

OREGON PUBLIC EMPLOYEES RETIREMENT BOARD

Friday September 23, 2005 11:00 A.M. and 1:00 P.M.		PERS 11410 SW 68th Parkway Tigard, OR	
ITEM		PRESENTER	
A. Contested Case Hearings (11:00 A.M.)			
1.	Appeal of Jon Randolph Brown	RODEMAN / KUTLER	
2.	Appeal of Steven E. Schwerdt	RODEMAN / KUTLER	
3.	Appeal of Alice Mitchell	RODEMAN / KUTLER	
4.	Appeal of Peggy Barlow	RODEMAN / KUTLER	
Lunch Break			
B. Administration (1:00 P.M.)			
1.	August 5, 2005 Board Meeting Minutes	CLEARLY	
2.	Director's Report		
	a. Forward-Looking Calendar		
	b. OIC Investment Report		
	c. Budget Report		
	d. Miscellaneous		
C. Consent Action and Information Items			
1.	Notice of Rulemaking for OAR 459-007-0015, Underpayment Interest Rate	RODEMAN	
2.	Notice of Rulemaking for Non-Substantive Changes to Chapter 459 Administrative Rules	RODEMAN	
3.	Adoption of OAR 459-035-0001, Health Insurance Programs Definitions	RODEMAN	
4.	Adoption of ETOB Final Order on Exemption	RODEMAN	
D. Action and Discussion Items			
1.	Action on Contested Cases	RODEMAN / KUTLER	
2.	Adoption of Division 015 Disability Rules	RODEMAN / WILSON	
3.	Adoption of Division 076 Disability Rules	RODEMAN / WILSON	
4.	Strunk / Eugene Implementation Policies and Methods	RODEMAN / STROUD	
5.	Board Governance Matters	PITTMAN	
E. Executive Session Pursuant to ORS 192.660(2)(f), (h), and/or ORS 40.225			
1.	Litigation Update	LEGAL COUNSEL	

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Note: If you have a disability that requires any special materials, services or assistance, call (503) 603-7575 at least 48 hours before the meeting.

Michael Pittman, Chair * James Dalton * Thomas Grimsley * Eva Kripalani * Brenda Rocklin * Paul R. Cleary, Executive Director

PUBLIC EMPLOYEES RETIREMENT BOARD

PERS Board Meeting
1:00 P.M.
August 5, 2005
Tigard, Oregon

MEETING	9-23-05
DATE	
AGENDA	B.1.
ITEM	8-05-05 Minutes

MINUTES

Board Members:

Mike Pittman, Chair
Brenda Rocklin, Vice-chair
Thomas Grimsley
Eva Kripalani
Excused: James Dalton

Staff:

Paul R. Cleary, Director
Donna Allen
Gay Lynn Bath
David Crosley

Steve Delaney
Gloria English
Jeff Marecic
Dale Orr

Dave Tyler
Steve Rodeman

Others:

Bruce Adams
Gordon Allen
Karen Artiaco
Ardis Belknap
Cathy Bloom

Tom Chamberlain
Myrnie Daut
Linda Ely
Paul Gornick
DeAnn Hardt
Greg Hartman

Bill Hallmark
Maria Keltner
Keith Kutler
Steve Manton
Beverly J. Orth
Amy Pacacios

Tracy Rutten
Gary Schwieck
Alan Stonewall
Deborah Tremblay
Pat West
Denise Yunker

Board Chair Mike Pittman called the meeting to order at 1:00 P.M.

ADMINISTRATION

A.1. BOARD MEETING MINUTES OF JUNE 24, 2005

Brenda Rocklin moved and Tom Grimsley seconded to approve the minutes of the June 24, 2005 meeting. The motion passed unanimously.

A.2. DIRECTOR'S REPORT

Director Paul Cleary presented the Forward-Looking Calendar and noted that the September 23, 2005 meeting was currently scheduled to include discussion of a final Individual Account Program (IAP) remediation plan. At the Board's request, Cleary said that the Director's report would include employer-reporting updates at future Board meetings. Cleary announced a tentatively scheduled October 1, 2005 Board Retreat, with topics to include review of strategic and tactical plans for the agency and its various divisions. Cleary reviewed performance of the Oregon Public Employees Retirement Fund, noting that the net asset value of the fund had increased from \$31.2 billion in September 2002 to the present all-time high of \$49.5 billion as of June 30, 2005. Cleary said that over the past three years, the PERS fund has been the top performing fund in investment returns for public funds of \$10 billion or more.

CONTESTED CASES

B.1. APPEAL OF JOSEFINA JOHNSON

Steve Rodeman, Policy, Planning and Legislative Analysis Division (PPLAD) administrator, reviewed the history of the Appeal of Josefina Johnson, and described the related proposed order.

The Board took no action, thus allowing the proposed order to become final 90 days after issuance.

B.2. APPEAL OF PEGGY BARLOW

Rodeman reviewed the history of the Appeal of Peggy Barlow and described the revised draft final order.

It was moved by Brenda Rocklin and seconded by Eva Kripalani to postpone consideration of the proposed order in the contested case of Peggy Barlow until the next regular Board meeting, currently scheduled for September 23, 2005. The motion passed unanimously.

CONSENT ACTION AND INFORMATION ITEMS

C.1. ADOPTION OF OAR 459-045-0030, ALTERNATE PAYEE WITHDRAWAL

Rodeman presented the modified rule that defines when an alternate payee may make a withdrawal and makes further modifications to more adequately cover general administration for all types of benefit payments. Rodeman noted there were no public comments submitted on the proposed rule modifications.

It was moved by Brenda Rocklin and seconded by Eva Kripalani to adopt the permanent rule modifications to OAR 459-045-0030, as presented, to be effective upon filing. The motion passed unanimously.

ACTION AND DISCUSSION ITEMS

D.1. OSGP ADVISORY COMMITTEE MEMBER APPOINTMENTS

Gay Lynn Bath, Manager of the Oregon Savings Growth Plan (OSGP) deferred compensation program presented a report on the composition and functions of the OSGP Advisory Committee. Bath recommended the Board reappoint Bill Robertson of Salem for a second 3-year term and appoint Jason Evers, of Bend, to fill a vacant position for an initial 3-year term. The Board expressed interest in receiving a more detailed report on OSGP's history and operations at a future meeting.

It was moved by Eva Kripalani and seconded by Brenda Rocklin to approve the staff recommendations. The motion passed unanimously.

D.2. IAP REMEDIATION UPDATE

Rodeman presented an overview of issues related to the Individual Account Program (IAP), including initial and ongoing implementation and operational challenges. Rodeman reviewed various remediation principles, including an annual crediting structure for member IAP accounts, and discussed the process and timetable for developing the detailed remediation plan.

Beverly Orth, a defined contributions plan expert with Mercer Human Resources Consulting, said that defined contribution programs in public retirement systems are relatively new and there were few public sector programs for research and comparison. Orth also noted that the principles outlined by staff were appropriate to guide the remediation effort.

PERS Member Paul Gornick asked how start-up and on-going costs were defined. Rodeman said that calendar year 2004 start-up costs included \$587,000 in investment expenses and \$11,598 in debt service. In addition, Rodeman said there was \$1.7 million for third-party administrative costs for CitiStreet record-keeping services; \$1.4 million for personal services under the agency's cost allocation model; and \$1.3 million for contracted services, computer equipment and other miscellaneous costs for the calendar year.

Attorney Greg Hartman spoke on behalf of PERS Coalition saying there were valid concerns over non-reporting employers effecting fund earnings. Hartman said the PERS Coalition strongly supports an Individual Account Program (IAP) administrative and earnings crediting structure that mirrors the Tier 1 / Tier 2 program administration.

Actuary Alan Stonewall reminded the Board that the more closely the IAP emulates the Chapter 238 Plan, the more it raises potential equity issues among participants. Stonewall said an example would be crediting earnings based on ending account balance. Stonewall said it was important to understand that under the Chapter 238 crediting approach, individuals who contribute \$4000 in January and \$800 in December would have the same earnings as those contributed \$400 per month for 12 months.

Steve Manton, City of Portland, asked about the necessity of CitiStreet's record-keeping process and, if it was not necessary, what would happen to administrative expenses. Cleary responded that PERS computer system has not been programmed to handle the individual account management and that CitiStreet's services would still be required to maintain account balances, and manage distributions and account roll-overs. Cleary noted that those needs could change over-time depending on the final IAP remediation plan.

D.3. LEGISLATIVE UPDATE

Deputy Director Steve Delaney provided a final update on the PERS related legislative issues. Delaney reported that five PERS Board sponsored bills; SB54, SB108, SB109, SB5558 and SB5559 did pass as introduced, and the other two Board sponsored bills (SB110 and SB111) were adopted as part of HB3262.

PERS Board meeting

8/5/05

Page 4 of 4

D.4. BOARD GOVERNANCE MATTERS

Pittman announced that due to the often health related nature and privacy concerns of contested case hearings, that those hearings would be held at a different time beginning in September, using those Board members who's schedules allowed them to meet at 11:00 A.M. on the day of the regular Board meetings.

EXECUTIVE SESSION

Pursuant to ORS 192.660 (2) (f), (h) and ORS 40.255, the Board went into executive session at 2:50 P.M.

The Board reconvened to open session.

Chair Pittman adjourned the meeting at 3:20 P.M.

Respectfully submitted,

Paul R. Cleary
Executive Director

Prepared by Donna R. Allen, Executive Assistant

PERS Board Meeting Forward-Looking Calendar

MEETING	9-23-05
DATE	
AGENDA	B.2.a.
ITEM	Forward Calendar

October 2005

Meeting: 11:00 A.M. and 1:00 P.M. October 21, 2005

Adoption of Non-Substantive Changes to Chapter 459 Administrative Rules
First Reading of OAR 459-007-0015, Underpayment Interest Rate
Notice of IAP Remediation Administrative Rules
Notice of OAR 459-020-0025, Penalty
Notice of OAR 459-010-0003 and –0014, 600 Hours and Creditable Service
IAP Remediation Implementation Plan
Stunk / Eugene Implementation Plan
2004 Earnings Crediting

November 2005

Meeting: 11:00 A.M. and 1:00 P.M. November 18, 2005

Adoption of OAR 459-007-0015, Underpayment Interest Rate
Adoption of OAR 459-020-0025, Penalty
First Reading of IAP Remediation Administrative Rules
First Reading of OAR 459-010-0003 and –0014, 600 Hours and Creditable Service

December 2005

Meeting: 11:00 A.M. and 1:00 P.M. December 16, 2005

Adoption of OAR 459-010-0003 and –0014, 600 Hours and Creditable Service
Adoption of IAP Remediation Administrative Rules

Returns for periods ending 7/31/05

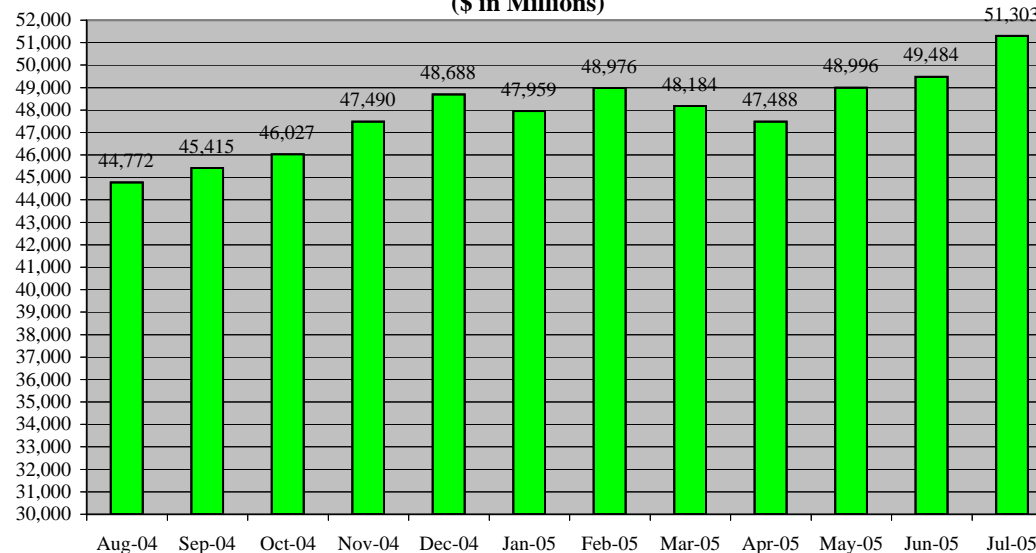
Oregon Public Employees Retirement Fund

OPERF	Regular Account				Historical Performance					
	Policy ¹	Target ¹	\$ Thousands	Actual	Year-To-Date	1 YEAR	2 YEARS	3 YEARS	4 YEARS	5 YEARS
Domestic Equity	30-40%	35%	\$ 18,000,061	36.3%	4.53	18.21	16.24	14.89	4.21	0.46
International Equity	15-25%	20%	10,786,983	21.7%	4.39	25.31	24.91	19.58	10.12	2.71
Alternative Equity	7-13%	10%	4,256,745	8.6%	23.87	38.79	27.15	14.09	7.29	1.95
Total Equity	60-70%	65%	33,043,789	66.6%						
Total Fixed	22-32%	27%	13,198,330	26.6%	2.42	7.17	7.00	8.36	7.36	8.23
Real Estate	5-11%	8%	2,941,755	5.9%	18.75	34.12	26.66	20.28	16.65	15.71
Cash	0-3%	0%	463,335	0.9%	1.57	2.37	1.79	1.71	1.93	2.77
TOTAL OPERF Regular Account		100%	\$ 49,647,209	100.0%	6.23	18.97	16.83	14.08	7.65	4.48
OPERF Policy Benchmark					4.33	14.90	14.84	12.59	6.58	3.88
Value Added					1.90	4.07	1.99	1.49	1.07	0.60

Asset Class Benchmarks:

Russell 3000 Index	4.09	16.91	15.09	14.05	3.53	(0.20)
MSCI ACWI Free Ex US	4.02	24.90	25.10	19.48	9.66	2.32
Russell 3000 Index + 300 bps--Quarter Lagged	7.75	11.61	20.61	10.31	6.26	3.50
LB Universal--Custom FI Benchmark	2.01	5.82	5.43	5.91	6.02	7.11
NCREIF Property Index--Quarter Lagged	8.33	15.55	12.59	10.74	9.64	10.15
91 Day T-Bill	1.53	2.27	1.65	1.58	1.80	2.58

TOTAL OPERF NAV
(includes variable fund assets)
One year ending July 2005
(\$ in Millions)



¹OIC Policy 4.01.18



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Headquarters:
11410 S.W. 68th Parkway, Tigard, OR
Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Brian DeForest, Budget and Fiscal Operations Manager
SUBJECT: September 2005 Budget Report

MEETING	9-23-05
DATE	
AGENDA	B.2.c.
ITEM	Budget Report

2005-07 ACTUAL EXPENDITURES AND PROJECTIONS

Operational expenditures for the first two months of the biennium, July and August, were \$1,636,446 and \$2,624,057 respectfully. Expenditures for the first months of the biennium are traditionally lower due to biennium start-up activities, the lag time in receiving invoices from vendors for services performed in July, and the close-out of financial activities and payment processing for the previous fiscal year and biennium.

ISSUES/OPPORTUNITIES

Budget staff has developed and distributed division and section level Budget Execution Reports similar to the monthly report reviewed by the Board. For the first time, section managers are able to track and manage expenditures against the Legislatively Adopted Budget. Agency managers are beginning to provide input into the expenditure projections at a finer level of detail than is presented to the Board. This information is aggregated to the agency-wide level and reviewed by the Budget Manager and agency administrators. These new management tools allow managers to more quickly identify budget issues and allow as much time as possible to develop strategies to either mitigate an emergency or leverage an opportunity.

BUDGET VARIANCES

As mentioned above, agency managers are projecting expenditures at the section level for the first time. Because there is little expenditure history available at the section level on which to base projections, they are essentially performing a 'zero-based' projection exercise. This exercise is not yet complete. Budget Execution Reports were not distributed to managers until early-September due to the length of the legislative session and the time necessary to distribute late-session changes down to the section level. Projected expenditures do not yet include some significant items such as overtime and temporary services for the annuals process, and contracts, programming and hardware costs for the RIMS conversion project. These projections are anticipated to be complete by the end of September.

SUMMARY OF 2003-05 ACTUAL EXPENDITURES

State agencies have until the close of business on December 31, 2005 to process payments for the 2003-05 biennium. This allows for delays in receiving and processing invoices from vendors and a period to make necessary accounting corrections. Agency accounting staff has completed the

Budget Report

9/16/2005

Page 2 of 2

majority of that work for each of the agency's 2003-05 appropriations. Total expenditures, by limited appropriation, as of this date are:

Summary of 2003-05 Leg. Approved Budget

	Admin	Deferred Comp	Debt Svc	AEF	HB 2020 / OPSRP	NL
Limitation Available	55,993,731	1,477,402	3,629,282	5,021,231	19,532,799	5,709,547,757
Actual Expenditures	(50,192,874)	(1,448,498)	(3,563,459)	(3,575,281)	(16,128,056)	(5,031,902,709)
Remainder	5,800,857	28,904	65,823	1,445,950	3,404,743	677,645,048

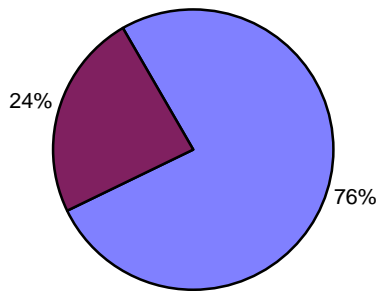
The remaining limitation in the Administration limited appropriation is primarily due to a delay in implementing the RIMS conversion project. Invoices totaling approximately \$1.8 million are being processed against the HB2020/OPSRP limitation by the December 31st deadline. Any remaining limitation in the HB2020/OPSRP limitation is attributed to contracted goods and services that had been planned to be delivered by June 30th, but will not be delivered until after July 1st, the beginning of the 2005-07 biennium. As reported in a prior budget report to the PERS Board, the agency may need to seek a 2005-07 limitation increase to effectively carry these expenditures forward from 2003-05 into 2005-07.

**2005-07 Agency-wide Operations - Budget Execution
Summary Budget Analysis
For the Month of: Aug. 2005**

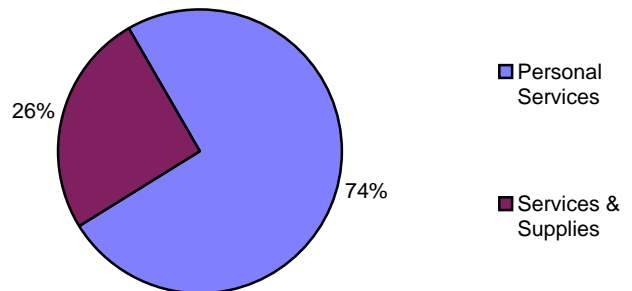
Biennial Summary

Category	Actual Exp. To Date	Projected Expenditures	Total Est. Expend.	2005-07 LAB	Variance
Personal Services	3,236,895	40,174,558	43,411,453	44,564,938	1,153,485
Services & Supplies	1,023,608	13,809,547	14,833,156	30,384,327	15,551,172
Capital Outlay		24,399	24,399	1,033,494	1,009,095
Special Payments					
Total	4,260,503	54,008,505	58,269,007	75,982,759	17,713,752

Actual Expenditures

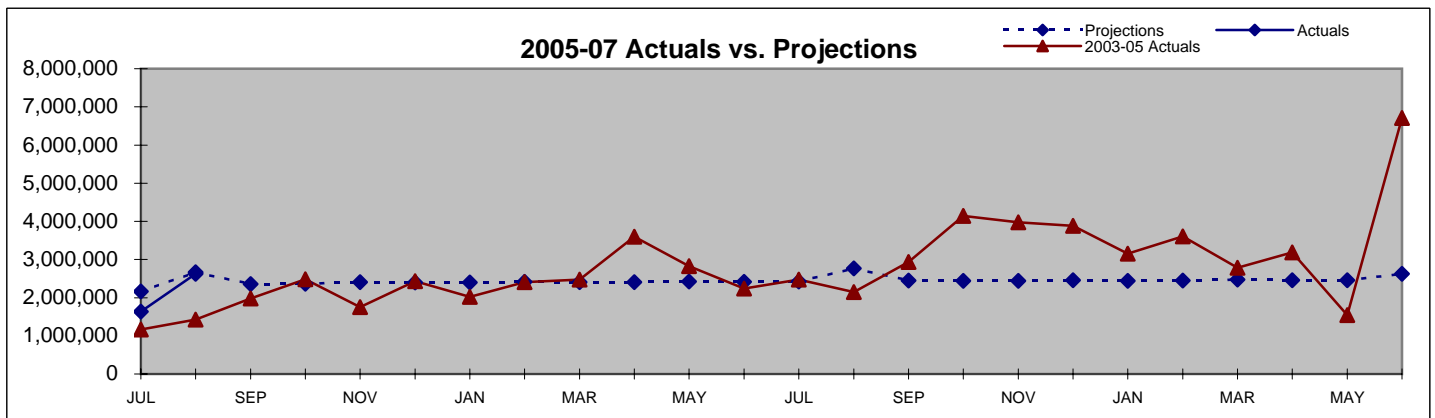


Projected Expenditures



Monthly Summary

Category	Actual Exp.	Projections	Variance	Avg. Monthly Actual Exp.	Avg. Projected Expenditures
Personal Services	1,688,353	1,759,234	70,880	1,618,447	1,826,116
Services & Supplies	935,703	910,611	(25,092)	511,804	627,707
Capital Outlay					1,109
Special Payments					
Total	2,624,057	2,669,845	45,788	2,130,251	2,454,932



2005-07 Agency-wide Operations - Budget Execution
Spending Plan - Actual and Estimated Expenditures
 2005-07 Summary

	1st QTR	2nd QTR	3rd QTR	4th QTR	5th QTR	6th QTR	7th QTR	8th QTR	ACTUAL EXPEND. TO DATE	EST. EXPEND.	ENC. & PRE-ENC.	TOTAL ESTIMATED EXPEND.	05-07 LAB BUDGET	VARIANCE
Personal Services														
Salaries & Wages	3,190,146	3,475,367	3,521,008	3,544,872	3,574,343	3,599,891	3,622,891	3,645,163	2,053,988	26,119,694		28,173,682	28,490,581	316,899
Temporary Appointments	25,682								25,682			25,682	156,924	131,242
Overtime	19,630								19,630			19,630	540,501	520,871
Shift Differential	877								877			877	1,978	1,101
All Other Differential	21,075								21,075			21,075	209,351	188,276
ERB Assessment	1,470	1,843	1,843	1,843	1,843	1,843	1,843	1,843	856	13,514		14,370	12,096	(2,274)
Wokers' Comp. Insurance (SA														
PERS	467,249	508,638	515,315	518,807	522,926	526,664	530,029	533,287	300,593	3,822,323		4,122,916	4,278,123	155,207
Pension Bond Contribution	210,319	217,292	220,145	221,637	223,396	224,993	226,431	227,823	139,123	1,632,913		1,772,036	1,375,395	(396,641)
Social Security Taxes	248,662	265,966	269,457	271,283	273,437	275,392	277,151	278,855	161,518	1,998,686		2,160,203	2,249,083	88,880
Unemployment Comp.													37,390	37,390
Workers' Comp. Assess.	2,782	3,345	3,345	3,345	3,345	3,345	3,345	3,345	1,667	24,532		26,199	26,835	636
Mass Transit Tax	19,554	20,860	21,134	21,277	21,446	21,599	21,737	21,871	12,719	156,760		169,478	177,399	7,921
Flexible Benefits	790,357	873,564	873,564	873,564	873,564	873,564	873,564	873,564	499,169	6,406,136		6,905,305	6,976,368	71,063
Vacancy Savings													(155,537)	(155,537)
Reconciliation Adj.													188,451	188,451
Unscheduled P.S.														
Total Personal Services	4,997,802	5,366,875	5,425,811	5,456,629	5,494,302	5,527,291	5,556,992	5,585,751	3,236,895	40,174,558		43,411,453	44,564,938	1,153,485
<i>actual</i>														
<i>estimated</i>														
Services & Supplies														
Instate Travel	13,280	17,670	17,670	17,670	17,670	17,670	17,670	18,665	7,390	130,575		137,965	116,894	(21,071)
Out-of-state Travel	300	300	300	300	300	300	300	300		2,400		2,400	31,127	28,727
Employee Training	28,644	34,215	34,215	34,215	34,215	34,215	34,215	35,315	17,239	252,010		269,249	488,069	218,820
Office Expenses	115,429	253,925	253,934	253,943	253,922	253,931	253,940	293,149	30,790	1,901,380		1,932,170	2,063,722	131,552
Telecommunications	40,101	68,249	68,249	68,249	68,249	68,249	68,249	68,249	17,351	500,495		517,845	537,685	19,840
St. Gov. Svc. Chg.	542,613	88,000	88,000	88,000	429,000	88,000	88,000	108,200	518,613	1,001,200		1,519,813	1,504,171	(15,642)
Data Processing	232,686	630,012	630,021	630,030	630,009	630,018	630,027	630,036	22,684	4,620,155	18,225	4,661,063	5,256,990	595,927
Publicity/Publications	8,002	8,100	2,100	2,100	2,100	8,100	2,100	2,100	7,302	27,400		34,702	292,704	258,002
Professional Services	358,992	370,500	370,500	370,500	370,500	370,500	370,500	379,300	235,492	2,725,800	103,169	3,064,462	2,862,534	(201,928)
IT Professional Services													13,897,953	13,897,953
Attorney General	68,185	122,040	122,040	122,040	122,040	122,040	122,040	133,290	27,505	906,210		933,715	947,681	13,966
Dispute Res. Svc.	3,000	9,000	9,000	9,000	9,000	9,000	9,000	9,000		66,000		66,000	73,736	7,736
Empl. Recruit./Devel.	7,558	6,450	6,450	6,450	6,450	6,450	6,450	6,450	5,408	47,300		52,708	58,036	5,328
Dues & Subscriptions	6,038	1,625	1,625	1,625	1,625	1,625	1,625	1,625	4,663	12,750		17,413	50,702	33,289
Facility Rental	97,842	92,718	94,068	94,068	94,068	97,368	99,018	132,024	67,836	733,338		801,174	703,597	(97,577)
Fuels/Utilities	17,970	15,000	15,000	15,000	15,000	15,000	15,000	20,000	12,970	115,000		127,970	121,063	(6,907)
Facility Maint.	52,683	76,251	76,251	76,251	76,251	76,251	76,251	101,668	27,266	584,591		611,857	724,698	112,841
Agency/Program S & S														
Other COP Costs													6,500	6,500
Other S & S	7,101								7,101			7,101	2,700	(4,401)
Expendable Property	16,850	6,350	6,350	6,350	6,350	6,350	6,350	6,600	14,000	47,550	14,000	75,550	193,465	117,915
IT Expendable Property													450,300	450,300
Unscheduled S & S														
Total Services & Supplies	1,617,272	1,800,405	1,795,773	1,795,791	2,136,749	1,805,067	1,800,735	1,945,971	1,023,608	13,674,154	135,394	14,833,156	30,384,327	15,551,172
Capital Outlay														
Office Furn./Fixture													30,868	30,868
Telecomm. Equip.													5,589	5,589
Technical Equipment													57,161	57,161
Data Proc.-Software													447,019	447,019
Data Proc.-Hardware											24,399	24,399	492,857	468,458
Building & Structure														
Total Capital Outlay											24,399	24,399	1,033,494	1,009,095
Special Payments														
Total Special Payments														
Total Expenditures	6,615,075	7,167,280	7,221,584	7,252,420	7,631,050	7,332,358	7,357,727	7,531,722	4,260,503	53,848,712	159,793	58,269,007	75,982,759	17,713,752

Percent of 2005-07 LAB Expended: 5.61%
 Percent of Biennium Expired: 8.33%



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board

FROM: Paul Cleary, Executive Director

SUBJECT: Update of HB2020 Employer Reporting

MEETING DATE	9-23-05
AGENDA ITEM	B.2.d.1. HB2020 Update

The agency is in its second year of administering the HB2020 program and using the new employer electronic reporting system. The Membership and Employer Relations Section (MERS) is working with 875 employer-reporting units to process outstanding 2004 employer reports and current 2005 reports. The table below shows the status of 2004 and 2005 employer reports and member records.

	Calendar Year 2004 (as of 9/12/05)	Calendar Year 2005 (as of 9-12-05)
Reports due (estimated)	12,562	8,649
Outstanding reports	17	448
Reports fully posted at 100%	12,016	6,921
Records due (estimated)	3,062,357	2,014,774
Records not posted	3,848	48,972
Contributions posted	\$383,630,525	\$264,310,814

As of September 12, 2005, employers have posted 99.9% and 94.8 % of the reports due for 2004 and 2005 respectively. Of those reports posted, 96% for 2004 and 80% for 2005 are 100% accurate. These statistics indicate the major educational effort and progress employers have made in providing member demographic and wage information from 2004 to 2005. Last year at this time, only 90% of reports due were submitted, and of the reports submitted only 64% were 100% accurate.

To help employers complete their reports, PERS created semi-monthly payroll reporting classes. Since April 2005, staff has conducted 11 classes for 170 employers. In addition, PERS organized teams to work with employers who have outstanding 2004 data. Since the inception of the teams in May 2005, PERS has helped employer's post approximately 9,200 members' records from 2004 out of approximately 13,000 un-posted records. This is an average of 2,000 corrected records per month. We anticipate all 2004 member records will be cleared by the end of October 2005.



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

TO: Members of the PERS Board

FROM: Gloria English, Retiree Insurance Program Manager

SUBJECT: PERS Health Insurance Program for Plan Year 2006
Implementation Update

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

MEETING DATE	9-23-05
AGENDA ITEM	B.2.d.2. Health Ins.

It has been more than three months since we presented the PERS Health Insurance Program health plan contract proposals for 2006. Since that time much work has been done by the health plans, consultants, and PERS staff to finalize the details necessary to have these benefits in place for January 1, 2006. Our booklets have been printed and mailed to all current members, and the first plan change meeting was scheduled for September 8th. We are conducting 71 meetings around the state over an 11-week period.

