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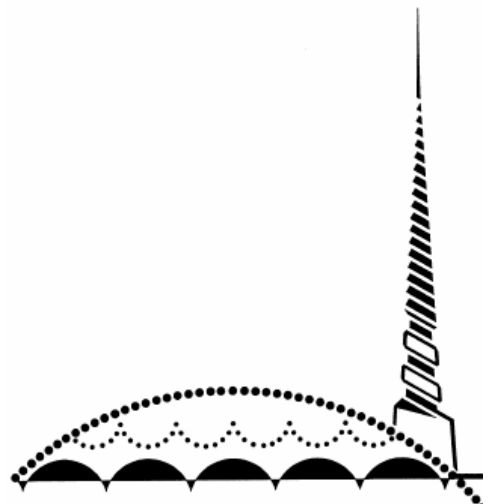
# 2006-2007 MARIN COUNTY GRAND JURY

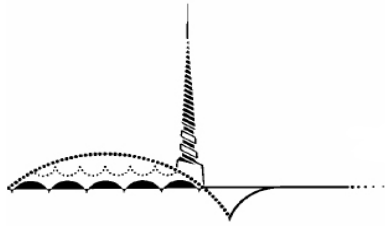
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## THE DISABILITY RETIREMENT PROCESS: PERCEPTION AND REALITY

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Date of Report: May 11, 2007





## THE DISABILITY RETIREMENT PROCESS: PERCEPTION AND REALITY

### SUMMARY

The process for granting or denying disability retirements must be so thorough that any fraud or abuse is eliminated and the public trust is preserved. Many members of the Marin public are suspicious about the disability process of the Marin County Employees' Retirement Association (MCERA). The media have echoed these suspicions.

Commonly held beliefs and the Grand Jury's assessment of them follow:

- The MCERA retirement board is a "rubber stamp" and the applicants do not go through a rigorous review. This is not what the Grand Jury found.
- Public employees are fraudulently applying for disability retirement and getting away with it at taxpayers' expense. This may happen, but the process has significant safeguards to prevent it.
- Public employees are double dipping by taking a disability retirement from one government employer and immediately taking a job (often similar) with another public or private employer. This is true of some and the law does not prohibit it.
- Hearings behind closed doors create suspicions of cronyism because a majority of the MCERA retirement board is composed of public employees/retirees. Interviews with MCERA board members and administrative staff showed just the opposite.
- There is an inherent unfairness in a disability retirement that is free from income tax. Not all disability retirements are tax free and for those that are, it is because that is the tax law.

The Grand Jury found a very rigorous and even-handed disability process administered by MCERA. It was duly impressed by the scrupulous way board members and administrative staff undertook their duties. While some of the above concerns are undoubtedly legitimate, MCERA's board does the best it can to prevent abuse. Where it cannot, the reason often is because its hands are tied by the County Employees

Retirement Law of 1937 which lays out very strict laws for a disability retirement, laws which are stacked heavily in favor of the applicant.

To make the disability retirement process more transparent, even handed, and/or cost effective, the Grand Jury recommends that:

- The Marin County Board of Supervisors appoint an individual with a medical background to MCERA's board when a vacancy occurs. Medical expertise would be useful in deciphering medical information, just as it is useful to have attorneys and individuals with investment experience on the board deciphering legal and investment information. The MCERA board currently consists of five employees/retirees and four appointees of the Marin County Board of Supervisors.
- MCERA post on its web site and make available to the public and disability applicant a written document in simple language describing the disability retirement process in detail. This document will give the public and applicant an indication of how rigorous the process really is.
- MCERA establish procedures, to the extent permitted by applicable law, so that the majority vote needed to grant or deny a disability retirement would require at least one vote by a Board of Supervisors' appointee. This action would somewhat dispel the perception of cronyism among the employee/retiree MCERA board members.
- MCERA's board make a preliminary decision before referring a disability claim with conflicting medical opinions or factual discrepancies to a formal hearing conducted by an administrative law judge. If the claim is preliminarily denied, the applicant can weigh the strengths and weaknesses of her/his claim before spending considerable sums on attorney's fees for a formal hearing.
- MCERA in conjunction with its 10 participating employers: (1) *estimate* the incremental cost to the employers of a disability retirement as compared to a normal retirement and (2) keep a record of the administrative costs for each disability application referred to a formal hearing so the employers are aware of the costs to the retirement system.

