

MINUTES OF THE REGULAR MEETING OF THE
BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT SYSTEM
OF THE STATE OF HAWAII

AUGUST 9, 2021

CITY FINANCIAL TOWER
201 MERCHANT STREET, SUITE 1200
HONOLULU, HAWAII 96813

Trustees present: (by teleconference)	Mr. Emmit Kane, Chair Mr. Vincent Barfield Dr. Catherine Chan Mr. Craig Hirai Dr. Genevieve Ley Mr. Lance Mizumoto Mr. Bennett Yap
Staff present: (City Financial tower by teleconference)	Mr. Thomas Williams, Executive Director Ms. Kanoe Margol, Deputy Executive Director Ms. Donna Curry, Program Specialist Mr. Bart Asato, Program Specialist Ms. Shanna Sakagawa, Program Specialist Ms. Elizabeth Burton, Chief Investment Officer Mr. Aaron Au, Investment Officer – Illiquid Markets Mr. Anthony Goo, Investment Officer – Liquid Markets Ms. Gerri Konishi, Member Home Loan Assistant (audio only) Ms. Diana Gomes, Secretary Ms. Dale Kehau Kanae, Recording Secretary Ms. Lori Kim, Secretary Ms. Andrea Gasper, Secretary
Attorneys present: (by teleconference)	Mr. Ivan Torigoe, Deputy Attorney General Ms. Elmira Tsang, Deputy Attorney General Ms. Diane Wong, Deputy Attorney General
Guests present: (by teleconference)	Mr. Colin Bebee, Meketa Investment Group, Inc.
Public present: (by teleconference)	Mr. Keith Balaod, Journalist, Pageant Media Mr. Riley Fujisaki, Staff, House Finance Committee

QUORUM/CALL TO ORDER

A quorum being present (Chair Kane, Trustees Barfield, Chan, Ley, Mizumoto, and Yap), Chair Kane called the regular meeting of the Board of Trustees (Board) of the Employees' Retirement System of the State of Hawaii (ERS) to order at 9:00 a.m.

On a motion made by Trustee Barfield, seconded by Trustee Ley, and unanimously carried, to be able to hold a meeting closed to the public and allow Trustees to participate by teleconference or other remote meeting technology, pursuant to the Governor of the State of Hawaii's Twenty-First Proclamation Related to the COVID-19 Emergency, dated June 7, 2021, in order to implement social distancing measures.

Chair Kane announced new procedures for Trustees attending remotely shared by Deputy Attorney General Ivan Torigoe that are required during executive session. All Trustees will need to identify that they are the only ones in their room while in attendance.

PUBLIC COMMENT

ANNUAL PRELIMINARY ACTUARIAL VALUATION REPORT FOR THE YEAR ENDING JUNE 30, 2021

Chair Kane then welcomed Trustee Lance Mizumoto to the Board and meeting. Trustee Mizumoto shared that he was pleased to be a part of the Board and looks forward to working with everyone.

Chair Kane called for public comment. There were two (2) members of the public present by teleconference, however, none of the public present had any comments. There was also no public written testimony received for this meeting.

Chair Kane announced that the meeting agenda items will be taken out of order starting with the presentations.

Gabriel, Roeder, Smith and Company (GRS), Messrs. Joe Newton and Lewis Ward presented an oral and written report to the Board regarding the Actuarial Issues and Outlook for the Year Ending June 30, 2021. An annual report will be presented in January of 2022.

Messrs. Newton and Ward discussed with the Board:

Update Including FY21 Investment Performance

Act 17 (SB 936) Contribution Rates

Preliminary 2021 Actuarial Valuation Results

Projection of UAAL (June 30, 2021)

Projection of Funding Period from 2016 Legislative Impact Statement vs. Actual Valuation Outcomes

Probabilities of Funding Period

Market and Actuarial (Smoothed) Values of Assets

Projected Growth of Market and Actuarial Assets

Probabilities of Funding Period

Update Summary

- Strong investment performance of this magnitude changes the trajectory and timeframes.
- The scheduled employer contribution rates are expected to be adequate to satisfy Hawaii Revised Statutes §88-122(e)(1), even with substantial adverse experience.
- However, all of the positive outlook assumes the current contribution rates continue. It is still imperative that the currently scheduled funding strategies are and sustained.

On a motion made by Trustee Barfield, seconded by Trustee Chan, and unanimously carried, the Board accepted the Actuarial Issues and Outlook Report for the Year Ending June 30, 2021, as presented.

After their presentation, Messrs. Newton and Ward left the meeting by exiting the teleconference.

This agenda item was inadvertently added and will be discussed at the January Board meeting.

ANNUAL REPORT TO THE LEGISLATURE REQUIRED BY ACT 85/2017 REGARDING THE ACTUARIAL ASSET AND LIABILITY STRESS TEST 2021

EXECUTIVE DIRECTOR'S REPORT

Executive Director (ED) Williams gave an oral presentation of his report to the Board as follows:

- Welcomed Trustee Lance Mizimoto.
- A Cyber Security presentation will be held in September by the Chief Information Officer and Chief Information Security Officer of the State Office

EXECUTIVE DIRECTOR'S REPORT (CONT'D)

- of Enterprise Technology Services. If the Trustees have any questions, ED Williams would like the questions incorporated into their presentation. Trustee Barfield requested counseling of staff who failed phishing testing.
- ERS has acquired a new telephone system.
- Employer meetings were held to help improve reporting to comply with Act 87. Staff is developing proposals with employers to make processing more efficient.
- Deputy Attorney General Elmira Tsang is verifying staff hours to be reimbursed in a securities litigation case.
- Congratulated the Investment Office staff on a job well done regarding the virtual Investment Summit last month.
- Discussed the Governor's emergency proclamation that all County and State employees be fully vaccinated beginning August 16, 2021. If not vaccinated, they will be subjected to testing and other details are still being worked out.

