

VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

DISABILITY MEETING

SEPTEMBER 14, 2020

AGENDA

PLACE: In Accordance with the Governor's Executive Order N-29-20 (3), the Members of the Board will be participating via teleconference. Pursuant to Government Code §54954.3, members of the public, to the extent required by law, will have the opportunity to directly address the Board concerning the below mentioned business.

TIME: 9:00 a.m.

The public may listen to the Public Session and offer comments by calling: 213-338-8477, using Meeting ID: 945-6014-1739#. Persons may also submit written comments to publiccomment@vcera.org prior to and during the Board meeting. Please include your name, agenda item, the last 4 numbers of the telephone number that will be used to call in, and your comment. Public comment emails will be read into the record or summarized if lengthy.

ITEM:

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| I. <u>CALL TO ORDER</u> | Master Page No. |
| II. <u>APPROVAL OF AGENDA</u> | 1 – 4 |
| III. <u>APPROVAL OF MINUTES</u> | |
| A. Business Meeting of July 27, 2020. | 5 – 19 |
| IV. <u>RECEIVE AND FILE PENDING DISABILITY APPLICATION STATUS REPORT</u> | 20 – 59 |
| V. <u>APPLICATIONS FOR DISABILITY RETIREMENT</u> | |
| A. Romney, Scott; Case No. 02-044—Determination on Incapacity Following Disability Retirement Medical Re-Evaluation Under Government Code 31729. | |
| 1. Staff Letter to Board of Retirement, dated September 14, 2020. | 60 – 61 |
| 2. Letter filed by Scott Romney to VCERA, received August 17, 2020. | 62 – 64 |
| 3. Staff Letter to Board of Retirement, dated July 13, 2020. | 65 – 67 |
| 4. Letter filed by Tracey Pirie, Sheriff's Bureau Manager, dated June 24, 2020. | 68 |
| 5. Independent Medical Evaluation Report, filed by Dr. Mark Ganjianpour, dated December 19, 2019. | 69 – 84 |
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| 7. | Hearing Notice, dated September 2, 2020. | 88 – 89 |
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B. Application for Service-connected Disability Retirement—Bittmann, Janeen R.; Case No. 17-014. | | |
| 1. | Addendum to Employer's Statement of Position, dated July 7, 2020. | 90 – 95 |
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| 4. | Staff Letter to Board of Retirement, dated September 14, 2020.
<i>To be Provided</i> | |
| 5. | Supporting Documentation for Employer's Statement of Position. | 185 – 241 |
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| 2. | Addendum to Employer's Statement of Position, dated August 31, 2020. | 264 – 269 |
| 3. | Supporting Documentation for Employer's Statement of Position. | 270 – 331 |
| 4. | Application for Service-connected Disability Retirement, filed by Michael Treger, dated October 24, 2017. | 332 – 337 |
| 5. | Hearing Notice, dated September 2, 2020. | 338 – 339 |
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D. Application for Service-connected Disability Retirement—Kristol, Michelle M.; Case No. 18-014. | | |
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| 2. | Supporting Documentation for Employer's Statement of Position. | 349 – 432 |
| 3. | Application for Service-connected Disability Retirement, filed by Applicant, dated May 2, 2018. | 433 – 444 |
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| 1. | Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated June 23, 2020. | 447 – 459 |
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<i>To be Provided</i> | |
| 3. | Supporting Documentation for Employer's Statement of Position. | 460 – 637 |
| 4. | Application for Service-connected Disability Retirement, filed by Applicant, dated February 25, 2019. | 638 – 650 |
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F. Application for Service-connected Disability Retirement—Duffield, Philip G.; Case No. 19-027. | | |
| 1. | Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated July 17, 2020. | 653 – 661 |
| 2. | Staff Letter to Board of Retirement, dated September 14, 2020.
<i>To be Provided</i> | |
| 3. | Supporting Documentation for Employer's Statement of Position. | 662 – 771 |
| 4. | Application for Service-connected Disability Retirement, filed by Applicant, dated 07/01/2019. | 772 – 779 |
| 5. | Hearing Notice, dated September 2, 2020. | 780 – 781 |

VI. OLD BUSINESS

- A. None.

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VII. NEW BUSINESS

A. Verbal Update from the County of Ventura on the Status of Appointments to the Board.

B. Fiduciary Counsel Comments on VCERA's Implementation of Alameda Decision Presentation.

Start Time: 9:45 a.m.

1. Presentation from Nossaman LLP, by Ms. Ashley Dunning. 782 – 807

2. Draft Resolution for Implementation of Alameda Ruling. 808 – 810

VIII. CLOSED SESSION

A. CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION
Significant Exposure to Litigation Pursuant to Paragraph (2) of Subdivision (d) of
Section 54956.9: One (1) Case.

IX. INFORMATIONAL

A. SACRS Legislative Update – September 2020. 811 – 812

X. PUBLIC COMMENT

XI. STAFF COMMENT

XII. BOARD MEMBER COMMENT

XIII. ADJOURNMENT

VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

BUSINESS MEETING

JULY 27, 2020

MINUTES

TRUSTEES
PRESENT:

Arthur E. Goulet, Chair, Retiree Member
Steven Hintz, Treasurer-Tax Collector
Steve Bennett, Public Member
Mike Sedell, Public Member
Robert Ashby, Safety Employee Member
Jordan Roberts, General Employee Member
Cecilia Hernandez-Garcia, General Employee Member
Will Hoag, Alternate Retiree Member

TRUSTEES
ABSENT:

STAFF
PRESENT:

Linda Webb, Retirement Administrator
Henry Solis, Chief Financial Officer
Julie Stallings, Chief Operations Officer
Dan Gallagher, Chief Investment Officer
Lori Nemiroff, General Counsel
Leah Oliver, Chief Technology Officer
Josiah Vencel, Retirement Benefits Manager
Rebekah Villalobos, Retirement Benefits Manager
Jess Angeles, Communications Officer
Chris Ayala, Program Assistant

PLACE:

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TIME:

9:00 a.m.

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ITEM:

I. CALL TO ORDER

II. APPROVAL OF AGENDA

Welcome of Newly Elected General Member, Cecilia Hernandez-Garcia.

Ms. Webb informed the Board that Trustee Ashby had requested that item VII.A., *Presentation of Internal Process Document to Implement Full In-House Independent Investigation Approved by the Board on October 7, 2019*, be advanced on the agenda to be heard after item IV., Consent Agenda, given the public comments anticipated.

MOTION: Approve as Amended.

Moved by Ashby seconded by Roberts

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

III. APPROVAL OF MINUTES

A. Disability Minutes of July 13, 2020.

Ms. Webb provided written corrections to the minutes with the majority related to style, clarity or punctuation. Corrections of substance were correcting Chair Goulet's title from "Vice Chair" to "Chair" and on Master Page 15, the motion regarding the SACRS election should have referred to the "Nominated Slate".

Trustee Hintz arrived at 9:04 a.m., before the vote on the item.

After discussion by the Board, the following motion was made:

MOTION: Approve with Corrections.