## **BACKGROUND**

Disability awards provide lifetime retirement income for employees who are deemed incapacitated and who, as a result, are permanently unable to perform some or all of the functions of their jobs. The problem lies in determining what constitutes a disability. Social Security, which also provides disability benefits, has books dedicated to disabilities, defining everything, but these definitions do not apply to the disability process for MCERA.

MCERA's disability process is governed by the County Employees Law of 1937 ('37 Act), which has its own definitions of disability. Medical experts are asked to determine disability under the '37 Act, but there are few, if any, medical experts familiar with that law. In the end this difficult decision is left up to MCERA for the 3,451 active employees of the 10 government employers participating in MCERA. These employers are County of Marin, Marin County Courts, City of San Rafael, San Rafael Redevelopment Agency, Novato Fire Protection District, Marin City Community Services District, Tamalpais Community Services District, Southern Marin Fire Protection District, Marin/Sonoma Mosquito & Vector Control District, and Local Agency Formation Commission.

The Grand Jury read several negative news articles claiming that the MCERA disability review process is a "rubber stamp" and that there is cronyism involved because the majority of MCERA board members themselves are employees/retirees. For privacy concerns, MCERA's board voted in June 2005 to close disability hearings so that only MCERA's board and staff and the disability applicant along with her/his attorney can be present. This action displeased the media. The Grand Jury also received a citizen's complaint about disabled individuals taking similar jobs with other public employers.

The Grand Jury believed that the disability retirement process must be so thorough that any fraud or abuse is eliminated and the public trust as well as the retirement fund's assets are preserved. The Grand Jury decided to investigate the disability retirement process to determine if it needed to be improved or made more transparent and even handed.

## **METHODOLOGY**

The Grand Jury interviewed board members of MCERA, including members of the Disability Committee. It also interviewed administrative staff of MCERA, county officials, and county attorneys involved in the disability process.

The Grand Jury reviewed the '37 Act, Americans With Disabilities Act of 1990, Health Insurance Portability and Accountability Act of 1996, California State Attorney General Opinions 04-408 (02-23-3005), as well as MCERA's Bylaws, Retirement Plan Handbook, and disability application form.

Additionally, the Grand Jury reviewed various web sites, including the California State Association of Counties' web site, news media articles, MCERA's newsletters, and the minutes of MCERA's board. It also attended at least 5 MCERA monthly board meetings.

## **DISCUSSION**

Both medical and legal considerations are interwoven in making a decision about disability retirement. The medical considerations entail: (1) reviewing medical records;

and (2) obtaining medical experts' opinions on disability issues.<sup>1</sup> The Grand Jury did not review medical records or the medical experts' opinions.

The legal considerations entail: (1) reviewing statutory/case law on disability; and (2) providing due process hearings for granting disability retirements. Believing that a thorough process yields good results, the Grand Jury investigated the disability procedures of MCERA. Because MCERA's attorneys advised the Grand Jury that it could not attend the closed hearings, the investigation was limited to interviews and document review. Although attending the hearings may have been useful, the Grand Jury concluded it had sufficient information for this Report from those interviews and reviews.

### **Disabilities under the '37 Act**

The '37 Act permits county retirement boards to grant disability pensions as public obligations. Disability pensions "provide a means by which public employees who become incapacitated may be replaced by more capable employees to the betterment of the public service without prejudice and without inflicting hardship upon the employees removed."<sup>2</sup> Thus, the legislature allowed a government employer to replace incapacitated employees with economic assistance in order to improve public service. This fundamental premise seems forgotten by many of the public today.

In accordance with the '37 Act, MCERA's retirement plan allows two types of disability retirement (for more details see the Glossary):

- service connected
- non-service connected

Both types require that the employee be permanently incapacitated to perform the duties of her/his job, regardless of the fact that the employee is capable of performing duties for another job.

For a service-connected disability, the job must substantially contribute to the incapacity. The '37 Act contains many legal presumptions to that effect, particularly with respect to safety employees such as police and firefighters. This means that if a certain illness exists, the job is legally presumed to have substantially contributed to the illness. Under the '37 Act some of these illnesses are heart trouble, cancer, blood-borne disease, and exposure to biochemical substances. For example, if a firefighter develops cancer, the cancer is legally presumed to arise out of and in the course of employment. If

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<sup>1</sup> Medical records are covered by rights of privacy, made more stringent by California and federal law. See Health Insurance Portability and Accountability Act of 1996 and California Confidentiality of Medical Information Act, California Civil Code Sections 56-56.16.

