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June 25, 2015

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** David Craig

**RE: STAFF BRIEF: ADMINISTRATIVE RULEMAKING: EDUCATIONAL RETIREMENT BOARD**

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**Adopted Rules:**

The June 16, 2015 issue of the *New Mexico Register* contained the following adoption of rules relating to Educational Retirement (see corresponding **Attachments 1a - 1f**):

**Attachment 1a, 2.82.1 and 2.82.11 NMAC - Administrative Appeals;**  
**Attachment 1b, 2.82.2 and 2.82.5 NMAC - Return to Work, Direct Deposit and Tax Matters;**  
**Attachment 1c, 2.82.4 NMAC - Service Credit;**  
**Attachment 1d, 2.82.7 NMAC - Paper Warrants;**  
**Attachment 1e, 2.82.8 NMAC - Investments; and**  
**Attachment 1f, 2.82.10 NMAC - Retirement Reciprocity.**

In addition, **Attachment 2, Form of Payment Options: Educational Retirement Board (ERB) and Public Employees Retirement Association (PERA)**, provides additional information related to payment options referenced in (1f) 2.82.10 NMAC - Retirement Reciprocity.

### **2.82.1 NMAC and 2.82.11 NMAC - Administrative Appeals**

The adopted rule changes created a single uniform appeals process under 2.82.11 Administrative Appeals by removing a separate provision related to disability appeals from 2.82.1 NMAC, and placing it with the provisions for all other administrative appeals in 2.82.11 NMAC. According to ERB, having differing procedures in two different sections of the NMAC was confusing to members and the legal community. Under the provisions of the new, uniform appeals process:

- a member has 30 days to appeal a denial, or recommendation of denial, of benefits;
- the ERB must:
  - hold a hearing within 90 days of the appeal; and
  - provide at least 30 days notice of the scheduled hearing;
- the appeal will be heard by a hearing officer, unless otherwise provided by the ERB;
- the hearing officer will prepare a written recommended decision for the ERB to consider; and
- the ERB can approve, disapprove, or modify the recommended decision and enter a final order.

### **2.82.2 NMAC and 2.82.5 NMAC - Return to Work, Direct Deposit and Tax Matters**

The adopted rule changes moved sections regarding return-to-work exceptions from 2.82.2 NMAC and placed them in 2.82.5 NMAC, which governs the return-to-work program. A return-to-work exception is provided to a member that earns up to \$15,000 per fiscal year or the amount possible under 0.25 full time equivalent (FTE), whichever is greater. The adopted rule changes also include:

- a definition of “earnings” that includes bonuses and annual payouts for accumulated leave;
- a requirement for all new retirees (after July 1, 2015) to provide authorization for electronic transfer of payments absent exceptional circumstances; and
- three new sections to comply with Internal Revenue Service (IRS) Internal Revenue Code (IRC) requirements, including clarifying:
  - the plan is a governmental plan as defined by the IRC;
  - how rollover distributions for non-spouse beneficiaries will be treated; and
  - provisions governing death benefits for participants while performing military service.

### **2.82.4 NMAC - Service Credit**

The adopted rule changes related to earned service credit clarify that members receive one quarter of service credit for each calendar year in which the member has earnings from regular employment and renders services for a minimum of 16 days. According to ERB, the 16-day requirement is based on the idea that:

- a calendar quarter contains approximately 60 working days; and
- a member would need to work at least 16 days to exceed the 0.25 FTE threshold for ERB membership.

Although the adopted rule changes indicate this rule is effective June 16, according to ERB the adopted changes to this rule will be effective August 1. Therefore, this rule change will have no effect on members who render services during the July 2015 summer session.

### **2.82.7 NMAC - Paper Warrants**

The adopted rule clarifies that paper warrants are to be mailed out no later than the last business day of the month. ERB indicates that all payments (electronic and paper) will go out on the same day. The previous rule indicated that paper warrants were required to be mailed in time to reach the member on the last business day of the month. ERB indicates this proved difficult to administer and raised compliance issues with the Department of Finance and Administration (DFA) regarding the proper dating of warrants.

### **2.82.8 NMAC - Investments**

The adopted rule changes the provisions of NMAC to remove outdated investment policies. The adopted rule removes references and requirements for: investment officers, the investment division and details of the investment philosophy. The adopted rule requires that the ERB promulgate a written investment policy and provide it to the Legislative Finance Committee (LFC) and DFA. The adopted rule changes indicate that the investment policy details the roles of the investment division.

