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Date: July 15, 2015
To: Board of Retirement
From: James Wilbanks, Retirement Administrator
Subject: Disability Process

Introduction

At the May 6, 2015 MCERA Board meeting, you approved a budget with a proposal to retain a firm to take over disability administrative processing. A contract with such a firm was put before you at the June 17, 2015 MCERA Board meeting and a motion to approve the contract failed on a 3-6 vote. Two issues were raised during the discussion leading to the vote. The first issue was that individual Trustees had no knowledge of the firm put before them. This issue will be addressed during a later agenda item today, if warranted.

The second issue raised in the discussion at the June 17, 2015 MCERA Board meeting was that individual trustees wanted the opinion of our Disability Legal Counsel, Tony Graham on this matter. Because of this concern, I reached out to Mr. Graham to discuss the proposal. He responded with the enclosed letter to the Chair dated June 25, 2015.

Current Process

In 2013, the MCERA Board adopted its current procedures for disability retirement applications (enclosed). These procedures codified the disability retirement application process and clearly delineated two distinct and separate steps in the process.

The first step is the administrative processing of the applications. During administrative processing, MCERA receives the application and supporting materials from the applicant and their medical providers, schedules independent medical evaluations, as needed, and requests a written opinion from our medical advisor. All of the gathered information is then put before the MCERA Board for consideration at an administrative review.

This review is conducted in closed session and the Board is advised by its counsel, Jeff Berk. The Board determines if the applicant meets the requirements to obtain a disability retirement benefit, and whether such retirement is service connected or non-service connected.

The second step in the process arises only if the MCERA Board denies an application and the applicant appeals that decision to a hearing officer. If the applicant requests an appeal, MCERA uses the services of Mr. Graham to represent the Board in the hearing.

History

My understanding of the history of the disability retirement process is limited, and based only on what others have shared with me. Given this limitation, I will do my best to portray the process prior to the change in 2013.

I am told that, at some point prior to the adoption of the new process in 2013, Mr. Graham was very involved in the administrative processing of disability retirement applications. The level of involvement began as soon as a complete application was filed. Mr. Graham regularly advised the MCERA Board and the Retirement Administrator regarding the administrative process of disability applications. I am also led to believe that Mr. Graham regularly met with MCERA during closed sessions to update the Board on disability retirement applications that were in the administrative review process.

When Mr. Berk learned of the above, he raised concerns. These concerns are outlined in his memo to the Board dated August 21, 2013. In part, the changes in the process were the result of these concerns.

Mr. Graham's Request

Based on conversations and pieces of various written communications, it appears that Mr. Graham is requesting the MCERA Board return to the old disability retirement application process, although this request is not clearly spelled out in his letter of June 25, 2015. I responded to his letter with the enclosed email dated June 30, 2015. The follow-up correspondence between Mr. Graham and I is also enclosed here, at the request of Mr. Graham. I provided Mr. Graham with a copy of Mr. Berk's memo and asked Mr. Graham to respond. He did not. Instead, Mr. Graham suggests that he consults with me "as the administrator as to how to handle pending applications."

If the MCERA Board returns to some version of the disability retirement application process utilized prior to 2013, there will be the possibility of an appearance of a violation of applicant's due process. Mr. Graham states in his email response to me of June 30, 2015 at 7:31 PM that he is not advising the Board, but that he is "consulting with you as the administrator as to how to handle pending applications."

Mr. Graham stated in another email in reference to the process in another county "this is an example of an expensive 'bureaucracy' … and why I like to be in control of the application process." Even if Mr. Graham did not meet with the Board in closed session, his request to be involved in and/or to control the process is concerning. There is a due process concern and, at minimum, an appearance of a conflict of interest, since cases that are denied and appealed would be assigned to Mr. Graham.

Summary

The separation of the disability retirement application process into the two distinct steps, as outlined in the current MCERA procedures, is consistent with the Board's fiduciary duty and is necessary to protect the due process rights of applicants. Further, the current process eliminates even the appearances of a due process violation or a conflict of interest by keeping the disability counsel at arm's length during the administrative processing.

MENDOCINO COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION

PROCEDURES FOR DISABILITY RETIREMENT APPLICATIONS AND FORMAL HEARINGS

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Procedures For Disability Retirement Applications And Formal Hearings

The purpose of these procedures are to expeditiously process applications for disability retirement benefits under the County Employees' Retirement Law of 1937 (CERL) and when a hearing is to be held, the APPLICANT will have notice of the hearing and an opportunity to appear and present his or her case.

Rule 1. Definitions

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

(a) "APPLICANT" means a member of the Mendocino County Employees' Retirement Association claiming disability retirement benefits under the County Employees' Retirement Law of 1937, or any person or persons entitled to claim such benefits as a result of the death of a member.

(b) "Board" means the Board of Retirement of the Mendocino County Employees' Retirement Association.

(c) Deny or dismiss the application "with prejudice" means the application is denied and the member will not be allowed to refile a disability application as to that injury or impairment.

(d) "Disability" or "disabled", whether used singly or in combination with other words, means permanent incapacity for performance of duty.

(e) "Medical Advisor" to the Board shall mean the County Health Officer, his or her designee, or a third party medical professional designated by the Association.

(f) "Permanent incapacity for the performance of duty" means an impairment of the member's body and/or mind, which causes the member to be unable to perform those duties essential to the performance of the job classification last held by the member, or the duties of a

permanent light duty position within the member's abilities and within the member's department or a successor department, when it is determined by competent medical evidence that the impairment is permanent or of such prolonged and uncertain duration as to be considered permanent. A member need not be able to perform each and every duty of the member's position, but if the member is permanently unable to perform any essential duty of the former classification, the member shall be deemed to be incapacitated. A member is not considered to be permanently incapacitated when the member unreasonably refuses medical treatment (including surgery) or other remedial treatment available in California if the probabilities are great that such treatment will 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 submitting to the same.

(g) "Retirement Administrator" means the person designated by the Board as its Retirement Administrator or his/her designee.

(h) "Retirement Association" or “Association” means the Mendocino County Employees' Retirement Association.

(i) "Duties" means the essential functions of the job that are functions which the individual who holds the position must be able to perform, with or without reasonable accommodations.