<sup>2</sup> County Employees Retirement Law of 1937. Government Code Section 31451.

permanently incapacitated, the firefighter will be eligible for a service-connected disability.

These legal presumptions preclude any further factual investigation into the matter and lead to the idea that MCERA's role is merely one of "rubber stamping." This is a misperception on the part of the public and frustrates some MCERA officials because they must follow the law.

### **MCERA's Board**

The MCERA board has nine trustees:

- County Treasurer by virtue of his office,
- two elected miscellaneous employees (all government employees other than safety employees),
- one elected safety employee (police, firefighter, etc.),
- one elected retiree, and
- four individuals appointed by the Marin County Board of Supervisors.

Of the four trustees currently appointed by the supervisors, one is a supervisor and the other three have investment experience. None of the trustees is a medical expert. MCERA does hire board-certified medical experts as needed to perform physical examinations on disability applicants. Late in 2006 MCERA hired a medical consultant to interpret all medical opinions involved in a disability claim and advise the board on whether to grant or deny that claim.

While the monetary consequences of disability decisions are smaller than for investments, disabilities consume a large portion of the board's time. Because MCERA board members can spend hours at meetings discussing disability claims, the Grand Jury believes a medical expert on the board would be helpful to decipher medical information, just as it is useful to have attorneys and individuals with investment experience on the board deciphering legal and investment information.

### **MCERA's Role and Duties**

MCERA's board members have a multi-faceted role in the retirement process. They have the exclusive authority over the administration and investment of the retirement plan's assets. They also have a fiduciary duty to administer the plan so its assets are protected from inappropriate claims. Fiduciary duties are very serious, as the individuals and entities performing them are held to a high standard of conduct and owe a duty of loyalty to all persons who have rights to the plan's assets. If the board intentionally favors one employee to the detriment of all the others or engages in any sort of cronyism, the board could be liable for a breach of its fiduciary duties. See Appendix A for more information of the board's duties. The MCERA board members are well aware of these duties and strive to perform them responsibly.

Before awarding or denying disability retirements, MCERA can and does require proof of disability. They do this to ensure that only those employees qualified for disability benefits receive them. Under the '37 Act the MCERA board is allowed to expend plan assets to retain counsel, appoint staff, obtain medical reports, and hold hearings on disability applications.

### **MCERA's Disability Process**

The disability process used by MCERA entails three basic steps:

- MCERA looks at the disability application, documentation from both the applicant's and MCERA's medical experts, and the '37 Act provisions. If there are no conflicting opinions of medical professionals and no factual discrepancies, MCERA will normally hold a hearing (sometimes called an informal hearing) at its monthly meeting to grant a disability retirement.
- If there are conflicting opinions of medical professionals and/or factual discrepancies, MCERA will normally refer the case to an outside hearing (sometimes called a formal hearing) conducted by an independent administrative law judge. The administrative law judge renders an opinion to grant or deny a disability retirement. This opinion is not a final decision.
- MCERA makes the final decision, which can be appealed by the applicant to the Superior Court if it is unfavorable.

See Appendix B for more information on Formal and Informal Hearings.

MCERA's Bylaws require a majority vote of board members to grant or deny a disability retirement. If MCERA's board adopts, to the extent legally permissible, a procedure to require a majority vote for a disability retirement consisting of at least one outside appointee of the Board of Supervisors, the Grand Jury believes it would help dispel notions of cronyism.

### **Matters MCERA Reviews**

Some of the issues MCERA reviews at its hearings follow:

- The applicant's job description is reviewed to determine whether the applicant is permanently incapacitated to perform the duties of that job. This means that an applicant may be able to do another job, but that determination is not the measure for granting a disability pension.
- For a service-connected disability the applicant's proof is reviewed to see if the employment "substantially contributes" to the disability. For some applicants this proof may consist of certain legal presumptions to that effect. For others the

courts have ruled that “substantially contributes” means considering whether there is “substantial evidence of a real and measurable connection between the job and the incapacity.”<sup>3</sup>

Medical opinions often state a percentage to quantify the real and measurable connection between the job and the incapacity. For example, the medical expert may opine that the job is 25% responsible for a permanent incapacity, the other 75% being non-employment factors. One court has indicated that 10% constitutes a real and measurable connection. Some legal experts argue that perhaps 1% is enough.

