

### Proposed Rule Abstract

1. Agency: Educational Retirement Board
2. Rule citation: 2.82.1 NMAC through 2.82.7 NMAC and 2.82.11 NMAC
3. Rulemaking Action: Amend 2.82.1 NMAC, 2.82.3 NMAC, 2.82.5 NMAC, 2.82.7 NMAC, 2.82.11 NMAC; Repeal and Replace 2.82.2 NMAC, 2.82.4 NMAC, 2.82.6 NMAC
4. Register issue and Date of NPRM: Vol. 28, Issue 13, July 11, 2017
5. Effective date: Undetermined
6. Specific legal authority: 22-11-6 NMSA 1978
7. Technical information: None noted
8. Purpose of rule: To amend rules to account for changes in the Educational Retirement Act pursuant to Laws 2017, Chapter 21 (SB 28) and make other changes.
9. Rulemaking information contact: Amanda Olsen, (505) 476-6133, AmandaS.Olsen@state.nm.us
10. Comment period: Submit written comments via email at [rule.change@state.nm.us](mailto:rule.change@state.nm.us) through 5 pm. On August 18, 2017
11. Rule hearing: August 25, 2017 9:00 AM, 6201 Uptown Boulevard NE, Suite 203, Albuquerque, NM 87110

## Rule Summary

This proposed rulemaking amends New Mexico Educational Retirement Board (ERB) rules to account for changes to the Educational Retirement Act (ERA) made by Laws 2017, Chapter 21 (Senate Bill 28) and makes additional amendments as follows: allows a committee chair to appoint temporary committee members; allows the executive director to seek lead plaintiff status in certain class action lawsuits; ensures members earning more than \$20 thousand pay the appropriate contribution rate; requires employers to pay both the employer and employee contribution if the employer fails to deduct contributions from a member's salary and it is later discovered that contributions should have been made; eliminates the requirement that a school bus owner-driver must terminate the owner-driver contract before receiving disability benefits; requires administrative appeals be held in Santa Fe, but allow a claimant to appear by telephone or video conference if it is difficult for the person to attend in person; requires a person representing a claimant at an administrative hearing be a licensed New Mexico attorney; and allows hearing officers to accept written closing arguments at administrative hearings.

## Analysis

The proposed changes to the ERB regulations apply to multiple sections of the administrative code and cover a wide variety of topics related to membership,

contributions, retirement, disability benefits, and administrative practices of the board.

### **Changes Related to Laws 2017, Chapter 21**

Laws 2017, Chapter 21 (Senate Bill 28) made changes to the ERA that removed most references to “provisional” members and reclassified employees not in a teaching, nursing, or administrative position as “regular” rather than “provisional” members. Although at one time provisional members were not required to contribute to ERB, a statute change in 1971 effectively eliminated the difference between regular and provisional members. The law retains the term provisional member only for those employees who have the option to become members of the Public Employees Retirement Association. The law also allows a member applying for disability benefits to submit medical records rather than undergo a medical exam from a doctor employed by ERB, although ERB may request an independent medical exam at their discretion. Those records are to be reviewed by a medical review authority selected by the board. The law also removed outdated provisions of the ERA which no longer apply to any ERB member and updated the names of several covered employers to reflect the current name of the organization.

Proposed changes to 2.82.2 NMAC, 2.82.4 NMAC, 2.82.5 NMAC, and 2.82.6 NMAC bring ERB rules in line with the changes made by Laws 2017, Chapter 21, including the removal of outdated provisions, references to federal laws that no longer exist, and ensure the standard for total disability matches the standard specified in statute.

### **Non-Reported Service and Failure to Deduct Member Contributions**

Under current ERB rules, non-reported service – service for which a member should have had contributions deducted and submitted to ERB but for which ERB received no contributions – must be purchased at the time it is discovered. According to ERB staff, members are required to purchase the credit, although employers are still responsible for the employer share of the contribution. Non-reported service is often found at the time a member applies for retirement and realizes he or she did not receive credit for service work in the past.

LESC staff conversations with ERB staff and Albuquerque Public Schools (APS) indicate current ERB practice is to seek contributions for non-reported service from the employer and the employer seeks reimbursement for the employee contribution from the employee – though APS indicated the district is not always successful in recovering the employee contribution.

The proposed rule would require an employer to pay the employee and employer contribution for non-reported service credit if the employer fails to deduct the contribution from the salary of the employee. ERB staff note this rule change would not prevent the employer from seeking reimbursement of the employee contribution from the member. Section 22-11-22 NMSA 1978 requires employers to deduct contributions from the salaries of members and forward them to ERB on a monthly basis. If an ERB employer is not in compliance ERA requirements or board rules, the executive director is required to order the employer to come into

compliance, “including payment to the fund of any contributions not properly calculated or paid.”

The proposed rule change could have an impact on school district and charter school budgets and practices related to withholding ERB contributions. ERB staff indicate the proposed rule changes would provide employers the incentive to ensure that the statutorily required contribution is withheld and forwarded to ERB, though rules adopted by ERB in 2016 may pose challenges for school districts and charter schools. Beginning in 2016, part-time employees who were not eligible for ERB membership because their position fell short of the full time equivalency required by ERB rule (0.25 FTE), became eligible if they were also employed by another ERB-covered employer and their combined FTE exceeded 0.25. ERB indicates it has created tools that allow employers to identify these employees and ensure contributions are made, including a universal reporting requirements that provides salary information to ERB on all employees, even if they are not eligible for ERB membership.

### **Administrative Hearings**

The proposed changes address several issues related to administrative hearings conducted by ERB. Hearings would be required to be held in Santa Fe. According to ERB staff, administrative hearings require a significant number of ERB personnel and holding such hearings around the state is time consuming and involves additional costs for staff travel; however, requiring individuals to travel to Santa Fe for an administrative hearing may be difficult for some. The proposed rule would require parties appear in person at the hearing, but allows the claimant to appear by telephone or video conference if “it is difficult or impossible for a claimant to appear in person.” A claimant must request a telephone or view conference in writing at least five days before the hearing. The proposed rule allows witnesses to appear by telephone or video conference if approved by the hearing officer.

Under current rules, parties to a hearing have the right to be accompanied by “counsel.” Recently, ERB had a situation where a party was represented by “counsel” who was not a licensed attorney. The proposed rule change strikes the word “counsel” and replaces it with a New Mexico licensed attorney.

The proposed rule also add a subsection to allow parties to file written closing arguments at a time set by the hearing officer. Closing arguments must be filed simultaneously.

### **Other Proposed Changes**

***Calculation of Salary.*** Proposed changes to 2.82.3.8 NMAC clarifies how member contributions are to be calculated for members earning under \$20 thousand. Statute sets member contributions at 7.9 percent for members who earn less than \$20 thousand and 10.7 percent for those who earn more than \$20 thousand. The rule clarifies that annual salary at the beginning of the fiscal year would be based on a member’s “expected annual salary.” If a member with an expected annual salary of less than \$20 thousand ends up earning more than \$20 thousand, the higher

contribution rate becomes effective on the first day of the month in which the member exceeds \$20 thousand. If a member changes positions during the year to increase salary expectations beyond \$20 thousand the higher contribution rate goes into effect the first day of the month when the salary expectation changes.

***Temporary Committee Membership.*** Proposed changes to Subsection G of 2.82.1.9 NMAC would allow the chairman of a board committee to temporarily appoint an ERB board member to that committee in order to achieve a quorum. In the past, board committees have not been able to conduct business at a scheduled committee meeting due to the failure to achieve a quorum. This change would make it easier to conduct business at a committee meeting that otherwise complies with Open Meetings Act requirements.

***Lead Plaintiff Status.*** Proposed changes to 2.82.1.17 NMAC allow the executive director to seek lead plaintiff status in class action lawsuits related to ERB investments. The board is frequently involved in such litigation in federal court. According to ERB staff, such litigation often moves quickly and often a decision may need to be made about seeking lead plaintiff status before the next regularly scheduled board meeting. The New Mexico Attorney General has requested this rule change, which would give the board a stronger voice in the course of class action litigation. The proposed rule is specific to securities class action lawsuits. Other litigation would not fall under this rule. In addition, the executive director is required to notify the chair and present the decision at the next regularly scheduled board meeting, where the decision may be rejected by the board.

***Other Cleanup.*** The proposed rule amends the definitions of “local administrative unit” and “regular members” to include regional education cooperatives (RECs) and REC employees with licenses issued by the Public Education Department (PED) in the respective definitions. This change does not expand ERB membership, as employees of RECs with licenses issued by PED are included in the statutory definition of “regular members.”

Changes to 2.82.5.8 NMAC are proposed to reflect five years of employment is required before a member is eligible to retire. Previous members have been eligible to retire after one year of service, but all currently active members are required to have at least five years of service credit.

Proposed changes to 2.82.6.8 NMAC eliminates the requirement that a school bus owner-driver terminate their contract before being eligible before disability benefit. ERB staff indicate that existing rules require that any member, including school bus owner-divers, must be unable to obtain employment to be eligible for disability benefits and that this rule reflects a belief that requirements for receiving disability benefits be the same for all members.

**NOTICE OF PROPOSED RULEMAKING AND PUBLIC HEARING**

**NOTICE IS HEREBY GIVEN** that the New Mexico Educational Retirement Board of Trustees (NMERB) will hold a public rulemaking hearing on August 25, 2017. The hearing will be held during the Board's regular business meeting at the ERB's Albuquerque office located at 6201 Uptown Boulevard NE, Suite 203, Albuquerque, NM 87110 beginning at 9:00 a.m. The purpose of the rulemaking hearing is to take public comment regarding the following proposed rulemaking actions:

**Amendment**

- 2.82.1 NMAC, General Provisions
- 2.82.3 NMAC, Member and Administrative Unit Contributions
- 2.82.5 NMAC, Retirement Benefits
- 2.82.7 NMAC, Annuitants and Disability Recipients
- 2.82.11 NMAC, Administrative Appeals

**Repeal and replace**

- 2.82.2 NMAC, Membership
- 2.82.4 NMAC, Service Credit
- 2.82.6 NMAC, Disability Benefits

The purpose of the proposed rule changes are primarily to accommodate for changes that were made to the Educational Retirement Act due to passage of SB 28 in the 2017 regular legislative session. Accordingly, proposed amendments to or repeal and replacement of the above rules make numerous technical and clarifying changes. Specifically, the proposed rule changes delete most references to "provisional members"; change the rules to conform to current NMERB practice in regards to applications for disability benefits; and eliminate or change other miscellaneous outdated provisions as well as changing to gender neutral language.

In addition, the proposed amendments to or repeal and replacement of the above NMERB rules offer the following additional changes:

- Allow committee chairs to temporarily appoint members to the committee when necessary to achieve a quorum. 2.82.1.9 NMAC.
- Authorize the executive director to decide whether NMERB will seek lead plaintiff status in class action lawsuits. Such decisions need to be ratified by the board. 2.82.1.17 NMAC.
- Clarify the rule regarding contributions for members whose salary is less than \$20,000. Clarify situations in which an employee begins work with a salary level of less than \$20,000, but then during the year their salary level rises above \$20,000 due to increased hours or additional employment. If the member's total salary level rises above \$20,000 during the course of the year the member shall pay higher contributions beginning the first day of the month of the action that causes the change in salary. 2.82.3.8 NMAC.
- Set out standards for purchase of non-reported service due to the employer's failure to deduct member contributions. Require employers to remit both employer and employee contributions when non-reported service is to be purchased. 2.82.3.12 NMAC.
- Delete outdated provisions that applied to school bus owner-drivers. 2.82.6.8 NMAC. The current rule presumes school bus owner-drivers could be employees or independent contractors and still be NMERB members.
- Delete redundant provisions dealing with direct deposit of retiree payments. 2.82.7.8 NMAC.
- Specify that administrative hearings shall be held in Santa Fe. 2.82.11.8 NMAC.
- Clarify that parties at administrative hearings can be represented, but only by a New Mexico licensed attorney. 2.82.11.8 NMAC.

- Require that parties must appear in person at administrative hearings unless it is difficult or impossible for claimant to appear in person and the hearing officer approves. Allow witnesses to appear by phone or video conference with hearing officer approval. 2.82.11.8 NMAC.
- Written closing arguments may be filed at administrative hearings if permitted by hearing officer. Parties must file simultaneously. 2.82.11.8 NMAC.

Legal authority for this rulemaking can be found at Section 22-11-6 NMSA 1978.

The Board will vote on the proposed rules during the meeting on August 25, 2017. A summary of the proposed revisions and copies of the full text of the proposed rules may be accessed at the NMERB's website [www.nmerb.org](http://www.nmerb.org) or by contacting Amanda Olsen at [AmandaS.Olsen@state.nm.us](mailto:AmandaS.Olsen@state.nm.us), 701 Camino de los Marquez, Santa Fe, New Mexico 87505 or (505) 476-6133.

Interested persons may submit comments on the proposed rules at the rule hearing or may submit written comments via email at [rule.change@state.nm.us](mailto:rule.change@state.nm.us). Written comments must be received no later than 5 p.m. on August 18, 2017. If submitting written comments by email, please indicate in the subject line the number of each rule(s) for which you are providing comments. Persons offering written comments at the rule hearing must have two copies for the hearing officer or agency representative who presides over the hearing. Oral comments will also be accepted at the rule hearing, subject to time limitations.

Any person with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or auxiliary aid or service to attend or participate in the hearing should contact Debbi Lucero at (505) 827-8030 one week prior to the meeting.



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*Educational Retirement Board*

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**Summary of ERB rule changes 2017**

These proposed rule changes are based primarily on changes that were made to the Educational Retirement Act due to passage of SB 28 in the 2017 legislative session. However, there are additional changes that staff is suggesting. This summary is divided into two sections: Section I details proposed rule changes that are necessary to be consistent with statutory changes made through the passage of SB 28. Section II are additional proposed rule changes suggested by staff to improve ERB operations or to provide clarity to members and employers.

**Section I. CHANGES BASED ON SB 28:**

SB 28 provided technical and clarifying changes to the Educational Retirement Act. It deleted most references to “provisional members” from the Act; changed the Act to conform to current NMERB practice in regards to applications for disability benefits; and eliminated or changed other miscellaneous outdated provisions as well as changing gender neutral language.

The following proposed rule changes are in accordance with the changes made in SB 28.

**2.82.1 (Rule 1) General Provisions:**

- Change language for disability review: “Medical Review Committee” changed to “Medical Review Authority” to acknowledge current practice of using outside contractor to review medical records of disability applicants. 2.82.1.15 NMAC.
- Delete language providing for medical “tests and examinations” during application process, but language does allow for an “independent medical examination” when necessary. (i.e. when medical records which are provided are questionable or equivocal). 2.82.1.15 NMAC.

**2.82.2 (Rule 2) Membership:**

- Clean-up language throughout proposed rules similar to statutory clean-up enacted by SB 28.
- Adjust list of “local administrative units” to parallel statute by including regional education cooperatives. 2.82.2.8 NMAC.

- Clarify that “regular members” are by default all employees of colleges, school districts, and state operated schools with the exception of retired members, participants in return to work program or return to work exception and participants in the alternative retirement plan. 2.82.2.9 NMAC.
- Delete most references to “provisional members” and other outdated provisions related to provisional membership. 2.82.2.10 NMAC.

#### **2.82.4 (Rule 4) Service Credit:**

- Delete sections of rule dealing with provisional membership. 2.82.4.8 NMAC.
- Additional clean-up changes throughout rule.

