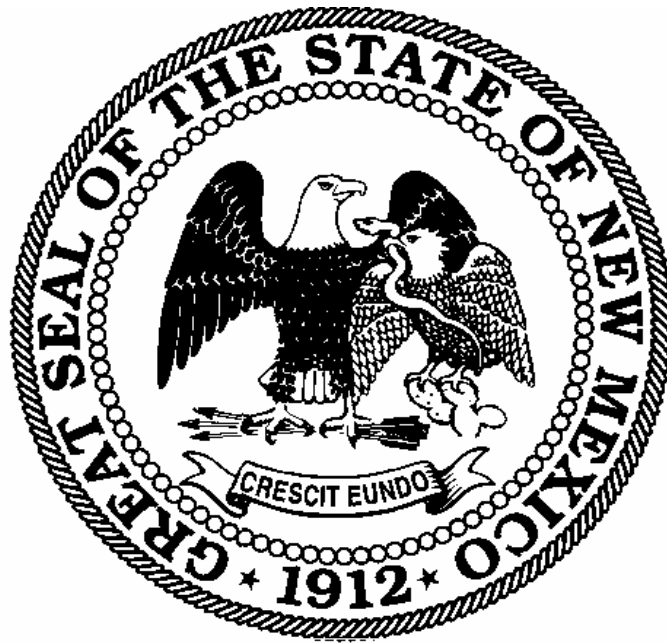


NEW MEXICO STATE PERSONNEL BOARD



Rules and Regulations
(Last Revised) September 14, 2007

State Personnel Office
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PURPOSE

The Personnel Act [NMSA 1978, Sections 10-9-1 to 10-9-25] was enacted according to the provisions of the Constitution of New Mexico [N.M. Const. art, 7, Section 2(B)].

These **Rules and Regulations** translate, when necessary, the broad language of the Personnel Act into specific rules and regulations that embody the merit principles.

The Board subscribes to the United States Office of Personnel Management's **Standards for Merit System of Personnel Administration**, which describe the merit principles as follows:

- Employee recruitment, selection, and advancement shall be on the basis of their relative knowledge, skills and abilities including open consideration of qualified applicants for initial appointment.
- Equitable and adequate compensation shall be provided.
- Employees shall be trained as needed to assure high-quality performance.
- Employees shall be retained on the basis of the adequacy of their performance. Provisions shall be made for correcting inadequate performance and separating employees whose inadequate performance can not be corrected.
- Fair treatment shall be assured for applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, disability, or other non-merit factors, and with proper regard for their primary and constitutional rights as citizens.
- Employees shall be informed of their political rights and prohibited practices under the Hatch Act [5 U.S.C. Sections 1501 to 1508].

A USER'S GUIDE

As of February 29, 2000, State Personnel Board (SPB) Rules complied with the New Mexico Administrative Code (NMAC) requirements to reformat existing Rules. The Board held a public hearing on May 23, 2001, to formally adopt the Rules in New NMAC format. State Personnel Board Rules will be presented entirely in New NMAC format effective July 07, 2001.

Rules are considered **Parts** and include the following designations at the beginning of each **Part**:

Title 1:	GENERAL GOVERNMENT ADMINISTRATION
Chapter 7 of Title 1:	STATE PERSONNEL ADMINISTRATION
Part(s) of Chapter 7, Title 1:	SPB RULES AND REGULATIONS

Parts are subdivided into: Sections, Subsections, Paragraphs and Sub-paragraphs:

Sections 1-7 in *every part* are required according to NMAC and appear as follows:

Section 1:	ISSUING AGENCY
Section 2:	SCOPE
Section 3:	STATUTORY AUTHORITY
Section 4:	DURATION
Section 5:	EFFECTIVE DATE
Section 6:	OBJECTIVE
Section 7:	DEFINITIONS

Statutory Citations In Parts: the § or §§ symbols representing the word “section” or “sections”, have now been replaced with the actual words “Section” or “Sections”.

To Find A Part: check the Table of Contents. Each Part generally contains information relating to the same subject. For example, 1.7.7 NMAC deals with the aspects of absence and leave.

To Cite a Part: always begin with: Title#, Chapter#, Part# NMAC. For example: 1.7.4 NMAC (Title 1, Chapter 7, Part 4 NMAC).

To Cite a Section, Subsection, Paragraph and Sub-paragraph: it is at this level that rules are organized. The part is subdivided into sections. The section may be further subdivided into subsections, paragraphs and sub-paragraphs. These are cited at the beginning, or before the numerical citation of the rule. For example: *Sub-paragraph (a) of Paragraph (1) of Subsection B of 1.7.4.9 NMAC.*

Non-discriminatory Language: to avoid gender-specific language, many nouns and their pronouns have been pluralized. A sentence such as “all employees shall notify their agencies” may be understood as “each employee shall notify his or her agency.”

History: the history note permits tracing the historical development of a rule provision. There is a history note appended at the end of each section. It contains the original effective date of sections filed after the implementation of NMAC. It also details all subsequent amendments and number changes by section in chronological sequence.

History of the Part: this is located at the end of the part after the last section. Pre-NMAC history is the first division of the history of the part and contains the pre-NMAC development of the rule material included in the part.

History of Repealed Material: this is the second division of the history of the part and contains repeats of NMAC parts or sections in full.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 1 GENERAL PROVISIONS

1.7.1.1 ISSUING AGENCY: State Personnel Board.
[1.7.1.1 NMAC - Rp, 1 NMAC 7.1.1, 07/07/01]

1.7.1.2 SCOPE: All state agencies in the classified service.
[1.7.1.2 NMAC - Rp, 1 NMAC 7.1.2, 07/07/01]

1.7.1.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(A); Section 7: NMSA 1978, Section 10-9-3; Section 12: NMSA 1978, Section 10-9-12 (A); Section 13: 42 U.S.C Section 101 et seq.; Section 14: NMSA 1978, Section 14-2-1 and 42 U.S.C Section 101 et seq; Chapter 173, laws of 1997.
[1.7.1.3 NMAC - Rp, 1 NMAC 7.1.3, 07/07/01; A, 11/14/02]

1.7.1.4 DURATION: Permanent.
[1.7.1.4 NMAC - Rp, 1 NMAC 7.1.4, 07/07/01]

1.7.1.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.1.5 NMAC - Rp, 1 NMAC 7.1.5, 07/07/01]

1.7.1.6 OBJECTIVE: The objective of Part 1 of Chapter 7 is: to define words and phrases used throughout Chapter 7, to cite provisions pertaining to different Parts of Chapter 7, to require maintenance of employment records, and to detail provisions that do not warrant a separate Part.
[1.7.1.6 NMAC - Rp, 1 NMAC 7.1.6, 07/07/01]

1.7.1.7 DEFINITIONS:

- A.** "Agency" means any state department, bureau, division, branch or administrative group which is under the same employer.
- B.** "Anniversary date" means the date of appointment or reemployment and is changed as of the date of promotion, demotion, reduction, or change to a different classification in the same pay band. The director shall resolve disputes over how an anniversary date is derived.
- C.** "Applicant" means any person, who has applied for a position in the classified service.
- D.** "Board" means the personnel board.
- E.** "Break in employment" means any period of separation of at least one workday of not being in the classified service.
- F.** "Candidate" means any person who is on the employment list for a position.
- G.** "Classified service" means all positions in the executive branch of state government which are not exempt by law.
- H.** "Classification" means a job that is occupationally and quantifiably distinct.
- I.** "Compa-ratio" means pay expressed as a percentage of the midpoint of a pay band.
- J.** "Demotion" means an involuntary downward change for disciplinary reasons with a reduction in pay within an employee's pay band or from a classified position in one pay band to a classified position in a lower pay band with a reduction in pay, and/or removal of supervisory responsibilities and pay for disciplinary reasons.
- K.** "Director" means the state personnel director.
- L.** "Dismissal" means the involuntary separation from employment for disciplinary reasons.
- M.** "Diversity in the workplace" means an acknowledgment of all people equally, regardless of their differences. Agencies' management of diversity will ensure that efforts are made to adapt to and accept the importance of all individuals who fall within a group identified for protection under equal employment laws and regulations.
- N.** "Employee" means a person in a position in the classified service. [note: For purposes of brevity and consistency, this definition differs from *NMSA 1978, Section 10-9-3-(I)* but in no way confers a greater right on certain persons than contemplated by *Section 10-9-3(I)*].
- O.** "Employer" means any authority having power to fill positions in an agency.
- P.** "Employment list" means the list of names, certified by the director, from which a candidate may be selected for appointment.

Q. “Established requirements” means a position’s individual job related qualification standards established by the agency and the office in accordance with the specific requirements and/or needs of the position and are subject to review by the director.

R. “Examination” means quantitative competitive assessment of qualifications, knowledge, skills, fitness and abilities of an applicant including tests.

S. “Exempt service” means all positions in the executive branch of state government exempt from the classified service by law.

T. “Filed” means received by the office.

U. “First line supervisor” means an employee in a technical occupation group who devotes a substantial amount of work time to supervisory duties, customarily and regularly directs the work of two or more other employees and has the authority in the interest of the employer to hire, promote, evaluate the performance of, or discipline other employees or to recommend such actions effectively but does not include an individual who performs merely routine, incidental or clerical duties, or who occasionally assumes supervisory or directory roles or whose duties are substantially similar to those of subordinates, and does not include lead employees, employees who participate in peer review or occasional employee evaluation programs.

V. “Involuntary separation” means involuntary removal of an employee from the classified service without prejudice as provided for in **1.7.10.13 NMAC**.

W. “Line authority” means the assignment of activities and/or approval authority in a manner that does not relinquish the director’s administrative oversight or authority.

X. “Manager” means an employee in a position that manages internal staff and/or external staff, and who plans, organizes, integrates, coordinates, and controls the activities of others. A manager also is held accountable for the performance of people, services, systems, programs and resources and can change their direction, objectives and assignments to meet performance and business needs.

Y. “Midpoint” means the salary midway between the minimum and maximum pay rates of a pay band or pay opportunity that represents the competitive market rate for jobs of the same relative worth in the relevant labor market(s). Midpoint represents a compa-ratio value of 1.00 or 100% percent.

Z. “Minimum qualifications” means statutory requirements as required by law, which shall be used to reject applicants.

AA. “Office” means the state personnel office.

BB. “Pay band” means the range of pay rates, from minimum to maximum.

CC. “Probationer” means an employee in the classified service who has not completed the one-year probationary period.

DD. “Promotion” means the change of an employee from a classified position in one pay band to a classified position in a higher pay band.

EE. “Reduction” means a voluntary change without prejudice, within an employee’s pay band, or from a classified position in one pay band to a classified position in a lower pay band, or voluntary removal of supervisory or leadworker responsibilities and pay.

FF. “Relation by blood or marriage within the third degree” includes spouse, domestic partner, parent, mother-in-law, father-in-law, step-parent, children, domestic partner children, son-in-law, daughter-in-law, step-child, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, grandparent, grandchild, uncle, aunt, nephew, niece, great-grandchild, and great-grandparent.

GG. “Resignation” means the voluntary separation of an employee from the classified service.

HH. “Rules” means the rules and regulations of the personnel board.

II. “Status” means all of the rights and privileges of an appointment.

JJ. “Suspension” means an involuntary leave of absence without pay for disciplinary reasons for a period not to exceed 30 calendar days.

KK. “Transfer” means the movement of an employee from one position to another in the same pay band without a break in employment.

LL. “Without prejudice” means a declaration that no rights or privileges of the employee concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided.

MM. “Writing or written” means in the written form and/or an alternative format, where deemed appropriate, and when requested.

[1.7.1.7 NMAC - Rp, 1 NMAC 7.1.7, 07/07/01; A, 11/14/02; A 10/30/03; A, 7-15-05; A, 12-30-05; A/E, 1-30-06; A, 3-31-06]

1.7.1.8 APPROVAL AUTHORITY:

A. Pursuant to the provision of *NMSA 1978, Section 10-9-12(A)* the director shall supervise all administrative and technical personnel activities of the state.

(1) The director, pursuant to direction from the board, will establish a quality assurance review program, and will ensure that a copy of the program is provided to each agency. The board will review the quality assurance review program on an annual basis.

(2) The director shall ensure that all agencies are reviewed, as outlined in the quality assurance review program, which will enable the director the ability to supervise all administrative and technical personnel activities of the state and ensure compliance with the rules. The director shall submit the findings to the board.

B. If it is established that an agency has violated the rules or their agency's policies which require office approval, and they are given adequate opportunity to correct violations and fail to do so, the director may suspend the agency's right to approve such actions as provided in the rules and all such actions will require director approval until the director rescinds the suspension.

C. The director reserves the right to assign line authority under these rules so long as such line authority maintains the director's administrative oversight and authority. Such decisions are subject to the board's review. Such authority shall be derived from the director through written instruction which shall specify the responsibility(ies) and accountability(ies) which are being delegated.

D. The director, with the approval of the board, shall establish criteria governing the requirements which must be met to achieve and maintain line authority status.

E. The director may modify or withdraw line authority status. Such decisions are subject to the board's review.

[1.7.1.8 NMAC - Rp, 1 NMAC 7.1.8, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.1.9 INTERPRETATIONS: The board shall establish a procedure for the issuance of interpretations of these Rules.

[1.7.1.9 NMAC - Rp, 1 NMAC 7.1.9, 07/07/01]

1.7.1.10 METHOD OF SERVING NOTICE: Any notice required of an agency by these rules, except for *1.7.1.3 NMAC*, shall be delivered by a method that provides proof of service or attempted service.

[1.7.1.10 NMAC - Rp, 1 NMAC 7.1.10, 07/07/01]

1.7.1.11 COMPUTATION OF TIME:

A. In computing any period of time prescribed or allowed by these rules, the day from which period of time begins to run shall not be included. The last calendar day of the time period shall be included in the computation unless it is a Saturday, Sunday or a day on which a legal holiday is observed. In such a case, the period of time runs to the close of business on the next regular workday. If the period is less than 11 days, a Saturday, Sunday or legal holiday is excluded from the computation.

B. Whenever an employee is permitted or required by these rules to respond or do some other act within a prescribed period after service of a notice or paper upon the employee and the notice or paper is served by mail or courier service, 3 calendar days shall be added to the prescribed period.

[1.7.1.11 NMAC - Rp, 1 NMAC 7.1.11, 07/07/01; A, 11/14/02]

1.7.1.12 EMPLOYMENT RECORDS:

A. The director and agencies shall maintain a record of each employee's employment history in accordance with operational necessity and applicable state and federal law requirements. Employees shall have access to their own file. Employment-related confidential records shall be available for inspection by agencies during the process of interviewing for employment when the employee has provided a signed release. No materials shall be placed in an employee's employment history without providing the employee with a copy. Employees may submit written rebuttal to any material placed in their employment history. Agencies shall transfer the complete record of an employee's employment history upon inter-agency transfer.

B. Employment records, except confidential records, are subject to inspection by the general public. Confidential records may be inspected with the written permission of the employee or pursuant to a lawful court order.

C. For the purpose of inspection of public records under *Subsection B of 1.7.1.12 NMAC*, the following material shall be regarded as confidential: records and documentation pertaining to physical or mental examinations and medical treatment of persons, including those confined to any institution; records and documentation maintained for purposes of the *Americans with Disabilities Act [42 U.S.C. Section 101 et seq.]*;

letters of reference concerning employment, licensing, or permits; records and documentation containing matters of opinion; documents concerning infractions and disciplinary actions; performance appraisals; opinions as to whether a person should be re-employed; college transcripts; military discharge, if other than honorable; information on the race, color, religion, sex, national origin, political affiliation, age, and disability of employees; and laboratory reports or test results generated according to the provisions of **1.7.8 NMAC**.

[1.7.1.12 NMAC - Rp, 1 NMAC 7.1.12, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.1.13 SETTLEMENT AGREEMENTS: Any settlement agreement reached by an agency and an employee to resolve a matter between them, that incorporates provisions covered by these rules, must conform to the provisions of these rules and have the prior approval of the director. The director may approve a settlement agreement, which does not conform to the provisions of these rules if, in the judgment of the director, the settlement is in the best interest of the state of New Mexico with the joint approval of the cabinet secretary of the department of finance and administration signifying budget availability.

[1.7.1.13 NMAC - Rp, 1 NMAC 7.1.13, 07/07/01; A, 7-15-05]

1.7.1.14 AGENCY HUMAN RESOURCE POLICIES: Each agency shall provide a copy of their human resource policies to the office and these policies must conform to the provisions of these rules and other statutory requirements as required by law and include, among other things, policies regarding diversity in the workplace.

[1.7.1.14 NMAC - Rp, 1 NMAC 7.1.14, 07/07/01]

1.7.1.15 TRAINING AND DEVELOPMENT: The director shall establish, pursuant to direction from the board, and maintain training and development guidelines and will ensure that a copy of the guidelines is provided to each agency. The board will review the training and development guidelines on an annual basis.

[1.7.1.15 NMAC - N, 07/07/01; A, 11/14/02]

1.7.1.16 SEVERABILITY: A determination by a court of competent jurisdiction that any provision of **1.7.1 NMAC** is unconstitutional or invalid shall not adversely affect the constitutionality, validity or enforceability of the remaining provisions.

[1.7.1.16 NMAC - N, 07/07/01]

HISTORY OF 1.7.1 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 1, Definitions, filed 05-22-80;
SPB Rule 1, Definitions, filed 06-03-81;
SPB Rule 1, Definitions, filed 07-22-82;
SPB Rule 1, Definitions, filed 10-21-82;
SPB Rule 1, Definitions, filed 06-28-83;
SPB Rule 1, Definitions, filed 03-07-86;
SPB Rule 1, Definitions, filed 10-17-86;
SPB Rule 1, Definitions, filed 07-30-87;
SPB-A, Glossary, filed 04-04-90;
SPB-A, Glossary, filed 10-19-90;
SPB 1, Definitions, filed 12-15-92;
SPB 1, Definitions, filed 02-10-94;
SPB Rule 2, General Provisions, filed 05-22-80;
SPB Rule 2, General Provisions, filed 06-03-81;
SPB Rule 2, General Provisions, filed 07-22-82;
SPB Rule 2, General Provisions, filed 10-21-82;
SPB Rule 2, General Provisions, filed 06-28-83;
SPB Rule 2, General Provisions, filed 03-07-86;
SPB Rule 2, General Provisions, filed 10-17-86;
SPB-1, General Applicability filed 04-04-90;
SPB-1, General Applicability filed 10-19-90;
SPB-1, General Applicability filed 12-24-91;
SPB 2, General Provisions, filed 12-15-92;

SPB 2, General Provisions, filed 02-10-94;
SPB 2, General Provisions, filed 12-29-94.