DEPUTY EXECUTIVE DIRECTOR'S OPERATIONS REPORT

DISCUSSION OF 2021 COMMITTEE ASSIGNMENTS

REPORTS BY ADMINISTRATIVE & AUDIT COMMITTEE

REVIEW OF PROPOSED UPDATED AMENDMENTS TO HAWAII ADMINISTRATIVE RULES (HAR) TITLE 6, HAR CHAPTERS 6-21, 6-22, 6-23, 6-26, AND 6-29, TO ADDRESS DETERMINATION OF SERVICE CREDIT FOR FRACTIONAL MONTHS OF EMPLOYMENT TO BE BASED ON EMPLOYEE EARNED PAY PER MONTH, AND FOR TEACHERS PAID ON CURRENT OFFICIAL SCHOOL SCHEDULES; ESTABLISHMENT OF FULL-TIME EQUIVALENCE FOR ELIGIBLE PART-TIME EMPLOYEES; CONVERSION OF SICK LEAVE CREDITS WHEN MEMBER RETIRES OR TERMINATES IN GOOD STANDING; TYPOGRAPHICAL

Deputy Executive Director (DED) Margol gave updates to ERS staffing and projects of Administration, Accounting, Information Services, Retirement Benefits and Staff Support Services Branches as presented in the July 2021 Monthly Operations Report.

Chair Kane proposed the new Committee assignments as submitted.

On a motion made by Trustee Yap, seconded by Trustee Chan, and unanimously carried, the Board approved the Committee assignments, as presented. (Committee Assignments are attached for clarification.)

Chair Kane noted with the departure of Trustee Rauckhorst, the Board consider a new Vice Chair to be selected at the next Board meeting.

Administrative & Audit Committee (Committee) Chair Ley reported that at the last Committee meeting of July 1, 2021, the following was discussed and is being re-presented again for acceptance and approval by the Board as additional changes have been made.

On a motion made by Committee Chair Ley, seconded by Committee Vice Chair Yap, and unanimously carried, the Board approved the updated amendments to Hawaii Administrative Rules (HAR) Title 6, HAR Chapters 6-21, 6-22, 6-23, 6-26, and 6-29, as presented. (The Amendments are attached for clarification.)

Committee Chair Ley further stated that the next meeting is tentatively scheduled to be held in September to discuss the financial audits.

CORRECTIONS;
APPROPRIATE ACTION.

REPORTS BY
COMPENSATION REVIEW,
GOVERNANCE POLICY,
INVESTMENT AND
KAANAPALI AD HOC, AND
LEGISLATIVE
COMMITTEES

Chair Kane reported that there was no **Compensation Review or Governance Policy Committee** meetings held.

Investment and Kaanapali Ad Hoc Committees (Committee) Chair Barfield reported to the Board that there were no new updates on Kaanapali, however, the Committee met on July 26, 2021, and discussed educational presentations for asset strategies to be considered that include private equity education from Common Fund, Mark Anson and Peter Burns; litigation finance education from Longford Capitol, Tim and William Farrell. Reviewed the standard report on Investment Office activities, covered executive session confidential items on manager pipeline updates and real estate investment. Chair Barfield also thanked the Investment Office on a job well done on the virtual Investment Summit.

Legislative Committee (Committee) Chair Chan reported that no Committee meeting was held, however, would like the Board to think about potential Bills that ERS could propose. Program Supports Donna Curry shared with the Board that there is no deadline for proposals to be provided to the Governor to be included in his legislative package, however, once dates are provided the Committee will then meet.

(Public participation concluded by ending the teleconference link.)

Chair Kane identified all the participants in Executive Session as the Board and staff members listed on the Executive Session minutes. Board members confirmed that no other persons are in the room while they are on the teleconference.

On a motion made by Trustee Barfield, seconded by Trustee Ley and unanimously carried, the Board entered into Executive Session at 9:57 a.m.

- Pursuant to HRS § 92-5 (a)(4) and (8), to consult with the Board's attorneys for legal advice regarding procurement and funding of Special Deputy Attorney General contracts for legal services relating to investments in private equity and real estate funds, hedge funds, separate accounts, investment service providers and similar sophisticated investment transactions, and involving consideration of information that must be kept confidential pursuant to state law; appropriate action.
- Pursuant to HRS § 92-5(a)(4), to consult with the Board's attorneys on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities regarding Sunshine Law Remote Meetings Procedural Update, Re: Act 220, Session Laws of Hawaii 2021.

ENTER EXECUTIVE
SESSION

EXECUTIVE SESSION

EXECUTIVE SESSION,
PURSUANT TO HRS § 92-
5(a)(4) AND (8), TO CONSULT
WITH THE BOARD'S
ATTORNEYS FOR LEGAL
ADVICE REGARDING
PROCUREMENT AND
FUNDING OF SPECIAL
DEPUTY ATTORNEY
GENERAL CONTRACTS FOR
LEGAL SERVICES RELATING
TO INVESTMENTS IN
PRIVATE EQUITY AND REAL
ESTATE FUNDS, HEDGE
FUNDS, SEPARATE
ACCOUNTS, INVESTMENT
SERVICE PROVIDERS AND

SIMILAR SOPHISTICATED
INVESTMENT
TRANSACTIONS, AND
INVOLVING
CONSIDERATION OF
INFORMATION THAT MUST
BE KEPT CONFIDENTIAL
PURSUANT TO STATE LAW;
APPROPRIATE ACTION

(Trustee Hirai entered the meeting at 10:05 a.m. by joining the teleconference.)

EXECUTIVE SESSION,
PURSUANT TO HRS § 92-
5(a)(2) AND (4), TO CONSULT
WITH THE BOARD'S
ATTORNEYS ON QUESTIONS
AND ISSUES PERTAINING TO
THE BOARD'S POWERS,
DUTIES, PRIVILEGES,
IMMUNITIES, AND
LIABILITIES REGARDING
SUNSHINE LAW REMOTE
MEETINGS PROCEDURAL
UPDATE, RE: ACT 220,
SESSION LAWS OF HAWAII
2021.

