

# CHAPTER 10

## PUBLIC OFFICERS AND EMPLOYEES

### ARTICLE 1

#### QUALIFICATIONS

##### **10-1-1. [Ineligibility for recess appointment after rejection by senate.]**

No person, whose nomination or appointment to any office in the state shall have been rejected by the senate, shall be eligible to hold office under recess appointment.

**History:** Laws 1915, ch. 61, § 1; C.S. 1929, § 96-138; 1941 Comp., § 10-101; 1953 Comp., § 5-1-1.

**Cross-references.** - For constitutional provision relating to qualifications to hold office, see N.M. Const., art. VII, § 2.

For employment of handicapped persons, policy of the state, see 28-10-11 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 16 to 19.

##### **10-1-2. [Person convicted of crime; ineligibility for office; exception.]**

No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in this state.

**History:** Laws 1912, ch. 44, § 1; Code 1915, § 3951; C.S. 1929, § 96-102; 1941 Comp., § 10-102; 1953 Comp., § 5-1-2.

**Cross-references.** - For Criminal Offender Employment Act, see 28-2-1 NMSA 1978.

For disqualification for bribery, see 30-24-2 NMSA 1978.

**Effect of appeal pending.** - Person who committed felony by assaulting a federal officer was ineligible to run for governor where although a jury rendered a guilty verdict, the person was appealing the judgment. A judgment on a verdict of a guilty is a conviction, and the fact that an appeal is pending does not alter that interpretation. 1968 Op. Att'y Gen. No. 68-98.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 48 to 50.

Oath of allegiance or loyalty, validity of governmental requirement of, 18 A.L.R.2d 302, 314.

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Legislative power to prescribe disqualifications to constitutional office because of conviction of crime, 34 A.L.R.2d 155, 246.

What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

Previous tenure of office, construction and effect of constitutional or statutory provisions disqualifying one for public office because of, 59 A.L.R.2d 716.

Conviction of crime: what constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for public office, 71 A.L.R.2d 593.

Effect of conviction in federal court, or court of another state or country, on right to hold public office, 39 A.L.R.3d 303.

Misconduct: removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.

Pardon as restoring eligibility to public office, 58 A.L.R.3d 1191.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

67 C.J.S. Officers and Public Employees § 22.

### **10-1-3. [Deputies and assistants convicted of crimes; penalty for appointment or retention.]**

It shall be unlawful for any state, county, district, or municipal officer to appoint, employ, or retain as a deputy or assistant any person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights; and any public officer who shall knowingly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than one hundred dollars [(\$100)] nor more than five hundred dollars [(\$500)] and, in addition to

such punishment, shall be removed from office in accordance with the provisions of this chapter.

**History:** Laws 1912, ch. 44, § 2; Code 1915, § 3952; C.S. 1929, § 96-103; 1941 Comp., § 10-103; 1953 Comp., § 5-1-3.

**Cross-references.** - For persons convicted of crime ineligible for office, see 10-1-2 NMSA 1978.

**Meaning of "this chapter".** - The 1915 Code compilers replaced "chapter 36 of the Session Laws of 1909," compiled as 10-3-1, 10-4-1 to 10-4-29 NMSA 1978, with "this chapter," referring to Chapter 80 of the 1915 Code, §§ 3950 to 3985, compiled as 10-1-2 to 10-1-4, 10-3-1, 10-4-1 to 10-4-29 and 10-17-5 NMSA 1978.

**"Public officer" and "state officer" are synonyms.** 1966 Op. Att'y Gen. No. 66-114.

**Employment in position other than deputy or assistant.** - It would appear that the employment by the commission or the chief highway engineer of a person (convicted of a felonious crime) in any position other than as deputy or assistant to the commission or the chief highway engineer would not violate the statute. 1953-54 Op. Att'y Gen. No. 5952.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Effect of conviction in federal court, or court of another state or country, on right to hold public office, 39 A.L.R.3d 303.

Pardon as restoring eligibility to public office, 58 A.L.R.3d 1191.

67 C.J.S. Officers and Public Employees §§ 22, 35.

#### **10-1-4. [Women eligible for appointment.]**

Women may hold any appointive office in the state of New Mexico.

**History:** Laws 1913, ch. 60, § 1; Code 1915, § 3953; C.S. 1929, § 96-104; 1941 Comp., § 10-104; 1953 Comp., § 5-1-4.

**Cross-references.** - For eligibility of women to any public office, see N.M. Const., art. VII, § 2.

For women as public officers, see N.M. Const., art. XX, § 11.

**Assistant commissioner of public lands.** - Under this section and N.M. Const., art. XX, § 11, a woman may hold the appointive office of assistant commissioner of public lands. 1919-20 Op. Att'y Gen. No. 184.

**A woman can hold the office of school director.** 1909-12 Op. Att'y Gen. No. 116.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Construction and application of provisions of Equal Pay Act of 1963 (29 U.S.C. § 206(d)) prohibiting wage discrimination on basis of sex, 7 A.L.R. Fed. 707.

Construction and application of provisions of Title VII of 1964 Civil Rights Act making sex discrimination in employment unlawful, 12 A.L.R. Fed. 15.

67 C.J.S. Officers and Public Employees § 20.

## **10-1-5. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1979, ch. 54, § 1, repeals 10-1-5 NMSA 1978, relating to residence requirement for public employees and percentage of residents on public works projects.

## **10-1-6. [Affidavits of residence; prima facie value as evidence.]**

Any person whose duty it is to engage or hire employees mentioned in Section 1 of this act may require any person applying for such employment to file an affidavit with such person, stating his name and residence and that he has been a bona fide resident of the state of New Mexico for a period of one year next previous to the date of application for such employment. In all prosecutions against any persons for violation of the provisions of this act, such affidavits shall be received in evidence as prima facie proof of the truth of the statements therein contained.

**History:** Laws 1933, ch. 68, § 2; 1941 Comp., § 10-106; 1953 Comp., § 5-1-6.

**Compiler's note.** - "Section 1 of this act," referred to near the beginning of the first sentence, means Laws 1933, ch. 68, § 1, which appeared as 10-1-5 NMSA 1978, but was repealed by Laws 1979, ch. 54, § 1.

**Meaning of "this act".** - The term "this act," referred to near the middle of the second sentence, means Laws 1933, ch. 68, which presently appears as 10-1-6 to 10-1-9 NMSA 1978.

**Application to construction project.** - This section, when read together with the provisions of 10-1-7 and 10-1-8 NMSA 1978, has specific application to the construction of the public works project contemplated by the interstate streams commission (the Ute

dam), and would have to be considered by the commission in the carrying out of the construction work. 1961-62 Op. Att'y Gen. No. 62-80.

**Where production of affidavits required.** - Under 6-2-1 NMSA 1978, the heads of departments may be compelled to produce the affidavit required under this section before making payment to any person or persons employed who have not been residents of New Mexico for one year prior to their employment as state employees. 1951-52 Op. Att'y Gen. No. 5388.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity, construction, and application of enactments relating to requirement of residency within or near specified governmental unit as condition of continued employment for policemen or firemen, 4 A.L.R.4th 380.

67 C.J.S. Officers and Public Employees § 26; 81A C.J.S. States § 83.

### **10-1-7. [Provisions of employment contracts.]**

Every written contract entered into by the state of New Mexico and all political subdivisions thereof, including all of the departments, bureaus, boards, commissions or institutions of said state and all of its political subdivisions, involving the employment of persons mentioned in Section 1 of this act shall contain such provisions relating to employment as comply with the provisions of this act.

**History:** Laws 1933, ch. 68, § 3; 1941 Comp., § 10-107; 1953 Comp., § 5-1-7.

**Compiler's note.** - For meaning of "Section 1 of this act" and "this act," see catchline, "Compiler's notes" in notes following 10-1-6 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 26; 81A C.J.S. States § 83.

### **10-1-8. [Failure to employ residents; penalties.]**

Any person, firm, corporation or association having charge of or control over the employment of persons mentioned in Section 1 of this act, who shall willfully refuse to comply with the provisions of said Section 1, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than \$100 nor more than \$300 or by imprisonment in the county jail not to exceed ninety days or both such fine and imprisonment, in the discretion of the court.

**History:** Laws 1933, ch. 68, § 4; 1941 Comp., § 10-108; 1953 Comp., § 5-1-8.

**Compiler's note.** - For meaning of "Section 1 of this act," see catchline, "Compiler's notes" in notes following 10-1-6 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 26; 81A C.J.S. States § 83.

### **10-1-9. [False affidavit to obtain employment; penalty.]**

Any applicant for employment mentioned in Section 1 thereof, who shall willfully file any false affidavit for the purpose of obtaining employment shall be deemed guilty of a misdemeanor and upon conviction shall be subject to the penalties mentioned in Section 4 [10-1-8 NMSA 1978] hereof.

**History:** Laws 1933, ch. 68, § 5; 1941 Comp., § 10-109; 1953 Comp., § 5-1-9.

**Compiler's note.** - "Section 1 thereof," referred to near the beginning of the section, means Laws 1933, ch. 68, § 1, which appeared as 10-1-5 NMSA 1978, but was repealed by Laws 1979, ch. 54, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 26; 81A C.J.S. States § 83.

### **10-1-10. [Nepotism prohibited; exceptions.]**

It shall hereafter be unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment; provided, that this act [10-1-10, 10-1-11 NMSA 1978] shall not apply where the compensation of such clerk, deputy or assistant shall be at the rate of \$600 or less a year, nor shall it apply to persons employed as teachers in the public schools.

**History:** Laws 1925, ch. 50, § 1; C.S. 1929, § 96-136; 1941 Comp., § 10-110; 1953 Comp., § 5-1-10.

**Constitutionality.** - This law is not unconstitutional by reason of the fact that the title merely states "An act relating to nepotism." 1937-38 Op. Att'y Gen. No. 263.

**Legislative intent.** - The legislature intended by this section to apply the civil law rule for determining the degree of relationship and under this method of computation a cousin is not within the third degree, so that a public officer may employ his cousin as a deputy or assistant. 1947-48 Op. Att'y Gen. No. 5040.

**Statute normally construed strictly.** - Anti-nepotism statutes, being penal in nature, are normally strictly construed. However, no statute may be construed so as to defeat the obvious intent of the legislature. 1982 Op. Att'y Gen. No. 82-8.

**Section inapplicable where person hired before relative's election.** - This section would not apply to a person employed prior to his relative's election to the hiring authority. 1982 Op. Att'y Gen. No. 82-8.

**Brothers are related within the second degree of consanguinity.** 1982 Op. Att'y Gen. No. 82-8.

**Employment where members of family on school district board.** - This section does not prohibit employment of a person in a nonteaching, supervisory capacity, although members of his immediate family serve on the board of the school district. 1957-58 Op. Att'y Gen. No. 57-201.

**Election of teacher's relative to school board.** - The rule that statutes in pari materia should, as far as reasonably possible, be construed consistently supports, by reference to this section and 29-2-6 NMSA 1978, the conclusion that 22-5-6 NMSA 1978 was intended only to apply to the initial hiring of teachers and does not affect the retention of teachers when a relative within the prohibited degree of consanguinity is elected to the school board. *New Mexico State Bd. of Educ. v. Board of Educ.*, 95 N.M. 588, 624 P.2d 530 (1981).

**Where teacher's spouse on school board.** - There is no prohibition against the spouse of a schoolteacher being a member of the school board, but in order to prevent any possible conflict of interest, such school board member should not vote on any issue which affects his or her spouse individually as opposed to affecting all the teachers in the system as a group. 1964 Op. Att'y Gen. No. 64-71.

**Where husband and wife hired.** - The New Mexico state racing commission may hire a husband and wife to carry on the duties of the racing commission so long as no such employee is related to the commissioner within the degree of consanguinity prohibited by this section. 1951-52 Op. Att'y Gen. No. 5424.

**County commissioner's daughter in county department.** - The laws on nepotism do not prohibit the employment of a daughter of county commissioner as a stenographer in the county health department of the county where the commissioner serves. 1957-58 Op. Att'y Gen. No. 57-224.

**Sheriff's relative as deputy sheriff.** - This statute would come into play should a sheriff employ as his guard the regularly employed deputy sheriff since a deputy sheriff would fall within the statutory definition of "deputy or assistant." If such a deputy were related to the sheriff within the prohibited degree it would be a violation of the law. A person temporarily employed as a guard might still be considered an assistant as defined by the statute. However, in the event of temporary employment, it is almost certain that the compensation paid to each assistant would be less than \$600 a year, in which case, the prohibition would not apply. Compensation as used here is synonymous with salary and does not include traveling or other incidental expenses usually called per diem. 1961-62 Op. Att'y Gen. No. 61-9.

**Section is not applicable to hiring of state police personnel**, but 29-2-6 NMSA 1978, pertaining specifically to the state police, is instead controlling. 1963-64 Op. Att'y Gen. No. 63-114.

**Prohibited appointments may be approved.** - Appointments within the prohibited degree may yet be made if such appointments are approved by a board or officer whose duty it is to approve the bond of the person making the appointment. 1949-50 Op. Att'y Gen. No. 5247.

**Approval of district judge's employee.** - As district judges are not bonded, there is no entity from which approval of otherwise prohibited employment by the district judge may be obtained. 1979 Op. Att'y Gen. No. 79-25.

**Employment by district judge of his step-daughter, as his secretary, is unlawful.** 1979 Op. Att'y Gen. No. 79-25.

**Deputy county assessor.** - When salary exceeds \$600 per year, appointment of a deputy county assessor without approval of the board of county commissioners is void. State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944).

**Municipality's council member is "elected public official".** - A member of the governing body of a municipality is an "elected public officer" for purposes of the statutory prohibition against nepotism. 1982 Op. Att'y Gen. No. 82-8.

**Brother of council member employable where council member abstains from voting.** - The brother of a member of the governing body of a mayor-council municipality may be employed as an assistant municipal clerk if the council member abstains from voting to approve his brother's employment. 1982 Op. Att'y Gen. No. 82-8.

**Assistant clerk of a municipality serves as "clerk"** to the governing body for purposes of the statutory prohibition against nepotism. 1982 Op. Att'y Gen. No. 82-8.

**Court reporter not clerk, deputy, etc.** - An official court reporter is not a clerk, deputy or assistant as those terms are used in this section. 1976 Op. Att'y Gen. No. 76-35.

**Neither is janitor.** - Since a janitor would be neither clerk, deputy or assistant to the employing authority, employment of the wife of one of the school board members by the board would not be prohibited by this section. 1951-52 Op. Att'y Gen. No. 5484.

**Nor a "levelman".** - This position of a "levelman" in the highway department is not such as would be included within the terminology of "clerk, deputy, or assistant" so as to be within that class of employment from which an officer is prohibited from naming any person related by consanguinity or affinity within the third degree. 1951-52 Op. Att'y Gen. No. 5448.



**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity, construction, and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.

67 C.J.S. Officers and Public Employees § 23.

### **10-1-11. [Payment of nepotism employees; liability of employer and bondsmen; employment void.]**

No person so unlawfully employed shall be paid or receive any compensation from public funds, and such employment shall be null and void, and the person or persons giving such employment, together with his or their bondsmen, shall be liable for any and all moneys so unlawfully paid out.

**History:** Laws 1925, ch. 50, § 2; C.S. 1929, § 96-137; 1941 Comp., § 10-111; 1953 Comp., § 5-1-11.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 23.

### **10-1-12. [Employment of persons advocating sabotage, sedition or treason prohibited; discharge of such persons already employed.]**

No person shall be knowingly employed by any state department, office, board, commission or bureau, county, municipality or other political subdivision, board of education or school board, who either directly or indirectly carries on, advocates, teaches, justifies, aids or abets a program of sabotage, force and violence, sedition or treason against the government of the United States or of this state.

When it becomes reasonably apparent to his appointing power that any employee has committed any of the acts hereinabove described it shall be the duty [duty] of such employer to refer the data and information available to him to the district attorney of the judicial district wherein such employee resides, and it shall thereupon become the mandatory duty of the district attorney to institute a proceeding in the district court to determine whether the employee has violated this act [section]. If such court determines that this act has been violated, such employee shall be immediately discharged and shall not be again employed in any capacity by any state department, office, board, commission, or bureau, county, municipality, or other political subdivision, board of education, or school board.

No part of any money appropriated from the state treasury shall ever be expended to compensate any person whose employment is forbidden by this section.

**History:** Laws 1949, ch. 45, § 1; 1941 Comp., § 10-112; 1953 Comp., § 5-1-12.

**Cross-references.** - For public policy regarding communism, see 12-4-1 to 12-4-3 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 48, 241.

Oath of allegiance or loyalty: validity of governmental requirement of, 18 A.L.R.2d 268.

Self-incrimination: right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 A.L.R.2d 388.

Schoolteacher, dismissal or rejection of because of disloyalty, 27 A.L.R.2d 487.

Libel and slander: imputation of subversive or otherwise objectionable political or social principles, 33 A.L.R.2d 1196.

Libel and slander: public officer's privilege as to statements made in connection with hiring and discharge, 26 A.L.R.3d 492.

Libel and slander: public officer's privilege in connection with accusation that another has been guilty of sedition, subversion, espionage, or similar behavior, 33 A.L.R.3d 1330.

67 C.J.S. Officers and Public Employees §§ 22, 120, 121, 125.

### **10-1-13. County officers; oath; bond.**

A. As used in this section, "county officer" means county commissioner, county assessor, county clerk, county sheriff, county surveyor, county treasurer, probate judge, county flood commissioner and small claims court clerk.

B. Before assuming the duties of his office, each officer shall take and subscribe the oath of office prescribed by the constitution and give an official bond payable to the state and conditioned for the faithful performance of his duties during his term of office and until his successor is elected or appointed and is qualified, and that he will pay all money received in his official capacity to the person entitled to receive it. The bond shall be executed by a corporate surety company authorized to do business in this state. The amount of the bond required shall be fixed by the board of county commissioners in a sum equal to twenty percent of the public money handled by the county officer during the preceding fiscal year, but not to exceed:

county commissioner	\$ 5,000
county assessor	5,000
county clerk	10,000
county sheriff	20,000
county surveyor	5,000
county treasurer	50,000
probate judge	5,000
county flood commissioner	10,000
small claim court clerk	10,000

C. Each county officer shall appoint a deputy or clerk, as allowed by law, who shall take the oath of office required of the appointing county officer and shall receive salary as provided by law. In case of the death of the appointing county officer, the deputy shall continue in office and perform the duties of the county officer until a new county officer is appointed and qualified as required by law.

D. The cost of official bonds for county officers shall be paid from the county general fund, and the board of county commissioners may elect to provide a schedule or blanket corporate surety bond covering county officers and employees for any period of time not exceeding four years.

E. If any county officer fails to give bond by January 10 following his election, or within ten days of his appointment, the board of county commissioners shall declare to the office vacant.

**History:** 1953 Comp., § 5-1-13, enacted by Laws 1967, ch. 238, § 1.

**Appointment to fill county office vacancy.** - A vacancy in a county office may occur where a successor in an office fails to qualify. The board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 45 to 48.

## **ARTICLE 2**

### **BONDS**

#### **10-2-1. [Sureties on bonds; qualifications.]**

No bond of any public officer of this state executed by any individual, or firm as surety, shall be accepted or approved unless the persons or firm executing the same shall be the owners of unencumbered real estate or personal property in this state to an amount equal to the amount for which they respectively qualify on such bonds.

**History:** Laws 1909, ch. 122, § 2; Code 1915, § 511; C.S. 1929, § 17-107; 1941 Comp., § 10-201; 1953 Comp., § 5-2-1.

**Cross-references.** - For amount of bonds of state, county, and municipal treasurers, see 6-10-38 NMSA 1978.

For supreme court law library, librarian, bond, see 18-1-8 NMSA 1978.

For commissioner of public lands, bond, see 19-1-4 NMSA 1978.

For corporation as surety on bond, see 46-6-1 NMSA 1978.

**Elements of public office.** - Five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission

or other written authority, and give an official bond, if the latter be required by proper authority. 1955-56 Op. Att'y Gen. No. 6396.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 487 to 566.

67 C.J.S. Officers and Public Employees § 47.

### **10-2-2. [County or district officer not to be surety for another official.]**

No county or district officer shall be in future surety on the official bond of another county officer, and no such officer who shall be required to give bond shall be considered as qualified, if any other of the officers above mentioned shall give such bond.

**History:** Laws 1882, ch. 34, § 1; C.L. 1884, § 501; C.L. 1897, § 843; Code 1915, § 512; C.S. 1929, § 17-108; 1941 Comp., § 10-202; 1953 Comp., § 5-2-2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-3. [State and county officers prohibited from being sureties.]**

It shall be unlawful for any state or county officer who is required by law to give official bonds to sign any bond or become surety for any other person or persons during the term for which he is required to give official bonds for himself.

**History:** Laws 1903, ch. 57, § 1; Code 1915, § 513; C.S. 1929, § 17-109; 1941 Comp., § 10-203; 1953 Comp., § 5-2-3.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-4. [Public officer becoming surety; misdemeanor in office.]**

Any violation of the preceding section [10-2-3 NMSA 1978] shall constitute a misdemeanor in office.

**History:** Laws 1903, ch. 57, § 2; 1905, ch. 85, § 1; Code 1915, § 514; C.S. 1929, § 17-110; 1941 Comp., § 10-204; 1953 Comp., § 5-2-4.

**Compiler's note.** - The compilers of the 1915 Code substituted "preceding section" for "provisions of this act" and omitted a provision subjecting the offender to summary removal from office by the governor.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-5. [Recording of bonds required.]**

The bonds given by all persons elected or appointed to office in this state shall be recorded.

**History:** Laws 1893, ch. 56, § 1; C.L. 1897, § 3187; Code 1915, § 515; C.S. 1929, § 17-111; 1941 Comp., § 10-205; 1953 Comp., § 5-2-5.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-6. [Record of official bonds of state and district officers.]**

The bonds of all state and district officers shall be recorded in a record book to be provided for that purpose, and known as the record of official bonds, in the office of the secretary of state.

**History:** Laws 1893, ch. 56, § 2; C.L. 1897, § 3188; Code 1915, § 516; C.S. 1929, § 17-112; 1941 Comp., § 10-206; 1953 Comp., § 5-2-6.

**Cross-references.** - As to bond of poundkeeper for irrigation district, see 77-14-26 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-7. [Filing of bonds by officials of state and state agencies.]**

The bonds of all state officials, and of the members of all state boards and institutions, after having been recorded as required by law, shall be filed and kept in the office of the secretary of state; and all state bonds now filed elsewhere shall be transferred to the office of the secretary.

**History:** Laws 1905, ch. 59, § 1; Code 1915, § 517; C.S. 1929, § 17-113; 1941 Comp., § 10-207; 1953 Comp., § 5-2-7.

**Cross-references.** - For board of dentistry, bond of secretary-treasurer, see 61-5-6 NMSA 1978.

For board of medical examiners, bond of secretary-treasurer, see 61-6-3 NMSA 1978.

For director and officers and employees of financial institutions division, bonds, see 58-1-33 NMSA 1978.

For livestock board members, bonds required when bond issue for epidemic is made, see 77-2-20 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 47.

### **10-2-8. County and precinct officers; recording and filing bonds.**

The bonds of all county officers and constables shall be recorded in the office of the county clerk in a book designated as the record of official bonds. After having been recorded, the bonds shall be filed and kept in the office of the county clerk.

**History:** Laws 1893, ch. 56, § 3; C.L. 1897, § 3189; Code 1915, § 518; C.S. 1929, § 17-114; 1941 Comp., § 10-208; 1953 Comp., § 5-2-8; Laws 1967, ch. 238, § 2.

**Cross-references.** - For county commissioners, assessor, clerk, sheriff, surveyor, treasurer, probate judge, flood commissioner, and small claims court clerk, see 10-1-13 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 43.

### **10-2-9. [Recording as prerequisite to discharging duties of office.]**

Each and every person who may hereafter be elected or appointed to office in this state, required by law to give bond, shall file the same for record before entering upon the discharge of the duties of the office.

**History:** Laws 1893, ch. 56, § 5; C.L. 1897, § 3190; Code 1915, § 519; C.S. 1929, § 17-115; 1941 Comp., § 10-209; 1953 Comp., § 5-2-9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 43.

### **10-2-10. [Action on bond; use of certified copy.]**

In all actions at law upon the bond of any officer in this state wherein the original bond of such officer cannot be produced in court, the certified copy thereof, under the seal of the officer making the record, shall be received by any court for the same uses and purposes as the original bond; and any judgment rendered and execution issued against the principal and sureties therein shall be as valid and binding and of as full force and effect as if the original bond had been produced in court in said action at law.

**History:** Laws 1893, ch. 56, § 6; C.L. 1897, § 3191; Code 1915, § 520; C.S. 1929, § 17-116; 1941 Comp., § 10-210; 1953 Comp., § 5-2-10.

**Cross-references.** - For enforcement of collection of bond, see 6-10-38 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 307.

### **10-2-11. [Recording fees; payment by officer.]**

The county clerk of each of the several counties shall be entitled to a fee of two dollars and fifty cents (\$2.50) for filing and recording each bond of a county officer, and one dollar [(\$1.00)] for filing and recording each bond of a precinct officer; the fees for such filing and record to be paid by the officer filing the same, at the time of such filing.

**History:** Laws 1893, ch. 56, § 7; C.L. 1897, § 3192; Code 1915, § 521; C.S. 1929, § 17-117; 1941 Comp., § 10-211; 1953 Comp., § 5-2-11.

**Compiler's note.** - This section has been partly superseded by 14-8-12 NMSA 1978, which requires a fee of \$2.50 for the recording of any official bond.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 43.

### **10-2-12. [Insufficient bond of county or precinct officer; new bond required; failure to provide; procedure; decree of vacancy by district court.]**

It shall be the duty of the board of county commissioners of each county at each regular meeting thereof on the first day of each meeting to examine and inquire into the sufficiency of all the official bonds given or to be given by any county or precinct officer as required by law, and if it shall appear that any one or more of the securities on the official bond of any county officer has or have removed from the county, died, or become insolvent, or of doubtful solvency, the said board of county commissioners shall cause such county or precinct officer to be summoned to appear before the said board on a day to be named in said summons, to show cause why he should not be required to give a new bond with sufficient security, and if at the appointed time he shall fail to satisfy said board as to the sufficiency of the present security, an order shall be entered of record by said board requiring such county or precinct officer, to file in the office of the county clerk within twenty days, a new bond to be approved as required by law, unless the number and pecuniary ability of other securities on said bond shall be such as to satisfy the board that the bond is sufficient, notwithstanding one or more of the securities on said bond may have removed, be dead, insolvent or of doubtful solvency, in which case the bond in question may be, in the discretion of the board, held sufficient. In the event any such bond is found insufficient, and a new bond is not filed as ordered, the fact shall be certified by the board of county commissioners to the district court of the county, and shall also be certified to the district attorney of the judicial district wherein such county is located; and it shall thereupon become the duty of the district attorney to cause a hearing to be had in said district court for the purpose of



adjudicating and declaring a vacancy in such office, in the event the district court determines, after a hearing, that the bond is in fact insufficient, and such officer fails within five days after the district court has so found to file a new bond with sufficient surety as required by law. Upon the entry of such decree of vacancy it shall thereupon become the duty of the appointing power to fill such office in the manner provided by law.

**History:** Laws 1876, ch. 1, § 37; C.L. 1884, § 368; C.L. 1897, § 687; Code 1915, § 1213; C.S. 1929, § 33-4227; Laws 1939, ch. 57, § 1; 1941 Comp., § 10-212; 1953 Comp., § 5-2-12.

**Cross-references.** - For county officers, oath, bond, see 10-1-13 NMSA 1978.

**Compiler's note.** - A similar provision relating only to constables, compiled in Comp. Laws 1865, ch. 40, § 2, deriving from the Kearny Code, Constables, § 3, appears to have been superseded by this section. Carried forward in Comp. Laws 1884, § 449; Comp. Laws 1897, § 802; Code 1915, § 3166; and Comp. Stat. 1929, § 79-112, modified by the 1915 compilers and carried in Code 1915 and Comp. Stat. 1929, it read: "Whenever the county commissioners shall be satisfied that the bond of any constable is likely to prove insufficient, by reason of the death or failure of the sureties to his bond, or any of them, they shall require such constable to give a new bond."

**Bonding of deputy treasurer.** - No statute requires that deputy county treasurers be bonded, and while it is good business for bonding companies which are sureties on county treasurers' bonds, as well as for county treasurers, to require that deputy treasurers be bonded, the county should not pay for the premiums on such deputies' bonds, since the state and county are protected on the treasurers' bonds for any defalcation, even by deputies, under 6-10-38 NMSA 1978. 1939-40 Op. Att'y Gen. No. 137.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 487 to 504.

Liability on bond of sheriff for negligence causing damages to property, 53 A.L.R. 41.

Liability on bond of sheriff for unlawful search, 62 A.L.R. 855.

Right of sureties to take advantage of noncompliance with statutory requirements as to approval of bond, 77 A.L.R. 1479.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office, 81 A.L.R. 10.

Liability on recording officer's bond for mistakes or defects in respect to records affecting title, 94 A.L.R. 1303.

Liability on bond of sheriff for failure to file return of his proceedings after seizing property under writ or process, 98 A.L.R. 692.

Liability of sureties on bond of public officer to property owners for failure to present or delay in presenting checks given in payment of taxes, 105 A.L.R. 711.

Provision of bond at variance with statutory conditions, 109 A.L.R. 501.

Liability on bond of public officer for loss of public funds due to insolvency of bank in which they were deposited, 155 A.L.R. 436.

False return of execution or attachment, what amounts to, imposing liability on sheriff's or constable's bond, 157 A.L.R. 194.

Public officer's bond as subject to forfeiture for malfeasance in office, 4 A.L.R.2d 1348.

Liability on bond of police or other peace officer for defamation, 13 A.L.R.2d 902.

Liability on bond of sheriff for personal injury or death, 60 A.L.R.2d 873.

Notary public or his bond, liability for negligence in performance of duties, 44 A.L.R.3d 555, 1243.

20 C.J.S. Counties § 100.

### **10-2-13. Short title.**

Sections 10-2-13 through 10-2-16 NMSA 1978 may be cited as the "Surety Bond Act".

**History:** 1953 Comp., § 5-2-13, enacted by Laws 1978, ch. 132, § 1.

**Repeals and reenactments.** - Laws 1978, ch. 132, § 1, repeals 5-2-13, 1953 Comp. (former 10-2-13 NMSA 1978), relating to the short title, and enacts the above section.

**Requiring excess bonds.** - The state board of education may not, pursuant to the terms of 22-2-7 NMSA 1978, require that the state superintendent of public instruction and designated employees of the state department of education obtain bonds in excess of those obtained pursuant to this act. 1987 Op. Att'y Gen. 87-42.

### **10-2-14. Definitions.**

As used in the Surety Bond Act [10-2-13 to 10-2-16 NMSA 1978]:

A. "department" means the general services department;

B. "director" means the director of the risk management division of the department;

C. "employee" means any officer or employee of the state, including elected or appointed officials and persons acting on behalf or in service of a state agency in any official capacity whether with or without compensation, but the term does not include an independent contractor;

D. "secretary" means the secretary of general services;

E. "state agency" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions;

F. "surety bond coverage" means:

(1) a schedule or blanket corporate surety bond payable to the state and conditioned on the faithful performance of the duties of each employee during his employment or term of office or until his successor is elected or appointed and is qualified and on a proper accounting for all money and property in his official capacity as a state employee; or

(2) a certificate of surety bond coverage issued by the director covering all or any part of the risk set forth in Paragraph (1) of this subsection; and

G. "covered educational entity" means a school district as defined in Section 22-1-2 NMSA 1978 or an educational institution established pursuant to Chapter 21, Article 13, 16 or 17 NMSA 1978 which requests and is granted surety bond coverage from the risk management division of the general services department, if the coverage is commercially unavailable; except that coverage shall be provided to a school district only through the public school group insurance authority or its successor unless the district has been granted a waiver by the authority or the authority is not offering the coverage for the fiscal year for which the division offers its coverage. A local school district to which the division may provide coverage may provide for marketing and servicing to be done by licensed insurance agents who shall receive reasonable compensation for their services.

**History:** 1953 Comp., § 5-2-14, enacted by Laws 1978, ch. 132, § 2; 1984, ch. 49, § 1; 1986, ch. 102, § 1.

**Repeals and reenactments.** - Laws 1978, ch. 132, § 2, repealed 5-2-14, 1953 Comp. (former 10-2-14 NMSA 1978), relating to definitions used in the Surety Bond Act, and enacted a new 10-2-14 NMSA 1978.

## **10-2-15. Surety bond coverage.**

A. The department shall provide surety bond coverage for all employees. Whenever an employee is required by another law to post bond or surety as a prerequisite to entering employment or assuming office, the requirement is met when coverage is provided for the office or position under the provisions of the Surety Bond Act [10-2-13 to 10-2-16 NMSA 1978]. Notwithstanding any other provisions of law, no state agency or employee

shall purchase any employee surety bond other than pursuant to the provisions of the Surety Bond Act.

B. The secretary shall prescribe the amount of surety bond coverage by class of employee.

C. All or any part of the amount of surety bond coverage prescribed by the secretary may be covered by a schedule or blanket corporate surety bond.

D. The department may provide coverage for employees of covered educational entities through insurance, self-insurance or a combination thereof.

**History:** 1953 Comp., § 5-2-15, enacted by Laws 1978, ch. 132, § 3; 1986, ch. 102, § 2.

**Repeals and reenactments.** - Laws 1978, ch. 132, § 3, repealed 5-2-15, 1953 Comp. (former 10-2-15 NMSA 1978), relating to surety bonds required, and enacted a new 10-2-15 NMSA 1978.

**Intent to cover all state officers and employees.** - This section, by its language, "Notwithstanding any other provision of law," evidences legislative intent that the Surety Bond Act controls surety bond coverage of all state officers and employees. 1987 Op. Att'y Gen. 87-42.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 43.

### **10-2-16. Surety bond fund.**

A. There is created in the state treasury a "surety bond fund".

B. Money deposited in the surety bond fund may be expended by the department:

(1) to provide surety bond coverage;

(2) to create a retention fund to cover all or any portion of the surety bond risks of state agencies and covered educational entities;

(3) to pay claims of state agencies and covered educational entities covered by a surety bond certificate of coverage issued by the department; and

(4) to pay any costs and expenses of carrying out the provisions of this section.

C. Claims against the surety bond fund shall be made in accordance with a certificate of coverage issued by the department to each state agency and covered educational entity. If the secretary has reason to believe that the surety bond fund would be exhausted by the payment of all claims allowed against the fund during a particular

state fiscal year, the amounts paid for each claim shall be prorated with each state agency and covered educational entity receiving an amount equal to the percentage that its claims bear to the total of claims outstanding and payable from the fund. Any amounts due and unpaid as a result of such proration shall be paid in the following fiscal years.

D. The department shall collect or transfer funds from each state agency and covered educational entity to cover costs of coverage of employees of the agency as required by this section. Money collected or transferred from a state agency or covered educational entity pursuant to this subsection shall be deposited in the surety bond fund.

E. The department may provide individual surety bond coverage protecting employees who are employers or supervisors from personal losses for which they may be responsible, which losses were caused by the lack of honesty or faithful performance of employees under their supervision or control.

F. The department shall have the right to recover from a public employee for any loss under the Surety Bond Act [10-2-13 to 10-2-16 NMSA 1978] for which the public employee was responsible.

G. The risk management advisory board shall review:

- (1) specifications for all surety bond coverage to be purchased by the department;
- (2) the form and legal sufficiency of any surety bond coverage to be purchased by the department; and
- (3) the form, purpose and content of any surety bond certificate of coverage to be issued by the director.

**History:** 1953 Comp., § 5-2-16, enacted by Laws 1978, ch. 132, § 4; 1986, ch. 102, § 3; 1989, ch. 324, § 4.

**Repeals and reenactments.** - Laws 1978, ch. 132, § 4, repealed 5-2-16, 1953 Comp. (former 10-2-16 NMSA 1978), relating to terms and conditions of surety bonds, and enacted a new 10-2-16 NMSA 1978.

**The 1989 amendment,** effective April 7, 1989, in Subsection A, inserted "in the state treasury" and deleted the former second sentence which read "The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the department with the prior approval of the state board of finance".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers § 39.

**10-2-17. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1978, ch. 132, § 6, repeals 5-2-17, 1953 Comp. (10-2-17 NMSA 1978), relating to bonds required under other laws, effective March 6, 1978.

### ARTICLE 3 VACANCIES IN LOCAL OFFICES

#### 10-3-1. [Circumstances causing vacancy in local office.]

Any office belonging to the class mentioned in Section 10-4-1 NMSA 1978 becomes vacant under any of the following circumstances:

- A. by death of the party in office;
- B. removal of the officer as provided by this chapter;
- C. failure of the officer to qualify as provided by law;
- D. expiration of the term of office when no successor has been chosen as provided by law;
- E. when the officer removes from the county in which he is elected and in case of municipal officers, when he removes from the town or city for which he is elected;
- F. absence from the county for six consecutive months, and in cases of municipal officers, absence for such length of time from the village, town or city for which he is elected; but this provision does not apply to those officers wherein the law provides that the duties may be discharged by a deputy, when such absence is due to illness or other unavoidable cause;
- G. by resignation of the officer;
- H. by an officer accepting and undertaking to discharge the duties of another incompatible office.

**History:** Laws 1909, ch. 36, § 3; Code 1915, § 3956; C.S. 1929, § 96-107; 1941 Comp., § 10-301; 1953 Comp., § 5-3-1.

**Cross-references.** - For temporary abandonment for service in military forces, see 10-6-1 NMSA 1978.

For permanent abandonment of office, what constitutes, see 10-6-3 NMSA 1978.

For incompatible office or service, definition, see 10-6-5 NMSA 1978.

For dismissal, demotion or suspension for conflict of interest, see 10-16-14 NMSA 1978.

**Meaning of "this chapter"**. - See same catchline in notes to 10-1-3 NMSA 1978.

**Effect of death of elected candidate before term begins.** - The death of an elected candidate before term of office commences does not seat the minority candidate, but creates a vacancy to be filled as in case of vacancy for any other reason. 1917-18 Op. Att'y Gen. No. 198.

**Meaning of "qualify"**. - The word "qualify" does not refer to eligibility for the office but rather to the performance of the acts which the chosen person is required to perform before he can enter into office (usually the taking of an oath and the filing of a bond). 1963-64 Op. Att'y Gen. No. 63-86.

**Effect on other section.** - This section, creating a vacancy for "failure of the officer to qualify as provided by law" does not repeal by implication the last line of 10-3-3 NMSA 1978 providing that an appointive officer shall hold office until "his successor shall be duly elected and qualified according to law." State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Effect where authority to hold over after expiration of term.** - During the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Where judicial successor not yet qualified.** - Justice of the peace (now magistrate), properly appointed in 1907, and qualified by giving required bond, was entitled to discharge the duties of the office until his successor was qualified. 1909-12 Op. Att'y Gen. No. 76.

**Residence in legal contemplation.** - Residence in legal contemplation may be maintained in a locality despite actual physical absence, the mental intent of the person being an important factor in determining residence. 1963-64 Op. Att'y Gen. No. 64-20.

**Intracounty move of county commissioner.** - The removal of a county commissioner from the district from which he was elected to another part of the county does not create a vacancy in the office. 1912-13 Op. Att'y Gen. No. 110.

**Of reelected county clerk's resignation before new term.** - Where a reelected county clerk resigned prior to the beginning of her new term, a vacancy in office was thereby created pursuant to this section and the person properly appointed on the same day as the resignation and qualified pursuant to 10-3-3 NMSA 1978 was entitled to hold the office until her successor was duly elected and qualified; therefore, there was no vacancy in the office for the new term. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Resignation of judge of small claims court.** - The resignation of the judge of the small claims court caused a vacancy in that office. 1964 Op. Att'y Gen. No. 64-146.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 138, 139.

Resignation from one office as affecting eligibility to another office during term of former office, 5 A.L.R. 117, 40 A.L.R. 945.

Right of officer to resign, 19 A.L.R. 39.

Incompatibility of offices or positions in military service and civil service, 26 A.L.R. 142, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Death or disability of one elected to office before qualifying as creating a vacancy, 74 A.L.R. 486.

Reconsideration of appointment to fill vacancy, 89 A.L.R. 141.

When resignation of public officer becomes effective, 95 A.L.R. 215.

Effect of election to, or acceptance of, one office by incumbent of another when both cannot be held by same person, 100 A.L.R. 1162.

Military service, induction or voluntary enlistment for, as creating vacancy in public office or employment, 151 A.L.R. 1462, 152 A.L.R. 1457, 153 A.L.R. 1429, 154 A.L.R. 1455, 155 A.L.R. 1456, 156 A.L.R. 1455, 157 A.L.R. 1454, 158 A.L.R. 1456, 35 A.L.R. Fed. 649.

Vacancy in public office within constitutional or statutory provision for filling vacancy, where incumbent appointed or elected for a fixed term and until successor is appointed or elected, is holding over, 164 A.L.R. 1248.

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office, 20 A.L.R.2d 732.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 A.L.R.2d 789.

Acceptance or assertion of right to pension or retirement as abandonment of public employment, 76 A.L.R.2d 1312.

Public officer's withdrawal of resignation made to be effective at future date, 82 A.L.R.2d 750.

Removal of public officer for misconduct during previous term, 42 A.L.R.3d 691.



Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.3d 632.

67 C.J.S. Officers and Public Employees §§ 74 to 76.

### **10-3-2. Local school boards; vacant or vacated offices.**

A. A local school board shall hold at least one regular meeting each month of the calendar year.

B. The office of any member of a local school board, if the member misses four consecutive regular meetings, may be declared vacant by a majority vote of the remaining members of the local school board.

C. The office of any member of a local school board, if the member misses six consecutive regular meetings, shall be vacant.

D. Any vacancy of an office on a local school board created pursuant to this section shall be filled in the same manner as other vacancies on a local school board are filled. Any member of a local school board who has his office declared vacant or vacated pursuant to this section shall not be eligible for appointment to the local school board until the term for which he was originally elected or appointed has expired.

E. As used in this section "regular meeting" means a meeting of the members of a local school board at which at least a quorum is present, about which notice has been published and at which normal school district business is transacted.

**History:** 1953 Comp., § 5-3-1.1, enacted by Laws 1967, ch. 131, § 1; 1979, ch. 335, § 2.

**Denial to citizen of right to address board.** - A local school board president has authority to deny citizens the right to address the local school board during a meeting of the board, if he is authorized to do so by rules promulgated by the board and he does not exercise that authority arbitrarily or capriciously. 1990 Op. Att'y Gen. No. 90-26.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 74 to 76.

### **10-3-3. [Vacancy in county or precinct office; appointment.]**

Whenever any vacancy in any county or precinct office in any of the counties of this state other than a vacancy in the office of county commissioner, shall occur by reason of death, resignation or otherwise it shall be the duty of the board of county commissioners of the county where such vacancy has occurred to fill said vacancy by appointment and said appointee shall be entitled to hold said office until his successor shall be duly elected and qualified according to law.

**History:** Laws 1907, ch. 6, § 2; Code 1915, § 1219; C.S. 1929, § 33-4233; 1941 Comp., § 10-302; 1953 Comp., § 5-3-2.

**Cross-references.** - For appointment of successor, see 10-4-28 NMSA 1978.

As to tenure of office of state officers, see N.M. Const. art. XX, § 2.

**Scope of powers.** - The board of county commissioners has the power to fill vacancies in any county offices, except vacancies occurring in the board itself. 1909-12 Op. Att'y Gen. No. 182.

**Commissioners must fill vacancies.** - This section makes it the mandatory duty of the county commissioners to fill vacancies in the office of justice of the peace (now magistrate) in every precinct where a vacancy exists. 1951-52 Op. Att'y Gen. No. 5327.

**Within a reasonable time.** - No mention is made of the time in which the appointment must be made, thus, in the absence of any directives, the appointment must be made within a reasonable time. 1970 Op. Att'y Gen. No. 70-50.

**No power to appoint when no power to elect.** - Where people had no legal right to elect an assessor for a county, board of county commissioners had no legal right to appoint, and where such appointment was made, there being no vacancy, such appointment was of no legal effect. Territory ex rel. Andoval v. Albright, 12 N.M. 293, 78 P. 204 (1904), appeal dismissed, 200 U.S. 9, 26 S. Ct. 210, 50 L. Ed. 346 (1906).

**Interim appointment.** - There is no provision in this statute for an interim appointment. Having made the appointment which filled the vacancy, the jurisdiction of the board was exhausted until another vacancy occurred. It is irrelevant that the plaintiff was designated as "acting county clerk" or that she filed her oath of office and bond as an "acting county clerk"; the appointment is for the full legal term, notwithstanding the appointing body's attempt to give it a different duration. State ex rel. Walker v. Dilley, 86 N.M. 796, 528 P.2d 209 (1974).

**Effect of hold-over authority after term expiration.** - During the period in which a public officer holds over after the expiration of his term, under constitutional or statutory authority entitling him to do so until the election and qualification of a successor, there is no vacancy in office which may be filled by an interim appointment. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**As to vacancy.** - Where power has been given to appoint to an office and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant, and an office is not vacant so long as it is supplied, in the manner provided by the constitution or law, with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it. State ex rel. Walker v. Dilley, 86 N.M. 796, 528 P.2d 209 (1974).

**Appointee incumbent cannot be displaced by another appointee.** State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Where second appointee authorized.** - Where one has been appointed county clerk and his bond has not been approved in 13 days, the commissioners are authorized to appoint another. 1914 Op. Att'y Gen. No. 98.

**When incumbent ineligible for reappointment.** - A vacancy in a county office may occur where a successor in an office fails to qualify. The board of county commissioners must appoint a person to fill the vacancy and an incumbent who has already served two consecutive terms is ineligible for that appointment. 1979 Op. Att'y Gen. No. 79-19.

**Where incumbent may hold over.** - Where person elected to office of probate judge dies before taking office, and incumbent of the office is appointed by county commissioners a year before that time upon resignation of the probate judge, the incumbent holds over until a successor is appointed by board of county commissioners. 1937-38 Op. Att'y Gen. No. 37.

**Where reelected clerk resigns prior to beginning of term.** - Where a reelected county clerk resigned prior to the beginning of her new term, a vacancy in office was thereby created pursuant to 10-3-1 NMSA 1978 and the person properly appointed on the same day as the resignation was entitled to hold the office until her successor was duly elected and qualified; therefore, there was no vacancy in the office for the new term. State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Duration of appointee's term.** - A county officer appointed by the board of county commissioners serves until the next succeeding general election. 1923-24 Op. Att'y Gen. No. 173.

**Last line of section not repealed.** - Section 10-3-1 NMSA 1978, creating a vacancy for "failure of the officer to qualify as provided by law" does not repeal by implication the last line of this section, providing that an appointive officer shall hold office until "his successor shall be duly elected and qualified according to law." State ex rel. Rives v. Herring, 57 N.M. 600, 261 P.2d 442 (1953).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 103.

## **ARTICLE 4**

### **REMOVAL OF LOCAL OFFICERS**

#### **10-4-1. [Local officers subject to removal.]**

Any county, precinct, district, city, town or village officer elected by the people, and any officer appointed to fill out the unexpired term of any such officer, may be removed from

office on any of the grounds mentioned in this chapter and according to the provision hereof.

**History:** Laws 1909, ch. 36, § 1; Code 1915, § 3954; C.S. 1929, § 96-105; 1941 Comp., § 10-303; 1953 Comp., § 5-3-3.

**Cross-references.** - For removal of justices, judges or magistrates of any court, see N.M. Const., art. VI, § 32.

For removal of municipal officers for financial interests, see 3-10-4 NMSA 1978.

For removal of municipal officer for malfeasance in office, see 3-10-7 NMSA 1978.

For supersedeas of judgment in removal proceedings, see Rule 1-062.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Constitutionality.** - This act (10-3-1, 10-4-1 to 10-4-29 NMSA 1978) does not violate N.M. Const., art. XX, § 2. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

**Purpose of removal** is not to determine whether a public officer has been a good person or a bad person in the past but only to determine whether, by reason of existing facts and circumstances, he should be removed from his present office. State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982).

**This is a civil and not a criminal proceeding.** State ex rel. Mitchell v. Medler, 17 N.M. 644, 131 P. 976 (1913); State ex rel. Mansker v. Leib, 20 N.M. 619, 151 P. 766 (1915); State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982).

**Officer not removable for misconduct during prior term.** - The terms "office" and "in office" in this section and 10-4-2 NMSA 1978 mean during the current term for which the officer is elected or appointed and in which the offenses charged occurred. Therefore, it is not within the province of the court to punish a public officer by allowing his removal for misconduct which may have occurred during a previous term. State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982).

**Power to remove board of education member not exclusive.** - Notwithstanding N.M. Const., art. XII, § 6, the school board does not have exclusive power to remove a member of the state board of education, but the court also has such power under this section. State ex rel. Hannah v. Armijo, 37 N.M. 423, 24 P.2d 274 (1933).

**District attorney not within purview.** - This section does not embrace a district attorney within its purview. State ex rel. Prince v. Rogers, 57 N.M. 686, 262 P.2d 779 (1953).

**Even though now elected.** - In 1909, when this section was passed, the district attorney was an officer appointed by the governor of the state by and with the consent of the legislature. The district attorney is not a "county, precinct, district, city, town or village officer elected by the people" under the terms of this section, even though N.M. Const., art. VI, § 24, adopted in 1911, provides for the election of district attorneys. State ex rel. Prince v. Rogers, 57 N.M. 686, 262 P.2d 779 (1953).

**Nor is a senator.** - Although a state senator may have been absent from the state for more than six months, yet it rests with the senate to declare his office vacant. 1925-26 Op. Att'y Gen. No. 82.

**Removal and suspension proceedings separate and distinct.** - Proceedings for removal and that for suspension are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the latter is auxiliary to the former. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 912.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

20 C.J.S Counties §§ 104 to 106; 62 C.J.S. Municipal Corporations § 508.

## **10-4-2. [Causes for removal of local officers.]**

The following shall be causes for removal of any officer belonging to the class mentioned in the preceding section [10-4-1 NMSA 1978]:

- A. conviction of any felony or of any misdemeanor involving moral turpitude;
- B. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;
- C. knowingly demanding or receiving illegal fees as such officer;
- D. failure to account for money coming into his hands as such officer;
- E. gross incompetency or gross negligence in discharging the duties of the office;
- F. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office.

**History:** Laws 1909, ch. 36, § 2; Code 1915, § 3955; C.S. 1929, § 96-106; 1941 Comp., § 10-304; 1953 Comp., § 5-3-4.

**Cross-references.** - For sheriff exercising powers after removal, penalty, see 4-41-4 NMSA 1978.

For misapplication of funds received from United States forest reserves, ground for removal, see 6-11-4 NMSA 1978.

For subregistrars, removal by state registrar of vital statistics, see 24-14-7 NMSA 1978.

For failure of peace officer to investigate violations of criminal laws or cooperate in prosecution, see 29-1-1 NMSA 1978.

For conservancy district officer, removal, see 73-17-8 NMSA 1978.

For New Mexico livestock board, failure to execute bonds, see 77-2-20 NMSA 1978.

For constable removed for failure to perform duties as pound-keeper in irrigation district, procedure, see 77-14-34 NMSA 1978.

**Generally, as to neglect of duty.** - Dismissal of a public officer for neglect of duty cannot be for honest errors in judgment or mistakes in administration. The dismissal must be for failure or neglect to do a positive duty. 1959-60 Op. Att'y Gen. No. 60-132.

**Cupidity or pathological sloth.** - The neglect must constitute "cupidity or pathological sloth." The mere failure to perform an act, with nothing more, does not constitute a neglect of duty. 1959-60 Op. Att'y Gen. No. 60-132.

**Where failure to attend meetings neglect of duty.** - The consistent, continual failure of an elected school board member to attend board meetings could be construed as a neglect of duty. The board is charged with the overall supervision of the schools of the district over which it has jurisdiction, and members thereof are certainly charged with a positive duty of such interest in the matters before the board to attend at least a part of its meetings. A complete failure on the part of a board member to take part in board affairs is a dereliction of a positive duty constituting neglect of office. 1959-60 Op. Att'y Gen. No. 60-132.

