MainePERS Consensus-Based Rulemaking

Proposed Ground Rules

Process

1. Engage in good faith to try to reach consensus
2. Review agenda and materials in advance of meetings
3. Do follow-up work between meetings
4. Attend each meeting or send a designee
5. Proposals should fit within one of the below topic areas, be consistent with the below principles, and be appropriate for rulemaking

Topic Areas

- Legal compliance
- Fairness, consistency, and predictability
- Just and rational decision-making
- Opportunity to submit information
- Clarity of communications
- Ease and understandability of process

Principles

- Standards are clear, fair, and consistent with statute and case law
- All relevant information is considered
- Applicants are kept informed
- Unnecessary burdens on applicants are avoided
- Applicants are viewed holistically
- Process is timely and can be administered efficiently

Appropriateness for Rulemaking

"'Rule' is defined as follows.

A. 'Rule' means the whole or any part of every regulation, standard, code, statement of policy, or other agency guideline or statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

B. The term does not include:

(1) Policies or memoranda concerning only the internal management of an agency or the State Government and not judicially enforceable; . . .

or

(4) Any form, instruction or explanatory statement of policy that in itself is not judicially enforceable, and that is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges. . . ."

5 M.R.S. §8002(9).

94-411 MAINE STATE RETIREMENT SYSTEM

Chapter 507 DETERMINATION OF INABILITY TO ENGAGE IN SUBSTANTIALLY GAINFUL ACTIVITY

SUMMARY: The purpose of this rule is to specify the standards and definitions to be applied in determining under 5 MRSA §§ 17907(2)(B), 17929(2)(B)(1), and 18507(2)(B) and 18529 (2) (B) (1) whether a disability retirement recipient is "unable to engage in any substantially gainful activity."

1. Standards and Related Definitions for Determination.

After the expiration of an initial period as specified by statute, disability benefit recipients continue to receive disability benefits only if they meet certain statutory requirements. One requirement is that the person be "unable to engage in any substantially gainful activity." The following standards govern the determination of a person's inability to engage in any substantially gainful activity under 5 MRSA §§ 17907(2)(B), 17929(2)(B)(1), and §§ 18507(2)(B) and 18529(2)(B)(1).

A. A person shall be determined to be unable to engage in any substantially gainful activity if the person lacks the physical or mental capacity, due to the incapacity for which the person was awarded disability retirement benefits, to perform or participate in any activity or activities, tasks or efforts that are or could be performed in such a manner as to generate remuneration in an amount which is consistent with average final compensation.

(1) For purposes of 5 MRSA §§ 17929(2)(B)(1), 18529(2)(B)(1) and this rule, "consistent with average final compensation" means an amount that, on an annual basis, is at least 80% of the person's average final compensation at retirement adjusted as if §17806 or §18407, whichever is appropriate, had been applicable.

(2) If inability to engage in any substantially gainful activity is being determined under §17907(2)(B) or §18507(2)(B), "substantially gainful activity" has the same meaning as "substantially gainful activity which is consistent with average final compensation as found in §17929(2)(B)(1) or §18529(2)(B)(1) respectively.

(3) Information about the labor market, including information contained in publications of the state and federal Departments of Labor, may be used when consideration of the nature of an employment activity or consideration of the salary level of a particular employment activity is needed. Such information on salary levels,

if not current at the time it is used, should be adjusted by the same inflation factor(s) applied to the disability recipient's average final compensation in subparagraph 1(A)(1) above.

(4) The person is not unable to engage in any substantially gainful activity when the person is engaged in any activity or activities, whether or not remuneration-generating, that demonstrate an ability to engage in substantially gainful activity.

(5) The person is not unable to engage in any substantially gainful activity when the person has the physical or mental capacity to engage in any substantially gainful activity, regardless of whether or not the person does in fact so engage.

(6) If inability to engage in substantially gainful activity is being determined under 17929(2)(B)(1) or 18259(2)(B)(1), the person is not unable to engage in substantially gainful activity if an employer could make reasonable job modifications that would allow the person to engage in substantially gainful activity. “Job modification” means changes to any aspect of work that inhibits a person’s ability due to physical or mental incapacity to perform the duties of a job including but not limited to modifications in the usual job tasks or duties, changes in the way a particular task or duty is usually carried out, changes to the physical environment, provision or allowed use of adaptive equipment and change in the job conditions.

B. If inability to engage in substantially gainful activity is being determined under §17907(2)(B) or §18507(2)(B), the person must also be qualified by training, education or experience to perform the activities, tasks or efforts that comprise the activity or activities against which the person's inability is being evaluated.

(1) "Qualified" means possessing, for purposes of meeting general requirements for employment, including self-employment or other gainful activity, either appropriate training in relevant skills and knowledge, including those that are transferable; or appropriate type and level of education; or appropriate experience.

(2) Such possession is established whenever there is a reasonable expectation that a person with this particular training, education or experience should be able to meet such general requirements.

C. If the person's inability to engage in substantially gainful activity is being determined under §17929(2)(B)(1) or §18529(2)(B)(1), the activity or

activities against which the person's inability is being evaluated must be consistent with the person's training, education or experience.

(1) "Consistent with" means that the activity or activities must bear a logical relationship to the person's previous training, education or experience.

(2) Such a relationship is demonstrated by the possession of appropriate training in relevant skills and knowledge, including those that are transferable; or appropriate type and level of education; or appropriate experience.

2. Application of Standards.

A. The recipient of disability benefits has the ultimate burden of demonstrating that s/he is unable to engage in substantially gainful activity and must make the demonstration of inability against the above standards.

B. When a recipient of disability benefits has at any time since the effective date of disability retirement been engaged in any activity or activities that produces or has produced remuneration that is consistent with the person's average final compensation, a rebuttable presumption is established that all of the applicable standards set forth in Section 1 have been met.

C. When a determination is made by the System that job modification would allow a recipient of disability benefits to engage in substantial gainful activity, the System has the initial burden to identify generally what types of job modifications would allow the member to engage in substantially gainful activity. This will be communicated in writing to the disability recipient prior to or at the time that a decision on the member’s ability to engage in substantially gainful activity is made. The burden then shifts to the member disputing this determination to refute that such modifications would allow the person to engage in substantially gainful activity.

EFFECTIVE DATE OF EMERGENCY RULE: July 9, 1993

EFFECTIVE DATE OF PERMANENT RULE: September 28, 1993

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 5, 1996

NON-SUBSTANTIVE CORRECTIONS: October 3, 1996 - minor format and spelling.

AMENDED: June 7, 1997 - Section 1(A)((6)) and 2(C) added.

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 509: DETERMINATION OF INABILITY TO PERFORM THE ESSENTIAL FUNCTIONS OF THE EMPLOYMENT POSITION

Summary: The purpose of this rule is to specify the standard and definitions to be applied under 5 MRSA §§ 17921 and 18521 in determining whether a disability applicant is unable to perform the functions of the employment position with reasonable accomodation.

SECTION 1. Standard and Related Definitions

A disability benefit applicant must meet certain statutory requirements under 5 MRSA §§ 17921 and 18521 in order to be eligible to receive disability retirement benefits. One of these requirements is that the applicant must demonstrate that the applicant is unable to perform the essential functions of the employment position with reasonable accomodation. The following standard and definitions govern the determination of whether this requirement is met.

1. A member shall not be considered incapacitated if the employer agrees to make job modifications as defined below that will enable the member to perform the functions of the employment position.

   A. For these purposes, "job modification" means a change or changes to the member's work situation that alters any aspect(s) that, because of the member's physical or mental incapacity, inhibit ability to perform the functions of the employment position. "Job modification" includes but is not limited to modification in the job tasks or functions, change in the way a particular task or function is carried out, change to the physical environment, provision of adaptive equipment, and change in the job conditions.

   B. “Employment position" means the position in which the member is employed at the time the member becomes incapacitated or this position as modified by the member's employer in accordance with (1) above, or a position that is made available to the member by the member's employer that is of comparable stature and equal or greater compensation and benefits to the position in which the member is employed at the time the member becomes incapacitated and whose location is of a reasonable commuting distance and does not require the member to relocate their residence.

