



**S.F. 2394**  
(Pariseau)

**H.F. xxxx**

**Executive Summary of Commission Staff Materials**

*Affected Pension Plan(s):* PERA-General  
*Relevant Provisions of Law:* Special legislation  
*General Nature of Proposal:* Authorizes a late disability benefit application  
*Date of Summary:* February 11, 2010

**Specific Proposed Changes**

- Authorizes a former PERA-General employee with a pre-2006 back injury to apply for a disability benefit despite failing to follow through on an appeal of a PERA board rejection of a prior late application.

**Policy Issues Raised by the Proposed Legislation**

1. Equitable factor: Failure to pursue judicial appeal of initial disability benefit application.
2. Equitable factor: Failure to meet three-year disability benefit application deadline time limit.
3. Question of actual occurrence of disability.
4. Likelihood that PERA-General disability benefit entitlement can be established.
5. Precedent.

**Potential Amendments**

No potential amendments.



TO: Members of the Legislative Commission on Pensions and Retirement  
FROM: Lawrence A. Martin, Executive Director *JLM*  
RE: S.F. 2394 (Pariseau); H.F. xxxx: PERA-General; Special Authority to Apply for a Disability Benefit After the Deadline Date  
DATE: February 11, 2010

Public Pension Problem of Mark A. May

Mark A. May, age 54, of Lakeville, Minnesota, was an employee of the Public Works Department of the City of Richfield from October 28, 1985, until June 27, 2006. Mr. May applied for a disability benefit from the Coordinated Program of the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General) on July 6, 2006, but the application was denied in July 2006 by the PERA Executive Director based on a review by the Minnesota Department of Health of his submitted medical evidence. Mr. May appealed the denial to the PERA Board of Trustees, which rejected his appeal on September 14, 2006. Mr. May then appealed the denial of his appeal to the Minnesota Court of Appeals on November 16, 2006, but withdrew his appeal when Mr. May's lawyer, Gary Manka, contends that the PERA Assistant Attorney General, Rory Foley, indicated to him that a request for reconsideration could be filed with the PERA board because of an incomplete evidentiary record in the possession of the PERA board at the time of denial. No request of reconsideration was filed by Mr. May with PERA, but Mr. May did obtain a new PERA-General disability benefit application form in July 2008. Mr. May did not file a new disability benefit application before the June 27, 2009, deadline (three years from the termination of public employment under Minnesota Statutes 2006, Section 353.33, Subdivision 2). Mr. May was found disabled for purposes of Social Security disability benefits as of June 2, 2008, by the Office of Disability Adjudication and Review of the Social Security Administration on December 19, 2008.

Mr. May desires to renew his application for PERA-General disability benefits and wants authorization to do so at this time, despite any time limit under PERA law (three years from termination under the 2006 PERA law; currently 18 months from termination under a 2007 PERA law change).

Summary of S.F. 2394 (Pariseau); H.F. xxxx

S.F. 2394 (Pariseau); H.F. xxxx allows Mark A. May to apply for a disability benefit from the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General) until January 1, 2011, and, if determined to have been totally and permanently disabled as of June 27, 2006, to become eligible to receive a PERA-General coordinated program total and permanent disability benefit.

Discussion and Analysis

S.F. 2394 (Pariseau); H.F. xxxx permits Mark A. May to make a late disability benefit application for a disability benefit from the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General) for a claimed disability that occurred on or before June 27, 2006.

The proposed legislation raises several pension and related public policy issues for consideration by and possible discussion by the Legislative Commission on Pensions and Retirement, as follows:

1. Equitable Factor: Failure to Pursue Judicial Appeal of Initial Disability Benefit Application. The policy issue is the relative weighing of the equitable factors favoring or disfavoring Mark A. May in obtaining special authority to apply for a disability benefit from the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General). The Commission's Principles of Pension Policy (Principle II.C.11.) cover deadline extensions and waivers and provides that they should be permitted only if, on a case-by-case basis, it is determined that there is a sufficient equitable basis for the extension or waiver. The equitable factors favoring Mr. May are unclear and could best be identified by Mr. May. The first equitable factor potentially weighing against Mr. May is his failure to proceed with a November 16, 2006, appeal to the Minnesota Court of Appeals of the denial of his disability benefit application by the PERA Executive Director, which was upheld by the PERA Board of Trustees on September 14, 2006. Mr. May's Court of Appeals appeal was withdrawn, apparently in December 2006, because Mr. May's attorney reportedly indicates in a December 11,

