

AGENDA

THE MEETING OF THE

DISABILITY PROCEDURES AND SERVICES COMMITTEE

and

BOARD OF RETIREMENT*

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION

300 NORTH LAKE AVENUE, SUITE 810

PASADENA, CA 91101

9:00 A.M., WEDNESDAY, JUNE 5, 2019 **

*The Committee may take action on any item on the agenda,
and agenda items may be taken out of order.*

COMMITTEE MEMBERS:

James P. Harris, Chair
Herman B. Santos, Vice Chair
Ronald A. Okum
Gina Zapanta-Murphy
William Pryor, Alternate

I. CALL TO ORDER

II. APPROVAL OF THE MINUTES

A. Approval of the minutes of the regular meeting of May 1, 2019

III. PUBLIC COMMENT

IV. REPORTS

A. That the Committee discuss the process of disability retirement applications when the member has been terminated for cause by the County of Los Angeles
(Memo dated May 28, 2019)

V. ITEMS FOR STAFF REVIEW

VI. GOOD OF THE ORDER
(For information purposes only)

VII. ADJOURNMENT

***The Board of Retirement has adopted a policy permitting any member of the Board to attend a standing committee meeting open to the public. In the event five (5) or more members of the Board of Retirement (including members appointed to the Committee) are in attendance, the meeting shall constitute a joint meeting of the Committee and the Board of Retirement. Members of the Board of Retirement who are not members of the Committee may attend and participate in a meeting of a Board Committee but may not vote, make a motion, or second on any matter discussed at the meeting. The only action the Committee may take at the meeting is approval of a recommendation to take further action at a subsequent meeting of the Board.**

****Although the meeting is scheduled for 9:00 a.m., it can start anytime thereafter, depending on the length of the Board of Retirement meeting. Please be on call.**

Any documents subject to public disclosure that relate to an agenda item for an open session of the Committee, that are distributed to members of the Committee less than 72 hours prior to the meeting, will be available for public inspection at the time they are distributed to a majority of the Committee, at LACERA's offices at 300 North Lake Avenue, suite 820, Pasadena, California during normal business hours from 9:00 a.m. to 5:00 p.m. Monday through Friday.

Persons requiring an alternative format of this agenda pursuant to Section 202 of the Americans with Disabilities Act of 1990 may request one by calling the Board Offices at (626) 564-6000, Ext. 4401/4402 from 8:30 a.m. to 5:00 p.m. Monday through Friday, but no later than 48 hours prior to the time the meeting is to commence. Assistive Listening Devices are available upon request. American Sign Language (ASL) Interpreters are available with at least three (3) business days notice before the meeting date.

MINUTES OF THE MEETING OF THE
DISABILITY PROCEDURES AND SERVICES COMMITTEE
and
BOARD OF RETIREMENT

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION
GATEWAY PLAZA - 300 N. LAKE AVENUE, SUITE 810, PASADENA, CA 91101

WEDNESDAY, MAY 1, 2019

COMMITTEE MEMBERS

PRESENT:

James P. Harris, Chair
Herman B. Santos, Vice Chair
Ronald Okum
Gina Zapanta-Murphy
William Pryor, Alternate

ALSO ATTENDING:

BOARD MEMBERS AT LARGE

Thomas Walsh
Vivian Gray
Les Robbins
Alan Bernstein
Joseph Kelly
Shawn Kehoe

The Meeting was called to order by Chair Harris at 1:48 p.m., in the Board Room of Gateway Plaza.

I. APPROVAL OF THE MINUTES

A. Approval of the minutes of the regular meeting of April 3, 2019.

Mr. Santos made a motion, Ms. Zapanta-Murphy seconded, to approve the minutes of the regular meeting of April 3, 2019. The motion passed unanimously.

II. PUBLIC COMMENT

There were no requests from the public to speak.

III. FOR INFORMATION ONLY

A. Disability Retirees Returning to County Service
Presentation by Francis J. Boyd, Sr. Staff Counsel

This item will be presented to the Disability Services and Procedures Committee at a future meeting.