### **2.82.10 NMAC - Retirement Reciprocity**

Finally, the adopted rule changes clarified practices ERB takes to comply with the *Public Employees Retirement Reciprocity Act* which requires service credit earned under the *Public Employees Retirement Act* (PERA) and the *Educational Retirement Act* (ERA) to be combined for purposes of determining retirement eligibility and benefits. Under PERA, a member has four payment options, one of which is a Temporary Joint Survivor Option (Option D). The adopted rule change places into regulation the practice that ERB and the Public Employees Retirement Association shall calculate retirement benefits using the same option elected by the retiring member, except in instances where a PERA member who formerly belonged to the ERA plan chooses Option D. In these instances, the ERA portion of service credit will be calculated according to ERB Option A, or the “straight life” benefit. The payment options available under the two plans are summarized in a matrix in Attachment 2.

This is an amendment to 2.82.1 NMAC, Sections 15 and 17, effective 6-16-15.

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

**A.** The board shall engage a medical review committee composed of three physicians well qualified in general medical knowledge. The committee 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 examinations upon applicants for disability, if necessary. Results of such examinations shall be reported in detail to, and reviewed by, the medical review committee. The director is authorized to pay a reasonable fee for the reports and examinations requested by the committee.

**C.** ~~[Appeals of recommendations by the medical review committee that the board not grant a disability retirement may be conducted by a panel of three (3) members of the educational retirement board appointed by the chairman and approved by the board. The appointments by the chairman shall take place at the regular October meeting each year. In the event that a member of the appeals panel resigns from the panel, the chairman may appoint a member of the board to serve for the remaining portion of the one (1) year term. The appointment shall become effectively immediately; provided, however, that it shall be subject to approval by the board at its first meeting occurring after said appointment. The actions of this panel shall be governed by the statutes and administrative rules and regulations adopted by the board.] 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 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, 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]

**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.** A final decision of the director may be appealed by an affected party. All appeals must comply with the following procedure:~~

~~(1) The appeal shall be initiated by the affected party serving on the director a notice of appeal within ninety (90) days of the date of the letter in which the member received notice of the director's final decision. The notice of appeal must state the reasons for claiming the denial is improper. If the claimant fails to submit a notice of appeal as provided herein, the director's decision shall constitute the final order of the board.~~

~~(2) The appeal shall be heard by a hearing officer designated to represent the board, unless otherwise provided by the board or the rules and regulations adopted by the board.~~

~~(3) Procedure.~~

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

~~(b) Discovery and evidence.~~

~~(i) 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 director and to the general counsel, at least fifteen (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 paragraph may result in the appeal proceeding without consideration of that documentary evidence. It shall not be considered error for the appeal to proceed without consideration of documentary evidence where a party did not timely submit such evidence as provided for in this paragraph.~~

~~(ii) At the same time documentary evidence is due to be submitted, the director or the general counsel may, but are not required to, file a written response to claimant's notice of appeal.~~

~~(iii) Upon the written request of any party, the parties shall provide to the other parties the names and addresses of persons that may be called as witnesses at the hearing.~~

~~(iv) Upon the written request of any party, pre-hearing discovery permitted by the rules of civil procedure for the district courts in New Mexico shall be allowed as authorized by the hearing officer. Upon the request of any party in writing, the hearing officer also may authorize depositions.~~

~~(v) Upon request, the claimant shall provide to the director authorizations for the release of records regarding the claimant's employment (whether self-employed or as an employee or an independent contractor).~~

~~(vi) 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.~~

~~(vii) The hearing officer may, upon good cause shown, remand the matter back to the director for reconsideration.~~

~~(e) Hearing.~~

~~(i) A hearing shall be held within sixty (60) 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 party, without the agreement of other parties. The parties shall be given at least thirty (30) days written notice of the scheduled hearing.~~

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

~~(iii) The parties have the right to present argument and evidence orally, to present or cross-examine witnesses, and to be accompanied by counsel.~~

~~(iv) Failure of the party bringing the appeal or that party's representative to appear at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of the appeal and any claims previously asserted.~~

~~(v) 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 shall be assessed against that party.~~

~~(d) 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.~~

~~(e) 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.~~

~~(f) Recommended decision.~~

~~(i) 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) days following the close of the record.~~

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

~~(g) Exceptions to recommended decision.~~

~~(i) The parties may file exceptions to the hearing officer's recommended decision with the board within fifteen (15) days of the date of issuance of the recommended decision. Upon the written request of a party, and for good cause shown, the hearing officer may extend the time to file exceptions.~~

~~(ii) 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.~~

~~(iii) 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.~~

~~(iv) Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded.~~

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

~~(4) Final action by the board.~~

~~(a) 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.~~

~~(b) 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.~~

~~(c) 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. The board members may discuss the recommended decision during consideration of the recommended decision and may consult with counsel to the board.~~

~~(d) The board's final action shall be rendered no later than 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 for one month.~~

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

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

~~(g) 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.]~~

~~[E.]~~ **D.** 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.

