

Executive Team

Dominic D. Brown, CPA, CFE
Chief Executive Officer

Daryn Miller, CFA
Chief Investment Officer

Jennifer Zahry, JD
Chief Legal Officer

Matthew Henry, CFE
Chief Operations Officer



Board of Retirement

Juan Gonzalez, Chair
Tyler Whitezell, Vice-Chair
Jeanine Adams
David Couch
Phil Franey
Joseph D. Hughes
Jordan Kaufman
Rick Kratt
Traco Matthews
Dustin Contreras, Alternate
Chase Nunneley, Alternate
Robb Seibly, Alternate

February 17, 2022

Members, Board of Retirement
Employee Bargaining Units
Requesting News Media
Other Interested Parties

Subject: Meeting of the Kern County Employees' Retirement Association Administrative Committee

Ladies and Gentlemen:

A meeting of the Kern County Employees' Retirement Association Administrative Committee will be held on Wednesday, February 23, 2022 at 1:30 p.m. via teleconference pursuant to Assembly Bill 361, signed into law on September 16, 2021 as urgency legislation, Resolution 2022-02 adopted by the KCERA Board of Retirement at its Regular Meeting held February 9, 2022 and Governor Newsom's March 4, 2020 proclaimed State of Emergency, which remains in effect. (Cal. Gov. Code section 54953, as amended by Assembly Bill 361).

If you wish to listen to the teleconference meeting, please dial one of the following numbers and enter ID# 842 5909 3895:

- (669) 900-9128
- U.S. Toll-free: (888) 788-0099 or (877) 853-5247

Items of business will be limited to the matters shown on the attached agenda. If you have any questions or require additional service, please contact KCERA at (661) 381-7700 or send an email to administration@kcera.org.

Sincerely,

Dominic D. Brown
Chief Executive Officer

Attachment

AGENDA:

All agenda item supporting documentation is available for public review on KCERA's website at www.kcera.org following the posting of the agenda. Any supporting documentation that relates to an agenda item for an open session of any regular meeting that is distributed after the agenda is posted and prior to the meeting will also be available for review at the same location.

**AMERICANS WITH DISABILITIES ACT
(Government Code §54953.2)**

Disabled individuals who need special assistance to listen to and/or participate in the teleconference meeting of the Board of Retirement may request assistance by calling (661) 381-7700 or sending an email to administration@kcera.org. Every effort will be made to reasonably accommodate individuals with disabilities by making meeting materials and access available in alternative formats. Requests for assistance should be made at least two (2) days in advance of a meeting whenever possible.

ROLL CALL

CONSENT MATTERS

ALL ITEMS LISTED WITH AN ASTERISK (*) ARE CONSIDERED TO BE ROUTINE AND NON-CONTROVERSIAL BY STAFF AND WILL BE APPROVED BY ONE MOTION IF NO MEMBER OF THE COMMITTEE OR PUBLIC WISHES TO COMMENT OR ASK QUESTIONS. IF COMMENT OR DISCUSSION IS DESIRED BY ANYONE, THE ITEM WILL BE REMOVED FROM THE CONSENT AGENDA AND WILL BE CONSIDERED IN THE LISTED SEQUENCE WITH AN OPPORTUNITY FOR ANY MEMBER OF THE PUBLIC TO ADDRESS THE COMMITTEE CONCERNING THE ITEM BEFORE ACTION IS TAKEN. STAFF RECOMMENDATIONS ARE SHOWN IN CAPS AFTER EACH ITEM.

- *1. [KCERA 2021 Board Self-Evaluation Survey](#) – APPROVE; COMMENCE SURVEY
- *2. [Discussion and appropriate action on review of the KCERA Legislative Policy](#) presented by Chief Executive Officer Dominic Brown and Chief Legal Officer Jennifer Zahry – RECOMMEND THE BOARD OF RETIREMENT APPROVE PROPOSED CHANGES
3. [Discussion and appropriate action regarding Assembly Bill 361 analysis,](#) considerations and available meeting options presented by Chief Executive Officer Dominic Brown and Chief Legal Officer Jennifer Zahry – RECOMMEND THE BOARD OF RETIREMENT IDENTIFY SPECIFIC METRICS AND THRESHOLDS TO GAUGE IMPACT ON ATTENDEE SAFETY AT IN-PERSON MEETINGS; SELECT AND RECOMMEND MEETING CONFIGURATION OPTION(S) TO BOARD OF RETIREMENT; TAKE OTHER ACTION, AS APPROPRIATE

4. [Presentation and update regarding disability application conflicts of interest](#) presented by Chief Executive Officer Dominic Brown and Chief Legal Officer Jennifer Zahry – RECOMMEND THE BOARD OF RETIREMENT APPROVE PROPOSED CHANGES
5. [Discussion and review of the 2022-2023 Chief Executive Officer Performance Evaluation Criteria](#) presented by Chief Executive Officer Dominic Brown – RECOMMEND THE BOARD OF RETIREMENT APPROVE THE CHIEF EXECUTIVE OFFICER PERFORMANCE EVALUATION CRITERIA FOR EVALUATION PERIOD OF 2022-2023

PUBLIC COMMENTS

6. The public is provided the opportunity to comment on agenda items at the time those agenda items are discussed by the Committee. This portion of the meeting is reserved for persons to address the Committee on any matter not on this agenda but under the jurisdiction of the Committee. Committee members may respond briefly to statements made or questions posed. They may ask a question for clarification and, through the Chair, make a referral to staff for factual information or request staff to report back to the Committee at a later meeting. Speakers are limited to two minutes. Please state your name for the record prior to making a presentation.

REFERRALS TO STAFF, ANNOUNCEMENTS OR REPORTS

7. On their own initiative, Committee members may make a brief announcement, refer matters to staff, subject to KCERA's rules and procedures, or make a brief report on their own activities.

CALL FOR PUBLIC COMMENT ON EXECUTIVE SESSION ITEM(S)

EXECUTIVE SESSION

8. PUBLIC EMPLOYEE PERFORMANCE EVALUATION (pursuant to GOVERNMENT CODE §54957): Title: Chief Executive Officer

RETURN TO PUBLIC SESSION

REPORT OF EXECUTIVE SESSION ACTIONS, IF APPLICABLE

9. Adjournment

KCERA 2022 Timeline for Trustee Self-Assessment and Trustee Educational Needs Assessment

Timeframe	Key Activities Description
2/7/2022- 2/23/2022	<ul style="list-style-type: none"> • Customize the Trustee Self-Assessment and Educational Needs Assessment questionnaire and seek approval of the document with the CEO (and Administrative Committee Chair and/or Board Chair?) • Confirm/receive updated contact information (name/email address) for all Trustees • Announce the Assessment processes to Trustees via email
2/24/2022	Aon electronically distributes the Trustee Self-Assessment and Educational Needs Assessment questionnaire via Survey Monkey to all Trustees
3/3//2022	Aon sends a reminder email to those Trustees who have not yet submitted completed Assessments
3/10/2022	Target deadline for Aon to receive the Trustees' completed responses
Week of 3/14/2022	Optional follow up one-on-one interviews with Board members
Week of 3/21/2022	Aon tabulates responses and compiles a Report of Findings
Week of 3/28/2022	Aon to provide the Report of Findings to CEO and Administrative Committee Chair and/or Board Chair, conference call to discuss Report of Findings and any governance related issues in preparation for April 13 Board discussion
4/4/2022	Aon electronically distributes the Report of Findings to all Trustees
4/13/2022	Aon facilitates the Board's discussion of the Report of Findings
On or before 4/29/2022	Aon documents the themes and resulting next actions from the Board's discussion and sends to Administrative Committee Chair and/or Board Chair in draft form for review and comment
On or before 5/9/2022	Aon incorporates suggested edits; sends final version to Administrative Committee Chair or Board Chair

KCERA Board Evaluation Process 2022

The KCERA Board has made a commitment to review its own performance on an annual basis to maintain excellence in governance. This year's evaluation involves a two-step process.

Board Member Self-Assessment

The purpose of having each Board member evaluate himself or herself is to encourage introspection and heighten awareness of the important areas of fiduciary responsibility. Service on the Board carries with it both a personal and collective duty to the funds. The Individual Board Member Self-Assessment Criteria on the following pages are an abbreviated outline and periodic reminder of what constitutes "good boardmanship." These criteria are for your personal reflection. Your individual responses will not be shared with others. However, they will be compiled with the other Board member responses and reported back to the Board without attribution.

Overall Board Evaluation

The purpose of the Overall Board Evaluation is to give the Board members an opportunity to evaluate the Board's performance with candor, objectivity, and a broad perspective. This governance practice is maintained even when the Board is functioning well. It may also be particularly valuable during periods when the Board needs to make improvements. The Overall Board Evaluation criteria contain elements of "best practices" of public funds. It is important for each Board member to complete the evaluation.

The final sections in the Board Evaluation cover satisfaction with key KCERA Board vendors, continuing board educational preferences, and general open-ended questions.

Upon receipt of your responses, Aon will tabulate the responses. Aggregated responses, including comments, will be shared with the entire Board, without attribution. Aon will also be available for optional follow-up interviews with Board members.

*Please complete the survey by end of business **Thursday, March 10, 2022**. If you have any questions or need assistance, please contact Julie Becker at julie.becker@aon.com or 614-519-6320. Thank you for your time and cooperation with this process.*

Individual Board Member Assessment Criteria Statements	5 Always	4 Usually	3 Sometimes	2 Rarely	1 Never
1. I attend the entire Board and Committee Meetings I am expected to attend.					
2. I read the materials distributed before meetings so I can constructively participate and make timely decisions.					
3. My decisions are based on a fair, balanced, and prudent assessment of each situation. I do not let my personal interest or those of a particular constituency conflict with my duty of loyalty to the membership of KCERA.					
4. I understand my fiduciary duties with regard to the funds for which we are responsible.					
5. I make an effort to be educated on the aspects of KCERA that I do not understand.					
6. I avoid conflicts of interest and refrain from activities that could give rise to the appearance of impropriety.					
7. I deal fairly, respectfully and professionally with other Board members and staff.					
8. I periodically review KCERA's Board Charters and Governance Policies, I am familiar with the requirements of each, and I act in compliance with these documents.					
9. I believe the highest and best use of the Board is to establish policy and the role of the Staff is to implement Board policy.					

