

## VCERA Resolution

### **APPROVAL OF APPEALS PROCESS FOR BENEFIT DETERMINATIONS ARISING OUT OF THE ALAMEDA SUPREME COURT DECISION (“ALAMEDA APPEALS”)**

**WHEREAS**, on July 30, 2020, the California Supreme Court issued a decision in the case of *Alameda County Deputy Sheriff's Assoc. et al., v. Alameda County Employees' Retirement Assn., et al.* (2020) 9 Cal.5th 1032 (the “*Alameda Decision*”). The *Alameda Decision* concludes that all amendments to the definition of Compensation Earnable in Government Code section 31461, enacted as a result of the Public Employees' Pension Reform Act of 2013 and related statutory changes to CERL (“PEPRA”), effective January 1, 2013, are constitutional, and that CERL retirement boards may not be contractually bound or estopped by settlement agreements, board resolutions, or other similar actions, from implementing those amendments. The *Alameda Decision* further determines that CERL retirement boards may not include items in compensation earnable that sections 31460 and/or 31461 require them to exclude.

**WHEREAS**, on October 12, 2020, the Board adopted a Resolution to comply with the *Alameda Decision*'s directives regarding mandatorily excluded pay items required by amendments to Government Code section 31461, effective January 1, 2013 (“PEPRA Exclusions”), and applied that directive to all retiree payroll for individuals who retired on or after PEPRA's effective date of January 1, 2013. Effective with the August 2020 payroll, VCERA will recalculate and adjust amounts paid to such retirees if their retirement allowances previously included the PEPRA Exclusions.

**WHEREAS**, as used herein, the term “PEPRA Exclusions” shall refer to any payments that are not permitted by subdivision (b)(2), (3) or (4) of Government Code section 31461 to be included in “compensation earnable,” including, among other items, payments received by the member for additional services rendered outside of normal working hours, whether paid in lump sum or otherwise.

**WHEREAS**, the October 12, 2020, Resolution direct that VCERA present impacted pay codes as soon as practicable to the Board to ratify exclusions from compensation earnable and pensionable compensation in compliance with *Alameda*, and communicate to VCERA participating employers that member contributions are no longer to be taken on such pay codes.

**WHEREAS**, in accordance with the October 12, 2020, Resolution, VCERA identified pay codes subject to the PEPRA Exclusions for compensation earnable and pensionable compensation, and notified VCERA participating employers that member contributions are no longer to be taken on such pay codes. On May 24, 2021, the Board ratified exclusion from compensation earnable and pensionable compensation such pay codes for pay items required to be excluded in compliance with the *Alameda Decision*.

**WHEREAS**, the Board, through the October 12, 2020 Resolution, directed staff to notify the affected members of the Board implementation of the *Alameda Decision* through appropriate means and to provide members with an opportunity to administratively appeal factual determinations VCERA makes regarding pay codes with which they may disagree (such as whether particular pay codes are for services rendered during normal working hours of

members in the class or grade of the member). Gov. Code §31461(b)(3); see *Stevenson v. Board of Retirement of OCERS* (2010) 186 Cal.App.4th 498. Such appeals would occur under Code of Civil Procedure section 1085. *Shelden v. Marin Cnty. Employees' Ret. Assn.* (2010) 189 Cal.App.4th 458.

**WHEREAS**, the notice to be sent to the affected members will provide a right to appeal the (1) recalculation of or other numeral data provided in the notice or (2) exclusion of any of the items identified for removal from final average compensation on the basis that the benefit was both "compensation" and "compensation earnable," because, for example, pay was for services rendered within "normal working hours" of "persons in the same grade or class of positions during the position, and at the same rate of pay," as the affected member was in at the time he or she rendered service, and thus should not have been excluded under subdivision (b)(3) of Government Code section 31461.

**WHEREAS**, it is the Board's intent to ensure due process, as well as an expedient determination concerning an appeal brought by an affected member or VCERA participating employer on behalf of its employees (VCERA member) for purposes specifically related to an appeal of PEPRA excluded items, incorrect data included into the calculation of a member's benefit, or the assertion the member actually was retired from VCERA before the effective date of the law that VCERA is applying to him or her. This Resolution prescribes steps of such an Alameda Appeal.

**THEREFORE BE IT RESOLVED**, that effective as of July 26, 2021, the following actions are authorized by the BOARD and required of VCERA:

1. The sole issue(s) for determination on Alameda Appeals are as follows:

a. Whether the pay was "compensation" under Government Code section 31460 and "compensation earnable" under Government Code section 31461. For example, was the pay for services rendered within the "normal working hours" of a member's position and of "persons in the same grade or class of positions during the period [the member rendered services] at the same rate of pay," such that it is not mandatorily excluded under subdivision (b)(3) in Government Code section 31461.

b. Whether VCERA calculations or other numerical data provided above are incorrect.

c. Whether the member actually was retired from VCERA before the effective date of the law that VCERA is applying to him or her.

