



June 4, 2019

TO: Each Member,
Board of Retirement

SUBJECT: BOR Meeting on June 5, 2019 – Green Folder Item

Following you will find the Green Folder item for the above mentioned meeting:

Item VII. A. – Update on Assembly Bill 664 (Attachment – SCERS Board of Retirement Regular Meeting of May 15, 2019)

FOR INFORMATION ONLY

May 28, 2019

TO: Each Member
Board of Retirement

FROM: Barry W. Lew 
Legislative Affairs Officer

FOR: June 5, 2019 Board of Retirement Meeting

SUBJECT: **Update on Assembly Bill 664—Disability Retirement and Peace Officers**

Author: Cooper [D]
Sponsor: Sacramento County Law Enforcement Managers Association
Introduced: February 15, 2019
Amended: March 13, 2019
Status: To SENATE Committees on LABOR, PUBLIC EMPLOYMENT & RETIREMENT and APPROPRIATIONS. (05/22/2019)

BOR Position: Support (05/01/2019)
IBLC Recommendation: Support (04/11/2019)

SUMMARY

AB 664 would require that any member who is employed as a peace officer under Section 830 of the Penal Code shall be evaluated under a retirement system's existing procedures to determine if he or she can perform all of the usual and customary duties of a peace officer. The evaluation would be based on the standards for peace officers as specified in Section 1031 of the Government Code. The bill, which only applies in the County of Sacramento, would also require the Board of Retirement of the Sacramento County Employees' Retirement System to track the costs of providing disability retirement to members retired under these provisions. If passed, the bill provides that the new requirements shall remain in effect until December 31, 2024, at which time the section is repealed.

DISCUSSION

At its meeting of May 1, 2019, LACERA's Board of Retirement adopted a "Support" position on AB 664. Staff provided an update of the Board of Retirement's "Support" position to Eric Stern, Chief Executive Officer of the Sacramento County Employees' Retirement System (SCERS). Mr. Stern informed staff that he intended to recommend

that the SCERS Board of Retirement oppose AB 664. At its meeting of May 15, 2019, the SCERS Board of Retirement voted 7-2 to oppose AB 664.

Attached is Mr. Stern's memorandum on AB 664 outlining several areas of concern with the bill, including inaccurate portrayal about SCERS' current practice, misperception about the legal standard, local control, new job duties in updated class specifications, SCERS' process in using an outside medical advisor, burden of proof, fiscal impact, and the bill's reporting requirement.

The bill unanimously passed the Assembly (76-0) on May 13, 2019. The bill is currently in the Senate, and has been referred to the relevant Senate committees.

Staff presents this update so that the Board is aware of the current status of the bill and can consider whether it warrants a change in the Board's current "Support" position or other action.

Reviewed and Approved:



Steven P. Rice, Chief Counsel

Attachment

SCERS Board of Retirement Regular Meeting of May 15, 2019: Agenda Item 10

cc:

JJ Popowich
Steven P. Rice
Vincent Lim
Ricki Contreras
Frank Boyd
Joe Ackler, Ackler & Associates



Board of Retirement Regular Meeting

Sacramento County Employees' Retirement System

Agenda Item 10

MEETING DATE: May 15, 2019

SUBJECT: Legislative Update – AB 664

SUBMITTED FOR: ___ Consent X Deliberation and Action ___ Receive and File

RECOMMENDATION

Staff recommends the Board oppose Assembly Bill (AB) 664.

PURPOSE

This item complies with the 2018-19 Strategic Management Plan goal to maintain prudent and effective policies and practices that support plan sustainability.

BACKGROUND

Assembly Member Jim Cooper has introduced AB 664 on behalf of the Sacramento County Law Enforcement Managers Association (LEMA). On April 24, 2019, the Assembly Committee on Public Employment and Retirement voted 7-0 to send the bill to the Assembly floor.

The bill establishes a broader standard for determining service-connected disability retirement for peace officers than is currently required by statute and case law. Specifically, the bill requires the Retirement Board evaluate a disability applicant based on the member's ability to perform all of the usual and customary duties of a peace officer. The existing legal standard requires an evaluation of the applicant's ability to perform the usual and customary duties of their current job, which may not require all of the physically demanding activities of a peace officer.