<i>Individual Board Member Assessment Criteria Statements</i>	5 Always	4 Usually	3 Sometimes	2 Rarely	1 Never
10. If I am aware of any Board governance problems, I report them to the Board Chair or Vice-Chair.					

Overall Board Assessment Criteria Statements	5 Strongly Agree	4 Agree	3 Neutral	2 Disagree	1 Strongly Disagree
Fiduciary Responsibility & Conflicts					
1. Board members receive sufficient fiduciary training to understand their fiduciary responsibilities and act in accordance with the laws, regulations and policies governing KCERA.					
2. Board members refrain from actions that would suggest real or perceived conflict of interest in carrying out Board responsibilities pursuant to applicable ethics laws and policies.					
Governance					
3. The Board does not “rubber-stamp” the recommendations of senior management or its external advisors.					
4. The Board reviews and updates each of its policies and charters as called for by the applicable document.					
5. The current committee structure assists the Board in focusing on pertinent topics.					
6. The Board develops and follows a clearly defined annual work-plan calendar which captures major items for Board consideration/decision making.					
7. Sufficient interaction and deliberation exist between Board members as part of the decision-making process.					

Overall Board Assessment Criteria Statements	5 Strongly Agree	4 Agree	3 Neutral	2 Disagree	1 Strongly Disagree
8. The Board engages in long-range strategic planning and keeps the KCERA mission in mind when making decisions throughout the year. <i>(To prudently administer retirement benefits, invest the assets of the Association, and provide quality membership services to public employees, retirees and their beneficiaries.)</i>					
Transparency					
9. Meeting minutes are timely and accurately reflect the deliberative process that occurred.					
10. The Board routinely communicates with its stakeholders.					
Roles and Responsibilities					
11. Board members keep decision-making at the policy level, delegate implementation of policy to Staff, and do not engage in micro-management.					
12. The Board understands what authority it has retained, and why it has retained it, and what has been delegated and to whom.					
13. The Board engages in active oversight of the responsibilities it has delegated to Staff, the consultants, and other service providers.					

Overall Board Assessment Criteria Statements	5 Strongly Agree	4 Agree	3 Neutral	2 Disagree	1 Strongly Disagree
Performance Measures and Compliance					
14. The Board sets reasonable benchmarks and regularly monitors investment performance throughout the year.					
15. Qualitative assessments of investment managers, consultants and other providers are routinely performed and discussed with the Board.					
Knowledge and Skills					
16. Board members demonstrate the appropriate knowledge and skill required to govern KCERA.					
17. Board members actively seek out continuing education opportunities.					
18. The Board stays abreast of issues and trends affecting the investment program and uses this information to guide its decision-making.					
19. New Board members are given a prompt, thorough orientation.					
Access to Information					
20. Board members are provided with the information and materials necessary to perform their responsibilities.					
21. Information is distributed sufficiently in advance of the meeting for adequate Board member preparation.					

Overall Board Assessment Criteria Statements	5 Strongly Agree	4 Agree	3 Neutral	2 Disagree	1 Strongly Disagree
22. Requests for information are responded to in a timely fashion by Staff and consultants.					
Risk Management/Compliance					
23. Appropriate attention is devoted to controlling operational risk, investment risk and fiduciary risk.					
24. The Board receives information on the effectiveness of the internal controls in place to mitigate risk.					
25. The Board receives sufficient information to determine if KCERA is in compliance with the policies it has adopted.					
Meeting Effectiveness					
26. Board meetings are conducted in a manner the encourages open communication and healthy debate, ensures all voices are heard, and provides for sound resolution of issues.					
27. The current number of board meetings is sufficient to accomplish the Board's annual goals and objectives.					
28. Meetings are a reasonable length with well-balanced agendas and appropriate time to address the most critical issues.					

<p>Satisfaction with key KCERA Board Vendors-please rate your satisfaction level for each of the following vendors and provide any relevant comments. Higher satisfaction ratings include the following traits:</p> <ul style="list-style-type: none"> • Vendor is knowledgeable about KCERA, current topics and relevant trends • Vendor provides useful and understandable presentations (written and verbal) to Board members • Vendor is accessible and provides timely responses to Board members 	5 Very Satisfied	4 Satisfied	3 Neutral	2 Dissatisfied	1 Very Dissatisfied
1. Actuary-The Segal Company, Inc.					
2. General Investment Consultant-Verus					
3. Hedge Fund Consultant-Albourne America LLC					
4. Private Markets Consultant-Cambridge Associates					
5. Legal Counsel- Nossaman, LLP					
6. Legal Counsel-Reed Smith, LLP					
7. Tax counsel-Ice Miller, LLP					

Board Educational Needs Assessment

Please rate your satisfaction levels with prior in-house continuing board education in the last year	5 Very Satisfied	4 Satisfied	3 Neutral	2 Dissatisfied	1 Very Dissatisfied
Prior in-house educational sessions					

Please indicate your preferred duration for in-house continuing board education	1 hour	2 hours	3 hours	Half-Day	All Day
Duration of in-house educational sessions					

Please indicate your preference for scheduled in-house educational topics	During Regular Board meeting at KCERA	During off-site Board Retreat	During specially scheduled Board meeting at KCERA	Virtual presentation
Scheduling of in-house educational sessions				

Please indicate your preferred method of continuing board education	In-house educational sessions	Virtual educational sessions by internal staff and/or KCERA consultants	In-person external educational conferences	External virtual educational programs
Method of continuing board education				

Please rank the order of the following continuing board educational topics from 1-11 (1=most desired, 11= least desired). The purpose is to identify the subjects you are interested in pursuing to become better equipped to participate in the Board’s discussions and carry out your responsibilities. The data collected will be shared with the CEO to plan for upcoming in-house educational topics.

Actuarial principles	
Benefit plan design & administration	
Disability process	
Ethics and Conflicts of Interest	
Fiduciary responsibilities & board governance	
Information Technology	
Internal audit functions	
Investment allocation	
Investment topics	
Laws, rules and regulations, including open meetings	
Risk Management	

What other continuing board educational topics do you believe would be beneficial to you to perform your board duties and responsibilities:

General Open-Ended Comments

1. What do you believe are the Board's greatest strengths?

2. What are areas in which the Board could improve? What do you believe is needed to assist this Board in becoming even better?

3. What do you consider to be the top 3 priorities for the Board over the next year?

4. What do you hope to gain during the Board Self-Assessment discussion?

5. Please provide any additional comments you may have.



KERN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

Memorandum from the
Office of the Chief Legal Officer
Jennifer Esquivel Zahry

Date: February 23, 2022
To: Board of Retirement, Trustees
From: Jennifer Esquivel Zahry, Chief Legal Officer
Subject: **Notice of Legislative Policy Due for Review**

In accordance with the Legislative Policy, the Board will review this policy at least every three years to ensure it remains relevant and appropriate. To be consistent with the review period for our governance policies and Board Charters, Staff recommends the review period for this policy be changed from three to five years. Staff does not recommend any substantive changes to the Legislative Policy at this time.

LEGISLATIVE POLICY

PURPOSE AND BACKGROUND

- 1) The purpose of the legislative policy is to provide the organization with a broad framework, which it can utilize as a basis for action. The Board is charged with the responsibility of administering the Association in a manner to assure appropriate and prompt delivery of benefits and related services to plan participants and their beneficiaries and of managing the assets in a prudent manner. Legislation affecting the Association must be closely monitored to determine the potential impact on the Association and whether action is necessary.

OBJECTIVES

- 2) The objectives of the Legislative Policy are to:
 - a) Establish a procedure by which the Board of Retirement can adopt an official position on proposed legislation;
 - b) Identify future legislative action in light of the Association's needs;
 - c) Facilitate the timely communication of proposed and enacted legislative changes to the Board and staff;
 - d) Provide guidance in communicating KCERA's official legislative positions to third parties;
 - e) Identify the optimal sources to promote KCERA's official legislative positions.

POLICY GUIDELINES

Roles and Responsibilities

- 3) The Board will be responsible for:
 - a) Adopting an official position for pertinent legislative proposals affecting the Association;
 - b) Identifying the ongoing needs of KCERA for future legislative proposals;
 - c) Analyzing legislative proposals suggested by KCERA's Board members, staff, or interested third parties, and determining appropriate action.

- 4) Staff will be responsible for:
- a) Analyzing and reporting on proposed legislation affecting KCERA, (and other public pension funds if relevant), at the beginning of each legislative session;
 - b) Monitoring proposed legislation throughout the legislative session and reporting material modifications and their potential impact on KCERA to the Board;
 - c) Monitoring all chaptered legislation and determining the impact on KCERA;
 - d) Reporting the impact of, and, as required, suggesting procedures to implement, all chaptered legislation to the Board and staff;
 - e) Communicating with organizations, active and retired KCERA's members, and/or plan sponsors, as applicable, to inform them of legislative changes affecting KCERA;
 - f) Drafting proposed legislation based upon proposals received from Board members, staff and interested parties, in accordance with SACRS' Legislative Committee, or other appropriate entity, guidelines and presenting the draft legislation to the Board for consideration; and
 - g) Identifying and communicating with elected representatives to serve as authors of KCERA-proposed legislation, when appropriate.