#### **2.82.5 (Rule 5) Retirement Benefits**

- Minor clean-up of rule language and removal of outdated or confusing provisions regarding retirement benefits.

#### **2.82.6 (Rule 6) Disability Benefits:**

- Eliminate out-dated requirement to provide work performance evaluation reports for disability applicants. 2.82.6.9(E) NMAC
- Change references to “medical review board” to “medical review authority” throughout rule.
- Deleted provisions for “Determination of Disability” to comply with changes in SB 28 and current practice of NMERB. 2.82.6.11 NMAC.
- Provisions changed to fit into current disability standard of “totally disabled.” 2.82.6.12 NMAC.



**Section II. ADDITIONAL PROPOSED RULE CHANGES**

**2.82.1 (Rule 1) General Provisions:**

1. Allow committee chairs to temporarily appoint members to the committee when necessary to achieve a quorum. 2.82.1.9 (G) NMAC.

Currently the Investment Committee has this set out in its charter, but the other committees do not. Addition of this rule will provide committee chairs the ability to obtain a quorum more easily.

2. Authorize the executive director to decide whether NMERB will seek lead plaintiff status in securities class action lawsuits. Allows director to make decisions between board meetings. Decisions need to be ratified by the board. 2.82.1.17 (D) NMAC.

Language will allow agency to act in between board meetings on lead plaintiff status in class actions. Rule change is supported by the Attorney General’s office who in the past has asked ERB to take on lead plaintiff status.

**2.82.3 (Rule 3) Member and Administrative Unit Contributions:**

3. Clarify rule regarding contributions for those whose salary is less than \$20,000. Clarifies situations in which an employee begins work with a salary level of less than \$20,000, but then during the year their salary level rises above \$20,000 due to increased hours or additional employment. 2.82.3.8 NMAC.

Under this proposed rule, one must consider the member’s expected annual salary at the beginning of the fiscal year. However, if the member’s total salary level rises above \$20,000 during the course of the year through either additional employment, working more hours than expected, or a change in position, the member shall pay the higher contributions beginning the first day of the month of the action that causes the change in salary.

4. Set out standards for purchase of non-reported service due to employer’s failure to deduct member contributions. Require employers to remit both employer and employee contributions when non-reported service is due to employer’s failure. 2.82.3.12 NMAC.

Occasionally, an LAU neglects to remit employer contributions and deduct employee contributions for a member. When this occurs, current rule states that non-reported service must be purchased by the member at the time it is discovered.

Proposed language to the rule adds that payment of non-reported service shall be at the contribution rate in effect at the time the non-reported service is discovered. The full fiscal year salary for the position for which the member was hired must be considered when determining whether the member pays the lower contribution rate for those who earn less than \$20,000 each year.

If the non-reported service is the result of inaction by the local administrative unit, then the LAU must remit both the member and employer contributions that are due, plus interest.

**2.82.6 (Rule 6) – Disability Benefits:**

5. Delete outdated provisions that applied to school bus owner-drivers. 2.82.6.8(B) NMAC. Existing rule presumed school bus owner-drivers could be employees or independent contractors and still be NMERB members.

**2.82.7 (Rule 7)—Annuitants and Disability Recipients**

6. Deletion of redundant provisions dealing with direct deposit of retiree payments. Section D of 2.82.7.8

**2.82.11 (Rule 11) Administrative Appeals:**

7. Specifies that administrative hearings shall be held in Santa Fe. 2.82.11.8 (D)(3)(a) NMAC.
8. Clarifies that parties at administrative hearings can be represented, but only by a New Mexico licensed attorney. 2.82.11.8 (D)(3)(d) NMAC.
9. Parties must appear in person at hearings unless it is difficult or impossible for claimant to appear in person and the hearing officer approves. Witnesses may appear by phone or video conference with hearing officer approval. 2.82.11.8 (D)(3)(e) NMAC.
10. Written closing arguments may be filed if permitted by hearing officer. Parties must file simultaneously. 2.82.11.8(D)(6) NMAC.

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 1 GENERAL PROVISIONS**

**2.82.1.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
[2.82.1.1 NMAC - Rp, 2.82.1.1 NMAC, 11-15-12]

**2.82.1.2 SCOPE:** This rule addresses the organization and operations of the educational retirement board.  
[2.82.1.2 NMAC - Rp, 2.82.1.2 NMAC, 11-15-12]

**2.82.1.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.  
[2.82.1.3 NMAC - Rp, 2.82.1.3 NMAC, 11-15-12]

**2.82.1.4 DURATION:** Permanent  
[2.82.1.4 NMAC - Rp, 2.82.1.4 NMAC, 11-15-12]

**2.82.1.5 EFFECTIVE DATE:** November 15, 2012, unless a later date is cited at the end of a section.  
[2.82.1.5 NMAC - Rp, 2.82.1.5 NMAC, 11-15-12]

**2.82.1.6 OBJECTIVE:** The purpose of this rule is to establish procedures and functions of the educational retirement board, its director, officers and committees.  
[2.82.1.6 NMAC - Rp, 2.82.1.6 NMAC, 11-15-12]

**2.82.1.7 DEFINITIONS:** [RESERVED]

**2.82.1.8 BOARD MEMBERS AND OFFICERS:** Ex-officio members of the board shall take office upon their qualifying for the offices enumerated in Section 22-11-3. The board member elected by the New Mexico educational association shall be elected in the manner prescribed by the constitution of that body and shall take office on January 1 following such election. The board member elected by the New Mexico members of the American association of university professors shall be elected in accordance with the constitution of that body and shall take office on July 1 following such election. The board member elected by the New Mexico association of educational retirees shall be elected in the manner prescribed by the constitution of that body and shall take office on July 1 following such election. The board members appointed by the governor shall take office upon their receipt of appointment. All board members shall hold office until their successors qualify regardless of the length of the term and office. At the regular August meeting of each year, the members of the board shall elect a chairman, a vice-chairman, and a secretary. The duties of the officers shall include the following.

- A. The chairman shall preside at all meetings of the board.
- B. The vice-chairman shall serve as the chairman in the absence of the chairman.
- C. The secretary shall attest to the official actions of the board when such is required. The vice-chairman may attest to the official actions of the board in the secretary's absence.

[2.82.1.8 NMAC - Rp, 2.82.1.8 NMAC, 11-15-12]

**2.82.1.9 MEETINGS:**

A. The New Mexico educational retirement board shall hold regular meetings in the months of February, April, June, August, October and December; provided however, that the board may change the date of a meeting by board action, which action shall be noted in the minutes. Special board meetings may be held in accordance with state law at the call of the chairman or by any three board members. Committee meetings shall be scheduled as directed by the chairman of each committee.

B. Four members of the board shall constitute a quorum at any regular or special meeting.

C. Notice of all meetings of the board and its committees shall be made in accordance with the Open Meetings Act (Chapter 10, Article 15, NMSA 1978) and the Open Meetings Resolution adopted by the board and shall be posted on the board's website and distributed as otherwise directed by the board. Notice shall be given at least eight (8) days in advance of any regular meeting scheduled by the board at its last meeting. Notice shall be given at least three (3) days in advance of any special meeting called by the chairman or any three members of the

board.

**D.** The chairman shall set the agenda of board meetings; provided however, that if the chairman refuses to place an item on the agenda, three individual board members may petition in writing and place an item on the agenda without the chairman's consent. Committee chairmen shall set the agendas of their respective committees. Notice of agendas shall be made in accordance with the Open Meetings Act and the Open Meetings Resolution adopted by the board and the director shall distribute board and committee agendas to board members, post the agendas to the board's website, and distribute the agendas as otherwise directed by the board.

**E.** Board members and their designees may attend and participate in any regular or special board meeting by telephone or other electronic device if:

- (1) the member or designee cannot attend the meeting due to an emergency or unforeseen circumstance;
- (2) the member or designee can clearly be heard by everyone attending the meeting and the member or designee clearly identifies his- or herself before speaking or participating in a vote;
- (3) the member or designee has not attended regular meetings electronically more than twice in a rolling twelve (12) month period;
- (4) no more than two members or designees who otherwise qualify for participation under this section may do so at the same meeting; and
- (5) the member or designee otherwise complies with the Open Meetings Act.

**F.** Failure of any board member other than state treasurer or secretary of public education to attend four consecutive regular meetings unless such absence is excused by the board at a board meeting will be considered resignation from the board by that board member. Failure of the designee of the state treasurer or the secretary of public education, respectively, to attend four consecutive regular meetings when the state treasurer or the secretary of public education is absent will be considered resignation from the board by that designee. An excused absence must be recorded in the board meeting minutes.

**G.** Board members not officially assigned to the committee which is meeting may be temporarily appointed to the committee by the committee chairperson when necessary to achieve a quorum.

[2.82.1.9 NMAC - Rp, 2.82.1.9 NMAC, 11-15-12; A, xx-xx-xx]

#### **2.82.1.10 SANCTIONS AND ENFORCEMENT:**

**A.** Any breach of a board member's fiduciary duty or violation of the rules or policies adopted by the board made known to the board or of which the board becomes aware shall be reviewed by the board. If a majority of the entire board so request, an alleged breach or violation may be investigated by an independent person or entity not otherwise associated or affiliated with any member of the board or the board's staff. Such person or entity shall be selected by at least five board members and designees, if such be sitting for board members.

**B.** Any hearing addressing an alleged breach of fiduciary duty or violation of the rules or the policies adopted by the board shall be conducted by the entire board, excepting the member accused of such a breach or violation, in accordance with the rule governing administrative appeals adopted by the board prior to the alleged breach or violation having occurred. If the rule governing administrative appeals is amended between the time that an alleged breach of fiduciary duty or violation of such rules or policies occurred and the time of the hearing, the board shall conduct the hearing in accordance with the rule that existed prior to its amendment.

**C.** Removal of a board member should occur only when necessary for the board to fulfill its fiduciary duty. A decision to remove a board member should be based on a determination that allowing the member to continue to serve on the board would be a violation of the other board members' fiduciary duty and would be detrimental to the educational retirement fund and the board. Removal should not be undertaken solely to inflict a penalty for a board member's past action(s) unrelated to the matter before the board.

(1) Removal is appropriate in instances of gross misconduct, violation of the board member's fiduciary duty, repeated violation of the rules and policies adopted by the board, or failure to fulfill the duties of a board member. "Gross misconduct" is defined as violation of a clearly established rule or policy, dereliction of duty, unlawful behavior involving matters of dishonesty or deception, gross negligence, but not negligence or carelessness.

(2) Removal of a board member other than the state treasurer or the secretary of public education shall occur only after a full investigation, hearing, and an affirmative vote by not less than five board members and designees, if such are sitting for a board member.

(3) The state treasurer and the secretary of public education may be removed from the board only by removal from their respective offices by an authority possessing such power. The board may nevertheless,

in compliance with the procedures set forth herein, make a finding that the actions of a state treasurer or a secretary of public education warrant removal from the board and report such finding to appropriate authorities. A designee of the state treasurer or the secretary of public education, respectively, shall not participate in board discussions or votes related to the board's consideration of a matter pursuant to this subparagraph that involve the board member who named that person as a designee.

(4) The designees of the state treasurer and the secretary of public education, respectively, may be removed from the board in accordance with the procedures set forth herein. A designee so removed may not be reappointed as a designee by either the state treasurer or the secretary of public education.

D. Board members or designees found to be in violation of the rules and policies adopted by the board or who fail to fulfill their duties, or who otherwise conduct themselves in a manner that is not appropriate for a member of a board governing a public pension fund, may be subject to formal reprimand or admonishment by the board. Reprimand or admonishment shall be done upon a public vote of not less than five board members and designees, if such are sitting for board members, and shall be permanently recorded in the board minutes.

(1) The board may choose to reprimand a board member or designee upon determining that the member's or designee's violation of the rules and policies adopted by the board or conduct as a board member warrant censure or reproval but do not warrant removal from the board.

(2) The board may choose to admonish a board member or designee upon determining that member or designee should be advised or cautioned regarding actions such as a failure to fulfill the duties of a board member or conduct that is inappropriate for a member of a board governing a public pension fund.

E. The board may not impose a fine on a board member or designee; however, the board may order a board member or designee to repay expenses paid by the board on behalf of a board member or designee for education or travel where a board member or designee did not fulfill the purpose for which the education or travel expense was provided. In addition, a board member or designee may be required to repay the donor of a gift accepted in violation of Section 22-11-5.1 or the rules and policies adopted by the board.

[2.82.1.10 NMAC - N, 11-15-12]

#### **2.82.1.11 FUNCTION OF THE BOARD:**

A. The board shall function primarily as a policy making body and except for such ministerial acts as may be required by law, administrative matters shall be the responsibility of the director. The board shall adopt administrative rules and regulations through which the director shall implement the policies of the board.

B. In the consideration of cases involving individual members of the educational retirement system, it shall be the stated policy of the board to consider all appeals on their merits, guided by the Educational Retirement Act and the rules or regulations adopted by this board.

C. Pursuant to the board's fiduciary duty to the fund, the board has sole discretion in determining whether there is adequate funding for any proposed change in benefits or the funding formula.

[2.82.1.11 NMAC - Rp, 2.82.1.10 NMAC, 11-15-12]

**2.82.1.12 ADMINISTRATIVE BUDGETS:** The director shall prepare budgets and requests for appropriations, which shall be considered and approved by the board prior to submission to the department of finance and administration or legislature.

[2.82.1.12 NMAC - Rp, 2.82.1.11 NMAC, 11-15-12]

#### **2.82.1.13 EMPLOYMENT OF STAFF:**

A. The board, at a regular meeting, shall employ a director who shall serve at the pleasure of the board and at a salary to be set by the board.

B. The board shall annually approve an organizational chart coincident with the adoption of the budget. This chart shall include a description of all positions required for the operation of the office, and the director shall be responsible for staffing these positions. This responsibility shall include the authority for the employment, promotion and dismissal of all employees.

[2.82.1.13 NMAC - Rp, 2.82.1.12 NMAC, 11-15-12]

**2.82.1.14 INVESTMENT COMMITTEE:** The investments of the retirement fund shall be under the immediate direction of an investment committee composed of the chairman of the board, and two members of the board appointed by the chairman and approved by the board, for terms of one year. The chairman shall appoint two members to the investment committee at the board's regular October meeting each year. In the event of a vacancy on the committee, the chairman shall appoint a member of the board to serve for the remaining portion of the one

year term. The appointment shall become effective immediately; provided, however, that it shall be subject to the approval by the board at its first meeting occurring after said appointment. The actions of the committee shall be subject to applicable statutes governing investment of the educational retirement fund, and the administrative rules and policies adopted by the board relating to investments of the fund.

[2.82.1.14 NMAC - Rp, 2.82.1.13 NMAC, 11-15-12; A, 12-30-13; A, 3-14-17]

**2.82.1.15 MEDICAL REVIEW [COMMITTEE] AUTHORITY AND APPEAL OF RECOMMENDATIONS:**

A. The board shall engage a medical review ~~[committee composed of three physicians well qualified in general medical knowledge]~~ authority. The ~~[committee]~~ authority shall review all disability examination reports and advise the board of the nature and extent of disability for all applicants for disability benefits and the nature and extent of disability for those members already approved for benefits when it becomes necessary to determine their continued eligibility. ~~[The committee shall also render advice to the board on the selection of physicians or other qualified persons to perform tests and examinations upon applicants for disability, if necessary, and other medical matters.]~~

B. The director may engage physicians and other qualified persons throughout the state to perform ~~[tests and]~~ independent medical examinations upon applicants for disability, if necessary. Results of such examinations shall be reported in detail to, and reviewed by, the medical review ~~[committee]~~ authority. The director is authorized to pay a reasonable fee for the ~~[reports and]~~ examinations ~~[requested by the committee]~~.