APPROVAL OF
EXECUTIVE SESSION
CONFIDENTIAL
SUPPLEMENTAL MINUTES
– JUNE 14, 2021

APPROVAL OF
EXECUTIVE SESSION
MINUTES
– JULY 12, 2021

EXIT EXECUTIVE SESSION

APPROVAL OF MINUTES
– JULY 12, 2021

ADJOURNMENT

On a motion made by Trustee Mizumoto, seconded by Trustee Yap, and unanimously carried, the Board exited Executive Session at 10:17 a.m.

On a motion made by Trustee Barfield, seconded by Trustee Ley, with Trustee Chan abstaining, the Board approved the Minutes of July 12, 2021, as presented.

On a motion made by Trustee Mizumoto, seconded by Trustee Yap, and unanimously carried, Chair Kane adjourned the meeting at 10:18 a.m.

REDACTED SIGNATURE

Thomas Williams
Executive Director

TW:dkik

SUMMARY OF PROPOSED AMENDMENTS TO HAR CHAPTER 6-20, 6-21, 6-22, 6-23, 6-26 AND 6-29

INTRODUCTION

The Employees' Retirement System of the State of Hawaii (ERS) provides the following summary of the proposed amendments to chapters 6-20, 6-21, 6-22, 6-23, 6-26 and 6-29 of the Hawaii Administrative Rules (HAR).

EXECUTIVE SUMMARY OF PROPOSED AMENDMENTS

The ERS has not made a major amendment to its rules since 2009. A new section (6-40) was added in 2020 to implement Hawaii Domestic Relations Orders under Sec. 88-93.5, Hawaii Revised Statutes (HRS). The purposes of the proposed amendments are to: (a) update the ERS rules with respect to current statutory law and decisions of the ERS board of trustees (ERS Board); (b) clarify the ERS rules on declaratory rulings and contested case proceedings; (c) conform the ERS rules to current ERS practices and procedures; (d) update and make consistent the definitions and terminology used in the ERS rules; and (e) make other clarifications and housekeeping changes. Some of the proposed amendments are to implement Act 17, 2017 Session Laws of Hawaii (Act 17).

HAR Chapter 6-20. This chapter contains the ERS rules for general definitions, public records and information, adoption, amendment, or repeal of ERS rules, and ERS declaratory rulings. The proposed amendments: update and clarify some of the general definitions used in the ERS rules; correct a statutory reference in the rule establishing ERS copying charges; increases the time that the ERS Board has to consider petitions seeking a change in the ERS rules; and makes some clarifying changes to the rules regarding ERS declaratory ruling proceedings.

HAR Chapter 6-21. This chapter contains the ERS rules for the determination of service credit, the conversion of unused sick leave credit for retirement benefits, and the exclusion of certain types of appointments. The proposed amendments will define service credit for fractional months of employment to be based on compensation; service credit for teachers on modified school schedules; to require that part-time employees are designated with full-time equivalence; to confirm that the conversion of sick leave credit would only apply to members who retire or terminate in good standing as reported by the employing agency; and corrects typographical errors in this chapter.

HAR Chapter 6-22. This chapter contains the ERS rules for certifications and findings of the ERS medical board regarding disability retirement and accidental death benefits applications. The proposed amendments implement sections 3-10 of Act 17, which allow the ERS to use a designated entity as an alternative to the ERS medical board. The proposed amendments also update the definitions and provisions used in disability retirement and accidental death benefits applications and proceedings to current decisions of the ERS Board and current ERS practices and procedures.

HAR Chapter 6-23, Subchapter 1. This chapter contains the ERS rules for contested case hearings on applications for disability retirement and accidental death benefits. The proposed amendments implement sections 3-10 of Act 17, which allow the ERS to use a designated entity as an alternative to the ERS medical board, and provides for applications for disability retirement and accidental death benefits to be handled by the ERS system (executive director) instead of the ERS Board. The proposed amendments make the definitions used in this subchapter consistent with the definitions in HAR chapters 6-20 and 6-22. The proposed amendments update the rules to current ERS practices and procedures – which provide for contested case hearings to be conducted by a hearing officer and exceptions to the hearing officer's recommended decisions to be heard by the ERS Board.

**HAR Amendment Summary
BOT (08-09-2021)**

HAR Chapter 6-23, Subchapter 2. This chapter contains the ERS rules for petitions for contested case hearings not covered by HAR Chapter 6-20 (declaratory rulings) or HAR Chapter 6-23, Subchapter 1 (disability retirement and accidental death benefits). The proposed amendments update the rules to current ERS practices and procedures, which provide for contested case hearings to be conducted by a hearing officer and exceptions to the hearing officer's recommended decisions to be heard by the ERS Board. The proposed amendments also make other clarifying and housekeeping changes to the rules.

HAR Chapter 6-26, Subchapter 2. This chapter contains the ERS requirements for applications for retirement benefits, proof of age, and rules for the computation of age. The proposed amendments for Subchapter 2 address the acceptance of copies of original documents for proof of birth and revises the types of acceptable evidence of a member's or beneficiary's date of birth.

HAR Chapter 6-29. This chapter contains ERS rules for miscellaneous administrative provisions. The proposed amendments update these rules to conform to current ERS practices and procedures. There is a new rule that implements section 1 of Act 17 regarding the finalization of ERS retiree's pension benefits and the interest rate to be applied for a finalization that takes place more than six calendar months after the month of the retiree's retirement.

EXPLANATION OF PROPOSED AMENDMENTS

1. PROPOSED AMENDMENTS TO RULES

A. Chapter 6-20

Section 6-20-1 Definitions.

The definition of "Administrator" is replaced with a definition for "Executive Director", which means the "executive director of the system or, in the executive director's absence, the deputy executive director of the system or other officer appointed by the board of trustees to act as the executive director of the system." The purpose of this amendment is to implement Act 23, 2013 Session Laws of Hawaii, which amended HRS § 88-29 to replace the term "administrator" with "executive director" as denoting the senior ERS staff member that the ERS Board appoints.

The definition of "Alternate Payee" is added for the purpose of implementing Act 263, SLH 2016 and its amending Act 30, SLH 2018 for the distribution of property in a divorce action. The alternate payee (spouse or former spouse of a member, former member or retiree) is recognized as having the right to receive all or a portion of the benefits payable by the system by a Hawaii Domestic Relations Order under Section 88-93.5.