**Failure of justice of peace to account for money.** - A justice of the peace (now magistrate) is an officer subject to removal for failure to account for money owing the state. 1963-64 Op. Att'y Gen. No. 63-84 (rendered under former law).

**Meaning of "gross incompetency".** - The plain meaning of the term "gross incompetency" is a glaringly noticeable or manifest lack of physical or mental ability. 1976 Op. Att'y Gen. No. 76-24.

**Requirements of nonrelated job causing conflict of duties.** - If an individual is unable to adequately and efficiently perform the duties of a public position because of the requirements of other nonrelated jobs of either a public or private nature, such

amounts to an inability to fill the position because of a conflict of duties, thus rendering such person subject to discharge. 1963-64 Op. Att'y Gen. No. 63-133.

**Officer not removable for misconduct during prior term.** - The terms "office" and "in office" in this section and 10-4-1 NMSA 1978 mean during the current term for which the officer is elected or appointed and in which the offenses charged occurred. Therefore, it is not within the province of the court to punish a public officer by allowing his removal for misconduct which may have occurred during a previous term. State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees § 231 et seq.

Physical or mental disability as ground for removal, 28 A.L.R. 777.

Pendency of impeachment proceeding as affecting power of officer, 30 A.L.R. 1149.

Removal or dismissal of public officers or employees for bringing or defending an action affecting personal rights or liabilities, 74 A.L.R. 500.

Refusal of public officer to answer frankly questions asked him during an investigation as grounds for removal or discipline, 77 A.L.R. 616.

Removal of officer for collecting mileage when he had traveled at no expense to himself, 81 A.L.R. 493.

Implied power of appointing authorities to remove officer whose tenure is not prescribed by law, but who has been appointed for definite term, 91 A.L.R. 1097.

Power to remove public officer without notice and hearing, 99 A.L.R. 336.

Reversal of conviction of crime as affecting status of one removed from office because of the conviction, 106 A.L.R. 644.

Constitutional provision for removal of officer at pleasure of appointing power as applicable to office created by statute which prescribes definite term or a different method of removal, 112 A.L.R. 107.

Membership in or affiliation with religious, political, social, or criminal society or group as ground for removal of public officer, 116 A.L.R. 358.

Constitutionality and construction of statute which fixes or specifies term of office, but provides for removal without cause, 119 A.L.R. 1437.

Conviction of offense under federal law or law of another state or country as vacating accused's holding of state or local office or as ground of removal, 20 A.L.R.2d 732.

Assertion of immunity as ground for removing public officer, 44 A.L.R.2d 789.

What is an infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 A.L.R.2d 1314.

What constitutes conviction within statutory or constitutional provisions making conviction of crime grounds for removal from public office, 71 A.L.R.2d 593.

Removal of officer for misconduct during previous term, 42 A.L.R.3d 691.

Validity, construction and effect of state constitutional or statutory provision regarding nepotism in the public service, 11 A.L.R.4th 826.

20 C.J.S. Counties § 105; 62 C.J.S. Municipal Corporations § 508.

### **10-4-3. [Grand jury accusation.]**

An accusation in writing against any officer belonging to the class of officers mentioned in Section 10-4-1 NMSA 1978, charging any of the matters mentioned in this chapter as sufficient ground for removal, may be presented by the grand jury to the district court of the county in or for which the officer accused is elected.

**History:** Laws 1909, ch. 36, § 4; Code 1914, § 3957; C.S. 1929, § 96-108; 1941 Comp., § 10-305; 1953 Comp., § 5-3-5.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**When order to show cause necessary.** - A citation or order to an officer to show cause why he should not be suspended from office until final determination of removal proceeding is necessary before the court has power to proceed to hear the matter of suspension. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 510.

### **10-4-4. [Form of accusation.]**

The accusation must state the offense charged in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended.

**History:** Laws 1909, ch. 36, § 5; Code 1915, § 3958; C.S. 1929, § 96-109; 1941 Comp., § 10-306; 1953 Comp., § 5-3-6.



**Strict formality inapplicable.** - Strict formality customarily required in the case of indictments or informations does not apply to accusation under this section. State ex rel. Mansker v. Leib, 20 N.M. 619, 151 P. 766 (1915).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Divorce and separation: goodwill in medical or dental practice as property subject to distribution on dissolution of marriage, 76 A.L.R.4th 1025.

20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 514.

### **10-4-5. [Presentment of grand jury accusation; service on defendant; return day.]**

The accusation must be presented in open court, and the judge, after receiving the same, must forthwith cause it to be transmitted to the district attorney who must cause a copy thereof to be served upon the defendant and require by written notice that such defendant appear before the district court at a date to be named in the notice, which shall be not less than five nor more than ten days after service of a copy of such notice, and answer the accusation.

**History:** Laws 1909, ch. 36, § 6; Code 1915, § 3959; C.S. 1929, § 96-110; 1941 Comp., § 10-307; 1953 Comp., § 5-3-7.

**Cross-references.** - For procedure for suspension from office, see 10-4-20 NMSA 1978.

For process, see Rule 1-004.

For service, see Rule 1-005.

**Citation or order to show cause necessary.** - A citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has power to proceed to hear the matter of suspension. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Substitute service.** - In proceedings for the suspension and removal of county commissioner, service may be had in the absence of the accused, by delivering copy of citation to a person over 15 years of age, residing at his usual place of abode. State ex rel. Leyba v. District Court, 33 N.M. 527, 270 P. 797 (1928).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 513.

### **10-4-6. [Defendant's appearance or default.]**

The defendant must appear at the time appointed in the notice and answer the accusation unless for sufficient cause the court has assigned another date for that purpose. If he does not appear, the court may proceed to hear and determine the accusation in his absence.

**History:** Laws 1909, ch. 36, § 7; Code 1915, § 3960; C.S. 1929, § 96-111; 1941 Comp., § 10-308; 1953 Comp., § 5-3-8.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 175, 176.

#### **10-4-7. [Defendant's answer; grounds.]**

The defendant may answer the accusation either by objecting to the sufficiency thereof, or any portion thereof, or by denying the truth of the same.

**History:** Laws 1909, ch. 36, § 8; Code 1915, § 3961; C.S. 1929, § 96-112; 1941 Comp., § 10-309; 1953 Comp., § 5-3-9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 176, 177.

#### **10-4-8. [Objection for insufficiency; form immaterial.]**

If he objects to the legal sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it represents intelligibly the ground of the objection.

**History:** Laws 1909, ch. 36, § 9; Code 1915, § 3962; C.S. 1929, § 96-113; 1941 Comp., § 10-310; 1953 Comp., § 5-3-10.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 177.

#### **10-4-9. [Criminal procedure made applicable.]**

All matters of procedure not otherwise provided for in this chapter shall be governed by the laws governing criminal procedure.

**History:** Laws 1909, ch. 36, § 10; Code 1915, § 3963; C.S. 1929, § 96-114; 1941 Comp., § 10-311; 1953 Comp., § 5-3-11.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Removal action is civil proceeding.** - An action for the removal of an officer from office under the provisions of this act is a civil and not a criminal proceeding. State ex rel. Mitchell v. Medler, 17 N.M. 644, 131 P. 976 (1913).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Injunction as remedy against removal, 34 A.L.R.2d 554.

67 C.J.S. Officers and Public Employees § 176.

#### **10-4-10. [Guilty plea; judgment; denial or refusal to plead; trial.]**

If the defendant pleads guilty, the court must render judgment of conviction against him. If he denied [denies] the matters charged or refuses to answer the accusation, the court must immediately, or at such time as it may appoint, proceed to try the accusation.

**History:** Laws 1909, ch. 36, § 11; Code 1915, § 3964; C.S. 1929, § 96-115; 1941 Comp., § 10-312; 1953 Comp., § 5-3-12.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 177.

#### **10-4-11. [Precedence in trial.]**

As soon as the case is at issue, it must be immediately set down for trial and shall have precedence over all other cases on the docket.

**History:** Laws 1909, ch. 36, § 12; Code 1915, § 3965; C.S. 1929, § 96-116; 1941 Comp., § 10-313; 1953 Comp., § 5-3-13.

**Preemption not absolute.** - These provisions are not absolutely preemptory, but secure to the public and the defendant a preference of right of trial over other cases. State ex rel. Mitchell v. Medler, 17 N.M. 644, 131 P. 976 (1913).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 177.

#### **10-4-12. [Jury trial required; procedure.]**

The trial must be by jury and conducted in all respects in the same manner as a trial on an information or indictment for a misdemeanor.

**History:** Laws 1909, ch. 36, § 13; Code 1915, § 3966; C.S. 1929, § 96-117; 1941 Comp., § 10-314; 1953 Comp., § 5-3-14.

**Generally.** - The provision of this section as to the conduct of the trial was designed to throw around the defendant the same safeguards with which the law clothes a

defendant in a criminal action. State ex rel. Mansker v. Leib, 20 N.M. 619, 151 P. 766 (1915); State ex rel. Mitchell v. Medler, 17 N.M. 644, 131 P. 976 (1913).

**Citation or order to show cause necessary.** - A citation or order to show cause is necessary before the court has the power to proceed to hear the matter. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 177.

### **10-4-13. [Verdict; form.]**

The form of verdict of the jury in such cases shall be "guilty" or "not guilty."

**History:** Laws 1909, ch. 36, § 14; Code 1915, § 3967; C.S. 1929, § 96-118; 1941 Comp., § 10-315; 1953 Comp., § 5-3-15.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 515.

### **10-4-14. [Judgment of removal; entry.]**

Upon a conviction the court must pronounce judgment that the defendant be removed from office; and the judgment must be entered upon the minutes assigning therein the causes of removal.

**History:** Laws 1909, ch. 36, § 15; Code 1915, § 3968; C.S. 1929, § 96-119; 1941 Comp., § 10-316; 1953 Comp., § 5-3-16.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 515.

### **10-4-15. [Attendance of witnesses.]**

The district attorney and the defendant are respectively entitled to such process as may be necessary to enforce the attendance of witnesses as upon a trial of [on] an information or indictment.

**History:** Laws 1909, ch. 36, § 16; Code 1915, § 3969; C.S. 1929, § 96-120; 1941 Comp., § 10-317; 1953 Comp., § 5-3-17.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 176.

### **10-4-16. [Appeal; suspension pending reversal; filling vacancy.]**

From a judgment of removal, appeal may be taken to the supreme court in the same manner as from a judgment in a civil action, but until such judgment is reversed, the defendant is suspended from his office, and pending the appeal, the office must be filled as in case of vacancy.

**History:** Laws 1909, ch. 36, § 17; Code 1915, § 3970; C.S. 1929, § 96-121; 1941 Comp., § 10-318; 1953 Comp., § 5-3-18.

**Removal and suspension proceedings separate and distinct.** - A proceeding for suspension and one for removal are separate and distinct, and each requires its own citation as a basis for jurisdiction, although the former is auxiliary to the latter. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 517.

### **10-4-17. [Presentment of accusation by district attorney; vacation; no grand jury in county.]**

The accusation provided for in this chapter may be presented by the district attorney to the judge in vacation or term time at any time when, under the provisions of law there will be no grand jury in the county where the same is presented, for a period of at least twenty days after the presentment of such accusation.

**History:** Laws 1909, ch. 36, § 18; Code 1915, § 3971; C.S. 1929, § 96-122; 1941 Comp., § 10-319; 1953 Comp., § 5-3-19.

**Cross-references.** - For grand jury accusation, see 10-4-3 NMSA 1978.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Jurisdiction of district attorney limited.** - The jurisdiction of the district attorney to present the accusation provided for is limited by this section. State v. Awalt, 21 N.M. 510, 156 P. 407 (1916).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 514.

### **10-4-18. [Duty of district attorney on receipt of evidence.]**

Whenever sworn evidence is presented to the district attorney showing that any of the officers of the class provided for in this chapter are guilty of any of the matters herein mentioned as causes for removal, he must present the accusation to the court as provided in the next preceding section [10-4-17 NMSA 1978].

**History:** Laws 1909, ch. 36, § 19; Code 1915, § 3972; C.S. 1929, § 96-123; 1941 Comp., § 10-320; 1953 Comp., § 5-3-20.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Generally.** - It is the duty of the district attorney to bring matter of complaint to attention of court by statement of the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common knowledge to know what is intended, and support such statement by the affidavit or affidavits of those having knowledge of the facts upon which cause for removal is based. State ex rel. Mansker v. Leib, 20 N.M. 619, 151 P. 766 (1915).

**As to filing accusation.** - The district attorney cannot proceed in the matter of removal of county officials under this act (10-3-1, 10-4-1 to 10-4-29 NMSA 1978), unless sworn evidence has been presented to him, and unless he files an accusation supported by affidavit or affidavits, at a time when the grand jury of the county would not be in session within a period of twenty days, or at a time when the grand jury was not actually in session. State v. Awalt, 21 N.M. 510, 156 P. 407 (1916).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 176.

### **10-4-19. [Presentment by district attorney; supporting affidavits; procedure.]**

When the accusation is presented by the district attorney as provided in the preceding section [10-4-18 NMSA 1978], the same must be supported by sworn affidavit or affidavits, and the court must forthwith investigate the matter, and if a jury is in attendance at the time such accusation is presented, the court must order a citation to the defendant and thenceforth the case must proceed as provided in this chapter where the accusation is by a grand jury.

**History:** Laws 1909, ch. 36, § 20; Code 1915, § 3973; C.S. 1929, § 96-124; 1941 Comp., § 10-321; 1953 Comp., § 5-3-21.

**Cross-references.** - For presentment of grand jury accusation, see 10-4-5 NMSA 1978.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**When amended verification prohibited.** - Where the verification of an accusation for the removal of a public officer is held insufficient by the trial court within twenty days of the time for the grand jury to meet, or while it is in session, the matter should be presented, and it is error to permit amended verifications. State v. Awalt, 21 N.M. 510, 156 P. 407 (1916).

**Accusation distinguished from information.** - Accusation to be presented to the court by the district attorney may be one based upon information of others and not a formal charge upon information of the district attorney. State ex rel. Mansker v. Leib, 20 N.M. 619, 151 P. 766 (1915).

**Citation or order to show cause necessary.** - Under the provisions of 10-4-5 NMSA 1978, a citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has the power to proceed to hear the matter of suspension. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 512.

## **10-4-20. [Procedure for suspension from office.]**

If the accusation provided in this chapter, to be presented by the district attorney, is presented at a time when there is no jury in attendance or is presented to the court in vacation, the court, if it deems such action necessary, after ordering a citation to the defendant as provided in the next preceding section [10-4-19 NMSA 1978], may, on application of the district attorney, also order the defendant to appear at a time not less than five nor more than fifteen days after service of such order and at such place as may be mentioned in the order, to show cause why he should not be suspended from office until the matters and things alleged in the accusation have been judicially determined under the provisions of this chapter.

**History:** Laws 1909, ch. 36, § 21; Code 1915, § 3974; C.S. 1929, § 96-125; 1941 Comp., § 10-322; 1953 Comp., § 5-3-22.

**Cross-references.** - For presentment of accusation by district attorney, see 10-4-17 NMSA 1978.

For deputy sheriff's commission being revoked by district judge, see 4-41-8 NMSA 1978.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**When citation or order necessary.** - A citation or order to an officer to show cause why he should not be suspended from office until final determination of a removal proceeding is necessary before the court has power to proceed to hear the matter of suspension. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Proceedings for removal and suspension are separate and distinct,** and each requires its own citation as a basis for jurisdiction, although the latter is auxiliary to the former. State ex rel. Delgado v. Leahy, 30 N.M. 221, 231 P. 197 (1924).

**Jurisdiction of preliminary investigations.** - District courts are without jurisdiction to entertain preliminary investigations except as provided in this section and 10-4-25 NMSA 1978, and jurisdiction assumed outside of these sections is properly restrained by a writ of prohibition. *State ex rel. Harvey v. Medler*, 19 N.M. 252, 142 P. 376 (1914), distinguished in, 71 N.M. 400, 379 P.2d 54 (1962).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 504.

### **10-4-21. [Order of suspension.]**

On the date provided in the order, if the defendant appears and offers proof, the court must hear the testimony presented by the district attorney and the defendant, and if in the judgment of the court there is reasonable ground to believe that the matters and things stated in the accusation will be established upon a trial, he may forthwith enter an order suspending the officer until after final hearing.

**History:** Laws 1909, ch. 36, § 22; Code 1915, § 3975; C.S. 1929, § 96-126; 1941 Comp., § 10-323; 1953 Comp., § 5-3-23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

### **10-4-22. [Effect of suspension order.]**

The order of suspension shall operate to relieve the officer from all the duties of the office until the matter is finally determined, and he must forthwith vacate the office and turn over all moneys, books, papers and property belonging thereto to the party appointed to serve until such suspension is removed.

**History:** Laws 1909, ch. 36, § 23; Code 1915, § 3976; C.S. 1929, § 96-127; 1941 Comp., § 10-324; 1953 Comp., § 5-3-24.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 108.

### **10-4-23. [Denial of motion to suspend; dismissal of proceedings.]**

If the court concludes that there is not sufficient ground for suspending the officer, it may enter an order denying the motion to suspend him and hold the matter in statu quo until final hearing, or the court may, in its discretion, dismiss the proceedings.

**History:** Laws 1909, ch. 36, § 24; Code 1915, § 3977; C.S. 1929, § 96-128; 1941 Comp., § 10-325; 1953 Comp., § 5-3-25.



**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-4-24. [Default of defendant; effect.]**

If the defendant fails to appear and answer the order to show cause why he should not be suspended, the court may proceed in his absence as in this chapter provided.

**History:** Laws 1909, ch. 36, § 25; Code 1915, § 3978; C.S. 1929, § 96-129; 1941 Comp., § 10-326; 1953 Comp., § 5-3-26.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-4-25. [Continuance; preliminary investigation required; suspension pending final adjudication.]**

Nothing in this chapter shall operate to deprive any defendant of the right to a continuance in any case in which such right would attach in any criminal case as provided by law, but before any case shall be continued, upon application of the defendant, beyond the term of court at which the accusation is presented, or if such accusation is presented in vacation beyond the first term of court after presentment thereof the court may, upon application of the district attorney, make a preliminary investigation as provided in this chapter and suspend the officer, pending a final adjudication of the matters alleged in the accusation.

**History:** Laws 1909, ch. 36, § 26; Code 1915, § 3979; C.S. 1929, § 96-130; 1941 Comp., § 10-327; 1953 Comp., § 5-3-27.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Jurisdiction of district courts.** - The act (10-3-1, 10-4-1 to 10-4-29 NMSA 1978) confers jurisdiction upon the district courts to make preliminary investigations and suspend an officer pending outcome of accusation, before continuance beyond the term of court. State ex rel. Harvey v. Medler, 19 N.M. 252, 142 P. 376 (1914).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-4-26. [Reinstatement of suspended officer.]**

If upon final trial the defendant is found not guilty, he must be reinstated and the party serving during the time of his suspension must immediately vacate the office and return

to the defendant all moneys, books, papers and other property in his hands as such officer.

**History:** Laws 1909, ch. 36, § 27; Code 1915, § 3980; C.S. 1929, § 96-131; 1941 Comp., § 10-328; 1953 Comp., § 5-3-28.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 111, 114.

### **10-4-27. [Payment of salary after reinstatement; compensation of interim officer.]**

If an officer has been suspended as provided in this chapter and reinstated after final trial, he shall receive pay for the entire time of his suspension, and the court may make an order to pay the officer serving during the time of such suspension, such reasonable compensation as his services warrant, which shall be paid out of a fund to be designated by the court.

**History:** Laws 1909, ch. 36, § 28; Code 1915, § 3981; C.S. 1929, § 96-132; 1941 Comp., § 10-329; 1953 Comp., § 5-3-29.

**Cross-references.** - For suspension of officer, see 10-4-25 NMSA 1978.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 114.

### **10-4-28. [Officer appointed for suspension period; oath and bond; filling vacancy after final removal.]**

When any officer is suspended as provided in this act [chapter], the judge of said court shall appoint some qualified person to discharge the duties of such officer during the period of his suspension, which person shall take the oath and give the bond required of incumbents of such office, and in case the final judgment be for the removal of such accused officer before the expiration of his term, his successor shall be appointed in the manner provided by law for filling vacancies in such office.

**History:** Laws 1909, ch. 36, § 29; Code 1915, § 3982; Laws 1915, ch. 21, § 1; C.S. 1929, § 96-133; 1941 Comp., § 10-330; 1953 Comp., § 5-3-30.

**Bracketed material.** - "Chapter" has been inserted in brackets by the compiler to conform with substitutions made by the 1915 Code compilers of "this chapter" for "this act." For meaning of "this chapter," see catchline "Meaning of this chapter" in notes to

10-1-3 NMSA 1978. The insertion was not enacted by the legislature and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 74 to 79, 108.

### **10-4-29. [Exclusive method of removal.]**

No officer belonging to the class mentioned in Section 10-4-1 NMSA 1978 can be removed from office in any manner except according to the provisions of this chapter.

**History:** Laws 1909, ch 36, § 30; Code 1915, § 3983; C.S. 1929, § 96-134; 1941 Comp., § 10-331; 1953 Comp., § 5-3-31.

**Meaning of "this chapter".** - See same catchline in notes to 10-1-3 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Injunction as remedy against removal, 34 A.L.R.2d 554.

20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 506.

## **ARTICLE 5 SUSPENSION OF CERTAIN OFFICIALS**

### **10-5-1. Definition.**

"Official of any local public body" means every officer, deputy or employee of:

- A. every political subdivision of the state of New Mexico;
- B. the agencies, instrumentalities and institutions of every political subdivision of this state; and
- C. charitable institutions for which appropriations are made by the legislature.

**History:** 1953 Comp., § 5-3-37.1, enacted by Laws 1957, ch. 254, § 1; 1979, ch. 281, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 2 to 4.

### **10-5-2. Power of secretary to suspend certain officials; grounds for suspension; secretary to take charge of office.**

The secretary of finance and administration may summarily suspend any official of any local public body in all cases where an audit conducted by the state auditor, or by personnel of his office, or by an independent auditor employed or approved by the state auditor reveals any of the following:

- A. a fraudulent misappropriation or embezzlement of public money;
- B. fiscal management of an office resulting in violation of law or willful violation of the fiscal regulations of the department of finance and administration for every local public body; or
- C. willful failure to perform any duty imposed by any law which the secretary of finance and administration is charged with enforcing.

Upon such suspension, the secretary of finance and administration may take charge of the office of the persons [person] suspended.

**History:** 1953 Comp., § 5-3-37.2, enacted by Laws 1957, ch. 254, § 2; 1977, ch. 247, § 37; 1979, ch. 281, § 2; 1980, ch. 151, § 7.

**Scope includes county treasurer.** - Since the county treasurer is a salaried public official, the suspension provisions of this section are applicable to anyone holding that office. *Mata v. Montoya*, 91 N.M. 20, 569 P.2d 946 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 912.

20 C.J.S. Counties § 106; 62 C.J.S. Municipal Corporations § 504; 67 C.J.S. Officers and Public Employees §§ 108 to 111.

### **10-5-3. Hearing; testimony.**

Within five days after such suspension or within such reasonable time as the person suspended may request, the secretary of finance and administration shall conduct a hearing for the person suspended. At such hearing the person suspended may show cause why such suspension should not be continued. The state auditor, and the employees of his office or the auditors employed by the state auditor to conduct the audit upon which suspension was based, shall appear at the hearing and give testimony.

**History:** 1953 Comp., § 5-3-37.3, enacted by Laws 1957, ch. 254, § 3; 1977, ch. 247, § 38; 1979, ch. 281, § 3.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-5-4. Oaths; subpoenas.**

The secretary of finance and administration is authorized to administer oaths to persons who testify at such hearing. The secretary may compel the attendance of any person whose testimony may be required or needed at such hearing, and to compel the production of books, papers, documents, records and data necessary thereto. The official requesting the hearing shall have the right to make timely request to the secretary that subpoenas for necessary and material witnesses or for the production of documents and papers be issued, and the same shall be issued. The secretary and such employees of the department as may be designated by the secretary are authorized to issue subpoenas for persons whose testimony is required, and subpoenas so issued shall be served by persons authorized by law to make such service in civil actions, and if served by a sheriff or deputy, such service shall be made without cost.

**History:** 1953 Comp., § 5-3-37.4, enacted by Laws 1957, ch. 254, § 4; 1977, ch. 247, § 39.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-5-5. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1979, ch. 281, § 7, repeals 10-5-5 NMSA 1978, relating to penalties.

#### **10-5-6. Continuance of suspension after hearing; discontinuance of salary.**

After such hearing, the secretary of finance and administration shall have discretion to continue such suspension for any of the causes above numbered, and if such suspension is continued no salary shall be received by such official during such suspension unless reinstated by the order of the district court as hereinafter provided.

**History:** 1953 Comp., § 5-3-37.6, enacted by Laws 1957, ch. 254, § 6; 1977, ch. 247, § 40.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 111.

#### **10-5-7. Petition for reinstatement; order to show cause; result.**

A. If after hearing before the secretary of finance and administration such suspension is continued, the person suspended shall have the right to appeal to the district court of

the county where he was serving as an official within thirty days after entry of the order of suspension.

B. Upon appeal, the court shall set aside an order of suspension only if it is found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with the law.

**History:** 1953 Comp., § 5-3-37.7, enacted by Laws 1957, ch. 254, § 7; 1977, ch. 247, § 41; 1979, ch. 281, § 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 108, 111, 114, 116.

### **10-5-8. Control of office; bond of agent in charge; discretionary reinstatement; institution of removal proceedings.**

Whenever the secretary of finance and administration assumes control of any office as hereinabove provided, the secretary may assign any employee of the department of finance and administration to perform the duties of the official suspended by the secretary.

The secretary of finance and administration may reinstate a suspended official of any local public body whenever the suspended official has made a proper showing satisfactory to the secretary that he is able and willing to conduct his office as provided by law, and that no loss will be suffered by the local public body.

In all cases where there shall be grounds for removal of such official, the secretary of finance and administration may cause removal proceedings to be instituted and prosecuted by the attorney general or district attorney, in the manner now provided by law for the institution and prosecution of such proceedings by the district attorney.

**History:** 1953 Comp., § 5-3-37.8, enacted by Laws 1957, ch. 254, § 8; 1977, ch. 247, § 42; 1979, ch. 281, § 5.

**Cross-references.** - For county officers, bond, see 10-1-13 NMSA 1978.

For definition of "official of any local public body," see 10-5-1 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 108, 111, 114.

### **10-5-9. Suspended official to deliver money and records to secretary; failure or refusal; criminal penalty.**

A. Upon written order of suspension by the secretary of finance and administration, the official suspended shall immediately deliver to the secretary all money, records and other property of the office in his charge, for which the secretary shall give a receipt.

B. If upon order of the secretary a suspended official of any local public body refuses or fails to deliver to the secretary all money, records and other property of the local public body, the secretary may invoke the aid of the court to require delivery of money, records and other property of the local public body.

C. It shall be a petty misdemeanor for an official of any local public body to willfully fail or refuse to deliver all money, records and other property of the local public body to the secretary upon order in accordance with the provisions of this section. Upon conviction, the official shall be sentenced to not more than six months in the county jail and fined not more than five thousand dollars (\$5,000) or both such imprisonment and fine in the discretion of the judge.

**History:** 1953 Comp., § 5-3-37.9, enacted by Laws 1957, ch. 254, § 9; 1977, ch. 247, § 43; 1979, ch. 281, § 6.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 108, 257 to 259.

## **ARTICLE 6 ABANDONMENT OF PUBLIC OFFICE OR EMPLOYMENT**

### **10-6-1. [Effect of public officer or employee entering military service.]**

Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall heretofore have entered or who hereafter shall enter military, naval, United States merchant marine, or other armed service of the United States of America, and who by reason of the duties imposed upon him in such service shall fail to devote his time to the performance in person of the duties of such office or employment shall, by entering or continuing in such service, be deemed to have waived and renounced the salary of, and to have abandoned such office or employment until, but only until, he shall have been relieved from active duty in such service and shall have resumed the personal performance of the duties of such public office or employment.

**History:** 1941 Comp., § 10-338, enacted by Laws 943, ch. 123, § 1; 1953 Comp., § 5-3-38.

**Generally, as to challenging provisions.** - A public officer who enters military service cannot challenge provisions of act which temporarily diverts emoluments of the office during his inability to perform the duties of such office, in view of applicability of the removal and vacancy statutes which would normally foreclose him from retaining any right to either emoluments or salary pertaining to such office. State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944).

**Where not legally appointed.** - One who was not legally appointed to the post of deputy assessor cannot question constitutionality of act which provides for carrying on duties of public officer who entered military service. State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944).

**Purpose of statute.** - Laws 1943, ch. 123 (10-6-1 to 10-6-6 NMSA 1978) had as its purpose the preservation to incumbents of their offices despite their failure to perform the duties thereof while in the armed services, and guarding against disruption of essential functions of government. State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944).

**Effect of national guard duty.** - A county clerk or any other public employee or official serving on active duty in the federalized national guard must be considered to have temporarily abandoned his office, and is not entitled to be paid for such office. 1951-52 Op. Att'y Gen. No. 5447.

**Section is applicable to members of municipal boards of education.** 1943-44 Op. Att'y Gen. No. 4629.

**Effect of failure to rule on repeal.** - Where trial court entered a correct judgment, its failure to rule that this statute did not by implication repeal a prior removal statute, where the two were not irreconcilable, or that the latter as a more general statute did not repeal the earlier special statute, if error, was harmless. State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877 (1944).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Induction or voluntary enlistment in military service as creating a vacancy in, or as ground of removal from, public office or employment, 143 A.L.R. 1470, 147 A.L.R. 1427, 148 A.L.R. 1400, 150 A.L.R. 1447, 151 A.L.R. 1462, 152 A.L.R. 1459, 154 A.L.R. 1456, 156 A.L.R. 1457, 157 A.L.R. 1456.

Constitutionality of statute providing for payments to public officers or employees who enter the military service of the United States, or to their dependents, 145 A.L.R. 1156.

20 C.J.S. Counties § 103; 62 C.J.S. Municipal Corporations § 502.

## **10-6-2. [Temporary appointments.]**



The officer, agent, employee, board or other agency of the state of New Mexico, or of its departments, agencies, counties, municipalities or political subdivisions, who is by law authorized to fill ordinary vacancies in the public office or employment so temporarily abandoned as provided in Section 1 [10-6-1 NMSA 1978] hereof is hereby authorized, empowered and directed to appoint to the public office or employment, so abandoned as provided in Section 1 hereof, another person who shall receive the salary and perform the duties thereof until, but only until, the former incumbent shall have been relieved from active duty in the armed services and shall have resumed the personal discharge of the duties of such public office or employment.

**History:** 1941 Comp., § 10-339, enacted by Laws 1943, ch. 123, § 2; 1953 Comp., § 5-3-39.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 135, 145, 164, 177 to 179.

67 C.J.S. Officers and Public Employees §§ 74 to 79, 100.

### **10-6-3. [Permanent abandonment of office, what constitutes.]**

Any incumbent of any public office or employment of the state of New Mexico, or of any of its departments, agencies, counties, municipalities or political subdivisions whatsoever, who shall accept any public office or employment, whether within or without the state, other than service in the armed forces of the United States of America, for which a salary or compensation is authorized, or who shall accept private employment for compensation and who by reason of such other public office or employment or private employment shall fail for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment.

**History:** 1941 Comp., § 10-340, enacted by Laws 1943, ch. 123, § 3; 1953 Comp., § 5-3-40.

**Factors constituting abandonment.** - It is not only the acceptance of another public office for which a salary or compensation is authorized that will automatically constitute the abandonment of the incumbent's public office; in addition, it must be found that because of such other public office the incumbent fails for 30 successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office. 1964 Op. Att'y Gen. No. 64-73.

**Offices of mayor and magistrate compatible.** - The office of mayor of an incorporated village and the office of justice of the peace (now magistrate) where the latter's precinct covers said village are not incompatible (rendered prior to 1977 amendment of 10-6-5 NMSA 1978. 1964 Op. Att'y Gen. No. 64-73.

**So are school superintendent and teacher.** - The office of county school superintendent is compatible with employment as a municipal schoolteacher. Such employment will result in a resignation by operation of law of the office of county school superintendent if it causes the superintendent to fail for 30 successive days to devote full time to his office. Employment as a teacher may also render the superintendent subject to removal from office if it results in the failure, neglect or refusal of the superintendent to discharge any or all of the duties devolving on him by virtue of his office. 1959-60 Op. Att'y Gen. No. 60-154.

**And judge and clerk where hours do not conflict.** - The test of physical incompatibility is a failure by an official for 30 consecutive days to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of his office. One cannot perform two full-time positions or one full-time position and one part-time position at the same time. Where the individual is serving in the capacity of municipal judge after his working hours as city clerk, there is no physical incompatibility of office. 1968 Op. Att'y Gen. No. 68-111.

**Judge and county maintenance worker.** - If an incumbent could successfully perform his duties as probate judge to the usual and normal extent outside his working hours at the county maintenance department, or vice versa, the two positions would be compatible under the statutory criteria. 1989 Op. Att'y Gen. No. 89-10.

**Tribal council member and county commissioner.** - A Native American may serve as a tribal council member and as a county commissioner at the same time, as long as his duties as tribal council member do not physically interfere with his duties as county commissioner during the ordinary working hours of that position and the functions of the two positions are not otherwise incompatible. 1990 Op. Att'y Gen. No. 90-14.

**Power to determine and fill vacancy.** - County commissioners have power to determine a vacancy in the office of the justice of the peace (now magistrate) to exist by reason of abandonment by the elected incumbent and to appoint another person to fill the vacancy. 1959-60 Op. Att'y Gen. No. 59-34.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 100.

#### **10-6-4. [Filling vacancy when office permanently abandoned.]**

The officer, agent, employee, board or other agency of the state, or of its departments, agencies, counties, municipalities or political subdivisions, who is by law authorized to fill ordinary vacancies in the public office or employment so permanently abandoned, as provided in Section 3 [10-6-3 NMSA 1978] hereof, is hereby authorized, empowered and directed to appoint to such public office or employment some qualified person who shall thereafter receive the salary and perform the duties thereof until the expiration of the term of the former incumbent or until his successor shall have been elected, appointed or otherwise chosen and qualified or until the former incumbent shall have

been relieved from active duty in the armed services and shall have resumed the personal discharge of the duties of such public office or employment.

**History:** 1941 Comp., § 10-341, enacted by Laws 1943, ch. 123, § 4; 1953 Comp., § 5-3-41.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 74 to 79, 100.

### **10-6-5. Definition of incompatible office; service and employment.**

Any public office or service, other than service in the armed forces of the United States of America, and any private employment of the nature and extent designated in Section 10-6-3 NMSA 1978 is hereby declared to be incompatible with the tenure of public office or employment.

**History:** 1941 Comp., § 10-342, enacted by Laws 1943, ch. 123, § 5; 1953 Comp., § 5-3-42; Laws 1977, ch. 56, § 1; 1979, ch. 344, § 1.

**Physical incompatibility explained.** - The test of physical incompatibility is a failure by an official for 30 consecutive days to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of his office. One cannot perform two full-time positions or one full-time position and one part-time position at the same time. Where the individual is serving in the capacity of municipal judge after his working hours as city clerk, there is no physical incompatibility of office. 1968 Op. Att'y Gen. No. 68-111.

**Public school instructors and administrators are state employees** within the constraints of the prohibition against serving in the legislature while receiving compensation as an employee of the state. 1988 Op. Att'y Gen. No. 88-20.

**Effect of section on schoolteacher.** - The position of schoolteacher is not an office within the meaning of this section. *Amador v. New Mexico State Bd. of Educ.*, 80 N.M. 336, 455 P.2d 840 (1969).

**On state board of education and schoolteacher.** - The state board of education only has jurisdiction over a schoolteacher in the instance where the teacher appeals to that board from an adverse ruling by the local board of education and if a teacher who is also a member of the state board should appeal from the action of the local board, the teacher would simply refrain from acting as a member of the board in his case just as would a member of any other trade or profession who appealed to the board of which he was a member. *Amador v. New Mexico State Bd. of Educ.*, 80 N.M. 336, 455 P.2d 840 (1969).

**On mayor and magistrate.** - The office of mayor of an incorporated village and the office of justice of the peace (now magistrate) where the latter's precinct covers said

village are not incompatible (opinion rendered prior to 1977 amendment of 10-6-5 NMSA 1978). 1964 Op. Att'y Gen. No. 64-73.

**On judicial and law enforcement officer.** - Regardless of salary, a judicial officer may never serve as a law enforcement officer in any situation where holding one office may cause some benefit to accrue to the other, or would intrude upon the disinterested and impartial disposition of civil or criminal cases in court. 1959-60 Op. Att'y Gen. No. 60-168.

**On probate judge and deputy district court clerk.** - A probate judge may be appointed to act as a deputy district court clerk and receive a salary therefor. 1957-58 Op. Att'y Gen. No. 57-298.

**On city clerk and municipal judge.** - No incompatibility of office exists because of inconsistency of functions between the offices of city clerk and municipal judge. 1968 Op. Att'y Gen. No. 68-111.

**Tribal council member and county commissioner.** - A Native American may serve as a tribal council member and as a county commissioner at the same time, as long as his duties as tribal council member do not physically interfere with his duties as county commissioner during the ordinary working hours of that position and the functions of the two positions are not otherwise incompatible. 1990 Op. Att'y Gen. No. 90-14.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Resignation of one office as affecting eligibility to another office during term of former office, 5 A.L.R. 117, 40 A.L.R. 945.

Incompatibility of offices or positions in military service and civil service, 26 A.L.R. 142, 132 A.L.R. 254, 147 A.L.R. 1419, 148 A.L.R. 1399, 150 A.L.R. 1444.

Incompatibility, under common-law doctrine, of office of state legislator and position or post in local political subdivision, 89 A.L.R.2d 632.

67 C.J.S. Officers and Public Employees §§ 27 to 33, 203.

## **10-6-6. [Penalties.]**

It shall be unlawful for any person who has temporarily or permanently abandoned his public office or employment, as herein defined and described, to receive compensation from public money on account of services or periods of time in his or her public office or employment accruing after such temporary or permanent abandonment and, in the case of temporary abandonment as herein defined, before the resumption of such office or employment as described in Section 1 [10-6-1 NMSA 1978] hereof. Any person receiving or paying compensation in violation of this section shall be punished by a fine of not less than two hundred fifty dollars (\$250), nor more than one thousand dollars (\$1,000), or by imprisonment for not more than one year, or by both such fine and imprisonment.

**History:** 1941 Comp., § 10-343, enacted by Laws 1943, ch. 123, § 6; 1953 Comp., § 5-3-43.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 103; 62 C.J.S. Municipal Corporations § 502.

## **ARTICLE 7**

# **COMPENSATION AND WORKING CONDITIONS GENERALLY**

### **10-7-1. [Temporary transfers of employees from one office, department or institution to another.]**

The governor is further authorized, subject to the approval of the state board of finance, to transfer, temporarily from one office, department or institution to another office, department or institution, such employees as in his judgment may be necessary or convenient at any time to further the economical and efficient conduct of the state government and without regard to the appropriation out of which such employee may be paid; provided, that the governor shall have the power to designate and employ a personnel director who shall assist him in the performance of the duties imposed upon the governor by the terms of this section.

**History:** Laws 1935, ch 70, § 3; 1941 Comp., § 10-403; Laws 1943, ch. 10, § 3; 1953 Comp., § 5-4-3.

**Cross-references.** - For causes for removal of local officers, see 10-4-1 NMSA 1978.

For permanent abandonment of office, see 10-6-3 NMSA 1978.

For definition of "incompatible office", see 10-6-5 NMSA 1978.

**State board of finance.** - Laws 1977, ch. 247, § 6, establishes the state board of finance, referred to in this section, in connection with the board of finance division of the department of finance and administration. See 6-1-1 NMSA 1978.

**Theory of section.** - This section contemplates that a public officer can perform the duties and obligations of any position to which he is temporarily transferred. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

**Meaning of "temporary".** - The word temporary means that which is to last for a limited time only, not of long duration but for a short time. 1957-58 Op. Att'y Gen. No. 57-94.

**Remuneration where two jobs.** - An employee of the state who is employed by one department on a monthly basis could be entitled to remuneration from a second

department or agency of the state if the services are performed at a time which are not regular working hours of the first department and in a location different from that of the first department. 1957-58 Op. Att'y Gen. No. 58-16.

**State highway engineer is not subject to transfer** provisions of this section. State ex rel. Bird v. Apodaca, 91 N.M. 279, 573 P.2d 213 (1977).

**Law reviews.** - For note, "Mandamus Proceedings Against Public Officials: State of New Mexico ex rel. Bird v. Apodaca," see 9 N.M.L. Rev. 195 (1978-79).

## **10-7-2. Salaries and wages payable at least semimonthly.**

It is hereby provided that all persons employed by and on behalf of the state of New Mexico, except those employed by institutions of higher education, including all officers, shall receive their salaries or wages for services rendered in accordance with regulations issued by the department of finance and administration.

**History:** Laws 1933, ch. 157, § 1; 1941 Comp., § 10-405; 1953 Comp., § 5-4-5; Laws 1961, ch. 70, § 1; 1975, ch. 128, § 1.

**Cross-references.** - For weekly payment for certain public projects, see 13-4-11 NMSA 1978.

**Compiler's note.** - The catchline of this section was not changed when the section was amended in 1975 so that it no longer expressly requires semimonthly payments.

**Where judgment for damages not within scope.** - This section did not concern judgments for damages for breach of contract awarded to discharge tenured teacher. Sanchez v. Board of Educ., 80 N.M. 286, 454 P.2d 768 (1969).

**Generally, as to payment of accrued vacation time.** - Employees of political subdivisions may, upon termination of their employment, be compensated for their permissible accrued vacation time unless prohibited therefrom by the personnel ordinance or merit system. 1964 Op. Att'y Gen. No. 64-155.

**Where payment of vacation time improper.** - Where an employee continues to be employed by a local public body but simply does not take his vacation time, payment therefor is improper. 1964 Op. Att'y Gen. No. 64-155.

**Organization of public employees.** - Public employees are certainly not entitled to the right to strike or to bargain collectively concerning the matters of their employment. The right to organize the public employees should be a matter of consideration for the legislature, and since the New Mexico legislature has not seen fit to grant this right, under the present state of the law, such right of organization is not available to public employees. 1955-56 Op. Att'y Gen. No. 6207.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity of statutory classifications based on population - governmental employee salary or pension statutes, 96 A.L.R.3d 538.

81A C.J.S. States § 111.

### **10-7-3. [Inapplicability of act.]**

Nothing in this act [10-7-2, 10-7-3 NMSA 1978] shall apply to those officials or employees receiving their salaries or wages at a time as fixed by any provision of the constitution of the state of New Mexico.

**History:** Laws 1933, ch. 157, § 2; 1941 Comp., § 10-406; 1953 Comp., § 5-4-6.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 228.

### **10-7-4. Group insurance; cafeteria plan; contributions from public funds.**

A. All state departments and institutions and all political subdivisions of the state, excluding municipalities and counties, shall cooperate in providing group term life, medical or disability income insurance for the benefit of eligible employees or salaried officers of the respective departments, institutions and subdivisions.

B. The group insurance contributions of the state or any of its departments or institutions, including institutions of higher education and the public schools, shall be made as follows:

(1) seventy-five percent of the cost of the insurance of an employee whose annual salary is less than fifteen thousand dollars (\$15,000);

(2) seventy percent of the cost of the insurance of an employee whose annual salary is fifteen thousand dollars (\$15,000) or more but less than twenty thousand dollars (\$20,000);

(3) sixty-five percent of the cost of the insurance of an employee whose annual salary is twenty thousand dollars (\$20,000) or more but less than twenty-five thousand dollars (\$25,000); or

(4) sixty percent of the cost of the insurance of an employee whose annual salary is twenty-five thousand dollars (\$25,000) or more.

As used in this subsection, "cost of the insurance" means the premium required to be paid to provide coverages. Any contributions of the political subdivisions of the state, except the public schools, shall not exceed sixty percent of the cost of the insurance.

C. When a public employee elects to participate in a cafeteria plan as authorized by the Cafeteria Plan Act [10-7-14 to 10-7-19 NMSA 1978] and enters into a salary reduction agreement with the governmental employer, the provision of Subsection B of this section with respect to the maximum contributions that can be made by the employer are not violated and will still apply. The employer percentage or dollar contributions as provided in Subsection B of this section shall be determined by the employee's gross salary prior to any salary reduction agreement.

**History:** Laws 1941, ch. 188, § 1; 1941 Comp., § 10-416; 1953 Comp., § 5-4-12; Laws 1965, ch. 181, § 1; 1969, ch. 86, § 1; 1970, ch. 73, § 1; 1973, ch. 387, § 1; 1981, ch. 151, § 1; 1986, ch. 84, § 1; 1987, ch. 256, § 1; 1987, ch. 289, § 7; 1989, ch. 27, § 1; 1989, ch. 231, § 9; 1991, ch. 191, § 2.

**Cross-references.** - As to continuation of group health insurance after retirement or death of insured, see 10-11-121 NMSA 1978.

For state police group life insurance, see 29-2-29 NMSA 1978.

As to group life insurance for the corrections department, see 33-1-12 NMSA 1978.

**The 1989 amendments.** - Laws 1989, ch. 27, § 1, effective June 16, 1989, in Subsection B, deleting the former second sentence of the last undesignated paragraph, relating to health maintenance organizations and inserting "counties and municipalities" in the last sentence, adding a Subsection C which read "Municipalities may contribute any amount up to one hundred percent of the cost of insurance", and redesignating the former Subsection C as Subsection D, while substituting "Subsections B and C" for "Subsection B" in the first sentence thereof, was approved on March 13, 1989. However, Laws 1989, ch. 231, § 9, effective April 5, 1989, giving effect only to the change by the first amendment which deleted the second sentence of the last undesignated paragraph of Subsection B, but not giving effect to any of the other changes by the first amendment, and, additionally, deleting from the end of the first sentence in Subsection B "no better than the coverages provided by the public employer's group insurance policy in force on January 1, 1985", was approved on April 5, 1989. The section is set out as amended by Laws 1989, ch. 231, § 9. See 12-1-8 NMSA 1978.

**The 1991 amendment,** effective April 4, 1991, substituted "excluding municipalities and counties" for "may and, by July 1, 1975" in Subsection A and made a minor stylistic change in Subsection C.

**Applicability.** - Laws 1986, ch. 84, § 4 makes the provisions of the act applicable to the first full pay period in the seventy-fifth fiscal year and subsequent pay periods.

**Severability clauses.** - Laws 1986, ch. 19, § 11 provides for the severability of the act if any part or application thereof is held invalid.



**Generally, as to constitutionality and effect of section.** - Provision by the state under this section of group or other forms of insurance for the benefit of eligible employees is a valid use of public funds and not a pledge of credit or donation in contravention of the state constitution, since such contribution is in fact an increment to a public employee's salary and is a benefit to the state or its subdivisions through its concomitant effect of attracting and maintaining capable public personnel in public positions. 1964 Op. Att'y Gen. No. 64-83.

**Constitutionality of payments.** - Payments by the state under this section do not violate N.M. Const. art. V, § 12 and are not payments of additional fees or compensation. 1968 Op. Att'y Gen. No. 68-1.

**Objective of section** was to expressly provide authority for the state, state institutions and political subdivisions of the state to make contributions from public funds to pay a portion of the cost of group insurance policies carried for the benefit of their employees up to certain prescribed maximums. Such contributions may be validly made if the amounts contributed by the state employer are kept within the statutory limitation. 1963-64 Op. Att'y Gen. No. 63-44. See also 1963-64 Op. Att'y Gen. No. 63-25.

**Meaning of "departments".** - The term "departments" as utilized in this section has application to the three basic departments of state government recognized in N.M. Const., art. III, § 1, that is, the legislative, executive and judicial departments. 1963-64 Op. Att'y Gen. No. 63-44.

**"For the benefit of" construed.** - The words "for the benefit of" the employee should be construed to include an employer's payment toward the premium of a group hospitalization insurance policy which covers both an employee and his or her dependents. 1969 Op. Att'y Gen. No. 69-59.

**As to dependents.** - The legislature did not intend to limit this employment benefit to the individual employee regardless of whether or not he had dependents. 1969 Op. Att'y Gen. No. 69-59.

**Payment of retirees health insurance premiums not authorized.** - This section is a general law providing municipalities with the authority to pay health insurance costs for employees and their family members, and does not authorize a municipality to pay a portion of its retirees' health insurance premium costs for its employees who retire under the Public Employee's Retirement Act. 1989 Op. Att'y Gen. No. 89-04.

**District attorney's office covered.** - The district attorney's office is covered under the provisions of this section through 10-7-6 NMSA 1978, inclusive. 1959-60 Op. Att'y Gen. No. 59-106.

**Effect on constables and magistrates.** - Constables and justices of the peace (now magistrates) are not eligible for group insurance as provided by New Mexico statutes. 1959-60 Op. Att'y Gen. No. 59-42 (rendered prior to 1969 amendment).

**Section applies to cattle sanitary board (now New Mexico livestock board)** and constitutes a legal limitation upon the maximum amount of contribution which the board may make in providing funds for group insurance programs covering the board's employees. 1963-64 Op. Att'y Gen. No. 63-44.

**Where employees of adjutant general's office ineligible.** - Persons employed by the office of the adjutant general of New Mexico in maintenance, technical, clerical and fiscal positions throughout the state of New Mexico who are paid by the federal government, and are participants in the state public employees' retirement association program, are nevertheless not eligible for participation in the state group insurance program. 1964 Op. Att'y Gen. No. 64-97.

**This section does not contemplate voluntary official organizations.** 1957-58 Op. Att'y Gen. No. 57-41.

**Scope of contribution.** - The contribution provided for in this section applies only to those plans of group insurance or other types of insurance approved by the governing authority of the respective subdivisions and of this state. 1965 Op. Att'y Gen. No. 65-6.

**Computation of contribution.** - It is lawful for governmental units referred to in this section to compute the percentage of their contribution to an employees' group hospitalization plan based upon the entire cost for both individual and dependent coverage. 1969 Op. Att'y Gen. No. 69-59.

**Maximum contribution applies even if additional coverage provided.** - A city may not contribute a greater share of the premium of each policy even if the policy contains coverage enabling the city to make a savings on workmen's compensation insurance. 1963-64 Op. Att'y Gen. No. 63-25.

**Participation in group insurance programs by school employees is optional** with each individual employee, and such participation may not be required in the absence of assent by each employee. 1963-64 Op. Att'y Gen. No. 63-100.

**Effect of Public Purchases Act.** - The purchase of group insurance for employees of state agencies must be made in compliance with the Public Purchases Act (now the Procurement Code, 13-1-28 NMSA 1978 et seq.) including the requirement for bids. 1969 Op. Att'y Gen. No. 69-117.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States § 109.

### **10-7-4.1. Youth authority; group life insurance.**

Notwithstanding the provisions of Section 10-7-4 NMSA 1978 and in addition to all other benefits provided juvenile correctional officers and correctional officer specialists, the youth authority shall provide life insurance coverage in the amount of twenty-five thousand dollars (\$25,000) for each juvenile correctional officer, to be paid to his

designated beneficiary. The coverage shall include double indemnity provisions for death incurred in the line of duty. The coverage shall be provided by a group term insurance policy, the premium for which shall be paid out of state funds appropriated to the youth authority.

**History:** Laws 1990, ch. 29, § 1.

**Cross-references.** - As to group life insurance for the corrections department, see 33-1-12 NMSA 1978.

**Effective dates.** - Laws 1990, ch. 29 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

### **10-7-4.2. Group insurance; counties and municipalities; contributions; definition; exemption from state plan.**

A. All municipalities and counties shall cooperate in providing group term life, medical or disability income insurance for the benefit of eligible employees or salaried officers of the respective department, institutions and subdivisions.