C. Applicants for disability benefits and recipients of disability benefits whose benefits are subject to re-examination shall be given written notice of those recommendations of the medical review ~~[committee]~~ authority which propose denial of the application for disability or termination of disability benefits. The written notice shall contain the following:

(1) the recommendation of the medical review ~~[committee]~~ authority, and a clear and concise statement of the reasons supporting the recommendation;

(2) a statement that the applicant or disability recipient may appeal the recommendation within thirty (30) days after receipt of the notice in accordance with 2.82.11 NMAC.

[2.82.1.15 NMAC - Rp, 2.82.1.14 NMAC, 11-15-12; A, 6-16-15; A, xx-xx-xx]

**2.82.1.16 ACTUARY:** The director shall recommend an actuarial firm to be engaged for the purpose of performing routine actuarial services and actuarial investigations and evaluations to be provided for in a contract to be approved by the board.

[2.82.1.16 NMAC - Rp, 2.82.1.15 NMAC, 11-15-12]

**2.82.1.17 CONDUCT OF BUSINESS:**

A. The business affairs of the board shall be conducted by the director within the authority outlined by the Educational Retirement Act and rules and procedures adopted by the board.

B. On behalf of the board, the director is authorized to execute vouchers, delegate others to execute vouchers, buy and sell, or assign, or otherwise acquire or dispose of stocks, bonds, notes, or other securities held by the board, and execute such other documents as may be necessary to the administration of the Educational Retirement Act.

C. The director shall obtain the board's approval before requesting a formal opinion interpreting the law from the attorney general. The director may, however, obtain advice, either oral or written, from the attorney general as the need may arise.

~~D. The director is authorized to decide whether the agency will seek lead plaintiff status in securities class action lawsuits in order to insure a timely decision is made in accordance with applicable deadlines set out by the court. The director shall promptly apprise the chair of such decisions. All such decisions shall be presented at the next board meeting and the board may ratify or reject the director's decision. If the board rejects the director's decision, the agency shall seek to remove itself from lead plaintiff status.~~

~~D.] E.~~ The rules and procedures of the board may be amended or expanded in the following manner:

(1) At any regular meeting, the board may request the director to prepare amendments or new rules for action at a subsequent meeting of the board.

(2) The director may, at any time, propose amendments or new rules for action at any meeting of the board.

(3) Any proposed amendment or new rule shall be drafted by the director and sent to each board member with the agenda for the meeting at which the proposal will be considered, and all proposed rule

changes will be sent to all local administrative units, within a reasonable time, prior to being considered by the board.

**E] F.** Interest rates that are to be set by the board under the Educational Retirement Act may be changed at any meeting of the board but shall at a minimum be set at a board meeting held in the final fiscal quarter of the year.

[2.82.1.17 NMAC - Rp, 2.82.1.16 NMAC, 11-15-12; A, 6-16-15; A, xx-xx-xx]

**HISTORY OF 2.82.1 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule I, Organization and Operation of the Educational Retirement Board, filed 7-2-82.

History of Repealed Material:

2.82.1 NMAC, General Provisions, filed 11-16-2001 - Repealed effective 11-15-2012 and replaced by 2.82.1 NMAC, General Provisions, effective 11-15-2012.

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 2 MEMBERSHIP**

**2.82.2.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.  
[6-30-99; 2.82.2.1 NMAC - Rn, 2 NMAC 82.2.1, 11-30-2001]

**2.82.2.2 SCOPE:** This rule defines membership status and processes within the Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.  
[6-30-99; 2.82.2.2 NMAC - Rn, 2 NMAC 82.2.2, 11-30-2001; A, 5-31-2012]

**2.82.2.3 STATUTORY AUTHORITY:** The Educational Retirement Act Section 22-11-1 to 22-11-55, NMSA 1978.  
[6-30-99; 2.82.2.3 NMAC - Rn, 2 NMAC 82.2.3, 11-30-2001; A, 5-31-2012; A, 9-30-2016]

**2.82.2.4 DURATION:** Permanent.  
[6-30-99; 2.82.2.4 NMAC - Rn, 2 NMAC 82.2.4, 11-30-2001]

**2.82.2.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section or paragraph.  
[6-30-99; 2.82.2.5 NMAC - Rn, 2 NMAC 82.2.5, 11-30-2001]

**2.82.2.6 OBJECTIVE:** The purpose of this rule is to govern operations and define the types of membership eligible for coverage, as well as employees excluded from coverage.  
[6-30-99; 2.82.2.6 NMAC - Rn, 2 NMAC 82.2.6, 11-30-2001]

**2.82.2.7 DEFINITIONS:** [RESERVED]

**2.82.2.8 EMPLOYEES AND EMPLOYERS COVERED BY THE EDUCATIONAL RETIREMENT ACT:**

**A.** Employers who are designated by statute as "local administrative units" shall be the following schools, institutions, and agencies:

(1) all public school districts in New Mexico;  
(2) educational institutions enumerated in Article XII, Section 11 of the Constitution of New Mexico;

(3) public education department;  
(4) educational retirement board;  
(5) New Mexico girls' school welfare home;  
(6) New Mexico boys' school;  
(7) Los Lunas medical center;  
(8) technical and vocational institutes created pursuant to the Technical and Vocational Institute Act;

(9) community colleges (also known as "junior colleges") created pursuant to Chapter 21, Article 13 NMSA 1978 (the "Community College Act"); ~~and~~

(10) New Mexico activities association~~[-]~~ ; and  
(11) regional education cooperatives.

**B.** In addition to the local administrative units enumerated in Subsection A of this section, any state institution or agency providing an educational program and employing certified school instructors shall be a local administrative unit with coverage in such unit limited to certified school instructors.

~~[C. — All employees of the schools, institutions and agencies enumerated in Subsection A of this section, except for those employees enumerated in Section 11 of this rule, are either "regular" "retired" or "provisional" members under the "Educational Retirement Act."]~~

[6-30-99; 2.82.2.8 NMAC - Rn & A, 2 NMAC 82.2.8, 11-30-2001; A, 5-31-2012; ~~xx-xx-xxxx~~]

**2.82.2.9 REGULAR MEMBERS:**



**A.** In four year colleges, technical and vocational institutes and community or junior colleges, public school districts, and state operated schools, "regular members" shall be all ~~regularly employed teaching staff, whether full time or part time (except retired members participating in the return to work program and exclusions under Section 11 of this rule); all regularly employed administrators, whether full time or part time, who hold a bachelor's degree or the professional equivalent thereof and who have managerial and supervisory responsibilities; (except retired members participating in the return to work program and exclusions under Section 11 of this rule); and all regularly employed nurses, whether full time or part time (except retired members participating in the return to work program and exclusions under Section 11 of this rule)~~ employees other than retired members, participants in the return to work program, participants in the return to work exception; participants in the alternative retirement plan (ARP) or employees excluded under Subsection 11 of 2.82.2 NMAC.

~~**B.** In the public school districts and state operated schools other than those listed in Subsection A above, "regular members" shall be all regularly employed teachers, administrators, and nurses who are holders of appropriate certificates issued by the public education department, regardless of whether employed full time or part time, (except retired members participating in the return to work program and exclusions under Section 11 of this rule).~~

~~**C.**~~ **B.** Any member except ~~a retired member~~ retired members participating in the return to work program, participants in the return to work exception, participants in the alternative retirement plan (ARP), or employees excluded under Subsection 11 of 2.82.2 NMAC, who is regularly employed in any of the following local administrative units, shall be a "regular member" if the member holds a ~~teacher's, nurse's or administrator's certificate (which is)~~ license issued by the public education department at the time of commencement of employment in such local administrative units:

- (1) northern New Mexico ~~state school~~ college;
- (2) New Mexico boys' school;
- (3) ~~New Mexico~~ girls' ~~school~~ welfare home;
- (4) Los Lunas medical center;
- (5) public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired;
- (8) New Mexico school for the deaf; ~~and~~
- (9) New Mexico activities association~~[-]~~ ; and
- (10) regional education cooperatives

~~**D.**~~ **C.** Except retired members participating in the return to work program, participants in the return to work exception; participants in the alternative retirement plan (ARP) or employees excluded under Subsection 11 of 2.82.2 NMAC, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under the Educational Retirement Act, commencing with the first day of employment.

~~**E.**~~ **D.** Except retired members participating in the return to work program, participants in the return to work exception; participants in the alternative retirement plan (ARP) or employees excluded under Subsection 11 of 2.82.2 NMAC any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if ~~he is~~ employed in an educational program and ~~if he~~ holds a ~~certified school instructor's certificate~~ license issued by the public education department.

[6-30-99; 2.82.2.9 NMAC - Rn & A, 2 NMAC 82.2.9, 11-30-2001; A, 5-31-2012; A, 9-30-2016; xx-xx-xxxx]

#### **2.82.2.10 PROVISIONAL MEMBERS:**

**A.** All persons regularly employed by the schools, institutions, and agencies outlined in Section 8 of this rule who are not "regular members" are "provisional members" and if employed or re-employed after July 1, 1971 must be covered under the Educational Retirement Act beginning with the first day of employment or re-employment, as a condition of employment, or if employed by a local administrative unit set forth in Subsection E of 2.82.2.10 NMAC, such provisional member may make the election provided therein.

**B.** Provisional members who entered employment prior to July 1, 1971 could exempt themselves from coverage under the Educational Retirement Act in the manner provided in Section 22-11-17 NMSA 1978 Compilation, as that section existed prior to July 1, 1971. If such provisional member did not exempt him or herself, that provisional member must be covered under the provisions of the Educational Retirement Act beginning with the first day of his employment.

~~C.~~ For the purpose of coverage under the Educational Retirement Act, school bus owner drivers shall be considered as provisional members. The term "owner driver" shall be taken to mean the person who drives a school bus owned by the person, over a regularly established route, under a regular contract in that person's name, approved by the state director of school transportation, and using equipment approved by the state director of school transportation for the regular transportation of children.

~~D.~~ Any provisional member who has exempted him or herself may, at any future date, revoke such exemption and commence coverage under the Educational Retirement Act on the first day of the month following his revocation.

~~E.~~ A. Any provisional member employed by any of the following local administrative units may elect to be covered under the public employees' retirement association in lieu of coverage under the Educational Retirement Act within the first 6 months of ~~his~~ employment or re-employment, but may not ~~exempt himself~~ be exempted completely from being covered under either retirement system unless excluded from coverage under Subsection 11 of 2.82.2 NMAC.

- (1) New Mexico boys' school;
- (2) ~~New Mexico~~ girls' ~~school~~ welfare home;
- (3) New Mexico school for the deaf;
- (4) educational retirement board
- (5) public education department;
- (6) northern New Mexico ~~state school~~ college;
- (7) Los Lunas medical center;
- (8) New Mexico school for the blind and visually impaired,
- (9) until or unless such provisional member does elect coverage under the Public Employees

Retirement Act that provisional member must be covered under the Educational Retirement Act commencing with the first day of his employment, or re-employment in any of the local administrative units enumerated in this section. Likewise, the election of coverage under the Public Employees Retirement Act requires continued coverage under that act for the duration of employment or re-employment in any of the units specified in this section.

(10) It shall be the policy of the board, in cooperation with the Public Employees Retirement Association ("PERA"), to determine annually if there are provisional members employed by these local administrative units who are retired from one system while having elected to participate in the second system.

~~F.~~ B. To elect coverage under the Public Employees Retirement Act, a provisional member must complete a form provided by the board for that purpose. The local administrative unit shall forward the completed form to the director. The director shall approve the election of such coverage if it is in order and forward a copy of the approved form to PERA and to the local administrative unit as notice that the employee's election to be covered under the Public Employees Retirement Act has been approved. The director shall retain the original approved election form as the board's record of the approved election.

~~G.~~ C. No provisional member may be covered under the Public Employees Retirement Act in lieu of the Educational Retirement Act unless a properly approved form electing such coverage is on file with the director.

~~H.~~ All employees of the public schools who are engaged as teacher aides or classroom aides but who do not teach shall be classified as provisional members even though such employees may hold certificates in some form issued by the public education department.

~~I.~~ There shall be no provisional membership extended to employees of the local administrative units described in Subsection B of 2.82.2.8 NMAC]

[6-30-99; 2.82.2.10 NMAC - Rn, 2 NMAC 82.2.10, 11-30-2001; A, 5-31-2012; xx-xx-xxxx]

#### **2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:**

**A.** Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

**B.** Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. For purposes of calculating a person's FTE, employment with all local administrative units shall be aggregated. Any person

employed on July 1, 1994 who was then covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

**C.** Any employee engaged on a day-to-day basis to replace another employee who is temporarily absent shall be considered a "substitute" and shall not be covered under the Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a "substitute" and must be covered under the Educational Retirement Act.

**D.** Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:

(1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;

(2) the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;

(3) whether the person receives benefits such as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;

(4) whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;

(a) as necessary, the director shall make available forms for use by local administrative units for use in making this determination;

(b) the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

**E.** All students enrolled in any public school, grade 1-12.

~~**F.** Employees who have a portion of their salaries paid through the Comprehensive Employment and Training Act (Public Law 95-524) shall not be covered for contributions on that portion except those employees who have vested.~~

[6-30-99; 2.82.2.11 NMAC - Rn, 2 NMAC 82.2.11, 11-30-2001; A, 10-31-2002; A, 9-15-2006; A, 5-31-2012; A, 6-16-2015; A, 9-30-2016; xx-xx-xxxx]

**2.82.2.12 RETIRED MEMBERS:** For the purposes of the return to work program, a retired member shall be defined as any member who has retired pursuant to the Educational Retirement Act.

[2.82.2.12 NMAC - N, 11-30-2001]

**2.82.2.13 MEMBERSHIP ENROLLMENT; RECORDS:**

**A.** Enrollment; changes in contact information.

(1) Members are required to complete a new employment form each time that they are hired or rehired by a local administrative unit and to provide the board with contact information, including their mailing address and e-mail address.

(2) Active members and retirees are responsible for providing the board notice in writing of any change of their mailing address or e-mail address on forms made available for this purpose by the director.

**B.** Local administrative units. For the purposes of providing members information regarding the board and the members' accounts, local administrative units are required to provide the educational retirement board the e-mail addresses assigned to members by a local administrative unit upon the board's request.

[2.82.2.12 NMAC - N, 5-31-2012]

**HISTORY OF 2.82.2 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule II, Membership, filed 7-2-82.

**History of Repealed Material: [RESERVED]**

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 3 MEMBER AND ADMINISTRATIVE UNIT CONTRIBUTIONS**

**2.82.3.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
[2.82.3.1 NMAC - Rp, 2.82.3.1 NMAC, 7-1-2012]

**2.82.3.2 SCOPE:** This rule defines earnings on which member contributions shall be made, refund of contributions, purchase of contributory employment and non-reported service, and the payment of interest on refunds.  
[2.82.3.2 NMAC - Rp, 2.82.3.2 NMAC, 7-1-2012; A, 10-15-2012]

**2.82.3.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.  
[2.82.3.3 NMAC - Rp, 2.82.3.3 NMAC, 7-1-2012]

**2.82.3.4 DURATION:** Permanent  
[2.82.3.4 NMAC - Rp, 2.82.3.4 NMAC, 7-1-2012]

**2.82.3.5 EFFECTIVE DATE:** July 1, 2012, unless a later date is cited at the end of a section.  
[2.82.3.5 NMAC - Rp, 2.82.3.5 NMAC, 7-1-2012]

**2.82.3.6 OBJECTIVE:** Clarification of the definition of earnings on which member contributions shall be made, the process to obtain refunds and to purchase contributory employment and non-reported service and the calculation of interest on such refunds and purchases.  
[2.82.3.6 NMAC - Rp, 2.82.3.6 NMAC, 7-1-2012]

**2.82.3.7 DEFINITIONS:**

**A.** Terms used herein shall have the definitions as set forth in the Educational Retirement Act. Additional definitions used in this regulation are set forth below.

