

Sanchez, Jose, Dec'd

PENSION RESERVE

Calculation

The Department's use of Table C to calculate the pension reserve is consistent with RCW 51.44.070(1) because the statute directs the Department to take into account the experience of the reserve fund in setting annuity values. That the table might not accurately represent current differences in life expectancy does not invalidate the use of Table C because its use adequately reflects the experience of the reserve fund. ...*In re Jose Sanchez, Dec'd, BIIA Dec., 01 19644 (2004)* [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

Standard of Review

The Department's decision on the appropriate pension reserve amount is reviewable on a preponderance of the evidence standard. ...*In re Jose Sanchez, Dec'd, BIIA Dec., 01 19644 (2004)* [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 04-2-00582-4.]

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Pension reserve calculation

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Scroll down for order.

1 No. J-247533 and Claim No. J-284750; placed the claimant on pension effective February 29,
2 2000; and deducted a total of \$10,157.99, including interest, from the pension reserve for
3 permanent partial disability previously paid. The Department order is **REVERSED AND**
4 **REMANDED.**
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6 DECISION

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8 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
9 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
10 issued on August 11, 2003, in which the industrial appeals judge affirmed the order of the
11 Department dated June 18, 2001.
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14 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
15 no prejudicial error was committed. The rulings are affirmed. We have granted review because we
16 agree with the claimant that interest paid on the permanent partial disability payments should not be
17 deducted from the pension reserve, and to clarify the appropriate standard of review.
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20 This matter involves the means by which the Department effectuates the directives in
21 RCW 51.44.070(1) and RCW 51.32.080(4). Specifically, the claimant's beneficiary raises the
22 following issues:
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- 24 1. She contends that use of Table C, a table used to calculate the present
25 value of a claimant's pension entitlement over his lifetime, is based on
26 data from U.S. mortality rates in 1980, and thus does not comport with
27 the statute or the goals of the Industrial Insurance Act;
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- 29 2. She contends that use of Table C does not comport with the statute or
30 the goals of the Industrial Insurance Act in that it does not distinguish
31 between gender; because women live longer than men, they will
32 ultimately have more money deducted than is necessary to recoup the
33 permanent partial disability paid;
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- 35 3. She contends that use of Table C is inappropriate because it is based
36 on an interest rate equal to 6.5 percent, which, in effect, is the interest
37 rate the Department charges over the course of repaying the excess
38 permanent partial disability award. The claimant's beneficiary argues
39 that this interest rate is too high.
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- 41 4. She contends that the pension reserve should be reduced only by the
42 amount of permanent partial disability, and should not include interest
43 paid by the Department on the permanent partial disability payments;
44
- 45 5. Finally, she contends that the cost of living adjustment (hereafter,
46 COLA) should be applied to his entitlement before it is reduced by the
47 amount of excess permanent partial disability paid to the claimant.