~~[F.]~~ **E.** 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]

This is an amendment to 2.82.11 NMAC, Part Name and Sections 2 and 8-12, effective 6-16-2015.

**PART 11**      ~~[DISABILITY]~~ **ADMINISTRATIVE APPEALS**

**2.82.11.2**      **SCOPE:** [This rule applies to the appeal process after a denial of disability benefits.] 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]

**2.82.11.8**      **[PROCEDURES TO INITIATE APPEAL]**

~~A. — 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 board which propose denial of the application for disability or termination of disability benefits. The written notice shall contain the following:~~

~~\_\_\_\_\_ (1) — the recommended action, and a clear and concise statement of the reasons supporting the recommendation;~~

~~\_\_\_\_\_ (2) — a statement that the applicant or disability recipient may request a hearing within thirty (30) days after receipt of the notice;~~

~~\_\_\_\_\_ (3) — a statement that, unless the applicant or recipient requests a hearing by timely filing a request for hearing within thirty (30) days of service of the notice, the educational retirement board may take the recommended action without further right of appeal to the board.~~

~~B. — Any notice required to be served, including notice of final decision, may be served personally or by certified mail, return receipt requested, directed to the applicant's or recipient's last known address as shown by the educational retirement board's ("ERB's") records. Where notice is served by certified mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery or the last attempted delivery or refusal to accept delivery.~~

~~C. — A request for hearing must be initiated by filing a request for hearing with ERB, by delivering such request to the ERB's administrative offices, addressed to ERB's director. "Filing" occurs when the request for hearing is received at ERB's offices; provided, however, that where a request for hearing is properly addressed with sufficient postage and mailed at least three (3) days before the expiration of the thirty (30) day period within which to request a hearing, filing will be deemed timely if received by ERB, notwithstanding that receipt by ERB may occur after the thirty (30) day period has expired. The request for hearing must contain the following:~~

~~\_\_\_\_\_ (1) — the reasons the applicant or recipient disagrees with the recommended action;~~

~~\_\_\_\_\_ (2) — a statement whether additional evidence will be submitted at the hearing; such evidence must be submitted within twenty (20) days of filing the request for hearing;~~

~~\_\_\_\_\_ (3) — the name and address of any representative of appellant.~~

~~D. — If the applicant or recipient does not request a hearing in the manner and within the time stated in this rule, the educational retirement board may adopt the recommendation of the medical review board. No further right of appeal exists.]~~ **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) 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) 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) 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 (1) party, without the agreement of other parties. The parties shall be given at least thirty (30) days written notice of the scheduled hearing.

(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.

(e) Failure of the party bringing the appeal or that party's representative to appear at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of the appeal and any claims previously asserted.

(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) 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) 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) Exceptions to recommended decision.

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

file a response to exceptions within fifteen (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) 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) 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]

**[2.82.11.9 — PRE HEARING PROCEDURES:**

A. Upon receipt of a timely filed request for hearing, ERB staff shall confer with the chairman of the educational retirement board. The chairman is authorized to determine whether the hearing will be held before a medical appeals hearing officer or before a medical appeals panel of not less than two (2) board members and is authorized to appoint the hearing officer or panel members to conduct the hearing.

B. Within fifteen (15) days from the date a request for hearing is filed, ERB shall mail to the applicant or recipient, hereinafter "appellant", notice of appointment of the medical appeals hearing officer or medical appeals panel. A lawyer or non-lawyer may serve as hearing officer. The director may serve as a member of the medical appeals panel.

C. ERB shall set a date for the hearing, which hearing must occur within sixty (60) days from the date of the filing of the request for hearing, except that continuances may be granted by the medical appeals hearing officer or medical appeals panel upon a showing of good cause. Notice of the date, time and place of the hearing must be mailed by certified mail to the appellant at least twenty (20) days prior to the date of the hearing.]