Without a legally established percentage figure, MCERA must review all the evidence on a case by case basis to decide if there is “substantial evidence of a real and measurable connection” between the job and the disability. Reasonable people may disagree on these matters and therein lies one of the problems in making a decision about disability pensions.

- MCERA must weigh the evidence on whether the incapacity is permanent. It regularly consults medical experts on this issue, but these medical conclusions are professional opinions and can vary.
- MCERA reviews the administrative law judge’s opinion to grant or deny a disability pension and can follow or overrule that opinion. Thus, MCERA must make the final decision, not the administrative law judge.

### **Other '37 Act Counties' Disability Processes**

Sonoma County and San Mateo County Retirement Boards take a different approach in granting or denying disability pensions under the '37 Act. In Sonoma a disability committee of the retirement board reviews the application and makes a recommendation to the full board. The board then makes a decision to approve, or a *preliminary* decision to *deny*, a disability application. If the applicant disagrees with the preliminary decision, the applicant can appeal the decision to a formal hearing with the accompanying expenses for attorney’s fees. San Mateo has a somewhat similar process. As a practical matter, a preliminary denial allows an applicant to re-assess how strong or weak her/his case is and decide whether to expend additional funds on attorney’s fees.

Fewer cases are referred to an outside hearing in Sonoma and San Mateo, avoiding the additional costs of such a hearing. With an employee base of around 4,200 active employees, the Sonoma retirement system had only two disability claims referred to an outside hearing in 2006. Similarly, San Mateo with around 6,000 active employees had no more than two referred outside, while MCERA with an active employee base of 3,451 had eight referred outside.

<sup>3</sup> See *People v. Bassett* (1968) 69 Cal.2d 122, 141.

MCERA should determine if it can reduce the number of disability claims referred to an outside hearing. It appears the other two counties reduce the number of outside hearings by making decisions on those disability claims, allowing the applicant to refer the claims if s/he disagrees with the decision.

### **Closed Hearings**

On June 8, 2005 MCERA voted to review all disability claims in closed hearings. Until that time there was concern that the Ralph M. Brown Act, requiring open meetings of government entities, may not permit closed hearings. The California State Attorney General's Office in a 2005 opinion<sup>4</sup> concluded that the medical records in a disability retirement proceeding may be evaluated in closed session. It also provided that a county retirement board could permit an applicant and her/his representative to attend the closed hearing at which the employee's medical records were discussed and evaluated.

Accordingly, since June 2005 MCERA has held closed hearings stating on its agenda: "All disability applications are heard in Closed Session unless applicant specifically waives confidentiality and requests an Open Session. Member's records are confidential (Government Code Section 31532)." The public is excluded from that part of the board meeting and is admitted when the board re-convenes in open session.

Some have viewed the closing of disability hearings as an attempt to reduce transparency and public oversight of a potentially collusive situation in which MCERA board members grant disability retirements to their friends. This is far from the truth. As noted above, MCERA board members have a fiduciary duty under the law to be fair and unbiased. Before the board voted to close disability hearings they were routinely closed by the attorneys for the applicants anyway. Of the other 19 California counties operating under the '37 Act, at least 14 have closed hearings.

Given an applicant's privacy rights over her/his medical records, a closed hearing is a safeguard so MCERA does not inadvertently violate those rights and get sued. Further, members of MCERA report that closed meetings tend to foster more frank discussions.

After weighing the privacy rights of the applicant and the public's concern about having a transparent process, the Grand Jury concluded MCERA is justified in conducting disability hearings behind closed doors.

### **What about the applicant?**

Historically, society has tended to isolate and segregate individuals with disabilities. Census data, national polls and other studies have documented that people with disabilities, as a group, occupy inferior status in our society and are severely

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<sup>4</sup> AG Opinions 04-408 (2-23-2005).

disadvantaged socially, vocationally, economically and educationally.<sup>5</sup> Why make a disabled person suffer more by airing private medical records in public when s/he applies for a disability retirement?

An open hearing does not ensure that fraudulent applications will be detected and there is no need for the public to be privy to personal medical details under any circumstances. Of course these statements assume that the process in place is working properly and that MCERA board members take their duties seriously. The Grand Jury found that is the case.

### **How rigorous is the disability process?**

After interviews and research, it appears to the Grand Jury that the process is very rigorous and even handed. MCERA's board members are scrupulous in their fiduciary duties and the administrative staff is thorough and diligent in documenting and investigating disability claims. There are extensive forms to fill out, physical examinations by MCERA's medical experts, many of whom are board certified, and undercover investigations on claimants.