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2 It is important to understand the means by which the Department sets aside the necessary
3 funds to pay a lifetime of permanent total disability benefits to a given worker. RCW 51.44.070(1)
4 provides as follows:
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6 For every case resulting in death or permanent total disability the
7 department shall transfer on its books from the accident fund of the
8 proper class and/or appropriate account to the "reserve fund" a sum of
9 money for that case equal to the estimated present cash value of the
10 monthly payments provided for it, to be calculated upon the basis of an
11 annuity covering the payments in this title provided to be made for the
12 case. Such annuity values shall be based upon rates of mortality,
13 disability, remarriage, and interest as determined by the department,
14 taking into account the experience of the reserve fund in such respects.
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16 In an effort to comply with this statute, the Department has developed Table C. This is the table
17 used to calculate the present value, that is, the amount of cash necessary at the time the pension is
18 awarded, to fund pension benefits for a given worker until the end of the Department's obligation to
19 the worker, that is, until he or she dies.
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22 Thus, when permanent total disability benefits are awarded, the Department first calculates
23 what it calls the original accident reserve, which is the amount of money to be paid to the worker on
24 a monthly basis. This sum is calculated as directed in RCW 51.32.060, which also is used to
25 calculate monthly time loss compensation benefits. Next, the Department determines the
26 claimant's age at the time the pension benefits were awarded. For any given age, Table C provides
27 a value, which is the amount of money needed to fund one dollar of the worker's pension for the
28 rest of his or her life. Taking the original accident reserve amount and multiplying it by the
29 appropriate value in Table C will provide the sum of money needed at the time the pension benefits
30 are awarded to fund the claimant's pension benefits for the rest of his or her life.
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33 Ordinarily, none of these calculations will affect a given worker's benefits; he or she is, in
34 any event, entitled to the sum set forth in RCW 51.32.060. Even if the sum set aside to fund the
35 benefits is inadequate, the worker's benefits will not change. Similarly, if the sum set aside is more
36 than sufficient, the worker will still receive the same benefits. Any risks taken in the investment of
37 the reserve amount are borne by the Department, as are any errors in the calculation. As a
38 practical matter, in this situation the calculation of the reserve fund does not affect the claimant in
39 any way.
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42 However, this changes when the claimant, as is often the case, receives a permanent partial
43 disability award prior to being determined permanently totally disabled. Rather than simply
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1 deducting a set amount from each pension payment, RCW 51.32.080(4) directs that in such a
2 situation the excess permanent partial disability award "shall be deducted from the pension reserve
3 of such injured worker and his or her monthly compensation payments shall be reduced
4 accordingly." This method of recouping the permanent partial disability award permits the worker to
5 repay the sum over the entire time he or she is entitled to benefits, that is, until the end of his or her
6 life. It may be inferred that this method of repayment is less onerous to the worker than simply to
7 deduct a set amount from his or her monthly entitlement.
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11 To effectuate the directive in RCW 51.32.080(4), the Department determines the amount of
12 permanent partial disability paid to the worker, and then divides it by the sum it has set aside to
13 fund the pension benefits (a sum derived from Table C). This provides a percentage that
14 represents that portion of the pension reserve paid out earlier in the form of a permanent partial
15 disability award. Multiplying this number by the claimant's monthly entitlement equals the amount
16 by which the monthly entitlement is reduced. Clearly, then, the use of Table C directly affects the
17 worker's entitlement in this instance. Because the number provided by Table C is in the
18 denominator of the equation, a higher value in the denominator will equal a smaller number, which
19 in turn means less money deducted on a monthly basis.
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22 Thus, the claimant's beneficiary takes issue with the values provided in Table C in that
23 because it is based on life expectancies in 1980, Table C will assume a lower life expectancy than
24 the present time. Since the Department assumes a lower life expectancy, it need not set aside as
25 much money and the reserve amount will be a smaller sum. Similarly, women have historically
26 lived longer than men, and thus a single gender table will result in an underestimate of how long an
27 injured female worker will live, again resulting in a smaller sum of money set aside to fund her
28 pension. As the size of the fund set aside to fund a pension decreases, the ratio of permanent
29 partial disability to pension reserve fund increases, thus resulting in a larger deduction each month.
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32 The claimant's beneficiary also takes issue with the fact that the Department assumes a
33 discount rate (synonymous in this matter with interest rate) of 6.5 percent interest on the money it
34 sets aside. In other words, it sets aside enough money that, assuming it earns 6.5 percent interest
35 on the fund, will adequately fund a pension for a given worker. Although her argument is somewhat
36 ambiguous, Mrs. Sanchez appears to contend that she is thus being charged 6.5 percent interest
37 on the repayment of the excess permanent partial disability. Booth Dep. at 164-165. As a practical
38 matter, however, if the Department assumes a lower interest rate, then it must set aside a greater
39 sum for the pension reserve. As noted above, a larger sum for pension reserve, when plugged into
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1 the equation, will result in a smaller amount to be deducted from the monthly payment. The
2 6.5 percent interest rate is embedded in Table C, and the claimant's beneficiary contends that
3 Table C is flawed in that 6.5 percent is too high.
4

