



September 27, 2017

To: Each Member,
Board of Retirement

From: Disability Procedures & Services Committee
Vivian H. Gray, Chair
Marvin Adams, Vice Chair
Alan Bernstein
Ronald Okum
David Muir, Alternate

For: October 12, 2017 Board of Retirement Meeting

Subject: **LATE-FILED APPLICATION POLICY
GOVERNMENT CODE SECTION 31722**

APPROVED

OCT 12 2017
BOARD OF
RETIREMENT

RECOMMENDATION

That the Board of Retirement terminate LACERA's Late-Filed Application Policy.

INTRODUCTION

On October 1, 2013, the Board of Retirement implemented a new policy for accepting late-filed applications for disability retirement. As will be explained below, this policy does not comply with Government Code section 31722 and potentially could violate due process.

LEGAL AUTHORITY

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

BACKGROUND

I. "Discontinuance of Service" under Section 31722

Government Code section 31722 provides:

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

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, **from the date of discontinuance of service to the time of the application**, he or she is continuously physically or mentally incapacitated to perform his or her duties. (Emphasis added.)

Section 31722 instructs that applications filed more than four months **"from the date of discontinuance of service"** require proof of continuous incapacity from the date of discontinuance of service to the time of the application.

Understanding the legal definition of "discontinuance of service" under the statute is critical in implementing a policy that comports with the law.

"County service" is defined under Section 31640 as follows:

'County service' means the employment of a person by a county, district, municipal court, or superior court.

"Service" under the CERL is defined in Section 31641 as follows:

'Service' means uninterrupted employment of any person appointed or elected for that period of time:

- (a) For which deductions are made from his earnable compensation from the county or district for such service while he is a member of the retirement association.
- (b) In military service for which the county or district or member is authorized by other provisions of this chapter to make, and does make contributions.
- (c) For which he receives credit for county service or for public service or for both pursuant to the provisions of this article.
- (d) Allowed for prior service.

Two decisions, *Weissman v. L.A. County Employees' Ret. Ass'n.*,² a 1989 case involving LACERA, and *Cameron v. Sacramento County Employees' Retirement System*³ a 2016 case involving Sacramento County, held that "discontinuance of service" under Section 31722 occurs when a member ceases work for a salary from

² *Weissman v. L.A. County Employees Ret. Ass'n.* (1989) 211 Cal.App.3d 40.

³ *Cameron v. Sacramento County Employees' Retirement System* (2016) 4 Cal.App.5th 1266.

which deductions were made, not when the member ceases "county service" under Section 31640. Historically, LACERA has considered members in service for purposes of measuring timeliness under Section 31722 if they are still in "county service."

II. LACERA's Current Late-Filed Application Policy

On October 1, 2013, the Board of Retirement implemented a new policy for accepting late-filed applications for disability retirement. A copy of the policy is attached.

According to the policy, applications filed more than four months after service has ended are only accepted under the following circumstances:

- A. A physician's statement from the member's treating physician who was treating the member at the time member **went off work**, stating the member has been continuously incapacitated for duty **from the time s/he left work** to present, OR
- B. A physician's statement from a current treating physician, in the specialty for which the member asserts incapacity for duty, dated within 6 months of the date the application is filed, stating the member has been continuously incapacitated for duty **from the time s/he left work to present AND a copy of the report, or off-work-slip**, [sic] from the member's prior treating physician, which [sic] took the member off work.

Applications which do not include the above information **will be rejected by staff** for processing. (Emphasis added.)

DISCUSSION

I. LACERA's late-filed application process does not comply with Section 31722.

Our current policy for late-filed applications, which requires applicants to prove continuous incapacity from the time the member "went off work" instead of the time the member "discontinued service," does not comply with Section 31722.

A. "Discontinuance of Service" vs. "Went off Work."

As noted earlier, Section 31722 instructs that applications filed more than four months **"from the date of discontinuance of service"** require proof of continuous incapacity from the date of discontinuance of service to the time of the application. The *Weissman* and *Cameron* decisions confirm that the term "service" as used in the statute turns on the point in time when the member stopped being compensated for his employment and

consequently, stopped making contributions to the retirement system, not the time the member went off work. Oftentimes, members continue to receive compensation, such as sick leave and vacation pay, after they stop working. Because deductions are made from this compensation, the member would still be considered in service under Section 31722 after they went off work.

B. Proof of a physician taking a member off work is not a prerequisite for a disability retirement under Section 31720.

Option B of our policy applies when the physician completing the physician's statement was not treating the member when they stopped working. In addition to having this doctor attest that the member was continuously incapacitated from the time they left work to the time the application is filed, the physician statement form must include "a copy of the report, or off-work-slip [sic], from the member's prior treating physician, which [sic] took the member off work."

Entitlement to a disability retirement is established when members meet their burden to prove by a preponderance of evidence that they are permanently incapacitated for the performance of their usual duties.⁴ Neither Section 31720 nor any case requires that a member produce an off-work slip or a report from a doctor removing the member from work as a prerequisite for a disability retirement. LACERA's policy therefore should not require a member to produce such a document to prove the threshold issue of whether or not an application is filed timely.

C. The Board of Retirement should determine whether or not an application meets the requirements under Section 31722, not staff.

LACERA's late-filed application policy states that applications which do not meet the criteria of either option A or B will be rejected by **staff** for processing. In doing so, members are denied an opportunity of having a hearing to prove their case.