Legislative Principles

- 5) The following legislative principles will guide the Board when considering its position on proposed legislation:
- a) Promote KCERA's legislative position primarily through organizations in which KCERA participates unless proposed legislation has a specific and unique effect on KCERA;
 - b) Support legislative proposals that strengthen the confidentiality protections for member records;
 - c) Support legislative proposals that clarify statutory interpretation of '37 Act provisions unless inconsistent with KCERA's legislative policy;
 - d) Support legislative proposals that strengthen the financial condition of KCERA and promote administrative efficiency;
 - e) Oppose legislative proposals that create the potential for increased unfunded actuarial liability without appropriate funding provisions;

- f) Oppose legislative proposals that compromise or interfere with KCERA's duty to deliver benefits to participants and beneficiaries.

POLICY REVIEW AND HISTORY

- 6) The Board will review this policy at least every ~~three~~five years to ensure that it remains relevant and appropriate.
- 7) This policy was:
 - a) Adopted by the Board on January 10, 2018.
 - b) Amended by the Board on March 9, 2022.



LEGISLATIVE POLICY

PURPOSE AND BACKGROUND

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Consideration of AB 361 Findings

DOMINIC D. BROWN, CHIEF EXECUTIVE OFFICER

MATT HENRY, CHIEF OPERATIONS OFFICER

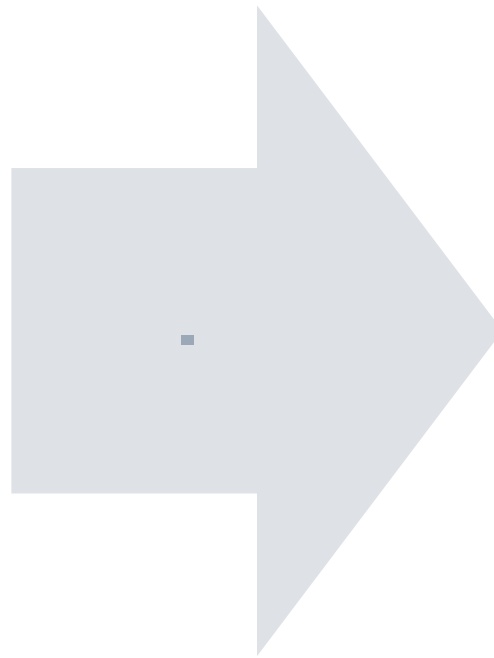
JENNIFER ESQUIVEL ZAHRY, CHIEF LEGAL OFFICER

Issue: Whether to Adopt AB 361

Findings



The Board must reconsider the circumstances of the current State of Emergency and determine whether any of the following circumstances exist:

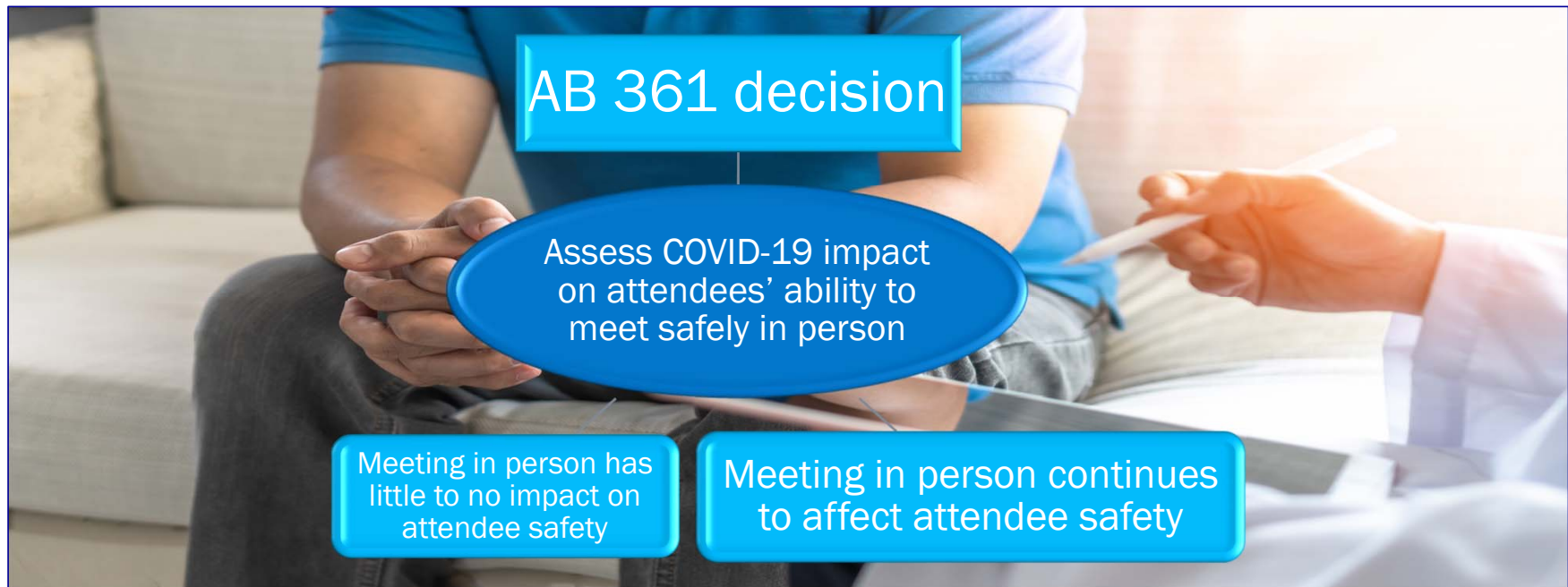


(i) The state of emergency continues to directly impact the ability of the attendees to meet safely in person; and/or



(ii) State or local officials continue to impose or recommend measures to promote social distancing.

AB 361 – Analysis - Decision-Tree



How to Assess Impact of COVID-19 on Safety of Attendees During In-person Meetings



Reliance on Public Health Metrics/Experts

- ❖ Centers for Disease Control and Prevention
- ❖ California Department of Public Health
- ❖ Kern County Public Health Services

CDC Metrics – COVID-19 Integrated County View

COVID Data Tracker

“... provides an integrated, county view of key data for monitoring the COVID-19 pandemic in the United States. ... For the most complete and up-to-date data for any particular county or state, visit the relevant health department website.”

7-day Metrics and 7-day Percent Change Metrics

- Cases
- Case Rate per 100k
- % Positivity
- Deaths
- % of population ≥ 5 years of age fully vaccinated
- New Hospital Admissions

Data Type:

- Community Transmission: High, Substantial, Moderate, Low
- Cases
- Deaths
- Hospital Utilization (new admissions of confirmed COVID-19)
- Vaccinations
- CDC Social Vulnerability Index

Determining Transmission Risk

If the two indicators suggest different transmission levels, the higher level is selected

	Low	Moderate	Substantial	High
New cases per 100,000 persons in the past 7 days*	<10	10-49.99	50-99.99	≥ 100
Percentage of positive NAATs tests during the past 7 days**	<5%	5-7.99%	8-9.99%	$\geq 10.0\%$

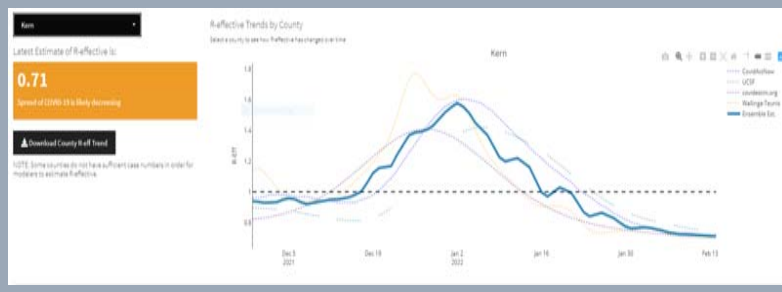
California Department of Public Health

California has collected a wide range of data to inform its response to COVID-19 and developed tools to help process and analyze that data. These are made available to everyone for transparency.

Available Metrics

- Data Models – California’s COVID-19 Assessment Tool (CalCAT)
- Data dashboards – Statewide and County-specific data on Tableau Public*

*free platform to publicly share and explore data visualizations online.



CalCAT Modeling Includes County-specific

- Nowcasts (Speed COVID-19 is spreading right now – Effective Reproduction number (R-effective)* (likely increasing, stable, decreasing))
- Forecasts (What to expect in 2-4 weeks for daily hospitalizations and ICU admissions)

*According the Centre for Evidence-Based Medicine, an R effective greater than 1 means COVID-19 will spread **exponentially**. If R effective is less than 1, COVID-19 will spread slower and cases will decline. The higher the value of R effective, the faster an epidemic will progress.