You will remember that the original strategy was to incorporate the benefits available from the Medicare Modernization Act (MMA) into the PERS Health Insurance Program and thereby bring two important enhancements to the program for PERS retirees and dependents. Those enhancements are 1) improve the prescription drug benefits available for retirees, and 2) lower member premiums for PERS members enrolled in the new Medicare Part D benefit. This new prescription drug benefit from Medicare is one of the biggest changes to Medicare since its inception.

Due to the persistent efforts by the PERS contracted health plans, consultants, program administrator's staff, and PERS staff, our planning has resulted in a successful mailing of health insurance program information to more than 60,000 PERS retirees. This brought a considerable increase of telephone calls to the administrator's office during the month of August, mostly attributable to the Limited Open Enrollment announcement mailed August 11th, 2005.

You may remember that our strategy for plan year 2006 has been to keep the PERS retiree insurance program configured much the same as it has been for the past 12 years, which includes four separate health plans, and a uniform Prescription Drug Plan insured and administered by two of our contracted health plans, ODS Health Plans and Kaiser Permanente. While early conversations with the Centers for Medicare and Medicare Services (CMS) were encouraging, we discovered in mid-summer that CMS had system restraints that would not allow them to recognize a member enrolled in two Medicare plans, e.g. a Medicare Advantage Plan and a Medicare Prescription Drug Plan. That problem was resolved by the health plans' agreement to do a subcontract arrangement thereby retaining the member's prescription drug coverage at ODS Health Plans.

During the late planning stages, it became apparent that Clear Choice Health Plans' (CCHP) would not be able to do the necessary internal work to permit members to be dually enrolled in both the CCHP Medicare Advantage Plan, and a different Medicare Part D plan. Again, we have been able to work through that constraint by simply not enrolling the CCHP Medicare members in Medicare Part D at this time. Those members will be enrolled in the ODS prescription drug plan, and enjoy the very same benefits as other PERS health plan members. This does not allow as much savings to the members for plan year 2006 as they would receive if we were able to enroll them into the Medicare Part D benefit, but it does meet our goal of providing the enhanced prescription drug benefits to all PERS health plan members. We are also able to pass along approximately \$20 per member per month in premium reductions for CCHP Medicare members over their plan cost for 2005. Also, since the PERS Health Insurance Program prescription drug plan is creditable under Medicare guidelines, the members will not be penalized for late enrollment.

During 2006, changes are being made at CMS and at CCHP that will allow PERS and CCHP to enroll CCHP members into Medicare Part D. Therefore the transition into Part D for Clear Choice members will take effect for plan year 2007.

Other than these issues, the planning and implementation has gone very well. A full report will be provided when statistics have been compiled. Please feel free to contact me at any time for further information.



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD

MEETING DATE	9/23/05
AGENDA ITEM	C.1. Estimated Benefits

SUBJECT: Notice of Rulemaking for OAR 459-007-0015, *Distribution of Earnings on Underpayment of Estimated Benefits*

OVERVIEW

- Action: None. This is notice that staff has begun rulemaking.
- Reason: To determine which interest rate to apply to the underpayments of estimated benefits.
- Policy Issue:
 - What rate should be used to credit interest on underpaid estimated payments under ORS 238.455(5)?

SUMMARY OF RULE AND POLICY ISSUES

Prior to the enactment of Senate Bill 109 by the 2005 Oregon legislature, ORS 238.455(5) required that if an estimated payment results in an underpayment of \$10 or more a month, the PERS Board shall pay interest on the underpaid balance “at the rate credited to the Public Employees Retirement Fund for the prior year” until the underpayment is paid. Under OAR 459-007-0015, that rate was set as simple interest based on the prior year’s rate that was credited to the member’s respective Tier.

SB 109, which went into effect on June 28, 2005 gives the Board authority to determine the rate to be applied to these underpaid estimated benefits under ORS 238.455. The rate is applicable to members who have effective dates of retirement that are on or after January 1, 2006. Those who retired prior to January 1, 2006 will receive the rates as provided under the current OAR 459-007-0015 as described above.

- *Policy Issue: What rate should be used to credit interest on underpaid estimated payments under ORS 238.455(5)?*

There are several possible rates the Board could choose to apply to underpayments. Briefly, they are described below:

- *Assumed Rate:* As defined in OAR 459-007-0001, the Assumed Rate is “the actuarial assumed rate of return on investments as adopted by the Board for the most recent actuarial valuation.” It is currently set at 8.00%. From an administrative perspective, using a stable rate like the assumed rate rather than a rate that fluctuates would simplify the process. A stable rate would minimize some of the issues such as potentially having to apply multiple rates in the interest calculation. On the other

hand, the 8.00% rate is the assumed rate of return over the portfolio's long-term performance. Underpayments do not typically stretch over such spans of time, so locking in an assumed rate would not reflect the actual return on those dollars in years of low returns or losses.

- *A Tier One and Tier Two factor showing the latest year to date earnings:* PERS calculates a factor for Tier One and Tier Two accounts based on year-to-date investment performance. The Tier One factor is no less than 8.00%, to reflect the assumed rate guarantee on those accounts. The Tier Two factor is updated monthly to reflect actual year-to-date gains and losses in the Fund, less anticipated charges for administrative expenses. Using these factors would pose two concerns: first, it would imbed the Tier One rate guarantee where it's not mandated by statute and, second, using a rate that fluctuates from month-to-month is much more difficult to administer.
- *Average Annualized Rate:* This rate is applied to funds held in the cash account out of which PERS makes periodic payments. The PERS Board previously chose this rate to use for "distribution interest," which is interest paid on a payment between the time that an amount is determined and then actually paid. The Board selected this rate in October 2003 from this same list of alternatives to calculate interest on pending payments. Using the Average Annualized Rate, which is updated monthly, would be consistent with other distribution interest calculations.

To ease administrative complication, staff proposes that the Average Annualized Rate in effect at the time the payment is made be used to credit interest, rather than tracking each month's change in the rate and applying them incrementally. This rate does not change much from month to month, so using the most recent rate would still reasonably approximate the actual return on those dollars while in the PERS Fund.

- Other rates to be considered are U.S. Treasury short-term rates, Oregon's 9.00% statutory rate on money owed (ORS 82.010) or a rate chosen by the Board that is not associated with a PERS Fund or external rate. The Treasury rates fluctuate and, as noted, staff prefers to use a known rate. The state's statutory rate is higher than the return actuarially expected for the Fund. And, it is not recommended that the Board apply an unrelated rate because such rates would not bear any relation to what the dollars would have earned while remaining invested in the PERS Fund.

LEGAL REVIEW

The proposed rule modification will be submitted to legal counsel for review and any comments or changes will be incorporated before the rules are presented for adoption.

PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing is scheduled for 2:00 p.m. on Tuesday, September 27, 2005. The comment period ends on November 1, 2005 at 5:00 p.m.

IMPACT

Mandatory: No. The Board can choose to retain the existing language in the administrative rule, which provides “simple interest, prorated from date of underpayment to date of distribution by PERS of the underpaid amount based on the rate credited to the respective tier in the Fund for the prior calendar year.” However, this language is imprecise and staff recommends the modifications explained above.

Impact: The rule modifications apply to underpayments of estimated benefits to members who have effective dates of retirement that are on or after January 1, 2006.

Cost:

- *Members:* There will be no new costs to members.
- *Employers:* There is no new cost to employers.
- *Administration:* There will be some costs in changing to the rate specified by the Board, but since estimated payments are calculated by hand, the incremental costs of changing to whatever rate the Board selects is minimal.
- *Fund:* If the Board adopts the rate recommended by staff, the earnings rate paid should closely reflect the actual earnings on these dollars while they were in the fund, so there should be little or no cost to the Fund.

RULEMAKING TIMELINE

August 15, 2005	Staff initiated the rulemaking process by filing a Notice of Rulemaking Hearing with the Secretary of State.
September 1, 2005	<i>Oregon Bulletin</i> published the Notice.
September 23, 2005	Board notified that staff began the rulemaking process.
September 27, 2005	Rulemaking hearing to be held at 2:00 p.m. in Tigard.
October 21, 2005	First Reading
November 1, 2005	Public comment period ends at 5:00 p.m.
November 18, 2005	Rule is presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

NEXT STEPS

The rule will receive a public hearing and PERS staff will return to the Board in October for the First Reading of the rule and notify the Board of any public comment or proposed modifications to the rule.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 007 – DIVISION TITLE**

MEETING DATE	9/23/05
AGENDA ITEM	C.1. Estimated Benefits

1 **459-007-0015**

2 **Distribution of Earnings on Underpayment of Estimated Benefits**

3 In accordance with ORS 238.455(5), earnings credited to an underpayment of either
4 Tier One or Tier Two estimated benefits shall be simple interest, prorated from date of
5 underpayment to date of distribution by PERS of the underpaid amount based on:

6 (1) the rate credited to the respective tier in the Fund for the prior calendar year for
7 members who have effective dates of retirement prior to January 1, 2006;

8 (2) the average annualized interest rate, as defined in OAR 459-007-0001(3), in
9 effect as of the date of distribution for members who have effective dates of
10 retirement on or after January 1, 2006.

11 Stat. Auth.: ORS 238.650

12 Stats. Implemented: ORS 238.455



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD

MEETING DATE	9/23/05
AGENDA ITEM	C.2. Misc. Rules

SUBJECT: Notice of Rulemaking for Non-Substantive Changes to Miscellaneous Chapter 459 Rules

OVERVIEW

- Action: None. This is notice that staff has begun rulemaking.
- Reason: To correct typographical errors, incorrect citations, and make other non-substantive changes to PERS administrative rules.
- Policy Issue:
 - o There are no policy issues associated with this rulemaking.

SUMMARY OF RULE AND POLICY ISSUES

PERS staff undertook a comprehensive review of the agency's administrative rules to clean up errors in citations, spelling, cross-references, etc. This rulemaking is to incorporate these non-substantive rule modifications. These changes were first noticed in the July 2005 Oregon Bulletin, but staff amended the notice to include changes prompted by PERS-related 2005 legislation (SB 108, HB 2189 and HB 3262). Rules changes set out below that are marked with an asterisk (*) were not included in the original notice.

459-001-0015, *Conduct of Meetings of the Board*: Update statutory authority citation.

459-001-0025, *Delegation to Director and Staff*: Change the term "a hearings officer" to "an administrative law judge" in section (2) to be consistent with the terminology used in the Oregon Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure; update statutory authority citation.

459-001-0035, *Contested Case Hearing*: Change the word "objections" to "exceptions" and change the term "Hearings Officer's" to "administrative law judge's" and the term "Hearings Officer" to "administrative law judge" in section (6) to be consistent with the terminology used in the Oregon Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure; update statutory authority citation.

459-005-0001*, *Definitions, Generally*: Add "Qualifying Position" to definitions (SB 108 section (5)); in section (9), "Elected Official" should cite ORS 238.015(5) (SB 108 section (6)); in section (11)(b)(C), change cite to 238.015(6) (SB 108 section (6)); in section (20), "Legislator" definition should cite ORS 238.015(5) (SB 108

section (6)); in section (25), “Salary” definition should cite ORS 238.005(21) (SB 108 section (5)).

459-005-0010, *Public Employees Retirement Fund, A Trust*: Delete “(s)” in section (1); add space after (a) in section (2)(a); add statement about "one plan" (HB 3262 sections (1-25)).

459-005-0150, *Effective Date of Power of Attorney Rules*: Correct spelling of “Employees” in first paragraph.

459-005-0210, *Transmittal of Reports and Documents*: Correct citation in section (2)(b).

459-005-0215, *Receipt Date for Reports, Documents and Remittances*: Correct statutory citation in section (3)(b).

459-005-0220, *Transmittal of Remittances or Payments*: Correct typographical error in section (4)(a), change the word “it” to “its” in section (5)(a); remove the word “thirty” in section (4)(b)(C) to be consistent with the Oregon Attorney General’s style guide for administrative rules (as found in the Administrative Law Manual).

459-005-0350*, *Membership Status of Persons in Concurrent Employment Eligible to Participate in an Optional or Alternative Retirement Plan*: In sections (2)(a) and (b), Non-Qualifying Position is referred to – should cite ORS 238.005(19) (SB 108 sections (5), (8)).

459-005-0525*, *Ceiling on Compensation for Purposes of Contributions and Benefits*: Change 238A.005(16)(i) to 238A.005(16)(c)(I) in Stat. Auth., (housekeeping change); the “Annual Compensation” definition in section (2)(d) should cite ORS 238.005(21) (SB 108 section (5)).

459-005-0560*, *Required Minimum Distributions, Generally*: Capitalize "Regulations" in section (1); make "requirement" plural (add "s" at end) in section (2)(b); add additional parens after "ORS 238A.190(1)(a)" in section (2)(f); remove "s" in "benefits" and change "or" to "of" in "...under section (2) or this..." in section (3); add "d" to end of word "designate" in section (4)(a); change effective date to January 1, 2003 in section (5). (All are housekeeping changes).

459-005-0599, *Election Procedures – Direct Rollovers*: Add space after “(f)” in section (1); remove the word “thirty” in sections (1)(a), (2) and (4); remove the word “ninety” in section (2) to be consistent with the Oregon Attorney General’s style guide for administrative rules (as found in the Administrative Law Manual).

459-007-0050, *Crediting Earnings for a Deceased Tier One Active or Inactive Member*: Correct statute cited in “Statutes Implemented” line.

459-007-0060, *Crediting Earnings to the Tier One Employer Death Benefit*: Correct statute cited in “Statutes Implemented” line.

459-007-0530*, *Crediting Earnings To Employer Lump Sum Payments*: Change cite for 238.225(11) to Section 13(4) of legislation in (2) (HB 3262 sections (10), (13))

459-009-0020*, *Public Employer*: Correct citation in section (1).

- 459-009-0070***, *Actuarial Pooling of Employer Liability*: Change cite in (2), (5), (7), (7)(a), (7)(b), and (10) for 238.225(8) to Section 13(1) of legislation (HB 3262 sections (10), (13)); Statutes Implemented should cite Sections 12, 13 and 14 of the legislation (HB 3262 sections (12), (13), (14)); add space between “(7)(b)” and “of” in Section (15)(b).
- 459-009-0084***, *Unfunded Actuarial Liability Lump-Sum Payments by Employers Participating in an Actuarial Group*: Change cite in (9)(e)(B) for 238.225(1) to 238.225 (HB 3262 section (10)).
- 459-009-0085***, *Unfunded Actuarial Liability Lump-Sum Payments by Employers Not Participating in an Actuarial Group*: Change cite in (9)(e)(B) for 238.225(1) to 238.225 (HB 3262 section (10)).
- 459-009-0120**, *Employer Recordkeeping for Multiple Qualified Retirement Plans*: Correct spelling of “Employees” in section (1).
- 459-009-0350***, *Allocation of PERS Employer Actuarial Assets and Liabilities*: Statutes Implemented should cite Sections 12, 13 and 14 of the legislation (HB 3262 sections (12), (13), (14)).
- 459-010-0003***, *Eligibility and Membership for the PERS Chapter 238 Program*: “Qualifying Position” definition in (1)(b) should be modified and cite ORS 238.005(19) (SB 108 sections (5), (8)); (1)(d)(B) should cite ORS 238.005(21) (SB 108 section (5)).
- 459-010-0005***, *Continuous Service*: Add creditable service language from Section 10 of the legislation (HB 2189 section (10)).
- 459-010-0010**, *Leave of Absence*: Correct citation in section (2)(b).
- 459-010-0011**, *Authorized Paid Leave of Absence*: Correct citations in sections (1), (2) and (3). In section (3)(b), add a dash between “12” and “month.”
- 459-010-0012**, *Membership of Community College Employees*: Correct citations in sections (3), (5), (6) and (7). In section (1), add a dash between “12” and “month.”
- [459-010-0014, Creditable Service in PERS Chapter 238 Program: While this rule was listed in this notice of rulemaking, PERS staff is no longer planning on modifying this rule as part of this rulemaking.]*
- 459-010-0025***, *Student Employee*: (1) should cite 238.015(4) (SB 108 section (6)); Stat. Auth. should cite 238.015(4) (SB 108 section (6)).
- 459-010-0030**, *Determination of Employee Status*: Corrected citations in section (1) and in the “Statutes Implemented” line.
- 459-010-0045***, *Substitution of Annuity*: (1) should cite 238.015(7) (SB 108 section (6)); Stat. Auth. should cite 238.015(7) (SB 108 section (6)).
- 459-010-0165**, *Transfer into a New Classification*: Correct spelling of “Employees” in section (1).

- 459-010-0175***, *Computation of Prior Credit Service for Accumulated Seasonal Employment*: Statutes Implemented should cite Sections 12, 13 and 14 of the legislation (HB 3262 sections (12), (13), (14)).
- 459-010-0205**, *Retention of Membership by School Employees*: Correct spelling of “Employees” in the title and the first paragraph.
- 459-011-0100***, *Credit for Service in Armed Forces*: (3)(a) cites section of statute that was deleted (ORS 238.015(4)) (SB 108 section (6)).
- 459-011-0110***, *Limited Service Credit for Time Spent in Armed Forces*: (3)(a) cites section of statute that was deleted (ORS 238.015(4)) (SB 108 section (6)).
- 459-011-0200**, *Re-Establishment of Membership*: Correct spelling of “Employees” in the first paragraph.
- 459-013-0060**, *Payment of Retirement Benefits*: Correct spelling of “Employees” in section (2).
- 459-013-0260***, *Effective Date Used in the Establishment of Service Retirement Benefits*: In (2), change cite for 238.435(3) to 238.435(5) (HB 3262 section (33)).
- 459-014-0030**, *Designation of Beneficiary*: In section (1), delete “ORS 238.390.” Correct spelling of “Employees” in section (3).
- 459-015-0030**, *Hearings on Denial or Discontinuance of Disability Retirement Allowances*: In section (3), replace the term “hearings officer designated by the Board” with “administrative law judge designated by the Office of Administrative Hearings” and in section (4), change the term “hearings officer’s” to “administrative law judge’s” to be consistent with the practices described in and the terminology used in the Oregon Attorney General’s Administrative Law Manual and Uniform and Model Rules of Procedure. Update statutory authority citation.
- 459-015-0035**, *Evidence -Contested Case Hearings*: In sections (1)(a), (1)(b) and (2), change the term “hearings officer” to “administrative law judge” to be consistent with the terminology used in the Oregon Attorney General’s Administrative Law Manual and Uniform and Model Rules of Procedure. Update statutory authority citation.
- 459-015-0040**, *Proof of Case -- Contested Case Hearings*: In section (3)(c), change the term “hearings officer” to “administrative law judge” to be consistent with the terminology used in the Oregon Attorney General’s Administrative Law Manual and Uniform and Model Rules of Procedure. Update statutory authority citation.
- 459-020-0015**, *Collection of Pro Rata Share of Expenses*: Correct spelling of “Employees” in section (1).
- 459-020-0050**, *Governmental Unit Contracting with Board Must Have Legal Status*: Correct spelling of “Employees” in the first paragraph and remove reference to “Public Law 96-88”.
- 459-020-0055**, *All Prior Rules Superseded*: Correct spelling of “Employees” in the first paragraph.

459-035-0150, *Continuation of Insurance Coverage Under COBRA*: Remove hyphen from “Admin-istrator” in section (2).

459-045-0000, *Authority and Purpose*: Correct spelling of “Employees” in the first paragraph.

459-045-0001, *Definitions*: Correct statutory reference in section (21); “Vested” definition in (14) should cite ORS 238.005(24) (SB 108 section (5)).

459-045-0010*, *Division of Benefits*: Change cite in (2)(b)(A) for 238.005(4) to 238.005(5).

459-050-0070*, *Catch-Up Programs*: Change cite in (1)(b) for 238.280(2) to 238.280(3) (HB 3262 section (37)).

459-060-0000, *Purpose*: Correct spelling of “Employees” in the first paragraph.

459-075-0010(2)*, *Eligibility and Membership*: Incorporate references to Section 2a, chapter 733, Oregon Laws 2003 (HB 2189 section (8)).

459-080-0150, *Employee Contributions into the IAP Account*: Correct typographical error in section (2)(b).

459-080-0250, *IAP Account Installments*: Correct statutory authority citation.

LEGAL REVIEW

The proposed rule modification will be submitted to legal counsel for review and any comments or changes will be incorporated before the rules are presented for adoption.

PUBLIC COMMENT AND HEARING TESTIMONY

Because the modifications in this rulemaking are non-substantive in nature, these rules will not be subject to a rulemaking hearing. The comment period ends on October 3, 2005 at 5:00 p.m.

IMPACT

Mandatory: No, although not amending the rules would allow incorrect statutory citations and typographical errors to remain in the agency’s administrative rules.

Impact: None. The rule modifications are non-substantive in nature.

Cost:

- *Members:* There will be no new costs to members.
- *Employers:* There is no new cost to employers.
- *Administration:* There is no added administrative cost.
- *Fund:* There is no cost to the fund.

RULEMAKING TIMELINE

June 10, 2005	Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.
June 24, 2005	Board notified that staff began the rulemaking process.
July 1, 2005	<i>Oregon Bulletin</i> published the first Notice.
August 15, 2005	Due to enacted legislation, staff re-initiated the rulemaking process by filing an amended Notice of Rulemaking Hearing with the Secretary of State.
September 1, 2005	<i>Oregon Bulletin</i> published the second Notice.
September 23, 2005	Board notified that staff re-initiated the rulemaking process.
September 27, 2005	Rulemaking hearing to be held at 2:00 in Tigard.
October 3, 2005	Public comment period ends at 5:00 p.m.
October 21, 2005	Rule is presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

NEXT STEPS

Following the hearing and the public comment period, PERS staff will return to the Board for adoption, including any modifications.



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD

MEETING DATE	9/23/05
AGENDA ITEM	C.3. Health Ins.

SUBJECT: Adoption of 459-035-0001, *Health Insurance Programs Definitions*

OVERVIEW

- Action: Adopt modifications to OAR 459-035-0001.
- Reason: The definition of “Dependent Domestic Partner of a PERS Retiree” must be amended if the rule is to apply to the same persons who were included in the definition before the Working Families Tax Act of 2004 became law.
- Policy Issue:
 - Should PERS continue to define “Dependent Domestic Partner of a PERS Retiree” so that it applies to the same persons that were included in the definition before the 2004 Working Families Tax Relief Act became law?

SUMMARY OF RULE AND POLICY ISSUES

In 2002, the PERS Board adopted amendments to OAR 459-035-0001 that defined a “Dependent Domestic Partner of a PERS Retiree.” Persons that fit within that definition are eligible to participate in the PERS-sponsored health insurance plan. The definition, in part, requires that a PERS retiree claims the person as a dependent on the PERS retiree's most recent federal tax return.

However, recent amendments to the Internal Revenue Code (“IRC”) through the 2004 Working Families Tax Relief Act (“Act”), P.L. 108-311, impacted who is eligible to be claimed as a dependent on a federal tax return. The key change was the limit on gross income that a person can earn and still be claimed as a dependent: the dependent must have gross income less than the exemption amount under IRC section 151(d) (for 2004, that was \$3,100).

As a result of the new law, a taxpayer cannot claim a domestic partner as a dependent on a federal tax return if the domestic partner's income exceeds \$3,100. Because the PERS definition of “Dependent Domestic Partners of PERS Retirees” relies on the dependent to be claimed on the retiree's federal tax return, the change in federal law limits the number of people eligible for PERS-sponsored health care.

A separate section of the Act preserved the definition of “dependent” for the purposes of employer-provided medical care reimbursements in conforming amendments to IRC section 105. If the domestic partner's income is the only reason why the domestic partner cannot be claimed as a dependent on the taxpayer's return, the domestic partner continues to be considered “dependent” for purposes of section 105(b).

The rule modifications would allow all persons who qualified as “Dependent Domestic Partners of PERS Retirees” under OAR 459-035-0001 before Congress passed the Act to continue to qualify by shifting to the definition of “dependent” to IRC section 105(b) instead of basing that determination on tax filing status. Staff recommended this change to maintain the broadest availability of dependent coverage. Although earlier memos encouraged public comment on whether a narrower definition should be adopted, no comments were received.

LEGAL REVIEW

The proposed rule amendments were submitted to the Department of Justice for review. Counsel’s recommendations have been incorporated into the final draft.

PUBLIC COMMENTS AND HEARING TESTIMONY

There were no attendees at the rulemaking hearing held on July 26, 2005 in the PERS headquarters building in Tigard. PERS received no public comment on the proposed changes to OAR 459-035-0001.

MODIFICATION TO RULE SINCE NOTICE

To ensure that the provisions of the rule cover those who qualify, section (27) was added to apply the rule retroactively making the provisions of the rule effective on January 1, 2005.

IMPACT

Mandatory: No.

Impact: None. This proposed rule modification maintains current eligibility standards.

Cost:

- *Members:* There will be no new costs to members.
- *Employers:* There is no new cost to employers.
- *Administration:* There is no added administrative cost.
- *Fund:* There is no cost to the fund.

RULEMAKING TIMELINE

June 10, 2005	Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.
June 24, 2005	Board notified that staff began the rulemaking process.
July 1, 2005	<i>Oregon Bulletin</i> published the Notice.
July 26, 2005	Rulemaking hearing held at PERS headquarters in Tigard.
August 5, 2005	Public comment period ended.
September 23, 2005	Rule is presented to the PERS Board for adoption.

BOARD OPTIONS

The Board may:

1. Make a motion to “adopt OAR 459-035-0001, as presented, effective upon filing.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** Amending the rule would apply the definition of “Dependent Domestic Partner of a PERS Retiree” to the same persons who were included in the definition before the 2004 Working Families Tax Relief Act became law.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 035 – HEALTH INSURANCE PROGRAMS**

MEETING	9/23/05
DATE	
AGENDA	C.3.
ITEM	Health Ins.

1 **459-035-0001**

2 **Definitions**

3 The words and phrases used in this Division have the same meaning given them in
4 ORS chapter 238. Additional terms are defined as follows unless the context requires
5 otherwise.

6 (1) "Board" *[shall have the same meaning as]* means the Public Employees
7 Retirement Board as established in ORS 238.630.

8 (2) "Carrier" shall have the same meaning as provided in ORS 238.410(1)(a).

9 (3) "Competitive Negotiations" means the procurement method whereby proposals
10 are requested from a number of sources and the Request for Proposals is publicized.

11 (4) "Creditable Service" shall have the same meaning as provided in ORS
12 238.005(5).

13 (5) "Dependent" means a PERS member's or retiree's dependent child who has never
14 married. For the purpose of this rule a "child" is defined as follows:

15 (a) A natural child.

16 (b) A legally adopted child, or a child placed in the home pending adoption.

17 (c) A step-child who resides in the household of the stepparent who is an eligible
18 retired member.

19 (d) A grandchild, provided that at the time of birth, at least one of the grandchild's
20 parents was covered under a PERS-sponsored health insurance plan as a dependent child
21 of the PERS member or retiree and resides in the household of the member or retiree.

1 (6) "Dependent Domestic Partner of a PERS Retiree" means a person who has a
2 relationship with a PERS retiree that has the characteristics described below. To qualify
3 as a "dependent domestic partner of a PERS retiree," the person and the PERS retiree
4 must:

5 (a) Share a close personal relationship and be responsible for each other's common
6 welfare, including but not limited to having joint financial responsibilities;

7 (b) Be each other's sole domestic partner;

8 (c) Not be married to anyone, nor have had another domestic partner within the
9 previous 12 months;

10 (d) Not be related by blood so closely as to bar marriage in the State of Oregon;

11 (e) Have jointly shared the same regular and permanent residence for at least 12
12 months immediately preceding the effective date of coverage with the intent to continue
13 doing so indefinitely; and

14 (f) Have the PERS retiree providing over one-half of the financial support for the
15 person and *[have claimed that person on the PERS retiree's most recent federal tax*

16 *return.]* **qualify as a dependent of the PERS retiree as determined under section**
17 **105(b) of the Internal Revenue Code, 26 USC 105(b), as amended by the Working**
18 **Families Tax Relief Act of 2004, P.L. 108-311.**

19 (7) "Eligible Person" means a person who is eligible for coverage under a PERS-
20 sponsored health insurance plan. The conditions for such eligibility are set forth in OAR
21 459-035-0020.

1 (8) "Eligible Retired Member" means an eligible person who is eligible for payments
2 toward the cost of the Medicare Companion Plan from RHIA. The conditions for such
3 eligibility are set forth in OAR 459-035-0030.

4 (9) "Eligible Retired State Employee" means an eligible person who is eligible for
5 non-Medicare insurance premium payments from the RHIPA. Conditions for such
6 eligibility are set forth in OAR 459-035-0040.

7 (10) "Fund" shall have the same meaning as the Public Employees Retirement Fund
8 in ORS 238.660.

9 (11) "Health Insurance" means insurance for health care, as that term is defined in
10 ORS 238.410(1)(c).

11 (12) "Medicare" means the federal health care insurance plan established under Title
12 XVIII of the Social Security Act as amended.

13 (13) "Medicare Companion Plan" means a PERS-sponsored health insurance plan
14 for eligible persons who are eligible for and enrolled in Medicare.

15 (14) "Non-Competitive Negotiation" means procurement through solicitation of a
16 proposal from only one source.

17 (15) "PEBB" means the Public Employees' Benefit Board established under ORS
18 243.061.

19 (16) "PERS" shall have the same meaning as the Public Employees Retirement
20 System in ORS 238.600.

21 (17) "PERS Member" shall have the same meaning as "member" provided in ORS
22 238.005(12).

1 (18) "Plan Year" means a 12-month period beginning January 1 and ending
2 December 31.

3 (19) "Qualifying Service" means creditable service, as defined in ORS 238.005(5),
4 plus any periods of employment with an employer participating in PERS that are required
5 of the employee before becoming a PERS member.

6 (20) "Retiree" means a PERS member who is receiving a service or disability
7 retirement allowance or benefit under PERS or who received an optional lump sum
8 payment under ORS 238.315, or a person who is receiving retirement pay or pension
9 calculated under ORS 1.314 to 1.380 (1989 Edition).

10 (21) "RHIA" means the Retirement Health Insurance Account established under
11 ORS 238.420 to help defray the cost of the Medicare Companion Plan.

