

TO: MainePERS Consensus Based Rule Making Representative Group (CBRM)
FROM: Sue Hawes, CBRM Interested Party
DATE: October 18, 2022
RE: Proposed Rule Changes to Ch. 702 and Questions for Staff

For four years and ten months, so far, I have served as a MainePERS Designated Representative to a disabled MainePERS retiree whom MainePERS anticipates will crossover to service retirement at age 70 in 2040. In April 2022, I requested that MainePERS engage in Consensus Based Rule Making to address the many systemic issues with the disability and appeals programs I have observed. However, contrary to my purpose in requesting CBRM, I find myself again assigned to a muted corner by Michael Colleran, MainePERS General Counsel, instead of addressing the group from the requested seat at the table representing directly impacted individuals and, as part of the team, applying my knowledge and experience.

In addition to my questions below for the CBRM Group, I propose the following rule changes A-E for Ch. 702:

- A. Within 30 days of a Notice of Appeal, the Appeals Clerk must have proof of service to the Appellant of the Appeal Packet containing the documentation upon which the CEO's adverse decision rests.
- B. The Appeals Clerk must use USPS Certified Mail to notice the Appellant of all scheduled pre-hearing conferences, hearings, and all other events subject to default under Ch. 702 Sec. 10. The notice must include language alerting the Appellant of the consequences of default.
- C. Sec. 14 Change "shall" to "must" in "If new grounds for affirming a decision adverse to the appellant are articulated by the Chief Executive Officer at this stage of the process, the hearing officer shall allow the parties a reasonable time to present additional evidence relevant to the issues raised in the Chief Executive Officer's reconsidered decision."
As described in my testimony for the Ch. 702 Rulemaking Public Hearing at the August 8, 2022, Board of Trustees meeting, in our second appeal the Hearing Officer F. Mark Terison ignored this mandate and did not "allow the parties a reasonable time to present additional evidence relevant to the issues raised in the Chief Executive Officer's reconsidered decision."
- D. Sec. 6(2)(b) needs the word "medical" removed--not all MainePERS appeals are medical.
- E. Sec. 9 Change "The MainePERS Representative shall:" to "The MainePERS **SYSTEM** Representative **MUST**:"

In the instruction to the MainePERS counsel in an appeal ("System Representative") Sec. 9(4) add "the" in "Provide records. Ensure that relevant records of the System are present...." to "4. Provide records. Ensure that **THE** relevant records of the System are present...."

The Appeal Packet created by MainePERS for our second appeal did not include the most relevant System document. As described in C above, in our case, Hearing Officer F. Mark Terison refused to reopen evidence as mandated when the CEO issues a "reconsidered" decision reaffirming the original adverse decision but based upon new legal grounds.

QUESTIONS

- 1. How do the disabled retirees end up in the Actively Seeking Work program?
- 2. Which states are represented in each response in the Continuation of Benefits table provided by MainePERS?
- 3. Does definition of Medical Review Service Provider include both MainePERS contractors, UMASS Disability Evaluation Service and Managed Medical Review Organization (MMRO)? Are there other providers in use by MainePERS for Independent Medical Exams (IMEs) outside these two contracts? How many IMEs each year so far? How many waived?
- 4. Sec. 5(4) needs a deep discussion. Employers of all stripes, not just PLDs and schools, should be required to participate to some degree if the employee is unable to meet the essential functions of the job due to a medical condition.

In the past, MainePERS has incorrectly applied essential functions and reasonable accommodations. Employers get

frustrated with MainePERS not granting disability. Further, MainePERS employees can impose requests for accommodations on the employer and retiree.

Employers should be compelled to participate at some level beyond the initial Employer Disability Report. (Example: Hawes case where MainePERS's September 2018 approval of the benefit relied upon both MainePERS and Cumberland County violating the Americans with Disabilities Act.)

Also, notices to the employer must be sent to the appellant. In our case, Kim Emery, the longtime MainePERS Appeals Clerk, sent her letter about Cumberland County being a party to the appeal to a Cumberland County Human Resources clerk. Ms. Emery only copied her letter to the Hearing Officer and MainePERS System Representative (System's attorney in the appeal)—Ms. Emery did not send a copy of the letter to the Appellant's attorney, Jerry Conley. See October 19, 2018, Kim Emery to Dawn Pazmany letter (page 3 below). Additionally, Ms. Emery's letter incorrectly states that the decision being appealed was a decision "to deny his application for disability benefits." His application had been approved September 12, 2018, under only epilepsy. MainePERS rejected his dementia. We filed the October 2018 appeal to force MainePERS to recognize the most disabling medical condition—the dementia. The CEO did accept the additional medical condition through a CEO's "reconsidered" decision. James Dusch, Deputy Executive Director, as her Designee, accepted the dementia diagnosis without an appeal hearing or any new evidence except what I wrote/put together submitted by Jerry Conley. That appeal cost us \$7,000.