5 The threshold issue in this matter is the determination of the appropriate standard of review.
6 As always, the language in the statute, RCW 51.44.070, governs this. Although our industrial
7 appeals judge determined that the Department's decision is reviewable as an abuse of discretion,
8 we believe that it is to be reviewed on a preponderance of the evidence basis. First and foremost,
9 we note that while RCW 51.44.070 includes the words "as determined by the Department," this
10 does not confer a discretionary decision upon the Department. This Board has long held that in
11 instances under the Industrial Insurance Act where the Legislature has intended to commit a
12 decision to the Director's discretion, it has explicitly so stated. See *In re Gary Manley*, BIIA
13 Dec., 66,115 (1986), and *In re Susan Irmer*, BIIA Dec., 89 0492 (1990). Moreover, we have
14 previously held in a decision not designated as significant, that this particular Department decision
15 is reviewable on a preponderance of the evidence basis. *In re Robert A. Burnside*, Dckt.
16 No. 00 11502 (May 10, 2001).
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23 It is equally important, however, that we specifically state the Departmental decision to be
24 reviewed. The Legislature conferred the authority, and the obligation, to the Department to transfer
25 enough present-day dollars to fund an annuity sufficient to pay the pension benefits for a given
26 worker. The Department is directed to calculate the annuity based on rates of mortality, disability,
27 remarriage, and interest, taking into account the experience of the reserve fund. The issue, then, is
28 whether the Department's calculation, including Table C, is within the statutory mandate.
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32 Certainly, the claimant's beneficiary presented extensive testimony to the effect that Table C
33 may not accurately reflect the life expectancy of a given individual, since it does not differentiate
34 between gender and race. Assuming the worker can prove that he or she is projected, for whatever
35 reason, to live longer, then the amount of money reserved for that particular worker will be too little.
36 Recall, too, that for any given individual, plugging a higher amount for pension reserve into the
37 equation will result in a proportionate decrease in the amount subtracted from the monthly benefit.
38 Thus, any individual worker may well have reason to argue that a calculation based on values in
39 Table C does not reflect his or her particular circumstance.
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43 RCW 51.44.070(1), however, specifically does **not** direct the Department to predicate this
44 calculation on a given individual. The statute directs the Department to set annuity values based on
45 variables that encompass overall rates, which reflect the experience of the reserve fund. Indeed,
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1 Table C has withstood a challenge based on inaccurate life expectancy in *Messer v. Department of*
2 *Labor & Indus.*, 118 Wn. App. 635 (2003), a recently published case. In *Messer*, the appellant
3 argued that Table C was "unreliable," because it failed to incorporate more recent statistics showing
4 a general increase in life expectancy. Division One of the Court of Appeals, however, held that the
5 evidence reflected that Table C was the only table that took into consideration the experience of the
6 reserve fund in this regard, and thus substantial evidence supported the use of Table C.
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10 Similarly, in this matter, while there may be a nationwide difference in life expectancy based
11 on gender, there is no evidence that Table C does not reflect the experience of the reserve fund.
12 Indeed, the only evidence in this respect is that the Department "experts" the reserve fund every
13 year, that is, checks to see if the assets set aside are sufficient to meet liabilities, and has found
14 that its calculations are accurate. In short, while the claimant's beneficiary takes issue with the
15 means by which the Department calculated the pension reserve, there is no evidence in this record
16 that the Department did not do so according to the statute. Indeed, use of any other table that does
17 not incorporate the experience of the reserve fund, as does Table C, would be contrary to the
18 statute.
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23 The same reasoning applies to the Department's use of the 6.5 percent interest rate in
