

39-PELRB-2024

STATE OF NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board at its regularly scheduled meeting on October 1, 2024, upon the completion of a Rulemaking Hearing conducted pursuant to the State Rules Act (NMSA 1978 §§ 14-4-1 et seq.). The Board, having considered the exhibits presented at the Rulemaking Hearing and the public comments received during the written comment period and at the hearing, hereby approves and adopts the proposed changes to NMAC 11.21.1.17 EVIDENCE ADMISSIBLE and 11.21.2.37 UNIT CLARIFICATION described in the Notice of Proposed Rulemaking published in Volume XXXV of the New Mexico Register on August 13, 2024. Staff are directed to complete the rulemaking process and publish the updated rules on the PELRB website when they become effective.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed by:

Mark Myers

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MARK MYERS, CHAIR

10/8/2024

DATE

NOTICE OF PROPOSED RULEMAKING

The New Mexico Public Employee Labor Relations Board (“PELRB”) hereby gives notice that on July 2, 2024, as part of its monthly meeting which will commence at 10:00 a.m., the PELRB will initiate the rulemaking process on the proposed amendment of PELRB administrative rules as described below. Copies of the proposed rules may be accessed on the PELRB website (<http://www.pelrb.nm.gov>) or at the PELRB offices. Concerned parties may provide comments at the public hearing or submit written comments. Written comments may be submitted to the PELRB via US Mail c/o Matthew Huchmala, Administrative Assistant; New Mexico Public Employee Labor Relations Board; 2929 Coors Blvd. NW, Suite 303; Albuquerque, NM 87102; or by electronic mail to matt.huchmala@pelrb.nm.gov. The submission of written comments as soon as possible is encouraged.

This information can be provided in a variety of accessible formats. If you are an individual who requires an alternative format or any other form of auxiliary aid to attend or participate in the rulemaking process, please contact the administrative assistant at 505-831-5422 or matt.huchmala@pelrb.nm.gov as soon as possible to arrange the appropriate accommodations.

Statutory Authority

Authority for this rulemaking is the Public Employee Bargaining Act, NMSA 1978 §§ 10-7E-1 through 10-7E-26 (2003, amended 2005).

Summary of Proposed Changes

This list provides a concise statement of the various ways the proposed rules change or codify current practice, and the general reasoning in support of the changes. It is not an elaborate analysis of the rules or of the detailed considerations upon which they are based; rather, it is designed to enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules. As this list shows, the amendments provide targeted solutions to discrete, specifically identified problems. If the proposed change removes language, that is indicated by text with strikethrough (e.g. ~~removed language~~); if the proposed change adds language, that is indicated by text with underlining (e.g. added language).

Several typographical errors will be corrected without changing the meaning of the rules.

11.21.1.17 EVIDENCE ADMISSIBLE: Changes to this section expands the scope of inadmissible evidence to include confidential information, as well as who and in what circumstances it may be excluded.

11.21.2.37 UNIT CLARIFICATION: Changes to this section clarifies that unit clarification is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly established classification.

The PELRB invites members of the public to comment on draft proposed regulations. Members of the public may comment during the rulemaking hearing in the PELRB’s meeting of June 4, 2024, or by submitting written comments prior to that meeting.

Written comments must be submitted no later than 5:00 p.m. on May 28, 2024. Please send comments to the PELRB care of Matthew Huchmala, Executive Administrative Assistant to the Board, either by email to matt.huchmala@pelrb.nm.gov, or have a hard copy delivered to Mr. Huchmala’s attention at the PELRB’s Albuquerque office. There is no need to provide comments via both email and hard copy.

TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 21 LABOR UNIONS/LABOR RELATIONS
PART 1 GENERAL PROVISIONS

11.21.1.1 ISSUING AGENCY: Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM 87120, (505) 831-5422.

[11.21.1.1 NMAC - N, 3/15/2004]

11.21.1.2 SCOPE: The scope of Part 1 of Chapter 21 applies to public employers, public employees and labor organizations as defined by the Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978.

[11.21.1.2 NMAC - N, 3/15/2004]

11.21.1.3 STATUTORY AUTHORITY: Authority for Part 1 of Chapter 21 is the Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978.

[11.21.1.3 NMAC - N, 3/15/2004]

11.21.1.4 DURATION: Permanent.

[11.21.1.4 NMAC - N, 3/15/2004]

11.21.1.5 EFFECTIVE DATE: March 15, 2004, unless otherwise cited at the end of the section.

[11.21.1.5 NMAC - N, 3/15/2004]

11.21.1.6 OBJECTIVE: The objective for Part 1 of Chapter 21 is to establish principles governing implementation of the New Mexico Public Employee Bargaining Act, Section 10-7E-1 through 10-7E-26 NMSA 1978 and to establish fair and expeditious procedures that further the purposes of that Act, which are: (1) to guarantee public employees the right to organize and bargain collectively with their employers; (2) to promote harmonious and cooperative relationships between public employers and public employees; and (3) to protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions. Section 10-7E-2 NMSA 1978, these rules should be interpreted consistently with the Public Employee Bargaining Act as presently written or as later amended.

[11.21.1.6 NMAC - N, 3/15/2004]

11.21.1.7 DEFINITIONS:

A. Statutory definition: The terms defined in Section 10-7E-4 NMSA 1978, shall have the meanings set forth therein.

B. Additional definitions: The following terms shall have the meanings set forth below.

(1) **“Act”** means the New Mexico Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978 including any amendments to that statute.

(2) **“Amendment of certification”** means a procedure whereby an incumbent labor organization certified by the board to represent a unit of public employees or a public employer may petition the board to amend the certification to reflect a change such as a change in the name or the affiliation of the labor organization or a change in the name of the employer.

(3) **“Certification of incumbent bargaining status”** shall mean a procedure whereby a labor organization recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 petitions the board for a declaration of bargaining status under Subsection B of Section 10-7E-24 NMSA 1978. or after a local board certifying the representative ceases to exist by operation of Section 10-7E-10 NMSA 1978 (2020).

(4) **“Challenged ballot”** means the ballot of a voter in a representation election whose eligibility to vote is questioned either by a party to the representation case or by the director.

(5) **“Complainant”** means an individual, labor organization, or public employer that has filed a prohibited practices complaint.

(6) **"Delivering a copy"** as it pertains to service or filing of pleadings or other documents means: (1) handing it to the board, to its agent(s), to opposing counsel or unrepresented parties; (2) sending a copy by facsimile or electronic submission in accordance with 11.21.1.10 NMAC or 11.21.1.24 NMAC; (3) leaving it at the board's, opposing attorney's or party's office with a clerk or other person in charge thereof; or (4) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the unrepresented person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(7) **"Director"** means the director of the public employee labor relations board.

(8) **"Document"** means any writing, photograph, film, blueprint, microfiche, audio or video tape, data stored in electronic memory, or data stored and reproducible in visible or audible form by any other means.

