

RESOLUTION NO. 480

WHEREAS, the Board of Trustees (Board) of the Bureau of Fire and Police Disability and Retirement (FPDR) determined that changes were necessary to the FPDR Administrative Rules; and

WHEREAS, FPDR staff and the City Attorney's office provided input; and

WHEREAS, a public hearing on proposed amendments to the FPDR Administrative Rules was held on August 27, 2013; and

WHEREAS, the Board has considered and recommends changes to parts of Sections 5.6, 5.7, 5.9 and 5.10 of the FPDR Administrative Rules as shown on Exhibits "A" and "B", attached hereto and by this reference made a part hereof; and

WHEREAS, it is appropriate and in the public interest that the FPDR Administrative Rules be changed in accordance with the recommendations of the Board.

NOW, THEREFORE, BE IT RESOLVED by the Board of Trustees that the sections of the FPDR Administrative Rules be amended as shown on Exhibit "B".

ADOPTED by the Board of Trustees on the 24th day of September 2013.



Samuel Hutchison
FPDR Director

EXHIBIT "A"
(Resolution No. 480)

Amends Section 5.6.01 – "Definitions"

Amends Section 5.6.02 – "Claim Processing; Request for Hearing"

Amends Section 5.7.15 – "Disability Retirement Age"

Adds Section 5.9.11 – "Disability Retirement Age"

Amends Section 5.10.09 – "Seeking Other Employment"

EXHIBIT "B"

**(Sections of proposed Administrative Rules
as listed on Exhibit A - Resolution No. 480)**

5.6.01 – DEFINITIONS

"Board of Trustees." As used in these rules relating to hearings procedures, the term "the Board of Trustees" or "the Board" shall mean the Board of Trustees of the Fire and Police Disability and Retirement Fund or a hearings officer appointed by the Board of Trustees pursuant to Charter Section 5-202(b).

"Discovery." The term "Discovery" means claim documents, including chart notes, medical records, medical and vocational reports, correspondence between the Member and the Fund, recorded statement of the Member and any witness, and correspondence related to the Member's claim(s) to and from the Office of Administrative Hearings. Discovery does not include claim documents that are 1) materials protected under the lawyer-client privilege as defined in Oregon Rules of Evidence 40.225 Rule 503; 2) attorney work products; and 3) material reflecting the mental impressions, case values or merits, plans or thought processes of the Member, Member's attorney or Member's representative or the Fund, Fund's attorney or Fund's representative.

"Good Cause." The term "Good Cause" means any reason why a hearing officer's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.

"Member." The term "Member" means

- (A) Those sworn permanent employees of the Bureau of Fire and Rescue having the job classifications of Fire Fighter, Fire Fighter Specialist, Fire Fighter Communications, Fire Lieutenant, Fire Training Officer, Staff Fire Lieutenant, Fire Captain, Fire Training Captain, Fire Battalion Chief, Deputy Fire Chief, Division Fire Chief, City Fire Chief, Fire Inspector I, Fire Inspector II, Fire Inspector I Specialist, Staff Fire Captain, Fire Lieutenant Communications, Harbor Pilot, Assistant Fire Marshal, Assistant Public Education Officer and EMS Coordinator;
- (B) Those permanent sworn employees of the Bureau of Police having the job classifications of Police Officer, Police Sergeant, Police Detective, Criminalist, Police Lieutenant, Police Captain, Police Commander, Deputy Police Chief, Assistant Police Chief, and Police Chief.

- (C) Persons first sworn on or after January 1, 2013 shall be a Member of this plan, and eligible for benefits under these Administrative Rules, upon completion of six (6) consecutive months of employment as a permanently appointed sworn employee in the Bureau of Fire or Police.

Membership shall commence at the time a sworn employee effectively receives his or her initial appointment to either the Bureau of Fire and Rescue or the Bureau of Police and shall continue until the Member's employment with the Bureau of Fire and Rescue or Bureau of Police terminates for any reason, other than retirement pursuant to Section 5-304 of the Plan or disability under Section 5-306 or 5-307 of the Plan.