Kern County Data Available on Tableau Public

- Cases per 100k (7-day avg)
- Newly Reported Cases
- Newly Reported Deaths
- Total Confirmed Deaths

Kern County Public Health

- ❖ Total New Cases
- ❖ New Deaths
- ❖ Latest COVID-19 Facts (reported once every two weeks)
 - Newly reported confirmed cases
 - New deaths as of the reporting date
 - 7-day case rate per 100k

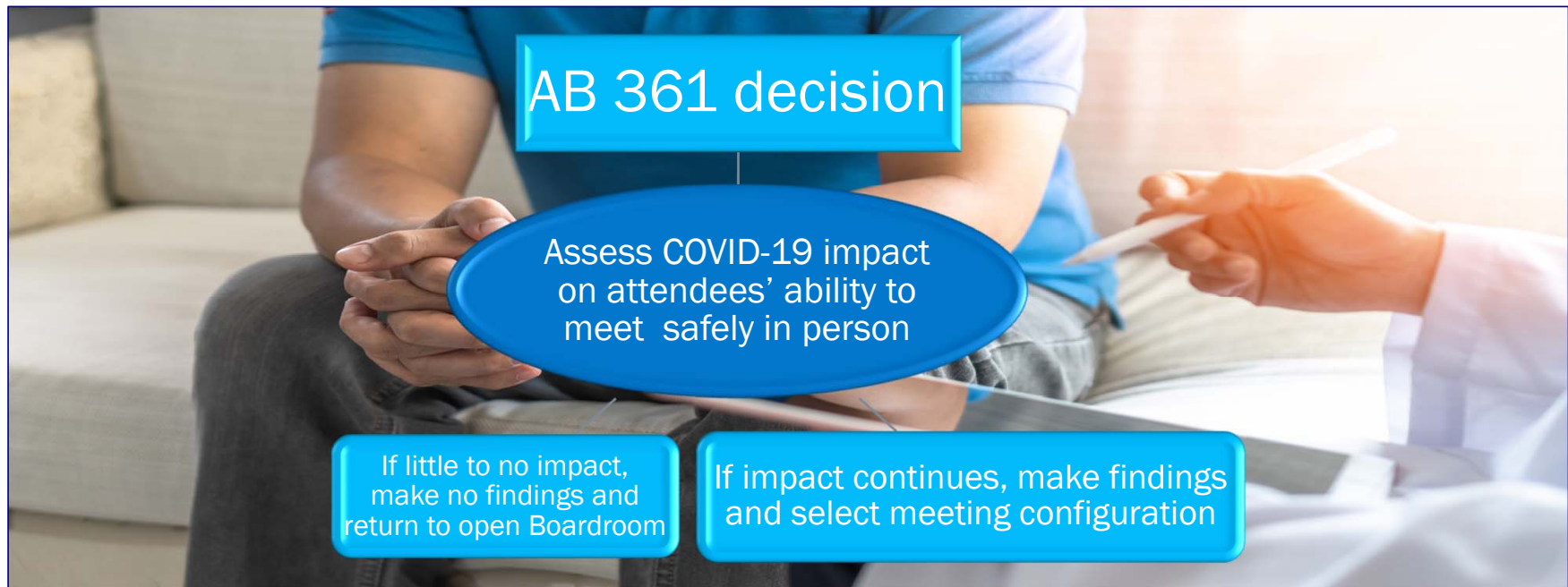
Recommended Metrics to Gauge Safety of Attendees Meeting In-person

CalCAT R- Effective – likely decreasing (.7 or less for seven days prior to posting agenda)

CDPH Positivity % (7-day rate) decreasing from prior 7 days

KCPHSD - New cases/Case rate per 100k (7-day average) decreasing from prior report

AB 361 – Analysis - Decision-Tree



AB 361 Findings

REQUIREMENTS - IF NO FINDINGS MADE

- ❖ Quorum of the Board Members Must Return to Board Room
 - Virtual attendance by some trustees possible, but
 - must post agenda at trustee's virtual location
 - must allow public to attend meeting from trustee's virtual location
- ❖ Must allow all public to attend meeting in-person
- ❖ May allow public/consultants to continue to participate via teleconference
- ❖ Staff members may attend in-person or virtually, per CEO direction
- ❖ Staff Implementation and enforcement of masking guidance

OPTIONS - IF STATUTORY FINDINGS MADE

- ❖ Continue meeting virtually – status quo
- ❖ Any Board Member may attend meeting in-person at KCERA (adherence to masking guidance required)
- ❖ Public/Consultants may continue to participate via teleconference – status quo
- ❖ Staff may attend in-person or virtually, at CEO direction
- ❖ Implementation and enforcement of state-wide masking mandate by Chief Executive Officer and Chief Operating Officer

Operational Considerations

BOARD ROOM MODEL

- ❖ Personal Comfort & Risk Tolerance
- ❖ Mask Mandates
- ❖ Attestations Standards
- ❖ Social Distancing
- ❖ Air Filtration
- ❖ Trustees, Staff, Vendors, Public

HYBRID MODEL

- ❖ Personal Comfort & Risk Tolerance
- ❖ Inconsistent Experience
- ❖ Presence Bias
- ❖ Public Access (Phone, Webinar)
- ❖ Peer Benchmarking



Date: February 17, 2022
To: Administrative Committee, Trustees
From: Jennifer Esquivel Zahry, Chief Legal Officer
Subject: **Disability Application Conflicts**

Request

Recommend approval of Conflicts of Interest section to the Rules of Procedure for Disability Retirement to the Board of Retirement.

Background

Within the last three years, KCERA has had three disability retirement applicants who were closely related to then-active Trustees of the Board of Retirement. Before these matters came to the Board for decision, KCERA Staff provided this Committee with a presentation and education on conflicts of interest related to disability retirement decisions. (See attached power point slides from the 5/27/21 Administrative Committee for reference).

As part of that presentation, KCERA Staff recommended the CEO evaluate disability applications for conflicts of interest and send the application to another CERL retirement system to administer KCERA's application process. (KCERA's Board of Retirement must take final action on all retirement applications. A Board of Retirement of another CERL system does not have jurisdiction to grant or deny disability retirement applications of KCERA members). Following the May 2021 meeting, this Committee directed KCERA Staff to bring any potential conflicts to the Board of Retirement to discuss a plan of action and potential outsource alternatives.

Rules Amendment

The new Conflict of Interest section identifies specific situations that require the CEO to evaluate an application for conflicts of interest. The section requires the CEO to notify the Board of such cases and seek Board approval of any disability retirement application that the CEO recommends for handling by an agency/vendor other than KCERA.

Conclusion

Based on prior direction from your Committee, Staff recommends the Committee approve the proposed addition of the new Conflict of Interest section to the Board of Retirement.



Rules of Procedure for Disability Retirement

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Rules are also available on the
Kern County Employees' Retirement Association website
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Rule 1. General Provisions

- 1.A.** Purpose. The Kern County Employees' Retirement Association ("KCERA") Rules of Procedure for Disability Retirement ("these Rules") have been promulgated for the purposes of providing a procedure for submitting and acting upon applications for disability retirement under the County Employees' Retirement Law of 1937 ("CERL"), expeditiously. All proceedings for applications for disability retirement shall be conducted in accordance with these Rules.
- 1.B.** Resolution of Conflicting Provisions. KCERA is governed by the CERL. If a conflict should arise between these rules and the CERL, the CERL will prevail.
- 1.C.** Amendments to Rules of Procedure for Disability Retirement. These Rules may be amended at any regular or specially noticed meeting of the KCERA Board of Retirement ("Board"). In order to facilitate the orderly and efficient implementation of these Rules, the Board hereby delegates to the KCERA Executive Officer the authority to approve amendments of a minor, non-substantive nature that do not alter the fundamental rights and responsibilities of any parties in the disability retirement process. The scope of this delegation of authority includes, but is not limited to, typographical errors, format revisions, conforming terminology, revision of forms, and similar types of amendments.
- 1.D.** Representation by Counsel. An Applicant and/or Member (if the Member is not the Applicant,) shall be entitled to be represented by legal counsel (that is licensed by the California State Bar and currently in good standing), at the party's expense, provided counsel has completed KCERA's authorization form and filed the form with the **Executive Director**. Once the form is accepted as filed by the **Executive Director**, all notices and information relating to this process shall thereafter be served upon such counsel. Until KCERA's authorization form has been filed with the **Executive Director**, KCERA, the Board or the Hearing Officer is not obligated to recognize any attorney claiming to represent a party. Substitution or dismissal of an attorney shall be made in the manner provided in sections 284, 285 and 286 of the Code of Civil Procedure.
- 1.E.** Communication with Individual Board Members. The Board is the decision-maker for all applications for disability retirement. As such, communications concerning the merits or substance of an application between any Board member and parties (or their legal counsel) are forbidden until such time as the Board issues its decision. Violations of this rule may result in the Board member being found ineligible to participate in any discussion regarding the Application, or vote on the Application.
- 1.F.** Confidential Records. All individual records of a Member (including, but not limited to, reports, medical reports and records, applications, notices, orders, and findings and decisions relating to an application for disability retirement) are confidential and shall not be disclosed by KCERA to anyone except as set forth

in these Rules or upon order of a court of competent jurisdiction, or upon written authorization by the Member.

- 1.G. Closed Sessions.** Substantive discussion by the Board related to an application for disability retirement shall be held in closed session. The general public is excluded during closed sessions, but the Parties may be present.

The Member may make public comment during open session, but the Member will have the opportunity to address the Board in closed session.

1.H. Service of Documents.

- a. When a provision of these Rules requires that parties be served, service shall be made upon KCERA, counsel for KCERA, Applicant or Member (when the Member is not the Applicant), and the Hearing Officer selected (unless stated otherwise). Service to KCERA and counsel for KCERA is to be made at the following address:

KCERA
Kern County Employees'
Retirement Association
11125 River Run Boulevard
Bakersfield, CA 93311

Counsel for KCERA
County of Kern County Counsel
County Administration Building
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301

- b. If the party to be served has an identified attorney of record, service shall be made upon the attorney of record in accordance with this section.
- c. Service of documents provided in these Rules may be made by mail in accordance with California Code of Civil Procedure section 1013. The time requirements of California Code of Civil Procedure section 1013 shall govern all service by mail.

1.I. Conflicts of Interest. To avoid actual bias or the appearance of impropriety, favoritism, or improper influence, the Chief Executive Officer will evaluate whether applicable conflict of interest rules and principles favor another CERL system or vendor administratively process, prepare, and present a disability retirement application to the Board of Retirement for final action (“alternate handling”).

A disability retirement application shall only be evaluated for alternate handling if action on the application by a current member of the Board of Retirement or KCERA staff involves a disqualifying financial interest. A disability retirement application filed by a current or former member of the Board of Retirement, his/her spouse, parent, or child, or a current KCERA staff member or his/her spouse, parent, or child shall be evaluated by the CEO for alternate handling. Other applications that involve a disqualifying financial interest may be evaluated as well.

The CEO will notify the Board of any disability retirement application evaluated for alternate handling and will seek approval from the Board if alternate handling is recommended. In all cases, the KCERA Board of Retirement is required to act on KCERA disability retirement applications regardless of whether the application was approved for alternate handling.