12 (22) "RHIPA" means the Retiree Health Insurance Premium Account established
13 under ORS 238.415 to help defray the cost of PERS-sponsored health plans other than
14 the Medicare Companion Plan.

15 (23) "Small Purchase Procedures" (informal bidding) means the relatively simple
16 and informal procurement methods whereby price and rate quotations are obtained from
17 at least three sources and selection is made on the basis of cost and other applicable
18 criteria.

19 (24) "SRHIA" means the Standard Retiree Health Insurance account established
20 within the Public Employees Retirement Fund separate from the General Funds to
21 administer employee and the employer contributions to the PERS sponsored health
22 insurance program.

23 (25) "Staff" means the employees of the Public Employees Retirement System.

1 (26) "Third Party Administrator" means the individual or organization that the Board
2 contracts with to provide administrative services as specified in the contract.

3 (27) The provisions of this rule are effective on January 1, 2005.

4 Stat. Auth.: ORS 238.410 & ORS 238.650

5 Stats. Implemented: ORS 238.410, ORS 238.415 & ORS 238.420



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD
SUBJECT: ETOB Final Determination

MEETING DATE	9/23/05
AGENDA ITEM	C.4. ETOB Final Determination

OVERVIEW

- Action: Adopt an order granting local public entities an exemption from participation in PERS under ORS 237.620 and OAR 459-030-0030.
- Subject: Local public entities that provide retirement benefits for police officers and firefighters outside of PERS must qualify for an exemption. The benefits provided must be “equal to or better than” (“ETOB”) PERS benefits.
- Reasons: Based on the report from Mercer Human Resource Consulting, the tested local public agencies qualified for an exemption because the plans met the standards established in OAR 459-030-0025. No objections were filed to Mercer’s report, and the Board can now enter its final order granting exemptions to the tested plans. The exemption, by law, is good for only two years.
- Policy Issue:
 - Does the PERS Board accept Mercer’s analysis that the retirement plans offered by the local public entities to police and firefighters meet the “Equal To Or Better Than” requirements of OAR 459-030-0025?

BACKGROUND

ORS 237.620 provides that all public employers of police officers and firefighters must participate in PERS with respect to those employees. However, ORS 237.620(4) exempts a public employer from this requirement if it provides an alternative retirement plan that is “equal to or better than” PERS’ retirement benefits. A 2003 legislative change to the statute added the requirement that the PERS Board test ETOB employers every two years to determine whether the public employer’s plan continues to qualify for the “equal to or better than” exemption.

OAR 459-030-0030 requires the actuary to issue a written report that concludes whether a public employer's plan meets the standards for receiving an exemption under OAR 459-030-0025. After receipt of the written report and recommendations of staff, the Board issues an order granting or denying the petition for exemption. It has been 91 days since the Board received the report on June 24, 2005, which fulfills the requirement that the Board allows at least 90 days to review the actuary’s recommendations.

SUMMARY OF RESULTS

In order for an employer to be granted the exemption, the employer's benefits must be at least 80 percent of the OPSRP benefit provided under each benefit category specified in OAR 459-030-0025, and at least 100 percent of the total OPSRP benefit. The table below shows the total employer plan benefits as a percentage of the total OPSRP benefits.

Employer	Benefits as a Percentage of OPSRP Benefits
City of Forest Grove	220%
Mid-Columbia Police and Fire	183%
Morrow County	205%
City of Portland	274%
City of Seaside	193%
City of Springfield	198%
City of The Dalles	142%
Tillamook County	205%
Union County	121%
Wheeler County	163%

Based on the data, methods, assumptions, and plan provisions described in the draft report to the Board on May 20, 2005, all of the employers evaluated comply with the requirements to provide benefits that are equal to or better than the value of the benefits available under PERS, including the requirement that benefits be at least 80 percent as valuable in each benefit category. Mercer concluded that these employers are eligible for the ETOB exemption under OAR 459-030-0025. PERS staff concurs and recommends that the Board issue final orders granting the exemption for the next two years.

BOARD OPTIONS

The Board may:

1. Adopt a motion to grant an exemption to the employers listed in Mercer's report as having met the "ETOB" requirements of OAR 459-030-0025.
2. Direct Mercer to evaluate these employers based on different methods, assumptions, or other criteria more closely matching the Board's policy direction if the Board determines that a change in policy is warranted.

STAFF RECOMMENDATION

Staff recommends that the Board choose Option #1.

- **Reason:** The Board went through extensive rule making to establish the parameters of Mercer's tests. All employers passed well outside the margins and no objections were filed during the interim.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is

ETOB Final Determination

9/23/2005

Page 3 of 3

warranted. Note, however, that adopting or rejecting the exemption is time critical as the two-year testing mandate has run and some action by the Board is needed.



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
FROM: Steven Patrick Rodeman, Administrator, PPLAD
SUBJECT: Action on Contested Cases

MEETING DATE	9/23/05
AGENDA ITEM	D.1. Contested Cases.

OVERVIEW

- Action: Reach a decision on the contested cases presented at this meeting.
- Reason: To decide the outcome of the contested cases included as part of this meeting's agenda. Staff recommends adopting the proposed orders, with minor changes in some cases. This recommendation is based on the record submitted to date. After the Board has heard from the members or their representatives and deliberated on these cases, this agenda item provides the opportunity to reach a decision during a public meeting.

BOARD OPTIONS

The Board may:

1. Adopt a motion to "accept the staff's recommendations in the contested cases of Jon Randolph Brown, Steven E. Schwerdt, Alice Mitchell, and Peggy Barlow."
2. Adopt alternative motions in each case, which, as is more fully explained in the accompanying memos, would result in different future actions on these cases.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** Staff's recommendations follow the Administrative Law Judges' proposed orders. These recommendations are put forth before the parties' Board presentations, which have been requested in some cases, and the Board's deliberation on these cases.

If the Board does not adopt: The specific outcomes and alternatives vary in some cases and are more fully explained in the memos on each individual case.



Oregon

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September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board

FROM: Steven Patrick Rodeman, Administrator, PPLAD

SUBJECT: Adoption of Amendments to Division 15 Rules Related to Disability Retirement Allowances for PERS Chapter 238 Members

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

OAR 459-015-0000, *Purpose* (New)
OAR 459-015-0001, *Definitions* (New)
OAR 459-015-0005, *Eligibility for Disability Retirement* (Amend)
OAR 459-015-0010, *Criteria for Granting and Denying Disability Retirement Allowances; Initial Determination* (Amend)
OAR 459-015-0015, *Commencement of Disability* (Repeal)
OAR 459-015-0020, *Application Required* (Amend)
OAR 459-015-0025, *Application Processing – Independent Examinations and Appeals* (Amend)
OAR 459-015-0045, *Return to Work* (Amend)
OAR 459-015-0050, *Periodic Reviews* (Amend)
OAR 459-015-0055, *Selection of Benefit Option and Commencement of Allowance* (Amend)
OAR 459-015-0060, *Reduction Due to Workers' Compensation Payment* (Amend)

OVERVIEW

- **Action:** Adopt new rules and permanent rule modifications to Division 15 disability rules.
- **Reason:** To provide PERS Chapter 238 plan members applying for a disability retirement allowance with adequate guidance on major administrative and policy issues. These rule modifications clarify standards and practices so members have sufficient, consistent information.
- **Subject:** Standards for determining eligibility and the administration of the disability program under the PERS Chapter 238 Plan.
- **Policy Issues:** The following are a list of policy decisions addressed by these rule modifications:
 1. Should “regular monthly salary” exclude “passive income?” (459-015-0001)
 2. In determining “similar in compensation” to what a member earned prior to disability, should overtime pay that a member regularly received be included? (459-015-0001)

3. Should guidelines for establishing disability due to work related stress be adopted? (459-015-0005)
4. Should we expand the situations where a specialist is required? (459-015-0010)
5. Should the PERS' information release requirements be revised to accommodate employer and medical provider needs and legal concerns including HIPAA requirements? (459-015-0020)
6. Should a member be allowed to apply for both service and disability benefits at the same time? (459-015-0025)
7. Should PERS obtain an independent medical examination or a vocational evaluation in every case? (459-015-0025)
8. Should staff review all disability retirements on the same schedule? (459-015-0050)
9. Should staff waive the requirement for the review of disability retirements in some cases? (459-015-0050)

SUMMARY OF RULES, POLICY ISSUES, AND MODIFICATIONS
TO RULES SINCE NOTICE

The policy issues identified above were discussed when these rules were noticed for rulemaking at the September 2004 meeting. The resolutions of those policy issues are reflected in the rule modifications as presented. In brief summary, they are:

1. "Regular monthly salary" excludes certain types of "passive income."
2. Overtime pay is not included in determining "similar in compensation" to what a member earned prior to disability.
3. Guidelines for establishing disability due to work related stress are set forth.
4. The types of cases where a specialist is required are expanded.
5. Information release requirements are revised to accommodate HIPAA requirements.
6. Members can apply for service retirement after their disability application is denied, with an effective retirement date as if the applications had been submitted concurrently.
7. PERS will not obtain an independent medical examination or a vocational evaluation in every case.
8. Staff will review disability retirements as warranted, not on the same schedule for all.
9. Staff may waive the requirement for the review of disability retirements in some cases.

Since the June 2005 PERS Board meeting, further staff review and public comment, in addition to recent legislative changes, have prompted additional modifications to the rules as presented, and those are summarized below. Changes due to grammar and typographical errors are not noted.

459-015-0001, *Definitions (New)* - Modifications:

(8) “Major contributing cause” – Changed “major” to “material” - definition remains the same.

(11) “Normal retirement age” – Clarified definition to include changes due to HB 3262, as enacted by the 2005 Oregon Legislature.

(12) “Other income” – Added “or wages” to clarify income received by an employee.

(15) “Performance of duty” – Clarified definition.

(16) “Pre-existing condition” - Clarified definition.

(20) “Similar in compensation” – removed “at the time of disability” since that requirement is already incorporated in the definition’s citation to section (9).

459-015-0005, Eligibility for Disability Retirement (Amend) - Modifications:

Section (3)(a) – Clarified consideration of pre-existing condition as part of duty disability determination.

459-015-0010, Criteria for Granting and Denying Disability Retirement Allowances; Initial Determination (Amend) - Modifications:

Section (1) – Re-worded second sentence to clarify that PERS’ options include both a treating physician’s medial report and/or having the applicant submit to an IME, not either/or.

Section (3)(c) – Added “neurosurgical” to clarify requirement.

Section (3)(e) – Removed requirement for consultation with PERS’ medical advisor for waiving a periodic review. Concerns arose over periods where PERS may not have a medical advisor and may need to waive periodic review.

Section (4) – Added in language previously proposed to be deleted to clarify burden of applicant.

459-015-0020, Application Required (Amend) - Modifications:

Section (6)(b)(A) – Changed “disabling condition” to “injury or disease” to make consistent with other rules.

Section (6)(b)(B) – Changed “separation” to “termination” because the later term is defined in the rule.

459-015-0025, Application Processing – Independent Examinations and Appeals (Amend) - Modifications:

Section (3)(b)(B) – Clarified that any penalty resulting from failing to attend a scheduled IME or vocational evaluation appointment will be deducted from a monthly benefit under the provisions set forth in ORS 238.715.

Section (5) – Clarified that information submitted will be reviewed if it is submitted within the 30 day timeframe as set forth in the rule.

459-015-0045, Return to Work (Amend) - Modifications:

Section (1)(a)(A) – Added “disability” to beginning of sentence to clarify that the benefit suspended during the period a member returns to work on a trial basis is the disability benefit.

Section (4) – Clarified that PERS may contact any state or federal agency to obtain employment information, not just the Oregon Employment Department or the Oregon Department of Revenue.

459-015-0050, *Periodic Reviews (Amend)* - Modifications:

Section (1) – Removed requirement for consultation with PERS’ medical advisor for waiving a periodic review. Concerns arose over periods where PERS may not have a medical advisor and may need to waive periodic review.

Section (7) – Removed; already included in section (4) of the rule.

459-015-0055, *Selection of Benefit Option and Commencement of Allowance (Amend)* - Modifications:

Section (3)(b) – Clarifies provision for beneficiary under the provisions of ORS 238.390(2) in cases where a member dies prior to submitting a beneficiary designation.

Section (5)(b)(A) and (B) – Clarifies the information required from the employer under the new EDX reporting structure.

Section (10)(a)(B) – Added “surviving” to clarify that it is the surviving spouse that is being referenced.

459-015-0060, *Reduction Due to Workers’ Compensation Payment (Amend)* -

Modifications:

Section (2)(c) – Added “monthly workers’ compensation” to clarify that it is the workers’ compensation benefit that is being referenced.

Section (3) – Clarified that PERS may contact any public or private insurance carrier for documentation of disability payments.

PUBLIC HEARING AND TESTIMONY

The first public hearings were held on October 18 and 27, 2004, with no attendance at those hearings. The original public comment period ended on November 19, 2004. On that date, we received a letter from Nelson Hall of Bennett, Hartman, Morris & Kaplan, LLP, commenting on the proposed rule changes. A copy of Mr. Hall’s letter was included in the May 24, 2005 Board packet. Mr. Hall’s comments, and our responses, were set forth in that Board memo.

At the May 24, 2005 Board meeting, Greg Hartman of Bennett, Hartman, Morris & Kaplan, LLP, appeared before the Board and expressed concern that the public did not have sufficient opportunity to comment on the proposed rules. When asked by Chair Pittman if he had attended the public hearings, Mr. Hartman responded by stating it was his experience that there were not any “professionals” at the hearings to respond to comments or questions, so he did not attend.

The Board directed staff to re-open the public comment period and make sure to address Mr. Hartman's concerns about staff availability at subsequent public hearings.

At the June 23, 2005 Legislative Advisory Committee meeting, Nelson Hall discussed his concerns with the proposed disability rules with the committee. He raised the same concerns and comments that were presented in his November 19, 2004 letter to PERS. The committee did not ask staff to make any changes to the rules as proposed. A copy of that meeting's minutes is attached to this memo.

The third public hearing was held in Tigard on July 26, 2005. As requested, PERS had a total of seven professional staff members in attendance to answer any questions on the proposed rules or disability program as a whole. No one else attended that hearing.

On August 30, 2005, Nelson Hall of Bennett, Hartman, Morris & Kaplan, LLP, submitted another letter commenting on the proposed rule changes. A copy of Mr. Hall's letter is included with this memo. Further reply to his most recent letter is set forth below.

Legislative Advisory Committee meeting. In his August 30, 2005 letter, Mr. Hall requested that his "testimony" from the June 23, 2005, meeting be transcribed and incorporated into the record. As noted above, the meeting minutes are attached to this memo. Staff does not customarily transcribe these meetings. Staff offered to make the meeting tape available to Mr. Hall if he wished to have it transcribed and submitted to the Board. His comments at the meeting were taken into consideration and additional modifications to the proposed rules were made based on those comments.

Definition of duty disability. OAR 459-015-0001(15). Mr. Hall argues that the proposed rule language providing that a duty disability arise while "actually on the job" is unclear and undefined. Mr. Hall goes on to state that the current rule "already includes the phrase 'which arises out of or in the course of duty,'" and that phrase "is sufficient to define the requirement that the injury or disease be caused by work" and it should remain.

In Mr. Hall's November 19, 2004 letter, however, he specifically requested we remove the language he now claims is "sufficient," stating that "this phrase has been the subject of case-by-case litigation in the workers' compensation field for decades." Because the phrase "arises out of or in the course of duty" appeared to be controversial in the workers' compensation field and may have become the source of the same type of confusion in the PERS Chapter 238 Program, the terminology was removed from the definition per Mr. Hall's earlier comments. Now he is requesting we put it back in. We have reinserted the earlier language based on this comment.

Pre-existing condition. OAR 459-015-0001(16). Mr. Hall requests that the definition of pre-existing condition be clarified so that it is clear that although the pre-existing condition may contribute to the disability, the on-the-job injury is otherwise the efficient, dominant, and proximate cause of the disability. Staff has clarified the definition.

Requirement of medical exam to accompany report or evaluation by a psychologist. OAR 459-015-0010(3)(a). Mr. Hall comments that this requirement makes no sense. This is not a new requirement. Because psychologists are not medical doctors, a report or evaluation from a psychologist must be accompanied by a medical physicians' report. No changes were made in response to this comment.

Incapacitation. OAR 459-015-0010(4). Mr. Hall comments that the term “impairs” is more stringent than the previous term, “incapacitates” and asks that since the underlying criteria remains the same, why change the term? No changes were made in response to this comment primarily because the term “incapacitate” is the term used in a portion of the rule that was previously proposed for removal, but was put back in per Mr. Hall’s request at the June 23, 2005 LAC meeting. Because staff re-incorporated the previous language which contained the term “incapacitate,” that term is most appropriate in the context of the provision.

Effective date of retirement. OAR 459-015-0025(4)(c). The proposed rule amendment provides that if a disability application is denied, a member may “convert” to a service retirement effective the first of the month that the application for a disability retirement allowance was received by PERS. Previously, that date was the first of the month following the last day the member performed service with a participating employer. Mr. Hall comments that it is unclear what rationale, if any, exists for moving the effective retirement date. The previous language was contradictory to the provisions for a service retirement which provides that a service retirement can be no sooner than the first of the month following separation from a participating employer or the first of the month in which a member submits an application, whichever is later. No changes were made in response to this comment.

Trial period. OAR 459-015-0045(1)(c). Mr. Hall comments that the trial (therapeutic) period for work effort has been reduced from 6 months to 90 days. This interpretation, however, is incorrect. The trial period is and has always been 90 days. The 6-month provision does not have anything to do with the 90-day trial period and was removed because it added confusion. No changes have been made in response to this comment.

Division 76. Finally, Mr. Hall submits the same comments for Division 76 where the rules are parallel. Our responses for Division 76 are the same as those set forth above.

LEGAL REVIEW

The attached drafts of OAR 459-015-0000 through 459-015-0060 were submitted to the Department of Justice for review. Assistant Attorney General Joe Dunne reviewed the drafts and his recommendations have been incorporated into these modifications.

IMPACT

Mandatory: No. Amending the current rules, however, will bring clarity to this program and is long overdue.

- **Impact:** None. These rule modifications clarify standards and practices so members have sufficient, consistent information.

Cost:

- ♦ *Members:* There will be no additional cost to members that is not already a part of the administration of the program.

- ♦ *Employers:* There are intrinsic costs to employers since disability retirement allowances are borne by the employer. Clarification of the standards will allow the disability program to be administered in a more efficient and consistent manner, which should result in the payment of disability benefits under a clear, consistent framework.
- ♦ *Administration:* Although some minor changes to the program are proposed, the changes will require little administrative adjustment and will not substantially affect costs to review, process, or administer disability benefits. The majority of changes are clarifications of how the program is already administrated.
- ♦ *Fund:* There will be no effect on the Fund.

RULEMAKING TIMELINE

September 15, 2004	Staff began the rulemaking process. Deadline to file Notice of Rulemaking with the Secretary of State.
September 17, 2004	Board notified that staff began the rulemaking process.
October 1, 2004	<i>Oregon Bulletin</i> published the Notice and the public comment period began.
October 18, 2004	A public hearing was held in Salem in conjunction with OPSRP Division 76 disability rulemaking.
October 27, 2004	A public hearing was held in Tigard in conjunction with OPSRP Division 76 disability rulemaking.
November 19, 2004	First reading. First public comment period ended.
May 24, 2005	PERS staff requested adoption of the proposed rules. The PERS Board directed staff to re-open public comment.
July 26, 2005	A third public hearing was held in Tigard in conjunction with OPSRP Division 76 disability rulemaking.
August 31, 2005	Second public comment period ended.
September 23, 2005	PERS staff will request adoption of the proposed rules.

BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt the permanent rule modifications to Division 15, as presented, to be effective upon filing.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

Adoption – OAR 459-015-0000 to 0060

9/23/05

Page 8 of 8

Reason: The rule modifications are needed to provide clarity to staff and members on how the disability program is administered.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is warranted.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING	9/23/05
DATE	
AGENDA	D.2.
ITEM	Div. 015 Disability

1 **459-015-0000**

2 **Purpose**

3 (1) The Legislative Assembly has established within the Public Employees
4 Retirement System (PERS) a program for early retirement by reason of disability. The
5 disability retirement program is solely intended to provide benefits to those members
6 who are unable to work because they are disabled and cannot perform any work for
7 which they are qualified.

8 (2) Disability retirement is an expedited retirement allowance resulting from a
9 disability and is intended solely to provide benefits to PERS members who are unable to
10 work because they are disabled. A disability retirement allowance is not in addition to a
11 service retirement allowance.

12

13 Stat. Auth: ORS 238.650

14 Stat. Implemented: ORS 238.320 to 238.345

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING	9/23/05
DATE	
AGENDA	D.2.
ITEM	Div. 015 Disability

1 **459-015-0001**

2 **Definitions**

3 The words and phrases used in this Division have the same meaning given them in
4 ORS chapter 238 and OAR 459-005-0001. Additional terms are defined as follows unless
5 the context requires otherwise.

6 (1) Any work for which qualified: A job, not necessarily the last or usual job, which
7 the applicant for a disability retirement allowance:

8 (a) Is physically and psychologically capable of performing, and

9 (b) Has, or may obtain with reasonable training the knowledge, skills and abilities, to
10 perform the job.

11 (2) Certified vocational consultant: A person who satisfies the criteria set forth under
12 either of the following:

13 (a) A Master’s Degree in vocational rehabilitation, and one year of experience in
14 performing vocation evaluations or developing individualized return-to-work plans; or a
15 Bachelor’s Degree and two years of such experience. All degrees must have been earned
16 at an accredited institution, or

17 (b) Accredited as a “Certified Rehabilitation Counselor (CRC)” by the Commission
18 on Rehabilitation Counselor Certification; as a “Certified Insurance Rehabilitation
19 Specialist (CIRS)” by the Certified Insurance Rehabilitation Specialist Commission; or a
20 “Certified Vocational Evaluation Specialist (CVE)” or a “Certified Work Adjustment
21 Specialist (CWA)” by the Commission on Certification of Work Adjustment and
22 Vocation Evaluation specialist.

1 (3) Confidential information: Information of a personal nature such that disclosure
2 would constitute an unreasonable invasion of privacy as defined by state law.

3 (4) Date of disability: The later of:

4 (a) The day an active member ceased to work because of injury or disease,

5 (b) The date an inactive member separated from employment if the inactive member
6 applies for a disability retirement allowance within five years from date of separation and
7 the disability has been continuous from the date of separation, or

8 (c) The date an inactive member was disabled if such disability occurred within six
9 months from date of separation.

10 (5) Date of termination: The date a member terminates from employment such that
11 an employee/employer relationship no longer exists; the last day worked (physically on
12 the job), the last day of paid leave, or the last day of an official leave of absence,
13 whichever is the later.

14 (6) Extended duration: A period of not less than 90 consecutive calendar days, unless
15 the disability is expected to result in the death of the disabled member in less than 90
16 days.

17 (7) Independent medical exam: An exam or exams conducted by a physician chosen
18 by PERS for purposes other than treatment which results in the issuance of a report or
19 reports based on those exams, giving an opinion regarding the claimed injury or disease.

20 (8) Material contributing cause: The efficient, dominant, and proximate cause of the
21 disability, without which the member would not be disabled.

1 (9) Monthly salary: “Salary” as defined in ORS 238.005(20)(a) that is earned in the
2 last full calendar month of employment, and includes employer payments under ORS
3 238.205.

4 (a) Retroactive payments or payments made due to clerical errors, paid in accordance
5 with ORS 238.005(20)(b)(C), are allocated to the period the salary was earned or should
6 have been earned.

7 (b) Payments of salary paid within 31 days of separation are allocated to the period
8 the salary was earned and should be considered as paid on the last date of employment.

9 (10) Monthly salary received: The salary paid, as defined in section (9) of this rule,
10 for the last full calendar month of employment prior to date of disability.

11 (11) Normal retirement age: The age at which a member can retire without a reduced
12 benefit as set forth under ORS 238.005 and 238.280.

13 (12) Other income: Includes, but is not limited to:

14 (a) Salary or wages received as an employee;

15 (b) Self-employment income from:

16 (A) Services industry,

17 (B) Sales,

18 (C) Assembly or manufacturing,

19 (D) Consulting,

20 (E) Property management,

21 (F) Hobby income, or

22 (G) Book advances;

23 (c) “Other income” does not include:

1 (A) Investment income,

2 (B) Rent, and

3 (C) Royalties.

4 (13) Physician: A medical doctor, a doctor of osteopathy, a doctor of oral surgery, a
5 chiropractic doctor, a naturopathic doctor, or a doctor of psychology practicing only
6 within the purview of their license issued by the designated authority of a state.

7 (14) Periodic review: A review of a member receiving a disability retirement
8 allowance to determine whether or not a continued allowance is warranted.

9 (15) Performance of duty: Mental or physical incapacitation arising out of and in the
10 course of duty and is not intentionally self-inflicted. The injury or disease must be
11 initially caused, aggravated or accelerated to cause incapacitation by the performance of
12 the member's duties in the employment of a participating public employer. The job must
13 be the material contributing cause of the injury or disease. Performance of duty includes
14 whatever an employee may be directed, required or reasonably expected to do in
15 connection with his or her employment, and not solely the duties peculiar to his or her
16 position.

17 (16) Pre-existing condition: A condition that was not sustained in actual performance
18 of duty with the current employer.

19 (17) Protected health information: Health information created or received by a health
20 care provider, health plan, or health care clearinghouse, where an individual has a
21 reasonable belief that the information can identify the individual, which relates to:

22 (a) the past, present, or future physical or mental health of an individual,

23 (b) the provision of health care to an individual, or

1 (c) the past, present, or future payment for the provision of health care to an
2 individual.

3 (18) Qualifying position: One or more concurrent positions with a participating
4 employer, in a participating class, which requires 600 or more hours in a calendar year.

5 (19) Separation from all service entitling the member to membership in the system:
6 means the last day worked (physically on the job), the last day of paid leave, or the last
7 day of an official leave of absence, whichever is the later.

8 (20) Similar in compensation: Salary or income, excluding overtime, equaling at
9 least 80% of the monthly salary, as defined in section (9) of this rule.

10 (21) Similar location: A position in the same general area of the applicant's
11 residence or last employment location.

12 (22) Training or vocational rehabilitation program: A comprehensive, coordinated
13 program, usually state or federally funded, to train and assist individuals with disabilities
14 in securing gainful employment commensurate with their abilities and capabilities.

15 (23) Vocational evaluation: An evaluation conducted by a certified vocational
16 consultant, to determine the ability of an applicant to perform any work for which they
17 are qualified.

18 (24) Work related stress: conditions or disabilities resulting from, but not limited to:

19 (a) Change of employment duties;

20 (b) Conflicts with supervisors;

21 (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;

22 (d) Relationships with supervisors, coworkers, or the public;

23 (e) Specific or general job dissatisfaction;

- 1 (f) Work load pressures;
- 2 (g) Subjective perceptions of employment conditions or environment;
- 3 (h) Loss of job or demotion for whatever reason;
- 4 (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;
- 5 (j) Objective or subjective stresses of employment; or
- 6 (k) Personnel decisions.

7

8 Stat. Auth: ORS 238.650

9 Stats. Implemented: ORS 238.320 to 238.345 and 238.435(5)

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0005**

2 **[Purpose] Eligibility for Disability Retirement [Benefits] Allowances**

3 *[(1) The Legislative Assembly has established within the Public Employes’*
4 *Retirement System (PERS) a program for early retirement by reason of disability. If a*
5 *member meets the eligibility requirements, the member can draw disability retirement*
6 *benefits using creditable service time as though the member had continuously worked for*
7 *a PERS participating employer through normal retirement age. Disability retirement is*
8 *an expedited retirement benefit due to disability and based on each individual’s*
9 *particular length of service and creditable service time.]*

10 *[(2)] (1) [Total disability is required, not partial disability.] The Legislative*
11 *Assembly has adopted rigorous criteria for eligibility to draw disability retirement*
12 **allowance[benefits:] . Total, not partial disability, for an extended duration is**
13 **required and eligibility for a disability retirement allowance requires that:**

14 **(a) A member be disabled to such an extent that the member is unable to**
15 **perform any work for which qualified as defined in OAR 459-015-0001(1), and**

16 **(b) Is unable to generate any income that is similar in compensation as**
17 **defined in OAR 459-015-0001(20) as of date of disability.**

18 **(2) In determining a member’s eligibility for a disability retirement**
19 **allowance, the burden of proof is upon the applicant. The Board is not required to**
20 **prove whether the applicant is or is not eligible for a disability retirement**

21 **allowance.** *[a member must be disabled to such an extent that the member is "unable to*
22 *perform any work for which qualified" (ORS 237 .171(1), (3) and OAR 459-015-*

1 0010(4)). A member who is unable to perform his or her usual job but is able and
2 qualified to do other work, does not meet the eligibility criteria; except as provided for in
3 OAR 459-015-0045. (Emphasis added)]

4 [(3) A member fails to meet the eligibility criteria for a PERS disability
5 retirement allowance if the member is able to perform any work for which qualified. The
6 PERS disability retirement program is solely intended to provide benefits to those
7 members who are unable to work because they are disabled and cannot perform any
8 work for which they are qualified.]

9 **(3) Eligibility requirements for duty disabilities. (a) Applicants with less than**
10 **ten years of PERS employment must establish that they are members of PERS and**
11 **were disabled while in the actual performance of duty, as defined in OAR 459-015-**
12 **0001(15).**

13 **(b) A member who has a pre-existing condition (as defined in OAR 459-015-**
14 **0001(16)) must prove that the material contributing cause (as defined in OAR 459-**
15 **015-0001(8)) of the disability was sustained while in actual performance of duty.**

16 **(c) Work related stress, as defined in OAR 459-015-0001(24), will not be**
17 **considered as the material contributing cause, as defined in OAR 459-015-0001(8),**
18 **of a duty disability unless the applicant establishes all of the following:**

19 **(A) The employment conditions producing the work related stress exist in a**
20 **real and objective sense,**

21 **(B) The employment conditions producing the work related stress are**
22 **conditions other than conditions generally inherent in every working situation or**
23 **reasonable disciplinary, corrective or job performance evaluation actions by the**

1 employer, or cessation of employment or employment decisions attendant upon
2 ordinary business or financial cycles,

3 (C) There is a diagnosis of a mental or emotional disorder which is generally
4 recognized in the medical or psychological community, and

5 (D) There is evidence that the work related stress arose out of and in the
6 course of employment.