Some board members expressed public displeasure about the legal limitations placed on their discretion. Others said some decisions "sickened" them. These frustrations are largely due to the strict definitions and presumptions under the '37 Act and court rulings which are stacked heavily in the applicant's favor.

To put the public's mind somewhat at ease, MCERA could be more transparent about the disability process. A public document in simple language setting forth the detailed steps of the disability process would show the public that the process is rigorous and even-handed. The Alameda County Retirement Board has posted such a document on its web site. MCERA's administrative staff does orally explain the process to a disability applicant. Nonetheless, the Grand Jury believes that MCERA should: (1) create a written document describing the disability process, available to both the applicant and the public and (2) post it on MCERA's web site.

Currently, MCERA's disability hearings are among the early items on its agenda. Some of the reasons for this order are so attorneys can be heard first to avoid undue legal expenses and because board members have expressed a desire to hear disability matters while the members are still "fresh." The problem, however, is that the amount of time in closed session varies and if an individual is interested in another matter on the agenda, the individual must wait outside of the hearing room not knowing when the board will reconvene in open session. This can mean waiting twenty minutes or two hours.

If MCERA really is interested in having open meetings, it should try to accommodate the public by setting a designated time for discussion on issues open to the public.

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<sup>5</sup> Americans With Disabilities Act of 1990.

## **MCERA's Yearly Disability Analysis**

MCERA issues a yearly Disability Analysis. In 2006 out of an active employee base of 3,451 there were 15 disability applications, 13 of which were for service-connected disabilities. Around 81% of disability claims were approved in 2006. Orthopedic disability claims constituted more than half the disability claims since 2002. See Appendix C for the entire MCERA 2006 Disability Analysis.

## **Incremental Cost to the Employer of a Disability Pension vs. a Normal Pension**

One perception is that a disability pension is more expensive to government employers than a normal pension. Another perception is that government employers drain away huge amounts of public resources to fund disability pensions. These perceptions may be unrealistic if the incremental cost of a disability pension vs. a normal pension is small.

The analysis of whether a disability pension costs more than a normal pension is heavily dependent on how close the applicant is to retirement. If close, the retirement benefit is largely funded by the normal contributions to MCERA.

MCERA's actuaries believe (based on actuarial studies) that a disabled person does not live as long as a person retiring with a normal pension, shortening the amount of time a disability pension is paid. As a result, the incremental cost of a disability pension may be small or non-existent compared to a normal pension.

What is costly about a disability benefit, however, is that a beneficiary is also covered and, for employees of Marin County, retiree health care is also included. This is not always the case in a normal pension benefit for the employers participating in MCERA.

MCERA and its employers do not estimate the incremental costs of disability pensions, and they operate without this critical piece of information. Some MCERA board members think that it is a good idea to break out this cost regularly. This would allow the employers to understand there is a cost and take steps to reduce disability claims through better personnel practices. Some in MCERA doubt a study based on so many variables would be meaningful.

If a study is done, MCERA does not want to fund it out of the retirement plan assets; rather it believes the participating employers should pay for it. In light of the perceptions that disability retirements are costly and draining away huge amounts of public funds, a study seems like a good way to determine if those perceptions are real. If the incremental cost of disability retirements is small, the public's fears would be allayed.

## **What about administrative costs for a formal hearing?**

Administrative costs in processing a disability application may be high after paying for medical consultants and experts, lab work, undercover investigations, administrative law

judges, attorneys' fees, transcripts and applicant's legal expenses (if MCERA loses on appeal). Unfortunately, these costs may be necessary to ensure that the process is fair to the applicant and other employees/retirees in the system. MCERA, however, has not calculated these costs on a case-by-case basis. If the administrative costs were known, the MCERA board could consider ways to reduce them, such as making preliminary decisions to deny certain controversial disability cases instead of referring them to an outside hearing.

### **Other Problems and Assessments**

While many of the problems listed below exist or are perceived to exist, few of them are within the control of MCERA. Many are a function of law.