(9) **"Electronic submission"** means the filing of a pleading or other document with the board using the electronic system established by the PELRB, service by the parties, or email communications.

(10) **"On a form prescribed by the director"** as used in these rules pertaining to the filing of documents with the board, shall include the electronic data submitted by use of any interactive form posted for that purpose on the board's website.

(11) **"Probationary employee"** for state employees shall have the meaning set forth in the State Personnel Act and accompanying regulations; for other public employees, other than public school employees, it shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for determining rights under the PEBA non-state employees a public employee may not be considered to be a probationary employee for more than one year after the date of hire by a public employer. If otherwise undefined, the term shall refer to an employee who has held that position, or a related position, for less than six months.

(12) **"Prohibited practice"** means a violation of Section 10-7E-19, 10-7E- 20 NMSA 1978 or Subsection A of Section 10-7E-21 NMSA 1978.

(13) **"Representation case"** or **"representation proceeding"** means any matter in which a petition has been filed with the director requesting a certification or decertification election, or an amendment of certification, or unit clarification.

(14) **"Respondent"** means a party against whom a prohibited practices complaint has been filed.

(15) **"Rules"** means the rules and regulations of the board (these rules), including any amendments to them.

(16) **"Unit accretion"** means the inclusion in an existing bargaining unit of employees who do not belong to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion will not render the existing unit inappropriate.

(17) **"Unit clarification"** means a proceeding in which a party to an existing lawful collective bargaining relationship petitions the board to change the scope or description of an existing bargaining unit; a change in union affiliation; to consolidate existing bargaining units represented by the same labor organization; or to realign existing bargaining units of employees represented by the same exclusive representative into horizontal units, where the board finds the unit as clarified to be an appropriate bargaining unit and no question concerning, representation arises.

(18) **"Unit inclusions or exclusions"** means the status of an individual, occupational group, or group of public employees in clear and identifiable communities of interest in employment terms and conditions and related personnel matters, as being within or outside of an appropriate bargaining unit based on factors such as supervisory, confidential or managerial status, the absence thereof, job context, principles of efficient administration of government, the history of collective bargaining, and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.

[11.21.1.7 NMAC - N, 3/15/2004; A, 2/28/2005; A, 10/16/2018; A, 7/1/2020]

11.21.1.8 COMPUTATION OF TIME: When these rules state a specific number of days in which some action must or may be taken after a given event, the date of the given event is not counted in computing the time, and the last day of the period is deemed to end at close of business on that day. Saturday's, Sundays and state recognized legal holidays observed in New Mexico shall not be counted when computing the time. When the last

day of the period falls on a Saturday, Sunday or legal holiday observed in New Mexico, then the last day for taking the action shall be the following business day.

[11.21.1.8 NMAC - N, 3/15/2004]

11.21.1.9 EXTENSION OF TIME: A party seeking an extension of time in which to file with the director, the board or a hearing examiner any required or permitted document may file with the director or the hearing examiner, an appropriate written request for an extension. Such a request shall be filed at least three days prior to the due date and shall state the position of all other parties, or that the filing party was unable to reach another party. The director, the board or the hearing examiner may grant an extension for good cause shown and, in granting an extension, may shorten the time requested.

[11.21.1.9 NMAC - N, 3/15/2004]

11.21.1.10 FILING WITH THE DIRECTOR OR THE BOARD: To file a document with the director or the board, the document may be either hand-delivered to the board's office in Albuquerque during its regular business hours, or sent to that office by United States mail, postage prepaid, or by the New Mexico state government interagency mail or by sending a copy by facsimile or electronic submission. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director.

A. Time of filing: A document will be deemed filed when it is received by the director. For hand delivered or mailed documents the date and time stamp affixed by the receiving board agent will be determinative. For faxed or electronically transmitted documents the time and date affixed on the cover page or the document itself by the board's facsimile machine or receiving computer will be determinative.

B. Additional time after service by mail: Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

C. Signatures: Parties or their representatives filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document. All electronically filed documents shall be deemed to contain the filer's signature. The signature in the electronic document may represent the original signature in the following ways:

- (1) by scanning or other electronic reproduction of the signature; or
- (2) by typing in the signature line the notation "/s/" followed by the name of the person who

signed the original document.

D. Demand for original: A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile or electronic submission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

[11.21.1.10 NMAC - N, 3/15/2004; A, 10/16/2018; A, 7/1/2020]

11.21.1.11 REPRESENTATION OF A PARTY: A party may, be self-represented or be represented by counsel or other representative. Any representative of a party shall file with the board a signed notice of appearance, stating the name of the party; the title and official number (if available) of the case in which the representative is representing the party, and the name, address and telephone number of the representative. The filing of a pleading containing the above information is sufficient to fulfill this requirement.

[11.21.1.11 NMAC - N, 3/15/2004; A, 2/11/2020; A, 7/1/2020]

11.21.1.12 EX PARTE COMMUNICATIONS: Except as otherwise provided in this rule, no party to a proceeding pending before this board or any of its agents shall communicate, or attempt to communicate, with a hearing examiner assigned to the case, with the director, or with a board member, concerning any issue in the case, without, at the same time, transmitting the same communication to all other parties to the proceeding. It shall not be a violation of this rule to communicate concerning the status of a case, or to communicate concerning such procedural matters as the location or time of a hearing, the date on which documents are due, or the method of filing.

It shall not be a violation of this rule for a party to communicate with the director during the investigatory phase of a proceeding. It shall not be a violation of this rule for a party to communicate with anyone concerning any rulemaking proceeding of the board, or to communicate with the director, a mediator, or board member at the director's, mediator's, or board member's request.

[11.21.1.12 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.13 DISQUALIFICATION: No board agent, member nor hearing examiner shall decide or otherwise participate in any case or proceeding in which he or she (a) has a financial interest in the outcome; (b) is indebted to any party, or related to any party or any agent or officer of a party by consanguinity within the third degree; (c) has acted on behalf of any party within two years of the commencement of the case or proceeding; or (d) for some other reason or prejudice, he or she cannot fairly or impartially consider the issues in the proceeding.

[11.21.1.13 NMAC - N, 3/15/2004]

11.21.1.14 MOTION TO DISQUALIFY:

A. A motion to disqualify a board agent, member or hearing examiner in any matter, based upon the foregoing criteria, shall be filed with the board, with copies served on all parties, prior to any hearing or the making of any material ruling involving the pending issues.

B. Such motion shall set out the basis for the disqualification and all facts in support thereof.

C. If the board finds such motion meritorious upon due inquiry, it shall disqualify the board agent, member or hearing examiner and he or she shall withdraw from the proceeding. If the motion is denied, the board shall so rule and the matter shall proceed.