The definition of "Hearing officer" is amended by deleting the words "and authorized" which is unnecessary and adding that a hearing officer may be appointed by the system (i.e., ERS executive director). Stating that ERS hearing officers are "appointed" is sufficient and having the ERS executive director contract with and appoint hearing officers has been the ERS's practice and procedure for some time.

The definition of "Petition" is amended to delete unnecessary and excess language. No substantive change results from this amendment.

The definition of "Presiding officer" is amended to add that a hearing officer may be appointed by the system (i.e., ERS executive director) as well as the ERS Board. As noted above, this is consistent

**HAR Amendment Summary
BOT (08-09-2021)**

with what has been ERS's practice and procedure for some time. The other amendments to this definition are non-substantive language changes.

Section 6-20-4. Disclosure of information. This section is amended to allow the ERS to release information to an alternate payee under section 88-93.5, HRS, with a certified copy of a complaint or decree for divorce, information relevant to the alternate payee's interest in the ERS member's, former member's with vested benefit status, or retirant's benefits.

Section 6-20-4.01 Cost of copies for government records and rules. Subsection (a) is amended to replace "section 92F-19" with "chapter 92F, HRS." When this rule was changed in 2009, the wrong statutory reference for public records requests was used. Public records requests are made under HRS chapter 92F, not HRS §92F-19. The purpose of this amendment is to provide the proper statutory reference for public records request in this rule.

Section 6-20.7 Consideration of petition. This section is amended to lengthen the time that the ERS Board has to consider petitions to adopt, amend, or repeal an ERS rule from "thirty" to "sixty" days. The ERS Board usually only meets once a month. Thirty days or less is not a sufficient amount of time for the ERS Board to review a petition proposing a change in one or more ERS rules, receive staff and counsel analysis of the proposed rule change, and decide whether or not to accept or reject the petition for a rule change. The purpose of this amendment is to give the ERS Board enough time to fully consider, rationally analyze, and make a reasoned decision on petitions for proposed rule changes.

Section 6-20-9 Form and content of petition.

Subsection (6) of this rule is amended to add the word "proposed" - since what is desired in a petition for a declaratory ruling to the ERS Board is the petitioner's "proposed interpretation of the statute, rule, or order"

Subsection (7) of this rule is amended to delete that "[t]he board may require the petitioner to file additional data or memoranda." This section has to do with the required contents of a petition for a declaratory ruling. The deleted language does not pertain to the form of a petition for a declaratory ruling. The deleted language is also unnecessary as the ERS Board may always ask for additional data or memoranda in the course of a declaratory ruling proceeding.

Section 6-20-10 Consideration of petition. This section is amended to state in a logical order what the ERS Board's options are upon receipt of a petition for declaratory ruling, i.e., deny the petition without a hearing, grant the petition without a hearing, or set the petition for a hearing before the board or a designated hearing officer. The amendments are for form and readability, not substantive.

Section 6-20-14 Notice of hearing. Subsection (c) of this rule is amended to clarify that the notice of hearing shall inform a party of the right to retain and be represented by legal counsel, and that the ERS Board or designated hearing officer may require any person purporting to represent a party to show authority or qualifications to act in that capacity. The amendments are for form and readability, not substantive.

Section 6-20-16 Conduct of hearing. Subsection (c) of this rule is amended to update the reference to the "administrator" with the "executive director." See HRS § 88-29. It is also amended to clarify that the presiding officer shall summarize "what is stated and requested in" the petitioner's petition as opposed to summarizing "the statement of" the petition. The other changes to this section are non-substantive language changes.

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Section 6-20-17 Parties; service. This section is amended to update references to the “administrator” with the “executive director.” See HRS § 88-29.

Section 6-20-18 Advisory memorandum. This section is amended to replace references to the “administrator” with the “executive director.” See HRS § 88-29. It is also amended to clarify that memoranda of the executive director’s and other parties’ positions may be filed with a hearing officer (where the hearing is before a hearing officer and not the ERS board of trustees).

Section 6-20-19 Request for additional facts or supplemental memorandum; documents. This section is amended to show that a hearing officer (like the ERS Board) may request a petitioner or other party to submit a statement of additional facts or a legal memorandum, and that a hearing officer may strike or require amendments of documents filed in a proceeding. The section is also amended to replace references to “administrator” with “executive director.” See HRS § 88-29.

Section 6-20-20. Argument. This section is amended to note that a hearing officer (same as the ERS Board) has the discretion to set a matter for hearing. A non-substantive language change is also proposed for this section.

Section 6-20-21 Proposed findings of fact and conclusions of law. This section is amended to note that a hearing officer (same as the ERS Board) has the discretion to order the filing of proposed findings of fact and conclusions of law.

Section 6-20-22 Disposition of petition. This section is amended to replace references to “administrator” with “executive director,” and to make some non-substantive language changes for clarity. See HRS § 88-29.

Section 6-20-23.01 Withdrawal of petition. This section is amended to replace a reference to the “administrator” with the “executive director.” See HRS § 88-29.

B. Chapter 6-21

Section 6-21-4 Fractional month of employment. This section is amended to define credited service for a fractional month of employment to be based on the employee’s pay rather than calendar days. The employee must be paid or on paid status for at least one-half the month to be credited for a full month of service credit.

Section 6-21-6 Teachers. This section is amended to specify that “teachers” are employed with either the Department of Education or the Hawaii Public Charter School Commission. In addition, it deletes the specific dates of “September 1 to August 31”, which defined a traditional school year prior to the revision of school calendars and teacher’s annual earnings as determined by the Hawaii Department of Education. In addition, this section is amended to differentiate traditional school year schedules from modified school year schedules for the purpose of determining credited service and the crediting of fractional months of employment.

Section 6-21-8 Part-time employees. This section is amended to require employers to establish a full-time equivalence percentage for part-time employees, that part-time hourly paid employees must be converted to full-time equivalence with a base pay compensation rate based on a salary schedule and that the employee must meet minimum membership eligibility of 50% FTE.

