

VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

DISABILITY MEETING

OCTOBER 12, 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: 987-7592-2306#. 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:

I. <u>CALL TO ORDER</u>	Master Page No.
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III. <u>APPROVAL OF MINUTES</u>	
A. Disability Meeting of September 14, 2020.	3 – 19
B. Business Meeting of September 28, 2020.	20 – 26
IV. <u>RECEIVE AND FILE PENDING DISABILITY APPLICATION STATUS REPORT</u>	27 – 64
V. <u>APPLICATIONS FOR DISABILITY RETIREMENT</u>	
A. Application for Service-connected Disability Retirement—Marquez, Georgia E.; Case No. 19-030.	
1. Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated September 3, 2020.	65 – 76
2. Supporting Documentation for Employer's Statement of Position.	77 – 333
3. Application for Service-connected Disability Retirement, filed by Applicant, dated October 8, 2019.	334 – 339
4. Hearing Notice, dated October 5, 2020.	340 – 341

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VI. 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.

VII. OLD BUSINESS

- A. Staff Recommendation to Adopt Resolution to Implement Changes to Compensation Earnable Resolution in Compliance with the California Supreme Court Decision, *Alameda County Sheriff’s Assoc. et al., v. Alameda County Employees’ Retirement Assn., et al (2020) 9 Cal.5th 1032 (“Alameda”)*.
RECOMMENDED ACTION: Approve.

- | | |
|---|-----------|
| 1. Staff Letter. | 342 – 347 |
| 2. Resolution of The Board of Retirement of Ventura County Employees’ Retirement Association Regarding <i>Alameda</i> Implementation to Compensation Earnable and Pensionable Compensation. | 348 – 351 |
| 3. Resolution of The Board of Retirement of Ventura County Employees’ Retirement Association Regarding <i>Alameda</i> Implementation to Compensation Earnable and Pensionable Compensation (Redline). | 352 – 356 |
| 4. VCERA Fiduciary Counsel’s Response to County and Labor Union Objections to Proposed Alameda Implementation. | 357 – 366 |
| 5. Identified Employer Pay Codes Impacted by <i>Alameda</i> Decision. | 367 – 373 |

VIII. NEW BUSINESS

- A. None.

IX. INFORMATIONAL

X. PUBLIC COMMENT

XI. STAFF COMMENT

XII. BOARD MEMBER COMMENT

XIII. ADJOURNMENT

VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

DISABILITY MEETING

SEPTEMBER 14, 2020

MINUTES

TRUSTEES
PRESENT:

Arthur E. Goulet, Chair, Retiree Member
Mike Sedell, Vice Chair, Public Member
Steven Hintz, Treasurer-Tax Collector
Steve Bennett, 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
Shalini Nunna, Retirement Benefits Manager
Josiah Vencel, Retirement Benefits Manager
Rebekah Villalobos, Retirement Benefits Manager
Jess Angeles, Communications Officer
Chris Ayala, Program Assistant

PLACE:

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9:00 a.m.

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ITEM:

I. CALL TO ORDER

Chair Goulet called the Disability Meeting of September 14, 2020, to order at 9:02 a.m.

Chair Goulet said that following the Disability meeting, the Board would go into Closed Session and adjourn from closed session, without action.

II. APPROVAL OF AGENDA

MOTION: Approve.

Moved by Sedell seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Hernandez-Garcia

Abstain: -

III. APPROVAL OF MINUTES

A. Business Meeting of July 27, 2020.

Trustee Hintz expressed his dissatisfaction with Zoom meetings, and preferred to simply call in and be heard easily. Without such an option, he would not participate in the next meeting.

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

MOTION: Approve.

Moved by Hintz seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Hernandez-Garcia

Abstain: -

IV. RECEIVE AND FILE PENDING DISABILITY APPLICATION STATUS REPORT

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

MOTION: Receive and File.

Moved by Ashby seconded by Sedell

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Hernandez-Garcia

Abstain: -

V. APPLICATIONS FOR DISABILITY RETIREMENT

- 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.
 2. Letter filed by Scott Romney to VCERA, received August 17, 2020.
 3. Staff Letter to Board of Retirement, dated July 13, 2020.
 4. Letter filed by Tracey Pirie, Sheriff's Bureau Manager, dated June 24, 2020.
 5. Independent Medical Evaluation Report, filed by Dr. Mark Ganjianpour, dated December 19, 2019.
 6. Staff Letter to Board of Retirement, dated May 6, 2019.
 7. Hearing Notice, dated September 2, 2020.

Ms. Webb provided a brief summary of the Board's potential, including ;that if the Board were to consider Mr. Romney to be incapacitated, they could opt for a full hearing, similar to the process for a contested application.

Trustee Sedell noted that in his letter, Mr. Romney stated that he was advised that there was an examination and if he did not attend the scheduled exam, his retirement benefits were at risk.

Ms. Webb said it was not VCERA's practice to tell a member that they were required to attend that kind of examination or risk losing their retirement benefit. However, staff would certainly advise the member that the Board had the authority to request a re-examination. VCERA staff is obligated to tell its members the repercussions of a certain.

Mr. Romney said he could have the re-examination done in Idaho where he now resided but was told that he would have to have the re-examination done in California. Mr. Romney asked if the Board had read his request in his letter to drop the matter, which he believed was one of the options in the letter from VCERA's General Counsel.

Trustee Roberts asked Ms. Nemiroff if, because the Board had requested the case be re-assessed in October 2019, and now had the results of the re-examination, would the Board now need to render its decision.

Ms. Nemiroff replied yes, the Board needed to decide how to proceed, but she had included the option to discontinue the process, based on some facts in the case which could justify dismissal.

Trustee Roberts said that he had a question regarding Mr. Romney's interpretation of Government Code, section 31729 in his letter to the Board, which stated that the physician for the re-examination was to be mutually agreed upon by both the Board and the beneficiary. Therefore, the way Mr. Romney cited the code seemed to indicate that both the Board and the member needed to

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agree with both the choice of physician and the location of the examination, which was not Trustee Roberts' interpretation. His reading of the code was that only the location of the re-examination needed to be agreed on by both parties.

Ms. Nemiroff replied that Trustee Roberts was correct.

Mr. Romney remarked that he was not given a choice of the location of the re-examination, since he requested that it be conducted in Idaho, but was instead told it had to be done in California.

Trustee Roberts then asked if there was any documentation that stated that he was required to have the re-examination done in California.

Ms. Webb said that she did not recall any correspondence that stated that, but staff had simply offered to pay for Mr. Romney's airfare and lodging to attend the re-examination and staff was also worried about the availability of a specialist in Mr. Romney's area.

Mr. Romney replied that he did not believe that staff had not even looked into the availability of specialists in his area. Although he did not remember to whom he spoke, he was told that he had to attend the re-examination in California. He also said that he was awarded a settlement from the Superior Court for lifetime future medical coverage, through a Workers Compensation case. Also, if his retirement benefit was changed from a disability retirement to a service retirement then he could lose his lifetime future medical coverage, which he had settled for instead of a six figure settlement and if he were to lose that coverage, he would seek legal action.

Chair Goulet said regarding the lifetime future medical coverage that was award through a Workers Compensation case, and it was not in the purview of the Board of Retirement.

Trustee Sedell commented taking into account the number of years it took for the anonymous complaint to be reported to VCERA, and the fact that the Sheriff's Department was unwilling to take him back as a Deputy Sheriff, he believed that option 3, which was to grant Mr. Romney's request to terminate the re-examination process and take no further action was the appropriate Board action.

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

MOTION: Grant Mr. Romney's Request to Terminate the Re-examination Process and Take No Further Action.

Moved by Sedell seconded by Hintz.

Vote: Motion carried

Yes: Ashby, Bennett, Hintz, Sedell,

No: Goulet, Roberts

Absent: -

Abstain: Hernandez-Garcia

Chair Goulet said that he was voting no because the Board had started the re-examination process and therefore, he did not feel that it appropriate to terminate the process.

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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.
 2. Supporting Documentation for Addendum.
 3. Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated September 29, 2017.
 4. Staff Letter to Board of Retirement, dated September 14, 2020.
To be Provided
 5. Supporting Documentation for Employer's Statement of Position.
 6. Application for Service-connected Disability Retirement, filed by Applicant, dated July 18, 2017.
 7. Hearing Notice, dated September 2, 2020.

Catherine Laveau was present on behalf of County of Ventura-Risk Management. Josiah Vencel and Nancy Jensen were present on behalf of VCERA. Danny Polhamus, Attorney at Law, was present on behalf of applicant, Janeen R. Bittmann, who was also present.

Ms. Laveau made a brief summary statement.

Mr. Vencel noted that during staff's review of Risk Management's Statement of Position, they found items of concern that they sent to Risk Management to consider. Specifically, he quoted from Dr. Bahk's deposition testimony in which the doctor admitted not knowing for certain the source of Ms. Bittmann's pain, although he and Dr. Tooke believed it was scapulothoracic. Due to his uncertainty, Dr. Bahk could not rule out potential treatment until her final diagnosis.

Chair Goulet expressed concern that Dr. Tooke's two comments about scapulothoracic injections were ignored. He questioned why that treatment was never pursued in lieu of surgery and a potentially dangerous cervical injection.

Ms. Laveau acknowledged the recommendation by Dr. Tooke and replied that Ms. Bittmann's complex condition had been reviewed by multiple specialists. However, the most specialized physician for her condition was Dr. Bahk, who did not agree with Dr. Tooke on the correct course of treatment. She said that Dr. Bahk was the specialist to whom both parties agreed and that he recommended an injection into the cervical spine to rule out that region as the source of her pain.

Mr. Polhamus largely agreed with the comments from Ms. Laveau, but he pointed out that neither Dr. Tooke nor Dr. Bahk had given glowing reports on the possible outcome of surgery. He said the disability should be granted because Ms. Bittmann should be allowed to decline the surgery option. Therefore, he believed Ms. Bittmann was permanent and disabled.

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

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MOTION: Approve the Recommendation to Grant Ms. Bittmann a Service-connected Disability Retirement.

Moved by Roberts.

Motion failed for lack of a second.

Trustee Sedell asked Chair Goulet for his recommendation on what the Board should do to move the case forward.

Chair Goulet noted that an injection into Ms. Bittmann's scapula area had been effective in the past and that if a second such injection had failed to bring relief, then the applicant could move on to Dr. Bahk's recommendation for the cervical spine injection. Chair Goulet believed there was treatment that could have been pursued.

Ms. Laveau noted the Dr. Tooke, who recommended the scapula injection, was not the applicant's treating physician; he was merely a consulting physician. So, there was no treating physician who was recommending an injection into the applicant's shoulder as an appropriate treatment.

Chair Goulet asked Ms. Nemiroff how the Board could proceed, given the failed motion and absence of a new motion. He asked whether the Board could direct the applicant to undergo the injection in the scapula.

Ms. Nemiroff replied no, but the Board could attempt to gather more medical documentation to determine whether the injection would enable the applicant to return to work.

Ms. Laveau informed the Board that Dr. Bahk was not cooperative in answering questions or providing reports; it took nearly three years and a deposition to get Dr. Bahk to answer the first question presented to him.

Trustee Sedell asked if Risk Management could depose Dr. Bahk again if he failed to respond in a timely manner.

To set up that deposition, Ms. Laveau said Risk Management must give Dr. Bahk time to answer questions posed by the Board. She also noted that Dr. Bahk tended to cancel depositions and that Risk Management must schedule depositions according to the physician's availability.

Trustee Sedell asked Chair Goulet if the Board could put a timeframe on a response from Dr. Bahk and, if the Board did not receive a response by then, could the Board make a decision in the applicant's case based on the information it had.

Chair Goulet expressed concern that the treating physician was unwilling to respond to questions in a timely manner. If Dr. Bahk was unwilling to do that, he suggested that Risk Management find someone else to answer the Board's questions related to treatment.

Mr. Vencel asked if the Board could also pose its question to Dr. Tooke.

Chair Goulet replied that, according to Risk Management, it was the treating physician who should answer that question. He then asked Ms. Laveau if it would help if the Board wrote the letter to Dr. Bahk to explain that it was unable to make a decision in the applicant's disability retirement case until he could answer the necessary questions in a timely manner.

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Ms. Webb replied that staff could certainly send the letter to Dr. Bahk, in coordination with Risk Management.