SECTION 2. Application of Standard

1. The member who is an applicant for disability retirement benefits has the ultimate burden of demonstrating inability to perform the essential functions of the employment position with reasonable accomodation.

2. When a determination is made by the System that job modification would enable the member to perform the functions of the employment position, the System has the initial

burden to determine generally the job modifications that would enable the member to perform the functions of the employment position. This will be communicated in writing to the applicant and the applicant's employer prior to or at the time that a decision on eligibility for disability retirement benefits is made. If the member disputes the determination, the member then has the burden to demonstrate either that the member has requested the employer to provide the job modifications determined by the System and that the employer has refused to make these job modifications or that the modifications identified by the System would not allow the member to perform the functions of the employment position.

3. In the event that the employer refuses to make the requested modifications, a member must also demonstrate that they have requested the employer to provide a position that the member's disability does not prevent them from performing and that is of comparable stature and equal or greater compensation and benefits to the member's employment position at the time the incapacity arose and that the employer has refused to offer such a position.

STATUTORY AUTHORITY:
5 MRS §§ 17103(4), 17921 and 18521

EFFECTIVE DATE:
June 7, 1997 – filing 97-199
September 20, 2022 – filing 2022-187

94-411 MAINE STATE RETIREMENT SYSTEM

Chapter 510: REDUCTION OF DISABILITY RETIREMENT BENEFITS BECAUSE OF LUMP-SUM SETTLEMENTS OF BENEFITS PAYABLE UNDER THE WORKERS' COMPENSATION OR SIMILAR LAW OR THE UNITED STATES SOCIAL SECURITY ACT

SUMMARY: This chapter sets forth the methodology by which disability retirement benefits under the Maine Legislative Retirement System, Maine Judicial Retirement System and the Maine State Retirement System are reduced when a beneficiary of such benefits receives a lump-sum settlement of benefits payable under the workers' compensation or similar law or the United States Social Security Act.

SECTION 1. DEFINITIONS

1. **Accumulated Contributions**. The term "accumulated contributions" as used in this Chapter means the amount of "accumulated contributions" calculated pursuant to the provisions of the applicable Retirement System plan, as of the effective date of the recipient's entitlement to Retirement System disability retirement benefits.

2. **Actuarial Equivalent of Accumulated Contributions**. "Actuarial Equivalent of Accumulated Contributions" as used in this Chapter means the recipient's accumulated contributions at the time of his or her disability retirement divided by the "annuity factor for recipient's age at retirement" as calculated pursuant to Section 5.2, and then converted to a monthly amount by dividing by twelve.

3. **Actuarial Equivalent of the Lump-Sum Settlement**. "Actuarial Equivalent of the Lump Sum Settlement" as used in this Chapter means the amount of the "lump-sum settlement" divided by the "annuity factor for recipient's age at effective date of lump-sum settlement" calculated pursuant to Section 5.3, and then converted to a monthly amount by dividing by twelve.

4. **Average Final Compensation**. "Average Final Compensation" as used in this Chapter means the amount of "average final compensation" calculated pursuant to the provisions of the applicable Retirement System plan, as of the effective date of the recipient's entitlement to Retirement System disability retirement benefits.

5. **Initial Disability Retirement Benefit**. "Initial disability retirement benefit" as used in this Chapter means the monthly disability retirement benefit, not reduced because of disability benefits received under other laws, payable to the recipient as of the effective date of his or her entitlement to Retirement System plan disability retirement benefits, calculated pursuant to the applicable Retirement System plan provisions.

6. **Lump-Sum Balance**. "Lump-Sum Balance" as used in this Chapter in a given month means the sum of the lump-sum settlement and interest for that month and all prior months subject to reduction pursuant to this Chapter less the reduction amount determined pursuant to Section 4.1 for that month and all prior months subject to reduction pursuant to this Chapter.

7. **Lump-Sum Settlement**. "Lump-sum settlement" as used in this Chapter means the amount paid or to be paid pursuant to a settlement agreement under the workers' compensation law and/or similar law and/or the United States Social Security Act for the same disability for which Retirement System plan disability retirement benefits are awarded, but not including any part of the lump-sum settlement amount attributable to vocational rehabilitation, attorneys', physicians', nurses', hospital, medical, surgical or related fees or charges or any amount paid or payable under former Title 39, section 56-B for permanent impairment or under Title 39-A, section 212, subsection 3 for specific loss benefits. "Lump-sum settlement" includes amounts paid or to be paid under the United States Social Security Act only if the employment for which Retirement System creditable service with the employer is allowed was also covered under that Act at the date of disability retirement.

8. **Lump-Sum Settlement Agreement**. A "Lump-Sum Settlement Agreement" as used in this Chapter is an agreement, signed or otherwise approved by the approving authority, describing payment of the lump-sum settlement.

9. **Retirement System Plan**. "Retirement System plan" as used in this Chapter means a benefit plan of the Maine Legislative Retirement System, Maine Judicial Retirement System, or the Maine State Retirement System. Benefit plans of the Maine State Retirement System include benefits for eligible state employees, teachers, and Participating Local District ("PLD") members.

SECTION 2. APPLICABILITY

This Chapter applies to any disability retirement benefit recipient who enters into a lump-sum settlement agreement or otherwise receives a lump sum settlement under the workers' compensation or similar law or the United States Social Security Act for the same disability for which disability retirement benefits were awarded pursuant to a Retirement System plan.

SECTION 3. MAKING THE REDUCTION

1. When a disability retirement benefit recipient enters into a lump-sum settlement agreement, the monthly Retirement System disability retirement benefit shall be reduced by an amount determined pursuant to the provisions of this Chapter.

2. The reduction amount determined pursuant to the provisions of this Chapter shall be deducted from Retirement System disability retirement benefits payable to the recipient, beginning the first day of the month following the effective date of the lump-sum settlement. For purposes of this Chapter, the effective date of the lump-sum settlement is the date that the settlement agreement is signed by the approving authority.

3. That same reduction amount determined pursuant to the provisions of this Chapter shall continue to be deducted from the monthly disability retirement benefit otherwise payable for the length of time that the recipient receives a Retirement System disability retirement benefit. If, for periods of time prior to the effective date of the lump-sum settlement during which Retirement System disability retirement benefits are payable to the recipient, the recipient is also paid benefits under the workers' compensation or similar

law or the United States Social Security Act, subject to the same limitations described in Section 1.7, then the recipient's disability retirement benefits shall also be reduced by amounts equal to those benefits unless the applicable statute bars any reduction or requires a smaller reduction.

4. A. Notwithstanding Section 3.3, reductions pursuant to this Chapter for a recipient who continues to be entitled to receive disability retirement benefits pursuant to a Retirement System plan that provides for cost-of-living adjustments ("COLAs") shall cease when the sum of the reduction amount equals the amount of the lump-sum settlement plus monthly interest on the lump-sum balance calculated at the annual rate of four percent (4%);

   B. Notwithstanding Section 3.3, reductions pursuant to this Chapter for a recipient pursuant to a Retirement System plan that does not provide for COLAs shall cease under the same circumstances as for Section 3.4.A except that monthly interest on the lump-sum balance shall be calculated at the annual rate of six percent (6%).

5. To determine when the sum of the reduction amounts will equal the lump-sum settlement plus interest calculated monthly at the annual rate specified in Section 3.4.A and 3.4.B as applicable:

   A. Calculate the interest for the first month subject to reduction by multiplying the lump-sum settlement by the specified annual interest rate and then dividing the product by 12.

   B. Determine the lump-sum balance in the given month.

   C. Calculate the interest for each month after the first month subject to reduction by multiplying the lump-sum balance for the previous month by the specified annual interest rate and then dividing the product by 12.

6. The month in which the lump-sum balance is zero is the last month of disability retirement benefits that will be reduced pursuant to Sections 3.4.A and 3.4.B.

