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December 17, 2012

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Kevin Force

**RE: STAFF BRIEF: ADMINISTRATIVE RULEMAKING**

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**Adopted Rules**

**2.82.1 NMAC, Public Finance, Educational Retirement, General Provisions**

The November 15, 2012 issue of the *New Mexico Register* contained changes to the Educational Retirement Board's (ERB) general provisions, specifically:

- the repeal of 2.82.1 NMAC (see Attachment 1, *Repeal 2.82.1 NMAC, "General Provisions," 11/15/12*); and
- the immediately subsequent adoption of a new section 2.82.1 NMAC (see Attachment 2, *Adopted Rule 2.82.1 NMAC, "General Provisions," 11/15/12*).

The new "General Provisions" includes:

- a new subsection, "Sanctions and Enforcement," which:
  - is inserted at 2.82.1.10 NMAC, with succeeding subsections renumbered accordingly; and
  - addresses procedures for sanctions imposed against ERB board members upon breach of fiduciary duty, which include:

- a provision permitting alleged violations to be investigated by an independent entity, selected by at least five board members, when requested by a majority of the board;
  - a requirement that any hearing addressing alleged breaches be conducted by the entire board, excepting the member alleged to have violated his or her fiduciary duty;
  - a provision noting that removal of a board member should only occur when it is necessary in order for the board to carry out its collective fiduciary duty and when allowing that member to stay would be detrimental to the educational retirement fund;
  - a requirement that the removal of a board member shall only occur after a full investigation, hearing, and affirmative vote by at least five board members or their designees;
  - a provision noting that the Secretary of Public Education and the State Treasurer may only be removed from the board by removal from their respective offices;
  - a provision allowing for the removal of the *designees* of the Secretary and Treasurer according to the procedures of this subsection, noting also that designees removed in this manner may not be reappointed;
  - a provision allowing for the formal reprimand or admonishment by the board for members or designees found to be in violation of the board's rules and policies or who conduct themselves in a manner inappropriate for a board member; and
  - a provision disallowing the board to impose fines on members or designees, except that the board may require:
    - ✓ repayment of travel or education expenses when a member or designee fails to fulfill the purpose of that education or travel; and
    - ✓ repayment to a donor of a gift accepted in violation of statute or board regulation;
- a mandate that any board member other than the Secretary of Public Education and the State Treasurer (who serve *ex officio*) who fails to attend four consecutive ERB meetings, without being excused by the Board, shall be considered to have resigned; and
  - minor clarifying and technical changes, including:
    - changes to the dates and times of scheduled ERB meetings; and
    - guidelines regarding notice to the public of board meetings and meeting agendas.

## **ATTACHMENT 1**

### **Repeal 2.82.1 NMAC, “General Provisions,” 11/15/12**

**New Mexico Register / Volume XXIII, Number 21 / November 15, 2012**

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

Adopted Rule, 2.82.1 NMAC, "General Provisions," 11/15/12

## New Mexico Register / Volume XXIII, Number 21 / November 15, 2012

**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 (3) 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 (4) 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.  
[2.82.1.9 NMAC - Rp, 2.82.1.9 NMAC, 11-15-12]

**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 reproof 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 fund shall be under the immediate direction of an investment committee composed of the director, the chairman of the board, and two members appointed by the chairman and approved by the board, for terms of one (1) year. The appointments by the chairman shall take place at the regular October meeting each year. The actions of this committee shall be governed by applicable statutes and by rules and regulations relating to investments adopted by the board.  
[2.82.1.14 NMAC - Rp, 2.82.1.13 NMAC, 11-15-12]

**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.  
[2.82.1.15 NMAC - Rp, 2.82.1.14 NMAC, 11-15-12]

**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. 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.

(c) 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. 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. 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]

**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.