Moved by Hintz seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Hintz, Roberts, Sedell

No: -

Absent: -

Abstain: -

IV. CONSENT AGENDA

A. Approve Regular and Deferred Retirements and Survivors Continuances for the Month of June 2020.

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- B. Receive and File Report of Checks Disbursed in June 2020.
- C. Receive and File Budget Summary for FY 2019-20 Month Ending June 30, 2020. (Preliminary)
- D. Receive and File Statement of Fiduciary Net Position, Statement of Changes in Fiduciary Net Position, Schedule of Investments, Cash, and Cash Equivalents, and Schedule of Investment Management Fees for the Period Ending May 31, 2020.

MOTION: Receive and File.

Moved by Ashby seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Hintz, Roberts, Sedell

No: -

Absent: -

Abstain: -

Following the vote on the item, the Board advanced to agenda item VII.A., "Presentation of Internal Process Document to Implement Full In-House Independent Investigation Approved by the Board on October 7, 2019."

V. INVESTMENT MANAGER PRESENTATIONS

- A. Receive Annual Investment Presentation from Hexavest, Marc C. Lavoie and Kristen Gaspar.

Marc C. Lavoie and Kristen Gaspar reviewed Hexavest's organizational changes, and discussed the firm's investment outlook, portfolio strategy, composition and performance.

Trustee Hintz left at 10:10 am during the presentation from Hexavest.

Following the annual investment presentation from Marc C. Lavoie and Kristen Gaspar of Hexavest, the Board advanced to agenda item VI.A., "UBS Trumbell Property Fund (TPF) Loyalty Discount Fee Recommendation."

- B. Receive Annual Investment Presentation from Walter Scott, Margaret Foley.

Margaret Foley reviewed Walter Scott's organizational changes, and discussed the firm's investment outlook, portfolio strategy, composition and performance.

Following the annual investment presentation from Margaret Foley of Walter Scott, the Board advanced to agenda item VI.B., "Preliminary Performance Report for Month Ending June 30, 2020."

VI. INVESTMENT INFORMATION

NEPC – Allan Martin.

VCERA – Dan Gallagher, Chief Investment Officer.

- A. UBS Trumbell Property Fund (TPF) Loyalty Discount Fee Recommendation.

RECOMMENDED ACTION: Approve.

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1. Staff Letter by C.I.O., Dan Gallagher.

MOTION: Approve Subject to Board Counsel Approval and Authorize the Board Chair or Retirement Administrator to Execute the Necessary Legal Documents to: 1) Accept UBS' Offered Loyalty Program Option of a 4-Year Soft Lock-Up, Entitling VCERA to a 25% Discount on a Base Annual Management Fee for the UBS Trumbull Property Fund (TPF), and; 2) Approve Committing VCERA's Entire Net Asset Value Investment in TPF, Excluding the \$30 Million already in TPF's Redemption Pool, for the Proposed 4-Year Loyalty Program Soft Lock-up.

Moved by Ashby seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

Following the vote on the item, the Board advanced to agenda item VIII.A., "Report & Analysis of Additional Pay Codes Under PEPRA and Board Resolution on Pensionable Compensation."

- B. Preliminary Performance Report for Month Ending June 30, 2020.

RECOMMENDED ACTION: Receive and file.

Following the presentation and discussion of agenda item VI.B, the Board advanced to agenda item VII.A. and invited public comment on that agenda item.

VII. OLD BUSINESS

- A. Presentation of Internal Process Document to Implement Full In-House Independent Investigation Approved by the Board on October 7, 2019.

RECOMMENDED ACTION: Receive and file.

1. Staff Letter.
2. October 7, 2019, Staff Memo Requesting Board Direction on Disability Model Options.
3. July 13, 2020, Staff Memo Presenting New Disability Model Process Document.
4. VCERA's Disability Retirement Process Document (New Model), Clean, as of July 23, 2020.
5. VCERA's Disability Retirement Process Document (New Model), Red-line, as of July 23, 2020.
6. VCERA's Disability Retirement Process (New Model) Flowchart.
7. VCERA Board of Retirement Disability Hearing Procedures (1999).
8. Questions and Responses from Meeting with Risk Management, as of July 22, 2020.

Ms. Webb summarized the agenda item before the Board heard the requests for public comment. Staff recommended that the Board adopt the new disability retirement processing model, which was developed following the Board's direction on October 7, 2019. It had been presented previously to the Board on July 13, 2020.

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Ms. Webb noted the new model was designed to address weaknesses and potential fiduciary risks associated with the current disability model, as identified in outside legal counsel Ashley Dunning's presentation in September 2019. These weaknesses included deficiencies in the Board's ability to monitor and maintain oversight of the disability retirement process, and its current delegation of the investigative process to the employer. With the Board's direction in October 2019 to implement "Option 3", which authorized full, in-house, independent investigations, staff had worked diligently to develop a new disability retirement process. Since the July 13 Board meeting, staff had received input from trustees and Risk Management, and edits were made to both the New Model Process Document and the Q&A document that addressed Risk Management's queries. The provided staff letter identified four (4) categories of employer concerns, the last of which Ms. Webb discussed separately.

Ms. Webb said that at the July 13 meeting, she told the Board that the new model was not in conflict with the 1999 Disability Hearing Procedures, and she still believed that to be correct. Risk Management had expressed their disagreement, particularly regarding their ability to challenge an application. The 1999 Procedures said if Risk Management challenged an application, it would automatically go to an evidentiary hearing; implicit in such a challenge was the assumption of "good cause" to send the case to hearing. However, in the new model, staff made this implicit assumption explicit; thus, in the new mode Risk Management could challenge VCERA staff's recommendation upon showing good cause to the Board. Staff believed this clarification gave the Board greater oversight over the process in line with its plenary authority.

Ms. Webb concluded by saying that staff believed the new disability model was comprehensive, in line with the Board's direction, and ready to be implemented.

Trustee Hintz made a motion to table the item until September's disability meeting because two Board member seats were currently vacant. He preferred to have more plan sponsor representation on the Board before considering the matter.

Trustee Sedell said he agreed with tabling the matter until September's disability meeting. He said the Board had not had sufficient time to flesh out the new model with the County. He suggested that VCERA schedule a meeting with a few Board members and the County.

Regarding Trustee Hintz's statement, Chair Goulet noted that the County had left the vacancies—with the exception of Trustee Wilson's seat due to his recent death—unfilled for a long time. Therefore, filling the Board vacancies did not appear to be a high priority for the County.

Trustee Roberts agreed with Chair Goulet, noting that the Board seats had been vacant since September 2019 and he did not understand the sudden priority to fill them. He noted the Board members' current difficulty trying to obtain a quorum at each meeting due to the lack of trustees.

Trustee Bennett said there had been difficulties for the County in filling the vacancies in a timely manner. He felt that the County needed more time to work with staff on the new disability retirement process, which was why he would be supporting the motion to table the item until September.

Trustee Roberts said he reviewed the questions that Risk Management raised, and he believed that staff had worked diligently and in good faith to address these questions and concerns.

Nick Odenath, President of the Ventura County Deputy Sheriffs' Association (VCDSA) provided the following public comment. Mr. Odenath said that VCDSA was thrilled in October 2019 that the Board had opted for the independent investigative process of disability retirements. He strongly urged the Board to implement the new independent process and wanted to share some of the

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experiences of VCDISA members under the current model. He noted VCERA was the only one of twenty CERL retirement systems that did not have an independent disability retirement process. VCDISA believed the County's involvement created an imbalance of power that was used to leverage disability retirements in Workers' Compensation claims, creating years-long delays and undue hardships on members. He said the Board had a fiduciary responsibility to the members and applicants that the County did not have. Mr. Odenath said the Board could not make informed decisions on disability retirements because, under the current process, there was a lack of independent medical examinations and a lack of access of VCERA staff to medical records from the County. He therefore urged the Board to adopt the new disability model as soon as possible.