Ms. Bittmann said that Dr. Bahk had been deposed three times and had made his written statements clear: there was only a 50 percent chance the surgery would be effective. The cervical injections were recommended twice but not approved in the past because the cervical specialist said she did not have a cervical injury.

Chair Goulet said the Board was asking for a definitive statement from Dr. Bahk that injections into the scapula region would not be sufficient to relieve Ms. Bittmann's pain to enable her to return to work.

Trustee Hintz told Ms. Bittmann she will win if her doctor writes a short letter stating that thoracic injections will not enable her to return to work.

Trustee Sedell said there needed to be a short time frame for Dr. Bahk to respond so that the case could move forward. He agreed to a proposal of November 9.

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

MOTION: Direct VCERA Staff and Risk Management to Work Together to Obtain a Written Statement from Dr. Bahk on Whether Injections into the Scapula Area Are Likely to Enable the Applicant to Return to Work on a Permanent Basis; and if Dr. Bahk Does Not Respond By the November 9 Disability Meeting, the Board Will Make a Decision Based on the Information Available.

Moved by Goulet seconded by Sedell.

Vote: Motion carried

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

No: -

Absent: -

Abstain: -

C. Application for Service-Connected Disability Retirement—Oliver, Gary D.; Case No. 17-023.

1. Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated August 3, 2020.
2. Addendum to Employer's Statement of Position, dated August 31, 2020.
3. Supporting Documentation for Employer's Statement of Position.
4. Application for Service-connected Disability Retirement, filed by Michael Treger, dated October 24, 2017.
5. Hearing Notice, dated September 2, 2020.

Carol Kempner, Attorney at Law was present on behalf of County of Ventura-Risk Management. Josiah Vencel and Nancy Jensen were present on behalf of VCERA. Michael Treger, Attorney at Law, was present on behalf of applicant, Gary Oliver, who was not present.

Ms. Kempner declined to make a statement.

Mr. Treger made a brief statement.

Chair Goulet remarked that he was concerned with the length of time the disability retirement case had taken to get to this point and also by a statement by Risk Management in their report. This statement said, "they came to agreement on the effective date", which he did not think was consistent with the law. He believed that law established the effective date, which could not be changed by a mutual agreement. He then asked Ms. Nemiroff if that was correct.

Ms. Nemiroff replied that he was correct, and the California Employees Retirement Law (CERL) that governed the effective date stated that the effective date should be the date in which the disability retirement application was filed, unless the applicant could show that the delay in filing was due to ascertaining permanency, in which case the application would be deemed to have been filed the date after the last day of compensation.

Chair Goulet also said that it seemed that case should have been "open and shut" as far as disability retirement was concerned. The applicant filed the disability retirement application in August 2017, and here they were in September 2020. So, he did not understand why the case had taken this long to get to this point, unless there was an attempt to combine the disability retirement case with the Workers Compensation claim.

Ms. Kempner stated that there was a Workers Compensation claim that was maintained during the time when the disability retirement case was pending. The application for service-connected disability retirement was filed on October 4, 2017, and at the same time in the Workers Compensation case, the applicant's attorney was maintaining that the applicant continued on a temporary total disability for an extended period of time. So, the delay associated with bringing the disability retirement case to the Board related to ongoing discovery in an effort to confirm or illicit firm evidence that the applicant was permanently incapacitated, and at what point that occurred. Discovery ended with the deposition of Dr. Vogel in February 2020. Dr. Vogel was not able to give a concise date of permanency, but instead relied on medical records that indicated that once Mr. Oliver began to receive chemotherapy treatment, that was the date that the applicant became incapacitated.

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

MOTION: Approve the Service-connected Disability Retirement for Gary D. Oliver, with the Effective Date being the Time that the Applicant First Filed.

Moved by Ashby seconded by Roberts.

Vote: Motion carried

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

No: -

Absent: -

Abstain: -

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- D. Application for Service-connected Disability Retirement—Kristol, Michelle M.; Case No. 18-014.
1. Employer's Statement of Position, submitted by County of Ventura-Risk Management, in support of the Application for Service-connected Disability Retirement, dated August 10, 2020.
 2. Supporting Documentation for Employer's Statement of Position.
 3. Application for Service-connected Disability Retirement, filed by Applicant, dated May 2, 2018.
 4. Hearing Notice, dated September 2, 2020.

Derek Straatsma, Attorney at Law was present on behalf of County of Ventura-Risk Management. Josiah Vencel and Nancy Jensen were present on behalf of VCERA. Thomas J. Wicke, Attorney at Law, was present on behalf of applicant, Michelle M. Kristol, who was not present.

Mr. Straatsma made a brief statement.

Mr. Wicke also made a brief statement.

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

MOTION: Approve the Recommendation for a Service-connected Disability Retirement for Applicant, Michelle M. Kristol.

Moved by Sedell seconded by Ashby.

Vote: Motion carried

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

No: -

Absent: -

Abstain: -

- E. Application for Service-Connected Disability Retirement—Quesada, Daniel J.; Case No. 19-010.
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.
 2. Staff Letter to Board of Retirement, dated September 14, 2020.
To be Provided
 3. Supporting Documentation for Employer's Statement of Position.
 4. Application for Service-connected Disability Retirement, filed by Applicant, dated February 25, 2019.

5. Hearing Notice, dated September 2, 2020.

Catherine Laveau was present on behalf of County of Ventura-Risk Management. Josiah Vencel and Nancy Jensen were present on behalf of VCERA. The applicant, Daniel J. Quesada, was also present.

Ms. Laveau made a brief statement.

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

MOTION: Approve the Recommendation for a Service-connected Disability Retirement for Applicant, Daniel J. Quesada.

Moved by Sedell seconded by Roberts.

Vote: Motion carried

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

No: Goulet

Absent: Hintz

Abstain: -

Chair Goulet said that voted no because he felt report from Risk Management was clear.

Trustee Hintz left the meeting at 10:13 a.m., after the vote on this item.

- 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.
2. Staff Letter to Board of Retirement, dated September 14, 2020.
To be Provided
3. Supporting Documentation for Employer's Statement of Position.
4. Application for Service-connected Disability Retirement, filed by Applicant, dated 07/01/2019.
5. Hearing Notice, dated September 2, 2020.

Catherine Laveau was present on behalf of County of Ventura-Risk Management. Josiah Vencel and Nancy Jensen were present on behalf of VCERA. The applicant, Phillip G. Duffield, was also present.

Ms. Laveau declined to make a statement.

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

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MOTION: Approve the Recommendation for a Service-connected Disability Retirement for Applicant, Phillip G. Duffield.

Moved by Ashby seconded by Roberts.

Vote: Motion carried

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

No: -

Absent: Bennett, Hintz

Abstain: -

VI. OLD BUSINESS

A. None.

VII. NEW BUSINESS

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

Mike Pettit, Assistant County Executive Officer, provided a brief update on the County of Ventura's efforts to appoint trustees to fill the vacancies left by former Trustee Bianchi and former Trustee McCombs, as well as the vacancy left by the recent and tragic passing of Trustee Wilson who had graciously served on the Board of Retirement for 25 years. Lastly, he thanked the Board for allowing him to present the update and also mentioned that the pandemic also made it difficult for individuals to consider applying for the opportunity to serve. Also, if the current Board members knew of any possible candidates, the County would seek their support in reaching out to them as well.

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.
2. Draft Resolution for Implementation of Alameda Ruling.

Trustee Hintz returned to the meeting at 10:18 a.m., prior to the presentation by Ms. Dunning.

Ms. Webb informed the Board that in addition to the letters related to the agenda item, there were 3 public comment requests, which she assumed the Board would like to hear following the presentation, one of which she would read into the record and the other two would like to speak on their own behalf.

Ms. Dunning then made her presentation regarding the Alameda Decision.

Following the presentation, Chair Goulet said that he would allow 3 minutes for each speaker to make their public comment. He then asked who would be making a presentation from the County of Ventura.

Ms. Webb said that the County Counsel Leroy Smith had sent a PowerPoint presentation he requested to make to the Board.

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Trustee Bennett remarked that he believed that the presentation from the County of Ventura and public comments were such important items that he would like to request that Chair Goulet not rush through the presentation and public comments. He then asked how many speakers there were.

Ms. Webb replied that there were 4 speakers in all.

Chair Goulet reminded Trustee Bennett that the Board was not taking action on the item at the meeting and it seemed to him that many of the comments that the Board received would be received again at a future meeting when the Board would take action on the issue.

Trustee Bennett then said though the Board would not be taking action on the item at the meeting, it was very difficult for all of the parties to get together in a Zoom meeting given the connection issues, so this would be the time for the Board to digest the arguments. Therefore, it would be his request to give ample time to hear the public comments.

Trustee Hintz asked that the record reflect that he agreed with Trustee Bennett.

Trustee Sedell also said that he agreed with Trustee Bennett.

Trustee Roberts said he supported the request to provide ample time for public comments.

Chair Goulet then said that he believed the Board needed to limit the speakers' comments to a reasonable timeframe, as the Board had been in open session since 9:00 a.m. and they needed to take a break, and in light of there being another opportunity to discuss the issues.

Trustee Bennett then asked if Chair Goulet would allow 10 minutes for public comment.

Trustee Hintz noted that the Board was discussing a proposal that could potentially take away thousands of dollars from thousands of County employees. Therefore, it would be inappropriate for the Chair to limit the speakers to 3 minutes.

Chair Goulet repeated that there was no action being considered at the meeting.

Trustee Bennett said that even though the Board was not considering taking action, they were trying to digest the comments, and considering it was the first time the matter had been discussed publicly, it would be the appropriate time to get a clear picture of the arguments.

Trustee Hintz then made the motion to change the time limit for the public comment speakers to 10 minutes.

Trustee Bennett then said that he would second the motion from Trustee Hintz to at least allow Mr. Smith to give his presentation.

Trustee Goulet then said the Board would need to take a break somewhere in the near future. He said that he would concede to allow the speakers 10 minutes for public comment.

The Board took at 10 minute break at 11:52 a.m.

The Board returned break at 12:02 p.m.

After the Board returned from break, Trustee Hernandez-Garcia was not in attendance.

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County Counsel Leroy Smith made a presentation to the Board on behalf of the County of Ventura to explain legal objections to the proposed implementation of the Alameda ruling.

Ms. Smith said both his office and the County of Ventura strongly disagreed with the legal interpretation the Board had just received from Ms. Dunning, and if implemented as proposed, it would set a horrible precedent and would be a disaster for the workforce and plan administration. He said for the Board to proceed with such a significant change, it would have to be indisputably clear, and only if the Board had no choice. He believed that case had not been made.

Mr. Smith said the flexible benefit allowance benefit was included in compensation earnable through adoption by the Board of Retirement in its 1989 Resolution. He disputed that a single court ruling could upset this long-standing inclusion, and he found such an interpretation to be absurd. He said the case before the Supreme Court was to address the PEPRA exclusions only, and that anything apart from that was pure dicta and not binding on any future court. He objected to what Ms. Dunning had termed, "Alameda" exclusions, which were no part of the statute or part of the issue the Court certified for review. He said that for a 2-hour presentation that nitpicks through a 98-page opinion to change the whole system based on the disapproval of a single footnote, was not the kind of clear authority needed to support the Board having no other choice. He submitted that when the Court definitively found something to be illegal or excluded, it said so directly and clearly, and a person would not need to review 98 pages and look in footnotes.

Mr. Smith referenced the four benefits that Government Code § 31461(b)(1)-(4) excluded from compensation earnable. He stressed that the retirement boards in *Alameda's* underlying cases had adopted resolutions to adopt provisions to exclude these benefits. It was not done by magic, nor by staff, but by an actual formal action of the retirement board. The VCERA retirement board had never acted, as the boards in the underlying cases did. He added this is why the County objected to the current practice of VCERA staff imposing their interpretation on members.

Mr. Smith said the County did not really put a lot of effort in monitoring the Alameda case because (b)(1)-(4) do not really apply to Ventura with the possible exception of b(3), which deals with overtime and that may be an issue where some of the pay codes are inconsistent. However, there is a legal dispute whether on-call time and standby constitute overtime, and even in the Alameda cases, they were remanded back to the trial courts to figure that out.

