

# Administrative Hearing Procedures

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## 1. Intent

The Board of Retirement of the Orange County Employees Retirement System (“OCERS”) specifically intends that this policy shall apply to and shall govern in each administrative review procedure regarding a decision made by the Board of Retirement pursuant to the County Employees Retirement Law of 1937, as amended (“CERL”).

## 2. Definitions

The following terms shall have the meanings set out in this section. All other words shall have their common meanings.

**Administrative Record:** The Administrative Record includes any documents submitted by an Applicant or on behalf of an Applicant, documents prepared by OCERS or by independent sources that are received by OCERS, or any other documents that are relevant to deciding the issue of an Applicant’s request to receive or modify a benefit and that are admitted into evidence by the Hearing Officer after the Parties have had an opportunity to object.

The Administrative Record also includes written correspondence, Party Pre-Hearing Statements, Party Briefs, Hearing Officer Findings and recommendations, Party objections and requests for clarification, rulings on objections and requests for clarification, Hearing transcripts, and other documents that are relevant to deciding the issue of an Applicant’s request to receive or modify a benefit.

**Applicant:** Any member of OCERS, or a person or other entity on behalf of a member of OCERS, who files an application with OCERS to request or modify a benefit that the Board of Retirement may grant pursuant to its authority set forth in the CERL.

**Application:** The paper(s) initially filed with OCERS by or on behalf of an Applicant, and/or any amended paper(s) filed with OCERS by or on behalf of an Applicant after the initial filing, to request or modify a benefit provided by OCERS.

**Board:** The Board of Retirement of OCERS.

**Days:** All days are calendar days.

**Effective Date:** The effective date of any disability retirement benefits shall be governed by Government Code §31724.

**Hearing:** Presentation of sworn testimony, other evidence, and legal argument before a Hearing Officer on the merits of an Application or benefit determination.

**Hearing de novo:** A new Hearing of a matter, conducted as if the original Hearing or Board determination had not taken place. This means the court or other fact finding body will consider anew all of the evidence submitted without relying on the past findings of a court, the Board or other fact finding body.

**Hearing Officer:** Pursuant to Government Code §31533, either a current member of the California State Bar on the approved OCERS’ Hearing Officer panel or a member of the Board of Retirement.

**Hearing Rules, Rules:** The “Orange County Employees Retirement System Administrative Hearing Procedures”.

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**Medical Witness:** A person who by profession is a physician, surgeon, psychologist, optometrist, dentist, podiatrist, or chiropractic practitioner licensed by the State of California or by such other jurisdiction of the United States in which such person maintains his or her regular practice in good standing.

**Member Services Director:** The Administrative Director in charge of the Member Services Department of OCERS or his/her designee.

**Party or Parties:** OCERS and / or any Applicant who sought administrative review of a decision by the Board.

**Pre-Hearing Conference:** A Pre-Hearing Conference is a conference between the Applicant(s) and OCERS conducted by the assigned Hearing Officer to discuss preliminary matters related to the Hearing process.

**Respondent:** OCERS and / or Board.

**Rule:** A Hearing Rule including all subparagraphs or subdivisions as contained in this policy.

### 3. Administrative Hearing Rules

#### *1. Hearing De Novo*

A written request for Hearing must be received by the Board, or its designee, within ninety (90) days after the initial Board determination of the initial application. A Hearing de novo shall be scheduled before a Hearing Officer. For disability retirement Hearings, the Board on its own referral may limit the issues to be presented to disability, service connection, or effective date only. If not so limited, the disability retirement Hearing will address the issues of disability, service connection, and effective date. Except as set forth in these Rules, for disability retirement Hearings and all other administrative Hearings, the Hearing Officer shall not make a finding or recommendation on any issue that was not raised before the Board. These Hearing Rules will apply to disability retirement Hearings and all other administrative Hearings.

#### *2. Notification of Request for, or Referral to, a Hearing*

Within fourteen (14) days after OCERS receives a request for Hearing or referral to a Hearing, OCERS will notify the Applicant in writing of the name and address of the Hearing Officer to whom the matter has been assigned.

**Assignment of Hearing Officer:** Hearing Officers are selected and placed on the panel pursuant to OCERS' Hearing Officer Selection and Retention Policy. As Hearings are requested, the Member Services Director assigns the next Hearing Officer on the list in alphabetical order, subject to the procedures for challenge under Rule 3 below.

#### *3. Petition to Reassign a Hearing Officer*

Each Party shall be entitled to have a Hearing Officer replaced by another Hearing Officer in accordance with the provisions of this Rule.