**B.** "Non-reported service" means service for which contributions should have been made by both a member and a local administrative unit pursuant to the Educational Retirement Act, but which were not made.

**C.** "Refund rate" means the rates at which interest is calculated for refunds to a member pursuant to Section 22-11-15 NMSA 1978, or to the beneficiary or estate of a member for refunds pursuant to Section 22-11-29 NMSA 1978. The refund rate shall be calculated based upon the process adopted by the board in its resolution entitled "the educational retirement board of trustees' adoption of a revised process for calculating and credit interest for refunds", June 4, 2010, or by a superseding resolution.

**D.** "Student teacher" means a person engaged in classroom teaching as part of a teacher education or training program whose employment in a local administrative unit is incidental to that person's status as a student. For purposes of example, a student in a teacher training program who receives a stipend, salary or other compensation while student teaching is a "student teacher"; a regular employee of a local administrative unit who also is enrolled in classes, possibly related to that employee's employment, in that or another local administrative unit, is not a student teacher.

[2.82.3.7 NMAC - N, 7-1-2012]

**2.82.3.8 SALARY COVERED; SALARY EXCLUDED:**

**A.** Except as otherwise set forth herein and subject to the limitations set forth in Section 22-11-21.2, a member's annual salary for the purpose of contributions to the fund and computation of the member's benefit shall consist of total compensation or wages paid to the member for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30, excluding any salary earned while employed under the return to work program of the Educational Retirement Act. For purposes of determining contribution rates, a member's expected annual salary at the beginning of the fiscal year shall be considered. When relevant, a member's annual salary shall take into consideration the FTE of the position and the aggregation of salaries if the member will have multiple positions with the same or other local administrative units during the fiscal year. If a member's total annual salary is more than \$20,000, the member shall be subject to the contribution rate set forth in Section 22-11-

21(A) NMSA 1978. If a member's total annual salary is \$20,000 or less the member shall be subject to the lower contribution rate set forth in Section 22-11-21(B) NMSA 1978. When a member whose salary is \$20,000 or less earns in excess of the \$20,000 limit during the fiscal year, the member shall be subject to the higher contribution rate in Section 22-11-21(A) effective the first day of the month in which the member earns in excess of the \$20,000 limit. However, if a member whose salary is \$20,000 or less changes positions with a local administrative unit during the fiscal year or engages in additional employment with the same or other local administrative unit during the fiscal year, and that change in employment creates the expectation that the member's total annual salary shall be more than \$20,000, then the member's contribution rate shall be adjusted in accordance with the change in employment beginning the first day of the month of the change in employment.

(1) Salary includes payments made directly to the member or to a third party on behalf of or for the benefit of the member. Salary includes, without limitation:

(a) base salary, compensation, or wages;

(b) salary, compensation or wages for additional services rendered; examples include: teaching courses in addition to or above a full teaching load during the September to May academic year; teaching courses or performing research during summer (e.g., June through August) where such courses or research are not included in the duties on which the member's salary is based; and, performing work in addition to that specified in the employee's job description; performing administrative duties, such as serving as a department head, head of a faculty or staff group, or for providing other additional services;

(c) salary, compensation or wages based on professional certifications or qualifications, or skills such as being bilingual or multilingual;

(d) overtime, shift differential, and 'on-call' or call back pay.

(2) Retirement contributions shall be made by a local administrative unit and a member on base salary earnings before the salary is reduced due to the local administrative unit and member entering into a voluntary "cafeteria" plan.

(3) The salary or compensation paid to a member under a school bus owner-driver contract shall be covered for contributions and benefit calculation purposes. Contributions for compensation paid under a school bus owner-driver contract shall be based upon and limited to the compensation amount paid to a person who drives a single school bus owned by that person over a regularly established route under a regular contract in that person's name with a local administrative unit.

(4) Tips or other remuneration paid to a member by a third party are considered salary to the extent that a local administrative unit reports such amounts as the member's income for tax purposes.

**B.** The following items shall not be considered annual salary for the purposes of contributions to the fund and computation of the member's annual benefit:

(1) Bonuses, awards and prizes, pay supplements or salary supplements or other "one-time" payments which do not increase an employee's annual base pay or which are made in lieu of an increase in base pay, and similar additional payments, as well as allowances or reimbursements for travel, housing, food, equipment or similar items.

(2) Lump-sum payments to the member for accrued sick leave made at any time, and lump-sum payments of accrued annual leave (also referred to as "vacation leave") made after July 1, 2010. Lump-sum payments for accrued annual leave made on or before July 1, 2010 shall be includable as annual salary only to the extent that it does not include payment for more than thirty (30) days of such leave.

(3) Payments made by a local administrative unit to a member where services are not rendered. By way of example, and with limitation to such examples: (a) payments by an employer to "buy-out" the remaining term of a member's employment contract or in connection with an early retirement program are not payments for services rendered, irrespective of whether payment is made in a lump-sum or distributed over a period of time, and (b) payments as a result of a legal settlement, whether related to the member's employment or otherwise, are not payments for services rendered, unless such payments are specifically made for salary that was not previously paid.

(4) Stipends, salary, or other compensation paid to student teachers.

(5) Stipends or one-time payments for attending training sessions where such payments are not reimbursements for travel expenses.

(6) Allowances or reimbursements for, or expenses related to, travel, housing, food, equipment, cars, or similar items.

(7) After July 1, 2012, additional pay or a pay differential that is based solely on a member performing duties at (a) a location that is different than the location at which the member regularly performs his or

her job duties or (b) that is based on the member performing duties outside of the United States and its insular areas, territories, and possessions (e.g., a location differential or hazard or hazardous duty pay).  
[2.82.3.8 NMAC - Rp, 2.82.3.8 NMAC, 7-1-2012; A, 10-15-2012; A, xx-xx-xxxx]

### **2.82.3.9 REFUNDS OF CONTRIBUTIONS:**

**A.** In the event that a member should terminate employment for reasons other than retirement, disability, or death, the member shall be entitled to a refund of the member's contributions, plus interest calculated at the refund rate, reduced by the sum of any disability benefits which that member might have previously received. Contributions made by an employer on behalf of an employee (also referred to as a "member") pursuant to Section 22-11-21(A) are "employee contributions" and are subject to refund. A member is not entitled to a refund of any "employer contributions" (also referred to as "local administrative unit contributions") made pursuant to Section 22-11-21(B) NMSA 1978. Interest paid by a member to reinstate withdrawn service credit is nonrefundable.

**B.** Any employee who was retired pursuant to the Public Employees Retirement Act (Chapter 10, Article 11 NMSA 1978) and who had made contributions to the fund prior to July 1, 2003, shall be entitled to a refund of such contributions, with interest calculated at the refund rate upon a bona fide termination of employment with the local administrative unit.

**C.** In order to obtain a refund of contributions, the eligible member must file a written request with the director on forms provided by the board.

**D.** A refund of a terminated member's contributions shall be made as soon as practical after receipt of a fully executed refund request form in the office of the board. If the member's record has been inactive for a full calendar quarter, the refund may be processed without further certification of termination by the last employer or the final monthly report upon which the member appears. If the member requesting a refund has an active record (i.e., a record reflecting contributions made in the preceding completed calendar quarter), the refund request shall not be processed without the last employer's certification of termination and the final monthly report upon which the refunding member will appear. No refund shall be processed until the board has received all required contributions. The board shall not accept contributions subsequent to the submission of the final monthly report, as certified by the employer. If a refunding member returns to employment with any local administrative unit before the refund process is complete, the refund request shall be denied. For purposes of this rule, "termination" means a complete severance of the employment relationship with no contract for, promise of, or expectation of future employment with any local administrative unit.

**E.** Refund of contributions for any period of service performed subsequent to July 1, 1957, will cancel all "prior service" credit which may have been credited to the member at the time of the refund. Restoration of all contributions withdrawn, together with interest calculated at the refund rate, will cause the prior service to be restored; provided, however, that as set forth Subsection C of [2.82.3.10 NMAC] 2.82.3.11 NMAC, effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

**F.** Whenever a terminated member leaves a balance of \$500.00 or less in the member's account, the account shall be closed into "unallocated income" after the member has been terminated for a period of not less than two years. The record of the terminated member's contribution balance at the time that it was closed into "unallocated income" shall be maintained. If the terminated member subsequently returns to employment, the balance shall be restored to that member's account. Alternatively, if the terminated member should later claim or request a refund of the amount transferred to unallocated income, such amount shall be restored to the terminated member's account and refunded.

**G.** Whenever a terminated member has received a refund in excess of the amount due the member, such excess may be "closed out" into unallocated income by the director if it does not exceed \$1,000.00 after the excess refund has been outstanding for a period of not less than two years, provided that staff has first made two or more separate attempts to contact the terminated member in writing and collect the excess refund. All such attempts must be documented by staff. All such "close out" actions shall be reported to the board in writing at its first regular meeting following that action. If a terminated member who received an excess refund that was closed into "unallocated income" should return to employment, such excess refund shall be charged to the member's contribution account.

**H.** If a terminated member shall have received a refund in excess of \$1,000.00 over the amount due that member, and two or more separate attempts have been made to contact the terminated member and collect the excess refund, the director may, after taking into account the costs of doing so, direct staff to pursue legal action to

recover the excess. If the amount is deemed uncollectible by the director, the matter shall be brought before the board to determine any further action.

**I.** Member contributions which have been withheld and paid to the educational retirement fund in error for a member who is not eligible to receive service credit for the time covered by the withholding, shall be returned to the employer, without interest, upon the member's written request or upon the board learning that the member was not eligible to receive service credit for the time covered. The employer shall be responsible for returning such contributions to the member.

[2.82.3.9 NMAC - Rp, 2.82.3.9 NMAC, 7-1-2012; A, 6-30-2016; A, xx-xx-xxxx]

**2.82.3.10 REFUNDS OF CONTRIBUTIONS IN THE EVENT OF DEATH OF MEMBER OR BENEFICIARY:**

**A.** In the event of the death of an active member who is not vested, member contributions together with interest calculated at the refund rate shall be refunded to the member's beneficiary or to the member's estate upon completion of the proper refund forms as provided for herein.

**B.** In the event of the death of a vested member who did not select Option B benefits prior to the effective date of retirement, the deceased member's beneficiary shall have the option of electing to receive a refund of the member's contributions or receiving benefits in the form of Option B as provided in Section 22-11-29 NMSA 1978. Refunds, together with interest calculated at the refund rate and reduced by the sum of any disability benefits which that member might have previously received, shall be paid to the member's surviving beneficiary or estate. If a beneficiary defers payment after the member dies as described in Section 22-11-29 NMSA 1978 and requests a lump sum payment in lieu of benefit under Option B, interest shall be calculated at the refund rate though the end of the calendar quarter prior to the date on which the completed refund request is received by the ERB. Under the provisions of Options B and C, if both the member and the designated beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference, less any disability benefits previously paid to the member, shall be paid to the member's or the beneficiary's estate.

**C.** In order to obtain a refund of contributions after the death of a member, the member's beneficiary must notify the director of the member's death and furnish a copy of the death certificate or other proof of death acceptable to the director, whereupon the director shall furnish the beneficiary the proper forms to request a refund.

**D.** If the amount of a deceased member's contribution does not exceed the sum of \$1,000.00 and no written claim is made to the board for it within one year from the date of the member's death, by the member's surviving beneficiary or estate, payment thereof may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.

[2.82.3.10 NMAC - Rp, 2.82.3.10 NMAC, 7-1-2012; A, 10-15-2012]

**2.82.3.11 RETURN OF REFUNDED CONTRIBUTIONS AND RETIREMENT ELIGIBILITY:**

**A.** Member contributions which have been withdrawn from the fund by a member who has terminated employment may be returned to the fund, together with interest at the rate set by the board, without the member being required to return to employment if the termination was under one of the following circumstances:

- (1) the member terminated employment for reasons other than by retirement, disability or death;
- (2) the member exempted himself or herself from the Educational Retirement Act; or
- (3) the member has not been reemployed following a period of disability during which the member received disability benefits.

**B.** Contributions restored to the fund after having been withdrawn by a member that were originally made prior to July 1, 1971 shall not be considered as having been paid to the fund after July 1, 1971 for the purpose of earning interest and no interest shall be paid on such restored contributions.

**C.** Effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

[2.82.3.11 NMAC - Rp, 2.82.3.11 NMAC, 7-1-2012, A, 10-15-2012]

**2.82.3.12 PURCHASE OF NON-REPORTED SERVICE; FAILURE TO DEDUCT MEMBER CONTRIBUTIONS:**

**A.** Non-reported service must be purchased at the time it is discovered [at a rate adopted by the board]. Payment for non-reported service shall be at the contribution rate in effect at the time the non-reported service is discovered. The full fiscal year salary for the position for which the member was hired shall determine whether a member pays the contribution rate applicable to members who earn \$20,000 or less per year in accordance with Section 22-11-21 NMSA 1978.

**B.** If the local administrative unit fails to deduct the applicable contribution from the salary paid to a member for each payroll period, the local administrative unit shall be responsible to remit to the fund the total amount due for both the member and the local administrative unit plus interest at a rate set by the board.

[2.82.3.12 NMAC - N, 7-1-2012; A, xx-xx-xxxx]

**2.82.3.13 INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS:** At the time of refund of a member's contributory balance, interest shall be paid at the refund rate through the end of the calendar quarter preceding the date of the refund; except that no interest shall be paid on contributions credited to a member's account for any period prior to July 1, 1971, nor shall interest be paid on contributions on deposit for less than one year.

[2.82.3.13 NMAC - N, 7-1-2012]

**HISTORY OF 2.82.3 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule III, Member and Administrative Unit Contributions, filed 7-2-82.