- Disability applications can take from several months to two or more years for a final decision. During the process some employees remain at work while others apply after separation. MCERA does all it can to consider these applications on a timely basis, but due to the complexity of the process there is little MCERA can do to speed it up.
- There is no statute of limitations on disability retirement. The law permits a person who takes normal retirement to come back 10 years later to apply for disability retirement.
- MCERA may review the case of an individual receiving a disability pension to ensure the individual is still disabled. It may do so in a sub rosa (undercover) investigation. This can be done until the disabled individual reaches age 55. MCERA is authorizing more sub rosa investigations to ensure the process is not abused.
- There are cases of public employees receiving disability pensions who end up going to a similar job with another public employer. The law does not make this illegal although the public finds it offensive.
- A service-connected disability pension may be exempt from federal and state income tax. The fact that an individual gets a lifetime pension tax free is disturbing when taxpayers believe that many public employees are abusing the system with fraudulent claims. MCERA has no control over the tax laws, but is working diligently to prevent fraudulent claims.
- Legislation passed in 2004 obligates retirement boards to determine whether a disabled employee is capable of performing other duties and to ask the employer to develop a reemployment plan.<sup>6</sup> The disabled employee must concur with the reemployment plan. If the employee is not interested in reemployment, the

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<sup>6</sup> AB 2982 signed into law on August 27, 2004.

reemployment process ends and the disability pension becomes permanent. As one would expect, virtually no employee concurs with the reemployment plan and so this legislation is ineffective. Some MCERA officials would like to see this changed.

- There is a strong belief by MCERA board members that employers use the disability process as a way to get rid of unwanted employees. Recently, several applications were withdrawn when MCERA's administrative staff asked employers specific questions about the employee.
- MCERA board members believe that sound personnel practices in hiring would help eliminate some individuals whose unhealthy lifestyles, for example heavy smoking, make them prone to incurring a disability. Hiring practices are difficult to administer because federal and state laws (such as the Americans With Disabilities Act of 1990 and its counterpart in California law) encourage the hiring of disabled individuals. The Grand Jury is not saying that these individuals are the ones who later file disability claims. They probably are not because they want to work. The Grand Jury merely is pointing out the difficulty employers face when trying to balance the hiring of disabled individuals while trying to avoid hiring individuals who are prone to future disability claims.

### **Disability Reforms**

Ideally, MCERA would like to see the law reformed so that it would have leeway to direct the employer to reassign rather than retire employees who can no longer perform their current jobs for health reasons. If MCERA board members exert pressure for a change, their attorneys have warned them that their efforts may conflict with their fiduciary duty of loyalty to the employee members of MCERA. As such, the members have urged the Marin County Board of Supervisors to try to influence disability reform legislation.

Some MCERA members believe the California State Association of Counties, a group representing all 58 counties in the state, should undertake reform. To date, however, the association's reform plan is modest. It recommends changing the law to prohibit disability pension payments "for any period of time the disabled employee participates in similar work with another public agency." Although modest, this could be of help so that a public employee could not retire on disability and then go to another public employer and be employed in a similar job. It would not, however, prevent the employee from taking comparable work in the private sector.

Any legislative change is certain to meet with stiff opposition from the unions. MCERA members report that most unions have lobbyists in Sacramento who routinely work to pass legislation favoring grants of disability retirements to employees, particularly safety employees. If history is any guide, attempts to write legislation making it harder to qualify for a disability will be subverted by lobbyists and have the opposite effect.

Internally, MCERA's new administrator has made several reforms to the disability process. As discussed above, a medical consultant was recently retained by MCERA to help in board deliberations. MCERA indicates it plans to undertake more undercover investigations in the future.

Other recent administrative reforms to the disability process include:

- developing new case "tracking sheets" to follow disability cases,
- hiring new medical experts, many of whom are board certified, to examine disability applicants,
- revising the disability application form to make it ADA compliant,
- creating standard letters to employers and applicants,
- revising the disability process so that before sending material to a medical expert, the medical consultant reviews it to focus the medical examination,
- creating new employer letters to describe the disability process, and
- expanding the application form to a two-page questionnaire which asks more specific questions on the nature of the claimed disability.

The Grand Jury believes MCERA's board members and administrative staff are doing the best they can to eliminate fraud and abuse in the disability retirement process and they deserve the public's trust.

