board denies an Application, no new Application based upon the same or similar Claimed Injury(ies) or Diseases(s) may be filed, in whole or in part, nor on the basis of any other Claimed Injury(ies) or Diseases(s) about which the Member, or Applicant if other than the Member, knew, or should have known, at the time of the denied Application, unless all of the following conditions are met:

- a. The Member continues in, or returns to, active service;
- b. In addition to the information required in the Member's Examining Physician Report (Article II, Sec. 2,b), the Applicant provides a written opinion signed by a licensed physician that the Applicant is Permanently Incapacitated for the Performance of Duty as a result of:
  1. A material change in the Claimed Injury(ies) or Disease(s) contained in the previous Application since the time that Application was denied; or
  2. New injury(ies) or disease(s) not apparent at the time of the previous Application, whether solely or in combination with the Claimed Injury(ies) or Disease(s) in the previous Application; and
- c. The Application is not otherwise subject to dismissal under the doctrines of collateral estoppel or res judicata.

### **Sec. 3 Judicial Review**

The Board has adopted the provisions of California Code of Civil Procedure Section 1094.6 and has made those provisions applicable to the judicial review (writ of administrative mandamus) of any Final Administrative Decision as provided under California Code of Civil Procedure Section 1094.5.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

Following each Final Administrative Action on an Application, the *Notice of Board Decision* shall include the following statement regarding judicial review:

“Pursuant to the Board of Retirement's Disability Retirement Procedures, action to seek judicial review of this decision is governed by the provisions of Section 1094.6 of the Code of Civil Procedure of the State of California. You are advised that any such petition must be filed not later than the ninetieth (90th) calendar day following the date this written notice of the Board's decision was sent by SCERS.”

Included with this notice will be a copy of the text of California Code of Civil Procedure section 1094.6 and Chapter 1.06 of the Sacramento County Code related to the judicial review of administrative decisions, as required by Section 1.06.040 of the Sacramento County Code.

### **Sec. 4. Administrative Record**

Any Party may request an administrative record. The complete record of the proceedings shall be prepared and certified by SCERS, and shall be delivered to the requesting Party within one hundred ninety (190) calendar days after a written request for the record is received, and the requesting Party has paid SCERS the amount determined by SCERS to cover the actual costs for transcribing or otherwise preparing the record. The record shall include: the transcript of any proceedings before a Hearing Officer; all pleadings; all notices and orders; any proposed recommendation by a Hearing Officer; any written objections to a decision, the final decision; all admitted exhibits; all rejected exhibits in the possession of SCERS; the reports and recommendations from the Medical Advisor and/or IM Examiner, if any; and any other unprivileged documents or writings submitted or presented in consideration of the Application.



# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE IX

### DETERMINATION OF DISABILITY RETIREMENT BENEFITS

#### **Sec. 1. Service-Connected Disability Retirement (SCDR) Allowance**

The SCDR allowance amount is 50% of the final compensation of the Member who is granted a disability retirement. The rules for determining SCDR benefits are contained in the CERL.

#### **Sec. 2. Nonservice-Connected Disability Retirement (NSCDR) Allowance**

The NSCDR allowance amount is determined based upon the membership category, benefit tier, age, service credit and final compensation of the Member who is granted a disability retirement. The rules for determining NSCDR benefits are contained in the CERL.

#### **Sec. 3. Service Retirement Pending Decision on Disability Retirement Application**

At any time after the Application Date, the Member to whom the Application applies may retire for service, if eligible, pending a decision on the disability retirement Application as provided in Government Code Section 31725.7. The receipt of a service retirement benefit does not constitute a waiver or withdrawal of a disability retirement Application. If the disability retirement Application is granted, SCERS will update the monthly retirement allowance amount paid to the Member and make a retroactive adjustment, if any, from the Effective Date through the date the monthly allowance was updated to the disability retirement allowance amount. If the disability retirement Application is denied, the Member shall not be entitled to return to the Member's former employment as provided in Government Code Section 31725 and will continue to receive the service retirement allowance.