Regarding leave cashouts, in his opinion, the County and the Retirement Board's 1997 resolution that includes annual leave cashouts perfectly meets the test in PEPRA that was part of the Alameda decision, and the proposal put before the Board was not justified by law. He did not understand the anti-straddling idea described by Ms. Dunning. Though the decision does mention straddling not being used, that non-use is specific to when it would undermine the requirement in b(2). Therefore, as long as someone is not in violation of b(2), straddling was permissible.

Ms. Smith said the most precedence-setting aspect of *Alameda* was they had applied the California Rule, which says offsetting comparable benefits must be provided unless there is the countervailing public purpose so great that it excuses not providing comparable benefits. The Court upheld the California Rule, but said the boards in those cases did not have to provide offsetting comparable benefits because the reasons were so significant. Fundamental to the Court's rationale was to address pension spiking in the last year of retirement, and cafeteria plan allowances do not represent spiking because they represent a standard flow of compensation over an entire career. Ms. Smith said Ms. Dunning has passed over the issue that even if the Board passed the resolution to ban, prohibit, or veto the inclusion of cafeteria plan allowances, the last part of subpart (c) says that would only apply to employees who become a member **after** that resolution, and could not be applied retroactively.

Chair Goulet asked Mr. Smith to begin wrapping up because he had exceeded his allotted ten minutes.

Trustee Bennett asked that Mr. Smith be asked to finish to make a rational presentation of his slides, and he would be willing to use his questioning time for this purpose.

Mr. Smith continued, referencing what he described as juxtaposed caselaw. He said that in *County of Fresno vs. Board of Retirement, County of Fresno*, the Fresno board adopted a bizarre rule (known as the Fresno Rule) where, in a 12-month measuring period for retirement, the months need not be consecutive, which the Court struck down, saying it was not allowed in the CERL, saying, "... *The Board has no power, plenary or otherwise, to establish a different system.*"

He next referenced *In Re Retirement*, a case he said was relied upon heavily by VCERA's fiduciary counsel. He said in talking about flexible benefit plans, it did not require exclusion, quoting, "*Accordingly we conclude the trial court properly found that CERL did not require these payments to be included in comp earnable.*" He stressed that it did not say "could not" or "had no power to" or "under no circumstances".

Mr. Smith took issue with Ms. Dunning's representation that Supreme Court now had spoken, having some kind of revelation that in-kind benefits cannot be included in comp earnable, but rather the Court was simply paraphrasing a statute that has been unchanged for 50 years, with language about advantages in kind that may be 75 years old. He defied Ms. Dunning to point to a sentence in the Alameda case that says cafeteria plan allowances cannot be included in comp earnable because it did not exist.

He said to conclude, ultimately the question will be – if somebody wanted to litigate it again – does cafeteria plan allowance qualify as compensation under the statute, or does it not qualify because it is an in-kind benefit? A strong case to be made that it is not an in-kind benefit, but a cash payment that can be used to purchase benefits, just like many payroll deductions are handled, and it is set up strictly as a tax-favored scheme.

Mr. Nick Odenath, President of the Ventura County Deputy Sheriffs' Association (VCDSA), provided public comment to the Board. He said on July 30, 2020, the California Supreme Court issued an opinion on the Alameda Deputy Sheriffs' Association versus Alameda County case and as they all could agree, this decision impacted all 20 retirement systems under CERL, including VCERA. Much like what was addressed by Mr. Smith, they did believe that the health care flex spending allowance or cafeteria plan should be excluded from legacy employees' pension calculations. This was mostly because it was not been expressly described as excluded in the opinion from the California Supreme Court. Also, they did not believe that Annual Leave Cash Outs in their Memorandum of Agreement (MOA) should be excluded from legacy employees' pension calculations, and they believe that on-call or standby pay was part of regular duty for certain assignments, and thus not be excluded from legacy members' pension calculations. Finally, VCDSA strongly urged the Board to allow for due process on the issue because of the impact it would have on their members as well as all County employees. One member who retired a few days after the Court's decision later received a notification from VCERA staff that their pension would be reduced by approximately \$1,000 per month, or \$12,000 annually, as a result of the ruling. He also asked that the Board, refer to the letter from VCDSA's legal counsel that relates to the detail opinion that was summarized.

Danny Carrillo, Regional Director for SEIU Local 721, provided public comment to the Board. Mr. Carrillo said the elimination of the cafeteria plan from the pension calculation for legacy members would have a devastating impact on their represented County workers. SEIU Local 721 urged the

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Board not to change compensation earnable for legacy employees' pension calculations until the legal issues were vetted. Furthermore, the Board could not repeal the 1989 resolution which designated cafeteria plan allowances as pensionable. SEIU would be in touch with their legal team and they stood united with their union brothers and sisters in the County of Ventura.

Ms. Webb said staff had received public comment from a VCERA member who asked that her comments be read into the record, as she was experiencing technical difficulties with her computer. Ms. Webb read the letter into the record, as requested.

Elizabeth Villafana, who retired on July 30 after 38 years of working for the County of Ventura on a retirement estimate she received in March 2020. Because of the pandemic and because she managed essential worker involved in food facilities, she decided to postpone her retirement until it became clear that the impacts from COVID-19 would be lasting. Her last day of work was July 30, 2020. It was difficult for her to understand how the ruling could be effective on the date it was made without any notification given to those who would be negatively impacted. She asked the Board to do everything in their power to minimize the impact of this decision and she appreciated the opportunity to share her concerns.

Kevin Aguayo, President of the Ventura County Professional Firefighters' Association (VCPFA), provided public comment to the Board on behalf of the more than 400 members of the Ventura County Professional Firefighters' Association, IAFF Local 1364. They strongly urged the Board to consider the items mentioned to be compensable and there was nothing that was presented in any of the presentations or comments that showed that the flex credit could not be included in their retirement calculation. They also, along with the Deputy Sheriffs Association believed that the stand-by pay, when part of an employee's schedule, should also be compensable. The Ventura decision had allowed it, and they did not see anything in the Alameda decision that would take that away from them. He thanked the Board for their time and looked forward to working with the Board to provide them with the best information so that they could continue to have those benefits that they believed were theirs.

Ms. Webb informed the Board that Mariaelena Miller, President of the Specialized Peace Officers' Association of Ventura County (SPOAVC) asked her to convey to the Board that SPOAVC agrees with the VCSDA President and they urged the Board to reconsider their position and allow for due process.

Chair Goulet said that concluded the public comments related to the presentation from VCERA's fiduciary counsel on the Alameda decision. He said that the Board would go into closed session shortly, but before they did, he asked Trustee Bennett if he should recuse himself from the closed session because Mr. Smith had eluded to the possibility of litigation against VCERA during his presentation, and the County of Ventura would be a party to that litigation.

Trustee Bennett replied that was an interesting question and asked whether that also would mean that none of the union representatives should be allowed to join the closed session because of possible litigation.

Chair Goulet said no, but Trustee Bennett also represented the County Board of Supervisors, and the unions were not representing the County and were not parties to the potential litigation, he believed.

Trustee Sedell remarked that the union representatives were present to represent their unions on the matter and would probably have the same conflict that the County of Ventura had if they were to pursue litigation as well.

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Trustee Bennett said that in his role on the Board of Retirement he was representing the public at large and it would be his decision whether there was a conflict of interest, and at present, no lawsuit had been filed, and it was important for him to participate.

Chair Goulet said that the Board of Supervisors frequently go into closed session based on potential litigation, which was the reason for today's closed session.

Trustee Bennett then said he was not ready to exit the conversation and he would need some good legal advice before he did. The law was very clear that the decision was his on whether or not he had a conflict of interest.

Ms. Dunning suggested that the Board discuss in closed session the various questions of recusals. Obviously, an individual could not be representing both sides of a litigation, which was a premise and was indisputable, but it could be discussed further in closed session as the initial topic before any substantive discussion of the matter.

Before adjourning to Closed Session, the Board advanced to agenda item, "XI. Staff Comment".

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.

X. PUBLIC COMMENT

None.

XI. STAFF COMMENT

Ms. Webb informed the Board that she had approved an enhancement to the V3 retirement database system to allow for a different type of data export to Segal Consulting for the annual valuation reports. The cost was approximately \$11,000 and necessary because Segal Consulting now was requiring that VCERA redact certain information from the transmittal file that staff provided for the valuation report. Ms. Webb said that she could provide more details if the Board would like. Also, staff previously had planned to present the Pensionable Compensation Pay Code update, but because there was a code that SEIU wanted to discuss and given that staff would be providing a report soon to the Board on pay codes related to the Alameda item, staff would bring that item to the Board at that same meeting.

The went into Closed Session at 12:34 p.m.

XII. BOARD MEMBER COMMENT

None.

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XIII. ADJOURNMENT

Chair Goulet adjourned the meeting at the conclusion of closed session at 11:43 p.m.

Respectfully submitted,



LINDA WEBB, Retirement Administrator

Approved,

ARTHUR GOULET, Chair

VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

BUSINESS MEETING

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TRUSTEES

PRESENT:

Arthur E. Goulet, Chair, Retiree Member
Mike Sedell, Vice Chair, Public Member
Steven Hintz, Treasurer-Tax Collector
Steve Bennett, 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:

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.

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ITEM:

I. CALL TO ORDER

Chair Goulet called the meeting of September 28, 2020, to order at 9:01 a.m.

Chair Goulet said that following the Business Meeting agenda items, the Board would go into Closed Session and would adjourn from closed session, without comments. Also, if anyone would like to make a public comment related to an item on the agenda, please send a message to Clerk of the Board, so that he can inform the Board on whom should be recognized.

II. APPROVAL OF AGENDA

MOTION: Approve.

Moved by Sedell seconded by Hintz

Vote: Motion carried

Yes: Ashby, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Bennett, Hernandez-Garcia

Abstain: -

III. CONSENT AGENDA

- A. Approve Regular and Deferred Retirements and Survivors Continuances for the Month of July 2020.
- B. Approve Regular and Deferred Retirements and Survivors Continuances for the Month of August 2020.
- C. Receive and File Report of Checks Disbursed in July and August 2020.
- D. Receive and File Budget Summary for FY 2019-20 Month Ending June 30, 2020 (Final).
- E. Receive and File Budget Summary Admin. – Disability for FY 2020-21 Month Ending July 31, 2020.
- F. Receive and File Budget Summary Combined for FY 2020-21 Month Ending July 31, 2020.
- G. Receive and File Budget Summary Admin. – Disability for FY 2020-21 Month Ending August 31, 2020.
- H. Receive and File Budget Summary Combined for FY 2020-21 Month Ending August 31, 2020.
- I. 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 June 30, 2020.
- J. Receive and File Statement of Reserves as of June 30, 2020.

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- K. Receive and File Statement of Fiduciary Net Position, Statement of Changes in Fiduciary Net Position, and Schedule of Investments, Cash, and Cash Equivalents for the Period Ending July 31, 2020.
- L. Receive and File Statement of Fiduciary Net Position, Statement of Changes in Fiduciary Net Position, and Schedule of Investments, Cash, and Cash Equivalents for the Period Ending August 31, 2020.

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

MOTION: Approve.

Moved by Sedell seconded by Hintz

Vote: Motion carried

Yes: Ashby, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Bennett, Hernandez-Garcia

Abstain: -

IV. INVESTMENT INFORMATION

NEPC – Allan Martin.

VCERA – Dan Gallagher, Chief Investment Officer.

- A. Investment Policy Revisions and Update.

RECOMMENDED ACTION: Approve.

1. Staff Letter by C.I.O., Dan Gallagher.
2. Investment Policy Proposed (Redline).
3. Investment Policy Proposed (Final).

Mr. Gallagher presented a proposed update to the Investment Policy with a staff letter highlighting the proposed changes approved by the Board in May 2019.

Trustee Bennett arrived at 9:04, before the vote in the item.

Chair Goulet said that Mr. Gallagher missed his suggestion to explicitly indicate that the investment managers had a fiduciary responsibility to VCERA.

Mr. Gallagher replied that he was awaiting confirmation that only managers with agency relationships to VCERA, such as separate account managers, would have fiduciary responsibility to VCERA. Instead, managers of commingled funds for both public and private markets portfolios would only be fiduciaries to the funds they managed, and to the limited partner investors as a whole, but would not agree to be fiduciaries to VCERA. However, consultants should also be fiduciaries.

Trustee Sedell noted that on Master Page 47 (MP), the heading of Section IX seemed to be incomplete. He believed that the heading should have included the word, "income" after the word, "fixed".