Danny Carrillo, Regional Director for SEIU Local 721, provided the following public comment. He said he also supported adopting the new disability process model and opposed the current motion to delay the item until September. He said the new process could create efficiencies that would allow for a more reasonable disability timeline, and it would remove conflicts of interest that come from Risk Management's current role in the process (i.e., members' disability retirements could be held as a bargaining chip while settling Workers' Compensation claims). Mr. Carrillo said the new process appeared effective in ensuring that the Board's obligation to SEIU's membership was met. He said he believed that VCERA should be in line with other nineteen CERL retirement systems.

Kevin Aguayo, President of the Board of Directors for Ventura County Professional Firefighters' Association (VCPFA), provided the following public comment. He agreed with the other union representatives and said the Board had an obligation to County employees, including the more than 400 VCPFA members, to decide the issue today. It was previously stated that Ventura was the only CERL county that allowed an employer to stifle the process used to grant members a disability retirement, which he claimed was unfair and unethical. He added that the Board had the opportunity today to change that, make it right, and fully comply with the law. He urged the Board not to delay the issue any longer, as that would be detrimental to members. He also criticized the County for leveraging disability retirement to get a Workers' Compensation claim settled and creating undue delays. He cited disability retirement cases ongoing for up to five years while members went bankrupt. Mr. Aguayo suggested the reason why no other county had the same disability retirement process as VCERA was because it was wrong and that the current process failed to satisfy CERL's mandate of providing timely disability retirement benefits. Lastly, regarding vacant seats on the Board, he said there would always be quorum issues on any board, but he urged the Board to work past it because kicking the can down the road would not help hardworking County employees.

Chuck Pode, Sr. Deputy Executive Officer and County Risk Manager, provided the following public comment. He said there were still substantive issues to resolve related to the new procedures, one of which came to light a few days prior to the Board meeting. Another important issue was the two vacant seats on the Board that are appointed by the Board of Supervisors. Mr. Pode asked the Board to have staff work out the differences in the new disability retirement process with the County. He noted that one substantive issue was the County's right to request an evidentiary hearing. Another issue was whether the new procedures required Board of Supervisors' approval.

Trustee Bennett asked what was causing the substantive issues to come up at the last minute.

Ms. Webb replied that one of the issues Mr. Pode mentioned was the right to request an evidentiary hearing, which staff discussed with Risk Management in June. The issue arose because, under the new model, Risk Management would be asked to demonstrate good cause to the Board for its approval before the case could go to hearing. In the current process, challenged cases would automatically go to hearing. Because cases that went to hearing not only caused delay but incurred

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monetary costs to VCERA, Ms. Webb said it was prudent for the Board to determine if cases should go to a hearing when good cause was shown. Staff believed this change was reasonable.

Trustee Bennett asked Mr. Pode if he agreed that the right to request an evidentiary hearing was the remaining substantive issue that needed to be addressed.

Mr. Pode said there were two issues that concerned him. One was the amount of time the County had to take a position under the new disability process. The other was whether the County had the right to send a case to a hearing or if it was up to the discretion of staff or the Board. This second issue arose on the Thursday before the meeting. He said Risk Management is concerned that there is no mechanism in the new process for how, when or where that petition should be done.

Trustee Bennett asked if staff and Risk Management had resolved all other substantive issues and if these noted issues came up suddenly or had been unresolved for some time.

Ms. Webb replied that staff responded to Risk Management's questions and concerns promptly, as shown in the provided Q&A document. Regarding the 21-day period that Risk Management had to respond to staff's Preliminary Recommendation, she said staff was open to a 28-day comment period, if needed. Regarding sending cases to hearing, she reminded that it was up to the Board to decide and that Risk Management's comments would always be considered. Regarding Trustee Bennett's question on whether the other substantive issues had been resolved, she noted that although staff had answered all of Risk Management's questions, the County may not consider them all resolved yet. She reiterated that the new procedures were in direct response to what VCERA's fiduciary counsel had described as weaknesses in the current process related to CERL, Board authority and the member's due process rights. Lastly, Ms. Webb remarked that staff believed the development of the new model had not been rushed, but rather the reverse, and her concern had been that the Board might have seen the model development as taking too long, to develop as the Option 3 had been chosen in October.

Trustee Roberts said he assumed that staff would not have submitted the new disability retirement model to the Board if it was not ready. He then asked Ms. Nemiroff for her perspective on the fourth issue in staff's memo, including what staff considered internal processes versus procedures that would need Board of Supervisors' approval.

Ms. Nemiroff said that she had been involved in every step of creating the new disability retirement process to ensure that it complied with CERL and protected the Board. Regarding the fourth issue, she said Ms. Webb's description of the matter was correct because under the current process there was an implicit duty on the County to not challenge a disability case unless there was a good cause for it. So, VCERA made explicit what was formerly implicit: Risk Management now would have to come before the Board to demonstrate good cause in order to send a case to a hearing after staff had reviewed the case, completed its medical investigation and recommended that it be granted. She explained that the reason for the requirement upon Risk Management to show good cause was because applicants were entitled to due process, such as prompt delivery of benefits, requiring VCERA to make a timely decision on applications. Once VCERA staff recommended that an application for disability retirement be granted, the County could choose to challenge it, but there would be costs to both VCERA and the applicant and would cause delays in the case. To protect the Board from a claim of a breach of fiduciary duty, Ms. Nemiroff believed it was legally prudent to have the Board evaluate Risk Management's good cause before sending a case to a hearing. She said the requirement was included to make the new process stronger and to more closely align with the law.

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Trustee Roberts referenced a few disability attorneys who claimed the Board was breaching its fiduciary duties by allowing the current process to continue. He asked Ms. Nemiroff about the Board's fiduciary risk in delaying implementation of the new disability retirement model.

Ms. Nemiroff replied that, because VCERA did not have a system in place to monitor and oversee the current disability retirement process and to ensure that applicants were receiving due process, a risk to VCERA remained. The sooner VCERA had an independent review of cases in place, the sooner that risk would be remedied.

Trustee Roberts asked if that risk fell on the Board and VCERA or if the County also shared in the liability.

Ms. Nemiroff said that under CERL and the California Constitution provisions that govern VCERA, those duties fell on the Board. She had not researched if the County might be at risk for anything under the current process.

Trustee Sedell said he did not disagree with the union representatives and had previously expressed concern over the length of time needed to close a disability retirement case. However, because the County still had concerns, he believed the Board should make every effort to resolve them before deciding to implement the new process.

Trustee Ashby agreed with Chair Goulet's comments about the County having sufficient time to fill their vacant seats on the Board of Retirement, noting VCERA and the Elections Office's ability to conduct a recent General member election in a timely manner. He opposed postponing the decision on the disability process again because he felt it was clear what needed to be done for the good of plan members.

Chair Goulet added that he had worked years ago with the California Retired County Employees' Association (CRCEA) to propose a law that would make the filling of Board seats—elected and appointed—mandatory. At that time, he said, the County's lobbyist opposed it, so the requirement on the County was removed from the proposed bill. Chair Goulet then asked Mr. Pode to identify which provision in CERL stated that the County had subpoena power over any aspect of the disability retirement process.