7. If there is no month in which the lump-sum balance is zero, then the last month of disability retirement benefits that will be reduced pursuant to Sections 3.4.A and 3.4.B is the first month in which the lump-sum balance is a negative number. In such case, the reduction amount required for the last month shall be equal to the lump-sum balance for the previous month plus interest.

8. Notwithstanding Sections 3.3, 3.4 and 3.5, the reduction amount shall be recalculated pursuant to the provisions of this Chapter if the recipient enters into a subsequent lump-sum settlement agreement.

9. The amount payable to the disability retirement recipient after the reduction amount is applied will be adjusted by any cost-of-living adjustments ("COLAs") according to the provisions of the applicable Retirement System plan.

SECTION 4. DETERMINING THE REDUCTION AMOUNT, IF ANY

1. The reduction amount that is to be applied to the recipient's monthly disability retirement benefit is determined by subtracting the figure representing 80% of average final compensation, converted to a monthly amount by dividing by twelve, from the amount represented by the sum of the initial disability retirement benefit and actuarial equivalent of the lump sum settlement.

2. If the result obtained in Section 4.1 is zero or a negative number, then no reduction is applied to the monthly disability retirement benefits.

3. If the reduction amount calculated in Section 4.1 causes the initial disability retirement benefit to be reduced to an amount that is less than the "actuarial equivalent of accumulated contributions", then the full reduction amount calculated in Section 4.1 may not be applied. Instead, the recipient shall receive the "actuarial equivalent of accumulated contributions" in lieu of the amount obtained by applying the full reduction described in section 4.1.

SECTION 5. DETERMINING THE ANNUITY FACTORS TO BE USED FOR SECTION 4

1. **Selecting the Applicable Table**. To determine the "annuity factor at age of retirement" or the "annuity factor at age at effective date of lump-sum settlement," use Table AA of Chapter 303.

   NOTE: As of the effective date of this rule, judicial retirement, legislative retirement, and Maine State Retirement System plans for state employees and teachers all include COLAs. Some Participating Local District ("PLD") plans include COLAs and others do not.

2. **Determining the "Annuity Factor for Recipient's Age at Retirement**." To determine the "annuity factor for recipient's age at retirement," use the applicable Table to locate the annuity factor that corresponds to the recipient's attained age as of the first day of the first month for which he or she received Retirement System plan disability benefits. If the recipient's previous birthday was six months or more prior to the first day of the first month for which he or she received Retirement System plan disability retirement benefits, then use the recipient's age at his or her next birthday to locate the applicable annuity factor.

3. **Determining the "Annuity Factor for Recipient's Age at Effective Date of Lump-Sum Settlement**. To determine the "annuity factor for recipient's age at effective date of lump-sum settlement, use the applicable Table to locate the annuity factor that corresponds to the recipient's attained age as of the effective date of the lump-sum settlement. If the recipient's previous birthday was six months or more prior to the effective date of the lump-sum settlement, then use the recipient's age at his or her next birthday to locate the applicable annuity factor.

SECTION 6. DETERMINING THE AMOUNT OF THE "LUMP-SUM SETTLEMENT" IF THE SETTLEMENT PROVIDES FOR PAYMENT IN A MONTH OR MONTHS FOLLOWING THE DATE THAT THE SETTLEMENT AGREEMENT IS SIGNED BY THE APPROVING AUTHORITY

1. If the lump-sum settlement is to be paid in a single payment but at a date subsequent to the effective date of the settlement agreement, then the single settlement payment must be converted into a single present value amount using the methodology of Section 6.5.B. The resulting present value shall be used as the amount of the lump-sum settlement for purposes of this Chapter.

2. If the lump-sum settlement is to be paid not as a single settlement payment, but instead is to be paid in installments, then the installment amounts must be converted into a single present value amount pursuant to the provisions of this Section. The resulting single present value shall be used as the "lump-sum settlement" for purposes of this Chapter.

3. The provisions of this Chapter do not apply if all of the installments to be paid pursuant to the lump-sum settlement agreement are to be paid in scheduled increments such that the total paid each month is less than or equal to the recipient's disability retirement benefit for that month in the absence of any reduction because of benefits payable under the workers' compensation or similar law or the United States Social Security Act. Instead, the recipient's disability retirement benefits shall be reduced in the same manner as if there had been no lump-sum settlement agreement.

4. Any part of the lump-sum settlement payment amounts attributable to vocational rehabilitation, attorneys' fees, physicians, nurses, hospital, medical, surgical or related fees or charges of any amount paid or payable under former Title 39, section 56-B for permanent impairment or under Title 39-A, section 212, subsection 3 for specific loss benefits shall not be included in any of the payment amounts for purposes of this Section.

5. The single present value of the settlement paid in installments shall be calculated as follows:

   A. Determine the amount of the first installment payment if the first payment is scheduled to be issued in the same month or in the month immediately following the month that the settlement agreement is signed or otherwise approved by the approving authority.

   B. To determine the present value of any payment to be issued in a subsequent month, except for any installment amount to be paid for a "term certain and life thereafter," apply an effective ("real") interest rate of 7.75% per year.

   C. Determine the present value, using an effective ("real") interest rate of 7.75% per year of any settlement installment amount to be paid for a certain term of years ("term certain") and life thereafter as follows:

      (1) Add the recipient's age as used in Section 5.3 to the number of years in the term certain.

(2) Using the sum obtained in Section 6.5.C.1, locate on Table X the corresponding figure in Column B.

(3) Divide the amount obtained in Section 6.5.C.2 by the figure in Column A in Table X corresponding to the recipient's age as used in Section 5.3.

(4) Add the result in Section 6.5.C.3 to the annuity factor on Table Y corresponding to the number of months in the term certain.

(5) Multiply the result obtained in Section 6.5.C.4 by the installment amount to be paid annually for the term certain and life thereafter.

D. Add the total results obtained in Sections 6.5.A, 6.5.B and 6.5.C.A to obtain the single value amount to be used as the amount of the "lump-sum settlement" for purposes of this Chapter.

The attached TABLES are an integral part of this Chapter:

TABLE 'X': Annuity Factors for use with installment settlement

TABLE 'Y': Annuity Factors (for installment settlements) corresponding with the number of months in term certain.

APA Office Note: the tables are available from the Maine State Retirement System.

STATUTORY AUTHORITY: 3 M.R.S.A. § 853; 4 M.R.S.A. § 1353(6); 5 M.R.S.A. §§ 17906(2); 17930(4); 18506(2); 18530(4); 1122(5-A) and 1122(6).

EFFECTIVE DATE
July 6, 199

AMENDED:
June 21, 2006 – filing 2006-269

BASIS FOR ADOPTION/STATEMENT OF COMMENTS:

Retirement System statutes generally require a reduction in disability retirement benefits if the individual receiving such benefits also receives disability benefits for the same disability under the Workers' Compensation or similar law or the United States Social Security Act. The purpose of the statutes is to limit duplication of the intended income replacement provided by Retirement System disability retirement benefits and disability benefits under other laws when the same disability is being recognized.

In the absence of a lump-sum settlement, the Retirement System disability retirement benefits are reduced on a dollar-for-dollar basis by amounts equal to the disability benefits payable under other laws unless the applicable MSRS statute bars any reduction or requires a smaller reduction.

The statutes require that the initial disability retirement benefit be reduced when necessary so that the Retirement System benefit plus the disability benefit under other laws do not exceed 80% of the person's average final compensation. However, the Retirement System benefit cannot be reduced below the amount that is the actuarial equivalent of the member's accumulated contributions at the time of retirement.

Retirement System disability retirement benefits must be similarly reduced if the person receives a lump-sum settlement of disability benefits under the Workers' Compensation or similar law or the United States Social Security Act for the same disability. The reduction must be accomplished by prorating the lump-sum settlement on a monthly basis in an equitable manner prescribed by the Board. Chapter 510 sets forth the methodology by which disability retirement benefits under the Maine State Retirement System, the Maine Legislative Retirement System, and the Maine Judicial Retirement System are reduced if a recipient of such benefits receives such a lump-sum settlement.