Rule 2. Forms

All forms to be used in proceedings under these Rules shall be first approved by the Retirement Administrator. Whenever forms are available for use, they shall, insofar as possible, be used by all interested parties. Most of the forms used in the disability process can be found in the MCERA Disability Retirement Application Handbook.

Rule 3. Filing Of Application

The Retirement Administrator shall furnish a copy of these Rules and a copy of the Disability Retirement Application Handbook to any person upon request. An application will not be accepted for filing until all forms, as described in these Rules and the disability retirement APPLICANT handbook have been completely filled out in accordance with these Rules and the instructions stated in the application forms; verified under oath or penalty of perjury by the person making the application in the presence of the Retirement Administrator or the Retirement Administrator's designated staff member or verified by a notary public; and submitted to the Retirement Administrator. Any attempt to file an application or document in support of the application that is incomplete or illegible shall not be accepted by the Retirement Administrator. An application must include the member's home address and telephone number, an attorney's address and telephone number is not sufficient. It is the responsibility of the APPLICANT and Applicant's attorney to notify the Board of Retirement of any change of address and/or telephone number. The Retirement Administrator will also not accept an application for filing unless it is accompanied by the Attending or Forensic Physician's Report pursuant to Rule 5.

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

Any application filed more than four months after a member's discontinuance of service must include a statement by the member's attending physician on the Attending or Forensic

Physician's Report that indicates the member has been continuously physically or mentally incapacitated to perform his or her duties since the date of the member's discontinuance of service to the time of the application.

Rule 4. Administrative Processing

At the time of furnishing the application forms, the Retirement Administrator shall notify the APPLICANT of the following requirements:

(a) The APPLICANT is required to obtain and to file with the Retirement Administrator, in the form prescribed in Rule 5 and an "Attending Physician's Report", which states that in the physician's opinion the APPLICANT is permanently incapacitated from doing those duties which are essential to the performance of the position last held by the APPLICANT, together with any and all other relevant evidence in the form of written medical reports, certificates or other documents which the APPLICANT wishes the Board to consider in support of the application. Processing the application will not commence until the application is both complete and timely as determined by the Retirement Administrator, and has been properly filed as described in Rule 3 above.

(b) The APPLICANT is required to report at times and places specified by the Retirement Administrator for one (1) or more medical examination(s) by a physician or physicians selected by the Board or the Retirement Administrator.

(c) If the application contends that the permanent incapacity for the performance of duties is the result of injury or disease arising out of and in the course of employment, the APPLICANT may be required by the Retirement Administrator or his/her designee, to be interviewed relative to the factual circumstances of the cause of such injury or disease.

The APPLICANT shall authorize the release of all medical records, personnel

records and Workers' Compensation files.

The Retirement Administrator shall: (1) Forward a "Department Statement of Facts and Circumstances" to the APPLICANT'S employer for completion. The Department Statement of Facts and Circumstances shall include a detailed statement of all action and efforts undertaken to find alternative employment for the employee within the department within the capacity of the employee to perform, and the results of such action and efforts, or a detailed explanation as to why such efforts were not undertaken; and;

(2) Request, from County Human Resources copies of all claims and medical reports filed by the APPLICANT for Workers' Compensation benefits; and

(3) Forward an "Immediate Supervisor Statement" to the APPLICANT'S last known supervisor.

The Retirement Administrator will, if appropriate, notify the APPLICANT at the address given in the application of the date, time and place the APPLICANT shall report for medical examination and advise the APPLICANT of the name of the person who will arrange to interview the APPLICANT.

The failure of an APPLICANT to diligently pursue or prosecute an application may result in the dismissal of the application. Diligently pursuing or prosecuting an application includes, but is not limited to: timely submission of any and all written documentation requested by the Board; compliance with lawful instructions of the Board; and cooperation with the staff in obtaining information pertinent to the application. Prior to dismissal of an application for failure to diligently pursue or prosecute, APPLICANT shall be given notice and an opportunity to respond.

Rule 5. Attending Physician's Report

The APPLICANT, at his own expense, shall obtain a medical examination by a duly licensed physician of APPLICANT'S choice. When the Retirement Association notifies the

APPLICANT of the requirements in Rule 4, it shall also provide the APPLICANT with the following documents which are to be delivered by the APPLICANT to his/her physician as follows:

(a) "Attending Physician's Report";

(b) Letter of instruction to physicians for APPLICANT and physician guidelines;

(c) Job Class specification and/or job description and essential functions list from the APPLICANT'S employer for the position held by APPLICANT.

Rule 6. Medical Evaluation By Board Physician and/or Medical Advisor

The Retirement Administrator may arrange an appointment(s) with the physician or physicians so selected by the Board of Retirement for an examination of the APPLICANT and notify the APPLICANT as specified in Rule 4(b).

The Medical Advisor shall advise the Board on medical matter; as requested.

Rule 7. Application Filed On Behalf Of A Member

Pursuant to the authority provided in Government Code section 31721(a), an application may be filed on behalf of a member of the Mendocino County Employees' Retirement Association by any other person, including the head of the department or office employing the member. For purposes of this section, 'APPLICANT" shall mean the person or entity filing the application claiming disability benefits on behalf of a member of MCERA.

The application must be accompanied by other medical documentation identifying the nature and extent of the disability (including physical limitations, if the disability is a result of physical limitation); evidencing the existence of a permanent incapacity which incapacitates the member on whose behalf the application is filed from the performance of the normal job duties of his/her classification; and describing the professional capacity of the author of the documentation in rendering the opinions (e.g., treating physician, fitness for duty evaluator, Agreed Medical

Examiner, Qualified Medical Examiner, etc.), together with any and all other relevant evidence in the form of written medical reports, certificates, or other documents which the APPLICANT wishes the Board to consider in support of the application.

As provided in Government Code section 31721(b), the APPLICANT (the person filing on behalf of the member) has the burden of proving that the member is permanently incapacitated for the performance of his or her job duties. Thereafter, the member has the burden of proving job causation

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

1) The right to provide medical and other evidence contesting the assertion that the member is permanently incapacitated for the performance of his or her job duties; and

2) The right to provide medical and other evidence showing that, if the Board determines that the member is permanently incapacitated, the disability arose out of and in the course of his or her job duties. The member specifically shall be advised that it is his or her burden to prove job causation.