[11.21.1.14 NMAC - N, 3/15/2004]

11.21.1.15 RECORDS OF PROCEEDINGS: All meetings of the board (whether general, special or emergency) and all rulemaking, unit determination, and prohibited practice hearings before the board or a hearing examiner of the board shall be audio-recorded, or, upon order of the board may be transcribed, except that board meetings or portions thereof lawfully closed shall not be recorded or transcribed, unless so directed by the board. Following the board's approval of the minutes of a meeting of the board, the minutes shall become the sole official record of the meeting, and the audio recording of the meeting may be erased. The director shall keep the audio recordings of the rulemaking, unit determination, and prohibited practices hearings for a period of at least one year following the close of the proceeding in which the hearing is held, or one year following the close of the last judicial or board proceeding (including any appeal or request for review) related to the case in which the hearing is held, whichever is later, or such longer period as may be required by law. No recording shall be made of any mediation proceeding, settlement discussion, or alternative dispute resolution effort except by agreement of all parties and participating officials. The board's recording or transcript shall be the only official record of a hearing.

[11.21.1.15 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.16 NOTICE OF HEARING:

A. After the appropriate notice or petition is filed in a representation, prohibited practices or impasse resolution case, the director shall hold a status and scheduling conference with the parties to determine the issues; establish a schedule for discovery, including the issuance of subpoenas, and pretrial motions; and set a hearing date.

B. Upon setting a rulemaking hearing, the director or the board shall cause notice of hearing to be issued setting forth the nature of the rulemaking proceeding, the time and place of the hearing, the manner in which interested persons may present their views, and the manner in which interested persons may obtain copies of proposed rules. Notices of rulemaking hearings shall be sent by regular mail to all persons who have made requests for such notice, and shall be published in at least one newspaper of general circulation in New Mexico at least 30 days prior to commencement of the hearing.

C. Upon setting a hearing or conference before the director or designee or before the board in any proceeding, the director or the board shall cause notice of hearing to be issued to all parties of record setting forth the time and place of the hearing or conference. A party to a representation, prohibited practices or impasse resolution case in which a hearing or conference is scheduled may request postponement of the hearing or conference by filing a written request with the director, and serving the request upon all other parties, at least five

days before commencement of the hearing or conference. The requesting party shall state the specific reasons in support thereof. Upon good cause shown, the director shall grant a postponement to a date no more than 20 days after the previously set date. Only in extraordinary circumstances may the director grant a further postponement, or a postponement to a date more than 20 days after the previously set date, or a postponement with less than five days' notice.

[11.21.1.16 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020]

11.21.1.17 EVIDENCE ADMISSIBLE: The technical rules of evidence shall not apply, but, in ruling ~~of~~ on the admissibility of evidence, the hearing examiner or board may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt.

A. Upon receiving a timely objection by a party or by any person who may be aggrieved by its admission, the hearing examiner may exclude irrelevant ~~Irrelevant~~, immaterial, unreliable, unduly repetitious or cumulative evidence, and evidence that is confidential or evidence protected by the rules of privilege (such as attorney-client, physician-patient or special privilege) unless admissibility is otherwise authorized or required by law or court order, shall be excluded upon timely objection.

B. The hearing examiner or board may receive any evidence not objected to, or may, upon the hearing examiner's or board's own initiative, exclude such evidence ~~if it is irrelevant, immaterial, unreliable, unduly repetitious, cumulative or privileged.~~

C. Evidence may be tentatively received by the hearing examiner or board, reserving a ruling on its admissibility until the issuance of a report or decision.

D. Nothing in this rule requires the hearing examiner or board to provide notice of a tentative or final decision on admissibility of evidence to any person who is not a party to the pertinent proceedings.

[11.21.1.17 NMAC - N, 3/15/2004]

11.21.1.18 MISCONDUCT: As part of the board's statutory duty under Section 2 of the Act to ensure the orderly functioning of the state and its political subdivisions; and as part of its power to hold hearings and enforce the Act by the imposition of appropriate administrative remedies pursuant to Section 9 of the Act, the hearing examiner or body conducting a hearing or official performing duties under the Act may exclude or expel from any hearing or proceeding, any person, whether or not a party, who engages in violent, threatening, disruptive, abusive or unduly disrespectful behavior. An exercise of the board's power to control its proceedings under this rule may include prohibiting a representative from appearing before the board or one of its hearing examiners for a period of time designated by the board, reprimanding, suspending, or recommending referral for other disciplinary action. In the event of such exclusion or expulsion the hearing examiner, body or official shall explain on the record the reasons for the exclusion or expulsion and may either proceed in the absence of the excluded person or recess such proceeding and continue at another time, as may be appropriate. An exercise of this power by an agent of the board is subject to review by the board.

[11.21.1.18 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.19 SUBPOENAS:

A. Any party to a proceeding in which a notice of hearing has issued may file a written request with the director for the issuance of a subpoena for witness testimony or a subpoena for the production of documents to procure testimony or documents at the hearing. Deadlines for requesting subpoenas shall be established pursuant to the scheduling order agreed to by the parties. A subpoena request shall state the name and number of the case; identify the person(s) or documents sought; and state the general relevance to an issue in the case of the testimony or documents sought. The director may refuse to issue a subpoena where the request fails to meet these requirements, or where it appears to the director that the documents or testimony sought are not relevant to issues in the case. Otherwise, the director shall immediately issue a subpoena to the requesting party.

B. The director, a hearing examiner, or the board may issue subpoenas on the initiative of the director, hearing examiner or board, in which case a showing of relevance is not required, and a notice of hearing need not have been issued.

C. A person upon whom a subpoena is served may move to quash the subpoena. A motion to quash shall be filed according to the scheduling order, or as permitted by the board, director or the hearing examiner.

D. Any applicable witness and travel fees shall be the responsibility of the subpoenaing party.
[11.21.1.19 NMAC - N, 3/15/2004]

11.21.1.20 EXCHANGE OF DOCUMENTS AND LISTS OF WITNESSES: Pursuant to the scheduling order, each party shall serve upon all other parties all documents it intends to introduce at the hearing and a list of all witnesses it intends to call, along with a brief statement of the subjects about which each witness is expected to testify. No party may compel discovery other than as provided in this rule and Section 19 (subpoenas), except by a specific order of the board upon good cause shown. The hearing examiner may permit the admission in evidence of witness testimony or of documents not timely supplied under this rule if, in the hearing examiner's judgment, there was sufficient reason for the failure to timely supply the names or documents.
[11.21.1.20 NMAC - N, 3/15/2004]

11.21.1.21 OWNERSHIP AND CONFIDENTIALITY OF SHOWING OF INTEREST: Evidence of a showing of interest submitted to the director in support of a representation petition shall remain the property of the party submitting such evidence; shall not become property of the director or the board, shall be kept confidential by the director and the board; and shall be returned to the party that submitted the same upon the close of the case.
[11.21.1.21 NMAC - N, 3/15/2004]

11.21.1.22 BURDEN OF PROOF:

A. Except in unit clarification proceedings, no party shall have the burden of proof in a representation proceeding. Rather, the director in the investigatory phase or the hearing examiner shall have the responsibility of developing a fully sufficient record for a determination to be made, and may request any party to present evidence or arguments in any order. In a unit clarification proceeding, a party seeking any change in an existing appropriate unit, or in the description of such a unit, shall have the burden of proof and the burden of going forward with the evidence.