The case of *Piscioneri v. City of Ontario*⁵ is on point. *Piscioneri* involved application of Government Code section 21154, a statute of limitations applicable to employees in the Public Employees Retirement System, which is similar to Government Code section 31722. The Court of Appeal held that the city could not deny a hearing in reliance on the fact that the application was not filed while the applicant was in service or within four months of discontinuance of service and ignore the fact that the application would be timely if the applicant was, from the date of discontinuance of service, continuously physically or mentally incapacitated to perform his or her duties. The court stated that

⁴ Government Code section 31720; *Lindsay v. County of San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 160; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 876; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 694-696; *Schrier v. San Mateo County Employees' Ret. Ass'n* (1983) 142 Cal.App.3d 957, 961-962.

⁵ *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037.

the applicant must be given an opportunity to develop the facts to support his contention of continuous incapacity. The court specifically stated:

But we agree with the trial court that the question of incapacity is a factual question to be determined at the administrative hearing. It would be premature to decide it as a legal issue before a hearing was held. . .⁶

Likewise, the question of whether or not a LACERA member was continuously incapacitated from the date service discontinued through the date the application was filed is a factual question which should be heard and decided by the Board of Retirement. And the member should be afforded the right to appeal the Board's decision and have an administrative hearing.

D. Discontinuance of Service

As explained above, "discontinuance of service" under Section 31722 occurs when a member last receives compensation from which deductions were contributed into the retirement system. It is not based on whether a member is in "county service" as defined under Section 31640. LACERA's practice of using "county service" for purposes of measuring the timeliness of the application under Section 31722 is contrary to law as interpreted by the courts in *Weissman* and *Cameron*.

The *Weissman* and *Cameron* definition of "discontinuance of service" under Section 31722 is in line with the discussion of a member's last day of regular compensation contained in *Katosh v. Sonoma County Employees Retirement Assn.*,⁷ *Porter v. Board of Retirement of Orange County Employees Retirement System*,⁸ and *Astorga v. Retirement Bd. of Santa Barbara County Employees Retirement System*⁹ which determined that members' earned benefits from which contributions were made constitute regular compensation under Section 31724.

However, there are circumstances where applying the *Weissman* and *Cameron* definition of "discontinuance of service" would pose certain challenges. In some circumstances, the member's service status can be a moving target. For example, if a member still in "county service" files a disability-retirement application more than four months after he or she ceases to work for a salary from which deductions are made, but still has unused leave balances, the member may elect to receive the unused leave balances—this would put them back into "service" and make their application timely.

⁶ *Id.* at 1044-1045.

⁷ *Katosh v. Sonoma County Employees' Retirement Assn.* (2008) 163 Cal.App.4th 56, 78.

⁸ *Porter v. Board of Retirement of Orange County Employees Retirement System* (2013) 222 Cal.App.4th 335, 342-343.

⁹ *Astorga v. Retirement Bd. of Santa Barbara County Employees Retirement System* (2016) 245 Cal.App.4th 386, 391.

II. LACERA's late-filed application policy should be terminated.

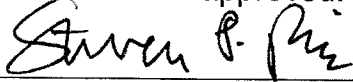
Considering the potential complexities in determining discontinuance of service and the *Piscioneri*¹⁰ holding that an application must be processed by a retirement association so that the applicant has an opportunity to develop the facts to support his or her contention of continuous incapacity, the Board of Retirement should terminate its current late-filed application policy. This would allow staff to evaluate late-filed applications on a case-by-case basis and counsel out-of-service members about using their leave balances.

CERL and the case law provide adequate guidance for addressing the timeliness of applications, and staff cannot take any action on a late-filed application without Board approval, allowing the Board final authority to address the issue on a case-by-case basis. This allows more oversight by the Board than our current policy which authorizes staff to reject an application.

CONCLUSION

The Board of Retirement has the fiduciary responsibility to administer the plan in accordance with County Employees Retirement Law of 1937. As demonstrated above, LACERA's current late-filed application policy does not comply with Section 31722. It is therefore recommended that the Board of Retirement terminate LACERA's Late-Filed Application Policy.

Reviewed and approved.



Steven P. Rice, Chief Counsel

Attachment

¹⁰ *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1044-1045.

LACERA POLICY STATEMENT**CRITERIA FOR ACCEPTANCE OF LATE FILED APPLICATIONS FOR A
DISABILITY RETIREMENT****(Effective October 1, 2013)****Purpose**

A member is entitled to a disability retirement when the member's County career is cut short by incapacity for duty (County Employees Retirement Law of 1937, GC §31720, GC §31451). CERL GC §31722 provides direction on when a member can submit their application for a disability retirement.

The application shall be made while the member is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.

This policy will provide direction to staff on what forms of documentation will be acceptable in order to determine whether an application filed more than 4 months after the discontinuance of service provided in the law will be accepted for processing.

I. Statement of Policy

LACERA will accept an application for a disability retirement benefit in accordance with Section 31722. Applications filed after the statutory deadline of 4 months after discontinuance of service, will be accepted if accompanied by the following documents:

- A. A physician's statement from the member's treating physician who was treating the member at the time member went off work, stating the member has been continuously incapacitated for duty from the time s/he left work to present, OR
- B. A physician's statement from a current treating physician, in the specialty for which the member asserts incapacity for duty, dated within 6 months of the date the application is filed, stating the member has been continuously incapacitated for duty from the time s/he left work to present AND a copy of the report, or off-work-slip, from the member's prior treating physician, which took the member off work.

Applications which do not include the above information will be rejected by staff for processing.

II. Implementation

This policy is established pursuant to the Board of Retirement's fiduciary responsibility to administer the retirement plan in accordance with the County Employees Retirement Law of 1937 and the Board of Retirement Bylaws. This policy may be modified in the future by Board of Retirement action.

Adopted: July 3, 2013