Chapter 510 was initially noticed for rulemaking on October 21, 1998 and a public hearing was held on November 12, 1998. No witnesses testified at the November 12, 1998 public hearing. The only written comments concerning the rule were those submitted by Stephen P. Sunenblick, Esq. during the week prior to the public hearing. In that same week, the System also received a letter from Gerard P. Conley, Jr. requesting the System's advice in a matter concerning a specific possible lump-sum settlement under the workers' compensation law. On January 27, 1999, the Board noticed its proposal to adopt the rule as amended in some important respects and again requested comments. The changes in the proposed rule, other than those made to increase the clarity of the rule, were made in response to the concerns of Mr. Sunenblick and Mr. Conley's query. No additional comments were received.

Mr. Sunenblick objected to the rule as originally proposed because for some beneficiaries, the cumulative amount withheld from their Retirement System disability retirement benefits could exceed the amount of the lump-sum settlement. In response to this concern, the Board has added Subsections 4, 5, 6, and 7 to Section 3 of the Chapter, which provide that the reduction shall cease when the sum of the reduction amount equals the amount of the lump-sum settlement plus the cumulative monthly interest on the lump-sum balance not yet offset. A single present value of the lump-sum settlement, determined pursuant to Section 6 of this Chapter, will be used as the lump-sum settlement amount if the payment of the lump-sum is scheduled to occur more than one month following the effective date of the lump-sum settlement. (The effective date of the lump-sum settlement is the date that the settlement agreement is signed or otherwise approved by the approving authority.) Paralleling the interest rates used in Tables A and B, if the recipient is entitled to receive disability retirement benefits pursuant to a Retirement System plan providing for COLAs, the monthly interest on the lump-sum balance is calculated at the annual rate of 4% and at 6% if the plan does not provide for COLAs.

The annuity factors contained in Tables A and B which are used to calculate the reduction amounts are based upon the 1964 Commissioner's Disability Table published by the Health Insurance Association of America. The Table A annuity factors for Retirement System plans that provide for cost-of-living-adjustments ("COLAs") are based upon the 1964 Commissioner's Disability Table at 4% interest, and Table B annuity factors for Retirement System plans without COLAs are based upon the 1964 Commissioner's Disability Table at 6% interest. As of the effective date of this rule, judicial retirement, legislative retirement, and Retirement System plans for state employees and teachers all include COLAs. Some Participating Local District ("PLD") plans include COLAs and others do not.

In his November 1998 written comments, Mr. Sunenblick objected to the application of an investment value or discount value to the lump-sum settlement amount and asserted that using a discount or investment factor would be contrary to statute and the MSRS's fiduciary responsibilities to its members. The Board disagrees. In order to prorate the lump-sum amount on a monthly basis as required by statute, a method had to be developed to convert the lump-sum amount into an equivalent annuity. Doing this requires determining the monthly pension amount that has the same "present value" as the lump-sum settlement, taking into account the probability of surviving from a given age to a future age. Future payments must be "discounted" to present value using an assumed interest rate. For those Retirement System plans providing for COLAs, the assumed interest rate used by the Board is 8% which is decreased by a 4% assumed rate of increase in retirement benefits, resulting in a net 4% interest rate. For those Retirement System plans without COLAs, the System has historically used a net 6% interest rate. These assumptions are consistent with standard actuarial practices and with the lump-sum offset methodology used by the System since 1983.

Mr. Conley's November 1998 letter inquired as to whether or not the reduction required under the statute could be obviated if the lump-sum settlement agreement specified that payment under the agreement would begin after the member's Retirement System disability retirement benefit converted by operation of law to a service retirement benefit. To permit such a loophole would be inconsistent with the intent of the statutes to limit duplication of income replacement. It would also be unfair to retirees who might not be able to afford to wait for the settlement payment and might be tempted to sell their rights to the future lump-sum settlement payment at a discount. Therefore, Section 6 of the adopted rule requires that such a future payment or payments be converted into a single present value to be used as the amount of the "lump-sum settlement" for purposes of determining the reduction amount to be applied to the Retirement System disability retirement benefits payable to the recipient. The reduction amount, if any, determined pursuant to Section 4 of the rule shall be effective the first day of the month following the date that the settlement agreement is signed or otherwise approved.

BASIS STATEMENT FOR AMENDMENTS ADOPTED JUNE 8, 2006/ STATEMENT OF COMMENTS:

This chapter was noticed for rulemaking on April 19, 2006. A public hearing was held on May 11, 2006. No members of the public presented testimony at the hearing and no written comments were submitted prior to or at the hearing or during the subsequent 10-day period for written comments. The public comment period closed on May 22, 2006.

The amendments to this rule result from the recent completion of an experience study of the State/Teacher plan. Upon the Actuary's presentation of the results of that study, the Board voted at its February 9, 2006 meeting to adopt the recommendation of the Actuary to change the underlying plan assumptions for the State/Teacher plan. At its March 9, 2006, the Board voted to adopt those assumptions for the PLD Consolidated Plan; on April 11, 2006, the Board voted to adopt those assumptions for the Legislative plan; and, on May 11, 2006, the Board voted to adopt those assumptions for the Judicial plan. A change in those assumptions necessitates a change to the actuarial tables used in the various calculations performed by the System. The amendments to this rule update those actuarial tables and factors. Additionally, at the recommendation of the Actuary, Tables A and B are replaced by Table AA of Chapter 303.

In Section 6, subsection 5, the interest rate has been amended to reflect the change in the interest assumption as adopted by the Board.

The new tables and factors are effective for any reduction of disability retirement benefits that is effective on and after July 1, 2006.

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 511: STANDARDS FOR ACTIVELY SEEKING WORK

SUMMARY: This Chapter sets out the standards and definitions to be applied in determining under 5 M.R.S.A. §§ 17929(2)(B)(1) and 18529(2)(B)(1) whether a disability retirement benefit recipient is actively seeking work.

SECTION 1. PURPOSE

The purpose of this Chapter is to set out the standards of "actively seeking work" for a person who was awarded disability retirement benefits and for whom a final determination has been made that the person does not meet the requirements for the continuation of disability retirement benefits.

SECTION 2. DEFINITIONS

1. **Actively seeking work status.** "Actively seeking work status" means that a final determination has been made that the person no longer meets the requirements for the continuation of disability retirement benefits and that the person is able to engage in substantially gainful activity. In this status, disability benefits are continued until the person has secured substantially gainful activity but only so long as the person is actively seeking work.

2. **Substantially gainful activity earnings level.** "Substantially gainful activity earnings level" means annual earnings that exceed the greater of $20,000 or 80% of average final compensation at disability retirement, each adjusted by cost of living adjustments if applicable to the member's retirement plan.

SECTION 3. STANDARDS

A person in actively seeking work status must:

1. Register with the Maine Department of Labor Career Center;

2. Participate in all job readiness or job seeking activities recommended by the Career Center;

3. Participate at least annually in resume preparation and interviewing skills workshops offered by the Career Center and submit an updated resume to the Career Center;

4. Maintain a current signed record release authorization that allows MainePERS to request and receive information from the Career Center and verify any other information submitted pursuant to this rule;

5. Apply in person or online for at least eight jobs each month with employers who are hiring or otherwise accepting applications, at least four of which must result in written acknowledgement of receipt of the application; and

6. Do all other activities that a reasonably prudent non-incapacitated individual would do to secure work.

SECTION 4. DOCUMENTING COMPLIANCE WITH STANDARDS

A person in actively seeking work status must demonstrate compliance with the standards set forth in Section 3 by submitting, so it is received by the system by the 5th of each month, an accurate, complete and signed report of the following information on forms provided by the system:

1. Verification of eight job applications, including date of submission, employer name and address, method of contact, and a short statement of the result, and a copy of any internet posting, advertisement or Career Center printout that led to submission of the application;

2. A copy of four written acknowledgements of receipt of job applications detailed under subsection 1, which written confirmation may include an email response, a computer-generated acknowledgement, a letter, or a signed system employer contact form;

3. Information pertaining to any job offer that the person has received and refused, including a detailed explanation for any such refusal;

4. Verification of the source and amount of any earnings, remuneration or other compensation from any employment, self-employment, commission sales, or other income for the previous month;

5. Verification of any change in name, address or telephone number; and

6. In the report submitted in January of each year, verification of any classes completed with the Career Center in the past year and verification that the person has submitted an updated resume to the Career Center.