B. In a prohibited practices proceeding, the complaining party has the burden of proof and the burden of going forward with the evidence.
[11.21.1.22 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.23 MOTIONS AND RESPONSES TO MOTIONS: All motions and responses to motions, except those made at a hearing, shall be in writing and shall be served simultaneously upon all parties to the proceeding. All written motions shall be filed and served on all parties pursuant to the scheduling order. Motions and responses made at hearings may be made orally. If a party decides to file a response to a written motion, the response shall be filed and simultaneously served pursuant to the scheduling order or, if no deadline is set forth in the scheduling order or such has yet to be issued, within 10 days.
[11.21.1.23 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.24 SERVICE: Service of papers upon parties may be made by personal delivery by depositing in United States mail, first class postage prepaid, by facsimile ("fax") submission or by electronic submission and, by the next scheduled work day after sending a "fax" or electronic submission, either personally delivering the document or depositing it in first class mail, in which case the date of "fax" or electronic submission shall be the date of service. Each document served shall be accompanied by a signed certification stating the name and address of each person served and the date and method of service. The certification may be placed on the document served. The board may serve any document by electronic transmission to an attorney or party or its representative under this rule.
[11.21.1.24 NMAC - N, 3/15/2004; A, 10/16/2018]

11.21.1.25 TESTIMONY OF BOARD AGENTS: Agents of the board (including the director, investigators, hearing examiner, and board members), whether employees of the board or contractors, may not be compelled to testify in board proceedings.
[11.21.1.25 NMAC - N, 3/15/2004]

11.21.1.26 FORM OF PAPERS: All papers required or permitted to be filed with the director, a hearing examiner, or the board shall be on an official form prepared by the director, if available, or on eight and one-half by 11 white paper, double spaced. All papers shall show at or near the top of the first page the case name and, if available, the case number, and shall be signed.

[11.21.1.26 NMAC - N, 3/15/2004]

11.21.1.27 APPEAL OR REVIEW BY THE BOARD: Unless otherwise provided in these rules, appeal or request for review by the board shall be permitted only upon completion of proceedings before a hearing examiner or the director. Review by the board shall be based on the evidence presented or offered at the earlier stages of the proceeding, and shall not be de novo. An interlocutory appeal may be allowed with the permission of the board, director or the hearing examiner.

[11.21.1.27 NMAC - N, 3/15/2004]

11.21.1.28 DIRECTOR'S AUTHORITY: Except as otherwise provided in these rules, the director shall have authority to delegate to other board employees or outside contractors any of the authority delegated to the director by these rules. In every case where these rules or the Act provide for the appointment of a hearing examiner, the director or the board shall appoint the hearing examiner, and may appoint the director or a board member as the hearing examiner.

[11.21.1.28 NMAC - N, 3/15/2004]

11.21.1.29 CLOSING OF CASES: The director shall close a case following completion of all administrative and judicial proceedings related to the case. The director may, after notice to the parties, summarily close any case in which the moving party has taken no action within the previous six months, unless the delay is caused by factors beyond the party's control.

[11.21.1.29 NMAC - N, 3/15/2004]

11.21.1.30 PUBLICATION OF BOARD DECISIONS: At the times and in the manner prescribed by the board, the director shall reproduce multiple copies of board decisions, classify and index the decisions, and make tables and indexes of the decisions, as well as compilations of the decisions, available to the public.

[11.21.1.30 NMAC - N, 3/15/2004]

11.21.1.31 TIME LIMITS FOR BOARD ACTIONS: Whenever these rules set forth a period of time within which the board, the director, or a hearing officer must take any action, the board, director or hearing examiner may, for good cause, extend for a reasonable time, not to exceed 20 workdays for each extension, the date by which such action must be taken, unless the date is controlled by statute.

[11.21.1.31 NMAC - N, 3/15/2004]

11.21.1.32 MEETINGS BY TELEPHONE:

A. Pursuant to Subsection C of Section 10-15-1 NMSA, 1978, a member of the board may participate in a meeting of the public employee labor relations board by means of a conference telephone or other similar communications equipment in accordance with the provisions enumerated in Subsections B through E of 11.21.1.32 NMAC.

B. This rule shall only apply when it is otherwise difficult or impossible for the member to attend the meeting in person.

C. Each member participating by conference telephone must be identified when speaking.

D. All participants must be able to hear each other at the same time.

E. Members of the public attending the meeting must be able to hear any member of the board who speaks during the meeting.

[11.21.1.32 NMAC - N, 3/15/2004]

11.21.1.33 CHAIRPERSON SUCCESSION:

A. From among the three members appointed to the public employee labor relations board pursuant to Section 10-7E-8 NMSA 1978, the board shall appoint a chair to serve as the primary point of contact for the

board's staff, to conduct the regular and special meetings of the board in a manner consistent with parliamentary procedure. In like manner the board shall appoint a vice-chair to serve in the capacity of chair in its absence or inability to serve and to provide for automatic succession when the term of the chair is up.

B. The chair and the vice-chair shall serve in those capacities for a period of one year. Upon completion of the chair's one-year term, the vice-chair shall automatically become the chair and assume the duties of that office. The past chair shall resume regular duties as a member of the board and the third board member, who has not served as vice-chair within the preceding year, shall assume that role.

C. Initial appointments under this rule shall be by seniority based on the board members' appointment letters. In the event of a tie, the chair shall be determined from between the two most senior members either by acclamation or by a coin toss supervised by the board's director.

[11.21.1.33 NMAC – N, 2/11/2020]

History of 11.21.1 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records-state records center and archives:

PELRB 1, General Provisions, filed 3/18/1993.

History of Repealed Material: 11 NMAC 21.1, General Provisions (filed 6/24/1996), repealed as a result of the internal duration of rule, stated as 7/1/1999.

Other History:

PELRB 1, General Provisions, filed 3-18-93 was renumbered and replaced by 11 NMAC 21.1, General Provisions, filed 6/24/1996.

11 NMAC 21.1, General Provisions, filed 6/24/1996, was replaced by 11.21.1 NMAC, General Provisions, effective 3/15/2004.

TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 21 LABOR UNIONS/LABOR RELATIONS
PART 2 REPRESENTATION PROCEEDINGS

11.21.2.1 ISSUING AGENCY: Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM, 87120, (505) 831-5422.
[11.21.2.1 NMAC - N, 3/15/2004]

11.21.2.2 SCOPE: The scope of Part 2 of Chapter 21 applies to public employers, public employees and labor organizations as defined by the Public Employee Bargaining Act (Sections 10-7E-1 to 10-7E-26 NMSA 1978).
[11.21.2.2 NMAC - N, 3/15/2004]

11.21.2.3 STATUTORY AUTHORITY: Authority for Part 1 of Chapter 21 is the Public Employee Labor Relations Act, Sections 1 through 26 (10-7E-1 to 10-7E-26 NMSA 1978).
[11.21.2.3 NMAC - N, 3/15/2004]

11.21.2.4 DURATION: Permanent.
[11.21.2.4 NMAC - N, 3/15/2004]

11.21.2.5 EFFECTIVE DATE: March 15, 2004, unless otherwise cited at the end of the section.
[11.21.2.5 NMAC - N, 3/15/2004]

11.21.2.6 OBJECTIVE: The objective of Part 2 of Chapter 21 is to establish a standard for uniform petition filings in an easily understood form in which all pertinent information is given to the public employee labor relations board to determine an appropriate bargaining unit.
[11.21.2.6 NMAC - N, 3/15/2004]

11.21.2.7 DEFINITIONS: [RESERVED]
[11.21.2.7 NMAC - N, 3/15/2004]

11.21.2.8 COMMENCEMENT OF CASE: A representation case is commenced by filing a representation petition with the director on a form prescribed by the director. The form shall include, at a minimum, the following information: the petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any; the name, address and phone number of the public employer or public employers whose employees are affected by the petition; a description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit; the geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit; a statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone number of the labor organization that is party to such agreement; a statement of what action the petition is requesting. In addition, a petition seeking a certification or decertification election, shall be supported by a thirty percent showing of interest in the existing or proposed bargaining unit. A petition shall contain a signed declaration by the person filing the petition that its contents are true and correct to the best of his or her knowledge and, in the case of a decertification petition that the filer is a member of the labor organization to whom the decertification petition applies.
[11.21.2.8 NMAC - N, 3/15/2004; A, 2/28/2005; A, 6/14/2013; A, 7/1/2020]

11.21.2.9 SERVICE OF PETITION: Upon filing a petition, the petitioner shall serve it upon the employer and any incumbent labor organization. Within 10 days of the filing of a petition, the director shall cause notice of the filing of the petition to be sent to any other interested party.
[11.21.2.9 NMAC - N, 3/15/2004]

11.21.2.10 FILING OF COLLECTIVE BARGAINING AGREEMENT: Along with a representation petition, the petitioner shall file with the director a copy of any collective bargaining agreement, then in effect or recently expired, covering any of the employees in the petitioned-for unit.
[11.21.2.10 NMAC - N, 3/15/2004]

11.21.2.11 SHOWING OF INTEREST: With the petition and at the same time the petition is filed, the petitioner shall deposit with the director a showing of interest consisting of signed, dated statements, which may be in the form of cards or a petition, by at least thirty percent of the employees in the proposed unit stating, in the case of a petition for a certification election, that each such employee wishes to be represented for the purposes of collective bargaining by the petitioning labor organization, and, in the case of a petition for a decertification election, that each such employee wishes a decertification election. Each signature shall be separately dated. So long as it meets the above requirements, a showing of interest may be in the form of signature cards or a petition or other writing, or a combination of written forms. No showing of interest need be filed in support of a petition for amendment of certification or unit clarification.
[11.21.2.11 NMAC - N, 3/15/2004]

11.21.2.12 INFORMATION REQUESTED OF PARTIES:

A. Within 10 days of the filing of a representation petition, the director shall by letter request of any party that appears to have an interest in the proceeding, including any public employees involved and any incumbent labor organizations, its position with respect to the appropriateness of the bargaining unit petitioned for; a statement of any issues of unit inclusion or exclusion that the party believes may be in dispute, and any other issue that could affect the outcome of the proceeding.

B. From any public employer involved, the director, within 10 days of the filing of a representation petition, shall also request a list of the employees who would be eligible to vote if the petitioned-for unit were found to be appropriate, based on the payroll period that ended immediately preceding the filing of the petition. The public-employer shall be instructed to file such a list within 10 days of the director's request. The board shall make the list available to the parties.

[11.21.2.12 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.13 INITIAL INVESTIGATION OF PETITION: After a petition has been filed, the director shall investigate the petition. The investigation shall include the following steps and shall be completed within 30 days of the filing of the petition.

A. The director shall check the showing of interest (if applicable) against the list of eligible employees, in the proposed unit filed by the public employer to determine whether the showing of interest has been signed and dated by a sufficient number of employees and that the signatures are sufficiently current. If signatures submitted for a showing of interest meet the requirements set forth in these rules, they shall be presumed valid unless the director is presented with clear and convincing evidence that they were obtained by fraud, forgery or coercion. In the event that evidence of such fraud, forgery or coercion is presented to the director, the director shall investigate the allegations as expeditiously as possible and shall keep the showing of interest confidential during the investigation. The director shall dismiss any petition supported by an improper or insufficient showing of interest, consistent with Section 23 (opportunity to present additional showing), and shall explain in writing the basis of the dismissal. The director's determination as to the sufficiency of a showing of interest is an administrative matter solely within the director's authority and shall not be subject to questions or review.

B. The director shall determine the facial validity of the petition, including the facial appropriateness of the petitioned-for unit and may request the petitioner to amend a facially inappropriate petition. In the absence of an appropriate amendment, the director shall dismiss a petition asking for an election in, or a clarification to, a facially inappropriate unit, or that is otherwise facially improper, in which case he shall explain his reasons in writing.

C. The director shall determine whether there are significant issues of unit scope, unit inclusion or exclusion, labor organization or public employer status; a bar to the processing of the petition; or other matters that could affect the proceedings. The director shall make the determination pursuant to the provisions of Subsection C of Section 10-7E-13 and Section 10-7E-24 NMSA 1978, of the Public Employee Bargaining Act.

[11.21.2.13 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.14 SETTLEMENT/STIPULATION OF UNIT ISSUES: If the director finds that there are significant issues affecting the proceeding that are or may be in dispute, the director shall confer with all parties to attempt to resolve the issues and to enter into a written stipulation stating the agreement. Any such stipulation shall be subject to approval of the board upon review, which may be requested by the board or sought by the director.

[11.21.2.14 NMAC - N, 3/15/2004]

11.21.2.15 NOTICE OF FILING OF PETITION: Unless the director has determined that there is need for a representation hearing pursuant to Section 19, then within 30 days of receipt of a petition, the director shall issue a notice stating that the petition has been filed, naming the petitioner, stating the unit petitioned-for, and stating the procedures for intervention as set forth in Section 16, below, including the date by which an intervenor must file its petition and showing of interest. The director shall issue sufficient copies of the notice to each employer involved, and each such employer shall post such copies in places where notices to employees are normally posted. The notices shall remain posted continuously for at least five days.