5. Sec. 8 What is the value in being able to select a Hearing Officer if there are no reviews available and no way to file or assess complaints against a HO? The grievance procedure through an Assistant Attorney General serving as Board Counsel is not a sufficient check on Hearing Officers.
6. Regarding Sec. 8(3)(B), the MainePERS Appeals Clerk is creating correspondence in the name of the Hearing Officer and applying the Hearing Officer's signature. See the June 19, 2019, Emery to Hawes "pro se" letter. I've learned through FOAA requests that for years MainePERS staff similarly wrote the MainePERS Medical Board reports later only signed by the providers. The Appeals Clerk Job Description provided in response to a FOAA request for the Appeals Clerk Job Description is attached (see pages 4-5 below).
7. Sec. 10(1) How many appeals each year over the last decade closed by default?
8. Sec. 10(2) How many appeal hearings each year over the last decade were held without the Appellant?
9. Sec. 17 How many cases have resolved eligible for attorney's fee reimbursement since this law went into effect? How many paid?
10. With the change to Sec. 16(5), now the Board Counsel won't even be writing the Board's Decisions??
If so, with that, the MainePERS Board of Trustees has now completely outsourced policy making to Hearing Officers and private attorneys instead of holding their own staff accountable to their job descriptions. The CEO issues opaque decisions without disclosed procedures while using unqualified employees to analyze disability eligibility, medical records, reasonable accommodations, annually collected income tax returns, vocational rehabilitation, etc. When a CEO decision is questioned, it's the *General Counsel's* job to "review contested member claims and make recommendations." To the contrary, the ill applicant or retiree must instead become an appellant and pay thousands of dollars to hire a lawyer to figure out what cloistered MainePERS did or is supposed to be doing, then the member must prove how MainePERS is wrong. The procedure in question in our second appeal remains unlawfully executed by employees misrepresenting the law and allows the continued exploitation of applicants and disabled retirees by MainePERS despite both an adjudicatory appeal and hearing at Maine Superior Court on the matter. The second appeal cost us over \$10,000.

ATTACHED:

October 19, 2018, letter from Kim Emery to Dawn Pazmany letter
Appeals Clerk Job Description

October 19, 2018

Cumberland County
Dawn Pazmany, HR Generalist
142 Federal Street
Portland, Maine 04101

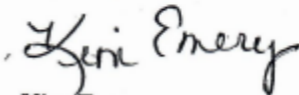
Re: Philip Hawes - Appeal #2018-019

Dear Ms. Pazmany:

Please be informed that Philip Hawes has appealed the Executive Director's Decision to deny his application for disability retirement benefits. As Mr. Hawes's employer and a participating local district in the Maine Public Employees Retirement System, you are a party to this appeal and, pursuant to Chapter 702, Section 5(4), must be given notice of the proceeding.

A Telephone Conference has been scheduled for Wednesday, November 7, 2018 @ 2:30 p.m. Please notify me in writing regarding your participation in this appeal no later than November 1, 2018. If you choose not to participate, you will not be provided with any further notice. If you seek to participate later in the appeals process, you may be precluded from doing so.

Sincerely,



Kim Emery
Appeals Clerk

cc: Richard Regan, Esq., Hearing Officer
N. Quinn Collins, Esq., System Representative



Maine Public Employees Retirement System
Position Classification Statement

Classification No.: 2054
Established: April 2011
Revised:
FLSA: Exempt
Bargaining Unit: Pro-Tech
Range: 22

Title: SERVICE PROGRAM SPECIALIST

SUMMARY: This position administers the QDRO activity and oversees the appeals process for the organization. Work is performed under limited supervision.

ESSENTIAL FUNCTIONS: *(The incumbent must be able to perform all the essential functions. Additional tasks not herein listed may be assigned.)*

- Drafts and reviews QDRO submissions to ensure compliance with the System's statutes and rules.
- Assists the Deputy Director and Chief Deputy Director in oversight of appeals cases.
- Administers and tracks appeal cases to ensure the reconsideration process stays on track.
- Monitors the status of appeals cases to ensure adherence to case schedules set by the hearing officers.
- Corresponds and communicates with members, lawyers, hearing officers and other external contacts.
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- (working with the disability unit)
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- Interfaces with management and staff in other business units as required.
- Maintains appropriately detailed procedural documentation for all assigned tasks and functions.
- Stays current with statutes and regulations as they pertain to assigned areas of responsibility.
- Performs other tasks as assigned.

Supervisory: None assigned

KNOWLEDGE, SKILLS, AND ABILITIES REQUIRED: *(These are required to successfully perform the essential functions.)*

Classification # 2054
Created 4/2011

- (Knowledge of the Administrative Procedures Act?)
- Ability to acquire and effectively apply knowledge of System's statutes, rules and regulations.
- Demonstrated ability to communicate effectively, both verbal and written, using tact and discretion, under often stressful circumstances.
- Strong analytical skills with a demonstrated ability to research complex issues and recommend appropriate action.
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- Knowledge of standard office procedures and equipment, including Microsoft Office applications (Word, Excel and Access).
- Ability to work independently on a variety of administrative tasks, pay attention to detail, and produce highly accurate work.
- Demonstrated ability to plan, organize and prioritize work, and to set and meet deadlines.
- Ability to establish and maintain effective working relationships with staff, co-workers and external contacts.
- Ability to maintain confidentiality of information.

QUALIFICATIONS:

Minimum qualifications:

Bachelor's degree with 3 years of complex administrative experience.

Preferred qualifications:

Experience with...

WORKING CONDITIONS:

The normal office setting. **Hazards:** Mainly those present in a normal office setting; no known significant hazards.

The above statements are intended to describe the general nature and level of work being performed by people assigned to do this job. The above is not intended to be an exhaustive list of all responsibilities and duties required.

*External and internal applicants, as well as position incumbents who become disabled, as defined under the Americans with Disabilities Act, must be able to perform the essential job functions (as listed) either unaided or with the assistance of a reasonable accommodation to be determined by management on a case by case basis.