SECTION 5. SUSPENSION OR TERMINATION OF BENEFITS

1. For any month during the calendar year that the person does not meet all the required standards, the retirement system will suspend the payment of benefits subject to 5 M.R.S. §17105-A. Such a suspension in benefits will occur in the month following the issuance of a written decision that the standards have not been met. If the person subsequently resumes compliance, the benefits will resume. Such resumption in benefits will occur in the month following the month for which the standards are again met. There will be no payment of disability retirement benefits for the month or months for which benefits were suspended under this subsection.

2. If the person fails to meet the standard for a total of any sequential or non-sequential three months in any 12-month period, the retirement system will terminate the payment of benefits.

3. If the person refuses a job that is consistent with the person's training, education, and experience that would generate an income equal to or greater than the member's substantially gainful activity earnings level, the retirement system will terminate the payment of benefits as of the month following the month that the person refused the job offer.

4. A disability retirement benefit recipient in actively seeking work status who is incarcerated shall be deemed unable to actively seek work, and the payment of disability retirement benefits will be suspended during the period of incarceration.

5. For any person who secures a job or engages in activity that generates an income equal to or greater than that member's substantially gainful activity earnings level, the retirement system will terminate the payment of benefits as of the month following the month the person accepts or engages in the job or activity.

STATUTORY AUTHORITY:
5 M.R.S. §§ 17103(4), 17929(2)(B)(1) and 18529(2)(B)(1)

EFFECTIVE DATE:
April 30, 2007 – filing 2007-152

AMENDED:
April 14, 2020 – Section 8 added, filing 2020-093 (EMERGENCY)
July 18, 2020 – Section 8, filing 2020-157

REPEALED AND REPLACED:
December 8, 2021 – filing 2021-241

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 512: INDEPENDENT MEDICAL EXAMINATIONS

SUMMARY: This Chapter implements and describes procedures for conducting independent medical examinations under 5 M.R.S. §17106-B(2).

SECTION 1. REIMBURSEMENT FOR INDEPENDENT MEDICAL EXAMINATIONS

Under 5 M.R.S. §17106-B(2), a member's representative who attends the member's independent medical examination is entitled to reimbursement of mileage and, if the representative is a health care provider, a per diem payment. The Maine Public Employees Retirement System ("the System") will make these reimbursements and payments as follows:

1. The member must identify the representative to the System in writing within 30 days after the independent medical examination. Within 60 days after the independent medical examination, the representative must provide the System with the representative's tax identification number by submitting IRS Form W-9 and any other information reasonably necessary to permit reimbursement and payment, if applicable. The member and representative will provide the System with information reasonably necessary to determine mileage and whether the representative is a health care provider.

2. Mileage will be reimbursed at the standard rate set by the Internal Revenue Service.

3. The health care provider per diem rate is set at $300.

SECTION 2. WAIVER OF INDEPENDENT MEDICAL EXAMINATION

A member may waive an independent medical examination pursuant to 5 M.R.S. §17106-B(2) by:

1. Signing a waiver form developed by the System's Chief Executive Officer for that purpose or otherwise clearly communicating a waiver in writing; or

2. On more than one occasion, failing to attend a scheduled independent medical examination or canceling a scheduled independent medical examination after the time at which the independent health care provider imposes a cancellation fee, unless the member reimburses the System for any no-show or cancellation fee or the failure or cancellation was not within the member's control.

STATUTORY AUTHORITY:
5 M.R.S. §§ 17103(4), 17106-B(2)

EFFECTIVE DATE:
May 31, 2022 – filing 2022-099

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 702 APPEALS OF DECISIONS OF THE CHIEF EXECUTIVE OFFICER

SUMMARY: This Chapter sets out the process for appeals of decisions of the Chief Executive Officer to the Board of Trustees ("Board"). It provides for the appointment of a hearing officer to conduct an appeal and to prepare a recommended decision for action by the Board.

SECTION 1. Purpose and Scope

The purpose of this Chapter is to set out procedures for reaching final agency action on matters initially decided by the Chief Executive Officer (or designee) of the Maine Public Employees Retirement System ("System" or "MainePERS"). The law governing the System provides that the Chief Executive Officer's decisions may be appealed to the Board, which has authority and responsibility to render a decision that will become the final agency action. The person appealing the Decision has the burden to establish, by a preponderance of the evidence, that the Chief Executive Officer's Decision is in error. This Chapter applies to appeals by any person aggrieved by a decision of the Chief Executive Officer.

SECTION 2. Authority

The authority for this Chapter is 5 M.R.S. §§ 9051 - 9064 and 5 M.R.S. §17451, which provide that an appeal under section 17451 is an adjudicatory proceeding subject to the Administrative Procedure Act and 5 M.R.S. §§ 17106-A, 17106-B.

SECTION 3. Definitions

1. **Appeals clerk**. "Appeals clerk" means the dedicated clerk who acts as liaison between the hearing officer and the parties to an appeal. The appeals clerk shall avoid all communication with System staff, or MainePERS representatives, regarding substantive issues for cases on appeal. The appeals clerk shall address all policy and procedural questions to the clerk's supervisor, the system advisor or Board counsel.

2. **Board**. "Board" means the Board of Trustees of MainePERS.

3. **Board counsel**. "Board counsel" means the attorney general or the designated assistant attorney general assigned to represent the Board and to prepare the Board's decisions.

4. **Chief Executive Officer**. "Chief Executive Officer" means the Chief Executive Officer of MainePERS or their decision-making designee.

5. **Hearing officer**. "Hearing officer" means an individual who has contracted with the Board to conduct appeal proceedings under this Chapter.

6. **Medical review service provider.** "Medical review service provider" means an entity with whom the Chief Executive Officer has contracted for the review of medical records and the provision of recommendations, opinions and certifications by health care providers employed by the entity.

7. **MainePERS or System Representative**. "MainePERS Representative" or "System Representative" means the person or persons advocating for the decision of the Chief Executive Officer in an appeal.

8. **Participating Local District**. "Participating local district" means a local district which has approved the participation of its employees in the Retirement System under 5 M.R.S. §18201.

9. **Party**. "Party" means the person bringing an appeal, MainePERS, and any person who intervenes in an appeal. If an appeal involves or affects a participating local district, "party" includes the participating local district, regardless of whether the participating local district actually participates as a party in the appeal.

10. **Person**. "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the Board or the System.

11. **Record**. "Record" means those materials required by 5 M.R.S. §9059 and this rule to be compiled in the course of an appeal.

12. **Staff**. "Staff" means an employee of MainePERS, other than the MainePERS Representative.

13. **Substantially larger caseload.** "Substantially larger caseload" means that the number of appeals a hearing officer is presiding over is at least five and exceeds the mean hearing officer caseload by at least 30%.

14. **System advisor**. "System advisor" is a System employee who is knowledgeable in System policies, practices and procedures and who is available as an informational resource to assist the hearing officer, the Board and Board counsel. If the hearing officer seeks information from the system advisor, such request shall be in writing and both the request and the response shall be copied to the parties and placed of record.

SECTION 4. Applicability: Who May Appeal

1. **Application**. This Chapter applies to all appeals of decisions of the Chief Executive Officer to the Board.

2. **Who may appeal**. Any person whose legal rights, duties or privileges are adversely affected by a decision of the Chief Executive Officer may appeal the decision to the Board. A person may but is not required to be represented by another person in accordance with 4 M.R.S. §807.

SECTION 5. Bringing an Appeal

1. **Notice**. When notifying a person whose legal rights, duties or privileges are affected by a decision of the Chief Executive Officer, the System must advise the person of the right to appeal to the Board and of the manner in which the right may be exercised. This notice must comply with 5 M.R.S. §9052.