The Retirement Administrator may require the member to be examined by an independent medical examiner appointed by the Board of Retirement. However, if the member refuses or fails to be examined, the Board may make its determination based on those medical reports provided by the APPLICANT and the member, notwithstanding the provisions of Rule 6, herein; or the Board may deny the application.

(b) It shall be the responsibility of the person filing the application to provide to the Board medical reports supporting its application. At the request of the person filing the application, the Retirement Administrator shall issue subpoenas or subpoenas duces tecum pursuant to Government Code section 31535 and Rule 12.

(c) The member on whose behalf benefits are claimed shall be advised of the time and place of the Board's initial determination review on the application. Hearings on applications filed pursuant to this Rule 6 shall be held in closed session.

(d) Within five (5) calendar days after the Board action on the application, the Retirement Administrator shall notify the person filing the application and the member on whose behalf disability retirement benefits are claimed of the Board action. Both the APPLICANT and the member shall have the right to request a hearing as provided in Rule 11.

Rule 8. Investigation Of Facts

When it is contended by the APPLICANT that a permanent incapacity for the performance of the APPLICANT'S duties resulted from an injury or disease arising out of and in the course of employment, the Retirement Administrator may arrange for an appointment with a staff member or an investigator to interview the APPLICANT and notify the APPLICANT as required in Rule 4(c). The investigator shall be employed to make a factual investigation of the factual circumstances surrounding the cause of the injury or disease. Any APPLICANT has the right to have a representative present during any interview of the APPLICANT by the investigator retained by the Board of Retirement. The investigation shall not necessarily be limited to the interview with the APPLICANT and records of employment. The investigator shall make a report to the Retirement Administrator of the result of that investigation.

Rule 9. Administrative Reports

After receipt of all requested documents, the Retirement Administrator shall make a written report to the Board as follows:

(a) Whether or not the file is sufficient to support a finding by the Board as to whether or not the APPLICANT is permanently incapacitated for the performance of his/her duties.

(b) In the case of an application for a service connected disability, that the file is sufficient to support a finding by the Board as to whether or not the incapacity was the result of an injury or disease arising out of and in the course of employment.

(c) In the case of an application for non-service connected disability retirement, the Retirement Administrator shall report to the Board whether or not the APPLICANT has served the required period of time that entitles the APPLICANT to a non-service connected disability benefit and, if so, that the disability is not due to: intemperate use of alcoholic liquor or drugs, willful misconduct or violation of law; and for APPLICANTs who become members of the system on or after January 1, 1988, that this disability is not due to conviction of a felony or criminal activity which caused or resulted in APPLICANT's disability. See Government Code sections 31726, 31726.5.

The report of the Retirement Administrator shall be in writing and shall include all reports and records, including but not limited to, medical evidence in support of the application as evaluated by the Board's Medical Advisor. When the medical records and other documents submitted in support of the application are insufficient or in conflict or if the Retirement Administrator is not satisfied with the investigative report and other pertinent documents, he/she shall report to the Board in what respects the application is deemed to be insufficient.

Rule 10. Board Initial Determination

(a) Disability retirement applications shall be considered by the Board in a four-step process, based on the evidence presented.

1) Determination of whether the member is permanently incapacitated for the performance of assigned duties, and, if so, the injury or disease that constitutes the permanent incapacity. If permanent incapacity is not found, the application shall be denied.

2) Determination of whether the incapacity is a result of injury or disease arising out of and in the course of the member's employment for the County or district.

3) Determination of whether a medical examination following retirement shall be required. This determination shall be made for members under age 55. See Government Code section 31729.

4) Determination of the effective date of disability retirement, see Government Code section 31724.

Within three (3) calendar days after the initial Board action on the application, the Retirement Administrator shall notify the APPLICANT at the address shown in the application of the Board action and, if the action of the Board denies in whole or part any of the benefits sought in the application, the notice shall advise the APPLICANT of his/her right to request a hearing.

Upon request, an applicant may address the Board at the initial determination review regarding his/her disability retirement application either personally or through counsel.

Rule 11. Hearings

When requested by an APPLICANT, hearings shall be scheduled and conducted in the following manner:

(a) Request by APPLICANT. An APPLICANT may request a hearing of an initial

determination by filing a request for a hearing with the Board of Retirement not later than the thirtieth (30th) day following the determination of the Board. Such request must be in writing and contain a statement indicating the retirement benefit(s) which the APPLICANT or the member is seeking to obtain through the administrative review process.

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

(c) Setting of Hearing Date. The hearing officer has 180 calendar days from the date of notification of selection as hearing officer to hold and complete the formal hearing. The hearing officer will coordinate the hearing date with all parties and set the dates when the prehearing statements are due, consistent with Rules 12 and 13, and set the cut-off date for requests to

subpoena witnesses, consistent with Rule 14.

(d) Continuances. Once a hearing date has been set by the hearing officer, any request for a continuance must be in writing to the hearing officer.

(e) Reporter. The proceedings of all hearings for disability retirement shall be reported by a stenographic reporter unless waived in writing by all interested parties. The stenographic report of the proceedings shall be transcribed only if requested by a party and, if so, the party requesting the same shall pay for the cost. In addition to stenographic reporting, any party may video tape all or part of the proceedings, and, if so, that party shall pay the cost thereof.

(f) Representation by Counsel. An APPLICANT may be represented by legal counsel at any hearing. Before an attorney appears on behalf of an APPLICANT, a written authorization from the APPLICANT shall be filed with the Retirement Administrator. After an attorney appears on behalf of an APPLICANT pursuant to the written authorization of representation, all notices and evidence shall thereafter be served upon such counsel.

Rule 12. Board of Retirement's Prehearing Statement

The Board's counsel shall serve upon the hearing officer and the APPLICANT a prehearing statement no later than sixty (60) calendar days before the date of the hearing. The prehearing statement shall contain the following:

(a) A statement of the contested issues;

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

(c) The names, business addresses and telephone numbers of any lay witnesses whose testimony the Board's counsel intends to present at the hearing, and a synopsis of the expected testimony of each witness;

(d) The names of any medical witnesses the Board's counsel intends to call for oral testimony at a hearing or hearings for that purpose and a synopsis of the expected testimony;

If APPLICANT'S prehearing statement, as described below in Rule 13, raises issues or identifies witnesses not in the Board's counsel's prehearing statement, the Board's counsel, in that event shall then serve upon the hearing officer and the APPLICANT a supplemental prehearing statement no later than fifteen (15) calendar days from the date of mailing of APPLICANT'S prehearing statement (no later than thirty (30) days before the hearing) in the format prescribed above.

