



# Board of Retirement Regular Meeting

## Sacramento County Employees' Retirement System

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### Agenda Item 19

**MEETING DATE:** December 9, 2020

**SUBJECT:** Felony Forfeiture Policy

**SUBMITTED FOR:** \_\_\_ Consent      X Deliberation and Action      \_\_\_ Receive and File

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### **RECOMMENDATION**

Staff recommends the Board adopt the attached proposed amendments to the Felony Forfeiture Policy. The proposed amendments give the Board additional procedural options to utilize when determining whether a member's felony conviction warrants pension forfeiture under Government Code section 7522.72 and 7522.74.

### **PURPOSE**

This item complies with the Strategic Management Plan goal to maintain prudent and effective policies and practices that support plan sustainability.

### **DISCUSSION**

PEPRA provides a mechanism whereby a public employee forfeits a portion of his or her retirement benefits following a conviction for a felony offense that occurred in the performance of his or her official duties. The court in *Hipsher v. Los Angeles County Employees' Retirement Association*, 2<sup>nd</sup> DCA Case No. B276486, June 19, 2018, held that Government Code section 7522.72 was constitutionally sound, and that the retirement system, not the County, bore the burden to afford the requisite due process protections in determining whether the member's conviction fell within the scope of the statute.

In May 2019, the Board approved a Felony Forfeiture Policy that is consistent with PEPRA and the *Hipsher* case and that provides the appropriate due process protections. However, the current Policy contemplates a one-size-fits-all hearing procedure. Under the Policy, the Board must consider forfeitures as part of a regularly agenda item. In addition, if the affected member wishes to present his/her case to SCERS, the Board must receive evidence, testimony, and legal argument directly, without the option of referring the matter to a hearing officer for a formal evidentiary hearing.

The proposed amendments to the Felony Forfeiture Policy give the Board additional procedural options. Similar to SCERS' procedures for processing disability retirement

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applications, the proposed amendments allow for processes that are more or less robust depending on the complexity of the issues presented:

- Proposed Paragraph 9 provides an option for the Board to vote against felony forfeiture as part of the consent calendar. This procedural option is most appropriate where, after an investigation, staff concludes that the member's felony is not job-related and therefore recommends against forfeiture. However, if after considering staff's recommendation, the Board believes that forfeiture is potentially appropriate, the Board must take the matter off the consent calendar and hold additional proceedings.
- Proposed Paragraph 10.c provides an option for the Board to refer a matter to a referee pursuant to Government Code section 31533 and 31534. This procedural option is most appropriate where, after considering staff's recommendation and receiving evidence and arguments from the member, the Board finds that there remain nuanced factual issues best resolved via a formal evidentiary hearing (i.e., with a hearing officer, live witnesses, and cross-examination).
- At the same time, Proposed Paragraph 10.c. preserves the Board's ability to make a decision on forfeiture after receiving evidence and arguments from the member. This procedural option is most appropriate where, after the member's presentation, the Board is satisfied that the facts are clear, and that the Board is able make a decision without further fact-gathering or fact-finding proceedings.

Finally, the proposed amendments clarify that recommendations on forfeiture shall be made by staff with assistance from outside counsel, with General Counsel taking on the role of a neutral adviser to the Board.

### **ATTACHMENTS**

- Felony Forfeiture Policy (with proposed amendments in redline)
- Felony Forfeiture Policy (incorporating proposed amendments)

Prepared by:

/S/

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Stephen Lau  
General Counsel

Reviewed by:

/S/

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Eric Stern  
Chief Executive Officer



# FELONY FORFEITURE POLICY

## PURPOSE

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The purpose of this policy is to establish due process protections in determining whether a member's conviction falls within the scope of the felony forfeiture statutes as set forth in Government Code sections 7522.72 and 7522.74.

## POLICY

Once SCERS receives notice that a SCERS member has been convicted of a felony arising out of or in the performance of the member's official job, SCERS will follow the process set forth below in the Application section. This Policy shall apply to any member convicted of a felony after January 1, 2013.