- 1.J. Definitions. In these Rules, unless the context or subject matter otherwise requires:
- a. “Applicant” means a Member of the Kern County Employees’ Retirement Association applying for disability retirement benefits under the CERL, or any person or persons (when the member is not the applicant) described in Government Code section 31721 as entitled to file an application on behalf of a Member.
 - b. “Board” means the Board of Retirement of the Kern County Employees’ Retirement Association.
 - c. “Disability” or “disabled,” whether used singly or in combination with other words, means permanent incapacity for performance of job duties.
 - d. “Disposition” means the final decision regarding an application for disability retirement.
 - e. “**Executive Director**” means the **Executive Director** appointed by the Board or his/her designee including, but not limited to, a third-party administrator, for purposes of administering the disability procedures under these Rules and in accordance with the CERL.
 - f. “Hearing Officer” is a designee of the Board who conducts the Administrative Hearing. The Hearing Officer acts as the judge assigned to the case and is granted the authority described in these Rules.
 - g. “In whole or in part”, for purposes of these Rules, means an application can be granted as to one claimed disability but denied as to another, or can be granted on a non-service- connected basis and denied on a service-connected basis.
 - h. “Member” means a current member of the Kern County Employees’ Retirement Association.
 - i. “Motion *in limine*” for purposes of these Rules, means an oral or written motion made by a party which asks the Hearing Officer to prevent certain evidence from being presented by the other side at the administrative hearing.

- j. “Party,” during the administrative hearing phase of the application, means a person, such as an attorney or Applicant (when the member is not the applicant).
- k. “Party in interest,” during the administrative hearing phase of the application, means the member who is the subject of the application filed by his/her employer.
- l. “Permanent incapacity” means an impairment of the member’s body and/or mind which causes the member to be substantially unable to perform the usual duties of the position held by the member at the time of application or, if retired for service, the position last held by the member and which is determined by competent medical evidence to be permanent or of such prolonged and uncertain duration as to be considered permanent.
- m. “Retirement Association” or “KCERA” means the Kern County Employees’ Retirement Association.
- n. “Staff Disability Application Group” or “SDAG” means a committee comprised of KCERA staff designated by the **Executive Director**. The Staff Disability Application Group reviews all applications for disability retirement, refers cases to independent medical examiners and/or investigators as the SDAG deems appropriate, and makes recommendations to the Board.
- o. “With Prejudice” means the decision by the Board prohibits the possibility of applicant submitting a new application on the same basis as the dismissed case.
- p. “Without Prejudice” means the decision by the Board does not prohibit the possibility of applicant submitting a new application on the same basis as the dismissed case.
- q. “Writing” means a handwritten, typed, or printed document used to communicate relevant information; transmission of information by email (electronic mail) with an attached handwritten, typed, or printed document communicating the relevant information may be sent as a courtesy, but is not an accepted method of writing under these Rules.

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Rule 2. Forms.

The pre-printed forms provided by KCERA without modification. The **Executive Director** has the authority to create and revise forms used in the disability retirement process, as necessary, to obtain information necessary to render a decision on an application.

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Rule 3. Required Forms.

Upon request, the **Executive Director** shall provide the forms for disability retirement benefits, which include an *Application for Disability Retirement* form, an *Authorization for Release of Medical Records and Information* form, an *Attending Physician's Report* form ("Disability Application Packet") and a copy of these Rules.

3.A. Disability Application Packet. An application packet must include all of the following:

3.A.1 A completed *Application for Disability Retirement* signed and dated by the Applicant which appropriately describes a disability that permanently incapacitates the Member from the performance of his/her job duties and contains any and all other information requested on the application form;

3.A.2 An *Authorization for Release of Medical Records and Information* (including, but not limited to, medical and employment records) signed by the Member or other person authorized by law;

3.A.3 A completed *Attending Physician's Report (APR)* signed by a duly licensed physician, which responds to the information requested, describes the disability alleged to permanently incapacitate the Member, and delineates any relevant work restrictions for the injury/condition.

3.A.3.a If more than one disabling injury is claimed, a separate *APR* is required for each claimed injury.

3.A.3.b The *APR* must be typed or printed legibly, or it may be rejected.

3.A.3.c The *APR* must be submitted to KCERA within three (3) months of the date it is signed by a duly licensed physician.

3.A.3.d Upon request, KCERA can supply a letter of instruction to the physician to accompany the *APR*.

3.A.3.e A copy of the Member's official job description for the position from which the Applicant claims permanent incapacity must be provided to and referenced by the duly licensed physician in completing the *APR*.

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- 3.B.** Application Accepted as “Filed”. No application will be considered “filed” within the meaning of Government Code sections 31721 - 31724, until all the required forms described in Rule 3.A. are received and officially accepted. KCERA may provisionally accept applications for initial review before officially accepting an application as “filed.” All applications will be marked “filed” as of the date they are deemed complete and officially accepted by the **Executive Director**.

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Rule 4. Administrative Process.

In the initial stages of processing a Disability Application Packet, KCERA processes may differ depending on whether the Applicant is the Member, the Member's employer, or another eligible person.

4.A. Application Filed by Member - Notification to Member. KCERA will provide Applicant one of two letters:

4.A.1 Acceptance by KCERA - KCERA will provide the Applicant a letter confirming the Disability Application Packet is complete and has been accepted as filed or provisionally accepted.

4.A.2 Inability to Accept or File - If the Disability Application Packet is not complete or cannot be accepted, KCERA will provide the Applicant a letter explaining why the Disability Application Packet could not be filed with KCERA.

4.B. Application filed by a Person Other than the Member – Notification to Member.

4.B.1 Upon receipt of an Application for Disability Retirement filed on behalf of a Member, the **Executive Director** shall, within ten (10) business days, send an instructional letter to the Member at his/her address on file with KCERA with the following:

4.B.1.a a copy of the *Application for Disability Retirement* filed by the Applicant;

4.B.1.b a Disability Application Packet; and

4.B.1.c a *Preference Form* in which the Member indicates whether he/she agrees that he/she is permanently incapacitated and, if so, whether the Member believes the condition is service-connected.

4.B.2 Members who wish to apply for disability retirement on conditions other than those listed in Applicant's application and/or contend the disabling condition(s) is service-connected must submit a completed Disability Application Packet (see Rule 3) and *Preference Form* within sixty (60) days of receiving the copy of the Applicant's application.

4.B.3 Members who wish to allow Applicant to pursue the application as submitted must return a completed *Preference Form*, an *Authorization for Release of Medical Records and Information*, and an *APR* for the disabling conditions listed in Applicant's application. If a Member fails to return the *Authorization for Release of Medical Records and Information*

and *APR* to KCERA, KCERA will close the application file until KCERA receives the required forms from the Member or until Applicant can submit a completed *APR*.

4.B.4 Members who object to Applicant's claim that he/she is permanently incapacitated must return a completed *Preference Form* and *Authorization for Release of Medical Records and Information*.

4.C. Application filed by a Person Other than the Member - Notification to Applicant.
After the sixty-day (60) period referenced in Rule 4.B.3. above, KCERA will provide Applicant one of two letters:

4.C.1 Acceptance by KCERA - KCERA will provide the Applicant a letter confirming that the application has been accepted and filed, and that the Disability Application Packet is complete.

4.C.2 Inability to Accept, File or Process - If the Disability Application Packet is not complete or cannot be accepted or processed further, KCERA will provide the Applicant a letter explaining its decision.

4.D. Compilation of Records in Support of Application.

4.D.1. After the application is accepted or provisionally accepted and filed, the **Executive Director** begins to collect the following documents and information:

4.D.1.a *A Report of Department Head Regarding Application for Disability* for completion by the Member's department head;

4.D.1.b Any Workers' Compensation claims and medical reports or records filed by the Member for Workers' Compensation benefits;

4.D.1.c Member employment and pay status verification;

4.D.1.d Member's personnel records, including performance evaluations and internal investigation files and reports; and

4.D.1.e Employment records from non-KCERA employers after the application filing date.

4.D.2. The letter accepting and filing the application informs the Applicant that he/she has sixty (60) calendar days from the date of that letter to submit to the **Executive Director** copies of all medical reports and records together with any and all other relevant evidence, certificates or other documents

which the Applicant wishes KCERA to consider in support of the application.

4.D.2.a the **Executive Director** or his/her designee, acting as Secretary of the Board, is authorized to issue subpoenas on behalf of KCERA or when requested by the Applicant, in order to obtain relevant evidence as allowed by California Government Code section 31535;

4.D.3. If, before the records are assembled and placed in chronological order, an initial review of the records received by the **Executive Director** reveals incomplete or missing medical information, the **Executive Director** may ask Applicant to obtain such additional medical information, if it is determined that such information is necessary to ensure a complete and comprehensive claim file. Applicant's failure to cooperate with the **Executive Director** in obtaining such reports may result in dismissal of the application without prejudice.

4.D.4. Applicant will be provided with the compiled records once assembled and placed in chronological order. The **Executive Director** will provide Applicant with thirty (30) calendar days to submit any additional medical information that was not included during the sixty (60) calendar day period described in Rule 4.D.2.

4.D.5. Except as described above, an Applicant will not have the ability to submit additional medical information to support the application until an initial determination and recommendation has been made by the SDAG in accordance with Rule 10.

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Rule 5. Investigation of Facts Prior to Administrative Hearing.

5.A. Investigator. The **Executive Director** may select **an investigator approved by the Board** to conduct an investigation of the facts giving rise to an alleged permanent incapacity and/or interview of Applicant or Member (when the Member is not the Applicant). The investigator shall make a report to the Board of the result of the investigation and provide a transcript of any interview.

5.A.1 Interview - Any Applicant has the right to have a representative present for moral support during an interview by the investigator. The representative may not participate in the interview in any manner. All interviews shall be recorded. The investigator shall summarize the investigation and/or interview in a report to the Board and provide a transcript of any interview.

