

MARIN COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
GUIDELINES FOR DISCUSSION OF DISABILITY RETIREMENT AND SURVIVOR BENEFIT
APPLICATIONS AT BOARD MEETINGS

ADOPTED: DECEMBER 11, 2013

AMENDED: MARCH 12, 2014

AMENDED: NOVEMBER 5, 2014

AMENDED: MAY 9, 2018

Public Comment

If a matter is set on the Board's *open session* agenda, then comments may be made by members of the public either during the general public comment agenda topic at the commencement of the meeting, or when the specific agenda item is called.

Discussions in Closed Session

Unless an applicant requests that his or her disability retirement application be considered in open session, the Board will consider the application in closed session. The Board considers disability retirement applications in closed session in reliance on a 2005 California Attorney General opinion that concluded that the Brown Act's "personnel exception" applies to a public retirement board's discussion and evaluation of such applications. The rationale of that Attorney General opinion does not, however, apply to permit consideration of survivor benefit applications (submitted when a member dies prior to commencing an MCERA retirement) in closed session.

Recusals

The Board is serving in a quasi-judicial role when acting on disability retirement applications. Accordingly, each Board member will endeavor to determine, prior to participating in any Board consideration of the application, whether he or she has information about a particular applicant that he or she obtained outside of the administrative proceeding presented to the Board that would render that Board member unable to act impartially with respect to that applicant. In that event, the Board member will recuse him or herself from the process (i.e., leave the room). In addition, if the applicant works within the same employing department as any Board member, that Board member should consult with the Board's legal counsel prior to participating in the matter to assess whether recusal may be warranted under Government Code section 1090 or otherwise.

Pro Se Applicants

Applicants may choose to represent themselves ("Pro Se"). Pro se applicants should know the following in advance of the Board's consideration of the application:

- a. MCERA will be represented by an attorney who may present factual and legal arguments in opposition to the application.

- b. The Board will have separate independent counsel who will represent and advise the Board during the presentations and its deliberations; that attorney does not act as an advocate for, or against, the application.
- c. If the application is considered in closed session, the Brown Act permits only the Board members and MCERA staff, consultants, and official presenters such as MCERA's medical advisor, in the meeting so as to avoid a "semi-closed" meeting. The California Attorney General has confirmed that the Brown Act also permits the Board to allow the applicant, as an interested party, and his or her "representative," as an advocate, to present during closed session. An applicant who is not represented by a lawyer may request, at least one week in advance of the Board meeting, that a duly appointed attorney-in-fact, or another representative, attend closed session to advocate on his or her behalf. The Board, in consultation with the Retirement Administrator and Board counsel, will determine prior to consideration of the application, whether the proposed non-attorney advocate has either an "official or essential" role to play in closed session, as required by the Brown Act, and thus whether such attendance will be permitted. Persons without an official or essential role in the meeting should not be present.
- d. Board members will have received and read all the documentation related to the application prior to the meeting where the Board considers it.
- e. Applicants representing themselves need not repeat information that is in the documentation but instead should summarize for the Board the relevant factual and legal points that support their applications.
- f. Applicants and MCERA's counsel will generally each be afforded 10 minutes to present their arguments, and 5 minutes will be provided for rebuttal, if requested.

Counsel Argument and Trustee Questions

The Board Chair will first invite legal counsel for the applicant, or the applicant if Pro Se, and then MCERA's counsel, to present their arguments. The Board Chair may also permit each presenter to provide rebuttal argument for a limited period of time, at the discretion of the Chair.

Upon recognition by the Board Chair, any trustee on the Board, including alternates, may ask questions of counsel or the applicant. The Board Chair may permit one question per trustee, until all trustees have asked a question, and then may proceed with additional questions from other trustees. Trustees must request to be acknowledged by the Chair prior to asking questions. Once all trustees have asked their questions of counsel, and counsel have completed their arguments, including any rebuttal, the Chair will ask counsel for the applicant, if any, and the applicant, and counsel for the Association, whether their cases have been submitted. Once both parties have submitted their cases, they are to leave the room.

The Board may ask its medical advisor to join the meeting to discuss the medical reports presented and to respond to questions from the Board members about the medical information presented. The medical advisor will leave the room during the Board's deliberations in closed session.