- A. Peremptory: Each Party is entitled to one automatic challenge to the assignment of the Hearing Officer in accordance with the provisions of this section. That challenge must be submitted in writing, directed to the Member Services Director, within fourteen (14) days after the date of the

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letter assigning the Hearing Officer. Thereafter, any challenge to the assigned Hearing Officer shall only be for cause.

At any time before the date of the Hearing if an Applicant obtains new counsel of record, or if OCERS replaces its counsel of record, each new counsel shall be entitled to a peremptory challenge. The challenge must be submitted in writing, directed to the Member Services Director, within fourteen (14) days after the date counsel commences representation.

- B. **Removal for Cause:** Each Party is entitled to challenge a Hearing Officer for cause by submitting a written request, with supporting declarations made under penalty of perjury under the laws of the State of California and any other evidence the Party is relying on, to the Member Services Director, who shall then place the matter on the agenda for the next regularly scheduled Board meeting.
- C. **Removal Due to Unforeseen Circumstances:** If the service of a Hearing Officer is discontinued due to unforeseen circumstances, including but not limited to death, termination with or without cause, or for medical restrictions, each Party is entitled to a peremptory challenge to the new Hearing Officer in accordance with this Rule.

### ***4. Appointment of the Hearing Officer***

On expiration of the time period in Rule 3(a), the Member Services Director shall contact the Hearing Officer by letter notifying the Hearing Officer of his/her assignment, providing the name, address and phone number of the Applicant, Applicant's counsel, if any, and counsel representing OCERS.

### ***5. Preparation of Administrative Record***

Following receipt of the request for a Hearing, OCERS shall assemble the Administrative Record and provide it to the Applicant or his or her attorney, if any, OCERS' counsel and the Hearing Officer.

### ***6. Applicant's Pre-Hearing Statement***

The Applicant shall serve a Pre-Hearing Statement on the Hearing Officer and OCERS' counsel no later than sixty (60) days before the date on which the Hearing is to be held.

- A. The Pre-hearing Statement shall include the following:
  - 1. A statement of the issues and contentions of the Applicant, and a brief summary of the evidence to be presented;
  - 2. A list and copies of any expert's reports, depositions of any witnesses, and any other documentary evidence on which the Applicant will rely, if not already in the Administrative Record;
  - 3. The names, addresses and telephone numbers of any non-expert witnesses whose testimony the Applicant intends to present at the Hearing and a brief description of the content of that testimony.
  - 4. The names, addresses and phone numbers of any expert witnesses whom the Applicant intends to call for oral testimony at the Hearing and a synopsis of the expected testimony.

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- B. If at any time during the Hearing process the Applicant either (i) alleges an injury or disease not listed on the disability retirement application or (ii) raises an issue that was not previously presented to the Board, the Hearing process shall be suspended by OCERS and the Application shall be treated as an amended Application. The amended Application shall be referred back to the Member Services Director to be processed. If the Board denies the amended Application or refers it for Hearing, the Hearing Officer who is presiding at that time will hear all allegations at the same time. A new Hearing date will be set in accordance with Rule 9 and all Pre-Hearing Statements not already served will be due in accordance with the new Hearing date.
- C. If an Applicant disputes the Effective Date established by the Board, or the Board in its initial decision found that an Applicant asserts that the proper Effective Date for the retirement allowance is a date other than the date of the Application, that Applicant shall raise the Effective Date as an issue and shall state that Applicant's contention in his/her Pre-Hearing Statement.

### ***7. Respondent's Pre-Hearing Statement***

OCERS shall serve a Pre-Hearing Statement on the Hearing Officer and the Applicant or Applicant's attorney no later than thirty (30) days before the date on which the Hearing is to be held. The Pre-Hearing Statement shall include the following:

- A. A statement of the issues and the contentions of OCERS;
- B. A list and copies of any experts' reports, depositions of any witnesses, and other documentary evidence on which OCERS will rely, if not already in the administrative record;
- C. The names and addresses of any non-expert witnesses whose testimony OCERS intends to present at the Hearing, and a brief description of the content of that testimony;
- D. The names and addresses of any expert witnesses whom OCERS intends to call for oral testimony at the Hearing and a synopsis of the expected testimony.

### ***8. Supplemental Pre-Hearing Statements***

Any Party may submit supplemental Pre-Hearing Statements no later than fourteen (14) days prior to the Hearing date.

### ***9. Applicant's Non-Compliance in Submitting Pre-Hearing Statement***

If an Applicant does not comply with the requirements of Rule 6, the Hearing shall be taken off calendar and the administrative proceeding shall be suspended until the Pre-Hearing Statement has been filed unless otherwise agreed to by the Parties. Subject to Rule 23, "Dismissal," once the Pre-Hearing Statement has been filed, the Hearing will be reset in the same manner as set forth in Rule 10, below. OCERS' Pre-Hearing Statement will be due thirty (30) days before the new Hearing date.