**History of Repealed Material:**

2.82.3 NMAC, Member and Administrative Unit Contributions, filed 11-16-2001 - Repealed effective 7-1-2012.



**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 4 SERVICE CREDIT**

**2.82.4.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
[6-30-99; 2.82.4.1 NMAC - Rn, 2 NMAC 82.4.1, 11-30-2001]

**2.82.4.2 SCOPE:** This rule applies to earned and allowed service credit.  
[6-30-99; 2.82.4.2 NMAC - Rn, 2 NMAC 82.4.2, 11-30-2001]

**2.82.4.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to ~~22-11-53~~ 22-11-55, NMSA 1978.  
[6-30-99; 2.82.4.3 NMAC - Rn, 2 NMAC 82.4.3, 11-30-2001; ~~xx-xx-xxxx~~]

**2.82.4.4 DURATION:** Permanent  
[6-30-99; 2.82.4.4 NMAC - Rn, 2 NMAC 82.4.4, 11-30-2001]

**2.82.4.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section or paragraph.  
[6-30-99; 2.82.4.5 NMAC - Rn, 2 NMAC 82.4.5, 11-30-2001]

**2.82.4.6 OBJECTIVE:** Clarifies requirements, conditions and procedures for determining a member's years of service, and the purchase of allowed service credit.  
[6-30-99; 2.82.4.6 NMAC - Rn, 2 NMAC 82.4.6, 11-30-2001]

**2.82.4.7 DEFINITIONS:** [RESERVED]

**2.82.4.8 EARNED SERVICE CREDIT:**

- A.** Earned service credit shall be granted on a quarterly basis.
- B.** A member shall receive one quarter of credit for each calendar quarter in which the member has earnings from regular employment and renders services for a minimum of 16 days. A member is considered to have rendered services for each day upon which the member is paid salary, regardless of whether the member is on annual, sick, administrative or other form of paid leave. Four calendar quarters of credit shall constitute one year. The calendar quarters of a year shall begin and end as follows: July 1 through September 30; October 1 through December 31; January 1 through March 31; and April 1 through June 30.
- C.** Members who are granted paid sabbatical leave shall receive one calendar quarter of earned service credit for each quarter in which they receive pay for such.
- D.** If a member is granted earned service credit while on paid sabbatical leave and that sabbatical leave is subsequently revoked, with salary payments returned to, or demanded by the administrative unit, under the terms of the leave agreement between the administrative unit and the member, the earned service credit granted during such sabbatical leave shall be revoked.
- E.** In the event of revocation of earned service credit as provided in Subsection D of 2.82.4.8 NMAC, disposition of contributions made by the member and local administrative unit relating to the revoked period of earned service credit shall be as follows:
  - (1)** ~~[Administrative]~~ Local administrative unit contributions shall be credited to the local administrative unit to be used against future contribution costs.
  - (2)** Before the member contribution shall be disbursed, or credited, the local administrative unit shall furnish the board with proof of the settlement which has been made with the member. Following the receipt of this proof, the member contributions shall be handled as follows:
    - (a)** If the local administrative unit has completed the financial settlement with the member without being reimbursed for member contributions relating to the leave and paid to the board, the administrative unit shall be granted credit for such member contributions to be used against the future administrative unit contribution costs.

(b) If the local administrative unit has been reimbursed by the member for member contributions relating to the leave and paid to the board, such member contributions shall be paid to the member on a refund voucher separate from any other refund which might be requested by the member.

F. An exchange teacher who is working outside the New Mexico public schools, but who is being paid a regular salary by a "local administrative unit," shall receive earned service credit for such service.

G. Provisional members who were employed between July 1, 1957 and July 1, 1961 and who were not covered at that time, may receive earned service credit for such service if the contributory requirements set forth in Section 22-11-17 are met, and if such provisional members do not exempt themselves.

H. A provisional member who has exempted himself, may revoke such exemption by filing ERA form #42 with his employer and by commencing regular contributions to the educational retirement fund on the first day of the month following the filing of ERA form #42, and earned service credit shall commence on that date.

I. A provisional member who exempted himself during the period July 1, 1957 to July 1, 1961 may receive earned service credit for service rendered prior to July 1, 1957 if he became covered under ERA subsequent to July 1, 1961 in lieu of exemption as provided in Section 22-11-17 as amended July 1, 1961. If a provisional member exempted himself from ERA coverage on or after July 1, 1961, he shall not be entitled to receive earned service credit for service rendered prior to July 1, 1957 by reason of later revoking the exemption or otherwise becoming covered.

J. G. The board shall not allow contributory service credit when token salaries are paid or when gratuitous service is performed. The ERB shall rule on each case involving gratuitous service or token salaries when each case is presented.

K. Notwithstanding Section 22-11-17(B) NMSA, 1978, a member may purchase any or all of the time that the member was exempt from ERA coverage. The cost of purchase shall be as prescribed in Section 22-11-17(C) or (D), NMSA, 1978, except that if the member purchases only a portion of the total exempt time, the cost shall be calculated by multiplying the cost of the exempt time by the ratio of time purchased to the total exempt time. Prior service, which was canceled due to the member's exemption, shall be restored in the same proportion as the exempt time purchased to the total exempt time. Any contribution paid through a payroll deduction plan as prescribed in Section 22-11-21.3 must be done under the local administrative unit's payroll deduction plan, and not through partial payments made to ERB. ERB shall not accept such partial payments as any service time purchased under Section 22-11-17(C) or (D) must be paid to ERB in a lump sum.

L. In the event that a member was neither covered nor exempt from coverage under ERA, the member shall have the right to purchase such service, or portion thereof, at a cost calculated in the same manner as for the purchase of exempt service delineated in Section 22-11-17(C). In such cases, the local administrative unit must pay the employer cost, but only if the member purchases non-covered time.

M. H. The board may accept rollover and employer payroll deduction contributions for the restoration of withdrawn earned service credit if the following conditions are met:

(1) The payments must be all or a portion of the member's interest qualified under Section 401(a) of the Internal Revenue Code.

(2) The payments shall contain only tax-deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases or indemnification to the board against any and all liabilities that may be connected with the transfer, verifying that the proposed transfer is a qualifying contribution under the Internal Revenue Code.

(3) Payroll deductions and employer pickups are authorized by the governing body of the ERA employer.

(4) The board may not accept rollover or employer pickup payroll deduction contributions in excess of the amount required to restore the withdrawn earned service credit.

N. I. For payments to restore earned service credit which commence on and after January 1, 2002, the board may accept rollover and transfers if the following conditions are met:

(1) Rollovers must be eligible rollover distributions that are not includible in the income of the member by reason of Internal Revenue Code sections 402(c), 403(b)(8), 408(d) or 457 (e)(16).

(2) Transfers must be direct trustee-to-trustee transfers from a qualified plan described in Internal Revenue Code section 401(a) or 403(a), an annuity contract described in Internal Revenue Code section 403(b) to the extent permitted by Internal Revenue Code section 403(b)(13), or an eligible plan under Internal Revenue Code section 457(b) to the extent permitted by Internal Revenue Code section 457(e)(13).

(3) The rollovers and transfers shall contain only pre-tax deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases, or

indemnification to the board against any and all liabilities that may be connected with the rollover or transfer verifying that the proposed rollover or transfer is permissible under the Internal Revenue Code.

(4) Payroll deduction contributions shall no longer be allowed for the purchase of earned service credit if the contributions would commence on or after July 1, 2002.

(5) The board may not accept rollovers or transfers in excess of the amount required to restore the withdrawn earned service credit.

[6-30-99; 2.82.4.8 NMAC - Rn, 2 NMAC 82.4.8, 11-30-2001; A, 4-15-2002; A, 7-15-2003; A, 6-16-2015; A, 6-30-2016; xx-xx-xxxx]

#### **2.82.4.9 ALLOWED SERVICE CREDIT:**

**A.** For purposes of granting allowed service credit pursuant to Section 22-11-34A(2) NMSA 1978, a member engaged in military service that interrupted the member's employment under a state system in New Mexico shall return to employment within eighteen months following honorable discharge.

(1) In order to claim such service credit the member shall furnish documentary evidence of: (a) the member's entry into and honorable discharge from military service; (b) the dates of service to an affiliated public employer prior to entry into military service.

(2) The director shall review the members' request for allowed service credit based upon the documentary evidence presented, and, in the director's discretion, shall request additional documentation to verify the member's eligibility for such allowed service credit.

**B.** For purposes of granting allowed service credit pursuant to Section 22-11-34A(3) NMSA 1978, a member engaged in United States military service, shall:

(1) be honorably discharged from such service;

(2) have five or more years of contributory employment at the time of the application for allowed service credit, in order to be eligible to purchase allowed service credit pursuant to Section 22-11-34A(3) NMSA 1978;

(3) contribute to the fund, for each year of service credit the member elects to purchase, a sum equal to the member's average annual actual salary for the five years of contributory employment preceding the date of the contribution multiplied by the sum of the member's contribution rate and the employer contribution rate in effect at the time of the member's written election to purchase, subject to the federal Uniformed Services Employment and Reemployment Rights Act of 1994;

(4) full payment shall be made in a single lump sum within sixty days of the date that the member is informed of the amount of the payment;

(5) the portion of the purchase cost derived from the employer's contribution rate shall be credited to the fund and, in the event that a member requests a refund of contributions pursuant to Section 22-11-15 NMSA 1978, the member shall not be entitled to a refund of that portion of the purchase cost derived from the employer contribution rate;

(6) the director shall use the salary information on file with the board in determining "average annual actual salary" under Section 22-11-34A(3) NMSA 1978; if reasonable evidence of the salaries earned is not available, the director shall set amounts to be used which, in his opinion, are representative of reasonable annual salaries for the periods of contributory employment for the position held by the applicant at that time;

(7) when the actual cost of purchase of allowed service credit for periods of military service is calculated under Section 22-11-34A(3) NMSA 1978, the "average annual actual salary" shall be based upon the member's most recent twenty calendar quarters of contributory employment prior to the date on which he makes payment;

(8) no allowed service credit shall be granted for service not performed by the member by reason of service in the uniformed services of the United States, nor for periods of service in the military reserves or national guard for short term training during which the member was not activated pursuant to a federal call to duty, deployment or peacekeeping mission or other declared national emergency;

(9) purchase of allowed service credit as provided in Section 22-11-34A(3) NMSA 1978, may be carried out only while the member is currently employed by an administrative unit;

(10) the provisions of 2.82.10.8 NMAC shall apply to purchase of allowed service credit under this paragraph;

(11) a member who has forfeited service credit may reinstate such service credit in order to establish the minimum period of contributory employment required by this subsection by repayment of withdrawn member contributions in the manner required by Section 22-11-33C NMSA 1978; such repayment shall be made at

the same time as the lump sum payment for allowed service credit as specified in Section 22-11-34A(3) NMSA 1978.

**C.** Notwithstanding the provisions of Subsection A of 2.82.3.8 NMAC the "annual actual salary" to be used in calculating the cost of allowed service credit described in Section 22-11-34A(3) and (4) shall be an annualized salary. For the purpose of this rule, employment shall be viewed as either full-time or part-time employment, and an annualized salary shall be defined as follows.

(1) For full-time employees: The annual salary as defined in Subsection A of 2.82.3.8 NMAC.

(2) For part-time employees: The total remuneration for the part-time employment divided by the full-time equivalency, as defined by the director at the time of the contribution. In no event shall allowed service credit contributions be granted for any calendar quarter in which the member did not work more than .25 of the full-time equivalency for the applicable position as determined pursuant to rules enacted by the board or the director.

(3) For employees on sabbatical leave: The amount that would have been earned during the entire year had the member been on regular assignment. In determining the full-time equivalency of an employee, the director may refer to the administrative unit's approved budget for the fiscal year under consideration.

**D.** For the purpose of granting allowed service credit, pursuant to Section 22-11-34A(4) NMSA 1978, a "public school or public institution of higher learning" in another state, territory, or possession of the United States shall be taken to mean one that is open to the public without regard to race, creed, or color, and such school or institution need not be tax supported. The out-of-state public school shall be accredited by the state in which it is located or another accrediting organization which is recognized by the state. Service credit purchasable pursuant to Section 22-11-34A(4)(a) NMSA 1978 shall not include employment as a graduate assistant, teaching assistant or teaching fellow or in any position of a similar nature while the member was enrolled as a student in that institution.

**E.** Prior to the purchase of allowed service credit under ~~Section 22-11-34 4(d)~~ ~~Section 22-11-34A(4)(d)~~, NMSA, 1978, a member must provide satisfactory evidence that the private school was accredited by the state board of education at the time of the member's employment.

**F.** The board may accept rollover and employer pickup payroll deduction contributions for the purchase of allowed service credit if the following conditions are met.

(1) The payments must be all or a portion of the member's interest qualified under Section 401(a) of the Internal Revenue Code.

(2) The payments shall contain only tax-deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases or indemnifications to the board against any and all liabilities that may be connected with the transfer, verifying that the proposed transfer is a qualifying contribution under the Internal Revenue Code.

(3) Payroll deductions and employer pickups are authorized by the governing body of the ERA employer.

(4) The board may not accept rollover or employer pickup payroll deduction contributions in excess of the amount required to purchase the allowed service credit.

**G.** For payments to purchase allowed service credit which commence on and after January 1, 2002, the board may accept rollover and transfers if the following conditions are met.

(1) Rollovers must be eligible rollover distributions that are not includible in the income of the member by reason of Internal Revenue Code sections 402(c), 403(b)(8), 408(d) or 457 (e)(16).

(2) Transfers must be direct trustee-to-trustee transfers from a qualified plan described in Internal Revenue Code section 401(a) or 403(a), an annuity contract described in Internal Revenue Code section 403(b) to the extent permitted by Internal Revenue Code section 403(b)(13), or an eligible plan under Internal Revenue Code section 457(b) to the extent permitted by Internal Revenue Code section 457(e)(13).

(3) The rollovers and transfers shall contain only pre-tax deferred contributions and earnings on the contributions. The member and employer must submit satisfactory documentation, releases, or indemnification to the board against any and all liabilities that may be connected with the rollover or transfer verifying that the proposed rollover or transfer is permissible under the Internal Revenue Code.

(4) Payroll deduction contributions shall no longer be allowed for the purchase of allowed service credit if the contributions would commence on or after July 1, 2002.

(5) The board may not accept rollovers or transfers in excess of the amount required to purchase the allowed service credit.

[6-30-99; 2.82.4.9 NMAC - Rn, 2 NMAC 82.4.9, 11-30-2001; A, 4-15-2002; A, 10-31-2002; A, 12-31-2009; xx-xx-xxxx]

**2.82.4.10 RETURN TO WORK:** No service credit can be earned, purchased or otherwise credited for any of the time a retired member is employed by ~~an~~ a local administrative unit while the member is participating in the return to work program of the Act or the return to work exception. While a member is participating in the return to work program or the return to work exception, no service credit can be purchased for service previously earned or withdrawn.

[2.82.4.10 NMAC - N, 11-30-2001; xx-xx-xxxx]

**HISTORY OF 2.82.4 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with The State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule IV, Service Credit, filed 7-2-82.

**History of Repealed Material:** [RESERVED]

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 5 RETIREMENT BENEFITS**

**2.82.5.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
[6-30-99; 2.82.5.1 NMAC - Rn, 2 NMAC 82.5.1, 11-30-2001]

**2.82.5.2 SCOPE:** This rule applies to procedures and eligibility for retirement, and the calculation of and selection of options for benefits.  
[6-30-99; 2.82.5.2 NMAC - Rn, 2 NMAC 82.5.2, 11-30-2001]

**2.82.5.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to ~~22-11-53~~ **22-11-55**, NMSA 1978.  
[6-30-99; 2.82.5.3 NMAC - Rn, 2 NMAC 82.5.3, 11-30-2001; **A, xx-xx-xx**]

**2.82.5.4 DURATION:** Permanent  
[6-30-99; 2.82.5.4 NMAC - Rn, 2 NMAC 82.5.4, 11-30-2001]

**2.82.5.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section or paragraph.  
[6-30-99; 2.82.5.5 NMAC - Rn, 2 NMAC 82.5.5, 11-30-2001]

**2.82.5.6 OBJECTIVE:** To specify procedures for retirement, benefits and options, and provide rules for the restoring process.  
[6-30-99; 2.82.5.6 NMAC - Rn, 2 NMAC 82.5.6, 11-30-2001]

**2.82.5.7 DEFINITIONS:** [RESERVED]

**2.82.5.8 ELIGIBILITY:**

**A.** A member shall not be considered eligible to retire unless he shall have completed at least ~~one year~~ **five years** of contributory employment even though such member might otherwise be eligible by reason of age and service, and tender of payment for contributory employment.