Exceptions

- (A) Persons other than FPDR Three Members who are currently employed by the Bureau of Fire and Rescue or the Bureau of Police who participate in the Public Employee Retirement System of the State of Oregon, or will so participate after a waiting period, shall not be Members.
- (B) The chief of the Bureau of Police or the Bureau of Fire and Rescue shall be a Member unless the terms of employment of such chief provide otherwise.

An Active Member (except those Members covered under Article 5 of the Plan) whose employment is terminated after completing five Years of Service shall be ineligible for any Plan benefits after such termination except the vested termination benefits described in Section 5-305 of the Plan. A Member (except those members covered under Article 5 of the Plan) whose employment is terminated after completing one-half year of service and before completing five Years of Service shall be ineligible for any Plan benefits after such termination except the unvested termination benefits described in Section 5-305 of the Plan.

A Member who is receiving benefits under Article 5, Prior Benefits, of the Plan or who has voluntarily elected to be covered under Article 5 of the Plan shall be ineligible to receive benefits under Article 3 of the Plan. Notwithstanding the preceding sentence, a Member who was receiving disability benefits on January 1, 1990 but subsequently returns to full duty, without limitation, and earns two more Years of Service may irrevocably elect to be covered under Article 3 rather than Article 5. A member who returns to duty, in a regularly budgeted sworn job classification, in the Bureau of which he or she is a member on a full time basis (either 40 hours per week, 42 hours per week or 53 hours per week in the Bureau of Fire and Rescue or 40 hours per week in the Bureau of Police) will be deemed to have returned to full duty without limitation.

"Office of Administrative Hearings." The term "Office of Administrative Hearings" or "OAH" shall mean an independent body that has been authorized by the Board of Trustees to conduct an evidentiary hearing under these rules on disputed issues concerning a Member's benefits under the Plan.

"Surviving Spouse." The term "Surviving Spouse" shall mean the person to whom the Member was legally married throughout the twelve-month period preceding death, and from whom the Member was not judicially separated or divorced by interlocutory or final court decree at the time of death. In accordance with Ordinance No. 176258, benefits provided to Fund Members' surviving spouses are extended on equal terms to gay and lesbian Members same-sex domestic partners. All references in Chapter 5 of the Charter of the City of Portland, and/or in the Administrative Rules to "surviving spouse" shall be understood to apply on equal terms to the same sex domestic partner of the Member.

5.6.02 – CLAIM PROCESSING; REQUEST FOR HEARING

- (A) If the Director denies a claim, the Member shall be notified in writing of the decision along with the notice of the right to request a fact finding hearing. If a Member wishes to proceed with a hearing, a request for hearing signed by or on behalf of the Member must be made, in writing, and received by the Director within 60 days of the mailing date of the denial. An untimely request for hearing may be accepted by the designated hearings officer upon a finding of good cause for the untimely request. Good cause for an untimely request shall be determined by the designated hearings officer and may be established as provided for in Oregon Rule of Civil Procedure 71B.
- (B) Within 14 days of receiving the Member's request for hearing, the Fund shall:
 - (1) Send a letter to the Member acknowledging the Fund's receipt of the request for hearing and simultaneously copy the Member's attorney or representative, if any;
 - (2) Provide the Member, Member's representative, or Member's attorney with copies of all discovery in the Fund's possession;
 - (3) Complete and send a Hearings Referral Form to OAH, along with a copy of the denial; and
 - (4) Assign the case to the Fund's attorney.
- (C) OAH shall designate a hearings officer to adjudicate the hearing and shall schedule a pre-hearing conference with the Member, Member's representative, or Member's attorney, and the Fund's attorney within 30 days of OAH's receipt of the referral. OAH shall provide formal written notification of the date and time of the pre-hearing conference to the Member, Member's representative, or Member's attorney, and to the Fund and the Fund's attorney. The purpose of the pre-hearing conference is to identify the issues for the hearing, to schedule the hearing, and to set deadlines for disclosure of

expert witnesses.