7 (4) Eligibility requirements for non-duty disabilities. Eligible applicants must
8 have a minimum of ten years of employment as calculated pursuant to ORS
9 238.320(6).

10 (5) If a member meets the eligibility criteria, the member's disability
11 retirement allowance shall be based on creditable service time as though the
12 member had continuously worked for a PERS participating employer to:

13 (a) Age 55 if retiring due to disability when the applicant's last PERS
14 covered position was as a police officer or a firefighter.

15 (b) Age 58 if retiring due to disability when the applicant's last PERS
16 covered position was as other than a police officer or firefighter.

17 (c) Actual service if member is over age 55 or 58 as used in (a) and (b) above.

18 (6) Termination of membership. Disability retirement allowances are
19 available only to PERS members. PERS membership is terminated by either loss of
20 membership or withdrawal of the member account balance as provided in ORS
21 238.095. Therefore, former PERS members who have terminated their membership
22 through loss of membership or withdrawal are not eligible to receive PERS
23 disability retirement allowances.

1

2 Stat. Auth: ORS 238.650 and 238.095

3 Stat. Implemented: ORS 238.320 to 238.345

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0010**

2 **Criteria for Granting and Denying Disability Retirement Allowances[; *Initial***
3 ***Determination*]**

4 (1) Medical documentation is required by *[the staff]* **PERS**. Each disability
5 retirement applicant shall supply any treating or consulting physician’s examination
6 report or other medical information requested by *[the staff]* **PERS**. **PERS** *[The staff]* may
7 *[adopt]* **base** its determination *[based]* on **either** a treating or consulting physician’s
8 medical examination report or have the applicant examined by one or more physicians
9 selected by *[the staff]* **PERS, or both**. *[No disability retirement allowance shall be*
10 *granted unless the diagnosis of injury or disease is supported by a written report or*
11 *reports, prepared by one or more physicians based on a medical examination or*
12 *examinations. [The Board may deny any application or discontinue any disability*
13 *retirement allowance in the case of any person who refuses to submit to any medical*
14 *examination or supply a completed application or review form.*

15 (2)*Extended Duration. Each eligible applicant shall be “incapacitated for an*
16 *extended duration” (ORS 237.171(1), (3)). An “extended duration” means at 90*
17 *consecutive days.]*

18 (2) *[A physician means a medical doctor, a doctor of osteopathy, a doctor of oral*
19 *surgery, a chiropractic doctor, a naturopathic doctor, or a doctor of psychology*
20 *practicing only with the purview of their license issued by the designated authority of a*
21 *state.] All claims of a disability [shall] **must** be supported by at least one physician’s*

1 report, **resulting from a [of] physical examination, [.] documenting how the injury or**
2 **disease incapacitates the member.**

3 (3) In addition, a disability retirement applicant shall be required to furnish the
4 following:

5 (a) For claims of mental or emotional disorder, at least one report of examination
6 by a psychiatrist or at least one report of evaluation by psychologist when accompanied
7 by a report of physical examination by a treating or consulting physician; [and]

8 (b) For claims of orthopedic injury or disease, at least one report of a treating or
9 consulting orthopedic specialist;

10 **(c) For claims of neurological or neurosurgical injury or disease, at least one**
11 **report of treating or consulting neurologist or neurosurgeon;**

12 **(d) For claims of fibromyalgia, at least one report of a treating or consulting**
13 **rheumatologist; and**

14 **(e) Any other specialized physician’s report that PERS deems necessary.**

15 (4) To demonstrate that he or she is [“]unable to perform any work for which
16 qualified[”], **as defined in OAR 459-015-0001(1),[an eligible]** the applicant shall
17 document how the injury or disease **incapacitates** [impairs] the applicant[‘s ability to
18 perform]. The standard is subjective (that is, whether the applicant is actually
19 incapacitated) not objective (that is, whether a "normal" member would have been
20 incapacitated by the same events)[:];

21 (a) In determining what work for which a member is qualified, the following
22 factors shall be considered:

23 (A) Previous employment experience;

- 1 (B) Formal education;
- 2 (C) Formal training;
- 3 (D) Transferable skills;
- 4 (E) Age; and
- 5 (F) Physical or mental impairment.

6 (b) In determining what work for which a member is qualified, **PERS** [*the staff*]
7 may request, **at PERS expense**, a vocational evaluation be done by a vocational
8 consultant who is fully certified **as set forth in OAR 459-015-0001(2)(a) or (b).** [*under*
9 *paragraphs (A) and (B) of this subsection, at PERS expense:*

10 (A) *Full certification as a vocational consultant requires a Master's Degree in*
11 *vocational rehabilitation; or a Master's Degree in a field related to vocational*
12 *rehabilitation, and one year of experience in performing vocational evaluations or*
13 *developing individualized return-to-work plans; or a Bachelor's Degree and two years of*
14 *such experience. All degrees must have been earned at an accredited institution;*

15 (B) *Regardless of these requirements, an individual will be considered fully*
16 *certified if accredited as a "Certified Rehabilitation Counselor (CRC)" by the*
17 *Commission on Rehabilitation Counselor Certification; as a "Certified Insurance*
18 *Rehabilitation Specialist (CIRS)" by the Certified Insurance Rehabilitation Specialist*
19 *Commission; or a "Certified Vocational Evaluation Specialist (CVE)" or a "Certified*
20 *Work Adjustment Specialist (CWA)" by the Commission on Certification of Work*
21 *Adjustment and Vocation Evaluation Specialist.*

1 (c) Any work means a suitable job which the applicant is physically capable of
2 performing and is substantially similar to the former job in compensation, location and
3 duration.]

4 [(d)] (c) The inability of the applicant to perform the duties of his or her last job,
5 in itself does not satisfy the criterion.

6 **(5) When there is a dispute among medical experts, more weight will be given**
7 **to those medical opinions that are both well reasoned and based on complete**
8 **information.**

9 **(6) The Board may deny any application or discontinue any disability**
10 **retirement allowance if an applicant refuses to submit to an independent medical or**
11 **vocational examination.**

12 [(5) Duty Disabilities. Applicants with less than ten years of PERS qualified
13 employment must establish that they are members of PERS and were disabled on the job;
14 the applicant's disability must arise out of and in the course of the applicant's
15 employment (ORS 237.171(2)):

16 (a) In performance of duty: Each duty disability retirement applicant shall
17 establish that the claimed disability was "sustained while in the actual performance of
18 duty" (ORS 237.171(1)). That means that the injury or disease was initially caused
19 aggravated or accelerated by the performance of the member's duties in the employment
20 of a participating public employer, not that the job is merely a contributing factor. The
21 job must be the material contributing cause of the injury or disease. Performance of duty
22 includes whatever an employee may be directed, required or reasonably expected to do

1 in connection with his or her employment, and not solely the duties peculiar to his or her
2 position;

3 (b) *Pre-existing condition or disease: Although a pre-existing condition or*
4 *disease may contribute to the result, the on-the-job injury or disease must be the efficient,*
5 *dominate and proximate cause of the duty disability.*

6 (6) *Non-Duty Disabilities. Eligible applicants must have eight years, six months*
7 *and one day of PERS creditable service that when added to any six-month waiting*
8 *period, prior service credit or service credit pursuant to an integration totals a minimum*
9 *of ten years of PERS qualified employment (ORS 237 .171(6)).*

10 (7) *Withdrawal of PERS member's account. Disability retirement allowances are*
11 *available only to PERS members (ORS 237 .171(1), (3)). PERS membership is terminated*
12 *by withdrawal of the member's account balance (ORS 237.109(1)). Therefore, former*
13 *PERS members who have withdrawn their accounts are not eligible to receive PERS*
14 *disability retirement allowances.]*

15 Stat. Auth: ORS 238.650

16 Stat. Implemented: ORS 238.320 and 238.335

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**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING	9/23/05
DATE	
AGENDA	D.2.
ITEM	Div. 015 Disability

OADR 459-015-0015 is Repealed:

1 *[459-015-0015*

2 *Commencement of Disability*

3 *The effective date of disability retirement shall be the date determined by the staff*
4 *according to applicable statutes and administrative rules, but a disability retirement*
5 *allowance shall not in any event begin in any month in which the member received salary*
6 *or paid leave benefits from a participating employer, exclusive of the cash pay-off of*
7 *accrued vacation or compensatory time.]*

8

9 Stat. Auth: ORS 238.650

10 Stats. Implemented: ORS 238.005(11) and 238.320

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0020**

2 **Application Required**

3 (1) No disability retirement allowance *[shall]* **will** be paid unless the member files a
4 timely and complete application. *[with the staff.]*

5 (2) Applications *[shall]* **must** be made on forms prescribed by **PERS** *[the staff]*.

6 **PERS** *[the staff]* may require the member to provide any information that **PERS** *[the*
7 *staff]* considers necessary to determine the applicant's eligibility for a disability retirement
8 allowance.

9 (3) Application may be made by a member or the member's authorized representative.
10 A representative *[shall]* **must** submit to **PERS** *[the staff]* written proof of the
11 representative's authority; such as, a power of attorney, guardianship or conservatorship
12 appointment.

13 (4) Upon the filing of an application for a disability retirement **allowance** *[benefit, the*
14 *applicant must authorize the staff to notify the applicant's employer(s) of such application.*
15 *Upon the filing of an application,]* **PERS** *[the staff shall]* **will** notify the applicant's current
16 or most recent employer of the filing. Additionally, **PERS** *[the staff]* may request of an
17 employer information pertaining to current or previous employment.

18 (5) When an employee member is disabled due to injury or disease, the member may
19 make application immediately after the last day worked even though the member may be
20 on a paid leave or on an official leave of absence without pay. No application will be
21 accepted *[which]* **that** predates the last day the member was actually on the job.

1 (6) An application *[shall]* **will** be considered filed in a timely manner when received
2 by PERS as follows:

3 (a) For a member who is disabled due to injury or disease and **has terminated**
4 **employment from all PERS covered service** *[entitling the member to membership not*
5 *separated from membership]*, the member must file an application for a disability
6 retirement allowance within five calendar years of the **date of termination.***[last day*
7 *worked; even though the member may continue on a paid leave or on an official leave of*
8 *absence without pay.]* The disabling condition must be continuous from the date **of**
9 **termination** *[the member last worked]* to the date the application is filed;

10 (b) For a member who is disabled due to injury or disease **after terminating**
11 **employment** *[is separated from all service entitling the member to membership in the*
12 *system]* from all **PERS covered service** *[entitling the member to membership]* and has not
13 withdrawn the amount credited to the account of the member in the system, the member
14 must file an application for a disability retirement allowance within six months *[five*
15 *calendar years]* after the date of **termination.** *[separation. The termination of employment*
16 *must be due to the disability and the disabling condition must be continuous from the date*
17 *the member last worked to the date of application and the separation must be continuous*
18 *from the date of separation to the date the application is filed;]*

19 *[(c) For a member who is disabled due to injury or disease after the date of separation*
20 *from all service entitling the member to membership in the system and has not withdrawn*
21 *the amount credited to the account of the member in the system, the member must file an*
22 *application for a disability retirement allowance within six months after the date of*
23 *separation. The disabling condition must be continuous from the date of onset to the date*

1 of application and the separation must be continuous from the date of separation to the
2 date the application is filed.]

3 **(A) The injury or disease must be continuous from the date of onset to the date of**
4 **application;**

5 **(B) The separation must be continuous from the date of termination to the date**
6 **the application is filed.**

7 **(C)The member must have a minimum of ten years of employment as calculated**
8 **pursuant to ORS 238.320(6).**

9 (7) In determining the effective date of a disability retirement allowance, **PERS** [*the*
10 *staff*] may allow up to 60 months of benefits retroactive from the date the application is
11 filed with PERS, but in no case earlier than the **first day of the month** following the **date**
12 **of termination.** [*last day worked or the last day of paid leave, whichever is later.*]

13 [*(8) For purposes of this rule, the term "separation from all service entitling the*
14 *member to membership in the system" means the last day worked (physically on the job),*
15 *the last day of paid leave, or the last day of an official leave of absence, whichever is the*
16 *later.*]

17 [(9)] **(8)** When making application for a PERS disability retirement allowance, [*the*
18 *applicant shall*] **PERS will request the applicant** authorize any physician, health
19 practitioner, hospital, clinic, pharmacy, employer, employment agency, or government
20 agency to release and disclose to [*the*] PERS [*staff*], or independent physicians and
21 vocational consultants retained by **PERS** [*staff*], any information within their records or
22 knowledge, including that information otherwise protected under federal or state law,
23 regarding the applicant's health and employment which **PERS determines** relates [*solely*]

1 to the applicant's claim of disability and inability to perform any work for which qualified.
2 [When filing an application for disability retirement allowance, the applicant shall
3 complete and sign a consent form which specifically authorizes the release and disclosure
4 of such information.]

5 **(9) When filing an application for disability retirement allowance, if the applicant**
6 **wishes to authorize release and disclosure of protected health information, as defined**
7 **in OAR 459-015-0001(17), the applicant must complete and sign a consent form**
8 **which specifically authorizes the release and disclosure of such information.**

9 **(a) This authorization is voluntary. Because PERS is not a covered entity as**
10 **defined in 45 C.F.R., Parts 160 and 164, the protected health information is not**
11 **subject to federal and state health information privacy laws, but is protected under**
12 **Oregon State Public Record disclosure laws.**

13 **(b) This authorization may be revoked in writing at any time, except to the extent**
14 **the entities named on the authorization form(s) have taken action in reliance of the**
15 **authorization.**

16 **(c) If the applicant refuses to give or revokes authorization to disclose to PERS**
17 **medical information that PERS determines it needs to evaluate the application,**
18 **eligibility for a disability retirement allowance may be affected.**

19
20 Stat. Auth.: ORS 183.310 - ORS 183.550, ORS 237 .171, ORS 237 .191, ORS 237.263,
21 and 45 CFR Parts 160 and 164.

22 Stats. Implemented:

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0025**

2 **Application Processing – Independent Examinations and Appeals**

3 (1) Following the timely filing of a completed application, *[the]* **PERS may, at**
 4 **its discretion, request an independent medical exam or a vocational evaluation.** *[or a*
 5 *physical capacities evaluation].* **If PERS requests one or more of these exams or**
 6 **evaluations, PERS will pay the reasonable associated expenses.** *[select one or more*
 7 *physicians and may select one or more vocational consultants to examine the applicant*
 8 *at PERS’ expense.]*

9 (a) **For independent medical exams,** *[The staff]* **PERS** shall inform the
 10 applicant **in writing and postmarked** not less than ten days prior to a scheduled
 11 examination of the identity of the physician(s) *[or vocational consultant(s)]* selected to
 12 examine the applicant, together with location, date and time. *[by certified mail, return*
 13 *receipt requested]*

14 **(b) For vocational evaluations, the vocational consultant or locator service**
 15 **shall inform the applicant of the location, date and time of the scheduled**
 16 **examination.**

17 *([b]c)* If the applicant fails to meet the scheduled appointment or fails to
 18 reschedule the examination within five days of notification, PERS will not reschedule an
 19 examination at PERS’ expense unless the applicant can demonstrate good cause for
 20 having failed to meet the scheduled appointment or reschedule the appointment as
 21 required.

22 **(d)** Good cause includes, but is not limited to:

1 (A) Physical or mental incapacitation preventing the member from meeting or
2 rescheduling the examination;

3 (B) [f] Failure of [staff] **PERS or the vocational consultant or locator service**
4 to send the member notice as described above; or

5 (C) A death in the member’s immediate family.

6 [(D) the death of the member.]

7 (d) Good cause does not include:

8 (A) [a] A member’s refusal to attend the scheduled appointment;

9 (B) [a] A member’s failure to meet the appointment with no reason provided; **or**

10 (C) **A member’s failure to make appropriate transportation arrangements.**

11 [(c)] (2) When **PERS** [the staff] requires an applicant to travel to be examined by
12 a physician, vocational consultant, or other professional, [the system] **PERS** [shall] **will**
13 reimburse the applicant’s reasonable transportation costs based on the least costly
14 alternative and on availability. Travel by private vehicle shall be compensated at the rate
15 applicable to travel by unrepresented state employees on state business. Transportation
16 by **taxi, bus,** rail[road], [bus] or other public carrier shall be paid only upon presentation
17 of receipts from the providers. Lodging and subsistence shall be allowed only when an
18 overnight stay is necessary and shall be paid at the rate applicable to unrepresented state
19 employees traveling on state business. Reimbursements will be reduced by the amount of
20 any penalty assessed by PERS because of a member’s failure to meet a scheduled
21 appointment.

22 (3) **In the event a member fails to meet a scheduled appointment in**
23 **accordance with section (1) of this rule, and PERS is assessed a penalty by the**

1 service provider for the failure to meet the scheduled appointment, the disability
2 applicant shall bear the cost of the penalty as follows:

3 (a) If the disability application is not approved, by making direct payment to
4 the service provider who assessed the penalty, or

5 (b) If the disability application is approved:

6 (A) By making direct payment to the service provider who assessed the
7 penalty, or

8 (B) By having the amount of the penalty deducted from the monthly
9 disability retirement allowance, as provided for under ORS 238.715, payable to the
10 member until the invoice is satisfied.

11 [(2)] (4) The Director, or the Director’s designee, is hereby authorized to
12 approve or deny a disability retirement application. Upon receipt and review of all
13 necessary documentation, staff shall present applicant’s claim to the Director, or the
14 Director’s designee, with a recommendation to approve or to deny a disability
15 retirement allowance. The Director, or the Director’s designee, may accept or reject
16 the staff’s recommendation[.The Director may], or refer the application back to staff
17 for further documentation and review. [;].

18 (a) If the Director, or the Director’s designee, *[accepts]* approves a disability
19 claim, the staff *[shall]* will notify the applicant and the applicant’s employer of such
20 approval. *[;]*

21 (b) If the *[staff’s recommendation is to deny]* the *[application]* disability claim is
22 denied, the staff shall issue an *[initial denial]* Intent to Deny letter by regular and
23 certified mail, return receipt requested. *[, prior to the Director’s action.] [This]* The

1 **denial** letter shall advise the applicant that additional information to substantiate the
2 claim, or a request for an extension of 30 days to present additional information, may be
3 submitted to the staff in writing within 30 days of the date of the **Intent to Deny** letter.

4 **(c) An applicant who is otherwise eligible for a service retirement allowance**
5 **shall have 30 days from the date of the Intent to Deny letter to apply for a service**
6 **retirement allowance and be entitled to establish an effective date of service**
7 **retirement [which is the later of] for the first of the month that the application for**
8 **disability retirement allowance was received by PERS. [or the first of the month**
9 *following the last day the member performed service for a participating employer.]*

10 **(d) The application for a service retirement allowance as provided for in**
11 **subsection (c) of this section shall not preclude a disability applicant from**
12 **requesting a contested case hearing under OAR 459-015-0030.**

13 *[(3)]* **(5)** Following the issuance of an *[initial denial]* **Intent to Deny** letter, staff
14 *[shall]* **will** review any additional information which is submitted *[in a timely manner]*
15 **within 30 days from the issuance of the Intent to Deny letter. [;]**

16 (a) If the additional information results in a recommendation to approve the
17 application, staff shall resubmit the application to the Director, or the Director’s
18 designee, with **the** recommendation. *[;]*

19 (b) If the additional information does not result in a recommendation to approve
20 the application, **PERS** *[staff shall]* **will** issue a final denial letter by **regular and** certified
21 mail, return receipt requested. *[;]*

22 (c) If no additional information is received, **PERS** *[staff shall]* **will** issue a final
23 denial letter by **regular and** certified mail, return receipt requested.

1 [(4) A] **(6)** The final denial letter *[shall]* **will** provide the applicant with
2 notification of the right to request a contested case hearing as provided for in OAR 459-
3 015-0030 and 459-001-0035.

4 [(5)] **(7) PERS** *[The staff shall]* **will** notify the most recent employer of the
5 *[acceptance]* **approval** or the denial of an application for a disability retirement
6 allowance, a request for review of the Director’s determination, and the Director’s final
7 action. Such notification *[shall]* **will** not contain any *[information of a]* confidential
8 *[nature]* **information as defined in OAR 459-015-0001(3).**

9 [(6) *The Director shall produce a summary of activity pertaining to PERS’*
10 *disability retirement applications for Board review and comment at each of its regularly*
11 *scheduled meetings.]*

12

13 Stat. Auth: ORS 238.650

14 Stat. Implemented: ORS 238.320 and 238.335

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0045**

2 *[Notification -]* **Return to Work**

3 (1) The Public *[Employes']* **Employees** Retirement Board allows **a member who**
 4 **is receiving a disability allowance to** return to work as follows: *[(ORS 237.187 (3)):]*

5 (a) **Returning to work in a PERS qualifying position.** A member *[receiving a*
 6 *disability retirement allowance]* who has not been medically released for any work for
 7 which qualified, may return to work in a PERS qualify*[ied]***ying position, as defined by**
 8 **OAR 459-010-0003,** for a 90-day trial period without losing disability retirement status.
 9 *[Benefits will not be paid during the trial period. Wages paid during the 90 day trial*
 10 *period are excluded from the definition of salary/wages for purposes of computing PERS*
 11 *contributions or determining PERS retirement benefits unless the member continues the*
 12 *employment beyond 90 days. The disability retirement allowance will be reinstated at the*
 13 *end if the 90 day period, or sooner, if the member us unable to continue employment due*
 14 *to the disabling injury or illness as confirmed by medical documentation;]* **While the**
 15 **member is working during this trial period:**

16 (A) **Disability benefits will be suspended.**

17 (B) **Any wages earned during the trial period are excluded from the**
 18 **definition of salary for purposes of computing PERS contributions or determining**
 19 **PERS retirement benefits unless the member continues the employment beyond 90**
 20 **days. If the member continues beyond the 90 days, the period will be considered**
 21 **qualifying as of the first day the member returned to work and retroactive**
 22 **contributions, without interest, are required.**

1 *[(b) A member receiving a disability retirement allowance who has not been*
2 *medically released for any work for which qualified, may return to work with a PERS*
3 *participating employer in a position not qualified for PERS membership. Income earned*
4 *by the member is not subject to PERS contributions. The monthly disability retirement*
5 *allowance shall be adjusted by any earned or paid income which, when added to the*
6 *disability retirement allowance, exceeds the gross monthly salary earned or paid at the*
7 *time of retirement for disability;*

8 *(c) A member receiving a disability retirement allowance who has not been*
9 *medically released for any work for which qualified, may be employed by other than a*
10 *PERS participating employer. The monthly disability retirement allowance shall be*
11 *adjusted by any earned or paid income which, when added to the disability retirement*
12 *allowance, exceeds the gross monthly salary earned or paid at the time of retirement for*
13 *disability.]*

14 **(b) Returning to work in a PERS non-qualifying position. A member who has**
15 **not been medically released for any work for which qualified, may return to work**
16 **with a PERS participating employer in a position not qualifying for PERS active**
17 **membership. Unless the member has reached normal retirement age, the monthly**
18 **disability retirement will be adjusted by any earned income which, when added to**
19 **the disability retirement allowance, exceeds the gross monthly salary earned at the**
20 **time of retirement for disability;**

21 **(c) Returning to work in a non-PERS position. A member who has not been**
22 **medically released for any work for which qualified, may be employed by other**
23 **than a PERS participating employer. Unless the member has reached normal**

1 retirement age, the monthly disability retirement allowance shall be adjusted by any
2 wages which, when added to the disability retirement allowance, exceeds the gross
3 monthly salary earned at the time of retirement for disability.

4 *[(2) A member receiving a disability retirement allowance who returns to work*
5 *under subsection (1)(b) and/or (c) of this rule and continues that employment for a*
6 *period exceeding six full calendar months is deemed to be performing work for which*
7 *qualified and benefits shall be terminated as of the beginning of the seventh calendar*
8 *month.]*

9 *(3) Exclusive of section (2) of this rule, a member receiving a disability retirement*
10 *allowance who has not been medically released for any work for which qualified, but is*
11 *medically approved for therapeutic employment, may return to work. Employment under*
12 *this section shall be within the constraints prescribed by an attending or consulting*
13 *physician. The monthly disability retirement allowance shall be adjusted by any earned*
14 *or paid income as provided for in subsections (1)(b) and (c) of this rule].*

15 *[(4)]* **(2)** A member's disability retirement allowance *[shall]* **will** be terminated if
16 the member has been medically released for any work for which qualified~~].~~, **whether**
17 **the member returns to work or not, and PERS will invoice the member for, or**
18 **recover under ORS 238.715, any overpayment of benefits.**

19 *[(5)]* **(3) If** [A] **a** member *[receiving a disability retirement allowance]* **returns**
20 **to work as provided in sections (1) or (2) of this rule, the member must:**

21 **(a)** *[shall n]* **Notify** PERS in writing of the *[member's]* reemployment within 30
22 days of such reemployment~~].~~, **and**

23 **(b) Report monthly to PERS the amount of any earned income.**

1 (4) PERS may contact other public or private agencies, such as the Oregon
2 Employment Department, the Oregon Department of Revenue, or the U.S. Internal
3 Revenue Service to obtain employment information.

4 (5) Upon request by PERS, a member must provide PERS with a copy of the
5 member's federal income tax returns, together with copies of IRS forms W-2.

6 (6) The Board may require medical examination reports or vocational
7 evaluations for any member receiving a disability retirement allowance who is
8 reemployed.

9 (7) If the member is reemployed under section (1) of this rule and is unable
10 to continue employment due to the disabling injury or disease as confirmed by
11 medical documentation, the member or employer must notify PERS. If medical
12 documentation substantiates that the disability prevents the completion of the trial
13 period, the disability retirement allowance will be reinstated at the end of the 90 day
14 period, or as of the date the member leaves the trial employment, whichever is
15 sooner.

16 *[(7) If a member returns to work as provided in subsection (1)(b) or (c) or section*
17 *(3) of this rule, the member shall report monthly to PERS the amount of any earned or*
18 *paid income. Upon the request by PERS, a member shall provide PERS with a copy of*
19 *the member's federal income tax returns, together with copies of IRS forms W-2.*

20 *(8) If a member returns to work as provided in subsection (1)(b) or (c) or section*
21 *(3) of this rule and the member has reached normal retirement age, the member is no*
22 *longer required to report any earned or paid income and the member's disability*

1 retirement allowance shall no longer be adjusted by any amount of earned or paid
2 income.]

3 [(9)] **(8)** A disability retirement allowance shall not be discontinued solely by
4 reason of the retired member entering a training or vocational rehabilitation program **as**
5 **defined in OAR 459-015-0001(22).**

6 **(9) Restoration of member account after return to work. If a member**
7 **returns to PERS covered employment after the 90-day trial period, or is medically**
8 **released at any time for any work for which they are qualified, the disability claim**
9 **will be closed and the member’s regular and variable PERS account(s) will be**
10 **restored to the dollar amount of the account as of the effective date of disability.**

11 **(10) Creditable service. A member does not receive creditable service while**
12 **drawing disability benefits. If, however, the member returns to PERS covered**
13 **employment, their disability claim is closed, and they subsequently retire under a**
14 **service retirement, service time for the period of disability will be restored as**
15 **follows:**

16 **(a) For duty disabilities, creditable service will be granted to the member at**
17 **no cost to the member.**

18 **(b) For non-duty disabilities, creditable service may be purchased by the**
19 **member under the provisions of ORS 238.175.**

20

21 Stat. Auth: ORS 238.320, 238.335, 238.330, 238.650, and 238.715

22 Stat. Implementation: ORS 238.175 and 238.330

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0050**

2 **Periodic Reviews**

3 (1) Members receiving disability retirement allowance are subject to periodic
4 reviews of their disabled status **until the member reaches normal retirement age or**
5 **staff determines that periodic reviews are no longer warranted.** *[The reviews may be*
6 *either medical or vocational in nature. The staff shall establish review dates for each*
7 *member receiving a disability retirement allowance. Upon review, the staff may accept*
8 *treating or consulting physician reports or may require independent medical or*
9 *vocational examinations. The staff may discontinue immediately the disability retirement*
10 *allowance of any person who refuses to provide current medical evidence or refuses to*
11 *submit to an examination.]*

12 **(2) Periodic reviews will be used to determine that continued disability**
13 **retirement allowances are warranted. In recommending the continuance or**
14 **discontinuance of a disability retirement allowance, for the original approved**
15 **disability or a new medical condition, PERS will follow the criteria established**
16 **under OAR 459-015-0010.**

17 **(3) For duty disability, the periodic review will not revisit the original**
18 **determination that the injury or disease was duty caused, unless there is evidence of**
19 **misrepresentation or fraud.**

20 **(4) PERS will establish review dates for each member subject to a periodic**
21 **review depending on type of disability, extent of disability, and medical reports**
22 **unique to each individual case.**

1 (a) The reviews may be medical or vocational in nature, or both.

2 (b) Upon review, PERS may accept or require:

3 (A) new treating or consulting physician or specialist reports,

4 (B) updated physician or specialist reports,

5 (C) independent medical or vocational examinations, or

6 (D) employment and wage information, including but not limited to, tax

7 returns or information from the State Employment Department.

8 (c) PERS may immediately discontinue the disability retirement allowance of

9 any person who refuses to provide current medical evidence or refuses to submit to

10 an examination.

11 (A) If the disability claim is discontinued, the staff shall issue an Intent to

12 Discontinue letter by regular and certified mail, return receipt requested. The

13 discontinuation letter shall advise the applicant that additional information to

14 substantiate the claim, or a request for an extension of thirty (30) days to present

15 additional information, may be submitted to the staff in writing within thirty (30)

16 days of the date of the Intent to Discontinue letter.

17 (B) Following the issuance of an Intent to Discontinue letter, staff will review

18 any additional information which is submitted within thirty (30) days.

19 (i) If the additional information results in a recommendation to approve the

20 application, staff shall resubmit the application to the Director, or the Director's

21 designee, with the recommendation.