History of Repealed Material:

1 NMAC 7.1, General Provisions, filed 06-13-97.

Other History:

1 NMAC 7.1, General Provisions, filed 01-12-96 **replaced** SPB 1, filed 02-14-94 and SPB 2, filed 12-29-94;

1 NMAC 7.1, General Provisions, filed 05-02-96;

1 NMAC 7.1, General Provisions, filed 06-13-97 **replaced by** 1.7.1 NMAC, General Provisions, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 2 CLASSIFIED SERVICE APPOINTMENTS

1.7.2.1 ISSUING AGENCY: State Personnel Board.
[1.7.2.1 NMAC - Rp, 1 NMAC 7.2.1, 07/07/01]

1.7.2.2 SCOPE: All state agencies in the classified service.
[1.7.2.2 NMAC - Rp, 1 NMAC 7.2.2, 07/07/01]

1.7.2.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(A); NMSA 1978, Sections 10-9-13(E), (J); and NMSA 1978, Section 10-9-18(A).
[1.7.2.3 NMAC - Rp, 1 NMAC 7.2.3, 07/07/01; A, 11/14/02]

1.7.2.4 DURATION: Permanent.
[1.7.2.4 NMAC - Rp, 1 NMAC 7.2.4, 07/07/01]

1.7.2.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.2.5 NMAC - Rp, 1 NMAC 7.2.5, 07/07/01]

1.7.2.6 OBJECTIVE: The objective of Part 2 of Chapter 7 is: to describe various types of appointments in the classified service and to describe employees' rights in the classified system.
[1.7.2.6 NMAC - Rp, 1 NMAC 7.2.6, 07/07/01]

1.7.2.7 DEFINITIONS:

- A.** "Career appointment" is the employment of a candidate in a position recognized by the office as permanent.
- B.** "Term appointment" is the employment of a candidate in a position created for a special project or a state or federally funded program with a designated duration.
- C.** "Temporary appointment" is the employment of a candidate in a position created for a duration of less than one year.
- D.** "Emergency appointment" is the employment of an apparently qualified applicant when an emergency condition exists and the appropriate employment list contains no available candidates.
- E.** "Convert(ed)" means the changing of an employee to a different type of status.

[1.7.2.7 NMAC - Rp, 1 NMAC 7.2.7, 07/07/01]

1.7.2.8 PROBATION:

- A.** A probationary period of one year is required of all employees unless otherwise provided for by these rules.
- B.** The probationary period includes all continuous employment in the classified service except temporary service-
- C.** A break in employment of at least one work day or more will require an employee to serve another probationary period upon rehire into the classified service with the exception of those employees returned to work under 1.7.10.10 or 1.7.10.14 NMAC.
- D.** Any full-time continuous leave, except for military leave, taken during the probationary period exceeding 30 calendar days shall extend the probationary period by the number of days of leave that exceeds 30 calendar days.
- E.** A probationer may have their appointment expired for non-disciplinary reasons with a minimum of 24 hours written notice without right of appeal to the board. Such employees shall be advised in writing of the reason(s) for the expiration of appointment.

[1.7.2.8 NMAC - Rp, 1 NMAC 7.2.8, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.2.9 CAREER STATUS: An employee in a career appointment attains career status beginning the day following the end of the probationary period required by **1.7.2.8 NMAC** unless otherwise provided for by these rules.[1.7.2.9 NMAC - Rp, 1 NMAC 7.2.9, 07/07/01]

1.7.2.10 TERM STATUS: Employees in term status who complete the one year probationary period required by **1.7.2.8 NMAC** shall have all of the rights and privileges of employees in career status except that term appointments may be expired due to reduction or loss of funding or when the special project or program ends with at least 14 calendar days written notice to the employee without right of appeal to the board.
[1.7.2.10 NMAC - Rp, 1 NMAC 7.2.10, 07/07/01; A, 11/14/02]

1.7.2.11 TEMPORARY STATUS: Temporary appointments may be expired with at least 24 hours written notice to the employee without right of appeal to the board.
[1.7.2.11 NMAC - Rp, 1 NMAC 7.2.11, 07/07/01]

1.7.2.12 EMERGENCY APPOINTMENTS:

A. An emergency appointment is the employment of an apparently qualified applicant when an emergency condition exists and there are no applicants available on an appropriate employment list.

B. No employee may hold an emergency appointment longer than 90 calendar days in any 12-month period.

C. Emergency appointments may be expired with at least 24 hours written notice to the employee without right of appeal to the board.

D. An employee in emergency appointment may be converted to a career, term, or temporary status if the employee: has met the established requirements or the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and is performing to the agency's satisfaction; and there are no available candidates for the position after appropriate recruitment.

[1.7.2.12 NMAC - Rp, 1 NMAC 7.2.12, 07/07/01]

1.7.2.13 EXPIRATION OF APPOINTMENT: The expiration of a term, probationary, emergency or temporary appointment shall not be considered to be a layoff within the meaning of **1.7.10.9 NMAC** or a dismissal within the meaning of **Subsection M of 1.7.1.7 NMAC**.

[1.7.2.13 NMAC - Rp, 1 NMAC 7.2.13, 07/07/01; A, 11/14/02]

1.7.2.14 ACKNOWLEDGMENT OF CONDITIONS OF APPOINTMENT: Agencies shall require that a form be signed by all employees at the time of appointment acknowledging the terms and conditions of the appointment.

[1.7.2.14 NMAC - Rp, 1 NMAC 7.2.14, 07/07/01; A, 11/14/02]

HISTORY OF 1.7.2 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB-6, Appointment, filed 04-04-90;

SPB-6, Appointment, filed 10-19-90;

SPB 3, Classified Service Appointments, filed 12-15-92.

History of Repealed Material:

1 NMAC 7.2, Classified Service Appointments, filed 06-13-97.

Other History:

1 NMAC 7.2, Classified Service Appointments, filed 01-12-96 replaced SPB 3, filed 12-15-92;

1 NMAC 7.2, Classified Service Appointments, filed 05-02-96;

1 NMAC 7.2, Classified Service Appointments, filed 06-13-97 replaced by 1.7.2 NMAC, Classified Service Appointments, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 3 CLASSIFICATION

1.7.3.1 ISSUING AGENCY: State Personnel Board.
[1.7.3.1 NMAC - Rp, 1 NMAC 7.3.1, 07/07/01]

1.7.3.2 SCOPE: All state agencies in the classified service.
[1.7.3.2 NMAC - Rp, 1 NMAC 7.3.2, 07/07/01]

1.7.3.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-13(A).
[1.7.3.3 NMAC - Rp, 1 NMAC 7.3.3, 07/07/01; A, 11/14/02]

1.7.3.4 DURATION: Permanent.
[1.7.3.4 NMAC - Rp, 1 NMAC 7.3.4, 07/07/01]

1.7.3.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.3.5 NMAC - Rp, 1 NMAC 7.3.5, 07/07/01]

1.7.3.6 OBJECTIVE: The objective of Part 3 of Chapter 7 is: to provide for a uniform and flexible system for the classification of state positions that supports the mission of state agencies, is adaptable to change, ensures that all positions are assigned to their appropriate classification, and sets forth a process for implementing classification studies.
[1.7.3.6 NMAC - Rp, 1 NMAC 7.3.6, 07/07/01; A, 11/14/02]

1.7.3.7 DEFINITIONS:

A. “Classification plan” means a document developed by the director and approved by the board, that describes the board’s classification philosophy and is the foundation for ensuring consistent application of the philosophy.
[1.7.3.7 NMAC - Rp, 1 NMAC 7.3.7, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.3.8 CLASSIFICATION PLAN:

A. The director, pursuant to direction from the board, shall establish, maintain and, in conjunction with state agencies, administer a classification plan for all positions throughout the classified service.
B. The board will review, approve and adopt new or revised classification descriptions.
C. The director may authorize the deletion of unused classification descriptions and revisions to classification descriptions if the revision does not necessitate a study.
D. The director shall provide affected parties an opportunity to comment on the creation, revision, and deletion of classification descriptions prior to implementation.
E. Agencies may request classification reviews, classification studies and/or classification re-evaluations.
[1.7.3.8 NMAC - Rp, 1 NMAC 7.3.8, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.3.9 POSITION ASSIGNMENT:

A. The director, in conjunction with state agencies, shall ensure that each position in the classified service is assigned to the classification that best represents the duties assigned by the employer and performed by the employee.
B. When a filled position is assigned a classification with a lower pay band, in accordance with the provisions *Subsection A of 1.7.3.9 NMAC*, the employee may elect to take a reduction in accordance with *Subsection II of 1.7.1.7 NMAC*, or overfill the position in their current classification.
C. A position assignment decision may be appealed to the director through the agency’s chain-of-command. Appeals to the director must be in writing and include the agency’s analysis of the reasons for the appeal. The director’s decision is final and binding.
[1.7.3.9 NMAC - Rp, 1 NMAC 7.3.9, 07/07/01; A, 11/14/02; A, 7-15-05; A, 12-30-05]

1.7.3.10 IMPLEMENTATION OF CLASSIFICATION STUDY RESULTS: On a date determined by the director, employees affected by a classification study shall be assigned to the resulting new classification which best represents the job performed without having to meet the established requirements, unless minimum qualifications are required by law.

[1.7.3.10 NMAC - Rp, 1 NMAC 7.3.10, 07/07/01; A, 7-15-05]

HISTORY OF 1.7.3 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 8, Classification, filed 05-22-80;

SPB Rule 8, Classification, filed 07-22-82;

SPB Rule 8, Classification, filed 08-11-82;

SPB Rule 8, Classification, filed 10-21-82;

SPB Rule 8, Classification, filed 10-17-86;

SPB Rule 8, Classification, filed 07-30-87;

SPB-7, Classification, filed 04-04-90;

SPB-7, Classification, filed 10-19-90;

SPB 5, Classification, filed 12-15-92.

History of Repealed Material:

1 NMAC 7.3, Classification, filed 06-13-97.

Other History:

1 NMAC 7.4, Classification, filed 01-12-96 replaced SPB 5, filed 12-15-92;

1 NMAC 7.4, Classification, filed 01-12-96 replaced by 1 NMAC 7.4, filed 05-02-96;

1 NMAC 7.4, Classification, filed 05-02-96 replaced by 1 NMAC 7.3, Classification, filed 06/13/97;

1 NMAC 7.3, Classification, filed 06-13-97 replaced by 1.7.3 NMAC, Classification, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 4 PAY

1.7.4.1 ISSUING AGENCY: State Personnel Board.
[1.7.4.1 NMAC - Rp, 1.7.4.1 NMAC, 11/14/02]

1.7.4.2 SCOPE: All state agencies in the classified service.
[1.7.4.2 NMAC - Rp, 1.7.4.2 NMAC, 11/14/02]

1.7.4.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-7-12 NMSA 1978, Sections 10-9-13(B);
and 29 U.S.C. Sections 201 to 262.
[1.7.4.3 NMAC - Rp, 1.7.4.3 NMAC, 11/14/02]

1.7.4.4 DURATION: Permanent.
[1.7.4.4 NMAC - Rp, 1.7.4.4 NMAC, 11/14/02]

1.7.4.5 EFFECTIVE DATE: 11/14/02 unless a later date is cited at the end of a section.
[1.7.4.5 NMAC - Rp, 1.7.4.5 NMAC, 11/14/02]

1.7.4.6 OBJECTIVE: The objective of Part 4 of Chapter 7 is: to provide a uniform system of pay
administration for employees that is externally competitive and internally equitable.
[1.7.4.6 NMAC - Rp, 1.7.4.6 NMAC, 11/14/02]

1.7.4.7 DEFINITIONS:

A. “Alternative pay band” means the range of pay rates, from the minimum to the maximum for a
classification based on the current market rate for benchmark jobs in the relevant labor market(s).

B. “Appropriate placement” means those elements to be considered in determining pay upon hire,
promotion, transfer or reduction including the employee’s education, experience, training, certification, licensure,
internal pay equity, budgetary availability and, when known and applicable, employee performance.

C. “Comparison market” means an identified group of employers for which similar jobs can be
recognized for the primary purpose of obtaining information that can be used to assess how competitive employee
pay levels are relative to the market.

D. “Contributor proficiency zones” means subdivisions of the pay band that designate the employee’s
contribution in their job role. These proficiency zones are characterized as associate, independent and principal
zones.

E. “In pay band adjustment” means movement within a pay band for demonstrated performance, skill
or competency development, and/or internal alignment, which allows agency management to provide salary growth
within a pay band.

F. “Internal alignment” means an adjustment that addresses pay issues involving the proximity of one
employee’s salary to the salaries of others in the same agency and classification who have comparable levels of
training, education and experience, duties and responsibilities, performance, knowledge, skills, abilities, and
competencies, and who are appropriately placed.

G. “Pay plan” means a document developed by the director and approved annually by the board, that
describes the board’s compensation philosophy and it is the foundation for ensuring consistent application of the
philosophy.

H. “Total compensation” means all forms of cash compensation and the dollar value of the employer-
sponsored benefit.

[1.7.4.7 NMAC - Rp, 1.7.4.7 NMAC, 11/14/02; A, 7-15-05; A, 12-30-05]

1.7.4.8 PAY PLAN:

A. The director, pursuant to the direction of the board, shall establish, maintain and, in conjunction
with state agencies, administer a pay plan for all positions throughout the classified service, which shall include the
pertinent factors that should be considered by managers for determining and justifying appropriate placement within
a pay band.

B. Agencies shall develop and utilize a compensation policy that is in compliance with *1.7.4 NMAC*. Agency compensation policies will be filed with, and reviewed by, the director. Subsequent revisions to the compensation policy shall be filed with the office prior to adoption of the policy.

C. The board shall adopt a recognized method of job evaluation to uniformly and consistently establish the value of each level.

D. The director shall conduct an annual compensation survey that includes total compensation. The comparison market shall be comprised of private and public entities within the state of New Mexico, regional state government employers, and central, western and southwestern state government employers. The board or director may authorize additional comparison markets when deemed necessary and appropriate.

E. Prior to the end of each calendar year, the director shall submit a compensation report that includes a summary of the status of the classified pay system and the results of the annual compensation survey that includes total compensation to the board. The board shall review, adopt and submit this report to the governor and the legislative finance committee.

[1.7.4.8 NMAC - Rp, 1.7.4.8 NMAC, 11/14/02; A, 7-15-05; A, 12-30-05]

1.7.4.9 ASSIGNMENT OF PAY BANDS: The director shall appoint a job evaluation committee consisting of 10 members. The director will provide training in the job evaluation and measurement process. The committee shall apply the job evaluation and measurement process to all newly created or revised classifications.

A. The committee shall submit the results of the job evaluation(s) as recommendations to the director. The director shall review the results and convert the total job evaluation points to the appropriate pay band. The director shall submit the pay band assignment results to the board for adoption.

B. Agencies may request a re-evaluation of a classification which, based upon their analysis, is inappropriately valued. Re-evaluations may be conducted no more than once every 24 months unless otherwise approved by the director.

[1.7.4.9 NMAC - Rp, 1.7.4.8.F NMAC, 11/14/02; A, 7-15-05; A, 12-30-05]

1.7.4.10 ASSIGNMENT OF ALTERNATIVE PAY BANDS:

A. The director shall recommend to the board the assignment of an alternative pay band(s).

(1) Alternative pay band(s) will be utilized to address compensation related to recruitment and retention issues.

(2) All jobs in an alternative pay band have the same range of pay: minimum, maximum and midpoint pay.

B. Requests for alternative pay bands must meet criteria established in the pay plan.

C. The board shall assign alternative pay bands based on the director's report on comparison market surveys, or additional market survey information, to address critical recruitment/retention issues.

D. The assignments to alternative pay bands shall be reviewed annually to determine their appropriateness. The director shall recommend to the board the continuation or removal of the alternative pay band assignments. The salary of affected employees shall be governed by *Subsection I. of 1.7.4.12 NMAC*.

[1.7.4.10 NMAC - N, 11/14/02; Repealed, 12-30-05; 1.7.4.10 NMAC - Rn, 1.7.4.11 NMAC & A, 12-30-05]

1.7.4.11 SALARY SCHEDULES:

A. Based on the pay plan, the director shall develop and maintain salary schedules for the classified service that shall consist of pay bands.

B. No employee in the classified service shall be paid a salary less than the minimum nor greater than the maximum of their designated pay band unless otherwise authorized by the director, or provided for in these rules, or the employee has been transferred into the classified service by statute, executive order, or order of a court of competent jurisdiction.

C. The director, pursuant to the direction of the board, shall adjust the salary schedules to address the external competitiveness of the service and/or other concerns. Employees whose pay band is adjusted upward or downward shall retain their current salary. Such salary schedule adjustments may result in employees temporarily falling below the minimum or above the maximum of their pay band upon implementation.

(1) The pay of employees who would be above the maximum of the pay band shall not be reduced.

(2) The pay of employees who fall below the minimum of their pay band shall be raised to the minimum unless the director confirms that the agency does not have budget availability. In these instances, agencies shall raise the pay of employees to the minimum of their pay band within six months of the effective date of the

salary schedule adjustment. The director may grant an extension to the six month time period upon submission and approval of a plan by the agency to raise the pay of employees to the minimum of their pay band.

D. An employee's placement in the pay band will be identified by a compa-ratio value.
[1.7.4.11 NMAC - Rp, 1.7.4.9 NMAC, 11/14/02; 1.7.4.11 NMAC - Rn, 1.7.4.12 NMAC & A, 12-30-05]

1.7.4.12 ADMINISTRATION OF THE SALARY SCHEDULES:

A. Entrance Salary: Upon entrance to a classified position, a newly-appointed employee's salary, subject to budget availability, should reflect appropriate placement within the pay band. Any entrance salary in the principal contributor zone must receive approval from the director prior to appointment.

B. Legislative Authorized Salary Increase:

(1) Subject to specific statutory authorization for each state fiscal year, employees may be eligible for a salary increase within their assigned pay band.

(2) Employees with a salary at or above the maximum of the position's pay band shall not be eligible for an increase unless authorized by statute.

C. Salary Upon In Pay Band Adjustment: Upon in pay band adjustment, subject to director approval, budget availability and reflective of appropriate placement, agencies may increase an employee's salary up to ten percent (10%) during a fiscal year. An employee may receive more than one adjustment within a fiscal year provided the salary increases do not exceed more than ten percent (10%) and the employee's base salary does not exceed the maximum of the assigned pay band. When reviewing requests for in pay band adjustments the director will take into consideration those instances where the requesting agency has employees with a current rate of pay that falls below the minimum of their pay band.

D. Salary Upon Promotion: Upon promotion, an employee's salary subject to budget availability, should reflect appropriate placement within the pay band. A salary increase of less than five percent (5%) or greater than fifteen percent (15%) shall require approval of the director. A salary increase greater than fifteen percent (15%) to bring an employee's salary to the minimum of the pay band or less than five percent (5%) to prevent an employee's salary from exceeding the maximum of the pay band does not require the approval of the director. The salary of a promoted employee shall be in accordance with *Subsection B of 1.7.4.11 NMAC*.

E. Salary Upon Demotion: Upon demotion, an employee's salary shall be decreased to an hourly rate of pay which does not result in more than a fifteen percent (15%) decrease from the previous salary unless a greater decrease is required to bring the salary to the maximum of the new pay band or the decrease is being made in accordance with *Paragraph (2) of Subsection F of 1.7.4.12 NMAC*.

F. Pay Allowance for Performing First Line Supervisor Duties:

(1) An agency shall grant a pay allowance to an employee in a non-manager classification who accepts and consistently performs additional duties which are characteristic of a first line supervisor. The amount of the pay allowance shall reflect the supervisory responsibilities which transcend the technical responsibilities inherent in the technical occupation group and shall be between 0% and 20% above the employee's base pay rate.

(2) When the supervisor duties are no longer being performed, the agency shall revert the employee to the hourly rate of pay held prior to granting the pay allowance, plus any authorized pay increases.

(3) Agencies shall require that a form, established by the director, be signed by all employees at the time of acceptance of a pay allowance evidencing their agreement to the terms and conditions of the pay allowance.

G. Salary Upon Transfer:

(1) Upon transfer an employee's salary, subject to budget availability and reflective of appropriate placement, may be increased up to ten percent (10%). The director may approve a salary increase greater than ten percent (10%) due to special circumstances that are justified in writing.

(2) Employees shall be compensated, in accordance with agency policy, for all accumulated leave, other than sick, annual, or personal leave, prior to inter-agency transfer.