[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:**

- \_\_\_\_\_ **A.** \_\_\_\_\_ The hearing shall not be open to the public.
- \_\_\_\_\_ **B.** \_\_\_\_\_ The rules of evidence do not apply. The medical appeals hearing officer or the medical appeals panel may admit any evidence and may give probative effect to evidence that is of a kind commonly relied upon by reasonably prudent people in the conduct of serious affairs. The medical appeals hearing officer or the medical appeals panel may, in their discretion, exclude incompetent, irrelevant or unduly repetitious evidence. Documentary evidence may be received in the form of copies or excerpts. Physician reports, medical treatises, guidelines established by the social security administration, vocational opinions, guides, books or reports and any other relevant information may be considered.
- \_\_\_\_\_ **C.** \_\_\_\_\_ An appellant, either personally and/or by means of a representative, including counsel, may present evidence and state his/her position, present a written summary of his/her case, enter written statements about the facts and law material to his/her case, submit and examine documentary evidence, and present and question witnesses.
- \_\_\_\_\_ **D.** \_\_\_\_\_ Appellant's failure to appear at the hearing, either personally or by means of a representative, shall result in the recommendation becoming final.
- \_\_\_\_\_ **E.** \_\_\_\_\_ The medical appeals hearing officer and the medical appeals panel have the duty to undertake a full inquiry and to fully and fairly develop the facts on both sides. The medical appeals hearing officer and the medical appeals panel are the only presenters of evidence that is against the appellant. All evidence that is against the appellant must be introduced by the medical appeals hearing officer or the medical appeals panel. If the medical appeals hearing officer or the medical appeals panel know of or require information that will be useful in making a decision, they have a duty to assure that it is received and taken into account.
- \_\_\_\_\_ **F.** \_\_\_\_\_ Subpoenas, if necessary for a full presentation of the case and to obtain evidence not otherwise available, may be issued by ERB at the direction of the medical appeals hearing officer or medical appeals panel. Any enforcement must occur through the courts.
- \_\_\_\_\_ **G.** \_\_\_\_\_ A record of the proceedings shall be made by either tape recording or by using a court reporter. An appellant must make arrangements with ERB or the court reporter, if applicable, to receive a transcript or duplicate tapes and copies of evidence.
- \_\_\_\_\_ **H.** \_\_\_\_\_ The medical appeals hearing officer or the medical appeals panel may continue a hearing to a later date, or may reopen a hearing before a recommended decision is issued, if additional evidence should be received.] [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:**

- \_\_\_\_\_ **A.** \_\_\_\_\_ The medical appeals hearing officer or the medical appeals panel will issue to the educational retirement board a recommended decision, based on the record, which will be filed at ERB's offices and a copy mailed by certified mail to the appellant.
- \_\_\_\_\_ **B.** \_\_\_\_\_ The medical appeals hearing officer or the medical appeals panel will propose findings of fact and conclusions of law as part of the recommended decision.
- \_\_\_\_\_ **C.** \_\_\_\_\_ Exceptions to the recommended decision may be filed at ERB's offices with supporting briefs within thirty (30) days from the date of issuance of the recommended decision.
- \_\_\_\_\_ **D.** \_\_\_\_\_ Exceptions to the recommended decision shall state the precise issue to which exception is made and shall be based solely on evidence contained in the hearing record. Any exception not made in the manner required by this rule is waived.
- \_\_\_\_\_ **E.** \_\_\_\_\_ The medical appeals hearing officer or the medical appeals panel may file a response to the exceptions within fifteen (15) days from the date of filing of the exceptions.] [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:**

- \_\_\_\_\_ **A.** \_\_\_\_\_ As a general rule, the educational retirement board shall only consider the medical appeals hearing officer's or the medical appeals panel's recommended decision, exceptions, briefs, and response to exceptions, if any. Where circumstances warrant, the board may review all or a portion of the hearing record.
- \_\_\_\_\_ **B.** \_\_\_\_\_ The board shall not consider any additional oral argument, evidence or affidavits in the hearing record.
- \_\_\_\_\_ **C.** \_\_\_\_\_ The board will deliberate the matter in closed session. Any final action must occur in open session.
- \_\_\_\_\_ **D.** \_\_\_\_\_ Under appropriate circumstances, the board may remand a recommended decision to the medical appeals hearing officer or the medical appeals panel for additional findings.

~~\_\_\_\_\_ E. \_\_\_\_\_ If the board wishes to modify proposed findings of fact, it may do so only after a review of the hearing record.~~

~~\_\_\_\_\_ F. \_\_\_\_\_ The medical appeals hearing officer's or the medical appeals panel's written recommendation is a public record.]~~

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

This is an amendment to 2.82.2 NMAC, Section 11, effective 6-16-2015.

**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. 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.

~~(1) — 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 effecting the retired member's retirement benefit:~~

~~(2) — 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.]~~

**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]

This is an amendment to 2.82.5 NMAC, amending Sections 9 and 15-20, effective 6-16-2015.