B. Municipalities and counties may contribute any amount up to one hundred percent of the cost of the insurance. As used in this section, "cost of the insurance" means the premium required to be paid to provide coverages.

C. When a public employee elects to participate in a cafeteria plan as authorized by the Cafeteria Plan Act [10-7-14 to 10-7-19 NMSA 1978] and enters into a salary reduction agreement with a municipal or county employer, the provisions of Subsection B of this section with respect to the maximum contributions that can be made by the employer are not violated and will still apply. The employer percentage or dollar contributions as provided in Subsection B of this section shall be determined by the employee's gross salary prior to any salary reduction agreement.

D. Exempt from the provisions of Section 10-7-4 NMSA 1978 are all municipalities and counties.

**History:** Laws 1991, ch. 191, § 1.

**Emergency clauses.** - Laws 1991, ch. 191, § 3 makes the act effective immediately. Approved April 4, 1991.

### **10-7-5. [Premiums; deduction from salaries.]**

That said departments and institutions and all political subdivisions of the state shall be authorized to deduct from said employees' salaries, who may elect to be covered by group or other insurance under this act [10-7-4, 10-7-5, and 10-7-6 NMSA 1978], for the payment of premiums on said policies of insurance.

**History:** Laws 1941, ch. 188, § 2; 1941 Comp., § 10-417; 1953 Comp., § 5-4-13.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States § 109.

### **10-7-5.1. Local public bodies; group health and group life insurance.**

A. Every local public body that is an affiliated public employer under the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978] and that provides a group health insurance plan to its employees by any method shall offer such insurance to any retiree who was immediately prior to retirement an employee of that affiliated public employer, is a retired member under the Public Employees Retirement Act and upon retirement wishes to continue to be insured under that affiliated public employer's health insurance plan.

B. Every local public body that is an affiliated public employer under the Public Employees Retirement Act and that provides a group life insurance plan to its employees by any method may offer to any employee retiring after July 1, 1990, a life insurance plan to such retiree who was immediately prior to retirement an employee of that affiliated public employer, is a retired member under the Public Employees Retirement Act and upon retirement wishes to be insured under that affiliated public employer's life insurance plan for retirees. Premiums may be paid by deduction from the retirement warrant of the retired employee.

C. Each of those affiliated public employers shall also offer such health insurance to the survivors of individuals who immediately prior to retirement were employees of that affiliated public employer who are survivor pension beneficiaries under the Public Employees Retirement Act and who wish to continue to be insured under that affiliated public employer's health insurance plan upon the employee's death.

**History:** Laws 1989, ch. 347, § 1; 1990, ch. 128, § 1.

**Cross-references.** - As to right of continuation in plan after retirement or death, see 10-11-121 NMSA 1978.

**The 1990 amendment,** effective May 16, 1990, in the catchline, substituted "group health and group life insurance" for "group health insurance requirement"; in Subsection A, inserted "health insurance" near the end; added Subsection B; designated the former third sentence of Subsection B as present Subsection C, inserting therein "health" and "health insurance"; and made minor stylistic changes.

**Effective dates.** - Laws 1989, ch. 347, § 3 makes the act effective on July 1, 1989.

### **10-7-6. [Repeal and saving clause.]**

All acts and parts of acts in conflict herewith, are hereby repealed. Provided that the provisions of this act [10-7-4, 10-7-5, and 10-7-6 NMSA 1978] shall not affect any contract of group insurance now maintained or in force; nor shall the provisions of this act repeal, alter or amend any special statute authorizing the carrying of such insurance by the state of New Mexico or any of its departments or the political subdivisions of the state.

**History:** Laws 1941, ch. 188, § 3; 1941 Comp., § 10-418; 1953 Comp., § 5-4-14.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States § 109.

### **10-7-7. [Old-age benefits under Social Security Act.]**

That in the event the government of the United States through amendment of the Social Security Act of the United States and particularly Title 8 thereof or by any other similar law of congress which authorizes or permits the payment by states of [or] their political subdivisions to become employers to the extent that they may cover employees of the respective states and the political subdivisions thereof under Title 8 of the Social Security Act of the United States or any amendment thereto or any other similar act of congress whereby old-age benefits or pensions may be established for said employees; then, and in that event, the state of New Mexico, its departments, municipalities in said state and the political subdivisions of the said state may [be] and hereby are authorized and directed to comply with the provisions of the said act of congress to the extent that all members of state and municipal police forces, and all paid members and employees of municipal fire departments within this state may receive any and all benefits with respect to such old-age benefit or pension provision of said federal law, and the state, its municipalities, and political subdivisions are hereby authorized and directed to pay on account of such employees the rate of tax which said federal law may levy and assess for said purposes, and to withhold and make payments on account of the employee's contributions required by such act of congress pertaining to said employees herein mentioned.

**History:** Laws 1939, ch. 138, § 1; 1941 Comp., § 10-419; 1953 Comp, § 5-4-15.

**Social Security Act.** - Title 8 of the Social Security Act, referred to in this section, was originally codified as 42 U.S.C. §§ 1001 to 1011. These sections have since been repealed and reenacted by the Internal Revenue Codes of 1939, 1954 and 1986. These provisions of the Internal Revenue Code of 1986 are compiled as 26 U.S.C. §§ 3101, 3102, 3111, 3121, 3122, 3501, 3502, 6011, 6071, 6081, 6091, 6205, 6302, 6313, 6413, 6601, 6802, 6803, 7208, 7209, 7509, 7701 and 7805.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare § 28.

### **10-7-8. Annuities and deferred compensation plans; reductions from gross salaries.**

State agencies, state or educational institutions and political subdivisions of the state shall be authorized to enter into salary reduction agreements with their employees for the purpose of purchasing annuity contracts and deferred compensation plans, offered by insurance companies, banks and savings and loan associations authorized to transact business in New Mexico, when the salary reduction will result in an income tax deferment for the employees under federal law. The salary reduction agreement shall provide that the employer is not liable to the employee in the event the plan provider becomes insolvent or income tax on the salary reductions is not deferred. Such annuity contracts and deferred compensation plans must be approved by the secretary of general services for state agencies and the governing body of political subdivisions for such political subdivisions. State agencies, state or educational institutions and political subdivisions of the state shall further be authorized to deposit or invest funds deducted from an employee's salary or wages pursuant to any such approved deferred compensation plan. Any funds deducted from an employee's salary or wages pursuant to any such deferred compensation plan shall not be subject to any state law regulating or restricting the deposit or investment of public funds.

**History:** 1953 Comp., § 5-4-18, enacted by Laws 1968, ch. 49, § 1; 1977, ch. 65, § 1; 1978, ch 37, § 1; 1981, ch. 155, § 11; 1983, ch. 301, § 20.

**Funds credited to employee's deferred account are governed by state laws** relating to the deposit and investment of public funds. 1980 Op. Att'y Gen. No. 80-33.

**And not distinguishable from county's public funds.** - Funds credited to an employee's deferred account are owned by the county, are subject to claims of county creditors and are not distinguishable from the public funds of the county. 1980 Op. Att'y Gen. No. 80-33.

**Deducted amounts not wholly exempt from public funds laws.** - The legislature did not, by the 1981 amendment to this section, wholly exempt deducted amounts, which are public funds, from all laws regulating public funds, including the Procurement Code. 1987 Op. Att'y Gen. No. 87-35.

**Agreement with company administering deferred compensation program.** - The public employee's retirement board's administrator's agreement with the company providing professional services by administering and marketing the state's deferred compensation program must be let for proposals pursuant to the Procurement Code, 13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978, to the extent the administrator receives as compensation an amount exceeding \$20,000, although the administrator's sole compensation under the contract derives from sales commissions, etc., from the underwriter. 1987 Op. Att'y Gen. No. 87-35.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Income tax: premiums paid by employer for annuity payable to employee as taxable income of latter, 7 A.L.R.2d 766.

Income tax: right of employer to deduct, for income tax purposes, premiums paid on annuity contracts for benefit of employees, 9 A.L.R.2d 280.

67 C.J.S. Officers and Public Employees § 223.

### **10-7-9. Minimum salary rate.**

Every state employee and every person regularly employed at a state educational institution named in Article 12, Section 11 of the New Mexico constitution, except student employees as defined by the board of educational finance, shall receive a salary at a rate equal to at least four hundred dollars (\$400) per month.

**History:** 1953 Comp., § 5-4-51, enacted by Laws 1974, ch. 10, § 2.

### **10-7-10. Accumulated sick leave; payment of certain excess amounts.**

An employee of the state who has accumulated six hundred hours of unused sick leave shall be entitled to be paid for additional unused sick leave at a rate equal to fifty percent of his hourly wage multiplied by the number of hours of unused sick leave over six hundred hours, not to exceed one hundred twenty hours of such sick leave in any one fiscal year. Payment for sick leave as authorized by this section shall be paid only on either the payday immediately following the first full pay period in January or the first full pay period in July. An eligible employee shall notify his agency of his desired payment date and the number of unused sick leave hours he wishes to convert pursuant to this section before payment can be authorized.

**History:** Laws 1983, ch. 150, § 1; 1984, ch. 6, § 1.

### **10-7-11. Accumulated sick leave prior to retirement; payment of certain excess amounts.**

Immediately prior to retirement from state service, an employee of the state who has accumulated six hundred hours of unused sick leave shall be entitled to be paid for additional unused sick leave at a rate equal to fifty percent of his hourly wage multiplied by the number of hours of unused sick leave over six hundred hours, not to exceed four hundred hours of such sick leave.

**History:** Laws 1983, ch. 150, § 2.

### **10-7-12. Government cost savings incentive award.**

A. As used in this section:

(1) "actual cost savings" means realized, not projected, cost savings substantiated by documentation;

(2) "award" means a government cost savings incentive award;

(3) "economy" includes maximizing the purchasing value of public funds;

(4) "efficiency" includes a significant reduction in paperwork and the elimination of unnecessary rules, regulations and procedures; and

(5) "state agency" means any office, department, institution, school district, board, commission, court, district attorney, council or committee of state government which receives appropriations and is authorized expenditures pursuant to a general appropriation act.

B. A state agency may provide an award to any employee whose accomplishment or written suggestion beyond the scope of his responsibility contributes to the efficiency, economy or improvement of agency operations and results in actual cost savings to the agency.

C. An award pursuant to this section shall:

(1) be paid only from actual cost savings;

(2) be paid only on the payday immediately following the first full pay period succeeding the award or immediately prior to separation or transfer from the agency; and

(3) be paid one time based on actual cost savings in an amount not to exceed the lesser of:

(a) two thousand dollars (\$2,000); or

(b) an amount equal to ten percent of the actual cost savings attributable to the employee in the twelve-month period immediately preceding the award or a lesser period preceding the award, if appropriate.

D. Documentation substantiating awards pursuant to this section shall be submitted to the state personnel board which shall, as necessary or appropriate, prescribe regulations and review proposed awards made under this section and procedures used in making the awards to verify the cost savings for which the awards were made.

E. The state personnel board shall report by September 1 of each year to the legislative finance committee all awards paid and savings realized under this act [this section].

**History:** Laws 1986, ch. 39, § 1.



### **10-7-13. Leave; coordination with workmen's compensation benefits.**

A. Payment of leave-time benefits in excess of an amount which results, when combined with workmen's compensation weekly benefits, in an injured state or university worker receiving in any month more than one hundred percent of that workman's monthly base salary is not permitted; provided that payment of accrued vacation leave time and compensating leave-time benefits may be permitted without regard to this limitation where the workman is finally determined to be permanently totally disabled or resigns his state or university employment.

B. As used in this section:

(1) "leave time" includes time accrued as sick leave, vacation leave and compensating leave; and

(2) "monthly base salary" means the full monthly salary to be paid the employee if he had worked as scheduled for the entire month, as established by the state personnel board's official salary schedule, or the official salary schedule of any state agency or university in effect during the last pay period during which the employee worked, exclusive of all overtime pay and the value of all accrued leave time and all fringe benefits of any kind.

C. The state personnel board shall send a copy of this law to all state agencies and universities which have salaried employees who do not fall under the jurisdiction of the state personnel board.

**History:** Laws 1987, ch. 258, § 1.

### **10-7-14. Short title; Cafeteria Plan Act.**

Sections 1 through 6 [10-7-14 to 10-7-19 NMSA 1978] of this act may be cited as the "Cafeteria Plan Act".

**History:** Laws 1987, ch. 289, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 450, 451.

67 C.J.S. Officers and Public Employees §§ 223, 248, 249.

### **10-7-15. Definitions.**

As used in the Cafeteria Plan Act [10-7-14 to 10-7-19 NMSA 1978]:

A. "agency" means the state of New Mexico, any of its political subdivisions, tax supported educational institutions or a local public school district;

B. "cafeteria plan" means a written plan as defined in 26 U.S.C. 125 under which all participants are eligible public employees and the participants are allowed to choose among two or more benefits consisting of cash and statutory nontaxable benefits;

C. "eligible public employee" means any public employee who elects to participate in a cafeteria plan as provided in the Cafeteria Plan Act but does not include individuals engaged as independent contractors or whose periods of employment are on an intermittent or irregular basis or who are employed on less than half-time basis unless the individual is employed in a position classified as a job-sharing position;

D. "public employee" means any officer or employee of an agency to whom a salary is paid from public funds for services rendered;

E. "salary reduction agreement" means a written agreement between an eligible public employee and his agency employer whereby the employee agrees to reduce his or her salary by a stated amount or an amount equal to the cost of benefits selected under a cafeteria plan and the agency agrees to contribute that amount to cover the cost of the benefits selected by the eligible public employee; and

F. "statutory nontaxable benefits" means any benefits that are not includable in the gross income of the public employee by reason of an express provision of the Internal Revenue Code, and such benefits may include but not be limited to: group life insurance not exceeding fifty thousand dollars (\$50,000); disability benefits; accident and health plans; group legal services plans and dependent care services.

**History:** Laws 1987, ch. 289, § 2.

### **10-7-16. Cafeteria plan; optional.**

Notwithstanding any other benefit plan or group insurance plan offered to an eligible public employee, any agency may adopt a cafeteria plan, as defined in 26 U.S.C. 125 et seq. and regulations made thereunder, for the benefit of eligible public employees and their dependents.

**History:** Laws 1987, ch. 289, § 3.

### **10-7-17. Salary reduction agreements.**

A. Contributions to cover the cost of benefits provided under a cafeteria plan authorized by Section 3 of the Cafeteria Plan Act [10-7-16 NMSA 1978] shall be paid by the eligible public employee pursuant to a salary reduction agreement. The agency is authorized to pay part or all of the administrative expenses therefor.

B. The agency may agree with an eligible public employee that the employee's salary payment shall be reduced by an amount equal to the cost of benefits selected and to be paid for by the eligible public employee. Such reduction shall be made pursuant to salary reduction agreements entered into between eligible public employees and the agency.

**History:** Laws 1987, ch. 289, § 4.

### **10-7-18. Status of salary reduction.**

A. The amount by which an eligible public employee's salary is reduced pursuant to a salary reduction agreement shall continue to be included as compensation for the purpose of computing retirement benefits under the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978], the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978] and the Judicial Retirement Act [Chapter 10, Article 12 NMSA 1978]; provided this inclusion does not conflict with federal law, including federal regulations, pertaining to the Federal Insurance Contributions Act or to Internal Revenue Code, Section 125 pertaining to cafeteria plans.

B. The amount by which an eligible public employee's salary is reduced pursuant to a salary reduction agreement shall not be considered as gross income for purposes of computing New Mexico income tax, state unemployment tax and state worker's compensation and federal income taxes to be withheld and paid on behalf of the employee.

**History:** Laws 1987, ch. 289, § 5.

**Federal Insurance Contributions Act.** - The Federal Insurance Contributions Act, referred to in Subsection A, appears as 26 U.S.C. §§ 3101 to 3128.

**Internal Revenue Code.** - Section 125 of the Internal Revenue Code, referred to in Subsection A, appears as 26 U.S.C. § 125.

### **10-7-19. Applicability to deferred compensation plans.**

The provisions of the Cafeteria Plan Act [10-7-14 to 10-7-19 NMSA 1978] do not apply to deferred compensation plans.

**History:** Laws 1987, ch. 289, § 6.

## **ARTICLE 7A DEFERRED COMPENSATION**

### **10-7A-1. Short title.**

Sections 1 through 10 of this act may be cited as the "Deferred Compensation Act".

**History:** Laws 1981, ch. 155, § 1.

**Cross-references.** - As to compensation and working conditions generally, see 10-7-1 NMSA 1978 et seq.

**Compiler's note.** - "Sections 1 through 10 of this act," referred to in this section, refers to Laws 1981, ch. 155, §§ 1 to 10, which are presently compiled as 10-7A-1, 10-7A-2, 10-7A-4 and 10-7A-6 to 10-7A-10 NMSA 1978.

## **10-7A-2. Definitions.**

As used in the Deferred Compensation Act:

- A. "board" means the public employees' retirement board;
- B. "local public body" means all political subdivisions of the state, their agencies, instrumentalities and institutions;
- C. "local public employee" means any officer or employee to whom a local public body pays a salary for services rendered;
- D. "deferred compensation carriers" means any corporation, partnership or persons who provide investment options to participants in deferred compensation plans pursuant to funding agreements; and
- E. "state employee" means any officer or employee to whom the state pays a salary for services rendered.

**History:** Laws 1981, ch. 155, § 2; 1985, ch. 161, § 1.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.

## **10-7A-3. Deferred compensation plan; state and local public body employees.**

A. After the effective date of the Deferred Compensation Act, the board shall review and approve deferred compensation plans for participation by state and local public employees. A deferred compensation plan shall provide for the method of transfer of funds to a plan through written salary reduction agreements with state and local public employees and shall provide for deferral of only those salary amounts upon which income taxes are eligible for deferral pursuant to federal law.

B. Compensation deferred under any deferred compensation plan shall be included with current income for purposes of computing retirement contributions and benefits.

C. Amounts by which salary is reduced shall be transmitted to the state treasurer or his designated agent who shall then transfer such amounts directly to the approved deferred compensation carrier.

D. Local public employees may, through formal action of their governing boards, participate in a deferred compensation plan selected by such governing board. If the plan selected is different from the plan approved by the board, the board shall have no responsibility concerning the plan. If the plan selected is that approved by the board pursuant to Section 10-7A-5 NMSA 1978, participation by employees of the local public body so selecting is effected pursuant to Section 10-7A-8 NMSA 1978.

**History:** 1978 Comp., § 10-7A-3, enacted by Laws 1984, ch. 127, § 988.1; 1985, ch. 161, § 2.

**Repeals and reenactments.** - Laws 1984, ch. 127, § 988.1, repeals former 10-7A-3 NMSA 1978, as amended by Laws 1983, ch. 251, § 1, and enacts the above section. For provisions of former section, see the 1983 replacement pamphlet.

**"Effective date of the Deferred Compensation Act".** - The phrase "effective date of the Deferred Compensation Act", referred to near the beginning of Subsection A, means April 6, 1981, the effective date of Laws 1981, ch. 155. As to the Deferred Compensation Act, see 10-7A-1 NMSA 1978 and notes thereto.

**Meaning of "board".** - The "board," referred to in the first sentence in Subsection A, apparently refers to the public employees' retirement board. See 10-7A-2 NMSA 1978 and notes thereto.

#### **10-7A-4. Deferred compensation plan; other participants.**

The deferred compensation plan may allow persons other than public employees, who provide services to the state or any local public body, to participate in the plan to the extent permitted by federal law.

**History:** Laws 1981, ch. 155, § 4.

#### **10-7A-5. Deferred compensation plan; approval.**

A. The board shall review proposals providing investment options to participants of a deferred compensation plan submitted by deferred compensation carriers which have been engaged for a minimum of three years in the business of funding public employee deferred compensation plans authorized by 26 U.S.C. Section 457 and approve not more than four such proposals which are consistent with the goals of providing state or local public employees with an investment that, in the opinion of the board, is safe and will provide a reasonable return to the employees upon their reaching the appropriate age or date at which they may begin receiving funds from the deferred compensation plan.

B. The type of deferred compensation investment options that may be approved include:

(1) life insurance or annuity contracts with insurance companies licensed to conduct such business in New Mexico;

(2) mutual funds, including stock funds and money market funds;

(3) deferred compensation investment options of New Mexico banks or savings and loan associations, such banks or savings and loan associations to provide, as security for participants' funds, collateral, such as U.S. treasury securities or other liquid securities, for amounts of participants' funds in excess of applicable depository insurance; and

(4) other deferred compensation investment options, including those created by the board not requiring funding agreements with deferred compensation carriers, deemed by the board to fulfill the goals of providing viable deferred compensation for state or local public employees.

**History:** 1978 Comp., § 10-7A-5, enacted by Laws 1984, ch. 127, § 988.2; 1985, ch. 161, § 3.

**Repeals and reenactments.** - Laws 1984, ch. 127, § 998.2, repeals former 10-7A-5 NMSA 1978, as amended by Laws 1983, ch. 251, § 2, and enacts the above section. For provisions of former section, see the 1983 replacement pamphlet.

**Meaning of "board".** - The "board," referred to in the introductory language in Subsection A, apparently refers to the public employees' retirement board. See 10-7A-3 NMSA 1978 and notes thereto.

### **10-7A-6. Deferred compensation plans; investment options.**

The board may select a deferred compensation plan that offers varied investment options to participating employees.

**History:** Laws 1981, ch. 155, § 6; 1985, ch. 161, § 4.

**Cross-references.** - As to types of plans which may be approved, see 10-7A-5 NMSA 1978.

### **10-7A-7. Deferred compensation plan; state tax deferral.**

Income deferred pursuant to the Deferred Compensation Act and any gains arising from such income, shall be subject to New Mexico income tax and other applicable taxes in the same year or years in which the income is subject to federal income tax pursuant to federal law.

**History:** Laws 1981, ch. 155, § 7.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.

### **10-7A-8. Deferred compensation plan; local public employee participation.**

A. Local public employees shall be eligible to participate in a deferred compensation plan approved by the board upon the filing of the governing authority's written notice applicable to all the local public employees and such other participants permitted by the plan as the local public body may elect. Such filing shall be made at such dates and places and in such manner as the board determines.

B. A local public body may terminate its local public employees' and other qualified participants' future participation in a board-approved plan any time not less than two years after the date participation has become effective, upon the governing authority's filing of written notice at such dates and places as the board determines.

**History:** Laws 1981, ch. 155, § 8; 1985, ch. 161, § 5.

### **10-7A-9. Existing deferred compensation plans.**

Any state or local public body deferred compensation plan in existence on the effective date of the Deferred Compensation Act shall not be affected and may be made available to employees and other persons of the state agency or local public body which had adopted said deferred compensation plan on the same basis as on the effective date of the Deferred Compensation Act. Funds of existing plans may be invested in all or any combination of the investments set forth in Subsection B of Section 10-7A-5 NMSA 1978.

**History:** Laws 1981, ch. 155, § 9; 1983, ch. 251, § 3.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.

**Effective date of the Deferred Compensation Act.** - The effective date of the Deferred Compensation Act is April 6, 1981.

### **10-7A-10. Expenditure.**

Any expenditure necessary to implement the Deferred Compensation Act shall be charged to participating employees or to deferred compensation carriers including those submitting proposals.

**History:** Laws 1981, ch. 155, § 10; 1985, ch. 161, § 6.

**Cross-references.** - As to salary reductions for deferred compensation plans, see 10-7-8 NMSA 1978.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.

**Agreement with company administering deferred compensation program.** - The public employee's retirement board's administrator's agreement with the company providing professional services by administering and marketing the state's deferred compensation program must be let for proposals pursuant to the Procurement Code, 13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978, to the extent the administrator receives as compensation an amount exceeding \$20,000, although the administrator's sole compensation under the contract derives from sales commissions, etc., from the underwriter. 1987 Op. Att'y Gen. No. 87-35.

### **10-7A-11. Rule making; agreements.**

The board may adopt such rules and enter into such agreements as may be necessary to implement the Deferred Compensation Act; provided, however, that any expenditures associated therewith are charged as provided in Section 10-7A-10 NMSA 1978.

**History:** 1978 Comp., § 10-7A-11, enacted by Laws 1985, ch. 161, § 7.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.

### **10-7A-12. Division of funds as community property; notice requirement.**

A court of competent jurisdiction, solely for the purposes of effecting a division of community property, may provide by appropriate order for a determination and division of a community interest in the deferred compensation plan provided for in the Deferred Compensation Act. Pursuant to such a court order a deferred compensation administrator shall provide notice, within ten days after a participating public employee files an application for a disbursement from the deferred compensation plan, to a former spouse who has a court-determined interest in a participating public employee's deferred compensation plan. The notice shall be sent to the last name and address the former spouse has filed with the administrator of the deferred compensation plan and shall include the schedule for and amounts of the disbursement and the address to which the participating public employee's disbursement will be sent.

**History:** 1978 Comp., § 10-7A-12, enacted by Laws 1991, ch. 22, § 1.

**Effective dates.** - Laws 1991, ch. 22, § 2 makes the act effective on July 1, 1991.

**Deferred Compensation Act.** - See 10-7A-1 NMSA 1978 and notes thereto.



# ARTICLE 7B

## GROUP BENEFITS

### 10-7B-1. Short title.

Sections 1 through 7 [10-7B-1 to 10-7B-7 NMSA 1978] of this act may be cited as the "Group Benefits Act".

**History:** Laws 1989, ch. 231, § 1.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees § 450.

67 C.J.S. Officers and Public Employees §§ 248, 249.

### 10-7B-2. Definitions.

As used in the Group Benefits Act [10-7B-1 to 10-7B-7 NMSA 1978]:

A. "committee" means the group benefits committee;

B. "director" means the director of the risk management division of the general services department;

C. "employee" means any salaried officer or employee of the state or a local public body, or both, as the context requires;

D. "local public body" means any New Mexico incorporated municipality, county or school district;

E. "professional claims administrator" means any person or legal entity which has at least five years of experience handling group benefits claims, as well as such other qualifications as the director may determine from time to time with the committee's advice; and

F. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

**History:** Laws 1989, ch. 231, § 2.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

### **10-7B-3. Group benefits committee; created.**

A. The "group benefits committee" is created. The committee shall be composed of nine members as follows:

(1) one employee of, appointed by the secretary of, each of the two departments of the state, excluding state institutions of higher education, having the largest number of full-time employees;

(2) the superintendent of insurance or his designee;

(3) the director of the state personnel office or his designee;

(4) the executive secretary of the public employees retirement association or his designee;

(5) the chief financial officer of a state agency or institution, appointed by the governor;

(6) one employee of a local public body participating in the state group plan, appointed by the governor; and

(7) two public employees of state agencies, other than those from whom members are appointed pursuant to Paragraphs (1) through (4) of this subsection, appointed by the governor.

B. Members of the committee appointed by the governor or by a department secretary shall serve terms of four years. Vacancies in appointive memberships shall be filled by the appointing authority. An appointive membership shall be deemed vacant when the member ceases to be a public employee or ceases to meet the qualifications for his membership set forth in Subsection A of this section. An appointive membership shall also be deemed vacant when the member fails to attend three consecutive meetings of the committee.

C. A majority of the committee shall constitute a quorum. The members of the committee shall elect annually from among the membership a chairman and vice chairman.

**History:** Laws 1989, ch. 231, § 3.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

### **10-7B-4. Group benefits committee; powers and duties.**

The committee shall:

- A. review and advise the director on all group benefits coverages, whether insured or self-insured, included or to be included in the state group plan;
- B. review and advise the director on all professional, technical or consulting contracts to be entered into in connection with the state group plan;
- C. if insurance is to be purchased through negotiation, pursuant to Subparagraph (a) of Paragraph (1) of Subsection D of Section 6 [10-7B-7 NMSA 1978] of the Group Benefits Act, review and advise the director as to companies and agents to be selected to submit proposals;
- D. review and advise the director on rules and regulations relating to group benefits insurance and self-insurance;
- E. review and advise the director on selection of an investment advisor for investments of the group self-insurance fund;
- F. review and advise the director on guidelines establishing rates for and methods of rating participating state agencies and local public bodies;
- G. perform any other duties and exercise any other powers as provided by law; and
- H. review any matters specified in this section, which review by the committee shall preempt such review of such matters previously accorded to the risk management advisory board.

**History:** Laws 1989, ch. 231, § 4.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

**Bracketed material.** - The bracketed reference in Subsection C was inserted by the compiler, as the reference therein to "Section 6 of the Group Benefits Act" is apparently erroneous. The apparent intended reference is to Section 7 of that act, and the bracketed code number inserted following the reference reflects that intended reference. The bracketed material was not enacted by the legislature and is not part of the law.

### **10-7B-5. Administrative costs.**

The director, with the prior approval of the group benefits committee, may apportion the costs of employee benefits administration and other employee benefit costs to all participating state agencies and their employees, and participating local public bodies and their employees, whether the plan is insured or self-insured.

**History:** Laws 1989, ch. 231, § 5.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

**10-7B-6. State employees group benefits self-insurance plan; authorization; local public body participation.**

A. The risk management division of the general services department may, with the prior advice of the committee, establish and administer a group benefits self-insurance plan, providing life, vision, health, dental and disability coverages, or any combination of such coverages, for employees of the state and of participating local public bodies. Any such group self-insurance plan shall afford coverage for employees' dependents at each employee's option. Any such group self-insurance plan may consist of self-insurance or a combination of self-insurance and insurance; provided, that particular coverages or risks may be fully insured, fully self-insured or partially insured and partially self-insured.

B. The director, with the advice of the committee, shall establish by regulation or letter of administration the types, extent, nature and description of coverages, the eligibility rules for participation, the deductibles, rates and all other matters reasonably necessary to carry on or administer a group benefits self-insurance plan established pursuant to Subsection A of this section.

C. The contribution of each participating state agency to the cost of any such group benefits self-insurance plan shall not exceed that percentage provided for state group benefits insurance plans as provided by law. The contribution of a participating local public body to the cost of any such group self-insurance plan shall not exceed that percentage provided for local public body group benefits insurance plans as provided by law.

D. Public employees' contributions to the cost of any group self-insurance plan may be deducted from their salaries and paid directly to the group self-insurance fund; provided, that where risks are insured or reinsured, the director may authorize payment of the costs of such insurance or reinsurance directly to the insurer or reinsurer.

E. Local public bodies and state agencies which are not participating in the state group benefits insurance plan or self-insurance plan may elect to participate in any group benefits self-insurance plan established pursuant to Subsection A of this section by giving written notice to the director on a date set by the director, which date shall not be later than ninety days prior to the date participation is to begin. The director shall determine an initial rate for such electing entity in accordance with a letter of administration setting forth written guidelines established by the director with the committee's advice. The initial rate shall be based on the claims experience of such electing entity's group for the three immediately preceding continuous years. If three years of continuous experience is not available, a rate fixed for the entity by the director with the committee's advice shall apply, and the electing entity's group shall be rerated on the first premium anniversary following the date one full year of experience for such group becomes available. Any such election may be terminated effective not earlier

than June 30 of the third calendar year succeeding the year in which the election became effective or on any June 30 thereafter. Notice of termination shall be made in writing to the director not later than April 1 immediately preceding the June 30 on which participation will terminate. A reelection to participate in the plan following a termination may not be made effective for at least three full years following the effective date of termination.

F. As soon as practicable, the director with the committee's advice shall establish an experience rating plan for state agencies and local public bodies participating in any group self-insurance plan created pursuant to Subsection A of this section. Rates applicable to state agencies and participating local public bodies shall be based on such experience rating plan. Any such experience rating plan may provide separate rates for individual state agencies and individual local public bodies or for such other experience centers as the director may determine.

**History:** Laws 1989, ch. 231, § 6.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

### **10-7B-7. Group self-insurance fund created.**

A. The "group self-insurance fund" is created. The fund and any income produced by the fund shall be held in trust for the benefit of participating state agencies and their employees and local public bodies and their employees, deposited in a segregated account and invested by the director with the advice of the committee. Money in the fund shall be used solely for the purposes of the fund and shall not be used to pay any general or special obligation or debt of the state, other than as authorized by this section. Balances in the fund in excess of amounts needed for the purposes of the fund shall not be used to pay dividends or refunds, however described, to individual public employees or their dependents, but may be used, in the director's discretion, to reduce future contributions, to provide additional benefits or as a reserve to stabilize premiums.

B. The fund shall consist of money appropriated to the fund, income from investment of the fund, employers' contributions, employees' contributions, insurance or reinsurance proceeds and other funds received by gift, grant, bequest or otherwise for deposit in the fund, including but not limited to refunds of amounts from prior state group life, vision, dental, health and disability insurance plans, all of which are hereby appropriated to and for the purposes of the fund.

C. Disbursements from the fund shall be made by warrant signed by the secretary of finance and administration upon vouchers signed by the director. Lump sum disbursements from the fund may be advanced, in the manner described in this subsection, to a professional claims administrator to be used to pay benefits. Such lump sum disbursements may be made not more than weekly in advance. The administrator shall keep any such lump sum advance in a segregated account and shall hold the

advance in trust for the benefit of participating employees. On or before the last day of each month, the administrator shall prepare a request for replenishment of the lump sum disbursement in the amount actually paid out for benefits during the month. Not more than thirty days after the last day of each month, the administrator shall make and submit to the director a detailed report of expenditures of any such lump sum advance during the month.

D. Money in the fund may be used by and is hereby appropriated to the risk management division of the general services department:

(1) to purchase life, vision, health, dental and disability insurance, or any combination of these, for state and local public body employees participating in the group self-insurance plan and their covered dependents, from an insurance company determined to be the best responsible bidder, as defined in the Procurement Code [13-1-28 to 13-1-117, 13-1-118 to 13-1-199 NMSA 1978], after:

(a) requesting sealed proposals from three or more insurance agents licensed in New Mexico; or

(b) requesting sealed proposals in accordance with the provisions of the Procurement Code;

(2) to contract with and pay one or more professional claims administrators;

(3) to contract with and pay private attorneys or law firms for advice and for defense of contested claims determinations;

(4) to contract with and pay qualified independent actuaries, financial auditors and claims management and procedures auditors;

(5) to contract with and pay consultants, financial advisors and investment advisors for independent consulting and advice;

(6) to pay reasonable investment commissions and expenses;

(7) to make lump sum advances to any person or firm acting as a professional claims administrator, such advances to be used exclusively to pay benefits to participating employees;

(8) to pay benefits to or for participating employees and their dependents;

(9) to pay any other costs and expenses incurred in carrying out this section; and

(10) as otherwise provided by law.

E. The fund shall be maintained in actuarially sound condition as evidenced by the annual written certification of an actuary qualified for such work that as of June 30 of the current year the fund was actuarially sound.

F. Annually on or before January 15, the director shall submit to the legislature a report on any group self-insurance plan created pursuant to Subsection A of Section 5 [10-7B-6 NMSA 1978] of the Group Benefits Act, a financial audit of the fund and a claims management and procedures audit by a qualified claims auditor for the one-year period ending on June 30 immediately preceding the report. With respect to claims files, the claims audit may, in the director's discretion, be limited to a random sampling.

**History:** Laws 1989, ch. 231, § 7.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

**Bracketed material.** - The bracketed material in Subsection F was inserted by the compiler, as the reference therein to "Section 5 of the Group Benefits Act" is apparently erroneous. The apparent intended reference is to Section 6 of that act, and the bracketed code number inserted following the reference reflects that intended reference. The bracketed material was not enacted by the legislature and is not part of the law.

### **10-7B-8. Group self-insurance fund; investment.**

A. In making investments of the fund, the director shall consider the relative safety of the investment and the need for liquidity in the fund, as well as the income to be produced. No investment of the fund shall have a maturity date, or similar date before which it may not be liquidated for cash without penalty, premium, deduction, surcharge or interest rate decrease, later than one year from the date of purchase.

B. The director may seek such investment advice as he deems proper. State agencies with investment expertise, including but not limited to the state treasurer, the state investment council, the state investment officer and the state board of finance, shall cooperate in providing investment advice upon the director's request. The director may contract with an investment advisor and pay him from the fund. Any such investment advisor shall have at least a bachelor's degree in economics, accounting, business administration or a related field from an accredited college or university and shall have at least five years of experience as an investment advisor or as a funds investment manager or a combination of both.

C. Any commission paid for the purchase or sale of any securities pursuant to this section shall be reasonable and shall not exceed the brokerage rate for such transaction charged at the time of purchase or sale by national brokerage firms.

D. Investment of the fund shall be made with the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation but for investment, considering the probable safety of their capital as well as the probable income to be derived.

E. Securities purchased from the fund shall be held in the custody of the state treasurer. At the director's direction, the state treasurer shall deposit the securities with a bank or trust company for safekeeping or servicing.

F. The director may delegate his investment authority to the state treasurer, who shall make investments or reinvestments of the fund in accordance with this section.

**History:** Laws 1989, ch. 231, § 8.

**Emergency clauses.** - Laws 1989, ch. 231, § 11 makes the Group Benefits Act effective immediately. Approved April 5, 1989.

## **ARTICLE 7C**

### **RETIREE HEALTH CARE**

#### **10-7C-1. Short title.**

Sections 1 through 16 [10-7C-1 to 10-7C-16 NMSA 1978] of this act may be cited as the "Retiree Health Care Act".

**History:** Laws 1990, ch. 6, § 1.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

**Appropriations.** - Laws 1990, ch. 6, § 18, effective February 13, 1990, appropriates \$6,000,000 in the eightieth fiscal year from the general fund operating reserve to the "retiree health care loan fund" for expenditure in the eightieth through eighty-fourth fiscal years for the initial development, establishment, and administration of the Retiree Health Care Act. However, the money appropriated remains in the general fund operating reserve except as drawn upon in accordance with provisions controlling loans to the retiree health care fund from the retiree health care fund subject to certain conditions as to interest, repayments, and prepayment, and the section provides that any amount remaining in the retiree health care loan fund at the end of any fiscal year representing repayments under the section shall revert to the general fund.

#### **10-7C-2. Purpose of act.**



The purpose of the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] is to provide comprehensive core group health insurance for persons who have retired from certain public service in New Mexico. The purpose is to provide eligible retirees, their spouses, dependents and surviving spouses and dependents with health insurance consisting of a plan or optional plans of benefits that can be purchased by funds flowing into the retiree health care fund and by co-payments or out-of-pocket payments of insureds.

**History:** Laws 1990, ch. 6, § 2.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-3. Legislative findings and declaration of policy.**

A. The legislature finds and declares that public employees face a severe problem in securing continuing medical insurance when they retire. Medical care inflation has far exceeded the general inflation rate for the past decade. It is expected that at least some of the factors that have contributed to this phenomenon will continue into the foreseeable future. As the public employee population grows older, the ratio of retirees to active employees is expected to continue to rise. This factor will be exacerbated as the life expectancy of the aged improves and the post-world war two generation approaches retirement age. Financial problems faced by the federal medicare system are becoming more serious, and it is apparent that there will be attempts to shift those costs to the public employer and employee. More such cost shifting is likely, and one of the purposes of the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] is, within the constraints of what can be afforded by the taxpayers, to alleviate this burden on the retiree as much as possible.

B. The legislature further finds and declares that the public employees covered by the Retiree Health Care Act have entered into public employment in circumstances where they have received in exchange for their services a present salary and an expectation of receiving a future stream of benefits, including payment of certain retirement benefits. The legislature declares that the expectation of receiving future benefits may be modified from year to year in order to respond to changing financial exigencies, but that such modification must be reasonably calculated to result in the least possible detriment to the expectation and to be consistent with any employer-employee relationship established to meet that expectation. The legislature does not intend for the Retiree Health Care Act to create trust relationships among the participating employees, retirees, employers and the authority administering the Retiree Health Care Act nor does the legislature intend to create contract rights which may not be modified or extinguished in the future; rather the legislature intends to create, through the Retiree Health Care Act, a means for maximizing health care services returned to the participants for their participation under the Retiree Health Care Act.

C. The legislature further finds and declares that nothing in the Retiree Health Care Act shall prohibit the legislature from increasing or decreasing participating employer and employee contributions, eligible retiree premiums or group health insurance coverages or plans, and that participation in the Retiree Health Care Act by retired and active public employees shall not be construed to establish rights between the retired and active public employees and the state for health care benefits which cannot be modified or extinguished in the future to meet changes in economic or social conditions.

D. The legislature further finds and declares that the health care coverage provided under the Retiree Health Care Act shall constitute a state group health insurance plan, separate subsequent state group health insurance plan, state group insurance plan, separate subsequent state group insurance plan, state medical group insurance plan and separate subsequent state medical group insurance plan for the purposes of Sections 10-11-121, 10-12-15, 10-12A-11 and 22-11-41 NMSA 1978.

E. The legislature further finds and declares that participation of current retirees in the Retiree Health Care Act is predicated on State ex rel. Hudgins v. Public Employees Retirement Board 58 N.M. 543, 273 P.2d 543 (1954); the additional monthly participation fee to be paid by current retirees as a condition of participation in the Retiree Health Care Act is in lieu of the lump-sum consideration paid by the retirees who were the relators in that case.

**History:** Laws 1990, ch. 6, § 3.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

#### **10-7C-4. Definitions.**

As used in the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978]:

A. "active employee" means an employee of a public institution or any other public employer participating in either the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978], the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978], the Judicial Retirement Act [Chapter 10, Article 12 NMSA 1978] or the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978];

B. "authority" means the "retiree health care authority" created pursuant to the Retiree Health Care Act;

C. "basic plan of benefits" means only those coverages generally associated with a medical plan of benefits;

D. "board" means the governing board of the retiree health care authority;

E. "current retiree" means an eligible retiree who is receiving a disability or normal retirement benefit under the Educational Retirement Act, the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act, the Retirement Reciprocity Act, the Judicial Retirement Reciprocity Act [10-13-6 to 10-13-9 NMSA 1978] or the retirement program of an independent public employer on or before July 1, 1990;

F. "eligible dependent" means a person obtaining retiree health care coverage based upon that person's relationship to an eligible retiree as follows:

(1) a spouse;

(2) an unmarried child under the age of nineteen who is:

(a) a natural child;

(b) a legally adopted child;

(c) a stepchild living in the same household who is primarily dependent on the eligible retiree for maintenance and support;

(d) a child for whom the eligible retiree is the legal guardian and who is primarily dependent on the eligible retiree for maintenance and support, as long as evidence of the guardianship is evidenced in a court order or decree; and

(e) a foster child living in the same household;

(3) a child described in Subparagraphs (a) through (e) of Paragraph (2) of this subsection who is between the ages of nineteen and twenty-five and is a full-time student at an accredited educational institution, provided that "full-time student" shall be a student enrolled in and taking twelve or more semester hours or its equivalent contact hours in primary, secondary, undergraduate or vocational school or a student enrolled in and taking nine or more semester hours or its equivalent contact hours in graduate school;

(4) a dependent child over nineteen who is wholly dependent on the eligible retiree for maintenance and support and who is incapable of self-sustaining employment by reason of mental retardation or physical handicap, provided that proof of incapacity and dependency must be provided within thirty-one days after the child reaches the limiting age and such times thereafter as may be required by the board;

(5) a surviving spouse defined as follows:

(a) "surviving spouse" means the spouse to whom a retiree was married at the time of death; or

(b) "surviving spouse" means the spouse to whom a deceased vested active employee was married at the time of death; and

(6) a surviving dependent child who is the dependent child of a deceased eligible retiree whose other parent is also deceased;

G. "eligible employer" means either:

(1) a "retirement system employer", which means an institution of higher education, a school district or other entity participating in the public school insurance authority, a state agency, state court, magistrate court, municipality or county, each of which is affiliated under or covered by the Educational Retirement Act, the Public Employees Retirement Act, the Judicial Retirement Act or the Magistrate Retirement Act; or

(2) an "independent public employer", which means a municipality or county which is not a retirement system employer;

H. "eligible retiree" means:

(1) a "nonsalaried eligible participating entity governing authority member" who is a person who has served without salary as a member of the governing authority of an employer eligible to participate in the benefits of the Retiree Health Care Act and is certified to be such by the executive director of the public school insurance authority and has maintained group health insurance coverage through that member's governing authority; or

(2) a "salaried eligible participating entity governing authority member" who is a person who has served with salary as a member of the governing authority of an employer eligible to participate in the benefits of the Retiree Health Care Act, has made contributions to the fund for at least five years prior to retirement and whose eligible employer, during that period of time, made contributions as a participant in the Retiree Health Care Act on the person's behalf, unless that person retires on or before July 1, 1995, in which event the time period required for contributions shall become the period of time between July 1, 1990, and the date of retirement, and who is certified to be a retiree by the executive director of the public employees retirement association and who has maintained group health insurance through that member's governing authority; or

(3) an "eligible participating retiree" who is a person who:

(a) falls within the definition of a retiree, has made contributions to the fund for at least five years prior to retirement and whose eligible employer during that period of time made contributions as a participant in the Retiree Health Care Act on the person's behalf unless that person retires on or before July 1, 1995 in which event the time period required for employee and employer contributions shall become the period of time between July 1, 1990, and the date of retirement and is certified to be a retiree by

the educational retirement director, the executive secretary of the public employees retirement board or the governing authority of an independent public employer; or

(b) falls within the definition of a retiree, retired prior to July 1, 1990, and is certified to be a retiree by the educational retirement director, the executive secretary of the public employees retirement association or the governing authority of an independent public employer;

I. "fund" means the retiree health care fund;

J. "group health insurance" means coverage that includes but is not limited to life insurance, accidental death and dismemberment, hospital care and benefits, surgical care and treatment, medical care and treatment, dental care, eye care, obstetrical benefits, prescribed drugs, medicines and prosthetic devices, medicare supplement, medicare carveout, medicare coordination, and other benefits, supplies and services through the vehicles of indemnity coverages, health maintenance organizations, preferred provider organizations and other health care delivery systems as provided by the Retiree Health Care Act and other coverages considered by the board to be advisable;

K. "ineligible dependents" include but are not limited to:

(1) those dependents created by common law relationships;

(2) dependents while in active military service;

(3) parents, aunts, uncles, brothers, sisters, grandchildren and other family members left in the care of an eligible retiree without evidence of legal guardianship; and

(4) anyone not specifically referred to as an eligible dependent pursuant to the rules and regulations adopted by the board; and

L. "participating employee" means an employee of a participating employer, which employee has not been excluded from participation in the Retiree Health Care Act pursuant to Subsection F of Section 9 [10-7C-9 NMSA 1978] or Section 10 [10-7C-10 NMSA 1978] of the Retiree Health Care Act.

M. "participating employer" means an eligible employer who has satisfied the conditions for participating in the benefits of the Retiree Health Care Act, including the requirements of Subsection M of Section 7 [10-7C-7 NMSA 1978] and Subsection E of Section 9 of the Retiree Health Care Act;

N. "retiree" means a person who is receiving:

(1) a disability or normal retirement benefit or survivor's benefit under the Educational Retirement Act;

(2) a disability or normal retirement benefit or survivor's benefit pursuant to the Public Employees Retirement Act, the Judicial Retirement Act, the Magistrate Retirement Act, the Retirement Reciprocity Act [10-13-1 to 10-13-5 NMSA 1978] or the Judicial Retirement Reciprocity Act; or

(3) a disability or normal retirement benefit or survivor's benefit pursuant to the retirement program of an independent public employer to which that employer has made periodic contributions.

**History:** Laws 1990, ch. 6, § 4.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-5. Authority created.**

There is created the "retiree health care authority" which is established to provide for comprehensive group health insurance programs under the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978]. The authority shall be administratively attached to the public school insurance authority until December 31, 1993. The executive director of the public school insurance authority shall be the executive director of the retiree health care authority until December 31, 1993. The board created by Section 6 [10-7C-6 NMSA 1978] of the Retiree Health Care Act shall remain fully independent of the board of the public school insurance authority.

**History:** Laws 1990, ch. 6, § 5.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-6. Board created; membership; authority.**

A. There is created the "board of the retiree health care authority". The board shall be composed of eleven members, consisting of the following:

(1) one member who is not employed by or on behalf of, or contracting with an employer participating in or eligible to participate in the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], and who shall be appointed by the governor to serve at the pleasure of the governor;

(2) the educational retirement director or the educational retirement director's designee;

(3) one member to be selected by the public school superintendent's association of New Mexico;

(4) one member who shall be a teacher who is certified and teaching in elementary or secondary education to be selected by a committee composed of one person designated by the New Mexico association of classroom teachers, one person designated by the national education association of New Mexico and one person designated by the New Mexico federation of teachers;

(5) one member shall be an eligible retiree of a public school and who shall be selected by the New Mexico association of retired educators;

(6) one member who shall be an eligible retiree of an institution of higher education participating in the Retiree Health Care Act and shall be selected by the New Mexico association of retired educators;

(7) the executive secretary of the public employees' retirement association or the executive secretary's designee;

(8) one member who shall be an eligible state government retiree and shall be selected by the retired public employees of New Mexico;

(9) one member who shall be an elected official or employee of a municipality participating in the Retiree Health Care Act to be selected by the New Mexico municipal league;

(10) one member who shall be an elected official or employee of a county participating in the Retiree Health Care Act to be selected by the New Mexico association of counties; and

(11) the state treasurer or the state treasurer's designee.

B. Every member of the board shall serve at the pleasure of the party or parties that selected that member.

C. The members of the board shall begin serving their positions on the board on the effective date of the Retiree Health Care Act or upon their selection, whichever occurs last, unless that member's corresponding position on the board has been eliminated pursuant to Subsection D of Section 9 [10-7C-9 NMSA 1978] of the Retiree Health Care Act.

D. The board shall elect from its membership a president, vice president and secretary.

E. The board may appoint such officers and advisory committees as it deems necessary. The board may enter into contracts or arrangements with consultants, professional persons or firms as may be necessary to carry out the provisions of the Retiree Health Care Act.

F. The members of the board and its advisory committees shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] but shall receive no other compensation, perquisite or allowance.

**History:** Laws 1990, ch. 6, § 6.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

**"Effective date of the Retiree Health Care Act".** - The phrase "effective date of the Retiree Health Care Act", referred to in this section, means February 13, 1990, the effective date of Laws 1990, ch. 6.

### **10-7C-7. Board; duties.**

In order to achieve the purposes of the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], the board may take all actions reasonably necessary to implement that act, including but not limited to the following:

A. employ or contract for the services of the state fiscal agent or select its own fiscal agent in accordance with the Procurement Code [13-1-1 to 13-1-172 NMSA 1978];

B. employ or contract for persons to assist it in carrying out the Retiree Health Care Act and determine the duties and compensation of these employees;

C. collect and disburse funds;

D. collect all current and historical claims and financial information necessary for effective procurement of lines of insurance coverage;

E. promulgate and adopt necessary rules, regulations and procedures for implementation of the Retiree Health Care Act;

F. negotiate insurance policies covering additional or lesser benefits as determined appropriate by the board, but the board shall maintain all coverage as required by federal or state law for each eligible retiree. In the event it is practical to wholly self-insure part or all of the retiree health care coverages, the board may do so;

G. procure group health care and other coverages authorized by the Retiree Health Care Act in accordance with the Procurement Code;

H. establish the procedures for contributions and deductions;

I. determine methods and procedures for claims administration;

J. administer the fund;



K. contract for and make available to all eligible retirees and eligible dependents basic and optional group health insurance plans. The optional coverage may include a lower deductible, lower coinsurance or additional categories of benefits permitted under this section and all other applicable sections of the Retiree Health Care Act to provide additional levels of coverages and benefits. Any additional contributions for these optional plans shall be paid for by the eligible retiree or eligible dependent. The coverage provided by the plan or plans shall be secondary to all other benefit coverages to which the eligible retiree or eligible dependent is entitled. In the event a covered eligible retiree becomes employed by an employer offering its employees a basic plan of benefits, the coverage provided by the plan under the Retiree Health Care Act shall be secondary to such coverage regardless of whether the employee enrolls in that employer's plan. In the event the eligible retiree or eligible dependent is entitled to receive medicare hospital insurance benefits at no charge, then the coverage provided by the plan under the Retiree Health Care Act shall be secondary to medicare hospital and medical insurance to the extent permitted by federal law;

L. provide, at its discretion, different plans for eligible retirees and eligible dependents covered by medicare than the plans provided for eligible retirees and eligible dependents who are not covered by medicare; and

M. promulgate and adopt rules and regulations governing eligibility, participation, enrollment, length of service and any other conditions or requirements for providing substantially equal treatment to participating employers who are independent public employers and their retirees and participating employees.

