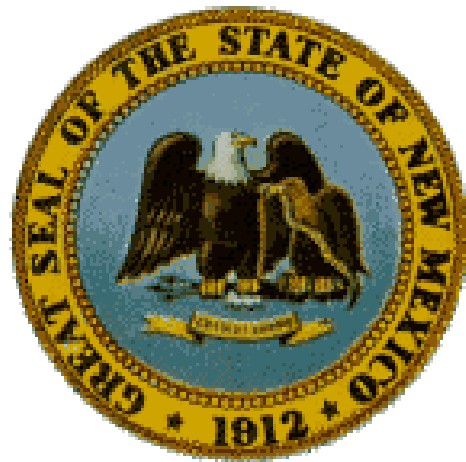


**Personnel Board
of the
State of New Mexico**



State Personnel Office
Adjudication
2600 Cerrillos Road – Room 104
Santa Fe, New Mexico 87505

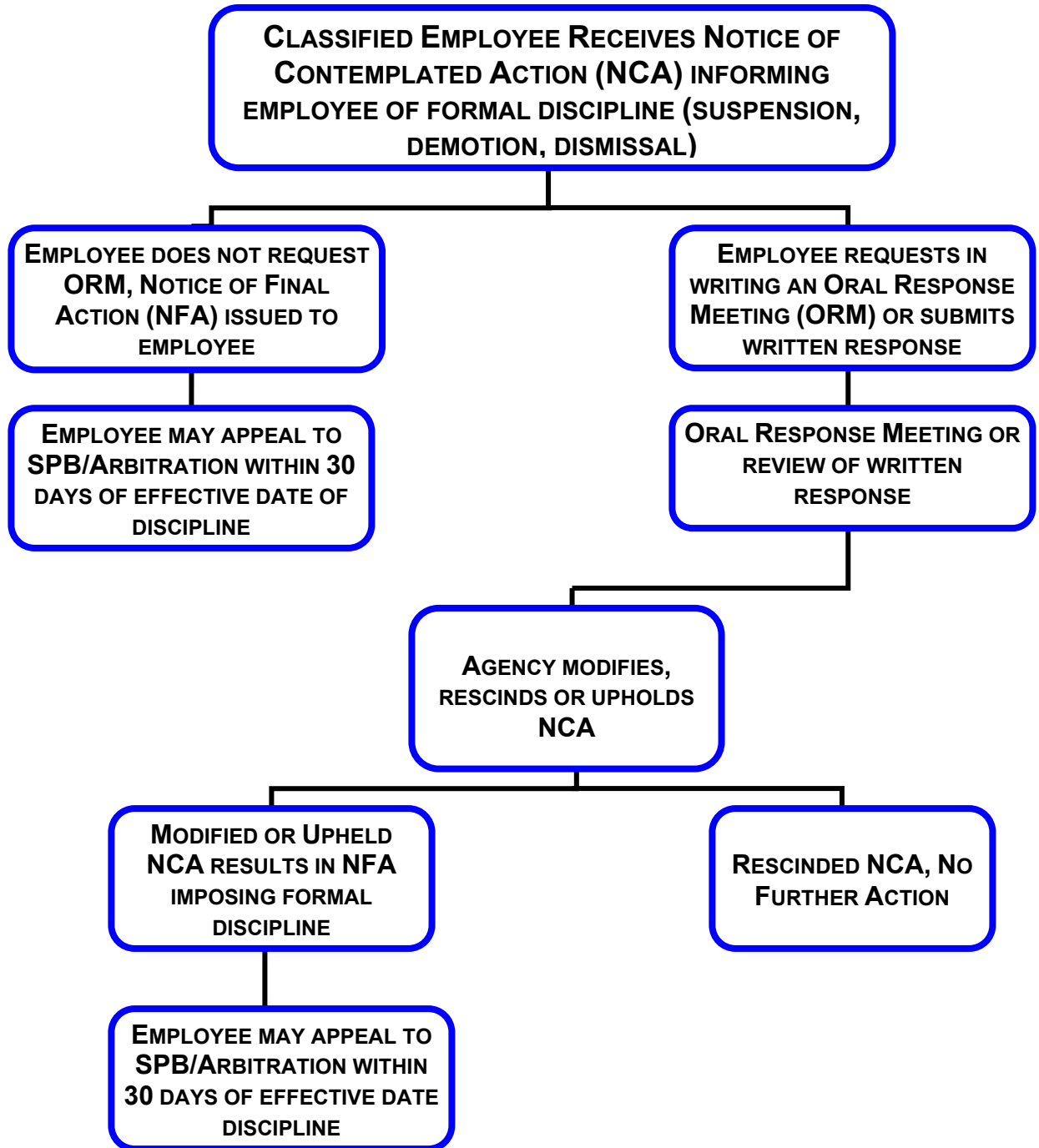
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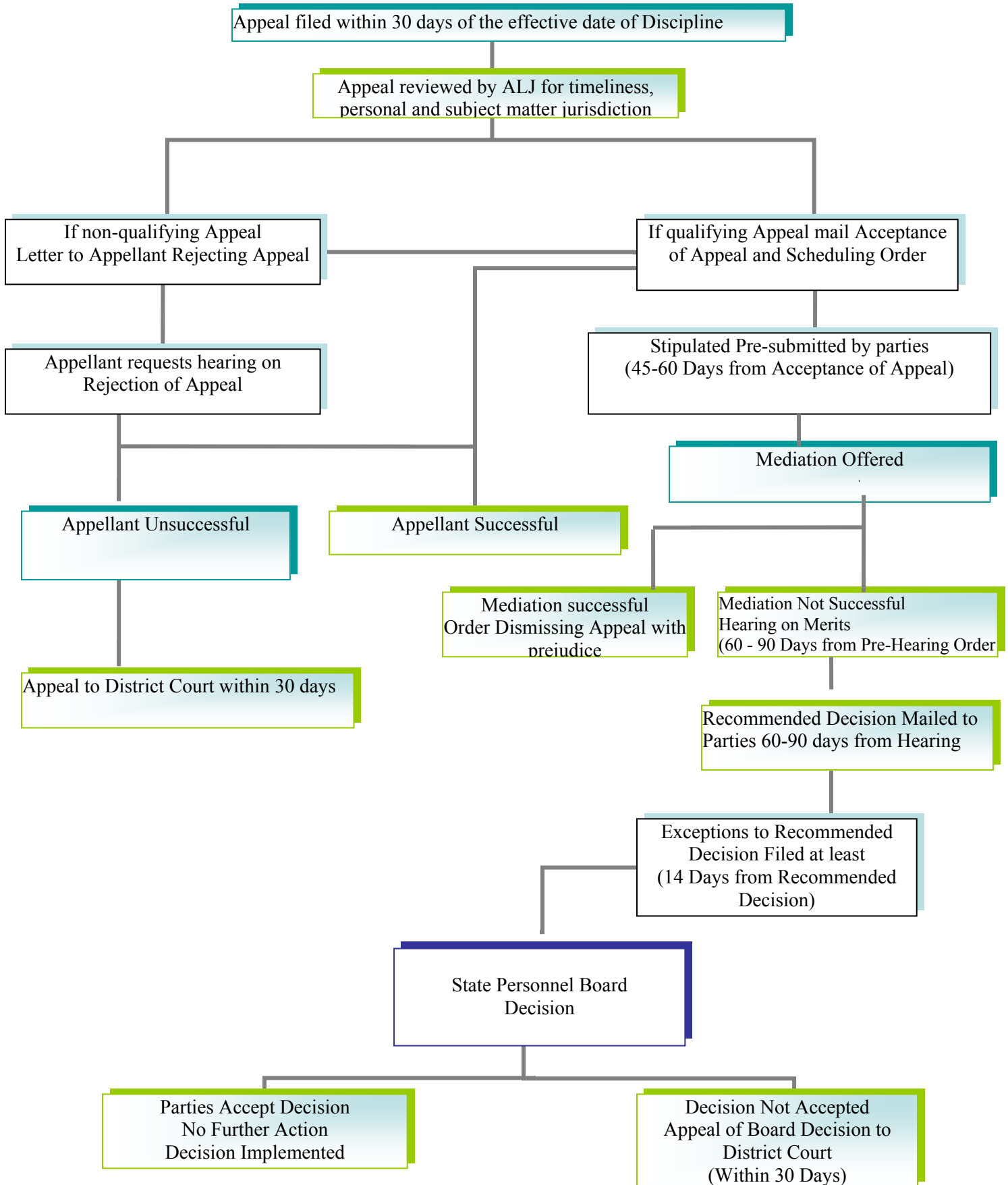
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Discipline Flow Chart



ADJUDICATION FLOW CHART



Adjudication Process (appealing a disciplinary action)

Classified employees who have met their probationary period (*1.7.2.8.A NMAC*) and have either been demoted, dismissed, or suspended by a State agency or department have a right to appeal their disciplinary action to the State Personnel Board for a public hearing, or for Arbitration.

The following is a brief outline of the adjudication procedure (*1.7.12 NMAC parts 11 & 12*). It is not meant to be all-inclusive or a substitute for reading both the law and governing rules. Attached are the rules governing the adjudication procedure. Should you have additional questions, please contact the State Personnel Office, Adjudication at (505) 476-7813.

• **Filing an appeal**

A notice of appeal must be in writing and filed with the State Personnel Director (Adjudication) no later than 30 calendar days from the effective date on which the classified employee was demoted, dismissed or suspended. The notice of appeal must be in writing and should include: appellant's full name, mailing address and a telephone number or contact, a statement or list of the reason(s) for the appeal, and whether the appellant is choosing Arbitration or SPB hearing. **A copy of the notice of final action must accompany the notice of appeal.** NOTE: untimely appeals, those not filed within 30 calendar days from the effective date of discipline, will be dismissed for lack of jurisdiction.