**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.

~~[E.]~~ E. 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.

[6-30-99; 2.82.5.9 NMAC - Rn, 2 NMAC 82.5.9, 11-30-2001; A, 6-16-2015]

**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 ~~[2.82.2.11]~~ 2.82.5.16 NMAC, without ~~[effecting]~~ 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 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]

**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]

**[2.82.5.16] 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, 5-31-2015]

**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, 5-31-2015]

**This is an amendment to 2.82.4 NMAC, Section 8, effective 6-16-2015.**

**2.82.4.8 EARNED SERVICE CREDIT:**

**A.** Earned service credit shall be granted for prior employment on the basis of one month of credit for each month worked in regular employment, and when a regular work year consisted of a period of time less than 12 months, such period of time shall be considered a full year.

**B.** Earned service credit shall be granted for employment after July 1, 1957, on a quarterly basis. ~~and~~ A member shall receive one quarter of credit for each calendar quarter in which ~~he~~ the member has earnings from regular employment and renders services for a minimum of 16 days. 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 leave after July 1, 1957. Members who received pay for sabbatical leave prior to July 1, 1957 shall receive one month of earned service credit for such month during which they received pay for such leave.

**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 administrative unit relating to the revoked period of earned service credit shall be as follows:

**(1)** Administrative unit contributions shall be credited to the administrative unit to be used against future contribution costs.

**(2)** Before the member contribution shall be disbursed, or credited, the 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 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 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.** Public school nurses whose first employment commenced after July 1, 1957 and prior to June 12, 1959 may acquire earned service credit for such employment if the contributions required by law are made. Such nurses are considered to have been provisional members prior to June 12, 1959.

**H.** 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.

**I.** 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.

**J.** 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.

**K.** 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.

**L.** 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.

**M.** 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.

**N.** 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.

**O.** 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]

**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, NMSA 1978.  
 [2.82.7.3 NMAC - Rp, 2 NMAC 82.7.3, 6-16-2015]

**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]

**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 Subsection D of 2.82.5.9 NMAC].

**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).

[2.82.7.9 NMAC - Rp, 2 NMAC 82.7.9, 6-16-2015]

**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.

This is an amendment to 2.82.8 NMAC, Sections 2, 9-11, effective 6-16-2015.

**2.82.8.2 SCOPE:** This rule establishes guidelines for investment of the ~~[ERA fund for]~~ educational retirement fund under management by the educational retirement board (ERB), and it applies to the educational retirement board, the director of the agency, the investment committee and the investment division staff. [6-30-99; 2.82.8.2 NMAC - Rn, 2 NMAC 82.8.2, 1-30-2004; A, 6-16-2015]

**2.82.8.9 INVESTMENT DIVISION:**

**A.** The investment division of ERB shall be managed by the chief investment officer ~~[and the equity investment officer]~~ under the direction of the director.

**B.** The ~~[primary]~~ role of the investment division is detailed in the investment policy. ~~[to manage the assets of the retirement fund. Further, the objectives shall be to provide significant real returns (inflation adjusted) over long periods of time (5-10 years), as set forth in the ERB investment objectives and guidelines.]~~

~~C.~~ The investment officers shall be responsible for proposing changes to the long term investment philosophy and investment guidelines. In addition, the investment officers shall implement strategic and tactical decisions which aid in achieving the objectives of the fund.

~~D.~~ Within the guidelines set forth by the board and the state statutes regulating investments, the investment officers are authorized to purchase, sell or exchange securities as, in their judgment, market conditions dictate and such transactions are in the best interest of the fund. The final investment decision rests with the investment officers. Investment management firms shall have full discretion to manage the assets allocated to their management, within the directives of the board.

**E.** Additional responsibilities for the investment division include:

~~(1)~~ monitoring the activities of ERB's fiscal agent in order to insure proper settlement of transactions and crediting of interest/ dividends;

~~(2)~~ administering the securities lending program so as to maximize income and insure that sufficient collateral is available at all times;

~~(3)~~ preparing following reports for approval by the investment committee and board:

~~(a)~~ asset listing (monthly);

~~(b)~~ investment summary reports (quarterly);

~~(c)~~ proxy report (quarterly);

~~(d)~~ broker commission report (annually);

~~(e)~~ soft dollar report (annually);

~~(f)~~ other reports as requested.

~~(4)~~ coordinating with the accounting division to insure proper recording of securities transactions;

~~(5)~~ voting proxies;

~~(6)~~ administering the "soft dollar" program in accordance with ERB's written policy.]