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Mr. Gallagher said Trustee Sedell was correct and the redline version should have included the word, "income" in the heading of item IX.

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

MOTION: Approve the Proposed Revised Investment Policy

Moved by Hintz seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Hernandez-Garcia

Abstain: -

Chair Goulet asked Mr. Gallagher to add language to the final Investment Policy reflecting that those managers who qualify will serve as fiduciaries to VCERA for any assets they advise upon or manage for VCERA.

Mr. Gallagher replied that would be done.

Following further discussion by the Board, Trustee Hintz amended his motion and Trustee Ashby seconded it. The following amended motion was made:

MOTION: Approve the Proposed Revised Investment Policy with the additional suggested revisions.

Moved by Hintz seconded by Ashby

Vote: Motion carried

Yes: Ashby, Bennett, Goulet, Hintz, Roberts, Sedell

No: -

Absent: Hernandez-Garcia

Abstain: -

B. 2nd Quarter Investment Performance Report for Period Ending June 30, 2020.

RECOMMENDED ACTION: Receive and file.

Mr. Martin presented the 2nd Quarter Investment Performance Report for 2020 to the Board.

Trustee Hernandez-Garcia arrived at 9:12 a.m., before the vote on the item.

After discussion by the Board, staff and consultant, the following motion was made:

MOTION: Receive and File the 2nd Quarter Investment Performance Report for Period Ending June 30, 2020.

Moved by Ashby seconded by Bennett

Vote: Motion carried

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

No: -

Absent:

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Abstain: -

C. Preliminary Performance Report Month Ending July 31, 2020.
RECOMMENDED ACTION: Receive and file.

D. Preliminary Performance Report Month Ending August 31, 2020.
RECOMMENDED ACTION: Receive and file.

Mr. Martin presented the Preliminary Performance Reports for July 31, 2020, and August 31, 2020, to the Board.

Trustee Bennett left the meeting at 9:41 a.m., before the vote on the item.

After discussion by the Board, staff and consultant, the following motion was made:

MOTION: Receive and File the Preliminary Performance Reports for July 31, 2020, and August 31, 2020.

Moved by Sedell seconded by Roberts

Vote: Motion carried

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

No: -

Absent: Bennett

Abstain: -

V. OLD BUSINESS

A. None.

VI. NEW BUSINESS

A. SACRS Fall Voting Proxy.

1. Staff Letter.

Ms. Webb said that the SACRS 2020 Fall Conference would be held as a virtual conference and the Board would need to appoint a voting proxy for the SACRS Business meeting, which was held on the last day of the conference. If the Board could appoint a proxy for that meeting today, then staff would report the Board's appointment to SACRS.

Chair Goulet said that though he would not be attending the entire conference, he could attend their business meeting, and therefore volunteered to be the voting delegate.

Ms. Webb said she volunteered to be the alternate voting delegate if the delegate was not required to be a Trustee.

Chair Goulet replied that a delegate did not have to be a Trustee.

Trustee Roberts said that he was also willing to serve as the alternate delegate since he planned on attending the conference.

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Chair Goulet then asked Trustee Roberts if he would be willing to be the voting delegate since Ms. Webb was willing to serve as the alternate delegate.

Trustee Roberts replied that he would be willing to serve as the voting delegate.

Chair Goulet then appointed Trustee Roberts as the voting delegate and Ms. Webb as the alternate voting delegate.

Before adjourning to Closed Session, the Board advanced to the agenda item, "VIII. Informational".

VII. 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.

VIII. INFORMATIONAL

A. SACRS Education Committee Flyer.

IX. PUBLIC COMMENT

Ms. Webb informed the Board that although there were no requests for comments regarding today's agenda, there had been some comments received by staff between meetings regarding the Alameda ruling that were provided to the Board in writing for their review.

X. STAFF COMMENT

Mr. Gallagher affirmed that they were reviewing opportunities in private equity and private credit and hoped to bring investment recommendations to the Board for the October or November Board meetings. In addition, Abbott Capital Management was scheduled to be at the Business meeting in October to discuss in greater detail the private equity portfolio's performance and investment pacing plan for 2021. Lastly, NEPC had continued to work on an analysis and a pacing plan for the real assets portfolio, but at present, there was no action recommended or needed.

Ms. Nemiroff reminded the Board that a couple of months ago, the Board had authorized staff to hire Fennemore Craig, P.C., to represent the Board in a lawsuit that was brought by Ms. Lisa Scott against the Board, which was an action regarding beneficiary rights. She said that she was pleased to report that the outside law firm filed a motion to dismiss the case for lack of jurisdiction, which the court granted. Therefore, the case was now terminated, and they were now only litigating in the local family law court. Lastly, she remarked that she believed that their outside counsel had done an outstanding job.

XI. BOARD MEMBER COMMENT

None.

The Board took a break at 9:49 a.m.

The Board returned from break at 10:05 a.m. and returned to agenda item, VII.A., "Closed Session", and would subsequently adjourn out of the closed session without a report.

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XII. ADJOURNMENT

The Chair adjourned the meeting at the conclusion of closed session at 11:39 a.m.

Respectfully submitted,



LINDA WEBB, Retirement Administrator

Approved,

ARTHUR GOULET, Chair



October 12, 2020

Board of Retirement
Ventura County Employees' Retirement Association
1190 South Victoria Avenue, Suite 200
Ventura, CA 93003

SUBJECT: STAFF RECOMMENDATION TO ADOPT RESOLUTION TO IMPLEMENT CHANGES TO COMPENSATION EARNABLE RESOLUTION IN COMPLIANCE WITH THE CALIFORNIA SUPREME COURT DECISION, ALAMEDA COUNTY SHERIFF'S ASSOC. ET AL., V. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSN., ET AL (2020) 9 Cal.5th 1032 ("Alameda")

Dear Board Members:

As the Board of Retirement is aware, the "Alameda" ruling by the California Supreme Court was issued on July 30, 2020. It is a significant decision and impacts many public employees across the state.

Background

When the California legislature passed the *Public Employee Pension Reform Act* ("PEPRA"), it primarily effected people who were hired after its effective date of January 1, 2013. However, some parts of PEPRA affected members, hired *prior* to January 1, 2013 (referred to as "legacy members.") The final average compensation used to calculate legacy members' retirement benefits is derived from compensation that also meets the definition of "compensation earnable."

PEPRA changed the definition of compensation earnable for legacy members by excluding pay for services rendered outside of normal working hours and pay that was provided in order to enhance a member's retirement benefit. It also placed limits on the inclusion of leave cash-out payments in compensation earnable.

After PEPRA, some CERL county plans, such as those in Alameda, Contra Costa, Merced, and Marin counties, began excluding these pay items from compensation earnable. Legacy retirement plan members in those counties sued their retirement systems, claiming that such exclusion was prohibited because they were entitled to their inclusion under the terms of settlement agreements entered into previously – invoking the long-standing *California Rule*. *The California Rule* says that public workers are entitled to the retirement benefits in effect

when they start their employment, and a public employer who changes the terms of a pension to the member’s detriment must in turn provide comparable new advantages.

Rather than excluding the specified pay items, some CERL plans (such as VCERA), continued the previous inclusions, relying on the *California Rule*, thus taking a “wait and see” approach based on the pending litigation.

The Ruling

In its 98-page *Alameda* ruling, the Supreme Court addressed two primary issues:

- 1) whether prior settlement agreements (such as ones resolving CERL plans’ implementation of the “Ventura Decision”) prohibited retirement systems from implementing statutory changes, such as PEPPRA, that were contrary to those agreements; and
- 2) the constitutionality of legislative changes to the retirement law that excluded certain pay items from compensation earnable for legacy members.

One of the reasons the *Alameda* decision is so significant is that Supreme Court spoke directly to the doctrine of the California Rule, clarifying its limits.

In *Alameda*, the Supreme Court **upheld the exclusion** of the pay items from compensation earnable by the CERL plans who were sued, overturning determinations made in a lower court of appeal decision on that topic. The Court concluded that all amendments to the definition of compensation earnable in Government Code section 31461, enacted as a result of PEPPRA and related statutory changes to CERL, effective January 1, 2013 are constitutional. Further, *Alameda* determined that CERL retirement boards may not (no discretion) include items in compensation earnable that section 31461(b) requires them to exclude, nor may these boards be contractually bound or estopped by settlement agreements, *Alameda* board resolutions, or other similar actions, from implementing those amendments.

So, not only did the Court address the specific legal challenges in the consolidated cases, but also other items not specifically challenged in the cases, but listed as exclusions in §31461(b). As the proposed Resolution specifies, these two categories of exclusions from *Alameda* have different “effective” dates based on whether they *should have been effective January 1, 2013*, or the PEPPRA effective date (“PEPPRA” exclusions), or whether *Alameda* ruled that retirement boards had no authority to *ever* include them (“*Alameda*” exclusions).

Category	Description	Examples
PEPPRA	Payments outside normal working hours; unused leave cash outs in excess of statutory amounts	Standby pay, Differentials on Overtime, Annual Leave Redemptions that exceed what member can cash out in each 12-month period (Leave “straddling”)
Alameda	In-kind or 3 rd party payments, not payable in cash directly to a member.	Flex Credit Restricted to Non-Cash Benefits; Annual Leave Donations

Member Impact:

As you can conclude from these circumstances, and unfortunately for certain of VCERA's legacy members, implementation of the *Alameda* decision in Ventura County translates into a reduction in their retirement benefits paid after July 30, 2020. It becomes a question of mathematics. Because retirement benefit calculations are based on a formula derived from a legacy member's "compensation earnable" amount, a lower amount causes the formula to yield a lower result. How much lower depends on how heavily the member's compensation is weighted by the excluded pay items. For example, while not all legacy members are eligible to receive call-back or standby pay, all of them **are** eligible to receive flex credit that includes a non-cashable component (subject to certain caveats discussed below).

Flex Credit

In Ventura County, the (now-excluded) compensation that most significantly impacts VCERA legacy members as a group, is the amount the employer credits toward medical and other tax qualified benefits for its employees each pay period. This has been referred to as "cafeteria plan allowance" or other similar terms, but it is most frequently called "flex credit". Flex "credit" is exactly that – a dollar amount contributed by the County to the cafeteria/flexible benefits plan, and credited toward the medical premium deductions that correspond with the employee's medical and qualified benefit choices. For most employees, this credit does not cover the cost of their premiums, though for some it may. If the flex credit amount exceeds the amount of deducted premium or qualified benefit cost, the employee receives the balance in cash. For employees who opt out of medical insurance altogether, such as when they are already covered on a spouse's policy, the County mandates that an "Opt Out" fee be deducted from the employee's flex credit and the amount of the Opt Out fee cannot be received by the employee in cash; the balance, however, is received in cash. The County has been providing flex credit to employees since 1989 or earlier. The Board of Retirement started including flex credit in compensation earnable effective December 1989 because it was payable in a fixed amount to all members of the same group or class. The Board continued this practice after the Court of Appeal decision in *In Re Retirement Cases*¹ in 2003 because the Court ruled that flex credit "need not" be included, but did not appear to require its exclusion. The Supreme Court in *Alameda* has ruled that retirement boards do not have, and never had, the discretion to include "in-kind benefits" (i.e., cannot be received in cash directly by a member) because they do not meet the definition of "compensation."

Going forward, VCERA staff recommends inclusion of only the portion of flex credit that an employee may receive in unrestricted cash; this is because that unrestricted cash portion does not fit the exclusion criteria of an "in-kind benefit" or one that is "paid directly by the employer to a third party." Rather, the "cash back" portion is an unrestricted payment made directly to the employee, and thus may be included in compensation earnable. However, this merely "softens the blow" of a wholesale exclusion of flex credit, because currently, there is no scenario in which an employee may receive their **entire** flex credit amount in cash.

Significantly, during its meeting with representatives of labor groups and the County on October 8, 2020, VCERA learned that certain labor groups have filed litigation in federal court against the County relating to the Opt-Out fee (*Sanders v. County*). Staff has recommended

¹ In re Retirement Cases (2003) 110 Cal.App.4th 426)

some amendments to the proposed Resolution Implementing *Alameda* Decision to reflect the significance of *Sanders v. County* on the topic of whether Flex Credit may in fact be considered an “all cash” benefit, or not.