**History:** Laws 1990, ch. 6, § 7.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-8. Fund created; investment; premiums; appropriation.**

A. There is created the "retiree health care fund". All money in the fund shall be invested as provided for in Subsection D of this section. All income earned from investment of the fund shall be credited to the fund. Except as otherwise specifically provided herein, the money in the fund is appropriated to the board to carry out the provisions of the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978]. Any funds remaining at the end of any fiscal year shall not revert to the general fund.

B. The board shall provide for the collection of premiums from eligible retirees and eligible dependents which money when combined with other money appropriated to the fund shall be sufficient to provide the required insurance coverage and to pay the expenses of the authority. All premiums and other money appropriated to the fund shall be credited to the fund.

C. All premiums and other money collected by the authority shall be received and disbursed directly by the authority. Receipts and disbursements are subject to audit by the state auditor.

D. The board shall determine which money in the fund constitutes the long-term reserves of the authority. The state investment officer shall invest the long-term reserves of the authority in accordance with the provisions of Sections 6-8-1 through 6-8-16 NMSA 1978. The state treasurer shall invest the money in the fund that does not constitute the long-term reserves of the fund in accordance with the applicable provisions of Chapter 6, Article 10.

**History:** Laws 1990, ch. 6, § 8.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

**Fund transfers.** - Laws 1990, ch. 6, § 17, effective February 13, 1990, amends L. 1987, ch. 136, § 1 primarily to transfer 3,073,886.27 to the retiree health care fund on July 1 of the seventy-ninth and eightieth fiscal years.

Laws 1991, ch. 9, § 44, effective June 14, 1991, appropriates \$3,073,886.27 from the retiree health care fund to the general fund in the seventy-ninth fiscal year.

### **10-7C-9. Participation.**

A. All eligible employers shall participate in the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] except as provided in Subsection D or Subsection E of this section. Participating employers are required to continue existing group health insurance coverages until such time as similar coverages are offered by the board under the Retiree Health Care Act.

B. Participation in the basic health insurance coverages provided by the authority shall be conditioned upon receipt by the board of a certificate of eligibility from the educational retirement director, the executive secretary of the public employees retirement association, the executive director of the public school insurance authority or the governing body of an independent public employer. Once eligibility is established, for each eligible retiree who retires on or after the effective date of the Retiree Health Care Act, the board shall contribute from money in the fund the authority's portion of the premium for the basic plan of benefits commencing no earlier than January 1, 1991, plus the balance of the premium which shall be collected from the retiree.

C. Each eligible retiree shall accept or reject enrollment in the basic plan of benefits on an enrollment form provided by the board. An eligible retiree who rejects enrollment or fails to return a properly executed enrollment form within the open enrollment period as established by the board forfeits all entitlement and eligibility for benefits under the

Retiree Health Care Act until the next open enrollment period as established by the board.

D. On or before January 1, 1991, municipalities, counties and institutions of higher education that are retirement system employers may at their option determine by ordinance, or for institutions of higher education, by resolution, to be excluded from coverage under the Retiree Health Care Act; that determination shall be irrevocable and shall be subject to the following conditions:

(1) Any contributions paid into the fund by a municipality, county or institution of higher education that exercises timely an irrevocable option not to participate in the Retiree Health Care Act under this subsection shall be returned without interest to that municipality, county or institution of higher education for return of the employee contributions to the employees and for crediting of the employer contributions to the appropriate fund of the municipality, county or institution of higher education. If the determination to be excluded from coverage is exercised by a municipality, county or institution of higher education prior to July 1, 1990, then that municipality, county or institution of higher education shall not be required to make the contributions that would otherwise be required by Section 15 [10-7C-15 NMSA 1978] of the Retiree Health Care Act.

(2) Any municipality, county or institution of higher education, in addition to complying with all other required notice and public hearing or meeting requirements, shall, no less than thirty days prior to the public hearing or public meeting on a proposed ordinance or proposed resolution, notify the authority of the public hearing or public meeting by certified mail.

(3) In the event that:

(a) a number of municipalities exercise this option so as to reduce the number of active employees employed by municipalities contributing to the fund to a number equalling less than sixty percent of all active employees employed by all municipalities that are retirement system employers, the municipal position on the board of the authority shall be eliminated and the size of the board thereby reduced; provided, however, that if a municipality with a population greater than one hundred thousand that is located in a class "A" county exercises this option, then the sixty-percent requirement shall be applied to the remaining municipalities only;

(b) a number of counties exercise this option so as to reduce the number of active employees employed by counties contributing to the fund to a number equalling less than eighty percent of all active employees employed by all counties that are retirement system employers, the county position on the board of the authority shall be eliminated and the size of the board thereby reduced; provided, however, that if a class "A" county exercises this option, then the eighty-percent requirement shall be applied to the remaining counties only;

(c) a number of institutions of higher learning exercise this option so as to reduce the number of active employees employed by institutions of higher learning contributing to the fund to a number equalling less than seventy percent of all active employees employed by an institution of higher education contributing to the educational retirement fund, the institution of higher education position on the board shall be eliminated and the size of the board thereby reduced.

(4) Any reduction in the size of the board pursuant to this subsection of the Retiree Health Care Act shall be effective January 1, 1991.

E. An independent public employer may become a participating employer if that employer satisfies the requirements imposed pursuant to Subsection M of Section 7 [10-7C-7 NMSA 1978] of the Retiree Health Care Act and if that employer also files with the authority on or prior to January 1, 1991, a written irrevocable election by the governing body of that employer to participate in the Retiree Health Care Act.

F. Any other provisions of the Retiree Health Care Act notwithstanding, retirees or active employees of institutions of higher education participating in the Retiree Health Care Act for whom those institutions of higher education have existing plans, programs, policies or contracts for health care benefits shall not be required to participate in the Retiree Health Care Act, nor shall employer or employee contributions be made to the authority on their behalf.

**History:** Laws 1990, ch. 6, § 9.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

**"Effective date of the Retiree Health Care Act".** - The phrase "effective date of the Retiree Health Care Act", referred to in this section, means February 13, 1990, the effective date of Laws 1990, ch. 6.

### **10-7C-10. Expulsion from program for falsification.**

A. After written notice to the participating employee, eligible retiree or eligible dependent and hearing with a fair opportunity to appear and present the case personally or by counsel, the board may expel from participation in the retiree health care plan or plans any participating employee, eligible retiree or eligible dependent who submits a false claim under, or has falsified or attempted to falsify, any claim for health benefits or life insurance offered by the authority.

B. On its motion or on the receipt of a complaint, the board may call and hold a hearing to determine whether a participating employee, eligible retiree or eligible dependent has submitted a false claim under, or has falsified or attempted to falsify any claim for health benefits or life insurance offered under the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978].

C. If the board, at the conclusion of the hearing, issues a decision that finds that a participating employee, eligible retiree or eligible dependent submitted a false claim or has falsified or attempted to falsify any claim for health benefits or life insurance offered under that act, the board shall expel the participating employee, eligible retiree or eligible dependent from participation in any or all coverage plans or impose conditions upon continued or future participation.

**History:** Laws 1990, ch. 6, § 10.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-11. Purchase of group insurance.**

A. The board shall be designated as the group policyholder for any plan or plans established under the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978].

B. The group insurance coverages provided under the plan or plans may include but are not limited to life insurance, accidental death and dismemberment, hospital care and benefits, surgical care and treatment, medical care and treatment, dental care, eye care, obstetrical benefits, prescribed drugs, medicines and prosthetic devices, medicare supplement, medicare carveout, medicare coordination and other benefits, supplies and services through the vehicles of indemnity coverages, health maintenance organizations, preferred provider organizations and other health care delivery systems as provided by the Retiree Health Care Act and other coverages considered by the board to be advisable.

C. To the extent practicable, each basic plan of benefits shall cover preexisting conditions.

**History:** Laws 1990, ch. 6, § 11.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-12. Automatic coverage; effect of preexisting conditions.**

A. An eligible retiree who applies for coverage during the initial and subsequent open enrollment periods as established by the board may not be denied any of the group insurance basic coverages provided under the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] except as provided in Section 10 [10-7C-10 NMSA 1978] of that act.

B. An eligible retiree or an eligible dependent who applies for optional coverage under the program after the first offering to the eligible retiree or eligible dependent is not

entitled to coverage for preexisting conditions existing during the six-month period immediately preceding the date on which optional coverage takes effect.

**History:** Laws 1990, ch. 6, § 12.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-13. Payment of premiums on health care plans.**

A. Eligible retirees shall pay a monthly premium of fifty dollars (\$50.00) per retiree for the basic plan beginning January 1, 1991, which premium may be increased by the board by not more than three percent in each succeeding fiscal year. Beginning January 1, 1991, and in addition to the monthly premium of fifty dollars (\$50.00) per retiree for the basic plan, current retirees and nonsalaried eligible participating entity governing authority members who become eligible retirees shall also pay monthly an additional participation fee of five dollars (\$5.00), which amount may be increased by the board by not more than three percent in each succeeding fiscal year. The additional monthly participation fee paid by the current retirees and nonsalaried eligible participating entity governing authority members who become eligible retirees shall be a consideration and a condition for being permitted to participate in the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978]. Eligible dependents shall pay monthly premiums to cover the cost of the basic plan for the eligible dependents.

B. Eligible retirees and eligible dependents shall pay monthly premiums to cover the cost of the optional plans that they elect to receive, and the board shall adopt rules for the collection of additional premiums from eligible retirees and eligible dependents participating in the optional plans. An eligible retiree or eligible dependent may authorize the authority in writing to deduct the amount of these premiums from the monthly annuity payments, if applicable.

**History:** Laws 1990, ch. 6, § 13.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-14. Exemption from legal process.**

All insurance benefit payments, participating employee and participating employer contributions, eligible retiree and eligible dependent contributions, optional benefits payments and any rights, benefits or payments accruing to any person under the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978], as well as all money in the fund created by that act, are exempt from execution, attachment, garnishment or any other legal process and may not be assigned except as specifically provided by that act.

**History:** Laws 1990, ch. 6, § 14.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-15. Retiree health care fund contributions.**

A. Each participating employer for the fiscal year beginning July 1, 1990, and thereafter, shall make contributions to the fund in the amount of one percent of each participating employee's annual salary.

B. Each participating employee as a condition of employment for the fiscal year commencing July 1, 1990, and thereafter, shall contribute to the fund an employee contribution in an amount equal to one-half of one percent of the employee's salary. Each month, participating employers shall deduct the contribution from the participating employee's salary and shall remit it to the board as provided by any procedures that the board may require.

C. A participating employer that fails to remit before the tenth day after the last day of the month all employer and employee deposits required by the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] to be remitted by the employer for the month shall pay to the fund, in addition to the deposits, interest on the unpaid amounts at the rate of six percent per annum compounded monthly.

D. The employer and employee contributions shall be paid in monthly installments based on the percent of payroll certified by the employer.

E. Except in the case of erroneously made contributions, or as may be otherwise provided in Subsection D of Section 9 [10-7C-9 NMSA 1978] of the Retiree Health Care Act, contributions from participating employers and participating employees shall become the property of the fund on receipt by the board and shall not be refunded under any circumstances including termination of employment or termination of the participating employer's operation or participation in the Retiree Health Care Act.

F. Notwithstanding any other provision in the Retiree Health Care Act, and at the first session of the legislature following July 1, 1995, the legislature shall review and adjust the distribution pursuant to Section 7-1-6.1 and the employer and employee contributions to the authority in order to insure the actuarial soundness of the benefits provided under the Retiree Health Care Act.

**History:** Laws 1990, ch. 6, § 15.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

### **10-7C-16. Retiree health care fund; budget.**

A. Expenditures for the development and for the administration of the program shall be made as provided by an operating budget adopted by the board and approved by the state budget division of the department of finance and administration. Beginning with the eightieth fiscal year, expenditures for the administration of the Retiree Health Care Act [10-7C-1 to 10-7C-16 NMSA 1978] shall be subject to appropriation by the legislature.

B. For the development and administration of the program up to ten full-time equivalents are hereby authorized by the legislature. During the period in which the authority is administratively attached to the public school insurance authority, all staff hired for the purpose of the development and administration of the program are under the direct supervision of the executive director of the public school insurance authority; thereafter, all such staff shall act under the direct supervision of an executive director to be selected by the board.

**History:** Laws 1990, ch. 6, § 16.

**Emergency clauses.** - Laws 1990, ch. 6, § 23 makes the Retiree Health Care Act effective immediately. Approved February 13, 1990.

**Severability clauses.** - Laws 1990, ch. 6, § 22 provides for the severability of the Retiree Health Care Act if any part thereof or application is held invalid, and, in the event a holding adversely affects the right to benefits of participating employees, contributions of participating employers or other designated persons shall be reimbursed, provided that a return of income tax money distributed pursuant to 7-1-6.30 NMSA 1978 shall not be required.

## **ARTICLE 8**

### **PER DIEM AND MILEAGE**

#### **10-8-1. Short title.**

Sections 10-8-1 through 10-8-8 NMSA 1978 may be cited as the "Per Diem and Mileage Act".

**History:** 1953 Comp., § 5-10-1, enacted by Laws 1963, ch. 31, § 1; 1978, ch. 184, § 1; 1979, ch. 273, § 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Officers §§ 224, 225.

#### **10-8-2. Purpose of act.**

The purpose of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] is to establish rates for reimbursement for travel for public officers and employees coming



under the Per Diem and Mileage Act. The act is designed to be referred to where applicable in statutes setting compensation of public officers and employees.

**History:** 1953 Comp., § 5-10-2, enacted by Laws 1963, ch. 31, § 2; 1971, ch. 116, § 1.

**Where allowance may not be drawn.** - State highway commissioners, as unsalaried state officers, may not draw the statutory per diem allowance while engaged in official state business at their residence or personal business premises. 1977 Op. Att'y Gen. No. 77-20.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 225; 81A C.J.S. States §§ 61, 106 to 109.

### **10-8-3. Definitions.**

As used in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]:

A. "secretary" means the secretary of finance and administration;

B. "employee" means any person who is in the employ of any state agency, local public body or public post-secondary educational institution and whose salary is paid either completely or in part from public money, but does not include jurors or jury commissioners;

C. "governing board" means the board of regents of any institution designated in Article 12, Section 11 of the constitution of New Mexico or designated in Chapter 21, Article 14 NMSA 1978, or the board of any institution designated in Chapter 21, Articles 13, 16 and 17 NMSA 1978;

D. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions, except public post-secondary educational institutions;

E. "state agency" means the state or any of its branches, agencies, departments, boards, instrumentalities or institutions, except public post-secondary educational institutions;

F. "public post-secondary educational institution" means any institution designated in Article 12, Section 11 of the constitution of New Mexico and any institution designated in Chapter 21, Articles 13, 14, 16 and 17 NMSA 1978; and

G. "public officer" or "public official" means every elected or appointed officer of the state, local public body or any public post-secondary educational institution. Public officer includes members of advisory boards appointed by any state agency, local public body or public post-secondary educational institution.

**History:** 1953 Comp., § 5-10-2.1, enacted by Laws 1971, ch. 116, § 2; 1977, ch. 247, § 49; 1978, ch. 184, § 2; 1979, ch. 273, § 3; 1989, ch. 338, § 1.

**The 1989 amendment,** effective June 16, 1989, in Subsection B, inserted "or public post-secondary educational institution"; added present Subsection C; redesignated former Subsections C and D as present Subsections D and E, inserting in both "except public post-secondary educational institutions"; added Subsection F; redesignated former Subsection E as present Subsection G, inserting therein "or 'public official'" and, in two places, "or any public post-secondary educational institution"; and made minor stylistic changes throughout the section.

**Payment to person not within definitions.** - A person not within these definitions who performs a service for or on behalf of a school district can be paid under this act for his expenses. 1974 Op. Att'y Gen. No. 74-29.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225.

#### **10-8-4. Per diem and mileage rates; in lieu of payment.**

A. Notwithstanding any other specific law to the contrary and except as provided in Subsection I of this section, every nonsalaried public officer shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or up to seventy-five dollars (\$75.00) per diem expenses:

(1) for each board or committee meeting attended; or

(2) for each day spent in discharge of official duties for travel within the state but away from his home.

Nonsalaried public officers who travel to attend a board or committee meeting may elect to be reimbursed per diem under either Paragraph (1) or (2) of this subsection.

B. Every salaried public officer or employee who is traveling within the state but away from his home and away from his designated post of duty on official business shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or:

(1) up to sixty-five dollars (\$65.00) per diem expenses for each day spent in the discharge of his official duties for a salaried public officer or employee of a local public body or state agency. If the secretary finds that a per diem allowance of sixty-five dollars (\$65.00) is inadequate for reimbursement of expenses in any municipality of this state, the secretary may authorize the reimbursement of per diem for travel to such municipality not to exceed seventy-five dollars (\$75.00); or

(2) up to sixty-five dollars (\$65.00) per diem expenses for each day spent in the discharge of his official duties for a salaried public officer or employee of a public post-secondary educational institution. If the governing board finds that a per diem allowance of sixty-five dollars (\$65.00) is inadequate for reimbursement of expenses in any municipality of this state, the governing board may authorize the reimbursement of per diem for travel to such municipality not to exceed seventy-five dollars (\$75.00).

C. Every public officer or employee shall receive either reimbursement pursuant to the provisions of Subsection K or L of this section or:

(1) for public officers or employees of a state agency or local public body, up to seventy-five dollars (\$75.00) per diem expenses for each day of travel outside the state on official business. If the secretary finds that a per diem allowance of seventy-five dollars (\$75.00) is inadequate for out-of-state travel to a geographical area, the secretary may authorize per diem not to exceed ninety-five dollars (\$95.00) for out-of-state travel to such geographical area; provided that the secretary may authorize per diem for travel to a locality inside or outside the continental United States for a public officer or employee who is reimbursed solely from federal funds in accordance with the rate allowed by the federal government for travel to that locality. In lieu of per diem, persons trained in the field of accountancy and performing duties in that field of training as an employee while assigned for periods exceeding three weeks per assignment to travel out-of-state on official business may receive either reimbursement pursuant to the provisions of Subsection L of this section or actual expenses not to exceed ninety-five dollars (\$95.00) per day. Expenses shall be substantiated in accordance with rules promulgated by the department of finance and administration. The secretary may promulgate rules defining what constitutes out-of-state travel for purposes of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]; or

(2) for public officers or employees of a public post-secondary educational institution, up to seventy-five dollars (\$75.00) per diem expenses for each day of travel outside the state on official business. If the governing board finds that a per diem allowance of seventy-five dollars (\$75.00) is inadequate for out-of-state travel to a geographical area, the governing board may authorize per diem not to exceed ninety-five dollars (\$95.00) for out-of-state travel to such geographical area; provided that the governing board may authorize per diem for travel to a locality inside or outside the continental United States for a public officer or employee who is reimbursed solely from federal funds in accordance with the rate allowed by the federal government for travel to that locality. Expenses shall be substantiated in accordance with rules promulgated by the governing board. The governing board may promulgate rules defining what constitutes out-of-state travel for purposes of the Per Diem and Mileage Act.

D. Every public officer or employee shall receive twenty-five cents (\$.25) a mile for each mile traveled in a privately owned vehicle or forty cents (\$.40) a mile for each mile traveled in a privately owned airplane if the travel is necessary to the discharge of his official duties and if the private conveyance is not a common carrier. Provided, however, that only one person shall receive mileage for each mile traveled in a single privately

owned vehicle or airplane except in the case of common carriers, in which case the person shall receive the cost of the ticket in lieu of the mileage allowance.

E. The per diem and mileage or per diem and cost of tickets for common carriers paid to salaried public officers or employees is in lieu of actual expenses for transportation, lodging and subsistence.

F. In addition to the in-state per diem set forth in this section, the department of finance and administration, by regulation, may authorize a flat subsistence rate in the amount set by the legislature in the general appropriations act for commissioned officers of the New Mexico state police in accordance with rules and regulations promulgated by the department of finance and administration.

G. In lieu of the in-state per diem set in Subsection B of this section, the department of finance and administration may, by regulation, authorize a flat monthly subsistence rate for certain employees of the state highway and transportation department, provided that the payments made under this subsection shall not exceed the maximum amount that would be paid under Subsection B of this section.

H. Per diem received by nonsalaried public officers for travel on official business or in the discharge of their official duties, other than attending a board or committee meeting, and per diem received by public officers and employees for travel on official business shall be prorated in accordance with regulations of the department of finance and administration or the governing board.

I. The provisions of Subsection A of this section do not apply to payment of per diem expense to a nonsalaried public official of a municipality for attendance at board or committee meetings held within the boundaries of the municipality.

J. In addition to any other penalties prescribed by law for false swearing on an official voucher, it shall be cause for removal or dismissal from office.

K. With prior written approval of the secretary or the secretary's designee or the local public body, a nonsalaried public officer of a state agency or local public body, salaried public officer of a state agency or local public body or salaried employee of a state agency or local public body is entitled to per diem expenses under this subsection and shall receive:

(1) reimbursement for actual expenses for lodging; and

(2) reimbursement for actual expenses for meals not to exceed twenty-two dollars fifty cents (\$22.50) per day.

L. With prior written approval of the governing board or its designee, a nonsalaried public officer of a public post-secondary educational institution, a salaried public officer of a public post-secondary educational institution or a salaried employee of a public

post-secondary educational institution is entitled to per diem expenses under this subsection and shall receive:

(1) reimbursement for actual expenses for lodging; and

(2) reimbursement for actual expenses for meals not to exceed twenty-two dollars fifty cents (\$22.50) per day.

**History:** 1953 Comp., § 5-10-3, enacted by Laws 1963, ch. 31, § 3; 1971, ch. 116, § 3; 1974, ch. 26, § 1; 1975, ch. 106, § 1; 1977, ch. 194, § 1; 1978, ch. 184, § 3; 1979, ch. 38, § 1; 1980, ch. 9, § 1; 1980, ch. 32, § 1; 1981, ch. 109, § 1; 1984, ch. 29, § 2; 1987, ch. 129, 1 § 1; 1989, ch. 338, § 2.

**Cross-references.** - As to payment of travel advances upon public vouchers, see 6-5-8 NMSA 1978.

For applicability to court of appeal judges, see 34-5-3 NMSA 1978.

For applicability to magistrates attending training program, see 35-2-4 NMSA 1978.

For applicability to district attorneys and their employees, see 36-1-3 NMSA 1978.

**The 1989 amendment**, effective June 16, 1989, in Subsections A and B, inserted "or L"; in Subsection B, added the Paragraph (1) designation, inserting therein "for a salaried public officer or employee of a local public body or state agency" and added Paragraph (2); in Subsection C, inserted "or L", added the Paragraph (1) designation, inserting therein "for public officers or employees of a state agency or local public body", and added Paragraph (2); in Subsection G, inserted "and transportation"; in Subsection H, inserted "or the governing board"; in Subsection K, inserted "of a state agency or local public body" in three places; and added Subsection L.

**Compiler's note.** - Laws 1981, ch. 109, § 1, as enacted by the legislature, contained provisions in Subsection K to require that travel vouchers contain a certificate to be subscribed and sworn to before a notary; however, such provisions were vetoed by the governor.

**General Appropriations Act.** - The General Appropriations Act, referred to in Subsection F, is the yearly act passed by the state legislature which funds all state agencies and personnel.

**Intent of payment.** - Payment under this section is intended to defray costs incurred in travel associated with the performance of public business rather than serve as a salary for services performed. 1977 Op. Att'y Gen. No. 77-20.

**Where allowance may not be drawn.** - State highway commissioners, as unsalaried state officers, may not draw the statutory per diem allowance while engaged in official

state business at their residence or personal business premises. 1977 Op. Att'y Gen. No. 77-20.

The "designated post of duty" of a county commissioner is established by reference to Section 4-38-8 NMSA 1978 at the county seat, and, therefore, a county commissioner may not receive per diem for travel to commission meetings or other official business at the county seat. 1988 Op. Att'y Gen. No. 88-65.

**Enforcement of dropped restriction disallowed.** - Where a 35-mile condition is retained only in a per diem clause of a bargaining agreement and it is clear that the parties intended that the 35-mile condition would not apply to a special living allowance provision, the highway department, once it agrees to drop a restriction during negotiations, cannot now be allowed to enforce it. Local 2238 AFSCME v. New Mexico State Hwy. Dep't, 93 N.M. 195, 598 P.2d 1155 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225.

## **10-8-5. Restrictions; regulations.**

A. The secretary may promulgate rules and regulations for state agencies and local public bodies for the purpose of carrying out the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. Public officials of public post-secondary educational institutions and employees of public post-secondary educational institutions shall be subject to the rules and regulations of their governing boards.

B. Public funds may be advanced to any public officer or employee before the travel occurs only with prior written approval of the secretary, the secretary's designee, the local public body or the governing board or its designee. This restriction shall not prohibit the use of authorized credit cards in connection with purchases necessary to the use of vehicles owned by the state, a local public body or a public post-secondary educational institution or for food, lodging or transportation as permitted by the department of finance and administration or the governing board. Public funds shall be paid out under the Per Diem and Mileage Act only upon vouchers duly presented with any required receipts attached thereto. For employees authorized to receive public funds in advance of travel, payment shall be received only upon vouchers submitted with attached authorization for each travel period. For public officers or employees using authorized credit cards, vouchers with required receipts for each month's travel expenses shall be submitted as a condition to receiving authorization to use the credit card for the next month's travel. Travel expenses may also be advanced if the travel is to be performed under provisions of federal or private contracts and the funds used are not derived from taxes or revenues paid to the state or any of its political subdivisions.

C. Money expended by the governor from the appropriations made for his office and contingent and other expenses are not subject to any of the foregoing provisions of this section and are not subject to audit.

D. The secretary may reduce the rates set for the per diem and mileage for any class of public officials and for employees of state agencies except public officials of public post-secondary educational institutions at any time he deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The secretary shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for all public officers and employees of the same classification. The secretary may, at the request of any state agency and for good cause shown, reduce the rates of per diem and mileage for that state agency. The governing body of any local public body may eliminate or may reduce the rates set for the per diem and mileage for all or any class of public officials and employees of the local public body at any time the local public body deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The local public body shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for all public officers and employees of the same classification. The secretary may, in extraordinary circumstances and with the prior approval of the state board of finance in public meeting, allow actual expenses rather than the per diem rates set in the Per Diem and Mileage Act.

E. The governing board or its designee may reduce the rates set for the per diem and mileage for public officials of public post-secondary educational institutions and for employees of public post-secondary educational institutions at any time the governing board deems it to be in the public interest, and such reduction shall not be construed to permit payment of any other compensation, perquisite or allowance. The governing board shall exercise this power of reduction in a reasonable manner and shall attempt to achieve a standard rate for public officers and employees of public post-secondary educational institutions. The governing board may reduce the rates of per diem and mileage for its public post-secondary educational institution and may, in extraordinary circumstances and in public meeting, allow actual expenses rather than the per diem rates set in the Per Diem and Mileage Act.

F. No reimbursement for out-of-state travel shall be paid to any elected public officer, including any member of the legislature, if after the last day to do so that officer has not filed a declaration of candidacy for reelection to his currently held office or has been defeated for reelection to his currently held office in a primary election or any general election.

G. Subsection F of this section does not apply to any elected public officer who is ineligible to succeed himself after serving his term in office.

H. Subsection F of this section does not apply to legislators whose travel has been approved by a three-fourths' vote of the New Mexico legislative council at a regularly called meeting.

I. Any person who is not an employee, appointee, or elected official of a county or municipality and who is reimbursed under the provisions of the Per Diem and Mileage

Act in an amount that singly or in the aggregate exceeds one thousand five hundred dollars (\$1,500) in any one year shall not be entitled to further reimbursement under the provisions of that act until the person furnishes in writing to his department head or, in the case of a department head or board or commission member, to the governor or, in the case of a member of the legislature, to the New Mexico legislative council an itemized statement on each separate instance of travel covered within the reimbursement, the place to which traveled and the executive, judicial or legislative purpose served by the travel.

**History:** 1953 Comp., § 5-10-3.1, enacted by Laws 1978, ch. 184, § 4; 1979, ch. 273, § 4; 1984, ch. 29, § 3; 1989, ch. 338, § 3; 1990, ch. 67, § 1.

**Cross-references.** - As to payment to travel expenses upon public vouchers, see 6-5-8 NMSA 1978.

**Repeals and reenactments.** - Laws 1978, ch. 184, § 4, repealed 5-10-3.1, 1953 Comp. (former 10-8-5 NMSA 1978), relating to restrictions and regulations, and enacted a new 10-8-5 NMSA 1978.

**The 1989 amendment,** effective June 16, 1989, added present Subsection A; redesignated former Subsections A to C as present Subsections B to D; in Subsection B, inserted "or the governing board or its designee" in the first sentence and "or a public post-secondary educational institution" and "or the governing board" in the second sentence; in Subsection D, inserted "except public officials of public post-secondary educational institutions" in the first sentence; added present Subsection E; redesignated former Subsections D to G as present Subsections F to I, updating internal subsection references therein; and made minor stylistic changes throughout the section.

**The 1990 amendment,** effective May 16, 1990, inserted "not an employee, appointee, or elected official of a county or municipality and who is" near the beginning of Subsection I.

**State board of finance.** - Laws 1977, ch. 247, §§ 6 and 93G (compiled as 9-6-6 NMSA 1978 and 6-1-1 NMSA 1978) establish the state board of finance, referred to in the last sentence of Subsection D, in connection with the board of finance division of the department of finance and administration. See 9-6-6 NMSA 1978 and 6-1-1 NMSA 1978.

**Generally, as to nonsalaried public officers.** - Nonsalaried public officers, including state highway commissioners, may receive the statutory per diem allowance for each day on which public business involving the requisite travel is performed without regard to the number of hours actually expended while away from place of residence and personal business premises in the performance of public duties. 1977 Op. Att'y Gen. No. 77-20.



**Reducing rates.** - A state agency may reduce rates of per diem and mileage for that state agency to an amount less than that specified in the Per Diem and Mileage Act, subject to the prior approval of the director (now secretary) of the department of finance and administration. 1977 Op. Att'y Gen. No. 77-20.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225.

### **10-8-6. Application of act.**

The Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] shall not apply to the members of the legislature unless the legislature by specific reference to the act makes it applicable to the members, and such application does not thereby exceed the per diem and mileage rates fixed in the constitution.

**History:** 1953 Comp., § 5-10-3.2, enacted by Laws 1971, ch. 116, § 5.

**Cross-references.** - For constitutional per diem and mileage rates, see N.M. Const., art. IV, § 10.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225.

### **10-8-7. Penalty.**

Any public officer or employee covered by the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] who knowingly authorizes or who knowingly accepts payment in excess of the amount allowed by the Per Diem and Mileage Act or in excess of the amount authorized by the secretary or the governing board pursuant to Section 10-8-5 NMSA 1978 is liable to the state in an amount that is twice the excess payment.

**History:** 1953 Comp., § 5-10-4, enacted by Laws 1963, ch. 31, § 4; 1971, ch. 116, § 6; 1977, ch. 247, § 51; 1989, ch. 338, § 4.

**Cross-references.** - For definition of "employee" and "public officer," see 10-8-3 NMSA 1978.

**The 1989 amendment,** effective June 16, 1989, inserted "or the governing board" and substituted "Section 10-8-5 NMSA 1978" for "Section 5-10-3.1 NMSA 1953".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225, 257.

### **10-8-8. Other reimbursements.**

A. The secretary may authorize by regulation reimbursement for the following actual expenses incurred by public officers and employees of state agencies:

(1) moving expenses;

(2) professional fees or dues;

(3) tuition and fees for attending educational programs or classes approved by the secretary; and

(4) registration fees for attending seminars, educational programs or classes.

B. The governing body of any local public body may, by resolution, authorize the reimbursement of public officers and employees for any of the actual expenses set forth in Subsection A of this section. No resolution adopted pursuant to this subsection shall authorize the reimbursement for any expense not authorized by regulation of the secretary pursuant to Subsection A of this section.

C. The governing board may, by regulation, authorize the reimbursement of public officers of public post-secondary educational institutions and employees of public post-secondary educational institutions for any of the actual expenses set forth in Subsection A of this section.

D. No reimbursement shall be made for any expenses unless receipts for all such expenses are attached to the reimbursement voucher.

**History:** 1978 Comp., § 10-8-8, enacted by Laws 1979, ch. 273, § 5; 1989, ch. 338, § 5.

**The 1989 amendment**, effective June 16, 1989, added present Subsection C and redesignated former Subsection C as present Subsection D.

## **ARTICLE 9 PERSONNEL**

### **10-9-1. Short title.**

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

**History:** 1953 Comp., § 5-4-28, enacted by Laws 1961, ch. 240, § 1.

**Meaning of "this act".** - The term "this act", referred to in this section, refers to Laws 1961, ch. 240, the provisions of which are presently compiled as 10-9-1 to 10-9-4, 10-9-8 to 10-9-10, 10-9-12, 10-9-13 and 10-9-15 to 10-9-17 and 10-9-20 to 10-9-25 NMSA 1978.

**Act preemptive of collective bargaining.** - Where the legislature has undertaken to act to regulate employment, such action preempts the authority of the state agency to engage in collective bargaining, and the purpose of the Personnel Act is inconsistent with the idea of collective bargaining. 1987 Op. Att'y Gen. No. 87-41 (overruling and withdrawing 1971 Op. Att'y Gen. No. 71-96).

Even if the legislature could delegate its power to make law concerning public sector collective bargaining, and even if it intended to do so in this act, it failed to do so properly, and the Rules for Labor-Management Relations promulgated by the personnel board are therefore void and a nullity, since the Personnel Act does not mention collective bargaining, much less any standards to guide the board in fashioning the RLMR. 1987 Op. Att'y Gen. No. 87-41.

**Rules constituting unlawful delegation of authority.** - The Rules for Labor-Management Relations promulgated by the personnel board unlawfully delegate the board's authority over personnel matters that the legislature has placed with the board. 1987 Op. Att'y Gen. No. 87-41.

**Medical center covered by act.** - The Los Lunas state hospital and training school (now the Los Lunas medical center) is a state institution and it falls within the category of departments covered by the Personnel Act. 1961-62 Op. Att'y Gen. No. 61-80.

**So is state land office.** - The state land office is presently subject to the Personnel Act. 1969 Op. Att'y Gen. No. 69-99.

**And agencies already with merit systems.** - Nothing in the Personnel Act indicates that agencies that have adopted merit systems are thereby exempted from the operation of the Personnel Act. 1959-60 Op. Att'y Gen. No. 60-229 (decided under former law).

**Attorney general barred from raising defenses.** - Doctrine of offensive collateral estoppel barred the attorney general from raising as defenses to an action for a declaration of the validity of a collective bargaining agreement essentially the same defenses to essentially the same substantive contract provisions he raised at the district court level in a prior case involving identical subject matter. Local 2839 of AFSCME v. Udall, 111 N.M. 432, 806 P.2d 572 (1991).

**Law reviews.** - For note, "Public Labor Disputes - A Suggested Approach for New Mexico," see 1 N.M.L. Rev. 281 (1971).

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

The purpose of the Personnel Act 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.

**History:** 1953 Comp., § 5-4-29, enacted by Laws 1961, ch. 240, § 2; 1963, ch. 200, § 1.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Legislative intent.** - In enacting the Personnel Act it was the desire of the legislature to insulate in some manner the paid state employee from the whims and caprice of the political election so as to provide continuity of government in a changing environment. 1963-64 Op. Att'y Gen. No. 64-7.

**Legislature intended balance between internal and statewide administration.** - The legislature intended to strike a balance between the inherent power of a state agency or department to act administratively to adjust or organize itself internally so as to more effectively and efficiently carry out its duties, and the statutory objective of establishing and creating an effective system of state personnel administration. 1963-64 Op. Att'y Gen. No. 63-33.

**Ability of government to be enhanced.** - The legislature wished to enhance the ability of government by insuring that the "sifting system" of the public election be replaced by objective examinations to assure that competent citizens are initially selected for the "insulated" positions. 1963-64 Op. Att'y Gen. No. 64-7.

**Purpose and interpretation of Personnel Act.** - The Personnel Act has for its basic purpose the furtherance of economy and efficiency in state government. To achieve this purpose and implement the objectives of the act, the provisions providing for the right of an administrative hearing and judicial review should not be narrowly interpreted so as to restrict such a view. *Montoya v. Department of Fin. & Admin.*, 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

**Merit system provided.** - The Personnel Act provides for a merit system, but not a seniority system. 1965 Op. Att'y Gen. No. 65-78A.

**State agencies not to engage in collective bargaining.** - A collective bargaining agreement between the division of vocational rehabilitation and the American Federation of State, County and Municipal Employees is void, as it is illegal for state agencies governed by the provisions of this article to engage in collective bargaining. 1987 Op. Att'y Gen. No. 87-56.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers, 15 A.L.R.4th 1207.

81A C.J.S. States § 86.

### **10-9-3. Definitions.**

As used in the Personnel Act:

- 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.

**History:** 1953 Comp., § 5-4-30, enacted by Laws 1961, ch. 240, § 3.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Effect on person contemplated by 28-15-1 NMSA 1978.** - If a person contemplated by 28-15-1 NMSA 1978 has gained the status of an "employee" as that term is defined by this section and the personnel board rules, he will have additional rights under the state personnel board rules that a "probationer" would not. 1969 Op. Att'y Gen. No. 69-108.

**Where employees not entitled to participate.** - Since the employees of an intercommunity gas association worked for a corporation controlled by three separate municipalities rather than for the state itself, such employees were not entitled to participate under the provisions of the State Personnel Act. 1966 Op. Att'y Gen. No. 66-7.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States § 86.

#### **10-9-4. Coverage of service.**

The Personnel Act 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.

**History:** 1953 Comp., § 5-4-31, enacted by Laws 1961, ch. 240, § 4; 1963, ch. 200, § 2; 1967, ch. 181, § 1; 1969, ch. 126, § 1; 1975, ch. 182, § 1; 1977, ch. 247, § 45; 1979, ch. 202, § 6; 1981, ch. 339, § 5; 1987, ch. 254, § 15; 1989, ch. 204, § 10; 1990, ch. 20, § 1.

**The 1989 amendment,** effective July 1, 1989, in Subsection H deleted "and all civilian employees" following "officers", and substituted "department of public safety" for "public safety department".

**The 1990 amendment,** effective May 16, 1990, substituted "the criteria of this subsection" for "of the above criteria" in Subparagraph (2)(a) of Subsection O, deleted former Subsection P which read "those employed by the corrections department of the executive branch of government and not excluded from coverage pursuant to the provisions of Subsections A through O of this section", and made a minor stylistic change.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Due process requirements.** - New Mexico has recognized that nonpolicymaking officials are entitled to due process before they may be dismissed, but members of boards and commissions and heads of agencies appointed by the governor are not entitled to the State Personnel Act's notice and hearing requirements preceding dismissal of state employees. *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976).

**Purposes underlying exemptions.** - The purposes underlying the exemption of certain classes of employees are not to preclude them from benefits such as vacation and sick leave. 1969 Op. Att'y Gen. No. 69-47.

**Meaning of "division".** - In determining whether departments are "divisions" for purposes of Personnel Act coverage, it is well to keep in mind that there is nothing magic in the word "division"; whether a subdivision of a governmental agency is termed a unit, department, bureau or something else is not the determining factor. Rather the critical determination is whether the subdivision is a major component within the internal administrative framework of the state agency, with certain policy-making powers vested

in the head of the "unit"; if so, the department or unit is a "division" within the meaning of the Personnel Act. 1963-64 Op. Att'y Gen. No. 63-90.

**Certain positions exempt.** - The following departments, agencies, offices, etc., are exempt from the Personnel Act because they are neither (1) not state positions within the meaning of the act or (2) they are not official state agencies within the meaning of the act: district judges, New Mexico historical society and probation officers. 1961-62 Op. Att'y Gen. No. 61-28.

**Removal of personnel from policy-making positions.** - By exempting members of boards and commissions and agency heads from the Personnel Act, under Subsection B, the legislature acknowledges that such policy-making positions are different from other types of employment positions and that such category of persons are not entitled to hearings, provided for by 10-9-13H NMSA 1978, before removal from their positions. State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985).

**Employing agency's determination of exemption prima facie correct.** - When an employing agency employs a person to hold an exempt position and so notifies the personnel department (personnel director), the determination by the employing agency is to be considered as prima facie correct. 1963-64 Op. Att'y Gen. No. 63-105.

**Status of classified employees upon transfer to successor department.** - If classified personnel of a department are transferred to a new, supplanting department, the personnel retain the same classified status and position that they held in the former department and are thus within the coverage of the Personnel Act, 10-9-1 NMSA 1978 et seq.; if a classified position is to become exempt from the provisions of the Personnel Act, then it must first become vacant. 1983 Op. Att'y Gen. No. 83-3.

**Associate museum directors exempt.** - The four associate directors of the museum of New Mexico are exempt from the Personnel Act under Subsection C. 1961-62 Op. Att'y Gen. No. 62-19.

**Judicial employees are specifically exempt** from the Personnel Act. - 1969 Op. Att'y Gen. No. 69-47.

**Coverage of insurance department personnel.** - All insurance department personnel are covered under the Personnel Act except those, if any, who have been properly excluded under the provisions of this section. 1964 Op. Att'y Gen. No. 64-121.

**Classification of corrections department teachers.** - Teachers employed by the department of corrections should be classified as state employees under the State Personnel Act. 1974 Op. Att'y Gen. No. 74-2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States § 86.



### **10-9-4.1. Personnel Act; rocky mountain information network employees; exemption from coverage.**

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.

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.

**History:** Laws 1987, ch. 337, § 1.

**"Effective date of this act".** - The phrase "effective date of this act," referred to in Subsections A and B, means June 19, 1987, the effective date of Laws 1987, ch. 337.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

### **10-9-5. Public officers and public employees; executive branch; annual exempt salaries plan.**

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.

**History:** 1953 Comp., § 5-4-31.1, enacted by Laws 1978, ch. 96, § 1; 1979, ch. 6, § 1; 1979, ch. 202, § 7; 1987, ch. 254, § 16; 1989, ch. 204, § 11.

**Repeals and reenactments.** - Laws 1978, ch. 96, § 1, repealed 5-4-31.1, 1953 Comp. (former 10-9-5 NMSA 1978), relating to annual exempt-salaries plan for public officers and employees in the executive branch, and enacted a new 10-9-5 NMSA 1978.

**The 1989 amendment,** effective July 1, 1989, in Subsection A(6) deleted "and all civilian employees" following "officers", and substituted "department of public safety" for "public safety department"; made minor stylistic changes in Subsection A(7); and in Subsection B substituted "commission on higher education" for "state board of educational finance".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity of statutory classifications based on population - governmental employee salary or pension statutes, 96 A.L.R.3d 538.

67 C.J.S. Officers and Public Employees § 226.

## **10-9-6. Certified school instructors previously employed under the provisions of the Personnel Act.**

Certified school instructors who were employed as certified school instructors by state institutions or state agencies under the provisions of the Personnel Act 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.

**History:** 1953 Comp., § 5-4-31.2, enacted by Laws 1975, ch. 182, § 2.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

## **10-9-7. Certain rules changes requiring legislative approval.**

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.

**History:** 1953 Comp., § 5-4-31.3, enacted by Laws 1976, ch. 11, § 1; 1980, ch. 6, § 1; 1984, ch. 7, § 1.

**1983 rules violative of section.** - The current Rules for Labor-Management Relations promulgated by the personnel board in 1983 were promulgated in violation of this section, since the rules contain numerous provisions that have, or are likely to have, a significant financial impact and since no specific, prior legislative approval was given for the promulgation. 1987 Op. Att'y Gen. No. 87-41.

## **10-9-8. Personnel board; appointment.**

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.

**History:** 1953 Comp., § 5-4-32, enacted by Laws 1961, ch. 240, § 5; 1980, ch. 47, § 1.

**Meaning of "political office".** - Under the theory advanced by a Kentucky court, any person who is elected by the voters to a public office would be deemed holding a political office within the intent of Laws 1961, ch. 240, §§ 5 and 15 (this section and 10-9-21 NMSA 1978). This would be so even if the election were conducted along what is commonly known as nonpartisan lines rather than political party lines. The term "political office" applies to every elected public office within the state including, but not limited to

state elected positions, county elected positions and municipal elected positions, even if conducted along nonpartisan lines. 1961-62 Op. Att'y Gen. No. 61-53.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 4, 15 et seq.

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

Each board member shall be paid per diem and mileage according to the Per Diem and Mileage Act [10-8-1 to 10-8-8 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.

**History:** 1953 Comp., § 5-4-33, enacted by Laws 1961, ch. 240, § 6; 1967, ch. 181, § 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 224, 225; 73 C.J.S. Public Administrative Law and Procedure § 19.

### **10-9-10. Board duties.**

The board shall:

- A. promulgate regulations to effectuate the Personnel Act;
- 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.

**History:** 1953 Comp., § 5-4-34, enacted by Laws 1961, ch. 240, § 7; 1963, ch. 200, § 3; 1967, ch. 181, § 3; 1983, ch. 301, § 21.

**Cross-references.** - For Public Records Act, see 14-3-1 NMSA 1978 et seq.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Effect of word "shall".** - The word "shall" in this section appears to place a mandatory duty upon the board to promulgate rules and regulations to effectuate the Personnel Act. 1963-64 Op. Att'y Gen. No. 64-22.

**Rules adopted by board may not abridge statutory rights and duties.** - The board has the statutory authority to adopt rules; however, the rules adopted may not abridge the rights or duties imposed by statute. *State ex rel. New Mexico State Hwy. Dep't v. Silva*, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

**Classification under rule-making authority.** - Under the rule-making authority of this section and 10-9-13 NMSA 1978 the state personnel board has a limited and restricted right to classify as confidential certain portions of an individual's personnel file which would not otherwise be made available to the state unless on a confidential or restricted basis. 1963-64 Op. Att'y Gen. No. 64-19.

**Board acts in quasi-judicial capacity in hearing appeals.** - In hearing administrative appeals by employees from agency action, as distinguished from its function in adopting rules and creating policy, the state personnel board acts in a quasi-judicial capacity rather than a policy-making function. *Montoya v. Department of Fin. & Admin.*, 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

**Collective bargaining.** - In New Mexico, there is an implied authority to bargain collectively in the public sector as an incident to the express grant of authority under the Personnel Act. *Local 2238 of AFSCME v. Stratton*, 108 N.M. 163, 769 P.2d 76 (1989).

Collective bargaining contracts with governmental employees cannot in any way conflict with, contradict, expand or enlarge the rules of labor-management relations adopted by the state personnel board or any other governmental entity acting in this regard. The same applies to any merit system in place or to be adopted in the future. *Local 2238 of AFSCME v. Stratton*, 108 N.M. 163, 769 P.2d 76 (1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 197.

## **10-9-11. Board and office administratively attached to general services department.**

The board and the state personnel office are administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the general services department.

**History:** 1953 Comp., § 5-4-34.1, enacted by Laws 1977, ch. 247, § 47; 1983, ch. 301, § 22.

## **10-9-12. Director duties.**

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; and
- F. supervise all tests and prepare lists of persons passing them to submit to prospective employers.

**History:** 1953 Comp., § 5-4-35, enacted by Laws 1961, ch. 240, § 8; 1967, ch. 181, § 4.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 197.

## **10-9-13. Rules; adoption; coverage.**

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.

**History:** 1953 Comp., § 5-4-36, enacted by Laws 1961, ch. 240, § 9; 1963, ch. 200, § 4; 1967, ch. 181, § 5; 1975, ch. 26, § 1; 1983, ch. 28, § 2.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Rules adopted by board may not abridge statutory rights and duties.** - The board has the statutory authority to adopt rules; however, the rules adopted may not abridge the rights or duties imposed by statute. State ex rel. New Mexico State Hwy. Dep't v. Silva, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

**No valid delegation of authority to promulgate rules.** - The words "among other things" at the beginning of this section do not constitute a valid delegation of legislative power, authorizing the personnel board to promulgate rules allowing state employees to bargain collectively with state agencies, since the state constitution commits New Mexico to the doctrine of separation of powers and vests the legislative powers in the legislature. It is fundamental that no one of the three branches can delegate effectively any of the powers which belong to it. 1987 Op. Att'y Gen. No. 87-41.

**No presumptive ratification of rules.** - Legislative acquiescence in and ratification of the Rules for Labor-Management Relations promulgated by the personnel board should not be presumed because the legislature did not disapprove collective bargaining when it amended this section in 1975 and 10-9-18 NMSA 1978 in 1980. 1987 Op. Att'y Gen. No. 87-41.

**Removal of personnel from policy-making positions.** - By exempting members of boards and commissions and agency heads from the Personnel Act under 10-9-4B NMSA 1978, the legislature acknowledges that such policy-making positions are different from other types of employment positions and that such category of persons are not entitled to hearings, provided for by Subsection H of this section, before removal from their positions. *State ex rel. Duran v. Anaya*, 102 N.M. 609, 698 P.2d 882 (1985).

**Collective bargaining contracts** with governmental employees cannot in any way conflict with, contradict, expand or enlarge the rules of labor-management relations adopted by the state personnel board or any other governmental entity acting in this regard. The same applies to any merit system in place or to be adopted in the future. *Local 2238 of AFSCME v. Stratton*, 108 N.M. 163, 769 P.2d 76 (1989).

**Requiring physical examination.** - The state personnel board has the authority to require a physical examination of all applicants for employment. 1963-64 Op. Att'y Gen. No. 64-22.

**Harmonization with other act.** - The Personnel Act can be harmonized with the provision in the General Appropriation Act that "insurance department personnel shall have qualifications as established by the superintendent of insurance." 1964 Op. Att'y Gen. No. 64-121.

**Granting of overtime pay or time-off.** - There is no prohibition against the cattle sanitary board (now livestock board) paying its employees engaged in inspecting meat overtime pay or granting compensatory time-off for the extra hours worked. 1967 Op. Att'y Gen. No. 67-20.

**Generally, as to specific work hours.** - There is no requirement contained in the New Mexico constitution or statutes that work be done at any specific hours of the day. 1967 Op. Att'y Gen. No. 67-89.

**And eight-hour days.** - There is no specific requirement, either constitutional or statutory, requiring that employees of the state work an eight-hour day. 1967 Op. Att'y Gen. No. 67-89.

**Classification of personnel file as confidential.** - Under the rule-making authority of this section and 10-9-10 NMSA 1978, the state personnel board has a limited and restricted right to classify as confidential certain portions of an individual's personnel file which would not otherwise be made available to the state unless on a confidential or restricted basis. 1963-64 Op. Att'y Gen. No. 64-19.

**Salary matter of public record.** - An employee's salary, kept and published under this section, is a matter of public record under 14-2-1 NMSA 1978. 1968 Op. Att'y Gen. No. 68-110.



**So is test score and position.** - A job applicant's test score and position on an eligibility list under this section, possessed by the state personnel office, is a public record under 14-2-1 NMSA 1978. 1968 Op. Att'y Gen. No. 68-110.

**But not medical and employment histories.** - The medical history and employment history solicited from an applicant's previous employer, under this section, are not public records under 14-2-1 NMSA 1978. 1968 Op. Att'y Gen. No. 68-110.

**Generally, as to employment termination and pay.** - Terminal leave pay is available to involuntarily terminated employees at the discretion of the appointing authority. Terminal leave pay is available to voluntarily resigning employees as a matter of right. The only limitations upon the power of the appointing authority to dismiss are that notice must be given in writing to the dismissed employee and an authorized reason for dismissal must be stated therein. The only limitation on the right of the voluntarily resigning employee to terminal pay is the requirement that he must give 14 days' notice to the appointing authority. 1959-60 Op. Att'y Gen. No. 60-213.