#### **Sec. 4. Nonservice-Connected Disability Retirement Pending Decision on Service-Connection**

In each case where the Board finds that a Member is entitled to an NSCDR prior to a final decision on a pending SCDR Application, pursuant to Government Code Section 31725.8 the Board shall grant the NSCDR. If the SCDR Application is later granted, SCERS will update the monthly retirement allowance amount paid to the Member and make a retroactive adjustment, if any, from the Effective Date through the date the monthly allowance amount was updated to the SCDR amount. If the SCDR Application is denied, the Member will continue to receive the NSCDR allowance.

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

### **Sec. 5. Effective Date of Disability Retirement Benefits**

The Effective Date of a disability retirement granted by the Board is the later of the Application Date or the day after Discontinuation of Service. However, the CERL and relevant case law provide for an Earlier Effective Date, if requested in the Application, depending upon a number of factors including the reason for applying, administrative oversight, the Discontinuation of Service and whether there was an inability to ascertain the permanency of the Member's incapacity at that time, and the date through which the Member received Regular Compensation.

### **Sec. 6. Reciprocity and the Effect on Disability Retirement**

If a Member has established reciprocity with one or more other public retirement systems in California as of the dates the Application is submitted to and granted by SCERS, each Reciprocal System will determine the benefit amount it may pay to the Member pursuant to the provisions of California Government Code Sections 31837 to 31840 and relevant case law, which specify that the combined monthly allowance from all Reciprocal Systems cannot be greater than the monthly disability retirement allowance the Member would receive had all the Member's service been credited in one retirement system. In certain circumstances, the allowance amount payable by SCERS is limited to an actuarially determined annuity based upon the Member's accumulated contributions, which may be significantly less than a reciprocal service retirement allowance or non-reciprocal disability retirement allowance.

A deferred Member of SCERS who applies for disability retirement from a Reciprocal System shall concurrently file an Application with SCERS. The Member must notify SCERS of the Reciprocal System's action to grant or deny the Member a disability retirement. If granted, the Application with SCERS will be submitted for Board action as expeditiously as practicable for approval with the same effective date as that of the disability retirement granted the Member by the Reciprocal System. Compliance with this requirement ensures that a member meets the statutory requirement to retire concurrently from all Reciprocal Systems in order to receive the benefits of reciprocity, including disability retirement. Failure to comply with this requirement will result in the loss of the benefits of reciprocity, as the Member will not have retired concurrently from all Reciprocal Systems, and the Application with SCERS will not be accepted.

### **Sec. 7. Active Member Death – Service Connection**

In each case where the Board finds that a Member would have been entitled to an SCDR but dies prior to retirement as a result of service-connected injury(ies) or disease(s), the surviving spouse shall have the option to elect between one of the death benefits described in Sections 31780 and/or 31781, or an optional

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

death benefit consisting of a monthly benefit equal to the allowance the Member would have received if granted an SCDR.

### **Sec. 8. Taxability of Disability Retirement Benefits**

By January 31<sup>st</sup> each year, SCERS sends a Form 1099R to each retired Member showing the total amount SCERS paid, federal and state taxes SCERS withheld, and the taxable amount (as determined by SCERS) of the payments issued to the payee by SCERS during the previous calendar year.

Whether a retired Member should pay income taxes on disability retirement benefits is a matter determined by federal and state taxing authorities. The retired Member should consult a tax expert for tax advice.

# SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

## ARTICLE X

### REEMPLOYMENT AND REEXAMINATION

#### Sec. 1. Reemployment

- a. Nonservice Connected Disability Retirement - In each case where the Board finds, based on medical advice, that a Member entitled to an NSCDR is capable of performing other Duties in County Service, the Member shall not be entitled to a disability retirement allowance if another position with Duties within the Member's capacity to perform with the Member's disability is available, and the Member accepts the offer of reemployment in the other position. The Member will be reemployed pursuant to Government Code Section 31725.5 and receive a supplemental disability allowance, if applicable, as described in Sec. 2 below.
- b. Service-Connected Disability Retirement - In each case where the Board finds, based on medical advice, that a Member entitled to an SCDR is capable of performing other Duties in County Service, the Board shall notify the appropriate agency in County Service of its findings. It is then that agency's responsibility to evaluate whether the Member may qualify for employment in another position pursuant to Government Code Section 31725.6 or Section 31725.65. If such other position is available, and the Member accepts the offer of reemployment in the other position, then the Member will be reemployed pursuant to Government Code Section 31725.6 or 31725.65, as applicable, and receive a supplemental disability allowance, if applicable, as described in Sec. 2 below.

#### Sec. 2. Supplemental Disability Allowance

If the Board determines, based on medical advice pursuant to Government Code Sections 31725.5, 31725.6, or 31725.65, that a Member who is granted a disability retirement is capable of performing other Duties in County Service, the Board shall notify the appropriate agency in County Service of its findings. The Participating Employer informs the Member of any vacant positions that may be suitable for the Member and consults with the Member in an effort to develop a reemployment plan. The Member is not required to accept an alternate position.

If the Member accepts an alternate position with the Participating Employer, the Member shall not be paid the disability retirement allowance to which the Member would otherwise be entitled during the entire period that the Member remains employed in the alternate position.

Instead, the Member will receive a monthly Supplemental Disability Allowance in lieu of the disability retirement allowance, the amount of which is the difference

## SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS

between the compensation rate of the alternate position and the compensation rate of the Member's former position from which the Member was determined to be disabled, if the compensation rate of the former position is higher than that of the alternate position, not to exceed the amount of the Member's disability retirement allowance.

### **Sec. 3. Reexamination and Reinstatement**

At the discretion of the Board, a Member who is granted a disability retirement and is younger than age 55 may be required to submit to reexamination pursuant to Government Code Section 31729. In determining whether to examine or reinstate a retired Member, the Board can take into consideration the Participating Employer's ability to reinstate the Member.

The Member may be asked to complete a questionnaire regarding continuing disability, execute an *Authorization for Release of Medical and Other Information* form for SCERS to obtain additional medical records, to provide SCERS copies of medical records dated subsequent to the date the disability retirement was granted, and to submit to additional IME(s) at SCERS expense. If, based on the examination or other evidence, the Board determines that a Member retired for disability is no longer incapacitated and the Member's Participating Employer offers to reinstate the retired Member, the Member may be reinstated to service with his/her former Participating Employer pursuant to Government Code Sections 31730 and 31732 and applicable Participating Employer personnel rules.

SCERS will send the Member a *Notice of Reinstatement* advising that the Board has determined the Member is no longer disabled, that the Participating Employer is willing to reinstate the Member and provide a copy of the written offer of employment, and that the Member's disability retirement allowance shall be cancelled fifteen (15) calendar days from the date of the notice unless the Member submits a *Request for Hearing or Record Review* form to appeal the Board's decision. If the Member requests a hearing, the issue of continuing disability shall be referred for Hearing as provided in these Procedures.

### **Sec. 4. Refusal to Submit to Reexamination**

If a Member who is younger than age 55 and retired for disability refuses to comply with the requirements for reexamination as specified in Sec. 3 above, the Board may discontinue payment of the Member's disability retirement allowance as provided in Government Code Section 31731, until the Member withdraws such refusal and complies with the requirements. If the refusal continues for one year, the Board shall cancel the disability retirement allowance.

**SCERS DISABILITY RETIREMENT PROCEDURES - WITH PROPOSED REVISIONS**

**HISTORY OF ACTIONS ON DISABILITY RETIREMENT PROCEDURES**

07-01-2018	Effective date of revised Procedures, <i>if approved</i>
06-20-2018	<i>Board to approve proposed revisions</i>
01-20-2016	Board first adopted Disability Retirement Procedures; full implementation contingent on amendments to SCERS' Bylaws, Chapter 5, which were approved by Board of Supervisors Resolution 2018-0098 on 2/27/2018.