1 (ii) If the additional information does not result in a recommendation to
2 approve the application, PERS will issue a final discontinuation letter by regular
3 and certified mail, return receipt requested.

4 (C) If no additional information is received within thirty (30) days, PERS will
5 issue a final discontinuation letter by regular and certified mail, return receipt
6 requested.

7 (D) The final discontinuation letter will provide the applicant with
8 notification of the right to request a contested case hearing as provided for in OAR
9 459-015-0030 and 459-001-0035.

10 (5) The member has the burden to prove continuing eligibility for a disability
11 retirement allowance.

12 *[(2) Periodic reviews, investigations, and examinations to determine a member's*
13 *continued disability retirement allowance will be waived by the staff upon the member*
14 *reaching normal retirement age.]*

15 *[(3) The Director is hereby authorized to approve or deny the continuance of a*
16 *disability retirement allowance].*

17 *[(4) In recommending the continuance or discontinuance of a disability*
18 *retirement allowance, staff shall follow the procedure established under OAR 459-015-*
19 *0010(25)(2), (3) and (4)].*

20 (6) The Director, or the Director's designee, is authorized to approve or deny
21 the continuance of a disability retirement allowance.

1 *[(5) The Director shall produce a summary of activity pertaining to PERS’*
2 *continuance or discontinuance of disability retirement allowance for Board review and*
3 *comment at each of this regularly scheduled meetings].*

4 *[(6) A denial letter shall provide the applicant with notification of the right to*
5 *request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-*
6 *0035.]*

7

8 Stat. Auth: ORS 238.650

9 Stat. Implemented: ORS 238.320 and 238.335

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0055**

2 **Selection of Benefit Option and Commencement of Allowance**

3 (1) Upon filing an written application for a disability retirement allowance, the
4 member *[shall]* **may** make a preliminary designation of beneficiary and a preliminary
5 selection of benefit option. *[The designation and selection shall be effective only upon*
6 *the Board's approval of the application for disability retirement allowance.]*

7 **(a) A member may choose from retirement Options 1, 2, 2A, 3, 3A, 15 year**
8 **certain or refund annuity as set forth in ORS 238.300 and 238.305, or an optional**
9 **disability retirement allowance under ORS 238.325.**

10 **(b) A member may not choose a lump-sum option.**

11 (2) Within 90 days following the *[Board's]* **Director's, or the Director's**
12 **designee's,** approval of the application for disability retirement allowance, the member
13 *[may change the]* **must complete a final** designation of beneficiary *[or the]* **and**
14 selection of benefit option *[by filing written notice with the staff]* **on forms provided by**
15 **PERS. Receipt of the final forms will supercede any preliminary beneficiary**
16 **designation or benefit option.**

17 **(a) The final option selected applies only to the corresponding time period**
18 **the member is receiving a disability retirement allowance.**

19 **(b) The beneficiary designation or benefit option may be changed up to 60**
20 **days after the date of the first benefit payment as provided in ORS 238.325(2).**

1 **(c) If a member’s disability retirement allowance is canceled, the option**
2 **selected for the purposes of that disability retirement allowance is canceled and a**
3 **new option may be selected upon a subsequent disability or a service retirement.**

4 **(3) If the member does not complete a final selection of benefit option within**
5 **90 days following the Director’s, or the Director’s designee’s, approval of the**
6 **application for disability retirement allowance:**

7 **(a) The benefit will be the benefit as set forth under ORS 238.320(1), and**

8 **(b) The latest beneficiary designation on file for the PERS Chapter 238**
9 **Program will be used to determine the default beneficiary. If no designation exists,**
10 **the beneficiary will be as provided for under ORS 238.390(2).**

11 *[(3) The payment of the disability retirement allowance shall commence within*
12 *ten days following receipt by the staff of all of the following items, but not earlier than*
13 *the first of the month following the 90 consecutive day period of incapacitation or the*
14 *first full calendar month following final payment by employer of any wages or paid*
15 *leaves:*

16 *(a) From the member:*

17 *(A) Confirmation of Benefit Option Selection;*

18 *(B) Birth Proof for the member;*

19 *(C) Birth Proof of age for the designated beneficiary if a joint survivor option is*
20 *elected.*

21 *(b) From the employer:*

22 *(A) Separation for Disability Retirement form, or*

23 *(B) Separation from PERS Covered Employment form.]*

1 (4) Purchases. If a member is eligible to purchase additional creditable
2 service or retirement credit under ORS chapter 238, the payment for the
3 purchase(s) shall accompany the final selection of benefit option form.

4 (5) The payment of a disability retirement allowance shall commence within
5 ten days following receipt by PERS of all of the following items, or the date the first
6 payment is due, as set forth in Section (6) of this rule, whichever is later:

7 (a) From the member:

8 (A) Final designation of beneficiary and selection of benefit option form;

9 (B) Proof of member's age;

10 (C) Proof of age for the designated beneficiary if a joint survivor option is
11 elected; and

12 (D) Spousal consent form.

13 (b) From the employer:

14 (A) Financial, and

15 (B) Demographic information indicating the member has separated from
16 PERS-covered employment.

17 (6) A disability payment is first due on the later of:

18 (a) The first of the calendar month in which the member files a complete
19 application for disability benefits with PERS, or

20 (b) The first of the month following the first full calendar month after final
21 payment by the employer of any wages or paid leave benefits to the member,
22 excluding any cash payoff of accrued vacation or compensatory time,

1 (c) The first of the calendar month following the date that the disability
2 application is approved by the Director.

3 (d) Notwithstanding subsections (a), (b) and (c) of this section, no payment
4 shall be made prior to the end of the period of 90 consecutive days beginning with
5 the date of disability as defined in OAR 459-015-0001(4), and

6 (e) A disability retirement allowance shall be retroactive to the effective date
7 of disability.

8 (7) If PERS cannot calculate the actual disability benefit payment, an
9 estimated payment will be made until PERS receives all the necessary information
10 needed to calculate the actual benefit payment. The payment will be made
11 retroactive to the effective date of disability if the benefits become due before the 90
12 consecutive day period of incapacitation has elapsed.

13 (a) If the estimated payment results in an underpayment of \$10 or more a
14 month, the member will receive interest based on the provisions set forth in OAR
15 459-007-0015.

16 (b) If the estimated payment results in an overpayment of any amount, the
17 overpayments may be recovered by decreasing the monthly benefit amount until the
18 difference between the amount the member received and the amount the member
19 should have received is recovered.

20 (8) Within the 60 day period following the issue date of the first actual (not
21 estimated) benefit payment, the member may change their benefit option. The
22 Option change will be retroactive to the effective disability retirement date.

1 (9) Minimum disability benefit. A disability benefit will not be less than \$100
2 per month under the non-refund Option 1 benefit or the amount the member would
3 have received for service retirement, if eligible, whichever is higher.

4 (10) In the event a member applying for a disability retirement allowance
5 dies prior to the Director's approval of the application, and:

6 (a) the member has made a preliminary designation of beneficiary or
7 selected a benefit option, the preliminary election(s) shall be effective upon the
8 Director's approval of that application.

9 (A) If the beneficiary is the surviving spouse, the surviving spouse may,
10 within 90 days from the date the disability application is approved, elect to have
11 either Option 2 or 3 disability benefits or pre-retirement death benefits, as provided
12 in ORS 238.390 or 238.395, if eligible.

13 (B) If the surviving spouse elects either Option 2 or 3, the surviving spouse
14 cannot name a beneficiary and all benefits will cease upon the spouse's death.

15 (b) the member has not made a preliminary designation of beneficiary or
16 selected a benefit option, the member will be considered as having died before
17 retirement.

18 Stat. Auth: ORS 238.650

19 Stat. Implemented: ORS 238.320, 238.325, and 238.335

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 015 - DISABILITY RETIREMENT**

MEETING DATE	9/23/05
AGENDA ITEM	D.2. Div. 015 Disability

1 **459-015-0060**

2 **Reduction Due to Workers' Compensation Payment**

3 (1) **PERS disability payments are reduced by payments a Tier Two member**
4 **receives from Workers' Compensation. There is no reduction for a Tier One**
5 **member. Other disability-related income, such as Social Security and/or private**
6 **disability insurance plan payments will not affect the amount of a PERS disability**
7 **retirement allowance.** *[For the purposes of this rule:*

8 (a) *A "Tier Two member" means an employee who establishes membership in*
9 *PERS on or after January 1, 1996, as described in ORS 238 .430.]*

10 **[(b)] (2) A Tier Two member's disability retirement allowance will be offset**
11 **by any gross** *["M]monthly workers' compensation payment[" means any gross*
12 *payment] paid in a calendar month on account of temporary total disability or permanent*
13 *total disability under the provisions of ORS Chapter 656; regardless of whether the*
14 *condition on which the worker[']s_ compensation claim is based is related to the*
15 *condition on which the PERS disability retirement claim is based. [A monthly workers'*
16 *compensation payment:]*

17 **(a) A monthly workers' compensation payment includes:**

18 *[(A) Shall include:]*

- 19 (A) Weekly gross payments;
- 20 (B) Semi-monthly gross payments;
- 21 (C) Monthly gross payments; and

1 (D) That portion of a lump sum payment of a workers' compensation disability
2 claim that is expressly designated as compensation for temporary total disability or
3 permanent total disability.

4 ~~[(B)b]~~ *[Shall]* **A monthly workers' compensation payment does** not include:

5 (A) Payments for medical services;

6 (B) Payments for vocational training;

7 (C) Reemployment assistance payments; and

8 (D) Any payment based on an employee's waiver of all rights to, and includes no
9 payment for, a temporary total disability or a permanent total disability claim.

10 ~~[(C) Shall be based]~~ **(c) The workers' compensation payment will be**
11 **considered paid** on the date that payment is issued, and *[shall]* **will** not be allocated to
12 any period other than the month payment is issued.

13 *[(c) "Monthly disability retirement allowance" means the PERS gross disability*
14 *retirement allowance payable under the benefit option elected by the member prior to*
15 *any deductions.]*

16 *[(d) "Monthly salary" means salary as defined in ORS 238 .005(11)(a) that is*
17 *earned in the last full calendar month of employment prior to date of disability.]*

18 *[(e) "Date of disability" shall have the same meaning as provided in OAR 459-*
19 *015-0015.]*

20 ~~[(2)]~~ **(3) In the event a Tier Two member is eligible to receive a PERS**
21 **disability retirement allowance, PERS** *[staff shall]* **will** request of the Workers'
22 Compensation Division, **or any other public or private workers' compensation**

1 **insurance carrier**, documentation of the portion of a lump sum settlement that is made
2 on account of a temporary total disability or a permanent total disability.

3 [(3)] **(4)** *[In the event a Tier Two member is eligible to receive a PERS disability*
4 *retirement allowance, t]The **disability** allowance **of a Tier Two member** [shall] **will** be*
5 reduced by the amount by which the combined monthly benefits payable from both PERS
6 and any monthly worker[']s' compensation payment on account of temporary total
7 disability or permanent total disability exceed the monthly salary of the member at time
8 of disability.

9 [(4)] **(5)** A Tier Two member who is eligible to receive a disability retirement
10 allowance [shall] **must** report immediately to PERS the receipt or the award of any
11 monthly worker[']s' compensation payment as described in section [(1)(b)] **(2)(a)** of this
12 rule.

13 [(5)] **(6)** In the event a Tier Two member receives one or more monthly
14 worker[']s' compensation payment(s) while also receiving a disability retirement
15 allowance [as described in OAR 459-015-0015], but PERS is not notified of the
16 worker[']s' compensation payment until after making one or more disability retirement
17 allowance payments:

18 (a) PERS [shall] **will** recalculate the disability retirement allowance, taking the
19 monthly worker[']s' compensation payments into account; and

20 (b) PERS [shall] **will** invoice the member for, or recover under ORS 238.715, any
21 overpayment of PERS benefits.

22 [(6)] **(7)** A Tier Two member's PERS disability retirement allowance:

1 (a) [*Shall*] **Will** first be calculated in accordance with ORS 238.435[(5)] and this
2 rule prior to determining any reduction to the PERS disability retirement allowance under
3 ORS 238.330(3).

4 (b) Any reduction under ORS 238.330(3) [*shall*] **will** be made to the adjusted
5 PERS disability retirement allowance established under ORS 238.435[(5)] and this rule.

6

7 Stat. Auth.: ORS 238.650

8 Stats. Implemented: ORS 238.435 & ORS 238.330(3)

Legislative Advisory Committee

Disability Rules Meeting Minutes

June 23, 2005

Minutes By: Christie Nunez

Handouts: Division 15 draft Disability Rules, Division 76 draft Disability Rules, Division 15 Disability Program memo, Division 76 Disability Program memo, public comment letter from Nelson Hall

OVERVIEW OF THE RULE MAKING PROCESS – Brendalee Wilson

- 5 years ago we put together a Disability Advisory Committee and met for a period of over two-years
- To bring the administrative rules for the disability program for the PERS Chapter 238 program, up to the present
- With the enactment of the Oregon Public Service Retirement Plan, OPSRP and the need to develop and adopt rules for the new pension program
- The board directed that the two programs mirror each other where possible
- We had two public hearings in October to elicit public comment of the new draft disability rules
 - We had no public comment until the last day for public comment in November
 - The policies were drafted using comments from the advisory committee, contested case experience and staff recommendations
 - The Board requested that we re-open the rule making process public comment period

SUMMARY OF DRAFT RULES

- We have created a definition rule for each division
 - To ensure everyone has a clear understanding of what we're talking about
 - We did make some modifications to existing definitions – our intention was to clarify and standardize
 - Some terms used previously were either clearly defined or omitted per comment from Nelson Hall, staff and advisory committee members
 - A PERS Disability Program is not a workers comp program – PERS disability rules definitions will be different than workers comp
- Where the statute isn't clear or leaves room to interpret, we must interpret through rules and policy
- See OAR 459-015-0001, *Definitions* (New) handout for specific definitions their modifications are listed on the Summary memo handout for the corresponding division. Definitions are clarified essentially the same way in both divisions.

RULES

- OAR 459-015-0005, *Eligibility for Disability Retirement* (Amend)
 - Handout – where there are brackets and italicized type, the language has been removed. Where type is underlined and bold, language has been added.
 - Based on Nelson Hall's comment we modified section 3

There have not been any changes to these draft rules since we modified them due to public comment received in November.

- There will be a public hearing on the 26th of July– PERS public hearings are every month on the last Tuesday of the month
- Public comment will close on August 31st
- If comments are received early in the public comment period, we will try to get our responses back to you before the end of the public comment period
- We hope to take these rules to the Board for adoption at the September Board meeting

Back to: OAR 459-015-0005, *Eligibility for Disability Retirement* (Amend)

- We split the eligibility guidelines for duty and non-duty disability
 - We have different standards for those

- Pre-existing condition clarification and definition
- Work-related stress is defined and clarified – there are very clear criteria that must be met in order for work-related stress to qualify as a duty disability
- It is not up to PERS staff to make a determination whether or not a person is disabled
- PERS does require documentation from medical professionals that support the member’s disability claim for eligibility
- The member bares the burden of providing (through physicians) documentation that supports their disability claim
- Our goal is to make the process as standardized as possible – treat all members the same and give staff clear and defined guidelines to follow
 - Employers need this information so that we know how to help or advise our employees in these matters
- PTSD is a diagnosis that is especially challenging for us – it is difficult to prove medically, for staff and the member
- It was very difficult to write these rules – we rely on comments from the employers, staff and the public for help.
 - If you see something in these rules that won’t work, we need to hear about it and we need to know why

COMMENTS

- *Nelson Hall* has been asked to be at this meeting and submit public comment for the PERS Coalition. The following are the major points of his comments at this meeting.
 - What is work connected and what is major contributing cause and how much they have been litigated
 - What PERS is and what it is not when we say that PERS is not workers compensation
 - PERS is much closer to Social Security than it is to workers compensation
 - You pay into Social Security and draw it out upon retirement
 - The definition of disability is the same for Social Security as it is for PERS
 - Social Security disability has nothing to do with what caused the disability or why you are disabled, the focus is whether or not a person is 100 percent disabled
 - The difference with PERS is the length of employment – under 10 years of employment or more than 10 years of employment
 - PERS is a pension program, members pay into the system and then draw out of the system
 - Workers comp is only for those injuries that were caused by work
 - We need to try as we go forward, to not turn the PERS disability program into a workers comp program
 - We need to try not to make a formula or cookie cutter program where everybody is going to be judged the same – needs to be done on a case by case factual basis
 - Some of these changes [to the disability rules] will increase litigation – in part because we are inserting new definitions
 - Division 15 specific comments
 - The first set of rules – definitions – Any work for which qualified or would be with reasonable training
 - What is reasonable training? It is speculative.
 - Would a person be able to collect a disability allowance while being retrained?
 - This [Nelson submits] is a new criteria
- *Brendalee responds*
 - We receive the results of the vocational evaluation that lists the jobs that the member is qualified for as well as which ones are similar in compensation

- Most would not be able to step into a different job right away, but would need some type of training
- This was an attempt on our part to help us determine whether or the member is or isn't disabled for all work for which they are qualified
- We define reasonable training as a person that already has the skill-sets, knowledge base and some applicable experience; we don't expect someone to spend years being trained for a completely different job. We rely on the information from the vocational evaluator to determine how easily the member could transfer their skills to a different position. We did not want to set ourselves up for a person to deny the ability to perform a job based on not knowing one particular aspect of that job (for example, not know a certain type of computer system). The vocational evaluator makes the determination of whether a person is qualified for other jobs not PERS staff.
- We don't have the funds to ask for an independent vocational evaluation on every person that applies for disability
- *Nelson* suggests having the member get documentation from their physician that they are not able to perform not only their current job but also jobs they are qualified for due to passed experience
- *Brendalee* responds, that would work if you have a varied work history but not if you've been working in the same or very similar field for several years
 - Our intention is take the advise of a vocational evaluation if we feel there is a question as to whether a member could perform a different job with the training and education they already have
- *Nelson* suggest that now we have the burden of not only determining whether the member is disabled from all work which they are qualified and determining how long and how much will it take to get them in a job for which they are qualified with similar compensation
 - Definition 22 – is that what is meant by reasonable training?
 - It may take someone longer than 90 to be retrained
 - PERS has radically narrowed the scope of qualification for disability with these definitions and rules
 - Why is PERS changing the name of Major contributing cause to efficient, dominant, and proximate cause of the disability
 - We have a statutory definition of disability
 - We have a regulatory definition of disability
 - We go from calling that same definition from a material contribution to now wanting to call it major contribution
 - Material is established and has been the test so far – and material means that is has to play a significant role
 - But it doesn't have to be the 50 percent or more reason
 - Internal inconsistencies - page 4
 - The injury must be initially caused, aggravated or accelerated to cause incapacitation by the performance of the members duties
 - In many cases these work injuries are the last straw that broke the camel's back
 - Or we refer to as a 'but for' – But for 'this' I would continue to work
 - The fix being offered isn't really a fix, it's going to complicate things
- *Brendalee* responds – We've defined it; we can call it anything we want but because we've defined it will still mean the same thing whatever we call it. Is the term, Major contributing cause a problem? We are trying to define the legal term, sustained in the actual act of duty.
- *Nelson* submits – in PERS' definition, calling it material contributing cause
 - I would ask that you take the training piece out on page four of the definitions as well
- *Brendalee* responds, that she will research the language change regarding the reasonable training terminology, however it came from a specific contested case and comments from the presiding ALJ
 - Further language change in regards to major contributing cause if disability

- Pre-existing condition – again it is similar to workers comp language
- The person that has an injury but is still able to work until the job disables them 100 percent should still be entitled to receive a disability allowance
- Is it a duty disability or just a disability? How much duty connection must there be to receive duty disability?
- *Brendalee* responds, what we are saying is that a pre-existing condition will not bar a member from being eligible for a duty disability allowance, if the condition contributes to the duty disability and is the efficient, dominant and proximate cause of the disability. The question of whether an injury is the material or efficient, dominant and proximate cause is determined by the member's physician.
- *Nelson* states that the language is still a problem and he is still confused. What roll does a pre-existing condition play? If a member is working but 80 percent disabled? What is the member has a combination of major illnesses going on? It has nothing to do with work – but work contributed to the member becoming 100 percent disabled?
- *Brendalee* We have no guidance on this issue. We do have knowledge from experience and the opinions of physicians to determine if the duties of the member's job contributed to the disability.
- *Nelson* Bringing pre-existing into the discussion creates confusion. You're saying that unless a member can document that an on the job injury has a causative effect on the member's 80 percent pre-existing disability; they do not qualify for duty disability.
- *Brendalee* That is not where we're trying to go with these rules. What we're trying to say is that if an employee brings a 'weakness' (post-surgery back) with them, it does not preclude them from being eligible for a duty disability. If that weakness in combination with the on the job injury makes them 100 percent disabled and unable to perform any work for which they are qualified, we will grant them early retirement based on their disability. Before, there wasn't any guidance and it was looked at the other way around – the duty injury aggravated the pre-existing condition. Our intention is to allow a member to use their pre-existing as part of their evidence of being 100 percent disabled.
- *Nelson* You've done the opposite. A doctor should simply be asked if an injury is the material cause, important, proximate cause of the member's disability. A simple yes or no.
- *Brendalee* Our experience has been that it isn't that simple. These clarifications were requested by staff, who, in their experience felt that further guidelines would be helpful in these types of cases. I would like to present your comments to them and give them a chance to comment since they wanted these clarifications.
- *Nelson* Would be happy to have a dialogue with staff regarding these issues.
- *Brendalee* We asked the staff in the Disability Section what would help them. What would take away some of the arbitrariness in making these determinations.
- *Nelson* I would submit that the notion of pre-existing condition is only relevant if you are going to require this higher bar for major contributing cause.
- *Brendalee* We're not. If you get your comments to us in writing we can get those out as part of public comment.
- *Nelson* I have submitted these comments in writing. I do have further comments.
 - Definition 24 – work related stress – comments
 - Criteria taken right out of workers comp
 - In 1987 the legislature said there will not be a stress claim in Oregon for workman's comp, unless the person meets certain criteria
 - Does the PERS Board want to make a workers comp system?
 - Does the PERS Board intend to differentiate between mental disabilities and physical disabilities?

- *Brendalee* In the notice that we submitted for public rulemaking, we did say that current rules do not reflect major administrative and policy decisions. We did look to the Workers comp system for guidance on this issue and we do want to present this to the Board as a major policy decision.
- *Nelson* This is a big enough change that it will require a statutory amendment. This is also very circular. This would effectively write stress disabilities out of the PERS disability system.
- *Brendalee* The definition states what work related stress is but is not limited to. There are conditions that are not inherent in a normal work environment, and there are certain criteria that must be met to be eligible for a stress related duty disability allowance. Again, we require documentation from a physician that the criteria are met and the member is now 100 percent disabled and unable to perform any work for which they are qualified. This is a policy decision for the Board to make.
- *Nelson* Page 2 of eligibility – 05
 - B says these conditions listed cannot be inherent in every work situation.
- *Brendalee* We have to look at these on a case-by-case basis.
- *Nelson* this is still workers comp language and I think you're making it worse.
- *Brendalee* Again, I will submit your comments to staff, but this was requested by them based on a specific case.
- *Nelson* Page 2 rule 10
 - Adding the requirement of a Neurologist as a specialist adds costs for the member.
- *Brendalee* the statute already provides using any specialist that PERS deems necessary. We wanted to let them know what they would need for a claim involving a neurological injury - rather than causing a delay by asking for it later.
- *Nelson* Under E – any other specialist deemed necessary – even though the statute gives it to you, it is sure broad.
- *Brendalee* That is why we added, after consultation with a PERS Medical Advisor. The PERS Medical Advisor would then advise staff to obtain an opinion from a specialist if necessary.
- *Nelson* Bottom of page 2
 - Language removed under sub-paragraph 4 – why?
 - These are all subjective case by case decisions
 - I would ask that, that language be left in
- Page 4 paragraph 5
 - When doctors' opinions conflict more weight will be given to the better reasoned opinion
- *Brendalee* This has to do with a disagreement between the hearings panel and PERS' legal counsel regarding a particular court case that has handed down the standard. We wanted to state that in PERS' cases we will follow that case law. Where the Administrative Law Judge was tending to go with the treating physician's opinion. So, we wanted to reflect that court case decision in our rules and this would be the standard that the PERS Board would use to determine.
- *Nelson* Does this take away the discretion of the Judge to go with the treating physician?
- *Brendalee* What it is taking away is the ability of the Judge saying that despite all of these independent medical exams and the fact that they are well reasoned, I'm going to go with the treating physician. That is what we have had happen.
- *Nelson* Under Paragraph 5 – page 4
 - Why take out that language?
- We moved that entire provision to 05, that's why the language has been taken out of that paragraph. We didn't remove it we just moved it.
- *Brendalee* I will forward Nelson's comments to staff for consideration – please submit any more that you may have.
 - We are agreed that we will not change the definition of 'material contributing cause', but change the terminology and in doing so it will change throughout the entire set of rules for both division 15

and 76. Anywhere that it says 'major' will be changed to say material. The definition will still be the same.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

ROBERT A. BENNETT*
GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN§
NELSON R. HALL
THOMAS K. DOYLE♦
ARUNA A. MASHI♦
HEIDI K. BROWN

ATTORNEYS AT LAW
SUITE 1650
111 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-3627
(503) 227-4600
FAX (503) 248-6800

LINDA J. LARKIN*
* OF COUNSEL
♦ ALSO MEMBER
WASHINGTON BAR
§ ALSO MEMBER
NEW YORK BAR

FACSIMILE TRANSMISSION

TO: David Martin FAX: 503-598-0561
FROM: Nelson R. Hall DATE: August 30, 2005
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BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

ROBERT A. BENNETT*
GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN'S
NELSON R. HALL
THOMAS K. DOYLE♦
ARUNA A. MASIH♦
HEIDI K. BROWN

ATTORNEYS AT LAW
SUITE 1650
111 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-3627
(503) 227-4600
FAX (503) 248-6800

LINDA J. LARKIN*

* OF COUNSEL
♦ ALSO MEMBER
WASHINGTON BAR
§ ALSO MEMBER
NEW YORK BAR

August 30, 2005

VIA FAX AND REGULAR MAIL

David K. Martin
Rules Coordinator/Hearings Officer
PERS
P.O. Box 23700
Tigard, OR 97281

Dear Mr. Martin:

Included herein are comments, regarding the proposed Division 15 and 76 Disability Rules, in response to the most recent additional modifications to the proposed amendments (see August 15, 2005 memorandum from Ms. Brendalee Wilson to the Legislative Advisory Committee). These additional comments are submitted on behalf of the PERS Coalition.

As a general proposition, we hereby refer the Committee and others to previous comments submitted on behalf of the PERS Coalition. To the extent that the proposed rules or modifications have not incorporated our previous comments, then such previous comments remain valid and are, by this reference, incorporated and repeated herein. Also, the undersigned, on behalf of the PERS Coalition, testified at length on June 23, 2005 before the Legislative Advisory Committee. That testimony was recorded and should be made a part of the record for the most recent/additional modifications to the rules as presented by Ms. Wilson on August 15, 2005. The testimony of the undersigned is hereby incorporated as though fully set forth herein. To the extent changes or modifications to the proposed rules have not been made consistent with the testimony/comments, then the comments/criticisms offered during the testimony remain valid and are hereby renewed. As to the "additional modifications" presented on August 15, 2005, the PERS Coalition offers the following additional comments.¹

Generally, PERS staff continues to use the term "clarified" in describing changes or amendments that go beyond *clarification* of a rule and actually reflect substantive changes to the rule. To the extent staff attempts to justify an amendment or

¹ The comments as to Division 15 Rules are also applicable to the Division 76 proposed rules and will not be repeated. Please note, the citations to OARs herein are citations to the proposed rule numbers.

additional modification based upon clarification, such proposal/modification should be viewed critically.

OAR 459-015-0001(1)(b) (Definitions): The proposed definition of "any work for which qualified" continues to contain the new, additional requirement: "...or may obtain with reasonable training..." This requirement does not clarify the definition. Just the opposite. The phrase adds ambiguity and confusion to the existing definition. More importantly, it is a substantial, indeed radical, departure from how a disability is currently defined and determined. Historically, a member's disability under PERS, like other disability programs, including Social Security and workers' compensation, determines a person's qualifications ("any work for which qualified") in the present tense: are they disabled at this time? Is the worker, due to injury or illness, unable to perform any work for which they are currently qualified? The law does not attempt to judge a person's current disability based upon the speculation of whether the person could obtain employment if he/she were to obtain additional training.

This proposed rule change opens up a hornet's nest. What actually constitutes "reasonable" additional training? Is a member entitled to disability benefits while they obtain such additional training, especially if the alternative employment requires additional certification, qualifications, or licensure? After all, the member by definition is unable to return to any past work for which they would otherwise be qualified (i.e. they are disabled until they receive the additional training). The example given by staff at the June 23, 2005, Advisory Committee meeting, was a police officer who was disabled and everybody agrees cannot be a police officer anymore but could perhaps be a probation officer and, thus, would not qualify for disability retirement benefits because with "reasonable training" they could qualify for an additional job. This proposal has not been thoroughly thought through, because, to use the staff example, a police officer cannot simply move from being a street officer to being a parole and probation officer.

The insertion of this new requirement does nothing to clarify and everything to confuse the definition. It goes beyond traditional legal notions or concepts for defining disability and is a significant change in the definition of disability. The proposal takes the focus from the present to speculation of the future regarding what employment may be obtainable.

OAR 459-015-0001(15) (Definitions): The phrase "while actually on the job" is included in the definition of performance of duty. It is unclear, and undefined within the regulations, what "actually on the job" means. The current definition already includes the phrase "which arises out of or in the course of duty". The current phrase is sufficient to define the requirement that the injury or disease be caused by work. It adds nothing to the definition and does not offer clarity, rather additional confusion or ambiguity, to include the phrase "while actually on the job". Indeed, the latest proposed amendment is to use the phrase "while actually on the job" and to drop the phrase "arises out of or in the course of duty". The latter is a historical phrase used to define the work relationship where the proposed language does not

have the historical interpretation.