[6-30-99; 2.82.8.9 NMAC - Rn, 2 NMAC 82.8.9, 1-30-2004; A, 6-16-2015]

**2.82.8.10 INVESTMENT PHILOSOPHY:**

~~[A.]~~ Recognizing the important and perpetual nature of the fund and the fiduciary responsibilities of the board, the primary goal in investing the assets shall be to provide significant real returns adjusted for inflation with acceptable risk (volatility). The "prudent ~~[man]~~ investor" standard, as defined in the state statutes, shall apply to the investment activities of the educational retirement board. ~~[At the same time, with the dramatic growth of the fund and changes and volatility in the securities markets, the investment division must explore new areas of investment for purposes of diversification.]~~

~~B.~~ The primary equity strategy shall be to build a high quality, diversified portfolio of stocks. Both growth and value styles shall be included in the equity structure. A mid-cap or small-cap equity portfolio can add diversification to the board's equity strategy. Exposure to international equity investing can further add diversification benefits to the equity strategy.

~~C.~~ Fixed income securities shall be managed using a rate anticipation style. The duration of the portfolio will be lengthened or shortened based on the outlook for interest rates. In addition, sector analysis, spread analysis and swaps will be used to increase the return on the portfolio. Exposure to international fixed income investing can add diversification benefits to the fixed income strategy.]

[6-30-99; 2.82.8.10 NMAC - Rn & A, 2 NMAC 82.8.10, 1-30-2004; A, 6-16-2015]

**2.82.8.11 [POLICIES] INVESTMENT POLICY:**

**A.** ~~[Investment guidelines]~~ The board shall adopt a written investment policy as required by Section 22-11-13(B) NMSA 1978 which establishes a policy for the investment and management of the educational retirement fund. At least annually, the board shall review, ratify and provide its written investment policy to the legislative finance committee and the department of finance and administration.

~~(1) Fixed income securities:~~

- ~~(a) Eligible fixed income investments include the following:~~
  - ~~(i) US treasury;~~
  - ~~(ii) federal agencies;~~
  - ~~(iii) US government sponsored enterprises (FNMA, FHLMC, etc.);~~
  - ~~(iv) US corporations;~~
  - ~~(v) repurchase agreements;~~
  - ~~(vi) prime bankers' acceptances;~~
  - ~~(vii) yankee bonds;~~
  - ~~(viii) collateralized obligations held in trust that: are publicly traded and are registered with the United States securities and exchange commission; and have underlying collateral that is either an obligation of the United States government or else has a credit rating above or equal to BBB according to the Standard and Poor's rating system or Baa according to the Moody's investors rating system;~~
  - ~~(ix) bills, bonds or notes of governments other than the United States or their political subdivisions, agencies or instrumentality's;~~
  - ~~(x) bonds, notes or commercial paper of any corporation organized outside of the United States.~~

~~(b) Domestic fixed income securities, managed internally by the investment division, at the time of purchase, must have at least a Baa3/Moody's and BBB /S & P rating; Yankee bonds, at the time of purchase, must have at least an A/Moody's and A/S & P rating; and international fixed income securities, at the time of purchase, must have a minimum rating equivalent to A/Moody's and A/S & P rating.~~

~~(c) At least 90 percent of domestic fixed income securities, managed externally by a paid investment manager, at the time of purchase, may have a minimum rating of at least a Caa3 Moody's and a CCC S&P rating.~~

~~(d) Not more than 2 percent of the fund (at market value) may be invested in a single corporate issuer.~~

~~(2) Equities:~~

- ~~(a) Eligible equity investments include the following:~~
  - ~~(i) common stock or preferred stock of U. S. corporations. Stock must be listed on a national exchange or on the N.A.S.D. national market;~~
  - ~~(ii) American depositary receipts of foreign corporations. Securities must be listed on a national stock exchange or on the N.A.S.D. national market;~~
  - ~~(iii) common stock or preferred stock of corporations organized outside of the United States. Stock must be listed on a national or foreign stock exchange.~~

~~(b) Not more than 10 percent of the voting stock of a corporation may be owned by the fund.]~~

**B.** Broker policy: Given the fiduciary responsibilities of the board and the chief investment [officers'] officer with regard to the management of the assets of the retirement fund, the board adopts the following policies relating to the execution of the securities orders:

**(1)** Equities. The brokerage community provides important services necessary for the successful management of the retirement fund. Recognizing that the value of the services varies widely from firm to firm, the [equity] chief investment officer is directed to allocate commission business based on his/her [judgement] judgment of the overall quality of service provided by each brokerage firm. The SEC, in release no. 34-23170 dated April 23, 1986, states that in judging the quality of service consideration should be given to "the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness to the money manager." When all factors are equal within the above guidelines, preference shall be given to brokerage firms with offices in New Mexico.