[11.21.2.15 NMAC - N, 3/15/2004]

11.21.2.16 INTERVENTION:

A. At any time within 10 days after the employer's posting of the notice of filing of petition, a labor organization other than the petitioner may file with the director an intervenor's petition seeking to represent some or all of the employees in the petitioned-for unit. The intervenor's petition shall contain the same information set forth in Section 8 above.

B. The intervenor's petition shall be accompanied by a showing of interest showing that at least thirty percent of the employees in the petitioned-for unit wish to be represented by the intervenor for purposes of collective bargaining. The showing of interest shall otherwise meet the requirements set forth in Section 11, above.

C. An intervenor that has presented a sufficient showing of interest in the unit found to be appropriate shall be placed on the ballot and shall be considered a party to the proceeding.

D. Upon application, an incumbent labor organization shall have automatic intervenor status if it is not the petitioner, pursuant to the provisions of Subsection B of Section 10-7E-24 NMSA 1978, of the Public Employee Bargaining Act.

[11.21.2.16 NMAC - N, 3/15/2004]

11.21.2.17 CONSENT ELECTION: Where the parties are in agreement on all issues required to be resolved in order to proceed to an election, and the director is satisfied that the issues are so resolved, including unit scope, the director shall draw up a consent election agreement to be signed by all parties and by the director. Consent election agreements are subject to board review and may be set aside by the board on its own initiative. If a consent election agreement is not set aside at the board's next regular meeting or the following regular meeting, the director shall proceed to an election on the basis of the agreement.

[11.21.2.17 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.18 INVESTIGATION, REPORT, NOTICE OF HEARING:

A. In the absence of a consent election agreement, the director shall investigate the outstanding issues and shall issue and serve a report and direction of election, a report and dismissal of petition, or a notice of hearing within 45 days of the posting of the notice of filing of petition. If there is a dispute between the parties regarding unit composition, or the director is satisfied that the issues can best be resolved in a hearing, the director shall issue and serve a notice of hearing without first conducting a further investigation. A hearing concerning unit composition, where the parties are in dispute on that issue, shall be set for a date not later than 30 days following the director's notice of hearing or the director's receipt of notice of the dispute, whichever is sooner.

B. A report and direction of election or a report and dismissal of petition shall be subject to board review under the procedures set forth in Section 22 below. The issuance of a notice of hearing shall not be subject to board review.

[11.21.2.18 NMAC - N, 3/15/2004]

11.21.2.19 REPRESENTATION HEARING:

A. In the absence of a consent election agreement, and where there are significant unit issues that, in the director's view, should be resolved in a hearing, the director shall issue a notice of hearing.

B. Except in cases where the board appoints the hearing examiner, the director shall appoint the hearing examiner, and may appoint himself or herself to serve as hearing examiner.

C. The hearing examiner shall take evidence sufficient to make a full and complete record on all unresolved unit issues and any other issues necessary to process the petition. Details such as the time, date and place of the election, and whether there will be manual or mail ballots or a combination, shall not be resolved through the hearing process, but shall be resolved instead through the pre-election conference process described in Section 25.

D. The hearing examiner may examine witnesses, call witnesses, and call for introduction of documents.
[11.21.2.19 NMAC - N, 3/15/2004]

11.21.2.20 BRIEFS: If any party requests permission to file a post-hearing brief, the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than 10 days following the close of the hearing. Briefs shall be filed with the director and copies shall be served on all parties.
[11.21.2.20 NMAC - N, 3/15/2004]

11.21.2.21 HEARING EXAMINER REPORTS: The hearing examiner shall issue his or her report following the close of the hearing. Except in extraordinary circumstances, which shall be set forth in the report, the report shall be issued no longer than 15 days following the close of the hearing or the submission of post-hearing briefs, whichever is later. The report shall make findings of fact, conclusions of law, and recommendations for the determination of issues, and shall adequately explain the hearing examiner's reasoning. The hearing examiner shall serve the report on all parties and the board.
[11.21.2.21 NMAC - N, 3/15/2004]

11.21.2.22 BOARD REVIEW OF HEARING EXAMINER REPORTS AND DIRECTOR DECISIONS:

A. Within 10 days after service of the hearing examiner's report, or, in a case where no hearing has been held, within 10 days after the issuance of a director's decision, any party may file a request for board review of the hearing examiner's or the director's recommended disposition. The request for review shall state the specific portion of the hearing examiner's or director's recommended disposition to which exception is taken and the factual and legal basis for such exception. The request may not rely on any evidence not presented to the hearing examiner or director. The request must be served on all other parties.

B. Within 10 days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

C. Whether or not a party has filed a request for review, the board, within 60 days, shall review any recommended disposition regarding the scope of a bargaining unit made by the director or a hearing examiner. In addition, the board shall review any other issue properly raised by a party in a request for review. The board shall conduct its review on the basis of the existing record and may, in its discretion, hear oral argument.

D. Within 60 days following review, the board shall issue its decision ordering an election, dismissing the petition, setting a further hearing, or otherwise disposing of the case. The board may adopt or incorporate in and attach to its decision all or any portion of the hearing examiner's report or director's decision.
[11.21.2.22 NMAC - N, 3/15/2004]

11.21.2.23 OPPORTUNITY TO PRESENT FURTHER SHOWING OF INTEREST:

A. When the director finds that the petitioner or an intervenor has submitted an insufficient showing of interest in the unit petitioned for, the director shall notify the petitioner or intervenor, and that party shall have the opportunity to submit an additional showing of interest. The director shall then review the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention.

B. In the event that the director, hearing examiner or board determines that a unit other than the unit petitioned for is appropriate and it appears to the board or director that the showing of interest filed by the petitioner or an intervenor is insufficient in the unit found appropriate the director shall notify the petitioner or intervenor and give such party a reasonable amount of time in which to file an additional showing. If the party fails to file a sufficient showing within that time, the director shall dismiss the petition or deny intervenor status.
[11.21.2.23 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.24 ELIGIBILITY TO VOTE:

A. Employees in the bargaining unit shall be eligible to vote in the election if they were employed during the last payroll period preceding date of the consent election agreement or the direction of election issued by the director or the board, and are still employed in the unit on the date of the election.

B. Employees in the bargaining unit who are eligible to vote but who will be absent on the day of voting because of hospitalization, temporary assignment away from normal post of duty, leave of absence, vacation

at a location more than 50 miles distant from the polling place, or other legitimate cause, may request an absentee ballot from the director. Except for good cause shown, such a request must be received by the director at least 10 days before the election, in which case the director, after preliminarily determining the employee's eligibility to vote, shall provide the employee with a ballot to be submitted to the director by mail. To be counted, an absentee ballot must be received by the director at least one day before the ballot count. The director shall establish procedures to permit an absentee ballot to be challenged, as provided in Section 30, below.