In 2017, Assembly Member Cooper introduced a similar bill, AB 283, which died in a Senate committee. This year's version includes the following provisions:

- Applies only to Sacramento County.
- Sunsets on December 31, 2024.
- Requires SCERS to track the costs of providing disability benefits under the broader standard.

DISCUSSION

SCERS—as well as other retirement systems—often avoid taking positions on legislative bills that modify or enhance pension benefits, preferring to serve as an “honest broker of information.” However, taking a neutral position is not appropriate because AB 664 applies only to Sacramento County and directly affects SCERS. The bill may also give the incorrect impression that SCERS has not treated members fairly or is inconsistently applying disability law under the County Employees’ Retirement Law of 1937 (CERL or 1937 Act). Engaging the Legislature will help correct the record.

Inaccurate portrayal about current practice. The bill’s sponsors contend that SCERS’ policy is to deny disability applications from peace officers in management positions because of their rank as a manager. In reviewing SCERS’ disability applications over the last 10 years, the Board concluded 104 service-connected disability cases from the Sheriff’s Department. Only four applications were submitted by management employees (captains or lieutenants). The Board granted two of the applications. The Board denied the other two applications, which were subsequently appealed to and denied by Administrative Law Judges and ultimately denied by the Sacramento County Superior Court.

Based on this data—and a 50% approval rate—there is not a systematic pattern or even an adequate data set to conclude that SCERS has a blanket policy to deny disability applications for peace officers in management positions. Because disability cases are confidential due to their medical nature, Staff cannot comment on any particular case that may have prompted the bill, but note that the underlying facts of each case are unique and based on a professional review of medical records.

Staff acknowledges that more work is needed to provide education and outreach to the Sheriff’s Department staff and employee groups to explain the disability process and standards. Staff recently committed to holding quarterly meetings with Sheriff’s Department administrative and human resources staff to review the status of pending disability cases and provide general information sharing. SCERS also has retained a Communication and Media Officer to help finalize disability handbooks and brochures as part of a broader member engagement effort.

Misperception about legal standard. The bill’s supporters argue there is an ambiguity in the law that needs to be corrected. In general, permanent incapacity for the performance of duty is determined by the inability of the member to substantially perform his or her usual duties. This standard was established in *Mansperger v. Public Employees’ Retirement System* (1970) and applies to disability cases under the CERL (see *Harmon v. Board of Retirement of San Mateo County* (1976) and *Schrier v. San Mateo County Employees’ Retirement Association* (1983). The courts upheld SCERS’ denials of disability claims referenced above under the *Mansperger* standard. While there may be a legitimate policy disagreement about the standard, there is no legal ambiguity about a well-established legal precedent in effect since the 1970s.

Local control. Supporters of AB 664 also contend the bill is needed to correct an inconsistency in the way the 20 county retirement systems interpret disability law because some retirement systems do use a broader standard regarding peace officer duties to grant disability awards. SCERS conducted a survey in April 2019 and found only 20%, or four, CERL systems –

Mendocino, Orange, San Bernardino, and San Joaquin—already apply the broader standard proposed by the bill. The other 80% of county retirement systems, including Sacramento, evaluate the usual and customary job duties on a case-by-case basis, consistent with case law. Inherent in the 1937 Act is the expectation that the 20 separate and independent retirement boards may apply different standards when making benefit determinations. Though this bill is characterized in the committee analysis as a “pilot project” for Sacramento County, it has the potential to create a uniform approach for all counties that conflicts with the local control provided by the 1937 Act and change the way in which 80% of county retirement systems review and adjudicate disability claims.

New job duties. In November 2017, the Sacramento County Civil Service Commission approved new class specifications for Sheriff’s Captains and Lieutenants. The class specifications now state that captains and lieutenants must possess sufficient physical ability to perform the full scope and functions of a peace officer “...including but not limited to the ability to frequently use physical force to restrain, defend against, or arrest uncooperative/combatative persons, drag lift a 160 pound person, and be able to run, jump, and climb in emergency situations.” Adding physical requirements to the job duties of peace officers in management positions will be taken under consideration as part of the medical review of disability applications.