**HAR Amendment Summary
BOT (08-09-2021)**

Section 6-21-8.1 Average final compensation. This section is amended to include the computation of average final compensation to be based on traditional and other school year schedules.

Section 6-21-10(c) Limitations. This subsection is amended to emphasize that, in order for the member's unused sick leave to be considered for additional service credit after retirement, the member's employing agency must certify that the member's termination was in good standing. The nature of termination is the employer's determination and is not the ERS's discretion.

Section 6-21-14(5) Employees excluded from membership. This subsection is amended to correct a typographical error, replacing the word "or" with "of."

C. Chapter 6-22

Title and Table of Contents.

The title of the chapter and the table of contents are modified to reflect that under Act 17, the ERS Board may use a designated entity as an alternative to the ERS medical board.

Section 6-22-1 Scope. This section is amended to state that HRS Chapter 6-22 shall govern certifications and findings of "a designated entity" as well as the ERS medical board. The purpose of this amendment is to implement sections 2-10 of Act 17, which provide, in part, that the ERS Board may use "a designated entity" as well as the ERS medical board to review disability retirement and accidental death applications.

Section 6-22-2 Definitions.

One of the proposed amendments to this section is a new definition of "Designated entity." This is added to implement sections 3-10 of Act 17 which, in part, permit the ERS to use an entity designated by the ERS Board as an alternative to the ERS medical board to provide requires certifications. The definition defines a "designated entity" to mean "an entity designated by the system to review applications for disability retirement and accidental death benefits and to provide findings and certifications to the system regarding those applications in accordance with sections 88-75, 88-79, 88-85.5, 88-284, 88-285, 88-286, 88-335, 88-336, or 88-339, HRS."

The definition of "Occupational hazard" is amended to make the definition consistent with applicable Hawaii appellate court decisions. Under those decisions, an occupational hazard is a danger or risk which is inherent in, and concomitant to, a particular occupation, and "the causative factors must be those which are not ordinarily incident to employment in general and must be different in character from those found in the general run of occupations." *See Lopez v. Board of Trustees, ERS*, 66 Haw. 127, 129 (1983). The decisions do not state that an occupational hazard is a danger or risk inherent in, or concomitant to, a "particular job" – so that language is deleted.

Section 6-22-3 Examination of a member. In order to implement sections 3-10 of Act 17, this section is amended to provide that the ERS executive director may have a "designated entity" investigate, review, and evaluate medical reports and other materials submitted to the ERS regarding applications for disability retirement or accidental death benefits, and may subject a member to a physical examination in arriving at its certifications and findings. As noted previously, Act 17 provides that the ERS may use a designated entity as an alternative to the ERS medical board to review applications for disability retirement and accidental death benefits.

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BOT (08-09-2021)

Section 6-22-4 Engagement of other specialists. In order to implement sections 3-10 of Act 17, this section is amended to provide that, in addition to the ERS medical board, a “designated entity” may engage physicians and other specialists to examine a member or review records.

Section 6-22-5 Workers’ compensation and Social Security Administration reports and findings. In order to implement sections 3-10 of Act 17, this section is amended to provide that a “designated entity” may consider but is not bound by determinations of the disability compensation division of the department of labor and industrial relations, the labor and industrial relations appeals board, and the Social Security Administration relating to an applicant’s claimed disability or death benefit.

Section 6-22-6 Position description of member. In order to implement sections 3-10 of Act 17, this section is amended to provide that, in addition to the ERS medical board, a “designated entity” may consider probative and credible evidence of a member’s actual job duties in its review of the member’s application for disability retirement.

Section 6-22-8 Certifications and findings. In order to implement sections 3-10 of Act 17, this section is amended to provide that a “designated entity,” as well as the ERS medical board, can provide the system with certifications and findings regarding a member’s application of ordinary or service-connected disability retirement. The section is also amended to clarify that for ordinary and service-connected disability retirement, the member’s incapacity and the permanence of that incapacity must be found at the time of the member’s application. In past contested case proceedings, there has been some confusion as to whether the ERS disability retirement statutes require a member to show that the member’s incapacity was likely to be permanent at the time of the member’s application. The clarification made by this amendment is in line with the ERS Board’s decisions on the matter.

Section 6-22-9 Appearance as a witness. In order to implement sections 3-10 of Act 17, this section is amended to provide that representatives of a “designated entity” may serve as witnesses at any hearing of an appeal from the designated entity’s certifications and findings. It is also clarified that more than one representative of a designated entity and more than one member of the ERS medical board may appear as witnesses in a hearing. In the past, the language of this section raised a question as to whether more than one member of the ERS medical board could testify at a hearing. There have been occasions whether more than one member of the ERS medical board has been required to testify due to the differing expertise of such members, e.g., where an applicant claims disability from both medical and psychiatric causes.

Section 6-22-10 Additional medical reports. In order to implement sections 3-10 of Act 17, this section is amended to provide that a “designated entity,” as well as the ERS medical board, may consider additional medical reports offered by an applicant after it has submitted its certifications and findings to the system, with the prior approval of the ERS executive director.

D. Chapter 6-23, Subchapter 1

Section 6-23-1 Scope. In order to implement sections 3-10 of Act 17, this section is amended to provide that this subchapter governs all petitions for contested case hearings filed with the “system” disputing preliminary decisions by the “system” regarding applications for disability retirement or accidental death benefits pursuant to certifications and findings of the medical board “or a designated entity.” Some of the changes made by Act 17 were to provide for disability retirement and accidental death benefits to be granted by the “system” instead of the ERS Board, and to provide for the ERS to use a “designated entity” as an alternative to the ERS medical board.

**HAR Amendment Summary
BOT (08-09-2021)**

Section 6-23-2 Definitions. This section is amended to note that definitions applicable to this subchapter are provided in HAR §§ 6-20-1 and 6-22-2, and to delete definitions that are repetitive of those already provided in HAR §§ 6-20-1 and 6-22-2. Another amendment modifies the definition of “causation” to state that it applies to accidental death as well as disability retirement, and to clarify the wording of that definition.