The Board may also invite MCERA staff to comment on the summary recommendation that was

prepared for the Board's consideration.

Legal Standards

Government Code section 31724 provides, in pertinent part, "If the proof received...shows to the satisfaction of the Board that the member is permanently incapacitated physically or mentally for the performance of his duties..., it shall retire him...." To determine whether a disability retirement application should be granted, the Board must therefore first determine if the applicant is permanently incapacitated. The Board has adopted the following definition of permanent incapacity:

The incapacitating condition is expected to continue for such an extended and uncertain duration of time to be considered permanent according to competent medical evidence, and as determined by the Board.

If the Board concludes that the applicant has proven, by a preponderance of the evidence (i.e., more likely than not), that he or she is permanently incapacitated so as to be unable to perform his or her usual job duties, then, at a minimum and so long as the member has completed five years of service as required by Government Code section 31720(b), the Board should grant a non-service connected disability retirement. Next, the Board must determine, even if the applicant has not completed five years of service, whether under section 31720(a) and applicable case law the applicant has proven, by a preponderance of the evidence, that there is a real and measurable connection between his or her county or district employment and that incapacitation. If so, then the Board should grant a service-connected disability retirement.

Board Deliberations, Motion and Voting

Once the matter is submitted, in accordance with Robert's Rules of Order, the Chair should ask if any trustee would like to make a motion.

On a matter that has not yet been considered in an administrative hearing, the six possible motions available to the Board are as follows:

- a. The Board may grant the application for service-connected disability retirement benefit.
- b. The Board may deny the application for service-connected disability retirement benefit, grant the application for non-service-connected disability retirement benefit and provide the applicant with the opportunity to request an administrative hearing on service connection.
- c. The Board may deny the application in its entirety and provide the applicant with the opportunity to request an administrative hearing on the denial.
- d. The Board may remand the application to staff for further review.
- e. The Board may refer the matter for an administrative hearing.
- f. The Board may deny all or a portion of the application and permit the Applicant to seek reconsideration of the denial within a designated period of time, with briefing to be provided by the Applicant and MCERA's counsel on one or more topics that the Board will identify.

On a matter that already has been considered in an administrative hearing as to which the hearing officer (e.g., Administrative Law Judge) has provided the Board with proposed findings of fact and recommendations, four different motions are available to the Board (under Gov. Code sec. 31534):

- a. The Board may approve and adopt the proposed findings and recommendations of the hearing officer.
- b. The Board may 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. The Board may refer the matter back with or without instructions to the hearing officer for further proceedings.
- d. The Board may 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 referee.

Once a motion is made and seconded, trustees may debate the motion. The maker of the motion has first right to the floor if he or she claims it promptly. All remarks should be addressed to the Chair. Debate must be confined to the merits of the motion. Debate can be closed only by a 2/3 vote or by the Chair if no one seeks further debate. Once debate is closed, the Chair puts the motion to a vote. The Chair may request a roll call vote. The Chair then announces the result of the vote. If the motion does not pass by majority vote of the Board, then another trustee makes a motion according to the procedure outlined above, until a motion passes.

Voting by Board members is to comply with Government Code sections 31520.1 and 31520.5. In particular, all regular Board members are to vote when they are present at a meeting, unless they have recused themselves. The alternate retiree member is to vote if the regular retiree member is absent from the Board meeting, for any cause. The alternate safety member is to vote if either elected miscellaneous or the regular safety are absent from the Board meeting, or if the retiree and the alternate retiree member are absent from the meeting, for any cause.

In addition, the Board has interpreted the “same service” provision in Government Code section 31520.1 to mean that the alternate safety member shall sit on the Board in the place of the regular safety member to vote if a member of the “same service” as the regular safety member is before the Board for determination. For example, if the regular safety member is in law enforcement, then when the applicant before the Board is in law enforcement, the alternate safety member (who would be in fire suppression) would vote on the matter.

Announcing the Decision

Immediately after adjournment of closed session, the Chair will announce the Board’s decision in open session, as well as the total vote tallies, and the votes of each Board member (which may be summarized by, among other things, identifying by name only the dissenting voters or by reporting a unanimous vote). That announcement will also be reported in the minutes of the Board meeting.