H. Salary Upon Pay Band Change: When a change of pay band is authorized in accordance with the provisions of *1.7.4.9 NMAC, 1.7.4.10 NMAC, and/or 1.7.4.11 NMAC* the salaries of affected employees shall be determined in accordance with *Subsection C of 1.7.4.11 NMAC*. Employees whose pay band is adjusted upward or downward shall retain their current salary in the new pay band. Employees' salaries may be addressed through in pay band adjustment unless otherwise allowed by statute.

I. Salary Upon Reduction: The salary of employees who take a reduction may be reduced by up to fifteen percent (15%) unless the reduction is made in accordance with *Paragraph (2) of Subsection F of 1.7.4.12 NMAC*. An employee's salary should reflect appropriate placement within the pay band. The director may approve a salary reduction greater than fifteen percent (15%) due to special circumstances that are justified in writing.

J. Salary Upon Return To Work Or Reemployment: The salary of former employees who are returned to work or re-employed in accordance with the provisions of *1.7.10.10 NMAC, 1.7.10.11 NMAC, 1.7.10.12 NMAC, or 1.7.10.14 NMAC* shall not exceed the hourly pay rate held at the time of separation unless a higher salary is necessary to bring the employee to the minimum of the pay band.

K. Salary Upon Temporary Promotion: Pay for a temporary promotion under *Subsection E of 1.7.5.12 NMAC*, will be administered in accordance with *Subsection D of 1.7.4.12 NMAC*. The agency shall discontinue the temporary promotion increase when the temporary conditions cease to exist or at the end of the 12 month period, whichever occurs first.

L. Temporary Salary Increase: An agency may, with the approval of the director, grant a temporary salary increase of up to fifteen (15%), for a period not to exceed 1 year, from the effective date of the salary increase, for temporarily accepting and consistently performing additional duties which are characteristic of a job requiring greater responsibility/accountability and/or a higher valued job. The director may approve temporary salary increases above the maximum of the employee's current pay band. The agency shall discontinue the temporary salary increase when the temporary conditions cease to exist or at the end of the 12 month period, whichever occurs first.

M. Shift Pay: Employees shall be paid, in addition to their regular pay rate, no less than \$0.60 per hour for each hour of regularly scheduled work between 6:00 p.m. and 7:00 a.m. Agencies shall notify the director of any change in this rate.

N. Salary Adjustment to Minimum: An employee whose salary falls below the minimum of the pay band will be adjusted in accordance with *Paragraph (2) of Sub-Section C of 1.7.4.11 NMAC*. [1.7.4.12 NMAC - Rp, 1.7.4.10 NMAC, 11/14/02; A, 7-15-05; 1.7.4.12 NMAC - Rn, 1.7.4.13 NMAC & A, 12-30-05]

1.7.4.13 PAY DIFFERENTIALS:

A. Temporary Recruitment/Retention Differential: The director may authorize, in writing, a pay differential of up to fifteen percent (15%) of an employee's base pay to an employee who fills a position which has been documented as critical to the effective operation of the agency and has been demonstrated and documented to be a severe recruitment problem for the agency.

(1) A differential authorized under this provision shall be tied to the position and may not transfer with the employee should the employee leave that position. Payment of this differential shall be separate from the employee's base salary. Agencies shall demonstrate to the office, at least biennially, the circumstances which justified the differential to determine the necessity for its continuance.

(2) A differential of more than fifteen percent (15%) of an employee's base pay or a total salary (base pay plus differential amount) that exceeds the maximum of the pay band may be authorized if approved by the director.

B. Out-of-State Differential: The director may authorize an out-of-state differential to an employee up to the maximum of the pay band if the agency is able to substantiate that the employee's current salary is insufficient to adequately pay an employee while working or residing out of state. Payment of this differential should be separate from the employee's base salary. A total salary (base pay plus differential amount) that exceeds the maximum of the pay band may be authorized if approved by the director.

[1.7.4.13 NMAC - Rp, 1.7.4.11 NMAC, 11/14/02; A, 10/30/03; A, 7-15-05; 1.7.4.13 NMAC - Rn, 1.7.4.14 NMAC & A, 12-30-05; A, 6-30-06]

1.7.4.14 OVERTIME:

A. Agencies are responsible for the evaluation of each employee's position and duties in order to determine their overtime status as set forth under the *Fair Labor Standards Act*.

B. Agencies shall provide documentation to employees as to the determination of their overtime status.

C. Employees have the right to appeal the determination of their overtime status according to the provisions of *1.7.6.13 NMAC*. Agencies shall notify employees in writing of their appeal decision within 30 calendar days. The employee may file an appeal of the agency's decision to the director within 30 calendar days of the agency's decision. Agencies shall notify employees that their appeal to the director must be in writing and must include the reason(s) why the employee believes he or she is improperly identified for overtime coverage. The appeal must include documentation describing the work currently being performed by the employee and any other relevant information. All information contained in the appeal shall be verified by the employing agency.

D. Agencies shall maintain a record on each employee containing information required by the provisions of the *Fair Labor Standards Act*.

E. Workweek is a period of time which begins at 12:01 a.m. Saturday, and ends at 12:00 midnight, the following Friday. The director may approve an alternative workweek.

F. Time worked in excess of 40 hours during the designated workweek shall be compensated in accordance with the provision of the *Fair Labor Standards Act* [29 U.S.C. Sections 201 to 262] for *Fair Labor Standards Act* covered, non-exempt employees.

G. Agencies shall not change the workweek to avoid payment of overtime. A change to the scheduled work hours within the workweek shall not be considered a change to the workweek.

H. Agencies shall determine the need for employees to work overtime, and be responsible for authorizing overtime work.

I. Paid holiday leave, annual leave, and administrative leave for voting taken in accordance with the provisions of **Subsection C of 1.7.7.14 NMAC** shall also count as time worked in the consideration of overtime for *Fair Labor Standards Act* covered, non-exempt employees.

J. Agencies shall pay *Fair Labor Standards Act* covered, non-exempt employees for overtime worked unless the employee, in advance, agrees in writing to compensatory time off. Employees may accrue a maximum of 240 hours of compensatory time, unless otherwise authorized by statute and shall be paid for accrued compensatory time upon separation.

K. Employees not covered or exempt from the overtime provisions of the *Fair Labor Standards Act* may be compensated for overtime if an agency's policy permits.

L. Any additional regular hours worked shall not be substituted for approved paid leave time during the same week additional regular hours were worked.

[1.7.4.14 NMAC - Rp, 1.7.4.12 NMAC, 11/14/02; A, 7-15-05; 1.7.4.14 NMAC - Rn, 1.7.4.15 NMAC & A, 12-30-05]

1.7.4.15 CALL-BACK PAY:

A. Employees who are directed to return to work after completing their normal shift and before their next shift:

(1) shall be paid in accordance with the provisions of **1.7.4.14 NMAC**, if the time worked results in overtime; or:

(2) shall be paid their hourly rates, if the time worked does not result in overtime.

B. Agencies may establish a minimum number of hours to be paid when employees are called back in accordance with their agency policy.

[1.7.4.15 NMAC - Rp, 1.7.4.13 NMAC, 11/14/02; 1.7.4.15 NMAC - Rn, 1.7.4.16 NMAC & A, 12-30-05]

1.7.4.16 ON-CALL PAY:

A. In accordance with the provisions of the *Fair Labor Standards Act*, agencies shall develop a policy to compensate employees directed to remain on-call after their normal work shift.

B. Agencies shall file their on-call compensation policy with the office. Subsequent revisions to the on-call policy shall be filed with the office prior to implementation.

[1.7.4.16 NMAC - Rp, 1.7.4.14 NMAC, 11/14/02; 1.7.4.16 NMAC - Rn, 1.7.4.17 NMAC, 12-30-05]

1.7.4.17 HOLIDAY PAY:

A. When an authorized holiday falls on an employee's regularly scheduled work day and the employee is not required to work, the employee shall be paid at their hourly rate of pay for the number of hours they would have normally worked.

B. Full-time employees, whose normal work schedule does not include the day observed as a holiday, shall be entitled to time off equal to the employee's normal workday.

C. Employees required to work on the day a holiday is observed, shall be compensated at two and one-half times their hourly rate of pay for all hours actually worked on the holiday. Such compensation shall be in the form of straight time cash payment for all hours actually worked and additional premium compensation, at the agency's discretion, of either compensatory time off or cash payment at one and one-half times the usual hourly rate of pay for all hours actually worked.

D. Part-time employees whose normal work schedule does not include the day a holiday is observed shall not be compensated for the holiday.

E. Employees who have been charged absence without leave on the workday prior to or directly following a holiday shall not be paid for the holiday.
[1.7.4.17 NMAC - Rp, 1.7.4.15 NMAC, 11/14/02; 1.7.4.17 NMAC - Rn, 1.7.4.18 NMAC, 12-30-05]

1.7.4.18 GOVERNMENT COST SAVINGS INCENTIVE AWARDS: Agencies may provide cash awards to employees with the approval of the board in accordance with the provisions of *NMSA 1978, Section 10-7-12*. The director and the secretary of the department of finance and administration shall jointly issue and administer guidelines for submitting proposed awards to the board.
[1.7.4.18 NMAC - Rp, 1.7.4.16 NMAC, 11/14/02; A, 7-15-05; 1.7.4.18 NMAC Rn, 1.7.4.19 NMAC, 12-30-05]

1.7.4.19 [Reserved]
[1.7.4.19 NMAC - Rp, 1.7.4.17 NMAC, 11/14/02; A, 7-15-05; A, 12-30-05]

HISTORY OF 1.7.4 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 4, Applications and Tests, filed 05-22-80;
SPB Rule 4, Applications and Tests, filed 06-03-81;
SPB Rule 4, Applications and Tests, filed 09-02-81;
SPB Rule 4, Applications and Tests, filed 07-01-82
SPB Rule 4, Applications and Tests, filed 10-21-82;
SPB Rule 4, Applications and Tests, filed 08-15-85;
SPB Rule 4, Applications and Tests, filed 10-17-86;
SPB Rule 4, Applications and Tests, filed 07-30-87
SPB-8, Pay, filed 04-04-90;
SPB-8, Pay, filed 09-04-90;
SPB-8, Pay, filed 10-17-90;
SPB-8, Pay, filed 10-19-90;
SPB-8, Pay, filed 12-13-90;
SPB-8, Pay, filed 07-15-91;
SPB-8, Pay, filed 10-11-91;
SPB-8, Pay, filed 12-24-91;
SPB-8, Pay, filed 06-09-92;
SPB-8, Pay, filed 09-10-92;
SPB 6, Pay, filed 12-15-92;
SPB 6, Pay, filed 02-10-94;
SPB 6, Pay, filed 12-01-94;
SPB 6, Pay, filed 09-01-95.

History of Repealed Material:

1 NMAC 7.4, Pay, filed 06-13-97.
1.7.4 NMAC, Pay, filed 06-14-01
1.7.4 NMAC, Pay filed 07-07-01

Other History:

1 NMAC 7.5, Pay, filed 01-12-96 **replaced** SPB 6, filed 09-01-95;
1 NMAC 7.5, Pay, filed 05-02-96;
1 NMAC 7.4, Pay, filed 06-13-97 **replaced** 1 NMAC 7.5, filed 05-02-96;
1 NMAC 7.4, Pay, filed 06-13-97 **replaced** by 1.7.4 NMAC, Pay, effective 07/07/01.
1.7.4 NMAC, Pay, filed 06-14-01 **replaced** by 1.7.4 NMAC, Pay, effective 11/14/02.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 5 RECRUITMENT, ASSESSMENT, SELECTION

1.7.5.1 ISSUING AGENCY: State Personnel Board.
[1.7.5.1 NMAC - Rp, 1 NMAC 7.5.1, 07/07/01]

1.7.5.2 SCOPE: All state agencies in the classified service.
[1.7.5.2 NMAC - Rp, 1 NMAC 7.5.2, 07/07/01]

1.7.5.3 STATUTORY AUTHORITY: NMSA 1978, Sections 10-9-10(A), 10-9-12(A), 10-9-13 (C), 10-9-13(F), 10-9-13(I), 10-9-13.2, 10-9-18(B), 10-9-22, 10-9-23; NMSA 1978, Section 20-4-9; NMSA 1978, Sections 24-2B-1 to 24-2B-8; NMSA 1978, Sections 28-2-1 to 28-2-6, 28-10-12.
[1.7.5.3 NMAC - Rp, 1 NMAC 7.5.3, 07/07/01; A, 11/14/02]

1.7.5.4 DURATION: Permanent.
[1.7.5.4 NMAC - Rp, 1 NMAC 7.5.4, 07/07/01]

1.7.5.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.5.5 NMAC - Rp, 1 NMAC 7.5.5, 07/07/01]

1.7.5.6 OBJECTIVE: The objective of Part 5 of Chapter 7 is: to provide a system for the recruitment, examination and selection of applicants for employment in the classified service.
[1.7.5.6 NMAC - Rp, 1 NMAC 7.5.6, 07/07/01; A, 11/14/02]

1.7.5.7 DEFINITIONS: “Open for recruitment” means soliciting applications from the general public and state employees for vacant positions.
[1.7.5.7 NMAC - Rp, 1 NMAC 7.5.7, 07/07/01]

1.7.5.8 VACANT POSITIONS:

- A.** All vacant positions to be filled shall be open for recruitment unless otherwise authorized by the director or provided for in these rules.
- B.** Positions in the classified service shall be filled at the assigned classification. An underfill may be approved by the director. An authorized underfill may not exceed one year unless extended by the director.
- C.** The director may approve a position to be doublefilled for up to one year.
- D.** Agencies may allow part-time employees to share the same position.

[1.7.5.8 NMAC - Rp, 1 NMAC 7.5.8, 07/07/01; A, 7-15-05]

1.7.5.9 RECRUITMENT:

- A.** The director shall establish a means to effectively advertise and recruit for vacant positions within the classified service.
- B.** Any qualified applicant shall have the opportunity to compete for vacant positions open for recruitment without regard to race, color, religion, national origin, ancestry, sex, sexual orientation, age, or mental or physical disability unless based on a bona fide occupational requirement.
- C.** Agencies shall be sensitive to creating diversity in the workplace.
- D.** Applications shall be filed in accordance with the director-established recruitment criteria, received within the prescribed time limits and be for positions open for recruitment.

[1.7.5.9 NMAC - Rp, 1 NMAC 7.5.9, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.5.10 APPLICATIONS:

- A.** The director shall establish application procedures which include, among other things, criteria that will ensure compliance with federal and/or state law. Information on gender, ethnicity, and age of applicants shall be utilized only for affirmative action and other non-discriminatory purposes.

B. An applicant's application shall be rejected if the applicant has been convicted of a felony or a misdemeanor and the provisions of the *Criminal Offender Employment Act [NMSA 1978, Sections 28-2-1 to 28-2-6]* permit such rejection.

C. The director shall reject an application and not accept any application from the applicant if the applicant:

- (1) has made any false statement or produced any false document in support of the application; or
- (2) has directly or indirectly given, paid, offered, solicited, or accepted any money or other valuable consideration or secured or furnished any special or secret information for the purpose of affecting the rights or prospects of any person with respect to employment in the classified service.

D. In the event an application of an employee is rejected, under the provisions of **Subsection C of 1.7.5.10 NMAC**, the applicant's employing agency shall take appropriate action and notify the Director.

E. An applicant whose application has been rejected may appeal to the board in accordance with the procedures established by the director.

[1.7.5.10 NMAC - Rp, 1 NMAC 7.5.10, 07/07/01; A, 11/14/02]

1.7.5.11 EXAMINATION:

A. Security:

- (1) The director shall maintain the security of all examinations.
- (2) Examinations shall be developed by the office in accordance with established professional techniques and relevant federal laws, regulations, and guidelines. Examinations shall measure critical or important knowledge, skills, and abilities necessary for successful job performance.
- (3) Except as provided in **Paragraph (4) of Subsection A of 1.7.5.11 NMAC** no agency shall administer any examination to an applicant or employee without the examination and the examination administration having been approved by the director unless otherwise authorized by statute.
- (4) An agency may request a description or demonstration of the skill or ability needed to perform an essential job function in accordance with the *Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 Note 29C.F.R. Part 1630.14(a) Pre-employment inquiry)*.

B. Exemptions from Examinations:

(1) The director shall exempt from examinations those applicants who possess recognized licensure, registration, or certification by the state of New Mexico and who are applying for positions in the classified service that require such licensure, registration, or certification.

(2) The director shall exempt from examinations applicants who, in the course of their duties:
(a) develop, administer, or otherwise have access to such examinations; or
(b) formerly developed or administered such examinations within a period of one year from separating from the office.

C. Administration of Examinations: In accordance with the provisions of *NMSA 1978, Section 10-9-12(F)*, the director shall supervise all examinations and establish procedures for their administration.

D. Preference Points:

(1) In accordance with the provisions of *NMSA 1978, Section 10-9-13.2 and NMSA 1978, Section 20-4-9*, veterans honorably discharged from the United States armed forces and applicants currently serving in the national guard shall have five points added to their final passing numerical scores on examinations. Veterans honorably discharged from the United States armed forces with a service-connected disability shall have 10 points added to their final passing numerical scores on examinations. A veteran with or without a service-connected disability has his/her name placed on the employment list in accordance with numerical rating of other veterans and non-veterans.

(2) In accordance with the provisions of *NMSA 1978, Section 10-9-13*, applicants who pass the examination shall have two preference points added for each year of residency in New Mexico, not to exceed 10 points.

[1.7.5.11 NMAC - Rp, 1 NMAC 7.5.11, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.5.12 SELECTION:

A. In accordance with the purpose of the *Personnel Act NMSA, Section 10-9-2*, selection shall be based solely on qualification and ability. Selection for any appointment to positions in the classified service shall be justified in writing and made from employment lists.

B. Agencies shall develop policies governing their use of the employment lists; such policies shall be submitted to the director for approval.

C. Agencies shall be sensitive to creating diversity in the workplace.

D. Employment lists shall include names of ranked candidates who have made application and met the established requirements plus any candidates certified by the New Mexico department of education, division of vocational rehabilitation, the commission for the deaf and hard of hearing, or the commission for the blind, in accordance with the provisions of *NMSA 1978, Section 28-10-12*.

(1) The director shall certify the names of former employees who are currently receiving temporary total or permanent partial workers' compensation benefits, resultant from an injury sustained while employed in the classified service and who apply for a position in accordance with the provisions of *1.7.10.12 NMAC*.

(2) The director shall certify only the name(s) of former employees who are currently eligible for reemployment from a reduction in force per *1.7.10.10 NMAC*.

E. **Temporary Promotions:** Employees may be temporarily promoted for a period not to exceed 12 months to a temporarily or effectively vacant position for which the agency certifies that the employee holds qualifications and abilities necessary for successful job performance. At the end of the temporary promotion period, employees shall return to their former position without right of appeal.

F. **Intra-Agency Transfers:** An agency may transfer an employee without the employee's consent to a position in the same classification within the same geographic location, which is 35 miles from the boundaries of the community in which the employee is employed or if the established requirements state that willingness to accept a change of geographic location is a condition of employment.

G. **Exempt to Career Appointments:** Employment in the exempt service shall not count towards the probationary period required by *Subsection A. of 1.7.2.8 NMAC*.

H. **Emergency Appointments:** Emergency appointments shall be made in accordance with *1.7.2.12 NMAC*.

I. **Reduction:** Employees may request a classification reduction to a position for which the agency certifies that the employee holds qualifications and abilities necessary for successful job performance.

J. **Physical Examinations:** Agencies may require physical examinations of candidates who have been selected for appointment contingent upon their meeting the prescribed physical health standards. The costs of such physical examinations shall be borne by the agency.

