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Witness Statement

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From: Martin A. Harry, Attorney, Austin, Texas
To: Sunset Advisory Commission, State Capitol, Austin, Texas

Subj: Employees Retirement System of Texas ("ERS")

I respectfully offer comment on Issue 3 discussed in the Sunset Staff Report ("Report"), dated April 29, 2016. The staff believes ERS' benefit decision processes lack balanced treatment and full information for members. Most of the staff's discussion, however, concerns health insurance claims and appeals but the same or greater scrutiny needs to be given to processes relating to disability retirement benefit claims.

As the staff notes, "[t]hrough ERS, the state provides competitive benefits that are an important recruitment and retention tool supporting the state workforce's employees and employers." Report at 4. Disability Retirement Benefits are one component of the benefits offered employees. Employees make contributions for these benefits.

A state employee is eligible to retire for an occupational disability regardless of age or amount of service credit if he or she was contributing to the retirement system at the onset of disability and meets the criteria in Section 811.001(12). Tex. Gov't Code § 814.202. In 2003, ERS proposed to the legislature that it change the criteria of Section 811.001(12). ERS Sunset Self-Evaluation Report at 5.

House Bill 2359, as passed by the House, made no mention of the definition of "occupational disability." In the Senate State Affairs Committee, however, a substitute bill amended the definition. There was no public committee discussion or testimony about it. Ultimately, after a conference committee, the bill passed both chambers at the end of the legislative session with the amended definition. The definition adopted is as follows:

> "Occupational disability" means disability from a sudden and unexpected injury or disease that results solely from a specific act or occurrence determinable by a definite time and place and solely from an extremely dangerous risk of severe physical or mental trauma or disease that is not common to the public at large and that is peculiar to and inherent in a dangerous duty that arises from the nature and in the course of a person's state employment.

Tex. Gov't Code § 811.001(12)

It appears that very little attention was given to the changes. Although it may have been treated as a housekeeping measure, the changes had profound legal significance.

The complexity of the definition is obvious and leads to considerable uncertainty. For example, a disability can only arise from a sudden and *unexpected* injury solely from an *extremely dangerous risk* of severe physical or mental trauma or disease. If extremely dangerous means a high probability of harm, a risk presumably foreseeable, then it seems contradictory to require

that it be unexpected at the same time. Unfortunately, the history of legislative action provides no clues as to the intended meaning of "extremely dangerous risk" and "dangerous duty that arises from the nature and in the course of a person's state employment."

ERS has interpreted the statutory definition to limit occupational disability benefits to only persons performing a dangerous duty. By doing so, ERS is effectively excluding members of the employee and elected classes from ever qualifying for occupational disability retirement benefits for which they are contributing *equally* with those persons performing dangerous duties.

There are workers whose employment with the state began before the 2003 change in law and who have regularly contributed to ERS' retirement plan. There is reason to believe ERS has not only failed to inform affected workers of the change in law and ERS' very restrictive application of it but continues to misinform workers. (Compare "Retirement Benefits for Elected State Officials," dated January 2016, "you are eligible for this benefit if you prove your disability was the *direct* result of *some* risk or hazard" with the words modified from the previous to current statutory definition, changing "direct" to "solely" and changing "a risk or hazard" to "extremely dangerous risk.")

It is fundamentally unfair for the state to recruit new workers by offering benefits, collect contributions from those workers and only reveal at the time they become seriously injured on the job that they were never performing a job for which they could qualify for occupational disability benefits if injured on *that* job.

The Report states that an objective of the staff recommendations is to make sure agency processes and decisions are well documented, consistent, and transparent. Report at 2. Because of the intricacies of the statutory definition of occupational disability, it would be especially beneficial for all interested parties if ERS articulated its understanding of the definition. It has been 13 years since the change in the definition but there is little case law to guide claimants and their representatives.

According to the Report, ERS reviewed 77 disability retirement applications in 2015. Report at 25. Whether any rules or policy have been derived from this experience is not evident for anyone outside the agency. The staff recommendations should be broadened to explicitly include greater transparency of decision-making in the appeals process for disability retirement benefits to protect against the appearance of ad hoc decision-making. A consistent application of the law will benefit ERS and workers alike.

Additionally, if not already done, ERS should analyze the impact of the change in definition. Has it affected the number of claims? Has it affected the adjudication of claims? Has the number of appeals increased and, if so, to what extent have administrative costs increased as a result?

Finally, the legislature needs to determine what is actuarially feasible and adopt a simpler definition. The legislative revision in 2003 appears to have been motivated by ERS' desire to reduce liability for occupational injuries without any consideration of the fiscal consequences of the change. Thank you for your consideration.