Mr. Pode replied that he was not sure if there was a specific provision in CERL or if it was a matter of executing a release to obtain documents. He said Risk Management had been delegated the responsibility to investigate an incident and exercised the subpoena right through that delegation, along with the ability to depose witnesses via subpoena. These aspects were important in creating the administrative record for a disability case that later could be litigated in the Superior Court. This raised the issue of the extent to which the County could participate in evidentiary hearings and help create the administrative record. Mr. Pode also addressed Trustee Robert's question about whether there was a conflict between the new proposed disability retirement process and the 1999 Procedures and whether it would require the approval of the Board of Supervisors to implement the new disability retirement process. He recalled Ms. Nemiroff saying there was no conflict between the two and, therefore, the Supervisors' approval was not necessary. Because County Counsel had not yet completed its evaluation of that matter and because of recent changes to the new process regarding petitioning the Board for an evidentiary hearing, he believed key issues remained.

Ms. Webb replied that she did not see a conflict, as the new provision merely memorialized a step that was already implicit in the current process. If Risk Management had good cause to request a hearing, she did not see why there would be a reservation to voice it to the Board.

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Mr. Pode agreed that he was not aware of any disability case that was sent to an evidentiary hearing without good cause, citing the County's excellent litigation record over the last 15 years. He also said there was no argument that a change in the disability retirement process was necessary and would be beneficial for timing purposes. Mr. Pode explained that the disability retirement process was inexplicitly linked to Workers' Compensation cases because the latter provided information on an applicant's permanency via work restrictions that the employer would try to accommodate. He then recounted the timeline of the County's interactions with VCERA staff regarding the new process, noting that the County did not participate whatsoever in putting together the process in the preceding eight months. Therefore, it was not correct to infer that the County was resisting the proposed changes. He noted that the new process did not serve all of the involved parties, including the County, which funded the program.

Ms. Webb expressed curiosity that Mr. Pode was surprised by staff's most recent revisions to the new process, given that the majority of the changes resulted from Risk Management's earlier feedback. She asked Mr. Pode if, aside from the good cause issue, there were any other issues he felt unprepared to discuss, as staff had tried to be transparent and to respond to his feedback promptly.

Mr. Pode said the unanswered questions were how and when the County's "good cause" petition should be made to the Board. He also expressed concern about the inability to request an extension of time beyond 21 days to evaluate a case. He was surprised that the process now included a petition to the Board for an evidentiary hearing. And he noted that, in his discussion with the County's legal counsel, there could be an issue with giving the Retirement Board the discretion to grant or deny an evidentiary hearing on demand.

Ms. Webb replied that staff would provide as much notice as possible, even beyond seven days, once staff's final recommendation was completed. She noted that staff's preliminary recommendation would have been provided to Risk Management weeks earlier, so the County would already know staff's intent. Ms. Webb reminded that the Board had discretion to give the County more time, upon request. Lastly, she said she believed the new process successfully afforded all parties involved in the process the ability to comment on cases.

Trustee Bennett said that a good argument had been made that the County of Ventura had not timely filled vacant positions on the Board of Retirement. He asked for the motion to say that the item would be heard at the September disability meeting for a definite decision without further delay. He also wondered why, given the County's requirement to have good cause for hearings, there would be an issue with providing it to the Board for consideration.

The following motion was made:

MOTION: Table the Item to the Disability Meeting in September 2020, When a Decision Shall be Made by the Board without Further Continuance.

Moved by Hintz seconded by Sedell

Vote: Motion failed

Yes: Bennett, Hintz, Sedell

No: Ashby, Goulet, Hernandez-Garcia, Roberts

Absent: -

Abstain: -

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Chair Goulet made a motion to adopt the new disability retirement process document with the ability for staff to recommend to the Board revisions to the document, as deemed prudent.

Mr. Pode wanted the record to reflect an uncertainty as to whether the new disability retirement process needed to be reviewed and approved by the Ventura County Board of Supervisors before it could be implemented. He added that the County's position was aligned with VCERA in implementing procedures that would expedite the disability retirement process while ensuring a timely and fair hearing for members.

Trustee Bennett said he recognized there was a problem with the current disability retirement process and that a good faith effort was made to resolve the problem. Although the County and VCERA staff were unable to come to a complete agreement on the matter, he believed the benefits of the proposed changes were significant enough to support the new motion.

Trustee Sedell agreed with Trustee Bennett. Although he wished the issues could have been resolved to everyone's satisfaction, he said he realized that changes to the current process needed to be done. He appreciated Chair Goulet's motion that would allow for future changes to the new process that staff felt was appropriate. He expressed support for the new motion despite still having concerns.

The following motion was made:

MOTION: Adopt the VCERA Internal Disability Retirement Process Document While Recognizing that There May be a Need for Revisions Over Time; Direct Staff to Return to the Board as Often as Deemed Prudent to Recommend Revisions, to Make Improvements Based on Experience, to Add Clarity or to Eliminate Inconsistencies.

Moved by Goulet seconded by Roberts

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: Hintz

Absent: -

Abstain: -

Following the vote on the item, the Board returned to agenda item V.A., "Receive Annual Investment Presentation from Hexavest, Marc C. Lavoie and Kristen Gaspar."

VIII. NEW BUSINESS

- A. Report & Analysis of Additional Pay Codes Under PEPRA and Board Resolution on Pensionable Compensation.

RECOMMENDED ACTION: Approve.

1. Staff Letter, with Pay Code Analysis.

Ms. Webb noted that the agenda item was cyclical in nature, since staff would typically present the Board with all of the new pay codes that had been created since the previous year. She said that she had previously discussed the agenda item with Ramon Rubalcava, Director of Member Benefits & Employer Relations for SEIU Local 721 and who had some questions related to the certification pay for one of pay codes. While staff believed that pay code in question which was related to

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certification was categorized correctly, but Mr. Rubalcava expressed that he had some issues with the pay code.

Chair Goulet said that he would like to continue the matter, with the indulgence of the rest of the Board, to allow Mr. Rubalcava a chance to present his concerns to the Board at a future meeting.

- B. Recommendation to Authorize Retirement Administrator to Execute Affirmation to Approve Retention of Fennemore Craig, P.C., by Nossaman LLP, to Represent VCERA in Litigation Pending in the Case of Scott V. VCERA, Et Al., Civil Action No. Cv-20-08166-PCT-DLR, Filed in United States District Court for The District of Arizona.

RECOMMENDED ACTION: Authorize Retirement Administrator to Execute Affirmation to Approve Retention of Fennemore Craig, P.C., by Nossaman LLP, Through a Legal Services Subcontract to Represent VCERA In Litigation Pending In The Case Of Scott V. VCERA, Et Al., Civil Action No. Cv-20-08166-PCT-DLR, Filed in United States District Court for the District of Arizona; Ratify VCERA's Authorization for Nossaman to Engage Fennemore Craig, LLC, as of July 13, 2020, and; Authorize Retirement Administrator to Execute Separate Engagement Letter with Fennemore Craig, LLC, to be Subordinate to the Subcontract.

1. Staff Letter by General Counsel, Lori Nemiroff.
2. Legal Services Subcontract (Ventura County Employees' Retirement Association - Scott Litigation Local Counsel).
3. Engagement Letter from Fennemore Craig, P.C.

