



City of Portland, Oregon



BUREAU OF FIRE AND POLICE DISABILITY AND RETIREMENT

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Statement of Rulemaking Need and Fiscal Impact

Purpose of Administrative Rule Amendment Recommendations – Staff proposes FPDR Administrative Rule amendments when it is deemed essential to providing clarity, consistency of application of Chapter 5 provisions, and full disclosure to all stakeholders.

Summary of Amendments:

FPDR Staff recommends amending Section 5.6, Appeals Process as follows:

Issues:

- #1 Amends Section 5.6.01 – “Definitions”
 - Adds a definition for the term Good Cause.
- #2 Amends Section 5.6.02 – “Claim Processing; Request for Hearing”
 - Adds language on procedure for request a change in hearings officer.

NOTE: Housekeeping changes consist primarily of typographical and grammatical corrections.

Desired Outcome:

Board adopts amendments as recommended by staff.

Fiscal Impact Statement

FPDR finance staff has reviewed the proposed rules changes for fiscal impact:

Minimal, if requests are infrequent. However, there is the potential for additional administrative and professional costs in making these requests, especially if a change in hearings officer is made.

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City of Portland, Oregon
FIRE AND POLICE DISABILITY, RETIREMENT
AND DEATH BENEFIT PLAN

Administrative Rules

SECTION 5.6 – APPEALS PROCESS

	<u>Page</u>
5.6.01 Definitions.....	3
5.6.02 Claim Processing: Request for Hearing.....	4
5.6.03 Conduct of the Hearing.....	6
5.6.04 Evidentiary Rules.....	7
5.6.05 Appellate Panel Review.....	8

Adopted November 12, 1991
Effective February 1, 1992

As Amended by:

Resolution No. 287 on August 8, 1995, Resolution No. 288 on September 12, 1995,
Resolution No. 298 on October 14, 1997, Resolution No. 320 on December 14, 1999,
Resolution No. 323 on April 11, 2000, Resolution No.332 on April 17, 2001,
Resolution No. 335 on August 14, 2001, Resolution No. 338 on December 11, 2001, Resolution
No. 340 on January 15, 2002, Resolution No. 345 on April 9, 2002, Resolution No. 349 on August
13, 2002, Resolution No. 350 on August 13, 2002,
Resolution No. 351 on September 10, 2002, Resolution No. 352 on October 8, 2002,
Resolution No. 365 on August 12, 2003, Resolution No. 372 on February 10, 2004,
Resolution No. 381 on August 10, 2004, Resolution Nos. 388, 389 and
390 on June 14, 2005, Resolution No. 392 on November 8, 2005,
Resolution No. 393 on December 13, 2005, Resolution No. 405 on May 9, 2006,
Resolution No. 419 on March 13, 2007; Resolution 423 on November 27, 2007;
Resolution No. 427 on February 12, 2008; Resolution No. 429 on November 25, 2008; and
Resolution No. 472 on November 27, 2012.

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FPDR Administrative Rules

Section 5.6 – Appeals Process

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.
- ~~(I)~~**(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.

5.6.03 – CONDUCT OF THE HEARING

- (A) Hearings before a hearings officer are non-adversarial fact-finding proceedings which are intended to develop an accurate and complete record which will allow the hearings officer to arrive at a fair and equitable determination.
- (B) Claimants may elect to represent themselves, or they may be represented by an attorney.
- (C) All hearings shall be conducted by and under the control of the hearings officer.
- (D) Testimony in all hearings shall be taken upon oath or affirmation of the witness from whom received. The hearings officer at the hearing or the court reporter (in the event the hearing is being recorded by a court reporter) shall administer the oath or affirmation. For the sake of convenience, oaths or affirmations may be administered at the commencement of the hearing to all witnesses who are to testify. The hearings officer, the Fund's attorney, the claimant or the claimant's attorney or representative shall have the right to question or examine any witness.
- (E) Any part of the evidence may be received in written form as well as orally.
- (F) Hearings on claims shall be conducted and shall proceed, subject to the discretion of the hearings officer, in the following manner:
 - (1) The parties may each present an opening statement. The Member or Member's attorney shall have the first opportunity to present any opening statement.
 - (2) Following the Fund's opening statement, if any, the Member or Member's attorney shall present evidence relevant to the claim.
 - (3) After the Member's presentation of evidence is complete, the Fund's attorney may present evidence on behalf of the Fund.
 - (4) The parties may present rebuttal evidence. The party bearing the burden of proof on an issue shall have the right to the last presentation of evidence on the issue.
 - (5) After the parties have completed presenting evidence, they may present closing arguments.
- (G) In disability cases before a hearings officer, if it appears to the hearings officer that further testimony or argument should be received, said officer may, in his or her discretion, continue the hearing.