5.B. Subpoena Power. The **Executive Director** or his/her designee, acting as Secretary of the Board, is authorized to issue subpoenas and subpoenas *duces tecum* on behalf of KCERA in order to obtain relevant evidence as allowed by California Government Code section 31535.

5.C. Examination. The Applicant shall report at times and places specified by the **Executive Director** for one or more medical examination(s) by a physician or physicians selected by the Board or the **Executive Director**.

5.C.1 Location of Examination - If the **Executive Director** authorizes a medical examination of the Member, reasonable attempts to engage a physician within 150 miles of the Member's current residence at a time and date convenient for the Member will be made. If a physician cannot be secured within 150 miles from the Member's current residence, KCERA will pay the Member's reasonable travel costs to and from the examination. Except as described in subsection 5.C.2 below, the cost of the medical examination(s) shall be paid by KCERA.

5.C.2 Cancellation of Scheduled Examination/Failure to Appear - If the **Executive Director** has scheduled an examination for the Member with a physician for purposes of evaluating his/her incapacity, and the Member cancels the examination with less than one (1) weeks' notice or fails to appear for the scheduled examination, the Member may be required to pay the physician's examination fee and/or cancellation fee, as applicable. (Cal.Gov. Code 31723). Failure to cooperate with the **Executive Director** or physician in scheduling, appearing for, or being prepared for the examination may, in the proper discretion of the Board, be grounds for dismissing the application without prejudice.

5.C.3 Psychiatric Examination - When it is contended that a permanent incapacity resulted from a psychiatric injury, a psychiatric examination may be conducted.

Rule 6. Recommendation to Grant Application.

After receipt of all requested documents, and based on the majority view of the SDAG, the **Executive Director** and the Board's Medical Advisor shall each prepare a written report.

- 6.A. Reports.** The reports shall summarize the evidence in support of the application and recommendation to grant the application.
- 6.B. Recommendation to the Board.** The reports and recommendation to the Board shall be written as follows:
 - 6.B.1** The medical reports and records are sufficient for the Board to support a finding that the Member is permanently incapacitated for the performance of his/her usual duties;
 - 6.B.2** In the case of an application for a service-connected disability retirement, that the medical records and reports and other pertinent documents are sufficient for the Board to support a finding that the incapacity was the result of an injury or disease arising out of and in the course of employment and that such employment contributed substantially to such incapacity; or
 - 6.B.3** In the case of an application for nonservice-connected disability retirement, that the Member has served the required period of time that entitles the Member to a nonservice-connected disability retirement.
- 6.C. Notice to the Applicant/Member.** A copy of the recommendation shall be mailed to the Applicant and Member (if the Member if not the Applicant) not less than five (5) business days prior to the next regular Board meeting.

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Rule 7. Recommendation to Deny Application - Notice of Right to Administrative Hearing and Ability to Submit Additional Medical Reports.

If the SDAG recommends denying an application, the **Executive Director** shall send a letter to the Applicant (and the Member, if the Member is not the Applicant) advising that the Applicant and/or the Member has a right to request an administrative hearing before a hearing officer (the *Notice of Right to Administrative Hearing*). The letter shall also contain a *Request for Administrative Hearing* form. The Applicant and/or Member shall have thirty (30) calendar days from the date of mailing of the *Notice of Right to Administrative Hearing* to complete and return the *Request for Administrative Hearing* form.

7.A. Administrative Hearing Requested. If an administrative hearing is requested, the Applicant (and the Member, if the Member is not the Applicant) may submit additional medical reports for consideration by SDAG so long as the medical reports and records are submitted by the Applicant and/or Member with the *Request for Administrative Hearing* form and within thirty (30) calendar days of the date of mailing of the *Notice of Right to Administrative Hearing*. The SDAG shall review and consider such medical reports and records and, upon completion of the review, shall either place the application on the Board's agenda with a recommendation to grant pursuant to Rule 6 or refer the application for administrative hearing pursuant to Rule 11.

7.B. Failure to Request an Administrative Hearing. If the Applicant and/or Member does not timely complete and return the *Request for Administrative Hearing* form and the Applicant does not withdraw the application pursuant to Rule 9, the application will be placed on the consent agenda for the Board's next regular meeting with a recommendation to deny the application, in whole or in part. The **Executive Director** and Medical Advisor shall prepare reports summarizing the evidence and explaining the recommendation. A copy of the reports and recommendation shall be mailed to the Applicant (and the Member, if the Member is not the Applicant) not less than ten (10) business days prior to the next regular Board meeting.

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Rule 8. Failure to Pursue Application or Administrative Hearing.

8.A. Withdrawal Prior to Request for Administrative Hearing. An Applicant may withdraw an application at any time before Applicant requests an administrative hearing or action is taken on the application under Rule 10. If Applicant requests to withdraw the application, KCERA will close the application file and no further action will be taken on the application. No fee will be owed by Applicant and the Board will not render a decision on the merits of the application. Applicant is required to start the application process anew for any future or renewed claim for disability retirement benefits.

8.B. Failure to Proceed with Administrative Hearing or Withdrawal of Request for Administrative Hearing. An Applicant may withdraw Applicant's *Request for Administrative Hearing* any time before commencement of the Administrative Hearing before the Hearing Officer.

8.B.1 Untimely Request to Cancel or Withdraw Request for Administrative Hearing – Providing Less than Two (2) Weeks' Notice:

8.B.2.a Fee - If the Hearing Officer has scheduled an administrative hearing and the Member cancels or withdraws the *Request for Administrative Hearing* or fails to appear for the hearing without providing at least two (2) weeks' notice to the Hearing Officer and counsel for KCERA, the Member may be required to pay the fees associated with the cancellation. Such fees include a stenographic reporter fee, attorneys' fees and any hearing officer costs or fees.

8.B.2.b Disposition of Application - When an Applicant fails to appear for an administrative hearing or cancels or withdraws a *Request for Administrative Hearing* without providing at least two (2) weeks' notice to the Hearing Officer and counsel for KCERA, the application shall be returned to the Board for a final decision with a recommendation to deny (in whole or in part) with prejudice.

8.B.2 Timely Request to Cancel or Withdraw Request for Administrative Hearing – Providing at Least Two (2) Weeks' Notice:

8.B.2.a No Fee - If the Hearing Officer has scheduled an administrative hearing and the Member cancels or withdraws the *Request for Administrative Hearing*, but provides at least two (2) weeks' notice to the Hearing Officer and counsel for KCERA, the Member will not be required to pay the fees associated with the cancellation.

8.B.2.b Disposition of Application – When an Applicant timely requests to cancel or withdraw a *Request for Administrative Hearing*, the application shall be returned to the Board for a final decision with a recommendation to deny (in whole or in part) with prejudice.

8.B.3 If, as a result of the Applicant's failure to comply with the procedures specified in these Rules, the matter is not heard within two (2) years after a *Request for Administrative Hearing* is made, the case shall be returned to the Board with a recommendation to dismiss with prejudice.

8.B.3.a This rule prevents further review of the Member's incapacity for the claimed condition regardless of who filed the application (e.g., Member, Employer, or other interested party).

8.B.3.b However, no case shall be dismissed without sixty (60) days' prior written notice to the Applicant and the Member (if the Member is not the Applicant) that failure to commence an administrative hearing within sixty (60) days from the date of the notice will result in dismissal of the case with prejudice.

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Rule 9. Amendment of Application.

An Applicant may amend an application at any time prior to the end of the thirty (30) day period referenced in Rule 7. If the application is amended to add a new condition, injury or disability, Applicant shall provide each of the required forms listed in Rule 3 for the new claimed condition, injury or disability.

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Rule 10. Board Action on SDAG Recommendation.

If a *Request for Administrative Hearing* is not received by KCERA in accordance with Rule 7, the **Executive Director** shall place the application on the Board's consent agenda. If an application is removed from the consent agenda, the matter shall be moved to the closed session portion of the Board's agenda for further discussion.

10.A. Board Determinations. The Board's action shall be either to refer the application to a hearing officer for an administrative hearing, take action on the recommendation of the SDAG, or refer the matter back to the SDAG for additional information. If action is taken, the Board shall make the following determinations, as applicable:

10.A.1 Whether the Member is permanently incapacitated for the performance of duty and, if so, the injury or disease that gives rise to such permanent incapacity. If permanent incapacity is not found, the application shall be denied.

10.A.2 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 participating district.

10.A.2.a If, by statute, a presumption of service-connection exists for the claimed condition, the Board shall determine whether the presumption applies to Applicant and, if so, whether the evidence presented rebuts the presumption of service-connection.

10.A.3 Whether any changes to the effective date of the Member's disability retirement should be made pursuant to California Government Code section 31724.

10.B. Notification of Board Decision. Within three (3) working days after the Board's action on the application, the **Executive Director** shall notify the Applicant and/or Member (if the Member is not the Applicant) at the address shown in the application of the Board action (or such other address as may be designated by the Applicant) and, if the action of the Board denies in whole or in part any of the benefits sought in the application, the notice shall advise the Applicant of his/her right to contest the Board action.

10.C. Effective Date of Board Decision. The decision of the Board shall be final on the day it is made.

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Rule 11. Hearing Officer Assignment and Selection.