## APPLICATION

1. The member and the employer have a duty to inform SCERS of a conviction of a work-related felony within 90 days of the conviction. The statutes also indicate that SCERS must enforce the statutes whether or not it receives proper notice of conviction.
2. As SCERS is notified or learns about a member's felony conviction, SCERS staff will investigate the matter to determine the extent of any retirement benefit forfeiture required by law.
3. Among the information that SCERS staff will obtain will be the criminal court record, evidence of the commission of the criminal acts, the judgment of conviction, and any other information SCERS staff believes is appropriate in order to assist the Board of Retirement in discharging its obligation to make the determinations required by Government Code sections 7522.72 and 7522.74. SCERS may exercise its subpoena power under Government Code section 31535 for this purpose. Staff is not limited to the criminal record in gathering the information it believes is appropriate for the Board's determination.
4. The purpose of staff's investigation is to assist the Board in the following:
  - a. Establishing the earliest date of the commission of the subject felony;
  - b. Establishing whether the felony arose out of or in the performance of the member's official duties, in pursuit of the office or appointment; in connection with obtaining salary, disability retirement, service retirement, or other benefits; or was committed within the scope of the member's

official duties against or involving a child who he or she has contact with as part of his or her official duties; and

- c. Calculating the amount of overpaid benefits, employee contributions to be credited to the member, the appropriate adjustment to future benefits due to the member, and the method and timing of any recovery of overpayments due from the member.

5. If the member is active or deferred:

- a. SCERS will determine the amount of service credit earned from the date of first commission of the subject felony to the date of conviction. SCERS will then remove from the member's account any service credit earned between the date of first commission and the date of conviction. SCERS will determine the amount of member contributions attributable to the removed service credit. No interest will be credited on the contributions.
- b. The member will be treated as if he or she had become a deferred member on the date of first commission of the subject felony for all purposes, including but not limited to retirement eligibility.
- c. Member contributions due to the member will be refunded to the member upon the occurrence of a distribution event through a credit to the member's employer in order to avoid violation of Internal Revenue Service early distribution rules. Such refunds to the employer will be made to the employer through an electronic funds transfer.

6. If the member is retired:

- a. SCERS will review the member's account to determine the member's service credit and Final Average Salary as if the member deferred as of the date of the first commission of the subject felony.
- b. SCERS will then determine whether the member had sufficient service credit to retire as of the date of first commission of the subject felony. If not, SCERS will rescind the retirement and place the member into deferred status until the member has sufficient eligible service to qualify for retirement.
- c. If the member did have sufficient eligible service to retire as of the date of first commission of the subject felony, SCERS will recalculate the member's retirement allowance based on the deferral date by making appropriate changes to service credit and Final Average Salary.
- d. If the recalculated retirement allowance results in an overpayment of retirement benefits by SCERS, SCERS will seek to recoup the overpayment from the member pursuant to this process.
- e. SCERS will also determine the amount of contributions made by the

member from the date of first commission of the felony to the date of conviction. These member contributions will be refunded to the member without interest; provided, however, that where there has been an overpayment by SCERS, SCERS will use the contribution refund, without interest, as an offset to the overpayment and only refund the amount by which the contributions exceed the amount of the overpayment.

- f. For purposes of this process, "overpayment" includes compounded interest on the principal amount of any such overpayment at SCERS' actuarial assumed rate of interest effective during the forfeiture period.
7. If the member was permanently incapacitated prior to committing the work-related felony, the member's right to a disability retirement may not be forfeited by later commission of a work-related felony. If the member did not become permanently incapacitated until after the member committed the work-related felony, the member's right to a disability retirement is forfeited.
8. SCERS staff may seek assistance from outside counsel in investigating the matters identified in Paragraph 4 and in analyzing whether forfeiture is warranted under the facts. Following such investigation and analysis, staff must present a recommendation concerning forfeiture to the Board of Retirement at its monthly meeting. General Counsel shall not participate in the foregoing fact investigation or legal analysis.
9. If staff determines that there is no basis for forfeiture under Sections 7522.72 and 7522.74, staff shall recommend against forfeiture in a memorandum to the Board and explain the basis for the recommendation. Staff may seek assistance from outside counsel in drafting the memorandum.
  - a. Staff shall notify the member in writing that a Board Meeting has been set, not less than 45 days and not more than 90 days following the date of the Notice, in which the Staff determination will be presented to the Board, and the Board shall determine whether to apply the felony forfeiture rules in Government Code sections 7522.72 and 7522.74. The Notice shall state that staff will be recommending against forfeiture.
  - b. In considering staff's recommendation, the Board may consult with SCERS' General Counsel, who (per Paragraph 8) did not participate in forming the recommendation. General Counsel shall provide neutral and independent advice to the Board on the advisability of staff's recommendation.
  - c. The Board may vote to accept the staff's recommendation against forfeiture as part of the consent calendar.
  - d. If after considering the staff's recommendation, the Board believes that there is potentially a basis for forfeiture and votes *against* the recommendation, the Board shall table the matter and consider the forfeiture issue again at a future meeting. That future meeting shall be

subject to notice and hearing procedures substantially similar to those described in Paragraph 10 below and shall afford the member an opportunity to address the Board.