C. The employer or employer's whose employees comprise the bargaining unit shall submit to the director and to all other parties a list of all employees eligible to vote in the election no later than 10 days before the commencement of the election balloting. Employees whose names do not appear on the list but who believe they are eligible to vote may cast ballots through the challenged ballot procedure set forth in Section 30, below.
[11.21.2.24 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.25 PRE-ELECTION CONFERENCE: At a reasonable time at least 15 days before the election, the director shall conduct a pre-election conference with all parties to resolve such details as the polling location(s), the use of manual, electronic, or mail ballots the hours of voting, the number of observers permitted, and the time and place for counting the ballots. The director shall notify all parties by mail (and email if available) of the time and place of the pre-election conference, at least five days in advance of the conference. The conference may proceed in the absence of any party.

A. The director will attempt to achieve agreement of all parties on the election details, but in the absence of agreement, shall determine the details. In deciding the polling location(s) and the use of manual mail or electronic participation in the election by employees in the bargaining unit there shall be a strong preference for on-site balloting.

B. The parties may stipulate to a consent election agreement without the necessity of a pre-election conference subject to approval of its terms by the director, in which case the requirement for a pre-election conference shall be waived.

[11.21.2.25 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020; A, 7/1/2020]

11.21.2.26 NOTICE OF ELECTION:

A. The director shall issue and serve on the parties a notice of election setting forth all of the details of the election, as described in Section 25 above, no later than 10 days before the election. The notice of election shall also describe the bargaining unit whose members are eligible to vote and shall describe the challenged ballot procedure. The notice shall include a sample ballot.

B. The director shall provide a sufficient number of copies of the notice of election to each employer whose employees are eligible to vote so that the employer may post a notice of election in all lounges or common areas frequented by unit employees and in all places where notices to employees are commonly posted. The employer shall post the notices in all such areas at least 10 days before the election and shall take reasonable measure to assure that they are not removed, covered, altered or defaced.

[11.21.2.26 NMAC - N, 3/15/2004]

11.21.2.27 BALLOTS AND VOTING:

A. All voting shall be by secret ballot prepared by the director, position on the ballot shall be determined randomly. Ballots in an initial election shall include a choice of "no representation."

B. All elections shall be conducted by the director, whether electronically, by mail in ballots or on-site elections, subject to the provisions of 11.21.1.28 NMAC regarding the director's authority to delegate duties.

C. Any voter who arrives at a polling area before the polls close will be permitted to vote.

D. Public employers whose employees are eligible to vote in an election shall allow their employees in the voting unit sufficient time away from their duties to cast their ballots and shall allow their employees who have been selected as election observers sufficient time away from their duties to serve as observers. This rule does not impose on public employers an obligation to change the work schedules of employees to accommodate voting hours.

[11.21.2.27 NMAC - N, 3/15/2004; A, 2/11/2020; A, 7/1/2020]

11.21.2.28 ELECTIONEERING: No electioneering shall be permitted within 50 feet of any room in which balloting is taking place.

[11.21.2.28 NMAC - N, 3/15/2004]

11.21.2.29 OBSERVERS: Each party shall be entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of ballots. The director has complete discretion to determine the number of observers. Observers shall not be supervisory or managerial employees or labor organization employees. However, representatives of the parties in addition to the observers may observe the counting of ballots.
[11.21.2.29 NMAC - N, 3/15/2004]

11.21.2.30 CHALLENGED BALLOTS:

A. Any party to an election, through its observer, or the election supervisor, may challenge the eligibility to vote of any person who presents himself or herself at the polls, and shall state the reason for the challenge. The director shall challenge any voter whose name does not appear on the list of employees eligible to vote.

B. The director shall furnish “challenge envelopes.” On the outside of each challenge envelope, the director shall write the name and job classification of the challenged voter, the name of the party making the challenge, and the reason for the challenge.

C. Following the voting and before the votes are counted, the director shall attempt to resolve the eligibility of challenged voters by agreement of the parties. The ballots of challenged voters who are agreed eligible shall be mixed with the other ballots and counted.

D. Challenged ballot envelopes containing unresolved challenged ballots shall not be opened and the challenges shall not be investigated unless, after the other ballots are counted, the challenged ballots could be determinative of the outcome of the election.

E. If the challenged ballots could be determinative of the outcome of the election, the director shall declare the vote inconclusive; shall, as soon as possible, investigate the challenged ballots to determine voter eligibility; and shall issue a report thereon or a notice of hearing within 15 days of the election. Any party may request board review of the director’s report, following the procedures set forth in Section 22 above.

F. Following resolution of determinative challenged ballots, the director shall count the ballot of voters found to be eligible, adding the results of the earlier count and issuing a revised tally of ballots.

[11.21.2.30 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.31 TALLY OF BALLOTS: Immediately following the counting of ballots, the election supervisor shall serve a tally of ballots upon one representative of each party. The tally shall show the number of votes cast for each labor organization listed on the ballot, the number of votes cast for no representation, the number challenged ballots, and the percentage of employees in the unit who cast ballots. The tally shall also state whether the results are conclusive, and, if so, what the conclusive vote is. If the tally shows that fewer than forty percent of the employees in the unit voted, or that the choice of “no representation” received fifty percent or more of the valid votes cast, then the tally shall reflect that no collective bargaining representation was selected.

[11.21.2.31 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.32 RUN-OFF ELECTIONS: In an election where there are three or more choices on the ballot, if no ballot choice receives a majority of the valid votes cast, and at least forty percent of eligible voters voted, the director shall set a run-off election in which voters will be permitted to cast ballots for the two choices that received the highest number of votes. A new tally shall be issued and served following the counting of the votes of a run-off election. A run-off election must be conducted within the 15 day statutory period following completion of the initial election.

[11.21.2.32 NMAC - N, 3/15/2004]

11.21.2.33 CERTIFICATION: If no objections are filed pursuant to Section 34, below, then the director shall issue as may be appropriate either a certificate showing the name of the labor organization selected as the exclusive representative and setting forth the bargaining unit it represents, or a certification of results, showing that no labor organization was selected as bargaining representative. The results of each election shall be reviewed by the board and appropriate action taken at the next regularly scheduled meeting of the board after the objection period following the election.

[11.21.2.33 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.34 OBJECTIONS: Within five days following the service of a tally of ballots, a party may file objections to conduct affecting the result of the election. The director shall, within 30 days of the filing of such objections, investigate the objections and issue a report thereon. Alternatively, the director may schedule a hearing

on the objections within 30 days of the filing of the objections. A determination to hold a hearing is not reviewable by the board and shall follow the same procedures set forth in Subsections B, C and D of Section 19, Section 20 and Section 21 above. A party adversely affected by the director's or hearing examiner's report may file a request for review with the board under the same procedures set forth in Section 22, above. If the director, hearing examiner or board finds that the objections have merit and that conduct improperly interfered with the results of the election, then the results of the election may be set aside and a new election ordered. In that event, the director in his or her discretion may retain the same period for determining eligibility to vote as in the election that was set aside, or may establish a new eligibility period for the new election.

