



**MARIN COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION**

CHARNEL K. BENNER, CFP
RETIREMENT ADMINISTRATOR

July 11, 2007

Marin County Grand Jury
Room 245
Civic Center
San Rafael, CA 94903

Dear Grand Jury members:

We are in receipt of your report issued in connection with your exhaustive investigation into the disability procedures followed by Marin County Employees' Retirement Association (MCERA). The board and staff thank you for and appreciate the time and effort expended on behalf of the citizens of Marin County to review the legal constraints under which MCERA operates and the process that is followed by the staff and trustees in evaluating and determining the validity of disability retirement applications placed before this MCERA board.

In accordance with Penal Code Section 933.05, our responses to your findings and recommendations are below:

Findings:

F1 The '37 Act permits county retirement boards to grant disability pensions as public obligations.

Agree.

Article I, Section 31450 of the 1937 County Employees Retirement Law states:

"The purpose of this chapter is to recognize a public obligation to county and district employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefits as additional elements of compensation for future services and to provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting a hardship upon the employees removed."

F2 There are no medical professionals on the MCERA Board of Trustees.

Agree.

F3 MCERA's Bylaws permit MCERA to grant or deny disability retirements by a majority vote of the MCERA board members.

Agree.

F4 The California Attorney General has opined that the Ralph M. Brown Act permits closed hearings for disability pensions. Accordingly, MCERA's board has voted to hold all disability hearings in closed sessions unless the applicant requests an open session.

Disagree partially with the finding.

The California Attorney General has opined that a county retirement board may meet in closed session to discuss and evaluate medical records submitted in connection with an employee's application for a disability retirement. (See, 88 Ops. Cal. Atty. Gen. 16 (2005). Thus, MCERA's Board has voted to conduct such portions of its meetings in closed session, unless an applicant requests that the meeting be conducted in open session and waives confidentiality with respect to the discussion of his or her medical records.

Hearings, as opposed to meetings, are conducted by a single hearing officer (usually an administrative law judge for MCERA's hearings). Such hearings are not considered meetings of a public body under the Ralph M. Brown Act; they also include the consideration of confidential medical information. Thus, such hearings need not be, and are not, conducted in public, unless the applicant so requests and provides the appropriate waivers of confidentiality.

F5 MCERA has no written document in simple language setting forth the detailed steps of the entire disability process that is available to the disability applicant or public.

Disagree.

MCERA's bylaws are available on MCERA's website at www.mcera.org, or paper copies will be provided to the public upon request. Part X of the bylaws sets forth the procedures for applications for disability retirement. Included in this easy to read format are the submission requirements for a disability application, procedural requirements to request a continuance and/or hearing, the relevant time frames involved, and the powers of the Retirement Board with respect to the application. Furthermore, the bylaws describe the process by which an application may be referred to a hearing officer, describes the hearing process and procedural requirements, including the taking of evidence and depositions, the powers of the hearing officer, the rights of the applicant to be represented by counsel, the applicant's right to due process under the law, and the applicant's right to an appeal.

Additionally, the application and review process, as well as the eligibility criteria for receiving a disability retirement, are provided to applicants by the staff during the application process. At that time, MCERA obtains a release for medical records from the applicant, who is then informed that his or her complete medical file will be requested and made available to staff and Board members in connection with their review of the applicant's application. They are also informed that MCERA requires an independent medical examination by a physician chosen by the Association, and that the process can take from 6-12 months, or longer, to complete. They are again informed of his or her right to be represented by legal counsel.

The Retirement Plan handbook (copies of which are displayed on the front counter in the Retirement Office and are available on the association website) also provides general information about the disability retirement benefits available. Lastly, the 1937 Act, which also contains rules governing the handling of disability retirement applications, is posted on MCERA's website.

- F6 MCERA's closed disability hearings are among the early items on its agenda, causing long, unpredictable waits for the public to hear business matters considered in open session.**

Agree.

- F7 The incremental cost between a disability pension and a normal pension is relatively small if the employee is close to retirement age and eligible for a normal pension. MCERA board members believe this, but there are no estimates to prove it.**

Agree.

- F8 The administrative costs to resolve whether a disability application should be granted or denied can be high because of the need for professional medical and/or legal advice.**

Agree partially with the finding.

The cost to process disability retirement applications is a necessary expense of administration. Whether these costs are 'high' or 'low' is subjective, especially when one considers the potential for costly litigation for violation of applicants' rights of due process or otherwise and/or the awarding of disability retirement pensions without properly investigating their validity.

- F9 Before making a decision on a disability application with conflicting opinions and/or factual discrepancies, MCERA refers the application to a hearing conducted by an administrative law judge.**

Agree.

As contemplated by Government Code section 31533, MCERA's Board refers disability retirement applications to a formal hearing when there is conflicting medical or other relevant evidence, so as to permit the development of a more complete administrative record, which includes the examination and cross-examination of witnesses.

Recommendations:

R1 The Marin County Board of Supervisors appoint a medical professional to MCERA when a vacancy of one of its four appointees occurs.

The recommendation will not be implemented by MCERA, because it is not within MCERA's power or authority to appoint members to its Board.

The appointment of Trustees remains within the sole authority of the County Board of Supervisors. Moreover, to appoint one Board member solely on the basis of his or her professional training suggests that one trustee's opinion should be given more weight than the opinion of other trustees in the discharge of their duty to determine the factual issues surrounding whether a member of MCERA is permanently incapacitated for duty or otherwise. Affording such deference to one Board member on the basis of his or her professional training is wholly incompatible with the Board's operating philosophy of one trustee, one vote.