Facsimile filings are permitted in Adjudication. A facsimile copy made has the same effect as any other filing for all procedural and statutory purposes. The Adjudication facsimile number is (505) 476-7727. A facsimile transmission of a pleading received before the close of the business day (5:00 pm) will be considered filed on that date. If the facsimile transmission is received after the close of business the pleading will be considered filed on the next business day. To ensure receipt, mailing of a paper copy is recommended.

• **Acceptance of an appeal**

Upon acceptance of the notice of appeal, a hearing officer will send the employee's agency a copy of the notice of appeal and will issue an order setting up a schedule for submitting pre-hearing paperwork. If the appellant chooses Arbitration, the parties are notified per the CBA. The hearing officer is normally an employee of the State Personnel Office or any qualified State employee who is strictly neutral. The hearing officer does not work for, or have any ties to, the agency. The hearing officer is interested only in a fair and just outcome to your case. The employee/appellant's representative will work with the agency to prepare a pre-hearing order which will contain: 1) a statement of contested facts and issues; 2) identification of those facts not in dispute; 3) a deadline for identification of all probable witnesses with a brief summary of their anticipated testimony; 4) a list of documentary or physical evidence; 5) a deadline for identifying new witnesses, evidence and requesting subpoenas. Remember, the parties do not have to be in agreement, but they must cooperate and communicate with each other.

• **Hearing Officer**

As previously mentioned, the hearing officer is outside the agency and is neutral. Therefore, he will not discuss the details of a case unless both parties are present, such as through a conference telephone call.

• **Dismissing an Appeal**

An appeal can be dismissed: 1) based on hearing officer coordination on a written settlement agreement between the parties; 2) based upon the employee/appellant filing a written request to withdraw the appeal.

• **Discovery**

The hearing officer can order a party to supply copies of written materials or other evidence considered relevant to the appeal. A party has the following legal tools available to seek official disclosure of information in the possession of the other party: depositions, interrogatories, requests for production, and requests for admission. All discovery is subject to the control of the hearing officer, but is scheduled by agreement of the parties. In case of disagreement, the parties may request extension of the discovery deadline, agreed upon in the prehearing order, through a motion to the hearing officer.

• **Alternative Dispute Resolution (ADR)**

Adjudication offers ADR services to appellants as part of the hearing process. If both parties believe the issue on appeal can be resolved through ADR, the forms submitted with the Acceptance of Appeal and

Scheduling Order must be returned to Adjudication by the deadline indicated in the Acceptance of Appeal and Scheduling Order. Upon receipt of the forms, Adjudication will make arrangements for a facilitator who will then contact the parties to make arrangements for mediation. In the event the issue is not resolved through ADR, the hearing is scheduled accordingly. If the issue is resolved through ADR, the Settlement Agreement must be submitted to the hearing officer for review. Thereafter, the parties must submit a Motion and Order of Dismissal.

- **Motions**

Any defense, objection, or request that can be decided prior to the hearing may be raised by motion, by either party, before the deadline set in the pre-hearing order. Responses to motions are also filed according to the schedule set in the rules. The hearing officer rules on all motions except those that would decide the merits of the case. Opposing party or counsel must be notified of any motion filed and proof of service should indicate so in the pleading.

- **Additional Witnesses**

If witnesses are not identified by the deadline set by the pre-hearing order, it is possible they may not be permitted to testify.

- **Subpoenas**

A subpoena is a document, hand delivered by a party, that orders a witness to appear at the hearing. In order to compel attendance, they must be delivered (served) at least 72 hours in advance of the hearing. The subpoena can also direct a witness to bring something to the hearing, such as documents. If this is the case, it is called a subpoena *duces tecum*. (A subpoena should be issued to all State employees to ensure they are given administrative leave to be present at the hearing.) See attached sample of the subpoena form used by the Adjudication office.

- **Sanctions that may be imposed**

The hearing officer can impose penalties on either of the parties to serve the cause of justice. If a party fails to: obey an order, such as to answer questions in a deposition; to deliver copies of evidence to the other party; to identify witnesses and their location; or to admit certain facts; then the hearing officer has the power to: 1) draw an inference in favor of the requesting party with regard to the information sought; 2) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought; 3) permit the requesting party to introduce secondary evidence concerning the information sought; and 4) strike any part of the pleadings or other submissions of the party failing to comply with such request. The hearing officer may refuse to consider any motion or other action which is not filed in a timely fashion. The hearing officer may issue an order to show cause why an appeal should not be dismissed because of the appellant's failure, for example, to state reasons for the appeal or to participate in preparing the pre-hearing order. The hearing officer can also rule for the appellant if the agency fails to proceed with the hearing schedule.

- **Notice of Hearing**

A notice of hearing will be mailed to the parties at least 14 days prior to the date set for hearing by the hearing officer. It is the Department's responsibility to obtain a location for the hearing. In certain cases, the hearing may be conducted by video conference which has the hearing officer at an agency facility in Santa Fe and the attorneys/representatives and witnesses at another New Mexico location.

- **Withdrawal of Appeal**

The appellant can withdraw an appeal at any time prior to the scheduled hearing. A written request or notice of withdrawal must be submitted to the hearing officer. Once approved, the hearing officer will dismiss the appeal. Agencies can also withdraw the disciplinary action in accordance with the provisions of Board Rule 1.7.12.9 NMAC.

- **The Hearing**

The hearing will be open to the public unless otherwise agreed. The appellant or an agency may appear at the hearing through a representative, but the representative must make a written entry of appearance prior to the hearing. The hearing will be conducted in an orderly manner. The hearing officer shall admit evidence relevant only to allegations against the appellant included in the notices of contemplated and final action, as well as those contested issues set forth in the pre-hearing order. The hearing will be recorded by a tape or digital recorder operated by the hearing officer.

- **Post-hearing Briefs (Submissions)**

The hearing officer may require written closing arguments, post-hearing briefs, proposed findings of fact and conclusions of law by a scheduled date.

- **Recommended Decision**

The hearing officer will prepare a written recommended decision to the parties just as soon as possible. Time will be allowed for the parties to submit written exceptions to any part of the decision before it is presented to the Personnel Board for review and consideration.

- **Decision of the Board**

The Personnel Board will only consider post-hearing briefs, the hearing officer's recommended decision and any exceptions to the recommended decision filed in the appeal. The Board will not consider any additional evidence (material or pleadings not in the record) before the hearing officer. The Board will consider the matter at a noticed/advertised meeting in executive (closed) session. The hearing officer is not present during the Board's closed deliberations. Parties may attend the open portions of a Board meeting. The Board will announce its decision when it reconvenes to open session and a written decision is mailed to the parties shortly thereafter. Either party may appeal the Board's decision to the appropriate District Court within 30 days of their decision being filed as provided by NMSA 1978, § 39-3-1.1(C) (1998).

- **Reinstatement**

The Personnel Board may order agencies to reinstate appellants. Affected appellants shall be reinstated to their former classifications or to classifications in the pay grades they occupied at the time of the disciplinary action. If the Board's order includes any back pay, the appellant shall provide the agency with a sworn statement of gross earnings and any unemployment compensation received 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. There is no statutory authority to award attorney's fees or other costs.

NEW MEXICO ADMINISTRATIVE CODE

PART 11 DISCIPLINE

1.7.11.7 NMAC DEFINITIONS

1.7.11.8 NMAC DISCIPLINE

1.7.11.9 NMAC NOTICES AND COMPUTATION OF TIME

1.7.11.10 NMAC JUST CAUSE

1.7.11.11 NMAC PROBATIONERS AND EMPLOYEES IN EMERGENCY OR TEMPORARY STATUS

1.7.11.12 NMAC ADMINISTRATIVE LEAVE PENDING DISCIPLINARY ACTION

1.7.11.13 NMAC EMPLOYEES IN CAREER STATUS

1.7.11.7 NMAC DEFINITIONS

1.7.11.8 NMAC 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.

1.7.11.9 NMAC 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.

1.7.11.10 NMAC 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.

1.7.11.11 NMAC 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.

1.7.11.12 NMAC 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.

1.7.11.13 NMAC 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 of his or her appeal rights.

(f) Appeal rights:

(a) For an employee not covered by a collective bargaining agreement inform the employee that the final 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 that the appeal must be received by the Director within 30 calendar days of the effective day of final action and that the employee must submit a copy of the notice of final action with the notice of appeal;

(b) for an employee covered by a collective bargaining agreement inform the employee that the final 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 that the appeal must be received by the Director within 30 calendar days of the effective day of final action and that the employee must submit a copy of the notice of final action with the notice of appeal; or the employee may make an irrevocable election of appeal to an arbitrator and that the appeal to an arbitrator shall be filed in accordance with the steps outlined in the collective bargaining agreement.

NEW MEXICO ADMINISTRATIVE CODE

PART 12 ADJUDICATION

- 1.7.12.7 NMAC DEFINITIONS**
- 1.7.12.8 NMAC FILING AN APPEAL**
- 1.7.12.9 NMAC AGENCY WITHDRAWAL OF DISCIPLINE**
- 1.7.12.10 NMAC HEARING OFFICER**
- 1.7.12.11 NMAC CONSOLIDATION AND JOINDER**
- 1.7.12.12 NMAC DISCOVERY**
- 1.7.12.13 NMAC MOTIONS**
- 1.7.12.14 NMAC ADDITIONAL WITNESSES**
- 1.7.12.15 NMAC SUBPOENAS**
- 1.7.12.16 NMAC SANCTIONS**
- 1.7.12.17 NMAC NOTICE OF HEARING**
- 1.7.12.18 NMAC HEARINGS**
- 1.7.12.19 NMAC POST-HEARING BRIEFS**
- 1.7.12.20 NMAC RECOMMENDED DECISION**
- 1.7.12.21 NMAC EXCEPTIONS TO RECOMMENDED DECISION**
- 1.7.12.22 NMAC DECISIONS OF THE BOARD**
- 1.7.12.23 NMAC REINSTATEMENT**
- 1.7.12.24 NMAC REPORT OF DECISIONS**
- 1.7.12.25 NMAC WORKERS' COMPENSATION JUDGES**
- 1.7.12.7 NMAC 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).