Looking Backward

Because the entire amount of flex credit has been included in compensation earnable up until now, and because *Alameda* opined that in-kind benefits that are not “compensation” because they are not receivable in cash, *never should have been* included, past years (back to the inception of flex credit in 1989) must be examined. Over time, the amounts provided to employees by the County in flex credit have varied. So have the premiums for medical coverage options, and the opt-out fee. Even within a given year, flex credit amounts vary between labor groups, and in 2020 the County adopted a tiered flex credit that increases with the number of family members covered. Despite the complexity of determining the maximum cash-back scenarios for each year for each labor group, it represents the only way to calculate the maximum amount that may be included in compensation earnable within the lines drawn clearly in *Alameda*.

Therefore, as the proposed Resolution specifies, staff recommends that for each year a legacy employee received flex credit, the employee be permitted to include in his or her compensation earnable the ***maximum amount he or she could have received in cash*** in any given year. Member contributions paid on the remaining flex credit amount would be refunded; provided, however, that as set forth in the newly amended Resolution, return of such contributions would be deferred for a determination in *Sanders v. County* regarding the legality of the Opt-Out fee. If the Opt-Out fee has not been lawful, then all of the Flex Credit could have been received by members in cash and VCERA staff would thus recommend that it be included. Until the resolution of that litigation, however, VCERA must consider only the maximum amount a member could receive in cash as pensionable for purposes of calculating retirement allowances due to members who retire on or after July 30, 2020.

To the best of our knowledge, none of the other 19 CERL counties currently utilize the cafeteria plan flex credit structure Ventura does with their employees, with the limited exception of Kern County and San Bernardino County who may have smaller districts among their employers that provide a credit in a similar way. (The retirement boards of both the Kern County Employees’ Retirement Association (KCERA) and the San Bernardino County Employees’ Retirement Association (SBCERA) have adopted post-*Alameda* Resolutions to exclude in-kind benefits from compensation earnable, and we understand from their public materials that they are working out particulars as to such benefits as well.)

In Ventura, flex credit represents a fairly significant portion of all legacy employees’ bi-weekly compensation. For example, in 2020, for non-represented County employees and those in several other labor groups, the biweekly flex credit amount is \$447 for employee only tier.

Objections from Members, the County of Ventura and Labor Groups

No one wants a reduction in their future anticipated retirement benefits, so many VCERA legacy members are understandably unhappy to hear that the result of this California Supreme Court ruling is that their monthly retirement may be less than they planned for and expected. Until now, VCERA has provided retirement estimates to certain members that were calculated using

compensation earnable amounts that were, according to *Alameda*, in excess of what is legally permitted to be included. While retirement estimates are just that – *estimates* – members use them as a tool to plan and choose a retirement date. It is doubtless discouraging to adjust retirement plans because the estimated benefit amount was apparently too high.

As the Board would expect, VCERA has heard from these disappointed members, and from their labor groups' leaders and attorneys. Each objection has been provided the Board, whether it be in a letter from an attorney, or an email from a distressed member.

The County of Ventura has expressed vehement objection to VCERA implementing *Alameda* in the way the proposed Resolution would require. Former County Counsel Leroy Smith did not accept staff's and fiduciary counsel's interpretation of *Alameda*. As communicated in his letter to VCERA and his presentation to the Board of Retirement on September 14th, he and his client, the County of Ventura, believe the Supreme Court in *Alameda* did not mandate exclusion of any portion of flex credit.

VCERA staff and counsels have reviewed each objection raised by these members, labor groups, and the County through County Counsel. VCERA's fiduciary counsel, Ashley Dunning, addressed each raised objection separately in the letter (provided) to the various counsels, basically communicating that the substance of each objection was considered and rejected by the Supreme Court in rendering its ultimate decision.

The labor unions of the Ventura County Deputy Sheriff's Association (VCDSA) and the Ventura County Professional Firefighters' Association (VCPFA) and Service Employees International Union (SEIU) requested that the Board meet with them and with the County to discuss their legal positions. As Brown Act prohibits the entire board from attending such a meeting, Chair Goulet appointed an ad hoc committee of three trustees, including himself and two others to meet with these parties, and all parties were represented by counsel for this purpose. As noted, that meeting took place on Thursday, October 8th, and the participants had a productive dialogue and exchange of viewpoints. We believe the parties now understand VCERA's interpretation and approach, though there are certainly points on which we disagree. The meeting led, however, to greater understanding on points relating to the *Sanders v. County* litigation, as well as a recognition that members' right to administrative appeals of certain factual determinations also should be set forth in the proposed Resolution. Those amendments, as well as earlier amendments that VCERA staff considered before the October 8 meeting that were already reflected in VCERA's fiduciary counsel's letter, are shown on the redline version of the Resolution provided with this memorandum.

Conclusion and Recommendation

As Retirement Administrator, recommending Board adoption of a Resolution that will in effect reduce the future retirement benefits of many long-standing County employees is not one that I make lightly. However, we are confident that our position on, and interpretation of, this

impactful California Supreme Court ruling is correct. Our meticulous analysis was completed in a spirit of fairness and compassionate to VCERA members, and in recognition of the interests of VCERA's participating employers.

RECOMMENDATION: ADOPT RESOLUTION OF THE BOARD OF RETIREMENT OF VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION REGARDING ALAMEDA IMPLEMENTATION TO COMPENSATION EARNABLE AND PENSIONABLE COMPENSATION AS PROVIDED.

Sincerely,

A handwritten signature in cursive script, appearing to read "Linda Webb".

Linda Webb

Retirement Administrator

**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) 9 Cal.5th 1032 (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 and compensation earnable. To the extent, in contravention of *Alameda*, VCERA currently includes any benefits that members may not receive in cash and therefore that are not “compensation” under Government Code section 31460 (e.g., all portions of Flex Credit that *may not be provided to members in cash* under a participating employer’s rules applicable during the pertinent time period) (“in-kind benefits” as described in *In re Retirement Cases* (2003) 110 Cal.App.4th 426), 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); provided, however, in light of pending litigation over the legality of certain “opt-out fees” currently required by the County of Ventura (“County”) (see *Sanders v. County of Ventura* (U.S.D.C., Central District of California, Case No. 2:19-cv-06370-MWF-E) (“*Sanders v. County* litigation)), implementation of this provision to Flex Credit will occur as described further in paragraphs 6 and 9 below.

4. With respect to overpayments that occurred prior to the August 31, 2020 payroll, VCERA shall not recoup those amounts related to PEPRA Exclusions from retirees unless directed to do so by the Internal Revenue Service and/or a final, non-appealable, order of a court of competent jurisdiction (any overpayments made on and after the August 31, 2020 payroll would be recouped).

5. VCERA shall make a corrective distribution (which may include interest) on the overpaid contributions reported on PEPRA Exclusions to retirees: (i) if such retirees were in active member service anytime on or after January 1, 2013; and (ii) to the extent the member's contributions exceed any retirement benefit payments that were based on 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. Subject to a final court determination in *Sanders v. County*, or other determination acceptable to the VCERA Board, that opt-out fees are lawful such that those amounts (or mandatory minimum insurance coverage as discussed in paragraph 9 below, whichever is lower) constitute in-kind benefits to members because they may not be received in cash directly by the member ("Opt-Out Fee Legality Determination"), 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 (provided such members did not retire before July 30, 2020 and therefore will not have the *Alameda* Exclusions included in the calculation of their retirement allowances from VCERA).

7. VCERA shall 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. For clarification with respect to corrective actions regarding *Alameda* Exclusions (e.g., return of contributions, collection of future contributions and determination of compensation earnable for members who retire on or after July 30, 2020), VCERA will assume that the VCERA member maximizes his or her benefit that may be received in cash directly by the member. See generally, *Hittle v. Santa Barbara County Employees' Retirement System* (1985) 39 Cal.3d 374. Further, as provided in paragraphs 3 and 6 above, VCERA shall defer the return of contributions relating to *Alameda* Exclusions until an Opt-Out Fee Legality Determination. If *Sanders v. County* determines that such opt-out fees have not been lawful, then no return of contributions will be warranted for individuals as to whom the County applies

the conclusion in *Sanders*. Further, in that instance, retirement benefits of any members who retire on or after July 30, 2020 that do not include Flex Credit that was able to be received in cash (as determined by *Sanders*) will be trued up (with interest if applicable).

10. 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.

11. 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.

12. Provide members with an opportunity to administratively appeal factual determinations VCERA makes regarding pay codes with which they may disagree (such as whether particular pay codes are for services rendered during normal working hours of members in the class or grade of the member). Gov. Code §31461(b)(3); see *Stevenson v. Board of Retirement of OCERS* (2010) 186 Cal.App.4th 498. Such appeals would occur under Code of Civil Procedure section 1085. *Shelden v. Marin Cty. Employees' Pet. Assn.* (2010) 189 Cal.App.4th 458.

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

14. 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

**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").

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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)~~ ([9 Cal.5th 1032](#)) (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

[57645409.v5](#)

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:

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3. VCERA shall comply with *Alameda*’s directives regarding the Board’s lack of authority to include the *Alameda* Exclusions in compensation; and compensation earnable ~~and pensionable compensation, as applicable, and.~~ To the extent, in contravention of *Alameda*, VCERA currently includes any benefits that members may not receive in cash and therefore that are not “compensation” under Government Code section 31460 (e.g., all portions of Flex Credit that *may not be provided to members in cash* under a participating employer’s rules applicable during the pertinent time period) (“in-kind benefits” as described in *In re Retirement Cases* (2003) 110 Cal.App.4th 426), 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); provided, however, in light of pending litigation over the legality of certain “opt-out fees” currently required by the County of Ventura (“County”) (see *Sanders v. County of Ventura* (U.S.D.C., Central District of California, Case No. 2:19-cv-06370-MWF-E) (“*Sanders v. County* litigation)), implementation of this provision to Flex Credit will occur as described further in paragraphs 6 and 9 below.

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4. ~~Unless so~~ With respect to overpayments that occurred prior to the August 31, 2020 payroll, VCERA shall not recoup those amounts related to PEPPRA Exclusions from retirees unless directed to do so by the Internal Revenue Service and/or a final, non-appealable, order of a court of competent jurisdiction, no recoupment shall be made directly from retirees for any overpaid amounts as a result of the PEPPRA Exclusions having been included in the calculation of a retiree's retirement benefit prior to the issuance of the Alameda decision. (any overpayments made on and after the August 31, 2020 payroll would be recouped).

5. VCERA shall make a corrective distribution (which may include interest) on the overpaid contributions reported on PEPPRA Exclusions to retirees: ~~(i) if such retirees were in active member service anytime from on or after January 1, 2013 through July 30, 2020, provided; and (ii) to the extent the member's contributions exceed any retirement benefit payments associated with that portion of the payment that is associated with that were based on~~ the PEPPRA Exclusions. In the event no contributions associated with the PEPPRA Exclusions remain for a retiree, no corrective distribution of contributions shall be made.

6. Subject to a final court determination in Sanders v. County, or other determination acceptable to the VCERA Board, that opt-out fees are lawful such that those amounts (or mandatory minimum insurance coverage as discussed in paragraph 9 below, whichever is lower) constitute in-kind benefits to members because they may not be received in cash directly by the member ("Opt-Out Fee Legality Determination"), 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 before July 30, 2020 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 PEPPRA 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 "PEPPRA 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. For clarification with respect to corrective actions regarding Alameda Exclusions (e.g., return of contributions, collection of future contributions and determination of compensation earnable for members who retire on or after July 30, 2020), VCERA will assume that the VCERA member maximizes his or her benefit that may be received in cash directly by the member. See generally, Hittle v. Santa Barbara County Employees' Retirement System

[57645409.v5](#)

(1985) 39 Cal.3d 374. Further, as provided in paragraphs 3 and 6 above, VCERA shall defer the return of contributions relating to Alameda Exclusions until an Opt-Out Fee Legality Determination. If Sanders v. County determines that such opt-out fees have not been lawful, then no return of contributions will be warranted for individuals as to whom the County applies the conclusion in Sanders. Further, in that instance, retirement benefits of any members who retire on or after July 30, 2020 that do not include Flex Credit that was able to be received in cash (as determined by Sanders) will be trued up (with interest if applicable).

~~9~~10. 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~~11. 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.