IV. GOOD OF THE ORDER

V. ADJOURNMENT

With no further business to come before the Disability Procedures and Services Committee, the meeting was adjourned at 1:49 p.m.



May 28, 2019

To: Disability Procedures & Services Committee
J.P. Harris, Chair
Herman Santos, Vice Chair
Ronald A. Okum
Gina Zapanta-Murphy
William Pryor, Alternate

From: Francis J. Boyd, 
Senior Staff Counsel

For: June 5, 2019, Disability Procedures & Services Committee

Subject: **APPLICATIONS WHEN THE MEMBER HAS BEEN TERMINATED FOR CAUSE BY THE COUNTY OF LOS ANGELES**

INTRODUCTION

The Board of Retirement has requested a discussion regarding the processing of disability-retirement applications where a member has been terminated for cause by the County of Los Angeles. The Board has expressed some concerns about the prejudicial effects of providing a history of the member's termination to the examining panel physician as well as to the Board itself during its adjudication process.

On April 3, 2019, the Committee was presented with the attached March 20, 2019, memorandum which outlines the law addressing post-termination applications for disability retirement. This memorandum provided several policy suggestions for the Committee to consider. The discussion at the Committee meeting raised several issues which will be addressed in this memorandum. Also, since the April 3, 2019, meeting, the Court of Appeal has issued a new decision on this issue, *Martinez v Public Employees' Retirement System*,¹ which will also be addressed.

The purpose of this memorandum is to facilitate the discussion of the adjudication process so that staff can draft a policy for processing these applications.

¹*Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156.

LEGAL AUTHORITY

The Board of Retirement has the plenary authority and fiduciary responsibility to administer the retirement system, and it holds executive, legislative, and quasi-judicial powers. It has the sole authority to determine eligibility for a disability retirement. In administering its duties, the Board has the authority to promulgate rules, regulations, and policies.²

LAW

Haywood v. America River Fire Protection Dist. and Smith v. City of Napa

The attached memorandum provides a complete discussion of the law under *Haywood v. America River Fire Protection Dist.*³ and *Smith v. City of Napa.*⁴ In a nutshell, the *Haywood* decision held that when an employee is terminated for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement.

In *Smith*, the court held that if a member were to prove with unequivocal evidence that the right to a disability retirement *matured* before the date of the event giving cause to dismiss, the dismissal would not preempt the right to receive a disability pension.

In both *Haywood* and *Smith*, the boards deciding the applications, and the administrative law judges whose decisions ruled on the appeals that were brought back to the board for approval, were provided with all of the details that led up to the termination.

Resignation in lieu of termination is tantamount to a dismissal for purposes of applying the *Haywood* criteria—*Martinez v. Public Employees' Retirement System* (April 2019)⁵

Martinez was an employee of the State Department of Social Services. In 2014, the Department moved to terminate her employment with a notice of adverse action. In response, Martinez filed an unfair labor practices complaint. In September 2015, the parties negotiated a settlement wherein Martinez agreed to voluntarily resign from her employment and agreed "she will never again apply for or accept any employment position" with DSS. The Department, in turn, agreed to cooperate with any application for disability retirement filed by Martinez. Martinez then filed her application, but in

² Cal. Const., art. XVI, § 17, subd. (a) and (b); Gov. Code Sec. 31725; *Preciado v. County of Ventura* (1982) 143 Cal.App.3d 783, 789.

³ *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292.

⁴ *Smith v. City of Napa* (2004) 120 Cal.App.4th 194.

⁵ *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156.

June 2015, CalPERS notified her that her application had been cancelled and gave the following reasons:

We have determined that you were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Therefore, you are not eligible for a disability retirement.

CalPERS relied on the *Haywood* and *Smith* decisions as well as a 2013 CalPERS Precedential Decision, *In the Matter of Application for Disability Retirement of Vandergoot*,⁶ which ruled that when an employee settles a pending termination for cause and agrees not to seek employment, this agreement is "tantamount to a dismissal" thus precluding a disability retirement. In deciding *Martinez*, the Court of Appeal agreed, stating: "From this perspective, *Vandergoot* is eminently logical: resignation in these circumstances does indeed appear to be 'tantamount to a dismissal for purposes of applying the *Haywood* criteria.'"⁷

In the *Martinez* case, the board deciding the application, and the administrative law judge whose decision ruled on the appeal that was brought back to the board for approval, were provided with all of the details that led up to the termination.