1.7.12.8 NMAC 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.

1.7.12.9 NMAC 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 reinitiate disciplinary action.

1.7.12.10 NMAC 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.

1.7.12.11 NMAC 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.

1.7.12.12 NMAC 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.

1.7.12.13 NMAC 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.

1.7.12.14 NMAC 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.

1.7.12.15 NMAC 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.

1.7.12.16 NMAC 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.

1.7.12.17 NMAC 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.

1.7.12.18 NMAC 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.

1.7.12.19 NMAC 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.

1.7.12.20 NMAC 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.

1.7.12.21 NMAC 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.

1.7.12.22 NMAC 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.

1.7.12.23 NMAC 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.

1.7.12.24 NMAC 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.

1.7.12.25 NMAC 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.

New Mexico Statutes Annotated (NMSA) 1978

ARTICLE 9

Personnel

Section

10-9-1 Short title.

10-9-2 Purpose of act; enactment under constitution.

10-9-3 Definitions.

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10-9-8 Personnel board; appointment.

10-9-9 Board members; pay; meetings.

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10-9-12 Director duties.

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10-9-15 Duties of state officers and employers.

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10-9-21 Prohibited acts.

10-9-22 Unlawful acts prohibited.

10-9-23 Penalties.

10-9-24 Existing rules.

10-9-25 Federal funds and assistance.

10-9-1. Short title. (1961)

This act may be cited as the "Personnel Act".

10-9-2. Purpose of act; enactment under constitution. (1963)

The purpose of the Personnel Act [10-9-1 NMSA 1978] is to establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs. The Personnel Act is enacted under and pursuant to the provisions of Article 7, Section 2 of the constitution of New Mexico, as amended.

10-9-3. Definitions. (1961)

As used in the Personnel Act [10-9-1 NMSA 1978]:

- A. "director" means the personnel director;
- B. "board" means the personnel board;
- C. "service" means the state personnel service created by the Personnel Act, and includes all positions covered by the Personnel Act;
- D. "position" means any state office, job, or position of employment;
- E. "employer" means any authority having power to fill positions, in an agency;
- F. "agency" means any state department, bureau, division, branch or administrative group which is under the same employer;
- G. "class" means a group of positions similar enough in powers and responsibilities that they can be covered by the same qualifications and rate of pay;
- H. "test" means a test of the qualifications, fitness and ability, and includes tests that are written, oral, physical or in the form of a demonstration of skill or any combination thereof;
- I. "employee" means a person in a position in the service who has completed his probationary period; and
- J. "probationer" means a person in a position in the service who is still in the probationary period for that position.

10-9-4. Coverage of service. (1990)

The Personnel Act [10-9-1 NMSA 1978] and the service cover all state positions except:

- A. officials elected by popular vote or appointed to fill vacancies to elective offices;
- B. members of boards and commissions and heads of agencies appointed by the governor;
- C. heads of agencies appointed by boards or commissions;
- D. directors of department divisions;
- E. those in educational institutions and in public schools;
- F. those employed by state institutions and by state agencies providing educational programs and who are required to hold valid certificates as certified school instructors as defined in Section 22-1-2 NMSA 1978 issued by the state board of education;
- G. those in the governor's office;
- H. those in the state militia or the commissioned officers of the New Mexico state police division of the department of public safety;
- I. those in the judicial branch of government;
- J. those in the legislative branch of government;
- K. not more than two assistants and one secretary in the office of each official listed in Subsections A, B and C of this section, excluding members of boards and commissions in Subsection B of this section;
- L. those of a professional or scientific nature which are temporary in nature;
- M. those filled by patients or inmates in charitable, penal or correctional institutions;
- N. state employees if the personnel board in its discretion decides that the position is one of policymaking; and
- O. disadvantaged youth under twenty-two years of age regularly enrolled or to be enrolled in a secondary educational institution approved by the state board of education or in an accredited state institution of advanced learning or vocational training and who are to be employed for not more than seven hundred twenty hours during any calendar year:
 - (1) the term "disadvantaged youth" shall be defined for purposes of this exemption by regulation duly promulgated by the board; and

- (2) the board shall:
- (a) require that all the criteria of this subsection have been met;
- (b) establish employment lists for the certification of the highest-standing candidates to the prospective employers; and
- (c) establish the pay rates for such employees.

10-9-4.1. Personnel Act; rocky mountain information network employees; exemption from coverage. (1987)

A. Notwithstanding the provisions of Section 10-9-4 NMSA 1978, all employees of the rocky mountain information network who commence employment on or after the effective date of this act are exempt from coverage under the Personnel Act [10-9-1 NMSA 1978].

B. Notwithstanding the provisions of Section 10-9-4 NMSA 1978, any employee of the rocky mountain information network who was employed prior to the effective date of this act may elect to become exempt from coverage under the Personnel Act by filing a written election to do so with the director of the rocky mountain information network and the director of the state personnel office. An election is effective upon filing and shall be irrevocable so long as the employee remains employed by the rocky mountain information network.

C. As used in this section, "rocky mountain information network" means that project funded by the United States department of justice, regulated by the provisions of 28 Code of Federal Regulations, Part 23, created as part of the regional information sharing systems program established by the United States department of justice and serving law enforcement agencies in the states of New Mexico, Arizona, Nevada, Colorado, Wyoming, Montana, Idaho and Utah.

10-9-5. Public officers and public employees; executive branch; annual exempt salaries plan. (1989)

A. The department of finance and administration shall prepare, by December 1 of each year, an exempt salaries plan for the governor's approval. The plan shall specify salary ranges for the following public officer and public employee positions of the executive branch of government:

- (1) members of boards and commissions appointed by the governor;
- (2) heads of agencies or departments appointed by the governor;
- (3) heads of agencies or departments appointed by the respective boards and commissions of the agencies;
- (4) directors of department divisions;
- (5) employees in the governor's office;
- (6) positions in the state militia and the commissioned officers of the New Mexico state police division of the department of public safety;
- (7) assistants and secretaries in the offices of each official covered by Paragraphs (2), (3) and (10) of this subsection;
- (8) positions of a professional or scientific nature which are temporary in nature;
- (9) state employees whose positions the personnel board has classified as policy-making positions and exempt employees of elective public officials; and
- (10) secretaries of departments appointed by the governor.

B. Excluded from the provisions of this section are employees of the commission on higher education and employees of state educational institutions named in Article 12, Section 11 of the constitution of New Mexico.

C. The exempt salaries plan for the ensuing fiscal year, as prepared by the department of finance and administration and approved by the governor, shall be published as a part of the executive budget document presented to the legislature at its next regular session following the preparation of the plan.

D. Upon the governor's approval, the plan shall take effect at the beginning of the subsequent fiscal year.

10-9-6. Certified school instructors previously employed under the provisions of the Personnel Act. (1975)

Certified school instructors who were employed as certified school instructors by state institutions or state agencies under the provisions of the Personnel Act [10-9-1 NMSA 1978] prior to July 1, 1974, may elect to continue to be employed under the Personnel Act. Certified school instructors who elect to continue under the Personnel Act shall file a notice of such election with the personnel director prior to the effective date of this act.

10-9-7. Certain rules changes requiring legislative approval. (1984)

The state personnel office shall not spend any of its appropriation for the promulgating or filing of rules, policies or plans which have significant financial impact or which would require significant future appropriations to maintain without prior, specific legislative approval.

10-9-8. Personnel board; appointment. (1980)

The personnel board is created, and shall be composed of five members appointed by the governor and confirmed by the senate, who shall served staggered terms of five years each with one board member's term expiring each year. No person shall be a member of the board or eligible for appointment to the board who is an employee in the service, holds political office or is an officer of a political organization.

10-9-9. Board members; pay; meetings. (1967)

Each board member shall be paid per diem and mileage according to the Per Diem and Mileage Act [10-8-1 NMSA 1978] when traveling on board business. The board shall meet at the call of the chairman but in the absence of such call, at least once every two months.

10-9-10. Board duties. (1983)

The board shall:

- A. promulgate regulations to effectuate the Personnel Act [10-9-1 NMSA 1978];
- B. hear appeals and make recommendations to the employers;
- C. hire, with the approval of the governor, a director experienced in the field of personnel administration;
- D. review budget requests prepared by the director for the operation of the personnel program and make appropriate recommendations thereon;
- E. make investigations, studies and audits necessary to the proper administration of the Personnel Act;
- F. make an annual report to the governor at the end of the fiscal year;
- G. establish and maintain liaison with the general services department; and

H. represent the public interest in the improvement of personnel administration in the system.

10-9-11. Board and office administratively attached to general services department. (1983)

The board and the state personnel office are administratively attached, as defined in the Executive Reorganization Act [9-1-1 NMSA 1978], to the general services department.

10-9-12. Director duties. (1967)

The director shall:

- A. supervise all administrative and technical personnel activities of the state;
- B. act as secretary to the board;
- C. establish, maintain and publish annually a roster of all employees of the state, showing for each employee his division, title, pay rate and other pertinent data;
- D. make annual reports to the board;
- E. recommend to the board rules he considers necessary or desirable to effectuate the Personnel Act [10-9-1 NMSA 1978]; and
- F. supervise all tests and prepare lists of persons passing them to submit to prospective employers.

10-9-13. Rules; adoption; coverage. (1983)

Rules promulgated by the board shall be effective when filed as required by law. The rules shall provide, among other things, for:

- A. a classification plan for all positions in the service;
- B. a pay plan for all positions in the service;
- C. competitive entrance and promotion tests to determine the qualifications, fitness and ability of applicants to perform the duties of the position for which they apply. Such rules shall also provide for the awarding to those applicants having a passing grade of two preference points for each year of residency in New Mexico not to exceed a total of ten preference points;
- D. exemption from competitive entrance tests for those professional persons applying for classified positions in the service who possess recognized registration or certification by another state agency;
- E. a period of probation of one year during which a probationer may be discharged or demoted or returned to the eligible list without benefit of hearing;
- F. the establishment of employment lists for the certification of the highest standing candidates to the prospective employers and procedure to be followed in hiring from the lists;
- G. hours of work, holiday and leave;
- H. dismissal or demotion procedure for employees in the service, including presentation of written notice stating specific reasons and time for the employees to reply thereto, in writing, and appeals to the board;
- I. the rejection of applicants who fail to meet reasonable requirements as to age, physical condition, training, experience or moral conduct; and
- J. employment of any apparently qualified applicant for a period of not more than ninety days when an emergency condition exists and there are no applicants available on an appropriate employment list as provided in Subsection F of this section. The applicant,

if employed, shall be paid at the same rate as a comparable position covered by the Personnel Act [10-9-1 NMSA 1978].