12. Provide members with an opportunity to administratively appeal factual determinations VCERA makes regarding pay codes with which they may disagree (such as whether particular pay codes are for services rendered during normal working hours of members in the class or grade of the member). Gov. Code §31461(b)(3); see Stevenson v. Board of Retirement of OCERS (2010) 186 Cal.App.4th 498. Such appeals would occur under Code of Civil Procedure section 1085. Sheldon v. Marin Cty. Employees' Pet. Assn. (2010) 189 Cal.App.4th 458.

~~11~~13. Inform VCERA members of the foregoing actions through appropriate means; and

~~12~~14. 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

Summary report:	
Litera® Change-Pro for Word 10.7.0.7 Document comparison done on 10/8/2020 3:56:58 PM	
Style name: Default Style	
Intelligent Table Comparison: Active	
Original DMS: iw://WORKSITE/Nossaman_LLP/57645409/4	
Modified DMS: iw://WORKSITE/Nossaman_LLP/57645409/5	
Changes:	
<u>Add</u>	27
Delete	19
Move From	0
<u>Move To</u>	0
<u>Table Insert</u>	0
Table Delete	0
<u>Table moves to</u>	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	46



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Refer To File # 501702-0001

BY EMAIL ONLY

October 6, 2020

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**Re: October 8, 2020 Meeting Regarding Legal Parameters for VCERA
Implementation of Alameda Decision**

Dear Counsel:

On behalf of the Ventura County Employees' Retirement Association and its Board of Retirement ("Board") (collectively, "VCERA"), this letter is to provide each of you with an explanation of the legal parameters that govern VCERA in implementing the California Supreme Court's recent decision, *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) 9 Cal.5th 1032 ("*Alameda*") in advance of our scheduled meeting with you and your respective clients on October 8, 2020.

In particular, this letter addresses the following six (6) issues identified in the objection letters ("Objections") VCERA received either from County Counsel on behalf of the County of Ventura ("County") and/or from counsel for the Ventura County Deputy Sheriff's Association ("VCDSA") and the Ventura County Professional Firefighters Association ("VCPFA") (collectively, "Unions"), regarding VCERA's proposed implementation of *Alameda*, as discussed during open session at the September 14, 2020 VCERA Board meeting. As set forth below, the first four "issues presented" address points in both the County and Union Objections, while the last two issues presented address points the Unions' Objections raised separately.

October 6, 2020

Page 2

In addition, this letter provides a comprehensive list of action items to implement *Alameda* that VCERA staff expect to propose to the VCERA Board for consideration at its regular meeting on October 12, 2020.

The VCERA Board considers its course of action in light of its fiduciary obligations to the entire membership of the system. In these difficult circumstances, VCERA is working hard to implement solutions that comply with the *Alameda* Court's admonition that it may not "evade" the law, that are fair and compassionate to its members and beneficiaries, and that recognize the interests of the participating employers of VCERA. At the same time, the VCERA Board recognizes that its primary "task ... is not to design the [ACERA] pension plan but to implement the design enacted by the Legislature through CERL." *Alameda*, pp. 1066-1067. We hope that upon careful review of the proposed actions set forth below, you and your respective clients will ultimately agree that this course of action is both prudent and lawful.

Issues Presented and Conclusions

Issue No. 1: Does *Alameda* require that the portion of a cafeteria plan allowance that a VCERA member may not receive in cash ("non-cash flexible benefit") be excluded from compensation earnable?

Response to Issue No. 1: Yes, for the reasons summarized below, *Alameda*'s interpretation of the applicable statutes requires that VCERA exclude any non-cash flexible benefit from the compensation earnable determination of any VCERA member who retires on or after July 30, 2020.

In *Alameda*, the Supreme Court held that county retirement boards have no discretion to include the "monetary value of in-kind benefits" in compensation earnable. Specifically, the Court stated:

The term "compensation," as used in section 31461¹ . . . is an employee's "remuneration paid in cash" and expressly excludes the "monetary value" of benefits paid in kind. (§ 31460.) Nothing in those definitions 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. 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.

Alameda, p. 1070 (emphasis added). Under *Alameda*, a non-cash flexible benefit cannot qualify as compensation earnable because it is not "remuneration paid in cash," and it is thus not "compensation" under section 31460, and therefore it cannot be "compensation earnable" under section 31461.

¹ All statutory references are to the California Government Code unless otherwise stated.

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In County Counsel’s comments to the Board during open session at the September 14, 2020, meeting, counsel stated that the topic of whether, under CERL, insurance payments made by employers were “in-kind” benefits has “never been litigated.” That statement is incorrect. In fact, in a case to which VCERA was a party represented by the Office of Ventura County Counsel (Retirement Cases Coordinated Proceeding JCCP No. 4049), the trial court (Judge Pollak, presiding) considered that very question. As the reviewing court of appeal stated with respect to Judge Pollak’s decision, “the [trial] court first considered whether CERL mandates inclusion of certain employment benefits in the calculations of retirement benefits. Plan members requested that the following items be included: . . . *insurance-related payments made by the employer.*” *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 436-437 (emphasis added). Thus, when the appellate court reviewed the trial court’s decision, it articulated one of the three questions it was to address as follows: “Should items of remuneration that do not involve cash payments to the employee prior to his or her retirement be included in pension calculations?” *Id.* at p. 438. The court in *In re Retirement Cases* then held:

Here, the employee is receiving an insurance premium, not a cash payment. ***Thus, it is an in-kind benefit, which is not “compensation” under section 31460.*** . . . The employee receives insurance coverage, not cash, and therefore it is not “compensation” under CERL.

Id. at pp. 478-479 (emphasis added). Notably, the appellate court in *In re Retirement Cases* also directly refuted County Counsel’s arguments regarding the import of section 31461.1, stating with respect to that statute, “contrary to plan members’ assertions, the Legislature expressed its intent that it *never* considered the inclusion of flexible benefits to be mandatory under CERL.” *Id.* at p. 480 (emphasis in original). Thus, the court held:

We conclude that the Legislature has expressed its intent not to include employer payments into flexible benefits plans and payments of insurance carrier premiums as ‘compensation’ under CERL. . . . Accordingly, we conclude the trial court properly found that CERL did not require these payments to be included in the calculation of retirement benefits.

Id. at p. 481. *In re Retirement Cases* definitively establishes that employer payments toward flexible benefits plans, when those payments may not be received directly by the member in cash, are not “compensation” under section 31460.

Under *Alameda*, because those benefits are not “compensation,” CERL retirement boards must not include them in compensation earnable. See *Alameda*, p. 1067 (“It is not within [a board’s] authority to expand pension benefits beyond those afforded by the authorizing legislation.”) (brackets in original, internal quotations omitted); see also, e.g., *Marin Assn. of Public Employees v. Marin County Employees’ Retirement Assn.* (2016) 2 Cal.App.5th 674 (“*MAPE v. MarinCERA*”) (court confirmed that flexible benefit plans constitute in-kind benefits and also upheld MarinCERA’s exclusion of *conversions* of in-kind benefits in that case, which was newly permitted by PEPRA in section 31461(b)(1)(A)).

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Issue No. 2: Does removing the non-cash flexible benefit violate vested contract rights of County employees who retire on or after *Alameda* was issued on July 30, 2020?

Response to Issue No. 2: No, the exclusion of benefits from compensation earnable that CERL does not include in compensation does not violated vested rights. VCERA members only have a vested right to statutorily authorized benefits. *Alameda*, p. 56, citing *International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292 (*Firefighters*). Specifically, the *Alameda* Court explained that in *Firefighters*:

our court made explicit what was already implicit in the vested rights doctrine, namely, that the contract clause does not protect public employees against adverse changes in the manner in which a pension plan is implemented that are authorized by the existing terms of the plan, rather than as a result of legislative changes to those terms. (*Id.* at pp. 301–302 [holding that an increase in employee contribution rates pursuant to the existing terms of a pension plan does not violate vested rights].)

Because non-cash flexible benefits are not statutorily permitted to be included in compensation earnable because they are not “compensation,” and because *Alameda* expressly disapproved the statement in *Guelfi* footnote 6 that county retirement boards have the statutory authority to include pay items in compensation earnable that are not compensation, no VCERA member has a vested contractual right to maintain its inclusion. Further, because *Alameda* 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,” the *Alameda* Exclusions are to be implemented as to all VCERA members who retire on or after the Supreme Court’s statement of that legal conclusion on July 30, 2020.

Issue No. 3: Does the VCERA’s Board’s 1989 resolution (providing that cafeteria plan allowances would be compensation earnable) provide other legal or equitable reasons that require the Board to include non-cash flexible benefit in compensation earnable of members who retire on or after July 30, 2020?

Response to Issue No. 3: No, *Alameda* confirms that previous county retirement board resolutions do not provide the legal or equitable bases that permit such boards to refuse to follow applicable statutes and case law. In fact, the Supreme Court’s central focus in *Alameda* was on plaintiffs’ contention that CERL provisions could not be applied according to their terms because of either “(1) agreements in effect when PEPR was enacted or (2) application of the doctrine of equitable estoppel.” (*Alameda*, p. 1052.) The Court rejected those contentions as follows:

We conclude that neither argument authorizes the county retirement boards to administer CERL in a manner inconsistent with the governing statutory provisions by including items of compensation in compensation earnable that section 31461, as amended, excludes.

Alameda, p. 26. Furthermore, the Court went to great lengths to explain the authority, and the limits thereof, of county retirement boards with respect to the inclusion of particular benefits in retirement allowance determinations. The Court stated:

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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. . . . The boards do not have the authority to 'evade the law' that otherwise applies to their system. [Citing *Westly v. Bd. of Admin.* (2003) 105 Cal.App.4th 1095, 1100.] 'The granting of retirement benefits is a legislative action within the exclusive jurisdiction of the [relevant legislative body]. . . . [¶] It is not within [a board's] authority to expand pension benefits beyond those afforded by the authorizing legislation. . . . The scope of the board's power as to benefits is limited to administering the benefits set by the [legislative body].'" (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 79–80; see similarly *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472, 495.)

For these reasons, under the Supreme Court's explicit conclusions in *Alameda*, the VCERA's Board's 1989 resolution providing that cafeteria plan allowances would be compensation earnable does not provide legal or equitable reasons that require, or authorize, the VCERA Board to include non-cash flexible benefit in compensation earnable of members who retire on or after July 30, 2020.

Issue No. 4: What contributions should be returned to VCERA members who retire on and after July 30, 2020 and do not have the non-cash flexible benefit included in the calculation of their compensation earnable?

Response to Issue No. 4: While the return of contributions question was not answered by *Alameda*, general principles of law and equity support returning all applicable member contributions (plus interest at a rates to be determined by the Board) to those members who retire from VCERA on and after July 30, 2020, to the extent that such contributions were paid on a non-cash flexible benefit.

Notably, California Supreme Court guidance provided in *Hittle v. Santa Barbara County Employees' Retirement System* (1985) 39 Cal.3d 374 ("*Hittle*"), as well as the discretionary authority of the VCERA Board, support making this correction in a manner which assumes, for purposes of the refund and for purposes of collecting future contributions, that the VCERA member will maximize his or her benefit that, under the participating employer's applicable rules at the time, may be received in cash. *Id.* [retirement system was required to permit a member to redeposit withdrawn contributions in order to be able to apply for disability retirement where retirement administrator was on notice of member's potential eligibility for disability retirement and did not inform member of waiver of rights upon withdrawal of contributions]. Point 8 of "Staff Recommended VCERA Board Actions" below provides language on this topic.

Note further that this application of *Hittle* to deem payments that may be received by a member in cash, rather than limiting them to those that are received by a member in cash, is consistent with section 31461 itself. Section 31461 includes such amounts in two specific contexts: (1) a leave of absence without pay, as to which compensation earnable is based on the "compensation of the position held by the member at the beginning of the absence," and (2) in the context of leave cash outs, as to which the "payable" rather than "paid" amount is included. In

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both of these instances, a member may not actually *receive* the compensation *during* the final compensation period, but it is a cash benefit that the member *may* receive in the normal course under applicable labor agreements and other rules. Point 7 of Staff Recommended VCERA Board Actions below provides language on this topic.

Finally, if permitted by the member's participating employer and applicable tax law, a rollover of those contributions would be allowed should VCERA members so elect.

Issue No. 5: Is VCERA permitted to include mandatory on-call or standby pay that is not paid for services a VCERA member renders within "normal working hours" of members in the same grade or class as the member?