K. **Human Immunodeficiency Virus-Related (AIDS) Test:** No agency shall require a candidate or employee to take the human immunodeficiency virus-related (AIDS) test or disclose the results of same test as a condition of selection, promotion or continued employment unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification for the job in question. Agencies must adhere to the provisions of the *Human Immunodeficiency Virus Test Act NMSA 1978 Sections 24-2B-1 to 24-2B-8 Cum. Supp. 1993*).
[1.7.5.12 NMAC - Rp, 1 NMAC 7.5.12, 07/07/01; A, 11/14/02; A, 7-15-05]

HISTORY OF 1.7.5 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 4, Applications and Tests, filed 05-22-80;

SPB Rule 4, Applications and Tests, filed 06-03-81;

SPB Rule 4, Applications and Tests, filed 10-21-82;

SPB Rule 4, Applications and Tests, filed 06-28-83;

SPB Rule 4, Applications and Tests, filed 10-17-86;

SPB-4, Tests, filed 04-04-90;

SPB-4, Tests, filed 10-19-90;

SPB 7, Recruitment, Applications, Tests, filed 12-15-92;

SPB 7, Recruitment, Applications, Tests, filed 03-18-94.

History of Repealed Material:

1 NMAC 7.5, Pay, filed 06-13-97.

Other History:

1 NMAC 7.6, Recruitment, Applications, Tests, filed 01-12-96 **replaced** SPB 7, filed 03-18-94;

1 NMAC 7.6, Recruitment, Applications, Tests, filed 05-02-96;

1 NMAC 7.5, Recruitment, Applications, Selection, filed 06-13-97 **replaced** 1 NMAC 7.6, filed 05-02-96;

1 NMAC 7.5, Recruitment, Assessment, Selection, filed 06-13-97 **replaced by** 1.7.5 NMAC, Recruitment, Assessment, Selection, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 6 GENERAL WORKING CONDITIONS

1.7.6.1 ISSUING AGENCY: State Personnel Board
[5-15-96; Rn, 1 NMAC 7.8, 7-1-97; 1.7.6.1 NMAC - Rn, 1 NMAC 7.6.1, 11/30/00]

1.7.6.2 SCOPE: All state agencies in the classified service
[5-15-96; Rn, 1 NMAC 7.8, 7-1-97; 1.7.6.2 NMAC - Rn, 1 NMAC 7.6.2, 11/30/00]

1.7.6.3 STATUTORY AUTHORITY: NMSA 1978, Sections 10-9-1 to 10-9-25, NMSA 1978, Section 10-9-10(A), NMSA 1978, Section 10-9-13(G), NMSA 1978, Section 10-9-21, NMSA 1978, Section 12-5-2, NMSA 1978, Sections 24-2B-1 to 24-2B-8, U.S.C. Sections 1501 to 1508.
[5-15-96; Rn, 1 NMAC 7.8, 7-1-97; 1.7.6.3 NMAC - Rn, 1 NMAC 7.6.3, 11/30/00; A, 11/14/02]

1.7.6.4 DURATION: Permanent.
[5-15-96; Rn, 1 NMAC 7.8, 7-1-97; 1.7.6.4 NMAC - Rn, 1 NMAC 7.6.4, 11/30/00]

1.7.6.5 EFFECTIVE DATE: July 1, 1997, unless a later date is cited at the end of a section.
[5-15-96; Rn, 1 NMAC 7.8.5, 7-1-97; A, 7-1-97; 1.7.6.5 NMAC - Rn & A, 1 NMAC 7.6.5, 11/30/00]

1.7.6.6 OBJECTIVE: The objective of Part 6 of Chapter 7 is: to define certain acceptable activities; to prohibit certain activities and to provide legal holiday observation dates, while setting forth general working conditions for employees.
[5-15-96; Rn, 1 NMAC 7.8.6, 7-1-97; A, 7-1-97; 1.7.6.6 NMAC - Rn, 1 NMAC 7.6.6, 11/30/00]

1.7.6.7 DEFINITIONS: “Nonpartisan election” is any election for public office when the candidate’s party affiliations are neither indicated nor required.
[7-1-97; 1.7.6.7 NMAC - Rn, 1 NMAC 7.6.7, 11/30/00]

1.7.6.8 NEPOTISM: No agency shall permit the hiring, promotion, or direct supervision of an employee by a person who is related by blood or marriage within the third degree to the employee.
[11-3-90...5-15-96; Rn, 1 NMAC 7.8.10, 7-1-97; 1.7.6.8 NMAC - Rn, 1 NMAC 7.6.8, 11/30/00]

1.7.6.9 LEGAL HOLIDAYS: Each year, prior to December 1, the Board shall publish the dates on which legal public holidays as designated in NMSA 1978, Section 12-5-2 (Repl. Pamp. 1988) shall be observed for the next calendar year.
[5-24-53...5-15-96; Rn, 1 NMAC 7.8.12, 7-1-97; 1.7.6.9 NMAC - Rn, 1 NMAC 7.6.9, 11/30/00]

1.7.6.10 PROHIBITED POLITICAL ACTIVITIES: Employees are prohibited from:

- A.** using official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office or for any other political purpose;
- B.** directly or indirectly coercing, attempting to coerce, commanding, or advising a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for a political purpose;
- C.** threatening to deny promotions or pay increases to any employee who does not vote for certain candidates, requiring employees to contribute a percentage of their pay to a political fund, influencing subordinate employees to buy tickets to political fund-raising dinners and similar events, advising employees to take part in political activity, and matters of a similar nature;
- D.** engaging in a political activity while on duty; or
- E.** being an officer of a political organization.

[4-27-62...5-15-96; Rn, 1 NMAC 7.8.14.5, 7-1-97; 1.7.6.10 NMAC - Rn & A, 1 NMAC 7.6.10, 11/30/00; A, 11/14/02]

1.7.6.11 PUBLIC/POLITICAL OFFICE:

A. Employees covered by the provisions of the *Hatch Act* [5 U.S.C. Sections 1501 to 1508] may not be candidates for partisan political office elections.

B. Employees not covered by the provisions of the *Hatch Act* [5 U.S.C. Sections 1501 to 1508] may be candidates for any partisan political office if, upon filing or accepting the nomination and during the entire campaign, they are authorized full-time continuous leave without pay.

C. Employees may be candidates for nonpartisan political office, subject to the restriction set forth in *1.7.6.11 NMAC*, without taking a leave of absence.

D. Employees may hold only a nonpartisan county or municipal political office during employment in the classified service.

E. Being a local school board member or an elected member of any post-secondary educational institution shall not be construed as holding political office.

F. Employees running for or holding public office shall not use state equipment, facilities, property or time dedicated to employment duties to conduct campaign or public office related business. Violation of this Rule is punishable by disciplinary action pursuant to *1.7.11 NMAC* and/or the criminal penalties set forth in *NMSA 1978 Section 10-9-23*.

[7-1-80...5-15-96; 1.7.6.11 NMAC - Rn & A, 1 NMAC 7.6.12, 11/30/00; A 2-14-01; A, 11/14/02]

1.7.6.12 RESCISSION OF RESIGNATION: An employee may rescind a letter of resignation within three workdays of its submission and the agency must honor the rescission if it is submitted within the prescribed time limit.

[1-2-93 ... 5-15-96; Rn, 1 NMAC 7.8.16.2, 7-1-97; 1.7.6.12 NMAC - Rn, 1 NMAC 7.6.12, 11/30/00; A, 11/14/02]

1.7.6.13 COMPLAINTS:

A. Each agency shall establish a written complaint procedure by which employees can seek to remedy problems associated with their working conditions. Agency complaint procedures shall be filed with the Office and the information made available to all employees of the agency.

B. Employees have the right to present or make known their complaints, free from interference, restraint, discrimination, coercion, or reprisal.

C. Agencies should utilize alternative methods of dispute resolution, including mediation, wherever appropriate to resolve conflicts in the workplace and encourage positive working relationships between employees and management.

D. If the complaint pertains to an interpretation of these Rules, it may be appealed to the Director within 30 calendar days of the agency's final decision. The Director may appoint a hearing officer and the Director's decision on the complaint shall be final and binding.

[7-1-80...5-15-96; Rn & A, 1 NMAC 7.15.11, 7-1-97; 1.7.6.13 NMAC - Rn & A 1 NMAC 7.6.11, 11/30/00]

1.7.6.14 [Reserved]

[Rn & R, 1 NMAC 7.6.8, 1 NMAC 7.6.9, 1 NMAC 7.6.13, 7-1-97; 1.7.6.14 NMAC - Rn, 1 NMAC 7.6.14, 11/30/00]

HISTORY of 1.7.6 NMAC: [Reserved]

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 7 ABSENCE AND LEAVE

1.7.7.1 ISSUING AGENCY: State Personnel Board.
[1.7.7.1 NMAC – Rp, 1 NMAC 7.7.1, 07/07/01]

1.7.7.2 SCOPE: All state agencies in the classified service.
[1.7.7.2 NMAC – Rp, 1 NMAC 7.7.2, 07/07/01]

1.7.7.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-13(G); Section 11: NMSA 1978, Section 10-7-10; Section 13: 29 U.S.C. Sections 201 and 2601 **et seq.**; Section 15: NMSA 1978, Section 1-12-42; Section 17: NMSA 1978, Sections 20-4-7, 20-5-14 and 20-7-5 and 38 U.S.C. Section 2024.
[1.7.7.3 NMAC - Rp, 1 NMAC 7.7.3, 07/07/01; A, 11/14/02]

1.7.7.4 DURATION: Permanent.
[1.7.7.4 NMAC - Rp, 1 NMAC 7.7.4, 07/07/01]

1.7.7.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.7.5 NMAC - Rp, 1 NMAC 7.7.5, 07/07/01]

1.7.7.6 OBJECTIVE: The objective of Part 7 of Chapter 7: is to provide for the accrual and administration of leave available to employees.
[1.7.7.6 NMAC - Rp, 1 NMAC 7.7.6, 07/07/01]

1.7.7.7 DEFINITIONS: [RESERVED]
[1.7.7.7 NMAC - Rp, 1 NMAC 7.7.7, 07/07/01]

1.7.7.8 ANNUAL LEAVE:

A. Employees, except those on full-time educational leave with pay, absence without leave, leave without pay, unpaid FMLA leave, or suspension without pay shall accrue annual leave at the rate of:

- (1) 3.08 hours per pay period if less than three years of cumulative employment,
- (2) 3.69 hours per pay period if three years or more but less than seven years of cumulative employment,
- (3) 4.61 hours per pay period if seven years or more but less than eleven years of cumulative employment,
- (4) 5.54 hours per pay period if eleven years or more but less than fifteen years of cumulative employment; or
- (5) 6.15 hours per pay period if fifteen years or more of cumulative employment.

B. For purposes of *Subsection A of 1.7.7.8. NMAC*, any employment in the classified or exempt service and judicial or legislative branches of New Mexico state government shall be counted in determining years of cumulative employment in the classified service.

C. For purposes of *Subsection A of 1.7.7.8. NMAC*, employment in programs transferred into the classified service by legislation or executive order shall count as cumulative employment.

D. Employees employed on a part-time basis and employees on furlough who work at least eight hours in a pay period shall accrue annual leave on a prorated basis.

E. A maximum of 240 hours of annual leave shall be carried forward after the last pay period beginning in December.

F. Annual leave shall not be used before it is accrued and must be authorized before it is taken in accordance with agency policy.

G. Employees separating from the classified service, except by a reduction in force, shall be paid for accrued annual leave, as of the date of separation, up to a maximum of 240 hours at their current hourly rate. Employees separating from the classified service as the result of a reduction in force shall be paid for all accrued annual leave, as of the date of separation, at their current hourly rate.

H. The estate of an employee who dies while in the classified service shall be paid for the employee's total accrued annual leave.
[1.7.7.8 NMAC - Rp, 1 NMAC 7.7.8, 07/07/01; A, 11/14/02]

1.7.7.9 DONATION OF ANNUAL AND/OR SICK LEAVE:

A. Employees may donate leave to another employee in the same agency for a medical emergency with approval of the head of the agency.

B. Employees may donate annual leave to the full amount of their accumulated hours.

C. In accordance with the provisions of *NMSA 1978, Section 10-7-10*, the donation of sick leave is governed by the following restrictions:

(1) employees who have accumulated more than six hundred hours of sick leave can transfer the additional amounts over 600 hours to another employee;

(2) the dollar value of the transferred leave shall equal 50% of the monetary value of the total hours transferred by the donor employee;

(3) no more than 120 hours of sick leave may be transferred by the donor in any one fiscal year, with the exception of the year in which an employee retires, when an employee may transfer up to 400 hours of sick leave;

(4) donations of sick leave may be made only once per fiscal year on either the pay date immediately following the first full pay period in January or the first full pay period in July, unless the employee is retiring.

D. An agency shall maintain the following documentation:

(1) the name, position title, and hourly rate of pay of the proposed leave recipient;

(2) a licensed health care provider's description of the nature, severity, and anticipated duration of the emergency involved which has been provided by the employee or legally authorized representative and a statement that the recipient is unable to work all or a portion of their work hours; and

(3) any other information which the employing agency may reasonably require.

E. Supporting documentation for the request to donate leave shall be kept confidential and not subject to public inspection without the written consent of the employee.

F. The agency shall transfer the leave to the leave account of the employee converting the dollar value of the donor's leave based on the donor's hourly rate of pay to hours of leave based on the recipient's hourly rate of pay.

G. The recipient of donated leave may not use such leave until first exhausting all accrued annual and sick leave, compensatory time and personal leave day.

H. Donated leave shall revert to the employees who donated the leave on a prorated basis when the medical emergency ends or the employee separates from the agency.

[1.7.7.9 NMAC - Rp, 1 NMAC 7.7.9, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.7.10 SICK LEAVE:

A. Employees, except those on full-time educational leave with pay, absence without leave, leave without pay, unpaid FMLA leave, or suspension without pay, shall accrue sick leave at the rate of 3.69 hours per pay period.

B. Employees employed on a part-time basis and employees on furlough who work at least eight hours in a pay period shall accrue sick leave on a prorated basis.

C. Sick leave may not be used before it is accrued and must be authorized or denied according to agency policy.

D. An employee may use sick leave for personal medical treatment or illness or for medical treatment or illness of a relation by blood or marriage within the third degree, or of a person residing in the employee's household. Employees affected by pregnancy, childbirth, and related medical conditions must be treated the same as persons affected by other medical conditions.

E. There is no limit to the amount of sick leave that may be accrued.

F. No payment shall be made for accrued sick leave at the time of separation from the classified service except as provided by law.

G. Former employees who were laid off and are returned to work in accordance with the provisions of *1.7.10.10 NMAC*, shall have restored the sick leave they had accrued as of the date of layoff.

H. An agency may authorize an employee to use accrued sick leave to attend the funeral of a relation by blood or marriage within the third degree, or of a person residing in the employee's household.

I. Payment for Accumulated Sick Leave:

(1) In accordance with the provisions of *NMSA 1978, Section 10-7-10*, employees who have accumulated 600 hours of unused sick leave are entitled to be paid for unused sick leave in excess of 600 hours at a rate equal to fifty percent (50%) of their hourly rate of pay for up to 120 hours of sick leave. Payment for unused sick leave may be made only once per fiscal year on either the payday immediately following the first full pay period in January or the first full pay period in July.

(2) Immediately prior to retirement from the classified service, employees who have accumulated 600 hours of unused sick leave are entitled to be paid for unused sick leave in excess of 600 hours at a rate equal to fifty percent (50%) of their hourly rate for up to 400 hours of sick leave.
[1.7.7.10 NMAC - Rp, 1 NMAC 7.7.10, 07/07/01; A, 11/14/02]

1.7.7.11 LEAVE WITHOUT PAY:

- A.** Leave without pay may be approved when:
- (1) the agency can assure a position of like status and pay, at the same geographic location, upon the return of the employee from leave without pay; or
 - (2) the employee agrees in writing to waive that requirement.
- B.** Leave without pay shall not exceed 30 consecutive calendar days for employees in emergency or temporary status.
- C.** Leave without pay may not exceed 30 consecutive calendar days for probationers or employees in term status with less than one year of employment without the prior approval of the agency. Any leave without pay in excess of 30 consecutive calendar days shall not be credited toward the probationary period unless the employee was called to active military duty.
- D.** Leave without pay for employees in career status and term status with more than one year of employment shall not exceed 12 consecutive months without the prior written approval of the agency.
- E.** Employees may be authorized leave without pay for up to one year to temporarily accept a position in the exempt service. Such leave without pay may be extended with the approval of the Board.
[1.7.7.11 NMAC - Rp, 1 NMAC 7.7.11, 07/07/01]

1.7.7.12 FAMILY AND MEDICAL LEAVE:

- A.** In addition to other leave provided for in *1.7.7 NMAC* eligible employees are entitled to leave in accordance with the *Family and Medical Leave Act (FMLA) of 1993 [29 U.S.C. Section 2601 et seq.]*. Employees who have been in the classified service for at least 12 months (which need not be consecutive) and who have worked, as defined by *Section 7 of the Fair Labor Standards Act [29 U.S.C. Section 201 et seq.]*, at least 1250 hours during the 12 month period immediately preceding the start of FMLA leave are eligible employees. In addition, employment in the exempt service, legislative or judicial branch, shall count as classified employment for purposes of this rule.
- B.** Eligible employees are entitled to a total of 12 weeks of unpaid FMLA leave in a 12-month period, at the time of a birth or placement of a child or at the time of a serious health condition for the employee, or family members, as defined in the FMLA. The 12-month period is calculated forward from the date an employee's first FMLA leave begins.
- C.** An employee may elect, or an agency may require the employee, to substitute any of the employee's accrued annual leave, accrued sick leave, or donated leave for any part of unpaid FMLA leave.
- D.** Compensatory time and paid holidays shall not count towards the 12 weeks entitled by FMLA.
- E.** Employees shall not accrue annual and sick leave while on unpaid FMLA leave.
- F.** Agencies shall post the required FMLA notices, maintain the required employee records, and implement agency policies in accordance with the FMLA. All medical records and correspondence relating to employees and/or their families shall be considered confidential in accordance with *1.7.1.12 NMAC*.
- G.** Disputes over the administration of this rule shall be forwarded to the director for resolution.
[1.7.7.12 NMAC - Rp, 1 NMAC 7.7.12, 07/07/01; A, 11/14/02; A, 6-30-06]

1.7.7.13 ABSENCE WITHOUT LEAVE:

- A.** Employees who fail to appear for work without authorized leave or who appear for work but are in violation of agency policy governing their readiness for work shall be considered to be absent without leave.
- B.** Employees shall not be paid for any periods of absence without leave and shall not accrue annual or sick leave.
[1.7.7.13 NMAC - Rp, 1 NMAC 7.7.13, 07/07/01]

1.7.7.14 ADMINISTRATIVE LEAVE:

A. An agency may authorize employees leave with pay for up to five consecutive work days when it is in the best interests of the agency to do so. Administrative leave in excess of five consecutive work days must have the prior written approval of the director except for administrative leave granted in accordance with the provisions of *Paragraph (2) of Subsection B of 1.7.8.19 NMAC* or *Paragraph (2) of Subsection D of 1.7.8.19 NMAC* or *1.7.11.12 NMAC*.

B. Employees who are members of a state board or commission may be entitled to leave with pay to attend meetings or transact business of the board or commission.

C. Employees who are registered voters may absent themselves from work for two hours for the purpose of voting between the time of the opening and the time of the closing of the polls. The employer may specify the hours during the period in which the voter may be absent. This leave is not available to employees whose work day begins more than two hours subsequent to the time of opening the polls or ends more than three hours prior to the time of closing the polls.