10-9-13.2. Veteran's preference. (1989)

A. In establishing the list of eligibles for appointment, the board shall provide preference points for veterans honorably discharged from the armed forces of the United States. Veterans with a service-connected disability shall be awarded ten points over and above their regular test scores. Veterans without a service-connected disability shall be awarded five points over and above their regular test scores.

B. The board shall determine the rank on any employment list by adding the points to the veteran's final passing grade on the examination after the veteran has submitted proof of having status as a veteran at the time of application for employment with a state agency. In the case of a veteran having a service-connected disability, the veteran shall provide proof of a service-connected disability in the form of a certification by the federal veterans' administration. A veteran with or without a service-connected disability shall have his name placed on the list in accordance with the numerical rating of other veterans and nonveterans.

10-9-14. Blind not barred from competitive examination; method of testing. (1967)

A. No agency or officer of the state or any of its political subdivisions shall prohibit, prevent, disqualify or discriminate against any blind person, otherwise qualified, from registering, taking or competing in a competitive entrance or promotion test for any position for which the blind person makes application.

B. The state personnel board and all political subdivisions of the state which require competitive or promotion tests for any position shall provide and adequate and equal test by an appropriate method for any blind person requesting such a test at the time of submitting his application.

10-9-15. Duties of state officers and employers. (1961)

All officers and employers of the state shall comply with the Personnel Act [10-9-1 NMSA 1978]. All employers shall hire employees only from employment lists of applicants who meet prescribed minimum requirements and have passed the prescribed tests, provided by the director. All officers and employers shall furnish any records or information which the director or the board requests.

10-9-16. Status of present employees. (1961)

All employees of the state holding positions brought into the classified service by the Personnel Act [10-9-1 NMSA 1978] shall be continued in their positions and become regular employees without original examinations, if they have held the position for at least one year immediately prior to the effective date of the Personnel Act. All other employees of the state holding positions brought into the service by the Personnel Act shall be continued in their positions as probationers until they have, not later than one year from the effective date of the Personnel Act, taken and passed a qualifying test prescribed by the director for the position held. An employee who fails to qualify shall be dismissed within thirty days after the establishment of an employment or promotion list for his position. Nothing in the Personnel Act shall preclude the reclassification or reallocation of any position held by an incumbent.

This section shall not apply to employees of the grant-in-aid agencies whose status as employees or probationers shall be recognized under rules to be promulgated by the board.

10-9-17. Certification of payroll. (1961)

No person shall make or approve payment for personnel services to any person in the service, unless the payroll voucher or account of the pay is certified by the director that the person being paid was employed in accordance with the Personnel Act [10-9-1 NMSA 1978].

10-9-18. Appeals by employees to the board. (1999)

A. An employee who is dismissed, demoted or suspended may, within thirty days after the dismissal, demotion or suspension, appeal to the board. The appealing employee and the agency whose action is reviewed have the right to be heard publicly and to present facts pertinent to the appeal.

B. An applicant denied permission to take an examination or who is disqualified may appeal to the board.

C. The technical rules of evidence shall not apply to appeals to the board.

D. A record shall be made of the hearing, which shall be transcribed if there is an appeal to the district court. Costs of the transcripts, including one copy for the board, shall be paid initially by the agency. The cost of the transcripts may be assessed by the court to the losing party on appeal.

E. The board may designate a hearing officer who may be a member of the board or any qualified state employee to preside over and take evidence at any hearing held pursuant to this section. The hearing officer shall prepare and submit to the board a summary of the evidence taken at the hearing and proposed findings of fact. The board shall render a decision, which shall include findings of fact and conclusions of law.

F. If the board finds that the action taken by the agency was without just cause, the board may modify the disciplinary action or order the agency to reinstate the appealing employee to his former position or to a position of like status and pay. Every consideration shall be given to placing the appealing employee in the same geographical location in which he was employed prior to the disciplinary action. The board may recommend that the appealing employee be reinstated by an agency other than the one who disciplined the appealing employee. When the board orders an agency to reinstate an appealing employee, the reinstatement shall be effective within thirty days of the board's order. The board may award back pay as of the date of the dismissal, demotion or suspension or as of the later date as the board may specify.

G. A party aggrieved by the decision of the board made pursuant to this section may appeal the decision to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

H. [NEW] Where the public employer has entered into a collective bargaining agreement pursuant to the Public Employees Bargaining Act [10-7E-1 NMSA 1978] covering the employee, such an employee who is dismissed, demoted or suspended may, within thirty days after the dismissal demotion or suspension, irrevocably elect to appeal the action through arbitration. An appeal under the subsection shall be conducted in accordance with procedures and requirements as set forth in Subsections A, C, and D of this section. A party aggrieved by the decision of the arbitrator may appeal the decision pursuant to Subsection G of this section. The

selection of an arbitrator shall be conducted in accordance with the selection procedures set forth in the collective bargaining agreement that covers the employee.

10-9-19. Reduction in force. (1963)

Whenever an employee is terminated by an employer in a reduction in force by the employer, the terminated employee shall be rehired by that employer if the same or a comparable position becomes available in an increase of force within six months after the termination.

10-9-20. Oaths; testimony; records; refusal. (1961)

The board has the power to administer oaths, subpoena witnesses and compel the production of books and papers pertinent to any investigation or hearing authorized by the Personnel Act [10-9-1 NMSA 1978]. Refusal to testify before the board on matters pertaining to personnel is grounds for dismissal from the service.

10-9-21. Prohibited acts. (1991)

A. No employer shall dismiss an employee for failure or refusal to pay or promise to pay any assessment, subscription or contribution to any political organization or candidate; however, nothing contained in this section shall prevent voluntary contributions to political organizations.

B. No person in the personnel office or employee in the service shall hold political office except for a non-partisan county or municipal office or be an officer of a political organization during his employment. For the purposes of the Personnel Act [10-9-1 NMSA 1978], being a local school board member or an elected board member of any post-secondary educational institution shall not be construed to be holding political office, and being an election official shall not be construed to be either holding political office or being an officer of a political organization. Nothing in the Personnel Act shall deny employees the right to vote as they choose or to express their opinions on political subjects and candidates.

C. Any employee who becomes a candidate for public office shall, upon filing or accepting the nomination and during the campaign, take a leave of absence. This subsection does not apply to those employees of a grant-in-aid agency whose political activities are governed by federal statute.

D. The director shall investigate any written charge by any person that this section has been violated and take whatever steps deemed necessary.

E. No person shall be refused the right of taking an examination, from appointment to a position, from promotion or from holding a position because of political or religious opinions or affiliation or because of race or color.

F. No employee or probationer shall engage in partisan political activity while on duty.

G. With respect to employees of federal grant-in-aid agencies, the applicable personnel standards, regulations and federal laws limiting activities shall apply and shall be set forth in rules promulgated by the board.

10-9-22. Unlawful acts prohibited. (1961)

It is unlawful to:

- A. make any false statement, certificate, mark or rating with regard to any test, certification or appointment made under the Personnel Act [10-9-1 NMSA 1978];
- B. directly or indirectly give, pay, offer, solicit or accept any money or other valuable consideration or secure or furnish any special or secret information for the purpose of affecting the rights or prospects of any person with respect to employment in the service.

10-9-23. Penalties. (1961)

Any person wilfully violating any provision of the Personnel Act [10-9-1 NMSA 1978] or the rules of the board is guilty of a misdemeanor. In addition to the criminal penalties, a person found guilty of a misdemeanor under the Personnel Act is ineligible for appointment to or employment in a position in the service, and forfeits his office or position.

10-9-24. Existing rules. (1961)

Existing personnel rules, policies and pay plans for the employees of the state shall govern until new rules, policies and pay plans are established under the Personnel Act [10-9-1 NMSA 1978].

10-9-25. Federal funds and assistance. (1961)

When the provisions of any laws of the United States, or any rule, order, or regulation of any federal agency or authority providing federal funds for use in New Mexico, either directly or indirectly or as a grant-in-aid, to be matched or otherwise, impose as a condition for the receipt of such funds, other or higher personnel standards or different classifications than are provided for by the Personnel Act [10-9-1 NMSA 1978], the board has the authority and is directed to adopt rules and regulations to meet the requirements of such law, rule, order or regulation.

ARTICLE 8A

Governmental Dispute Prevention and Resolution

Section

- 12-8A-1 Short title.**
- 12-8A-2 Definitions.**
- 12-8A-3 Alternative dispute resolution; authorization; procedures; agency coordinators.**
- 12-8A-4 Agency budgets; contracts for services.**
- 12-8A-5 Effect on other laws.**
- 12-8A-6 Alternative dispute prevention and resolution advisory council created.**
- 12-8A-7 Alternative dispute prevention and resolution advisory council; duties.**
- 12-8A-8 Office of alternative dispute prevention and resolution; created; powers; duties.**

12-8A-1. Short title. (2007)

Chapter 12, Article 8A NMSA 1978 may be cited as the "Governmental Dispute Prevention and Resolution Act".