After the thirty (30) day period to request an administrative hearing or SDAG's review of addition medical reports and records described in Rule 7, whichever is later, a hearing officer will be selected in the following manner:

- 11.A. Assignment.** The **Executive Director** assigns hearing officers on a rotational basis from KCERA's pre-existing panel of hearing officers. A written *Notice of Hearing Officer Assignment* shall be sent by the **Executive Director** to the parties. Applicant, Member (if the Member is not the Applicant), and counsel for KCERA shall have ten (10) calendar days from the date of the *Notice of Hearing Officer Assignment* to exercise, in writing, a peremptory challenge. If either party exercises its challenge, the next hearing officer in the rotation shall be assigned the case and the other party will then have ten (10) calendar days from the notice to exercise, in writing, a peremptory challenge. Only one peremptory challenge may be exercised by a party. The **Executive Director** will notify the hearing officer once he/she is selected. In the event the selected hearing officer recuses himself or herself from the case, the next hearing officer in the rotation shall be assigned to the case regardless of whether a party has exercised its peremptory challenge against that hearing officer.
- 11.B. Peremptory Challenge(s).** A peremptory challenge, if any, by either party shall be supported by a declaration made under penalty of perjury using KCERA's *Peremptory Challenge of a Hearing Officer* form. Any party who wishes to exercise its peremptory challenge must file and submit a completed *Peremptory Challenge of a Hearing Officer* form to the **Executive Director**. A blank form is provided to all parties with the *Notice of Hearing Officer Assignment* letter.
- 11.C. Selection.** A written *Notice of Hearing Officer Selection* shall be sent by the **Executive Director** to the parties within twenty (20) calendar days of the final peremptory challenge.
- 11.D. Administrative Record.** The **Executive Director** or designee shall provide the Hearing Officer and all parties with a copy of the Administrative Record compiled by the **Executive Director**.

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Rule 12. Hearing Officer Jurisdiction.

The Hearing Officer has two hundred seventy (270) calendar days (from the date he/she is notified of his/her selection) to hold and complete the Administrative Hearing process, including receiving all evidence and written closing statements, and submitting proposed findings and recommendations to KCERA's Board of Retirement.

The Hearing Officer's jurisdiction expires two hundred seventy (270) calendar days after he/she is notified of his/her selection as a hearing officer.

Nothing in these Rules is to be construed as preventing the Hearing Officer from allowing parties to stipulate to lesser intervals than those specified in these Rules. The Hearing Officer may, for good cause shown, after giving both parties an opportunity to be heard, shorten the times specified in these Rules.

- 12.A.** Setting of Administrative Hearing Date. The Hearing Officer will coordinate the Administrative Hearing date with all parties and set the dates for the submission of the *Prehearing Statements*, the Prehearing Conference, and the cut-off date to send KCERA a request to prepare subpoena(s) for witnesses, which must be before the *Prehearing Statements* are due. If the parties cannot agree on an administrative hearing date within the time specified, the Hearing Officer shall decide on a hearing date within the time specified and inform the parties in writing of the Administrative Hearing date. If the administrative hearing process is not completed within the Hearing Officer's jurisdiction, the case will be returned to the **Executive Director** for reassignment to another hearing officer.
- 12.B.** Continuances/Extensions of Time. Any request for a continuance or an extension of time must be in writing to the Hearing Officer and served on all parties and parties in interest. Any party or party in interest is entitled to oppose a request for continuance by filing written objections with the Hearing Officer. The Hearing Officer shall issue a determination on the request and provide all parties with formal notice of the decision.

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Rule 13. Prehearing Statements.

Each party must file a completed *Prehearing Statement* form. A blank *Prehearing Statement* form is provided to all parties with the *Notice of Hearing Officer Selection* letter.

The *Prehearing Statement* form shall contain the following:

- (a) A statement of the issues and the contentions of the party, including the claimed physical/psychological disabilities;

NOTE: Allegations and/or evidence that incapacity is the result of an injury or disease not evaluated by the SDAG is not admissible at the Administrative Hearing and cannot be a basis for determining incapacity. Nothing herein shall be construed to constitute a waiver or denial of a Member's right to file a separate application for disability retirement based on the newly alleged injury or disease.

- (b) A list of documentary evidence not included in the Administrative Record that the party intends to offer into evidence and copies of such documents (including any deposition transcript, affidavit, or medical report or record), along with a declaration explaining why the party did not know or could not have reasonably known about the medical reports or records at the time the matter was under review by SDAG;
- (c) The names, business addresses and telephone numbers of any witnesses and affiants whose testimony the party intends to present at the Administrative Hearing (including Medical Witnesses), and a description of each witness's expected testimony, including a curriculum vitae for professional or expert witnesses; and
- (d) If the Member is asserting that the effective date of the disability retirement allowance is a date other than the date the application was accepted as filed, the Member shall raise the "effective date" as an issue in the Prehearing Statement. Nothing in this Rule excuses the Applicant from the need to indicate the request for an earlier effective date in the application.

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Rule 14. Prehearing Conference and Order.

- 14.A.** Prehearing Conference. The Hearing Officer shall conduct a Prehearing Conference to address any issues raised in the *Prehearing Statement*.
- 14.B.** Order. The Hearing Officer shall issue a written order addressing any issues raised in the *Prehearing Statement* and/or Prehearing Conference and shall serve such order on all parties.

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Rule 15. Written Medical Reports as Evidence.

- 15.A.** Statement of Policy. It is the policy of the Board that production of medical evidence shall be in the form of written medical reports. A written medical report bearing the signature of the medical witness shall be admissible in evidence as the author's direct testimony.
- 15.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 or by such other jurisdiction in which such person maintains his/her regular practice.

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Rule 16. Oral Testimony of Medical Witnesses.

- 16.A.** Hearings. Oral testimony of a medical witness on direct or cross-examination, for any purpose, may be taken at the time and place set for the Administrative Hearing.
- 16.B.** Depositions. The deposition of a medical witness may be taken. 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 *Prehearing Statements* are due.
- 16.C.** Subpoenas and fees. Issuance of a subpoena for a medical witness's attendance at an administrative hearing or deposition shall be contingent on the party accepting the obligation to pay the medical witness the fees set forth herein.
- 16.C.1** The party requesting oral testimony of the Member's treating physician shall advance to the treating physician such fees and mileage as Government Code section 68093 prescribes for ordinary, non-expert witnesses in the superior court. If the party requesting oral testimony of a treating physician intends to question the physician as to the physician's expert opinion, the party requesting the oral testimony shall advance to the medical witness an expert witness fee.
- 16.C.2** The party requesting oral testimony of a medical witness who is not the Member's treating physician shall in all cases advance to the medical witness an expert witness fee. The witness shall be entitled to claim an expert witness fee on the same conditions that such witness would be entitled to claim under Government Code section 68092.5 if subpoenaed to testify in a civil action or proceeding.
- 16.C.3** When payment of an expert witness fee is required, the party requesting the oral testimony shall contact the office of the medical witness and determine the witness's reasonable and customary hourly or daily fee and shall advise the office of the medical witness of the anticipated length of the deposition or administrative hearing. The medical witness's fee, based on the witness's reasonable, customary rate and anticipated length of the testimony, shall be delivered to the medical witness at least ten (10) calendar days in advance of the deposition or administrative 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.

16.C.4 Failure to timely serve a subpoena and/or pay the prescribed witness fee in advance of the Administrative Hearing or deposition may be treated by the Hearing Officer and Board as a waiver of the right to question such witness. Failure to advance the expert witness fee will be deemed a waiver of the right to question the witness or require the witness's appearance at the deposition or administrative hearing, and any subpoena which may have been issued to compel the 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.

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Rule 17. Depositions of Witnesses.

Any party to the proceeding may cause the depositions of witnesses or Applicant or Member (when the Applicant is not the Member) to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state. Attendance of witnesses and production of records in regard to depositions may be required and appropriate subpoenas will be issued in accordance with these Rules. The parties shall bear their own costs for such depositions. Depositions of lay witnesses must be scheduled and taken before the *Prehearing Statement* is due. Depositions of medical witnesses shall be governed by Rule 16.

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Rule 18. Resolution of Disputes in Regard to Discovery and Administrative Hearing Procedure.

Disputes in regard to depositions, other discovery and administrative hearing procedures shall be resolved by the Hearing Officer once a *Request for Administrative Hearing* has been made. If a discovery dispute arises prior to such request, it shall be resolved by the **Executive Director**.

If a request for resolution of a discovery dispute is made to a Hearing Officer, it 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 an opportunity 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 or **Executive Director**, as the case may be, shall notify the parties and the witness involved of the resolution of the dispute. If the witness continues to refuse to comply with the resolution, the Hearing Officer or **Executive Director** may dismiss the application for disability retirement without prejudice.

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Rule 19. Subpoenas.

The chair and **Executive Director**, or their designee, in accordance with the CERL, are hereby authorized to issue and sign subpoenas for attendance at the Administrative Hearing and/or depositions on applications for disability retirement, upon the request of any party.

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Rule 20. The Burden of Proof.

An Applicant has the burden of producing evidence and the burden of proving, by a preponderance of the evidence, that the Member is permanently incapacitated for the performance of his or her usual duties, and, if applicable, that such incapacity is service-connected.

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Rule 21. Evidence

21.A. Oral Testimony. Oral evidence shall be taken only on oath or affirmation.

21.B. Parties' Rights. Subject to these Rules and any rulings made by the Hearing Officer at a Prehearing Conference or *in limine* prior to the presentation of evidence, each party or party in interest shall have these rights:

21.B.1 to call and examine witnesses;

21.B.2 to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination;

21.B.3 to impeach any witness regardless of which party first called the witness to testify;

21.B.4 to rebut adverse testimony; and

21.B.5 to introduce exhibits, deposition transcripts and reports of medical witnesses.

21.C. Applicant/Member Testimony.

21.C.1 If the application is filed by the Member, the failure or refusal of the Member to submit to examination for the purpose of answering relevant questions shall be grounds for dismissing the application in whole or in part with prejudice.

21.C.2 If the application is filed by someone other than the Member and the Member is requesting disability retirement benefits on a service-connected basis or has filed an application on injuries different from those listed in the application not filed by the Member, the failure or refusal of the Member to submit to examination for the purpose of answering relevant questions shall be grounds for denying such portions of the application for disability retirement.

21.C.3 If the application is filed by someone other than the Member, the failure or refusal of the Member to submit to examination for the purpose of answering relevant questions shall be grounds for denying the application for disability retirement in whole or in part without prejudice.

21.D. Hearsay Evidence. 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 or records

received into evidence pursuant to Rule 15.