The Board of Retirement is the trier of fact and it has the discretion to exclude prejudicial evidence.

The California Constitution and the Government Code give the Board of Retirement sole authority to determine members' eligibility for a disability retirement.⁸ And the Board exercises its quasi-judicial powers and acts as the trier of fact when it decides eligibility for disability-retirement benefits.⁹

Under California Evidence Code section 352, the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. These same principals apply to the Board of Retirement when it is exercising its adjudicatory powers.

APRIL 3, 2019 DISABILITY PROCEDURES & SERVICES COMMITTEE MEETING

During the April 3, 2019, Disability Procedures & Services Committee meeting, Committee Members discussed the policy considerations in regard to eliminating

⁶ *In the Matter of Application for Disability Retirement of Vandergoot* (2013) CalPERS Precedential Dec. No. 13-01 (Vandergoot).

⁷ *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, 1176.

⁸ Cal. Const., art. XVI, § 17, subd. (a) and (b); Gov. Code Sec. 31725.

⁹ *Preciado v. County of Ventura* (1982) 143 Cal.App.3d 783, 789.

prejudicial information related to the applicant's termination that is provided to the Board of Retirement and the panel physician. The Committee's discussion raised issues that are outlined below.

A. Information Provided to the Board of Retirement

- **Non-psychiatric cases**

There was a general consensus that the Board of Retirement should be informed of the applicant's termination in order for it to properly adjudicate the application under the applicable law. However, Committee Members were concerned that the Board of Retirement did not necessarily need to know the details leading up to the member's termination, especially when the probative value of the specific details was outweighed by the propensity to prejudice the Board against the member. Other Committee Members voiced concern that withholding information regarding the details of the termination may hinder the Board's ability to determine the credibility of the applicant.

- **Psychiatric cases**

Post-termination applications involving psychiatric disabilities pose challenges because the Board must determine, under *Haywood*, whether or not the termination was the result of a disabling medical condition. For psychiatric cases, the Board should be provided with all of the details leading up to the termination so that it can determine whether or not the termination was the result of a disabling psychiatric condition.

- **Bifurcating certain applications**

The Committee Members also discussed bifurcating the application process into two steps when the facts contained information that may be prejudicial to the applicant. It was suggested that in these instances, the application first be brought to the Board for a determination of whether or not the applicant should be evaluated by a Board's panel physician. This approach would treat certain post-termination applications differently and has the potential of raising due-process issues. It would also involve staff weighing the evidence, instead of the Board, on credibility issues.

Recommendation

- **Non-psychiatric cases**

Staff recommends that the Board of Retirement be informed that the member has been terminated and be provided with the date(s) of the event(s) which led to the termination so that it can properly adjudicate the application under the applicable law.

Staff's role in the application process is to gather the facts and provide the Board with facts related to members' inability to perform their usual duties. As the trier of fact, the

Board has the discretion not to consider certain evidence when the probative value of that evidence is outweighed by the probability that the facts will create undue prejudice against the member. Oftentimes there are nuances in the evidence and it is difficult to determine whether the value of the evidence is outweighed by its prejudicial effect. Creating a policy that instructs staff to perform a probative-value/prejudicial-effect determination takes away from the Board its discretion to weigh the evidence in these circumstances. The Board should be trusted with the discretion to determine the probative value of the evidence presented and disregard evidence that is prejudicial. Also, having staff withhold evidence may hinder the Board in making a determination of credibility. Therefore, staff recommends that the Board of Retirement be provided with all the facts surrounding the member's termination.

- **Psychiatric cases**

Staff recommends that the Board be advised of all the details concerning the applicant's termination when the application is based on a psychiatric condition so that it can determine whether or not the termination was the result of a disabling psychiatric condition.