2006, affidavit that the Assistant Attorney General representing PERA suggested that a reconsideration request could be filed with the PERA Board on the basis that the board lacked a full evidentiary record when it considered his appeal. There is no specific provision in the statewide retirement plan adverse benefit determination appeals process, Minnesota Statutes, Section 356.96, for a reconsideration request although PERA may permit reconsideration requests as a matter of administrative practice. The PERA file on Mr. May contains no written request for reconsideration by the PERA Board of Mr. May's previously denied disability benefit application. If Mr. May had pursued his appeal to a judicial resolution, the issue may not have become one for a legislative resolution. Mr. May or his legal counsel should be requested by the Commission to explain the withdrawal of the judicial appeal and the subsequent apparent failure to file a request for reconsideration by the PERA board. Where a judicial remedy exists, it may be inappropriate for the legislative branch to interfere or otherwise act. If a judicial remedy is discarded by a petitioner, the legislative branch may be reasonable in demanding that the petitioner meet a heightened standard of equities before the Legislature undertakes a resolution.

2. Equitable Factor: Failure to Meet Three-Year Disability Benefit Application Deadline Time Limit. The policy issue is whether or not any equities favoring Mr. May are sufficiently great to outweigh his failure to continue to pursue a disability benefit for a disability benefit from the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General) within the three-year limit in force when he terminated public employment in 2006. As indicated under issue #1, the Commission's Policy Principles require a case-by-case weighing of equitable considerations for a deadline extension or waiver. The record provided to the Commission contained no explanation by Mr. May or on his behalf for his failure to file a new disability benefit application with PERA before June 27, 2009, the pre-2007 time limit on disability applications. The Commission should hear from PERA about its practices in allowing new disability benefit applications when prior disability benefit applications have been denied and from Mr. May or his representative about the reasons for his second disability benefit application delay or failure. PERA previously has indicated to the Commission staff that it will oppose special legislation for Mr. May because of his unexplained lack of response after being sent a second disability benefit application within the three-year time limit.
3. Question of Actual Occurrence of Disability. The policy issue is a question of when Mr. May became disabled. The record provided to the Commission indicate that Mr. May has a history of lower back injuries from 1996. A 2001 Workers Compensation Court of Appeals decision against Mr. May on the payment for the expenses of chiropractic treatment that departed from treatment parameters indicates that he suffered a January 25, 1996, work-related lower back injury from a fall. The 1996 injury was apparently accommodated in his job duties by his employer, the City of Richfield Public Works Department, by allowing him to change his physical position frequently to avoid prolonged standing or sitting activities, and he also had the benefit of vocational rehabilitation efforts. The prolonged period for the indicated disabling injury and his continued public employment during that period raise the question of when the disability occurred, how great the disability was, and as laid out in detail in issue #4, whether the claimed disability is total and permanent under the statutory definition.
4. Likelihood that PERA-General Disability Benefit Entitlement Can Be Established. The policy issue is the likelihood that Mark A. May ultimately will be determined by the Public Employees Retirement Association (PERA) to be totally and permanently disabled under Minnesota Statutes, Section 353.01, Subdivision 19. Mr. May has been determined by Social Security to be disabled under a significantly similar standard to the PERA-General and currently receives a Social Security disability benefit. The Social Security standard for disability, as indicated in its program handbook, is an...

... inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. A person must not only be unable to do his or her previous work but cannot, considering age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. It is immaterial whether such work exists in the immediate work area, or whether a specific job vacancy exists, or whether the worker would be hired if he or she applied for work.

Minnesota Statutes, Section 353.01, Subdivision 19, defines a "total and permanent disability" as being the...

... inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to be of long-continued and indefinite duration. Long-continued and indefinite duration means that the disability has been or is expected to be for a period of at least one year.

Although the two standards appear highly similar to each other, the fact finder is different for each benefit and the fact of Mr. May's receipt of a Social Security disability benefit is not automatically binding on PERA. If it becomes apparent that Mr. May is not likely to meet the PERA disability definition, the extension of his application deadline in the proposed legislation is not a sound exercise of legislative effort.

5. Precedent. The policy issue is whether or not there is an arguably binding precedent for assisting Mr. May by extending the disability benefit application time deadline for him and whether or not providing relief to Mr. May would establish an inappropriate precedent for future deadline extension or waiver requests. The Commission staff has identified five instances where special legislation has extended the deadline for a disability benefit application, which are:
  - a. Laws 2000, Chapter 461, Article 19, Section 1, relating to the General State Employees Retirement Plan of the Minnesota State Retirement System (MSRS-General) and to an employee of the Department of Employment Security;
  - b. Laws 2002, Chapter 392, Article 14, Section 9, relating to the General Employee Retirement Plan of the Public Employees Retirement Association (PERA-General) and to a Blooming Prairie police officer; and
  - c. First Special Session Laws 2005, Chapter 1, Article 2, Section 159, relating to MSRS-General and to a Department of Natural Resources Photo Lab employee.
  - d. Laws 2009, Chapter 169, Article 12, Section 14, relating to MSRS-General and to a former Department of Veteran's Services employee.
  - e. Laws 2009, Chapter 169, Article 12, Section 16, relating to PERA-General and to a former Independent School District No. 11, Anoka-Hennepin, employee.

The 2000, 2002, and 2009 special laws were recommended by the Legislative Commission on Pensions and Retirement, but none of those four recommended extensions involved a person who appealed the disability benefit application denial to the Minnesota Court of Appeals and then withdrew the appeal. The 2005 special law was never considered by or recommended by the Commission. The Commission also has turned down a disability benefit application deadline extension request (see 2003 Session H.F. 740 (Hilstrom); S.F. 801 (Scheid), relating to PERA-General and a former Hennepin County employee). Unless the Commission was to recommend the May special authorization either without adequately establishing his equities or in spite of unfavorable equities, it is unlikely that any legislation assisting Mr. May would establish an arguably binding adverse precedent for future additional disability benefit application time deadline extension or waiver requests.



## Senate

State of Minnesota

Lawrence A. Martin, Executive Director  
Legislative Commission on Pensions and Retirement  
State Office Building, Room 55  
100 Rev. Dr. Martin Luther King, Jr. Blvd.  
Saint Paul, MN 55155

Mr. Martin,

Our office has been asked to introduce a bill on behalf of a constituent, Mark May – who missed his June deadline for filing with the Public Employee Retirement Association – in order that the Legislative Commission on Pensions and Retirement may make a petition on his behalf.

Enclosed, please find all the pertinent material our office was sent regarding this situation.

Thank you for your assistance.

Sincerely,

The Office of State Senator Pat Pariseau  
State Office Building, Room 117

LCPR SEP 30 2009



**Lisa Diesslin**

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**From:** Mary.Vanek@state.mn.us  
**Sent:** Monday, November 09, 2009 9:34 AM  
**To:** Lisa Diesslin  
**Subject:** Mark May

DOB: 04/05/1955

Employed by City of Richfield: October 28, 1985 through June 27, 2006 (20 years, 9 months)

Applied for Coordinated Plan total and permanent disability benefits on July 6, 2006

Application was denied because "the medical evidence did not support total and permanent disability for a period of at least one year" per evaluation of medical reports submitted by member and reviewed by the physicians at the MN Department of Health.

Denial appealed to the PERA Board of Trustees, who upheld the denial on September 14, 2006

Member retained counsel and filed for review of the Board's decision by the MN Court of Appeals - Notice of Case Filing: 11/16/2006

Affidavit dated 12/11/2006 by May's attorney, Gary Manka, swears that Rory Foley, PERA's Assistant Attorney General representative, indicated that a "Request for Reconsideration" could be filed with the PERA Board of Trustees, citing that the Board was not in possession of all evidence prior to the Board's September denial of the application. The case was withdrawn from the Court of Appeals.