**Physician dismissal by miners' hospital board.** - The miners' hospital board may dismiss a physician in their employment for not abiding by the rules and regulations of the hospital board, but the physician has the right to appeal the dismissal to the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Dismissal of employees.** - The miners' hospital board has the power to remove or discharge any employee, but it must exercise this power in accordance with the rules promulgated by the personnel board. 1964 Op. Att'y Gen. No. 64-130.

**Right to board hearing.** - An employee covered by Personnel Act has a right to a personnel board hearing on his dismissal when the reason given for the dismissal is administrative change and a reduction in personnel. 1961-62 Op. Att'y Gen. No. 62-138.

**Law reviews.** - For note, "Public Labor Disputes - A Suggested Approach for New Mexico," see 1 N.M. L. Rev. 281 (1977).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - What constitutes unfair labor practice under state employee relations act, 9 A.L.R.4th 20.

67 C.J.S. Officers and Public Employees § 197.

### **10-9-13.1. Legislative finding; purpose of act.**

The legislature finds that residents of the state are a valuable resource in state employment because of their dedication and commitment to the state they live in. Therefore, the purpose of this act [10-9-13, 10-9-13.1 NMSA 1978] is to encourage residents to remain in the state rather than moving out of state because of unsatisfactory employment opportunities in New Mexico.

**History:** Laws 1983, ch. 28, § 1.

### **10-9-13.2. Veteran's preference.**

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.

**History:** Laws 1989, ch. 284, § 1.

**Cross-references.** - As to act's purpose of encouraging residents to remain in state because of favorable employment opportunities, see 10-9-13.1 NMSA 1978. As to reemployment of person in armed forces, see 28-15-1 NMSA 1978.

**Effective dates.** - Laws 1989, ch. 284, contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

**Compiler's note.** - Laws 1989, ch. 43, § 1 and Laws 1989, ch. 284, § 1 enacted virtually identical versions of this section. The section is set out as enacted by Laws 1989, ch. 284, § 1. Subsection A is identical in both versions, but Subsection B in the Laws 1989, ch. 43, § 1 version read "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 having a service-connected disability, the veteran shall provide proof of a service-connected disability in the form of a certification by the United States veterans' administration. A veteran in both five and ten point categories shall have his name placed on the list in accordance with the numerical rating of other veterans and nonveterans." See 12-1-8 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employers §§ 37 to 39.

### **10-9-14. Blind not barred from competitive examination; method of testing.**

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.

**History:** 1953 Comp., § 5-4-36.1, enacted by Laws 1967, ch. 71, § 1.

**Cross-references.** - For definition of "agency," see 10-9-3 NMSA 1978.

For Handicapped Employment Act, see 28-10-9 NMSA 1978 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 15, 16, 60, 61; 81A C.J.S. States § 86.

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

All officers and employers of the state shall comply with the Personnel Act. 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.

**History:** 1953 Comp., § 5-4-37, enacted by Laws 1961, ch. 240, § 10.

**Cross-references.** - For definition of "employer", see 10-9-3 NMSA 1978.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Employees in journeyman occupations must obtain certificate of competency.** - The Personnel Act does not exempt state employees in journeyman occupations from obtaining a certificate of competency. 1981 Op. Att'y Gen. No. 81-11.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 197.

### **10-9-16. Status of present employees.**

All employees of the state holding positions brought into the classified service by the Personnel Act 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.

**History:** 1953 Comp., § 5-4-38, enacted by Laws 1961, ch. 240, § 11.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 60, 61, 64.

### **10-9-17. Certification of payroll.**

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.

**History:** 1953 Comp., § 5-4-39, enacted by Laws 1961, ch. 240, § 12.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Only concern of personnel department (personnel director) under this section** is to certify whether the person shown on a payroll voucher is employed in accordance with the Personnel Act, and this would involve such matters as eligibility for the particular covered position at the particular salary shown on the payroll voucher. 1963-64 Op. Att'y Gen. No. 63-105.

**Certification authority applies only to positions covered under Personnel Act.** 1963-64 Op. Att'y Gen. No. 63-105.

The status and compensation of unclassified (exempt) employees is of no concern to the personnel department (personnel director), as its statutory authority is limited to the "service" defined in Subsection C of 10-9-3 NMSA 1978. 1963-64 Op. Att'y Gen. No. 63-105.

**Department of finance and administration corrects computation errors.** - If an objection of the personnel office (personnel director) to a payroll voucher goes to errors

in computation or something of like nature, it is for the department of finance and administration to see that such errors are corrected. 1963-64 Op. Att'y Gen. No. 63-105.

**But exemption questions determined by attorney general.** - The department of finance and administration is to honor a payroll voucher so long as it meets that department's requirements, but if the personnel department is of the opinion that a position is not exempt from coverage under the Personnel Act, a legal question involving statutory interpretation arises, and the matter should be referred to the office of the attorney general for determination. 1963-64 Op. Att'y Gen. No. 63-105.

**Employing agency's determination of exemption prima facie correct.** - When an employing agency employs a person to hold a position which is exempt from coverage under the Personnel Act and so notifies the personnel department (personnel director), the determination by the employing agency is to be considered as prima facie correct. 1963-64 Op. Att'y Gen. No. 63-105.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 238; 81A C.J.S. States § 86.

### **10-9-18. Appeals by employees to the board.**

A. Any 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. Any 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 such transcripts, including one copy for the board, shall be paid initially by the agency. The cost of such transcripts may be assessed [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, such 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 such later date as the board may specify.

G. Any party aggrieved by the decision of the board made pursuant to this section may appeal the decision to the direct court for the district in which he resides, is employed or maintains his principal office or for the district of Santa Fe county. Such appeal shall be initiated by filing a notice of appeal with the clerk of the appropriate district court within thirty days after the service of a written copy of the decision of the board on that party. Upon appeal the district court shall affirm the decision of the board unless the decision is found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence; or
- (3) otherwise not in accordance with law.

H. An appeal from the decision of the district court may be taken to the court of appeals in accordance with the rules of civil procedure.

**History:** 1978 Comp., § 10-9-18, enacted by Laws 1980, ch. 47, § 2.

**Repeals and reenactments.** - Laws 1980, ch. 47, § 2, repeals former 10-9-18 NMSA 1978, relating to appeals by employees to the personnel board, and enacts the above section.

**Board acts in quasi-judicial capacity in hearing appeals.** - In hearing administrative appeals by employees from agency action, as distinguished from its function in adopting rules and creating policy, the state personnel board acts in a quasi-judicial capacity rather than a policy-making function. *Montoya v. Department of Fin. & Admin.*, 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

**Board may modify agency's action.** - The board can find there was employee misconduct and can also determine that the agency's action was inappropriate for the misconduct found by the board. The board may then modify the agency's action, and this includes reinstatement of a dismissed employee. *State ex rel. New Mexico State Hwy. Dep't v. Silva*, 98 N.M. App. 549, 650 P.2d 833 (1982).

**Agency appeal will stay reinstatement order.** - An appeal by the highway department operates as a stay of an employment reinstatement order. *State ex rel. New Mexico State Hwy. Dep't v. Silva*, 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).

**Board not indispensable party on appeal.** - The state personnel board is not an indispensable party to an appeal from a final order making an administrative determination as to the employment status of a state employee. *Montoya v. Department of Fin. & Admin.*, 98 N.M. 408, 649 P.2d 476 (Ct. App. 1982).

**Review by district court.** - In determining whether a decision by the board is supported by substantial evidence in the record as a whole, the district court, on appeal, will review the evidence in the light most favorable to the board's decision. *Jimenez v. Department of Cors.*, 101 N.M. 795, 689 P.2d 1266 (1984).

A reviewing court on appeal must determine whether, on balance, the record as a whole contains substantial evidence to support the hearing officer's finding. *Anaya v. New Mexico State Personnel Bd.*, 107 N.M. 622, 762 P.2d 909 (Ct. App. 1988).

**Dismissals from human services department were in accordance with law** and supported by substantial evidence, which included the failure to promptly report the alleged sexual abuse of a child to the proper authorities. *Perkins v. Department of Human Servs.*, 106 N.M. 651, 748 P.2d 24 (Ct. App. 1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Rights of state and municipal public employees in grievance proceedings, 46 A.L.R.4th 912.

67 C.J.S. Officers and Public Employees §§ 112, 113, 145 to 185.

### **10-9-19. Reduction in force.**

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.

**History:** 1953 Comp., § 5-4-40.1, enacted by Laws 1963, ch. 200, § 7.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 115.

### **10-9-20. Oaths; testimony; records; refusal.**

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. Refusal to testify before the board on matters pertaining to personnel is grounds for dismissal from the service.

**History:** 1953 Comp., § 5-4-41, enacted by Laws 1961, ch. 240, § 14.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 73 C.J.S. Public Administrative Law and Procedure §§ 76 to 86.

### **10-9-21. Prohibited acts.**

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, 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.

**History:** 1953 Comp., § 5-4-42, enacted by Laws 1961, ch. 240, § 15; 1963, ch. 200, § 6; 1967, ch. 181, § 6; 1983, ch. 81, § 1; 1991, ch. 152, § 1.

**The 1991 amendment,** effective June 14, 1991, inserted "except for a non-partisan or municipal office" in the first sentence in Subsection B.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.



**Constitutionality.** - Subsection B does not violate the first amendment guarantee of freedom of speech in requiring that certain state employees not hold public office, nor does it deny equal protection by exempting some state employees from its provisions. State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

**Legislative power.** - The legislature had the constitutional power under N.M. Const., art. VII, § 2B, to enact this section and to thereby provide, as a qualification or standard for continued employment by the state in a position covered by the State Personnel Act, that the employee not hold "political office." State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

**Scope of prohibition in Subsection B.** - The words "be an officer of a political organization" are relatively clear. The prohibition (in Subsection B) is without restriction and the legislative intent of these words applies with equal force to the highest and lowest office in a political party or organization. Since there is no restriction, all officers of the party or organization are included within the prohibition, from the state chairman to membership in the central committee or executive committee on down the line to precinct officers and division officers. 1961-62 Op. Att'y Gen. No. 61-53.

**Effect of election to public office.** - Under the theory advanced by a Kentucky court, any person who is elected by the voters to a public office would be deemed holding a political office within the intent of Laws 1961, ch. 240, §§ 5 and 15 (10-9-8 NMSA 1978 and this section). This would be so even if the election were conducted along what is commonly known as nonpartisan lines rather than political party lines. The term "political office" applies to every elected public office within the state including, but not limited to state elected positions, county elected positions and municipal elected positions, even if conducted along nonpartisan lines. 1961-62 Op. Att'y Gen. No. 61-53 (rendered prior to 1963 amendment).

**Example of political office.** - The office of city councilman clearly falls within the definition of a "political office" and petitioner who held such office could properly be discharged from his classified state job under this section. State ex rel. Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

**Effect of section on municipal election judges or clerks.** - Municipal election judges or clerks are not holders of public office under the prohibition of the Personnel Act. 1961-62 Op. Att'y Gen. No. 62-37.

**On candidate for delegate to constitutional convention.** - A candidate for the position of delegate to the constitutional convention, which is both a temporary and occasional position, is not a candidate for "public office" and need not take a leave of absence. 1969 Op. Att'y Gen. No. 69-28.

**On the delegate.** - The position of delegate to a constitutional convention is not a "political office" within the meaning of Subsection B or C of this section. 1969 Op. Att'y Gen. No. 69-28.

**Generally, as to delegates.** - There is no fundamental inconsistency between the positions of public employee covered by the State Personnel Act and that of delegate to the constitutional convention. 1969 Op. Att'y Gen. No. 69-28.

**Phrase "while on duty"** as used in the Personnel Act means to be actually on the job. 1961-62 Op. Att'y Gen. No. 62-116.

**When political activity permissible.** - A state employee covered by the Personnel Act may engage in political activity while on annual leave, on week-ends and after working hours during the work week. 1961-62 Op. Att'y Gen. No. 62-116.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - What constitutes unfair labor practice under state public employee relations act, 9 A.L.R.4th 20.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 A.L.R.4th 702.

Prohibiting public employee from running for elective office as violation of employee's federal constitutional rights, 44 A.L.R. Fed. 306.

Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment, 70 A.L.R. Fed. 371.

67 C.J.S. Officers and Public Employees §§ 60, 90, 107, 128, 130, 152.

## **10-9-22. Unlawful acts prohibited.**

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;

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.

**History:** 1953 Comp., § 5-4-43, enacted by Laws 1961, ch. 240, § 16.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 255, 257, 258.

## **10-9-23. Penalties.**

Any person wilfully violating any provision of the Personnel Act 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.

**History:** 1953 Comp., § 5-4-44, enacted by Laws 1961, ch. 240, § 17.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 22, 135 to 136, 255, 257, 258.

### **10-9-24. Existing rules.**

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.

**History:** 1953 Comp., § 5-4-45, enacted by Laws 1961, ch. 240, § 18.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

### **10-9-25. Federal funds and assistance.**

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, the board has the authority and is directed to adopt rules and regulations to meet the requirements of such law, rule, order or regulation.

**History:** 1953 Comp., § 5-4-46, enacted by Laws 1961, ch. 240, § 19.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

## **ARTICLE 10 STATE GOVERNMENT INTERNSHIP PROGRAM**

### **10-10-1. Creation of state government internship program.**

There is established under the personnel board the office of inter-university and college training, to administer a program for securing, placing and training qualified university and college students who are New Mexico residents in positions within the state government.

**History:** 1953 Comp., § 5-8-1, enacted by Laws 1959, ch. 73, § 1; 1967, ch. 54, § 1; 1975, ch. 85, § 1.

**Cross-references.** - For personnel board, see 10-9-8 NMSA 1978.

### **10-10-2. Purposes.**

The purposes of this act [10-10-1 to 10-10-5 NMSA 1978] are:

A. to secure and to channel selected college students into positions within the state government;

B. to aid in the process of coordinating the various institutions of higher learning of the state with the state government;

C. to stimulate the various state agencies and offices to improve their services and functions;

D. to formulate recommendations concerning personnel administration and other programs affecting state personnel.

**History:** 1953 Comp., § 5-8-2, enacted by Laws 1959, ch. 73, § 2.

### **10-10-3. Director of inter-university training program.**

The inter-university training program shall be headed by the personnel director.

**History:** 1953 Comp., § 5-8-3, enacted by Laws 1959, ch. 73, § 3; 1963, ch. 124, § 1; 1967, ch. 54, § 2; 1975, ch. 85, § 2.

### **10-10-4. Duties of director.**

The duties of the personnel director are:

A. with the approval of the personnel board, to establish regulations regarding qualifications, procedures for applying for internships, and related matters;

B. to select and place especially talented university or college students, or graduates, as interns in state government;

C. to provide orientation and training programs for student interns to prepare them for a career in state government;

D. to coordinate the activities of the intern personnel and the various state agencies to obtain the maximum benefits for both the state and the agency personnel; and

E. to submit to the personnel board, the governor and the legislature recommendations concerning the intern program.

**History:** 1953 Comp., § 5-8-4, enacted by Laws 1959, ch. 73, § 4; 1967, ch. 54, § 3; 1975, ch. 85, § 3.

**Cross-references.** - For personnel board, see 10-9-8 NMSA 1978.

For personnel board of the office of inter-university and college training, see 10-10-1 NMSA 1978.

### **10-10-5. Employment of intern personnel.**

A. Every employing office or agency of the state hiring a student or graduate under the inter-university and college program shall be free to employ intern personnel under conditions and salary provisions determined by the employing office or agency. The employing office or agency or the director of inter-university training, with the consent of the employing office or agency, shall have the right to discharge any intern with one week advance notice.

B. The employing office or agency shall cooperate with the personnel director and release intern personnel to participate in orientation or training programs where the employing office or agency head determines that the programs are beneficial and within the functions of the participating state employer. Participation by intern personnel in orientation or training programs in connection with their state employment, when approved by the employing office or agency head, shall be compensated as regular employment.

C. At each college or university in the state which desires to participate in the state government internship program, the president or other chief executive officer shall appoint an intern adviser who will serve as a liaison between the personnel director, the university or college, and the students. The intern adviser shall assist the personnel director in recruiting and selecting students for the program.

**History:** 1953 Comp., § 5-8-5, enacted by Laws 1959, ch. 73, § 5; 1967, ch. 54, § 4; 1975, ch. 85, § 4.

## **ARTICLE 11 RETIREMENT OF PUBLIC OFFICERS AND EMPLOYEES GENERALLY**

### **10-11-1. Short title.**

Chapter 10, Article 11 NMSA 1978 may be cited as the "Public Employees Retirement Act".

**History:** Laws 1987, ch. 253, § 1.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-1 NMSA 1978, as amended by Laws 1985 (1st S.S.), ch. 10, § 1, relating to definitions, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

**Compiler's note.** - Laws 1987, ch. 59 purported to amend this section, but was not published because of the repeal and reenactment by Laws 1987, ch. 253. See 12-1-8 NMSA 1978.

Sections 10-11-139 and 10-11-140 NMSA 1978, enacted by Laws 1987, Chapter 176, were added to the end of Article 11 of Chapter 10 NMSA 1978 by the compiler and may not be part of the Public Employees Retirement Act.

**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

**Recovery of worker's compensation benefits and benefits under this article.** - A worker is not precluded from recovering benefits under both the Public Employees' Retirement Act and the Workers' Compensation Act. *Montney v. State ex rel. State Hwy. Dep't*, 108 N.M. 326, 772 P.2d 360 (Ct. App. 1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 60A Am. Jur. 2d Pensions and Retirement Funds §§ 85, 1603 to 1737.

67 C.J.S. Officers and Public Employees §§ 243 to 249; 70 C.J.S. Pensions and Retirement Plans and Benefits §§ 1 to 6, 19 to 110; 81 A C.J.S. States §§ 112 to 119.

## **10-11-2. Definitions.**

As used in the Public Employees Retirement Act [this article]:

A. "accumulated member contributions" means the credit balance in a member's individual account in the member contribution fund;

B. "affiliated public employer" means the state and any public employer affiliated with the association as provided in the Public Employees Retirement Act;

C. "association" means the public employees retirement association established under the Public Employees Retirement Act;

D. "employee" means any employee of an affiliated public employer;

E. "federal social security program" means that program or those programs created and administered pursuant to the act of congress approved August 14, 1935, Chapter 531, 49 Stat. 620, as that act may be amended;

F. "final average salary" means the final average salary calculated in accordance with the provisions of the applicable coverage plan;

G. "form of payment" means the applicable form of payment of a pension provided for in Section 10-11-117 NMSA 1978;

H. "medical committee" means the medical committee of the retirement board created under the authority of the Public Employees Retirement Act;

I. "member" means an individual who is a member of the public employees retirement association, except where "member" is used to refer to individuals who are not members of the association but have been designated by the retirement board as members of the medical or other committee of the retirement board and includes the following:

(1) "hazardous duty member" means a state policeman who is a member and who is a juvenile or adult correctional officer employed by a corrections facility of the corrections department or its successor agency;

(2) "municipal fire member" means any member who is employed as a full-time nonvolunteer firefighter by an affiliated public employer and who has taken the oath prescribed for firefighters;

(3) "municipal police member" means any member who is employed as a police officer by an affiliated public employer, other than the state, and who has taken the oath prescribed for police officers; and

(4) "state police member" means any member who is an officer of the New Mexico state police and who has taken the oath prescribed for such officers;

J. "membership" means membership in the association;

K. "pension" means a series of monthly payments to a retired member or survivor pension beneficiary as provided in the Public Employees Retirement Act;

L. "public employer" means the state, any municipality, city, county, metropolitan arroyo flood control authority, economic development district, any regional housing authority, any soil and water conservation district, any entity created pursuant to a joint powers agreement, council of government, conservancy district, water and sanitation district,

water district and metropolitan water board including the boards, departments, bureaus and agencies of a public employer;

M. "refund beneficiary" means a person who has been designated to be paid accumulated member contributions in the event of the death of a member or former member, or a residual refund of unexpended accumulated member contributions in the event of the death of a retired member or survivor pension beneficiary;

N. "retired member" means a person who is being paid a pension on account of membership in the association;

O. "retirement board" means the retirement board provided for in the Public Employees Retirement Act;

P. "salary" means the base salary or wages paid a member, including longevity pay, for personal services rendered an affiliated public employer. Salary shall not include overtime pay, allowances for housing, clothing, equipment or travel, payments for unused sick leave, unless the unused sick leave payment is made through continuation of the member on the regular payroll for the period represented by that payment, and any other form of remuneration not specifically designated by law as included in salary for Public Employees Retirement Act purposes; and

Q. "survivor pension beneficiary" means a person who is being paid a pension or who has been designated to be paid a pension as a result of the death of a member, vested former member or retired member.

**History:** Laws 1987, ch. 253, § 2; 1989, ch. 31, § 1; 1989, ch. 333, § 1; 1991, ch. 231, § 1.

**Cross-references.** - For county hospitals, retirement plans for employees, see 4-48B-17 NMSA 1978.

For Educational Retirement Act, see Chapter 22, Article 11 NMSA 1978.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repealed former 10-11-2 NMSA 1978, as enacted by Laws 1965, ch. 284, § 1, relating to short title of Public Employees' Retirement Act, and enacted a new 10-11-2 NMSA 1978. For provisions of former section, see the 1983 replacement pamphlet.

**The 1989 amendments.** - Laws 1989, ch. 31 § 1, effective June 16, 1989, making minor stylistic changes in Subsections G and J, and inserting "any soil and water conservation district, any regional dispatch authority" in Subsection L, was approved on March 13, 1989. However, Laws 1989, ch. 333, § 1, also effective June 16, 1989, in Subsection G, substituting "Section 10-11-117 NMSA 1978" for "Section 117 of the Public Employees Retirement Act"; in Subsection J, deleting "public employees retirement" preceding "association"; and in Subsection L, inserting "any regional



housing authority, and soil and water conservation district, any entity created pursuant to a joint powers agreement," was approved on April 7, 1989. The section is set out as amended by Laws 1989, ch. 333, § 1. See 12-1-8 NMSA 1978.

**The 1991 amendment**, effective June 14, 1991, inserted "water and sanitation district, water district and metropolitan water board" and made a related stylistic change in Subsection L.

**Temporary provisions.** - Laws 1987, ch. 253, § 142 provides that the public employees' retirement association established by Laws 1947, Chapter 167, Section 2, as amended, is redesignated and continued as the public employees retirement association with the duties and responsibilities provided for in the Public Employees Retirement Act and that all rights, duties, etc., existing immediately prior to the effective date of the Public Employees Retirement Act shall, unless specifically modified by the Public Employees Retirement Act, continue without abatement, interruption, change or need for any further action upon the effective date of the Public Employees Retirement Act.

**"Salary"**. - Injury time payments to city employees which did not exceed the difference between workers' compensation benefits and the employees' regular pay, were not "wages paid for personal services rendered" within the meaning of Subsection P. 1988 Op. Att'y Gen. No. 88-23.

Workers' compensation benefits are not "wages paid for personal services rendered", but rather are benefits to compensate the injured employee for a portion of those wages he might have earned but for his injury during the course of his employment. Thus, the benefits are not "salary" for purposes of Subsection P. 1988 Op. Att'y Gen. No. 88-23.

Subsection P's exclusion of overtime, clothing and other allowances evidences legislative intent to exclude fringe benefits. 1988 Op. Att'y Gen. No. 88-23.

Cash payments to retiring city employees for compensatory time, which were not part of the regular, periodic wages of those employees, were not "salary" for purposes of Subsection P. 1988 Op. Att'y Gen. No. 88-23.

Payments for unused sick leave, whether converted to annual leave or not, were not "salary" as defined by Subsection P. 1988 Op. Att'y Gen. No. 88-23.

**Lump sum annual leave payment.** - A retired city policeman's benefits could not be calculated to include a lump sum annual leave payment for 586.56 hours where he was covered under a police officers' association's collective bargaining agreement with the city that permitted cash compensation upon termination for "any" unused vacation. 1988 Op. Att'y Gen. No. 88-23.

**Law reviews.** - For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to

the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity of statutory classifications based on population - governmental employee salary or pension statutes, 96 A.L.R.3d 538.

Validity under § 302(c)(5) of the Labor Management Relations Act (29 USCS § 186(c)(5), of trust fund eligibility provisions regarding health, compensation, and retirement benefits, 58 A.L.R. Fed. 171.

67 C.J.S. Officers and Public Employees §§ 243, 245; 81A C.J.S. States §§ 46, 112 to 119.

### **10-11-3. Membership; requirements; exclusions; termination.**

A. Except as may be provided for in the Volunteer Firefighters Retirement Act [10-11A-1 to 10-11A-7 NMSA 1978], the Judicial Retirement Act [Chapter 10, Article 12 NMSA 1978], the Magistrates Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978], the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978] and the provisions of Sections 29-4-1 through 29-4-11 NMSA 1978 governing the state police pension fund, each employee and elected official of an affiliated public employer shall be a member of the association unless excluded from membership in accordance with Subsection B of this section.

B. The following employees and elected officials are excluded from membership in the association:

- (1) elected officials who are not members on June 30, 1987;
- (2) elected officials who file with the association a written application for exemption from membership within ninety days of taking office;
- (3) elected officials who file with the association a written application for exemption from membership within ninety days of the date the elected official's public employer becomes an affiliated public employer;
- (4) employees designated by the affiliated public employer as seasonal or student employees;
- (5) employees on June 30, 1987, who have been excluded from membership as a consequence of being in a part-time or temporary occupational classification;
- (6) employees of an affiliated public employer on the effective date of affiliation who file with the association a written exemption from membership within thirty days of affiliation; and

(7) employees of an affiliated public employer which is making contributions to a private retirement program on behalf of the employee as part of a compensation arrangement who file with the association a written application for exemption within thirty days of employment.

C. Employees designated as seasonal and student employees shall be notified in writing by their affiliated public employer of the designation and the consequences of the designation with respect to membership, credited service and benefits. A copy of the notification shall be filed with the association within thirty days.

D. An exemption from membership by an elected official shall expire at the end of the term of office for which filed.

E. Employees and elected officials who have exempted themselves from membership may subsequently withdraw the exemption by filing a membership application. Membership shall commence the first day of the first pay period following the date the application is filed.

F. The membership of an employee or elected official shall cease upon termination of the employee's employment with an affiliated public employer, upon the elected official's relinquishment of office or upon either the employee or the elected official becoming excluded from membership as provided in Subsection B of this section.

**History:** Laws 1987, ch. 253, § 3.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-3 NMSA 1978, as enacted by Laws 1967, ch. 25, § 1, relating to exemption of national guard employees, and enacts the above section effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Exemption of elected official.** - A person who was a contributing member of the retirement association at the time of taking office as an elected official has the right to exempt himself as an elected official. 1957-58 Op. Att'y Gen. No. 57-90.

An elected official who has been a member of the association for one elected term of office may choose to exempt himself from membership when he commences serving a successive term of that elective office. However, the official may not "retire," resume office under a successive term to which he has been re-elected, and attempt to invoke the "elected official" exception to membership and benefit suspension. 1989 Op. Att'y Gen. No. 89-25.

An elected official who is exempt from membership on June 30, 1987 must file an exemption from membership with respect to that official's successive term of office to remain exempt from membership. 1989 Op. Att'y Gen. No. 89-25.

**Person appointed to fill unexpired term of elected official.** - A person appointed to fill an unexpired term of an elected official may exempt himself from membership in the association for the remainder of that term. 1989 Op. Att'y Gen. No. 89-25.

**An "appointee" to an elective office is an "elected official"** for purposes of Subsection B's membership exemption option. 1989 Op. Att'y Gen. No. 89-25.

**Employees exempted from membership.** - Full-time city public school teacher who was a member of the educational retirement system, and who was simultaneously employed on a part-time basis by the city, was not required to be a member of the Public Employees Retirement Association. 1988 Op. Att'y Gen. No. 88-70.

**Benefits under Volunteer Firefighters Act precluded.** - A Public Employees Retirement Act member, having entitlement to PERA retirement benefits upon meeting the necessary age and service requirements, may not also participate in and receive benefits under the Volunteer Firefighters Act. 1987 Op. Att'y Gen. No. 87-75.

**Benefits suspended upon employment by entity covered by Educational Retirement Act.** - A Public Employees Retirement Act retiree who returns to employment with a governmental entity whose employees are covered exclusively under the provisions of the Educational Retirement Act for retirement purposes may not continue to receive PERA benefits. Such retiree's benefits must be suspended. That retiree is employed by an affiliated public employer and his "membership," within the meaning of that term, is not provided for in the PERA. 1987 Op. Att'y Gen. No. 87-79.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 246; 81A C.J.S. States §§ 46, 112 to 119.

#### **10-11-4. Credited service; requirements for; forfeiture; reinstatement.**

A. Personal service rendered an affiliated public employer by a member shall be credited to the member's credited service account in accordance with retirement board rules and regulations. Service shall be credited to the nearest month. In no case shall any member be credited with a year of service for less than twelve months of service in any calendar year or more than a month of service for all service in any calendar month or more than a year of service for all service in any calendar year.

B. Service rendered as a judge of the district court or court of appeals or as a justice of the supreme court shall not be considered service for purposes of the Public Employees Retirement Act [this article].

C. Personal service rendered an affiliated public employer prior to August 1, 1947 shall be credited to a member if the member acquires one year of credited service for personal service rendered an affiliated public employer.

D. Personal service rendered an affiliated public employer after July 31, 1947 but prior to that date the public employer became an affiliated public employer is prior service and shall be credited to a member if:

(1) the member acquires five years of credited service for personal service rendered an affiliated public employer; and

(2) the member pays the association the amount determined in accordance with Subsection E of this section.

E. The amount of payment for each year of prior service being purchased under the provisions of Subsection D of this section is equal to the member contribution rate multiplied by the member's final average salary, both determined in accordance with coverage plan applicable to the member at the time payment is made. Payment shall be made within sixty days of the date the member is informed of the amount of the payment.

F. Credited service shall be forfeited if a member ceases to be a member and is paid the member's accumulated member contributions.

G. A member may reinstate forfeited credited service by paying the association all accumulated member contributions previously withdrawn plus compound interest from the date of withdrawal to the date of repayment. The rate of compound interest shall be set from time to time by the retirement board. Payment shall be made within sixty days of the date the member is informed of the amount of the payment.

**History:** Laws 1987, ch. 253, § 4.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-4 NMSA 1978, as amended by Laws 1985, ch. 253, § 1, relating to retirement association and retirement board, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

**Purchase of increased earnings.** - Subsection D does not permit a member to purchase increased earnings, and a contract under a former law which resulted solely in increasing final average salary must be refunded together with the amount of interest paid. 1988 Op. Att'y Gen. No. 88-17.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Disciplinary suspension of public employee as affecting computation of length of service for retirement or pension purposes, 6 A.L.R.2d 506.

67 C.J.S. Officers and Public Employees § 246; 81A C.J.S. States §§ 46, 112 to 119.

**10-11-4.1. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1987, ch. 253, § 140, repeals 10-11-4.1 NMSA 1978, as amended by Laws 1977, ch. 247, § 48, relating to authorization to build and rent building, effective July 1, 1987.

### **10-11-5. Credited service; municipal election to make employee contributions.**

A municipal affiliated public employer may elect by resolution of its governing body and in the manner prescribed by the retirement board to be responsible for making contributions of seventy-five percent of its employees' member contributions as follows:

A. the resolution shall be irrevocable, shall apply to all employees or else to specified employee divisions of the municipal affiliated public employer and shall be effective the first pay period of the month following the filing of the resolution with the retirement board;

B. the portion of the employee contributions made by the municipal affiliated public employer on behalf of a member shall be credited to the member's individual accumulated member contribution account in the member contribution fund. The member shall be responsible for the difference between the contributions the member would be required to make if the municipal affiliated public employer had not made the election provided for in this section and the amount contributed by the municipal affiliated public employer under the provisions of this section; and

C. pensions payable to members whose municipal affiliated public employer makes the election provided for in this section shall be the same as if the member had made the entire member contribution.

**History:** Laws 1987, ch. 253, § 5.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-5 NMSA 1978, as amended by Laws 1977, ch. 247, § 48, relating to officers, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-6. Credited service; credit for intervening military and United States government service.**

A. A member who leaves the employ of an affiliated public employer to enter an armed service of the United States shall be given credited service for periods of active duty subject to the following conditions:

- (1) the member is reemployed by an affiliated public employer within ninety days following termination of the period of active duty;
- (2) the member reinstates any forfeited credited service;
- (3) credited service shall not be given for periods of active duty following voluntary reenlistment; and
- (4) credited service shall not be given for periods of active duty which are used to obtain or increase a benefit from another retirement program.

B. For a member who is subsequently employed by the government of the United States within thirty days of leaving the employ of an affiliated public employer:

- (1) that member may continue membership in the association subject to the following conditions:
  - (a) the member has fifteen or more years of credited service;
  - (b) employment by the government of the United States commences within ninety days of termination of employment with the last affiliated public employer;
  - (c) the member files with the association a written application for continued membership within ninety days of termination of employment with the last affiliated public employer; and
  - (d) the member remits to the association, at the times and in the manner prescribed by the association, the member contributions and the employer contributions that would have been made had the member continued in the employ of the last affiliated public employer;
- (2) the contributions required by Paragraph 1 of this subsection shall be based on a salary equal to the member's monthly salary at time of termination of employment with the last affiliated public employer;
- (3) credited service will be determined as if the employment by the government of the United States was rendered the last affiliated public employer; and
- (4) the employer contributions remitted by the member shall be credited to the employer accumulation fund and shall not be paid out of the association in the event of subsequent cessation of membership.

**History:** Laws 1987, ch. 253, § 6.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-6 NMSA 1978, as amended by Laws 1970, ch. 81, § 1, relating to types of investment, and

enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Ninety-day application period in Subsection A(1).** - Subsection A(1) must be interpreted in a manner consistent with the federal and state laws on veteran reemployment rights. If the veteran otherwise qualifies for reemployment and applies within 90 days of the termination of his active duty period, he still may acquire service credit for retirement purposes even though the employer does not actually rehire him until after the ninetieth day. 1988 Op. Att'y Gen. No. 88-24.

### **10-11-7. Credited service; purchase of service.**

A. A member who entered an armed service of the United States may purchase credited service for periods of active duty subject to the following conditions:

- (1) the member pays the association the purchase cost determined according to Subsection D of this section;
- (2) the member has five or more years of credited service acquired as a result of personal service rendered in the employ of an affiliated public employer;
- (3) the aggregate amount of credited service purchased under this subsection does not exceed five years reduced by any period of credited service acquired for military service under any other provision of the Public Employees Retirement Act [this article]; and
- (4) credited service may not be purchased for periods of active duty that are used to obtain or increase a benefit from another retirement program.

B. A member who was employed by a utility company, library, museum, transit company or by a nonprofit organization administering federally funded public service programs, which utility company, library, museum, transit company or nonprofit organization administering federally funded public service programs or federally funded public service programs administered by a nonprofit organization are subsequently taken over by an affiliated public employer, or a member who was employed by an entity created pursuant to a joint powers agreement between two or more affiliated public employers for the purpose of administering or providing drug or alcohol addiction treatment services irrespective of whether the entity is subsequently taken over by an affiliated public employer, may purchase credited service for the period of employment subject to the following conditions:

- (1) the member pays the association the purchase cost determined according to Subsection D of this section;
- (2) the member has five or more years of credited service acquired as a result of personal service rendered in the employ of an affiliated public employer; and



(3) the aggregate amount of credited service purchased under this subsection does not exceed five years.

C. A member who was appointed to participate in a cooperative work study training program established jointly by the state highway and transportation department and the university of New Mexico or New Mexico state university may purchase credited service for the period of participation subject to the following conditions:

(1) the member pays the association the purchase cost determined according to Subsection D of this section;

(2) the member has five or more years of credited service acquired as a result of personal service rendered in the employ of an affiliated public employer; and

(3) the aggregate amount of credited service purchased under this subsection does not exceed five years.

D. Except for service to be used under a state legislator coverage plan, the purchase cost for each month of credited service purchased under the provisions of this section is equal to the member's final average salary multiplied by the sum of the member contribution rate and employer contribution rate, determined in accordance with the coverage plan applicable to the member at the time of the written election to purchase. The purchase cost for each year of credited service to be used under a state legislator coverage plan is equal to the sum of the member contribution and an employer contribution of ten times the annual amount of pension per year of credited service under the state legislator coverage plan applicable to the member. Full payment shall be made in a single lump sum within sixty days of the date the member is informed of the amount of the payment. The portion of the purchase cost derived from the employer contribution rate shall be credited to the employer accumulation fund and shall not be paid out of the association in the event of cessation of membership. In no case shall any member be credited with a month of service for less than the purchase cost as defined in this section.

E. A member shall be refunded, upon written request filed with the association, the portion of the purchase cost of credited service purchased under this section that the association determines to have been unnecessary to provide the member with the maximum pension applicable to the member. The association shall not pay interest on the portion of the purchase cost refunded to the member.

**History:** Laws 1987, ch. 253, § 7; 1991, ch. 157, § 1.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-7 NMSA 1978, as amended by Laws 1980, ch. 5, § 1, relating to conditions of investments, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**The 1991 amendment**, effective June 14, 1991, in the introductory paragraph in Subsection B, inserted "public" following "federally funded" in two places and "or a member who was employed by an entity created pursuant to a joint powers agreement between two or more affiliated public employers for the purpose of administering or providing drug or alcohol addiction treatment services irrespective of whether the entity is subsequently taken over by an affiliated public employer"; in the first sentence in Subsection D, substituted "month of credited service" for "year of credited service" and "of the written election to purchase" for "payment is made" at the end; substituted "Full payment shall be made in a single lump sum" for "Payment shall be made" at the beginning of the third sentence in Subsection D; added the final sentence in Subsection D; substituted "refunded" for "paid" near the beginning of Subsection E; and made minor stylistic changes throughout the section.

**Cooperative work study training program.** - A member may not obtain free service credit under the Public Employees' Retirement Act for the period of time he was in "school phases" of a cooperative work study training program. 1989 Op. Att'y Gen. No. 89-05.

### **10-11-8. Normal retirement; suspension.**

A. A member or vested former member may retire upon fulfilling the following requirements:

(1) a written application for normal retirement, in the form prescribed by the association, is filed with the association prior to the selected date of retirement;

(2) employment is terminated with all affiliated public employers prior to the selected date of retirement;

(3) the member or vested former member selects a date of retirement which is the first day of a calendar month; and

(4) the member or vested former member meets an age and service requirement for normal retirement specified in the coverage plan applicable to the member.

B. The amount of normal retirement pension is determined in accordance with the coverage plan applicable to the member.

C. Except as provided in Subsections D and E of this section, payment of a normal retirement pension shall be suspended at the end of the calendar month of the first calendar year in which a retired member, who is reemployed by or serves a term of office with an affiliated public employer, earns one hundred percent or more of the amount which causes a decrease or suspension of an old age benefit under the federal social security program, subject to the following conditions:

(1) the retired member shall become a member at the beginning of the first full pay period following suspension of payment of the pension;

(2) the amount of pension shall be recomputed upon termination of the reemployment or term of office with the affiliated public employer, taking into account the credited service and salary resulting from the reemployment or term of office;

(3) payment of the pension shall resume the first day of the calendar month following termination of the reemployment or term of office;

(4) the recomputation shall be made using the provisions of the Public Employees Retirement Act [this article] in effect on the date of the original retirement unless the retired member acquired at least three years of credited service on account of the reemployment or term of office;

(5) the recomputed pension shall not be less than the amount of the suspended pension but shall be made employing the form of payment selected by the retired member prior to the resumption of the pension payments; and

(6) member contributions made for the period of reemployment or term of office shall be paid to the retired member upon resumption of pension payments if the amount of pension is unchanged by the period of reemployment or term of office.

D. The provisions of Subsection C of this section shall not apply to a retired member who is appointed chief of police of an affiliated public employer, other than of the affiliated public employer from which retired, or who is appointed undersheriff if the retired member files an irrevocable exemption from membership with the association within thirty days of appointment. For purposes of this subsection, each sheriff's office shall be limited to one undersheriff. The irrevocable exemption shall be for the chief of police's or the under-sheriff's term of office. Filing of an irrevocable exemption shall irrevocably bar the retired member from acquiring credited service for the period of exemption from membership.

E. The provisions of Subsection C of this section shall not apply to a retired member who is elected to serve a term as an elected official if the retired member files an irrevocable exemption from membership with the association within thirty days of taking office. Filing of an irrevocable exemption shall irrevocably bar the retired member from acquiring credited service for the period of exemption from membership.

F. The pension of a member who has three or more years of credited service under each of two or more coverage plans shall be determined in accordance with the coverage plan, from among the two or more coverage plans which produces the highest pension. The pension of a member who has credited service under two or more coverage plans but who has three or more years of credited service under only one of those coverage plans shall be determined in accordance with the coverage plan in which the member has three or more years of credited service, and any difference

between the actuarial present value of the resulting pension and of the member's contributions shall be paid to the annuitant; provided, however, that if the credited service is acquired under two different coverage plans applied to the same affiliated public employer as a consequence of an election by the members, adoption by the affiliated public employer or a change in the law which results in the application of a coverage plan with a greater annuity, the greater annuity shall be paid a member retiring from the affiliated public employer under which the change in coverage plan took place regardless of the amount of credited service under the coverage plan producing the greater annuity. The provisions of each coverage plan for the purpose of this subsection shall be those in effect at the time the member ceased to be covered by the coverage plan. Credited service for the purposes of this subsection shall be only personal service rendered an affiliated public employer and credited to the member under the provisions of Subsection A of Section 10-11-4 NMSA 1978. Service credited under any other subsection of the Public Employees Retirement Act shall not be used to satisfy the three-year credited service requirement of this subsection.

**History:** Laws 1987, ch. 253, § 8; 1989, ch. 79, § 1.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repealed former 10-11-8 NMSA 1978, as amended by Laws 1978, ch. 167, § 2 relating to affiliated public employers, and enacted a new 10-11-8 NMSA 1978. For provisions of former section, see 1983 replacement pamphlet.

**The 1989 amendment,** effective June 16, 1989, in Subsection F inserted "adoption by the affiliated public employer" near the middle of the second sentence and "affiliated" preceding "public employer" near the end of that sentence, and made a minor stylistic change in the fourth sentence.

**Effect of 1987 recodification.** - The 1987 recodification of the public employees retirement act does not permit a normal or disability retirement pension to be made retroactive. 1988 Op. Att'y Gen. No. 88-15.

**Written application for retirement.** - The public employees retirement board may not excuse the statutory requirement that a member file a written application for retirement, even where a member alleges that he made verbal requests of the public employees retirement association for an application form but did not receive the form promptly, since strict compliance with the statutory requirements for receiving retirement benefits is required. 1988 Op. Att'y Gen. No. 88-33.

**Death not treated as retirement.** - An employee who dies during employment does not retire, and thus an employee's affidavit directing that his death be treated as his retirement is ineffectual. 1989 Op. Att'y Gen. No. 89-06.

**The general rule under Subsection F** is that a retiring member who has coverage under two different coverage plans will receive benefits calculated under the provisions of the better coverage plan if the member has three years of credited service under the

better coverage plan. If not, the member will receive benefits calculated under the provisions of the lesser coverage plan. 1987 Op. Att'y Gen. No. 87-66.

**The only exception to the general rule under Subsection F** is where the retiring member acquires credited service under two coverage plans "applied to the same affiliated public employer . . . ." This exception must be strictly construed, because it departs from the general rule, financially impacts the association as imminent retirees make little contribution toward the greater benefits, and envisions potential manipulation and abuse as demonstrated by the association's experience with the "loopholers" or "job jumpers". 1987 Op. Att'y Gen. No. 87-66.

The object to the phrase "same affiliated public employer" in Subsection F is to prevent "job jumping" from a public employer covered under a lower benefit formula to a public employer covered under a higher benefit formula to retire at the higher formula from the second entity after working, if at all, for a brief period of time. 1987 Op. Att'y Gen. No. 87-66.

**Reappointment after suspension of benefits.** - County treasurer could not retire in June, 1988, and resume office as county treasurer without suspension of public employee retirement benefits, if the county commission reappointed him as county treasurer to serve the remainder of his unexpired term, ending December 31, 1988. 1987 Op. Att'y Gen. No. 87-80.

**Suspension of benefits upon resumption of employment.** - An employee of the department of finance and administration, retired pursuant to the provisions of Public Employee's Retirement Act, may not resume employment with the department of education without suspension of retirement benefits. 1987 Op. Att'y Gen. No. 87-37 (decided under former 10-11-22 NMSA 1978).

An employee of a public school system, retired pursuant to the provisions of the Educational Retirement Act, may not resume employment with the department of education without suspension of educational retirement benefits. 1987 Op. Att'y Gen. No. 87-38 (decided under former 10-11-8 NMSA 1978).

**The suspension provisions of the disbursing system** apply to the benefits granted pursuant to the reciprocity act to a member retired under the public employee retirement association and the educational retirement system who resumes employment. 1988 Op. Att'y Gen. No. 88-22.

**Public Employee Retirement Act annuitants whom the department of education subsequently employs** and who elect to participate in the educational retirement system by making contributions to that system do not "qualify for (retirement) coverage" under 22-11-17D NMSA 1978, since they are not considered as having acquired any service credit for purposes of educational retirement benefits. 1987 Op. Att'y Gen. No. 87-37 (decided under former 10-11-22 NMSA 1978).

**Exception to 3-year credited service requirement.** - Because a leave of absence without pay can be distinguished from a termination of employment, is not a complete separation of employment, and denotes continuity of employment status, members who take a bona fide leave of absence without pay are eligible for Subsection F's exception to the three-year credited service requirement for coverage under state general member coverage plan 2. 1988 Op. Att'y Gen. No. 88-19.

**Reemployment as seasonal employees of legislature.** - Retirees of the Public Employees Retirement Association who are reemployed as seasonal employees by the state legislature are subject to benefit suspension when they exceed the maximum earnings permitted by Subsection C. 1989 Op. Att'y Gen. No. 89-15.

### **10-11-9. Vested termination of membership.**

A. A member who ceases to be a member for a reason other than death or retirement shall be a vested former member if the member meets the following requirements:

(1) the member has five or more years of credited service; and

(2) the member's accumulated member contributions are left on deposit in the association.

B. Eligibility for normal retirement, amount of normal retirement pension, eligibility for disability retirement, amount of disability retirement pension, eligibility for a survivor pension and amount of survivor pension shall be determined according to the provisions of the Public Employees Retirement Act at time of termination of membership.

C. An election by a vested former member to be paid accumulated member contributions shall cause forfeiture of credited service and all rights to any benefits of the association other than payment of the accumulated member contributions.

**History:** Laws 1987, ch. 253, § 9.

**Repeals and reenactments.** - Laws 1987, ch. 253 repeals former 10-11-9 NMSA 1978, as amended by Laws 1981, ch. 135, § 3 relating to membership in association, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Resignation of judge prior to new term for which elected.** - A magistrate member of the public employees retirement association, reelected in November for a new term commencing January 1st, may not qualify for retirement benefits by resigning from his then-current position during the period between his election and the new term. 1987 Op. Att'y Gen. No. 87-13.

**10-11-9.1, 10-11-9.2. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1987, ch. 253, § 140, repeals 10-11-9.1 NMSA 1978, as enacted by Laws 1979, ch. 316, § 2, relating to exemption of participants covered under Comprehensive Employment and Training Act, and 10-11-9.2 NMSA 1978, as enacted by Laws 1986, ch. 85, § 1, relating to exemption permitted for undersheriffs, effective July 1, 1987.

### **10-11-10. Disability retirement.**

A. The retirement board may retire a member or vested former member on account of disability if the following requirements are satisfied:

(1) the individual seeking disability retirement was a member or vested former member at the time disability was incurred;

(2) a written application for disability retirement, in the form and containing the information prescribed by the association, has been filed with the association by the member, by the member's affiliated public employer or by the vested former member;

(3) membership is terminated prior to the selected date of disability retirement and:

(a) the member or vested former member has five or more years of credited service; or

(b) the retirement board finds the disability to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer;

(4) the member or vested former member submits to all medical examinations and tests, and furnishes copies of all medical reports, requested by the association or medical committee, provided that if the member or vested former member meets an age and service requirement for normal retirement, the cost of all medical examinations, tests and reports shall be paid by the member or vested former member; and

(5) the retirement board or the medical committee of the retirement board makes the certification required under Subsection B of this section.

B. A member or vested former member seeking disability retirement must obtain certification by the retirement board or by the medical committee to the retirement board that:

(1) the member is mentally or physically totally incapacitated for continued employment with the affiliated public employer or the vested former member is mentally or physically totally incapacitated for any gainful employment;

(2) the incapacity is likely to be permanent; and

(3) the member or vested former member should be retired.

C. The medical committee shall include in its membership at least one licensed physician selected by the association. Any licensed physician selected shall not be required to be a member of the retirement board.

D. The amount of a disability retirement pension shall be calculated in the same manner as a normal retirement pension. If the retirement board finds the disability to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of a member's performance of duty with an affiliated public employer and the member has not met an age and service requirement for normal retirement, the amount of disability retirement pension shall be calculated using the amount of credited service the member could have acquired had the member continued in the employ of the affiliated public employer until an age and service requirement for normal retirement had been met.

E. Each disability retired member shall annually submit to the association, prior to July 1, a statement of earnings from gainful employment during the preceding calendar year. The statement of earnings shall be in the form requested by the association. Payment of the disability retirement pension shall be suspended for the months of July through December if the amount of earnings from gainful employment is one hundred percent or more of the amount which causes a decrease or suspension of an old age benefit under the federal social security program. Payment of the disability retirement pension shall be suspended starting with the month of July if the statement of earnings is not received by the association prior to July 1. The provisions of Subsection C of Section 8 [10-11-8 NMSA 1978] of the Public Employees Retirement Act shall be applicable in lieu of the provisions of this subsection if the disability retired member is age sixty-five years or older or meets an age and service requirement for normal retirement specified by the coverage plan applicable at time of disability retirement.

**History:** Laws 1987, ch. 253, § 10.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-10 NMSA 1978, as amended by Laws 1986, ch. 86, § 1, relating to membership of lieutenant governor and members of legislature, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

**Compiler's note.** - Laws 1987, ch. 44 purported to amend this section, but was not published because of the repeal and reenactment by Laws 1987, ch. 253.

**Legislative intent, as to contributing service.** - The five years of contributing service for each employee was placed in this section by the legislature, with the intent that it be a safeguard to protect the association and the board from retiring employees for nonduty disability when they enter the service of the state or any of its agencies, and who were already disabled and could work for the state or its agencies for a few weeks or months and then claim nonduty disability. 1955-56 Op. Att'y Gen. No. 6449.



**Retroactive award prohibited.** - The Public Employees Retirement Association may not award disability benefits retroactive to the date on which the member's name last appeared on the payroll with pay. 1989 Op. Att'y Gen. No. 89-18.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Firemen: causal connection between fireman's performance of official duties and his disability, for purpose of recovering disability benefits, 27 A.L.R.2d 974.

Relationship between performance of official duties and subsequent disability or death, for purpose of pension or survivorship benefits of government employee other than fireman, policeman, or military personnel, 85 A.L.R.2d 1048.

Determination whether firefighter's disability is service-connected for disability pension purposes, 7 A.L.R.4th 799.

Determination whether peace officer's disability is service-connected for disability pension purposes, 12 A.L.R.4th 1158.

67 C.J.S. Officers and Public Employees § 248; 81A C.J.S. States §§ 46, 105, 112 to 119.

### **10-11-11. Reevaluation of disability retired member; termination of disability pension.**

A. The association may require a disability retired member to undergo periodic medical or other reevaluation at the association's expense or submit acceptable evidence of continuation of disability if the member has not met an age and service requirement for normal retirement specified by the coverage plan applicable to the disability retired member at time of retirement or is not age sixty-five years or older. Medical or other reevaluations not specifically required by the association shall be solely at the retired member's expense.

B. The retirement board may suspend payment of a disability pension if the disability retired member refuses to submit to reevaluation. If the refusal continues for one year, the retirement board may terminate the disability retirement pension and revoke the disability retired member's right to the disability retirement pension.