2. **Statement of appeal**. A person who wishes to appeal a decision of the Chief Executive Officer must begin the appeal process by sending a written statement of appeal to the Board. Any reasonably clear statement to the effect that the person wishes to appeal a decision of the Chief Executive Officer, and identifying that decision, shall be treated as a statement of appeal. The only issues that are the subject of an appeal are those that have previously been decided by the Chief Executive Officer. If the person wishes to raise issues or conditions not previously considered by the Chief Executive Officer, those additional issues can be added in accordance with section 6(2) below.

3. **Assignment to hearing officer**. When a statement of appeal is received, the System, in a timely manner, will assign the appeal to a hearing officer in accordance with section 8. The System will notify the person of the identity of the assigned hearing officer and alternative hearing officers, describe the process for selecting an alternative hearing officer, briefly outline the appeal process and advise that, if the person fails to appear at any hearing, the appeal may be deemed to have been abandoned and the matter dismissed with prejudice.

4. **Notice to Participating Local District**. If the appeal involves an employee of a participating local district, the System will notify the participating local district that the appeal has been brought, identify the employee and hearing officer and advise that the participating local district is a party to the appeal. The notice must comply with 5 M.R.S. §9052.

SECTION 6. Choice of Appeal Process

At the pre-hearing conference described in section 8(3)(C) of this Chapter, the appellant shall affirmatively elect either the expedited or the unrestricted appeal process. This election becomes irrevocable 10 days after the pre-hearing conference, unless the System agrees to a later request to change the election.

1. **Expedited Appeal.** If the appellant elects the expedited process to pursue an appeal of the issues decided in the decision of the Chief Executive Officer, the evidence is limited to the appellant's testimony, the testimony of any lay witnesses and the documentary evidence already considered by the Chief Executive Officer. The parties may not raise any additional issues for decision. It is anticipated that a decision will be issued by the Board within approximately 90 days of the initial pre-hearing conference. Under this option, only non-expert witnesses may provide testimony on behalf of the appellant or the System.

2. **Unrestricted Appeal.** Alternatively, in the unrestricted appeal process, the appellant may raise issues in addition to those decided by the Chief Executive Officer, and the parties may introduce documentary evidence in addition to the evidence already considered by the Chief Executive Officer and testimony from expert as well as non-expert witnesses. The

unrestricted appeal process is anticipated to take substantially longer than 90 days because some or all of the steps listed below may be required, or duplicated prior to the hearing officer's issuance of a recommended decision. An appellant who chooses to proceed under the unrestricted appeal process must affirmatively accept and acknowledge that this appeal process is likely to take substantially longer than 90 days. The additional steps that might occur in the unrestricted appeal process include, but are not limited to the following:

A. If the appellant introduces issues not previously decided by the Chief Executive Officer, the hearing officer will return the appeal to the Chief Executive Officer for consideration of the new issues and reconsideration of any issues previously decided by the Chief Executive Officer. The appeal will be stayed pending the issuance of a decision of the Chief Executive Officer on all issues.

B. If the appellant seeks to introduce new documentary medical evidence on any of the issues previously decided by the Chief Executive Officer, the hearing officer will, at the request of the MainePERS Representative, return the appeal to the Chief Executive Officer for reconsideration of those issues. The appeal will be stayed pending a reconsidered decision of the issues previously decided by the Chief Executive Officer. The Chief Executive Officer may submit the new evidence to the medical review provider.

C. If any party introduces expert testimony, any other party, upon request to the hearing officer, may be granted additional time to prepare cross-examination of the expert and/or the submission of rebuttal expert testimony. Parties are entitled to a rebuttal hearing on request.

SECTION 7. Public Interest; Notice

If the Chief Executive Officer or designee determines that an appeal involves an issue of substantial public interest, notice must be given to the public, sufficiently in advance of the hearing date, to afford interested parties an adequate opportunity to prepare and submit evidence and to petition to intervene pursuant to 5 M.R.S. §9054. Notice to the public must be given in accordance with 5 M.R.S. §9052(3). If a party asserts that an appeal involves a matter of substantial public interest, such that public notice is required and the Chief Executive Officer or designee does not agree, the Board will make the determination in the following manner.

1. **By request**. The Chief Executive Officer or any other person may request that the Board make a determination of substantial public interest.

2. **Determination after appeal process has begun**. If the Board makes a determination of substantial public interest after the appeal process has begun, the process must be suspended until notice to the public has been given and interested persons have had an adequate opportunity to take action in accordance with this section.

SECTION 8. Hearing officer

1. **Appointment**. The Board shall contract with hearing officers to perform the duties and exercise the powers set forth in this Chapter. The hearing officers must have appropriate

experience and training, be fair, impartial, unbiased, and demonstrate a continuing ability to conduct a fair, efficient and effective appeal process.

2. **Assignment; Removal; Replacement**

A. An appeal will be assigned by the System to a hearing officer who has no personal or financial interest, direct or indirect, in the appeal or its outcome, and who has not been involved directly or indirectly in the matter that is the subject of the appeal. The fact that a hearing officer is the recipient of a MainePERS benefit does not constitute, by itself, direct or indirect personal or financial interest in an appeal or its outcome. The assignment shall be based on balancing caseloads among contracted hearing officers. The appellant within 15 days after notice of the assigned hearing officer may select an alternative hearing officer who has contracted with the Board.

(1) The System need not offer as an alternative any hearing officer who has a substantially larger caseload than other hearing officers. The appellant may select a hearing officer who was not offered as an alternative because of a substantially larger caseload if the appellant shows, within the timeframe for selecting an alternative hearing officer, that the hearing officer is uniquely qualified to preside over the appeal.

(2) In an appeal with more than one appellant, if the appellants cannot agree on an alternative hearing officer, the hearing officer assigned by the System will serve as hearing officer.

B. If a party files a timely allegation of bias, prejudice or personal or financial interest, either direct or indirect, against the hearing officer, the hearing officer will promptly determine whether to remove herself/himself as hearing officer and will include that determination in the record.

C. A hearing officer may also independently remove themselves from the appeal if the hearing officer cannot be fair, impartial and unbiased.

D. When a hearing officer is removed, terminated or cannot continue, the System will assign the appeal to another hearing officer, and the appellant will have an opportunity to select an alternative hearing officer consistent with paragraph A and section 5(3). The new hearing officer will continue the ongoing appeal process, unless the hearing officer determines that in order to avoid substantial prejudice to any party it is necessary to start the process anew.

3. **Duty and powers of the hearing officer**. The hearing officer has the duty to render a fair and impartial recommended decision to the Board in accordance with section 15. This recommended decision must be based on the record as a whole and resolve all material issues in the appeal. In lieu of a recommended decision, the hearing officer may recommend dismissal. The hearing officer has the following powers:

A. To resolve an appeal without a hearing; provided that the parties mutually agree to dispense with a hearing, by issuing:

(1) a recommended decision which meets the requirements of section 15, to be acted on by the Board under section 16, on the basis of the documentary materials which constitute the record; or

(2) a recommended dismissal with prejudice to be submitted to the Board for approval if, pursuant to section 6(2), the Chief Executive Officer issues a decision that favors the appellant, in whole or in part, and the appellant withdraws the appeal with respect to all portions of the decision of the Chief Executive Officer that are not in the appellant's favor; or

(3) a recommended dismissal, with or without prejudice as circumstances warrant, to be submitted to the Board for approval.