There is nothing in the file indicating the member's attorney followed up with PERA to request a reconsideration before the Board.

Member contacted PERA in July 2008 requesting an application for disability benefits. Estimates of the benefit values and an application and supporting medical forms were mailed to member on July 15, 2008.

PERA has received nothing in response to the materials sent July 15, 2008. Member passed the three-years from date of termination time limit for applying for benefits in June 2009.

Special legislation would be required to allow this individual to apply for benefits, but PERA will oppose this given the member was sent information and application material within the three-year period to which the member never responded.

*Mary Most Vanek, Executive Director  
Public Employees Retirement Association  
60 Empire Drive, Suite 200  
St. Paul, MN 55103  
(651) 296-8358*

Senator Pariseau introduced—

S.F. No. 2394: Referred to the Committee on State and Local Government Operations and Oversight.

1.1 A bill for an act  
 1.2 relating to retirement; general employees retirement plan of the Public Employees  
 1.3 Retirement Association; authorizing a late disability benefit application in certain  
 1.4 cases.

1.5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.6 Section 1. PERA-GENERAL; LATE DISABILITY BENEFIT APPLICATION  
 1.7 AUTHORIZATION.

1.8 (a) Notwithstanding any provisions of Minnesota Statutes, section 353.01,  
 1.9 subdivision 19, 353.031, subdivision 3, or 353.33, subdivision 1, to the contrary, an  
 1.10 eligible person described in paragraph (b) is entitled to file an application for a disability  
 1.11 benefit from the coordinated program of the general employees retirement plan of the  
 1.12 Public Employees Retirement Association within the time period specified in paragraph  
 1.13 (c) and in compliance with the evidentiary requirements of paragraph (d), and, if  
 1.14 determined to be totally and permanently disabled for a period of at least one year under  
 1.15 Minnesota Statutes, section 353.01, subdivision 19, as of June 27, 2006, is eligible to  
 1.16 receive a disability benefit under Minnesota Statutes, section 353.33.

1.17 (b) An eligible person is a person who:

1.18 (1) was born on April 5, 1955;

1.19 (2) was employed by the city of Richfield from October 28, 1985, until June 27,  
1.20 2006;

1.21 (3) was a member by virtue of that employment of the coordinated program of the  
1.22 general employees retirement plan of the Public Employees Retirement Association;

1.23 (4) applied for a total and permanent disability benefit under Minnesota Statutes,  
1.24 chapter 353, on July 6, 2006;

2.1 (5) had the total and permanent disability benefit application denied by the executive  
2.2 director of the Public Employees Retirement Association because the medical evidence  
2.3 did not support total and permanent disability for a period of at least one year based on  
2.4 an evaluation of medical reports submitted by the person as reviewed by the physicians  
2.5 at the Minnesota Department of Health;

2.6 (6) had an appeal of the total and permanent disability benefit application denial by  
2.7 the Board of Trustees of the Public Employees Retirement Association on September  
2.8 14, 2006;

2.9 (7) filed for a review of the decision by the Board of Trustees of the Public  
2.10 Employees Retirement Association by the Minnesota Court of Appeals in November 2006;

2.11 (8) withdrew the request for a review by the Minnesota Court of Appeals after  
2.12 December 11, 2006;

2.13 (9) requested a disability benefit application in July 2008; and

2.14 (10) has passed the three-year time limit from the date of termination for applying  
2.15 for a disability benefit on June 27, 2009.

2.16 (c) An application for a disability benefit under paragraph (a) must be filed on or  
2.17 before January 1, 2011.

2.18 (d) An application for a disability benefit under paragraph (a) must include evidence  
2.19 of a total and permanent disability benefit that was not provided to the Board of Trustees  
2.20 of the Public Employees Retirement Association prior to September 14, 2006.

2.21 **EFFECTIVE DATE.** This section is effective the day following final enactment.