

POLICE AND FIRE PLAN: DISABILITY TRAINING

**CITY OF SAN JOSE POLICE AND FIRE DEPARTMENT
RETIREMENT PLAN**

**DISABILITY RETIREMENT: FROM A LAWYER'S
PERSPECTIVE**

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POLICE AND FIRE PLAN: DISABILITY TRAINING

- Summary of Today's Training on Disability Issues: Legal Perspective
 - Two Types of Disability
 - San Jose Municipal Code's definition of incapacity
 - Work Restrictions
 - Accommodation
 - San Jose Municipal Code's definition of service-connection
 - Real and Measurable Standard

POLICE AND FIRE PLAN: LEGAL OVERVIEW

- Among the Board's Fiduciary obligations is the obligation to administer the disability provisions of the San Jose Municipal Code ("SJMC").
- The SJMC sets forth the legal parameters that an applicant must satisfy before the Board of Administration may grant either of the SJMC's two types of disability retirement: service-connected disability retirement or non-service connected disability retirement.
 - Workers compensation legal terms and concepts and presumptions not applicable.
- The SJMC's requirement for both types of disability retirement is incapacity.
- The additional SJMC requirement for a service-connected disability retirement is service-connection.
- An applicant bears the burden of persuading the Board of Administration that the SJMC requirements have been satisfied.
- An applicant is not to be given the benefit of the doubt.

POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON THE SJMC'S DEFINITION OF INCAPACITY

The following SJMC terms are synonyms: “disability” or “incapacity for the performance of duty” or “incapacitated for the performance of duty”.

- **INCAPACITY REQUIREMENT NO. 1: “DISABILITY OF A MEMBER”.**
 - There must be a “disability”, a term undefined in the SJMC, and so is to be given its everyday, ordinary meaning.
 - Determination of the existence of a disability is based on medical evidence, usually in the form of medical reports.
 - The “relevant date” for determining disability is usually the date of the applicant’s separation from city employment.

POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON THE SJMC'S DEFINITION OF INCAPACITY (CONTINUED)

- **INCAPACITY REQUIREMENT NO. 2: “OF A PERMANENT OR EXTENDED AND UNCERTAIN DURATION”.**
 - If the applicant has not tried a reasonable treatment option, then disability is not permanent.
 - Surgery is NOT a reasonable treatment option.
- **INCAPACITY REQUIREMENT NO. 3: “AS A RESULT OF INJURY OR DISEASE”.**
 - There must be a diagnosis so that the Board of Administration can confirm that there is really an injury or disease
 - Except for “mental incapacity”.
- **INCAPACITY REQUIREMENT NO. 4: “OCCURRING WHILE SUCH MEMBER IS AN EMPLOYEE OF THE CITY”.**
 - The injury or disease must occur while the applicant is employed with the city.
 - Aggravation of a condition that already existed at the date of the applicant’s hire satisfies this requirement.
 - For a non-service connected disability, a non-work event that resulted in a disability satisfies this requirement.

POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON THE SJMC'S DEFINITION OF INCAPACITY (CONTINUED)

- **INCAPACITY REQUIREMENT NO. 5: “WHICH RENDERS THE MEMBER PHYSICALLY OR MENTALLY INCAPABLE OF CONTINUING TO SATISFACTORILY ASSUME THE RESPONSIBILITIES OF AND PERFORM THE DUTIES AND FUNCTIONS OF THE POSITION THEN HELD ...”.**
 - The disability must “render” the applicant unable to perform his or her job.
 - The disability can be physical, i.e., broken back or severe congestive heart failure, or mental, i.e., nervous breakdown or PTSD.
 - Work restrictions as determined by the Board’s medical advisor indicate whether this requirement has been satisfied.
 - Note that percentages of impairment in workers compensation reports are not applicable.
 - The applicant’s department, in response to the work restrictions, determines whether it could have accommodated those restrictions in the applicant’s position.
 - If the applicant’s department can accommodate those work restrictions, then the applicant is not incapacitated.
 - Notice that work restrictions are ones as of the “relevant date”, which is usually the date of separation from City service.
 - So the report by the Board’s medical advisor to the Board of Administration may be written years after the “relevant date” but will be based on medical records and reports dated before or shortly after that date.

**POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON THE SJMC'S DEFINITION OF INCAPACITY
(CONTINUED)**

- **INCAPACITY REQUIREMENT NO. 6: “AND OF ANY OTHER POSITION IN THE SAME JOB CLASSIFICATION OF POSITIONS TO WHICH THE CITY MAY OFFER TO TRANSFER HIM” [OR HER].**
 - Notice that we are not to look at any city job for accommodation to the applicant's work restrictions.
 - It must be a job within the applicant's same job classification.
 - The City does not have an obligation under this SJMC section to offer another job to the applicant.
 - If the City does offer the applicant a position in the same job classification, then the applicant is not incapacitated.
- **INCAPACITY REQUIREMENT NO. 7: “AS DETERMINED BY ...”.**
 - Until the independent medical panel is seated, the Board of Administration possesses the discretion as to incapacity, a discretion which must be reasonably exercised.

POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON THE SJMC'S DEFINITION OF INCAPACITY (CONTINUED)

- **INCAPACITY REQUIREMENT NO. 8: “ON THE BASIS OF COMPETENT MEDICAL EVIDENCE”.**
 - Medical evidence is the key to deciding incapacity.
 - There are often conflicting medical reports.
 - The Board needs to review each medical report and decide which reports are most persuasive.
 - The logic of the report, its reasoning, its citation to relevant medical literature, and its citation to an applicant's relevant medical history, imagining studies, and medical treatments tried are what is relevant, not the number of reports on one side of the issue of incapacity or the other.
- **THE APPLICANT BEARS THE BURDEN OF PERSUADING THE BOARD ON THE BASIS OF MEDICAL EVIDENCE THAT THE APPLICANT WAS INCAPACITATED FOR THE PERFORMANCE OF DUTY AS OF THE RELEVANT DATE.**

POLICE AND FIRE PLAN: DISABILITIES: COMMENTS ON SJMC'S DEFINITION OF SERVICE CONNECTION

- **SERVICE-CONNECTION REQUIREMENT NO. ONE: “DISABILITY”.**
 - The applicant must be disabled. See above.
- **SERVICE-CONNECTION REQUIREMENT NO. TWO: “DISABILITY WHICH ARISES AND RESULTS FROM AN INJURY OR DISEASE”.**
 - The applicant must have a disease or injury. See discussion of diagnosis above.
- **SERVICE-CONNECTION REQUIREMENT NO. THREE: “INJURY OR DISEASE ARISING OUT OF AND IN THE COURSE OF THE MEMBER’S EMPLOYMENT WITH THE CITY”.**
 - The California Supreme Court has ruled that similar language in similar statutes means that the applicant’s employment contributed in a real and measurable way to the applicant’s incapacity.
 - The “real and measurable” standard also applies to situations where the applicant’s employment with the city aggravates, i.e., permanently worsens, in a real and measurable way the applicant’s incapacity.
 - Real” means actual and concrete, not speculative.
 - Measurable” means verifiable and having a basis in medical fact or in reasonable medical inference.