B. Upon adequate notice to the parties, to schedule the date, time and place or to change the date, time or place and to continue any conference, hearing, or deadline of any nature;[1]

C. Generally working through the appeals clerk, to notify parties and hold a pre-hearing conference, of which all parties must be notified and at which they may participate, the purposes of which may include:

(1) determining whether the appellant elects the expedited or unrestricted appeal process in accordance with section 6, and explaining the consequences of the choice of appeal process;

(2) identifying and clarifying the issues on appeal and determining whether the appellant intends to introduce issues, not previously considered by the Chief Executive Officer;

(3) developing stipulations of fact and admissions as to facts that are not contested;

(4) identifying exhibits to apprise the parties as fully as is practicable of the nature of the evidence to be offered by all parties and to eliminate, as far as possible, the element of surprise;

(5) identifying witnesses and the manner in which the testimony will be provided as described in section 11(2);

(6) identifying any potential parties to the adjudication whose joinder may foster economy, efficiency and fairness;

(7) identifying and resolving disputes as to production of documents and admissibility of evidence, including the making of evidentiary rulings; and

[1] The MainePERS office in Augusta shall be the normal location for hearings, absent a request made in the notice of appeal or at the pre-hearing conference, together with a showing by the requesting party of a compelling need for an alternative venue.

(8) any other action that will encourage and maintain a fair, efficient and effective appeal process.

D. To order, where relevant and useful, one or more independent medical evaluations, for which the System will, to the extent reasonably practicable, provide the names of three appropriately qualified health care providers, among whom the person appealing will choose and to whom the person will go for evaluation, the costs of which will be paid by the System;

E. To return to the Chief Executive Officer or designee for consideration, any issue raised for the first time in the appeal process, as required pursuant to section 6(2)(A);

F. To rule on any request at any conference, during the hearing or at any other time during the appeal process, prior to delivery of the recommended decision to the Board;

G. Generally working through the appeals clerk, to set the time for all filings, appearances, and other actions by any party or parties in connection with the appeal process, in accordance with 5 M.R.S. §17451;

H. To issue subpoena(s) on request of a party or to deny a request when the hearing officer determines that the testimony or evidence is not relevant to any issue of fact in the hearing, or otherwise inadmissible, in accordance with 5 M.R.S. §9060 and section 12 of these rules;

I. After the close of the evidence, the parties' receipt of a hearing transcript, if any, and the issuance of an Chief Executive Officer's reconsidered decision as described in section 14, to request that the parties submit briefs on the issues not decided by the Chief Executive Officer in the appellant's favor, and to request or allow the parties to make oral argument to the hearing officer, when the hearing officer deems oral argument to be necessary or useful;

J. To refer or re-refer to the medical review service provider any matter involving medical evidence, questions or issues;

K. To ascertain the rights of the parties, to identify and notify all parties that may be affected by a decision, to ensure that all parties have a full opportunity to present their claims orally or in writing and to secure witnesses and evidence to establish their claims, and to assist parties and witnesses in making full and free statements in order to develop all issues which may govern the outcome of the appeal;

L. To administer oaths or affirmations to all witnesses in all hearings;

M. To regulate the presentation of evidence, including questioning of witnesses and the participation of parties, in order to ensure an adequate and comprehensive record of the proceedings and to avoid repetition and delay;

N. To examine witnesses and ensure that relevant evidence is admitted in the record;

O. To determine the credibility of witnesses and to decide the weight to be given to testimony and all other evidence;

P. To take official notice of facts in accordance with 5 M.R.S. §9058, and parties shall be copied with the facts noticed, and the source of those facts, which shall be placed of record;

Q. To rule on the admissibility of evidence;

R. To ensure that a complete record is made of the hearing, including recording in accordance with 5 M.R.S. §9059;

S. To consult with the Board's counsel on legal issues; provided that, when an appeal raises issues of equity or constitutionality, the hearing officer must consult with the Board's counsel.

T. To consult with the System advisor if the hearing officer requires information concerning general System structure, policies or practices if the hearing officer determines that such consultation would be helpful to a determination of the issues on appeal.

U. To recommend dismissal in the event an appellant fails to appear at a hearing, or otherwise fails to prosecute the appeal, unless there is a showing of good cause under section 10.

SECTION 9. Duties and Responsibilities of the MainePERS Representative

The MainePERS Representative shall:

1. Organize case. Organize the presentation of the Chief Executive Officer's case;

2. Pre-hearing conference. Participate in the pre-hearing conference;

3. Present witnesses. Present and examine witnesses when appropriate;

4. Provide records. Ensure that relevant records of the System are present at the hearing and that other parties have adequate opportunity to examine the records prior to and during the hearing;

5. Introduce records. Introduce into evidence relevant System records and documents; and

6. Provide evidence. Present and establish relevant facts and circumstances by oral testimony, including that of MainePERS staff, and by documentary evidence.

SECTION 10. Default

1. **Failure to appear**. Except as provided in subsection 2 below, if an appellant fails to participate in a scheduled conference, appear at hearing, or otherwise fails to prosecute his or her case, the appellant may be deemed by the hearing officer to have abandoned

the appeal. The hearing officer will so notify the appellant in writing. If within 10 business days of receipt of the notice, the appellant submits information which demonstrates, in the judgment of the hearing officer, that she or he had good cause for failure to appear, the hearing will be rescheduled. On the 11th day following receipt of the notice by appellant and without suitable response, the decision of the Chief Executive Officer will become final and the hearing officer will issue a recommended dismissal with prejudice to the Board.

2. **Hearing in the absence of the appellant**. A hearing may be held in the absence of the person appealing when:

   A. The person requests or agrees to a hearing in their absence; or

   B. The hearing officer, at their discretion, proceeds with the hearing as the alternative to a default.

SECTION 11. Evidence

1. **Admissibility**. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.

2. **Testimony and Conduct of Hearings**. Testimony may be provided telephonically, by deposition, by video, by a sworn written statement, or, after the requirement to conduct hearings using audio or video conferencing has expired, in person, at the discretion of the hearing officer. With the exception of sequestered witnesses, all participants in a hearing conducted by audio or video conferencing must be able to hear the other participants. Parties must ensure that witnesses who provide sworn written statements or testimony be available for cross-examination during the hearing, although the cross-examination of expert witnesses may, at the request of a party, take place at a different time.

3. **Irrelevant or repetitious evidence**. Evidence which is irrelevant or unduly repetitive may be excluded.

4. **No formal rules of evidence**. Formal rules of evidence are not required and need not be observed.

5. **Weight of evidence**. The fact that evidence is admitted shall not limit the authority of the hearing officer to determine the weight to be given the evidence.

6. **Hearsay**. Hearsay evidence shall not be excluded simply because of its hearsay nature. The hearing officer will determine the weight to be given to hearsay evidence.

7. **Rules of privilege**. Rules of privilege as provided in the *Maine Rules of Evidence*, Article 5, shall be observed.

8. **Stipulation of facts**. When all parties stipulate to a fact, the hearing officer may make a finding of fact on the basis of the stipulation. Signed statements or on-the-record oral statements by parties are sufficient as stipulations.

9. **Official notice of facts**. The hearing officer may take official notice of a fact upon her/his own initiative or at the request of a party. Official notice may be taken of any fact of which judicial notice could be taken, and in addition, of any general or technical matter within the specialized experience or knowledge of the hearing officer, and of any statutes, rules and non-confidential public records. The hearing officer will notify the parties when official notice is taken and shall afford the parties an opportunity to contest the reliability, substance and/or materiality of the material noticed.

10. **Rebuttal Evidence**. To the extent that the appellant testifies or introduces evidence on matters or facts not previously known to the System, the hearing officer may, at the request of the MainePERS Representative, hold the record open for a reasonable period in order to allow the System to offer rebuttal evidence.

SECTION 12. Discovery and subpoenas

1. **Access to System documents and records**. A party must have an adequate opportunity prior to hearing, and at the hearing, to examine all of the System's documents and records to be offered as evidence. The System must provide to the person bringing the appeal a copy of the relevant portions of the record without charge.

2. **Request for subpoenas**. Any party may request the issuance of a subpoena by presenting the request to the hearing officer. The request must contain:

   A. The name and address of the party requesting the subpoena; and

   B. The name and address of the person to be subpoenaed, or other place where the person to be subpoenaed may be found; and

   C. A brief statement why the testimony or evidence of the person to be subpoenaed is relevant to an issue of fact in the appeal.