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

Rule 13. APPLICANT'S Prehearing Statement

The APPLICANT shall serve upon the hearing officer and the Board's counsel a prehearing statement no later than fifteen (15) calendar days from the date of mailing of respondent's prehearing statement (no later than forty-five (45) days before the hearing). The prehearing statement shall contain the following:

(a) A statement of the contested issues;

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

(c) The names, business addresses and telephone numbers of any lay witnesses whose testimony the APPLICANT intends to present at the hearing, and a synopsis of the

expected testimony of each witness;

(d) The names of any medical witnesses the APPLICANT intends to call for oral testimony at a hearing or hearings set for that purpose and a synopsis of the expected testimony;

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

If the APPLICANT alleges in the prehearing statement or at any time during the administrative appeal process that the incapacity is the result of an injury or disease not listed on the application submitted to the Board, or if listed, upon which the APPLICANT submitted no medical evidence for the Board's review when it considered the application, the administrative appeal shall be suspended, the allegation shall be treated as an amendment to the application and the matter shall be referred back to the Board for its original determination on the application. In all other respects an application returned to the Board of Retirement shall be processed in accordance with these rules, as if it were a new application consistent with the scheduling and prehearing statement requirements of Rules 11, 12, 13 and 14.

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

Rule 14. Subpoena Cut-Off Date

Any party may request that the Board issue a subpoena for a witness, but such requests must be made in writing, consistent with Rule 24. Written requests for subpoenas must be received by the Board no less than thirty (30) calendar days before the date of the hearing. No subpoena will issue upon a request received after this date. All subpoenas shall be served upon

the prospective witness no later than fifteen (15) calendar days before the hearing.

Rule 15. Time And Place Of Hearings

Unless the parties and the hearing officer agree otherwise, a hearing shall be deemed set for one full day (i.e., a morning session and an afternoon session). Morning sessions shall begin at 9:30 A.M. and end at 12:00 noon, and afternoon sessions shall begin at 1:30 P.M. and end at 5:00 P.M. Hearings which are not concluded within either the full day (i.e. a morning and an afternoon) session, or whatever other time period to which there has been a stipulation, shall be continued to the next agreeable hearing date. When the hearing date and time have been selected, the Board of Retirement staff shall arrange for a reporter and use of a hearing room and shall in writing notify the parties and the hearing officer of the time and place of the hearing.

Rule 16. Penalties For Failure To Comply With Requirements Of The Rules

(a) Failure of the APPLICANT to submit to medical examinations by a physician or physicians selected by the Board of Retirement, as prescribed in Rule 4 above, shall be treated as noncooperation may result in dismissal of the application.

(b) Failure of a party to raise an issue in the prehearing statement as prescribed in Rules 12 and 13 shall be treated as a waiver of that issue for further consideration by the hearing officer and the Board.

(c) Failure of the APPLICANT to cooperate in completing the formal hearing record, consistent with Rule 11, including, but not limited to: submitting all testimonial and documentary evidence and closing the record within 180 days of the selection of the hearing officer, will result in the case being returned to the Board. If the Board subsequently determines that the APPLICANT did not cooperate in completing the formal hearing record, as described above, the Board may dismiss the application. (d) Failure of a party to make a written request to subpoena a witness no less than thirty (30) calendar days before the hearing date, consistent

with Rule 14, shall be treated as a waiver of the right to compel the attendance of that witness to the hearing.

(e) Failure of a party to serve a subpoena on a witness no later than fifteen (15) calendar days before the hearing may be treated by the hearing officer and Board as a waiver of the right to compel the attendance of that witness to the hearing.

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

(g) Failure of a party to serve a subpoena on a witness no less than fifteen (15) calendar days before the hearing, consistent with Rule 14, shall be treated by the hearing officer and the Board as a waiver of the right to compel attendance of that witness at the hearing.

(h) Failure of the APPLICANT, after appeal from the Board's initial decision, to comply with the requirements set forth in these rules as to time and discovery, shall be treated as non-cooperation. In that event, no formal hearing shall be scheduled or conducted and the application will be returned to the Board. If the Board subsequently determines that the APPLICANT did not cooperate in the appeal process, as described above, the Board may dismiss the application.

(i) No testimony of a witness or documentary evidence not identified in a prehearing statement shall be allowed into evidence at the formal hearing, except as prescribed in Rules 12, 17 or 19.

(j) Failure of the APPLICANT to submit to an interview by the Board's investigator, as prescribed in Rule 8 above, shall be treated as non-cooperation and the application shall be sent to the Board. If the Board subsequently determines that the APPLICANT did not cooperate with the Board of Retirement's Investigator in completing the interview, as prescribed in Rule 8, the

Board may dismiss the application.

(k) If the Board determines that an APPLICANT has offered an incomplete application and has failed to complete the application pursuant to these Rules, within 12 months of offering an incomplete application to Retirement Administrator or the Retirement Administrator's designee, the Board shall dismiss the application..

(l) Any dismissal of an application with prejudice by the Board pursuant to Rule 16 is a final administrative decision and subject to judicial review as proscribed in Rule 35.

Rule 17. Written Medical Reports As Evidence

(a) Statement of Policy: It is policy of the Board that production of medical evidence shall be in the form of written medical reports attached to the parties' prehearing statements. A written medical report bearing the signature of the medical witness shall be admissible in evidence as the author's direct testimony and shall support findings made by the Board or the hearing officer. Such medical reports shall not be inadmissible on the basis that they constitute hearsay, but each party shall have the right to cross-examine the authors of medical reports. In addition, such medical reports when offered as expert opinions shall not be inadmissible on the basis that the author of the medical report was called as a percipient witness and not as an expert witness and did not attend the hearing.

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

(c) Late Submission Of Medical Reports: Submission of a medical report subsequent to the filing of the party's prehearing statement shall be allowed only upon a showing of good cause. The party requesting submission of such a medical report shall address the request to the

hearing officer assigned the case and send a copy of the request to opposing counsel, or, if no counsel, then to the opposing party. The request shall state the reason the medical report was not timely produced. The hearing officer shall have the power to rule on such a request.