The Board's policy decisions implementing the law set forth in the *Alameda* Decision, such as the manner in which the pensionability of leave cashouts are determined and the topic of "in-kind" benefits, are not administratively appealable issues, but rather are subject only to judicial review under Code of Civil Procedure section 1085.

2. Within 30 days of the postmark of the notice letter, the member shall submit an appeal request to the Retirement Administrator and specify the basis for such appeal, using the form which will be made available on the VCERA website. In addition, the member shall also provide supporting materials, if any, as part of their appeal to the Retirement Administrator. If no appeal is received within the time prescribed, then the right to appeal has expired and the

member has waived the right to administratively appeal the determination of the issues set forth above. In the event the member requests an extension to submit an appeal, the Retirement Administrator may provide an extension of not more than 30 days. If a VCERA participating employer files an appeal on behalf of its employees, then the appeal, specifying the basis for such appeal, with supporting materials, if any, shall be submitted to the Retirement Administrator.

3. If there are members of the same grade and class of position appealing the same PEPRAs excluded item, then such appeal may be grouped together by VCERA for purposes of analyzing the excluded item and a final determination of these appeals.

4. Within 60 days of receipt of the appeal, the Retirement Administrator or designee shall provide a written determination concerning the appeal.

a. If, based on a finding of facts and conclusions of law, it is determined that the excluded item is for services rendered **within** a member's "normal working hours" and is provided to persons in the same grade or class of positions and at the same rate of pay at the time the member rendered services, then such pay item shall be placed on the agenda at Board's regular meeting for approval of staff's determination that the item is to be included in the members' compensation earnable. In addition, staff shall notify any retired member affected by this determination and recalculate the benefit accordingly.

b. In alternative, if based on a finding of facts and conclusions of law it is determined that the excluded item is for services rendered **outside** a member's "normal working hours" and/or is not provided to persons in the same grade and class of positions at the time the member rendered services, at the same rate of pay, then the affected member, or in the case where the determination affects a group of members with the same PEPRAs excluded items and such appeals have been grouped together, shall be referred to the Board for a final determination following the rules set forth in this Resolution regarding Alameda Appeals ("Board Referral").

c. If the issue on appeal is the question presented in Section 1.c. above, if based on the findings of facts and conclusions of law the member actually was retired from VCERA before the effective date of the law that VCERA is applying to him or her, then staff shall recalculate the member's benefit. However, if the findings do not support a conclusion that the member actually was retired from VCERA before the effective date of law that VCERA is applying to him or her, then such matter shall be referred to the Board for a final determination.

5. Where such Alameda Appeal affects a group of members with the same PEPRAs excluded items and such persons are all part of the same grade and class of positions, then presentation of the matter to the Board may, upon direction by VCERA, be conducted with all affected members of the group.

6. As to all matters referred to the Board for a final determination in an Alameda Appeal, the following briefing schedule and related rules shall apply:

a. Member, Participating Employer on behalf of its employees, or Group of Members', individually or through counsel, may submit an Opening Statement to the Board by service on the Board's Legal Counsel at "BORCOUNSEL@vcera.org, and such Opening Statement is due not later than the 30<sup>th</sup>

day following the Board Referral, unless VCERA directs that the Opening Statement is due on a later date so as to facilitate the referenced grouping of proceedings or for other administrative reasons.

b. VCERA, individually or through counsel, may submit a Reply Statement to the Board, and such Reply Statement is due not later than the 60<sup>th</sup> day following the Board Referral, or 30 days after the date the Opening Statement is due, whichever is later.

c. Alameda Appeals will be scheduled for determination by the Board no fewer than 30 days, and no more than 90 days, from the due date of VCERA's Reply Statement, unless the Board grants itself additional time to make such a determination. The Board reserves the right to request additional briefing from the parties should it determine, in its sole discretion, such briefing is warranted. The Board will control the time allocated for oral argument of parties or their counsel during its consideration of Alameda Appeals. The Board reserves the right, in its sole discretion, to refer a fully-briefed Alameda Appeal in the manner provided by Government Code section 31533, to "either one of its members or a member of the State Bar of California," with directions (i) to consider the parties' submissions to the Board, (ii) to determine whether to request additional documentary evidence or written argument from the parties and if so to do so within 45 days of the appointment, and (iii) to transmit, in writing, to the Board the referee's proposed findings of fact and recommended decision within 90 days of appointment of the referee. The proposed findings of fact and recommendations of any such referee will be considered by the Board as provided in Government Code section 31534. Any judicial review of the Board's decision in Alameda Appeals shall be subject to Code of Civil Procedure section 1085. *Shelden v. Marin County Employees' Retirement Association* (2010) 189 Cal. App. 4th 458.

d. All evidence provided on Alameda Appeals shall be submitted in documentary form.

**IN WITNESS WHEREOF**, the above Resolution for VCERA is hereby adopted by the Board of Retirement on this 28<sup>th</sup> day of November 2022.



MIKE J. SEDELL, Chairman  
Board of Retirement