24 setting aside sums for pension reserves. The 6.5 percent interest rate reflects the reserve fund's
25 experience. The claimant's beneficiary argues that she is, in effect, being charged 6.5 percent
26 interest on the excess permanent partial disability sum. She argues that this is "contrary to the
27 remedial nature of the Industrial Insurance Act." Petition for Review, at 4. We note that above all,
28 the issue in this matter is not whether the use of the 6.5 percent interest rate is contrary to the
29 remedial nature of the Industrial Insurance Act; it is whether use of the 6.5 percent interest rate is
30 consonant with the statutory direction. Again, there is simply no evidence that use of the
31 6.5 percent interest rate does not reflect the experience of the reserve fund. Moreover, the
32 argument that the claimant's beneficiary is being **charged** 6.5 percent interest is not well taken; she
33 is repaying money her husband previously received based on a ratio that reflects the relationship of
34 the money Mr. Sanchez received to the money set aside to fund his pension (which earns money at
35 6.5 percent).
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43 Turning then, from the use of Table C, the claimant's beneficiary argues that the amount of
44 excess permanent partial disability should not include sums the Department paid out as interest
45 when it initially paid the permanent partial disability award. In reviewing this file, we note that this
46 issue was decided by way of Summary Judgment. Our industrial appeals judge issued an Order on
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1 Summary Judgment by way of a letter dated May 12, 2003. In the letter, he held that since the
2 claimant's beneficiary did not file any documents containing facts that would create a material issue
3 of fact, he granted Summary Judgment in favor of the Department. However, the parties stipulated
4 to additional facts in a document entitled "Stipulation and Factual Agreement." With the submission
5 of these additional facts, we reverse the Summary Judgment order of our industrial appeals judge.
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8 The Stipulation and Factual Agreement establishes that Mr. Sanchez was paid a total of
9 \$10,157.99, which sum represents \$10,050 paid for permanent partial disability awards under these
10 claims, and \$107.99 in interest paid under Claim No. J-284750. We have previously heard and
11 determined this issue, and have held that the Department cannot include money representing
12 interest payments in the amount deducted from the pension reserve. *In re Esther Rodriguez*, BIIA
13 Dec., 91 5594 (1993). Accordingly, we reverse and remand these matters with direction to apply
14 only the amount of permanent partial disability awards paid under these claims, not including any
15 sums paid in interest, against the pension reserve amount.
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18 Finally, the claimant's beneficiary argues that the COLA should be computed on her monthly
19 pension entitlement prior to its reduction, based on receipt of a permanent partial disability award.
20 This issue has been addressed by the Supreme Court in *Auman v. Department of Labor & Indus.*,
21 110 Wn.2d 917 (1988), and more recently in *Messer*. We will not revisit this issue. Pursuant to the
22 decisions in the aforementioned matters, the COLA shall be computed after reduction of the
23 pension reserve for the permanent partial disability awards previously paid under these claims,
24 pursuant to RCW 51.44.070(1).
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27 In conclusion, we determine that the claimant's beneficiary failed to prove, by a
28 preponderance of the evidence, that the Department violated RCW 51.44.070(1) in using Table C,
29 but that the Department must deduct from the pension reserve fund only that sum of money paid as
30 permanent partial disability award, and not as interest on the permanent partial disability award,
31 and finally, that the Department must compute COLAs based on the monthly pension amount after
32 such reduction. The Department order of June 18, 2001, is reversed, and this matter remanded to
33 the Department with direction to issue a further order determining the claimant was permanently
34 and totally disabled as of February 28, 2000, and deducting from the pension reserve, as calculated
35 by the use of Table C, the sum of \$10,050 for previously paid permanent partial disability awards.
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FINDINGS OF FACT