Trustee Sedell remarked that he did not understand why there was a need to go from one contract to another. Also, why couldn't they simply use the recommendation from Nossaman, LLP instead of going through Nossaman, LLP to engage with Fennemore Craig, P.C.

Ms. Nemiroff replied that staff went to Nossaman, LLP because VCERA's current contract with them allows Nossaman, LLP to engage other local counsel when necessary for VCERA. There was also a very short window in which to respond, and Ms. Dunning's partner had previously worked on a similar sub-contract before, so they were poised to get the response done quickly. Also, staff was having Nossaman, LLP assist with VCERA's claim under the fiduciary liability insurance policy.

Trustee Sedell asked if there would be any additional cost by going through Nossaman, LLP to engage Fennemore Craig, P.C.

Ms. Nemiroff replied that there would be no duplication of effort and no additional cost.

Trustee Sedell then said that he was satisfied with the explanation and the request.

After discussion by the Board, the following motion was made:

MOTION: Approve, 1) Authorization for Retirement Administrator to Execute Affirmation to Approve Retention of Fennemore Craig, P.C., by Nossaman, LLP, Through a Legal Services Subcontract to Represent VCERA in Litigation Pending in the Case of Scott v. VCERA, ET AL., Civil Action No. CV-20-08166-PCT-DLR, Filed in United States District Court for the District of Arizona; 2) Ratify VCERA's Authorization for Nossaman to Engage Fennemore Craig, LLC, as of July 13, 2020, and; 3) Authorize Retirement Administrator to Execute Separate Engagement Letter with Fennemore Craig, LLC, to be Subordinate to the Subcontract.

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Moved by Roberts seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

C. 2020/21 Business Plan.

RECOMMENDED ACTION: Approve.

1. Proposed 2020/21 Business Plan.
To be Provided.

MOTION: Approve.

Moved by Sedell seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

D. Recommendation to Approve Payment for Waiver of Recourse, Fiduciary Liability Insurance, FY 2020/21.

RECOMMENDED ACTION: Approve.

1. Staff Letter.
2. Binder of Insurance.

Ms. Webb reminded the Board that VCERA had a Fiduciary Liability Insurance policy, but the Waiver of Recourse was a separate item which was issued to the individual Trustees. Also, the individual Board members were required to pay the premium, which could not be paid by Plan assets.

After discussion by the Board, the following motion was made:

MOTION: Approve.

Moved by Ashby seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

E. Request for Trustees Roberts & Hernandez-Garcia to Attend the CALAPRS Virtual Program - Principles for Trustees, August 18, 25, & 26, 2020.

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RECOMMENDED ACTION: Approve.

1. Staff Letter.
2. CALAPRS Program Flyer.

F. Request for Trustee Hoag to Attend the SACRS/UC Berkeley, July 28 – August 13, 2020.

RECOMMENDED ACTION: Approve.

1. Staff Letter.
2. SACRS/UC Berkeley Program Schedule.

Trustee Goulet said that with the Board's indulgence he would combine agenda items, VIII.E. and VIII.F., as they were both requests for approval for Trustees to attend training and education. He also said that he wanted the motion to say that any other Trustees who were interested in the two courses could also attend.

Trustee Bennett left the meeting at 10:40 a.m., before the vote on this item.

After discussion by the Board, the following motion was made:

MOTION: Approve the Request for Trustees Roberts and Hernandez-Garcia to Attend the CALAPRS Virtual Program - Principles, August 18, 25, & 26, 2020 and the Request for Trustee Hoag to Attend the SACRS/UC Berkeley, July 28 – August 13, 2020; and Any Other Board Members Wishing to Attend.

Moved by Sedell seconded by Roberts

Vote: Motion carried

Yes: Ashby, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Bennett, Hintz

Abstain: -

G. Appointment of Vice Chair.

1. Staff Letter.

Ms. Webb noted that the appointment of a Chair and Vice Chair was typically done in December, but with the unfortunate passing of Trustee Wilson, Vice Chair Goulet had agreed to serve as Chair until December. In the interim, the Board would need to appoint a Vice Chair to also serve until December.

Chair Goulet asked if a Trustee was required to have been on the Board for a year before they could serve as the Vice Chair.

Ms. Nemiroff replied yes.

Trustee Bennett nominated Trustee Sedell for Vice Chair.

After discussion by the Board, the following motion was made:

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MOTION: Approve Trustee Sedell to Serve as Vice Chair, for the Remainder of 2020.

Moved by Goulet seconded by Roberts

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Hintz, Roberts, Sedell

No: -

Absent: -

Abstain: -

H. Quarterly Retirement Administrator's Report for April – June 2020.

RECOMMENDED ACTION: Receive and file.

I. Quarterly Chief Investment Officer's Report for April - June 2020.

RECOMMENDED ACTION: Receive and file.

After discussion by the Board, the following motion was made:

MOTION: Approve both the Quarterly Retirement Administrator's Report and the Quarterly Report for the Chief Investment Officer's Report for April – June 2020.

Moved by Bennett seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hernandez-Garcia, Roberts, Sedell

No: -

Absent: Hintz

Abstain: -

Trustee Ashby left the meeting at 10:46 a.m., after the vote on this item.

Trustee Bennett also left the meeting at 10:46 a.m., after the vote on this item.

Following the vote on the item, the Board returned to agenda item V.B., "Receive Annual Investment Presentation from Walter Scott, Margaret Foley."

IX. INFORMATIONAL

None.

X. PUBLIC COMMENT

None.

XI. STAFF COMMENT

Ms. Webb informed the Board that Mr. Solis had postponed his retirement until November, instead of August, which was good news for VCERA.

Mr. Gallagher said that he wanted to report a hack on SEI's systems. SEI was a company that provided private investment managers with cloud based data rooms, which contain both client and

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manager data and documents. There were 3 managers of VCERA's who used portals to those data rooms and at this time he did not know what the scope or the impact of the hack was. Currently the FBI and other experts were investigating the situation and he would update the Board once he has received more information.

XII. BOARD MEMBER COMMENT

Trustee Roberts said that he wanted to propose having the Board meetings on a different day of the week. He had found it challenging to prepare for the meetings over the weekends and made it difficult for him to spend time with his family. He also felt that he was bothering staff over the weekends and thanked Ms. Webb and staff for working on the ongoing data issue with the County of Ventura, Auditor-Controller. He also wanted to thank Staff for all of the work that had been done on the new disability retirement process model over the last 10 months.

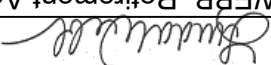
Chair Goulet said that he would like to ask staff to provide a report to the Board on optional days that the Board meetings could be held, as well as the pros and cons of each.

Ms. Webb replied that the Bylaws would have to be amended, but that issue would be included in the report to the Board as well as an alternate schedule.

XIII. ADJOURNMENT

The Chair adjourned the meeting at 11:19 a.m.