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### *10. Establishing a Hearing Date*

The Hearing Officer will confer with the Parties to set a mutually agreeable Hearing date. The Hearing will be held within the time frame provided by Rule 23. OCERS, at its expense, shall arrange for a court reporter and a Hearing room.

- A. The Hearing Officer may continue any Hearing on stipulation of the Parties or for good cause shown, on receipt of a written request by either Party.
- B. With the exception of an emergency continuance request, all requests for a continuance as set forth herein shall be made at least thirty (30) days in advance of the Hearing date. If not made thirty (30) days before the Hearing, the Hearing Officer or the Board shall not be obligated to honor the request. Nevertheless, the Hearing Officer is authorized to grant an emergency continuance to the next agreeable Hearing date because of the illness or disability of any Party, witness, attorney, or the Hearing Officer himself or herself, or any family emergency or matter of a similar nature of any Party, witness, attorney, or the Hearing Officer.
- C. If an Applicant cancels a Hearing less than thirty (30) days prior to the scheduled Hearing date, the Board is authorized to seek reimbursement from the Applicant for actual costs incurred as a result of the cancellation.
- D. The Applicant or OCERS may request, or the Hearing Officer on his/her own motion may schedule a Pre-hearing Conference; provided, however, in all cases where the Applicant is pro per, the Hearing Officer shall schedule a Pre Hearing Conference.

### *11. Time and Place of Hearings*

All Hearings on the merits shall be held at OCERS' offices; Pre-Hearing Conferences shall be held at the OCERS offices and may be held telephonically on the agreement of the Parties and the Hearing Officer. Hearings that are not concluded within the original time set shall be continued to the next agreeable Hearing date.

### *12. Documentary Evidence*

- A. **Statement of Policy:** Documentary evidence shall be produced in the form of written medical reports or other documentary evidence attached to the Parties' Pre-Hearing Statements or included in the Administrative Record. A written medical report bearing the signature of the Medical Witness shall be admissible in evidence as the author's direct testimony.
- B. **Late Submission of Documentary Evidence:** Submission of a medical report or other documentary evidence after a Party files his, her or its Pre-Hearing Statement shall be allowed only on a showing of Good Cause. For purposes of this Rule, "Good Cause" means relevant evidence that, in the exercise of reasonable diligence, could not have been previously produced. The Party requesting submission of such evidence shall address a written request to the Hearing Officer. The written request shall state the reason the evidence was not timely produced. After providing a reasonable opportunity for each adverse party to be heard, the Hearing Officer shall rule on such a request. If the evidence is allowed to be admitted into evidence, the Parties shall have the right to a continuance to engage in further discovery, obtain rebuttal medical evidence, or cross-examine the Medical Witness.

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### *13. Oral Testimony of Expert and Non-Expert Witnesses*

- A. **Hearings:** Oral testimony shall be taken as prescribed under Rule 15(a).
- B. **Depositions:** Witness depositions may be taken by either Party before a certified shorthand reporter and shall be taken under oath or affirmation. The Party taking the deposition shall pay all associated costs. If any Party offers any portion of any deposition testimony into evidence at the Hearing, that Party shall provide a full copy of the deposition transcript to each adverse Party and the Hearing Officer free of charge.
- C. **Subpoenas and Related Fees/Costs:**
  - 1. Any Party may request a subpoena for the personal appearance of a witness at the time of the Hearing or at a deposition. The request must be in writing and addressed to the Member Services Director. OCERS will prepare the subpoena, but the requesting Party shall be obligated to serve the subpoena and pay all associated witness fees and costs of service. The Party requesting oral testimony of an expert witness shall in all cases be responsible for any expert witness fees.
  - 2. Any Party may request a subpoena for the production of documents. The request must be in writing and addressed to the Member Services Director. OCERS will prepare the subpoena, but the requesting party shall be obligated to serve the subpoena and pay all associated costs of service and production.
  - 3. Any fee disputes between a witness and the requesting Party is independent from any proceeding between the Applicant and OCERS. Those fee disputes shall be resolved by the requesting Party and the witness in the California courts, not in this forum. The Hearing Officer has no authority or jurisdiction to hear evidence about, or decide any such dispute.