Because the class specifications are new and appear to accomplish the same goal as AB 664, it will take time for SCERS to incorporate the job duties into the medical-review process. No captains and lieutenants have applied for service-connected disability retirement since the updated class specifications went into effect in 2017. Therefore, AB 664 is not necessary to direct disability determinations that SCERS might otherwise grant in the future.

Assuming the eligibility and filing requirements are met, it is reasonable to expect that the broader scope of job duties will make it harder for SCERS to deny future service-connected disability claims to Sheriff’s Captains and Lieutenants. However, it is important to note that the new class specifications will not guarantee a disability award. Each application will still be evaluated on a case-by-case basis.

Defensible process. In May 2016, SCERS began utilizing an outside Medical Advisor to review all medical records in order to make an initial disability determination. Previously, Staff would make an initial recommendation based on a lay-person’s review of medical files. This arms-length approach has added more objectivity to the Board’s decision-making.

Burden of proof. An essential step in determining disability is to evaluate if the member can return to work with a reasonable accommodation. Staff engages the applicant’s department to inquire if an accommodation can be made (or could have been made if the applicant has discontinued service), based on the restrictions identified by SCERS’ outside Medical Advisor. This bill shifts the burden of proof away from the applicant, and presumes that any peace officer, regardless of position, should receive a disability award if he or she can demonstrate a prior work-related injury, even if the employee is able to return to work with an accommodation.

Fiscal impact. This bill enhances benefits, which increases pension costs to the extent more members seek disability benefits due to the lower eligibility standard. Disability retirement can provide a higher lifetime pension for members without substantial years of service, a higher

continuance benefit for a surviving spouse, and a significant tax exemption. SCERS also will face higher administrative costs if more disability applications are filed. SCERS incurs thousands of dollars for medical review on behalf of each applicant, and tens of thousands of dollars on legal costs if a hearing is held before Administrative Law Judge. Additionally, granting more disability awards than what was actuarially assumed will increase unfunded liabilities.

Reporting requirement. SCERS will have difficulty complying with the reporting requirement to track costs related to the new standard. The reporting requirement assumes that disability benefits would be granted that otherwise would not be. This premise does not take into consideration the case-by-case nature of disability determinations, the recent change in class specifications, and other administrative changes to SCERS review process. This places SCERS in an untenable situation of guessing that SCERS would have denied an application, even if it very well would have granted retirement disability. Based on historic data, it is possible there will be zero applications that could be tested under the proposed standard before the bill sunsets in 2024.

ATTACHMENTS

- AB 664 (as amended March 13, 2019)
- Bill Analysis, April 24, 2019, Assembly Committee on Public Employment and Retirement Analysis

Prepared by:

/S/

Eric Stern
Chief Executive Officer

AMENDED IN ASSEMBLY MARCH 13, 2019

CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL

No. 664

Introduced by Assembly Member Cooper

February 15, 2019

An act to ~~amend Section 31720 of~~ *add and repeal Section 31720.2* of the Government Code, relating to county employees' retirement.

LEGISLATIVE COUNSEL'S DIGEST

AB 664, as amended, Cooper. County employees' retirement: permanent incapacity.

The County Employees Retirement Law of 1937 provides that a member who is permanently incapacitated shall be retired for disability despite age if, among other conditions, the member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and that employment contributes substantially to that incapacity or the member has completed 5 years of service and not waived retirement in respect to the particular incapacity or aggravation thereof, as specified.

This bill would require, for purposes of determining permanent incapacity of certain members employed as ~~peace officers~~, *officers in the County of Sacramento*, that those members be evaluated by the retirement system to determine if they can perform all of the usual and customary duties of a peace officer, as specified. The bill would apply to members who file applications for disability on or after the effective date of the act, except for cases on appeal at that time. The bill ~~also would make nonsubstantive changes to that provision.~~ *would require the board of retirement to develop a method of tracking the costs of providing permanent disability retirement to the members who become*

eligible for disability retirement pursuant to the bill’s provisions. The bill would repeal these provisions on December 31, 2024.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 31720.2 is added to the Government Code,
2 to read:

3 31720.2. (a) Notwithstanding subdivision (b) of Section 31720,
4 in determining permanent incapacity for a member who is
5 employed in a position classified as a peace officer under Section
6 830 of the Penal Code, the member, based on the standards
7 specified in Section 1031, shall be evaluated by the existing
8 procedure established by the retirement system to determine if that
9 member can perform all of the usual and customary duties of a
10 peace officer who is described under Section 830 of the Penal
11 Code.