**B.** A school bus owner-driver shall not be eligible to retire unless he/she terminates the owner- driver contract with the public schools.  
[6-30-99; 2.82.5.8 NMAC - Rn, 2 NMAC 82.5.8, 11-30-2001; **A, xx-xx-xxxx**]

**2.82.5.9 APPLICATIONS:**

**A.** Retirement application forms furnished by the director and made available in each local administrative unit, may be initiated by the member or his employer. The member may also write to the director to apply for benefits. In either case, the application must be signed by the member.

**B.** If a member seeking retirement is not employed at the time of application, the director shall deal directly with the member in processing the application, without reference to, or concurrence of the last employer.

**C.** The application for retirement (being the completed form supplied by the director) must be filed in the office of the director prior to the desired effective date of benefits.

**D.** A member who has been re-employed following a previous retirement shall make application for benefits in the same manner as one who has not previously been retired.

**E.** Any member with an effective retirement date on or after July 1, 2015 shall provide authorization to the director for the electronic transfer of pension payments to the retiree's banking institution. Such authorization shall be executed in the form prescribed by the director. The director may waive this requirement upon a showing of exceptional circumstances.

**F.** In order to implement Section 22-11-32, the director shall, at the time of the member's application for benefits, obtain the member's written statement that he or his beneficiary does or does not receive any other benefit from any public agency which would be adversely affected by his or his beneficiary's receipt of benefits pursuant to the Educational Retirement Act. If he or his beneficiary does, or will receive such benefits, the director shall make the benefit adjustment called for in this section.

**2.82.5.10 COMPUTATION AND COMMENCEMENT OF RETIREMENT BENEFITS:**

**A.** Upon retirement, the following procedures shall apply with regard to commencement of the member's benefit:

(1) If the retiring member's employment terminated at least 90 days prior to the effective date of retirement, the benefit may be commenced at the end of the month following the effective date of retirement.

(2) If the retiring member's employment terminated within 90 days prior to the effective date of retirement, the retiring member's benefit may be estimated by the director and commenced at the end of the month following the effective date of retirement.

(3) After the employer report is received from the administrative unit, reporting the retiring member's final earnings, the director shall determine whether or not the estimated benefit is correct. If the estimated benefit is incorrect, the director shall make the appropriate adjustment to the member's benefit, retroactive to the effective date of the benefit. This adjustment, if required, shall be made at the earliest practical date. The retiring member shall be advised regarding the nature of any such adjustment. An adjustment will be made in this manner if and only if the adjustment based upon the member's actual earnings would result in a monthly benefit which differs more than \$1 from the estimated benefit.

**B.** Whenever a retiring member completes the academic or fiscal year prior to July 1, he shall not be entitled to retirement benefits for the months of July or August if he returns to employment at the beginning of the next following academic or fiscal year. If a member shall have received benefits for such months, he shall be required by the director to return the sums received, to the educational retirement fund, in accordance with Section 22-11-40, NMSA, 1978 Compilation.

**C.** The retiring member shall be furnished with copies of all computations including a listing of his service credit, and he shall have 90 days after receipt of same in which to file notice of correction with the director, after which time the computations and service may not be corrected by the member.

**D.** A member's average annual salary as defined in Section 22-11-30 shall be the average annual earnings of the member in the last twenty calendar quarters in which there were earnings preceding retirement or the average annual earnings of any twenty consecutive calendar quarters in which there were earnings, whichever is greater.

~~**E.** — No member covered under the Educational Retirement Act prior to July 1, 1957 may receive a benefit computed under the terms of Section 22-11-44 unless such member shall have fulfilled all of the requirements of the retirement law repealed by the Educational Retirement Act; however, in determining whether the member has five years of service consecutive and immediately prior to the date of retirement, the director may allow an interruption of such service of not to exceed one calendar quarter.~~

~~**F.**~~ **E.** ~~When~~ When determining a member's last five-year average annual salary (last twenty calendar quarters), the director shall use the reported earnings on which ~~contribution has~~ contributions have been made by the member during the twenty quarters of employment immediately preceding the member's date of termination, except that if a member's last employment terminated at least one month prior to the close of the calendar quarter (or one month prior to the close of the academic year if such ends in May), his last five years' earnings shall be the reported earnings upon which contributions have been made by the member during the five years of employment preceding the end of the month in which termination occurs. In such cases, any earnings in a calendar quarter shall be considered as earnings for the full quarter, except for the first quarter and the last quarter of the last five years of employment.

~~**G.**~~ **F.** When the member's application for benefits has been approved and his effective date of retirement has been reached, the member shall then be retired.

~~**H.**~~ **G.** Benefits shall not be commenced until the retiring member has elected the retirement benefit as provided in Section 22-11-30, or an optional benefit pursuant to Section 22-11-29.

~~**I.**~~ **H.** Re-retirement benefits shall be computed in the following manner:

(1) The re-retirement benefit will be calculated in the same way as his last benefit and will be based on the last five-year average or the highest consecutive five-year average, whichever is greater, for which contributions were made, and his total service at re-retirement. The retirement benefit formula will be the same as at last retirement unless the member returns to employment for at least four quarters after the effective date of change in the formula. If this occurs, the benefit computation will be based on the benefit formula in effect at the time of re-retirement.

(2) The re-retirement benefit calculated above is reduced under the following conditions:

(a) At re-retirement the member's retirement age shall be his chronological age less any period of time(s) during which benefits were received while in retirement. If this age is under 60 and his total service is under 25 years, his benefit is reduced by .6% for each quarter year under 60, down to age 55, plus 1.8% for each quarter year this age is under 55.

(b) If the last benefit was payable as a reduced benefit under the terms of an option, the same terms and reduction shall apply to the re-retirement benefit.

(c) In no case can his re-retirement benefit be less than he was receiving when he returned to employment.

[6-30-99; 2.82.5.10 NMAC - Rn, 2 NMAC 82.5.10, 11-30-2001; A, 10-31-2002; A, xx-xx-xxxx]

**2.82.5.11 EFFECTIVE DATE OF BENEFIT:**

A. Whenever a retiring member completes the academic year for which he has been contracted or employed, his effective date of retirement shall be July 1, provided that application is made as stipulated in Subsection B of 2.82.5.11 NMAC. Whenever a retiring member terminates at a time other than at the end of the academic year for which he has been contracted or employed, the effective date may be the first day of the month following termination, provided that application must be as stipulated in Subsection B of 2.82.5.11 NMAC.

B. The effective date of benefits cannot in any case be earlier than the first day of the month following receipt of the completed application forms (as provided by the director) from the member or his employer, except as provided in Subsection D of 2.82.5.11 NMAC.

C. Section 22-11-28 shall be construed to mean that the effective date of benefits shall be in accordance with Section D [~~Paragraph (1) and (2)~~] of this Rule, and further that on concurrence of the local administrative unit for retirement on a date other than July 1 has been given when the local administrative unit certifies the member's termination on the application form.

D. If a member's application for benefits is received after the effective date desired by the member, and such desired effective date would otherwise be in accordance with the law and rules of the board, the director may commence the member's benefit as of such date, only if the delay in filing was due to delay in processing by the local administrative unit, and not due to any fault or wish of the member. The director shall also consider an application to have been duly filed in this office on the date postmarked if the application is mailed.

[6-30-99; 2.82.5.11 NMAC - Rn, 2 NMAC 82.5.11, 11-30-2001]

**2.82.5.12 APPROVAL OF RETIREMENT APPLICATION:** The director of educational retirement is authorized to approve duly executed applications for age and service retirement on behalf of the board in order to insure timely approval of same; however, all such approvals must be ratified by the educational retirement board at a subsequent meeting of the board.

[6-30-99; 2.82.5.12 NMAC - Rn, 2 NMAC 82.5.12, 11-30-2001]

**2.82.5.13 OPTIONS:**

A. Option B provided in accordance with Section 22-11-29, Paragraph D, shall be operative:  
(1) during periods of non-participation, if contributions are not withdrawn, and  
(2) during periods of time when a member is receiving disability benefits, and  
(3) during the period of time from a member's effective retirement date until the final election of option is received in the ERB office.

B. If a member with option B coverage should terminate employment and withdraw his contributions, thereby causing the option B to become inoperative, the member may restore the amount withdrawn, together with required interest, and cause the option to become operative again.

C. An option election on file with the director by a member who has not retired shall become void on July 1, 1984 at which time the member will automatically be afforded the coverage of option B.

D. Upon retirement, a member may elect an optional benefit in accordance with Section 22-11-29. If electing coverage under Option B, the member may not designate a beneficiary more than 10 years younger than the member unless the beneficiary is the member's spouse. In order that the retiring member may have the opportunity to properly consider this decision and to allow sufficient time for the member and the board to carry out necessary administrative procedures relating to the election of an option, an option election filed with the director subsequent to the effective date of retirement, but prior to commencement of benefit payments, shall be deemed to have been filed in accordance with the provisions of Section 22-11-29 NMSA 1978.

E. Whenever a member with option B coverage dies prior to the member's effective retirement date, it shall be incumbent upon the member's beneficiary to furnish proof of death to the director. The director shall then



advise the beneficiary of the amount payable as a lump-sum settlement. Additionally, the director shall advise the beneficiary of the monthly amount of benefit payable as of the first of the month following the death of the member, as well as the approximate monthly amount payable, if the beneficiary defers receipt of the benefit to the date on which the member would have been age 60, had the member lived. The beneficiary shall then advise the director, in writing, whether he wishes to receive a lump-sum payment, commence the benefit at the earliest possible date, or defer the benefit to a date not later than the date on which the member would have attained age 60, had the member lived. If the beneficiary chooses a monthly benefit, he shall not be required to make formal application for such benefit as required of members seeking retirement status. If the beneficiary chooses to defer the benefit to a later date, he must advise the director at least thirty days in advance of the date on which he wishes benefit to start.

**F.** Upon the death of a member who has the automatic option B coverage, and who has failed to name or who has incorrectly named a beneficiary under the option, the following shall apply:

- (1) If the member has named one person on the form 42, that person shall be declared the beneficiary under option B.
- (2) If more than one person is named on the form 42 of which one is the spouse of the member, the spouse shall be declared the beneficiary for option B purposes.
- (3) If the beneficiary named on the form 42 is deceased, a lump-sum payment of contributions plus applicable interest will be paid to the estate of the member.
- (4) If the beneficiary named on the form 42 is a minor child, the legal guardian, if other than the parent, will designate the manner in which the alternative payments under option B will be paid to the minor.
- (5) If the beneficiary named on the form 42 is a minor child in the care and custody of a parent, the parent shall designate the method of payment to the minor child under the option B.
- (6) If more than one person is named on the form 42, none of which is the spouse of the member, a lump-sum payment of contributions plus appropriate interest shall be made to the beneficiaries as per the directions of the member on the form 42. In the absence of contrary directions by the member, equal shares will be made. If one or more of the beneficiaries are minors, the distribution to the minor(s) shall be made to:
  - (a) a trust fund for the minor(s), if established, or
  - (b) on behalf of the minor(s), a person who has care and custody of the minor, or
  - (c) directly to the beneficiary(ies) upon attainment of age 18.
  - (d) these methods of distribution of payments shall also apply to Paragraphs 4 and 5 above.

(7) If a person(s) is not named on the form 42, a lump-sum payment of the member's contributions plus applicable interest will be made as the member has directed on the form 42. [6-30-99; 2.82.5.13 NMAC - Rn, 2 NMAC 82.5.13, 11-30-2001; A, 6-30-2016]

#### **2.82.5.14 COST-OF-LIVING ADJUSTMENTS:**

**A.** The adjustment factor to be applied annually to eligible benefits shall be determined by using the "Consumer Price Index for All Urban Consumers U.S. City Average All Items".

**B.** If a member who was certified by the board as disabled at the time of regular retirement returns to gainful employment with a local administrative unit in a position commensurate with the member's background, education and experience, the member's benefit shall no longer be subject to adjustments as provided for in Subsection G of Section 22-11-31 NMSA 1978. Any adjustments made prior to the date of reemployment shall remain in effect. All future adjustments shall be made solely as provided for in Subsections B and C of Section 22-11-31, NMSA 1978.

[6-30-99; 2.82.5.14 NMAC - Rn, 2 NMAC 82.5.14, 11-30-2001; A, 6-30-2016]

#### **2.82.5.15 RETURN TO WORK PROGRAM:**

**A.** In order to qualify to return to employment (hereinafter "return to work") as provided for in Subsections A and E of Section 22-11-25.1, NMSA 1978, a retired member must have a period of at least twelve consecutive months in which they have not been employed as an employee or independent contractor by a local administrative unit (hereinafter, a "break in service").

(1) To satisfy the requirements of a "break in service," the retired member must not have rendered service of any nature whatsoever to a local administrative unit for the twelve consecutive month period. "Service" shall be defined to include, without limitation, all employment whether full time, part-time including service allowed under [Paragraph (1) of] Subsection B of 2.82.2.11 NMAC, substitute teaching, performing duties as a volunteer, which would otherwise be, or in the past have been, performed for the local administrative unit by a paid employee or independent contractor, or services rendered as an independent contractor, an employee of an

independent contractor, or any other employment as described in Subsections A through D of 2.82.2.11 NMAC. A "local administrative unit" shall include any entity controlled by or subject to the control of a local administrative unit, including without limitation, a corporation or other entity regardless of legal form and of whether such corporation or entity is created for profit or non-profit purposes.

(2) The break in service must have commenced after the effective date of retirement and been completed prior to the first day of re-employment, but need not have been the twelve consecutive months immediately prior to the first day of such re-employment (i.e. the break in service could have occurred at any time during the period after the effective date of retirement and before the first day of re-employment but must have been at least twelve consecutive months within that period). [After completing a twelve consecutive month break in service, a retired member may work .25 FTE or less as provided by Paragraph (1) of Subsection B of 2.82.5.16 NMAC, without affecting that member's eligibility for the return to work program.]

**B.** In addition to a break in service of at least twelve consecutive months, in order to satisfy the provisions of Section 22-11-25.1 (E), a member who retired on or before January 1, 2001, and who subsequently removed him or herself from retirement (also referred to as "suspending retirement") pursuant to Section 22-11-25, NMSA 1978, and thereafter re-retired, must complete an additional period of at least ninety days after the re-retirement, during which the retired member has not been employed as an employee or an independent contractor by a local administrative unit. During the ninety day period, the retired member must satisfy the same requirements regarding employment by a local administrative unit as must be satisfied for a twelve consecutive month break in service. The ninety day period shall not include any portion of the period used to satisfy the twelve consecutive month break in service. In addition, the ninety day period shall not include any scheduled breaks, vacations, paid administrative or sick leave, or holidays consisting of more than two business days.

**C.** Any and all time that a retired member has provided service to a local administrative unit under the return to work program cannot be used in the calculation of retirement benefits and a retired member is not entitled to acquire service credit or to acquire or purchase service credit in the future for the period of the retired member's re-employment with a local administrative unit under the return to work program.

**D.** No retired member is eligible for the return to work program until the member submits a completed, signed and notarized return to work form as supplied by ERB, (the "return to work application"), verifying their eligibility for the return to work program.