Response to Issue No. 5: No. Section 31461(b)(3) prohibits the inclusion in compensation earnable for those who retire on and after January 1, 2013, of any "pay for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise." Furthermore, the statutory framework for "compensation earnable" set forth in section 31461 looks to the days "ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay." Thus, "normal working hours" is to be determined by reference to the normal working hours of "members in the same grade or class of positions during the period, at the same rate of pay."

The *Alameda* Court determined that this mandatory exclusion from compensation earnable was a change in law. *Alameda*, p. 59 ("We conclude that the amendment of section 31461 to add subdivision (b)(1) through (3) constituted a change in the law because those provisions narrowed the expansive interpretation of compensation earnable adopted in *Ventura County*.") The Court also noted with respect to subdivision (b)(3):

An often-cited example of such compensation is on-call duty pay, which is provided to employees in return for voluntarily making themselves available to be called to work outside their normal working hours. Because such pay is cash remuneration, it is "compensation" under section 31460. Yet because compensation earnable excludes overtime pay and is calculated on the basis of the days "ordinarily" worked by an employee's peers (§ 31461, subd. (a)), the inclusion of payment for services provided outside normal hours in compensation earnable is arguably inconsistent with the statutory concept.

Alameda, pp. 18-19. The Court held that section 31461, subdivision (b)(3) is constitutional and concluded that "the PEPRA amendment was enacted to maintain the integrity of the pension system and 'bear[s] some material relation to the theory of a pension system and its successful operation.'" *Alameda*, p. 76. While the Supreme Court focused its discussion of the restriction of employees who volunteer "during their final compensation period, to perform additional services outside normal working hours in order to artificially inflate their daily rate of pay," the Court also concluded that "subdivision (b)(3) therefore reinforces the portion of section 31461 that requires compensation earnable to be based on the same work year for all employees within a particular pay grade." (*Alameda*, p. 80.) As a result of its conclusion the PEPRA Exclusions are

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constitutional as written and must be applied by county retirement boards consistent with the statutory language and without regard to any legal or equitable defenses that plaintiffs asserted, the Supreme Court reversed the decision of the Court of Appeal and remanded the matter to that court, “with directions to remand the matter to the trial court to vacate the judgments entered in each of the consolidated proceedings and to conduct further proceedings consistent with this decision.”

While those “further proceedings” have not yet occurred, Merced County Employees’ Retirement Association (“MercedCERA”) excluded all standby and on-call pay from retirement allowance calculations as “outside normal working hours,” and the County did not reverse that application of the PEPRAs Exclusions. In addition, on September 23, 2020, the Supreme Court issued an order dismissing the petition for review that it previously had granted in *MAPE v. MarinCERA*, thus upholding that decision’s ruling that MarinCERA was legally authorized to exclude all standby and on-call pay from retirement allowance calculations as outside normal working hours. The First District Court of Appeal subsequently issued a “remititur” in the case awarding MarinCERA its costs. Thus, *MAPE v. MarinCERA* remains published, on-point, legal authority for the exclusion of all pay codes that reflect payments for services rendered outside normal working hours from compensation earnable.

We therefore conclude that section 31461(b)(3) requires the exclusion of all standby and on-call type of payments that are for services rendered outside the normal working hours of a particular class or grade, regardless of whether those services are characterized by the member or employer as voluntary or mandatory.

Issue No. 6: May VCERA include annual leave cash-outs that exceed amounts that a VCERA member is able to earn and receive in cash during each 12 month period, such as may occur through cashouts that straddle a calendar year or through the inclusion in compensation earnable of an annual leave donation that a VCERA member may choose to make to another VCERA member?

Response to Issue No. 6: No. Section 31461(b)(2) prohibits the inclusion in compensation earnable payments for leave “in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.” This provision thus prohibits, as discussed in detail in *Alameda* itself, the inclusion of cash outs in excess of that statutory maximum that VCERA members have received by “straddling” their leave redemptions. In addition, annual leave donations that a VCERA member may make to *others* do not constitute “compensation” the member receives directly from his or her employer each year that may be added to their compensation earnable. Such donations may not be received in cash by the member and, therefore, are akin to an “in-kind” benefit.

Next Steps

VCERA will take actions to implement *Alameda* that address both benefit payments and contribution collection applicable to PEPRAs Exclusions and *Alameda* Exclusions. These actions will identify (i) to whom the action applies, (ii) as to what period of payments it applies; and (iii) the pay items to which it applies. Following is an 11-point list of staff’s recommended high-level

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directions for the Board to provide VCERA staff on these topics. Notably, as the *Alameda* Court made clear, both VCERA staff and its Board are required to follow the law, regardless of the manner in which VCERA sets forth its administrative actions from a procedural standpoint.

Staff Recommended VCERA Board Actions

(1) Comply with *Alameda's* directives regarding mandatorily excluded pay items that are PEPRA Exclusions, and apply that directive to all retiree payroll for individuals who are legacy or PEPRA members who retired 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* becomes final, that is, the VCERA retiree payroll on August 31, 2020.

(2) Comply with *Alameda's* directives regarding the Board's lack of authority to include the *Alameda* Exclusions in compensation and compensation earnable. To the extent, in contravention of *Alameda*, VCERA currently includes any benefits that members may not receive in cash and therefore that are not "compensation" under Government Code section 31460 (e.g., all portions of Flex Credit that *may not be provided to members in cash* under a participating employer's rules applicable during the pertinent time period) ("in-kind benefits" as described in *In re Retirement Cases* (2003) 110 Cal.App.4th 426), apply that directive to all retiree payroll for individuals who retire on or after July 30, 2020, when the Supreme Court overturned footnote 6 of *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi* footnote 6") and VCERA was thus on notice of that change in judicial law (including those who will retire on or after the date of the Board's Resolution).

(3) With respect to overpayments that occurred prior to the August 31, 2020 payroll, do not recoup those amounts related to PEPRA Exclusions from retirees unless directed to do so by the Internal Revenue Service and/or a final, non-appealable, order of a court of competent jurisdiction (any overpayments made on and after the August 31, 2020 payroll would be recouped).

(4) Make a corrective distribution (which may include interest) on the overpaid contributions reported on PEPRA Exclusions to retirees: (i) if such retirees were in active member service anytime on or after January 1, 2013; and (ii) to the extent that the member's contributions exceed any retirement benefit payments that were based on 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.

(5) Make a corrective distribution (which may include interest) to active and deferred members of member contributions that they made on pay codes for the *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.

(6) Regarding VCERA active and deferred members, also implement a corrective distribution (which may include interest) to such 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.

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(7) For clarification with respect to all corrective distributions provided for in the Resolution regarding PEPRA Exclusions, 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), 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.’”

(8) For clarification with respect to corrective distributions provided for in the Resolution regarding Alameda Exclusions (e.g., return of contributions paid on Flex Credit and other in-kind benefits to members who retire on or after July 30, 2020), VCERA will assume for purposes of the refund, collection of future contributions, and determination of compensation earnable, that the VCERA member maximizes his or her benefit that may be received in cash directly by the member. See generally, *Hittle v. Santa Barbara County Employees’ Retirement System* (1985) 39 Cal.3d 374.

(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; and

(11) Inform VCERA members of the foregoing actions through appropriate means.

VCERA Staff and Counsel, and an ad hoc committee of three VCERA Board members that the VCERA Board Chair appointed for purposes of participating in these discussions, look forward to hearing your thoughts on the above during our virtual meeting on October 8, 2020.

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As noted, recommendations of both staff and the ad hoc committee will be made to the full Board during open session of the VCERA Board's regular meeting on October 12, 2020.

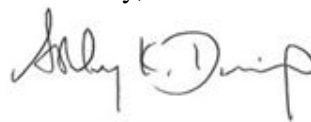
A few final comments are warranted here regarding the role of the VCERA Board as it implements PEPRA and *Alameda*, and as the County and Unions consider their respective next steps.

First, under section 31461(b), VCERA is not to include in compensation earnable "Any compensation determined by the board to have been paid to enhance a member's retirement benefit under that system." Accordingly, to the extent that the County and Unions take actions designed to increase pension benefits that are otherwise affected by implementation of *Alameda*, that action may not be taken in a manner that results in a new payment "to enhance a member's retirement benefit under that system." And consistent with this legislative directive, the VCERA Board will have a statutory obligation to exclude any such amounts from compensation earnable.

Second, while VCERA will of course consider the County's views on the topics discussed herein, under *Alameda* and other applicable law VCERA must implement the statutes that govern the retirement system, and the County may not give directives to VCERA that are contrary to those statutes. Therefore, the County's desires with respect to whether a particular benefit is pensionable or not is not the appropriate standard. Rather, the County must conform its reporting of compensation earnable to the applicable statutory standards, which of course the Legislature sets. (Section 31582, subd. (a).) Furthermore, as *Alameda* also makes clear, VCERA may not *grant* new statutory/vested benefits to its members, as a matter of law. The provision of compensation to VCERA's active members who are county employees of course remains within the domain of the County.

Third, as noted at the outset of this letter, the VCERA Board is mindful of its fiduciary responsibility to the overall best interest of its members and beneficiaries as well as of the limitations on its authority as an administrative agency that applies statutes that the Legislature has enacted. VCERA staff has now developed a plan to implement *Alameda* that is consistent with both the Board's fiduciary duties and the statutes under which VCERA operates. VCERA prefers to operate collaboratively with both the County and the Unions in terms of understanding the roles of each of us with respect to these topics, and we provide this letter in that spirit.

Sincerely,



Ashley K. Dunning

cc: VCERA Ad Hoc Committee re Potential Litigation over *Alameda* Implementation
Linda Webb, VCERA Retirement Administrator
Lori Nemiroff, VCERA General Counsel

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

PEPRA EXCLUSIONS

Employer Code	Earn Code	Earn Code Description	VCERA Analysis	VCERA Comments
01	ANM	ANM-ANIMAL REGULATION DIFFERENTIAL	Situational	Includable only for services rendered within normal working hours.
01	ARP	ARP-ARMED PREMIUM VCPPOA PVP 8.5%	Situational	Based on the ARP Spec Accumulator, which includes all overtime.
01	ASN	ASN-ASSIGNMENT BONUS - NURSES	Situational	Includable only for services rendered within normal working hours.
01	B1A	B1A-BILINGUAL LEVEL 1 - CNA	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	B2A	B2A-BILINGUAL LEVEL 2 - CNA	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	B3A	B3A-BILINGUAL LEVEL 3 - CNA	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	CBN	CBN-CALL BACK RETIREMENT CNA	Excluded	Payment for services outside of normal working hours.
01	CBR	CBR-CALL BACK CNA RETIREMENT	Excluded	Payment for services outside of normal working hours.
01	CBS	CBS-CALL BACK STRAIGHT TIME 1.0X	Excluded	Payment for services outside of normal working hours.
01	CRJ	CRJ-PP CNA CALL BACK RET ADJ	Excluded	Payment for services outside of normal working hours.
01	CRN	CRN-TRUCK CRANE ASSIGNMENT PAY	Situational	Includable only for services rendered within normal working hours.
01	CRT	CRT-SHERIFF COURT TIME	Excluded	Payment for services outside of normal working hours.
01	CSF	CSF-CALL BACK STRAIGHT TIME FCW	Excluded	Payment for services outside of normal working hours.
01	DFT	DFT-FLOAT NURSE PREMIUM PAY	Situational	Includable only for services rendered within normal working hours.
01	DTN	DTN-DISPATCHER TRAINING BONUS	Situational	Includable only for services rendered within normal working hours.
01	EAT	EAT-SHERIFF MEAL PAY 4/2 SCHEDULE	Situational	Includable only for services rendered within normal working hours.
01	EHN	EHN-Emergency In-House <40 NOC	Excluded	Payment for services outside of normal working hours.
01	EHP	EHP-Emergency In-House <40 PM	Excluded	Payment for services outside of normal working hours.