12-8A-2. Definitions. (2007)

As used in the Governmental Dispute Prevention and Resolution Act [12-8A-1 NMSA 1978]:

- A. "agency" means the state and its agencies, departments, boards, instrumentalities or institutions that are insured by the division;
- B. "alternative dispute resolution" means a process other than litigation used to prevent or resolve disputes, including mediation, facilitation, regulatory negotiation, settlement conferences, binding and nonbinding arbitration, fact-finding, conciliation, early neutral evaluation and policy dialogues;
- C. "council" means the alternative dispute prevention and resolution advisory council;
- D. "department" means the general services department;
- E. "division" means the risk management division of the department;
- F. "interested party" means a person having or anticipating a dispute with any agency, or a representative of that person;
- G. "neutral party" means a person who is trained to provide services as a mediator, arbitrator, facilitator, fact-finder or conciliator who aids parties to prevent or resolve disputes;
- H. "office" means the bureau known as the office of alternative dispute prevention and resolution in the division; and
- I. "public facilitation" means collaboration with identified stakeholders concerning public policy issues, including policy dialogues and other techniques to seek consensus, reconcile differences or prevent disputes from arising in the development or implementation of public administration issues.

12-8A-3. Alternative dispute resolution; authorization; procedures; agency coordinators. (2007)

A. An agency shall provide interested parties with access to alternative dispute resolution procedures to prevent or resolve any dispute, issue or controversy involving any of the agency's operations, policies, programs or functions, including formal and informal adjudications, rulemakings, enforcement actions, permitting, certifications, licensing, policy development and contract administration. Alternative dispute resolution procedures are voluntary and may be initiated at the request of the agency or an interested party to a dispute. Either party may decline to participate in a requested or offered alternative dispute resolution activity.

B. An agency that participates in alternative dispute resolution shall develop a written agreement to be signed by interested parties that:

- (1) provides for the appointment of neutral parties, consultants or experts agreed upon by all parties and serving at the will of all parties. A neutral party, consultant or expert shall have no official, financial or personal conflict of interest with any issue or party in controversy unless the conflict of interest is fully disclosed in writing to all of the parties and all parties agree that the person may continue to serve;
- (2) specifies any limitation periods applicable to the commencement or conclusion of formal administrative or judicial proceedings and, if applicable, specifies any time periods that the parties have agreed to waive;
- (3) contains provisions for alternative dispute resolution that conform with rules promulgated by the division; and
- (4) sets forth how costs and expenses of the procedure chosen shall be equitably apportioned among the parties.

C. An agreement, developed pursuant to Subsection B of this section, may be included in an enforcement order, stipulation, contract, permit or other document entered into or issued by the agency.

D. The administrative head of an agency may designate an employee as the alternative dispute resolution coordinator for that agency. The coordinator shall:

- (1) make recommendations to the agency's executive staff on issues and disputes that are suitable for alternative dispute resolution;
- (2) analyze the agency's enabling statutes and rules to determine whether they contain impediments to the use of alternative dispute resolution or inconsistencies with rules promulgated by the office and suggest any modifications;
- (3) monitor the agency's use of alternative dispute resolution;
- (4) arrange for training of agency staff in alternative dispute resolution;
- (5) respond to inquiries from the office or council concerning the agency's use of alternative dispute resolution;
- (6) make recommendations to the office and council concerning development and implementation of rules, standards and educational materials;
- (7) serve as the agency's liaison with the office and the council; and
- (8) provide information about the office's rules and the agency's alternative dispute resolution procedures to the agency's staff and to the public.

12-8A-4. Agency budgets; contracts for services. (2007)

A. An agency shall take fiscal actions necessary to achieve the objectives of the Governmental Dispute Prevention and Resolution Act [12-8A-1 NMSA 1978] and pay for costs incurred in taking those actions, including reasonable fees for training, policy review, system design, evaluation and the use of impartial third parties. Unless specifically

prohibited by law, an agency may request category transfers pursuant to Sections 6-3-23 through 6-3-25 NMSA 1978 for the purpose of paying the necessary costs incurred in meeting the objectives of the Governmental Dispute Prevention and Resolution Act.

B. An agency may contract with another agency or with a private entity for any service necessary to meet the objectives of the Governmental Dispute Prevention and Resolution Act.

12-8A-5. Effect on other laws. (2007)

Nothing in the Governmental Dispute Prevention and Resolution Act [12-8A-1 NMSA 1978] and rules, agreements and procedures developed pursuant to that act:

- A. limits other dispute prevention or resolution procedures available to an agency;
- B. denies a person a right granted under federal or other state law, including a right to an administrative or judicial hearing;
- C. waives immunity from suit or affects a waiver of immunity from suit contained in any other law;
- D. waives immunity granted under the eleventh amendment to the constitution of the United States;
- E. authorizes or prohibits binding arbitration as a method of alternative dispute resolution when mutually agreed to in writing by the interested parties;
- F. authorizes or requires an agency to take any action that is inconsistent or contrary to any law or rule;
- G. authorizes or requires any meeting, otherwise required to be open to the public, to be closed;
- H. authorizes or requires any record, otherwise open to public inspection, to be sealed; or
- I. shall be interpreted to create an additional layer of administrative process or to discourage or impede the use of alternative dispute resolution.

12-8A-6. Alternative dispute prevention and resolution advisory council created. (2007)

- A. The "alternative dispute prevention and resolution advisory council" is created in the division. The council consists of nine voting members as follows:
- (1) the secretary of general services;
 - (2) the secretary of finance and administration;
 - (3) the director of the state personnel office;
 - (4) the superintendent of regulation and licensing;
 - (5) the cabinet secretary or agency head of four other executive branch agencies to be appointed by the governor from among the ten agencies with the highest occurrence of public liability claims per authorized number of staff, no more than two of whom are cabinet secretaries; and
 - (6) the director of the division, who shall serve as chair of the council.
- B. An agency head may designate a representative to serve on the council.
- C. The council shall meet at least twice each year.

12-8A-7. Alternative dispute prevention and resolution advisory council; duties. (2007)

The council shall:

- A. review information about the use of alternative dispute resolution, including referrals, and make recommendations to the office to improve the effectiveness of alternative dispute resolution programs;
- B. develop strategies to encourage and expand the use of public facilitation in government operations;
- C. recommend to the division appropriate training standards and schedules for neutral parties and agency managers and supervisors;
- D. review and recommend standards and rules to the division to foster participation in alternative dispute resolution and minimize conflict in the discussion of issues under consideration by interested parties; and
- E. present an annual report to the department, the governor and the legislature by December 1 of each year on the use, cost and success of alternative dispute resolution programs.

12-8A-8. Office of alternative dispute prevention and resolution; created; powers; duties. (2007)

- A. The "office of alternative dispute prevention and resolution" is created as a bureau of the division.
- B. In order to promote alternative dispute resolution, the office shall:
 - (1) organize and manage alternative dispute resolution programs for agencies, employees, vendors, businesses regulated by governmental entities and other interested parties;
 - (2) coordinate the use of neutral parties to facilitate alternative dispute resolution for interested parties and training for agency staff;
 - (3) implement development and use of alternative dispute resolution strategies;
 - (4) provide staff support for the council;
 - (5) maintain information and educate government officials about training and use of alternative dispute resolution and referrals; and
 - (6) prepare an annual report for review and presentation by the council on the use, cost and success of alternative dispute resolution programs.

New Mexico State Personnel Board

State Personnel Office

Post Office Box 26127
2600 Cerrillos Road
Santa Fe, New Mexico 87505-0127
(505) 476-7759

Alternative Dispute Resolution

FACTS ABOUT ADR

Alternative Dispute Resolution (ADR) is offered by the New Mexico State Personnel Office (SPO) as an alternative to the traditional administrative appeal process. ADR is an informal process in which a neutral third party helps the opposing parties reach a voluntary, negotiated resolution of their differences. The decision to participate in ADR is completely voluntary for the Appellant and Appellee. ADR gives the parties the opportunity to discuss the issues raised in the appeal, clear up misunderstandings, determine underlying interests or concerns, find areas of agreement and, ultimately, incorporate those areas of agreement into solutions. A facilitator does not impose a decision on the parties. Instead, the facilitator helps the parties agree on a mutually acceptable resolution. The ADR process is strictly confidential. Information disclosed during ADR will not be revealed to anyone.

HOW DOES ADR WORK?

A SPO representative will contact the parties concerning their participation in the program. If both parties agree, an ADR session conducted by a trained and experienced facilitator is scheduled. While it is not necessary to have an attorney or other representative in order to participate in

SPO's ADR program, either party may choose to do so. **It is important that persons attending the ADR session have the authority to resolve the dispute.** If ADR is unsuccessful, the appeal proceeds like any other appeal. Information disclosed during ADR will not be revealed to anyone.

ADVANTAGES OF ADR

- ADR is an efficient process that saves time and money. Successful ADR avoids time consuming litigation and achieves a prompt resolution of the appeal. The majority of ADRs are completed in one session, which usually lasts from one to five hours.
- ADR is fair. Facilitators are neutral third parties who have no interest in the outcome. Their role is to help the parties resolve the appeal.
- ADR is a confidential process. The sessions are not tape-recorded or transcribed. Notes taken during the ADR are discarded.
- Settlement agreements secured during ADR do not constitute an admission by either party.

For additional information about the ADR program, you may contact SPO at (505) 476-7813.

INVITATION TO PARTICIPATE IN SETTLEMENT FACILITATION OF DISCIPLINARY ACTION(S)

SPO has a voluntary ADR program that provides an effective, confidential alternative to potentially disruptive, time-consuming and expensive litigation of disciplinary actions! **IT CAN WORK FOR YOU!**

Features:

- Free to parties
- Administrative proceedings are placed “on-hold” during the time the appeal is in ADR
- Early and complete resolution relatively quickly
- Experienced facilitators who are truly neutral and not involved in any other aspect of processing the administrative appeal
- Completely confidential – all ADR records are destroyed after the process, except for any agreement by the parties

Program Description

ADR is an alternative approach to resolving employment disputes in a more cost and time-effective manner. It can reduce or eliminate litigation expenses and is consistent with good business practices. ADR is a process in which a neutral third party, the facilitator, helps the parties to explore options and reach a mutually acceptable resolution which serves their unique interests.