C. A disability pension shall be terminated if the medical committee reports to the retirement board that the disability retired member no longer meets the requirements for disability retirement.

D. A disability retired member may return to employment with an affiliated public employer or other employer for a trial period not to exceed one hundred twenty calendar days without becoming a member or affecting the disability retired member's status upon prior approval by the association. Trial periods of employment shall be limited to two in any five-year period following disability retirement.

**History:** Laws 1987, ch. 253, § 11.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-11 NMSA 1978, as amended by Laws 1981, ch. 142, § 1, relating to continuation of coverage, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Return for "trial period".** - A disability annuitant retired under the provisions of the Public Employees Retirement Act in effect before July 1, 1987, may return to employment for a "trial period" pursuant to Subsection D. 1988 Op. Att'y Gen. No. 88-44.

**Suspension of benefits when member capable of resuming gainful employment.** - To construe Subsection C as requiring the retirement board to continue disability benefits to a member who is capable of engaging in gainful employment is wholly foreign to the statutory scheme governing disability benefits, would be a radical departure from former law, is inconsistent with Subsection E, and would amount to reading into the statute significant obligations against the association's funds that the legislature has not contemplated. 1990 Op. Att'y Gen. No. 90-09.

Rule adopted by the retirement board, providing for suspension of disability benefits if a member is capable of resuming gainful employment, was consistent with the statutory scheme governing the grant and continuation of disability benefits and was a reasonable implementation of Subsection C. 1990 Op. Att'y Gen. No. 90-09.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Requiring submission to physical examination or test as violation of constitutional rights, 164 A.L.R. 967, 25 A.L.R.2d 1407.

## **10-11-12. Status of disability retired member upon termination of disability retirement.**

A. The membership status of a disability retired member following termination of the disability retirement pension shall be governed by the membership provisions of the Public Employees Retirement Act [this article]. Upon reacquisition of membership, the credited service of the member at time of disability retirement shall be restored. Credited service shall not be granted for the period of disability retirement unless the retirement board has found the disability to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of the disability retired member's performance of duty with an affiliated public employer. In no case shall credited service be granted for disability retirement time incurred after the date the disability retired member meets an age and service requirement for normal retirement or after the date the disability retired member attains age sixty-five years.

B. A terminated disability retired member who does not reacquire membership shall have actual credited service at time of disability retirement restored and shall become a

vested former member. The former disability retired member may retire upon meeting the requirements for normal retirement specified by the applicable coverage plan, except the service requirement for normal retirement at age sixty-five years or older shall be waived.

**History:** Laws 1987, ch. 253, § 12.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-12 NMSA 1978, as enacted by Laws 1973, ch. 328, § 1, relating to purpose, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-13. Survivor pensions; automatic coverage of eligible beneficiaries.**

A. A survivor pension shall be paid to the eligible surviving spouse and eligible surviving children of a deceased member or vested former member who does not have an elective survivor pension beneficiary designation in effect under Section 14 [10-11-14 NMSA 1978] of the Public Employees Retirement Act, if the following requirements are met:

(1) a written application for the pension, in the form prescribed by the association, is filed with the association; and

(2) the member or vested former member has five or more years of credited service or the retirement board finds the death to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of the member's performance of duty with an affiliated public employer.

B. An eligible surviving spouse is the spouse to whom the deceased member or vested former member was married at time of death. An eligible surviving child is an unmarried natural or adopted child of the deceased member or of the vested former member which child is under age eighteen years.

C. The survivor pension payable to an eligible surviving spouse is subject to the following conditions:

(1) the amount of the eligible surviving spouse's survivor pension shall be the greater of:

(a) eighty percent of the amount of pension calculated in the same manner as a normal retirement pension under form of payment A; or

(b) thirty percent of the deceased member's or vested former member's final average salary;

(2) if the retirement board finds the death to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of a member's performance of duty with an affiliated public employer, the thirty percent of final average salary minimum pension provided in Subparagraph (b) of Paragraph (1) of this subsection is increased to fifty percent of the deceased member's final average salary; and

(3) if there is no eligible surviving child, the eligible surviving spouse may elect to be paid the deceased member's or vested former member's accumulated member contributions instead of the pension.

D. The survivor pension payable to an eligible surviving child is subject to the following conditions:

(1) an eligible surviving child shall be paid the pension provided by this subsection if there is not an eligible surviving spouse or the eligible surviving spouse subsequently dies; and

(2) the amount of an eligible surviving child's pension is an equal share with all other eligible surviving children of the greater of:

(a) fifty percent of an amount calculated in the same manner as a normal retirement pension under form of payment A; or

(b) twenty-five percent of the deceased member's or vested former member's final average salary.

E. An eligible surviving child shall be the paid pension provided by this subsection instead of the pension provided by Subsection D of this section if the retirement board finds the death to have been the natural and proximate result of causes arising solely and exclusively out of and in the course of a member's performance of duty with an affiliated public employer. The amount of an eligible surviving child's pension is an equal share with all other eligible surviving children of either:

(1) fifty percent of the deceased member's final average salary whenever an eligible surviving spouse is not paid a pension; or

(2) twenty-five percent of the deceased member's final average salary whenever an eligible surviving spouse is paid a pension. If there is only one eligible child, the amount of pension is twenty-five percent of the deceased member's final average salary.

F. An eligible surviving child's pension shall terminate upon death or marriage or reaching age eighteen years. The pension of each remaining eligible surviving child shall be recalculated. An eligible surviving spouse's pension shall terminate upon death.

**History:** Laws 1987, ch. 253, § 13.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-13 NMSA 1978, as enacted by Laws 1973, ch. 328, § 2, relating to appropriations, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**"Final average salary".** - The "final average salary" figure may not include lump sum payments for annual leave, sick leave or sick leave converted to annual leave, because such payments are not "salary" within the meaning of the Public Employees' Retirement Act. 1989 Op. Att'y Gen. No. 89-06.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 248; 81A C.J.S. States §§ 46, 112 to 119.

### **10-11-14. Survivor pensions to selected survivor pension beneficiary.**

A. A survivor pension shall be paid for life to the designated survivor pension beneficiary of a deceased member or vested former member who has elected form of payment B and designated a survivor pension beneficiary in accordance with the provisions of the Public Employees Retirement Act [this article] if the following requirements are met:

- (1) a written application for the pension, in the form prescribed by the association, is filed with the association; and
- (2) the member or vested former member has five or more years of credited service.

B. The amount of pension is calculated in the same manner as a normal retirement pension under form of payment B in accordance with the coverage plan applicable to the member or vested former member at time of death.

C. An election of form of payment B may be rescinded and the designated survivor pension beneficiary may be changed by the member at any time prior to the date a pension payment is made to the member.

**History:** Laws 1987, ch. 253, § 14.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-14 NMSA 1978, as amended by Laws 1986, ch. 101, § 1, relating to credited service, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

### **10-11-14.1 to 10-11-14.4. Repealed.**

## **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 253, § 140, repeals 10-11-14.1 to 10-11-14.4 NMSA 1978, as enacted by Laws 1987, ch. 89, §§ 1 to 4, relating to findings and purpose, definitions, purchase of service credit, and limitation of superannuation annuity, effective July 1, 1987.

### **10-11-15. State general member coverage plan 1; applicability.**

State general member coverage plan 1 is applicable to state general members who are not specifically covered by another coverage plan.

**History:** Laws 1987, ch. 253, § 15.

**Compiler's note.** - Laws 1981, ch. 135, § 18 repealed former 10-11-15 NMSA 1978, relating to contributing service credit, effective March 21, 1981. Laws 1987, ch. 253, § 143 makes the act effective July 1, 1987.

### **10-11-16. State general member coverage plan 1; age and service requirements for normal retirement.**

Under state general member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 16.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-16 NMSA 1978, as amended by Laws 1970, ch. 56, § 1, relating to time served as judge or justice, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-17. State general member coverage plan 1; amount of normal requirements for normal retirement; form of payment A.**

Under state general member coverage plan 1, the amount of a normal retirement pension under form of payment A is equal to two percent of final average salary multiplied by credited service. The amount shall not exceed sixty percent of final average salary.

**History:** Laws 1987, ch. 253, § 17.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-17 NMSA 1978, as amended by Laws 1981, ch. 135, § 5, relating to funds of association, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-18. State general member coverage plan 1; final average salary.**

Under state general member coverage plan 1, final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under state general member coverage plan 1, if a member has less than thirty-six months of credited service, final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 18.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-18 NMSA 1978, as amended by Laws 1986, ch. 84, § 2, relating to employees' savings fund, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

### **10-11-18.1. Repealed.**

## **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 253, § 140, repeals 10-11-18.1 NMSA 1978, as enacted by Laws 1986, ch. 46, § 1, relating to member contributions and tax treatment, effective July 1, 1987.

### **10-11-19. State general member coverage plan 1; member contribution rate.**

A member under state general member coverage plan 1 shall contribute three and eighty-three one-hundredths percent of salary.

**History:** Laws 1987, ch. 253, § 19.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-19 NMSA 1978, as amended by Laws 1986, ch. 84, § 2, relating to employer's accumulation fund, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

### **10-11-20. State general member coverage plan 1; state contribution rate.**

The state shall contribute eleven and forty-eight one-hundredths percent of the salary of each member under state general member coverage plan 1.

**History:** Laws 1987, ch. 253, § 20.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-20 NMSA 1978, as amended by Laws 1965, ch. 284, § 5, relating to retirement reserve fund, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-21. State general member coverage plan 2; applicability.**

State general member coverage plan 2 is applicable to state general members after September 30, 1987.

**History:** Laws 1987, ch. 253, § 21.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-21 NMSA 1978, as amended by Laws 1985 (1st S.S.), ch. 10, § 4, relating to income fund, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

### **10-11-22. State general member coverage plan 2; age and service requirements for normal retirement.**

Under state general member coverage plan 2, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;



F. age sixty years and twenty or more years of credited service; or

G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 22.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-22 NMSA 1978, as amended by Laws 1985 (1st S.S.), ch. 10, § 5, relating to superannuation retirement annuity, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

**Compiler's note.** - Laws 1987, ch. 95 purported to amend this section, but was not published because of the repeal and reenactment by Laws 1987, ch. 253.

**Continuation of work for affiliated employer.** - A state employee who filed an application for retirement with the public employees retirement association and commenced receiving a monthly annuity from the public employees retirement association but continues to work for an affiliated employer is not entitled to receive that annuity. 1987 Op. Att'y Gen. No. 87-14.

### **10-11-23. State general member coverage plan 2; amount of pension; form of payment A.**

Under state general member coverage plan 2, the amount of pension under form of payment A is equal to two and one-half percent of final average salary multiplied by credited service. The amount shall not exceed seventy-five percent of the final average salary.

**History:** Laws 1987, ch. 253, § 23.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-23 NMSA 1978, as amended by Laws 1981, ch. 135, § 10, relating to retirement annuity while employed, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-24. State general member coverage plan 2; final average salary.**

Under state general member coverage plan 2, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under state general member coverage plan 2, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 24.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-24 NMSA 1978, as amended by Laws 1973, ch. 344, § 2, relating to employment without suspension of annuity, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-25. State general member coverage plan 2; member contribution rate.**

A member under state general member coverage plan 2 shall contribute six and eighteen one-hundredths percent of salary starting with the first full pay period in the calendar month in which state general member coverage plan 2 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 25.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-25 NMSA 1978, as amended by Laws 1981, ch. 135, § 11, relating to deferred retirement annuity, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-26. State general member coverage plan 2; state contribution rate.**

The state shall contribute thirteen and eighty-three one-hundredths percent of the salary of each member covered by state general member coverage plan 2.

**History:** Laws 1987, ch. 253, § 26.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-26 NMSA 1978, as amended by Laws 1981, ch. 135, § 12, relating to annuity options, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-27. State police member coverage plan 1; applicability.**

State police member coverage plan 1 is applicable to state police members who are not specifically covered by another coverage plan. The credited service of a state police member who has held the permanent rank of patrolman or sergeant and does not hold an exempt rank or who is assigned to the aircraft division as a pilot shall have actual credited service increased by twenty percent for the purposes of state police member coverage plan 1.

**History:** Laws 1987, ch. 253, § 27.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-27 NMSA 1978, as enacted by Laws 1965, ch. 263, § 1, relating to elective option coverages, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-28. State police member coverage plan 1; age and service requirements for normal retirement.**

Under state police member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 28.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-28 NMSA 1978, as enacted by Laws 1981, ch. 135, § 13, relating to survivor annuities, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-29. State police member coverage plan 1; amount of pension; form of payment A.**

Under state police member coverage plan 1, the amount of pension under form of payment A is equal to three percent of final average salary multiplied by credited service. The amount shall not exceed eighty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 29.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-29 NMSA 1978, as amended by Laws 1985, ch. 162, § 1, relating to cost-of-living adjustment, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

## **10-11-29.1. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 253, § 140, repeals 10-11-29.1 NMSA 1978, as enacted by 1981, ch. 139, § 1, relating to cost of living increase authorization and procedure for adjustment, effective July 1, 1987.

## **10-11-30. State police member coverage plan 1; final average salary.**

Under state police member coverage plan 1, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under state police member coverage plan 1, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 30.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-30 NMSA 1978, as enacted by Laws 1975, ch. 155, § 1, relating to group insurance, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

## **10-11-31. State police member coverage plan 1; member contribution rate.**

A member under state police member coverage plan 1 shall contribute seven and six-tenths percent of salary.

**History:** Laws 1987, ch. 253, § 31.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-31 NMSA 1978, as amended by Laws 1981, ch. 135, § 14, relating to duty disability, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

## **10-11-32. State police member coverage plan 1; state contribution rate.**

The state shall contribute twenty-five and one-tenth percent of the salary of each member under state police member coverage plan 1.

**History:** Laws 1987, ch. 253, § 32.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-32 NMSA 1978, as amended by Laws 1981, ch. 135, § 15, relating to nonduty disability, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-33. State hazardous duty member coverage plan 1; applicability.**

State hazardous duty member coverage plan 1 is applicable to state hazardous duty members who are not specifically covered by another coverage plan.

**History:** Laws 1987, ch. 253, § 33.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-33 NMSA 1978, as amended by Laws 1981, ch. 135, § 16, relating to reexamination of disability annuitants, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-34. State hazardous duty member coverage plan 1; age and service requirements for normal retirement.**

Under state hazardous duty member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 34.

**Compiler's note.** - Laws 1981, ch. 135, § 18 repealed 10-11-34 NMSA 1978, relating to annuities for death in the line of duty, effective March 21, 1981.

### **10-11-35. State hazardous duty member coverage plan 1; amount of pension; form of payment A.**

Under state hazardous duty member coverage plan 1, the amount of pension under form of payment A is equal to two and one-half percent of final average salary multiplied by credited service. The amount shall not exceed one hundred percent of the final average salary.

**History:** Laws 1987, ch. 253, § 35.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-35 NMSA 1978, as amended by Laws 1985 (1st S.S.), ch. 10, § 6, relating to survivors' benefit fund, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1986 cumulative supplement.

### **10-11-36. State hazardous duty member coverage plan 1; final average salary.**

Under state hazardous duty member coverage plan 1, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under state hazardous duty member coverage plan 1, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 36.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-36 NMSA 1978, as enacted by Laws 1953, ch. 162, § 21, relating to funds not subject to process, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-37. State hazardous duty member coverage plan 1; member contribution rate.**

A member under state hazardous duty member coverage plan 1 shall contribute four percent of salary.

**History:** Laws 1987, ch. 253, § 37.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-37 NMSA 1978, as enacted by Laws 1953, ch. 162, § 22, relating to inapplicability of insurance and banking laws, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-38. State hazardous duty member coverage plan 1; state contribution rate.**

The state shall contribute twenty-one and five-tenths percent of the salary of each member under state hazardous duty member coverage plan 1.

**History:** Laws 1987, ch. 253, § 38.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-38 NMSA 1978, as enacted by Laws 1953, ch. 162, § 23, relating to gifts and bequests, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

### **10-11-39. State legislator member coverage plan 1; applicability.**

State legislator member coverage plan 1 is applicable to state legislators and lieutenant governors.

**History:** Laws 1987, ch. 253, § 39.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-39 NMSA 1978, as enacted by Laws 1963, ch. 102, § 1, relating to assumption of retirement plans created pursuant to 1947 law, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

### **10-11-40. State legislator member coverage plan 1; age and service requirements for normal retirement.**

Under state legislator member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years or older and eight or more years of credited service;
- C. age sixty-three years or older and eleven or more years of credited service;
- D. age sixty years or older and twelve or more years of credited service; or
- E. any age and fourteen or more years of credited service.

**History:** Laws 1987, ch. 253, § 40.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-40 NMSA 1978, as enacted by Laws 1963, ch. 102, § 2, relating to transfer of funds and obligations created pursuant to 1947 law, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

### **10-11-41. State legislation member coverage plan 1; amount of pension; form of payment A.**

A. Under state legislator member coverage plan 1, the annual amount of pension under form of payment A is equal to two hundred fifty dollars (\$250) multiplied by credited service as a legislator or lieutenant governor, if the member served as legislator or lieutenant governor after December 31, 1959.

B. Under state legislator member coverage plan 1, the annual amount of pension under form of payment A is equal to forty dollars (\$40.00) multiplied by credited service as a legislator or lieutenant governor, if all service as a legislator or lieutenant governor is prior to January 1, 1960.

**History:** Laws 1987, ch. 253, § 41.

**Repeals and reenactments.** - Laws 1987, Chapter 253 repeals former 10-11-41 NMSA 1978, as enacted by Laws 1963, ch. 102, § 3, relating to disbursement by municipalities upon assumption of plans created pursuant to 1947 law, and enacts the above section, effective July 1, 1987. For provisions of former section, see 1983 replacement pamphlet.

**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

### **10-11-42. State legislator member coverage plan 1; member contribution rate.**

A member under state legislator member coverage plan 1 shall contribute one hundred dollars (\$100) for each year of credited service earned after December 31, 1959.

**History:** Laws 1987, ch. 253, § 42.



**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

### **10-11-43. State legislator member coverage plan 1; state contribution rate.**

The state shall contribute amounts sufficient to finance the membership of members under state legislator member coverage plan 1 on an actuarial reserve basis.

**History:** Laws 1987, ch. 253, § 43.

**Legislative retirement provisions unconstitutional.** - The legislative retirement provisions of the Public Employees' Retirement Act, Chapter 10, Article 11 NMSA 1978, are unconstitutional, invalid and unenforceable: Legislators may receive only per diem and mileage under N.M. Const., art. IV, § 10. 1987 Op. Att'y Gen. No. 87-62.

### **10-11-44. Municipal general member coverage plan 1; applicability.**

Municipal general member coverage plan 1 is applicable to municipal general members who are not specifically covered by another coverage plan.

**History:** Laws 1987, ch. 253, § 44.

### **10-11-45. Municipal general member coverage plan 1; age and service requirements for normal retirement.**

Under municipal general member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 45.

**10-11-46. Municipal general member coverage plan 1; amount of pension; form of payment A.**

Under municipal general member coverage plan 1, the amount of pension under form of payment A is equal to two percent of the final average salary multiplied by credited service. The amount shall not exceed sixty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 46.

**10-11-47. Municipal general member coverage plan 1; final average salary.**

Under municipal general member coverage plan 1, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal general member coverage plan 1 for a member having less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 47.

**10-11-48. Municipal general member coverage plan 1; member contribution rate.**

A member under municipal general member coverage plan 1 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 48.

**10-11-49. Municipal general member coverage plan 1; affiliated public employer contribution rate.**

An affiliated public employer shall contribute seven percent of the salary of each member which it employs and who is covered under municipal general member coverage plan 1.

**History:** Laws 1987, ch. 253, § 49.

**10-11-50. Municipal general member coverage plan 2; applicability.**

Municipal general member coverage plan 2 is applicable to a designated group of municipal general members the first day of the calendar month following an affirmative

vote by the majority of the municipal general members in a designated group. A designated group may be all members employed by the affiliated public employer, an organizational group whose compensation is established by negotiated contract or all members employed by the affiliated public employer whose compensation is not established by negotiated contract. The election shall be conducted by the retirement board in accordance with procedures adopted by the retirement board. The procedures shall afford all municipal general members who are part of the designated group an opportunity to vote. A new election for coverage by municipal general member coverage plan 2 shall not be held prior to the expiration of six months following the date of an election which failed to adopt municipal general member coverage plan 2. An election adopting municipal general member coverage plan 2 is irrevocable for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions with respect to all current and future municipal general employees of the affiliated public employer who are part of the designated group.

**History:** Laws 1987, ch. 253, § 50; 1989, ch. 79, § 2.

**The 1989 amendment**, effective June 16, 1989, inserted "retirement" preceding "board" near the end of the third sentence, and inserted "for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions" in the last sentence.

### **10-11-51. Municipal general member coverage plan 2; age and service requirements for normal retirement.**

Under municipal general member coverage plan 2, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 51.

### **10-11-52. Municipal general member coverage plan 2; amount of pension; form of payment A.**

Under municipal general member coverage plan 2, the amount of pension under form of payment A is equal to two and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed seventy-five percent of the final average salary.

**History:** Laws 1987, ch. 253, § 52.

### **10-11-53. Municipal general member coverage plan 2; final average salary.**

Under municipal general member coverage plan 2, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal general member coverage plan 2, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 53.

### **10-11-54. Municipal general member coverage plan 2; member contribution rate.**

A member under municipal general member coverage plan 2 shall contribute nine and fifteen one-hundredths percent of salary starting with the first full pay period in the calendar month in which coverage plan 2 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 54.

### **10-11-55. Municipal general member coverage plan 2; affiliated public employer contribution rate.**

An affiliated public employer shall contribute nine and fifteen one-hundredths percent of the salary of each member which it employs and who is covered under municipal general member coverage plan 2.

**History:** Laws 1987, ch. 253, § 55.

### **10-11-56. Municipal police member coverage plan 1; applicability.**

Municipal police member coverage plan 1 is applicable to municipal police members whose affiliated public employer has adopted municipal police member coverage plan 1

for its municipal police officers. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 56.

### **10-11-57. Municipal police member coverage plan 1; age and service requirements for normal retirement.**

Under municipal police member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 57.

### **10-11-58. Municipal police member coverage plan 1; amount of pension; form of payment A.**

Under municipal police member coverage plan 1, the amount of pension under form of payment A is equal to two percent of the final average salary multiplied by credited service. The amount shall not exceed sixty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 58.

### **10-11-59. Municipal police member coverage plan 1; final average salary.**

Under municipal police member coverage plan 1, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal police member coverage plan 1, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 59.

**10-11-60. Municipal police member coverage plan 1; member contribution rate.**

A member under municipal police member coverage plan 1 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 60.

**10-11-61. Municipal police member coverage plan 1; affiliated public employer contribution rate.**

The affiliated public employer shall contribute ten percent of the salary of each member which it employs and who is covered under municipal police member coverage plan 1.

**History:** Laws 1987, ch. 253, § 61.

**10-11-62. Municipal police member coverage plan 2; applicability.**

Municipal police member coverage plan 2 is applicable to municipal police members whose affiliated public employer has adopted municipal police member coverage plan 2 for its municipal police officers. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 62.

**10-11-63. Municipal police member coverage plan 2; age and service requirements for normal retirement.**

Under municipal police coverage plan 2, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or

G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 63.

### **10-11-64. Municipal police member coverage plan 2; amount of pension; form of payment A.**

Under municipal police member coverage plan 2, the amount of pension under form of payment A is equal to two and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed one hundred percent of the final average salary.

**History:** Laws 1987, ch. 253, § 64.

### **10-11-65. Municipal police member coverage plan 2; final average salary.**

Under municipal police member coverage plan 2, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal police member coverage plan 2, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 65.

### **10-11-66. Municipal police member coverage plan 2; member contribution rate.**

A member under municipal police member coverage plan 2 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 66.

### **10-11-67. Municipal police member coverage plan 2; affiliated public employer contribution rate.**

The affiliated public employer shall contribute fifteen percent of the salary of each member which it employs and who is covered under municipal police member coverage plan 2.

**History:** Laws 1987, ch. 253, § 67.

### **10-11-68. Municipal police member coverage plan 3; applicability.**

Municipal police member coverage plan 3 is applicable to municipal police members whose affiliated public employer has adopted municipal police member coverage plan 3 for its municipal police officers. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 68.

### **10-11-69. Municipal police member coverage plan 3; age and service requirements for normal retirement.**

Under municipal police member coverage plan 3, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 69.

### **10-11-70. Municipal police member coverage plan 3; amount of pension; form of payment A.**

Under municipal police member coverage plan 3, the amount of pension under form of payment A is equal to two and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed one-hundred percent of the final average salary.

**History:** Laws 1987, ch. 253, § 70.

### **10-11-71. Municipal police member coverage plan 3; final average salary.**

Under municipal police member coverage plan 3, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal police member coverage plan 3, if a member has less than thirty-six months of credited service, the final average



salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 71.

### **10-11-72. Municipal police member coverage plan 3; member contribution rate.**

A member under municipal police member coverage plan 3 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 72.

### **10-11-73. Municipal police member coverage plan 3; affiliated public employer contribution rate.**

The affiliated public employer shall contribute eighteen and one-half percent of the salary of each member which it employs and who is covered under coverage municipal police member coverage plan 3.

**History:** Laws 1987, ch. 253, § 73.

### **10-11-74. Municipal police member coverage plan 4; applicability.**

Municipal police member coverage plan 4 is applicable to municipal police members of an affiliated public employer on the first day of the calendar month following certification of the election adopting municipal police member coverage plan 4 by an affirmative vote of the majority of the affiliated public employer's municipal police members. The election shall be conducted by the affiliated public employer. The certification shall be in the form prescribed by the retirement board. The election procedures shall afford all municipal police members of the affiliated public employer an opportunity to vote. An election adopting municipal police member coverage plan 4 for a given affiliated public employer is irrevocable for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions with respect to all current and future municipal police members of that affiliated public employer.

**History:** Laws 1987, ch. 253, § 74; 1989, ch. 79, § 3.

**The 1989 amendment**, effective June 16, 1989, inserted "for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions" in the last sentence.

### **10-11-75. Municipal police member coverage plan 4; age and service requirements for normal retirement.**

Under municipal police member coverage plan 4, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 75.

#### **10-11-76. Municipal police member coverage plan 4; amount of pension; form of pension A.**

Under municipal police member coverage plan 4, the amount of pension under form of payment A is equal to three percent of the final average salary multiplied by credited service. The amount shall not exceed eighty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 76.

#### **10-11-77. Municipal police member coverage plan 4; final average salary.**

Under municipal police member coverage plan 4, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive, but not necessarily continuous, months of credited service. Under municipal police member coverage plan 4, for a member having less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 77.

#### **10-11-78. Municipal police member coverage plan 4; member contribution rate.**

A member under municipal police member coverage plan 4 shall contribute twelve and thirty-five one-hundredths percent of salary starting with the first full pay period in the

calendar month in which municipal police member coverage plan 4 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 78.

### **10-11-79. Municipal police member coverage plan 4; affiliated public employer contribution rate.**

The affiliated public employer shall contribute eighteen and one-half percent of the salary of each member which it employs and who is covered under municipal police member coverage plan 4.

**History:** Laws 1987, ch. 253, § 79.

### **10-11-80. Municipal police member coverage plan 5; applicability.**

Municipal police member coverage plan 5 is applicable to municipal police members of an affiliated public employer on the first day of the calendar month following certification of the election adopting municipal police member coverage plan 5 by an affirmative vote of the majority of the affiliated public employer's municipal police members. The election shall be conducted by the affiliated public employer. The certification shall be in the form prescribed by the retirement board. The election procedures shall afford all municipal police members of the affiliated public employer an opportunity to vote. An election adopting municipal police member coverage plan 5 for a given affiliated public employer is irrevocable for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions with respect to all current and future municipal police members of that affiliated public employer.

**History:** Laws 1987, ch. 253, § 80; 1989, ch. 79, § 4.

**The 1989 amendment**, effective June 16, 1989, inserted "for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions" in the last sentence.

### **10-11-81. Municipal police member coverage plan 5; age and service requirements for normal retirement.**

Under municipal police member coverage plan 5, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;

- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 81.

### **10-11-82. Municipal police member coverage plan 5; amount of pension; form of payment A.**

Under municipal police member coverage plan 5, the amount of pension under form of payment A is equal to three and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed eighty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 82.

### **10-11-83. Municipal police member coverage plan 5; final average salary.**

Under municipal police member coverage plan 5, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal police member coverage plan 5, if a member having [has] less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 83.

### **10-11-84. Municipal police member coverage plan 5; member contribution rate.**

A member under municipal police member coverage plan 5 shall contribute sixteen and three-tenths percent of salary starting with the first full pay period in the calendar month in which the municipal police member coverage plan 5 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 84.

### **10-11-85. Municipal police member coverage plan 5; affiliated public employer contribution rate.**

The affiliated public employer shall contribute eighteen and one-half percent of the salary of each member which it employs and who is covered under municipal police member coverage plan 5.

**History:** Laws 1987, ch. 253, § 85.

### **10-11-86. Municipal fire member coverage plan 1; applicability.**

Municipal fire member coverage plan 1 is applicable to municipal fire members whose affiliated public employer has adopted municipal fire member coverage plan 1 for its municipal firefighters. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 86.

### **10-11-87. Municipal fire member coverage plan 1; age and service requirements for normal retirement.**

Under municipal fire member coverage plan 1, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 87.

### **10-11-88. Municipal fire member coverage plan 1; amount of pension; form of payment A.**

Under municipal fire member coverage plan 1, the amount of pension under form of payment A is equal to two percent of the final average salary multiplied by credited service. The amount shall not exceed sixty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 88.

### **10-11-89. Municipal fire member coverage plan 1; final average salary.**

Under municipal fire member coverage plan 1, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal fire member coverage plan 1, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 89.

### **10-11-90. Municipal fire member coverage plan 1; member contribution rate.**

A member under municipal fire member coverage plan 1 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 90.

### **10-11-91. Municipal fire member coverage plan 1; affiliated public employer contribution rate.**

The affiliated public employer shall contribute ten percent of the salary of each member which it employs and covers under municipal fire member coverage plan 1.

**History:** Laws 1987, ch. 253, § 91.

### **10-11-92. Municipal fire member coverage plan 2; applicability.**

Municipal fire member coverage plan 2 is applicable to municipal fire members whose affiliated public employer has adopted municipal fire member coverage plan 2 for its municipal fire members. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 92.

### **10-11-93. Municipal fire member coverage plan 2; age and service requirements for normal retirement.**

Under municipal fire member coverage plan 2, the age and service requirements for normal retirement are:

A. age sixty-five years or older and five or more years of credited service;

- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service;
- F. age sixty years and twenty or more years of credited service; or
- G. any age and twenty-five or more years of credited service.

**History:** Laws 1987, ch. 253, § 93.

### **10-11-94. Municipal fire member coverage plan 2; amount of pension; form of payment A.**

Under municipal fire member contribution plan 2, the amount of pension under form of payment A is equal to two and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed one hundred percent of the final average salary.

**History:** Laws 1987, ch. 253, § 94.

### **10-11-95. Municipal fire member coverage plan 2; final average salary.**

Under municipal fire member coverage plan 2, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal fire member coverage plan 2, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 95.

### **10-11-96. Municipal fire member coverage plan 2; member contribution rate.**

A member under municipal fire member coverage plan 2 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 96.

### **10-11-97. Municipal fire member coverage plan 2; affiliated public employer contribution rate.**

The affiliated public employer shall contribute sixteen and one-half percent of the salary of each member which it employs and covers under municipal fire member coverage plan 2.

**History:** Laws 1987, ch. 253, § 97.

### **10-11-98. Municipal fire member coverage plan 3; applicability.**

Municipal fire member coverage plan 3 is applicable to municipal fire members whose affiliated public employer has adopted municipal fire member coverage plan 3 for its municipal firefighters. The affiliated public employer shall certify this adoption to the retirement board in the form prescribed by the retirement board.

**History:** Laws 1987, ch. 253, § 98.

### **10-11-99. Municipal fire member coverage plan 3; age and service requirements for normal retirement.**

Under municipal fire member coverage plan 3, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 99.

### **10-11-100. Municipal fire member coverage plan 3; amount of pension; form of payment A.**

Under municipal fire member coverage plan 3, the amount of pension under form of payment A is equal to two and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed one hundred percent of the final average salary.



**History:** Laws 1987, ch. 253, § 100.

### **10-11-101. Municipal fire member coverage plan 3; final average salary.**

Under municipal fire member coverage plan 3, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal fire member coverage plan 3, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 101.

### **10-11-102. Municipal fire member coverage plan 3; member contribution rate.**

A member under municipal fire member coverage plan 3 shall contribute seven percent of salary.

**History:** Laws 1987, ch. 253, § 102.

### **10-11-103. Municipal fire member coverage plan 3; affiliated public employer contribution rate.**

The affiliated public employer shall contribute twenty and twenty-five one-hundredths percent of the salary of each member which it employs and who is covered under municipal fire member coverage plan 3.

**History:** Laws 1987, ch. 253, § 103.

### **10-11-104. Municipal fire member coverage plan 4; applicability.**

Municipal fire member coverage plan 4 is applicable to municipal fire members of an affiliated public employer on the first day of the calendar month following certification of the election adopting municipal fire member coverage plan 4 by an affirmative vote of the majority of the affiliated public employer's municipal fire members. The election shall be conducted by the affiliated public employer. The certification shall be in the form prescribed by the retirement board. The election procedures shall afford all municipal fire members of the affiliated public employer an opportunity to vote. An election adopting municipal fire member coverage plan 4 for a given affiliated public employer is irrevocable for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions with respect to all current and future municipal fire members of that affiliated public employer.

**History:** Laws 1987, ch. 253, § 104; 1989, ch. 79, § 5.

**The 1989 amendment**, effective June 16, 1989, inserted "for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions" in the last sentence.

### **10-11-105. Municipal fire member coverage plan 4; age and service requirements for normal retirement.**

Under municipal fire member coverage plan 4, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 105.

### **10-11-106. Municipal fire member coverage plan 4; amount of pension; form of payment A.**

Under municipal fire member coverage plan 4, the amount of pension under form of payment A is equal to three percent of the final average salary multiplied by credited service. The amount shall not exceed eighty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 106.

### **10-11-107. Municipal fire member coverage plan 4; final average salary.**

Under municipal fire member coverage plan 4, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal fire member coverage plan 4, if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 107.

### **10-11-108. Municipal fire member coverage plan 4; member contribution rate.**

A member under municipal fire member coverage plan 4 shall contribute eleven and eight-tenths percent of salary starting with the first full pay period in the calendar month in which municipal fire member coverage plan 4 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 108.

### **10-11-109. Municipal fire member coverage plan 4; affiliated public employer contribution rate.**

The affiliated public employer shall contribute twenty and twenty-five one-hundredths percent of the salary of each member which it employs and who is covered under municipal fire member coverage plan 4.

**History:** Laws 1987, ch. 253, § 109.

### **10-11-110. Municipal fire member coverage plan 5; applicability.**

Municipal fire member coverage plan 5 is applicable to municipal fire members of an affiliated public employer on the first day of the calendar month following certification of the election adopting municipal fire member coverage plan 5 by an affirmative vote of the majority of the affiliated public employer's municipal fire members. The election shall be conducted by the affiliated public employer. The certification shall be in the form prescribed by the retirement board. The election procedures shall afford all municipal fire members of the affiliated public employer an opportunity to vote. An election adopting municipal fire member coverage plan 5 for a given affiliated public employer is irrevocable for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions with respect to all current and future municipal fire members of that affiliated public employer.

**History:** Laws 1987, ch. 253, § 110; 1989, ch. 79, § 6.

**The 1989 amendment**, effective June 16, 1989, inserted "for the purpose of subsequently adopting a coverage plan which would decrease employer or employee contributions" in the last sentence.

### **10-11-111. Municipal fire member coverage plan 5; age and service requirements for normal retirement.**

Under municipal fire member coverage plan 5, the age and service requirements for normal retirement are:

- A. age sixty-five years or older and five or more years of credited service;
- B. age sixty-four years and eight or more years of credited service;
- C. age sixty-three years and eleven or more years of credited service;
- D. age sixty-two years and fourteen or more years of credited service;
- E. age sixty-one years and seventeen or more years of credited service; or
- F. any age and twenty or more years of credited service.

**History:** Laws 1987, ch. 253, § 111.

### **10-11-112. Municipal fire member coverage plan 5; amount of pension; form of payment A.**

Under municipal fire member coverage plan 5, the amount of pension under form of payment A is equal to three and one-half percent of the final average salary multiplied by credited service. The amount shall not exceed eighty percent of the final average salary.

**History:** Laws 1987, ch. 253, § 112.

### **10-11-113. Municipal fire member coverage plan 5; final average salary.**

Under municipal fire member coverage plan 5, the final average salary is one thirty-sixth of the greatest aggregate amount of salary paid a member for thirty-six consecutive months of credited service. Under municipal fire member coverage plan 5 if a member has less than thirty-six months of credited service, the final average salary is the aggregate amount of salary paid a member for the member's period of credited service divided by the member's credited service.

**History:** Laws 1987, ch. 253, § 113.

### **10-11-114. Municipal fire member coverage plan 5; member contribution rate.**

A member under municipal fire member coverage plan 5 shall contribute fifteen and two-tenths percent of salary starting with the first full pay period in the calendar month in which municipal fire member coverage plan 5 becomes applicable to the member.

**History:** Laws 1987, ch. 253, § 114.

### **10-11-115. Municipal fire member coverage plan 5; affiliated public employer contribution rate.**

The affiliated public employer shall contribute twenty and twenty-five one-hundredths percent of the salary of each member which it employs and who is covered under municipal fire member coverage plan 5.

**History:** Laws 1987, ch. 253, § 115.

### **10-11-116. Election of form of payment of a pension.**

A. Except as otherwise provided in Section 10-11-136 NMSA 1978, a member may elect to have pension payments made under any one of the forms of payment provided in Section 10-11-117 NMSA 1978. The election of form of payment and naming of survivor pension beneficiary shall be made on a form furnished by and filed with the association prior to the date the first pension payment is made. An election of form of payment may not be changed after the date the first pension payment is made. If the member is married, the association shall obtain the consent of the member's spouse to the election of the form of payment and any designation of survivor pension beneficiary before the election or designation is effective. Except as provided in Subsection C of this section, a named survivor pension beneficiary may not be changed after the date the first pension payment is made if form of payment B or C is elected. Except as otherwise provided in Section 10-11-136 NMSA 1978, payment shall be made:

(1) under form of payment A if the member is not married at the time of retirement and if there is not a timely election of another form of payment; or

(2) under form of payment C with the member's spouse as survivor pension beneficiary if the member is married at the time of retirement and there is not a timely election of another form of payment.

B. The amount of pension under forms of payment B, C and D shall have the same actuarial present value, computed as of the effective date of the pension, as the amount of pension under form of payment A.

C. A retired member who is being paid a pension under form of payment B or C with the member's spouse as the designated survivor pension beneficiary may, upon becoming divorced from the named spouse and subject to an order of a court as provided for in Section 10-11-136 NMSA 1978, elect to have future payments made under form of payment A.

**History:** Laws 1987, ch. 253, § 116; 1991, ch. 149, § 1.

**The 1991 amendment**, effective July 1, 1991, in Subsection A, rewrote the first sentence which read "A member may elect to have pension payments made under any one of the forms of payment provided in Section 117 of the Public Employees

Retirement Act and name a survivor pension beneficiary", added the fourth sentence, deleted the former fifth sentence which read "A named survivor pension beneficiary shall have an insurable interest in the life of the retired member on the date first payment of the pension is made" and substituted the language beginning "Except as otherwise" including Paragraphs (1) and (2) for "payment shall be made under form of payment A if there is not a timely election of another form of payment" and, in Subsection C, substituted "with the member's spouse as the designated survivor" for "and who named the spouse as survivor" and substituted "Section 10-11-136 NMSA 1978" for "Section 136 of the Public Employees Retirement Act".

### **10-11-117. Forms of payment of a pension.**

A. Straight life pension is form of payment A. The retired member is paid the pension for life under form of payment A. All payments stop upon the death of the retired member, except as provided by Subsection F of this section. The amount of pension is determined in accordance with the coverage plan applicable to the retired member.

B. Life payments with full continuation to survivor beneficiary is form of payment B. The retired member is paid a reduced pension for life under form of payment B. Upon the death of the retired member during the lifetime of the named survivor pension beneficiary, the named survivor pension beneficiary is paid the full amount of the reduced pension until death. Upon the death of the named survivor pension beneficiary during the lifetime of the retired member, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

C. Life payment with one-half continuation to survivor beneficiary is form of payment C. The retired member is paid a reduced pension for life under form of payment C. Upon the death of the retired member during the lifetime of the named survivor pension beneficiary, the named survivor pension beneficiary is paid one-half the amount of the reduced pension until death. Upon the death of the named survivor pension beneficiary during the lifetime of the retired member, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

D. Life payments with temporary survivor benefits for children is form of payment D. The retired member is paid a reduced pension for life under form of payment D. Upon the death of the retired member during the lifetime of a declared eligible child of the retired member, each declared eligible child is paid a share of the reduced pension until death or age twenty-five years, whichever occurs first. The share is the share specified in writing and filed with the association by the retired member. If shares are not specified in writing and filed with the association, each declared eligible child is paid an equal share of the reduced pension. A redetermination of shares shall be made when the pension of any child terminates. An eligible child is a natural or adopted child of the retired member who is under age twenty-five years. A declared eligible child is an eligible child whose name has been declared in writing and filed with the association by

the retired member at the time of election of form of payment D. The amount of pension shall be changed to the amount of pension that would have been payable had the retired member elected form of payment A upon there ceasing to be a declared eligible child during the lifetime of the retired member.

E. A retired member who elected form of payment B or C prior to July 1, 1987 with a child as named survivor beneficiary may elect to have the amount of pension changed to the amount that would have been payable had the retired member elected form of payment A if the following requirements are met:

- (1) the retired member files, prior to July 1, 1988, a written election for the change in a form specified by the retirement association;
- (2) the named survivor beneficiary is age eighteen years or older; and
- (3) the named survivor beneficiary files a written agreement to the change with the retirement association.

F. If all pension payments permanently terminate before there is paid an aggregate amount equal to the former member's accumulated deductions at time of retirement, the difference between the amount of accumulated deductions and the aggregate amount of pension paid shall be paid to the former member's refund beneficiary. If no refund beneficiary survives the former member, the difference shall be paid to the estate of the former member.

**History:** Laws 1987, ch. 253, § 117.

**Change of retirement action.** - Where there is no evidence that the retiree was suffering from psychosis when he selected his option or that his use of alcohol rendered him incompetent to select an option he may not later change his retirement action. 1988 Op. Att'y Gen. No. 88-27.

**Effect of voiding of option.** - When a court voids a retirement option selection because of incompetence, it will grant relief as if the retiree did not select an option. 1988 Op. Att'y Gen. No. 88-27.

### **10-11-118. Cost of living adjustments.**

A. For the purposes of this section:

- (1) "adjustment factor" means adjustment factor determined in accordance with Subsection D of this section;
- (2) "consumer price index" means the consumer price index for all urban consumers published by the United States department of labor; if the index is discontinued or

restructured in a manner materially changing its character, the retirement board shall select the alternative index which most closely preserves the intent of this section;

(3) "preceding calendar year" means the twelve month period ending on the December 31 preceding the July 1 in which pensions are being adjusted; and

(4) "second preceding calendar year" means the full calendar year prior to the preceding calendar year.

B. The amount of pension payable to a qualified pension recipient shall be adjusted each July 1. The adjusted amount of pension is equal to the adjustment factor multiplied by the amount of pension inclusive of all prior adjustments. A qualified pension recipient may decline an adjustment by so notifying the association, in writing, at least thirty days prior to the scheduled adjustment.

C. A qualified pension recipient is:

(1) a normal retired member who has been retired for at least two full calendar years on July 1 of the year in which the pension is being adjusted;

(2) a normal retired member who has attained age sixty-five years and been retired for at least one full calendar year on the July 1;

(3) a disability retired member who has been retired for at least one full calendar year on the July 1;

(4) a survivor pension beneficiary who has been in receipt of a survivor pension for at least two years; or

(5) a survivor pension beneficiary of a deceased retired member who otherwise would have been retired at least two full calendar years.

D. The adjustment factor is equal to the average of the monthly consumer price indexes for the preceding calendar year divided by the average of the monthly consumer price indexes for the second preceding calendar year. The maximum adjustment factor is 1.030. The minimum adjustment factor is .970.

**History:** Laws 1987, ch. 253, § 118.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 247; 81A C.J.S. States §§ 46, 112 to 119.

### **10-11-119. Commencement, change and termination of a pension.**

A. A normal or disability pension shall commence the first day of the month following retirement. A preretirement survivor pension shall commence the first day of the month



following the date of the death resulting in the pension. A postretirement survivor pension shall commence the first day of the month following the date of the death resulting in the pension.

B. Termination of payment of a pension shall occur at the end of the month in which the event causing termination occurs. Payment shall be made for the full month of termination.

C. A change in the amount of a pension shall occur the first day of the month following the date of the event causing the change.

**History:** Laws 1987, ch. 253, § 119.

**Effect of 1987 recodification.** - The 1987 recodification of the public employees retirement act does not permit a normal or disability retirement pension to be made retroactive. 1988 Op. Att'y Gen. No. 88-15.

**Retroactive award prohibited.** - The Public Employees Retirement Association may not award disability benefits retroactive to the date on which the member's name last appeared on the payroll with pay. 1989 Op. Att'y Gen. No. 89-18.

### **10-11-120. Denial of benefit claim; appeals.**

A. A benefit claimant shall be notified in writing, within thirty days, of denial of a claim for benefits. The notification shall give the reason for the denial. A claimant may appeal the denial and request a hearing. The appeal shall be in writing filed with the association within ninety days of the denial. The appeal shall contain a statement of the claimant's reason for claiming the denial to be improper. The retirement board shall schedule a hearing of the appeal before the retirement board or, at the discretion of the retirement board, a committee of the retirement board, within sixty days of receipt of the appeal. A final decision on the matter being appealed shall be made by the retirement board.

B. Appeals from a final decision of the retirement board shall be made to the first judicial district court and initiated by filing a notice of appeal with the district court within thirty days after the retirement board has issued its final decision. The review of the district court shall be restricted to the record made before the retirement board, and the district court shall not permit the introduction of new evidence on any of the issues presented before the retirement board. The decision of the retirement board shall be upheld by the district court unless the district court finds the decision of the retirement board to be unlawful, arbitrary or capricious or not supported by substantial evidence on the entire record as submitted by the retirement board.

**History:** Laws 1987, ch. 253, § 120.

### **10-11-121. Group health insurance; continuation; group life insurance.**

A. Any member or survivor pension beneficiary may continue to be insured under the provisions of any affiliated public employer's group health insurance plan in effect at the time of retirement or death or under the terms of any separate subsequent group health insurance plan of the affiliated public employer if the retired member or survivor pension beneficiary pays the periodic premium charges and consents to have the association deduct the periodic premium charges from the retired member's or survivor pension beneficiary's pension. The affiliated public employer shall furnish to the association in the manner prescribed by the association a monthly listing of all members or survivor pension beneficiaries who have elected to continue to be insured in accordance with this section and shall also provide the association with written notification of any changes in insurance providers at least sixty days prior to any such change. The association shall make any such changes no later than sixty days after the date of notification.

B. Any member who retires after July 1, 1990, may be insured under the provisions of any affiliated public employer's group life insurance plan for retirees in effect at the time of retirement or death or under the terms of any separate subsequent group life insurance plan for retirees of the affiliated public employer if the retired member pays the periodic premium charges and consents to have the association deduct the periodic premium charges from the retired member's pension. The affiliated public employer shall furnish to the association in the manner prescribed by the association a monthly listing of all members who have elected to continue to be insured in accordance with this section and shall also provide the association with written notification of any changes in insurance providers at least sixty days prior to any such change. The association shall make any such changes no later than sixty days after the date of notification.

**History:** Laws 1987, ch. 253, § 121; 1989, ch. 347, § 2; 1990, ch. 128, § 2.

**Cross-references.** - As to amounts of group insurance contributions of governmental entities, see 10-7-4 NMSA 1978.

As to right of retiree of affiliated public employer to participate in group health insurance plan, see 10-7-5.1 NMSA 1978.

**The 1989 amendment**, effective July 1, 1989, substituted references to affiliated public employer's group health insurance plan for references to state group health insurance plan in two places in the first sentence and added the second and third sentences.

**The 1990 amendment**, effective May 16, 1990, added "group life insurance" to the catchline, designated the former undesignated provisions as Subsection A, and added Subsection B.

## **10-11-122. Public employer affiliation.**

A. A public employer who is an affiliated public employer on the effective date of the Public Employees Retirement Act [this article] shall continue to be an affiliated public employer.

B. A public employer who is not an affiliated public employer on the effective date of that act may become an affiliated public employer by resolution or ordinance adopted by its governing body. Affiliation shall be effective the first day of the month following completion of each of the following requirements;

(1) the public employer files a certified copy of the resolution or ordinance with the association; and

(2) the public employer furnishes the association with all information requested by the association.

C. An affiliated public employer may adopt a coverage plan by resolution or ordinance of its governing body, unless a procedure for adopting the change is otherwise provided in the Public Employees Retirement Act. The change shall be effective the first day of the month following completion of each of the following requirements:

(1) the public employer files a certified copy of the resolution or ordinance with the association; and

(2) the public employer furnishes the association with all information requested by the association.

**History:** Laws 1987, ch. 253, § 122.

### **10-11-123. Funds of association.**

A. The accounting funds of the association are the "member contribution fund", "employers accumulation fund", "retirement reserve fund" and "income fund". The maintenance of separate accounting funds shall not require the actual segregation of the assets of the association among the various funds.

B. The accounting funds provided for in Subsection A of this section are trust funds and shall be used only for the purposes provided in the Public Employees Retirement Act [this article].

**History:** Laws 1987, ch. 253, § 123.

**Segregation and allocation of investments.** - There is no statutory requirement that the various funds be segregated as to investments, and no prohibition against the allocation of a share of an investment to each of the several funds. 1957-58 Op. Att'y Gen. No. 58-172.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States §§ 46, 112 to 119, 223, 224, 229.

### **10-11-124. Member contribution fund.**

A. The member contribution fund is the accounting fund in which shall be accumulated contributions of members and from which shall be made refunds and transfers of accumulated member contributions as provided in the Public Employees Retirement Act [this article]. Each affiliated public employer shall cause the member contributions specified by the coverage plan applicable to each of that affiliated public employer's members to be deducted from the salary of each member. Each affiliated public employer shall remit the deducted member contributions to the association in accordance with the procedures and schedules established by the association. The association may assess an interest charge and a penalty charge on any remittance not made by its due date. Each member shall be deemed to consent and agree to the deductions made and provided for in this section by continuing employment with the affiliated public employer. Contributions by members shall be credited to the members' individual accounts in the member contribution fund.

B. A member's accumulated contributions shall be transferred to the retirement reserve fund if a pension becomes payable upon the retirement or death of the member or vested former member. If a disability pension is terminated for a reason other than the death of the retired member before an amount equal to the retired member's accumulated member contributions has been paid, the unexpended balance of the accumulated member contributions shall be transferred from the retirement reserve fund to the former retired member's individual account in the member contribution fund.

C. Except as provided in Section 136 [10-11-136 NMSA 1978] of the Public Employees Retirement Act, the accumulated member contributions of a former member or a member on leave of absence from an affiliated public employer as a consequence of the entry into active duty with the armed forces of the United States shall be paid to the former member upon written application.

D. If a member or former member dies and no pension becomes payable on account of the death, the deceased member's or former member's accumulated member contributions shall be paid to the refund beneficiary named in the most recent designation of refund beneficiary on file with the association unless that beneficiary is deceased. If there is not a living refund beneficiary named in the most recent designation of refund beneficiary on file with the association, the deceased member's or former member's accumulated member contributions shall be paid to the estate of the deceased member or former member.