### *14. Resolution of Disputes about Depositions and Conduct of Hearings*

The Hearing Officer shall resolve disputes about depositions and conduct of the Hearing. If not made at a Hearing, a request for resolution of a dispute shall be made in writing and may be supported by declarations, a copy of the deposition or Hearing transcript, a memorandum of points and authorities and a proposed resolution. The adverse Party involved shall have ten (10) days after receipt of such a request in which to respond. Declarations, a copy of the deposition or Hearing transcript, a memorandum of points and authorities and a proposed resolution may also accompany the response. The Hearing Officer shall notify the Parties and the witness(es) involved of the Hearing Officer's resolution of the dispute within thirty (30) days of the Hearing Officer's receipt of the adverse Party's response to the request for resolution.

### *15. Conduct of Hearings*

- A. Oral evidence shall be taken only on oath or affirmation administered by the Hearing Officer or the shorthand reporter.
  - 1. . If an Applicant or witness does not speak or understand English sufficiently to participate in the proceedings or provide testimony, an interpreter certified to provide interpretation services in administrative hearings shall be provided to that Applicant or witness at OCERS'

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- expense. An Applicant or witness who requires interpreting services shall provide OCERS with reasonable notice of the need for an interpreter and the language the Applicant or witness will use during the proceedings so that OCERS has sufficient time to locate and contract with an interpreter.
2. The Hearing Officer may continue or reschedule a Hearing so that the Applicant or witness requesting an interpreter can be accommodated.
  3. All interpreters in OCERS' Hearings shall be certified to provide interpreting services in administrative hearings pursuant to Gov. Code § 11435.30. The interpreter shall not have had any involvement in the issues of the case prior to the Hearing.
  4. If an Applicant or witness objects to the interpreter provided by OCERS and wishes to locate his or her own interpreter certified under Gov. Code § 11435.30, the Applicant or witness shall provide OCERS with contact information for his or her chosen interpreter. OCERS will pay the chosen interpreter the same amount OCERS would have paid an interpreter hired directly by OCERS. The Applicant or witness shall be responsible for any amounts charged by the interpreter that are over the amount OCERS would have paid to an interpreter hired directly by OCERS. Fee disputes between the interpreter and the Applicant or witness shall not be resolved in this forum, and the Hearing Officer shall have not authority to resolve any fee disputes between interpreters and the Parties.
- B. Each Party shall have these rights:
1. Subject to paragraph (2) of this subsection (B) of this Rule, to call and examine witnesses; to introduce exhibits, including reports and depositions of medical witnesses; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which Party first called the witness to testify; and to rebut adverse evidence. If an Applicant does not testify by direct examination, OCERS may call and examine the Applicant under cross-examination.
  2. Any witness a Party did not list in his/her Pre-Hearing Statement shall not be called to testify unless each adverse Party has the right to a continuance to obtain rebuttal evidence and/or to cross-examine the unlisted witness. The Party who originally called the unlisted witness to testify shall bear the responsibility of ensuring the unlisted witness's attendance at each further hearing set for that witness's cross-examination.
- C. The Hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the Hearing. Irrelevant and unduly repetitious evidence shall be excluded.
- D. Hearsay evidence may be used for the express purpose of supplementing or explaining other evidence but shall not be sufficient by itself to support a finding unless it would be admissible over objection in civil actions. Every Hearing shall proceed as though each Party had made a standing

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objection to all inadmissible hearsay at the commencement of the Hearing. This section shall not be applicable to written medical reports received into evidence pursuant to Rule 12.

- E. Each Party shall have the right to submit oral or written argument, as determined by the Hearing Officer. A waiver of argument at the administrative Hearing shall not constitute a waiver of argument on appeal before the Board.
- F. The record shall be closed to new evidence at the conclusion of the final day of Hearing unless each Party stipulates to leave the record open. However, if subsequent to the close of the Hearing, a Party discovers or obtains new evidence that is relevant and not repetitive, that Party may submit that evidence to the Hearing Officer to be considered for inclusion in the Administrative Record. The Hearing Officer may require the Parties to provide declarations and argument about inclusion of the new evidence. If, after showing of Good Cause under Rule 12(b), the Hearing Officer allows inclusion of the new evidence, the opposing Party will be provided an opportunity to submit rebuttal evidence in accordance with Rule 12(b).

### ***16. Findings of Fact, Conclusions of Law, and the Hearing Officer's Recommended Decision***

The Hearing Officer shall serve his/her Proposed Findings of Fact, Conclusions of Law, and Recommended Decision on all Parties or their counsel. Service shall be made within sixty (60) days of either (i) the date the Hearing Officer receives the last brief or (ii) the date the Hearing Officer deems the matter closed.