12 (b) This section shall apply to a member who files an application
13 for disability retirement on or after the effective date of this section,
14 and shall not apply to an appeal brought before that date.

15 (c) This section shall only apply in the County of Sacramento.

16 (d) The board shall develop a method of tracking the costs of
17 providing permanent disability retirement to the members who
18 become eligible for disability retirement under this section.

19 (e) This section shall remain in effect only until December 31,
20 2024, and as of that date is repealed.

21 ~~SECTION 1. Section 31720 of the Government Code is~~
22 ~~amended to read:~~

23 ~~31720. (a) Any member permanently incapacitated for the~~
24 ~~performance of duty shall be retired for disability regardless of~~
25 ~~age if, and only if:~~

26 ~~(1) The member’s incapacity is a result of injury or disease~~
27 ~~arising out of and in the course of the member’s employment, and~~
28 ~~that employment contributes substantially to that incapacity, or~~

29 ~~(2) The member has completed five years of service, and~~

30 ~~(3) The member has not waived retirement in respect to the~~
31 ~~particular incapacity or aggravation thereof as provided by Section~~
32 ~~31009.~~

1 ~~(b) For any member who is employed in a position classified~~
2 ~~as a peace officer under Section 830 of the Penal Code, in~~
3 ~~determining permanent incapacity pursuant to subdivision (a), the~~
4 ~~member, based on the standards specified in Section 1031, shall~~
5 ~~be evaluated by the existing procedure established by the retirement~~
6 ~~system, to determine if that member can perform all of the usual~~
7 ~~and customary duties of a peace officer who is described under~~
8 ~~Section 830 of the Penal Code.~~

9 ~~(e) The amendments to this section enacted during the 1979-80~~
10 ~~Regular Session of the Legislature shall apply to all applicants for~~
11 ~~disability retirement on or after the effective date of those~~
12 ~~amendments.~~

13 ~~(d) The amendments to this section enacted during the 2019-20~~
14 ~~Regular Session of the Legislature shall apply to any member who~~
15 ~~files an application for disability retirement on or after the effective~~
16 ~~date of the amendments, except that the amendments shall not~~
17 ~~apply to an appeal brought before the effective date of these~~
18 ~~amendments.~~

Date of Hearing: April 24, 2019

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYMENT AND RETIREMENT

Freddie Rodriguez, Chair

AB 664 (Cooper) – As Amended March 13, 2019

SUBJECT: County employees' retirement: permanent incapacity

SUMMARY: Requires, for purposes of determining incapacity of certain peace officers in the County of Sacramento, that they be evaluated by the county retirement system to determine ability to perform duties, as provided, among other provisions. Specifically, **this bill:**

- 1) Requires, for purposes of determining permanent incapacity, Penal Code Section 830 peace officers to be evaluated by the existing procedure established by the retirement system to determine if the member can perform all of the usual and customary duties of a peace officer, as provided.
- 2) Provides that these provisions apply to a member who files an application for disability retirement on or after the effective date of this bill, and that it does not apply to an appeal brought before that date.
- 3) Establishes that this bill only applies to the County of Sacramento.
- 4) Requires the county retirement board to develop a method of tracking the costs of providing permanent disability retirement to members who become eligible for disability retirement, in accordance with these provisions.
- 5) Repeals these provisions on December 31, 2024.

EXISTING LAW:

- 1) Establishes the County Employees Retirement Law of 1937 ('37 Act), which governs 20 independent county retirement associations, and provides for retirement systems for county and district employees in those counties adopting its provisions. Currently, 20 counties operate retirement systems under the '37 Act.
- 2) Contains several optional provisions that counties operating retirement systems established under the '37 Act can adopt that require safety members to retire once they reach a certain age (60, 65, etc.).
- 3) Establishes comprehensive public employee pension reform through enactment of the Public Employee Pension Reform Act (PEPRA) that apply to all public employers and public pension plans on and after January 1, 2013, excluding the University of California and charter cities and counties that do not participate in a retirement system governed by state statute.