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

01	EHR	EHR-Emergency In-House <40 Hours	Excluded	Payment for services outside of normal working hours.
01	ELC	ELC-ELECTION WORKER PAY	Excluded	One-time ad hoc payments.
01	F30	F30-30-YEAR RETIREMENT VCPFA LINE	Situational	Based on the HPP Special Accumulator, which has situational pay codes.
01	F32	F32-30-YEAR RETIREMENT VCPFA STAFF	Situational	Based on the HPP Special Accumulator, which has situational pay codes.
01	FPA	FPA-Fire Pumps & Accessories 1.5%	Situational	Includable only for services rendered within normal working hours.
01	FTO	FTO-FIELD TRAINING OFFICER BONUS	Situational	Includable only for services rendered within normal working hours.
01	HDP	HDP-HOLIDAY DAY OFF PAID SPOAVC	Excluded	Payment made for holiday outside of regular working hours.
01	HDS	HDS-SHERIFF HOLIDAY ON REG DAY OFF	Excluded	Payment made for holiday outside of regular working hours.
01	HPP	HPP-HIRT POOL PREMIUM PAY VCPFA	Situational	Includable only for services rendered within normal working hours.
01	HSP	HSP-HOUSE SUPERVISOR PAY VCMC	Situational	Includable only for services rendered within normal working hours.
01	ICD	Inter-Campus Drift Premium	Situational	Includable only for services rendered within normal working hours.
01	IHN	IHN-IN-HOUSE REGISTRY <40 NOC	Excluded	Payment for services outside of normal working hours.
01	IHP	IHP-IN-HOUSE REGISTRY <40 PM	Excluded	Payment for services outside of normal working hours.
01	IHR	IHR-IN-HOUSE REGISTRY <40 HOURS	Excluded	Payment for services outside of normal working hours.
01	JCP	JCP-Jail Cook Premium 5%	Situational	Based on the JCP Spec Accumulator, which includes overtime.
01	MED	MED-MEDI PICK-UP	Situational	Based on the MDI Spec Accumulator, which includes all overtime.
01	MHD	MHD-MH INPATIENT DIFFERENTIAL IUOE	Situational	Includable only for services rendered within normal working hours.
01	MIC	Mobile Intensive Care Cert	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	MSC	MSC-OTHER COMPENSATION	Situational	Includable only for services rendered within normal working hours.

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

01	NB1	NB1-NURSES CERTIFICATION BONUS 1	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	NB2	NB2-NURSES CERTIFICATION BONUS 2	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	NB3	NB3-NURSES CERTIFICATION BONUS 3	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	NB4	NB4-NURSES CERTIFICATION BONUS 4	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	NB5	NB5-NURSES CERTIFICATION BONUS 5	Situational	Based on the NRS Spec Accumulator, which includes all overtime.
01	NHO	NHO-4850 NON TAX HOLIDAY RDO-SHF	Excluded	Payment made for holiday outside of regular working hours.
01	NS1	NS1-NOCS - IUOE 7.5%	Situational	Includable only for services rendered within normal working hours.
01	NS2	NS2-NOCS - 10%	Situational	Includable only for services rendered within normal working hours.
01	NS3	NS3-NOCS - HOSPITAL 15% - CNA	Situational	Includable only for services rendered within normal working hours.
01	NS4	NS4-NOCS - 10% - ADDL PAY	Situational	Includable only for services rendered within normal working hours.
01	NS5	NOCS-12.5% SPOAVC	Situational	Includable only for services rendered within normal working hours.
01	NSM	NSM-NURSE SPECIALTY PAY - MGMT	Situational	Includable only for services rendered within normal working hours.
01	NSP	NSP-NURSE SPECIALTY PAY	Situational	Includable only for services rendered within normal working hours.
01	PCN	PCN-PSYCH CHARGE NURSE VCMC	Situational	Includable only for services rendered within normal working hours.
01	PCP	Charge Nurse Patient Premium	Situational	Includable only for services rendered within normal working hours.
01	PM1	PM1-NIGHT SHIFT - MGMT & CJA AVC	Situational	Includable only for services rendered within normal working hours.
01	PM2	PM2-P.M. SHIFT - 5%	Situational	Includable only for services rendered within normal working hours.

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

01	PM3	PM3-P.M. SHIFT - HOSPITAL 7.5%	Situational	Includable only for services rendered within normal working hours.
01	PM4	PM4-P.M. SHIFT - 5% - ADDL PAY	Situational	Includable only for services rendered within normal working hours.
01	PRC	PRC-PRECEPTOR PAY RN VCMC	Situational	Includable only for services rendered within normal working hours.
01	RBD	RBD-RETRO SICK & VAC BUYDOWN	Included	Limited to 31461
01	RCB	RCB-RETRO CALL BACK STRAIGHT	Excluded	Payment for services outside of normal working hours.
01	RF1	RF1-RETRO INCENTIVE PAY VCPFA FF1	Situational	Includable only for services rendered within normal working hours.
01	RF2	RF2-RETRO INCENTIVE PAY VCPFA FF2	Situational	Includable only for services rendered within normal working hours.
01	RIM	RIM-RETRO INCENTIVES MANAGEMENT	Situational	Includable only for services rendered within normal working hours.
01	RIP	RIP-RETRO INCENTIVES	Situational	Includable only for services rendered within normal working hours.
01	RIS	RIS-RETRO INCENTIVES SAFETY	Situational	Includable only for services rendered within normal working hours.
01	RSP	RSP-RETRO SICK PAYDOWN	Included	Limited to 31461
01	RXM	RXM-RETRO XTRA INCENTIVE MANAGEMENT	Situational	Includable only for services rendered within normal working hours.
01	RXP	RXP-RETRO XTRA INCENTIVES	Situational	Includable only for services rendered within normal working hours.
01	RXS	RXS-RETRO XTRA INCENTIVES SAFETY	Situational	Includable only for services rendered within normal working hours.
01	SBP	SBP-STAND BY PAY	Excluded	Payment for services outside of normal working hours.
01	SLP	SLP-SICK LEAVE PAYDOWN 25%	Included	Limited to 31461
01	SSB	SSB-SHERIFF STANDBY PAY	Excluded	Payment for services outside of normal working hours.
01	STU	STU-STUDENT LOAN PAYMENT	Excluded	Other
01	SVB	SVB-VACATION BUYDOWN - VCDSA	Included	Limited to 31461
01	TAP	TAP-TEMPORARY ASSIGNMENT PREMIUM	Situational	Includable only for services rendered within normal working hours.

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

01	TWR	TWR-RADIO TOWER PREMIUM - IUOE	Situational	Includable only for services rendered within normal working hours.
01	VAB	VAB-VACATION BUYDOWN (GROSSUP)	Included	Limited to 31461
01	VBD	VBD-VACATION BUYDOWN	Included	Limited to 31461
01	VMB	VMB-VACATION MGT BUYDOWN	Included	Limited to 31461
01	VPD	VPD-VACATION PAYDOWN - VCPFA	Included	Limited to 31461
01	WCP	WCP-WATCH COMMANDER PREMIUM 5%	Situational	Includable only for services rendered within normal working hours.
01	WKD	WKD-WEEKEND WORKED-CNA	Situational	Includable only for services rendered within normal working hours.
01	WKM	Weekend Worked MGMT	Situational	Includable only for services rendered within normal working hours.
01	WKS	WKS-WEEKEND WORKED SEIU	Situational	Includable only for services rendered within normal working hours.
01	WKV	WKV-WEEKEND WORKED-VCPPQA	Situational	Includable only for services rendered within normal working hours.
01	XTR	XTR-ONE TIME PAYMENT	Situational	Includable only if paid to all similarly situated members.
22	01NITE	01NITE-(R) NIGHT SHIFT	Situational	Includable only for services rendered within normal working hours.
22	R-NITE	R-NITE-(A) RETRO-NIGHT SHIFT	Situational	Includable only for services rendered within normal working hours.
22	R-SBHL	R-SBHL-(A) RETRO-STANDBY HOLIDAY	Excluded	Payment for services outside of normal working hours.
22	R-SBSU	R-SBSU-(A) RETRO-STAND BY-SEIU	Excluded	Payment for services outside of normal working hours.
22	R-SBWD	R-SBWD-(A) RETRO-STAND BY WEEK DAY	Excluded	Payment for services outside of normal working hours.
22	R-SBWE	R-SBWE-(A) RETRO-STANDBY WEEK END	Excluded	Payment for services outside of normal working hours.
22	R-VACB	R-VACB R-VACBUY - (A) CAL BUY OUT	Included	Limited to 31461
22	SSTAND	SSTAND-(R) STAND BY-SEIU	Excluded	Payment for services outside of normal working hours.
22	STNDHL	STNDHL-(R) STANDBY HOLIDAY	Excluded	Payment for services outside of normal working hours.
22	STNDWD	STNDWD-(R) STAND BY WEEK DAY	Excluded	Payment for services outside of normal working hours.
22	STNDWE	STNDWE-(R) STANDBY WEEK END	Excluded	Payment for services outside of normal working hours.
22	VACBUY	VACBUY-(R) CAL BUY OUT	Included	Limited to 31461

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

ALAMEDA EXCLUSIONS

Employer Code	Earn Code	Earn Code Description	VCERA Analysis	VCERA Comments
01	CBK	CBK-CASH BACK FLEX CREDIT NO PAY	Included	Cashback
01	CF1	CF1-COURTS FLEX SEIU P/T	Excluded	In-kind payment
01	CF2	CF2-COURTS FLEX SEIU F/T	Excluded	In-kind payment
01	CF3	CF3-COURTS FLEX CJAAVC P/T	Excluded	In-kind payment
01	CF4	CF4-COURTS FLEX CJAAVC F/T	Excluded	In-kind payment
01	CF5	CF5-COURTS FLEX MGMT P/T	Excluded	In-kind payment
01	CF6	CF6-COURTS FLEX MGMT 4 & 5 F/T	Excluded	In-kind payment
01	CF7	CF7-COURTS FLEX MGMT3 F/T	Excluded	In-kind payment
01	CF8	CF8-COURTS FLEX MGMT 1&2 F/T	Excluded	In-kind payment
01	EEF	EEF-EE ASSISTANCE DONATION	Excluded	In-kind payment
01	EEP	EEP-EE ASSIST DONATION (GROSSUP)	Excluded	In-kind payment
01	FC	FC-FLEX CREDIT ADJUSTMENT	Excluded	In-kind payment
01	FC1	FC1-FLEX CREDIT PART TIME - VCDSA	Excluded	In-kind payment
01	FC2	Tier2PT365Flex Credit Tier II Part time	Excluded	In-kind payment
01	FC3	Tier3PT383Flex Credit Tier III PT	Excluded	In-kind payment
01	FC4	Flex Credit Part Time 330	Excluded	In-kind payment
01	FC5	FC5-Flex Credit VCPPOA Prob F/T	Excluded	In-kind payment
01	FC6	FC6-FLEX CREDIT MGMT, CJAVC	Excluded	In-kind payment
01	FC7	FC7-FLEX CREDIT MGMT	Excluded	In-kind payment
01	FC8	FC8-FLEX CREDIT P/T \$313	Excluded	In-kind payment
01	FC9	FC9-FLEX CREDIT PART-TIME	Excluded	In-kind payment
01	FCA	FCA-Flex Credit CJAAVC	Excluded	In-kind payment
01	FCC	FCC-Flex Credit VCSCOA F/T	Excluded	In-kind payment
01	FCD	FCD-Flex Credit VCDSA F/T	Excluded	In-kind payment
01	FCE	FCE-FLEX CREDIT IUOE F/T - \$347.00	Excluded	In-kind payment
01	FCF	FCF-Flex Credit VCPFA	Excluded	In-kind payment

PAY CODES IMPACTED BY ALAMEDA IN VENTURA COUNTY

01	FCM	FCM-FLEX CREDIT MGMT F/T	Excluded	In-kind payment
01	FCN	FCN-Flex Credit CNA F/T	Excluded	In-kind payment
01	FCP	Flex Credit VCPPOA PVT - \$347.00	Excluded	In-kind payment
01	FCS	FCS-Flex Credit SPOAVC F/T	Excluded	In-kind payment
01	FCU	FCU-FLEX CREDIT SEIU F/T	Excluded	In-kind payment
01	FCV	FCV-FLEX CREDIT VEA F/T	Excluded	In-kind payment
01	FCX	FCX-Flex Credit Tier II Full Time	Excluded	In-kind payment
01	FCY	FCY-Flex Credit Tier III Full Time	Excluded	In-kind payment
01	RFC	RFC-RETRO FLEX CREDIT	Excluded	In-kind payment
22	CAFAPL	CAFAPL-CAFETERIA APPLIED TO BENEFITS	Excluded	In-kind payment