3. **Issuance on approval**. If the hearing officer determines that the request seeks testimony or evidence relevant to an issue of fact in the appeal, and not otherwise excludable, the hearing officer must submit the subpoena for approval by the Attorney General or Deputy Attorney General who is not involved in the appeal.

4. **Requirements**. A subpoena shall comply with the requirements of 5 M.R.S. §9060.

SECTION 13. Hearings recorded

1. All hearings will be recorded in a form susceptible to transcription.

2. A copy of the transcript of a hearing or of expert testimony taken pursuant to section 11(2) will be provided to the parties.

SECTION 14. Reconsideration by the Chief Executive Officer

After the close of the evidence and the parties' receipt of any transcript, the Chief Executive Officer shall have 10 working days to reconsider all of the evidence and affirm or reverse, in whole or in part, the decision that is the subject of the appeal. 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. If, after receiving the appeal evidence and any transcripts, the Chief Executive Officer consults with the medical review provider, the 10-day period described above begins to run upon the Chief Executive Officer's receipt of the medical review provider's reports.

SECTION 15. Recommended decision of the hearing officer

1. **Contents**. Following the hearing or, if the parties have agreed to waive hearing, following review of the documentary and testimonial record, and following the issuance of the Chief Executive Officer's reconsidered decision, the hearing officer will prepare a recommended decision, which will include:

   A. A clear statement of the subject(s) of the appeal and of the issues which must be resolved to decide the appeal;

   B. A listing of the date, place of hearing, and participants at the hearing or, if no hearing was held, a statement that the parties agreed to proceed without a hearing or other explanation;

   C. A listing of all evidence admitted and upon which the recommended final decision is based;

   D. Findings of fact, which must be sufficient to apprise the parties of the basis for the recommended decision;

   E. A clear statement of result resolving all issues under consideration; and

   F. A clear explanation of the reasoning underlying the result, including references to applicable law and rules.

2. **Comments, modification, and delivery to the Board**

   A. The hearing officer will furnish a copy of the recommended decision to each of the parties for comment. A party's comments must be in writing and must be received within the time period set by the hearing officer.

   B. If a party believes that the hearing officer's decision contains one or more errors of law, or that the hearing officer has exceeded their jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party shall so advise the hearing officer in that party's written comments. Identification of the error(s) by specific record citation is required.

C. The hearing officer may, but is not required to, modify the recommended decision in response to the parties' comments. If in the judgment of the hearing officer, the previously issued recommended decision is substantially modified, the hearing officer will send the recommended decision as modified to the parties for further comment, as provided in paragraph A.

D. The hearing officer will submit the recommended decision, as originally prepared and as modified, together with the written comments made by the parties, to the Board clerk. Where the recommended decision is not modified, the hearing officer will also deliver to the Board clerk a written response to the parties' written comments. Upon transmittal to the Board, the decision of the hearing officer constitutes the recommended final decision of the hearing officer.

E. If a party believes that the recommended final decision of the hearing officer contains one or more errors of law, or that the hearing officer has exceeded their jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party must so notify the Board in writing so that the notification is received by the Board within 10 days after that party's receipt of the recommended final decision, specifying the error(s) by specific citation to the record. In the event no written comments are received by the Board as specified herein, the Board will be compelled to accept the recommended final decision pursuant to 5 M.R.S. §17106-A and will not schedule consideration of the appeal or permit oral argument by the parties.

SECTION 16. Action by the Board

1. If the Board is compelled to adopt the recommended final decision of the hearing officer pursuant to 5 M.R.S. §17106-A(1), the Board will do so during its monthly meeting, as time permits, and will not schedule consideration of the appeal or permit oral argument by the parties.

2. If a party believes an error exists in the recommended decision pursuant to 5 M.R.S. §17106-A and the alleged error has not been resolved by the hearing officer, that party shall notify the Attorney General's Office, to the attention of MainePERS Board counsel, so that the notification is received within 10 days of that party's receipt of the recommended final decision.

   A. The Board or Board counsel may on its own initiative, determine that an error pursuant to 5 M.R.S. §17106-A exists in the recommended final decision.

3. Upon review of the record, the Attorney General or designee shall notify the parties, prior to the scheduled Board consideration, whether the Board will be advised that an error of law exists in the recommended final decision.

4. If the Attorney General or designee recommend that the Board find one or more errors in the recommended final decision as described in 5 M.R.S. §17106-A(1), then the following procedures will be followed.

   A. **Board Consideration**. The Board will consider the recommended final decision, together with the allegation of error(s), on a timely basis and, for an appellant

who has chosen the expedited appeal process, will issue a decision within 90 days of the initial pre-hearing conference, when possible.

B. **Recommended final decision and record**. In advance of Board consideration, a copy of the recommended final decision with the parties' comments and Board counsel's recommendation, will be forwarded to each Board member.

C. **Statement by party**. A party who is present at a scheduled consideration may not offer evidence but may make a statement of position not to exceed 15 minutes in length. Such statement of position may address the alleged error(s) pursuant to 5 M.R.S. §17106-A(1). When a party's statement of position relies on specific portions of the record, the party must provide copies of the relevant portions to the Board and other parties at least 5 days prior to the date for consideration by the Board.

D. **Hearing officer present**. If requested by the Board, the hearing officer may be present at the scheduled consideration to assist the Board.

E. **Action after consideration**. After considering the recommended final decision, the Board may:

(1) adopt the recommended final decision as delivered;

(2) modify the recommended final decision;

(3) send the recommended final decision back to the same hearing officer if possible, or a replacement hearing officer for the taking of further evidence, for additional consideration of issues, for reconsideration of the application of law or rules, or for such other proceedings or considerations as the Board may specify; or

(4) reject the recommended final decision in whole or in part and issue an amended Board decision;

5. Board counsel will draft the decision and order. A decision as issued by the Board under this Section is the final administrative decision in the appeal.

SECTION 17. Attorney's Fees

1. The System is required to pay attorney's fees, up to a total of $12,000, if an attorney has represented the appellant on appeal of a disability retirement decision and obtained a favorable result. A favorable result is a reversal of a decision of the Board or Chief Executive Officer that results in the grant of benefits to the appellant or otherwise materially advantages the appellant.

2. Attorney's fees under this section may be awarded by a Court on judicial review of a Board decision or by the hearing officer in the case where a decision of the Chief Executive Officer has been reversed by the Board or the Chief Executive Officer.

3. Application to a hearing officer for attorney's fees must be made no later than 30 days after receipt of the Board decision or the dismissal of the appeal following reversal by the Chief Executive Officer.

   A. The application must be accompanied by proof of the fee arrangement and a statement of attorney's fees incurred in the appeal. The statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and a statement of the attorney's customary billing rate for similar work.

   B. The hearing officer may grant the application based on the proof submitted or may hold a hearing and receive argument orally, in writing, or both.

   C. A decision on an attorney's fee application may be appealed to the Board, who shall affirm the decision unless it is not supported by the record as a whole, the Board is advised by Attorney General that the hearing officer has made an error of law, or the decision exceeds the authority or jurisdiction conferred upon the hearing officer.

      1. The process for Board review shall be consistent with section 16 above to the extent applicable.

      2. The Board's decision constitutes final agency action.

STATUTORY AUTHORITY:
5 M.R.S. §§ 9051-9064, 17103(4), 17106-A, 17106-B and 17451

EFFECTIVE DATE:
June 30, 1992

AMENDED:
March 2, 1994
April 30, 1995

EFFECTIVE DATE (ELECTRONIC CONVERSION):
May 5, 1996

NON-SUBSTANTIVE CORRECTIONS:
October 3, 1996 - minor spelling and format

AMENDED:
January 5, 1997
May 9, 2007, filing 2007-183

REPEALED AND REPLACED:
March 31, 2010 – filing 2010-108

AMENDED:

December 20, 2013 – filing 2013-296
April 14, 2020 – Section 11(2), filing 2020-095 (EMERGENCY)
July 18, 2020 - Section 11(2), filing 2020-159
September 20, 2022 – filing 2022-188