- 4) Provides that a member permanently incapacitated for the performance of a duty must be retired for disability regardless of age, only if:
 - a) The incapacity is a result of injury or disease arising from, and in the course of, the member's employment, and that employment substantially contributes to the incapacity; or
 - b) The member has completed five years of service; and
 - c) The member has not waived retirement due to the incapacity, or aggravation thereof, as specified.

- 5) Establishes that permanent incapacity for the performance of duty must, in all cases, be determined by the '37 Act county retirement board.

If a medical examination and other available information do not show, to the satisfaction of the board, that the member is physically or mentally incapacitated for the performance of duty, and the application for disability retirement is denied by the board, the board must provide notice of the denial to the employer. However, an employer may seek judicial review or intervene in an action filed by the member, as provided. If certain actions are not adhered to relating to judicial review and the member has been dismissed by the employer for disability, the employer must reinstate the member to employment effective as of the day following the effective date of dismissal.

- 6) Permits, as deemed necessary by a '37 Act county retirement board, to require proof, including a medical examination at the expense of the member or on its own accord, to order a medical examination to determine the existence of a disability.
- 7) Prohibits, in determining whether a member is eligible to retire for disability, a county retirement board from considering a medical opinion unless it is deemed competent, and from using disability retirement as a substitute for the employer's disciplinary process.
- 8) Establishes, for purposes of determining disability retirement, several rebuttable presumptions for a safety member where a health condition or disease arose out of, and in the course of employment. Cancer, heart trouble, blood-borne infectious diseases, and exposure to biochemical substances are among these presumptions.
- 9) Requires peace officers, as specified, to be free from any physical, emotional or mental condition that might adversely affect the exercise of powers of a peace officer and meet standards developed by the Commission on Peace Officer Standards and Training (POST) to attain peace officer status.

- 10) Defines a peace officer in Penal Code Section 830 as any person who comes within the provisions of Chapter 4.5 of the Penal Code who otherwise meets all standards imposed by law on a peace officer and includes in addition to police, sheriff, deputies, several other categories of positions including security officers of municipal utilities and water districts, park rangers of water districts, welfare fraud investigators, child support inspectors, and various other law enforcement-related positions.
- 11) Provides that the restriction of peace officer functions of any public officer or employee shall not affect his or her status for purposes of retirement.

FISCAL EFFECT: Unknown. This bill is flagged as non-fiscal by Legislative Counsel.

COMMENTS: According to information from the author, “[t] CERL allows for a permanent incapacity status for its members. This status is determined at the time of retirement, only if the member applies for it and only if certain conditions are met.

‘In some cases this status is denied or granted, depending on how each ‘37 Act retirement board interprets the law. For example, the Sacramento County Employees Retirement System (SCERS) will deny permanent incapacity status and benefits to sworn law enforcement managers because enforcement is not part of their usual and customary duties as a manager. In contrast, the Alameda County Employees Retirement Association does grant this status to sworn law enforcement managers who meet the criteria of permanent incapacity.

‘The problem lies within the interpretation of existing law between 37’ Act retirement systems and how it is applied to peace officers, as defined by Section 830 of the Penal code, differently. Assembly Bill 664 will create a “pilot program” for the SCERS by changing the language of the law to apply to all peace officers, regardless of their classification. [This bill] will not change the authority of SCERS to ensure the employee meets the other requirements of permanent incapacity.

‘The law is needed for a few reasons. First, consistency. Although 37’ Act counties are independent, they are all subject to the CERL. This specific problem creates a situation where employees under the jurisdiction of the CERL are treated differently in regards to retirement benefits from one system to another.

‘Secondly, as a Section 830 Penal Code peace officer in California, one is sworn to uphold the laws and to react to criminal activity regardless of rank or day-to-day assignments. Every peace officer must maintain the physical and mental ability to exercise the power of a peace officer [pursuant to existing law]. This is regardless of rank or assignment. This is evident in times of natural disasters, civil unrest and situations in which an officer, on- or off-duty, must react and engage when they see a felony in progress. Just in individual department policies alone, failure to act can lead to adverse action such as ‘incompetency’ or ‘dereliction of duty.’”