"Good Cause" shall include an opportunity to have a medical witness comment in a written report on testimony produced at a hearing.

However, if the medical report is allowed to be submitted into evidence, the other party shall have the right to a continuance to engage in further discovery, obtain rebuttal medical evidence and/ or to cross-examine the medical witness.

Rule 18. Oral Testimony Of Medical Witnesses

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

(b) Depositions: The deposition of a medical witness may be taken before the hearing officer. The deposition shall be scheduled at a reasonable time as requested by the medical witness. The deposition shall take place in the office of the medical witness, or such other reasonable place as requested by the medical witness. Depositions of medical witnesses for any purpose shall be taken before the first day of the formal hearing.

(c) Subpoenas and Fees: (1) Issuance of a subpoena for a medical witness's attendance at a hearing or deposition shall be contingent on the party accepting the obligation to

pay the medical witness.

The party requesting the oral testimony shall contact the office of the medical witness and determine the witness's reasonable and customary hourly fee and shall advise the office of the medical witness of the anticipated length of the deposition or hearing as to hours in duration. An agreement on the medical witness's fee, based on the witness's reasonable customary rate and anticipated length of the testimony, shall be entered into with the medical witness at least ten (10) days in advance of the deposition or hearing. If a balance is due following the testimony, the party requesting the oral testimony shall pay the balance upon receipt of an itemized statement. Disputes as to fees between the medical witness and the party requesting the oral testimony shall be resolved by the hearing officer.

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

Rule 19. Testimony of Witnesses Without Notice

Upon written request made to the hearing officer with a copy sent to opposing counsel, or, if no counsel, then to the opposing party, a witness not listed in the prehearing statement may be called to testify provided the party making the request presents a synopsis of the expected testimony and a showing that this witness will testify to matters the party did not know about or

could not have reasonably known about at the time the prehearing statement was due.

The hearing officer shall have the power to rule on the request. If the witness is allowed to testify, the adverse party shall have the right to a continuance to obtain rebuttal evidence and/or to cross examine the witness. The party originally calling the witness to testify shall bear the responsibility of insuring the witness's attendance at a further hearing set for the witness's cross-examination. But even if a continuance is granted, the hearing officer's jurisdiction to hear and complete the case will not extend past 180 days from the notification of selection as hearing officer.

Rule 20. Depositions Of Lay Witnesses

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

Rule 21. Resolution Of Disputes In Regard To Discovery And Hearing Procedure

Disputes in regard to depositions and other discovery and hearing procedure shall be resolved by the hearing officer. If not made at a hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the deposition transcript if appropriate, a memorandum of points and authorities and a proposed resolution. The other party and the witness involved shall have ten (10) calendar days from the date of the mailing of such a request in which to respond. The response may be accompanied by declarations, a copy of the deposition transcript if appropriate, a memorandum of points and authorities and a

proposed resolution.

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

Rule 22. Enforcement Of Right Of Discovery And Compelling Testimony

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

Rule 23. Prehearing Conferences; Unrepresented APPLICANTS

If either the Board's counsel, the APPLICANT, or the hearing officer so desires, there may be a prehearing conference by telephone for the purpose of conducting a general discussion of the formal hearing procedures, and attempting a reconciliation of any dispute to include attempting to agree or to obtain the hearing officer's ruling on a dispute as to the admissibility or

inadmissibility of evidence.

Rule 24. Subpoenas

The chair of the Board or the Retirement Administrator are authorized to issue and sign subpoenas for attendance at Board hearings on disability retirement applications, upon request of the APPLICANT or member, the APPLICANT'S or member's attorney, the person filing on behalf of the member pursuant to Rule 7, and the Board's counsel.

Rule 25. Further Medical And Lay Evidence On Behalf Of Respondent

At the request of the Board's counsel and with concurrence of the Retirement Administrator, the Board of Retirement 's disability retirement staff may obtain independent medical examinations and/or investigations. The fees for these medical examinations and/or investigations shall be paid by the Board.

The APPLICANT shall submit to examinations by physicians appointed by the Board's disability retirement staff. Such examinations shall be scheduled with due consideration to the APPLICANT'S convenience and ability to attend. If examinations occur further than 75 miles from the home of the Applicant, the Applicant can request reimbursement of reasonable travel expenses, as determined and approved by the Board of Retirement.

Rule 26. Evidence

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

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

(c) Each party shall have these rights: to call and examine witnesses; to introduce exhibits, to include reports and depositions of medical witnesses; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the

direct examination; to impeach any witness regardless of which party first called the witness to testify; and to rebut adverse evidence. If the APPLICANT does not testify, the APPLICANT may be called and examined as if under cross-examination. Refusal of any APPLICANT to submit to examination for the purpose of answering relevant questions shall be grounds for dismissing the application with prejudice.

(d) 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. This section shall not be applicable to written medical reports received into evidence pursuant to Rule 17.

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

(f) Affidavits. A party may include as part of the party's prehearing statement a copy of any affidavit which the party proposes to introduce in evidence. The affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after timely subpoena is requested and served as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(g) Official Notice. In reaching a decision, the hearing officer shall take official notice of

those matters which must be judicially noticed pursuant to section 451 of the California Evidence Code, may take official notice of those matters which may be judicially noticed pursuant to section 452 of the California Evidence Code, and shall take official notice of any matter specified in said section 452 if the provisions of section 453 of the California Evidence Code are complied with by a party.

Rule 27. Order Of Business For Hearings

Unless the hearing officer rules that it is unnecessary, all hearings shall 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 parties may make opening statements, orally or in writing, except the respondent may delay its opening statement until after APPLICANT'S presentation of evidence.

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

(c) APPLICANT'S full presentation, including any witness testimony, is given. During this presentation, the hearing officer and the Board's counsel have the right to ask questions.

(d) Board's full presentation, including any witness testimony, is given. During this presentation, the hearing officer and the APPLICANT have the right to ask questions.

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

(f) APPLICANT'S summary and closing statements are made followed by Board's summary and closing statements. Upon the request of either party, the summary and closing statements may be made in writing and submitted by all parties to the hearing officer, no later than fifteen (15) calendar days after the close of the hearing or as otherwise agreed to by the

parties and the hearing officer.