Respectfully submitted,


LINDA WEBB, Retirement Administrator

Approved,

ART GOULET, Chair



Fiduciary Counsel Comments on VCERA's Implementation of Alameda Decision

Presented by: Ashley K. Dunning, Partner
Co-Chair, Public Pensions & Investments
Practice Group

Presented to the Board of Retirement of
Ventura County Employees' Retirement
Association

September 14, 2020

California Law – The State Constitution and the *Alameda Decision*

- Article XVI, Section 17 vests the Board with “plenary” authority over the administration of VCERA, subject to its fiduciary duties.
- On July 30, 2020, the California Supreme Court filed its decision *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) __ P.3d.__ (WL 4360051) (S247095) (“*Alameda*”).
- Now that *Alameda* has been decided by the highest court in California, and it interprets the law applicable to county retirement systems, VCERA is bound by its mandates.
- In *Alameda*, the Court described the fiduciary and administrative role of public retirement boards, such as VCERA's Board of Retirement, to implement statutes governing them as those statutes are written.

California Law – The State Constitution and the *Alameda Decision*

The Supreme Court observed:

- “An understanding of the proper role of county retirement boards under CERL is critical to resolving plaintiffs’ contract and estoppel claims. Under CERL, ‘management of the retirement system is vested’ in the county retirement boards. (§ 31520.) This delegation of authority is echoed by article XVI of our Constitution, which grants to public employee retirement boards, including those operating under CERL, the ‘sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.’”

California Law – The State Constitution and the *Alameda Decision*

.....

The Supreme Court further noted:

- “The task of a county retirement board is not to design the county’s pension plan but to implement the design enacted by the Legislature through CERL. As noted, CERL speaks of the retirement boards as “manag[ing]” the retirement system (§ 31520), while the Constitution charges them with “administer[ing]” the system and its assets (Cal. Const., art. XVI, § 17, subd. (a)). Although CERL grants to retirement boards the power to make regulations, those regulations must be consistent with the provisions of CERL. (§ 31525 [“The board may make regulations not inconsistent with this chapter”].) The boards do not have the authority to “evade the law” that otherwise applies to their system.”

California Law- The County Employees Retirement Law of 1937 ("CERL")

- Government Code section 31461 of CERL, as amended by Assembly Bill 197 (2012-2013) ("AB 197") and the Public Employees' Pension Reform Act of 2013 (collectively, "PEPRA"), required new exclusions from "compensation earnable" that the *Alameda* Court determined were, in large part, changes in the law.
- The *Alameda* Court further determined that the new exclusions were both constitutional (thus, not a violation of legacy members' vested rights) and must be applied, even if pre-existing settlement agreements or other Board actions provided that such pay items would be included in compensation earnable, and even if active members had paid retirement contributions on those pay items.

Prior VCERA Board Actions on Compensation Earnable and Pensionable Compensation

- The VCERA Board enacted a Pensionable Compensation Resolution in November 2014, implementing PEPRA's specific rules on pensionability to PEPRA members.
- The VCERA Board postponed implementing AB 197 and continued to include a number of pay codes of legacy and PEPRA members that were required to be excluded by PEPRA, deferring further action on those pay codes until *Alameda* was decided for potential vested rights and estoppel-based considerations that derived from post-*Ventura* settlement agreements or otherwise.

The *Alameda* Decision

- *Alameda* was filed on July 30, 2020.
- *Alameda* rejected vested rights and estoppel-based concerns, including those based on post-*Ventura* settlement agreements, that dissuaded the VCERA Board from acting on PEPRA with respect to legacy and PEPRA members previously.

The *Alameda* Decision

- Significantly, the *Alameda* Court's primary conclusions were based on its analysis of the narrow questions relating to the legality of PEPRA amendments to the compensation earnable statute.
- Because those amendments were consistent with the "theory and successful operation" of a public pension system, and because requiring a "comparable new advantage" to members who were disadvantaged by the change in law would undermine the constitutionally permitted purpose of the change, the changes were upheld as a matter of both law and equity.

The *Alameda* Decision— Disapproval of *Guelfi* footnote 6

- *Alameda* also described somewhat greater restraints on CERL Boards than previously was understood with respect to inclusions in compensation earnable that statutes did not permit (e.g., the “*Guelfi* footnote 6” issue and *Alameda* Exclusions).
- In particular, the Court concluded that there was nothing in CERL’s definitions of “compensation” and “compensation earnable” that “hints either that they are intended merely to establish a minimum, rather than to serve as a comprehensive definition, or that they may be implemented at the discretion of local retirement boards.”
- This limitation on the Board’s authority to include that which is statutorily excluded also applies to PEPRA’s definition of “pensionable compensation” for PEPRA members.

Alameda Exclusions— Monetary Value of In-Kind Benefits

.....

The Supreme Court explained:

- “There is no indication, for example, that a local board has the discretion to include the monetary value of in-kind benefits, which are expressly excluded by section 31461. Necessarily, the same is true of any other item of compensation that, even if not expressly mentioned as excluded, does not fall within the definitions. County retirement boards, as discussed above, have the ordinary authority of an administrative body to resolve, in the first instance, ambiguities in the interpretation and application of these statutes, but nothing in the text of sections 31460 and 31461 hints that the discretion extends further.”

(Emphasis added.)

VCERA Implementation of *Alameda*

- Four key questions arise:
 - To whom does *Alameda* apply?
 - As to what period of time are benefits to be corrected?
 - What about member contributions?
 - What pay items must be excluded?

Question No. 1: To Whom Does *Alameda* Apply?

- The *Alameda* Court stated:

“County retirement boards . . . have the ordinary authority of an administrative body to resolve, in the first instance, ambiguities in the interpretation and application of these statutes, but nothing in the text of sections 31460 and 31461 hints that the discretion extends further.”

(Emphasis added.)

Question No. 1: To Whom Does *Alameda* Apply? (cont.)

- The *Alameda* Court also stated:

“We assume for purposes of this analysis that the settlement agreements embodied permissible interpretations of CERL at the time they were executed. The issue here is whether the retirement boards could have agreed to *continue* to implement those interpretations despite a statutory amendment that rendered the interpretations contrary to CERL. For the reasons discussed above, such a provision would have been beyond their authority. County employees can have no express contractual right to the continued adherence to interpretations of CERL that are now, as a result of PEPRA, contrary to the statute.” (Emphasis added.)

Question No. 1: To Whom Does *Alameda* Apply? (cont.)

.....

- *Alameda* thus determines that PEPRA's amendments to section 31461 apply effective January 1, 2013, as written.
- The *Alameda* Court further stated: "it is the law in effect at the time of retirement that is used to calculate the amount of an employee's pension benefit." (Emphasis added.)
- There is no basis to perpetuate the erroneous construction of CERL as the Supreme Court concluded in *Alameda*, even as to currently retired members. See generally, *Retirement Cases* (2003) 110 Cal.App.4th 426 ("Retirement Cases"); *City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69 ("City v. "SDCERS").

Question No. 1: To Whom Does *Alameda* Apply? (cont.)

- Thus, as to VCERA, *Alameda*'s interpretation of PEPRA amendments to section 31461 and exclusions in section 7522.34, subd. (b) (the "PEPRA Exclusions") applies to VCERA legacy and PEPRA members who retired, and will retire, on and after January 1, 2013, because that was the statute-based law applicable to those individuals when they retired.
- However, *Alameda* Exclusions (i.e., those that are based on the judicial law first stated in *Alameda* rather than statutory exclusions first stated in PEPRA) apply to VCERA members who retired, and will retire, on and after July 30, 2020, because that was when the Supreme Court expressly disapproved *Guelfi* footnote 6.

Question No. 2: As to What Period of Time Are Retirement Benefits to Be Corrected Under *Alameda*?