D. Employees shall be entitled to administrative leave when appearing during regularly scheduled work hours in obedience to a subpoena as a witness before a grand jury or court or before a federal or state agency. Fees received as a witness, excluding reimbursement for travel, shall be remitted to the employee's agency.

E. Employees shall be entitled to leave with pay for serving on a grand or petit jury during regularly scheduled work hours. Fees received as a juror, excluding reimbursement for travel, shall be remitted to the employee's agency.

[1.7.7.14 NMAC - Rp, 1 NMAC 7.7.14, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.7.15 EDUCATIONAL LEAVE:

A. An agency may grant employees educational leave with or without pay to pursue special training related to their employment.

B. Employees on full-time educational leave with pay shall not accrue annual or sick leave.

C. Employees who are working part-time while on educational leave shall accrue annual and sick leave in accordance with the provisions of *Subsection D of 1.7.7.8 NMAC* and *Subsection B of 1.7.7.10 NMAC*.

D. Employees who are granted paid educational leave for training in excess of 100 work hours in a calendar year shall agree in writing to continue with the agency for a period of time equal to three times the period of the training.

[1.7.7.15 NMAC - Rp, 1 NMAC 7.7.15, 07/07/01]

1.7.7.16 MILITARY LEAVE:

A. Members of organized reserve units or the national guard ordered to active duty training shall be given up to 15 workdays of paid military leave per federal fiscal year. These 15 workdays are in addition to other authorized leave.

B. The governor may grant members of the national guard paid military leave for active duty training, in addition to that already given by law. Such additional leave must not exceed 15 workdays per federal fiscal year.

C. Members of the state defense force shall be granted paid military leave to attend officially authorized training or instruction courses. Such leave applies only to full-time employees and must not exceed 15 workdays per federal fiscal year.

D. Members of the civil air patrol shall be granted military leave not to exceed 15 workdays per calendar year for search and rescue missions.

E. Employees on military leave with pay shall accrue annual and sick leave.

F. Employees who are members of a reserve component of the United States armed forces shall, upon request, be granted unpaid leave for the period required to perform active duty for training or inactive duty training in the United States armed forces.

G. This rule does not apply to employees in temporary or emergency status.

[1.7.7.16 NMAC - Rp, 1 NMAC 7.7.16, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.7.17 PERSONAL LEAVE DAY:

A. Employees in career status are entitled to 1 personal leave day each calendar year. The personal leave day will be consistent with the employee's normal workday. Such leave must be requested and approved in advance.

B. The personal leave day must be taken during consecutive hours.

C. The personal leave day must be taken by the end of the last pay period beginning in December or it will be lost.

D. Employees who do not take the personal leave day shall not be paid for it upon separation from the classified service.

[1.7.7.17 NMAC - Rp, 1 NMAC 7.7.17, 07/07/01; A, 11/14/02]

1.7.7.18 TRANSFER OF LEAVE:

A. Employees who transfer from one agency to another shall retain all accrued annual, personal and sick leave.

B. All accrued annual and sick leave shall be transferred when persons change status from a position in the exempt service to a position in the classified service without a break in employment.

C. Agencies shall accept all accrued sick leave from persons who separate from the judicial or legislative branches of state government and are employed in the classified service without a break in employment of such separation.

[1.7.7.18 NMAC - Rp, 1 NMAC 7.7.18, 07/07/01; A, 11/14/02]

HISTORY OF 1.7.7 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 13, Leaves of Absence, filed 05-22-80;
SPB Rule 13, Leaves of Absence, filed 09-01-81;
SPB Rule 13, Leaves of Absence, filed 09-04-81;
SPB Rule 13, Leaves of Absence, filed 07-22-82;
SPB Rule 13, Leaves of Absence, filed 10-21-82;
SPB Rule 13, Leaves of Absence, filed 03-07-86;
SPB Rule 13, Leaves of Absence, filed 10-17-86;
SPB Rule 13, Leaves of Absence, filed 01-13-89;
SPB-15, Absence and Leave, filed 04-04-90;
SPB-15, Absence and Leave, filed 12-13-90;
SPB 10, Absence and Leave, filed 12-15-92;
SPB 10, Absence and Leave, filed 08-03-93;
SPB 10, Absence and Leave, filed 12-02-93;
SPB 10, Absence and Leave, filed 03-18-94;
SPB 10, Absence and Leave, filed 12-01-94;
SPB 10, Absence and Leave, filed 12-29-94;
SPB 10, Absence and Leave, filed 01-27-95;
SPB 10, Absence and Leave, filed 03-20-95;
SPB 10, Absence and Leave, filed 09-01-95.

History of Repealed Material:

1 NMAC 7.7, Absence and Leave, filed 06-13-97.

Other History:

1 NMAC 7.9, Absence and Leave, filed 01-12-96 **replaced** SPB 10, filed 09-01-95;

1 NMAC 7.7, Absence and Leave, filed 06-13-97 **replaced** 1 NMAC 7.9, Absence and Leave, filed 01-12-96;

1 NMAC 7.7, Absence and Leave, filed 06-13-97 **replaced by** 1.7.7 NMAC, Absence and Leave, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 8 DRUG AND ALCOHOL ABUSE

1.7.8.1 ISSUING AGENCY: State Personnel Board.
[1.7.8.1 NMAC - Rp, 1 NMAC 7.8.1, 07/07/01]

1.7.8.2 SCOPE: All state agencies in the classified service.
[1.7.8.2 NMAC - Rp, 1 NMAC 7.8.2, 07/07/01]

1.7.8.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(A).
[1.7.8.3 NMAC - Rp, 1 NMAC 7.8.3, 07/07/01; A, 11/14/02]

1.7.8.4 DURATION: Permanent.
[1.7.8.4 NMAC - Rp, 1 NMAC 7.8.4, 07/07/01]

1.7.8.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.8.5 NMAC - Rp, 1 NMAC 7.8.5, 07/07/01]

1.7.8.6 OBJECTIVE: The objective of Part 8 of Chapter 7 is: to require training on the awareness of the effects of drug and alcohol abuse; to require drug and/or alcohol testing for certain employees in specific situations; and to establish required collection, screening, rehabilitative and sanction parameters.
[1.7.8.6 NMAC - Rp, 1 NMAC 7.8.6, 07/07/01]

1.7.8.7 DEFINITIONS:

A. “Alcohol” means all consumable non-prescription substances which contain alcohol, specifically including, without limitation, spirits, wine, malt beverages, and intoxicating liquors.

B. “Aliquot” means a portion of a urine specimen used for testing.

C. “Chain of custody” refers to procedures to account for the integrity of each specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. A chain of custody form approved by the director shall be used for blood and urine samples. In any dispute regarding chain of custody, the identity and integrity of the sample at issue may be shown by a preponderance of the evidence.

D. “Confirmatory test” means a second analytical procedure to identify the presence of a specific drug or metabolite in a urine specimen by gas chromatography/mass spectrometry (GC/MS).

E. “Drug” means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines; a metabolite of those drugs; or any non-prescription substance containing those drugs.

F. “Initial test” means an immunoassay screen which meets the requirements of the food and drug administration to eliminate negative specimens from further consideration.

G. “Medical review officer” means a licensed physician knowledgeable in the medical use of prescription drugs and alcohol and the pharmacology and toxicology of illicit drugs and alcohol.

H. “Non-prescription” refers to all substances other than a substance which has been prescribed for the particular candidate, or employee who has ingested or otherwise used the substance by a doctor or other health professional licensed with authority to prescribe such substances by the state of New Mexico or other governmental entity of the United States.

I. “On duty” means any time during an employee's regular workday or other period during which the employee is required to work by the employer, including authorized lunch and other breaks, and anytime while operating or riding in a state vehicle.

J. “Random selection basis” means a system for selecting employees or groups of employees for drug testing in a statistically random system based on a neutral criterion, such as employment or social security numbers, without individualized suspicion that a particular employee is using drugs.

K. “Reasonable suspicion” means a belief drawn from specific objective and articulable facts and the reasonable inferences drawn from those facts.

L. “Safety-sensitive position” is a position approved as such by the board, including a supervisory or managerial position in which impairment by drug or alcohol use would constitute an immediate and direct threat to

public health or safety and includes, but is not limited to, peace officers, correctional officers, employees who are required to regularly carry a firearm, and employees who regularly transport other people as their principal job. [1.7.8.7 NMAC - Rp, 1 NMAC 7.8.7, 07/07/01; A, 11/14/02]

1.7.8.8 OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT OF 1991:

A. Employees in safety-sensitive positions within the meaning of the *Omnibus Transportation Employee Testing Act of 1991* ("Act" [49 U.S.C. Section 31-03-06] are exempt from and are not covered by the provisions of **1.7.8.7 NMAC** and **1.7.8.9 NMAC** through **1.7.8.20 NMAC**.

B. Agencies with employees covered by the act shall develop plans or a plan and submit it to the director and implement such plans or plan for drug and alcohol abuse testing of employees covered by the act.

C. The plans or plan shall contain at the least:

- (1) the positions covered;
- (2) testing requirements for drugs and alcohol;
- (3) the collection of specimen;
- (4) reporting and explanation of test results;
- (5) confidentiality;
- (6) training;
- (7) rehabilitation and sanctions; and
- (8) record retention.

D. Agencies with employees covered by the act shall advise the board by January 1 of each year of those positions covered by the act.

[1.7.8.8 NMAC - Rp, 1 NMAC 7.8.8, 07/07/01]

1.7.8.9 DESIGNATION OF SAFETY-SENSITIVE POSITIONS:

A. Only those positions specifically designated by the board as such shall be considered to be safety-sensitive positions for purposes of **1.7.8 NMAC**.

B. The director shall maintain a list of positions designated by the board as being safety-sensitive.

C. The board shall review at least annually the positions designated as safety-sensitive and after proper notice add or delete positions as being safety-sensitive on its own initiative or following a request.

[1.7.8.9 NMAC - Rp, 1 NMAC 7.8.9, 07/07/01]

1.7.8.10 AWARENESS PROGRAM:

A. Each agency shall appoint a drug abuse coordinator who shall be responsible for the agency's drug and alcohol abuse program.

B. The drug abuse coordinator shall administer the drug and alcohol abuse awareness program to inform employees about:

- (1) the dangers of drug and alcohol abuse;
- (2) available counseling, rehabilitation, and employee assistance programs; and
- (3) the sanctions that may be imposed upon employees as provided in **1.7.8.19 NMAC**.

C. The drug abuse coordinator shall ensure that the agency has contracted or made arrangements with a medical review officer to perform the duties required by **1.7.8 NMAC**.

[1.7.8.10 NMAC - Rp, 1 NMAC 7.8.10, 07/07/01; A, 11/14/02]

1.7.8.11 AUTHORIZED DRUG AND ALCOHOL TESTING:

A. All external candidates for safety-sensitive positions are required to submit to drug testing after an offer of employment is made and prior to final selection for appointment.

B. Prior to assuming a safety-sensitive position from a nonsafety-sensitive position, employees shall be required to submit to drug testing.

C. Agencies that require employees in safety-sensitive positions to undergo regular physical examinations shall require such employees to undergo drug testing as part of those physical examinations.

D. Each agency shall require employees to undergo drug and/or alcohol testing if the agency has a reasonable suspicion that the employee has committed drug or alcohol abuse based on, but not limited to:

- (1) direct observation of the physical symptoms or manifestations of being under the influence of a drug or alcohol while on duty such as liquor on breath, slurred speech, unsteady walk, or impaired coordination; or
- (2) direct observation of the use or possession of drugs or drug paraphernalia, or the use of alcohol while on duty.

E. Before an employee is required to submit to reasonable suspicion drug and/or alcohol testing, a supervisor must secure the approval of the next level supervisor unless the requesting supervisor is the agency head. The supervisor must prepare a memorandum within 24 hours after the specimen collection stating what gave rise to the reasonable suspicion and submit the memorandum to the drug abuse coordinator.

F. At least ten percent (10%) of employees in safety-sensitive positions shall be required to undergo drug testing on a yearly basis.

- (1) The director or a contractor shall identify the employees on a random selection basis.
- (2) At the discretion of the director, employees may be excused from random drug testing if:
 - (a) they have previously requested referral in accordance with the provisions of *Subsection Bof*

1.7.8.19 NMAC;

(b) the selection for random drug testing is made during the first 30 calendar days following the request for referral; or

- (c) they are on an authorized absence.

[1.7.8.11 NMAC - Rp, 1 NMAC 7.8.11, 07/07/01; A, 7-15-05]

1.7.8.12 COLLECTION OF SPECIMENS:

A. Unless otherwise specified in *1.7.8 NMAC*, urine specimens for drug testing shall be collected by an independent laboratory or under the direction of an independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing. The collection shall be in accordance with the September 1988 edition of the urinalysis collection handbook for federal drug testing programs of the national institute on drug abuse. Any and all consent forms used in, or related to, the collection of urine specimens under *1.7.8 NMAC* shall be approved by the director. Forms and logbooks specified or recommended in the urinalysis collection handbook for federal drug testing programs may not be used at all, may be used in a different form, may contain different information, or may involve different procedures than those used under *1.7.8 NMAC*.

B. Breath specimens shall be collected by any appropriately certified person or a medical or laboratory facility selected by the director.

C. Blood specimens shall be collected by or under the direction of an independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the college of American pathologists.

[1.7.8.12 NMAC - Rp, 1 NMAC 7.8.12, 07/07/01]

1.7.8.13 DRUG TESTS:

A. The initial and confirmatory drug tests, shall be performed in accordance with DHHS/DOT testing guidelines and by an independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing. The laboratory shall have the capability, on the same premises, of performing initial and confirmatory tests for each drug or metabolite for which service is offered.

B. The following initial cutoff levels shall be used when screening specimens on the initial drug tests to determine whether they are negative for these five drugs or classes of drugs:

- (1) Marijuana metabolites50 (ng/ml)
- (2) Cocaine metabolites300 (ng/ml)
- (3) Opiate metabolites.....2,000 (ng/ml)
- (4) Phencyclidine25 (ng/ml)
- (5) Amphetamines.....1,000 (ng/ml)

C. All specimens identified as positive on the initial drug test, shall be confirmed by the laboratory at the cutoff values listed below for each drug. All confirmations shall be by quantitative analysis:

- (1) Marijuana metabolites¹15 (ng/ml)
- (2) Cocaine metabolites²150 (ng/ml)
- (3) **Opiates:**
 - (a) Morphine2,000 (ng/ml)
 - (b) Codeine.....2,000 (ng/ml)
- (4) Phencyclidine25 (ng/ml)
- (5) **Amphetamines:**
 - (a) Amphetamine.....500 (ng/ml)
 - (b) Methamphetamine.....500 (ng/ml)

(6) ¹Delta - 9-tetrahydrocannabinol - 9-carboxylic acid

(7) ²Benzoyllecgonine

D. The laboratory shall report as negative all specimens that are negative on the initial test or negative on the confirmatory test. Only specimens reported as positive on the confirmatory test shall be reported positive for a specific drug.

E. The laboratory shall retain and place those specimens confirmed positive in properly secured long-term frozen storage for at least 365 calendar days. An agency may request the laboratory to retain the specimen for an additional period of time. If the laboratory does not receive a request to retain the specimen during the initial 365 calendar day period, the specimen may be discarded.

[1.7.8.13 NMAC - Rp, 1 NMAC 7.8.13, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.8.14 ALCOHOL TESTS:

A. A test for alcohol shall be administered by breath or blood. A test for any indication of alcohol in the 30 to 180 calendar day period following an employee's request to be referred to alcohol rehabilitation in accordance with the provisions of *Paragraph (1) of Subsection B of 1.7.8.19 NMAC* may be performed by urinalysis.

B. A test for alcohol by blood shall be performed by an independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the college of American pathologists.

C. A test result of a blood-alcohol content (BAC) level of .06 or more shall be deemed positive for alcohol. For employees who have been required to undergo alcohol rehabilitation in accordance with the provisions of *Paragraph (1) of Subsection D of 1.7.8.19 NMAC*, any indication of alcohol at any level for the 30 to 180 calendar day period following an employee's request to be referred for rehabilitation shall be considered a positive test result.

[1.7.8.14 NMAC - Rp, 1 NMAC 7.8.14, 07/07/01; A, 11/14/02]

1.7.8.15 REPORTING OF TEST RESULTS:

A. Drug and alcohol test results shall be reported only to the drug abuse coordinator or designee.

B. The test report shall contain the specimen number assigned by the agency, the laboratory accession number and results of the tests. All specimens negative on the initial test or negative on the confirmatory test shall be reported as negative. Only specimens confirmed positive shall be reported positive. Results may be transmitted to the drug abuse coordinator by various means including certified mail with return receipt requested, courier service, and/or electronic mail in a secure area (e.g., teleprinter, facsimile, or computer). Certified copies of all analytical results and chain-of-custody forms shall be available from the laboratory when requested by appropriate authority.

C. The drug abuse coordinator shall advise candidates and employees in writing of the test results. The drug abuse coordinator may also advise candidates and employees verbally of the test results.

D. All records pertaining to a given urine specimen shall be retained by the laboratory for a minimum of two years.

E. Only those members of management who need to know shall be made aware of the test results. Breach of confidentiality may be grounds for disciplinary action.

[1.7.8.15 NMAC - Rp, 1 NMAC 7.8.15, 07/07/01]

1.7.8.16 EXPLANATION OF POSITIVE TEST RESULTS:

A. Candidates for employment who test positive for drugs may, within 2 workdays of being advised of the test results, submit a written request to the agency's drug abuse coordinator for a review of the test results by the medical review officer. The test results of all employees who test positive for drugs and/or alcohol shall be referred by the agency's drug abuse coordinator to the medical review officer.

(1) If the candidate does not request a review of the test results within two work days, the candidate waives review by the medical review officer and any retesting of the sample and consents to rejection for selection.

(2) The medical review officer shall examine any proffered or possible explanations concerning the validity of the confirmed positive test results. This action may include conducting a medical interview, review of the medical history, review of the chain of custody, and discussions with the collection or laboratory personnel. The medical review officer shall review all medical records made available by the individual when a positive test could have resulted from legally prescribed medications and/or medical or dental treatment. The medical review officer shall also review the results of any retest done according to the provisions of *1.7.8.17 NMAC*.

(a) Should any questions arise as to the accuracy or validity of a confirmed positive test result, only the medical review officer is authorized on behalf of the state to order a reanalysis of the original sample and such retests are authorized to be performed only at an independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing.

(b) Prior to making a final decision to verify a positive test result, the medical review officer shall give the candidate or employee an opportunity to discuss the test results. The discussion between the medical review officer and the candidate or employee may be in person or by telephone.

(c) The medical review officer shall advise the appropriate drug abuse coordinator of his or her medical conclusions from the review of the test results. If there are conflicting factual statements, the medical review officer shall not attempt to resolve that factual conflict, but shall report it along with his or her medical conclusions to the drug abuse coordinator for the agency. Similarly, the medical review officer shall not attempt to ascertain the factual correctness of any claim by the candidate or employee of involuntary ingestion of drugs or alcohol, but shall simply report such claims to the drug abuse coordinator for the agency, all with his or her medical opinion as to the possibility that such occurrence could have affected the test results.

B. Based upon the medical review officer's report and such other inquiries or facts as the agency may consider, the agency shall determine whether the candidate's or employee's explanations or challenges of the confirmed positive test results are satisfactory.

(1) If the candidate's or employee's explanations or challenges of the positive test results are unsatisfactory to the agency:

(a) a written explanation as to why the explanation is unsatisfactory, along with the test results, shall be provided to the candidate or employee within 11 calendar days of the agency's determination; and

(b) such records shall be kept confidential by the agency and shall be retained for one year.