- (H) In disability cases, the hearings officer shall not excuse from the hearing room staff, the Member, Member's representative or Member's attorney, the Fund's attorney or the Fund's representative. The hearings officer may exclude all other persons and shall conduct the hearing.
- (I) After the hearings officer has closed the hearing record, the determination or decision on any claim shall issue within 30 days, shall be in writing and shall contain findings of fact, conclusions of law, rulings on admissibility of evidence (if not otherwise appearing in the record) and, if the determination is adverse to the Member, a citation of the statutes under which the determination or decision may be appealed.
- (J) Informal disposition may be made of any claim by stipulation, agreed settlement or consent order.

5.6.04 – EVIDENTIARY RULES

- (A) The Member shall bear the burden of presenting evidence to support each criterion for entitlement to service-connected disability benefits, nonservice-connected disability benefits or pension benefits, and this burden shall not shift to the Fund. A Member shall not receive disability benefits unless his or her claim is supported by medical evidence, and arises out of and in the course of the Member's employment with the Bureau of Fire and Rescue or Police.
- (B) The hearings officer shall exclude evidence if it is immaterial, irrelevant or unduly repetitious. Hearsay is admissible if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs. However, the probative weight given hearsay will depend upon the circumstances, such as whether the party offering the hearsay could have offered better evidence and whether the hearsay could have been but was not rebutted.
- (C) Objections to evidentiary offers may be made and shall be noted in the record.
- (D) All offered evidence, not objected to, will be received by the hearings officer subject to the hearings officer's power to exclude irrelevant, immaterial, or unduly repetitious matters.
- (E) Evidence objected to may be received by the hearings officer. Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.
- (F) The hearings officer may take notice of facts of which a court may take judicial notice.
- (G) Each applicant for service-connected disability benefits under Article 3 of the Plan must establish that his or her claimed condition arose out of and in the course of the Member's employment with the Bureau of Fire, Rescue and Emergency Services or the Bureau of Police. Except for Members claiming stress or mental disorders, this means it must be proven by medical evidence, supported by objective findings, that the Member's employment is a Significant Factor of the claimed condition, disability or need for medical treatment. Members claiming stress or mental disorders must prove that their employment is the primary cause of the disorder.

- (H) In the case of a FPDR Two or FPDR Three Member who is disabled as a result of hernia of the abdominal cavity or diaphragm, AIDS, AIDS-related complex, tuberculosis, hepatitis B, or pneumonia (except terminal pneumonia) it will be rebuttably presumed that such condition arises out of and in the course of the Member's employment with the Bureau of Fire, Rescue and Emergency Services or Bureau of Police. The same rebuttable presumption exists with respect to a Member suffering from heart disease if the Member has five or more years of service with his or her respective bureau when his or her condition becomes disabling. The presumptions referred to in this rule may be rebutted only if the Fund determines by a preponderance of the evidence that the Member's condition did not result from service as a police officer or fire fighter.

5.6.05 – APPELLATE PANEL REVIEW

- (A) The Member or the Fund may request review of an Order by the hearings officer by filing a written request for review with the Office of Administrative Hearings. The request for review shall be received by the Office of Administrative Hearings or postmarked within 30 days of the date of the hearings officer's Order. The party requesting review shall mail copies of the request for review simultaneously to all other parties. The party not requesting review shall have ten days from the expiration of the time allowed for appeal to file a cross-request for review. The Office of Administrative Hearings shall not grant an untimely request for review or cross-review. A request for review timely received by the Director within 30 days of the date of the hearings officer's Order shall be considered timely by the Office of Administrative Hearings.
- (B) Review of a hearings officer's Order shall be performed by an appellate panel of three hearings officers assigned by the Office of Administrative Hearings.
- (C) Review by the appellate panel shall be de novo upon the entire record developed at the hearing.
- (D) The appellate panel will not entertain oral argument. The parties' arguments should be reduced to writing and filed within the time frames provided in these rules.
- (E) The party requesting review by the appellate panel shall file its appellant's brief to the appellate panel within 30 days after the date of mailing of the transcript of record or the OAH's acknowledgement of the request for review to the parties, whichever is later. The respondent shall file its brief within 30 days after the date of mailing of the appellant's brief. Any party who has filed a cross-request for review shall include its cross-appellant's opening brief as a part of its respondent's brief. An appellant may file a reply and/or cross-respondent's brief within 15 days after the date of mailing of the respondent's/cross-appellant's brief. A cross-appellant may file a cross-reply brief within 15 days of the mailing date of a cross-respondent's brief. Unless otherwise authorized by the appellate panel, no other briefs will be considered.
- (F) A party requesting an extension of time for filing a brief shall file a written request no later than the date on which the brief is due. A request for extension in all cases shall include a statement whether opposing attorney (or an unrepresented party) objects to, concurs in or has no comment regarding the extension of time requested.

- (G) The appellate panel shall issue a written Order, which shall set forth:
- (1) the parties;
 - (2) the issues;
 - (3) the appellate panel's decision, including findings of fact and conclusions of law;
 - (4) the date on which the Order was entered: and
 - (5) the appeal rights of the parties.

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