OAR 459-015-0001(16) "Pre-existing condition": Here, the staff proposes to add a new concept and definition to the regulations. It is unclear why or for what purpose the addition of a definition for "pre-existing condition" is offered. With all due respect, the definition of a "pre-existing condition" appears to be similar, if not the same, as the definition of "material contributing cause" (see OAR 459-015-0001(8)). Is staff suggesting that a "pre-existing condition" can be the basis for a member's disability retirement claim as long as the "pre-existing condition" is an efficient, dominant, and proximate cause of the disability, without which the member would not be disabled? The notion of a "pre-existing condition" is used in workers' compensation claims. It is unclear what role or purpose it has in the PERS disability retirement program. Inasmuch as a member, with less than 10 years of service, must establish that their disability arose out of their employment in the first instance, it makes no sense to confuse the criteria and definitions by attempting to include a foreign definition. The confusion is extended in proposed OAR 459-015-0005(3)(b) wherein the same proposed language is repeated. It is unclear whether the effort is to exclude pre-existing conditions or to include them or whether a pre-existing condition potentially defeats or supports a claim.

If the rules contain a definition or reference to a pre-existing condition or disease, the Coalition recommends a definition be used that makes it clear that the pre-existing condition may contribute to and be a part of a member's total disability, as long as the on-the-job injury is otherwise the efficient, dominant, proximate cause of the total disability. That definition we can understand and apply.

OAR 459-015-0001(24) and OAR 459-015-0005(3)(c) "Work related stress": Despite public comment on this issue, the staff continues to recommend creating an entirely new and separate classification for disabilities resulting from work related stress. No such distinction is made in the statute between physical and mental injuries. The creation of a separate and distinct classification for work related mental disorders is contrary to statute. Ironically, Governor Kulongoski just signed into law, with substantial fanfare, legislation which prohibits the discrimination in insurance coverage between physical and mental disorders. Here, the staff is proposing the adoption of a workers' compensation type definition and classification for mental disorders which discriminates between mental and physical disorders (making it substantially more difficult --- next to impossible -- to establish disability based on a mental disorder). The proposed definition of "work related stress" encompasses virtually every aspect of employment, which thereby has the effect of eliminating work related stress as the source for any member's disability retirement claim.

So there is no confusion, it should be understood that the proposed amendment is intended to treat mental disorders differently than physical disorders. The proposed new rules create an entire new classification, segregating mental disorders from physical disorders, requiring far greater proof regarding work causation, requiring proof on issues not required of a physical disability, and excluding almost every form

of employment related stress as a potential basis for a mental disorder claim. The end result, the effect of the proposed changes and limitations to mental health disabilities, is a substantial, again, a radical, departure from the current eligibility requirements. PERS disability retirement is not a workers' compensation scheme and should not be redefined as if it were.

OAR 459-015-0010(3)(a): There is also a requirement, in a mental disorder claim, that any report or evaluation by a psychologist be "accompanied by a report of physical examination by a treating or consulting physician;". Such a requirement makes no sense. Given that the nature of the disorder is mental and not physical, it adds nothing but additional cost and delay to have the claimant examined physically. Mental disorders should be an exception to the otherwise requirement that a claim be based upon a physical examination.

OAR 459-015-0010(3)(c): Objection continues to be made to the requirement that a claimant establish entitlement to disability retirement benefits based on reports by medical "specialists." The requirement of such medical specialists drives up the cost of the claim. Medical consultations and reports, whether generated by PERS or by the claimant, are not cheap. The proposed rule requires the use of a neurological or neurosurgical expert/specialist in claims for neurological or neurosurgical injury or disease. While many orthopedists charge in the neighborhood of \$250 for a 15 minute telephone consult, neurosurgeons can cost four times that amount for a simple consult. These physicians charge additional money to write a report. Further, the requirement to consult with a specialist can substantially delay a decision on a claim (the scheduling of any such consultation is at the discretion and availability of the physician, which can be months out). Consequently, it is not accurate, in the "cost" analysis, for staff to say that there will be no cost impact as a result of the proposed amendments. This requirement to use specialists will clearly drive up the costs for claimants and for PERS to the extent that PERS will also be consulting specialists.

OAR 459-015-0010(3)(e): Staff also recommends including an additional requirement ("disability retirement applicant shall be required to furnish the following"): "(e) Any other specialized physician's report that PERS deems necessary." (emphasis added) This ambiguous and unlimited "requirement" is ripe for abuse, not necessarily intentional abuse, but abuse that comes in the form of requiring yet one more report on top of other reports with the claimant having to go and spend hundreds of dollars, with further delay, in an attempt to satisfy the staff demand for yet further evidence.

OAR 459-015-0010(4): This proposed amendment changes the criteria from an injury or disease which "impairs" the applicant's ability to perform work to an injury or disease which "incapacitates" the applicant. Why the need for a change in terminology, assuming that the underlying criteria of being unable to perform any work for which qualified remains the same? Incapacitate, by any definition, carries a greater burden and demonstrates a greater degree of limitation than does the term impair. Again, if the end result is that a member must demonstrate an inability to

perform any work for which otherwise qualified (i.e., they are disabled from employment), what does the staff hope to obtain by using the much more stringent and demanding term "incapacitates"? Members are not now legally required to prove they are bedridden or otherwise totally incapacitated to nevertheless be unable to perform any work for which qualified. Changing the requirement from "impairs" to "incapacitates" is a significant change in the current criteria.

OAR 459-015-0025(3): This proposed amendment continues in its failure to put any limits or caps on the amount of the so-called "penalty" that may be assessed by a medical provider for a missed appointment. The amount of money charged for a missed appointment varies greatly from doctor to doctor. There are doctors charging hundreds of dollars for appointments and have no qualms or reservations about charging such fees. The proposed amendment leaves a member wide open to the whims of a physician or billing person without any recourse for the members. In response to earlier comments submitted by the PERS Coalition on this issue, we have been told that it is not possible to put any kind of cap or limitation on what fee may be charged for a missed appointment. That is simply not legally so. This state agency, as is the case with other state agencies, has the ability and the authority to negotiate with those physicians with whom PERS contracts for a medical exam for a "fee schedule" for the examinations and for any canceled or missed examinations, as well as negotiating a fee for reports that may be written as a result of the medical examinations. There is no reason, therefore, why this rule could not incorporate or reference a fee schedule, with limits/caps for appointments, missed or canceled, and reports written so that members know, in advance, the potential fee or penalty they would be required to pay. Leaving members exposed to unlimited fees is unacceptable. After all, these are not appointments that the member/claimant is arranging or seeking, but rather are appointments required by PERS.

OAR 459-015-0025(4)(c): Here, the proposed amendment changes the "effective date of service retirement"—in the face of a denied application for "disability retirement allowance"—to be "the first of the month that the application for disability retirement allowance was received by PERS." This is a change from the current provision that the "effective date of service retirement"—in the face of a denied application for disability retirement allowance—be the "first of the month following the last day the member performed service for a participating employer." The proposed change has the clear effect of moving the "effective date of service retirement" from the first of the month following last employment to the first of the month in which the application for disability retirement was received by PERS. Given the fact that an application for disability retirement allowance may be filed for up to five years after the last date of employment, this has the effect of moving a member's effective retirement date by five years. It is unclear what rationale, if any, exists for moving the effective dates. If a member is ultimately denied a disability allowance but that member otherwise qualifies for regular service retirement, then why should the otherwise retirement date be tied into (bound by) the date of filing an application for disability allowance? If a member otherwise qualifies for "service retirement," the member should be free to pursue both/either "service retirement" or "disability retirement allowance" without prejudice. We object to this proposed amendment.

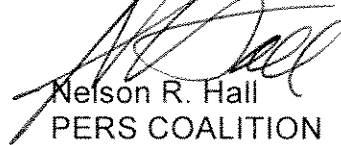
OAR 459-015-0045(1)(c): Finally, the Coalition objects to what appears to be a cut/reduction of 3 months for a "trial" ("therapeutic") work effort in non-PERS qualifying employment. That is, if the proposed rule is being correctly interpreted, it appears that a member only has 90 days for a trial work effort under the proposed rule versus 6 months trial work effort under current rules (see, current OAR 459-015-0045(2)(3)).

Inasmuch as disability benefits are reduced or eliminated by any wages earned and such wages do not count for purposes of retirement account contributions, then why cut in half the time allowed for a disabled member to try and successfully return to work? At that time in a member's recovery, six months versus three months is critical. Indeed, OAR 459-015-0045(1)(a) (which currently provides for only 90 days trial work effort in PERS qualifying employment) should be amended to give a member six months (not 90 days) to attempt to successfully return to work.

Thank you for making sure these comments are provided to the Advisory Committee and to the PERS Board for consideration. We urge incorporation of these comments in the final proposed rules.

Respectfully submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP



Nelson R. Hall
PERS COALITION

NRH/db

G:\Hartman\AFSCME 5415\237 PERS 2\Comments on PERS.wpd



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board

FROM: Steven Patrick Rodeman, Administrator, PPLAD

SUBJECT: Adoption of Division 76 Rules Related to Disability Benefits for OPSRP Ch. 238A Members

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

OAR 459-076-0000, *Purpose* (New)
OAR 459-076-0001, *Definitions* (New)
OAR 459-076-0005, *Eligibility for Disability Benefits* (New)
OAR 459-076-0010, *Criteria for Granting and Denying Disability Benefits; Initial Determination* (New)
OAR 459-076-0020, *Application Required* (New)
OAR 459-076-0025, *Application Processing – Independent Examinations and Appeals* (New)
OAR 459-076-0045, *Cessation of Disability Benefits Upon Reaching Normal Retirement Age* (New)
OAR 459-076-0050, *Periodic Reviews* (New)
OAR 459-076-0055, *Payment of Disability Benefit* (New)
OAR 459-076-0060, *Reduction Due to Workers' Compensation Payment* (New)

OVERVIEW

- **Action:** Adopt new rules in Division 76 relating to disability benefits under the OPSRP Pension Program.
- **Reason:** House Bill 2020 (2003 Oregon Legislature) established the Oregon Public Service Retirement Plan (OPSRP) and requires new administrative rules to clarify and implement its provisions. These rules relate to disability benefits, ORS 238A.235.
- **Subject:** Standards for determining eligibility and the administration of the disability program under the OPSRP Pension Plan.
- **Policy Issues:** These new rules incorporate the policy decisions made in relation to the Division 15 rules on the PERS Chapter 238 disability program, reflecting the policy to keep disability standards parallel when possible.

BACKGROUND

The statutory standards for the OPSRP disability benefit are generally identical to the language in the PERS Chapter 238 Plan. There is no explicit direction that the OPSRP program mirror Chapter 238. However, keeping the programs parallel would be simpler to administer and easier for members. Those areas where the OPSRP statutes are clearly different (e.g., only benefit is 45% of salary) are preserved.

Staff's recommendation and assumption (unless otherwise directed by this Board) is to adopt policies and practices that are consistent between the two programs. The rules presented here are based on that premise.

SUMMARY OF RULES AND MODIFICATIONS TO RULES SINCE NOTICE

Since the June 2005 PERS Board meeting, further staff review and public comment, in addition to recent legislative changes, have prompted additional modifications to the rules as presented, and those are summarized below. Changes due to grammar and typographical errors are not noted.

459-076-0001, *Definitions* - Modifications:

- (8) "Major contributing cause" – Changed "major" to "material" - definition remains the same.
- (11) "Normal retirement age" – Clarified definition to include changes due to HB 3262, 2005 Oregon Legislature.
- (12) "Other income" – Added "or wages" to clarify income received by an employee.
- (15) "Performance of duty" – Clarified definition.
- (16) "Pre-existing condition" - Clarified definition.
- (20) "Similar in compensation" – removed "at the time of disability" since that requirement is already incorporated in the definition's citation to section (9).

459-076-0005, *Eligibility for Disability Benefit* - Modifications:

- Section (4) – Modified to mirror Division 15 language.
- Section (4)(a) – Clarified consideration of pre-existing condition as part of duty disability determination.
- Section (5) – Clarified eligibility for non-duty disability to reflect changes due to recently enacted HB 3262.
- Section (7) – Clarified that there are no return-to-work allowances under the Chapter 238A disability program.
- Section (8) and (9) – Included language to mirror Division 15 language.

459-076-0010, *Criteria for Granting and Denying Disability Benefits; Initial Determination* - Modifications:

- Section (1) – Re-worded second sentence to clarify that PERS' options include both a treating physician's medial report and/or having the applicant submit to an IME, not either/or.
- Section (3)(c) – Added "neurosurgical" to clarify requirement.
- Section (3)(e) – Removed requirement for consultation with PERS' medical advisor for waiving a periodic review. Concerns arose over periods where PERS may not have a medical advisor and may need to waive periodic review.
- Section (5) – Added language to mirror changes to Division 15, Section (4) changes.

459-076-0020, Application Required – Modifications:

Section (1)(a) – Clarified language.

459-076-0025, Application Processing – Independent Examinations and Appeals - Modifications:

Section (1)(d)(B) – Modified to mirror Division 15 language.

Section (3)(b)(B) – Clarified that any penalty resulting from failing to attend a scheduled IME or vocational evaluation appointment will be deducted from a monthly benefit under the provisions set forth in ORS 238.715.

Section (5) – Clarified that information submitted will be reviewed if it is submitted within the 30 day timeframe as set forth in the rule.

459-015-0060, Reduction Due to Workers' Compensation Payment - Modifications:

Section (2)(c) – Added “monthly workers’ compensation” to clarify that it is the workers’ compensation benefit that is being referenced.

Section (3) – Clarified that PERS may contact any public or private insurance carrier for documentation of disability payments.

PUBLIC HEARING AND TESTIMONY

The first public hearings were held on October 18 and 27, with no attendance at those hearings. The original public comment period ended on November 19, 2004. On that date, we received a letter from Nelson Hall of Bennett, Hartman, Morris & Kaplan, LLP, commenting on the proposed rule changes. A copy of Mr. Hall’s letter was included in the May 24, 2005 Board packet. Mr. Hall’s comments, and our responses, were set forth in the Board memo.

At the May 24, 2005 Board meeting, Greg Hartman of Bennett, Hartman, Morris & Kaplan, LLP, appeared before the Board and expressed concern that the public did not have sufficient opportunity to comment on the proposed rules. When asked by Chair Pittman if he had attended the public hearings, Mr. Hartman responded by stating it was his experience that there were not any “professionals” at the hearings to respond to comments or questions, so he did not attend.

The Board directed staff to re-open the public comment period and make sure to address Mr. Hartman’s concerns about staff availability at subsequent public hearings.

At the June 23, 2005 Legislative Advisory Committee meeting, Nelson Hall discussed his concerns with the Division 15 and 76 rules with the committee. He raised the same concerns and comments that were presented in his November 19, 2004 letter to PERS. The committee did not ask staff to make any changes to the rules as proposed. A copy of that meeting’s minutes is attached to the Division 15 memo in this packet. (Agenda Item D.2.)

The third public hearing was held in Tigard on July 26, 2005. As requested, PERS had a total of seven professional staff members in attendance to answer any questions on the proposed rules or disability program as a whole. No one else attended that hearing.

On August 30, 2005, staff received another letter from Mr. Hall commenting on the proposed rule changes. A copy of Mr. Hall's letter and the staff's response to his comments are included in Agenda Item D.2. of this Board packet.

LEGAL REVIEW

After consulting with attorneys at the Department of Justice (DOJ) and Orrick, the attached drafts of proposed rules for Division 76 were submitted to the DOJ for review since the Division 76 rules closely follow, where possible, the provisions of the PERS Division 15 disability rules. Assistant Attorney General Joe Dunne reviewed the drafts and his recommendations are incorporated.

IMPACT

Mandatory: No, but clarification of the new program will benefit staff, members, and stakeholders.

Impact: These new rules will incorporate policy decisions made in relation to the Division 15 rules on the PERS Chapter 238 disability program, reflecting the policy to keep disability standards comparable when possible.

Cost:

- ◆ *Members:* There will be no additional cost to members that is not already a part of the administration of the ongoing PERS Chapter 238 Program.
- ◆ *Employers:* There are intrinsic costs to employers since disability benefits are borne by the employer. Clarification of the standards, however, will allow the OPSRP disability program to be administered in a more efficient and consistent manner, which should result in the payment of disability benefits under a clear, consistent framework.
- ◆ *Administration:* The proposed rules will require little administrative adjustment from the PERS Chapter 238 Program and will not substantially affect costs to review, process, or administer disability benefits for the new disability program.
- ◆ *Fund:* There will be no effect on the Fund.

RULEMAKING TIMELINE

September 15, 2004	Staff began the rulemaking process. Deadline to file Notice of Rulemaking with the Secretary of State.
September 17, 2004	Board notified that staff began the rulemaking process.
October 1, 2004	<i>Oregon Bulletin</i> published the Notice and the public comment period began.

- October 18, 2004 A public hearing was held in Salem in conjunction with PERS Division 15 disability rulemaking.
- October 27, 2004 A public hearing was held in Tigard in conjunction with PERS Division 15 disability rulemaking.
- November 19, 2004 First reading. First public comment period ended.
- May 24, 2005 PERS staff requested adoption of the proposed rules. The PERS Board directed staff to re-open public comment.
- July 26, 2005 A third public hearing was held in Tigard in conjunction with PERS Division 15 disability rulemaking.
- August 31, 2005 Second public comment period ended.
- September 23, 2005 PERS staff will request adoption of the proposed rules.

BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt the proposed rules for Division 76, as presented, to be effective upon filing.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

Reason: The rule modifications are needed to provide clarity to staff and members on how the OPSRP disability program is to be administered.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0000**

2 **Purpose**

3 (1) The Legislative Assembly has established within the Oregon Public Service
 4 Retirement Plan (OPSRP) Pension Program a program for a disability benefit. The
 5 disability benefit program is solely intended to provide benefits to those members who
 6 have not reached normal retirement age as defined in OAR 459-076-0001(11) and who
 7 are unable to work because they are disabled and cannot perform any work for which
 8 they are qualified. A disability benefit is not in addition to a service retirement allowance
 9 and is payable until the member:

10 (a) is no longer disabled, or

11 (b) reaches normal retirement age as defined in OAR 459-076 0001(14), or

12 (b) dies.

13 (2) A member who is no longer receiving a disability benefit due to conditions set
 14 forth under section (1)(a) or (b) and has not applied for a service retirement benefit after
 15 reaching normal retirement age will be considered an inactive member as defined in ORS
 16 238A.005(8).

17

18 Stat. Auth: ORS 238A.450

19 Stat. Implemented: ORS 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0001**

2 **Definitions**

3 The words and phrases used in this Division have the same meaning given them in
4 ORS chapter 238A and OAR 459-070-0001. Additional terms are defined as follows
5 unless the context requires otherwise.

6 (1) Any work for which qualified: A job, not necessarily the last or usual job, which
7 the applicant for disability benefits:

8 (a) Is physically and psychologically capable of performing, and

9 (b) Has, or may obtain with reasonable training, the knowledge, skills and abilities,
10 to perform the job.

11 (2) Certified vocational consultant: a person who satisfies the criteria set forth under
12 either of the following:

13 (a) A Master’s Degree in vocational rehabilitation, and one year of experience in
14 performing vocation evaluations or developing individualized return-to-work plans; or a
15 Bachelor’s Degree and two years of such experience. All degrees must have been earned
16 at an accredited institution, or

17 (b) Accredited as a “Certified Rehabilitation Counselor (CRC)” by the Commission
18 on Rehabilitation Counselor Certification; as a “Certified Insurance Rehabilitation
19 Specialist (CIRS)” by the Certified Insurance Rehabilitation Specialist Commission; or a
20 “Certified Vocational Evaluation Specialist (CVE)” or a “Certified Work Adjustment
21 Specialist (CWA)” by the Commission on Certification of Work Adjustment and
22 Vocation Evaluation specialist.

1 (3) Confidential information: Information of a personal nature such that disclosure
2 would constitute an unreasonable invasion of privacy as defined by state law.

3 (4) Date of disability: The day an active member ceased to work because of injury or
4 disease,

5 (5) Effective date of disability benefit: The first of the month following the later of:

6 (a) The last day the member worked for a participating employer,

7 (b) The last day the member was on paid leave, or

8 (c) The last day the member received any salary or paid leave benefits from a

9 participating employer, exclusive of the cash pay-off for accrued vacation or

10 compensatory time, as long as that payment is made within the 31 days after the member

11 separates from PERS covered employment.

12 (6) Extended duration: A period of not less than 90 consecutive calendar days unless
13 the disability is expected to result in the death of the disabled member in less than 90
14 days.

15 (7) Independent medical exam: An exam or exams conducted by a physician chosen
16 by PERS for purposes other than for treatment which results in the issuance of a report or
17 reports based on those exams, giving an opinion regarding the claimed injury or disease.

18 (8) Material contributing cause: The efficient, dominant, and proximate cause of the
19 disability, without which the member would not be disabled.

20 (9) Monthly salary: Salary as defined in ORS 238A.005(16) that is earned in the last
21 full calendar month of employment.

1 (a) Retroactive payments or payments made due to clerical errors, paid in accordance
2 with ORS 238A.005(16)(b)(E), are allocated to the period the salary was earned or
3 should have been earned.

4 (b) Payments of salary paid within 31 days of separation are allocated to the period
5 the salary was earned and should be considered as paid on the last date of employment.

6 (10) Monthly salary received: The salary paid, as defined in section (9) of this rule,
7 for the last full calendar month of employment prior to date of disability.

8 (11) Normal retirement age: The age at which a member can retire without a reduced
9 benefit as set forth under ORS 238A.160.

10 (12) Other income: includes, but is not limited to:

11 (a) Salary or wages received as an employee;

12 (b) Self-employment income from:

13 (A) Services industry,

14 (B) Sales,

15 (C) Assembly or manufacturing,

16 (D) Consulting,

17 (E) Property management,

18 (F) Hobby income, or

19 (G) Book advances;

20 (c) "Other income" does not include:

21 (A) Investment income,

22 (B) Rent, and

23 (C) Royalties.

1 (13) Physician: A medical doctor, a doctor of osteopathy, a doctor of oral surgery, a
2 chiropractic doctor, a naturopathic doctor, or a doctor of psychology practicing only
3 within the purview of their license issued by the designated authority of a state.

4 (14) Periodic review: A review of a member receiving a disability retirement
5 allowance to determine whether or not a continued allowance is warranted.

6 (15) Performance of duty: Mental or physical incapacitation arising out of and in the
7 course of duty and is not intentionally self-inflicted. The injury or disease must be
8 initially caused, aggravated or accelerated to cause incapacitation by the performance of
9 the member's duties in the employment of a participating public employer. The job must
10 be the material contributing cause of the injury or disease. Performance of duty includes
11 whatever an employee may be directed, required or reasonably expected to do in
12 connection with his or her employment, and not solely the duties peculiar to his or her
13 position;

14 (16) Pre-existing condition: A condition that was not sustained in actual performance
15 of duty with the current employer.

16 (17) Protected health information: Health information created or received by a health
17 care provider, health plan, or health care clearinghouse, where an individual has a
18 reasonable belief that the information can identify the individual, which relates to:

19 (a) the past, present, or future physical or mental health of an individual,

20 (b) the provision of health care to an individual, or

21 (c) the past, present, or future payment for the provision of health care to an
22 individual.

1 (18) Qualifying position: One or more positions with a participating employer, in a
2 participating class, which requires performance of 600 or more hours in a calendar year.

3 (19) Separation from all service: The date a member terminates from employment
4 such that an employee/employer relationship no longer exists; the last day worked
5 (physically on the job), the last day of paid leave, or the last day of an official leave of
6 absence, whichever is the later.

7 (20) Similar in compensation: Salary or income, excluding overtime, equaling at
8 least 80% of the monthly salary, as defined in section (9) of this rule.

9 (21) Similar location: A position in the same general area of the applicant's
10 residence or last employment location.

11 (22) Vocational evaluation: An evaluation conducted by a certified vocational
12 consultant, to determine the ability of an applicant to perform any work for which they
13 are qualified.

14 (23) Work related stress: conditions or disabilities resulting from, but not limited to:

- 15 (a) Change of employment duties;
- 16 (b) Conflicts with supervisors;
- 17 (c) Actual or perceived threat of loss of a job, demotion, or disciplinary action;
- 18 (d) Relationships with supervisors, coworkers, or the public;
- 19 (e) Specific or general job dissatisfaction;
- 20 (f) Work load pressures;
- 21 (g) Subjective perceptions of employment conditions or environment;
- 22 (h) Loss of job or demotion for whatever reason;
- 23 (i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards;

1 (j) Objective or subjective stresses of employment; or

2 (k) Personnel decisions.

3

4 Stat. Auth: ORS 238A.450

5 Stats. Implemented: ORS 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0005**

2 **Eligibility for Disability Benefits**

3 (1) Only disabilities arising while the member is an active member of the OPSRP
 4 Pension Program and are expected to last for an extended duration qualify for the
 5 disability benefit under ORS Chapter 238A. Members with disabilities arising after a
 6 member has terminated employment from a qualifying position(s) are not eligible for a
 7 disability benefit.

8 (2) A member fails to meet the eligibility criteria for an OPSRP disability benefit:

9 (a) If the member is able to perform any work for which qualified, and

10 (b) Is able to generate other income that is similar in compensation, as defined in
 11 OAR 459-076-0001(20), as of date of disability.

12 (3) In determining a member’s eligibility for disability benefits, the burden of
 13 proof is upon the applicant. The Board is not required to prove whether the applicant is or
 14 is not eligible for disability benefits.

15 (4) Eligibility for duty disabilities. (a) Applicants with less than ten years of
 16 OPSRP retirement credit must establish that they are active members of OPSRP and were
 17 disabled while in the actual performance of duty, as defined in OAR 459-076-0001(15).

18 (b) A member who has a pre-existing condition (as defined in OAR 459-076-
 19 0001(16)) must prove that the material contributing cause (as defined in OAR 459-076-
 20 0001(8)) of the disability was sustained while in actual performance of duty.

1 (c) Work related stress, as defined in OAR 459-076-0001(23), will not be
2 considered as the material contributing cause, as defined in OAR 459-076-0001(8), of a
3 duty disability unless the applicant establishes all of the following:

4 (A) The employment conditions producing the work related stress exist in a real
5 and objective sense,

6 (B) The employment conditions producing the work related stress are conditions
7 other than conditions generally inherent in every working situation or reasonable
8 disciplinary, corrective or job performance evaluation actions by the employer, or
9 cessation of employment or employment decisions attendant upon ordinary business or
10 financial cycles,

11 (C) There is a diagnosis of a mental or emotional disorder which is generally
12 recognized in the medical or psychological community, and

13 (D) There is evidence that the work related stress arose out of and in the course of
14 employment.

15 (5) Eligibility for non-duty disabilities. (a) Members, other than members who are
16 school employees as defined by ORS 238A.140, must have a minimum of ten years of
17 OPSRP retirement credit as calculated pursuant to ORS 238A.140, and the disability
18 must arise while the applicant is an active member of the OPSRP Pension Program.

19 (b) Members, who are school employees as defined by ORS 238A.140, must have
20 been active members in ten or more calendar years and the disability must arise while the
21 applicant is an active member of the OPSRP Pension Program.

22 (6) Termination of OPSRP membership. Disability benefits are available only to
23 OPSRP members. OPSRP membership is terminated by withdrawal under ORS

1 238A.120 or forfeiture of retirement credit under ORS 238A.145. Therefore, former
2 OPSRP members who have withdrawn or forfeited are not eligible to receive OPSRP
3 disability benefit.

4 (7) Return to work. If a member who is receiving a disability benefit becomes
5 employed, the member's disability benefit will be terminated, effective the first of the
6 month following employment. PERS will invoice the member for, or recover under ORS
7 238.715, any overpayment of benefits.

8 (8) PERS may contact other public or private agencies, such as the Oregon
9 Employment Department, the Oregon Department of Revenue, or the U.S. Internal
10 Revenue Service to obtain employment information.

11 (9) Upon request by PERS, a member must provide PERS with a copy of the
12 member's federal income tax returns, together with copies of IRS forms W-2.

13

14 Stat. Auth: ORS 238A.120 and 238A.450

15 Stat. Implemented: ORS 238A.140 and 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Div. 076 Disability

1 **459-076-0010**

2 **Criteria for Granting and Denying Disability Benefits**

3 (1) Medical documentation is required by PERS. Each disability benefit applicant
4 shall supply any treating or consulting physician’s examination report or other medical
5 information requested by PERS. PERS may base its determination on either a treating or
6 consulting physician’s medical examination report or have the applicant examined by one
7 or more physicians selected by PERS, or both.

8 (2) The Board may deny any application or discontinue any disability benefit in
9 the case of any person who refuses to submit to any medical examination or supply a
10 completed application or review form.

11 (3) All claims of a disability must be supported by at least one physician’s report
12 resulting from a physical examination documenting how the injury or disease
13 incapacitates the member.

14 (4) In addition, a disability benefit applicant shall be required to furnish the
15 following:

16 (a) For claims of mental or emotional disorder, at least one report of examination
17 by a psychiatrist or at least one report of evaluation by psychologist when accompanied
18 by a report of physical examination by a treating or consulting physician;

19 (b) For claims of orthopedic injury or disease, at least one report of a treating or
20 consulting orthopedic specialist or neurosurgeon;

21 (c) For claims of neurological or neurosurgical injury or disease, at least one
22 report of treating or consulting neurologist or neurosurgeon;

1 (d) For claims of fibromyalgia, at least one report of a treating or consulting
2 rheumatologist; and

3 (e) Any other specialized physician's report PERS deems necessary.

4 (5) To demonstrate that he or she is unable to perform any work for which
5 qualified, as defined in OAR 459-076-0001(1), the applicant shall document how the
6 injury or disease incapacitates the applicant. The standard is subjective (that is, whether
7 the applicant is actually incapacitated) not objective (that is, whether a "normal" member
8 would have been incapacitated by the same events).

9 (a) In determining what work for which a member is qualified, the following
10 factors shall be considered:

11 (A) Previous employment experience;

12 (B) Formal education;

13 (C) Formal training;

14 (D) Transferable skills;

15 (E) Age; and

16 (F) Physical or mental impairment.

17 (b) In determining what work for which a member is qualified, PERS may
18 request, at PERS expense, a vocational evaluation be done by a vocational consultant
19 who is fully certified as set forth in OAR 459-076-0001(2).