B. Information Provided to the Panel Physician

- **Non-psychiatric cases**

Staff had originally recommended that the panel physician not be informed that the applicant had been terminated. At the April 3, 2019, Committee meeting, the Board's Medical Advisor voiced concerns over this approach and indicated that withholding this information would prevent the physician from having a complete and accurate history and hinder the physician's ability to measure the applicant's credibility, particularly with respect to pain complaints, when determining his or her disability status on the relevant date.

- **Psychiatric cases**

When the claim involves a psychiatric condition, the panel psychiatrist should be provided with all of the details that led up to the applicant's termination so that the panel psychiatrist can opine as to whether or not the termination was the result of a disabling medical condition.

Recommendation

- **Non-psychiatric cases**

The panel physician's role in non-psychiatric cases is to review the medical records and provide the Board with a medical opinion as to whether or not the medical evidence supports a conclusion that the member was medically unable to perform his or her usual

duties before the date of the event giving cause to the member's dismissal. It is the Board's role to take this medical opinion, weigh it with the facts surrounding the dismissal, and make a determination regarding the eligibility for benefits. Staff therefore recommends that the panel physician not be told that the member was terminated in non-psychiatric cases.

- **Psychiatric cases**

For psychiatric applications, staff recommends that the panel psychiatrist be provided with all of the details leading up to the termination.

SUGGESTED POLICY CONSIDERATIONS

The following policy considerations are provided for the consideration by the Committee. Staff welcomes any further suggestions from the Committee.

1. Staff recommends that the Board maintain its current practice of accepting the application for processing so it can determine the member's eligibility to apply for a disability retirement and the member's eligibility for the benefit.
2. Staff recommends that the Board maintain its current practice of having the member evaluated by a panel physician to determine whether or not the member was permanently incapacitated on the day before the date of the event which gave cause for the member's dismissal.
3. Staff recommends that the panel physician only be asked the following two questions:
 - Please state whether or not your review of the medical evidence establishes that the applicant was permanently incapacitated on [insert date prior to the event which gave cause for the member's termination]. Please explain your opinion.
 - Did the applicant's employment play a role in any injury or illness that the applicant claims to cause incapacity? Please explain your opinion.
4. **For psychiatric cases**, staff recommends that the panel physician be provided with all of the details that led to the termination.

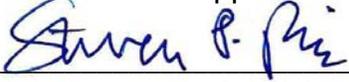
For non-psychiatric cases, staff recommends that the panel physician not be told that the member was terminated.

5. Staff recommends that the Board of Retirement be informed that the member has been terminated when the application is presented for a decision.

Re: Termination for Cause
May 28, 2019
Page 7 of 7

6. Staff recommends that the Board be provided with all of the details of the termination.

Reviewed and approved.

A handwritten signature in blue ink, appearing to read "Steven P. Rice", is written over a horizontal line.

Steven P. Rice, Chief Counsel

Attachment

c: Each Member, Board of Retirement



March 20, 2019

To: Disability Procedures & Services Committee
J.P. Harris, Chair
Herman Santos, Vice Chair
Ronald A. Okum
Gina Zapanta-Murphy
William Pryor, Alternate

From: Francis J. Boyd, 
Senior Staff Counsel

For: April 3, 2019 Disability Procedures & Services Committee

Subject: **APPLICATIONS WHEN THE MEMBER HAS BEEN TERMINATED FOR CAUSE BY THE COUNTY OF LOS ANGELES**

INTRODUCTION

The Board of Retirement has requested a discussion regarding the processing of disability retirement applications where a member has been terminated for cause by the County of Los Angeles. The Board has expressed some concerns about the prejudicial effects of providing a history of the member's termination to the examining panel physician as well as to the Board itself during its adjudication process. This memorandum will provide an outline of the laws pertaining to disability applications filed after a member has been terminated. As explained below, these post-termination applications are different than normal disability-retirement applications and require the Board make its determination under well-established law. The purpose of this memorandum is to facilitate the discussion of the adjudication process so that staff can draft a policy for processing these applications.