E. Except as otherwise provided in the Public Employees Retirement Act, at the expiration of a period of five years from the date a member ceases to be a member, the member's accumulated member contributions unclaimed by the the former member or refund beneficiary shall be transferred to the income fund.

**History:** Laws 1987, ch. 253, § 124.

**Where mandatory duty on department heads.** - By the very wording of the statute a mandatory duty is placed upon each department head to see that proper deductions are made from eligible employees' salaries so that proper credit can be received by such employees under the terms and provisions of the public employees' retirement system of New Mexico. 1955-56 Op. Att'y Gen. No. 6370.

**Contributions not exempt from state income tax.** - The amounts deducted from the salaries of public employees for Public Employees Retirement Act contributions are not exempt from the state income tax. 1982 Op. Att'y Gen. No. 82-9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Retroactive change in rate of employee's contribution to public pension fund, validity of, 78 A.L.R.2d 1197.

81A C.J.S. States §§ 46, 112 to 119.

### **10-11-125. Member contributions; tax treatment.**

Upon implementation, each affiliated public employer shall, solely for the purpose of compliance with Section 414(h) of the Internal Revenue Code, pick up, for the purposes specified in that section, member contributions required by the Public Employees Retirement Act [this article] for all salary earned by the member after implementation. Member contributions picked up under the provisions of this section shall be treated as affiliated public employer contributions for purposes of determining income tax obligations under the Internal Revenue Code; however, such picked up member contributions shall be included in the determination of the member's gross annual salary for all other purposes under federal and state laws. Members' contributions picked up under this section shall continue to be designated member contributions for all purposes of the Public Employees Retirement Act and shall be considered as part of the member's salary for purposes of determining the amount of the member's contribution. The provisions of this section are mandatory, and the member shall have no option concerning the pick up or to receive the contributed amounts directly instead of having them paid by the affiliated public employer to the association. With respect to members employed by an affiliated public employer other than the state, implementation occurs upon the employer's filing of a resolution with the association stating the employer's intent to pick up member contributions as provided in this section. With respect to members employed by the state, implementation occurs upon authorization by the association. In no event may implementation occur other than at the beginning of a pay period.

**History:** Laws 1987, ch. 253, § 125.

**Internal Revenue Code.** - Section 414(h) of the Internal Revenue Code, referred to in the first sentence, appears as 26 U.S.C. § 414(h).

## **10-11-126. Employers accumulation fund; employers contributions; transfers to retirement reserve fund.**

A. The employers accumulation fund is the fund in which shall be accumulated contributions by affiliated public employers. Except as provided in Section 5 [10-11-5 NMSA 1978] of the Public Employees Retirement Act, an affiliated public employer shall remit its contributions to the association in accordance with the procedures and schedules established by the association. The association may assess an interest charge and a penalty charge on any remittance not made by its due date.

B. Each year following receipt of the report of the annual actuarial valuation, the excess, if any, of the reported actuarial present value of pensions being paid and likely to be paid to retired members and survivor pension beneficiaries and residual refunds likely to be paid to refund beneficiaries of retired members and to survivor pension beneficiaries over the balance in the retirement reserve fund shall be transferred to the retirement reserve fund from the employers accumulation fund.

**History:** Laws 1987, ch. 253, § 126.

**Employee contributions not exempt from state income tax.** - The amounts deducted from the salaries of public employees for the Public Employees Retirement Act contributions are not exempt from the state income tax. 1982 Op. Att'y Gen. No. 82-9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States §§ 46, 112 to 119.

## **10-11-127. Retirement reserve fund.**

The retirement reserve fund is the fund from which shall be paid all pensions to retired members and survivor pension beneficiaries and all residual refunds to refund beneficiaries of retired members and survivor pension beneficiaries.

**History:** Laws 1987, ch. 253, § 127.

## **10-11-128. Income fund.**

The income fund is the fund to which shall be credited all interest, dividends, rents and other income from investments of the association, all gifts and bequests, all unclaimed member contributions and all other money the disposition of which is not specifically provided for in the Public Employees Retirement Act [this article]. There shall be paid or transferred from the income fund all administrative expenses of the association.

**History:** Laws 1987, ch. 253, § 128.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States §§ 46, 112 to 119.

## **10-11-129. Distribution of income fund.**

The association shall at least annually distribute all or a portion of the balance in the income fund to the member contribution fund, the retirement reserve fund and the employer accumulation fund. Distribution rates shall be determined by the retirement board and may vary by fund.

**History:** Laws 1987, ch. 253, § 129.

## **10-11-130. Retirement board; authority; membership.**

A. The retirement board is hereby created and shall be the trustee of the association and shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the Public Employees Retirement Act [this article] including, in addition to any specific powers provided for in the Public Employees Retirement Act, but without limiting the generality of the foregoing, the power:

(1) to administer the Public Employees Retirement Act, including the management of the association and making effective the provisions of that act, as well as to administer and manage any other employee benefit acts as provided by law;

(2) in addition to utilizing services of the attorney general, to employ competent legal counsel to handle the legal matters of the retirement board and the association and to give advice and counsel in regard to any matter connected with the duties of the retirement board and, in the discretion of the retirement board;

(3) to administer oaths;

(4) to adopt and use a seal for authentication of records, processes and proceedings;

(5) to create and maintain records relating to all members, affiliated public employers and all activities and duties required of the retirement board;

(6) to issue subpoenas and compel the production of evidence and attendance of witnesses in connection with any hearings or proceedings of the retirement board;

(7) to make and execute contracts;

(8) to purchase, acquire or hold land adjacent to the state capital [capitol] grounds or other suitable location and build thereon a building to house the public employees retirement association and its employees; and in the event additional office space is available in the building after the retirement board and its employees have been housed, to rent or lease the additional space to any public agency or private person, provided that first priority for the rental or leasing shall be to public agencies, and further provided that for the purpose of purchasing, acquiring or holding the land and the building thereon the retirement board may use funds from the "income fund" and any

other funds controlled by the retirement board the use of which for such purposes is not prohibited by law;

(9) to make and adopt such reasonable rules and regulations as may be necessary or convenient to carry out the duties of the retirement board and activities of the association, including any rules and regulations necessary to preserve the status of the association as a qualified pension plan under the provisions of the Internal Revenue Code of the United States, as amended, or under successor or related provisions of law; and

(10) to designate committees and to designate committee members, including individuals who may not be members of the association.

B. The retirement board shall consist of:

(1) the secretary of state;

(2) the state treasurer;

(3) four members under a state coverage plan to be elected by the members under state coverage plans;

(4) four members under a municipal coverage plan to be elected by the members under municipal coverage plans, provided at least one member shall be a municipal member employed by a county; and

(5) one retired member to be elected by the retired members of the association.

C. The elections of elected members of the retirement board shall be held at the time of the annual meeting of the association and shall be conducted according to rules and regulations the retirement board shall from time to time adopt.

D. The regular term of office of the elected members of the retirement board shall be four years. The term of one retirement board member under a state coverage plan shall expire annually on December 31. The terms of retirement board members under a municipal coverage plan shall expire on December 31 of noncoinciding years in the pattern set by the retirement board. Members of the retirement board shall serve until their successors have qualified.

E. A member elected to the retirement board who fails to attend four consecutively scheduled meetings of the retirement board, unless in each case excused for cause by the retirement board members in attendance, shall be considered to have resigned from the retirement board, and the retirement board shall by resolution declare the office vacated as of the date of adoption of the resolution. A vacancy occurring on the retirement board, except in the case of an elected official, shall be filled by the remaining retirement board members, without requirement that a quorum be present



until the next election of the association, at which time a successor shall be elected for the remainder of the vacated term.

F. Members of the retirement board shall serve without additional salary for their services as retirement board member, but they shall receive as their sole remuneration for services as members of the retirement board those amounts authorized under the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

G. The retirement board shall hold four regular meetings each year and shall designate in advance the time and place of the meetings. Special meetings and emergency meetings of the retirement board may be held upon call of the chairman or any three members of the retirement board. Written notice of special meetings shall be sent to each member of the retirement board at least seventy-two hours in advance of the special meeting. Verbal notice of emergency meetings shall be given to as many members as is feasible at least eight hours before the emergency meeting and the meeting shall commence with a statement of the nature of the emergency. The retirement board shall adopt its own rules of procedure and shall keep a record of its proceedings. All meetings of the retirement board shall comply with the Open Meetings Act [10-15-1 to 10-15-4 NMSA 1978]. A majority of retirement board members shall constitute a quorum. Each attending member of the retirement board is entitled to one vote on each question before the retirement board, and at least a majority of a quorum shall be necessary for a decision by the retirement board.

H. Annual meetings of the members of the association shall be held in Santa Fe at such time and place as the retirement board shall from time to time determine. Special meetings of the members of the association shall be held in Santa Fe upon call of any seven retirement board members. The retirement board shall send a written notice to the last known residence address of each member at least ten days prior to any meeting. The notice shall contain the call of the meeting and the principal purpose of the meeting. All meetings of the association shall be public and shall be conducted according to procedures the retirement board shall from time to time adopt. The retirement board shall keep a record of the proceedings of each meeting of the association.

**History:** Laws 1987, ch. 253, § 130.

**Effect of employment termination on board membership.** - There is nothing in the Retirement Act for the termination of membership on the retirement board upon termination of employment. 1959-60 Op. Att'y Gen. No. 59-191.

**The public office of member of the Public Employees Retirement Board,** a state agency, is a nonsalaried, policy-making position. Board members have no constitutionally protected property interest in the position. 1989 Op. Att'y Gen. No. 89-24.

**Amendment to board rule concerning nominations to the board was legal**, where the board complied with procedural rule-making requirements, the rule did not conflict with the board's statutory authority, and the amendment did not operate retroactively to divest any nominee of any vested right. 1989 Op. Att'y Gen. No. 89-24.

**Rule limiting member composition to one member complies with subsection.** - Subsection B(4) requires that "at least one" municipal member on the board be a county employee, but does not require that more than one be a county employee. Therefore, a board rule limiting the municipal member composition to only one county member complies with the subsection. 1989 Op. Att'y Gen. No. 89-24.

### **10-11-131. Retirement board; officers; employment of services.**

A. The retirement board shall elect from its own number a chairman and a vice chairman.

B. The retirement board shall appoint an executive secretary who shall be the chief administrative officer for the retirement board and the association.

C. The retirement board shall employ professional, technical, clerical and other services as required for the operation of the association. The compensation for employed services shall be fixed by the retirement board.

D. The state treasurer shall be the treasurer of the association and the custodian of its funds. The treasurer's general bond to the state shall cover all liability for acts as treasurer of the association. The treasurer shall credit all receipts of money and assets of the association to the association. The treasurer shall make disbursements from association assets only upon warrants issued by the secretary of finance and administration based upon vouchers signed by the executive secretary or vouchers signed by the state treasurer for purposes of investment.

**History:** Laws 1987, ch. 253, § 131.

**Generally, as to salary of executive secretary.** - The retirement board has the authority to fix the salary of the executive secretary of such board, and in the absence of any attempt of the state personnel board to classify the position and fix the salary of the executive secretary, no consent or approval from said board is required. 1955-56 Op. Att'y Gen. No. 6070.

### **10-11-132. Investment of funds; types of investments; indemnification of board members.**

The retirement board is trustee of the several funds created by the Public Employees Retirement Act [this article]. Members of the retirement board jointly and individually shall be indemnified from the funds by the state from all claims, demands, suits, actions, damages, judgments, costs, charges and expenses, including court costs and attorneys'

fees, and against all liability losses and damages of any nature whatsoever that members shall or may at any time sustain by reason of any decision made in the performance of their duties pursuant to this section. The retirement board may invest and reinvest the funds in the following classes of securities and investments, subject to the approval of the state investment council after explanation and presentation of the investment plan:

A. bonds, notes or other obligations of the United States or those guaranteed by or for which the credit of the United States is pledged for the payment of the principal and interest;

B. bonds, notes or other obligations of a municipality or other political subdivision of this state issued pursuant to a law of this state if the issuer, within ten years prior to making the investment, has not been in default for more than three months in payment of any part of the principal or interest on any debt evidenced by its bonds, notes or other obligations. If any bonds are municipal or county utility revenue bonds or utility district revenue bonds, the revenues of the utility, except for operation and maintenance expenses, shall be pledged wholly to the payment of the interest and principal of the indebtedness and the utility project shall have been completely self-supporting for a period of five years next preceding the date of investment;

C. bonds, debentures or other obligations issued by a federal land bank or by a federal intermediate credit bank under the act of congress of July 17, 1916 known as the Federal Farm Loan Act, as amended;

D. bonds, debentures or other obligations issued or guaranteed by any national mortgage association under the act of congress of June 27, 1934 known as the National Housing Act, as amended;

E. bonds, notes or commercial paper of any corporation organized and operating within the United States or preferred stock, common stock or American depository receipts of any corporations whose securities are listed on at least one stock exchange recognized by the securities and exchange commission or on the national association of securities dealers national market; provided that the corporations shall have a minimum net worth of twenty-five million dollars (\$25,000,000); or provided that the securities shall have a minimum credit rating of BAA or its equivalent; provided that the funds for which the retirement board is trustee shall not at any one time own more than ten percent of the voting stock of a company; and provided that in the investment of the funds, not more than seventy-five percent of the total amount of the funds shall at any time be invested in corporate securities;

F. revenue-producing bonds issued by the capitol buildings improvement commission for the purpose of purchasing and clearing land and building buildings under a long range plan of capitol grounds improvement;

G. bonds, debentures or notes issued by banks or savings and loan associations domiciled in New Mexico whose deposits and savings accounts are insured by an agency of the United States, provided the notes are:

(1) secured by mortgages upon dwellings located in New Mexico and suitable for occupancy by not more than four families or secured by obligations of the United States or obligations fully guaranteed by the United States, subject to regulations, restrictions and limitations prescribed by the retirement board. Any such investment is subject to the following limitations as to amount:

(a) if secured by a mortgage insured under the provisions of Title 1, 2, 6, 8 or 9 of the National Housing Act, the investment may be for an amount not in excess of ninety percent of the unpaid principal of the mortgage loan;

(b) if secured by a home mortgage given in respect of any home mortgage loan, the investment shall not be for an amount in excess of fifty percent of the unpaid principal of the home mortgage loan, but in no case shall the amount of the investment exceed forty percent of the value of the real estate securing the home mortgage loan; or

(c) if secured by obligations of the United States, the investment shall not be for an amount in excess of the face value of the obligations;

(2) no home mortgage shall be accepted as collateral security for an investment if, at the time the investment is made:

(a) the home mortgage loan secured by it has more than thirty years to run to maturity, unless the home mortgage is insured under the National Housing Act, as amended or insured or guaranteed under the Servicemen's Readjustment Act of 1944, as amended, Chapter 37 of Title 38;

(b) the home mortgage exceeds a sum equal to forty thousand dollars (\$40,000) for each home or other dwelling unit covered by the mortgage; or

(c) is past due;

(3) no home mortgage otherwise eligible to be accepted as collateral security for an investment shall be accepted if any director, officer, employee, attorney or agent of the borrowing institution is personally liable thereon;

(4) the bank or savings and loan association applying for an investment in its notes secured as provided in this subsection shall enter into a primary and unconditional obligation to pay off all such investments, together with interest and any unpaid costs and expenses in connection therewith, according to the terms under which they were made, in a form which meets the approval of the retirement board; and

(5) notes secured as provided in this subsection shall be repayable at any time without penalty or extra cost upon thirty days' written notice to the retirement board;

H. insured savings deposits or insured savings accounts of banks or savings and loan associations domiciled in this state, the deposits and accounts of which are insured by an agency of the United States;

I. industrial revenue bonds issued pursuant to the Industrial Revenue Bond Act [3-32-1 to 3-32-16 NMSA 1978] where both the principal and interest of the bonds are fully and unconditionally guaranteed by a lease agreement executed by a corporation organized and operating within the United States and which has net assets of at least ten million dollars (\$10,000,000) and has issued securities traded on one or more national stock exchanges and where the senior securities of the guaranteeing corporation would have the equivalent of a BAA rating;

J. notes or obligations securing loans to New Mexico businesses made by banks and savings and loan associations pursuant to the act of congress of July 30, 1953, known as the Small Business Act of 1953, as amended, only to the extent that both principal and interest are guaranteed by the United States government. The applicant bank or savings and loan association shall be required to enter into an indemnity agreement which meets the approval of the retirement board and to pay off the investments, together with interest and any unpaid costs and expenses in connection therewith, in the event the United States government refuses to honor its guarantee. The retirement board may enter into conventional agreements for the servicing of the loans and the administration of the receipts therefrom. Any servicing agreement may contain such reasonable and customary provisions as the retirement board may deem advisable and as may be agreed upon;

K. notes or obligations securing loans or participation in loans to business concerns or other organizations which are obligated to use the loan proceeds within New Mexico, to the extent the loans are secured by first mortgages on real estate located in New Mexico and are further secured by an assignment of rentals, the payment of which is fully guaranteed by the United States in an amount sufficient to pay all principal and interest of the mortgages;

L. notes or obligations securing loans issued by banks and savings and loan associations pursuant to Title IV of the act of congress of November 8, 1965, known as the Higher Education Act of 1965, as amended, only to the extent that both principal and interest are guaranteed unconditionally by the United States government. The applicant banks or savings and loan associations shall enter into an indemnity agreement to pay off the investments, together with interest and any unpaid costs and expenses in connection therewith, according to the terms under which they are made in a form which meets the approval of the retirement board. The retirement board may enter into conventional agreements for the servicing of the loans and the administration of the receipts therefrom. Any servicing agreement may contain such reasonable and

customary provisions as the retirement board may deem advisable and as may be agreed upon; and

M. contracts, including contracts through its designated agent, for the temporary exchange of securities for the use by broker-dealers, banks or other recognized institutional investors, for periods not to exceed one year, for a specified fee or consideration; provided no such contracts shall be entered into unless the contracts are fully secured by a collateralized, irrevocable letter of credit running to the board, cash or equivalent collateral of at least one hundred two percent of the market value of the securities plus accrued interest temporarily exchanged, which collateral shall be delivered to the state fiscal agent or its designee contemporaneously with the transfer of funds or delivery of the securities; and further provided that such contracts may authorize the board to invest cash collateral in instruments or securities which are authorized investments for the funds and may authorize payment of a fee from the funds or from income generated by the investment of cash collateral to the borrower of securities providing cash as collateral, and the retirement board may apportion income derived from the investment of cash collateral to pay its agent in securities lending transactions.

**History:** Laws 1987, ch. 253, § 132; 1989, ch. 46, § 1.

**The 1989 amendment**, effective June 16, 1989, added "indemnification of board members" to the catchline, restructured the undesignated introductory paragraph so as to add the present second sentence and made minor stylistic changes in the present third sentence, deleted "or dividends" at the end of Subsection A, rewrote Subsection E, and added Subsection M.

**Federal Farm Loan Act.** - The Federal Farm Loan Act, referred to in Subsection C, appeared as various sections throughout Title 12 that are now repealed.

**National Housing Act.** - For the National Housing Act, referred to in Subsection D, see 12 U.S.C. § 1701 et seq. Titles 1, 2, 6, 8 and 9 of the act, referred to in Subsection G(1)(a), appear as Subchapters I, II, VI, VIII and X of Title 12.

**Servicemen's Readjustment Act of 1944.** - The Servicemen's Readjustment Act of 1944, referred to in Subsection G(2)(a), was repealed and reenacted as 38 U.S.C. § 1801 et seq. in 1958.

**Small Business Act.** - The Small Business Act of 1953, referred to in Subsection J, is compiled as 15 U.S.C. §§ 631 to 647.

**Title IV of the Higher Education Act of 1965.** - For Title IV of the Higher Education Act of 1965, referred to in Subsection L, see 20 U.S.C. §§ 1070 to 1089; 42 U.S.C. § 2751 et seq.

**Investment in mortgages.** - Under this section, and without violating its fiduciary obligation as trustee, the retirement board may properly invest in a share of a mortgage guaranteed by the United States and the federal housing administration. 1957-58 Op. Att'y Gen. No. 58-172.

### **10-11-133. Investment of funds; conditions.**

A. Commissions paid for the purchase and sale of any security shall not exceed brokerage rates prescribed and approved by national stock exchanges or by industry practice.

B. Investments of money from any fund of the association shall be made with the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation but for investment, considering the probable safety of their capital as well as the probable income to be derived. All purchases shall be made at the current market price at the time of purchase.

C. Securities purchased with money from or held for any fund of the association shall be in the custody of the state treasurer who shall, at the direction of the retirement board, deposit with a bank or trust company the securities for safekeeping or servicing.

D. The retirement board shall consult with the state investment council or state investment officer and request information or advice with respect to the retirement board's overall investment plan and shall utilize the services of the state investment council and state investment officer and act on their advice concerning the plan. The state investment council and state investment officer shall render investment services to the retirement board without expense to the retirement board. The retirement board may also employ the investment management services of a trust company or national bank exercising trust powers or of an investment counseling firm and pay reasonable compensation for such services from funds of the association. The terms of any such investment management services contract shall incorporate the statutory requirements for investment of funds under the retirement board's jurisdiction.

E. Except as provided in the Public Employees Retirement Act [this article], no member of the retirement board, employee of the retirement board or any person connected with the retirement board in any manner shall:

(1) have any direct or indirect interest in the gains or profits of any investment made by the retirement board;

(2) receive any direct or indirect pay or emolument for services provided the retirement board or the association;

(3) directly or indirectly, for the member, employee or person for themselves or as agent or partner of others, borrow any of the funds or deposits of the association or in any

manner use them except to make current and necessary payments authorized by the retirement board; or

(4) become an endorser or surety or become in any manner an obligor for money of the retirement board loaned or borrowed.

**History:** Laws 1987, ch. 253, § 133; 1989, ch. 46, § 2.

**The 1989 amendment**, effective June 16, 1989, in Subsection D deleted "which is accredited by or a member of the investment council of America, incorporated" following "firm" in the third sentence.

### **10-11-134. Survivor benefit fund; disposition.**

A. The pensions being paid from the survivor benefit fund on June 30, 1987 shall thereafter be paid from the retirement reserve fund.

B. The actuarial present value of pensions being paid from the survivor benefit fund on June 30, 1987 shall be transferred from the survivor benefit fund to the retirement reserve fund.

C. Affiliated public employer contributions to the survivor benefit fund shall be discontinued effective the first full pay period after June 30, 1987.

D. Each affiliated public employer contributing to the survivor benefit fund as of June 30, 1987 shall have its equity in the survivor benefit fund credited toward future employer contributions. The amount of credit shall be transferred from the survivor benefit fund to the employer accumulation fund as credits are earned.

E. The association shall determine the equity of each affiliated public employer in the survivor benefit fund in proportion to contributions made during the year ended June 30, 1986 and the number of months the affiliated public employer has contributed to the survivor benefit fund. The determination shall be made after the provisions of Subsections A and B of this section have been implemented.

**History:** Laws 1987, ch. 253, § 134.

**Compiler's note.** - Laws 1987, ch. 355, § 10 provides that notwithstanding other acts of the legislature, the contributions made by the New Mexico state police and the corrections department to the public employees' retirement association for the survivors' benefit fund are hereby suspended.

### **10-11-135. Funds not subject to process.**

Except as provided in Sections 10-11-136 and 10-11-136.1 NMSA 1978, none of the money, pensions or other benefits mentioned in the Public Employees Retirement Act



[this article] shall be assignable either in law or in equity or be subject to execution, levy, attachment, garnishment or other legal process.

**History:** Laws 1987, ch. 253, § 135; 1989, ch. 125, § 1; 1990, ch. 49, § 14.

**The 1989 amendment,** effective June 16, 1989, substituted "Sections 10-11-136 and 10-11-136.1 NMSA 1978" for "Section 136 of the Public Employees Retirement Act".

**The 1990 amendment,** effective May 16, 1990, deleted "and shall be exempt from any state income tax" at the end of the section.

**Applicability.** - Laws 1990, ch. 49, § 24, makes the provisions of the act applicable to taxable years beginning on or after January 1, 1990.

**Enactment reflects legislative recognition.** - This enactment is simply a recognition by the legislature that for the most part persons drawing state retirement benefits are those of advanced age whose economic situation in living on a small fixed income in a period of rising prices is already perilous. 1961-62 Op. Att'y Gen. No. 62-13.

**Effect of state income tax amendments.** - The 1961 amendment of the statutes relative to state income tax did not have the effect of making annuities and benefits paid pursuant to the Public Employees' Retirement Act subject to state income tax. 1961-62 Op. Att'y Gen. No. 62-13.

**Income tax exemptions may be properly denied.** - The legislature may grant a special income tax exemption to one kind of public employee, teachers, yet deny the same exemption to other public employees. *Vaughn v. State, Taxation & Revenue Dep't*, 98 N.M. 362, 648 P.2d 820 (Ct. App. 1982).

**"Trading" tax exemptions for health care.** - Repeal of the state income tax exemptions for teacher pensions and public employee pensions does not remedy constitutional defects of the proposed retiree health care act under a theory that those exemptions would be "traded" for retiree health care. Those exemptions are not property rights, irrevocable contractual entitlements, or pension benefits. Hence, elimination of the favorable tax treatment for current retirees is not consideration for a multi-million dollar health care plan that the state proposes to provide them. 1990 Op. Att'y Gen. No. 90-03.

**Law reviews.** - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

## **10-11-136. Division of funds as community property.**

A court of competent jurisdiction, solely for the purposes of effecting a division of community property, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the Public

Employees Retirement Act [this article]. In so doing, the court shall fix the manner in which warrants shall be issued, may order direct payments to a person with a community interest in the pensions or other benefits, may require the election of a specific form of payment and designation of a specific survivor pension beneficiary, refund beneficiary or survivor pension beneficiary designated in accordance with Section 10-11-14 NMSA 1978 and may restrain the refund of accumulated member contributions. The court shall not alter the manner in which the amount of pensions or other benefits is calculated by the association or cause any increase in the actuarial present value of the pensions or other benefits to be paid by the association.

**History:** Laws 1987, ch. 253, § 136; 1991, ch. 149, § 2.

**The 1991 amendment**, effective July 1, 1991, inserted "may require the election of a specific form of payment and designation of a specific survivor pension beneficiary, refund beneficiary or survivor pension beneficiary designated in accordance with Section 10-11-14 NMSA 1978" in the second sentence and made minor stylistic changes.

### **10-11-136.1. Legal process to satisfy child support obligations.**

A court of competent jurisdiction, solely for the purposes of enforcing current or delinquent child support obligations, may provide by appropriate order for withholding amounts due in satisfaction of current or delinquent child support obligations from the pensions or other benefits provided for in Public Employees Retirement Act [this article] and for payment of such amounts to third parties. The court shall not alter the manner in which the amount of pensions or other benefits is calculated by the association. The court shall not cause any increase in the actuarial present value of the pensions or other benefits to be paid by the association. Payments made pursuant to such orders shall only be made when the member terminates public employment and requests a refund of contributions or when the member retires; in no case shall more money be paid out, either in a lump sum or in monthly benefits, of association funds in enforcement of current or delinquent child support obligations than would otherwise be payable at that time.

**History:** 1978 Comp., § 10-11-136.1, enacted by Laws 1989, ch. 125, § 2.

**Effective dates.** - Laws 1989, ch. 125 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **10-11-137. Insurance and banking laws not applicable.**

None of the laws of this state regulating insurance or insurance companies or banking institutions shall apply to the association.

**History:** Laws 1987, ch. 253, § 137.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 243.

### **10-11-138. Gifts and bequests.**

The retirement board is authorized and empowered to receive donations, gifts and bequests and credit them to the income fund.

**History:** Laws 1987, ch. 253, § 138.

**Effect of gift on annuity.** - A retired member of the public employees' retirement association who was granted an annuity effective March 20, 1957, of \$66.13 per month could not reduce his annuity by \$1.00 per month by contributing or giving said \$1.00 per month as a gift to the public employees' retirement association. 1959-60 Op. Att'y Gen. No. 59-119.

**Public Employees Retirement Board members could not accept expense-paid trip.** - Public Employees Retirement Board members could not accept an offer of an expense-paid trip to Columbus, Ohio to be hosted by Public Employees Benefit Services Corporation. 1989 Op. Att'y Gen. No. 89-21.

### **10-11-139. Definitions.**

For purposes of this act, the definitions set forth in the Public Employees' Retirement Act [Chapter 10, Article 11 NMSA 1978] or any successor act or acts shall apply.

**History:** Laws 1987, ch. 176, § 1.

**Compiler's note.** - Sections 10-11-139 and 10-11-140 NMSA 1978, enacted by Laws 1987, Chapter 176, were added to the end of Article 11 of Chapter 10 NMSA 1978 by the compiler and may not be part of the Public Employees Retirement Act.

**Meaning of "this act".** - The term "this act" refers to Laws 1987, ch. 176, which appears as 10-11-139 and 10-11-140 NMSA 1978.

### **10-11-140. Purchase of service credit. (Effective until July 1, 1992.)**

A local government affiliated public employer of the public employees retirement association which assumes a fire-fighting function previously provided by the United States government may, at the time of the assumption of the fire-fighting function, provide credited service for retirement board purposes to any employees who were previously employed by a fire-fighting unit of the United States government in connection with the assumed fire-fighting function. The credited service may be provided by the local government affiliated public employer subject to the following conditions:

A. the employee shall pay to the retirement board the difference between the actuarial present value of association benefits likely to be paid the employee computed with and without the United States government service;

B. the employee, within one year of the assumption of the governmental function, irrevocably forfeits all rights based upon employee contributions in and to the immediate vested or nonvested retirement benefits under the retirement program of the United States government in which the employee was participating immediately prior to the assumption of the governmental function; and

C. the payments made under Subsections A and B of this section shall be made in a lump sum or by entering into an installment contract for up to thirty-six months with the retirement board at the regular interest rates and under the standard conditions set for such installment contracts by the retirement board. The employee may purchase service credit equivalent to the employee's United States government service up to a maximum of ten years' service credit. The employee shall make a written election concerning payment not later than June 30, 1992 and any election made thereafter shall be void and of no effect.

**History:** Laws 1987, ch. 176, § 2; 1988, ch. 110, § 1; 1989, ch. 80, § 1.

**Delayed repeals.** - Laws 1989, ch. 80, § 2 repeals 10-11-140 NMSA 1978, as amended by Laws 1988, ch. 110, § 1, relating to purchase of service credit, effective July 1, 1992. For provisions of former section, see 1988 Supplement.

**The 1989 amendment,** effective June 16, 1989, inserted "public employees retirement" near the beginning of the first sentence of the undesignated introductory paragraph, and substituted "1992" for "1989" in the last sentence of Subsection C.

**Compiler's note.** - Sections 10-11-139 and 10-11-140 NMSA 1978, enacted by Laws 1987, Chapter 176, were added to the end of Article 11 of Chapter 10 NMSA 1978 by the compiler and may not be part of the Public Employees Retirement Act.

The delayed repeal of this section by Laws 1989, ch. 80, § 2 may not have any effect since the attempted delayed repeal was not of current 10-11-140 NMSA 1978, but of that section as amended by Laws 1988, ch. 110, § 1.

## **ARTICLE 11A**

### **VOLUNTEER FIREFIGHTERS RETIREMENT**

#### **10-11A-1. Short title.**

This act [10-11A-1 to 10-11A-7 NMSA 1978] may be cited as the "Volunteer Firefighters Retirement Act".

**History:** Laws 1983, ch. 263, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 60A Am. Jur. 2d Pensions and Retirement Funds §§ 1616, 1633, 1635.

62 C.J.S. Municipal Corporations §§ 595, 614.

## **10-11A-2. Definitions.**

As used in the Volunteer Firefighters Retirement Act [10-11A-1 to 10-11A-7 NMSA 1978]:

- A. "association" means the public employees' retirement association;
- B. "board" means the retirement board of the public employees' retirement association;
- C. "fire department" means any volunteer fire department certified by the state fire marshal's office;
- D. "fund" means the volunteer firefighters retirement fund; and
- E. "member" means any volunteer nonsalaried firefighter who is listed as an active member on the rolls of a fire department and whose first year of service credit was accumulated during or after the year he attained the age of sixteen and no later than during the year in which he attained the age of forty-five. Excluded from membership is any volunteer nonsalaried firefighter who has been retired by or is receiving an annuity from any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions, except the state police pension fund established under the provisions of Sections 29-4-1 through 29-4-11 NMSA 1978.

**History:** Laws 1983, ch. 263, § 2.

**Membership exclusions.** - A Public Employees Retirement Act member, having entitlement to PERA retirement benefits upon meeting the necessary age and service requirements, may not also participate in and receive benefits under the Volunteer Firefighters Retirement Act. 1987 Op. Att'y Gen. No. 87-75.

## **10-11A-3. Volunteer firefighters retirement fund; creation; transfer of funds from the fire protection fund.**

A. There is created the "volunteer firefighters retirement fund" in the state treasury. All annuities and benefits in lieu of annuities shall be paid from the fund as provided in the Volunteer Firefighters Retirement Act [10-11A-1 to 10-11A-7 NMSA 1978].

B. Beginning in the seventy-third fiscal year, the state treasurer shall transfer annually on or before the last day of July five hundred thousand dollars (\$500,000) from the fire protection fund to the credit of the volunteer firefighters retirement fund.

**History:** Laws 1983, ch. 263, § 3.

#### **10-11A-4. Administration of the Volunteer Firefighters Retirement Act, program and funds by the public employees' retirement board; annual actuarial evaluation.**

A. The provisions of the Volunteer Firefighters Retirement Act [10-11A-1 to 10-11A-7 NMSA 1978] and the volunteer firefighters retirement program authorized under that act shall be administered by the board. The provisions of law relating to the administration and investment of retirement funds administered by the board shall apply to all funds transferred and paid into the volunteer firefighters retirement fund. In its administration of the volunteer firefighters retirement program, the board is authorized to promulgate rules and regulations.

B. The board shall provide for an annual actuarial evaluation of the volunteer firefighters retirement fund and shall make recommendations to the legislature for any changes necessary to maintain the actuarial soundness of the fund.

**History:** Laws 1983, ch. 263, § 4.

#### **10-11A-5. Retirement benefits; eligibility.**

A. Any member who attains the age of fifty-five years and has twenty-five years or more of service credit shall be eligible to receive a retirement annuity of two hundred dollars (\$200), payable monthly from the fund during the remainder of his life.

B. Any member who attains the age of fifty-five years and has at least ten but less than twenty-five years or more of service credit shall be eligible to receive a retirement annuity of one hundred (\$100), payable monthly from the fund during the remainder of his life.

C. Any member who ceases to be a volunteer nonsalaried firefighter after completing at least ten but less than twenty-five years of service credit is eligible to receive upon attaining the age of fifty-five years a retirement annuity of one hundred dollars (\$100), payable monthly from the fund during the remainder of his life.

D. Any member who ceases to be a volunteer nonsalaried firefighter after completing twenty-five years of service credit is eligible to receive upon attaining the age of fifty-five years a retirement annuity of two hundred dollars (\$200), payable monthly from the fund during the remainder of his life.

E. Any member who qualifies for and receives a retirement annuity pursuant to this section may continue as an active member on the rolls of a fire department. However, such member shall not accrue additional service credit for the purpose of increasing the amount of his retirement annuity.

**History:** Laws 1983, ch. 263, § 5.

### **10-11A-6. Determination of service credit.**

A. A member may claim one year of service credit for each year in which a fire department certifies that the member:

- (1) attended seventy-five percent of all scheduled fire drills;
- (2) attended seventy-five percent of all scheduled business meetings; and
- (3) participated in at least fifty percent of all emergency response calls for which the fire department held him responsible to attend.

B. The chief of each fire department shall submit to the state fire marshal's office by April 30 of each year the records of attendance of members for emergency response calls, fire drills and business meetings during the preceding calendar year; provided, he shall:

- (1) submit such records on forms provided by the state fire marshal's office;
- (2) acknowledge the truth of the records under oath before a notary public; and
- (3) have the notarized forms signed by the mayor, if distributions from the fire protection fund for the fire department are made to an incorporated municipality, or the chairman of the county commission, if distributions from the fire protection fund for the fire department are made to an independent fire district.

**History:** Laws 1983, ch. 263, § 6.

### **10-11A-7. Retirement annuity; surviving spouse.**

In the event a retirement annuitant dies, the surviving spouse shall receive an annuity equal to two-thirds of the retirement annuity being paid to the retirement annuitant at the time of death; provided, the annuity shall cease upon the surviving spouse's marriage or death.

**History:** Laws 1983, ch. 263, § 7.

# ARTICLE 12

## JUDICIAL RETIREMENT

### 10-12-1. Benefit eligibility.

A. Any person who attains the age of sixty-four years while occupying the office of judge or justice and who, upon retirement, has served as a judge or justice in any combination for not less than five years, continuously or otherwise, and has ceased to hold office by reason of expiration of his term or voluntary resignation shall receive his vested retirement allowance, payable in monthly installments from the judicial retirement fund during the remainder of his life. Any person who attains the age of sixty years while in one of those offices and who, upon retirement, has served as a judge or justice in any combination for not less than fifteen years, continuously or otherwise, and has ceased to hold office by reason of expiration of his term or voluntary resignation shall receive his vested retirement allowance during the remainder of his life, payable in monthly installments from the judicial retirement fund.

B. Any former judge or justice who is receiving retirement pay shall continue to receive only the annual amount of retirement pay fixed by the law in force at the date of his retirement; provided, however, that any former judge or justice shall receive cost-of-living adjustments pursuant to Section 10-12-1 NMSA 1978.

**History:** 1941 Comp., § 3-1624, enacted by Laws 1947, ch. 132, § 1; 1953, ch. 124, § 1; 1953 Comp., § 5-5-24; Laws 1959, ch. 19, § 1; 1963, ch. 251, § 1; 1966, ch. 28, § 17; 1971, ch. 181, § 1; 1980, ch. 136, § 1; 1987, ch. 241, § 4.

**Constitutionality of prior law.** - If retired district judges and retired supreme court justices were in state service at the time of the initial enactment of the Judges Retirement Law, such law would not be repugnant to N.M. Const., art. IX, § 14. 1957-58 Op. Att'y Gen. No. 57-221.

**Retirement prior to 1987 amendments.** - Judges who retired before Laws 1987, Chapter 241 became effective may not receive a cost-of-living increase to their retirement annuities pursuant to such law. 1988 Op. Att'y Gen. No. 88-66.

**Law reviews.** - For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?," see 9 Nat. Resources J. 446 (1969).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 46 Am. Jur. 2d Judges § 65.

48A C.J.S. Judges § 85.

### 10-12-1.1. Election.



Any judge or justice who occupies that office on or after July 1, 1984 shall elect to become subject to the provisions of the Judicial Retirement Act [this article] applicable to him by filing an irrevocable written election to do so with the secretary of state and that election will be effective upon filing.

**History:** Laws 1980, ch. 136, § 14; 1984, ch. 120, § 1.

### **10-12-1.2. Early retirement.**

A. Any person who has served as a judge or justice, or in any combination thereof, for not less than eighteen years may irrevocably elect to retire at any time between age fifty and age sixty and receive a percentage of his vested retirement allowance based upon the following formula:

70 percent of salary received during the last full year in office prior to retirement plus one-half of one percent annually times the number of years between age 50 and age 60 at the time of retirement.

B. In the event a judge or justice electing the option set forth in Subsection A of this section should subsequent to his retirement become a judge or justice, he shall be required to contribute to the judicial retirement fund at the same rate as any other judge or justice but shall receive no retirement allowance during the years of such subsequent service. Upon completion of the term of subsequent service or upon voluntary resignation, the judge or justice shall again receive his vested retirement allowance at the same percentage applicable to his earlier election.

C. The provisions of the Judicial Retirement Reciprocity Act [10-13-6 to 10-13-9 NMSA 1978] and Section 10-12-16 NMSA 1978 shall apply to the provisions of this section.

**History:** Laws 1987, ch. 241, § 3; 1988, ch. 51, § 1.

### **10-12-1.3. Credited service; credit for intervening military service.**

A. A judge or justice who during a term of office enters an armed service of the United States shall be given credited service for periods of active duty subject to the following conditions:

(1) the judge or justice returns to office within ninety days following termination of the period of active duty;

(2) the judge or justice reinstates any forfeited credited service;

(3) credited service shall not be given for periods of active duty following voluntary reenlistment; and

(4) credited service shall not be given for periods of active duty which are used to obtain or increase a benefit from another retirement program.

B. A judge or justice who entered an armed service of the United States may purchase credited service for periods of active duty subject to the following conditions:

(1) the judge or justice pays the judicial retirement fund the purchase cost determined according to Subsection C of this section;

(2) the judge or justice has five or more years of credited service;

(3) the aggregate amount of credited service purchased under this subsection does not exceed five years reduced by any period of credited service acquired for military service under any other provision of the Judicial Retirement Act [this article]; and

(4) credited service may not be purchased for periods of active duty which are used to obtain or increase a benefit from another retirement program.

C. The purchase cost for each year of credited service purchased under the provisions of this section shall be the increase in the actuarial present value of the benefits of the judge or justice under the Judicial Retirement Act as a consequence of the purchase, as determined by the public employees retirement association. Payment shall be made within sixty days of the date the judge or justice is informed of the amount of the payment. Except as provided in Subsection D of this section, three-quarters of the purchase cost shall be considered to be employer contributions and shall not be paid out of the association in the event of cessation of membership.

D. A judge or justice shall be paid, after retirement and upon written request filed with the public employees retirement association, the portion of the purchase cost of credited service purchased under this section which the association determines to have been unnecessary to provide the judge or justice with the maximum pension applicable to the judge or justice. The association shall not pay interest on the portion of the purchase cost refunded to the judge or justice.

**History:** Laws 1988, ch. 100, § 1.

## **10-12-2. Survivor's allowances.**

A. Upon the death of any judge or justice, the surviving spouse shall receive an annual survivor's allowance equal to seventy-five percent of the judge's or justice's vested retirement allowance, payable in monthly installments from the judicial retirement fund.

B. The surviving spouse of any former judge or justice who is receiving a survivor's allowance shall continue to receive only the amount of the survivor's allowance fixed by the law in force at the date the survivor became entitled to the allowance.

C. In the event a surviving spouse forfeited a survivor's allowance prior to the effective date of this 1983 amendment to Chapter 12 [10], Article 10 [12] NMSA 1978 [this article], that survivor's allowance shall be reinstated but only in the amount of the survivor's allowance fixed by the law in force at the date the survivor originally became entitled to the allowance.

**History:** 1953 Comp., § 5-5-24.1, enacted by Laws 1959, ch. 19, § 2; 1963, ch. 251, § 2; 1965, ch. 98, § 1; 1966, ch. 28, § 18; 1971, ch. 181, § 2; 1973, ch. 71, § 1, 1980, ch. 136, § 2; 1983, ch. 128, § 1; 1984, ch. 121, § 1.

**Compiler's note.** - The language "the effective date of this 1983 amendment to Chapter 12 [10], Article 10 [12] NMSA 1978," in Subsection C first appeared in Laws 1983, ch. 128, § 1. Laws 1983, ch. 128, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-2.1. Survivor's allowance for minor and dependent children.**

Whenever and to the extent that a survivor's allowance would be payable to a surviving spouse of a judge or a justice, but there is no qualified surviving spouse to receive that allowance, the survivor's allowance shall be paid to all minor and dependent children, if any, of the judge or justice, in equal shares, so long as each child remains a minor or dependent child. As each child ceases to have the status of a minor or dependent child, as the case may be, the number of shares shall be reduced and the amount payable to each remaining child increased proportionately so that the total survivor's allowance remains unchanged as long as there is any such child.

**History:** Laws 1980, ch. 136, § 13; 1983, ch. 128, § 2.

**Cross-references.** - As to determination of incapacity under the Judicial Retirement Act, see Rule 23-105.

### **10-12-3. Disablement benefits.**

After service as a judge or justice, or any combination, for five years, continuously or otherwise, any judge or justice who becomes incapacitated from carrying on the duties of his office due to physical or mental disability shall, upon determination of the disability and retirement from office, receive his vested retirement allowance, payable in monthly installments from the judicial retirement fund as long as the disability continues. If, after retirement under this section, a judge or justice dies while receiving retirement benefits, the surviving spouse shall receive the benefits provided by Section 10-12-2 NMSA 1978. The supreme court shall promulgate rules providing for a determination of incapacity under this section.

**History:** 1953 Comp., § 5-5-24.2, enacted by Laws 1963, ch. 251, § 3; 1965, ch. 98, § 2; 1966, ch. 28, § 19; 1971, ch. 181, § 3; 1973, ch. 71, § 2; 1980, ch. 136, § 3; 1983, ch. 128, § 3.

**Law reviews.** - For student symposium, "Constitutional Revision - Judicial Removal and Discipline - The California Commission Plan for New Mexico?," see 9 Nat. Resources J. 446 (1969).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

#### **10-12-4. Deferred retirement allowance.**

Any judge or justice who ceases to hold office by reason of expiration of his term or voluntary resignation, but who is ineligible by reason of age at the time of leaving office to receive immediately his vested retirement allowance, shall receive his vested retirement allowance upon reaching the age of sixty years if he has fifteen or more years of service in any combination of these positions, continuously or otherwise, or upon reaching the age of sixty-four years if he has five or more years of that service. The allowance shall be paid in monthly installments from the judicial retirement fund. Following his death, the surviving spouse shall receive a survivor's allowance of seventy-five percent of his vested retirement allowance, payable in the same manner.

**History:** 1953 Comp., § 5-5-24.3, enacted by Laws 1965, ch. 211, § 1; 1966, ch. 28, § 20; 1971, ch. 181, § 4; 1973, ch. 71, § 3; 1980, ch. 136, § 4; 1983, ch. 128, § 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

#### **10-12-5. Death before retirement eligibility; survivor's benefit.**

Whenever any judge or justice, or former judge or justice, dies and he has served not less than five years in any combination of these positions, continuously or otherwise, but is ineligible by reason of age at the time of death to receive immediately his vested retirement allowance, the surviving spouse shall receive an annual survivor's allowance in the amount of seventy-five percent of his vested retirement allowance. The allowance shall be paid in monthly installments from the judicial retirement fund.

**History:** 1953 Comp., § 5-5-24.4, enacted by Laws 1965, ch. 211, § 2; 1966, ch. 28, § 21; 1971, ch. 181, § 5; 1973, ch. 71, § 4; 1980, ch. 136, § 5; 1983, ch. 128, § 5.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

#### **10-12-6. Judicial Retirement Act; definitions.**

As used in the Judicial Retirement Act [this article]:

A. "current judge or justice" means a judge or justice occupying such an office on July 1, 1980 who has not made an effective election as provided in Section 10-12-1.1 NMSA 1978;

B. "dependent child" means a natural or adopted child who is physically or mentally incapable of self-support, regardless of age;

C. "former judge or justice" means a judge or justice who occupied such an office prior to July 1, 1980, but had ceased to hold such an office prior to that date and who has not made an effective election as provided in Section 10-12-1.1 NMSA 1978;

D. "judge" means a judge of the district court or court of appeals of the state of New Mexico;

E. "justice" means a justice of the supreme court of the state of New Mexico;

F. "minor child" means a natural child or adopted child who has not reached his eighteenth birthday nor been earlier emancipated by marriage or otherwise;

G. "new judge or justice" means:

(1) a judge or justice who first assumed such an office after July 1, 1980; and

(2) a judge or justice who occupied such an office on or before July 1, 1980 and who has made an effective election as provided in Section 10-12-1.1 NMSA 1978;

H. "years of service" shall be computed beginning that date a person commences to hold office as a judge or justice by reason of appointment or election and ending that date a person ceases to hold office as a judge or justice by reason of expiration of his term, voluntary resignation, death or disability and shall include fractions of years of service, if any; and

I. "vested retirement allowance" means:

**REFER TO THE BOOK FOR THE PROPER FORM**

**History:** 1953 Comp., § 5-5-24.5, enacted by Laws 1971, ch. 181, § 6; 1980, ch. 136, § 6; 1981, ch. 273, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

**10-12-7. Reinstatement of membership in judicial retirement fund.**

Any judge or justice who was a contributing member to the judicial retirement fund and has withdrawn his retirement contributions may elect to reinstate prior service credit under the Judicial Retirement Act [this article]. Prior service credit may be reinstated

upon the repayment of the accumulated contributions withdrawn plus contributions that would have been paid by the member if the member had not withdrawn from the fund, together with interest at the rate of six percent per year from the date the contribution was withdrawn and the contribution would have been paid. Repayment of the contribution and interest may be made in the period of time and under the terms as the public employees' retirement board may prescribe by regulation.

**History:** 1953 Comp., § 5-5-24.6, enacted by Laws 1973, ch. 321, § 1; 1980, ch. 136, § 7; 1984, ch. 120, § 2; 1985, ch. 34, § 1.

**Cross-references.** - As to the judicial retirement fund, see 10-12-8 NMSA 1978.

**Thirty-day option.** - Laws 1973, ch. 321, § 2, provides that "Any judge or justice who assumes office in 1973 before the effective date of this act and otherwise qualifies to exercise the election for reinstatement with restoration of service credit as provided in section 1 of this act, shall have thirty days from the effective date of this act to exercise such election."

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-8. Judicial retirement fund.**

Each district court clerk shall indicate the sum of thirty-eight dollars (\$38.00) from each civil case docket fee paid in the district court for credit to a fund in the state treasury designated the "judicial retirement fund".

**History:** 1941 Comp., § 3-1625, enacted by Laws 1947, ch. 132, § 2; 1953, ch. 124, § 2; 1953 Comp., § 5-5-25; Laws 1957, ch. 198, § 1; 1963, ch. 251, § 4; 1966, ch. 28, § 22; 1971, ch. 181, § 7; 1974, ch. 65, § 1; 1980, ch. 136, § 8; 1984, ch. 120, § 3; 1987, ch. 241, § 5.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-9. Judicial Retirement Act; member contributions.**

A. The department of finance and administration shall deduct ten percent from the salary payable to former or current judges or justices and cause the amount deducted to be paid into the judicial retirement fund.

B. The department of finance and administration shall deduct seven percent from the salary payable to new judges or justices and cause the amount deducted to be paid into the judicial retirement fund.

**History:** 1941 Comp., § 3-1626, enacted by Laws 1947, ch. 132, § 3; 1949, ch. 143, § 1; 1953, ch. 124, § 3; 1953 Comp., § 5-5-26; Laws 1966, ch. 28, § 23; 1971, ch. 181, § 8; 1974, ch. 65, § 2; 1980, ch. 136, § 9; 1984, ch. 120, § 4.

**Membership.** - A district judge, judge of the court of appeals or supreme court justice automatically is a member of the Judicial Retirement Act unless he waives such membership pursuant to the provisions of this section. 1969 Op. Att'y Gen. No. 69-1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-9.1. Partial funding of annuities; certain contributions.**

Notwithstanding the provisions of Section 10-12-9 NMSA 1978 and any other provisions of the Judicial Retirement Act [this article] to the contrary, the department of finance and administration shall be solely responsible for contributing fifty percent of each judge's or justice's required contribution pursuant to Section 10-12-9 NMSA 1978 to the judicial retirement fund.

**History:** 1978 Comp., § 10-12-9.1, enacted by Laws 1984, ch. 120 § 5.

### **10-12-10. Refund of contributions.**

If any person who has served as a judge or justice, or any combination, dies, resigns or ceases to be a judge or justice prior to the time he retires or becomes eligible for retirement and neither he nor his surviving spouse is eligible for benefits under the Judicial Retirement Act [this article], the amount of his accumulated contribution shall, at his request or the request of his beneficiary in case of his death, be paid to him or to his beneficiary nominated by written designation filed with the secretary of state.