**E.** The date of suspension of retirement for any retired member shall be the last day of the month in which the member suspended retirement.

**F.** Any retired member who is participating in the return to work program who has violated the provisions of the program, failed to submit the required return to work application, or is discovered to have been ineligible to participate in the program shall have their retirement immediately suspended and shall pay the educational retirement fund a sum equal to all retirement payments that they have received while ineligible under the provisions of the return to work program plus interest at a rate to be set by the board. Before his or her monthly retirement benefits can resume, the suspended retired member must certify to the ERB that they have terminated any and all employment that would disqualify them from retirement under the Educational Retirement Act. To re-qualify for the return to work program, the retired member must complete the minimum break in service as described in Subsection A of ~~[2.82.5.15]~~ 2.82.5.15 NMAC, calculated from the date of reinstatement of retirement.

**G.** A retired member is qualified under Section 22-11-25.1(B) to return to full time employment without being required to suspend retirement benefits if the member:

- (1) retired on or before January 1, 2001; and
- (2) did not work more than .25 FTE at any time after January 1, 2001 or provide any other service to a local administrative unit after that date that would have required the member to suspend retirement benefits under the act; and
- (3) did not suspend retirement after January 1, 2001; and
- (4) completed a return to work application with ERB.

**H.** Member's qualifying under Section 22-11-25.1(B) may begin full time employment immediately after ERB approval without any additional waiting period. [2.82.5.15 NMAC - N, 11-30-2001; A, 12-14-2001; A, 10-31-2002; A, 7-15-2003; A, 12-31-2008; A, 6-16-2015; A, xx-xx-xxxx]

#### **2.82.5.16 RETURN TO WORK EXCEPTION:**

**A.** A retired member may return to employment (includes "substitution") and earn up to \$15,000 per fiscal year or the amount possible under the .25 or less FTE provision, whichever is greater, without affecting the retired member's retirement benefit. For purposes of this provision, earnings shall include bonuses, annual and sick

leave payouts, and any other form of cash remuneration for services rendered except for reimbursements and allowances for expenses.

**B.** In the event that a retired member enters into an agreement which provides for earnings in excess of the above limits or the retired member actually has earnings in excess of the above limits, the retired member's retirement benefit will be suspended for the duration of the employment, and the retired member will be returned to an active status effective the first day of the month following the month in which the retired member has earnings in excess of the above limits. The retired member shall pay the educational retirement fund a sum equal to all retirement payments that they have received while ineligible under the provisions of the return to work exception plus interest at a rate to be set by the board.

**C.** A retiree who is participating under the return to work program may elect to switch to the return to work exception. Such election shall be effective the first day of the quarter following the date of the election. [2.82.5.16 NMAC - N, 6-28-13; 2.82.5.16 NMAC - N, 6-16-2015]

**2.82.5.17 TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS:** The rights of members to benefits accrued, to the extent funded, will become vested to the extent required by and upon the events set forth in Treas. Reg. Section 1.401-6(a)(1). *See* 26 CFR 1.401-6. [2.82.5.17 NMAC - Rn, 2.82.5.16 NMAC, 6-16-2015]

**2.82.5.18 INTERNAL REVENUE CODE SELECTION:** The Educational Retirement Act of New Mexico is intended to satisfy Section 401(a) of the Internal Revenue Code and to be a governmental plan within the meaning of Section 414(d) of the Internal Revenue Code. [2.82.5.18 NMAC - N, 6-16-2015]

**2.82.5.19 ROLLOVER DISTRIBUTIONS FOR NON-SPOUSE BENEFICIARIES:** The Educational Retirement Act shall allow direct rollovers to non-spouse beneficiaries for lump sum distributions only, and such distributions must be requested before the end of the year after the year of the member's death. No partial rollovers shall be permitted. A direct rollover by a non-spouse beneficiary must be made into a traditional or roth IRA established on behalf of the designated beneficiary and that will be treated as an inherited individual retirement account (IRA) pursuant to the provisions of Section 402(c)(11) of the Internal Revenue Code. The distribution must also otherwise satisfy the definition of an "eligible rollover distribution" under Section 401(a)(31) of the Internal Revenue Code. All other current rules applicable to rollover distributions under the Educational Retirement Act, or adopted by the board pursuant to the Educational Retirement Act, must be followed. The non-spouse beneficiary shall be notified that he or she is responsible for following the applicable minimum required distribution rules under Section 401(a)(9) of the Internal Revenue Code. [2.82.5.19 NMAC - N, 6-16-2015]

**2.82.5.20 DEATH BENEFITS WHILE PERFORMING MILITARY SERVICE:** In the case of a death or disability occurring on or after January 1, 2007, if a participant dies while performing qualified military service (as defined in section 414(u)), the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service not otherwise credited under the terms of the Educational Retirement Act) provided under the plan as if the participant had resumed and terminated employment on account of death. [2.82.5.20 NMAC - N, 6-16-2015]

**HISTORY OF 2.82.5 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule V, Retirement Benefits, filed 7-2-82.

**History of Repealed Material:** [RESERVED]

This rule was filed as 2 NMAC 82.6.

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 6 DISABILITY BENEFITS**

**2.82.6.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.  
[6/30/99; Recompiled 10/01/01]

**2.82.6.2 SCOPE:** This rule applies to ERA disability retirement.  
[6/30/99; Recompiled 10/01/01]

**2.82.6.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to ~~22-11-53~~ 22-11-55, NMSA 1978.  
[6/30/99; Recompiled 10/01/01, ~~xx-xx-xx~~]

**2.82.6.4 DURATION:** Permanent.  
[6/30/99; Recompiled 10/01/01]

**2.82.6.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section or paragraph.  
[6/30/99; Recompiled 10/01/01]  
[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

**2.82.6.6 OBJECTIVE:** Clarification of procedures and requirements for disability benefits.  
[6/30/99; Recompiled 10/01/01]

**2.82.6.7 DEFINITIONS:** [RESERVED]

**2.82.6.8 ELIGIBILITY:**  
~~**A.** The member is eligible when he has met the statutory requirements for service and extent of disability if application is filed as provided in ~~Section 9, Paragraph 1 of this rule [now Subsection A of 2.82.6.9 NMAC]~~ Subsection A of 2.82.6.9 NMAC.~~  
~~**B.** A school bus owner driver shall not be eligible for disability benefits unless he/she terminates the owner driver contract with the public schools.~~  
[6/30/99; Recompiled 10/01/01; ~~xx-xx-xxxx~~]

**2.82.6.9 APPLICATION:**

- A.** An application for benefits may be filed prior to, and in anticipation of a member's termination by reason of disability, or within a reasonable time following the date of termination.
- B.** Application for disability may be initiated by the member or his employer on forms furnished by the director and made available in each local administrative unit. The member may also write to the director to apply for benefits.
- C.** If the applicant for disability benefits is not employed at the time of application, the director shall deal directly with the member in processing the application, without reference to, or concurrence of, the last employer.
- D.** At the time of application, the member shall furnish medical proof satisfactory to the educational retirement board, that his termination of employment is, or was, a direct result of his disability. The member's employer, or former employer shall also be requested to advise the board, in writing, of all facts pertinent to the applicant's termination, of which the employer has knowledge.
- E.** Applicant shall furnish a list of all physicians who have examined or treated the member regarding the disability and provide copies of their reports, shall provide copies of any and all vocational rehabilitation reports and work performance evaluation reports made since the disability was incurred and shall provide any other

information requested by the educational retirement board, the medical review ~~[board] authority [or the medical appeals panel]~~ or medical appeals hearing officer.

F. An applicant may review any and all evidence, physician reports etc., which the medical review ~~[board] authority or medical appeals hearing officer~~ has which pertains to his/her case.  
[6/30/99; Recompiled 10/01/01, xx-xx-xx]

#### **2.82.6.10 EFFECTIVE DATE OF BENEFITS:**

A. The effective date of disability benefits shall be the first day of the month following the member's termination of employment, or the first day of the month following receipt of the member's application, whichever is later.

B. The applicant for disability benefits shall not be considered to have terminated employment until all accumulated sick leave granted by the employer shall have been used. If the employer pays the member's accumulated sick leave in a lump-sum, the member's termination date shall be the date on which the last day would have been paid had payment been made in due course, rather than in a lump-sum.

C. In the absence of any other formal declaration of termination of employment, the member's application for disability benefits shall serve as declaration as of the date indicated thereon by employer.  
[6/30/99; Recompiled 10/01/01]

#### **2.82.6.11 DETERMINATION OF DISABILITY:**

~~A. Coincident with the initiation of disability application forms, the director shall make an appointment with a medical examiner, located in the state of New Mexico, for the examination of the applicant, and the applicant shall be advised of the date and hour of such appointment.~~

~~B. The medical examiner shall report his findings to the director who shall present same at the next meeting of the medical review board who will formulate a recommendation to the retirement board for action, or if the medical review board is unable to determine the extent of disability based upon the examiner's report, further examination and reports may be required for submission to the medical review board until said board can determine a recommended course of action for the retirement board.~~

~~C. A.~~ The medical review ~~[board] authority~~ shall, in its recommendation to the educational retirement board, report whether the applicant is or is not totally disabled to continue with his employment and unable to obtain and retain other gainful employment commensurate with his/her background, education and experience. In cases of recommended denials, reasons with sufficient detail shall also be provided.

~~D. An applicant who does not suffer from a disability which significantly limits his/her ability to perform basic work activities, i.e. abilities and aptitudes necessary to do most jobs, will be denied disability without reference to applicant's background, education and experience. In such cases, the recommendation should state that the applicant does not suffer from a disability which significantly limits his/her ability to perform basic work activities.~~

~~E. B.~~ When considering an applicant's background, education and experience, the guidelines established by the social security administration, vocational opinions, guides, books or reports and any other relevant information may be used.

~~F. C.~~ If recommending disability benefits to the educational retirement board, the medical review ~~[board] authority or medical appeals hearing officer~~ may, if appropriate, recommend that the applicant be referred to the division of vocational rehabilitation ("DVR") for its provision of available services to the disabled member.  
[6/30/99; Recompiled 10/01/01, xx-xx-xx]

#### **2.82.6.12 CONTINUATION OF DISABILITY BENEFITS:**

A. The requirements of Section 22-11-36 NMSA 1978 shall be met in the following manner:

(1) Each recipient of disability benefits shall be required to ~~[either]~~ furnish a report from ~~[his] his/her~~ personal physician ~~or health care provider~~ or report to an assigned medical examiner for examination at least once each year following approval of disability status. The frequency of examination (not less than once each year) ~~[and whether such shall be by special appointment or by personal physician]~~ shall be determined in each individual case by the medical review ~~[board] authority~~ based upon the nature and extent of the disability. The ~~[retirement board] director~~ shall, in all cases, retain the authority to require ~~[further examinations] an independent medical examination~~ not called for by the medical review ~~[board] authority~~.

(2) Periodic examination reports on disability cases shall be studied by the medical review ~~[board] authority~~ who shall make recommendations to the retirement board for consideration and action, and in no case shall a disability benefit be discontinued without the action of the retirement board.

**B.** If a member approved for disability is age 60 or more at the time of approval, or ~~if he~~ is receiving disability benefits when ~~he~~ the member becomes age 60, ~~he~~ the member shall be considered to have then retired by reason of age as provided in Section 22-11-38 NMSA 1978. At such time, the member may elect an optional benefit as provided in Section 22-11-29 NMSA 1978, regardless of number of years of earned service credit attained by the member.

**C.** Coincident with the annual medical report required of each member receiving disability benefits, the director shall obtain a report of the employment status of the disabled member which shall be considered along with the medical report in determining the member's continued eligibility.

**D.** In the event that a member receiving disability benefits from ~~ERA~~ ERB is removed from a disability status by the board, disability payments shall continue to that member for a period of two full months following the month of removal, except if such member becomes employed before the expiration of this two-month period, the member shall be removed from the payroll on the date of employment. If the member removed from a disability status is eligible and opts for age/service retirement, disability payments shall terminate upon the effective retirement date, but in no case shall extend beyond the two-month period cited in this rule.

**E.** In making a recommendation following re-examination of a disability recipient, the medical review ~~board~~ authority shall state whether there is or is not a substantial betterment of the member's disability. ~~In~~ In the event a substantial betterment is concluded by the medical review ~~board~~ authority, it shall further state whether, in light of that betterment, the member is or is not totally disabled for employment and unable to obtain and retain other gainful employment commensurate with his/her background, education and experience. In cases of recommended terminations of disability, reasons with sufficient detail shall also be provided. In the event that no substantial betterment can be concluded in any future re-examination, the medical review ~~board~~ authority can recommend the recipient as permanently disabled.

**F.** A disability recipient who ~~does not suffer or no longer suffers from a disability which significantly limits his/her ability to perform basic work activities, i.e. abilities and aptitudes necessary to do most jobs,] is no longer totally disabled for employment and is able to obtain and retain gainful employment commensurate with the recipient's background, education and experience,~~ will be determined not disabled, with consequent termination of benefits ~~[, without reference to applicant's background, education and experience]~~. In such cases, substantial betterment should be recommended by the medical review ~~board~~ authority to the board ~~[, reported, together with a statement that the recipient does not suffer or no longer suffers from a disability which significantly limits his/her ability to perform basic work activities.]~~ The board shall take action on such recommendation. A disability recipient who ~~suffers from a disability which significantly limits his/her ability to perform basic work activities and]~~ is totally disabled and unable to maintain and obtain employment commensurate with his/her background, education and experience may be determined permanently disabled without future re-examination ~~[as is required by Rule VI, Section E(1) [Rules and Procedures Manual]]~~. The permanent disability should be recommended by the medical review ~~board~~ authority to the board, together with a statement that the recipient is permanently disabled. The board shall take action on such recommendation.

**G.** When considering a recipient's background, education and experience, the guidelines established by the social security administration, vocational opinions, guides, books or reports, reports from DVR and any other relevant information may be used.

**H.** A disability recipient shall furnish a list of all physicians who have examined or treated the recipient during the period of disability and provide copies of their reports ~~[, shall provide copies of any and all vocational rehabilitation reports and work performance evaluation reports made since the disability was incurred]~~ and shall provide any other information requested by the educational retirement board, the medical review ~~board~~ authority or the ~~medical appeals panel or~~ medical appeals hearing officer.

~~I.~~ At time of re-examination, in addition to the required physician reports, a disability recipient may be required to provide a vocational rehabilitation report prepared by a vocational rehabilitation evaluator approved by the educational retirement board.

~~J.] I.~~ A disability recipient may review any and all evidence, physician reports, etc., which the medical review ~~board~~ authority has which pertains to his/her case.

[6/30/99; Recomplied 10/01/01, xx-xx-xx]

[Compiler's Note: Subsection F of 2.82.6 NMAC contains a reference to *Rule IV, Section E(1)*. This rule was replaced 2.82.4 NMAC however it contains no cross reference for *Section E(1)*.]

### **2.82.6.13 APPROVAL OF APPLICATION:**

**A.** Whenever a member completes the school year, (or academic year) his application for disability benefits shall not be considered for approval until the beginning of the next school year (or academic year)

following his date of termination because of a disability. If the member has returned to employment, or was able to return to employment commensurate with his background, education and experience since his termination because of disability, the application shall not be approved. Whenever a member terminates employment because of disability at a time other than upon completion (or substantial completion) of the school year, (or academic year) his application for disability shall be considered for approval at the earliest possible date. For purposes of this rule, April 15 of the academic year shall be considered substantial completion.