- As set forth the proposed Resolution, all retirement allowances of legacy and PEPRA members who retired on and after January 1, 2013 for pay periods from July 30, 2020 forward, are to exclude all PEPRA Exclusions.
- As also set forth in the proposed Resolution, the retirement allowances of VCERA members who retire on and after July 30, 2020 are not to include the *Alameda* Exclusions.

Question No. 2: As to What Period of Time Are Retirement Benefits to Be Corrected Under *Alameda*?

- We further conclude, however, that under California law, recoupment from retirees for period preceding the *Alameda* decision is not required. *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210; *Blaser v. State Teachers' Retirement System* (2019) 37 Cal.App.5th 349.
- Tax counsel to address federal tax qualification topic regarding permissible error correction.

Question No. 3: What About Member Contributions?

- As stated in *Alameda* footnote no. 18, it did not “address,” or thus decide, whether the return of any member contributions made on pay items that are excluded by section 31461, as amended, are warranted.
- As to member contributions taken on pay codes associated with the PEPRA Exclusions before January 1, 2013, contributions were not only permitted, they were required by CERL and PEPRA. The PEPRA amendments to CERL do not provide for a refund of such contributions. *Cf.* Gov. Code sec. 7522.74 (felony forfeiture statute provides for certain refunds of contributions).

Question No. 3:

What About Member Contributions? (cont.)

- As to member contributions taken on such non-pensionable pay codes after January 1, 2013, they should be refunded to active members, in a manner that complies with federal tax law.
- As to member contributions taken on pay codes after January 1, 2013 that paid for retirement benefits that included pay items that PEPRA excluded, if those benefits are not recouped from currently retired members, they will typically fully offset the members contributions made on them.

Question No. 4: What Pay Items Must Be Excluded from Compensation Earnable Now?

- Per the Supreme Court's discussion of section 31461, as amended, PEPRA also closes certain "loopholes" such as straddling of fiscal years for leave cash outs (a PEPRA Exclusion) and inclusion of "in-kind" benefits in compensation earnable (an *Alameda* Exclusion).

Question No. 4:

What Pay Items Must Be Excluded from Compensation Earnable Now? –No “Straddling” of Years for Leave Cashout

.....

- With respect to the annual leave cash outs, the Court concluded that the PEPRA Exclusions prohibit “straddling years” for pensionability purposes, such that more leave is included in compensation earnable than that which the member may both earn and receive in cash during “each 12-month period” of the member’s final compensation period.

Question No. 4: No “Straddling” of Years for Leave Cashout

.....

The *Alameda* Court stated:

- “Prior to PEPRA’s amendment, even in counties that limited the amount of leave time that could be cashed out in a calendar year, employees were able to double the amount of cashed out leave time received during a final compensation year by designating a final compensation year that straddles two calendar years, for example, July 1 through June 30. By cashing out leave time in the second half of the prior calendar year and the first half of the subsequent calendar year, a retiring employee could double the amount of cashed out leave time received in the final compensation year. By limiting the inclusion of cashed out leave time to that “earned and payable” in a “12-month period,” subdivision (b)(2) and (4) prevent this practice.”

(Emphasis added.)

Question No. 4:

What Pay Items Must Be Excluded from Compensation Earnable Now?

.....

- Mandatory exclusions are in subdivisions (b)(2), (3) and (4) of section 31461, such as:
 - “Payments for additional services rendered outside of normal working hours” must be excluded. (On-Call and Standby Type pay, as well as any differential pay on excluded over time)
 - This pay is excluded from pensionable compensation as well (Gov. Code sec. 7522.34, subd. (c)(6).)
 - Leave cashouts or buybacks in excess of what “may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid,” must be excluded. (No “straddling”)

Question No. 4: What Pay Items Must Be Excluded from Compensation Earnable Now?

- Exclusions in subdivision (b)(1)(A), (B) and (C) are more discretionary in that the Board “may” exclude such items, such as conversions to cash of in-kind benefits, one-time or ad hoc payment of benefits, and pre-termination golden handshakes.
- Discretionary, as opposed to mandatory, PEPRA Exclusions should not be applied for the first time to current retirees now as a result of *Alameda*, unless a board took such action in response to PEPRA previously and applied that action to future retirees.

Next Steps for VCERA and Its Board

- VCERA is to determine each pay code that is not to be included in compensation earnable under the PEPRA amendments and exclude those pay codes for purposes of both contribution collection and benefit payments for individuals who retired from VCERA on or after January 1, 2013.
- *Alameda* Exclusions should be applied to any member who retired on or after the date VCERA was on notice of the Supreme Court's ruling, i.e., July 30, 2020.
- The Board should adopt a Resolution Implementing the *Alameda* Decision, providing proper direction to VCERA staff on these topics.

Questions?

Thank you

**RESOLUTION OF THE BOARD OF RETIREMENT OF
VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
REGARDING ALAMEDA IMPLEMENTATION TO COMPENSATION EARNABLE
AND PENSIONABLE COMPENSATION**

WHEREAS, the Ventura County Employees' Retirement Association ("VCERA") and the VCERA Board of Retirement ("Board") are governed by the County Employees Retirement Law of 1937 (Gov. Code sections 31450, et seq. ("CERL") and the Public Employees' Pension Reform Act of 2013 (Gov. Code sections 7522, et seq.), enacted by Assembly Bill 340 (regular session 2011-2012), effective January 1, 2013 ("PEPRA").

WHEREAS, by Resolution adopted on November 17, 2014, the Board implemented PEPRA's provisions regarding the determination of "pensionable compensation" in Government Code section 7522.34 ("Pensionable Compensation"), which applies to VCERA members for their service rendered on or after January 1, 2013 as "new members" under Government Code section 7522.04(f) of PEPRA ("New Member" or "PEPRA Members") ("Pensionable Compensation Resolution").

WHEREAS, the Pensionable Compensation Resolution includes a reservation of rights to change any particular determination it makes on the bases set forth therein and that reservation of rights applies to this *Alameda* Implementation Resolution as well.

WHEREAS, the Board is required by Government Code sections 31460, 31461 and 31542, to determine *compensation* and *compensation earnable* for those VCERA members ("legacy members") who are not PEPRA Members and is required by Government Code sections 31460, 31542, and 7522.34, to determine *compensation* and *pensionable compensation* for those individuals who are PEPRA members.

WHEREAS, the Board has taken numerous prior actions to implement pensionable compensation to PEPRA members as anticipated by the Pensionable Compensation Resolution, but the Board has postponed applying Assembly Bill 197 (2012-2013) ("AB 197"), as it amended section 31461 ("PEPRA Exclusions"), because it was awaiting the outcome of pending litigation against other CERL retirement systems who had implemented the PEPRA Exclusions ("AB 197 Litigation").