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3 1. On April 11, 1983, the claimant, Jose N. Sanchez, filed an application
4 for benefits in Claim No. J-247533 with the Department of Labor and
5 Industries, alleging that he sustained an industrial injury on December 9,
6 1992, while in the course of employment with Harold Clayton, d.b.a.,
7 Clayton Farms. On February 29, 2000, the Department closed the claim
8 with an award for 5 percent of the amputation value of the left leg above
9 the knee joint with short thigh stump (3 inches or below the tuberosity of
10 the ischium). On April 6, 2000, the claimant appealed the order. On
11 February 27, 2001, the Department affirmed the February 29, 2000
12 order. On April 5, 2001, the claimant appealed the order to the Board of
13 Industrial Insurance Appeals. On April 27, 2001, the Department issued
14 an order reassuming jurisdiction over the claim. On April 30, 2001, the
15 Board issued an order returning the case to the Department for further
16 action. On June 18, 2001, the Department issued an order determining
17 the claimant to be permanently and totally disabled. The order deducted
18 \$10,157.99, including interest, from the pension reserve. On August 17,
19 2001, the claimant filed by mail an appeal from the June 18, 2001 order.
20 On September 27, 2001, the Board issued an Order Granting Appeal
21 and assigned it Docket No. 01 19644.

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23 On July 8, 1983, the claimant filed an application for benefits in Claim
24 No. J-284750 with the Department of Labor and Industries, alleging that
25 he sustained an industrial injury on June 13, 1983, while in the course of
26 employment with Harold Clayton, d.b.a., Clayton Farms. On
27 February 29, 2000, the Department closed the claim with a permanent
28 partial disability of Category 2 permanent cervical and cervico-dorsal
29 impairments and Category 2 permanent dorso-lumbar and/or
30 lumbosacral impairments. On April 6, 2000, the claimant protested the
31 order. On October 24, 2000, the Department forwarded the protest to
32 the Board of Industrial Insurance Appeals. On November 2, 2000, the
33 Board issued an order denying the Department's request to treat the
34 protest as an appeal and issued an Order Denying Appeal. On
35 February 27, 2001, the Department affirmed the February 29, 2000
36 order. On April 5, 2001, the claimant appealed the February 27, 2001
37 order to the Board of Industrial Insurance Appeals. On April 27, 2001,
38 the Board issued an order returning the case to the Department for
39 further action. On June 18, 2001, the Department issued an order that
40 determined the claimant to be permanently and totally disabled. The
41 order deducted \$10,157.99, including interest, from the pension reserve.
42 On August 17, 2001, the claimant filed an appeal from the order of
43 June 18, 2001. On September 27, 2001, the Board issued an Order
44 Granting Appeal and assigned it Docket No. 01 19645.

45 2. In its orders of June 18, 2001, the Department determined the excess
46 payment in this case to total \$10,157.99. This sum consists of \$1,800
47 paid in a permanent partial disability award under Claim No. J-247533,
and \$8,250 paid in a permanent partial disability award under Claim

1 No. J-284750, plus \$107.99 paid by the Department as interest on the
2 latter permanent partial disability award.

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- 4 3. The Department deducted excess permanent partial disability payments
5 in the sum of \$10,157.99, which included interest paid on the permanent
6 partial disability award under Claim No. J-284750, from Mr. Sanchez's
7 pension reserve and calculated a new monthly pension payment amount
8 for him before applying cost of living adjustment amounts to his
9 payments.
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- 11 4. The Department determined the actuarial factors by which the present
12 value of Mr. Sanchez's pension award should be determined by utilizing
13 "Table C."
- 14
- 15 5. Table C is an actuarial table that does not distinguish between male and
16 female mortality. Table C further bases its calculations on mortality
17 rates derived from data collected from 1980.
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- 19 6. Table C is an actuarial table that uses a discount, or interest rate equal
20 to 6.5 percent.
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- 22 7. Table C reflects the experience of the reserve fund with respect to rates
23 of mortality, remarriage, and interest.
- 24
- 25 8. The Department calculated the claimant's COLA based on his monthly
26 entitlement after reducing that amount due to payment of permanent
27 partial disability, pursuant to RCW 51.32.080.

28

29 **CONCLUSIONS OF LAW**

- 30
- 31 1. The Board of Industrial Insurance Appeals has jurisdiction over the
32 parties to and the subject matter of this appeal.
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- 34 2. The Department's calculation of the pension reserve amount, pursuant
35 to RCW 51.44.070(1), is reviewable on a preponderance of the evidence
36 basis.
- 37
- 38 3. The Department correctly calculated the claimant's pension reserve
39 amount, pursuant to RCW 51.44.070(1), prior to taking deductions as
40 required by RCW 51.32.080.
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- 42 4. The Department incorrectly included interest paid with installments of
43 payments for permanent partial disability, pursuant to
44 RCW 51.32.080(6), when reducing the pension reserve, pursuant to
45 RCW 51.32.080(4).
- 46
- 47 5. The COLA adjustment is properly applied to the claimant's monthly
entitlement after its reduction for excess permanent partial disability.

1 6. The Department orders of June 18, 2001, are incorrect, and are
2 reversed. These matters are remanded to the Department with direction
3 to issue further orders determining Mr. Sanchez to have been
4 permanently totally disabled effective February 29, 2000, and to deduct
5 the sum of \$10,050 paid out in permanent partial disability awards under
6 these claims from the pension reserve. The pension reserve shall be
7 calculated by use of Table C, and any cost of living adjustments shall be
8 calculated using the claimant's entitlement as reduced, pursuant to
9 RCW 51.32.080(4), due to payment of excess permanent partial
10 disability. Thereupon, these claims will be closed.

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12 It is so **ORDERED**.

13 Dated this 20th day of January, 2004.

14 BOARD OF INDUSTRIAL INSURANCE APPEALS

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19 /s/ _____
20 THOMAS E. EGAN Chairperson

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24 /s/ _____
25 FRANK E. FENNERTY, JR. Member

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29 /s/ _____
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