The author states that, “[t]he hazards of being a peace officer never stop, regardless of the assignment or rank. A sworn peace officer has a statutory and administrative responsibility to respond to violent crime, civil unrest and even natural disasters when ordered to do so. This includes sworn law enforcement managers. AB 664 simply provides for the time to study the balance between the health of one retirement system and the fairness of protecting employees who have been permanently incapacitated because they have given everything in protecting the public.

1) Similarities in the CERL Related to Administration of Retirement Benefits by CERL Retirement Boards, but the CERL Also Recognizes and Allows a Modicum of Difference Among Them

As stated under “Existing Law” *supra*, 20 counties currently operate separate retirement systems under the ’37 Act. The counties are: Los Angeles, Orange, San Diego, Alameda, San Bernardino, Sacramento, Contra Costa, San Mateo, Fresno, Ventura, Kern, San Joaquin, Santa Barbara, Marin, Sonoma, Stanislaus, Tulare, Merced, Imperial, and Mendocino.

The CERL establishes “classes” of each county operating a retirement system which mirror the population of each county as ascertained and determined pursuant to Section 28020 of the Government Code. For example, under the CERL, Los Angeles County is of the first class; Orange County is of the second class; San Diego County is of the third class; Alameda County is of the fourth class; and so forth. None of these counties are within the same class.

The Public Employees’ Retirement Law (PERL) and the Teachers’ Retirement Law (TRL) for statewide public employee retirement systems establish uniform standards that commonly apply to members, participating agencies and school districts governed by those laws, respectively. However, although the CERL generally provides uniform standards in the administration of retirement benefits by these systems, it also recognizes and allows for a modicum of difference in the administration of retirement benefits since each CERL jurisdiction is separate and unique.

Each ’37 Act system operates pursuant to the CERL and, on occasion, an issue might arise related to the administration of retirement benefits. However, the issue may only be applicable to an individual system due to its interpretation of a provision in the CERL, or interpretation of a CERL provision that is specific to that jurisdiction. For example, Chapter 97, Statutes of 2018 (Assembly Bill 2076, Rodriguez) provides authority to the Los Angeles County Employees Retirement Association (LACERA) – a CERL system – to reconsider its decisions regarding the effective date of a disability retirement during a specific period. That measure only applied to LACERA because the issue only occurred in that system.

The practical and operational mechanics of the CERL permit such variation.

2) Administration of Disability Retirement Among CERL Systems

Under existing law, '37 Act county retirement boards determine whether an applicant for a disability retirement is permanently incapacitated for "the performance of duty" and apply other standards, as specified, in making a determination whether the applicant is eligible for a disability retirement.

Among '37 Act retirement boards, some use a narrow (stricter) standard and interpret "performance of duty" as the duties required of the position in which the member is employed at the time of the member's application for disability. Other boards utilize a broader (more accommodating) definition that comprises the duties required of all general peace officers as required for certification by the Commission on Peace Officer Standards and Training (POST) and not the duties of a specific classification. Thus, a board using the former standard might not find that a high ranking, desk bound officer is eligible for a disability retirement for an injury that prevents the member from sustained, significant physical activity since that activity is not within the usual and customary duties of the member's job class. However, boards using the latter standard would award the member the disability retirement because the injury no longer permits the member to fulfill one of the duties of all peace officers (i.e., a physical stamina sufficient to give chase and effect arrests).

It is unclear how many of the 20 '37 Act Retirement boards use the narrow standard and how many use the broader standard.

3) Disability Retirement Activity and Potential Economic Incentives

If a tree falls in the woods and no one is around to hear it, does it make a sound? This question is somewhat symbolic and metaphorical of questions raised relating to some injuries among peace officers which have resulted in an earlier-than-normal retirement due to a disability.

Generally known as "Chief's Disease," there have been instances where a peace officer, particularly those that are high ranking, has received a determination that the officer is unable to perform the duties of the job based on an injury that might not appear sufficiently serious to warrant the determination.