- (D) ***Either party may request a change of hearings officer for Good Cause. The request must be made in writing and submitted to the Chief Administrative Law Judge at OAH prior to the date of the prehearing conference. The requesting party shall mail copies of the request simultaneously to all parties. The designated hearings officer shall provide any relevant information regarding the request to the Chief Administrative Law Judge prior to the Good Cause determination. If the Chief Administrative Law Judge determines there is Good Cause, OAH shall designate a new hearings officer to adjudicate the hearing and shall schedule a prehearing conference with the parties within 30 days of the new hearings officer's designation.***
- (D)(E) Within a reasonable time after the pre-hearing conference has been held, OAH shall provide formal written notification of the date, time, and location of the hearing to the Member, Member's representative, or Member's attorney, and to the Fund and the Fund's attorney.
- (E)(F) After the Fund's initial provision of discovery to the Member, Member's representative, or Member's attorney, the Member and the Fund shall produce to the other party, on an ongoing basis, any previously undisclosed discovery within 14 days of coming into possession of such documents.
- (F)(G) At least 45 days prior to hearing, the Fund's attorney will submit a complete set of exhibits to OAH and provide a copy of it to the Member, Member's attorney, or Member's representative. Each proposed hearing exhibit shall be marked, arranged in chronological order, and numbered in the lower right corner of each page, beginning with the document of the earliest date, with the abbreviation "Ex" preceding the number of each exhibit. The page number of documents with multiple pages shall be designated by hyphenating the exhibit number and including the page number after the hyphen. E.g., the second page of Exhibit 1 would be marked "Ex. 1-2." The Fund's attorney will prepare the exhibits and submit the exhibits and an index of the exhibits to the hearings officer and simultaneously to the Member, Member's representative, or Member's attorney.
- (G)(H) The hearings officer may receive evidence submitted within 45 days of the hearing if such evidence was not in the possession of the party offering such evidence at the time of the initial submission of exhibits. The hearings officer may hold the record open for rebuttal evidence when there is a submission within 45 days of the hearing, or if the rebuttal report is not available at the time of the hearing despite the due diligence of the party soliciting the report. Subject to the limitations in subsection (H) of this rule, the hearing officer may hold the record open for cross examination of a medical expert by deposition.
- (H)(I) The Member may take the deposition of the author of any expert medical report solicited by the Fund if:

- (1) The Fund intends to rely on that report at the hearing;
 - (2) The Fund does not call that medical expert to testify at the hearing;
and
 - (3) Within 14 days of disclosure of an expert medical report to the Member, Member's representative, or Member's attorney, the Fund's attorney is provided with a written request for cross examination of that medical expert report's author by the Member or on behalf of the Member by his or her representative or attorney.
- ~~(H)~~(J) For any deposition satisfying all the criteria in subsection (H) of this rule, the Fund shall pay the fee of the medical expert to be deposed for the time spent in the deposition, and the Fund shall pay the court reporter's fee. The Fund shall also pay these same fees for any such deposition of a medical expert it requests. The Fund's right to depose a medical expert shall be subject to the limitations imposed on a Member by subsection (H) of this rule.
- ~~(J)~~(K) The Member or Director may request a reset of a scheduled hearing for "extraordinary circumstances" as provided for in subsection (K) of this section. The request must be made in writing as soon as practicable and include an explanation of the reason for the request to reset the hearing. If the request to reset the scheduled hearing is granted, a rescheduled hearing will then be set as soon as the hearings officer's and parties' calendars will permit. In any event, a hearing shall not be postponed for more than one year from the date the Member requested a hearing except in extraordinary circumstances beyond the control of the Member or the Fund.
- ~~(K)~~(L) Extraordinary circumstances for resetting a scheduled hearing may include, but are not limited to investigation by outside agencies, illness and any other basis deemed an extraordinary circumstance by the designated hearings officer.
- ~~(L)~~(M) The decision concerning a request to reset a scheduled hearing shall be made by the hearings officer designated to adjudicate the issue(s) in dispute.