(2) If the candidate's or employee's explanations or challenges of the positive test results are satisfactory to the agency:

(a) the agency shall notify the candidate or employee of the agency's determination within 11 calendar days of the determination; and

(b) such records shall be kept confidential by the agency and shall be retained for one year.

[1.7.8.16 NMAC - Rp, 1 NMAC 7.8.16, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.8.17 RETESTING:

A. Candidates who have sought review of their positive drug tests by the medical review officer and all employees who tested positive for drugs may elect to have, at their expense, an aliquot of the original urine specimen retested by another independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing. The drug testing laboratory shall arrange for the shipment of the aliquot to the laboratory of the candidates' or employees' choosing. The agency shall pay for the retest if the retest is negative.

B. Employees who test positive for alcohol by blood may elect to have, at their expense, a tube of the original blood sample retested by another independent laboratory that meets applicable provisions of any state licensure requirements and is certified by the college of American pathologists. The laboratory shall arrange for the shipment of the blood sample to the laboratory of the employee's choosing. The agency shall pay for the retest if the retest is negative.

[1.7.8.17 NMAC - Rp, 1 NMAC 7.8.17, 07/07/01]

1.7.8.18 CONFIDENTIALITY: No laboratory reports or test results shall appear in the employee's employment history unless they are a part of a disciplinary action taken in accordance with the provisions of **1.7.8 NMAC**, but shall be placed in a special locked file maintained by the drug abuse coordinator. Files relating to laboratory reports or test results maintained by the drug abuse coordinator are confidential within the meaning of **1.7.1.12 NMAC**.

[1.7.8.18 NMAC - Rp, 1 NMAC 7.8.18, 07/07/01]

1.7.8.19 REHABILITATION AND SANCTIONS:

A. Candidates for Employment:

(1) A candidate for employment in a safety-sensitive position who tests positive for drugs and who does not seek review by the medical review officer or who is unable to satisfactorily explain the positive test results shall be rejected for selection.

(2) An employee for transfer or promotion to a safety-sensitive position who tests positive for drugs and is unable to satisfactorily explain the positive test results shall be subject to disciplinary action including dismissal if the employee occupies a safety-sensitive position. If the employee is not in a safety-sensitive position, the employee shall be treated in accordance with the provisions of *Subsection D of 1.7.8.19 NMAC*.

B. Voluntary Self-Identification by Employees:

(1) The drug abuse coordinator shall refer those employees who request such a referral prior to selection for drug or alcohol testing to an employee assistance program, counseling, or a drug or alcohol rehabilitation program. Any costs for counseling or rehabilitation shall be borne by the employee.

(2) The agency may grant administrative leave to an employee to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial voluntary self-identification only.

(3) Employees in safety-sensitive positions who have requested referral shall be assigned to nonsafety-sensitive duties while in an employee assistance program, counseling, or a drug or alcohol rehabilitation program.

(4) Employees are subject to drug and/or alcohol testing at the discretion of the drug abuse coordinator at any time between 30 calendar days and 180 calendar days of requesting referral.

(a) Employees in safety-sensitive positions who test positive during this time period or fail to successfully complete such program are subject to disciplinary action including dismissal.

(b) Employees in non-safety-sensitive positions who test positive during this time period or fail to successfully complete such program may be subject to disciplinary action including dismissal. The agency may allow the employee to use annual leave, sick leave, or leave without pay for additional counseling or rehabilitation by the agency after considering all factors relevant to the employee's condition and job performance history.

(5) For employees who have been required to undergo an alcohol rehabilitation program, any indication of alcohol at any level during the 30 calendar day to 180 calendar day period following the request for referral shall be considered a positive test result.

C. Safety-Sensitive Positions: Employees in safety-sensitive positions who have not requested referral to an employee assistance program, counseling, or a drug or alcohol rehabilitation program and test positive on a required drug or alcohol test shall be subject to disciplinary action including dismissal if they do not have a satisfactory explanation for the positive test results.

D. Nonsafety-Sensitive Positions:

(1) Employees in nonsafety-sensitive positions who test positive on a reasonable suspicion drug or alcohol test required by *Subsection D of 1.7.8.11 NMAC* and do not have a satisfactory explanation for the positive test results shall be referred to an employee assistance program, counseling, or a drug or alcohol rehabilitation program. Employees are subject to drug or alcohol testing at the discretion of the drug abuse coordinator at any time between 30 calendar days and 180 calendar days of the first positive test. Any such employee who tests positive for drugs or alcohol between 30 calendar days and 180 calendar days of the first positive test or has a second positive test without a satisfactory explanation or who fails to enter and successfully complete a program shall be subject to disciplinary action including dismissal.

(2) The agency may grant an employee administrative leave to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial reasonable suspicion referral only.

E. Refusal to Cooperate in Testing Procedure: Any employee who refuses or fails without good cause to cooperate in the drug or alcohol testing procedure by refusing or failing to complete the specified forms, by refusing or failing to submit a urine, blood, or breath specimen, or otherwise refuses or fails to cooperate shall be subject to disciplinary action including dismissal.

F. Possession of Drugs or Alcohol:

(1) Employees who illegally sell, purchase, or transfer drugs or any substance in *Schedules I and II of the Controlled Substances Act NMSA 1978, Sections 30-31-1 to 30-31-41 (Repl. Pamp. 1994)*, while on duty shall be subject to disciplinary action including dismissal and reported to the local law enforcement agency.

(2) Employees who, while on duty, possess drugs or any substance in *Schedules I and II of the Controlled Substances Act NMSA 1978, Sections 30-31-1 to 30-31-41 (Repl. Pamp. 1994)* without a valid prescription or as otherwise authorized by law shall be subject to disciplinary action including dismissal and reported to the local law enforcement agency.

(3) Employees who consume alcohol while on duty shall be subject to disciplinary action including dismissal.

G. Application of Other Sanctions: Nothing in *1.7.8 NMAC* shall prevent or limit the imposition of other or additional sanctions that may be applicable under any of these rules merely because an incident involves drug or alcohol abuse.

[1.7.8.19 NMAC - Rp, 1 NMAC 7.8.19, 07/07/01; A, 11/14/02]

1.7.8.20 PILOT PROGRAM: The board may authorize a pilot program to evaluate impairment testing. Such pilot programs may authorize variances from provisions of *1.7.8 NMAC*, including random drug testing for participants in the pilot program.

[1.7.8.20 NMAC - Rp, 1 NMAC 7.8.20, 07/07/01]

HISTORY OF 1.7.8 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB-14, Drug and Alcohol Abuse, filed 04-04-90;

SPB-14, Drug and Alcohol Abuse, filed 10-17-90;

SPB-14, Drug and Alcohol Abuse, filed 12-13-90;

SPB 11, Drug and Alcohol Abuse, filed 12-15-92;

SPB 11, Drug and Alcohol Abuse, filed 03-18-94;

SPB 11, Drug and Alcohol Abuse, filed 12-29-94.

History of Repealed Material:

1 NMAC 7.8, Drug and Alcohol Abuse, filed 06-13-97.

Other History:

1 NMAC 7.10, Drug and Alcohol Abuse, filed 01-12-96 **replaced** SPB 11, filed 12-29-94;

1 NMAC 7.10, Drug and Alcohol Abuse, filed 05-02-96 **replaced by** 1 NMAC 7.8, Drug and Alcohol Abuse, filed 06-13-97;

1 NMAC 7.8, Drug and Alcohol Abuse, filed 06-13-97 **replaced by** 1.7.8 NMAC, Absence and Leave, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 9 PERFORMANCE APPRAISALS

1.7.9.1 ISSUING AGENCY: State Personnel Board.
[1.7.9.1 NMAC - Rp, 1 NMAC 7.9.1, 07/07/01]

1.7.9.2 SCOPE: All state agencies in the classified service.
[1.7.9.2 NMAC - Rp, 1 NMAC 7.9.2, 07/07/01]

1.7.9.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(A) and NMSA 1978, Section 10-9-15.
[1.7.9.3 NMAC - Rp, 1 NMAC 7.9.3, 07/07/01; A, 11/14/02]

1.7.9.4 DURATION: Permanent.
[1.7.9.4 NMAC - Rp, 1 NMAC 7.9.4, 07/07/01]

1.7.9.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.9.5 NMAC - Rp, 1 NMAC 7.9.5, 07/07/01]

1.7.9.6 OBJECTIVE: The objective of Part 9 of Chapter 7 is: to provide for the regular appraisal and documentation of employee performance and review of agency compliance in conducting performance appraisals.
[1.7.9.6 NMAC - Rp, 1 NMAC 7.9.6, 07/07/01]

1.7.9.7 DEFINITIONS: [RESERVED]
[1.7.9.7 NMAC - Rp, 1 NMAC 7.9.7, 07/07/01]

1.7.9.8 FORM:

A. The performance and development of managers and employees shall be documented on a director approved appraisal form that includes:

- (1) basic employee information (employee's name, working title, employee identification number, position number, anniversary date, and the name of their immediate supervisor);
- (2) job assignments and goals;
- (3) performance rating areas; and
- (4) signature spaces for the employee, rater and reviewer to record initial, interim and final performance appraisal discussions.

B. A performance and development plan shall be initiated within 90 calendar days of appointment, reassignment, promotion, demotion, reduction, transfer and/or the employee's appraisal date, and shall become a part of each employee's employment history.

[1.7.9.8 NMAC - Rp, 1 NMAC 7.9.8, 07/07/01; A, 11/14/02; A, 3/31/04; A, 9-14-07]

1.7.9.9 PERFORMANCE APPRAISAL:

A. Managers and supervisors must successfully complete a director-approved course of study on employee performance appraisal within 90 days of appointment as a supervisor.

B. The performance and development of a career employee shall be reviewed semi-annually and appraised by the immediate supervisor on an annual basis completed by the employee's anniversary date.

C. The performance and development of a probationary employee shall be reviewed through at least two interim reviews and a final review prior to the completion of the employee's probationary period. The performance and development of promoted employees shall be reviewed through at least two interim reviews and a final review prior to the completion of a one-year period upon promotion.

D. The appraisal of employee performance and development shall be performed by the immediate supervisor with employee input and participation. Additional input and participation from employee's peers, customers, subordinates, or other appropriate personnel may be applied when appropriate.

E. Appraisals may be performed whenever an immediate supervisor wishes to make an employee's performance a matter of record, upon change of immediate supervisor, or whenever appropriate.

F. Managers and immediate supervisors who fail to comply with the provisions of **1.7.9 NMAC** may be subject to disciplinary action including dismissal.
[1.7.9.9 NMAC - Rp, 1 NMAC 7.9.9, 07/07/01; A, 11/14/02; A, 7/30/03; 12/01/03; A, 3/31/04]

1.7.9.10 [RESERVED]

[1.7.9.10 NMAC - N, 07/01/02; A, 11/14/02; A, 7/30/03; A, 12/01/03; A, 3/31/04]

1.7.9.11 REBUTTAL: Employees may submit a rebuttal to performance appraisals, which shall become a part of the performance appraisal.

[1.7.9.11 NMAC - Rp, 1 NMAC 7.9.10, 07/07/01]

1.7.9.12 REPORT TO THE BOARD: During the fourth quarter of each calendar year the director shall report to the board on the record of each agency in conducting performance appraisals of its employees in the classified service. Agencies shall cooperate with the director, in accordance with the provisions of *NMSA 1978, Section 10-9-15*, and provide the director with such information concerning its performance appraisals as the director may require.

[1.7.9.12 NMAC - Rp, 1 NMAC 7.9.11, 07/07/01; A, 11/14/02]

HISTORY OF 1.7.9 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 17, Performance Evaluation and Training, filed 05-22-80;

SPB Rule 17, Performance Appraisal and Training, filed 06-03-81;

SPB Rule 17, Performance Appraisal and Training, filed 10-21-82;

SPB Rule 13, Leaves of Absence, filed 07-22-82;

SPB-9, Performance Appraisal, filed 04-04-90;

SPB 12, Performance Appraisals, filed 12-15-92;

SPB 9, Performance Appraisals, filed 03-18-94;

History of Repealed Material:

1 NMAC 7.9, Performance Appraisals, filed 06-13-97.

Other History:

1 NMAC 7.11, Performance Appraisals, filed 01-12-96 **replaced** SPB 12, filed 12-15-92;

1 NMAC 7.11, Performance Appraisals, filed 05-02-96;

1 NMAC 7.11, Performance Appraisals, filed 05-02-96 **replaced by** 1 NMAC 7.9, Performance Appraisals, filed 06-13-97;

1 NMAC 7.9, Performance Appraisals, filed 06-13-97 **replaced by** 1.7.8 NMAC, Absence and Leave, effective 07/07/01

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 10 FURLOUGH, REDUCTION IN FORCE, REEMPLOYMENT, SEPARATION WITHOUT
PREJUDICE

1.7.10.1 ISSUING AGENCY: State Personnel Board.
[1.7.10.1 NMAC - Rp, 1 NMAC 7.10.1, 07/07/01]

1.7.10.2 SCOPE: All state agencies in the classified service.
[1.7.10.2 NMAC - Rp, 1 NMAC 7.10.2, 07/07/01]

1.7.10.3 STATUTORY AUTHORITY: NMSA 1978, 10-9-10(A); Section 10: NMSA 1978, Section 10-9-19; Section 11: NMSA 1978, Sections 28-15-1 to 28-15-3 and 38 U.S.C. Section 2021; Section 13: NMSA 1978, Section 52-1-25.1.
[1.7.10.3 NMAC - Rp, 1 NMAC 7.10.3, 07/07/01; A, 11/14/02]

1.7.10.4 DURATION: Permanent
[1.7.10.4 NMAC - Rp, 1 NMAC 7.10.4, 07/07/01]

1.7.10.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.10.5 NMAC - Rp, 1 NMAC 7.10.5, 07/07/01]

1.7.10.6 OBJECTIVE: The objective of Part 10 of Chapter 7 is: to provide a system for employee furlough, and separation upon reduction in force; to provide for reemployment after military service; to provide for injured employees' return to work, and potential separation.
[1.7.10.6 NMAC - Rp, 1 NMAC 7.10.6, 07/07/01]

1.7.10.7 DEFINITIONS:

A. "Furlough" means a temporary placement of an employee in a reduced work hour schedule, which can either be partial or full-time, for lack of work or funds.

B. "Agency hire date" means the date on which an employee's current continuous employment with the agency or its legal predecessor began or, when an agency or organizational unit of an agency is merged with another agency, the date on which the employee began continuous employment with the original hiring agency.
[1.7.10.7 NMAC - Rp, 1 NMAC 7.10.7, 07/07/01]

1.7.10.8 FURLOUGH:

A. In the event of the need for a furlough, an agency shall submit a plan identifying organizational units to be affected by the furlough to the board for approval to effect the furlough. The director may approve such plans if an emergency exists and there is insufficient time for the board to consider such plans.

B. The furlough plan shall affect all employees within the organizational unit impacted to the same extent.

C. No furlough shall exceed 12 months in duration.

D. Employees shall be given at least 14 calendar days written notice of furlough, unless the time limit is waived by the director. Notice shall be served in accordance with the provisions of **1.7.1.10 NMAC**.

E. Employees shall be returned from furlough when the reasons for the furlough cease to exist. Wherever possible, all affected employees shall be returned at the same time, to the same extent.
[1.7.10.8 NMAC - Rp, 1 NMAC 7.10.8, 07/07/01; A, 7-15-05]

1.7.10.9 REDUCTION IN FORCE:

A. An agency may lay off employees only for deletion of positions, shortage of work or funds, or other reasons that do not reflect discredit on the services of the employees.

B. An agency shall identify organizational units for purposes of a layoff and submit a written plan to the board. Such organizational units may be recognized on the basis of geographic area, function, funding source, or other factors. The agency must define the classifications affected within the organizational unit.

C. Upon board approval of a layoff plan, the agency effecting the layoff shall initiate a right of first refusal within the agency. All employees affected by the layoff shall be provided the following rights:

(1) employees to be affected by the reduction in force (RIF) shall be provided the right of first refusal to any position to be filled within the agency for which they meet the established requirements, at the same or lower midpoint than the midpoint of the position the employee currently holds, unless there is an actual layoff candidate exercising RIF rights for that position;

(2) affected employees shall compete only with other employees in the same agency affected by the reduction in force;

(3) the agency's list of eligible candidates for the open positions shall be comprised of those affected employees meeting the established requirements of the position;

(4) employees shall have eleven calendar days from the date of an offer to accept the position unless otherwise agreed; employees who do not accept an offer shall not lose the right of first refusal status to other positions; and

(5) the right of first refusal under *Subsection C of 1.7.10.9. NMAC* shall extend until the first effective date of layoff as defined in the plan.

D. The order of layoff due to reduction in force shall be by service date which is determined based upon the agency hire date. In the event of a tie, the director shall determine an appropriate mechanism for breaking the tie.

E. No employee in career status shall be laid off while there are term, probationary, emergency or temporary status employees in the same classification in the same organizational unit.

F. Employees in career status shall be given at least 14 calendar days written notice of layoff. Notice shall be served according to the provisions of *1.7.1.10 NMAC*.

[1.7.10.9 NMAC - Rp, 1 NMAC 7.10.9, 07/07/01; A, 11/14/02; A, 03/31/04; A, 7-15-05]

1.7.10.10 RETURN FROM REDUCTION IN FORCE:

A. Former employees who were in career status at the time of separation by a reduction in force shall have reemployment rights within the classified service, for a six-month period, under the following provisions:

(1) Former employees shall be returned to work in order of highest service date as determined by *Subsection D of 1.7.10.9 NMAC* to any position to be filled within the agency from which the employee was laid off. The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements;

(2) Reemployment to positions and agencies, other than the agency from which the former employee was laid off, shall extend when any position is to be filled. The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements. If, when an agency intends to fill a position, there is more than one eligible former employee with rights to return to work under this rule, the agency shall select the former employee who is best qualified in the agency's opinion;

(3) Offers of employment shall be made in writing and shall be delivered by a method that provides proof of service or attempted service;

(4) A former employee who is offered and accepts employment after layoff shall occupy the position within 14 calendar days of accepting the offer of employment or forfeit the right to employment ; and

(5) Any former employee who refuses an offer of employment or fails to respond to an offer of employment within 14 calendar days shall be removed from the employment list for the position offered.

B. Former employees returned to work according to the provisions of *Subsection A of 1.7.10.10 NMAC* shall have that period of time they were laid off counted as time in the classified service, shall hold the status of the position in accordance with *1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC* and do not have to serve a new probationary period if reemployed into career status.

[1.7.10.10 NMAC - Rp, 1 NMAC 7.10.10, 07/07/01; A, 11/14/02]

1.7.10.11 REEMPLOYMENT AFTER MILITARY SERVICE: Any employee who separates from the classified service to enter the United States armed forces, national guard, or an organized reserve unit may be reemployed in accordance with the provisions of *38 U.S.C. Section 2021* and *NMSA 1978, Sections 28-15-1 to 28-15-3*.

[1.7.10.11 NMAC - Rp, 1 NMAC 7.10.11, 07/07/01; A, 11/14/02]

1.7.10.12 EARLY RETURN-TO-WORK/MODIFIED DUTY ASSIGNMENTS:

A. Agencies shall implement a policy to enable employees who have been unable to work because of a compensable injury or illness under the workers' compensation act to return to work in a modified duty assignment for up to 6 months and may be extended for a period of up to 6 additional months if substantial progress in the recovery of an injured or ill employee has been demonstrated and it has been anticipated the injured or ill employee will be able to return to full duty within the time frame of the considered extension.

B. The agency shall make a good faith effort to identify and offer modified duty/return to work opportunities to injured or ill employees in accordance with the provisions of *NMSA 1978, Section 52-1-25.1 and NMSA 1978 52-3-49.1* At the agency's discretion the employee may be assigned to his or her current classification with modified duties or to a temporary assignment comprised of a combination of duties from a variety of positions.