**(2)** Fixed income. Recognizing the difference in the nature of the equity and fixed income markets, i.e., no central market for fixed income securities, fixed income trades will be executed through firms, [which] that originate ideas and are able to offer/bid securities on a continuing competitive basis. When market

conditions permit in the judgment of the fixed income investment officer [~~market conditions permit~~], offerings and bids will be solicited on a competitive basis.

(3) Soft dollar policy. The chief investment [officers] officer, with approval of the director, and concurrence by the legislature, [~~are~~] is authorized to use "soft dollars" to pay for research services and equipment [~~which~~] that assist in the investment decision - making process as related to the management of the assets of the ERB retirement fund. Section 28(e) of the SEC Act of 1934, SEC interpretive release no. 34 -23170 dated April 23, 1986 and any subsequent interpretative releases shall be used as guidelines in this procedure. [6-30-99; 2.82.8.11 NMAC - Rn & A, 2 NMAC 82.8.11, 1-30-2004; A, 6-16-2015]

**TITLE 2 PUBLIC FINANCE**  
**CHAPTER 82 EDUCATIONAL RETIREMENT**  
**PART 10 RETIREMENT RECIPROACITY**

**2.82.10.1 ISSUING AGENCY:** Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129  
 [2.82.10.1 NMAC - Rp, 2 NMAC 82.10.1, 6-15-2015]

**2.82.10.2 SCOPE:** This rule applies to retirees combining service from PERA and ERA for retirement purposes. The governing boards of both systems must adopt these rules.  
 [2.82.10.2 NMAC - Rp, 2 NMAC 82.10.2, 6-15-2015]

**2.82.10.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Sections 22-11-1 to 22-11-53, NMSA 1978, the Retirement Reciprocity Act, Sections 10-13A-2 to 10-13A-3, NMSA 1978.  
 [2.82.10.3 NMAC - Rp, 2 NMAC 82.10.3, 6-15-2015]

**2.82.10.4 DURATION:** Permanent.  
 [2.82.10.4 NMAC - Rp, 2 NMAC 82.10.4, 6-15-2015]

**2.82.10.5 EFFECTIVE DATE:** June 16, 2015, unless a later date is cited at the end of a section.  
 [2.82.10.5 NMAC - Rp, 2 NMAC 82.10.5, 6-15-2015]

**2.82.10.6 OBJECTIVE:** Clarification of reciprocity retirement requirements adopted by the ERA and PERA boards.  
 [2.82.10.6 NMAC - Rp, 2 NMAC 82.10.6, 6-15-2015]

**2.82.10.7 DEFINITIONS: [RESERVED]**

**2.82.10.8 RETIREMENT RECIPROACITY:**

**A.** "Salary" is defined by each state system for that state system. Each system shall certify the member's salary as defined by that system to the payor system, and the payor system shall accept that salary for pension calculation purposes where applicable.

**B.** The Public Employees Retirement Reciprocity Act applies to normal retirement only, and does not apply to disability retirement or pre-retirement survivor pensions.

**C.** If a retired member whose service credit at retirement was acquired only under PERA, is subsequently employed by an employer covered under ERA; and the retired member becomes a contributing member of ERA; and the retired member's PERA pension is suspended for the period of membership under ERA; and the retired member acquires service credit under ERA; the subsequently acquired service credit is eligible reciprocal service credit. When the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

**D.** If a retired member whose service credit at retirement was acquired only under ERA is subsequently employed by an employer covered under PERA; the member may remove himself from a retirement status and become a contributing member of PERA; and the member may acquire service credit under PERA which shall be eligible for reciprocity service credit. When the member terminates the subsequent employment and retires again, the subsequent retirement shall be governed by the provisions of the Public Employees Retirement Reciprocity Act.

**E.** If a member has service credit for the same period of time for employment by public employers covered under different state systems, service credit may only be acquired under one state system for the period of overlapping service credit.

**F.** If a member retires with service credit under more than one state system for an overlapping period, the member shall be granted service credit for this overlapping period as follows:

**(1)** PERA shall grant service credit earned for the months the member was employed by an employer covered under PERA in accordance with all applicable PERA statutes and rules.

**(2)** ERA shall grant service credit for the quarters of ERA service credited to the member in accordance with all applicable ERA statutes and rules less the amount of service credit granted by PERA in subsection 8.6.a (now Paragraph (1) of Subsection F of 2.82.10.8 NMAC) above.

