

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

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

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

**2.82.11.3 STATUTORY AUTHORITY:** The Educational Retirement Act, Sections 22-11-1 to 22-11-55 NMSA 1978.  
[6/30/99; 2.82.11.3 NMAC - Rn, 2 NMAC 82.11.3, 3-14-2008; A, 10-17-2017]

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

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

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

**2.82.11.7 DEFINITIONS:** [Reserved]

**2.82.11.8 GENERAL PROVISIONS:**

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

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

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

**D.** Procedure.

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

**(2)** Discovery and evidence.

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

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

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

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

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

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

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

**(3) Hearing.**

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

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

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

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

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

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

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

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

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

**(7) Recommended decision.**

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

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

**(8) Exceptions to recommended decision.**

(a) The parties may file exceptions to the hearing officer's recommended decision with the board within 15 days of the date of issuance of the recommended decision. Any other party may file a response to exceptions within 15 days of the date such exceptions were filed. Upon the written request of a party, and for good cause shown, the hearing officer may extend the time to file exceptions and responses.

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

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

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

E. Final action by the board.

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

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

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

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

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

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

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

F. A refund of a member's contributions pending appeal shall result in the forfeiture of service credit and the automatic dismissal of an appeal and issuance of a notice of dismissal. [6/30/99; 2.82.11.8 NMAC - Rn, 2 NMAC 82.11.8, 3-14-2008; Repealed, 6-16-2015; 2.82.11.8 NMAC - N, 6-16-2015; A, 10-17-2017]

**2.82.11.9 PRE-HEARING PROCEDURES:** [RESERVED]  
[6/30/99; 2.82.11.9 NMAC - Rn, 2 NMAC 82.11.9, 3-14-2008; Repealed, 6-16-2015]

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

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

**2.82.11.12 DECISION BY THE EDUCATIONAL RETIREMENT BOARD:** [RESERVED]  
[6/30/99; 2.82.11.12 NMAC - Rn, 2 NMAC 82.11.12, 3-14-2008; Repealed, 6-16-2015]

#### **HISTORY OF 2.82.11 NMAC:**

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

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

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

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

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