POLICE AND FIRE PLAN: DISABILITIES: MORE ON THE “REAL AND MEASURABLE” STANDARD

- **THE “REAL AND MEASURABLE” STANDARD DOES NOT MEAN THAT THE APPLICANT’S EMPLOYMENT WAS THE PRIMARY OR PREDOMINANT CONTRIBUTOR TO THE APPLICANT’S INCAPACITY.**
 - There often are more than one contributing factor to an applicant’s incapacity, including many non-work factors, such as family medical history.
- **THE “REAL AND MEASURABLE” STANDARD DOES MEAN THAT THE APPLICANT’S EMPLOYMENT WAS A SUBSTANTIAL CONTRIBUTOR TO THE APPLICANT’S INCAPACITY.**
 - The Board must weigh work factors against non-work factors.
- **AN APPLICANT MAY HAVE AN UNDERLYING DISEASE PROCESS THAT NATURALLY PROGRESSES.**
 - A minor work event may “light up”, reveal, the underlying disease. The work event then is not a “real” contributor to the applicant’s incapacity.
 - The applicant in many cases would have had the same symptoms even if the applicant had never worked for the City.
- **AGGRAVATING AN UNDERLYING DISEASE PROCESS ON THE JOB SATISFIES THE “REAL AND MEASURABLE” STANDARD**

POLICE AND FIRE PLAN: DISABILITIES: MORE ON THE “REAL AND MEASURABLE” STANDARD (CONTINUED)

- **MEDICAL UNDERSTANDING PROGRESSES OVER TIME AND CLARIFIES PAST MEDICAL MISCONCEPTIONS CONCERNING WHETHER EMPLOYMENT IS A CONTRIBUTOR TO INCAPACITY.**
 - Cumulative trauma without significant trauma is a problematic concept.
 - Genetic factors are increasingly seen to be important.
 - Twin studies, where the sedentary twin develops the same lumbar degenerative disc disease as the physically active twin, suggest that the physical activity required by applicant's job was not a “real” contributor to the lumbar incapacity.

POLICE AND FIRE PLAN: DISABILITIES: MORE ON THE “REAL AND MEASURABLE” STANDARD (CONTINUED)

- **THIS IS A DIFFICULT STANDARD TO APPLY IN ANY GIVEN APPLICATION.**
 - The Board of Administration is frequently presented with workers compensation reports that set forth a conclusion on service connection but contain little or not reasoning to back up the conclusion.
- **THE BURDEN OF PERSUASION RESTS WITH THE APPLICANT ON SERVICE CONNECTION.**
 - The applicant is not given the benefit of the doubt, notwithstanding the sympathy engendered by an applicant's underlying disease or injury.
- **THE BOARD POSSESSES DISCRETION IN DECIDING THIS ISSUE.**
 - It is a discretion which the Board must exercise reasonably.

POLICE AND FIRE PLAN: DISABILITIES: APPENDIX 1

- THE SJMC AT 3.36.910(A) DEFINES INCAPACITY:

3.36.910 – Definitions

- A. “Disability,” “incapacity for the performance of duty,” and “incapacitated for the performance of duty,” as a basis for retirement, means disability of a member, short of death, of permanent or extended and uncertain duration, occurring while such member is a member of this system, as a result of injury or disease, which renders a person physically or mentally incapable of assuming the responsibilities and performing duties of the position then held by him and of any other position in the same classification of positions to which the city may offer to transfer him, as determined by the independent medical panel or, upon appeal, by the administrative law judge, on the basis of competent medical opinion, it does not mean or include mere inability to assume said responsibilities or perform said duties.

1. “Disability,” “incapacity for the performing of duty,” and “incapacitated for the performance of duty,” as a basis for retirement, also means disability of a member short of death, of permanent or extended and uncertain duration, occurring while such member is a member of this system, not as a result of injury or disease, which renders a person mentally incapable of assuming the responsibilities and performing duties of the position held by him and any other person in the same classification of position to which the city may offer to transfer him, as determined by the independent medical panel or, upon appeal, by the administrative law judge on the basis of competent medical opinion. It does not mean or include mere inability to assume said responsibilities or perform said duties; provided, however, that notwithstanding any other provisions of this Chapter 3.36, including Sections 3.36.990, 3.36.1000 and 3.36.1010, no member shall be deemed disabled or incapacitated within the meaning of this section unless at the time such disability occurs he shall be entitled to credit for the last ten years of service in this system.

POLICE AND FIRE PLAN: DISABILITIES: APPENDIX 2

- SJMC 3.36.910(C) DEFINES INCAPACITY:

“Service-connected disability” means disability of a member as a result of injury or disease arising out of and in the course of such member’s employment with the city.