LEGAL AUTHORITY

The Board of Retirement has the plenary authority and fiduciary responsibility to administer the retirement system, and it holds executive, legislative, and quasi-judicial powers. It has the sole authority to determine eligibility for a disability retirement. In administering its duties, the Board has the authority to promulgate rules, regulations, and policies.¹

¹ Cal. Const., art. XVI, § 17, subd. (a) and (b); Gov. Code Sec. 31725; *Preciado v. County of Ventura, et al.* (1982) 143 Cal.App.3d 783, 789.

LAW

I. Purpose of County Employees Retirement

The County Employees Retirement Law of 1937² was enacted to recognize a public obligation to county employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities, as well as provide a means for incapacitated employees to be replaced by more capable employees without inflicting hardship on the employee removed.³

II. Permanent Incapacity

When it has been established with substantial medical evidence that a LACERA member is permanently incapacitated from the performance of duty, the member shall be retired for disability.⁴ Incapacity for the performance of duty under CERL means the substantial inability to perform one's usual duties.⁵

A. Disability retirement cannot be used as a substitute for the employer's disciplinary process.

Government Code section 31720.3 states the following:

In determining whether a member is eligible to retire for disability, the board shall not consider medical opinion unless it is deemed competent *and shall not use disability retirement as a substitute for the employer's disciplinary process.* (Italics added).

B. Termination for cause severs the employment relationship and the right to a disability retirement unless the evidence establishes that the right to a disability retirement "matured" before the date of the event giving cause to dismiss.

Disability retirement law addresses the case of an employee who is unable to perform his or her duties, not an employee who is unwilling to perform.⁶ In *MacIntyre v. Retirement Board of San Francisco*, the court pointed out that disability retirement laws are not intended for an unwilling employee to retire early in derogation of the obligation

² Gov. Code §31450 *et seq.*

³ Gov. Code §31451.

⁴ Gov. Code § 31720.

⁵ *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 694-696; *Schrier v. San Mateo County Employees Ret. Ass'n* (1983) 142 Cal.App.3d 957, 961-962.

⁶ See *Schneider v. Civil Service Com.* (1955) 137 Cal.App.2d 277, 285.

of faithful performance of duty.⁷ The court referred to the following quote:

'The pension roll is a roll of honor—a reward of merit, not a refuge from disgrace; and it would be an absurd construction of the language creating it to hold that the intention of the Legislature was to give a life annuity to persons who, on their merits, as distinguished from mere time of service, might be dismissed from the force for misbehavior.'⁸

Under civil-service employment, qualified employees are given a legal expectation of continued employment. But “[c]ourts have also upheld the policy that the public is best served when department officials are permitted to eliminate unqualified or undesirable personnel, and to replace them with persons better qualified.”⁹

1. The termination of an employment relationship renders the employee ineligible for disability retirement. *Haywood v. American River Fire Protection District* (1998).

In *Haywood v. American River Fire Protection District*, the court held that when an employee is terminated for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the termination of the employment relationship renders the employee ineligible for disability retirement.¹⁰ In this case, there was no medical evidence that Haywood had any medical limitations before he was terminated. He claimed a psychiatric incapacity as a result of his termination.

The *Haywood* court offered the following discussion:

Haywood's firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with the District if it ultimately is determined that he no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set

⁷ *MacIntyre v. Retirement Board of San Francisco* (1941) 42 Cal.App.2d 734, 736.

⁸ *MacIntyre* at 736.

⁹ *Hostetter v. Alderson* (1952) 38 Cal.2d 499, 504.