5.7.15 – DISABILITY RETIREMENT AGE

- (A) Service-connected ***injury/illness*** or occupational disability benefits payable under ~~Article 3 of the Plan to a FPDR Two Member~~ shall cease upon ~~attaining at~~ Disability Retirement Age except as provided in Section ~~BC~~ hereof. A Member receiving service-connected ***injury/illness*** or occupational disability benefits shall be eligible to receive a retirement benefit at Disability Retirement Age, which shall be the earlier of the dates the Member is (1) credited with 30 Years of Service for retirement benefit purposes or (2) the date the Member attains social security retirement age. ~~Since a Member who receives a disability benefit which is less than 75 percent of the Member's Base Pay in any given year will not be credited with a full Year of Service for any such year (refer to § 5-302(c) of the Plan), there will be more than 30 years between the time a Member was hired and the time he or she will be deemed to have reached Disability Retirement Age based on 30 Years of Service. For example, assume that a Member who has 19 Years of Service becomes disabled. Assuming that the Member receives service-connected disability benefits equal to 75 percent of Base Pay during the first year of disability and 50 percent of Base Pay thereafter, the Member would have to be disabled for 16 years before he or she would be considered to have attained Disability Retirement Age based upon 30 Years of Service. For purposes of this rule, social security retirement age means the retirement age provided in 42 USC § 416(l)(1).~~
- (B) ***Service-connected injury/illness or occupational disability benefits payable to a FPDR Three Member shall cease at Normal Retirement Age under PERS except as provided in Section C hereof.***
- (B)(C) ~~A disabled Member who is receiving service-connected or occupational disability benefits pursuant to Article 3 of the Plan at the time he or she attains Disability Retirement Age shall only be eligible to receive disability benefits up to the date he or she attains Disability Retirement Age, at which time the disabled Member shall be entitled to receive only a retirement benefit. If the Director determines the service-connected injury/illness or occupational disability to be temporary, benefits may continue after Disability Retirement Age for a FPDR Two Member or PERS Normal Retirement Age for a FPDR Three Member up to two (2) years from the date of such disability. A Member covered under Article 3 of the Plan, who is actively employed and suffers a service-connected illness/injury, or occupational disability after attaining Disability Retirement Age for a FPDR Two Member or PERS Normal Retirement Age for a FPDR Three Member, shall be eligible to receive disability benefits for a period of up to two (2) years from the date of such disability, at which time the disabled Member shall be entitled to receive only a retirement benefit if the Director determines the disability to be temporary.~~

5.9.11 – DISABILITY RETIREMENT AGE

- (A) Service-connected injury/illness or occupational disability benefits payable to a FPDR Two Member shall cease at Disability Retirement Age except as provided in Section BC hereof. A Member receiving service-connected injury/illness or occupational disability benefits shall be eligible to receive a retirement benefit at Disability Retirement Age, which shall be the earlier of the dates the Member is (1) credited with 30 Years of Service for retirement benefit purposes or (2) the date the Member attains social security retirement age. For purposes of this rule, social security retirement age means the retirement age provided in 42 USC § 416(l)(1).**
- (B) Service-connected injury/illness or occupational disability benefits payable to a FPDR Three Member shall cease at Normal Retirement Age under PERS except as provided in Section C hereof.**
- (C) If the Director determines the service-connected injury/illness or occupational disability to be temporary, benefits may continue after Disability Retirement Age for a FPDR Two Member or PERS Normal Retirement Age for a FPDR Three Member up to two (2) years from the date of such disability. A Member, who is actively employed and suffers a service-connected illness/injury, or occupational disability after attaining Disability Retirement Age for a FPDR Two Member or PERS Normal Retirement Age for a FPDR Three Member, shall be eligible to receive disability benefits for a period of up to two (2) years from the date of such disability if the Director determines the disability to be temporary.**

5.10.09 – SEEKING OTHER EMPLOYMENT

A Member receiving **service-connected injury/illness or occupational** disability, **or nonservice-connected disability** benefits, ~~under Article 3 of the plan,~~ who is released to modified duty and capable of Substantial Gainful Activity, but who is unable to return to the ~~B~~**Bureau of which he or she was an employee at the time of becoming disabled**, shall Pursue Other Employment within the Member's restrictions.

- (A) The concept of an active work search includes consideration of the customary methods of obtaining work for which the Member is suited by experience, education, and/or training.
- (B) A Member who is seeking employment will develop verifiable documentation of the reasonable efforts to find work without placing restrictions. **The Member will be required to provide verifiable documentation of his or her reasonable efforts to find gainful employment to the Director every other week.** Telephone inquiries are considered preliminary exploration of the job market and should be accompanied by appropriate follow-up contacts; personal visits; and submission of applications or résumés.