

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:

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.

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

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.

- 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:

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.

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 elicit 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: -

- 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:

Abstain: -

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

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:

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.

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 a 10 minute break at 11:52 a.m.

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

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

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.

Mr. 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 cash outs, in his opinion, the County and the Retirement Board's 1997 resolution that includes annual leave cash outs 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.

Mr. 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. Mr. 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 not 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 not be excluded from legacy employees' pension calculations, and they believed 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 detailed 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

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 based 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 alluded 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 union members 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.

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

XII. BOARD MEMBER COMMENT

None.

XIII. ADJOURNMENT

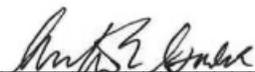
Chair Goulet adjourned the meeting at the conclusion of closed session at 11:43 p.m.

Respectfully submitted,



LINDA WEBB, Retirement Administrator

Approved,



ARTHUR GOULET, Chair