C. Employees on modified duty assignment to a temporary position shall maintain their salary and status for the duration of such temporary assignment.

[1.7.10.12 NMAC - Rp, 1 NMAC 7.10.12, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.10.13 SEPARATION WITHOUT PREJUDICE:

A. Employees who have suffered an injury or illness which is compensable under the workers' compensation act and are physically or mentally unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, shall be separated from the service without prejudice provided:

- (1) the employee has been afforded modified duty in accordance with *1.7.10.12 NMAC*;
- (2) the employee has reached maximum medical improvement prior to the completion of up to 12 months of modified duty; or, the employee has not reached maximum medical improvement upon the expiration of up to 12 months of modified duty;
- (3) all efforts to accommodate the medical restrictions of the employee have been made and documented; and
- (4) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:
 - (a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or
 - (b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

B. Employees who have suffered an illness or injury that is not compensable under the workers' compensation act and are unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, as a result of the physical or mental disability created by the non job-related injury or illness shall be separated from the service without prejudice provided:

- (1) all efforts to reasonably accommodate the medical restrictions of the employee have been made and documented; and
- (2) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:
 - (a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation; or
 - (b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

C. Agencies may provide modified duty to employees for a period of up to 4 months during the separation process if required to meet the provisions of this rule.

D. Notice of contemplated separation without prejudice:

- (1) to initiate the separation without prejudice of an employee who has completed the probationary period, the agency shall serve a notice of contemplated separation without prejudice on the employee which: describes the circumstances which form the basis for the contemplated separation without prejudice; gives a general explanation of the evidence the agency has; advises the employee of his or her right to inspect and obtain copies of any documentary evidence relied upon; specifies what the contemplated action is; and states that the employee has 11 calendar days from service of the notice to respond in writing to the notice or to request an opportunity for an oral response;

(2) when the notice of contemplated separation without prejudice is served by mail, the employee receiving service shall have 3 additional calendar days in which to file a response;

(3) at the time the notice of contemplated separation without prejudice is served on the employee, the agency shall notify the director and the risk management division of the general services department of the proposed separation without prejudice and submit a copy of the separation notice along with documentation to support efforts to provide modified duty and to support efforts to find other suitable vacant positions.

E. Response to notice of contemplated separation without prejudice:

(1) a representative of the employee's choosing may respond in writing to the notice of contemplated separation without prejudice on behalf of the employee;

(2) if there is a request for an oral response to the notice of contemplated separation without prejudice, the agency shall meet with the employee within 11 calendar days of a request for an oral response, unless the employee and the agency agree in writing to an extension of time; a representative of the employee's choosing may represent the employee.

(3) the purpose of the oral response is not to provide an evidentiary hearing but is an opportunity for the employee to present his or her side of the story; it is an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to support the proposed involuntary separation without prejudice.

F. Notice of final separation without prejudice:

(1) if the employee does not respond to the notice of contemplated separation without prejudice the agency shall issue a notice of final separation within 11 calendar days following the response period;

(2) if the employee has filed a written response or has been provided an opportunity for oral response, the agency shall issue a notice of final separation without prejudice no later than 11 calendar days from the date of receipt of the response;

(3) the notice of final separation without prejudice shall:

(a) specify the action to be taken;

(b) describe the circumstances which form the basis for the separation without prejudice, which may not include allegations not included in the notice of contemplated separation without prejudice;

(c) give a general explanation of the evidence the agency has;

(d) specify when the final separation without prejudice will be effective, which must be at least 24 hours from the time of service of the notice of final separation without prejudice;

(e) inform the employee that the final separation without prejudice may be appealed to the board with a written statement of the grounds for the appeal delivered to the state personnel office in Santa Fe, New Mexico, and received by the director within 30 calendar days of the effective date of the separation without prejudice; and

(f) the adjudication process is outlined in 1.17.12 NMAC.

[1.7.10.13 NMAC - Rp, 1 NMAC 7.10.13, 07/07/01; A, 11/14/02; A, 06/08/04; A, 10/29/04; A, 7-15-05]

1.7.10.14 REEMPLOYMENT OF JOB-RELATED INJURED OR ILL FORMER EMPLOYEES:

A. A former employee who has separated from the service due to job-related injury or illness and who has received or is due to receive benefits under the workers' compensation act shall have reemployment rights in accordance with the provisions of *NMSA 1978, Section 52-1-25.1 and NMSA 1978 Section 52-3-49*, under the following provisions:

(1) Reemployment rights under **1.7.10.14 NMAC** are extended only by the agency employing the former employee at the time of the job related injury or illness and are provided only for positions which contain the same or lower midpoint as that held at the time of separation.

(2) To initiate reemployment rights under this rule, the former employee must notify the agency in writing, with a copy to the office, of their desire to be reemployed. The notification shall include the positions and locations, which the former employee is willing to accept, and an appropriate application for employment.

(3) The agency must receive certification in writing from the treating health care provider that the former employee is fit to carry out the essential functions of the position with or without reasonable accommodation without significant risk of re-injury or relapse to illness.

(4) When the agency is to fill a vacant position which is a position and location indicated by the former employee, the agency shall offer the job to the former employee provided:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

(5) Former employees reemployed in accordance with the provisions of *Subsection A of 1.7.10.14 NMAC* will hold the status of the position in accordance with *1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC* and do not have to serve a probationary period if they were in career status at the time of separation.

B. The risk management division of the general services department and the office shall be notified immediately of any injured or ill former employee who applies for a position and subsequently declines a job offer. [1.7.10.14 NMAC - Rp, 1 NMAC 7.10.14, 07/07/01; A, 11/14/02]

HISTORY OF 1.7.10 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

- SPB Rule 14, Separation and Demotions, filed 08-31-87;
- SPB-16, Furlough and Reduction in Force, filed 04-04-90;
- SPB 14, Furlough, RIF, Reemployment, filed 12-15-92;
- SPB 14, Furlough, Reduction in Force, Reemployment, filed 03-18-94.

History of Repealed Material:

1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97.

Other History:

- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 01-12-96 **replaced** SPB 14, filed 03-18-94;
- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 05-02-96;
- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 05-02-96 **replaced by** 1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97;
- 1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97 **replaced by** 1.7.10 NMAC, Furlough, Reduction in Force, Reemployment, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 11 DISCIPLINE

1.7.11.1 ISSUING AGENCY: State Personnel Board.
[1.7.11.1 NMAC - Rp, 1 NMAC 7.11.1, 07/07/01]

1.7.11.2 SCOPE: All state agencies in the classified service.
[1.7.11.2 NMAC - Rp, 1 NMAC 7.11.2, 07/07/01]

1.7.11.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-13(H), NMSA 1978, Section 10-9-18(A), NMSA 1978, Section 10-9-22 and NMSA 1978, Sections 28-2-1 to 28-2-6; Chapter 173, laws of 1997.
[1.7.11.3 NMAC - Rp, 1 NMAC 7.11.3, 07/07/01; A, 11/14/02]

1.7.11.4 DURATION: Permanent.
[1.7.11.4 NMAC - Rp, 1 NMAC 7.11.4, 07/07/01]

1.7.11.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.11.5 NMAC - Rp, 1 NMAC 7.11.5, 07/07/01]

1.7.11.6 OBJECTIVE: The objective of Part 11 of Chapter 7 is: to provide a mechanism by which management can implement constructive, progressive steps towards solving performance or behavior problems.
[1.7.11.6 NMAC - Rp, 1 NMAC 7.11.6, 07/07/01]

1.7.11.7 DEFINITIONS: [RESERVED]
[1.7.11.7 NMAC - Rp, 1 NMAC 7.11.7, 07/07/01]

1.7.11.8 DISCIPLINE:

A. The primary purpose of discipline is to correct performance or behavior that is below acceptable standards, or contrary to the employer's legitimate interests, in a constructive manner that promotes employee responsibility.

B. Progressive discipline shall be used whenever appropriate. Progressive discipline can range from a reminder, to an oral or written reprimand, to a suspension, demotion or dismissal. There are instances when a disciplinary action, including dismissal, is appropriate without first having imposed a less severe form of discipline.

C. Agencies shall utilize alternative methods to resolve conflicts or improve employee performance or behavior whenever appropriate.

[1.7.11.8 NMAC - Rp, 1 NMAC 7.11.8, 07/07/01]

1.7.11.9 NOTICES AND COMPUTATION OF TIME:

A. Notices prescribed by *1.7.11 NMAC* shall be served in accordance with the provisions of *1.7.1.10 NMAC*.

B. The computation of time prescribed or allowed by *1.7.11 NMAC* shall be in accordance with the provisions of *1.7.1.11 NMAC*.

[1.7.11.9 NMAC - Rp, 1 NMAC 7.11.9, 07/07/01; A, 11/14/02]

1.7.11.10 JUST CAUSE:

A. An employee who has completed the probationary period required by *Subsection A of 1.7.2.8 NMAC* may be suspended, demoted, or dismissed only for just cause which is any behavior relating to the employee's work that is inconsistent with the employee's obligation to the agency.

B. Just cause includes, but is not limited to: inefficiency; incompetency; misconduct; negligence; insubordination; performance which continues to be unsatisfactory after the employee has been given a reasonable opportunity to correct it; absence without leave; any reasons prescribed in *1.7.8 NMAC*; failure to comply with any provisions of these Rules; falsifying official records and/or documents such as employment applications, or conviction of a felony or misdemeanor when the provisions of the *Criminal Offender Employment Act NMSA 1978, Sections 28-2-1 to 28-2-6* apply.

[1.7.11.10 NMAC - Rp, 1 NMAC 7.11.10, 07/07/01; A, 11/14/02]

1.7.11.11 PROBATIONERS AND EMPLOYEES IN EMERGENCY OR TEMPORARY STATUS:

Probationers and employees in emergency or temporary status may be suspended, demoted, or dismissed effective immediately with written notice and without right of appeal to the board. The written notice shall advise the employee of the conduct, actions, or omissions which resulted in the suspension, demotion, or dismissal.

[1.7.11.11 NMAC - Rp, 1 NMAC 7.11.11, 07/07/01; A, 11/14/02]

1.7.11.12 ADMINISTRATIVE LEAVE PENDING DISCIPLINARY ACTION: Agencies may authorize administrative leave for a period up to 160 consecutive work hours during a disciplinary action proceeding or investigation. Administrative leave in excess of 160 consecutive work hours must be approved by the director.

[1.7.11.12 NMAC - Rp, 1 NMAC 7.11.12, 07/07/01; A, 7-15-05]

1.7.11.13 EMPLOYEES IN CAREER STATUS:

A. Notice of Contemplated Action:

(1) To initiate the suspension, demotion, or dismissal of an employee in career status and an employee in term status who has completed the probationary period, the agency shall serve a notice of contemplated action on the employee which: describes the conduct, actions, or omissions which form the basis for the contemplated disciplinary action; gives a general explanation of the evidence the agency has; advises the employee of his or her right to inspect and obtain copies of any documentary evidence relied upon; specifies what the contemplated action is; and states that the employee has eleven calendar days from service of the notice to respond in writing to the notice or to request an opportunity for an oral response.

(2) When the notice of contemplated action is served by mail, the employee receiving service shall have 3 additional calendar days in which to file a response.

B. Response to Notice of Contemplated Action:

(1) A representative of the employee's choosing may respond in writing to the notice of contemplated action on behalf of the employee.

(2) If there is a request for an oral response to the notice of contemplated action, the agency shall meet with the employee within 11 calendar days of a request for an oral response, unless the employee and the agency agree in writing to an extension of time. A representative of the employee's choosing may represent the employee.

(3) The purpose of the oral response is not to provide an evidentiary hearing but is an opportunity for the employee to present his or her side of the story. It is an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

C. Notice of Final Action:

(1) If the employee does not respond to the notice of contemplated action the agency shall issue a notice of final action within 11 calendar days following the response period.

(2) If the employee has filed a written response or has been provided an opportunity for oral response, the agency shall issue a notice of final action no later than 11 calendar days from the date of receipt of the response.

(3) The notice of final action shall:

(a) specify the final action to be taken, which may be upholding the contemplated action, a lesser form of discipline than contemplated, or no disciplinary action;

(b) describe the conduct, actions, or omissions which form the basis for the disciplinary action, which may not include allegations not included in the notice of contemplated action;

(c) give a general explanation of the evidence the agency has;

(d) specify when the disciplinary action will be effective, which must be at least 24 hours from the time of service of the notice of final action; and

(e) inform the employee that the disciplinary action may be appealed to the board with a written statement of the grounds for the appeal delivered to the state personnel office in Santa Fe, New Mexico, and if it is, it must be received by the director within 30 calendar days of the effective day and that the employee must submit a copy of the notice of final action with the notice of appeal.

[1.7.11.13 NMAC - Rp, 1 NMAC 7.11.13, 07/07/01; A, 11/14/02; A, 7-15-05]

HISTORY OF 1.7.11 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 14, Separations and Demotions, filed 05-22-80;
SPB Rule 14, Separations and Demotions, filed 09-01-81;
SPB Rule 14, Separations and Demotions, filed 07-22-82;
SPB Rule 14, Separations and Demotions, filed 10-21-82;
SPB Rule 14, Separations and Demotions, filed 03-04-86;
SPB Rule 14, Separations and Demotions, filed 03-14-86;
SPB Rule 14, Separations and Demotions, filed 10-17-86;
SPB Rule 14, Separations and Demotions, filed 08-31-87;
SPB-18, Disciplinary Actions, filed 04-04-90;
SPB-18, Disciplinary Actions, filed 10-19-90;
SPB-18, Disciplinary Actions, filed 12-24-91;
SPB 17, Discipline, filed 12-15-92;
SPB 17, Discipline, filed 03-18-94.

History of Repealed Material:

1 NMAC 7.11, Discipline, filed 06-13-97.

Other History:

1 NMAC 7.16, Discipline, filed 01-12-96 **replaced** SPB 17, filed 03-18-94;
1 NMAC 7.16, Discipline, filed 05-02-96;
1 NMAC 7.11, Discipline, filed 06-13-97 **replaced** 1 NMAC 7.16, filed 05-02-96;
1 NMAC 7.11, Discipline, filed 06-13-97 **replaced by** 1.7.11 NMAC, Discipline, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 12 ADJUDICATION

1.7.12.1 ISSUING AGENCY: State Personnel Board.
[1.7.12.1 NMAC - Rp, 1 NMAC 7.12.1, 07/07/01]

1.7.12.2 SCOPE: All state agencies in the classified service.
[1.7.12.2 NMAC - Rp, 1 NMAC 7.12.2, 07/07/01]

1.7.12.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(B), NMSA 1978, Section 10-9-13(E),(H), NMSA 1978, Section 10-9-18, NMSA 1978, Section 10-9-20, NMSA 1978, Section 10-15-1(H) and NMSA 1978, Section 52-5-2(B),(C).
[1.7.12.3 NMAC - Rp, 1 NMAC 7.12.3, 07/07/01; A, 11/14/02]

1.7.12.4 DURATION: Permanent.
[1.7.12.4 NMAC - Rp, 1 NMAC 7.12.4, 07/07/01]

1.7.12.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.12.5 NMAC - Rp, 1 NMAC 7.12.5, 07/07/01]

1.7.12.6 OBJECTIVE: The objective of Part 12 of Chapter 7 is: to provide a system for career status employees to appeal disciplinary actions to the personnel board and to provide a process for the personnel board to hear complaints against workers' compensation judges.
[1.7.12.6 NMAC - Rp, 1 NMAC 7.12.6, 07/07/01]

1.7.12.7 DEFINITIONS: For purposes of *1.7.12.24 NMAC*.
A. "Complaint" means a sworn statement of the alleged facts underlying the claim that a judge has violated one or more of the canons of the code of judicial conduct as adopted by the supreme court, except canon 21-900 of that code; and;
B. "Judge" means a workers' compensation judge appointed in accordance with the provisions of *NMSA 1978, Section 52-5-2(B)*.
[1.7.12.7 NMAC - Rp, 1 NMAC 7.12.7, 07/07/01; A, 11/14/02]

1.7.12.8 FILING AN APPEAL:
A. Employees who have completed the probationary period as required by *Subsection A of 1.7.2.8 NMAC* and have been demoted, dismissed, or suspended have the right to appeal to the board for a public hearing before a hearing officer designated by the board.
B. A notice of appeal must be in writing and filed with the director no later than 30 calendar days from the effective date of the dismissal, demotion, or suspension. A copy of the notice of final action and a statement of the grounds for the appeal must accompany the notice of appeal. Appeals not filed within 30 calendar days shall be dismissed by the hearing officer for lack of jurisdiction.
C. Within fifteen days from the date of dismissal, an appellant may request a hearing in which to present evidence challenging a dismissal for lack of jurisdiction. If a hearing on the dismissal is held, the hearing officer shall submit a recommended decision to the board which shall contain a summary of the evidence and findings of fact and conclusions of law. The board, at a regularly scheduled meeting, shall then issue a final decision.
D. Upon acceptance of a notice of appeal, the hearing officer shall send the agency a copy of the notice of appeal and issue a scheduling order directing the parties, in part, to submit to the hearing officer a stipulated pre-hearing order for his/her approval, which shall contain at least: a statement of any contested facts and issues; proposed stipulation of those facts not in dispute; the relief or remedy requested by the appellant; a deadline for disclosure of all probable witnesses with a brief summary of their anticipated testimony and documentary evidence; a list of exhibits; a deadline for the completion of discovery and filing of motions; a deadline for requesting subpoenas; and whether the parties agree to participate in voluntary alternative dispute resolution.
(1) The hearing officer may further revise the pre-hearing order.

(2) Any discussion concerning possible settlement of an appeal shall not be a part of the pre-hearing order and may not be introduced at the hearing.
[1.7.12.8 NMAC - Rp, 1 NMAC 7.12.8, 07/07/01; A, 7-15-05; A, 5/15/07]

1.7.12.9 AGENCY WITHDRAWAL OF DISCIPLINE:

A. An agency may withdraw a completed disciplinary action prior to commencement of a personnel board appeals hearing so long as the appellant is fully restored to pre-disciplinary status insofar as employment, back pay and benefits are concerned.

B. Upon agency withdrawal of a disciplinary action, the hearing officer may dismiss the appeal without prejudice to the agency, which may reinstate disciplinary action.

[1.7.12.9 NMAC - Rp, 1 NMAC 7.12.9, 07/07/01; 1.7.12.9 NMAC - N, 7-15-05]

1.7.12.10 HEARING OFFICER:

A. The hearing officer shall not participate in any adjudicatory proceeding if, for any reason, the hearing officer cannot afford a fair and impartial hearing to either party. Either party may ask to disqualify the designated hearing officer for cause by filing an affidavit of disqualification within 14 calendar days of the order. The affidavit must state the particular grounds for disqualification. The designated hearing officer shall rule on motions for disqualification and an appeal of the ruling may be made to the board within 14 calendar days of the hearing officer's ruling.

B. Appeals from employees of the office shall be heard by the board or a member of the board designated as hearing officer.

C. No person shall discuss the merits of any pending adjudicatory proceeding with the designated hearing officer or member of the board unless both parties or their representatives are present.

D. The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the hearing officer or upon the filing of a motion to withdraw the appeal at any time before the deadline for the completion of discovery.

E. The hearing officer may dismiss an appeal with prejudice upon the filing of a motion to withdraw the appeal after the deadline for the completion of discovery upon such terms and conditions as the hearing officer deems proper, up to and including the assessment of costs.