ADR sessions are conducted at no cost to you by skilled, experienced facilitators. The process is informal and confidential. The proceedings are non-adversarial and the sessions are not recorded. ADR does not involve litigation, and no attorney is required, although the parties may have their attorneys present if they wish. Participants speak informally, on their own behalf. Participation in ADR (and any agreement) does not constitute an admission. Settlements are recognized by SPO as fully resolving the administrative appeal.

During the ADR session each party explains their view of the problem and what they believe is necessary to resolve the dispute. The facilitator will then assist the participants in reaching a resolution which is satisfactory to all those involved. Your agreement to participate in ADR does not mean that you have agreed to settle the dispute or to pay any monies. ADR allows the parties to forge solutions that work for them. Sometimes ADR is the best way to preserve or build a better working or parting relationship. To participate, you need only an open mind to the possibility of resolution.

If you would like to participate in ADR, simply complete the attached forms and return them via FAX to (505) 476-7727 or via mail to the above address, ATTN: Leonard J. Padilla, ADR Coordinator. We are always available to answer questions about the ADR process.

AGREEMENT TO PARTICIPATE IN ALTERNATIVE DISPUTE RESOLUTION

CAPTION & DOCKET #: _____

APPELLANT: _____

APPELLEE: _____

This is an agreement by the parties to participate in ADR involving the Appellant and Appellee in the above referenced appeal. The parties understand that ADR is a voluntary process, which may be terminated at any time.

The parties and, if they desire, their representative and/or attorneys, are invited to attend an ADR session. No one else may attend without the permission of the parties and the consent of the facilitator(s).

The facilitator(s) will not function as the representative of either party. However, the facilitator(s) may assist the parties in crafting a settlement agreement. Each party acknowledges being advised to seek independent legal review prior to signing any settlement agreement.

The parties acknowledge that they have received a copy of the ADR Fact Sheet.

The parties acknowledge that the facilitator(s) possesses the discretion to terminate the ADR at any time if an impasse occurs, or either party or the facilitator deems the case inappropriate for ADR.

The parties recognize that ADR is a confidential process and agree to abide by the terms of the attached Confidentiality Agreement.

The parties acknowledge that if a settlement is reached as a result of ADR, the assigned facilitator(s) is required to report to SPO any terms of settlement. This information is reported for purposes of providing data to SPO for evaluation of ADR and for Director approval. The individual terms of the agreement will not be disclosed to the public.

Appellant	Date	Appellee	Date
or		or	
Appellant's Representative	Date	Appellee's Representative	Date

Please be sure to sign the Confidentiality Agreement on the next page.

ALTERNATIVE DISPUTE RESOLUTION CONFIDENTIALITY AGREEMENT

CAPTION & DOCKET #: _____

APPELLANT: _____

APPELLEE: _____

1. The parties agree to participate voluntarily in ADR in an effort to resolve the administrative appeal filed with SPO, and agree to strict confidentiality.
2. The parties agree that all matters discussed during the ADR are confidential unless otherwise discoverable, and cannot be used as evidence in any subsequent administrative or judicial proceeding. Only a Settlement signed by all parties may be so admissible. Confidentiality, however, will not extend to threats of imminent physical harm or incidents of actual violence that occur during the ADR process. *[Note: Settlement facilitators are legally required to report alleged instances of child abuse or situations of potential personal violence to self or others.]*
3. Any communication between the ADR Coordinator and the facilitator(s) and/or the parties are considered dispute resolution communications with a neutral facilitator and will be kept confidential. The parties further agree that any meetings between the settlement facilitator and an individual party in caucus shall be confidential between that party and the settlement facilitator, except to the extent that the party specifically authorizes the settlement facilitator to share information in joint settlement facilitation sessions.
4. The parties agree not to subpoena the facilitator(s) or compel the facilitator(s) to produce any documents provided by a party in any pending or future administrative or judicial proceeding. The facilitator(s) will not voluntarily testify on behalf of a party in any pending or future administrative or judicial proceeding. The parties further agree that the facilitator(s) will be held harmless for any claim arising from the ADR process.
5. ADR sessions will not be tape recorded or transcribed by SPO, the facilitator, or any of the participants. All information including all notes, records, or documents generated during the course of the ADR shall be destroyed at the conclusion of the session. Parties or their representatives are not prohibited from retaining their own notes. However, SPO will not maintain any such notes or records as part of its record keeping procedures.
6. If a settlement is reached by all the parties, the agreement shall be reduced to writing and when signed shall be binding upon all parties to the agreement. If the appeal is not resolved through ADR, it is understood by the parties that the appeal will be referred to the Adjudication unit at SPO for a hearing.

Appellant	Date	Appellee	Date
or		or	
Appellant's Representative	Date	Appellee's Representative	Date

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

Appellant,

v.

Docket No.

NEW MEXICO

Appellee.

SETTLEMENT AGREEMENT
New Mexico State Personnel
Alternative Dispute Resolution

The parties have reached a specific agreement this _____ day of _____ 2008.
The following terms are intended to resolve, fully or in part as indicated, the existing dispute between the parties. The terms seek to predict what may happen, provide for the contingency and protect the parties with a resolution.

The parties agree as follows:

This Settlement Agreement constitutes a final and complete statement of the agreement between the parties. The ADR Coordinator of the State Personnel Office will keep a copy of the signed original of the Settlement Agreement in a separate, confidential file for each of the parties. Copies of the Agreement will not become a part of the participant's personnel file.

By their signatures, all of the parties acknowledge that they have read and understand each of the terms stated above. They also acknowledge that they are entering into this agreement freely and acknowledge that its terms are to be carried out in their entirety.

Signature – Party

Signature - Party

Signature –Facilitator

Date: _____

Samples of Forms and Pleadings

Checklist Outline for Notice of Contemplated Action Letter

From: Adjudication Section, State Personnel Office

To: Seminar Participants

DATE

ADDRESSEE ELEMENT

Re: Notice of Contemplated Action

Dear (employee name):

This is to notify you of my intention to (suspend) (demote) (dismiss) you from your position as (list name of position and basic, operational or advanced; if demotion list change in pay band and salary decrease up to 15%) with the (office, section or bureau) with the (Department).

The following constitutes the factual basis for this NCA:

(sample) Employee Reporting Violations (Describe conduct, actions, or omissions)

On (date) you were placed on a work Improvement Plan as a result of (list lateness to work, unexcused absences, absences without leave(s) etc.) List counseling's, letters of caution or reprimand etc.

On date(s) you were scheduled to work (hours) and were (late) (failed to report or call in) (failed to provide a doctor's excuse).list key details.

On date(s) you called in sick but failed to submit a doctor's excuse

(sample) Policy or Ethical Violations (Describe conduct, actions, or omissions)

List agency code of conduct violations involved in alleged misconduct

Your conduct, as described above is (unprofessional) (insubordinate) (inconsistent with your responsibilities as a (job title). Your (name action or omission) is inconsistent with agency policy (name and citation to numbered policy and paragraph). List any other violations of work Improvement Plans, counseling(s), or written directives. List potential sanctions if they are contained in agency policies relating to the named offenses. **In all cases, quote the entire passage from agency policies violated, including policy and paragraph references.**

The (agency) has the following evidence to support this action:

List all written memorandums, investigations and documents that have been presented to the decision-maker signing the NCA letter.

You have the right to inspect and obtain copies of the above-mentioned documentary evidence upon request to (name) at (telephone number). **A better practice, if the evidence is not too**

voluminous, is to eliminate bureaucratic follow-up and just attach copies of the documents, so indicating in the NCA letter.

Under Personnel Board Rules, you have eleven (11) calendar days from the service of this notice to respond in writing (or) (and) request an opportunity for an oral response meeting (ORM). NOTE: If you serve the employee by mail, rather than calling in an employee who has been placed on administrative leave, the employee has three additional days to respond. Best practice is personal service on the affected employee.

Signature of agency official with disciplinary authority. NOTE: Signatures “for” this official are not impressive; discipline is an important event worthy of pre-planning and coordination with the deciding official. This leader/manager/executive should appreciate the gravity of formal disciplinary action and be available to initiate the process.

Enclosures: List the evidence! Provide the evidence!

RECEIPT ACKNOWLEDGED

_____ **(SIGNATURE OF EMPLOYEE)**

DATE:

TIME:

If the employee refuses to sign the acknowledgement, the server should so annotate the agency copy of the NCA letter, completing the date and time entries.

NOTES: Do state the effective date of the discipline (the date it starts). Do specify, in detail, the employee’s actions and/or omissions, and explicitly tie these to agency policy, Personnel Board Rules, laws, etc. Do list the evidence. Do specify ORM rights; and, do provide a place for acknowledgment and assure it is completed by someone!

Checklist Outline for Notice of Final Action Letter

From: Adjudication Section, State Personnel Office

To: Seminar Participants

Date

ADDRESSEE

Re: Notice of Final Action

Dear (employee name):

This is to notify you of my decision to (list discipline and **effective date**)

The following constitutes the factual basis for this final action:

NOTE: This should be a mirror image of the NCA letter. Restate everything.
DO NOT say “see NCA letter, or “incorporate it” into the NFA.

Detail important assertions of any written submission by the employee (identify by date), or provide relevant highlights of an (date) oral response meeting (ORM). State that the decision maker has considered these matters, has decided to proceed with the final action or modify the final action).

Explain how the actions of the employee violated agency policies, Personnel Board Rules, laws (etc.) Review any previous discipline the decision maker relied on to impose progressive discipline, or to impose the most severe discipline (dismissal).

The agency has the following evidence to support this final action:

Itemize the evidence relied upon. **NO NEW EVIDENCE MAY BE LISTED.**
However, evidence originally listed in the NCA letter may be dropped (omitted) if it was not relied on following the ORM.

Under Personnel board Rules, you have the right to appeal (state the discipline) to the Personnel Board, Adjudication Section, 2600 Cerrillos Road, Post Office Box 26127, Santa Fe, New Mexico 87505-0127, within 30 calendar days of (state effective date, which is the date the discipline starts, NOT the date of this letter). If you appeal this action, a copy of this notice must accompany your appeal.