Section 6-23-3 Preliminary decision by system; notice of preliminary decision; petition for contested case hearing. In order to implement sections 3-10 of Act 17, this section is amended by adding “or designated entity” to all references to the “medical board” and replacing all references to the “board” with the “system” or the “executive director on behalf of the system.” Thus, the section is amended to provide that upon receipt of the medical board’s “or a designated entity’s” certifications and findings, the “executive director on behalf of the system” shall make a preliminary decision as to whether to accept the medical board’s “or designated entity’s” certifications and findings or remand the same to the medical board “or designated entity” for any clarification or correction, or reject the medical board’s “or designated entity’s” certifications and findings. Further, the section is amended so that the “executive director” notifies the applicant of the “system’s” preliminary decision, and of the applicant’s right to file a petition for a contested case hearing disputing the “system’s” preliminary decision.

Section 6-23-4 Filing of petition for contested case hearing. In order to implement Act 17, this section is amended to replace all references to the board with the “system” and adds “or the designated entity” to the section’s reference to the medical board. In accordance with HRS § 88-29, it replaces the reference to administrator with “executive director.” Thus, the section provides that after receipt of the “system’s” preliminary decision regarding the medical board’s “or the designated entity’s” certifications and findings, the applicant may file a petition for a contested case hearing. The section is also amended to shorten the time for the applicant to file such a petition from sixty to thirty days following receipt of written notification of the system’s preliminary decision. Given the simple nature of filing a petition under the ERS rules and the need to expeditiously handle these matters, the ERS Board and staff believe that shortening the time for the filing of a petition is warranted.

Section 6-23-5 Contents of petition. This section is amended to replace references to “employee organization” and “organization” with “a person or other entity” because petitions for contested case hearing by applicants seeking disability retirement or accidental death benefits are often filed on behalf of applicants by persons or entities other than employee organizations, e.g., personal lawyers, relatives, or friends. Such persons or other entities should also be required to submit proof that they have the right to represent the member or applicant.

Section 6-23-6 Contested case hearing. This section is amended to clarify that contested case hearings under this subchapter are held before a hearing officer not the ERS Board. In accordance with current ERS practices and procedures, the “system” not the ERS Board contracts with and appoints ERS hearing officers.

Section 6-23-7 Time and place of hearing and notice. This section is amended to clarify that contested case hearings under this subchapter are held before a hearing officer not the ERS Board, so it is the hearing officer not the “board” that sets the time and place of the hearing and gives the required notice.

Section 6-23-8 Docket. This section is amended to replace the reference to “administrator” with the “system.” See HRS § 88-29. In addition, sections 3-10 of Act 17 provide for the “system” to

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grant or deny disability retirement and accidental death benefits. Thus, it should be the “system” that maintains the docket of petitions disputing denials of such benefits.

Section 6-23-9 Computation of time; extension of time. This section is amended to clarify that time periods may be set by orders of the “system or a presiding officer,” as well as the ERS Board, and that extensions of such time periods may be extended by the “presiding officer or the executive director on behalf of the system or board.”

Section 6-23-10 Documents. In order to implement sections 3-10 of Act 17, this section is amended to provide that documents filed in petitions under this subchapter are to be filed with the “system” and in substantial conformity with the applicable rules of the “system.”

Section 6-23-11 Depositions. This section is amended to delete references to the “board” as under ERS practices and procedures, applications for depositions under this subchapter are made to and approved by an ERS hearing officer not the ERS Board.

Section 6-23-12 Depositions; person before whom taken, oath, examination, and cross-examination, record of examination, filing of deposition. This section is amended to require that depositions be forwarded for filing with the “system” instead of the “board” at the system’s office. This is in accord with ERS practices and procedures.

Section 6-23-13 Use of depositions. This section is amended to replace the reference to “presiding officer” with “hearing officer.” Since contested case hearings are not held before the ERS Board, the use of deposition testimony in such proceedings will only be considered by an ERS hearing officer - not a “presiding officer” which under HAR § 6-20-1 includes the chairperson or other designated member of the ERS Board.

Section 6-23-14 Jurisdiction; Presiding officer; powers and duties. Under ERS practices and procedures, contested case hearings under this subchapter are heard only before an ERS hearing officer, and exceptions to the ERS hearing officer’s recommended decision are heard by the ERS Board. Thus, this section is amended to provide that a “hearing officer appointed by the system shall preside over contested case hearings governed by this subchapter” and that “the chairperson of the board or other member of the board designated by the chairperson shall preside over hearings of arguments on exceptions under section 6-23-20.” The section is also amended to specify the powers and duties of the presiding officer regarding exceptions hearings before the ERS Board. The section is also amended to make it clear that the substantive provisions of HAR §§ 6-22-5, 6-22-6, and 6-22-7 apply to contested case hearings and exceptions hearings under this subchapter.

Section 6-23-14.01 Default. This new section provides that a presiding officer may find a party to be in default for: “(1) failure to comply with an administrative order; (2) failure to appear at a pre-hearing conference or hearing without good cause being shown; or “failure to prosecute the case.” The new section also provides that the presiding officer may issue a default order that constitutes a recommended decision if issued by a hearing officer or a proposed decision if issued by the chairperson or other designated member of the ERS Board. There have been many occasions where petitioners have failed to appear for pre-hearing conferences with ERS hearing officers or failed to prosecute their case, e.g., failed to return calls from the hearing officer or failed to appear at status conferences. This new provision is meant to clarify that ERS hearing officers may enter a default order that will terminate the contested case hearing. Such a remedy is necessary to avoid undue and costly delays in the processing of petitions covered by this subchapter.

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Section 6-23-14.02 Motions to dismiss or for summary judgement. This new section provides that a presiding officer issue an order for summary judgment as to claims in contested case proceedings under this subchapter if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law, and that a presiding officer may issue an order of dismissal for lack of jurisdiction, failure to state a claim or other ground upon which a petition under this subchapter may be dismissed. Such orders shall constitute recommended decisions if issued by a hearing officer or shall constitute proposed decisions if issued by the chairperson or other designated member of the ERS Board. The purpose of this new rule is to avoid the time and cost of contested case hearings or exceptions hearings where there are one or more dispositive issues as to the whole case or significant parts of the case.