10. If staff determines that forfeiture is warranted under Sections 7522.72 and 7522.74, staff shall recommend forfeiture in a memorandum to the Board and explain the basis for the recommendation. Staff may seek assistance from outside counsel in drafting the memorandum.

~~Following the SCERS Staff determination of the foregoing information,~~  
sStaff shall notify the member in writing that a Special Board Meeting has been set, not less than 45 days and not more than 90 days following the date of the Notice, in which the Staff determination will be presented to the Board, and the Board shall determine whether to apply the felony forfeiture rules in Government Code sections 7522.72 and 7522.74.

~~a.~~

a. The notice to the member shall include the Staff determination of the following: the first date of commission of the felony, whether the felony conviction was work-related, the calculation of overpayments, the amount of contributions to be refunded, the monthly adjustment going forward to retirement benefits, if any, and the amount of overpaid benefits, if any, due from the member.

b. Both the member and SCERS Staff shall have the opportunity to submit to the Board written evidence, to include written sworn testimony, and oral arguments relevant to the matters under consideration. All written submissions shall be delivered to the Board and the other party at least fourteen (14) days before the date of the Board meeting. At the time of the Board meeting, the member and SCERS Staff may present written evidence and oral arguments. The member may be represented by counsel.

c. At the conclusion of the presentations, the Board will take one of the following actions: ~~as it determines appropriate. SCERS shall notify the member in writing of the Board's determination within ten (10) business days following the determination. This is a final administrative decision, which the member may appeal within 30 days in a writ of mandate to trial court.~~

i. If after receiving the member's presentation the Board finds that it would benefit from a formal evidentiary hearing with, and a recommendation from, a referee or hearing officer, the Board may refer the matter for further proceedings pursuant to Government Code sections 31533 and 31534.

ii. Alternatively, if the Board finds that further proceedings are unnecessary, it may vote on staff's recommendation regarding forfeiture. as it determines appropriate. SCERS shall notify the member in writing of the Board's determination within ten (10)

business days following the determination. This is a final administrative decision, which the member may appeal within 30 days in a writ of mandate to trial court.

iii. In making any decisions under this Paragraph 10.c., the Board may consult with and obtain neutral and independent advice from SCERS' General Counsel.

~~8-11.~~ The member may waive both the right to the Board hearing under Paragraph 10.b. and the right to appeal to trial court in a writ of mandamus, and the member may accept the ~~SCERS S~~staff recommendation in favor of forfeiture, which is then a final administrative action. If the member does not waive the right to appeal to the trial court, then the proceeding before the Board will continue as scheduled and will constitute a final administrative action.

~~9-12.~~ At least three (3) business days prior to payment of any refund of member contributions, SCERS will notify the court and the District Attorney's Office or other prosecuting authority of any contribution refund payments SCERS will be making to the member, either directly or through the member's employer.

~~10-13.~~ While the member has the right to challenge SCERS' administrative determination under the writ procedures set forth in the California Code of Civil Procedure, a member's filing of a writ challenging SCERS' final administrative determination shall not prevent SCERS from implementing its determination, unless a court orders otherwise.

~~11-14.~~ If this Policy conflicts with any statutory or case law, the statutory or case law shall govern.

## **BACKGROUND**

The Public Employee Pension Reform Act of 2013 (PEPRA) provides a mechanism whereby a public employee forfeits a portion of his or her retirement benefits following a conviction of a felony offense that occurred in the performance of his or her official duties. The court in *Hipsher v. Los Angeles County Employees' Retirement Association*, 2<sup>nd</sup> DCA Case No. B276486, June 19, 2018, held that Government Code section 7522.72 was constitutionally sound, and that the retirement system, not the County, bore the burden to afford the requisite due process protections in determining whether the member's conviction fell within the scope of the statute. This policy is consistent with PEPRA and the *Hipsher* case and provides the appropriate due process protections.

## **RESPONSIBILITIES**

Executive Owner: Chief Executive Officer

## POLICY HISTORY

Date	Description
<u>12/09/2020</u>	<u>Staff to recommend Board approve amendments to the policy.</u>
05/15/2019	Board approve policy.



# FELONY FORFEITURE POLICY

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## BACKGROUND

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