



State of New Mexico
Educational Retirement Board

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**MINUTES OF THE
NEW MEXICO EDUCATIONAL RETIREMENT BOARD OF TRUSTEES
SPECIAL MEETING**

March 27, 2024

1. a. ROLL CALL: QUORUM PRESENT

A Special Meeting of the New Mexico Educational Retirement Board was called to order on this date at 10:00 a.m. via GoToWebinar.

Members Present:

Mr. H. Russell Goff, Chair
Ms. Mary Lou Cameron, Vice Chair
Mr. Larry Magid, Secretary
Hon. Laura M. Montoya, New Mexico State Treasurer
Mr. Max Baca
Dr. Donald W. Duszynski
Dr. Matías Fontenla

Members Excused:

Mr. Antonio Ortiz
Mr. Mario Suazo

Staff Present:

Mr. David Archuleta, Executive Director
Mr. Randall Cherry, General Counsel
Mr. Lawrence Esquibel, Deputy Director
Mr. Bob Jacksha, Chief Investment Officer
Ms. Jennifer Jacques, Records Custodian
Mr. Jacob Maule, Deputy General Counsel
Ms. Ariana Wakefield, Executive Assistant
Ms. Jenna Vigil, Benefit Services Bureau Chief
Ms. Sandra Alva, General Ledger Manager
Ms. Selina Herrera, School Reporting Group

Others Present:

Ms. Judith Beatty, Board Recorder

b. Approval of Agenda

Dr. Duszynski moved approval of the agenda. Treasurer Montoya seconded the motion, which passed unanimously.

c. Introduction of Guests

Chairman Goff welcomed guests.

2. PROPOSED RULE CHANGES TO RETURN-TO-WORK RULE & LOCAL ADMINISTRATIVE UNIT PENALTIES: DAVID ARCHULETA, EXECUTIVE DIRECTOR; RANDALL CHERRY, GENERAL COUNSEL

Mr. Archuleta summarized the proposed rule changes:

- Retains the true violations and the penalties associated with them. If someone retires and doesn't sit out the statutorily required period to come back to work and returns to work without approval, the NMERB would recoup payments made for the period of ineligibility. In instances where member returns to the classroom to substitute teach or help out part-time or help out at a concession stand, etc., and fails to fill out an application as required, the NMERB would send them a certified letter notifying them that they have 30 days in which to come into compliance. Failure to come into compliance would result in suspension of their pension. The NMERB will no longer go back and recoup the amount paid during the period of ineligibility regardless of the time of ineligibility.
- Members who are currently participating in a return-to-work program must decide at the beginning of each fiscal year which return to work program they want to participate in. They will no longer be allowed to change programs any time and multiple times during the year.
- A fine will be assessed against an LAU for each failure to correctly include or identify an individual as employed or to miscategorize an employee when submitting a work report reflecting payment of wages. First failure: \$500; second failure, \$1,000; third and each subsequent failure: \$1,500.

Mr. Archuleta said there was some discussion about imposing fines of \$5,000, \$10,000 and \$15,000; however, this would be a substantial burden on some of the smaller organizations while also placing an administrative burden on NMERB staff in managing the appeals process. Each appeal would cost the NMERB about \$2,500. The NMERB wants the fine to be meaningful, but also something that an organization can afford to pay.

Mr. Baca suggested that the draft Notice of Proposed Rulemaking include something about each LAU being required to have an internal return to work policy.

Mr. Baca suggested that paragraph I under 2.82.5.15 include a requirement that any mailed application be sent by certified mail. Treasurer Montoya said she spotted this omission in E, F and G in the same section but said she understands that the attorneys may create a separate section requiring certified mail.

Mr. Baca said he had suggested increasing the penalties for the LAUS to \$5,000, \$10,000 and \$15,000 respectively to make sure the NMERB gets the attention of the LAU in violation. The language also states that the Executive Director has the discretion to waive penalties. He also suggested requiring the chair of the LAU's governing board to request any waiver.

Treasurer Montoya expressed concern that the use of the word "termination" in Section 2.82.5.11 makes it sound like the employee has been fired. She asked if another word could be used.

Mr. Cherry responded that the word is used consistently throughout the rules and statutes.

Treasurer Montoya said it would be helpful to add a definition of "terminate" under Definitions. She also suggested defining "LAU" and "fiscal year" in that section.

Treasurer Montoya suggested that, in addition to each LAU being required to create and maintain a return-to-work policy [paragraph K] it also be required to distribute it to their employees. Mr. Baca said the language could be amended to say "create, maintain, and distribute" or "publicize." Treasurer Montoya agreed.

Referring to Part 9 (Administrative Unit Reports and Remittances), Section 2.82.9.8(3), Treasurer Montoya cited the sentence stating that charges for late contributions would be calculated at a rate equal to the State Treasurer's overnight investment program rate plus one percent. She commented that the rates were very low when this language was created 20 years ago, but now the rate is very high. With the additional one percent, this amounts to more than six percent being assessed daily, which is punitive. She asked when the last violation was, and what was the amount assessed. She added that the overnight rate changes every day, and asked if the system allows for that.

Ms. Herrera responded that they update the rate daily for the month they are processing.