¹⁰ *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292, 1307.

aside the termination through a grievance process.¹¹

2. A termination for cause cannot preempt the right to receive a disability retirement if the member's right to a disability retirement *matured* before the date giving cause for dismissal. *Smith v. City of Napa* (2004)

Several years later, the court in *Smith v. City of Napa* clarified its statement in *Haywood* that the discharge cannot be *preemptive of an otherwise valid claim for disability retirement*. Unlike *Haywood*, *Smith* had prior workers' compensation claims for injuries that established some physical limitations before he was terminated. The court held that if a member were to prove that the right to a disability retirement *matured* before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension.¹² The court explained that this exception flows from the public agency's obligation to apply for disability retirement on behalf of disabled employees rather than seeking to dismiss employees directly or indirectly on the basis of the disability. Conversely, if the employee is dismissed before the right to a disability retirement *matures*, then the right to disability retirement is lost.¹³

a) The *Smith* court confirmed that the right to a disability retirement *matures* the day the pension board determines that the member is permanently incapacitated.

The *Smith* court explains, in the following excerpt, that the right to a disability retirement matures at the time the pension board determines that the member is permanently incapacitated:

The key issue is thus whether his right to a disability retirement matured before plaintiff's separation from service. A vested right matures when there is an unconditional right to immediate payment.¹⁴ In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) **did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties.**¹⁵ [the right has not come into existence

¹¹ *Id.* at 1296-1297.

¹² *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.

¹³ *Id.* at 205-206.

¹⁴ *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66, 71; see *In re Marriage of Brown* (1976) 15 Cal.3d 838, 842.

¹⁵ *Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672.

until the commission has concluded that the condition of disability renders retirement necessary'].) [footnote omitted]¹⁶
(Emphasis added.)

The *Smith* court determined that because Smith's right to a disability retirement did not mature before the event giving cause to his dismissal, he was not eligible to apply for a disability retirement.¹⁷

b) Equitable Exceptions for Maturity Date

The *Smith* court stated that there may be facts which a court, applying the principals of equity, could deem that an employee's right to a disability retirement matured prior to the event giving cause to the dismissal. The court provided two examples.

1. Delay of Application Filed Before Dismissal

The *Smith* court stated if a member's impending ruling on his disability retirement application was delayed through no fault of the member until after the dismissal, the member's right to a disability retirement may survive the dismissal.

2. Unequivocal Medical Evidence of Permanent Incapacity

The *Smith* court also stated that if there was unequivocal medical evidence establishing that the member was permanently incapacitated prior to the event which gave cause to the dismissal, the member's right to a disability retirement would survive the dismissal. The court noted that though Smith had medical records of a permanent disability in his prior workers' compensation claims, the evidence did not unequivocally establish that he was permanently incapacitated prior to the event which gave rise to his dismissal.

III. The Board of Retirement owes a fiduciary duty to all county employees, must investigate applications for disability retirement, and pay benefits only to those members who are eligible for them.

The Board of Retirement owes fiduciary duties of good faith and loyalty to the county employees who are members of the retirement system.¹⁸ Government Code section 31725 entrusts Board members with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty. The Board is therefore required to administer the retirement system "in a manner to best provide

¹⁶ *Smith v. City of Napa*, *supra*, 120 Cal.App.4th 194, 206.

¹⁷ *Id.* at 206.

¹⁸ *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 392-393.

benefits to the participants of the plan."¹⁹ It cannot fulfill this mandate unless it investigates applications and pays benefits only to those member's who are eligible for them.²⁰

a. The Board has the discretion to exclude prejudicial evidence.

Under California Evidence Code section 352, the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. These same principals apply to the Board of Retirement when it is exercising its adjudicatory powers.

DISCUSSION

I. Processing Disability Retirement Applications under *Haywood/Smith*.

A. Eligibility to Apply vs. Eligibility for Benefit

It is important to understand that in both *Haywood* and *Smith*, the disability-retirement applications were rejected because the pension boards determined that the former employees were ineligible to apply. The issue at the administrative hearings in both cases was whether or not the member was eligible to apply, not whether they were eligible for the benefit.

It has been LACERA's practice, in post-termination applications, to accept the application for processing and then present the application to the Board of Retirement to determine the eligibility to apply as well as the eligibility for the benefit. If the applicant is able to meet the burden under *Haywood* and *Smith* and present unequivocal medical evidence of permanent incapacity prior to the event giving cause to dismiss, the Board would then determine whether or not the incapacity was service connected and award the appropriate benefit. This practice facilitates the efficiency of the process.