Section 6-23-15 Reassignment of petition. This section is amended to provide that the “system” rather than the “board” will reassign contested case hearings where a hearing officer is unable to complete a hearing. This change recognizes that the “system” as opposed to the “board” is the entity that is handling disability retirement and accidental death benefits under sections 3-10 of Act 17.

Section 6-23-16 Conduct of contested case hearing. The proposed amendments to this section recognize two things. First, that under ERS practices and procedures, it is an ERS “hearing officer” that convenes and conducts contested case hearings. The chair or other designated member of the ERS Board, who are included in the definition of “presiding officer,” do not handle contested case hearings. Second, that under sections 3-10 of Act 17, a “designated entity” may appear as the respondent in the contested case hearings as well as the ERS medical board.

Section 6-23-17 Recommended decision. This section is amended to clarify that recommended decisions by a hearing officer are filed with the “system” not the “board.” As noted above, sections 3-10 of Act 17 provide for the system not the board to handle disability retirement and accidental death benefits applications and proceedings.

Section 6-23-18 Proposed decision. This section is amended to provide that “the executive director on behalf of the system” not the “board” may accept recommended decisions and issue the “system’s” proposed decision. As noted above, sections 3-10 of Act 17 provide for the system not the board to handle disability retirement and accidental death benefits applications and proceedings.

Section 6-23-19 Filing of exceptions; extension of time; finality of proposed decision. This section is amended to provide that within fifteen days of the “system’s” proposed decision, any party may file exceptions with the “system.” It is also amended to provide that upon good cause shown, the “executive director on behalf of the system” may extend the time for filing exceptions. As noted above, sections 3-10 of Act 17 provide for the system not the board to handle disability retirement and accidental death benefits applications and proceedings. The amendments also delete language that allowed the ERS Board to order further proceedings even in the absence of exceptions. The ERS Board has never ordered further proceedings in the absence of exceptions. In addition, this language has been argued to create an ambiguity as to when an ERS proposed decision becomes final. Thus, the ERS believes that this language should be deleted.

Section 6-23-20 Argument on exceptions. This section is amended so that the “system” as opposed to the “board” grants an opportunity to present arguments to the ERS Board and replaces a reference to the “administrator” with the “executive director.” Under ERS practices and procedures, oral argument on exceptions is customarily granted by the executive director and ERS staff set the time and date for hearing such arguments.

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Section 6-23-21 Final decision. This section is amended to delete a provision regarding when the “board has heard and examined all the evidence” As noted previously, under current ERS practices and procedures, only an ERS hearing officer hears evidence in contested case proceedings under this subchapter. Thus, this provision is inaccurate and should be deleted.

Section 6-23-21.01 Attorneys' fees upon successful petition. This section is amended to provide for a successful petitioner to move the “system” and not the “board” for reimbursement of the petitioner’s attorneys’ fees and costs. This change is commensurate with the greater authority granted the system regarding disability retirement and accidental death benefits under sections 3-10 of Act 17.

E. Chapter 6-23, Subchapter 2

Section 6-23-23 Definitions. This section is amended to delete the repetitive definition of “Petition” already set out in HAR § 6-20-1, to clarify the definition of “Respondent” to mean persons proceeded against in a petition “under this subchapter,” and to clarify that an “information decision” and “petition” must relate to an alleged misapplication of provisions chapter 88, HRS (or rules promulgated thereunder) setting forth an alleged entitlement to a benefit, service credit, or other alleged entitlement.”

Section 6-23-24 Commencement of proceedings; service. This section is amended to clarify that petitions under this subchapter are filed “at the system’s main office in Honolulu” as opposed to any of the other offices of the system, e.g., the ERS offices on Hawaii, Maui, or Kauai. The purpose of this amendment is to avoid confusion as to where petitions under this subchapter are to be filed.

Section 6-23-26 Computation of time; extension of time. This section is amended to reflect that an order setting a period of time for something to be done or extending such a period of time, may be done by a “hearing officer” as well as the “board.” Contested case hearings under this subchapter are handled by ERS hearing officers. This amendment is needed because in these contested case hearings, the hearing officer is the one who sets deadlines and decides whether such deadlines may be extended.

Section 6-23-28 Contents of the petition; form; rejection. This section is amended to provide that petitions shall be filed with the “system” and not the “board,” that the “executive director on behalf of the system” may reject petitions that don’t comply with the requirements of this section, and that petitions that are not rejected “will be assigned by the system to a hearing officer.” These provisions are in line with current ERS practices and procedure. This section is also amended to delete a provision that the “board may require the petitioner to file additional statements.” The ERS Board has never invoked this provision and it has little to do with the form of petitions.

Section 6-23-29 Consideration of petition. This section is amended to provide that a “hearing officer” not a “presiding officer” will deny or set the petition for a hearing. Under ERS practices and procedure, ERS hearing officers initially consider petitions under this subchapter and make recommended decisions to the ERS Board. The ERS Board does not make initial reviews of petitions under this subchapter. This section is also amended to clarify that denial of a petition is proper where there is no alleged misapplication of provisions chapter 88, HRS (or rules promulgated thereunder) setting forth an alleged entitlement to a benefit, service credit, or other alleged entitlement.

Section 6-23-30 Jurisdiction; powers and duties of presiding officer. This section is amended to accord with ERS practices and procedure which are that a “hearing officer appointed by the system shall preside over contested case hearings governed by this subchapter” and “the chairperson of the board or other member of the board designated by the chairperson shall preside over hearings of arguments on

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exceptions under section 6-23-51.” This section is also amended to set out the powers and duties of the presiding officer over exceptions hearings.

Section 6-23-32 Prehearing conference. This section is amended to replace the references to “presiding officer” with “hearing officer” as under current ERS practices and procedures, it is a hearing officer not a presiding officer (which includes the chairperson or other designated member of the ERS Board) who handles prehearing conferences for petitions under this subchapter.

Section 6-23-33 Notice of hearing. This section is amended to delete language regarding the power of the ERS Board to require any person acting in a representative capacity to show his or her authority to act in such capacity. This language is being deleted not to take away this power, but because it has nothing to do with the required content of a notice of hearing.