Rule 28. Service Of Proposed Findings Of Fact And Recommended Decision

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

Rule 29. Objections To Proposed Findings Of Fact And Recommended Decision

Any party objecting to the proposed findings of fact and recommended decision has ten (10) calendar days from the date of mailing of the proposed finding of fact and recommended decision to submit written objections to the hearing officer and the other party. Within thirty (30) calendar days from the date of mailing the objections to the hearing officer, or the time for filing objections expires, whichever is earlier, the hearing officer shall:

(a) Adopt the proposed findings and recommended decision originally submitted, or

(b) Make such changes in the proposed findings and recommended decision as the hearing officer deems appropriate in light of the evidence, the objections submitted by the unsuccessful party, and any response, or

(c) Serve notice of the final proposed findings and recommended decision of the Board, together with a summary of the evidence, the pleadings of the parties, and their attachments.

Rule 30. Action By The Board

(a) The Hearing Officer's Proposed Findings of Fact and Recommended Decision on an application for disability retirement benefits will be placed on the Board's Closed Session Agenda for determination.

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

(1) Approve and adopt the proposed findings and the recommendations of the hearing officer, or

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

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

(4) Set the matter for hearing before itself. At such hearing the Board shall hear and decide the matter as if it had not been referred to the hearing officer.

Rule 31. Board's Decision After Review Of the Record

In any case where the Board makes a decision based upon a transcript or summary of all the testimony, plus all other evidence received by the hearing officer, the Board may approve and adopt proposed findings and recommended decision or, the Board shall direct the prevailing party to prepare proposed findings of fact and conclusions of law consistent with its tentative decision. The proposed findings of fact and conclusions of law shall be served on the unsuccessful party who shall have ten (10) calendar days from the date of mailing of the proposed findings to serve and file written objections thereto. Thereafter, the Board shall consider such written objections, if any, and shall adopt such findings of fact and conclusions of law as it deems appropriate.

Rule 32. Alteration Of Time Requirements

Nothing in these procedures is to be construed as preventing the parties from stipulating to lesser intervals than those prescribed above. The hearing officer may for good cause shown,

after giving both parties an opportunity to be heard, shorten or lengthen the times specified above, except that the hearing officer may not lengthen the one hundred eighty (180) days to close the record, the sixty (60) days to submit a recommended decision, or the thirty (30) days for reconsideration.

Rule 33. Dismissal For Lack Of Prosecution

If, as a result of the APPLICANT'S failure to comply with the procedures specified above, the matter is not heard within two (2) years after a request for hearing is granted by the Board, the case may be dismissed with prejudice, except that where these procedural rules have been served on APPLICANT or APPLICANT'S counsel, and APPLICANT continues to fail to follow the rules, the case shall be dismissed in accordance with Rule 16, above.

Rule 34. Service Of Documents

Unless otherwise provided, service of documents provided for in these rules may be made by mail or by personal service. The time requirements of California Code of Civil Procedure section 1013 shall govern all service by mail.

Rule 35. Judicial Review

Judicial review of final retirement decisions shall be subject to Code of Civil Procedure section 1094.6. Following each final decision, the Retirement Administrator shall send to the APPLICANT and the APPLICANT'S attorney written notice as follows:

A 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) day following the date a decision becomes final.

Rule 36. Access to Board Records

(a) Prior to the Board's administrative action in Rule 10, the APPLICANT is given, at no

cost to the APPLICANT, a copy of all the material, including administrative reports and medical records, which is presented by the Retirement Administrator to the Board for its consideration of the application.

(b) Pursuant to Rule 12, the APPLICANT is given, at no cost to the APPLICANT, a copy of all the Board's exhibits which are presented to the hearing officer.

(c) Prior to the Board's final decision on the application under Rule 30, or Rule 31, the APPLICANT is given, at no cost to the APPLICANT, a copy of all documents which are presented by the Retirement Administrator to the Board for its final consideration of the application.

(d) Due to the sensitive nature of psychiatric or psychological records, these records will only be given to APPLICANT'S attorney. If APPLICANT is in pro per, that is not represented by counsel, the Retirement Administrator will send copies of the APPLICANT'S psychiatric or psychological records to APPLICANT'S treating physician.

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

CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGE

MEMORANDUM

TO: Retirement Board

FROM: Jeffrey L. Berk
Deputy County Counsel

DATE: August 21, 2013

RE: Due Process Requirements in Disability Retirement Hearings

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This memo is intended to briefly discuss due process requirements in disability retirement hearings and the process MCERA currently follows.

The most recent decision that discussed this issue is *City of Pleasanton v. Board of Administration of PERS* (2012) 211 Cal.App.4th 522. Although this is a PERS case, the same legal principles apply to 37 Act systems. The court reviewed past court decisions over the last ten years. It summarized one key case by stating:

> "The Supreme Court is saying that . . . the agency decision maker cannot properly solicit or receive *private, ex parte* advice from the personnel who served as adversaries in the case. It is *not* saying the agency decision making body is precluded from soliciting or receiving a written analysis and recommendation from the agency's prosecuting attorney delivered to it as part of a public agenda packet along with the adversary's opposing analysis and recommendation."
>
> *Department of Alcoholic Beverage Control v. ABC Appeals Board* (2006) 40 Cal.4th 1, 16-17.

After reviewing the past decisions, the court in the *City of Pleasanton* case summarized the law as follows:

> "Due process in the handling of an administrative appeal does not in general preclude the advocate for the agency staff's position from communicating with and making recommendations to the agency decision maker or the decision maker's advisers about the substance of the matter as long as (1) no part of the communication is made ex parte, (2) the administrative appellant is simultaneously afforded at least the same opportunity to communicate with the decision maker as the staff advocate,

and (3) the decision maker is not subject to the advocate's authority or direction."

The court applied this rule to the facts in its case and found that the attorney trying the case did not sit with the board or its presiding officer and give legal advice to them in private as they heard or voted on the matter, or any other time. As a result, the court did not find a due process violation.