**B.** The director is authorized to approve duly executed applications for disability benefits on behalf of the board in order to insure timely approval of same if the medical review board authority has agreed determined that the applicant is disabled as defined by law; however, all such approvals must be ratified by the educational retirement board at a subsequent meeting of the board. At the time of ratification, the director shall make available to the board, the reports of the medical examiners, the recommendations of the medical review board authority, and the member's completed application along with such other information as the board may require.  
[6/30/99; Recompiled 10/01/01, xx-xx-xx]

**HISTORY OF 2.82.6 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6/30/67.

ERB 78-1, Rules and Procedures, filed 8/7/78.

ERB Rule VI, Disability Benefits, filed 7/2/82.

History of Repealed Material: [RESERVED]

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 7 ANNUITANTS AND DISABILITY RECIPIENTS**

**2.82.7.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.  
[2.82.7.1 NMAC - Rp, 2 NMAC 82.7.1, 6-16-2015]

**2.82.7.2 SCOPE:** This rule applies to members receiving disability benefits.  
[2.82.7.2 NMAC - Rp, 2 NMAC 82.7.2, 6-16-2015]

**2.82.7.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Section 22-11-1 to ~~22-11-53~~ **22-11-55**, NMSA 1978.  
[2.82.7.3 NMAC - Rp, 2 NMAC 82.7.3, 6-16-2015; **A, xx-xx-xxxx**]

**2.82.7.4 DURATION:** Permanent.  
[2.82.7.4 NMAC - Rp, 2 NMAC 82.7.4, 6-16-2015]

**2.82.7.5 EFFECTIVE DATE:** June 16, 2015, unless a later date is cited at the end of a section.  
[2.82.7.5 NMAC - Rp, 2 NMAC 82.7.5, 6-16-2015]

**2.82.7.6 OBJECTIVE:** Clarifies requirements for disability retirement.  
[2.82.7.6 NMAC - Rp, 2 NMAC 82.7.6, 6-16-2015]

**2.82.7.7 DEFINITIONS:** [RESERVED]

**2.82.7.8 BENEFIT PAYMENTS:**

**A.** After the initial payment of benefits, payments shall be processed or mailed monthly, not later than the last day of the month for which they are paid.

**B.** At the time of death, a retired member's benefit shall be paid in accordance with the option selected, or if none was selected, the member's beneficiary who shall have been named at the time of retirement, shall receive the benefit for the month of the member's death or the excess of total contributions over total benefits received by the member, whichever is greater.

**C.** Upon the death of a member who is receiving disability benefits and who has rejected the coverage of option B, the member's surviving beneficiary shall receive the benefit due the member from the first day of the month of death to the date of death, inclusive, or the excess of total contributions over total benefits received by the member, whichever is greater.

**(1)** A member eligible to receive disability benefits, shall receive unmodified benefits as set forth in Section 22-11-37 NMSA 1978, until the member attains age 60, at which time the benefit will be modified in accordance with option selected at that time, if any, and the modifications will be based upon the then attained ages of the member and beneficiary.

**(2)** Upon the death prior to age 60 of a member receiving disability benefits who has option B coverage, the beneficiary of such member shall be entitled to the benefits provided by Section 22-11-29(D) NMSA 1978.

~~**D.** Upon the request of a member receiving retirement or disability benefits, the director may deposit the member's monthly benefit payments directly to member's bank account provided the bank is located within the state of New Mexico, and to out-of-state banks only if officials of the bank sign the depository agreement approved by the board.~~

[2.82.7.8 NMAC - Rp, 2 NMAC 82.7.8, 6-16-2015; **A, xx-xx-xxxx**]

**2.82.7.9 EMPLOYMENT:**

**A.** Once each calendar quarter, administrative units shall be required to report to the educational retirement board "the full-time equivalency" of members retired for age or service and members receiving disability benefits.

**B.** A member receiving disability benefits may engage in employment in the same manner and such employment shall be considered as partial evidence of ability to return to regular employment, and this, together



with medical evidence, may be considered by the board in determining whether the member's disability benefit should continue.

**C.** Members retired for age or service may reside anywhere they choose, and engage in any employment which is not covered by the Educational Retirement Act, without affect to their retirement status.

**D.** If a member who returns to employment and is removed from a retirement status wishes to retire again, he may do so in accordance with ~~the statute and 2 NMAC 82.5.9.4~~ ~~[now]~~ Section 22-11-25 NMSA 1978 and Subsection D of 2.82.5.9 NMAC ~~[3]~~.

**E.** Retired members who perform services for local administrative units as an independent contractor must meet the criteria set forth for an independent contractor in ~~2 NMAC 82.2.11.4~~ ~~(now)~~ Subsection D of 2.82.2.11 NMAC ~~[2]~~.  
[2.82.7.9 NMAC - Rp, 2 NMAC 82.7.9, 6-16-2015; A, xx-xx-xxxx]

**HISTORY OF 2.82.7 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6/30/67;

ERB 78-1, Rules and Procedures, filed 8/7/78;

ERB Rule VII, Annuitants and Disability Recipients, filed 7/2/82.

History of Repealed Material:

2 NMAC 82.7, Annuitants and Disability Recipients - Repealed 6-16-2015.

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 11 ADMINISTRATIVE APPEALS**

**2.82.11.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129.  
[6/30/99; 2.82.11.1 NMAC - Rn, 2 NMAC 82.11.1, 3-14-2008]

**2.82.11.2 SCOPE:** This rule sets forth the process for appealing a denial of a claim for retirement benefits or a recommended denial of a claim for disability benefits.  
[6/30/99; 2.82.11.2 NMAC - Rn, 2 NMAC 82.11.2, 3-14-2008; A, 6-16-2015]

**2.82.11.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Sections 22-11-1 to [22-11-53] [22-11-55], NMSA 1978 [~~The Retirement Reciprocity Act, Sections 10-13A-2 to 10-13A-3~~].  
[6/30/99; 2.82.11.3 NMAC - Rn, 2 NMAC 82.11.3, 3-14-2008; A, xx-xx-xxxx]

**2.82.11.4 DURATION:** Permanent.  
[6/30/99; 2.82.11.4 NMAC - Rn, 2 NMAC 82.11.4, 3-14-2008]

**2.82.11.5 EFFECTIVE DATE:** June 30, 1999, unless a later date is cited at the end of a section.  
[6/30/99; 2.82.11.5 NMAC - Rn & A, 2 NMAC 82.11.5, 3-14-2008]

**2.82.11.6 OBJECTIVE:** Specification of procedures for the disability appeals process.  
[6/30/99; 2.82.11.6 NMAC - Rn, 2 NMAC 82.11.6, 3-14-2008]

**2.82.11.7 DEFINITIONS:** [RESERVED]

**2.82.11.8 GENERAL PROVISIONS:**

**A.** A final written decision of the director which results in a denial of a claim for retirement-related benefits or a recommendation of the medical review committee for a denial of an application for disability or termination of disability benefits may be appealed by an affected member.

**B.** The appeal shall be initiated by the affected party serving on the director a notice of appeal within [thirty (30)] 30 days of the date of the letter in which the member received notice of the final decision or recommendation. The notice of appeal must state the reasons for claiming the decision or recommendation is improper. If the claimant fails to submit a notice of appeal as provided herein, the decision or recommendation shall become final.

**C.** The appeal shall be heard by a hearing officer designated by the board, unless otherwise provided by the board.

**D.** Procedure.

**(1)** The office of general counsel will establish internal procedures for processing appeals within the parameters set by this rule.

**(2)** Discovery and evidence.

**(a)** Following the filing of an appeal, the parties must submit to the hearing officer, with a copy to the other parties, including copies separately addressed to the educational retirement board's (ERB) office of general counsel, at least [fifteen (15)] 15 days prior to the scheduled hearing, any documentary evidence a party may wish to present for consideration at the de novo hearing. The hearing officer may grant a request for extension of time to submit documentary evidence for good cause, if such extension is not prejudicial to another party. This documentary evidence shall include all documents that will be introduced as exhibits at the hearing. Failure to comply with the requirements of this provision may result in the appeal proceeding without consideration of the documentary evidence.

**(b)** At the same time documentary evidence is due to be submitted, the ERB may, but is not required to, file a written response to claimant's notice of appeal.

**(c)** The parties shall provide to the other parties the names and addresses of persons that may be called as witnesses at the hearing.

(d) Upon the written request of any party, pre-hearing discovery permitted by the rules of civil procedure for the state district courts in New Mexico may be allowed as authorized by the hearing officer.

(e) Upon request, the claimant shall provide to the director authorizations for the release of records regarding employment (whether self-employed or as an employee or an independent contractor) and, in the case of a disability appeal, the claimant's health care records.

(f) The rules of evidence do not apply, but the hearing officer may admit all relevant evidence which in the hearing officer's opinion is the best evidence most reasonably obtainable, having due regard to its necessity, competence, availability and trustworthiness. Such evidence shall be given the weight the hearing officer deems appropriate.

(g) The hearing officer may, upon good cause shown, remand the matter back to the director or the medical review committee for reconsideration.

(3) Hearing.

(a) A hearing shall be held within ~~ninety (90)~~ 90 days of receipt of the notice of appeal unless the parties agree to an extension of time and the extension is approved in writing by the hearing officer. The hearing officer also may grant an extension upon good cause shown by one ~~(4)~~ party, without the agreement of other parties. The parties shall be given at least ~~thirty (30)~~ 30 days written notice of the scheduled hearing. The hearing shall be held in Santa Fe.

(b) A hearing involving the denial of disability benefits shall not be open to the public.

(c) The board's authority to administer oaths is delegated to the hearing officer for the purpose of conducting the hearing.

(d) The parties have the right to present argument and evidence orally, to present or cross-examine witnesses, and to be accompanied by ~~counsel~~ a New Mexico licensed attorney.

(e) The parties shall appear in person at the hearing, except as provided in this rule. The claimant may appear by telephone or video conference when it is difficult or impossible for the claimant to appear in person. A claimant who wishes to appear by telephone or video conference shall submit a written request to the hearing officer at least five days prior to the hearing stating the reason(s) why it is difficult or impossible for the claimant to appear in person. Failure of the party bringing the appeal or that party's representative to appear in person or by telephone or video conference at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of the appeal and any claims previously asserted. Witnesses may appear by telephone or video conference if approved by the hearing officer.

(f) If the party bringing the appeal or that party's representative requests rescheduling of a hearing so close to the time of the hearing that additional costs are incurred, any such additional costs may be assessed against that party, such as court reporting or other costs.

(4) Burden of persuasion. Unless otherwise established by law, the party bringing the appeal has the burden of proving by a preponderance of the evidence the facts relied upon to show that such party is entitled to relief or the benefit denied.

(5) Record. The hearing shall be recorded, and copies of all evidence offered shall be maintained by the director for a period of five (5) years. Any party desiring a transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such transcript. A party appealing the decision of the board to the district court shall make arrangements with the director for the preparation of transcripts for that appeal.

(6) Written closing arguments. If any party requests permission to file a written closing argument, the hearing officer may permit all parties to file written closing arguments and shall set a time for the simultaneous filing of written closing arguments.

~~(6)~~ (7) Recommended decision.

(a) The hearing officer shall prepare a recommended decision for the board's consideration. The hearing officer shall provide the parties a copy of the recommended decision upon its completion. The hearing officer's recommended decision shall be based upon the evidence adduced at the hearing and shall be issued within ~~sixty (60)~~ 60 days following the close of the record.

(b) The hearing officer shall propose findings of fact and conclusions of law as part of the recommended decision.

~~(7)~~ (8) Exceptions to recommended decision.

(a) The parties may file exceptions to the hearing officer's recommended decision with the board within ~~fifteen (15)~~ 15 days of the date of issuance of the recommended decision. Any other party may file a response to exceptions within ~~fifteen (15)~~ 15 days of the date such exceptions were filed. Upon the

written request of a party, and for good cause shown, the hearing officer may extend the time to file exceptions and responses.

(b) Copies of such exceptions and any briefs shall be served on all parties and the hearing officer, and a statement of such service shall be filed with the exceptions.

(c) Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken and shall be based solely on the evidence and arguments presented at the hearing. Any exception that fails to comply with the foregoing requirements may be disregarded.

(d) The hearing officer may file with the board a response to any exceptions filed within ~~fifteen (15)~~ 15 days of the date of filing of the exceptions and shall serve copies of the response on all parties.

**E. Final action by the board.**

(1) The board shall consider the hearing officer's recommended decision, any exceptions to the recommended decision together with supporting briefs, and the hearing officer's response to the exceptions, if any. The board may review all of the record made before the hearing officer.

(2) The board shall not consider any additional oral argument, evidence or affidavits not in the record before the hearing officer, or pleadings not filed in accordance with these rules.

(3) The board may request that the hearing officer be present at the time the board reviews a recommended decision and may discuss the recommended decision with the hearing officer. Board deliberations regarding the recommended decision and consultations with counsel to the board shall occur in closed session in accordance with the Open Meetings Act.

(4) The board's final action shall be rendered in an open meeting no later than ~~one hundred eighty (180)~~ 180 days after the date the hearing officer's recommended decision was issued. Board members who need additional time to review the record before taking final action may ask the board chairman for additional time to complete the review. If additional time is requested, the deadline for the board's final action shall be extended until the next regularly scheduled board meeting.

(5) Ex parte communication with board members or the hearing officer concerning a decision that is on appeal is prohibited.

(6) The board may remand a recommended decision to the hearing officer for additional findings, conclusions, clarification or the taking of additional evidence. Such a remand shall restart the time frames contained in this rule.

(7) The board shall approve, disapprove or modify the recommended decision, and shall enter a final order concerning the matter being appealed. The board may modify the proposed conclusions of law based on the proposed findings of fact. If the board wishes to modify the proposed findings of fact, it may do so only after review of the record before the hearing officer. The board shall provide a reasoned basis for changing the hearing officer's recommendation.

**F.** A refund of a member's contributions pending appeal shall result in the forfeiture of service credit and the automatic dismissal of an appeal and issuance of a notice of dismissal.

[6/30/99; 2.82.11.8 NMAC - Rn, 2 NMAC 82.11.8, 3-14-2008; Repealed, 6-16-2015; 2.82.11.8 NMAC - N, 6-16-2015; ~~A, xx-xx-xxxx~~]

**2.82.11.9 PRE-HEARING PROCEDURES: [RESERVED]**

[6/30/99; 2.82.11.9 NMAC - Rn, 2 NMAC 82.11.9, 3-14-2008; Repealed, 6-16-2015]

**2.82.11.10 HEARING PROCEDURES: [RESERVED]**

[6/30/99; 2.82.11.10 NMAC - Rn & A, 2 NMAC 82.11.10, 3-14-2008; Repealed, 6-16-2015]

**2.82.11.11 RECOMMENDED DECISION: [RESERVED]**

[6/30/99; 2.82.11.11 NMAC - Rn, 2 NMAC 82.11.11, 3-14-2008; Repealed, 6-16-2015]

**2.82.11.12 DECISION BY THE EDUCATIONAL RETIREMENT BOARD: [RESERVED]**

[6/30/99; 2.82.11.12 NMAC - Rn, 2 NMAC 82.11.12, 3-14-2008; Repealed, 6-16-2015]

**HISTORY OF 2.82.11 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6/30/67.

ERB 78-1, Rules and Procedures, filed 8/7/78.

ERB Rule XI, Disability Appeals, filed 3/14/94.

History of Repealed Material: [RESERVED]