[11.21.2.34 NMAC - N, 3/15/2004]

11.21.2.35 AMENDMENT OF CERTIFICATION: A petition for amendment of certification may be filed at any time by an exclusive representative or an employer to reflect such a change as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. The director shall dismiss such a petition within 30 days of its filing if the director determines that it raises a question concerning representation and the petitioner may proceed otherwise under these rules. If the director finds sufficient facts to show that the amendment should be made, after giving all parties notice and an opportunity to submit their views, the director shall issue an amendment of certification within 30 days of the filing of the petition. The director's decision dismissing the petition or issuance of amended certification may be appealed to the board pursuant to the procedures set out in Section 22, above.

[11.21.2.35 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.36 CERTIFICATION OF INCUMBENT BARGAINING REPRESENTATIVE STATUS: A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 shall be recognized as the exclusive representative of the unit. Such recognition shall not be affected by a local labor board ceasing to exist pursuant to Section 10-7E-10 NMSA 1978 (2020). Such labor organization may petition for declaration of bargaining status under Subsection B of Section 10-7E-24 NMSA 1978 (2003).

[11.21.2.36 NMAC - N, 3/15/2004; A, 7/1/2020]

11.21.2.37 UNIT CLARIFICATION:

A. Except as provided in Section 24(A) of the Act, [a unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly established classification](#); where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or [where](#) a merger or realignment of previously existing bargaining units represented by the same labor organization [occurs](#); ~~either~~ [Either](#) the exclusive representative or the employer may file with the director a petition for unit clarification. Such a petition seeking realignment of existing units into horizontal units may be filed and processed only when it relates to state employees.

B. Upon the filing of a petition for unit clarification, the director shall investigate the relevant facts, and shall either set the matter for hearing or shall issue a report recommending resolution of the issues within thirty (30) days of the filing of the petition. In the director's investigation or through the hearing, the director or hearing examiner shall determine whether a question concerning representation exists and, if so, shall dismiss the petition. In such a case, the petitioner may proceed otherwise under these rules.

C. If the director or hearing examiner determines that no question concerning representation exists and that the petitioned-for clarification is justified by the evidence presented, the director or hearing examiner shall issue a report clarifying the unit within 30 days of the filing of the petition if no hearing is determined necessary, or within 30 days of the hearing if a hearing is determined necessary. If the director determines that a question concerning representation exists, the petition shall be dismissed.

D. A director or hearing examiner determination on a unit clarification petition shall be appealable to the board under the same procedures set forth in Section 22, above.

[11.21.2.37 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020]

11.21.2.38 ACCRETION:

A. The exclusive representative of an existing collective bargaining unit, may petition the board to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit,

who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate.

B. If the number of employees in the group sought to be accreted is less than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petitioner may proceed by filing a unit clarification petition under these rules. Such a unit clarification petition to be processed, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit. No group of employees may be accreted to an existing unit without an election if the board determines that such group would constitute a separate appropriate bargaining unit.

C. If the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion raises a question concerning representation, and the petitioner may proceed only by filing a petition for an election under these rules. Such a petition, in an accretion situation, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit.

[11.21.2.38 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.39 VOLUNTARY RECOGNITION:

A. A labor organization representing the majority of employees in an appropriate collective bargaining unit and a public employer, after a petition for certification has been filed, may enter into a voluntary recognition agreement in which the employer recognizes the labor organization as the exclusive representative of all of the employees in the unit. Such petition shall be accompanied by a showing of majority support, which shall be verified in accordance with the procedures of Section 11, above.

B. Prior to board approval of any voluntary recognition, the director shall post notice of filing of petition in the manner provided for in Section 15, above. The director shall also give notice to any individuals or labor organizations that register with the director to be informed of such petitions.

C. If an intervenor does not file a petition for intervention within 10 days then the board shall consider the petition for approval of the voluntary recognition if accompanied by consent of the employer.

D. The board shall treat a voluntary recognition relationship so established and approved the same as a relationship established through board election and certification, unless the board finds the agreed-to bargaining unit to be inappropriate. In that event, the board may require the filing and processing of a petition as provided for in these rules, and the conduct of an election, before recognizing the relationship.

E. If an intervenor files a proper petition pursuant to Section 16 above, within the 10 day time period, then the board may not approve a voluntary recognition, and the director shall proceed in the manner set forth for representation petitions as provided in Section 10 to 14 and 17 to 34 above.

[11.21.2.39 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020]]

11.21.2.40 PETITION WITHDRAWAL: The petitioner in a representation proceeding may request permission of the director to withdraw the petition at any time prior to an initial election. The director has discretion to grant or deny a withdrawal request only after soliciting the positions of all parties.

[11.21.2.40 NMAC - N, 3/15/2004; A, 7/1/2020]

11.21.2.41 SEVERANCE PETITION: A severance petition is a representation petition filed by a labor organization that seeks to sever or slice a group of employees who comprise one of the occupational groups listed in Section 10-7E-13 NMSA from an existing unit for the purpose of forming a separate, appropriate unit. It must be accompanied by a thirty percent showing of interest among the employees in the petitioned-for unit. It may be filed no earlier than 90 days and no later than 60 days before the expiration date of a collective bargaining agreement or may be filed at any time after the expiration of the third year of a collective bargaining agreement with a term of more than three years.

[11.21.2.41 NMAC - N, 3/15/2004]

11.21.2.42 DISCLAIMER OF INTEREST: Any labor organization holding exclusive recognition for a unit of employees may disclaim its representational interest in those employees at any time by submitting a letter to the PELRB and the employer disclaiming any representational interest in a unit for which it is the exclusive representative. Upon receipt of a letter disclaiming an interest under this rule, the board shall cause to be posted in a

place or places frequented by employees in the affected bargaining unit, a notice that the union has chosen to relinquish representation of the employees.
[11.21.2 NMAC – N, 2/11/2020]

History of 11.21.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records-state records center and archives:
PELRB 2, Representation Proceedings, filed 3/18/1993.

History of Repealed Material: 11 NMAC 21.2, Representation Proceedings (filed 6/24/1996), repealed as a result of the internal duration of rule, stated as 7/1/1999.

Other History:

PELRB 2, Representation Proceedings, filed 3/18/1993 was renumbered and replaced by 11 NMAC 21.2, Representation Proceedings, filed 6/24/1996.

11 NMAC 21.2, Representation Proceedings, filed 6/24/1996, was replaced by 11.21.2 NMAC, Representation Proceedings, effective 3/15/2004.