Ms. Herrera responded that the last penalty for a late payment was about \$175, but this is based on the amount of the deposit, so the penalties are usually from the smaller charter schools. Their deposits aren't nearly as significant as APS or NMSU, for example, which are in the millions. She stated that there aren't many schools that pay after the 15th. If they do, there is usually a very good reason for it. There are only a couple of violations a month, if that, and the penalty is usually around \$200.

Treasurer Montoya asked Ms. Herrera to provide her with a list of the violators over the previous three months and how much penalty was paid.

Treasurer Montoya stated that she thought the one percent should be removed altogether from the penalty, and that the overnight rate should be based on whatever it was for the 15th of the month of the violation.

Mr. Archuleta noted that the proposed changes have been focused on return to work. He suggested that the discussion today focus on that, with the intent to come back later to focus on other items.

Treasurer Montoya responded that her concern is that the language in question refers to her office, and she doesn't want to be part of the problem because a lot of people don't know what the overnight rates are each day.

Referring to Section 2.82.9.8(4), Treasurer Montoya asked if the penalties per failure are per person. Mr. Archuleta responded that each report would be its own failure. Treasurer Montoya suggested that this be clarified to avoid any possible pushback.

Treasurer Montoya suggested that the penalties that are paid each month be applied for school training or for something else connected to educating people about return to work.

Chairman Goff said Ms. Cameron suggested making the following change in the second paragraph of the Summary of Proposed Amendments: "...notifying the retiree of their his or her failure to file an application." [Mr. Baca reminded board members that the language throughout the document has been amended to be gender neutral.]

Chairman Goff stated the Superintendents Associations supports the \$500, \$1,000 and \$1,500 penalties. He was not sure the Association would support increasing the penalties as suggested.

Treasurer Montoya did said she did not support increasing the penalties,

especially if violations could not occur after the implementation of ERB's new pension administration system.

Mr. Cherry noted that, in order to go live on July 1, the proposed changes have to be published by April 11.

Dr. Fontenla asked if language should be included regarding a member's right to appeal.

Dr. Fontenla commented that, assuming these proposed changes solve the return-to-work problems that the NMERB has been dealing with up to now, he thought the next issue where the NMERB could be penalizing and suspending members would be around the \$15,000 program, where someone loses track and then ends up being in violation. He wondered if this could be addressed in advance to avoid the prospect of this happening. Perhaps the \$15,000 could be moved to a higher number or someone could be given a 30-day window, etc.

Mr. Archuleta responded that most of the violations that occurred last year were people who went over the \$15,000. Only a handful failed to submit an application and appealed to the board because they forgot about it or didn't know about it. He said the \$15,000 is set by statute so can't be increased. The NMERB isn't proposing to change anything about the violations that occur for someone who goes over the \$15,000, but it would still go back and collect the dollars paid during the period of ineligibility. He said the members know ahead of time because the NMERB warns them as they approach the \$15,000. Previously, they were warned as they approach \$10,000, and that has been cut back to \$7,500. He pointed out that people who go into that program aren't making contributions to the fund, so that is harmful to the Trust and this bounces up against the NMERB's fiduciary responsibility.

Treasurer Montoya asked how people receive notice as they approach \$7,500. Mr. Archuleta said this is a business process and not part of a rule. It is triggered in Payroll. Treasurer Montoya suggested that adding this to the rule would reflect that the NMERB is doing its due diligence.

Treasurer Montoya moved to proceed with the recommended draft with the following amendments:

- **Page 4, reword paragraphs beginning with "A retiree who fails to comply" and "A retiree who is not qualified."**
- **Page 6 (Title 2/Public Finance), add definitions of "LAU," "terminate," and "fiscal year."**
- **Page 5, under Return to Work Program, add "certified" to mail for notice. Add appeal process in this portion as well as on page 11.**

Mr. Archuleta said the NMERB isn't proposing to change anything regarding the appeal process, which applies to all violations, which people are still eligible to appeal. Treasurer Montoya said Dr. Fontenla had recommended putting it in the document so people know that the appeal process exists, since there was a time when people didn't know they had the right to appeal or weren't told about it.

Chairman Goff asked if Mr. Baca's suggestions were included in the motion. Treasurer Montoya responded that she believed so. She did not include "repeal and replace."

Treasurer Montoya said that, as part of the amendment, a potential recommendation to identify the notice that Mr. Archuleta referred to, if counsel indicates it can apply.

- **Page 13, clarifying language under Employee Reports (2.82.8.c.4) that the failure is per month and not per application.**
- **Page 13, removing the one percent in 2.82.8.c.4.**
- **Making all language gender neutral.**

Mr. Baca seconded the motion, which passed unanimously under roll call vote:

For: Chairman Goff; Vice Chair Cameron; Mr. Magid; Treasurer Montoya; Mr. Baca; Dr. Duszynski; Dr. Fontenla.

Mr. Archuleta stated that the changes recommended will be incorporated and circulated. A hearing will be scheduling following a survey of board members.

3. NEXT MEETING: FRIDAY, APRIL 26, 2024 - ALBUQUERQUE

4. ADJOURN: 11:20 a.m.



Russell Goff, Chairman

ATTEST:



Larry Magid, Secretary