Currently, the process MCERA follows is consistent with the principles described above. I act as the Board's advisor as it makes its decisions, such as whether to grant or deny an application or to seek review of the decision of a hearing officer or Superior Court Judge. We are permitted to have those discussions in closed session outside the presence of the applicant. Tony Graham acts as an advocate on behalf of MCERA in contested matters before hearing officers and in court. He should only appear before the Board when the applicant is also present. Keeping these functions separate satisfies legal due process concerns and avoids the appearance of any impropriety. I sent an email asking if any system allows the counsel who presents the case to a hearing officer to also meet with the Board outside the presence of the applicant or in an advisory role. Eight systems replied and all recognized the need to keep the advisory and advocacy functions separate.

Jeffrey L. Berk
Deputy County Counsel

JLB:ao

Law Office Of
ANTHONY E. GRAHAM

45060 Ukiah Street
P.O. Box 1090
Mendocino, California 95460
Telephone (707)937-0206 Fax (707)937-4705

RECEIVED BY
JUN 29 2015
The Mendocino County Employees' Retirement Association

June 25, 2015

Ms. Shari Schapmire, Chair
Mendocino County Employees'
Retirement Association
625 B Kings Court
Ukiah, CA 95482

Re: Retirement Disability Applications

Dear Ms. Schapmire:

I understand from James Wilbanks that the Board is considering the retention of an out-of-state claims management company to prepare disability applications for me to then take to hearing.

My question is "why?"

For the past thirty years in over 100 cases, I have prepared my own cases for hearing. During the Irene Lange and Tim Knudsen administrations, when an application was submitted, I would preliminarily review it and provide the administrator with my "discovery recommendations." In many instances, when meritorious, I would recommend the granting of an application.

I personally know the physicians to retain, the medical records to subpoena, and how to efficiently prepare and litigate a case. In my forty-year career as a trial attorney, I have handled over 3,000 litigated cases including appearances before the California Supreme Court. I know what I am doing.

As for the supposed "due process" argument, Marin and Alameda Counties handle their applications using a very similar procedure. Please see the enclosed emails.

This procedure has saved the Retirement Association millions in indemnity dollars at minimal legal expense.

I don't interfere with Jeff Burke's advice to you regarding pension law. Conversely, he should not interfere with my handling of retirement disability applications.

Very truly yours,

Tony Graham

AEG/jl
Enclosures
cc: James Wilbanks

MARIN

Print Close

RE: Retirement Cases

From: **Richardson, Patrick** (PRichardson@marincounty.org)
Sent: Tue 6/23/15 4:01 PM
To: tony graham (tony_maryanne@hotmail.com)

Tony;

Nice chatting with you as well. I can't really see any problem with you handling the application from beginning to end as long as your not advising the Board. In Marin I will interface with MCERA's Disability Coordinator on many cases as they are getting worked up and will often advise her on the issues as I see them. The Coordinator actually handles the collection of medical records and arranging for IME's etc. MCERA also has a medical advisor that advises the Coordinator (and ultimately the Board) on the medical issues.

I believe that Sonoma and San Mateo have some similarities to MCERA's initial application procedures.

I had actually lobbied our Board for more interaction between myself and the Coordinator in the initial stages of the application/evaluation process some years ago. It was my intention to help clarify the issues up front in the hopes of avoiding missed issues from a legal standpoint and to provide my own evaluation regarding the likelihood of prevailing at a hearing/trial in complex or close cases. As an example, I recently suggested that MCERA retain the services of a biomechanical consultant during the initial investigation.

Sorry for the long-winded response. I hope this helps.

Yours,

Patrick M.K. Richardson

Deputy, Office of the County Counsel

County of Marin

3501 Civic Center Dr., Suite 275

RZRMZDH

Print Close

RE: Mendocino county

From: **MacKay, Raymond, County Counsel** (raymond.mackay@acgov.org)
Sent: Wed 6/24/15 7:12 AM
To: 'tony graham' (tony_maryanne@hotmail.com)

Good morning Tony:

In Alameda County, the Retirement Association (ACERA) administers the County retirement system including Disability Retirement (DR). In initiating the DR process, ACERA obtains medical and other records from the applicant/employee directly; then also requests that the employer (in the case of service-connected DR Applications) provide all available WC medical and other records relating to the injury/illness. You can find the ACERA disability retirement procedures at www.ACERA.org

Once those records are gathered by ACERA, ACERA assembles them into a "Disability Packet" and distributes to the applicant/applicant's lawyer and me, as the attorney/representative for the Employer/County of Alameda. ACERA conducts no formal discovery other than, as noted above, at the initial stages requesting supporting medical and other records from the applicant and the Employer/County. As the attorney/representative for the Employer, it is then my responsibility to review the Packet and determine what discovery (e.g. depositions, subpoena of records, etc.) may be needed to complete the information in the Packet and/or support potential defenses/responses of the Employer to the DR Application.

As you know, potential defenses/responses to a DR Application can raise multiple, complex issues (e.g. service connection; incapacity where reasonable accommodation available, *Bowen* causation, "earlier effective date", etc.) requiring legal analysis in order to ascertain appropriate discovery.

I understand that your Retirement Association wishes to remain "neutral" in the process and avoid advocating for the applicant and/or the Employer. It does not appear inappropriate for the Retirement Association, in administrating the process, to initiate some degree of discovery including gathering relevant medical and other records/reports. However, it would not appear appropriate for the Association to then limit your ability, as the attorney assigned to represent the Employer/County, to prevent or limit your ability to independently evaluate the case and initiate and pursue all appropriate discovery to support any potential defenses/responses of the Employer to the DR Application. If the Retirement Association did attempt to do so, I believe it would implicate due process of the Employer. Hope this is helpful.

James Wilbanks - Disability Retirement Applications

From: James Wilbanks
To: Tony Graham
Date: 6/30/2015 6:19 PM
Subject: Disability Retirement Applications
CC: Jeff Berk; Shari Schapmire
Attachments: 2013 08 21 Berk Memo RE Due Process.pdf

Mr. Graham,

This is in response to your letter dated June 25, 2015.

In your letter, you state: "I understand from James Wilbanks that the Board is considering the retention of an out-of-state claims management company to prepare disability applications for me to then take to hearing." Mendocino County Employees Retirement Association (MCERA) is considering the retention of an out-of-state claims management company. However, it appears that you may not understand that there are two separate and distinct processes involved with a disability application at MCERA. The first step is an administrative review wherein the necessary information is gathered from the applicant, their medical provider, the applicant's employer, independent medical professionals, and the medical advisor to MCERA, as appropriate. This information is then presented to the Board to make a determination to administratively approve or deny the application.