20 (c) The inability of the applicant to perform the duties of his or her last job, in
21 itself, does not satisfy the criterion.

22 (5) When there is a dispute among medical experts, more weight will be given to
23 those medical opinions that are both well reasoned and based on complete information.

1 (6) The Board may deny any application or discontinue any disability benefit if an
2 applicant refuses to submit to an independent medical or vocational examination.

3

4 Stat. Auth: ORS 238A.450

5 Stat. Implemented: ORS 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0020**

2 **Application Required**

3 (1) No disability benefit will be paid unless the member files a timely and complete
4 application with PERS.

5 (a) An inactive member who was disabled due to injury or disease while the
6 applicant was an active member and is not separated from membership, must file an
7 application for a disability retirement allowance within five calendar years of the last day
8 worked; even though the member may continue on a paid leave or on an official leave of
9 absence without pay. The disabling condition must have arisen while the applicant was
10 an active member and be continuous from the date the member last worked to the date
11 the application is filed.

12 (b) Members who become disabled due to injury or disease after the date of
13 separation from all service entitling the member to active membership in the system, are
14 not eligible for a disability benefit under ORS Chapter 238A.

15 (2) Applications will be made on forms prescribed by PERS. PERS may require the
16 member to provide any information that PERS considers necessary to determine the
17 applicant's eligibility for a disability benefit.

18 (3) Application must be made by a member or the member's authorized
19 representative. A representative must submit to PERS written proof of the
20 representative's authority; such as, a power of attorney, guardianship or conservatorship
21 appointment.

1 (4) A member may make application immediately after the last day worked even
2 though the member is on a paid leave or on an official leave of absence without pay. No
3 application will be accepted that predates the last day the member was actually on the
4 job.

5 (5) In determining the effective date of a disability benefit PERS may allow up to 60
6 months of benefits retroactive from the date the application is filed with PERS, but in no
7 case earlier than the first day of the month following the date of termination.

8 (6) Upon the filing of an application for a disability retirement benefit, PERS will
9 notify the applicant's current or most recent employer of the filing. Additionally, PERS
10 may request of an employer information pertaining to current or previous employment.

11 (7) When making application for a PERS disability benefit, PERS will request the
12 applicant authorize any physician, health practitioner, hospital, clinic, pharmacy,
13 employer, employment agency, or government agency to release and disclose to PERS,
14 or independent physicians and vocational consultants retained by PERS, any information
15 within their records or knowledge, including that information otherwise protected under
16 federal or state law, regarding the applicant's health and employment which PERS
17 determines relates to the applicant's claim of disability and inability to perform any work
18 for which qualified.

19 (8) When filing an application for disability benefit, if the applicant wishes to
20 authorize release and disclosure of protected health information, as defined in OAR 459-
21 015-0001(17), the applicant must complete and sign a consent form which specifically
22 authorizes the release and disclosure of such information.

1 (a) This authorization is voluntary. Because PERS is not a covered entity as defined
2 in 45 C.F.R. Parts 160 and 164, the protected health information is not subject to federal
3 and state health information privacy laws, but is protected under Oregon State Public
4 Record disclosure laws.

5 (b) This authorization may be revoked in writing at any time, except to the extent the
6 entities named on the authorization form(s) have taken action in reliance of the
7 authorization.

8 (c) If the applicant refuses to give or revokes authorization to disclose to PERS
9 medical information that PERS determines it needs to evaluate the application, eligibility
10 for a disability retirement allowance may be affected.

11
12 Stat. Auth.: ORS 238A.450 and 45 CFR Parts 160 and 164
13 Stats. Implemented: ORS 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0025**

2 **Application Processing – Independent Examinations and Appeals**

3 (1) Following the timely filing of a completed application, PERS may, at its
 4 discretion, request an independent medical exam or a vocational evaluation. If PERS
 5 requests one or more of these exams or evaluations, PERS will pay the reasonable
 6 associated expenses.

7 (a) For independent medical exams, PERS will inform the applicant in writing
 8 and postmarked not less than ten days prior to a scheduled examination, of the identity of
 9 the physician(s) selected to examine applicant, together with location, date and time.

10 (b) For vocational evaluations, the vocational consultant or locator service shall
 11 inform the applicant of the location, date and time of the scheduled examination.

12 (c) If the applicant fails to meet the scheduled appointment or fails to reschedule
 13 the examination within five days of notification, PERS will not reschedule an
 14 examination at PERS’ expense unless the applicant can demonstrate good cause for
 15 having failed to meet the scheduled appointment or reschedule the appointment as
 16 required.

17 (d) Good cause includes, but is not limited to:

18 (A) Physical or mental incapacitation preventing the member from meeting or
 19 rescheduling the examination;

20 (B) Failure of PERS or the vocational consultant or locator service to send the
 21 member notice as described above; or

22 (C) A death in the member’s immediate family.

1 (e) Good cause does not include:

2 (A) A member's refusal to attend the scheduled appointment;

3 (B) A member's failure to meet the appointment with no reason provided; or

4 (C) A member's failure to make appropriate transportation arrangements.

5 (2) When PERS requires an applicant to travel to be examined by a physician,

6 vocational consultant, or other professional, PERS will reimburse the applicant's

7 reasonable transportation costs based on the least costly alternative and on availability.

8 Travel by private vehicle will be compensated at the rate applicable to travel by

9 unrepresented state employees on state business. Transportation by taxi, bus, rail, or other

10 public carrier will be paid only upon presentation of receipts from the providers. Lodging

11 and subsistence will be allowed only when a stop-over is necessary and will be paid at

12 the rate applicable to unrepresented state employees traveling on state business.

13 Reimbursements will be reduced by the amount of any penalty assessed PERS because of

14 a member's failure to meet a scheduled appointment.

15 (3) In the event a member fails to meet a scheduled examination in accordance

16 with section (1) of this rule, and PERS is assessed a penalty by the service provider for

17 the failure to meet the scheduled appointment, the disability applicant will bear the cost

18 of the penalty as follows:

19 (a) If the disability application is not approved, by making direct payment to the

20 service provider who assessed the penalty, or

21 (b) If the disability application is approved:

22 (A) By making direct payment to the service provider who assessed the penalty,

23 or

1 (B) By having the amount of the penalty deducted from the monthly disability
2 benefit, as provided for under ORS 238.715, payable to the member until the invoice is
3 satisfied.

4 (4) The Director, or the Director’s designee, is hereby authorized to approve or
5 deny a disability benefit application. Upon receipt and review of all necessary
6 documentation, staff will present applicant’s claim to the Director, or the Director’s
7 designee, with a recommendation to approve or to deny a disability benefit. The Director,
8 or the Director’s designee, may accept or reject the staff’s recommendation, or refer the
9 application back to staff for further documentation and review.

10 (a) If the disability claim is approved, the staff will notify the applicant and the
11 applicant’s employer of such approval.

12 (b) If the disability claim is denied, the staff will issue an Intent to Deny letter by
13 regular and certified mail, return receipt requested. The Intent to Deny letter will advise
14 the applicant that additional information to substantiate the claim, or a request for an
15 extension of 30 days to present additional information, may be submitted to the staff in
16 writing within 30 days of the date of the Intent to Deny letter.

17 (5) Following the issuance of an Intent to Deny letter, staff will review any
18 additional information submitted within 30 days from the issuance of the Intent to Deny
19 letter.

20 (a) If the additional information results in a recommendation to approve the
21 application, staff will resubmit the application to the Director with the recommendation.

1 (b) If the additional information does not result in a recommendation to approve
2 the application, PERS will issue a final denial letter by regular and certified mail, return
3 receipt requested.

4 (c) If no additional information is received, PERS will issue a final denial letter
5 by regular and certified mail, return receipt requested.

6 (6) The final denial letter will provide the applicant with notification of the right
7 to request a contested case hearing as provided for in OAR 459-015-0030 and 459-001-
8 0035.

9 (7) PERS will notify the most recent employer of the approval or the denial of an
10 application for a disability benefit, a request for review of the Director’s determination,
11 and the Director’s final action. Such notification will not contain any confidential
12 information as defined in OAR 459-076-0001(3).

13

14 Stat. Auth: ORS 183.310 to 183.550, and 238A.450

15 Stat. Implemented: ORS 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING DATE	9/23/05
AGENDA ITEM	D.3. Div. 076 Disability

1 **459-076-0045**

2 **Cessation of Disability Benefits Upon Reaching Normal Retirement Age.**

3 (1) If a member who is receiving an OPSRP disability benefit reaches normal
4 retirement age, as defined in OAR 459-076-0001(11), disability benefits will cease as of
5 the first of the following month.

6 (2) The disability benefit will not automatically convert to a retirement benefit
7 upon the member reaching normal retirement age. The member must apply for service
8 retirement benefits before receiving them. In order to receive a service retirement benefit
9 beginning in the month in which a disability benefit ceases under section (1) above, the
10 member must:

11 (a) Complete the applicable Service Retirement application(s), and

12 (b) Submit the application(s) to PERS at least 92 days before the first of the
13 month in which the disability benefit ceases under section (1). In no case will a service
14 retirement benefit become payable during a month in which a member receives a
15 disability benefit or earlier than the first of the month in which an application was
16 submitted.

17 (3) The OPSRP retirement pension benefit will be based on:

18 (a) The adjusted salary as set forth in section (4) of this rule, and

19 (b) The total retirement credit accrued, set forth in section (5) of this rule.

20 (4) The salary the member was receiving immediately prior to leaving active
21 employment as a result of disability will be adjusted for the cost-of-living for each year

1 after the member left employment and before the member's effective date of service
2 retirement.

3 (a) Cost-of-living adjustments will be based on the Portland-Salem, OR-WA CPI
4 and may not exceed a two percent increase or decrease for any year.

5 (b) Cost-of-living adjustments will be made only for calendar years in which the
6 member received an OPSRP disability benefit for at least six months during a calendar
7 year.

8 (5) Retirement credit. A member receiving OPSRP disability benefits will accrued
9 retirement credit, as well as hours of service credit toward vesting, for the entire period of
10 disability until:

11 (a) The member is no longer disabled, or

12 (b) The member reaches normal retirement age.

13 (6) The retirement credit will accrue under the same employment classification in
14 which the member was immediately employed prior to becoming disabled.

15 (7) A member who is receiving disability benefits who reaches normal retirement
16 age and has not applied for a service retirement will become an inactive member on the
17 first of the month following the month in which they reach normal retirement age.

18

19 Stat. Auth: ORS 238A.450

20 Stat. Implementation: ORS 238A.155 and 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0050**

2 **Periodic Reviews**

3 (1) Members receiving a disability benefit are subject to periodic reviews of their
4 disabled status until the member reaches normal retirement age or staff determines that
5 periodic reviews are no longer warranted.

6 (2) Periodic reviews will be used to determine that continued disability retirement
7 allowances are warranted. In recommending the continuance or discontinuance of a
8 disability retirement allowance, for the original approved disability or a new medical
9 condition, PERS will follow the criteria established under OAR 459-076-0010.

10 (3) For a duty disability, the periodic review will not revisit the original
11 determination that the injury or disease was duty caused, unless there is evidence of
12 misrepresentation or fraud.

13 (4) PERS will establish review dates for each member subject to a periodic review
14 depending on type of disability, extent of disability, and medical reports unique to each
15 individual case.

16 (a) The reviews may be medical or vocational in nature, or both.

17 (b) Upon review, PERS may accept or require:

18 (A) new treating or consulting physician or specialist reports,

19 (B) updated physician or specialist reports,

20 (C) independent medical or vocational examinations, or

21 (D) employment and wage information, including but not limited to, tax returns or
22 information from the State Employment Department.

1 (c) PERS may immediately discontinue the disability benefit of any person who
2 refuses to provide current medical evidence or refuses to submit to an examination.

3 (A) If the disability claim is discontinued, the staff shall issue an Intent to
4 Discontinue letter by regular and certified mail, return receipt requested. The
5 discontinuation letter shall advise the applicant that additional information to substantiate
6 the claim, or a request for an extension of 30 days to present additional information, may
7 be submitted to the staff in writing within 30 days of the date of the Intent to Discontinue
8 letter.

9 (B) Following the issuance of an Intent to Discontinue letter, staff will review any
10 additional information which is submitted within 30 days.

11 (i) If the additional information results in a recommendation to approve the
12 application, staff shall resubmit the application to the Director, or the Director's
13 designee, with the recommendation.

14 (ii) If the additional information does not result in a recommendation to approve
15 the application, PERS will issue a final discontinuation letter by regular and certified
16 mail, return receipt requested.

17 (C) If no additional information is received within 30 days, PERS will issue a
18 final discontinuation letter by regular and certified mail, return receipt requested.

19 (D) The final discontinuation letter will provide the applicant with notification of
20 the right to request a contested case hearing as provided for in OAR 459-015-0030 and
21 459-001-0035.

22 (5)The member has the burden to prove continuing eligibility for a disability
23 benefit.

1 (6) In recommending the continuance or discontinuance of a disability benefit,
2 PERS shall follow the criteria established under OAR 459-076-0010.

3 (7) The Director, or Director's designee, is hereby authorized to approve or deny
4 the continuance of a disability benefit.

5

6 Stat. Auth: ORS 238A.450

7 Stat. Implemented: ORS 23A8.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING DATE	9/23/05
AGENDA ITEM	D.3. Div. 076 Disability

1 **459-076-0055**

2 **Payment of Disability Benefit**

3 (1) The payment of a disability benefit will commence on the later of:

4 (a) The first of the calendar month in which the member files an complete
5 application for disability benefits with PERS, or

6 (b) The first of the month following the first full calendar month after final
7 payment by the employer of any wages or paid leave benefits to the member, excluding
8 any cash payoff of accrued vacation or compensatory time,

9 (c) Notwithstanding subsections (a) and (b) of this section, no payment shall be
10 made prior to the end of the period of 90 consecutive days beginning with the date of
11 disability as defined in OAR 459-015-0001(4), and

12 (d) A disability benefit will be retroactive to the effective date of disability
13 benefit, as defined in Oar 459-076-0001(5).

14 (2) If PERS cannot calculate the actual disability benefit payment, an estimated
15 payment will be made until PERS receives all the necessary information needed to
16 calculate the actual benefit payment. The payment will be made retroactive to the
17 effective date of disability if the benefits become due before the ninety consecutive day
18 period of incapacitation has elapsed.

19 (a) If the estimated payment results in an underpayment of \$10 or more a month,
20 the member will receive interest under the provisions of OAR 459-007-0015.

21 (b) If the estimated payment results in an overpayment of any amount, the
22 overpayments may be recovered by decreasing the monthly benefit amount until the

1 difference between the amount the member received and the amount the member should
2 have received is recovered.

3 (3) In the event a member applying for a disability benefit dies prior to the
4 Director's approval of the application:

5 (a) The application will be considered cancelled effective on the date of the
6 member's death.

7 (b) The member will be considered as dying prior to retirement.

8 (c) If the member was vested and married at the time of death, the spouse of the
9 deceased member will be eligible for an OPSRP death benefit as set forth in ORS
10 238A.230.

11 (d) The amounts in the member's Individual Account Program (IAP) account(s),
12 to the extent the member is vested in those accounts, will also be paid in a lump sum to
13 the beneficiary or beneficiaries designated by the member for the purposes of the IAP.

14 (5) In the event a member applying for a disability benefit dies after the Director's
15 approval of the application, the member will be considered as dying prior to retirement. If
16 a married member is vested, the member's spouse will be eligible for an OPSRP death
17 benefit as set forth in ORS 238A.230.

18 (6) For the period during which a member is receiving a disability benefit,
19 retirement credit, as well as hours of service toward vesting, will be credited to the
20 member if:

21 (a) The member accrued 10 years or more of retirement credit under the OPSRP
22 pension Program prior to becoming disabled, or

1 (b) The member became disabled by reason of injury or disease sustained while in
2 the performance of duty.

3

4 Stat. Auth: ORS 238.450

5 Stat. Implemented: ORS 238A.230 and 238A.235

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 076 - DISABILITY BENEFIT**

MEETING	9/23/05
DATE	
AGENDA	D.3.
ITEM	Div. 076 Disability

1 **459-076-0060**

2 **Reduction Due to Workers' Compensation Payment**

3 (1) The total payments received by an OPSRP member receiving both OPSRP
 4 disability benefits and payments from Workers' Compensation may not exceed 75
 5 percent of the member's monthly salary as of the date the member becomes disabled.
 6 Other disability-related income, such as Social Security and/or private disability
 7 insurance plan payments will not affect the amount of OPSRP disability benefits.

8 (2) A member's disability benefit will be offset by any gross monthly workers'
 9 compensation payment paid in a calendar month on account of temporary total disability
 10 or permanent total disability under the provisions of ORS Chapter 656; regardless of
 11 whether the condition on which the workers' compensation claim is based is related to
 12 the condition on which the OPSRP disability benefit claim is based.

13 (a) A monthly workers' compensation payment includes:

14 (A) Weekly gross payments;

15 (B) Semi-monthly gross payments;

16 (C) Monthly gross payments; and

17 (D) That portion of a lump sum payment of a workers' compensation disability
 18 claim that is expressly designated as compensation for temporary total disability or
 19 permanent total disability.

20 (b) A monthly workers' compensation payment does not include:

21 (A) Payments for medical services;

22 (B) Payments for vocational training;

1 (C) Reemployment assistance payments; and

2 (D) Any payment based on an employee's waiver of all rights to, and includes no
3 payment for, a temporary total disability or a permanent total disability claim.

4 (c) The workers' compensation payment will be considered paid on the date that
5 payment is issued, and will not be allocated to any period other than the month payment
6 is issued.

7 (3) In the event a member is eligible to receive an OPSRP disability benefit,
8 PERS will request of the Workers' Compensation Division, or any other public or private
9 workers' compensation insurance company, documentation of the portion of a lump sum
10 settlement that is made on account of a temporary total disability or a permanent total
11 disability.

12 (4) The disability allowance of a member will be reduced by the amount by
13 which the combined monthly benefits payable from both PERS and any monthly
14 workers' compensation payment on account of temporary total disability or permanent
15 total disability exceed 75 percent of the monthly salary of the member on the date of
16 disability.

17 (5) In determining whether the combined monthly benefits exceed 75 percent of
18 the monthly salary of the member on the date of disability, cost-of-living adjustments
19 will not be considered.

20 (6) A member who is eligible to receive a disability benefit must report
21 immediately to PERS the receipt or the award of any monthly workers' compensation
22 payment as described in section (2)(a) of this rule.

1 (7) In the event a member receives one or more monthly workers' compensation
2 payment(s) while also receiving a disability benefit as described in OAR 459-076-0015,
3 but PERS is not notified of the workers' compensation payment until after making one or
4 more disability benefit payments:

5 (a) PERS will recalculate the disability benefit, taking the monthly workers'
6 compensation payments into account; and

7 (b) PERS will invoice the member for, or recover under ORS 238.715, any
8 overpayment of OPSRP disability benefits.

9

10 Stat. Auth.: ORS 238.715 and 238A.450

11 Stats. Implemented: ORS 238A.235



Oregon

Theodore R. Kulongoski, Governor

September 23, 2005

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board

FROM: Steven Patrick Rodeman, Administrator
Policy, Planning, & Legislative Analysis Division

MEETING DATE	9/23/05
AGENDA ITEM	D.4. Implementation

SUBJECT: City of Eugene Decision and Implementation

OVERVIEW

- Subject: The Oregon Supreme Court issued its decision in the City of Eugene case on August 11, 2005. Resolution of that appeal triggered agency obligations under the court's earlier Strunk decision and the settlement agreement reached by the Board and Petitioners in the Eugene case ("Settlement Agreement"). This memo explores the policy decisions and options the PERS Board has to fulfill those obligations.
- Action: Provide policy direction to PERS staff on the issues identified below.
- Policy Issues:
 - What sources of funds does PERS have to meet its obligations under the Settlement Agreement?
 - How should PERS recover the funds needed to meet those obligations from the source(s) identified?
 - Should PERS exercise its waiver authority under ORS 238.715 for overpayments less than \$50?
 - Should PERS attempt to recover interest on the overpaid amounts?

BACKGROUND

The Eugene case began in the Marion County Circuit Court as a challenge to the PERS Board's 1998 and 2000 employer rate orders for the petitioning employers and the Board's order allocating 1999 fund earnings. Several individual members then intervened in the suit. Judge Lipscomb entered a judgment in favor of the petitioning employers and the intervenors in several respects. PERS filed an appeal to that judgment and sought a stay in implementing it from both the Circuit Court and the Oregon Court of Appeals. Both courts denied granting a stay.

In the interim, the 2003 Oregon Legislature adopted PERS Reform Legislation that enacted into law many of the changes that would have been required to comply with Judge Lipscomb's judgment. That legislation was challenged by direct appeal to the Oregon Supreme Court (the Strunk case) and the Eugene appeal was also sent directly to the Oregon Supreme Court by legislative direction.

While the Strunk and Eugene cases were pending at the Oregon Supreme Court, the PERS Board entered into the Settlement Agreement with the petitioning employers in the

Eugene case. The Settlement Agreement resolved how PERS would fulfill its obligations under some elements of the PERS Reform Legislation and the Eugene case. Some of those obligations were contingent upon how the Strunk case was decided; others were fulfilled in accordance with the terms of the Agreement. The Board's actions in this regard have been challenged in a Multnomah County Circuit Court case, White v. PERB, which was put on hold pending resolution of the Eugene case, and is in the process of being revived.

PERS' OBLIGATIONS UNDER THE AGREEMENT

The Strunk decision triggered the following additional obligations under the Settlement Agreement:

1. Credit the Contingency Reserve with 7.5% of 1999 available earnings;
2. Fund the Gain/Loss Reserve up to the 30-month goal; and
3. Allocate 1999 earnings to Tier One member regular accounts at 11.33% (instead of the original 20%).¹

Executing the last obligation does provide some of the funds needed to accomplish the first two. Additional funds to meet the obligations to the Contingency and Gain/Loss Reserves must be made available. Following the earnings crediting policy in effect at the time of the original crediting (March 2000) would result in the following steps:

1. Credit the Contingency Reserve up to \$518.85 million. This number represents 7.5% of available 1999 earnings from Tier One member regular accounts, employer accounts, and the Benefits-in-Force Reserve ("BIF"). Staff does not recommend using 1999 earnings from Tier Two member regular accounts to fund the Contingency Reserve. The amount of 1999 Tier Two earnings that would be reallocated to the reserve would be *de minimis* (approx. \$2 million) by comparison. Moreover, in the vast majority of cases, the Tier Two member account adjustment would be below the \$50 threshold that the Board can waive recovery under ORS 238.715(6). Lastly, including Tier Two member regular accounts in the re-allocation of 1999 earnings, would significantly expand the administrative workload. An additional 95,500 accounts would need to be adjusted and 13,500 payments recovered (predominantly withdrawals and some retirements) if Tier Two accounts were included in the re-allocation.
2. Add an additional \$2,054.68 million to the Gain/Loss Reserve. This would conform to the 2000 PERS Board's stated goal to fund that reserve with enough money to credit the assumed rate (8%) to Tier One regular member accounts, employer accounts, and the BIF for a period of 30 months of zero market returns. Again, following the earnings crediting policy in place at that time, earnings from Tier Two regular member accounts would not fund this reserve because they were not part of the annual rate guarantee nor protected from subsequent market losses.

¹ As the Supreme Court noted in Strunk, "The legislature subsequently enacted the 2003 PERS legislation, Oregon Laws 2003, chapter 67, sections 9 and 10, *as amended by* Oregon Laws 2003, chapter 625, section 13, effectively codifying the 11.33 percent figure as the correct 1999 crediting decision."

3. Reduce allocated earnings to Tier One member regular accounts and related employer and BIF balances to an 11.33% earnings allocation, resulting in \$2,573.53 million being available to credit to the Contingency and Gain/Loss Reserves as proposed above. Although the Settlement Agreement does not specify (or prohibit) the related employer and BIF balances to be adjusted to 11.33%, doing so would conform to the earnings crediting policy in place in 1999 and would be a consistent adjustment, garnering more of the funds needed to meet the first two obligations. As a practical matter, these earnings would be returned to their respective accounts when earnings are credited for 2000 and 2001 (the Gain/Loss Reserve would be fully liquidated in 2001), and brought forward consistent with the Board's earnings crediting policy in effect for those years.

ANALYSIS OF POLICY ISSUES

- o ***What sources of funds does PERS have to meet its obligations under the Settlement Agreement?***

One source of funds will be adjustments to the regular accounts for existing Tier One members (active and inactive) to reflect a re-allocation of the 1999 earnings. Similarly, employer accounts and the BIF will be adjusted to reflect this re-allocation.

This 1999 re-allocation to existing Tier One member regular and employer accounts and the BIF will yield revised account balances that will then be brought forward consistent with the crediting decisions for intervening years. That means that the Gain/Loss Reserve will be liquidated as needed to credit 8% to Tier One member regular and employer accounts and the BIF for 2000, 2001, and 2002 (to the extent funds from that Reserve are available). As of year end 2002, employer accounts and the BIF will be adjusted to reflect pending losses that were allocated to those accounts and the Tier One Rate Guarantee Reserve will have a revised balance. For calendar year 2003, Tier One member regular accounts will receive 8% as required by the *Strunk* decision, while employer accounts and the BIF will receive their previously allocated shares of those earnings. Earnings for 2004 have not yet been allocated.

That brings us to the issue of recovering over-credited amounts with respect to Tier One members who no longer have existing accounts. Tier One members (and their beneficiaries or alternate payees, if any) who had regular accounts in 1999 and have retired, withdrawn, or died have received some form of distribution based on an account balance that was credited with 20% earnings for 1999. The actuary estimates the impact of that over-crediting to be about \$800 million, including sums already paid out and amounts scheduled to be paid in future benefits. (see attachment)

In his Final Opinion and Order issued in October 2002, after remanding the 1999 earnings allocation order to the PERS Board, Judge Lipscomb said the following about recovering these amounts:

The Board will also have to decide on remand how to administer the accounts of members who have retired since the 1999 earnings were originally allocated. Presumably, these employees retired upon PERS' representation that in doing so they would be entitled to a certain level of retirement benefits. It would not necessarily be legally permissible to simply readjust the benefits of the retired members since they have given up their public employment positions and changed their legal position by

accepting one of the PERS' retirement options, **although there is some apparent statutory authority for doing so. See ORS 238.715.** (emphasis added) Accordingly, the Board should also consider other potential options, such as utilizing the Contingency Reserve provided for in ORS 238.670(1) or the Benefits-in-Force Reserve established in accordance with subsection (2) of ORS 238.670. The Board may also need to consider treating any funding shortfalls resulting from its recalculation of the employer contribution rates on remand as an administrative expense.¹ These are all decisions entrusted to the Board's discretion in the first instance by the legislature. See ORS 238.610.

¹ But cf. ORS 238.610(4).

The possible sources of recovery posited by Judge Lipscomb (retired members, reserves, and administrative expenses) will be discussed separately below. For each, staff will explore whether the option is legally permissible, fiscally prudent, and consistent with the Board's fiduciary obligations:

1. Administrative Expense. This option would involve charging the overpaid amounts that have already been paid and are to be paid in future benefits to retired Tier One members as an administrative expense, which would be recovered from future fund earnings.

Legal Analysis: Section 14b of HB 2003 (2003 Oregon Legislature) provides:

(1) If the Public Employees Retirement Board is required to correct one or more of the erroneous benefit calculation methods identified in [the *Eugene* case], the board shall recover the cost of benefits erroneously paid to retired members as a result of those erroneous benefit calculations by one or both of the following methods:

(a) The board may withhold cost of living increases under ORS 238.360 from a retired member whose benefit is greater than the correctly calculated benefit of the member until such time as the member's benefit is equal to the correctly calculated benefit.

(b) The board may treat all or part of the present value of the benefits erroneously paid and payable to retired members as a result of the erroneous benefit calculations as an administrative expense of the Public Employees Retirement System, to be paid exclusively from future income of the Public Employees Retirement Fund, and to be amortized over an actuarially reasonable period not to exceed 15 years.

(2) In no event may the cost of erroneous benefit calculation methods identified in *City of Eugene et al. v. State of Oregon* be considered an employer liability or charged to employers through employer contributions.

The cost of living adjustment ("COLA Freeze") method in (1)(a) above was found unconstitutional in the *Strunk* decision when applied under a different provision in the PERS Reform Legislation, leaving just the administrative expenses method in (1)(b).

An Oregon Attorney General opinion addressed to Senator Tony Corcoran dated June 3, 2003, stated, in relation to this provision, that charging the excess benefits received by certain PERS retirees against future earnings of the PERS Fund in the form of administrative expenses would "more likely than not" constitute a diversion of trust funds

prohibited by ORS 238.660. The analysis was based on trust law principles that place the burden of making a trust whole from excessive benefit payments on those who received such payment. Those principles further provide that assets of the trust are not liable for recovery of overpayments. The Attorney General noted that current PERS statutes are consistent with this analysis as they authorize the PERS Board in the first instance to recover excess payments from those who receive them (again, referring to ORS 238.715). While not officially released, the opinion has been summarized in newspaper articles and is available on the Internet.

Normally, retirement allowances may not be treated as administrative expenses.² Section 14b(1)(b) of HB 2003 (quoted above) attempts to modify this rule. Assuming that HB 2003 validly amended the PERS statute to allow treatment of the benefit overpayments as administrative expenses, as qualified by Section 14b(2) (also quoted above), the excess benefits payments would be chargeable solely to earnings that would otherwise be credited to the remaining member regular accounts. Thus, Tier One and Tier Two members with existing regular accounts would subsidize the retirement allowances received and to be received by the so-called “window retirees” (those retiring between April 1, 2000 and March 31, 2004). This would likely result in the benefits payable in the future to those Tier One and Tier Two members to be lower than they otherwise would be.

For example, assume earnings of \$100 and normal administrative expenses of \$10 and a charge for these special expenses at another \$10. That would normally leave \$80 in earnings to distribute. The restriction from section 14b(2), however, would require that employers receive earnings based on \$90 to distribute, as these special administrative expenses cannot affect their distribution. That further reduces the balance of earnings available to distribute to member accounts to absorb what would otherwise be the employer’s share of the special administrative expenses.