(3) In no case shall a member be credited with more than one month of service credit for all service in any calendar month.

**G.** Free or purchased military service credit under any state system may only be considered eligible reciprocal service credit under one state system for reciprocity retirement purposes.

**H.** When a member retires according to the provisions of the Public Employees Retirement Reciprocity Act, each state system under which the member has acquired eligible reciprocal service credit shall furnish the payor system with a certified statement of the member's service credit, and other pertinent data necessary to compute the member's pension.

**I.** A member retired according to the provisions of the Public Employees Retirement Reciprocity Act shall receive the same cost-of-living adjustments provided by each state system under which the retired member acquired eligible reciprocal service credit. Each state system shall pay the cost-of-living adjustment due under the provisions of that state system for the portion of the total pension attributable to service credit acquired under that state system.

**J.** A member retiring according to the provisions of the Public Employees Retirement Reciprocity Act shall only elect a form of payment option with the payor system. Each state system shall calculate benefits according to the same form of payment, except in the case of a member who retires under PERA and elects form of payment D, in which case the ERA component of the pension shall be calculated according to form of payment A.

**K.** Amendments to this rule shall be adopted by the educational retirement board and the public employees retirement board.

[2.82.10.8 NMAC - Rp, 2 NMAC 82.10.8, 6-15-2015]

**HISTORY OF 2.82.10 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 X, Retirement Reciprocity, filed 10/3/83.

ERB Rule X, Retirement Reciprocity, filed 2/4/85.

ERB Rule X, Retirement Reciprocity, filed 9/21/93.

History of Repealed Material:

2 NMAC 82.10, Retirement Reciprocity - Repealed 6-16-2015.

**FORMS OF PAYMENT OPTIONS:  
EDUCATIONAL RETIREMENT BOARD (ERB) AND  
PUBLIC EMPLOYEES RETIREMENT ASSOCIATION (PERA)**

ERB	PERA
<p><b>Option A - "Straight Life" Benefit.</b> The monthly payment amount is the full amount due to the retiree. There is no monthly survivor benefit under this option. A beneficiary or estate receives the balance of contributions to the plan if they have not been fully distributed at time of death.</p>	<p><b>Option A - "Straight Life" Benefit.</b> Provides a monthly benefit to the retiree during the retiree's lifetime only. When the retiree dies, payments stop the first day of the month following death.</p>
<p><b>Option B - "Joint 100% Survivor" Benefit.</b> The retiree's monthly benefit is reduced to provide a designated beneficiary with a 100% survivor's benefit for the remainder of his or her life. The monthly benefit is based on the retiree and beneficiary's age at retirement, with certain restrictions on the beneficiary. If the beneficiary precedes the retiree in death, the monthly benefit increases to what would be received under Option A.</p>	<p><b>Option B - Joint Survivor Option (100 Percent).</b> Provides a monthly benefit to the retiree for life. Upon death, a beneficiary receives the same amount for his or her life. The monthly retirement benefit is reduced to provide the same benefit to the beneficiary. If the survivor beneficiary dies before the retiree, the retiree's benefit is changed to payment Option A.</p>
<p><b>Option C - "Joint 50% Survivor" Benefit.</b> The retiree's monthly benefit is reduced to provide a designated beneficiary with a 50% survivor's benefit for the remainder of his or her life. The monthly benefit is based on the retiree and beneficiary's age at retirement. If the beneficiary precedes the retiree in death, the monthly benefit increases to what would be received under Option A.</p>	<p><b>Option C - Joint Survivor Option (50 Percent).</b> Provides a monthly benefit to the retiree for life. Upon death, a beneficiary receives half the amount for his or her life. The monthly retirement benefit is reduced to provide half of the benefit amount to the beneficiary. If the survivor beneficiary dies before the retiree, the retiree's benefit is changed to payment Option A.</p>
N/A	<p><b>Option D - Temporary Joint Survivor Option (An option for retirees with unmarried minor children under the age of 25).</b> Provides a monthly benefit to the retiree for life. Upon death, the same amount is shared by the retiree's eligible children until the last child reaches age 25. Once a child reaches 25 or marries, his or her benefit stops. The monthly retirement benefit is reduced based upon the retiree's age and the age of the youngest eligible child at the time of retirement. Once the youngest child reaches age 25, the retiree's benefit is changed to payment Option A.</p>

Source: ERB and PERA Member Handbooks, New Mexico Statutes Annotated (NMSA) and New Mexico Administrative Code (NMAC)