### ***17. Objections to, and Responses to Objections to, the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Decision***

Any Party shall have thirty (30) days after service of the Proposed Findings of Fact, Conclusions of Law, and Recommended Decision, to submit written objections and/or written requests for clarification to the Hearing Officer and serve such objections and/or requests for clarification on each other Party. Each adverse Party shall then have twenty (20) days after service of the written objections and/or written requests for clarification to serve a response to them. The objections and/or requests for clarification and any response to those objections and/or requests for clarification shall be added to the Administrative Record to be considered by the Board. Within thirty (30) days after the later of the date that Hearing Officer receives the objections and/or requests for clarification or an adverse party's response to such objections and/or requests for clarification, the Hearing Officer may:

- A. Affirm the findings, conclusions, and recommendations as originally submitted, or
- B. Make such changes the Hearing Officer deems appropriate in light of the evidence, the objections or requests for clarification submitted by the Parties, and the responses.

### ***18. Content of Hearing Officer's Proposed Findings of Fact and Recommended Decision***

The Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommended Decision shall include a summary of the following: (1) issues raised by the parties; (2) the testimony; (3) the exhibits offered by the parties, both those received into evidence and those not received; (4) a factual discussion of



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matters on which the Hearing Officer relied; (5) conclusions of law with citations to legal authority; and (6) recommended action.

### ***19. Action by the Board***

The Board's staff shall refer to the Board for its consideration the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommended Decision, any related objections and/or requests for clarification and any responses to those objections and/or requests for clarification. After reviewing the foregoing documents, pursuant to Government Code §31534, the Board may:

- A. Approve and adopt the proposed findings, conclusions and recommendation of the Hearing Officer; or
- B. Require a transcript or summary of all Hearing testimony, plus all other evidence received by the Hearing Officer. On receipt thereof, the Board shall take such action as in its opinion is indicated by such evidence; or
- C. Refer the matter back, with or without instructions, to the Hearing Officer for further proceedings; or
- D. Set the matter for hearing before itself. At such hearing, the Board shall hear and decide the matter de novo.

### ***20. Oral Argument Before the Board Regarding Objections to a Hearing Officer's Recommended Decision***

The Parties shall be provided written notice of the time and date of the regular meeting where the matter will be placed on the Board's agenda for action. The Parties will have the opportunity to be heard at the Board meeting subject to appropriate time limitations.

### ***21. Board's Decision After its Review of the Record***

In any case where the Board makes a decision based on a transcript or summary of all Hearing testimony, plus other evidence received by the Hearing Officer, or where the Board sets the matter for Hearing before itself, the Board may approve and adopt the Proposed Findings, Conclusions of Law and Recommended Decision of the Hearing Officer; otherwise, the Board shall direct the prevailing Party to prepare Proposed Findings of Fact, Conclusions of Law and Recommended Decision consistent with its tentative decision. The Proposed Findings shall then be served on the unsuccessful Party who shall have ten (10) days after such service to serve and file written objections to the Board. The Board shall then consider such written objections, if any, and then adopt its final decision as it deems appropriate.

### ***22. Alteration of Time Requirements***

Nothing in these Rules shall be construed to prevent the Parties from stipulating to different intervals than those prescribed in these Rules. The Hearing Officer may, for good cause shown after giving both parties an opportunity to be heard, shorten or lengthen the times specified above as he/she deems necessary.

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### ***23. Dismissal Without Prejudice for Failure to Pursue the Hearing***

Except as otherwise provided, if, as a result of an Applicant's failure to comply with any of these Rules and/or with any request made by either the OCERS' Disability Section or Member Services staff, the Applicant's request for an Administrative Hearing or Board referral is not heard within one year after receipt of the Applicant's request for Hearing, or the Board's referral of a case to a Hearing Officer, the case shall be dismissed without prejudice by the Board.

### ***24. Service of Documents***

Unless otherwise agreed to by the Hearing Officer and Parties in writing, service of documents provided for in these Rules may be made by first class mail, postage pre-paid, or by personal delivery. If documents are sent by first-class mail, the postmark date shall be deemed the date of service. If the Hearing Officer and Parties do agree in writing to service by facsimile transmission and/or electronic mail, the service date for any documents so delivered will be the date shown in a delivery receipt generated by the facsimile machine or electronic mail program.

## **4. Policy Review**

The Board will review this policy at least every three (3) years to ensure that it remains relevant and appropriate.

## **5. Policy History**

This policy was adopted by the Board of Retirement on February 19, 2002. It was amended on August 30, 2004, June 18, 2007, May 19, 2008, June 18, 2012 and December 14, 2015.

## **Secretary's Certificate**

I, the undersigned, the duly appointed Secretary of the Orange County Employees Retirement System, hereby certify the adoption of this policy.



12/14/15

Steve Delaney  
Secretary of the Board

Date