- 21.E. Rules of Evidence.** The Administrative Hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence received in accordance with these Rules 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 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 Administrative Hearing, and irrelevant and unduly repetitious evidence shall be excluded.
- 21.F. Affidavit.** A party may include as part of the *Prehearing Statement* a copy of any affidavit of any lay witness which the party proposes to introduce in evidence, together with a notice as provided below. 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 a timely subpoena has been 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. The notice required shall be substantially in the following form:

The accompanying affidavit(s) [here insert name of affiant(s)] will be introduced as evidence at the Administrative Hearing in [here insert title of the proceeding]. [Here insert name of affiant] will not be called to testify orally and you will not be entitled to question him/her unless you subpoena the affiant(s).

- 21.G. Judicial 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 section 452 if the provisions of section 453 of the California Evidence Code are complied with by a party.

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Rule 22. Order of Business for Administrative Hearings Before Hearing Officer.

Unless the Hearing Officer rules that it is unnecessary or a different order of business is appropriate to suit the convenience of witnesses, all administrative hearings shall proceed as outlined below.

- 22.A. Reporter.** The proceedings of all administrative hearings for applications for disability retirement shall be reported by a stenographic reporter. 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 thereof. All parties must contact the stenographic reporter directly in order to obtain a copy of the transcript.
- 22.B. Appearances.** 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 that counsel for KCERA may delay its opening statement until after Applicant's presentation of evidence.
- 22.C. Identify the Record.** If the parties are ready to proceed, the Hearing Officer will describe the documentary file before the Administrative Hearing and ensure that all parties have identical document sets. (Except, in situations where a physician has not allowed certain psychiatric records to be disclosed to the Member and the Member has not retained counsel, the Member's document set may remain redacted.)
- 22.D. Applicant Presents Evidence.** Applicant's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and counsel for KCERA (and other parties in interest, if any/present) have the right to ask questions. If the application was filed by the Member's employer, the Member shall also have the opportunity to present evidence under the same terms as the Applicant.
- 22.E. Counsel for KCERA Presents Evidence.** Counsel's full presentation, including any witness testimony, is given. During this presentation, the Hearing Officer and the Applicant (and other parties in interest, if any/present) have the right to ask questions.
- 22.F. Rebuttal evidence.** Rebuttal evidence may then be presented in the same order.
- 22.G. Oral Arguments and Closing Statements.** If oral arguments are made, Applicant's oral arguments are made first, followed by other parties in interest, if any/present. Oral arguments by counsel for KCERA are last. Upon the request of any party or party in interest, written closing statements may be made and filed with the Hearing Officer after the close of the Administrative Hearing. If

written closing statements are requested by the parties or party in interest, the Hearing Officer shall determine whether to grant such request.

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Rule 23. Service of Proposed Findings of Fact and Recommended Decision.

At the conclusion of the Administrative Hearing, *Proposed Findings of Fact and Recommended Decision* of the Hearing Officer shall be sent to the Board by the Hearing Officer who presided at the Administrative Hearing within the two hundred seventy (270) calendar days described in Rule 12. The Board will serve the *Proposed Findings of Fact and Recommended Decision* on the parties in accordance with these Rules.

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Rule 24. Objections to Proposed Findings of Fact and Recommended Decision.

Pursuant to California Government Code section 31534, any party objecting to the *Proposed Findings of Fact and Recommended Decision* has ten (10) business days after service of the *Proposed Findings of Fact and Recommended Decision* to serve written objections to the Board and the other party(ies), but not the Hearing Officer. References or citations to portions of the Administrative Record, or deposition transcript, if any, may be made, but nothing shall be attached to the objections and any evidence argued in the written objections must have been admitted by the Hearing Officer at the Prehearing Conference.

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Rule 25. Action by the Board.

After the close of the ten-day (10) objection period, the **Executive Director** will submit the *Proposed Findings of Fact and Recommended Decision* at the Board's next available regular meeting.

In accordance with California Government Code section 31534, upon receipt of the *Proposed Findings of Fact and Recommended Decision*, the Board may:

- (a) Approve and adopt the Findings of Fact and Recommended Decision;
- (b) 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;
- (c) Refer the matter back, with or without instructions, to the Hearing Officer for further proceedings; or
- (d) 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.

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Rule 26. Board's Decision After Review of the Record.

In any case where the Board makes a decision based upon review of the Administrative Hearing transcript, plus all other evidence received by the Hearing Officer, the Board may approve and adopt the Hearing Officer's *Proposed Findings of Fact and Recommended Decision* or the Board shall prepare its own *Alternate Findings of Fact and Recommended Decision* for consideration. The Board's decision is final upon the Board's adoption of the *Findings of Fact and Decision*.

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Rule 27. Judicial Review.

Code of Civil Procedure section 1094.6 has been adopted and applies to judicial review of any decision of the Board or of the Kern County Employees' Retirement Association.

Rules Review and History

These Rules were adopted by the Board on April 10, 2019.

Appendices

(Form samples to be provided)



DISABILITY RETIREMENT APPLICATIONS AND CONFLICTS OF INTEREST

Dominic Brown, Executive Director
Jennifer Zahry, General Counsel

INTRODUCTION

- This presentation covers
 - potential conflicts of interest relating to disability retirement cases,
 - High level overview of KCERAs disability application processes, and
 - options for handling conflict cases

CONFLICT OF INTEREST RULES

- “Under the Act, a public official has a disqualifying conflict of interest in a governmental decision if it is **foreseeable** that the decision will have a **financial impact on his or her personal finances or other financial interests**. In such cases, there is a risk of biased decision-making that could sacrifice the public’s interest in favor of the official’s private financial interests. To avoid actual bias or the appearance of possible improprieties, the public official is prohibited from participating in the decision.” (FPPC Conflicts of Interest Rules).

PERSONAL FINANCES

- The action item involves ...
 - “the official's personal finances including **his or her** expenses, **income**, assets, or liabilities, **as well as those of his or her immediate family.**”

INCOME

- The action item involves ...
 - “[a]n individual or an entity from whom the official has received income or promised income aggregating to \$500 or more in the previous 12 months, **including the official's community property interest in the income of his or her spouse or registered domestic partner.**”

DISQUALIFYING FINANCIAL IMPACT

- If a decision may have a financial impact or effect on any of the foregoing interests, an official is disqualified from making a governmental decision if the following two conditions are met:
 - The financial impact or effect is foreseeable; and
 - The financial impact or effect is significant enough to be considered material.

NON-SERVICE CONNECTED DISABILITY

- A non-service connected disability retirement could award a member as much as 40% of his or her final average compensation.
 - A married member's interest in his or her retirement may be considered community property and subject to division if the member divorced or legally separated from spouse(s).
 - The member's pension benefit may continue to a qualifying spouse after the member's death.

SERVICE CONNECTED DISABILITY

- A service-connected disability retirement will award a member at least 50% or as much as 100% of his or her final average compensation with 50% of the benefit being non-taxable.
 - A married member's interest in his or her service retirement may be considered community property and subject to division if the member divorced or legally separated from spouse(s).
 - 100% of the member's pension benefit may continue to a qualifying spouse after the member's death with the 50% remaining non-taxable.

LIKELY SCENARIOS

- Board member applicant
- Board member's spouse as applicant
- Staff member applicant
- Staff member's spouse as applicant

RECUSAL

- An official with a disqualifying conflict of interest may not make, participate in making, **or use his or her position to influence a governmental decision.** When appearing before his or her own agency or an agency subject to the authority or budgetary control of his or her agency, **an official is making, participating in making, or using his or her position to influence a decision any time the official takes any action to influence the decision including directing a decision, voting, providing information or a recommendation, or contacting or appearing before any other agency official.** When appearing before any other agency, the official must not act or purport to act in his or her official capacity or on behalf of his or her agency.

THE CURRENT PROCESS

- SDAG provides Applicant counseling on initiating/navigating the process
- SDAG reviews file for completeness
- SDAG submits file to MMRO w/ initial documentation obtained by applicant and KCERA
- MMRO establishes member contact, administers file through review process
- MMRO provides report to SDAG with recommendation
- SDAG reviews for completeness and compliance with legal standards
- SDAG presents recommendation to Board of Retirement
- Board of Retirement make final decision on application

OPTIONS

- Process
 - Formalized Process – LACERA
 - Informal Process – Explore possibility of working with other plans that use MMRO
- Recommendation on Final Decision presented by other CERL plan representatives to KCERA's Board of Retirement
 - Trustee with conflict recuses self and does not vote.

RECOMMENDATION

- **ACTION:** Allow the Executive Director to evaluate and decide when a trustee or staff member may have a disqualifying financial interest related to a pending disability retirement matter;
- **ACTION:** Direct Executive Director to exercise discretion to send such case(s) to other CERL system(s) using MMRO.



Date: February 23, 2022
To: Trustees, Administrative Committee
From: Dominic D. Brown, Chief Executive Officer *Dominic D. Brown*
Subject: **2022-23 Chief Executive Officer Performance Evaluation Criteria**

In accordance with the Chief Executive Officer Performance Evaluation Policy, the Chief Executive Officer Performance Evaluation Criteria must be reviewed by the Administrative Committee each year for the twelve-month period in which the criterion is effective. Following is the criteria with weightings that were approved for 2021-2022, and will be used for 2022-2023:

**CHIEF EXECUTIVE OFFICER
PERFORMANCE EVALUATION CRITERIA**

1. General Management Abilities as determined by the CEO Evaluation Survey	30%
2. Financial Accounting and Reporting	15%
3. Budgetary Control	15%
4. Strategic Plan Implementation	40%
	<hr/> <hr/> 100%

The Chief Executive Officer is required to annually complete a self-evaluation and to share that with the Board, along with the results of a Climate Survey.

Therefore, it is recommended that your Committee approve the revised 2022-2023 Chief Executive Officer Performance Evaluation Criteria.