Section 6-23-35 Procedures at hearing. This section is amended to replace the references to “presiding officer” with “hearing officer” as under current ERS practices and procedures, it is a hearing officer not a presiding officer who handles hearings under this subchapter.

Section 6-23-36 Evidence; witnesses; exhibits. This section is amended to replace the references to “presiding officer” with “hearing officer” as under current ERS practices and procedures, it is a hearing officer not presiding officer who admits evidence in hearings under this subchapter. This section is also amended to do away with the requirement that eight copies of exhibits be provided. The ERS believes that the number of exhibits to be submitted by a party should be left up to the hearing officer involved. (The original requirement of eight copies is a holdover from when these types of hearings were heard before the ERS Board, which has eight members.)

Section 6-23-37 Motions. This section is amended to provide that responses to motions shall be filed with the “presiding officer” instead of the “board or the hearings officer.” This is more commensurate with the rest of this section which provides that the “presiding officer” may deem when a party has waived objection to a motion, may extend or shorten the time for filing a response to a motion, and make other orders regarding a motion.

Section 6-23-38 Motions to dismiss or for summary judgment; disposition of claims. This section authorizes presiding officers to issue orders to dismiss or for summary judgment. As such, it should read that an order to dismiss is a “proposed decision if issued by the chairperson or other designated member of the board” not a “final decision if issued by the board.” The chairperson or other designated member of the board is the “presiding officer” under HAR 6-20-1, not the “board.”

Section 6-23-39 Intervention. Since under current ERS practices and procedures, contested case hearings under this subchapter are handled by hearing officers not presiding officers, permission to intervene in such hearings should be handled by the “hearing officer” not “presiding officer.” This section is also modified to replace references to the “administrator” with the “executive director.” See HRS § 88-29.

Section 6-23-40 Default. This section is amended in two ways. First, it provides that “[t]erms and conditions of a default order can include dismissal of the petition.” While this may be implicit, it is inserted here for clarity. Second, it provides that the default order shall constitute a proposed decision if filed by the “chairperson or other designated member of the board” (i.e., by a presiding officer). Under this section, it is the presiding officer that issues a default order not the “board.”

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Section 6-23-41 Filing of documents. In accordance with current ERS practices and procedures, this section is amended to provide for documents to be filed with the “system” not the “board.” Similarly, when a person believes that some document filed is not a government record open to inspection under HRS Chapter 92F, a motion by that person should be filed with the “system” not the “board or hearing officer.”

Section 6-23-42 Deposition; application for. This section is amended to reflect that under current ERS practices and procedures, hearing officers not the “board” approve the taking of depositions in proceedings under this subchapter.

Section 6-23-44v Use of Depositions. This section is amended to reflect that under current ERS practices and procedures, it is a “hearing officer” not a “presiding officer” that approves the use of depositions in proceedings under this subchapter.

Section 6-23-46 Reassignment of case. This section is amended to provide that the “system” rather than the “board” will reassign contested case hearings under this subchapter. This change reflects current ERS practices and procedures regarding the handling or reassignment of other contested case hearings.

Section 6-23-51 Argument on exceptions. To conform with HRS § 88-29, this section replaces the term “administrator” with “executive director.”

Section 6-23-52 Final decision. This section is amended to delete the provision regarding when the “board has heard and examined all the evidence” As noted previously, under current ERS practices and procedure, only an ERS hearing officer hears evidence in contested case proceedings under this subchapter. Thus, this provision is inaccurate and should be deleted.

F. Chapter 6-26

Section 6-26-11 Original documents of record; copies. This section is amended to allow copies to be submitted in lieu of original documents, as evidence of age and dates of birth. In addition, if copies are submitted in lieu of original documents, the system has the discretion to require that original documents be made available for inspection.

Section 6-26-12 Types of evidence. This section is amended to include as evidence of date of birth, “Real ID” credentials. This amendment is based on the federal Real ID law requiring that original documents regarding date of birth be produced in order to obtain “Real ID” credentials.

Section 6-26-13 Computation of age to determine the actuarial equivalence of the maximum allowance. The examples of age calculations have been updated with more current dates of birth and dates of retirement.

G. Chapter 6-29

Section 6-29-1 Address change and account balance. This section is amended to include rules under which a member, retiree, beneficiary or alternate payee can obtain account balance information as well as notify the system of an address change. If a request is made by phone, the amendment requires information to verify the caller is the member, retiree, beneficiary, alternate payee or someone acting on their behalf, i.e., social security number, birth date, and address currently shown in the system.

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Section 6-29-2 Mailing and distribution of semi-monthly pension checks. Under current ERS statutes and practice, nearly all pension payments are made monthly by electronic transfer. Thus, this rule is outdated, no longer needed, and should be repealed.

Section 6-29-4 Service while engaged in professional improvement leave with or without pay. This section is amended to delete certain limitations on leaves of absence that qualify for service under this rule, i.e., that leaves of absence not exceed two years and are authorized as educational or sabbatical leave.

Section 6-29-5 Employee contributions; workers compensation. This section is being updated to note that it applies to Class H members and HRS § 88-325.

Section 6-29-6 Finalization of retirant's pension benefit interest payment. This is a new rule to implement section 1 of Act 17 and to specify when a pension benefit may be determined "finalized." Section 1 of Act 17 amends HRS § 88-74.5 by providing that the ERS shall finalize a retirant's pension benefit within seven calendar months following the month of the retirant's retirement, and by providing that finalizations after that time shall require the payment of interest at an amount to be established by the ERS board of trustees "that shall not be less than the ninety-day United States treasury bill rate as of the end of the prior year plus one percent per year" This new rule contains language that applies the statutory language to ordinary and service-connected disability retirements (as well as regular service retirements), sets the method for calculating any interest payments due based on the difference between the retirant's finalized pension amount and the actual pension paid to the retirant prior to finalization, and sets interest at "simple interest at a rate per year equal to the ninety day or three month United States treasury bill rate as of the end of the calendar year prior to the effective date of the retirant's retirement plus one percent."