R2 MCERA establish procedures, to the extent permitted by applicable law, so that the majority vote needed to grant or deny a disability retirement would require at least one vote by a Board of supervisors' appointee.

The recommendation will not be implemented because to do so would violate applicable law.

First, this recommendation is inconsistent with provisions of the California Pension Protection Act of 1992, establishing the plenary authority of the Retirement Board, and its independence from undue control by County government. That Act is now incorporated into Article XVI, Section 17 of the California Constitution which states, in part:

"The people of the State of California hereby find and declare as follows:

...(f) To protect pension systems, retirement board trustees must be free from political meddling and intimidation...

(g) The integrity of our public pension systems demands that safeguards be instituted to prevent political "packing" of retirement boards, and encroachment upon the sole and exclusive fiduciary powers or infringement upon the actuaries duties of those retirement boards."

Section 3 states, in part:

“The people of the State of California hereby declare that their purpose and intent in enacting this measure is as follows:

(a) To protect pension funds so that retirees and employees will continue to be able to enjoy a basic level of dignity and security in their retirement years...

(e) To give the sole and exclusive power over the management and investment of public pension funds to the retirement boards elected or appointed for that purpose, to strictly limit the Legislature’s power over such funds, and to prohibit the Governor or any executive or legislative body of any political subdivision of this state from tampering with public pension funds.

(f) To affirm the legal principle that a retirement board’s duty to its participants and their beneficiaries takes precedence over any other duty.”

Second, altering the method of determination regarding the validity of a disability retirement application to give Board of Supervisors appointees additional weight in the decision could result in the denial of due process to the applicant. *See e.g., Button v. Board of Administration*, 122 Cal. App. 3d 730, 738 (1981) (“Due process requires that administrative hearings be full and fair.”); *see also Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Third, affording such deference to a specified group of Board members is wholly incompatible with the Board’s operating philosophy of one trustee, one vote and is inconsistent with rules of order which govern boards generally.

R3 A detailed document in simple language describing the steps of the entire disability process be: (1) created for distribution to the public or applicant upon request and (2) posted on MCERA’s web site. This should be completed by December, 2007.

This recommendation is in the process of being implemented.

MCERA staff recently embarked on a project to produce and post additional information on the MCERA website. We recently completed revisions to existing forms and developed several new ones that are in legal review, and expect those to be available shortly. We are currently reviewing board policies and drafting procedures as well as developing “Frequently Asked Questions” on a broad range of subjects. Developing a plain language description of the disability retirement process falls within the scope of that project, which should be completed by December, 2008.

R4 MCERA accommodate the public by setting a designated time for discussion on issues open to the public in MCERA board meetings.

This recommendation has been implemented to the extent possible.

All of MCERA's board meetings are set at a designated time (usually 9:00 am) and the meetings are open to the public, except to the extent that specified matters are to be considered in closed session. Unfortunately, it is not possible to anticipate how long the Board will need to deliberate in closed session. Accordingly, the Board is unable to set a designated time at which closed session will be over and open session of the meeting will recommence.

It should also be noted that the Board has chosen to consider disability applications, which are typically discussed in closed session (*see* MCERA response to Finding No. 4 above), early on its agenda as an accommodation to its members who are applying for disability retirement and in the interest of ensuring that the Board has sufficient time to consider fully those applications. The Board believes this decision is appropriate in light of all of the interests involved.

R5 The 10 participating employers work with the MCERA board to estimate an incremental cost for a disability retirement compared to a normal retirement.

The recommendation will be implemented, provided that the Board of Supervisors and/or the governing board of other participating employers fund the recommended analysis.

Proposition 162, The California Pension Protection Act of 1992, Section 3(a) states, in part:

"... The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system."

It is the opinion of the Retirement Board that the recommended analysis falls outside of the scope of "reasonable expenses of administering the system", because the data derived from such an analysis will do little to improve system administration, in that the information may not be acted upon by MCERA. However, if the analysis is funded by MCERA's participating employers, then MCERA's board will cooperate fully.

R6 The 10 participating employers work with the MCERA board to keep a record of the administrative costs for each disability application referred to a formal hearing.

The recommendation has not yet been implemented, but it will be implemented beginning with the 2007-08 fiscal year.

The recommendation requires neither additional funding by MCERA, nor cooperation from MCERA's participating employers to implement.

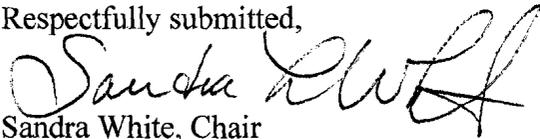
R7 MCERA make a preliminary decision on a disability claim even if there are conflicting opinions.

The recommendation already has been implemented.

By referring any matter to a hearing officer, MCERA's Board has, in effect, made a preliminary decision to deny the application unless and until additional competent evidence is produced through the hearing process to support granting of the application. Unless and until such evidence is produced, and the Board is persuaded that the evidence satisfies the applicable legal standards to support granting a disability retirement, the applicant is not granted disability retirement.

We hope that the foregoing is responsive to your findings and recommendations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra White". The signature is written in a cursive, flowing style.

Sandra White, Chair

Marin County Employees' Retirement Association