WHEREAS, on July 30, 2020, the California Supreme Court filed its decision in the AB 197 Litigation, in a decision entitled *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) __ P.3d.__ (2020 WL 4360051) (S247095) (the "*Alameda* Decision"). The *Alameda* Decision concludes that all amendments to the definition of compensation earnable in Government Code section 31461, enacted as a result of the PEPRA and related statutory changes to CERL (PEPRA Exclusions), effective January 1, 2013 are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. The *Alameda* Decision further determines that CERL retirement boards may not include items in retirement allowance calculations, either compensation earnable under section 31461, as amended, or pensionable compensation under

section 7522.34, that the applicable statutes require them to exclude. As used herein, the term "PEPRA Exclusions" shall refer to any payments that are not permitted by subdivision (b)(2), (3) or (4) of Government Code section 31461 to be included in "compensation earnable," or by subdivision (c) of Government Code section 7522 to be included in "pensionable compensation," including, among other items, payments received by the member for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

WHEREAS, the *Alameda* Decision also held that CERL retirement boards have no discretion to include pay items in retirement allowance calculations that are excluded under CERL, PEPRA, or other applicable statutes even without the enactment of PEPRA ("Alameda Exclusions), disapproving of statements to the contrary in footnote no. 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi* footnote 6").

WHEREAS, the Board hereby determines that the *Alameda* Decision and other applicable law require it to change its determinations of certain pay codes for either compensation earnable, pensionable compensation, or both, as resolved below.

WHEREAS, this Resolution is intended to comply with the requirements of the Internal Revenue Code of 1986, as amended or replaced from time to time and the regulations issued thereunder (the "Code") as applicable.

NOW, THEREFORE BE IT RESOLVED, by the VCERA Board of Retirement declares the following:

1. The foregoing Recitals are incorporated herein by this reference.
2. VCERA shall comply with *Alameda's* directives regarding mandatorily excluded pay items, which includes the PEPRA Exclusions, and apply that directive to all retiree payroll for individuals who retire on or after January 1, 2013 (including those who will retire on or after the date of this Resolution), effective with the first retiree payroll occurring after *Alameda*, that is, as of the VCERA retiree payroll on August 31, 2020;
3. VCERA shall comply with *Alameda's* directives regarding the Board's lack of authority to include the *Alameda* Exclusions in compensation, compensation earnable and pensionable compensation, as applicable, and apply that directive to all retiree payroll for individuals who retire on or after July 30, 2020, when the Supreme Court overturned *Guelfi* footnote 6 and VCERA was thus on notice of that statement of law (including those who will retire on or after the date of this Resolution);
4. Unless so directed by the Internal Revenue Service or a court of competent jurisdiction, no recoupment shall be made directly from retirees for any overpaid amounts as a result of the PEPRA Exclusions having been included in the calculation of a retiree's retirement benefit prior to the issuance of the *Alameda* decision.
5. VCERA shall make a corrective distribution (which may include interest) on the overpaid contributions reported on PEPRA Exclusions to retirees, if such retirees were in active member service anytime from January 1, 2013 through July 30, 2020, provided the member's contributions exceed any retirement benefit payments associated with that portion of the payment

that is associated with the PEPRA Exclusions. In the event no contributions associated with the PEPRA Exclusions remain for a retiree, no corrective distribution of contributions shall be made.

6. VCERA shall also make a corrective distribution (which may include interest) to active and deferred members of contributions that they made on in-kind benefits that constitute *Alameda* Exclusions prior to July 30, 2020, provided such members did not retire by that date and therefore will not have the *Alameda* Exclusions included in the calculation of their retirement allowances from VCERA.

7. VCERA shall also make a corrective distribution (which may include interest) to active and deferred members for employee contributions reported and or associated with PEPRA Exclusions while in active service from January 1, 2013 through the date of implementation of the corrective distribution.

8. For clarification with respect to all corrective distributions provided for in this Resolution, to the extent a particular payment is permitted to be included in compensation earnable under section 31461 so long as the timing of the payment did not result in prohibited overpayments (e.g., "straddling" of years for leave cash outs, which is a "PEPRA Exclusion"), active member contributions will continue to be taken, and will not be refunded, on those leave cash outs because they properly contribute to the payment of the member's future VCERA retirement allowance's inclusion of leave cash outs in an amount that does not exceed that which may be earned and payable in each 12-month period during the final average compensation period, regardless of when reported or paid.

9. Any amounts that VCERA is unable to collect from VCERA's active, deferred, and retired members as a result of this corrective action shall be collected instead through participating employer payments on the unfunded actuarial liability in accordance with recommendations from VCERA's actuary.

10. Present impacted pay codes as soon as practicable to the Board to ratify exclusions from compensation earnable and pensionable compensation in compliance with *Alameda*, and communicate to VCERA participating employers that member contributions are no longer to be taken on such pay codes;

11. Inform VCERA members of the foregoing actions through appropriate means; and

12. This resolution supersedes any previous resolutions for employer pay codes of employee compensation relating to compensation earnable and pensionable compensation to the extent they are inconsistent with the foregoing directives.

ADOPTED AND APPROVED by the Board of Retirement of the Ventura County Employees' Retirement Association on the ___ day of _____ 2020.

Arthur "Art" E. Goulet, Chair of the Board



EDELSTEIN GILBERT ROBSON & SMITH^{LLC}

Donald B. Gilbert Michael R. Robson Trent E. Smith Jason D. Ikerd^{Associate}

September 3, 2020

TO: State Association of County Retirement Systems

FROM: Mike Robson, Trent Smith, and Bridget McGowan, Edelstein Gilbert Robson & Smith, LLC

RE: **Legislative Update – September 2020**

On Monday August 31, the Legislature adjourned for final recess, marking the end of the 2019-2020 legislative session. The 2020 legislative year has been the strangest in modern times. The COVID-19 pandemic has forced legislators out of the Capitol twice this year, once between March and mid-May and once for two weeks at the end of July when two Assemblymembers contracted the virus.

Last Wednesday, Republican Senator Brian Jones tested positive for COVID-19, throwing yet another curveball as the Legislature approached the end of session. While Democrats have been caucusing via zoom, most Republicans have continued meeting in person. They also recently met for an in-person dinner. Consequently, Senate Leadership chose to prevent members who attended those meetings with Senator Jones from attending floor session in person. Instead, members of the Republican caucus, with the exemption of one Senator who did not attend the gatherings, were forced to remain home and vote remotely from there.

Since the beginning of the pandemic, both houses have set procedures for remote voting in anticipation for a scenario like this one. While it has been used in select circumstances, the legality of remote voting has been questioned. It remains to be seen if there will be legal challenges regarding this decision.

Given the decision to quarantine nearly the entire Senate Republican caucus, tensions in the final days of session were high. The last hours of floor session were characterized by unprecedented conflict between Senate Republicans and Democrats, centered primarily around the fact that Republicans, being quarantined as they were, felt restricted in their ability to participate in the proceedings on the Senate floor.

As leadership worked to settle these disagreements, business on the Senate floor was delayed, leaving the house in a time crunch to take up the remaining bills on their agenda before midnight. The impacts of this time delay were also felt in the Assembly, whose members must wait for many bills to be sent over from the Senate for final passage. At the same time, both houses were holding bills hostage and Senate Republicans were accused of stalling to run out the clock.

In the end, due to the conflict in the Senate and bill hostage-taking, the clock struck midnight before several bills were heard on the floor on both houses. The bills that did pass out of both houses will be sent to the Governor who will have 30 days to consider the bills for his signature.

SACRS Sponsored Bill – AB 2101 (Committee on Public Employment and Retirement)

As previously reported, the provisions of the SACRS sponsored bill, SB 783 (Committee on Labor, Public Employment and Retirement), were amended into AB 2101. The bill passed out of the Legislature on August 31 and was sent to the Governor. He is expected to sign the bill.