B. Burden of establishing that the member's right to a disability retirement matured before the event giving cause for the member's dismissal.

Under *Smith*, a member who has been terminated is eligible to apply if there is unequivocal medical evidence establishing permanent incapacity prior to the event giving cause to the dismissal. The *Smith* court's use of the word *unequivocal* does not proscribe the Board from applying the usual standard from measuring incapacity—whether the preponderance of substantial medical evidence supports a finding of permanent incapacity. But the Board must determine whether or not the applicant met this standard the day before the event which gave cause for the dismissal.

¹⁹ *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d1470, 1493; see also Cal. Const., art. XVI, § 17.

²⁰ *Id* at 1494; see also Gov. Code § 31723.

In processing post-termination applications, it has been LACERA's practice to obtain the available medical evidence and arrange for the applicant to be evaluated by a panel physician. The panel physician is sent a copy of LACERA's Panel Physician Guidelines which includes the nine medical-legal questions used to process applications that do not involve post-termination issues. In addition, the physician is asked whether or not the evidence establishes that the applicant was permanently incapacitated on the day before the event which gave cause for termination—at times this question is ignored by the physician and staff has to obtain a supplemental report. The only issues relevant in a post-termination application are whether or not the member was permanently incapacitated the day before the event which gave cause for the termination and whether or not the incapacity is service connected. Therefore, staff suggests that only these two questions be posed to the panel physician when evaluating post-termination applications.

C. Eliminating prejudicial information from the application.

Panel Physician

Providing the panel physician with information that the member has been terminated from employment has the potential of prejudicing the physician against the applicant. This information has no probative value for the physician to form an opinion as to whether or not the member was permanently incapacitated at a certain point of time and whether or not the incapacity is service connected. The panel physician should therefore not be told that the member was terminated.

Board of Retirement

As explained above, post-termination applications are different than normal disability-retirement applications—the Board must determine if the member is eligible to apply for a disability retirement before it can decide whether the member is eligible for a benefit. To make this decision, the Board must determine whether or not the member was permanently incapacitated the day before the event which led to the termination. The fact that the member was terminated is probative in this decision-making process, so the Board should be informed that the member was terminated.

Depending on the circumstances, the event which led to the termination can have a prejudicial effect on the Board. However, in some circumstances, a member can be terminated due to a series of events. And the Board, who is called upon to decide whether or not the member was permanently incapacitated the day before the event which gave rise to the termination, may be called upon to decide what event led to the termination. In these situations, the events leading to the termination may have probative value for the Board in making its decision. A policy on this issue should afford some flexibility that allows for staff to weigh the prejudicial effects against the probative value of the information it provides to the Board. Alternatively, the Board could create a

policy where staff would use the date of the last event which gave cause for the dismissal.

SUGGESTED POLICY CONSIDERATIONS

1. Staff recommends that the Board maintain its current practice of accepting the application for processing so it can determine the member's eligibility to apply for a disability retirement and the member's eligibility for the benefit.
2. Staff recommends that the Board maintain its current practice of having the member evaluated by a panel physician to determine whether or not the member was permanently incapacitated on day before the date of the event which gave cause for the member's dismissal.
3. Staff recommends that the panel physician not be told that the applicant has been terminated.
4. Staff recommends that panel physician only be asked the following two questions:
 - Please state whether or not your review of the medical evidence establishes that the applicant was permanently incapacitated on [insert date prior to the event which gave cause for the member's termination]. Please explain your opinion.
 - Did the applicant's employment play a role in any injury or illness that the applicant claims to cause incapacity? Please explain your opinion.
5. Staff recommends that the Board of Retirement be informed that the member has been terminated when the application is presented for a decision.
6. In cases where there are a series of events giving cause for the termination, staff recommends that the Board establish a policy which affords some flexibility for staff to weigh the prejudicial effects against the probative value of the information it provides to the Board. Alternatively, the Board could create a policy where staff would use the date of the last event that gave cause for the dismissal.

Reviewed and approved.



Steven P. Rice, Chief Counsel

c: Each Member, Board of Retirement