## **FINDINGS**

- F1. The '37 Act permits county retirement boards to grant disability pensions as public obligations.
- F2. There are no medical professionals on the MCERA Board of Trustees.
- F3. MCERA's Bylaws permit MCERA to grant or deny disability retirements by a majority vote of the MCERA board members.
- F4. The California Attorney General has opined that the Ralph M. Brown Act permits closed hearings for disability pensions. Accordingly, MCERA's board has voted to hold all disability hearings in closed sessions unless the applicant requests an open session.
- F5. MCERA has no written document in simple language setting forth the detailed steps of the entire disability process that is available to the disability applicant or public.
- F6. MCERA's closed disability hearings are among the early items on its agenda, causing long, unpredictable waits for the public to hear business matters considered in open session.
- F7. The incremental cost between a disability pension and a normal pension is relatively small if the employee is close to retirement age and eligible for a normal pension. MCERA board members believe this, but there are no estimates to prove it.

- F8. The administrative costs to resolve whether a disability application should be granted or denied can be high because of the need for professional medical and/or legal advice.
- F9. Before making a decision on a disability application with conflicting opinions and/or factual discrepancies, MCERA refers the application to a hearing conducted by an administrative law judge.

## RECOMMENDATIONS

### The Grand Jury recommends that:

- R1. The Marin County Board of Supervisors appoint a medical professional to MCERA when a vacancy of one its four appointees occurs.
- R2. MCERA establish procedures, to the extent permitted by applicable law, so that the majority vote needed to grant or deny a disability retirement would require at least one vote by a Board of Supervisors' appointee.
- R3. A detailed document in simple language describing the steps of the entire disability process be: (1) created for distribution to the public or applicant upon request and (2) posted on MCERA's web site. This should be completed by December 2007.
- R4. MCERA accommodate the public by setting a designated time for discussion on issues open to the public in MCERA board meetings.
- R5. The 10 participating employers work with the MCERA board to estimate an incremental cost for a disability retirement compared to a normal retirement.
- R6. The 10 participating employers work with the MCERA board to keep a record of the administrative costs for each disability application referred to a formal hearing.
- R7. MCERA make a preliminary decision on a disability claim even if there are conflicting opinions of medical professionals and/or factual discrepancies before referring the application to a hearing by an administrative law judge.

## GLOSSARY

These definitions are derived from the MCERA Retirement Plan Handbook.

**Non-Service-Connected Disability:** disability retirement which requires that an applicant: 1) be credited with at least five years of service to apply, 2) establish s/he is disabled from a substantial portion of the duties of her/his position, and 3) demonstrate that the disability is permanent.

**Service-Connected Disability:** disability retirement which has no length of service requirement, but in addition to proving that the applicant is disabled from a substantial

portion of the duties of her/his position and that the disability is permanent, the applicant must also prove that there is substantial evidence of a “real and measurable” relationship between the disability and the employment.

## REQUEST FOR RESPONSES

Pursuant to Penal Code Section 933.05, responses to this report are mandatory as follows:

From the following governing bodies:

- Marin County Employees’ Retirement Board: F1-F9; R1-R7
- County of Marin, Marin County Courts, City of San Rafael, San Rafael Redevelopment Agency, Novato Fire Protection District, Marin City Community Services District, Tamalpais Community Services District, Southern Marin Fire Protection District, Marin/Sonoma Mosquito & Vector Control District, and Local Agency Formation Commission: F7-F8; R5-R6
- Marin County Board of Supervisors: F2; R1

The governing bodies indicated above should be aware that the comment or response of the governing body must be conducted in accordance with Penal Code section 933 (c) and subject to the notice, agenda and open meeting requirements of the Brown Act.

The California Penal Code section 933(c) states that “...the governing body of the public agency shall comment to the presiding judge on the findings and recommendations pertaining to matters under the control of the governing body.” Further, the Ralph M. Brown Act requires that any action of a public entity governing board occur only at a noticed and agendized public meeting.

Reports issued by the Grand Jury do not identify individuals interviewed. Penal Code Section 929 requires that reports of the Grand Jury not contain the name of any person, or facts leading to the identity of any person who provides information to the Grand Jury. The California State Legislature has stated that it intends the provisions of Penal Code Section 929 prohibiting disclosure of witness identities to encourage full candor in testimony in Grand Jury investigations by protecting the privacy and confidentiality of those who participate in any Grand Jury investigation.

## APPENDIX A

### Retirement Board Members’ Duties

Under the California Constitution the retirement board of a public pension or retirement system shall have:

- The sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system.
- The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.

- The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

The members of the retirement board of a public pension or retirement system shall:

- Discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system.
- A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.<sup>7</sup>

## **APPENDIX B**

### **Informal Hearings and Formal Hearings**

As a general rule, only courts have the authority to decide controversies that affect individual rights. One major exception to this rule is the power of an administrative agency, a body of government created by a legislature, to make decisions concerning the rights of parties, such as a right to a disability pension.