Fiscal Analysis: Charging these overpayments to administrative expenses necessarily puts the burden of repayment on current members. Not only would their accounts be adjusted for the 1999 earnings over-crediting, but their future earnings would be reduced to pay for the amounts overpaid to retired members because administrative expenses are charged first against available earnings in a calendar year and, if there are none, paid for by employers. Future earnings do not generally affect currently payable retirement, withdrawal, or death benefits, so the “window retirees” would receive the full benefit of the 1999 earnings over-crediting and not contribute to its recovery.

Fiduciary Obligation: Even if a court were to hold that treating the overpayments to the “window retirees” as an administrative expense is legal, placing the full burden of repaying approximately \$800 million in over-crediting on those who did not (and will not) receive any benefit from it appears contrary to sound fiduciary practice, particularly when an available and legally permissible direct recovery method would more equitably align the burden with the benefit.

² In the excerpt from Judge Lipscomb’s opinion quoted above, he notes that recovering these funds from administrative expenses contradicts ORS 238.610(4), which specifies that amounts payable as allowances shall not for any purpose be deemed expenses of the Board.

2. Contingency and/or BIF Reserves. This option would involve transferring funds from the Contingency Reserve to the BIF to cover the costs of failing to adjust Tier One benefit payments, or to let the BIF absorb those additional costs by creating additional unfunded actuarial liability.

Legal Analysis: The Attorney General opinion to Tony Corcoran referenced above does not address the use of the Contingency or BIF Reserves. The opinion's reasoning applied to recovery from administrative expenses could, however, be similarly applied to these reserves. Using these reserves would subject assets of the trust to recovery of the overpayments, rather than looking to the trust's beneficiaries that received the benefit of the 1999 earnings over-crediting. Particularly, using the BIF would place the entire burden of repayment on the employers, as they are the only "swing" fund source when the BIF is under-funded. Unlike the administrative expense method, however, there is no statutory authority that would directly contradict or expressly authorize the use of the BIF or Contingency Reserve in this instance.

Fiscal Analysis: Some portion of the Contingency Reserve will undoubtedly be needed to cover the deficit created by the 1999 earnings over-crediting. Not everyone who received payments based on the original account balance will be found, much less be able or compelled to repay the excess benefit. The chief question is whether an additional portion of the Contingency Reserve should be used right now to cover the entire obligation of retired and withdrawn members before good-faith efforts have been made to recover directly from those who received the over-credited amounts. From a fiscal standpoint, this decision would shift the burden of repayment entirely to future earnings, as only they can be used to replenish the Contingency Reserve.

Fiduciary Obligation: The same principle described above about matching the source of repayment with its beneficiary would not be met if the Contingency or BIF Reserves were used to fund the entire remaining obligation. Using those reserves would leave certain retired and withdrawn members with a windfall while burdening current Tier One and Tier Two regular account members (actives and inactives) and employers with the obligation to repay the entire over-crediting (and without any corresponding benefit).

3. Direct Recovery. This option involves: (a) adjusting the future benefit payments made from Tier One member regular accounts to retired members, beneficiaries, or alternate payees that included the over-credited 1999 earnings; and (b) collecting the amounts already overpaid.

Legal Analysis: Tier One members who had regular accounts in 1999 have since then retired or withdrawn their regular accounts with the understanding that they would receive a certain level of benefits from that transaction, and they may have changed their position and circumstances based on that understanding. The fact remains, however, that representations as to benefit amounts were always made while a timely filed challenge to the 1999 earnings allocation order was pending. While the effect of that challenge was not and could not be known by PERS, much less by the retiring or withdrawing members, that pending court action nonetheless cast uncertainty on any transaction and signaled it may be subjected to some future adjustment depending on the outcome of that challenge.

The Settlement Agreement by its terms does not specify a method for (or prohibit PERS from) adjusting benefits for retired members; in fact, it leaves silent any obligation beyond re-crediting Tier One member regular accounts at 11.33% for 1999 earnings. The

issue of whether and how that re-crediting would affect individual members was not addressed in the Settlement Agreement or by the Eugene case. While neither the Strunk decision nor Judge Lipscomb's opinion reached a conclusion about whether and how the PERS Board may recover from retired members, both made direct reference to ORS 238.715, a statute which outlines the methods by which the Board is to recover overpayments or other improperly made payments.

That statute (copy attached) provides authority, direction and process for notifying members about, and recovering improperly made payments. Judge Lipscomb's decision, as it is now to be implemented under the Settlement Agreement, makes it clear that the allocation of 1999 earnings to Tier One member regular accounts in excess of 11.33% was improper. This conclusion was reinforced by the 2003 Oregon Legislative Assembly in its findings supporting the PERS Reform package (see the preamble to HB 2003 from that session). Under ORS 238.715, the Board has the authority to remedy that error.

The 2003 PERS Reform Legislation enacted a special, supplemental method of recouping overpayments from these recipients by instituting a COLA Freeze on a certain group of affected retired members, leaving other recipients unaffected by that method of recoupment (withdrawn accounts, double lump sum retirements, etc.). In Strunk, the Supreme Court invalidated the COLA Freeze as a recoupment method. An August 26, 2005 letter from Gregory A. Hartman to Paul Cleary (copy attached) argues that the Court's discussion of the COLA Freeze issue amounted to a holding that the Legislative Assembly determined that the higher allowance (referred to in the legislation as the "fixed" retirement allowance) was properly payable to the "window retirees" and cannot be adjusted.

As the response letter from Joseph Malkin to Mr. Hartman (copy attached) makes clear, the Strunk Court acknowledged that the legislature's intent was "to recoup what it deemed to be overpayments to the affected members' regular accounts in 1999." The Court's holding in Strunk was limited to finding the elimination of the COLA to be a breach of the PERS contract. The Court expressly stated, "Our conclusion that that particular legislative action amounted to a breach of the PERS contract, however, **implies nothing about PERB's – or, for that matter, the legislature's – authority to recover amounts determined to have been paid from the fund in error**" (emphasis added). The Court ended its discussion by saying, "The effect of our choice to declare that part of the law to be void is that petitioners will be returned – **at least for the time being** – to the same position in which they would have been if the legislature had not enacted the COLA suspension." (emphasis added).

Fiscal Analysis: Each affected person's benefit payment would need to be individually recalculated to determine the scope of the over-crediting under this recovery option. That effort (involving 43,000 benefit recipients) would be substantial, but it's the only way that we can accurately assess the impact of the improper crediting and related overpayment on each recipient. Staff is developing specific approaches to implement the Strunk and Eugene decisions; however, the range of approaches and related details are dependent upon the policy decisions outlined by this memo. Staff expects to return to the Board at a future meeting with a detailed implementation plan, including related staffing and budget requirements.

Developing a charge-off policy and identifying a source of funds will also be crucial for the direct recovery option. Some of the amounts over-credited will ultimately be determined to be uncollectable because the recipient cannot be found or does not have available assets to satisfy the claim. Those amounts must be recovered from elsewhere, possibly a charge against the Contingency Reserve.

Fiduciary Obligation: The direct recovery option comes closest to aligning the recovery of the amounts with those who received benefit from the overpayment. To adopt either of the first two options (charging all the over-credited amounts to administrative expenses or reserves) would hold retired or withdrawn members harmless and shift the burden to current members and employers.

STAFF RECOMMENDATION: Staff recommends adopting a policy that would pursue collection of the over-paid amounts from those who received direct benefit of the over-crediting. Charging that amount to administrative expenses has questionable legal authority and does not conform to sound fiscal or fiduciary principles as well as the direct recovery method does. Other methods of shifting the burden entirely to the shoulders of current members and employers raise similar fiscal and fiduciary concerns, at least until the option of direct recovery is exhausted.

- *How should PERS recover the funds needed to meet those obligations from the source(s) identified?*

To establish the amount of an individual recipient's overpayment, the first step for PERS staff is to recalculate the monthly benefit the recipient should be receiving, based on the adjusted account balance reflecting the 1999 earnings re-allocation at 11.33%. This reduced benefit will next be compared to the benefit that the recipient has received and is projected to be paid up to a date certain (e.g., August 1, 2006). This calculation will yield the gross amount that the recipient has been overpaid

Next, the vast majority of these recipients were subjected to the COLA Freeze that was found to be unlawful under the Strunk decision. Those recipients are owed the amount of COLA they should have received had the freeze not been implemented. Again, that amount will be determined to a date certain and offset against the gross overpayment amount, yielding a net amount owed either by the recipient to PERS or vice versa.

If PERS owes more to the recipient to make up for the COLA Freeze than they were in fact overpaid, PERS will cut them a check and begin issuing the adjusted benefit as of the effective date of that adjustment. For recipients that end up owing PERS because the amount overpaid to them exceeds their COLA Freeze amount, a process must be instituted to collect the remaining overpaid amount.

ORS 238.715 provides the framework for proceeding to collect overpayments from the recipients. The first step would be to notify the affected recipients, describing the manner in which the recipient can appeal the Board's determination, the action the Board may take if the recipient does not respond, and the authority to assess interest, penalties, or costs of collection. This notice must be mailed to the recipient within at least six years of the overpayment or the Board loses its right to recovery, so staff expects to generate and send these notices no later than April 2006.

After receiving notice and exhausting any appeals they choose to pursue, assuming the agency's determination is upheld, recipients can work out repayment plans with PERS

staff to recover the balances owed. For recipients that are not receiving on-going payments, PERS staff will return to the Board for some collection parameters that refine the repayment plans available.

For members that continue to receive a monthly benefit, the statute and rules set a baseline that PERS could recover up to 10% of the monthly payment without the member's consent. Given the nature of this situation, however, staff proposes to follow a less aggressive repayment structure than the 10% reduction fully allowed under the statute.

ORS 238.715(1) provides two options for the Board to recover an overpayment: (a) reduce the monthly payment for a number of months or (b) reduce the monthly payment "by an amount actuarially determined to be adequate to recover the overpayment . . . during the period which the monthly payment will be made to the member. . .". In this second method, the reduction is actuarially determined and applied on a system-wide basis. Initially, any lump sum payment owed to the member from the COLA Freeze would be offset against the sum of overpaid benefits owed, as of a date certain. Then, for those recipients who still owe a balance to PERS, the actuary can calculate, based on the member's projected longevity and retirement option, how much their benefit needs to be reduced to repay the balance over the remaining stream of payments.

If PERS offered this option to recipients, their current benefit payment may be reduced when first adjusted but would then increase at the next (and subsequent) COLA date(s). From an actuarial standpoint, the payment adjustments would balance out on a system-wide level, so those recipients who outlived their mortality projections would contribute more than the actual overpayment, but that would be balanced out by those recipients who died early, leaving an unpaid balance.

Staff suggests that the recipient be able to choose this option in lieu of a lump sum payment. As to financial and fiduciary concerns, the main risk is that the actuarial assumptions used to calculate the payments do not hold up. This risk would be mitigated by using the most recently reviewed and approved actuarial assumptions at the time of the recalculation. Administratively, this option would relieve PERS of having to track exact repayment balances and transactions, limiting the time required to affect the recipient's payment to the one-time set up.

STAFF RECOMMENDATION: Staff endorses adopting an alternative payment structure other than the full 10% reduction allowed by statute. The Actuarial Adjustment option is more straightforward and extends the repayment over the longest period of time, minimizing the overall impact on the recipient. The adjustment only needs to occur at inception, but is also only accurate when implemented on a system-wide basis.

- *Should PERS exercise its waiver authority under ORS 238.715(6) for overpayments less than \$50?*

That statute allows the PERS Board to waive collecting an overpayment that is less than \$50. Staff recommends the Board exercise that right for all overpayments below that amount in regard to the class of benefit recipients who no longer have existing PERS accounts (members, beneficiaries, or alternate payees who retired, withdrew, or are receiving a death benefit). The Board can provide further guidance on how those funds should be recovered, such as from the Contingency Reserve, when it addresses the

charge-off and collection policy that will be presented as part of the detailed implementation plan.

STAFF RECOMMENDATION: Staff recommend waiving the collection of overpayments of less than \$50 from benefit recipients who no longer have existing PERS accounts.

o *Should PERS attempt to recover interest or costs on the overpaid amounts?*

ORS 238.715(5) allows the Board to recover interest and costs on an overpaid benefit only when the system or a participating employer was not at fault. Here, the overpayment was caused by the allocation of 1999 earnings by the PERS Board at that time, so staff does not support charging interest or costs in recovering these amounts.

Even if other statutory bases could provide authority for charging interest, adding the element of interest would greatly complicate the fiscal administration of this recovery. Also, the recipients were not at fault in causing this overpayment, so there's no compelling fiduciary obligation to charge interest.

STAFF RECOMMENDATION: Staff recommend that recovery of the overpaid amounts not include interest or other costs.

COMMENTS AND CORRESPONDENCE

Numerous letters, e-mails, and telephone calls have been received by staff and the PERS Board regarding the Settlement Agreement since the *Eugene* decision was issued. Staff responded to all correspondence and posted a Frequently Asked Questions on the PERS website. Generally, these comments fell into four main categories.

The main categories of comment (in order of correspondence volume) are:

1. Comments that recalculating a benefit and requiring retirees to pay back the overpayment is unfair.

Retirees have expressed the opinion that recovering the overpayment to Tier One regular members based on 1999 earnings crediting is not fair and should not be paid by retirees. Many commented that they believe there is no legal basis to recoup the overpayment from retirees or adjust future benefits to correct for the over-crediting.

2. Retirees have asked how the recalculation of 1999 earnings crediting for Tier One regular members will affect their respective accounts and related benefit payment.

Retirees want to know if and how much they will have to repay and when guidelines and schedules for repayment will be in place.

3. Declarations that PERS has already determined how the Settlement Agreement will be implemented and demanding to know how and when that will be done.

A number of comments accused PERS of already having an implementation plan in place and withholding that information.

4. Suggestions on how to implement the Settlement Agreement.

PERS has received suggestions on how to implement the Settlement Agreement and potential sources to recoup the overpayment, including using current and future reserves, applying frozen COLAs, and spreading repayment over as much time as possible.

REVIEW AND APPEAL PROCESS

Before the Board directs staff to pursue direct recovery of the overpayments under ORS 238.715, some procedural requirements should be noted. The recipient must receive notice of the overpayment under ORS 238.715(4), and that notice must describe the manner in which the recipient can appeal the Board's determination. Generally, that appeal will be structured around the administrative appeal process. Staff will be coming to the Board at its retreat later this year with options for dealing with contested cases in general. Given the special nature of these cases, staff will include in that discussion some options to streamline and accelerate the appeal process to reach resolution of these cases as quickly as possible.

Note that whatever appeal process the Board describes in the notice will be the recipient's administrative appeal recourse. These overpayments will not trigger a notice of contest under ORS 238.450 unless the affected member had not already been sent a notice of entitlement.

SUMMARY OF STAFF RECOMMENDATIONS AND POLICY ISSUES

As noted earlier, PERS has three remaining obligations to execute now that the Strunk and Eugene cases have been resolved:

- (1) Credit the Contingency Reserve with 7.5% of 1999 available earnings;
- (2) Fund the Gain/Loss Reserve up to the 30-month goal; and
- (3) Allocate 1999 earnings to Tier One member regular accounts at 11.33% (instead of the original 20%).

The remaining funds needed for the reserve transfers will come from re-allocating 1999 earnings to existing accounts (employer accounts and the BIF), but some action must be taken to recover amounts that have been and are scheduled to be paid to accounts that have moved into pay status (members, beneficiaries, or alternate payees who have retired, withdrawn, or are receiving a death benefit). These actions would include both recalculating an adjusted benefit going forward and recovering amounts that had already been overpaid as of the date of that adjustment.

Staff recommends that PERS recover those overpaid amounts from the recipients, using its Actuarial Adjustment and other authority under ORS 238.715 (unless the obligation is waived because it's under \$50). Lastly, staff recommends that interest or other costs not be recovered on the overpaid amounts.

MERCER

Human Resource Consulting

Impact of Eugene Settlement

In our April 15 Board presentation, we estimated the impact of the Eugene settlement on PERS liabilities as of December 31, 2003. The following table reviews those estimates, breaking out the impact on benefits already in force.

	Post-Strunk Ruling	Impact of Eugene Settlement	Post Eugene Settlement
Actives Tier 1	\$16.6	\$(0.5)	\$16.1
Actives Tier 2	\$1.2	\$0.0	\$1.2
Judges	\$0.1	\$0.0	\$0.1
Inactives	\$4.5	\$(0.3)	\$4.2
Benefits in Force	\$23.8	\$(0.8)	\$23.0
Total Accrued Liability	\$46.2	\$(1.6)	\$44.6

The above estimates are based on the data, methods and assumptions used in the December 31, 2003 actuarial valuation, with modifications for valuing the Strunk ruling. In addition, the following assumptions have been incorporated to value the impact of the Eugene settlement:

- The Tier One interest credit for 1999 was reduced from 20.00% to 11.33%. We estimated this change to reduce Tier One active member account balances (post Strunk) as of December 31, 2003 by approximately 6.0%. This reduction is less than the immediate reduction would have been as of December 31, 1999 because it reflects the average impact of member contributions for 2000, 2001 and 2002.
- For these estimates, it is assumed that retirees who retired between April 1, 2000 and December 31, 2003, have their future benefits recalculated to reflect 1999 earnings crediting of 11.33% instead of 20.00%. The reduced benefit amount was previously estimated and provided to us by the prior actuary. We used this estimated benefit to value the impact of the Eugene settlement.
- We estimate the amount of benefits paid to retirees as of December 31, 2003 in excess of the benefit that would have been paid had 1999 earnings been credited at 11.33% to be approximately \$75 million.
- Please note that all of these estimates are as of December 31, 2003 and do not reflect any retirements or changes in value after that date.

As you know, Mercer Human Resource Consulting is not a law firm and cannot render legal advice. The estimates provided above are not intended to imply any opinion as to the legality of reducing the liabilities, in particular for benefits in force, as described above.

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238.715 Recovery of overpayments; rules.

(1) If the Public Employees Retirement Board determines that a member of the Public Employees Retirement System or any other person receiving a monthly payment from the Public Employees Retirement Fund has received any amount in excess of the amounts that the member or other person is entitled to under this chapter and ORS chapter 238A, the board may recover the overpayment or other improperly made payment by:

(a) Reducing the monthly payment to the member or other person for as many months as may be determined by the board to be necessary to recover the overpayment or other improperly made payment; or

(b) Reducing the monthly payment to the member or other person by an amount actuarially determined to be adequate to recover the overpayment or other improperly made payment during the period during which the monthly payment will be made to the member or other person.

(2)(a) Any person who receives a payment from the Public Employees Retirement Fund and who is not entitled to receive that payment, including a member of the system who receives an overpayment, holds the improperly made payment in trust subject to the board's recovery of that payment under this section or by a civil action or other proceeding.

(b) The board may recover an improperly made payment in the manner provided by subsection (1) of this section from any person who receives an improperly made payment from the fund and who subsequently becomes entitled to receive a monthly payment from the fund.

(c) The board may recover an improperly made payment by reducing any lump sum payment in the amount necessary to recover the improperly made payment if a person who receives an improperly made payment from the fund subsequently becomes entitled to receive a lump sum payment from the fund.

(3) Unless the member or other person receiving a monthly payment from the fund authorizes a greater reduction, the board may not reduce the monthly payment made to a member or other person under the provisions of subsection (1) of this section by an amount that is equal to more than 10 percent of the monthly payment.

(4) Before reducing a benefit to recover an overpayment or erroneous payment, or pursuing any other collection action under this section, the board shall give notice of the overpayment or erroneous payment to the person who received the payment. The notice shall

describe the manner in which the person who received the payment may appeal the board's determination that an overpayment or erroneous payment was made, the action the board may take if the person does not respond to the notice and the authority of the board to assess interest, penalties or costs of collection.

(5) If the board determines that an overpayment or erroneous payment was not caused by the system or by a participating public employer, the board may assess interest in an amount equal to one percent per month on the balance of the improperly made payment until the payment is fully recovered. The board may also assess to the member or other person all costs incurred by the system in recovering the payment, including attorney fees. Interest and costs may be collected in the manner prescribed in subsections (1) and (2) of this section. The board may waive the interest and costs on an overpayment or other improperly made payment for good cause shown.

(6) Notwithstanding ORS 293.240, the board may waive the recovery of any payment or payments made to a person who was not entitled to receive the payment or payments if the total amount of the overpayment or other improperly made payments is less than \$50.

(7) A payment made to a person from the fund may not be recovered by the board unless within six years after the date that the payment was made the board has commenced proceedings to recover the payment. For the purposes of subsection (1) of this section, the board shall be considered to have commenced proceedings to recover the payment upon mailing of notice to the person receiving a monthly payment that the board has determined that an overpayment or other improperly made payment has been made.

(8) The remedies authorized under this section are supplemental to any other remedies that may be available to the board for recovery of amounts incorrectly paid from the fund to members of the system or other persons.

(9) The board shall adopt rules establishing the procedures to be followed by the board in recovering overpayments and erroneous payments under this section. [Formerly 237.312; 2003 c.105 §6; 2003 c.733 §66]

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

ATTORNEYS AT LAW

GREGORY A. HARTMANhartmang@bennetthartman.com
Direct Dial: 503-546-9601SUITE 1650
111 S.W. FIFTH AVENUE
PORTLAND, OREGON 97204-3627
(503) 227-4600
FAX (503) 248-6800

August 26, 2005

*BY FAX AND MAIL: 503-598-0561*Paul Cleary
Executive Director
Public Employees Retirement System
PO Box 23700
Tigard, OR 97281-3700Re: Implementation of 1999 Earnings Recalculation for Retirees
Our File No. 5415-260

Dear Paul:

I understand with the dismissal of the appeal in the *City of Eugene* case that the PERS board intends at its upcoming September 23 meeting to take action on issues relating to the redistribution of 1999 income. Although your website makes it clear that no particular plan of action has, as yet, been adopted, it also contains information showing the potential for substantial cutbacks for current retirees as well as potential invoices for overpayment. The purpose of this letter, which I am sending on behalf of the PERS Coalition, is to point out that any action by the PERS board to reduce the benefits of so-called window retirees (April 2000 through April 2004) would be inconsistent with the analysis of the Supreme Court in the *Strunk* case. This letter is limited to reviewing the rights of the window retirees as articulated in the *Strunk* case; it is not meant to address the rights of other retirees or non-retired PERS members. We continue to study issues relating to those members and will communicate our thoughts to the board at the appropriate time.

Prior to reviewing *Strunk* it is important to note that nothing in Judge Lipscomb's judgment compels the PERS board to take any specific action in regard to PERS retirees. In his opinion Judge Lipscomb acknowledged the existence of ORS 238.715 but nonetheless expressed great concern about whether it would be legally permissible for the PERS board to attempt to modify the benefits of PERS retirees. In addition there is nothing in the Settlement Agreement between *City of Eugene* plaintiffs and the PERS board which

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Paul Cleary
August 26, 2005
Page 2

requires the PERS board to take any particular action in regard to retirees. The failure of the Settlement Agreement to reference any change in retiree benefits leads to the logical conclusion that the parties agreed to settle the *City of Eugene* litigation on the basis of the remedies set out in the Agreement and that no further action was contemplated. However, as discussed below, it is not necessary for the board to review either Judge Lipscomb's opinion or its own Settlement Agreement as the rights of the window retirees were defined by the 2003 legislature as explained in the majority opinion in *Strunk*.

In *Strunk* petitioners argued that the 2003 legislative enactment which took away COLA increases from window retirees was either a breach or an impairment of the individual members' contract rights. 338 Or at 218-219. In response the major argument made by the respondents was that no contract rights could adhere to benefits which were based on an improper crediting to members' individual accounts. *Id.* at 219. In support of that position the respondents referenced ORS 238.715, which they argued gave the PERS board a broad right to recover benefits based on over-crediting. *Id.*

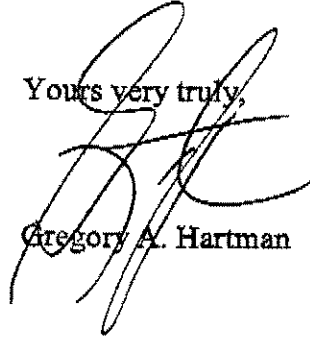
After first holding that the COLA promise contained in ORS 238.360 was contractual, the court went on to hold, after citing ORS 238.715, that the COLA promise does not extend to erroneous overpayments included in a member's service retirement allowance that the member was not entitled to receive. 338 Or at 222. However the court then pointed out that ORS 238.715 had no application to the window retirees as the legislature itself had determined a new "fixed" service retirement allowance for these particular retirees. *Id.* at 223. Since this new "fixed" retirement allowance was determined by the legislature, no argument could be made that this was a retirement allowance to which the member was not entitled. *Id.* Put another way, once the legislature had provided for this new "fixed" retirement allowance, ORS 238.715 had no relevance. The court went on to hold that this new "fixed" service retirement allowance as determined by the legislature came within the scope of the COLA promise and therefore window retirees were entitled not only to the "fixed" service retirement but any COLA which would have attached to that retirement benefit. *Id.* As a result the court declared void the language in the statute which said that COLA would not be applied to the new fixed service retirement allowance. *Id.* at 225.

As the PERS board deals with the issue of the appropriate steps to take in regard to window retirees, it should be clear that any action the board takes must be consistent with this "fixed" retirement allowance granted to window retirees. The only action available to the board is the continuation of the "fixed" service retirement amount and, in addition, whatever COLA increases should have been paid. It should be clear that ORS 238.715 cannot be applied to the window retirees, given the analysis in the *Strunk* opinion. As pointed out above, there is nothing in either the Lipscomb judgment or the Settlement Agreement which would lead to a contrary conclusion. Most importantly, even if there were language in either the Lipscomb judgment or alternatively in the Settlement Agreement requiring some other course of action, the PERS board is required to follow the mandate of the 2003 legislature as interpreted by the *Strunk* court.

Paul Cleary
August 26, 2005
Page 3

After you've had a chance to review this material if you should have any additional questions or require any additional information from our office, do not hesitate to contact me.

Yours very truly,



Gregory A. Hartman

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cc: Clients (email only)
Joe Malkin
Keith Kutler
Bill Gary

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ORRICK, HERRING FOREMAN & SMITH LLP
THE ORRICK BUILDING
405 BOWARD STREET
SAN FRANCISCO, CA 94104-2000
tel. 415-773-5700
fax 415-773-5759
www.orrick.com

September 12, 2005

Joseph M. Malkin
(415) 773-5505
jmalkin@orrick.com

Gregory A. Hartman, Esq.
Bennett, Hartman, Morris & Kaplan, LLP
Suite 1650
111 S.W. Fifth Avenue
Portland, Oregon 97204-3627

Re: Implementation of 1999 Earnings Recalculation for Retirees

Dear Greg:

As counsel to the Public Employees Retirement Board (“PERB” or the “Board”), we are responding to your August 26, 2005 letter to Paul Cleary concerning the implementation of the 1999 earnings recalculation for retirees.

First, you point out that neither Judge Lipscomb’s judgment in *City of Eugene* nor the Settlement Agreement in that case requires PERB to take any particular action with respect to retirees. From this you assert that the “logical conclusion” is that “the parties agreed to settle the *City of Eugene* litigation on the basis of the remedies set out in the Agreement and that no further action was contemplated.” Your conclusion is not logical, however. Judge Lipscomb held in *City of Eugene* that the prior board had abused its discretion by crediting 20 percent earnings to Tier One member accounts in 1999 instead of properly funding the Contingency Reserve and the Gain-Loss Reserve. The Legislative Assembly codified Judge Lipscomb’s conclusion that Tier One member accounts should have been credited with 11.33 percent earnings. Oregon Laws 2003, chapter 67, sections 9 & 10, *as amended by* Oregon Laws 2003, chapter 625, section 13. As the Supreme Court pointed out in *Strunk*, the failure of the prior boards to fully fund the reserves created a “funding gap.” The Board must take some action to close this funding gap.

You next argue (and this is the principal thrust of your letter) that the Supreme Court’s *Strunk* decision holds that “once the legislature had provided for [the] new ‘fixed’ service retirement allowance, ORS 238.715 [addressing recovery of overpayments] had no relevance.” We disagree with your conclusion and believe that you are reading more into the Court’s discussion of the COLA issue than the Court intended.




O R R I C K

Gregory A. Hartman, Esq.
September 12, 2005
Page 2

In *Strunk*, the Supreme Court invalidated the COLA freeze as a recoupment method for the overpayments flowing from the erroneous 1999 earnings crediting. The *Strunk* Court acknowledged that the legislature's intent was "to recoup what it deemed to be overpayments to the affected members' regular accounts in 1999." The Court's holding in *Strunk* was limited to concluding that Tier One members are entitled to COLA on any retirement allowance provided for under PERS and that the elimination of the COLA constituted a breach of the PERS contract. The Court expressly stated, "Our conclusion that that particular legislative action amounted to a breach of the PERS contract, however, **implies nothing about PERB's – or, for that matter, the legislature's – authority to recover amounts determined to have been paid from the fund in error.**" (emphasis added) The Court ended its discussion by saying, "The effect of our choice to declare that part of the law to be void is that petitioners will be returned – **at least for the time being** – to the same position in which they would have been if the legislature had not enacted the COLA suspension." (emphasis added) Had the Court intended to preclude the application of ORS 238.715 or legislative enactments other than the COLA freeze, it would not have included these statements.

Thus, we believe the *Strunk* Court expressly reserved to the Board and/or the Legislative Assembly the determinations of whether the "fixed" retirement benefit, which was nothing more than the pre-existing overpayment based on the erroneous 1999 earnings crediting, had been paid from the PERS fund in error and whether PERS should take some action to recovery the erroneous payments from those who received them. Given Judge Lipscomb's ruling that a prior PERS board had abused its discretion when it credited 20% to Tier One member regular accounts for 1999, the legislature's codification of 11.33% as the appropriate earnings crediting rate for that period, and the Settlement Agreement's direction to reallocate those earnings, we conclude that the Board's ability to spread the impact of that reallocation across all affected groups, including retired members, to the extent reasonably available, is not restricted by the Supreme Court's decision.

Sincerely yours,



Joseph M. Malkin

JMM/mj

cc: Paul Cleary