The second step in the disability application process is only at issue in those cases where the MCERA Board denies the application at the administrative review stage and the applicant files a written appeal of the denial and requests a hearing before a hearing officer. At this point, MCERA's counsel and counsel for the applicant have the opportunity to conduct discovery, as appropriate. The hearing process is where MCERA currently utilizes your services.

MCERA recognizes the need to separate the disability retirement application process into the two distinct steps outlined above. For reference, I have enclosed the memo from Jeff Berk to the MCERA Board that explains the legal reasons he believes the current process, with its separate steps, is necessary and correct. I would ask that you keep this memo confidential as it is privileged attorney-client communication.

Separating the process is consistent with the email you provided from Patrick Richardson, which states "I can't really see any problem with you handling the application from beginning to end as long as your (sic) not advising the Board." The statement in your letter that: "In many instances, when meritorious, I would recommend the granting of an application." is not consistent with this approach.

This matter will be on the July 15, 2015 MCERA Board meeting agenda. I would ask you to please send a response addressing the concerns outlined in Jeff Berk's memo. So that it may be included with the Board materials distributed in advance of the meeting, your response must be received by July 9, 2015.

Please do not hesitate to contact me should you have any questions.

Respectfully,

James R. Wilbanks, Ph.D.
Retirement Administrator
Mendocino County Employees Retirement Association
(o) 707.463.4328

James Wilbanks - RE: Disability Retirement Applications

From: tony graham [redacted]
To: James Wilbanks MCERA <wilbanksj@co.mendocino.ca.us>
Date: 6/30/2015 7:31 PM
Subject: RE: Disability Retirement Applications

James: I am not advising the Board! I am consulting with you as the administrator as to how to handle pending applications. Tony

---

Date: Tue, 30 Jun 2015 18:19:05 -0700
From: wilbanksj@co.mendocino.ca.us
To: tony[redacted]
CC: schapmis@co.mendocino.ca.us; jeff.berk@sonoma-county.org
Subject: Disability Retirement Applications

Mr. Graham,

This is in response to your letter dated June 25, 2015.

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Respectfully,

James R. Wilbanks, Ph.D.
Retirement Administrator
Mendocino County Employees Retirement Association
(o) 707.463.4328
[redacted]

James Wilbanks - RE: Disability Retirement Applications

From: tony graham [redacted]
To: James Wilbanks MCERA <wilbanksj@co.mendocino.ca.us>
Date: 6/30/2015 9:08 PM
Subject: RE: Disability Retirement Applications

James: would you kindly call me to discuss this issue. frankly I am of the opinion that you and the board are on legal "thin ice". if you want to create your own expensive inefficient "due process " bureaucracy so be it. Tony [redacted]

Date: Tue, 30 Jun 2015 18:19:05 -0700
From: wilbanksj@co.mendocino.ca.us
To: [redacted]
CC: schapmis@co.mendocino.ca.us; jeff.berk@sonoma-county.org
Subject: Disability Retirement Applications

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In your letter, you state: "I understand from James Wilbanks that the Board is considering the retention of an out-of-state claims management company to prepare disability applications for me to then take to hearing." Mendocino County Employees Retirement Association (MCERA) is considering the retention of an out-of-state claims management company. However, it appears that you may not understand that there are two separate and distinct processes involved with a disability application at MCERA. The first step is an administrative review wherein the necessary information is gathered from the applicant, their medical provider, the applicant's employer, independent medical professionals, and the medical advisor to MCERA, as appropriate. This information is then presented to the Board to make a determination to administratively approve or deny the application.

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Please do not hesitate to contact me should you have any questions.

Respectfully,

James R. Wilbanks, Ph.D.
Retirement Administrator
Mendocino County Employees Retirement Association
(o) 707.463.4328
[redacted]

James Wilbanks - RE: Disability Retirement Applications

From: tony graham <[redacted]
To: James Wilbanks MCERA <wilbanksj@co.mendocino.ca.us>
Date: 7/1/2015 11:55 AM
Subject: RE: Disability Retirement Applications
CC: Shari Schapmire <schapmis@co.mendocino.ca.us>

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If this is how MCERA wants to spend its limited budget, so be it.

Please let me know how you wish to proceed

Tony

From: [redacted]
To: wilbanksj@co.mendocino.ca.us
Subject: RE: Disability Retirement Applications
Date: Tue, 30 Jun 2015 21:07:50 -0700

James: would you kindly call me to discuss this issue. frankly I am of the opinion that you and the

board are on legal "thin ice". if you want to create your own expensive inefficient "due process " bureaucracy so be it. Tony [redacted]

Date: Tue, 30 Jun 2015 18:19:05 -0700
From: wilbanksj@co.mendocino.ca.us
To: [redacted]
CC: schapmis@co.mendocino.ca.us; jeff.berk@sonoma-county.org
Subject: Disability Retirement Applications

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James Wilbanks - RE: Disability Retirement Applications

From: James Wilbanks
To: tony graham
Date: 7/1/2015 4:52 PM
Subject: RE: Disability Retirement Applications
CC: Jeff Berk; Shari Schapmire

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From: tony graham [redacted]
To: James Wilbanks MCERA <wilbanksj@co.mendocino.ca.us>
Date: 7/1/2015 6:21 PM
Subject: RE: Disability Retirement Applications
CC: Shari Schapmire <schapmis@co.mendocino.ca.us>

James: Thank you, yes I will be at the meeting. By way of background, Mr. Burke admonished me in the past not to have any interaction what so ever with the Board. I have already sent my position letter to you and the Board. Please distribute it along with my attchments and emails. I am getting tired of this senseless "legal debate" over "nonsensical issues". By the way, how many applications do you have in the "pipeline" and for how long ? This is where applicant's "due process " begins and where the Board is legally exposed. For over 100 cases over 30 years I have kept the MCERA out of trouble. Why are we having this debate? Tony

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Date: Wed, 1 Jul 2015 16:52:30 -0700
From: wilbanksj@co.mendocino.ca.us
To: [redacted]
CC: schapmis@co.mendocino.ca.us; jeff.berk@sonoma-county.org
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