A determination relating to an inability to perform the duties permits the officer to retire for disability, instead of a normal service retirement, and receive a lifetime retirement allowance that is, in significant part, exempt from taxation. As such, there exists an economic incentive to obtain a disability retirement instead of a normal service retirement which provides more take-home dollars when compared to a normal service retirement allowance, especially when the officer is high ranking and on a higher salary schedule subject to a higher tax rate.

Attempts to obtain a disability retirement under these circumstances is not limited only to peace officers seeking an economic incentive. While existing law prohibits the use of a disability retirement as a disciplinary tool, employers may use the broader standard previously discussed,

to strategically remove disfavored employees by providing a higher pension through a disability retirement.

4) Relevant Court Rulings on Determination of Performance of Duty

Pursuant to *Mansperger v. Public Employees' Retirement System* (1970), 6 Cal.App. 3d 873, “incapacitated for the performance of duty” means the substantial inability of the applicant to perform his or her usual duties.

In *Harmon v. Board of Retirement* (1976), 62 Cal. App. 3d 689, the court held that a policy by a sheriff employer that all employees be capable of all POST certification requirements does not preclude a retirement board from finding that the employee is not permanently incapacitated for his or her usual duties and requiring the employee be returned to duty in a position that does not require the performance of one of the POST duties.

The issue of determining incapacity arose in litigation as it relates to causation. In *Curtis v. Board of Retirement of Los Angeles County Employees Retirement Association*, App. 2 Dist. (1986), the court held that when considering a county employees’ application for disability retirement, “the county board of retirement is faced with the question as to whether [the] employee is permanently incapacitated for performance of a duty and whether such permanent incapacity is a result of injury or disease arising out of, and in the course of, an employee’s employment. Causation is a secondary issue, and permanent incapacity is the major issue.”

5) Potential Unfunded Liability for Disability Retirement

There have been concerns expressed regarding disability retirement, especially for defined benefit retirement systems or associations that have employers where a sharp increase in the number of such retirements occur in any given point in time, which could result in an unfunded liability. As of this writing, definitive data supporting this concern currently is unavailable. While there have been instances of abuse regarding disability retirement, the overall number of employees obtaining such retirement compared to those who retire for service (i.e., normal service retirement) is not as significant in comparison. In addition, tracking disability retirement and associated abuse of this benefit might pose a challenge for ’37 Act county retirement boards.

Because abuse has occurred and continued potential abuse exists, careful consideration should be exercised by defined benefit retirement systems or associations in granting such determinations. In addition, systems and associations should employ methods to track increases in disability retirements among their respective employers. Further, the systems or associations might consider, if not currently utilized, post-determination procedures or methods that require periodic follow-up examination to guard against abuse and potential abuse.

6) Comments by Supporters

According to the Law Enforcement Managers' Association, "[the CERL] allows for permanent incapacity status for its members. This status is determined at the time of retirement only if the member applies for it and only if certain conditions are met. At this time, there is an inconsistency on findings of permanent disability applications concerning peace officers who are of certain ranks, mainly in management positions. This inconsistency occurs because some [CERL] boards deny the permanent disability status because the day-to-day activities of higher ranking positions do not require frequency of physical activities such as affecting arrests, like their subordinates.

'... other [CERL] boards grant permanent incapacity status because regardless of rank, these officers must meet certain standards throughout their careers and can be subjected to the physical demands of the job at any time. This problem has manifested itself in situations where peace officers in management ranks have been hurt performing law enforcement duties and were denied this status.

' Assembly Bill 6664 will fix this issue by specifying that any member who is classified as a peace officer, regardless of rank or assignment, will be granted permanent disability status upon meeting the criteria for this designation''

7) Prior or Related Legislation

Assembly Bill 283 (Cooper, 2017), which would have required '37 Act County Boards of Retirement, when evaluating whether a member employed in a peace officer position has a permanent incapacity for purposes of approving a disability retirement application, to determine if the member can perform all the usual and customary duties of a peace officer, as specified. This bill was held in the Senate Public Employment and Retirement Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Law Enforcement Managers' Association (*Sponsor*)

Opposition

None on file

Analysis Prepared by: Michael Bolden / P.E. & R. / (916) 319-3957