[1.7.12.10 NMAC - Rp, 1 NMAC 7.12.10, 07/07/01; 1.7.12.10 NMAC - Rn, 1.7.12.9 NMAC, 7-15-05]

1.7.12.11 CONSOLIDATION AND JOINDER:

A. The hearing officer may consolidate cases in which two or more appellants have cases containing identical or similar issues.

B. The hearing officer may join the appeals of an appellant who has two or more appeals pending.

C. The hearing officer may consolidate or join cases if it would expedite final resolution of the cases and would not adversely affect the interests of the parties.

[1.7.12.11 NMAC - Rp, 1 NMAC 7.12.11, 07/07/01; 1.7.12.11 NMAC - Rn, 1.7.12.10 NMAC, 7-15-05]

1.7.12.12 DISCOVERY: The hearing officer has the power to compel, by subpoena or order, the production of written materials or other evidence the hearing officer may deem relevant or material. The parties shall have a right to discovery limited to depositions, interrogatories, requests for production, and requests for admission and witness interviews. All discovery shall be subject to the control of the hearing officer.

[1.7.12.12 NMAC - Rp, 1 NMAC 7.12.12, 07/07/01; 1.7.12.12 NMAC - Rn, 1.7.12.11 NMAC & A, 7-15-05]

1.7.12.13 MOTIONS:

A. Any defense, objection, or request that can be determined on the merits prior to a hearing may be raised by motion before the deadline set by the hearing officer unless good cause is shown for the delay.

B. Prior to filing the motion, the filing party shall determine whether the non-filing party concurs with the motion. If the non-filing party concurs, the filing party shall include a stipulated order with the motion. If the non-filing party does not concur, the filing party shall indicate the non-concurrence in the motion and include a proposed order.

C. A response to a motion is due twelve (12) calendar days from the date of filing of the motion. A reply to a response is due seven (7) days from the date of filing the response. The response and reply schedule may also be set or modified by the hearing officer.

D. Responses to any motions shall be filed according to a schedule set by the hearing officer.

E. During the course of a hearing, motions may be renewed or made for the first time, if such a motion then becomes appropriate.

F. The hearing officer shall rule on all motions except for dispositive motions on the merits.
[1.7.12.13 NMAC - Rp, 1 NMAC 7.12.13, 07/07/01; 1.7.12.13 NMAC - Rn, 1.7.12.12 NMAC & A, 7-15-05]

1.7.12.14 ADDITIONAL WITNESSES: Witnesses who are not disclosed by the deadline contained in the pre-hearing order shall not be permitted to testify except for good cause shown and to prevent manifest injustice.
[1.7.12.14 NMAC - Rp, 1 NMAC 7.12.14, 07/07/01; 1.7.12.14 NMAC - Rn, 1.7.12.13 NMAC, 7-15-05]

1.7.12.15 SUBPOENAS:

A. The hearing officer has the power to subpoena witnesses.
B. The hearing officer has the power to subpoena documents or other tangible items.
C. Subpoenas shall be prepared in triplicate by the party requesting the subpoena and will be issued by the hearing officer. A copy of each subpoena shall be sent to the opposing party by the requesting party, together with a transmittal letter listing all persons subpoenaed.

D. Subpoenas shall be hand delivered unless otherwise agreed to.

E. In order to compel attendance at a hearing, the subpoena shall be received by the witness at least 72 hours prior to the time the witness is to appear. The hearing officer may waive this rule for good cause shown.

F. Employees under subpoena shall be granted administrative leave as required by the provisions of *Subsection D of 1.7.7.14 NMAC*.

[1.7.12.15 NMAC - Rp, 1 NMAC 7.12.15, 07/07/01; 1.7.12.15 NMAC - Rn, 1.7.12.14 NMAC & A, 7-15-05]

1.7.12.16 SANCTIONS:

A. The hearing officer may impose sanctions upon the parties as necessary to serve the cause of justice including, but not limited to the instances set forth below.

(1) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, a request for admission, and/or production of witnesses, the hearing officer may:

(a) draw an inference in favor of the requesting party with regard to the information sought;
(b) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought;

(c) permit the requesting party to introduce secondary evidence concerning the information sought; or

(d) strike any part of the pleadings or other submissions of the party failing to comply with such request.

(2) The hearing officer may refuse to consider any motion or other action which is not filed in a timely fashion.

B. The hearing officer may issue an order to show cause why an appeal should not be dismissed for failure to prosecute, or rule either for the appellant or the appellee, so long as the merits of the case are not concerned. If the order is uncontested, the hearing officer may dismiss the appeal or rule for the appellant. If the order is contested and the hearing officer dismisses the appeal or rules for the appellant, such decision is appealable to the board within 14 calendar days of the order.

C. The board may prohibit a representative from appearing before the board or one of its hearing officers for a period of time set by the board for good cause shown.

[1.7.12.16 NMAC - Rp, 1 NMAC 7.12.16, 07/07/01; 1.7.12.16 NMAC - Rn, 1.7.12.15 NMAC & A, 7-15-05]

1.7.12.17 NOTICE OF HEARING: Notice of hearing shall be made by certified mail with return receipt requested at least 14 calendar days prior to the hearing, unless otherwise agreed to by the parties and the hearing officer.

[1.7.12.17 NMAC - Rp, 1 NMAC 7.12.17, 07/07/01; A, 11/14/02; 1.7.12.17 NMAC - Rn, 1.7.12.16 NMAC, 7-15-05]

1.7.12.18 HEARINGS:

A. The hearing shall be open to the public unless the parties agree that it shall be closed.

B. A party may appear at the hearing through a representative, provided such representative has made a written entry of appearance prior to the hearing date.

C. The hearing officer may clear the room of witnesses not under examination, if either party so requests, and of any person who is disruptive. The agency is entitled to have a person, in addition to its representative, in the hearing room during the course of the hearing, even if the person will testify in the hearing.

D. The agency shall present its evidence first.

E. Oral evidence shall be taken only under oath or affirmation.

F. Each party shall have the right to:

(1) make opening and closing statements;

(2) call and examine witnesses and introduce exhibits;

(3) cross-examine witnesses;

(4) impeach any witness;

(5) rebut any relevant evidence; and

(6) introduce evidence relevant to the choice of discipline if it was raised as an issue in the pre-hearing order.

G. The hearing shall be conducted in an orderly and informal manner without strict adherence to the rules of evidence that govern proceedings in the courts of the state of New Mexico. However, in order to support the board's decisions, there must be a residuum of legally competent evidence to support a verdict in a court of law.

H. The hearing officer shall admit all evidence, including affidavits, if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs. The hearing officer shall exclude immaterial, irrelevant, or unduly cumulative testimony.

I. If scientific, technical, or other specialized knowledge will assist the hearing officer to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise. In the case of evidence relating to polygraph examinations, the proponent must have followed all the provisions of rule *11-707 NMRA*.

J. The hearing officer may take administrative notice of those matters in which courts of this state may take judicial notice.

K. The rules of privilege shall be effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.

L. The hearing officer shall admit evidence relevant only to those allegations against the appellant included in both the notice of contemplated action and the notice of final action or which are contested issues as set forth in the pre-hearing order.

M. The hearing shall be recorded by a video and/or audio-recording device under the supervision of the hearing officer. No other recording of the hearing, by whatever means, shall be permitted without the approval of the hearing officer.

N. The board shall provide an interpreter to appellants whose hearing is so impaired that they can not understand voice communications. Appellants must provide proof of disability.

O. The hearing officer shall appoint an interpreter to appellants who do not understand English well enough to understand the proceedings.

[1.7.12.18 NMAC - Rp, 1 NMAC 7.12.18, 07/07/01; 1.7.12.18 NMAC - Rn, 1.7.12.17 NMAC, 7-15-05; A, 5/15/07]

1.7.12.19 POST-HEARING BRIEFS: The hearing officer may require or permit written closing arguments, post-hearing briefs and proposed findings of fact and conclusions of law according to a scheduling order issued by the hearing officer. If case law is cited, a copy of the case shall be provided to the hearing officer.

[1.7.12.19 NMAC - Rp, 1 NMAC 7.12.19, 07/07/01; 1.7.12.19 NMAC - Rn, 1.7.12.18 NMAC, 7-15-05]

1.7.12.20 RECOMMENDED DECISION: The hearing officer shall recommend a decision to the board as soon as practicable upon conclusion of the hearing. The hearing officer shall provide a copy of the recommended decision to the parties by certified mail with return receipt requested.

[1.7.12.20 NMAC - Rp, 1 NMAC 7.12.20, 07/07/01; 1.7.12.20 NMAC - Rn, 1.7.12.19 NMAC, 7-15-05]

1.7.12.21 EXCEPTIONS TO RECOMMENDED DECISION:

A. The parties to a proceeding may file exceptions with supporting briefs to a hearing officer's recommended decision according to a scheduling order issued by the hearing officer.

B. Copies of such exceptions and any briefs shall be served simultaneously on all parties, and a statement of such service shall be furnished to the board's hearing officer.

C. Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken.

D. Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded. Any brief in support of exceptions shall not contain matters not related to or within the scope of the exceptions.
[1.7.12.21 NMAC - Rp, 1 NMAC 7.12.21, 07/07/01; 1.7.12.21 NMAC - Rn, 1.7.12.20 NMAC, 7-15-05]

1.7.12.22 DECISIONS OF THE BOARD:

A. As a general rule, the board shall only consider post-hearing briefs, and proposed findings of fact and conclusions of law, the hearing officer's recommended decision, and exceptions to the recommended decision. Where circumstances warrant, the board may review all or a portion of the record before the hearing officer.

B. The board shall not consider any additional evidence or affidavits not in the record before the hearing officer or pleadings not filed in accordance with the hearing officer's scheduling order.

C. The board may consider the record in executive session. Should the board have questions of the hearing officer, the questions shall be put to the hearing officer in open session.

D. Unless otherwise ordered by the board in advance of its consideration of the appeal, the board shall not permit any oral arguments.

E. If the board determines that the credibility of a witness is at issue, it shall review at least as much of the record as is necessary to support its decision.

[1.7.12.22 NMAC - Rp, 1 NMAC 7.12.22, 07/07/01; 1.7.12.22 NMAC - Rn, 1.7.12.21 NMAC, 7-15-05]

1.7.12.23 REINSTATEMENT:

A. The board may order agencies to reinstate appellants. Such appellants shall be reinstated to their former position, or to a position of like status and pay, that they occupied at the time of the disciplinary actions.

B. In the event the board's order includes any back pay, the appellant shall provide the agency with a sworn statement of gross earnings and unemployment compensation since the effective date of the disciplinary action. The agency shall be entitled to offset earnings and unemployment compensation received during the period covered by the back pay award against the back pay due. The hearing officer shall retain jurisdiction of the case for the purpose of resolving any disputes regarding back pay.

[1.7.12.23 NMAC - Rp, 1 NMAC 7.12.23, 07/07/01; 1.7.12.23 NMAC - Rn, 1.7.12.22 NMAC, 7-15-05]

1.7.12.24 REPORT OF DECISIONS: When the board renders a final decision in an appeal, the board's decision including the hearing officer's recommended decision will be available to the public pursuant to the Inspection of Public Records Act, NMSA 1978, Section 14-2-1 (as amended through 2003). Copies of the board's final order and the hearing officer's recommended decision shall be stored at the state personnel office, separate from case files, and will be available to the public when provided to the parties. The director will redact any privileged and confidential information pursuant to state and federal law.

[1.7.12.24 NMAC - Rp, 1 NMAC 7.12.24, 07/07/01; A, 11/14/02; 1.7.12.24 NMAC - Rn, 1.7.12.23 NMAC, 7-15-05; A, 5/15/07]

1.7.12.25 WORKERS' COMPENSATION JUDGES:

A. The board's duly appointed hearing officer shall hear all complaints filed in accordance with the provisions of *NMSA 1978, Section 52-5-2(C)*.

B. Whenever some action is required to be taken within a certain number of calendar days, the hearing officer may extend the time for a reasonable period.

C. Upon receipt of a complaint, the hearing officer shall serve a copy of the complaint on the judge by certified mail.

D. Within 14 calendar days after service of a complaint, the judge shall file an answer with the hearing officer. The facts alleged in the complaint may be deemed admitted if not specifically denied by answer or if no answer is filed within the prescribed time.

E. Upon the filing of an answer or upon the expiration of the time for its filing, the hearing officer shall issue an order directing the parties to submit a stipulated pre-hearing order for the hearing officer's approval and signature, which shall contain at least: a statement of any contested facts and issues; stipulation of those matters not in dispute; the identity of all witnesses to be called and a brief summary of their testimony; a list of exhibits; and requests for subpoenas.

F. The hearing officer has the power to subpoena witnesses, compel their attendance, and require the production of any books, records, documents or other evidence the hearing officer may deem relevant or material.

G. The Hearing:

(1) The hearing officer shall receive evidence admissible under the rules of evidence, that govern proceedings in the courts of the state of New Mexico and oral evidence shall be taken only under oath or affirmation.

(2) The hearing officer shall make procedural rulings.

(3) The formal hearing shall be open unless the hearing officer, for compelling reasons, determines otherwise. Reasons for closing the hearing shall be stated in the record.

(4) A judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel and to examine and cross-examine witnesses.

(5) The hearing shall be recorded by a sound recording device under the supervision of the hearing officer.

H. The hearing officer may require post-hearing briefs and proposed findings.

I. The hearing officer shall, within a reasonable time, prepare and submit to the parties a report which shall contain a brief statement of the proceedings and the answer thereto, if any; a summary of the evidence; and findings with respect to the allegations.

J. Within 14 calendar days of receipt of the hearing officer's report, the parties may file objections to the hearing officer's report, setting forth all objections to the report and all reasons in opposition to the findings.

K. The board shall consider the report of the hearing officer and the record made before the hearing officer and in connection therewith make its findings as to whether there was a violation of the code of judicial conduct and transmit its findings to the director of the workers' compensation administration.

[1.7.12.25 NMAC - Rn, 1.7.12.24 NMAC, 7-15-05]

HISTORY OF 1.7.12 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 15, Appeals and Hearings, filed 05-22-80;

SPB Rule 15, Appeals and Hearings, filed 10-21-82;

SPB Rule-19, Hearings, filed 04-04-90;

SPB Rule-19, Hearings, filed 12-24-91;

SPB 18, Adjudication, filed 12-15-92;

SPB 18, Adjudication, filed 12-29-94;

SPB 18, Adjudication, filed 11-17-95.

History of Repealed Material:

1 NMAC 7.12, Adjudication, filed 06-13-97.

Other History:

1 NMAC 7.17, Adjudication, filed 01-12-96 **replaced** SPB 18, filed 11-17-95;

1 NMAC 7.17, Adjudication, filed 05-02-96;

1 NMAC 7.12, Adjudication, filed 06-13-97 **replaced** 1 NMAC 7.17, filed 05-02-96;

1 NMAC 7.12, Adjudication, filed 06-13-97 **replaced by** 1.7.11 NMAC, Discipline, effective 07/07/01.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 13 RULE MAKING

1.7.13.1 ISSUING AGENCY: State Personnel Board.
[1.7.13.1 NMAC - Rp, 1 NMAC 7.13.1, 07/07/01]

1.7.13.2 SCOPE: All state agencies in the classified service.
[1.7.13.2 NMAC - Rp, 1 NMAC 7.13.2, 07/07/01]

1.7.13.3 STATUTORY AUTHORITY: NMSA 1978, Section 10-9-10(A) (Repl. Pamp. 1995), NMSA 1978, Section 10-9-13 (Repl. Pamp. 1995), NMSA 1978, Section 10-15-1 (Repl. Pamp. 1995) and NMSA 1978, Section 14-4-7.1 (Repl. Pamp. 1995).
[1.7.13.3 NMAC - Rp, 1 NMAC 7.13.3, 07/07/01]

1.7.13.4 DURATION: Permanent.
[1.7.13.4 NMAC - Rp, 1 NMAC 7.13.4, 07/07/01]

1.7.13.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.13.5 NMAC - Rp, 1 NMAC 7.13.5, 07/07/01]

1.7.13.6 OBJECTIVE: The objective of Part 13 of Chapter 7 is: to provide a process for adoption, amendment, or repeal of a State Personnel Board Rule.
[1.7.13.6 NMAC - Rp, 1 NMAC 7.13.6, 07/07/01]

1.7.13.7 DEFINITIONS: [RESERVED]
[1.7.13.7 NMAC - Rp, 1 NMAC 7.13.7, 07/07/01]

1.7.13.8 NOTICE AND COMMENT:

- A. The Director shall provide an opportunity for agencies and interested parties to comment on proposed rule changes at least 30 calendar days prior to the adoption, amendment or repeal of any Rule.
- B. At least 30 calendar days prior to the adoption, amendment, or repeal of any Rule, the Director shall publish notice of the proposed action.
 - (1) The notice shall be published in the *New Mexico Register*.
 - (2) The notice shall be mailed to broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have provided a written request for such notice.
 - (3) The notice shall be mailed to the last known address of persons and organizations who have made a written and timely request to the Office.
 - (4) The notice shall state where a copy of the proposed Rule may be obtained.
- C. The giving of the notice shall be considered complete upon mailing.
- D. One copy of the full text of any proposed Rule shall be made available without cost to any person or organization who requests a copy.

[1.7.13.8 NMAC - Rp, 1 NMAC 7.13.8, 07/07/01]

1.7.13.9 HEARING: The Board shall hold a public hearing on the proposed action. Interested persons or duly authorized representatives shall have the opportunity to submit written statements or make oral presentations.
[1.7.13.9 NMAC - Rp, 1 NMAC 7.13.9, 07/07/01]

1.7.13.10 EFFECTIVE DATE: The Board shall determine the effective date of Rules, which shall be filed with the Records Center.
[1.7.13.10 NMAC - Rp, 1 NMAC 7.13.10, 07/07/01]

1.7.13.11 EMERGENCY RULES: The Board may adopt, amend, or suspend a Rule as an emergency, without compliance with *1.7.13.8 NMAC* and *1.7.13.9 NMAC*, if the Board determines that it is in the public interest.

An action to adopt, amend, or suspend a Rule pursuant to this Rule shall not be effective for longer than 120 calendar days.

[1.7.13.11 NMAC - Rp, 1 NMAC 7.13.11, 07/07/01]

1.7.13.12 PUBLICATION OF RULES: Rules, including emergency Rules, adopted, amended, or repealed by the Board shall be published in the *New Mexico Register*.

[1.7.13.12 NMAC - Rp, 1 NMAC 7.13.12, 07/07/01]

1.7.13.13 DEMONSTRATION PROJECTS: The Board may authorize demonstration projects which may require the temporary suspension of the Rules when the Office and the agency(ies) agree to utilize such a project to improve operations.

[1.7.13.13 NMAC - Rp, 1 NMAC 7.13.13, 07/07/01]

HISTORY OF 1.7.13 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

SPB Rule 20, Modification and Revisions, filed 05-22-80;

SPB Rule 20, Modification and Revisions, filed 10-21-82;

SPB Rule 20, Modification and Revisions, filed 10-17-86;

SPB-22, Rule-making, filed 04-04-90;

SPB 19, Rule Making, filed 12-15-92.

History of Repealed Material:

1 NMAC 7.13, Rule Making, filed 06-13-97.

Other History:

1 NMAC 7.18, Rule Making, filed 01-12-96 **replaced** SPB 19, filed 12-15-92;

1 NMAC 7.18, Rule Making, filed 05-02-96;

1 NMAC 7.18, Rule Making, filed 05-02-96 **replaced by** 1 NMAC 7.13, Rule Making, filed 06-13-97;

1 NMAC 7.13, Rule Making, filed 06-13-97 **replaced by** 1.7.13 NMAC, Rule Making, effective 07/07/01.