Under federal and state law, an agency follows a process for the formulation of a decision on the rights of parties. This process is called a hearing. A hearing is generally distinguished from a court trial in that the hearing is usually shorter and often less formal.

Hearings are structured to afford the parties due process of the law. This means that the parties have notice of the hearings, an opportunity to be heard and the right to defend themselves. These hearings are often referred to as quasi-judicial hearings because the actions to investigate or ascertain facts and make an official decision are similar to official actions of a judge in a court trial. Some hearings are informal with relaxed rules of procedures, such as Robert's Rules of Order. Others are formal because they operate similar to a judicial trial with written rules of evidence and the presentation of testimony, evidence and arguments to a referee or administrative law judge. A written record is made of the formal hearing and a decision is rendered. Formal hearings are costly.

MCERA is an administrative agency. MCERA undertakes hearings on applications for disability retirement giving the applicant an opportunity to be heard, the right to defend the application, and the right to be represented by an attorney.

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<sup>7</sup> California Constitution, Article 16, Section 17.

**APPENDIX C**

**MCERA**

**DISABILITY ANALYSIS ACTIVITY**

**Calendar Year**

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Prior Year Pending Applications</b>	21	22	20	26	14
<b>New Applications</b>	23	34	26	22	15
<b>Approved</b>	20	27	18	29	7
<b>Denied</b>	2	3	1	2	3
<b>Applications withdrawn</b>	0	6	1	3	2
<b>Pending Applications at Year-end</b>	22	20	26	14	17
<b>Referred to Hearing</b>	5	2	5	5	8

**MCERA NEW APPLICANTS BY ENTITY**

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>County of Marin</b>	14	23	22	13	12
<b>Marin County Courts</b>	0	0	0	0	0
<b>City of San Rafael</b>	7	5	3	7	0
<b>Southern Marin Fire</b>	0	0	0	2	2
<b>Novato Fire</b>	2	5	1	0	0
<b>Other</b>	0	1	0	0	1
<b>Total</b>	<b>23</b>	<b>34</b>	<b>26</b>	<b>22</b>	<b>15</b>

**MCERA NEW APPLICANTS BY MEMBERSHIP TYPE**

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Miscellaneous</b>	7 30%	14 41%	15 58%	9 41%	9 60%
<b>Safety</b>	16 70%	20 59%	11 42%	13 59%	6 40%
<b>Total</b>	23 100%	34 100%	26 100%	22 100%	15 100%

**MCERA NEW APPLICANTS BY MEMBERSHIP PLAN**

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Service Connected</b>	21 91%	27 79%	26 100%	20 91%	13 87%
<b>Non-Service Connected</b>	2 9%	7 21%	0 0%	2 9%	2 13%
<b>Total</b>	23 100%	34 100%	26 100%	22 100%	15 100%

**MCERA APPROVED DISABILITIES BY CAUSATION**

	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Orthopedic</b>	12 60%	19 70%	13 72%	8 73%	4 58%
<b>Cancer</b>	0 0%	0 0%	0 0%	0 0%	1 14%
<b>Heart</b>	2 10%	0 0%	0 0%	2 18%	0 0%
<b>Psychological</b>	3 15%	4 15%	2 11%	0 0%	1 14%
<b>Other</b>	3 15%	4 15%	3 17%	1 9%	1 14%
<b>Total</b>	20 100%	27 100%	18 100%	11 100%	7 100%

**MCERA FIVE YEAR SUMMARY**

**2002 through 2006**

<b>Average Annual Disabilities Resolved</b>	<b>24.8</b>
<b>Member Type</b>	
<b>Miscellaneous</b>	<b>43%</b>
<b>Safety</b>	<b><u>57%</u></b>
	<b>100%</b>
<b>Resolution</b>	
<b>Approved</b>	<b>81%</b>
<b>Denied</b>	<b>9%</b>
<b>Withdrawn</b>	<b><u>10%</u></b>
	<b>100%</b>
<b>Disability Type</b>	
<b>Orthopedic</b>	<b>68%</b>
<b>Cancer</b>	<b>1%</b>
<b>Heart</b>	<b>5%</b>
<b>Psychological</b>	<b>12%</b>
<b>Other</b>	<b><u>14%</u></b>
	<b>100%</b>