Signature of agency official with disciplinary authority.

Enclosures: List any evidence if not already furnished. The employee should have already been advised of his/her right to inspect and copy the evidence.

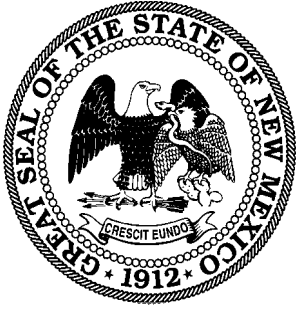
RECEIPT ACKNOWLEDGED

_____ (SIGNATURE OF EMPLOYEE)

DATE:

TIME:

Personal service is always best or the three-day mailing rule kicks in. The individual serving the employee should make a written notation of any declination by the employee to sign for the NFA letter.



Notice of Appeal

State Personnel Director
New Mexico State Personnel Office
2600 Cerrillos Road
Post Office Box 26127
Santa Fe, New Mexico 87505-0127
(505)476-7813 Fax: (505)476-7727

Classified employees who have met their probationary period (*1.7.2.8.A NMAC*) and have either been demoted, dismissed, or suspended by a State agency or department have a right to appeal their disciplinary action to the Personnel Board for a public hearing. Your notice of appeal **must** be filed with the State Personnel Director no later than 30 calendar days from the actual or effective date on which you were demoted, dismissed or suspended. NOTE: Untimely appeals, those not filed within 30 calendar days from the actual or effective date of discipline, will be dismissed for lack of jurisdiction.

To file a notice of appeal, please complete the following five steps:

Step #1 I wish to file a notice of appeal for the disciplinary action imposed upon me. My full name, mailing address and telephone or contact number is:

Name: _____

Address: _____

Phone No. _____

Other No. _____ (work, relative, cellular, etc.)

Step #2 I irrevocably elect the following appeal

- State Personnel Board Hearing
- Arbitration

Step #3 My Notice of Appeal concerns the following disciplinary action of:

- a demotion;
- a dismissal;
- a suspension for _____ days; or
- a _____-work hour pay suspension.

Step #4 You **must** provide a copy of your "notice of final action" in conjunction with this Notice of Appeal. Your Notice of Appeal **will not** be considered complete until you provide the State Personnel Director with a copy of your notice of final action.

Step #5 The following is a list of my reasons (grounds) for my appeal:

- ◆ _____

- ◆ _____

- ◆ _____

- ◆ _____

- ◆ _____

- ◆ _____

Step #6 You have completed your Notice of Appeal by providing us with a copy of your Notice of Final Action. Please sign and date.

Date: _____

Signature: _____

Upon acceptance of your notice of appeal, a hearing officer will mail your agency or department a copy of your notice of appeal and will issue an order setting up a schedule for submitting pre-hearing paperwork. If you have a change of address or telephone number, please advise our office immediately so your hearing notices are not delayed.

For SPO use only: Filed: _____

Docket No. _____

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

**IN THE MATTER OF
[NAME],**

Appellant,

v.

Docket No. 08-###

NEW MEXICO DEPARTMENT

,

Appellee.

ACCEPTANCE OF APPEAL AND SCHEDULING ORDER

The appeal of Mr. Ms. [NAME] from a [action] by the New Mexico [department] Department as set forth in the Notice of Final Action dated [date 2008], is hereby accepted.

Pursuant to the provisions of 1.7.12.8.C NMAC, I am forwarding a copy of the Appeal Letter and the Notice of Final Action to [Counsel], General Counsel, New Mexico [Department]

This matter is set for hearing on [Date] in [City], New Mexico.

The parties shall submit to me by [Date] a stipulated pre-hearing order, in hard copy only, for my approval and signature which shall contain at least:

1. a statement of any contested facts and issues;
2. a stipulation as to those matters not in dispute;
3. a list of witnesses to be called and a brief summary of their testimony;
4. a deadline for interviewing and/or deposing witnesses;
5. a deadline for filing a final list of witnesses and requests for subpoenas;
6. a list of exhibits;
7. deadlines for discovery;
8. a deadline for filing a final list of exhibits;
9. the relief sought by Appellant; and
10. whether the parties agree to participate, in good faith, in alternative dispute resolution.

Discovery conducted by the mutual agreement of the parties does not require further order from the Administrative Law Judge. All other discovery may be conducted only upon further order of the Administrative Law Judge. The parties shall provide a paper copy of all cited cases

to the Administrative Law Judge. The parties shall copy each other with all pleadings and correspondence filed with the Personnel Board.

All parties must provide each other and the Administrative Law Judge with a current telephone number and address at all times.

In accordance with sub-paragraph A, 1.7.12.12 (Motions) any defense, objection or request that can be determined prior to the hearing on the merits of an appeal may be raised by motion prior to the expiration of the parties' agreed date ending discovery or the submission of final witness lists, whichever is later.

Motions in this case shall take the form of motion at Common Law, with case caption, preamble, numbered paragraphs describing the factual and legal basis for the motion and a concluding paragraph summarizing the order or action requested from the hearing officer. The party filing the motion must determine whether the non-moving party concurs with the motion. If the non-moving party concurs, the party filing the motion must include a stipulated order with the motion. If the non-moving party does not concur, the party filing the motion must include a draft order with the motion.

ALL DOCUMENTARY EXHIBITS PREPARED FOR THE HEARING SHALL BE MARKED AND TABBED, WITH ONE EXHIBIT PER TAB. APPELLANT'S EXHIBITS WILL BE ALPHABETICALLY LETTERED, AND APPELLEE'S WILL BE NUMBERED. Request for telephonic testimony by a witness must be presented to the Administrative Law Judge, for approval, at least three work days prior to the hearing with notice to the opposing party.

The Department is responsible to locate and reserve a suitable hearing location for all hearings not scheduled for the State Personnel Office or by video teleconference. The Department is also responsible to prepare the shell of the Stipulated Pre-Hearing Order (SPHO) and to transmit it to the Appellant, or Appellant's representative, for entry of Appellant's information no later than twenty-one (21) days before the filing date of the SPHO. The

Appellant' shall return the SPHO to the Department for filing no later than seven (7) days before the filing date.

Subpoenas, using our format, copy enclosed, will be prepared by the parties with a cover request letter copied to the opposing party for notification purposes. We will sign and apply our raised seal and follow your directions as to delivery (U.S. mail-postage paid by requesting party, courier, fax, or pickup at our office).

The State Personnel Office offers the parties an opportunity to appear before a settlement facilitator for the purpose of settling the appeal prior to participating in an administrative hearing. Enclosed is information concerning the settlement facilitation process. Please indicate in the Stipulated Pre-Hearing Order whether the parties agree to participate in good faith settlement facilitation. The parties shall jointly notify the Adjudication Division of the State Personnel Office in writing no later than [Date], 2008 if they agree to utilize the settlement facilitation option. Please note that even if settlement facilitation is agreed upon the date for the Stipulated Pre-Hearing Order and hearing remain as scheduled.

Thank you in advance for your cooperation in this matter.

ENTERED: [Date] , 2008

[LEONARD J. PADILLA or
SCOTT SUMMERFIELD]
Administrative Law Judge

Enclosures: State/Appellant Exhibit List Form
Samples – Pre-Hearing Order; Subpoena
New Mexico State Personnel Alternative Dispute Resolution packet

STATE'S EXHIBITS
Docket No. 08-###

Exhibit #	Identification	Marked	Admitted W/O Objection	Admitted Over Objection	Withdrawn	Rejected
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
13						
14						
15						
16						
17						
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21						
22						
23						
24						
25						
26						

NOTE: Only one (1) document per Exhibit number or letter.
Exhibits MUST be separated by appropriate tabs.

APPELLANT'S EXHIBITS

Docket No. 08-###

Exhibit #	Identification	Marked	Admitted W/O Objection	Admitted Over Objection	Withdrawn	Rejected
A						
B						
C						
D						
E						
F						
G						
H						
I						
J						
K						
L						
M						
N						
O						
P						
Q						
R						
S						
T						
U						
V						
W						
X						
Y						
Z						

NOTE: Only one (1) document per Exhibit number or letter .Exhibits MUST be separated by appropriate tabs.

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

**IN THE MATTER OF
[NAME]**

Appellant,

v.

NEW MEXICO DEPARTMENT

,

Appellee.

Docket No. 08-###

STIPULATED PRE-HEARING ORDER

CONTESTED FACTS AND ISSUES:

----list any contested facts and issues----

STIPULATIONS:

----a statement as to matters not in dispute----

RELIEF SOUGHT BY APPELLANT:

----a statement by Appellant as to relief or remedy sought----

SETTLEMENT FACILITATION (check one):

The parties agree to participate in good faith settlement facilitation.

The parties do not agree to participate in good faith settlement facilitation.

If the parties agree to settlement facilitation, please notify the State Personnel Office in writing within fifteen days of the date of the Acceptance of Appeal and Scheduling Order.

WITNESSES:

For Appellant:

----list each witness with a brief summary of their testimony----

For Appellee:

----list each witness with a brief summary of their testimony----

The parties have the right to interview and/or depose each other's witnesses at a mutually agreeable date, time and place by ----list date-----.

The parties will submit a final list of witnesses and request for any subpoenas by ----list date----.

EXHIBITS:

For Appellant:

----list each exhibit----

For Appellee:

----list each exhibit----

Deadline for filing a final list of exhibits: ----list date----

DISCOVERY:

Discovery demands will be made by ----list date-----.

Discovery will close on ----list date-----.

Appellant's signature

Appellee's signature

Approval:

Administrative Law Judge's signature

BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO

Sample

IN THE MATTER OF
[NAME]

Appellant,

v.

NEW MEXICO DEPARTMENT

,

Appellee.

Docket No. 08-###

SUBPOENA

TO:

GREETINGS:

YOU ARE HEREBY COMMANDED to appear before the PERSONNEL BOARD at the place, date, and time specified below to testify in the above-entitled cause there pending.

Place:

Date:

Time:

Requested By: (Attorney name and address)

Witness my hand this ___ day of _____ 2008.

[LEONARD J. PADILLA
R.SCOTT SUMMERFIELD]
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that on the _____ day of _____, 2008,

I served the above subpoena on _____.
(Name of Person Served)

Title (if any)

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,
Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,
Appellee.

ENTRY OF APPEARANCE

COMES NOW the [Office of General Counsel or Appellant's representative] and hereby enters its appearance on behalf of [Appellee or Appellant] in the above-entitled matter.

Respectfully submitted,

[OFFICE OF GENERAL COUNSEL
NEW MEXICO _____ DEPARTMENT
or
Name of Representative]

[Name, Address, Phone, & email address]

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,
 Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,
 Appellee.

**[APPELLANT’S or APPELLEE’S] MOTION TO AMEND THE STIPULATED
PREHEARING ORDER**

COMES NOW [Appellant or Appellee] by and through his/her [counsel or representative of record] and for his/her Stipulated Motion to Amend the Stipulated Prehearing Order, hereby states as follows:

1. [reason(s) to amend the Stipulated Prehearing Order]
2. [names of Appellant or Appellee] in this matter has/have stipulated to this

Motion to Amend the Stipulated Prehearing Order.

Respectfully submitted,

[OFFICE OF GENERAL COUNSEL
NEW MEXICO _____ DEPARTMENT
or
Name of Representative]

[Name, Address, & Phone number]

I hereby certify that a true and correct copy of the foregoing pleading was Mailed [or faxed] on this [date] to:

Name and address of opposing counsel or representative or appellant

Signature of party submitting Motion

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,
 Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,
 Appellee.

ORDER MODIFYING THE STIPULATED PREHEARING ORDER

THIS MATTER having come before the Administrative Law Judge on (date) upon [Appellant/or Appellee's] *Motion to Amend the Stipulated Prehearing Order*, Appellant appearing through its [attorney/representative/pro se] and the Appellee appearing through its attorney, [name of assistant general counsel] otherwise fully advised in his premises finds:

1. The Court has jurisdiction over the parties and the subject matter herein.
2. Appellant's motion to modify the stipulated prehearing order is not object to in part and is well taken as set forth herein.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the pretrial order filed in the above numbered cause, be and hereby is modified as follows:

[list of modifications].

[NAME OF JUDGE]
ADMINISTRATIVE LAW JUDGE

Submitted by:
[Name of law firm;
Office of General Counsel
or Representative]

By: _____
[name, address & phone]

Noted and approved as to form

[Name of law firm;
Office of General Counsel
or Representative]

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,

Appellant,

v.

Docket No. 08-xxx

NEW MEXICO,

Appellee.

[APPELLANT’S or APPELLEE’S] FINAL EXHIBIT AND WITNESS LIST

COMES NOW, [Appellant or Appellee] by and through [Counsel or Representative] and files the following as his/her Final Exhibit and Witness List.

A. EXHIBITS

[APPELLANT LISTS EXHIBITS ALPHABETICALLY AND APPELLEE LISTS EXHIBITS NUMERICALLY]

B. WITNESSES

[LIST OF WITNESSES (must correspond to list of witnesses in Stipulated Prehearing Order)]

Respectfully submitted,

[OFFICE OF GENERAL COUNSEL
NEW MEXICO _____ DEPARTMENT
or
Name of Representative, or Name of
Appellant]

[Name, Address, & Phone number]

CERTIFICATE OF MAILING

I, [Appellee, or Appellant] certify that on this __ day of _____, I mailed/faxed a true and correct copy of the [Appellant or Appellee] Final Exhibit and Witness List to [opposing party's name and address].

Respectfully submitted,

[OFFICE OF GENERAL COUNSEL
NEW MEXICO _____ DEPARTMENT

or

Name of Representative, or Name of
Appellant]

[Name, Address, & Phone number]

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,

Appellant,

v.

NEW MEXICO

,

Appellee.

Docket No.

NOTICE OF HEARING

The hearing in the referenced matter is set for _____ .m. on _____, 2008 at the New Mexico State Personnel Office, 2600 Cerrillos Road, Room 239, Santa Fe, New Mexico.

The parties shall pre-mark their exhibits prior to the hearing on the merits, the Appellant alphabetically and the Appellee numerically. Use tabs and place only one complete document, irrespective of number of pages, behind each tab. Assure that each page of a multi-page document carries a number for ease of reference on the record. The parties shall have a sufficient number of exhibits available for the Administrative Law Judge, a witness, and the opposing party.

Testimony by telephone will not be permitted without the express prior approval of the Administrative Law Judge.

Citations to case law must be accompanied by a copy of the case.

ENTERED: _____, 2008

[LEONARD J. PADILLA
R. SCOTT SUMMERFIELD]
Administrative Law Judge

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,
 Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,
 Appellee.

STIPULATED MOTION FOR CONTINUANCE

COMES NOW [Appellant or Appellee] by and through his/her [counsel or representative of record] and for his/her Stipulated Motion for Continuance, hereby states as follows:

1. [reason for conflict of hearing date]
2. [names of Appellant or Appellee] in this matter has/have stipulated to the continuance.

WHEREFORE, Appellant or Appellee [name] requests that the Administrative Law Judge vacate the hearing on the merits currently scheduled for [date] and reschedule it for another date [or list dates agreed upon by the parties].

Respectfully submitted,

[OFFICE OF GENERAL COUNSEL
NEW MEXICO _____ DEPARTMENT
or
Name of Representative]

[Name, Address, & Phone number]

I hereby certify that a true and correct
copy of the foregoing pleading was
Mailed [or faxed] on this [date] to:

Name and address of opposing counsel
or representative or appellant

Signature of party submitting Motion

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,

Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,

Appellee.

STIPULATED ORDER OF CONTINUANCE

THIS MATTER having come before the Administrative Law Judge upon [Appellant/or Appellee's] *Stipulated Motion for Continuance* and the Administrative Law Judge, having reviewed the pleadings and being fully advised in the premises;

IT IS HEREBY ORDERED that the hearing on the merits currently scheduled in the matter for [date] is hereby continued and shall be rescheduled for [date].

[NAME OF JUDGE]
ADMINISTRATIVE LAW JUDGE

Submitted by:
[Name of law firm;
Office of General Counsel
or Representative]

By: _____
[name, address & phone]

**BEFORE THE PERSONNEL BOARD
STATE OF NEW MEXICO**

IN THE MATTER OF

,

Appellant,

vs.

Docket No. 08-xxx

NEW MEXICO

,

Appellee.

**APPELLANT'S REQUESTED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Appellant submits the following requested Findings of Fact and Conclusions of Law:

A. REQUESTED FINDINGS OF FACT

1. The State Personnel Board has jurisdiction over the parties and subject matter herein.
2. Appellant, _____, was employed with (Department). At the time of his termination, he was a permanent, career status employee.
3. Prior to his discharge, Appellant was notified that Appellee intended to terminate his employment by Notice of Contemplated Action dated _____, and served the Notice on him in person on the same date.
4. An Oral Response meeting was conducted before (Department) managers on _____, at which Appellant responded to the allegations of the Notice of Contemplated Action.
5. Appellant provided a written statement stating his position in addition to his personal statement at the oral response meeting.

6. Appellant timely filed his appeal pursuant to NMAC 1.7.12.8.

7. Appellant was dismissed effective _____ based on allegations of _____.

8. The Notice of Final Action states that the discipline of termination is being taken for _____.

9. In the present case Appellee represents that Appellant was warned about his actions together with the potential for disciplinary action.

10. Other forms of warning can include training and/or giving an employee relevant Appellee policies.

11. In addition to the foregoing, the evidence presented at the hearing on the merits is summarized as follows:

[List the evidence presented at hearing favorable to Appellant].

B. REQUESTED CONCLUSIONS OF LAW:

1. Appellant was a full time classified employee of the Appellee within the meaning of NMSA 1978, Section 10-91-8(A) at all times relevant to this appeal.

2. Appellant timely filed a notice of appeal within the time provided by law.

3. The Personnel Board has personal and subject matter jurisdiction over the parties.

4. The Appellee has the burden to demonstrate disciplinary action is based upon just cause. In order to find just cause the State Personnel Board is required to find not only that there was employee misconduct but also that the Appellee's discipline was appropriate in light of that misconduct. While the first prong focuses on the employee's

conduct the second prong inquires into any actions that the Appellee took to warn the employee about the consequences of his actions.

5. Just Cause is defined at 1.7.11.10 (A) NMAC as, “any behavior relating to the employee’s work that is inconsistent with the employee’s obligation to the Appellee.”

Further, 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.

6. The Appellee has failed to prove by a preponderance of the evidence that Appellant [reason for termination] as alleged in the Notice of Final Action and consequently has failed to prove charges that Appellant violated rules pertaining to _____.

7. The Appellee has failed to prove by a preponderance of the evidence that Appellant disobeyed any directive or engaged in any conduct to be construed as [allegations of Appellee]. Accordingly, there is no just cause to support his termination.

8. The Appellee has not properly exercised progressive discipline in this case and the nature of the conduct in this case does not constitute just cause in the absence of progressive discipline.

9. Appellant should be reinstated to his position as _____ with the [Department] and made whole by awarding his back pay and benefits.

Respectfully submitted,

[Name of Appellant or Representative]

[Name, Address, Phone, & email address]

I hereby certify that a true copy of the foregoing was mailed to opposing counsel [name], and the State Personnel Board on this ___ day of _____, 2008.

Name

Appellant's Withdrawal Form

Date: _____

State Personnel Director
c/o Adjudication Office
State Personnel Office
Post Office Box 26127
Santa Fe, New Mexico 87505-0127

Re: Withdrawal of Appeal
Docket No. _____

To Whom It May Concern:

Please be advised that I, _____, hereby
withdraw my appeal before the Personnel Board.

Sincerely,

(name)

(address)