**History:** 1941 Comp., § 3-1627, enacted by Laws 1947, ch. 132, § 4; 1953, ch. 124, § 4; 1953 Comp., § 5-5-27; Laws 1963, ch. 251, § 5; 1966, ch. 28, § 24; 1967, ch. 226, § 1; 1980, ch. 136, § 10; 1983, ch. 128, § 6.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-11. Judicial Retirement Act; suspension or forfeiture of benefits.**

A. The right to receive retirement pay under the Judicial Retirement Act [this article] shall be suspended during the period that any retired judge or justice:

(1) occupies a public office to which a salary is attached and shall be resumed upon retirement therefrom; or

(2) receives an annuity from any other retirement, pension or annuity plan created and established by the state or any of its political subdivisions, but the suspension shall only be effective to the extent that such annuity would cause the total retirement benefits of the judge or justice, from all such plans, to exceed an amount equal to 75 percent of the salary received during the last year in office as a judge or justice.

B. The right to receive retirement pay under the Judicial Retirement Act shall be forfeited if the judge or justice is removed from office under Article 6, Section 32 of the constitution of New Mexico for willful misconduct in office, willful and persistent failure to perform his duties or habitual intemperance, and his only entitlement from the judicial retirement fund shall be the return of his own contributions.

**History:** 1941 Comp., § 3-1628, enacted by Laws 1947, ch. 132, § 5; 1953 Comp., § 5-5-28; Laws 1966, ch. 28, § 25; 1969, ch. 95, § 2; 1980, ch. 136, § 11.

**Exception to retirement provisions.** - Laws 1971, ch. 181, § 11, provides that 10-12-11B NMSA 1978 and 10-11-16 NMSA 1978 (now repealed and reenacted) do not apply "to any judge of the district court who, on September 1, 1972, is entitled to receive a retirement annuity from the judicial retirement fund and is entitled to a retirement annuity under the Public Employees' Retirement Act."

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-12. Judicial retirement act; short title.**

Chapter 10, Article 12 NMSA 1978 may be cited as the "Judicial Retirement Act".

**History:** 1953 Comp., § 5-5-28.1, enacted by Laws 1966, ch. 28, § 26; 1972, ch. 12, § 1; 1989, ch. 62, § 1.

**The 1989 amendment,** effective June 16, 1989, substituted "Chapter 10, Article 12 NMSA 1978" for "Sections 5-5-24 through 5-5-28.3 NMSA 1953".

### **10-12-13. Administration of the Judicial Retirement Act, program and funds by the public employees' retirement board.**

The provisions of the Judicial Retirement Act [this article] and the judicial retirement program authorized under the act shall be administered by the public employees' retirement board established under Section 10-11-4 NMSA 1978. All funds of the existing retirement program shall be transferred to the board, on the effective date of this section and the provisions of law relating to the administration and investment of retirement funds administered by the board shall apply to all funds transferred and any future funds paid into the "judicial retirement fund" that is hereby established. In its administration of the judicial retirement program the public employees' retirement board is authorized to promulgate rules and regulations.

**History:** 1953 Comp., § 5-5-28.2, enacted by Laws 1972, ch. 12, § 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A C.J.S. Judges § 85.

### **10-12-14. Repealed.**



## ANNOTATIONS

**Repeals.** - Laws 1980, ch. 136, § 15, repeals 10-12-14 NMSA 1978, relating to reinstatement of persons under the judicial retirement program under certain conditions, effective July 1, 1980.

### **10-12-15. Group insurance; continuation.**

Any judge or any justice who is entitled to retirement benefits under the Judicial Retirement Act [this article], upon ceasing to hold office by reason of retirement, may have the option to continue to be insured under the provisions of any state group insurance plan in effect at the time of retirement or under the terms of any separate subsequent state group insurance plan, if he pays the entire periodic premium charges for such insurance and consents to have the association deduct such periodic premium charges from the retired member's annuity benefits.

**History:** 1953 Comp., § 5-5-28.4, enacted by Laws 1975, ch. 155, § 2; 1980, ch. 136, § 12.

### **10-12-16. Cost-of-living adjustment.**

Each annuity paid under the Judicial Retirement Act [this article] shall be adjusted in the manner provided in Section 10-11-29 NMSA 1978.

**History:** Laws 1987, ch. 241, § 1.

**Compiler's note.** - Section 10-11-29 NMSA 1978, referred to in this section, was repealed by Laws 1987, ch 253, § 140, effective July 1, 1987. For the present cost of living provision for PERA retirees, see 10-11-118 NMSA 1978.

**Retirement prior to effective date of section.** - Judges who retired before this section became effective may not receive a cost-of-living increase to their retirement annuities. 1988 Op. Att'y Gen. No. 88-66.

### **10-12-17. Member contributions; tax treatment.**

Upon implementation, the state acting as employer of judges or justices who are members of the judicial retirement fund shall, solely for the purpose of compliance with Section 414(h) of the Internal Revenue Code, pick up for the purposes specified in that section member contributions required by Section 10-12-9 NMSA 1978 for all annual salary earned by the member. Member contributions picked up under the provisions of this section shall be treated as employer contributions for purposes of determining income tax obligations under the Internal Revenue Code; however, such picked-up member contributions shall be included in the determination of the member's gross annual salary for all other purposes under federal and state laws. Member contributions picked up under this section shall continue to be designated member contributions for

all purposes of the Judicial Retirement Act and shall be considered as part of the member's annual salary for purposes of determining the amount of the member's contribution. The provisions of this section are mandatory, and the member shall have no option concerning the pickup or to the receipt of the contributed amounts directly instead of having them paid by the employer to the retirement system. Implementation occurs upon authorization by the public employees' retirement board. In no event may implementation occur other than at the beginning of a pay period applicable to the members.

**History:** Laws 1987, ch. 241, § 2.

**Internal Revenue Code.** - Section 414(h) of the Internal Revenue Code, referred to in the first sentence, appears as 28 U.S.C. § 414(h).

### **10-12-18. Funds not subject to legal process; division of funds as community property.**

A. Except as provided in Subsection B of this section, none of the money, pensions or other benefits mentioned in the Judicial Retirement Act shall be assignable either in law or in equity or be subject to execution, levy, attachment, garnishment or other legal process.

B. A court of competent jurisdiction, solely for the purposes of effecting a division of community property, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the Judicial Retirement Act [this article]. In so doing, the court shall fix the manner in which warrants shall be issued, may order direct payments to a person with a community interest in the pensions or other benefits and may restrain the refund of accumulated member contributions, but shall not alter the manner in which the amount of pensions or other benefits is calculated nor shall the court cause any increase in the actuarial present value of the pensions or other benefits to be paid.

**History:** 1978 Comp., § 10-12-18, enacted by Laws 1989, ch. 62, § 2; 1990, ch. 49, § 15.

**The 1990 amendment,** effective May 16, 1990, deleted "and shall be exempt from any state income tax" at the end of Subsection A.

**Effective dates.** - Laws 1989, ch. 62 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

**Applicability.** - Laws 1990, ch. 49, § 24, makes the provisions of the act applicable to taxable years beginning on or after January 1, 1990.

# ARTICLE 12A

## MAGISTRATE RETIREMENT

### 10-12A-1. Short title.

Sections 1 through 15 [10-12A-1 to 10-12A-13 NMSA 1978] of this act may be cited as the "Magistrate Retirement Act".

**History:** Laws 1984, ch. 119, § 1.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 46 Am. Jur. 2d Judges § 65.

48A C.J.S. Judges § 85.

### 10-12A-2. Definitions.

As used in the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978]:

A. "annuity" means an annual amount payable in equal monthly installments throughout the life of a person or for a temporary period;

B. "association final average salary" means a member's final average salary computed according to the law governing the retirement association;

C. "dependent child" means a natural or adopted child who is incapable of financial self-support, regardless of age, due to physical or mental incapacity;

D. "fund" means the magistrate retirement fund;

E. "judicial final average salary" means the salary used to compute an annuity according to the law governing the judicial retirement system;

F. "judicial retirement system" means that system provided by the Judicial Retirement Act [Chapter 10, Article 12 NMSA 1978];

G. "magistrate" means a magistrate or a metropolitan judge;

H. "magistrate final average salary" means the salary received during the last year in office prior to retirement;

I. "magistrate retirement system" means that system provided by the Magistrate Retirement Act;

J. "minor child" means a natural or adopted child who has not reached his eighteenth birthday nor been earlier emancipated by marriage or otherwise;

K. "retirement association" means the public employees' retirement association established under the Public Employees' Retirement Act [Chapter 10, Article 11 NMSA 1978];

L. "state system" means the public employees' retirement association of New Mexico, the judicial retirement system of New Mexico or the magistrate retirement system of New Mexico; and

M. "vested annuity" means an annual amount equal to the salary received during the last year in office prior to retirement multiplied by the following percentage corresponding to the total number of full years of service as a magistrate, continuously or otherwise:

(1) for five years of service, thirty-seven and one-half percent;

(2) for six years of service, forty-one and one-fourth percent;

(3) for seven years of service, forty-five percent;

(4) for eight years of service, forty-eight and three-fourths percent;

(5) for nine years of service, fifty-two and one-half percent;

(6) for ten years of service, fifty-six and one-fourth percent;

(7) for eleven years of service, sixty percent;

(8) for twelve years of service, sixty-three and three-fourths percent;

(9) for thirteen years of service, sixty-seven and one-half percent;

(10) for fourteen years of service, seventy-one and one-fourth percent; and

(11) for fifteen or more years of service, seventy-five percent;

Provided that for less than a full year's service, credit shall be given on a percentage basis to the nearest month for the time served.

**History:** Laws 1984, ch. 119, § 2.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-3. Magistrate retirement fund created; administration; appropriations.**

A. There is created in the state treasury the "magistrate retirement fund" which shall be administered by the retirement board of the retirement association, which shall also administer the provisions of the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] and the magistrate retirement program authorized pursuant to that act. The provisions of law relating to the administration and investment of retirement funds administered by that board shall apply to all funds paid into the fund, and the board is authorized to promulgate rules and regulations for the administration of the magistrate retirement program.

B. Each magistrate or metropolitan court clerk shall indicate the sum of twenty-five dollars (\$25.00) from each civil action docket fee paid in that court and ten dollars (\$10.00) from each civil jury fee paid in that court for credit to the fund.

**History:** Laws 1984, ch. 119, § 3.

**Cross-references.** - As to public employees' retirement association and retirement board, see 10-11-130 NMSA 1978.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-4. Election.**

Any magistrate who accepted that office prior to the effective date of the Magistrate Retirement Act may elect to remain under the provisions of the Public Employees' Retirement Act [Chapter 10, Article 11 NMSA 1978], provided that the election is made prior to July 1, 1984. A magistrate who elects to remain under the provisions of the Public Employees' Retirement Act shall not be entitled to any of the benefits of the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978].

**History:** Laws 1984, ch. 119, § 4.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-5. Benefit eligibility; benefits.**

A. Any magistrate or former magistrate who attains the age of sixty-four years and who has served as a magistrate for not less than five years, continuously or otherwise, and has ceased to hold office by reason of expiration of his term or voluntary resignation shall receive his vested annuity, payable in monthly installments from the fund during the remainder of his life.

B. Any magistrate or former magistrate who attains the age of sixty years and who has served as a magistrate for not less than fifteen years, continuously or otherwise, and has ceased to hold office by reason of expiration of his term or voluntary resignation shall receive his vested annuity, payable in monthly installments from the fund during the remainder of his life.

C. Upon the death of any magistrate, former magistrate or retired magistrate, the surviving spouse shall receive an annual survivor's annuity equal to seventy-five percent of the magistrate's vested annuity, payable in monthly installments for life.

D. Notwithstanding the provisions of Subsections A, B and C of this section, no magistrate shall receive any benefits under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] until he has completed five years of service, continuously or otherwise, as a member of the magistrate retirement system, except as provided in Section 10-12A-8 NMSA 1978.

E. Until July 1, 1989 and notwithstanding the provisions of Subsection D of this section, any magistrate presently in office who has served continuously as a magistrate for not less than eighteen years, is seventy-five years of age or older and is eligible for superannuation retirement from any state system may elect to receive his vested annuity after one or more years' service under the magistrate retirement system, with benefits payable at the rate of seven and one-half percent of his magistrate final average salary for each year of service under the magistrate retirement system, in addition to his annuity from any state system for the years of service under such state system.

**History:** Laws 1984, ch. 119, § 5; 1988, ch. 145, § 1.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-6. Reciprocal service credit.**

The following conditions shall apply in the event a magistrate or a former magistrate who has entitlement to the vested annuity under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] also has entitlement to a vested annuity or deferred annuity under another state system:

A. the magistrate or former magistrate may combine his service credits under each state system for the purpose of satisfying the service requirements for superannuation retirement;

B. payment of an annuity shall commence under each state system upon satisfaction of the age, service and other requirements of the particular system for superannuation retirement; and

C. in no case shall the total amount of annual annuities received from all state systems exceed seventy-five percent of the greater of:

(1) his magistrate final average salary;

(2) his judicial final average salary; or

(3) his association final average salary.

Any reduction in the amount of annuity which may be required by this provision shall be implemented in accordance with regulations of the retirement board of the retirement association.

**History:** Laws 1984, ch. 119, § 6.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-7. Survivor's annuity for minor and dependent children.**

Whenever and to the extent that a survivor's annuity would be payable to a surviving spouse of a magistrate, but there is no qualified surviving spouse to receive that annuity, the survivor's annuity shall be paid to all minor and dependent children, if any, of the magistrate, in equal shares, so long as each child remains a minor or dependent child. As each child ceases to have the status of a minor or dependent child, as the case may be, the number of shares shall be reduced and the amount payable to each remaining child increased proportionately so that the total survivor's annuity remains unchanged as long as there is any such child.

**History:** Laws 1984, ch. 119, § 7.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-8. Disablement benefits.**

After service as a magistrate for five years, any magistrate who becomes incapacitated from carrying on the duties of his office due to physical or mental disability shall, upon determination of the disability and retirement from office, receive his vested annuity payable in monthly installments from the magistrate retirement fund, so long as the disability continues. Determination of disability shall be made by the retirement board of the retirement association in accordance with Sections 10-11-31 through 10-11-33 NMSA 1978. The five-year service requirement shall be waived if the retirement board of the retirement association finds the disability to have been incurred in the line of duty as a magistrate and the amount of annuity shall be computed as if the magistrate had five years of service as a magistrate.

**History:** Laws 1984, ch. 119, § 8.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-9. Reinstatement of membership in magistrate retirement fund.**

Any magistrate who was a contributing member to the retirement association or the judicial retirement system and has withdrawn his retirement contributions as provided under Section 10-11-18 or Section 10-12-10 NMSA 1978, and does not have an



irrevocable written election on file as provided under Section 10-12-1.1 NMSA 1978 of the Judicial Retirement Act, may elect to reinstate prior service credit under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978]. Prior service credit may be reinstated upon the repayment of the accumulated contributions withdrawn together with interest at the rate prescribed by the retirement board of the retirement association from the date the contribution was withdrawn until it is paid. Repayment of the contribution and interest may be made in the period of time and under terms as the retirement board of the retirement association may prescribe by regulation.

**History:** Laws 1984, ch. 119, § 9.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

### **10-12A-10. Suspension or forfeiture of benefits.**

A. The right to receive an annuity under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] shall be suspended during the period that any retired magistrate:

(1) occupies a public office to which a salary is attached and shall be resumed upon retirement therefrom; or

(2) receives an annuity from any other retirement pension or annuity plan created and established by the state or any of its political subdivisions, but the suspension shall only be effective to the extent that such annuity would cause the total retirement benefits of the magistrate from all such plans to exceed an amount equal to seventy-five percent of the salary received during the last year in office as a magistrate.

B. The right to receive an annuity under the Magistrate Retirement Act shall be forfeited if the magistrate is removed from office under Article 6, Section 32 of the constitution of New Mexico for willful misconduct in office, for willful and persistent failure to perform his duties or for habitual intemperance.

**History:** Laws 1984, ch. 119, § 10.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

## **10-12A-11. Group insurance; continuation.**

Any magistrate who is entitled to an annuity under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978], upon ceasing to hold office by reason of retirement, may have the option to continue to be insured under the provisions of any state group insurance plan in effect at the time of retirement or under the terms of any separate subsequent state group insurance plan if he pays the entire periodic premium charges for the insurance and consents to have the periodic premium charges deducted from his annuity.

**History:** Laws 1984, ch. 119, § 11.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

## **10-12A-12. Funds not subject to process.**

None of the money, annuities or other benefits provided for in the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] shall be assignable either in law or in equity or be subject to execution, levy, attachment, garnishment or other legal process.

**History:** Laws 1984, ch. 119, § 12; 1990, ch. 49, § 16.

**The 1990 amendment,** effective May 16, 1990, deleted "nor shall it be subject to any state income tax" at the end of the section.

**Applicability.** - Laws 1990, ch. 49, § 24, makes the provisions of the act applicable to taxable years beginning on or after January 1, 1990.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixth legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

## **10-12A-13. Cost of living adjustment.**

Each annuity paid under the Magistrate Retirement Act [10-12A-1 to 10-12A-13 NMSA 1978] shall be adjusted in the manner provided in Section 10-11-29 NMSA 1978.

**History:** Laws 1984, ch. 119, § 13.

**Compiler's note.** - Laws 1984, ch. 119, § 14, provides that the Magistrate Retirement Act is effective contingent upon the enactment of House Bill 238 of the thirty-sixty legislature, second session, into law. House Bill 238 of the thirty-sixth legislature, second session, was enacted into law as Laws 1984, ch. 118, which contains no effective date provision, but was enacted at the session which adjourned on February 16, 1984. See N.M. Const., art. IV, § 23.

Section 10-11-29 NMSA 1978, referred to in this section, was repealed by Laws 1987, ch. 253, § 140, effective July 1, 1987. For the present cost of living provision for PERA retirees, see 10-11-119 NMSA 1978.

## **ARTICLE 13**

### **RETIREMENT RECIPROACITY**

#### **10-13-1. Short title.**

This act [10-13-1 to 10-13-5 NMSA 1978] may be cited as the "Retirement Reciprocity Act".

**History:** 1953 Comp., § 5-11-1, enacted by Laws 1963, ch. 275, § 1.

**Purpose of act.** - The Retirement Reciprocity Act was enacted to extend to public employees the benefit of increased retirement credit irrespective of the particular state retirement system the individual may have been employed under, and to permit an individual to receive greater retirement advantages than would otherwise be possible under either of the single state retirement systems. 1964 Op. Att'y Gen. No. 64-118.

**To be liberally construed.** - The Retirement Reciprocity Act is remedial in nature and should be liberally interpreted in order to best carry out the announced purposes of the act. 1964 Op. Att'y Gen. No. 64-118.

**Where credit extended.** - The Retirement Reciprocity Act was adopted to extend reciprocal retirement credit to individuals who have been employed under both the state public educational system and state public employment. 1964 Op. Att'y Gen. No. 64-118.

#### **10-13-2. Definitions.**

As used in this act [10-13-1 to 10-13-5 NMSA 1978]:

A. "state system" means the public employees' retirement association of New Mexico or the educational retirement system of New Mexico;

B. "retirement association" means the public employees' retirement association of New Mexico;

C. "educational retirement system" means that system provided by the Educational Retirement Act [Chapter 22, Article 11 NMSA 1978];

D. "member" means a member of a state system;

E. "accumulated deductions" means the amounts deducted from the compensations of a member and credited to his individual account in a state system, together with interest, if any, credited thereto;

F. "association final average salary" means a member's final average salary computed according to the law governing the retirement association. In computing a member's association final average salary, the compensations received by him for services rendered in positions covered by the educational retirement system shall be used in the same manner as if the compensations were received for services rendered in positions covered by the retirement association;

G. "educational final average salary" means a member's final average salary computed according to the law governing the educational retirement system. In computing a member's educational final average salary, the compensations received by him for services rendered in positions covered by the retirement association shall be used in the same manner as if the compensations were received for services rendered in positions covered by the educational retirement system;

H. "reciprocal service credit" means the sum of a member's credited service in force acquired as a member of the retirement association, to the extent such service is credited by the retirement association, and his credited service in force acquired as a member of the educational retirement system, to the extent such service is credited by the educational retirement system; and

I. "annuity" means an annuity or pension payable by a state system on account of a member's superannuation retirement.

**History:** 1953 Comp., § 5-11-2, enacted by Laws 1963, ch. 275, § 2.

**Cross-references.** - For Public Employees' Retirement Act, see 10-11-1 to 10-11-140 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States §§ 46, 112 to 119.

### **10-13-3. Accumulated deductions.**

A. If prior to July 1, 1974, a member withdrew his accumulated deductions from a state system, he shall not receive credit for the portion of his reciprocal service credit for service rendered under the state system until he returns to the state system the amount he withdrew therefrom, together with interest at the rate prescribed by the state system.

B. If, subsequent to June 30, 1974, a member of the retirement association withdraws or has withdrawn his accumulated deductions from the educational retirement system, or a member of the educational retirement system withdraws or has withdrawn his accumulated deductions from the retirement association, in either case he shall forfeit the portion of his reciprocal service credit acquired as a member of the state system from which he withdrew his accumulated deductions.

**History:** 1953 Comp., § 5-11-3, enacted by Laws 1963, ch. 275, § 3; 1973, ch. 352, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 246.

#### **10-13-4. Reciprocal service credit; retirement; annuity.**

In the event a member leaves a position covered by the retirement association and becomes employed in a position covered by the educational retirement system, or a member leaves a position covered by the educational retirement system and becomes employed in a position covered by the retirement association, the following provision shall apply, together with the other provisions of the Retirement Reciprocity Act [10-13-1 to 10-13-5 NMSA 1978] and together with such rules and regulations as the retirement board of the retirement association and the retirement board of the educational retirement system shall from time to time agree upon.

A. A member shall have at least one year of credited service in force under the state system from which he transfers his employment, and he shall have at least one year of credited service in force for service credited immediately prior to his retirement under a state system, except that the requirement of one year of service immediately prior to retirement shall not apply to those members who have at least five years of contributory service in the system under which they retire.

B. A member's reciprocal service credit shall be used in satisfying the service requirements for superannuation retirement under the state system from which he retired.

C. If a member with reciprocal service credit retires under the retirement association, he shall receive an annuity payable by the retirement association and an annuity payable by the educational retirement system. His annuity payable by the retirement association shall be computed based upon (1) the portion of his reciprocal service credit acquired as a member of the retirement association, and (2) his association final average salary. His annuity payable by the educational retirement system shall be computed based upon (1) the portion of his reciprocal service credit acquired as a member of the educational retirement system, and (2) his educational final average salary. His annuity payable by the educational retirement system shall begin as of the date he retires under the retirement association, but in no case prior to the date he would have been eligible for superannuation retirement under the educational retirement system, had all his reciprocal service credit been acquired on account of service rendered as a member of

the educational retirement system. Any annuities payable under this subsection shall be subject to the provisions of Subsection E of this section.

D. If a member with reciprocal service credit retires under the educational retirement system, he shall receive an annuity payable by the educational retirement system and an annuity payable by the retirement association. His annuity payable by the educational retirement system shall be computed based upon (1) the portion of his reciprocal service credit acquired as a member of the educational retirement system, and (2) his educational final average salary. His annuity payable by the retirement association shall be computed based upon (1) the portion of his reciprocal service credit acquired as a member of the retirement association, and (2) his association final average salary. His annuity payable by the retirement association shall begin as of the date he retires under the educational retirement system, but in no case prior to the date he would have been eligible for superannuation retirement under the retirement association had all his reciprocal service credit been acquired on account of service rendered as a member of the retirement association. Any annuities payable under this subsection shall be subject to the provisions of Subsection F of this section.

E. In the event a member with reciprocal service credit retires under the retirement association on account of superannuation, his annuity payable by the retirement association shall not exceed the lesser amount as determined in Paragraphs (1) and (2) of this subsection:

(1) the difference between (a) the annuity to which he would have been entitled under the law governing the retirement association at the time of his retirement if all his reciprocal service credit had been acquired as a member of the retirement association, and (b) his annuity payable by the educational retirement system. If (b) equals or exceeds (a), no annuity shall be paid by the retirement association;

(2) the retirement association annuity determined under Subsection C of this section.

F. In the event a member with reciprocal service credit retires under the educational retirement system on account of superannuation, his annuity payable by the educational retirement system shall not exceed the lesser amount as determined in Paragraphs (1) and (2) below:

(1) the difference between (a) the annuity to which he would have been entitled under the law governing the educational retirement system at the time of his retirement if all his reciprocal service credit had been acquired as a member of the educational retirement system, and (b) his annuity payable by the retirement association. If (b) equals or exceeds (a) no annuity shall be paid by the educational retirement system;

(2) the educational retirement system annuity determined under Subsection D of this section.

**History:** 1953 Comp., § 5-11-4, enacted by Laws 1963, ch. 275, § 4; 1971, ch. 297, § 2; 1977, ch. 331, § 1.

**Scope of "state system".** - "State system" includes service under either of the two state retirement systems, the public employees retirement association and the educational retirement system. 1964 Op. Att'y Gen. No. 64-118.

**Where service immediately prior to retirement.** - Under the Retirement Reciprocity Act the year of credited service required to be completed "immediately prior" to a member's retirement may consist of service performed under either the Public Employees' Retirement Act or the Educational Retirement Act or a combination of service acquired under both acts. 1964 Op. Att'y Gen. No. 64-118.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81A C.J.S. States §§ 46, 112 to 119.

### **10-13-5. Disbursing agent; reimbursement.**

The state system from which a member with reciprocal service credit retires shall be the disbursing agent for his annuities. In cases where the retirement association is the disbursing agent, the educational retirement system shall reimburse the retirement association for the portions of the annuities payable from the funds of the educational retirement system, and vice versa. Such reimbursements shall be made in the manner and frequency, and shall be accompanied by the supporting data, as the retirement board of the retirement association and the retirement board of the educational retirement system shall from time to time agree upon.

**History:** 1953 Comp., § 5-11-5, enacted by Laws 1963, ch. 275, § 5.

### **10-13-6. Short title.**

This act [10-13-6 to 10-13-9 NMSA 1978] may be cited as the "Judicial Retirement Reciprocity Act".

**History:** Laws 1983, ch. 138, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 47 Am. Jur. 2d Judges § 65.

48A C.J.S. Judges § 85.

### **10-13-7. Definitions.**

As used in the Judicial Retirement Reciprocity Act [10-13-6 to 10-13-9 NMSA 1978]:

A. "state system" means the public employees' retirement association of New Mexico or the judicial retirement system of New Mexico;

B. "retirement association" means the public employees' retirement association of New Mexico;

C. "judicial retirement system" means that system provided by the Judicial Retirement Act [Chapter 10, Article 12 NMSA 1978];

D. "member" means a member of a state system;

E. "accumulated deductions" means the amounts deducted from the compensations of a member and credited to his individual account in a state system, together with interest, if any, credited thereto;

F. "association final average salary" means a member's final average salary computed according to the law governing the retirement association;

G. "judicial final average salary" means a member's final average salary computed according to the law governing the judicial retirement system;

H. "reciprocal service credit" means the sum of a member's credited service in force acquired as a member of the retirement association to the extent the service is credited by the retirement association, and his credited service in force acquired as a member of the judicial retirement system to the extent the service is credited by the judicial retirement system; and

I. "annuity" means an annuity or pension payable by a state system on account of a member's superannuation retirement.

**History:** Laws 1983, ch. 138, § 2.

### **10-13-8. Accumulated deductions.**

If a member withdrew his accumulated deductions from a state system, he shall not receive credit for the portion of his reciprocal service credit for service rendered under the state system until he returns to the state system the amount he withdrew, together with interest at the rate prescribed by the state system.

**History:** Laws 1983, ch. 138, § 3.

### **10-13-9. Reciprocal service credit; retirement; annuity.**

In the event a member leaves a position covered by the retirement association and becomes employed in a position covered by the judicial retirement system, or a member leaves a position covered by the judicial retirement system and becomes employed in a position covered by the retirement association, the following provisions apply, together with the other provisions of the Judicial Retirement Reciprocity Act [10-13-6 to 10-13-9



NMSA 1978] and together with the rules and regulations promulgated by the retirement board of the retirement association:

A. a member shall have at least five full years of credited service in force under the retirement association and at least five full years of credited service in force under the judicial retirement system;

B. a member's total reciprocal service credit shall be used in satisfying the service requirements for superannuation retirement under the state system from which he retired;

C. if a member with reciprocal service credit retires under the retirement association, he shall receive an annuity payable by the retirement association and an annuity payable by the judicial retirement system. His annuity payable by the retirement association shall be computed based upon:

(1) the portion of his reciprocal service credit acquired as a member of the retirement association; and

(2) his association final average salary.

His annuity payable by the judicial retirement system shall be computed based upon:

(1) the portion of his reciprocal service credit acquired as a member of the judicial retirement system; and

(2) his judicial final average salary.

His annuity payable by the judicial retirement system shall begin as of the date he retires under the retirement association, but in no case prior to the date he would have been eligible for superannuation retirement under the judicial retirement system, had all his reciprocal service credit been acquired on account of service rendered as a member of the judicial retirement system. Any annuities payable under this subsection shall be subject to the provisions of Subsection E of this section;

D. if a member with reciprocal service credit retires under the judicial retirement system, he shall receive an annuity payable by the judicial retirement system and an annuity payable by the retirement association. His annuity payable by the judicial retirement system shall be computed based upon:

(1) the portion of his reciprocal service credit acquired as a member of the judicial retirement system; and

(2) his judicial final average salary.

His annuity payable by the retirement association shall be computed based upon:

(1) the portion of his reciprocal service credit acquired as a member of the retirement association; and

(2) his association final average salary.

His annuity payable by the retirement association shall begin as of the date he retires under the judicial retirement system, but in no case prior to the date he would have been eligible for superannuation retirement under the retirement association had all his reciprocal service credit been acquired on account of service rendered as a member of the retirement association. Any annuities payable under this subsection shall be subject to the provisions of Subsection E of this section; and

E. in no event shall the total of all annuities received by a member under the state system exceed seventy-five percent of his judicial final average salary.

**History:** Laws 1983, ch. 138, § 4.

## **ARTICLE 14**

### **SOCIAL SECURITY COVERAGE**

#### **10-14-1. Declaration of policy.**

In order to extend to employees of the state and its political subdivisions and to the dependents and survivors of such employees, the basic protection accorded to others by the old-age and survivors' insurance system embodied in the Social Security Act, it is hereby declared to be the policy of the legislature, subject to the limitations of this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978], that such steps be taken as to provide such protection to employees of the state and its political subdivisions on as broad [broad] a basis as is permitted under the Social Security Act. It is also the policy of the legislature that the protection afforded employees in positions covered by a retirement system on the date an agreement under this act is made applicable to service performed in such positions, or receiving periodic benefits under such retirement system at such time, will not be impaired as a result of making the agreement so applicable or as a result of legislative enactment in anticipation thereof.

**History:** 1953 Comp., § 5-7-1, enacted by Laws 1955, ch. 172, § 1.

**Social Security Act.** - The federal Social Security Act, referred to in the first sentence, appears as 42 U.S.C. § 301 et seq.

**Legislative effect.** - What in effect the legislature did by the passage of Laws 1955, ch. 172, was make an offer to all state employees covered by state retirement system that if they elected to come within the provisions of social security, the state would provide for the share required by the Social Security Act from the employer. 1957-58 Op. Att'y Gen. No. 57-61.

**Effect of section on school for visually handicapped.** - The New Mexico school for the visually handicapped is not legally separate and distinct; it is in fact a state educational institution. Most of its funds come from either state school lands or from appropriations from the legislature. This institution is actually a part of the state. Inasmuch as the school for the visually handicapped is not a political subdivision, it cannot be considered a separate retirement system for the purposes of holding a referendum relative to the coverage under the old-age and survivors insurance program. 1955-56 Op. Att'y Gen. No. 6411.

**Eligibility.** - Under the social security laws, both state and federal, all members of the retirement system become eligible for social security upon a favorable vote of the referendum posing the questions of joining the social security system. 1955-56 Op. Att'y Gen. No. 6416.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 32 et seq.

## **10-14-2. Definitions.**

For the purposes of Sections 10-14-1 through 10-14-10 NMSA 1978:

A. the term "wages" means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were for "employment" within the meaning of the Federal Insurance Contributions Act would not constitute "wages" within the meaning of that act;

B. the term "employment" means any service performed by an employee in the employ of the state, or any political subdivision thereof, for such employer, except (1) service which in the absence of an agreement entered into under this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978] would constitute "employment" as defined in the Social Security Act; or (2) service which under the Social Security Act may not be included in an agreement between the state and the secretary of health, education and welfare entered into under this act. Service which under the Social Security Act may be included in an agreement only upon certification by the governor or an officer of the state designated by the governor, in accordance with Section 218(d)(3) of that act shall be included in the term "employment" if and when the governor, or an officer of the state designated by the governor, issues, with respect to such service, a certificate to the secretary of health, education and welfare pursuant to Section 9(b) [10-14-10B NMSA 1978] of this act, provided, however, that an agreement may exclude (1) any service of an emergency nature; (2) services performed in the employ of a school, college or university by a student who is enrolled and regularly attending classes at such school, college or university; (3) all services in any class or classes of (a) elective positions; (b) part-time positions, or (c) positions the compensation for which is on a fee basis, performed by an employee of the state or an employee of a subdivision of the state, if

so provided in a plan submitted by said subdivision under Section 5 [10-14-6 NMSA 1978] of this act;

C. the term "employee" includes an officer of a state or political subdivision thereof;

D. the term "state agency" means the agency of the state of New Mexico designated by the governor for the administration of this act;

E. the term "secretary of health, education and welfare" includes any individual to whom the secretary of health, education and welfare has delegated any functions under the Social Security Act with respect to coverage under such act of employees of states and their political subdivisions, and with respect to any action taken prior to April 11, 1953, includes the federal security administrator and any individual to whom such administrator had delegated any such function;

F. the term "political subdivision" includes an instrumentality of the state or one or more of its political subdivisions, or of the state and one or more of its political subdivisions, but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or subdivision and only if its employees are not by virtue of their relation to such juristic entity employees of the state or subdivision;

G. the term "Social Security Act" means the act of congress approved August 14, 1935, Chapter 531, 49 Stat. 620, officially cited as the "Social Security Act," (including regulations and requirements issued pursuant thereto), as such act has been and may from time to time be amended; and

H. the term "Federal Insurance Contributions Act" means Subchapter A of Chapter 9 of the federal Internal Revenue Code of 1939 and Subchapters A and B of Chapter 21 of the federal Internal Revenue Code of 1954, as such codes have been and may from time to time be amended; and the term "employee tax" means the tax imposed by Section 1400 of such code of 1939 and Section 3101 of such code of 1954, as it has been and may from time to time be amended.

**History:** 1953 Comp., § 5-7-2, enacted by Laws 1955, ch. 172, § 2; 1973, ch. 329, § 1.

**Federal Insurance Contributions Act.** - The Federal Insurance Contributions Act, referred to in Subsections A and H, appears as 26 U.S.C. §§ 3101 to 3128.

**Social Security Act.** - The federal Social Security Act, referred to in Subsection B, appears as 42 U.S.C. § 301 et seq. Section 218(d)(3) of the act, also referred to in Subsection B, appears as 42 U.S.C. § 418(d)(3).

**Internal Revenue Code.** - Section 1400 of the Internal Revenue Code of 1939, referred to in Subsection H, has been repealed and superseded by § 3101 of the Internal Revenue Code of 1986, also referred to in Subsection H, compiled as 26 U.S.C. § 3101.

**Effect of section on sick leave payments.** - Where the university of New Mexico did not make a social security contribution with respect to sick leave payments on the grounds that such payments were excluded from wages, the social security administration was justified in assessing \$28.60 in respect to those payments and holding that they were not excluded from wages. *New Mexico v. Weinberger*, 517 F.2d 989 (10th Cir. 1975), cert. denied, 423 U.S. 1051, 96 S. Ct. 779 (1976).

**Where sick leave payments are wages.** - Payments made to employees of the University of New Mexico during period of sickness are considered wages and therefore reportable for social security purposes. 1971 Op. Att'y Gen. No. 71-21.

**Where exclusion construed differently.** - In assessing contributions to be paid in by private employers the commissioner of internal revenue has construed the sick pay exclusion from wages differently than has the secretary of health, education and welfare in assessing public employers. *New Mexico v. Weinberger*, 517 F.2d 989 (10th Cir. 1975), cert. denied, 423 U.S. 1051, 96 S. Ct. 779 (1976).

**Where hospitals not political subdivisions.** - Hospitals created jointly by counties and municipalities are not independent political subdivisions, but are an intricate part of the county and the municipality creating the same, and therefore they can come under the social security system only as the county and the municipality of which they are part come within the provisions of the Social Security Act. 1955-56 Op. Att'y Gen. No. 6437.

**Where mayordomo officer of political subdivision.** - The mayordomo of a community ditch association is considered an officer of a political subdivision of the state for social security coverage purposes. 1970 Op. Att'y Gen. No. 70-46.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare § 28.

### **10-14-3. Federal-state agreement.**

A. The state agency, with the approval of the governor, is hereby authorized to enter on behalf of the state into an agreement with the secretary of health, education and welfare, consistent with the terms and provisions of this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978], for the purpose of extending the benefits of the federal old-age and survivors' insurance system to employees of the state or any political subdivision thereof with respect to services specified in such agreement which constitute "employment" as defined in Section 2 [10-14-2 NMSA 1978] of this act. Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration and other appropriate provisions as the state agency and secretary of health, education and welfare shall agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that:

(1) benefits will be provided for employees whose services are covered by the agreement (and their dependents and survivors) on the same basis as though such services constituted employment within the meaning of Title II of the Social Security Act;

(2) the state will pay to the secretary of the treasury, at such time or times as may be prescribed under the Social Security Act, contributions with respect to wages (as defined in Section 2 of this act), equal to the sum of the taxes which would be imposed by the Federal Insurance Contributions Act if the services covered by the agreement constituted employment within the meaning of that act;

(3) such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein in accordance with the Social Security Act;

(4) all services which constitute employment as defined in Section 2 and are performed in the employ of the state by employees of the state, shall be covered by the agreement;

(5) all services which (a) constitute employment as defined in Section 2, (b) are performed in the employ of a political subdivision of the state, and (c) are covered by a plan which is in conformity with the terms of the agreement and has been approved by the state agency under Section 5 [10-14-6 NMSA 1978], shall be covered by the agreement;

(6) as modified, the agreement shall include all services described in either Paragraph (4) or Paragraph (5) of this subsection and performed by individuals to whom Section 218(c)(3)(C) of the Social Security Act is applicable, and shall provide that the service of any such individual shall continue to be covered by the agreement in case he thereafter becomes eligible to be a member of a retirement system; and

(7) as modified, the agreement shall include all services described in either Paragraph (4) or Paragraph (5) of this subsection and performed by individuals in positions covered by a retirement system with respect to which the governor, or an officer of the state designated by the governor, has issued a certificate to the secretary of health, education and welfare pursuant to Section 9(b) [10-14-10B NMSA 1978] of this act.

B. Any instrumentality jointly created by this state and any other state or states is hereby authorized, upon the granting of like authority by such other state or states, (1) to enter into an agreement with the secretary of health, education and welfare whereby the benefits of the federal old-age and survivors' insurance system shall be extended to employees of such instrumentality, (2) to require its employees to pay (and for that purpose to deduct from their wages) contributions equal to the amounts which they would be required to pay under Section 4(a) [10-14-5A NMSA 1978] if they were covered by an agreement made pursuant to Subsection A of this section; and (3) to make payments to the secretary of the treasury in accordance with such agreement, including payments from its own funds, and otherwise to comply with such agreements.

Such agreements, shall, to the extent practicable, be consistent with the terms and provisions of Subsection A and other provisions of this act.

C. Pursuant to Section 218(d)(6)(B) of the Social Security Act, the retirement system covering the employees who are eligible to acquire or who have acquired retirement and emeritus status under Section 1 of Chapter 112, Laws of 1937, as amended, shall be deemed to constitute a separate system for the employees of each institution of higher learning covered thereunder.

**History:** 1953 Comp., § 5-7-3, enacted by Laws 1955, ch. 172, § 3; 1973, ch. 329, § 2.

**Social Security Act.** - The federal Social Security Act, referred to throughout Subsection A, appears as 42 U.S.C. § 301 et seq. Title II, referred to in Subsection A(1), appears as 42 U.S.C. § 401 et seq. Section 218, referred to in Subsections A(6) and C, appears as 42 U.S.C. § 418.

**Federal Insurance Contributions Act compiled.** - The Federal Insurance Contributions Act, referred to in Subsection A(2), appears as 26 U.S.C. §§ 3101 to 3128.

**Section 1 of Chapter 112 repealed.** - Laws 1957, ch. 197, § 60, repeals Laws 1937, ch. 112, § 1, which was compiled as 73-12-16, 1953 Comp., and which is referred to in Subsection C.

**Constitutionality of payments.** - Social security payments under this section were not payments of additional fees or compensation in violation of N.M. Const., art. V, § 12. 1968 Op. Att'y Gen. No. 68-1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

#### **10-14-4. Federal-state agreement; divided retirement systems.**

The agreement executed and approved as specified in Section 10-14-3 NMSA 1978 shall provide, in accordance with the Social Security Act, 42 U.S.C. § 301 et seq., for dividing retirement systems, and for extending coverage to individuals in positions covered by divided retirement systems.

**History:** 1953 Comp., § 5-7-3.1, enacted by Laws 1962 (S.S.), ch. 2, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

#### **10-14-5. Contributions by state employees.**

A. Every employee of the state whose services are covered by an agreement entered into under Section 3 [10-14-3 NMSA 1978] shall be required to pay for the period of such coverage, into the contribution fund established by Section 6 [10-14-7 NMSA 1978], contributions, with respect to wages (as defined in Section 2 [10-14-2 NMSA 1978]) of this act, equal to the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act, if such services constituted employment within the meaning of that act. Such liability shall arise in consideration of the employee's retention in the service of the state, or his entry upon such service, after the enactment of this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978.]

B. The contribution imposed by this section shall be collected by deducting the amount of the contribution from wages as and when paid, but failure to make such deduction shall not relieve the employee from liability for such contribution.

C. If more or less than the correct amount of the contribution imposed by this section is paid or reduced [deducted] with respect to any remuneration, proper adjustments, or refund if adjustment is impracticable, shall be made, without interest, in such manner and at such times as the state agency shall prescribe.

**History:** 1953 Comp., § 5-7-4, enacted by Laws 1955, ch. 172, § 4.

**Federal Insurance Contributions Act.** - The Federal Insurance Contributions Act, referred to in Subsection A, appears as 26 U.S.C. §§ 3101 to 3128.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

### **10-14-6. Plans for coverage of employees of political subdivisions.**

A. Each political subdivision of the state is hereby authorized to submit for approval by the state agency a plan for extending the benefits of Title 2 of the Social Security Act, in conformity with applicable provisions of such act, to employees of such political subdivision. Each such plan and any amendment thereof shall be approved by the state agency if it finds that such plan, or such plan as amended, is in conformity with such requirements as are provided in regulations of the state agency, except that no such plan shall be approved unless:

(1) it is in conformity with the requirements of the Social Security Act and with the agreement entered into under Section 10-14-3 NMSA 1978;

(2) it provides that all services which constitute employment as defined in Section 10-14-2 NMSA 1978 and are performed in the employ of the political subdivision by employees thereof, shall be covered by the plan, except that it may exclude services performed by individuals to whom Section 218(c)3(C) [Section 218(c)(3)(C)] of the Social Security Act is applicable;



(3) it specifies the source or sources from which the funds necessary to make the payments required by Paragraph (1) of Subsection C and by Subsection D of this section are expected to be derived and contains reasonable assurance that such sources will be adequate for such purpose;

(4) it provides for such methods of administration of the plan by the political subdivision as are found by the state agency to be necessary for the proper and efficient administration of the plan;

(5) it provides that the political subdivision will make such reports, in such form and containing such information, as the state agency may from time to time require, and comply with such provisions as the state agency or the secretary of health and human services may from time to time find necessary to assure the correctness and verification of such reports; and

(6) it authorizes the state agency to terminate the plan in its entirety, in the discretion of the state agency, if it finds that there has been a failure to comply substantially with any provision contained in such plan, such termination to take effect at the expiration of such notice and on such conditions as may be provided by regulations of the state agency, and may be consistent with the provisions of the Social Security Act.

B. The state agency shall not finally refuse to approve a plan submitted by a political subdivision under Subsection A of this section, and shall not terminate an approved plan, without reasonable notice and opportunity for hearing to the political subdivision affected thereby.

C. (1) Each political subdivision as to which a plan has been approved under this section shall pay into the contribution fund, with respect to wages, as defined in Section 10-14-2 NMSA 1978, at such time or times as the state agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the state agency under Section 10-14-3 NMSA 1978.

(2) Each political subdivision required to make payments under Paragraph (1) of this subsection is authorized, in consideration of the employee's retention in, or entry upon, employment after enactment of Sections 10-14-1 through 10-14-3 and 10-14-5 through 10-14-10 NMSA 1978, to impose upon each of its employees, as to services which are covered by an approved plan, a contribution with respect to his wages, as defined in Section 10-14-2 NMSA 1978, not exceeding the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act if such services constituted employment within the meaning of that act, and to deduct the amount of such contribution from his wages as and when paid. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of such political subdivision or instrumentality under Paragraph (1) of this subsection. Failure to deduct such contribution shall not relieve the employee or employer of liability therefor.

D. Delinquent payments due under Paragraph (1) of Subsection C of this section with interest charged by the federal government, may be recovered by action in a court of competent jurisdiction against the political subdivision liable therefor or may, at the request of the state agency, be deducted from any other money payable to such subdivision by any department or agency of the state.

**History:** 1953 Comp., § 5-7-5, enacted by Laws 1955, ch. 172, § 5; 1981, ch. 154, § 1.

**Social Security Act.** - The federal Social Security Act, referred to in Paragraphs (1) and (6) of Subsection A, appears as 42 U.S.C. § 301 et seq.

Title II of the Social Security Act, referred to in the first sentence in the introductory paragraph of Subsection A, appears as 42 U.S.C. § 401 et seq. Section 218(c)(3)(C), referred to in Subsection A(2), appears as 42 U.S.C. § 418(c)(3)(C).

**Federal Insurance Contributions Act.** - The Federal Insurance Contributions Act, referred to in Subsection C(2), appears as 26 U.S.C. §§ 3101 to 3128.

**Effect of section.** - Under this section, each political subdivision of the state is authorized and required to submit for approval a plan to extend the benefit of Title II of the Social Security Act in conformity with the applicable provisions of such act to employees of such political subdivision. 1955-56 Op. Att'y Gen. No. 6471.

**Power of state agency.** - The board (now state agency) can require whatever is necessary to show that a budget item has been included so as to insure the payment of the amount due. 1955-56 Op. Att'y Gen. No. 6284.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

## **10-14-7. Contribution fund.**

A. There is hereby established a special fund to be known as the "contribution fund." Such fund shall consist of and there shall be deposited in such fund:

(1) all contributions, interest, and penalties collected under Sections 10-14-5 and 10-14-6 NMSA 1978;

(2) all moneys appropriated thereto under this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978];

(3) any property or securities and earnings thereof acquired through the use of moneys belonging to the fund;

(4) interest earned upon any moneys in the fund; and

(5) all sums recovered upon the bond of the custodian or otherwise for losses sustained by the fund and all other moneys received for the fund from any other source. All moneys in the fund shall be mingled and undivided. Subject to the provisions of this act, the state agency is vested with full power, authority and jurisdiction over the fund, including all moneys and property or securities belonging thereto, and may perform any and all acts whether or not specifically designated, which are necessary to the administration thereof and are consistent with the provisions of this act.

B. The contribution fund shall be established and held separate and apart from any other funds or moneys of the state and shall be used and administered exclusively for the purpose of this act. Withdrawals from such fund shall be made for, and solely for:

(1) payments of amounts required to be paid to the secretary of the treasury pursuant to an agreement entered into under Section 10-14-3 NMSA 1978;

(2) payment of refunds provided for in Subsection C of Section 10-14-5 NMSA 1978;

(3) refunds of overpayments, not otherwise adjustable, made by a political subdivision or instrumentality;

(4) expenditures by the state agency for the administration of this act; and

(5) transfers by the state treasurer, upon certification by the director of the social security division, to the state general fund of amounts not necessary to satisfy expenditures required by Paragraphs (1) through (4) of this subsection. Such transfers shall be made by July 30 of each fiscal year.

C. From the contribution fund the custodian of the fund shall pay to the secretary of the treasury such amounts and at such time or times as may be directed by the state agency in accordance with any agreement entered into under Section 10-14-3 NMSA 1978 and the Social Security Act.

D. The state treasurer shall be ex-officio treasurer. The secretary of finance and administration shall be custodian of the contribution fund and shall administer such funds in accordance with the provisions of this act and the directions of the state agency and shall pay all warrants drawn upon it in accordance with the provisions of this section and with such regulations as the state agency may prescribe pursuant thereto.

E. (1) There are hereby authorized to be appropriated annually to the contribution fund, in addition to the contributions collected and paid into the contribution fund under Sections 10-14-5 and 10-14-6 NMSA 1978 to be available for the purposes of Subsections B and C of Section 10-14-7 NMSA 1978 [this section] until expended, such additional sums as are found to be necessary in order to make the payments to the secretary of the treasury which the state is obligated to make pursuant to an agreement entered into under Section 10-14-3 NMSA 1978.

(2) The state agency shall submit to each regular session of the state legislature, at least ninety days in advance of the beginning of such session, an estimate of the amounts authorized to be appropriated to the contribution fund by Paragraph (1) of this subsection for the next appropriation period.

**History:** 1953 Comp., § 5-7-6, enacted by Laws 1955, ch. 172, § 6; 1973, ch. 329, § 3; 1983, ch. 5, § 1; 1983, ch. 301, § 23.

**Social Security Act.** - The federal Social Security Act, referred to in Subsection C, appears as 42 U.S.C. § 301 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

### **10-14-8. Rules and regulations.**

The state agency shall make and publish such rules and regulations, not inconsistent with the provisions of this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978], as it finds necessary or appropriate to the efficient administration of the functions with which it is charged under this act.

**History:** 1953 Comp., § 5-7-7, enacted by Laws 1955, ch. 172, § 7.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

### **10-14-9. Studies and reports.**

The state agency shall make studies concerning the problem of old-age and survivors' insurance protection for employees of the state and local governments and their instrumentalities and concerning the operation of agreements made and plans approved under this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978] and shall submit a report to the legislature at the beginning of each regular session, covering the administration and operation of this act during the preceding biennium, including such recommendations for amendments to this act as it considers proper.

**History:** 1953 Comp., § 5-7-8, enacted by Laws 1955, ch. 172, § 8.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

### **10-14-10. Referenda and certification.**

A. The governor is empowered to authorize a referendum, and to designate any agency or individual to supervise its conduct, in accordance with the requirements of Section 218(d)(3) of the Social Security Act, on the question of whether service in positions

covered by a retirement system established by the state or by a political subdivision thereof should be excluded from or included under an agreement under this act [10-14-1 to 10-14-3, 10-14-5 to 10-14-10 NMSA 1978]. The notice of referendum required by Section 218(d)(3)(C) of the Social Security Act to be given to employees shall contain or shall be accompanied by a statement, in such form and such detail as the agency or individual designated to supervise the referendum shall deem necessary and sufficient, to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject, if their services are included under an agreement under this act.

B. Upon receiving evidence satisfactory to him that with respect to any such referendum the conditions specified in Section 218(d)(3) of the Social Security Act have been met, the governor or an officer of the state designated by the governor, shall so certify to the secretary of health, education and welfare.

**History:** 1953 Comp., § 5-7-9, enacted by Laws 1955, ch. 172, § 9; 1973, ch. 329, § 4.

**Social Security Act.** - Section 218 of the federal Social Security Act, referred to in Subsections A and B, appears as 42 U.S.C. § 418.

**Legislative intent.** - The legislature intends, so far as the political subdivisions are concerned, that the initial step for coverage is to be made by the political subdivision by submitting a plan. If the plan is proper, and the political subdivision has its own retirement system or was a part of the state system, the governor is to call for a referendum for such political subdivision. If there happens to be a number of such divisions with proper plans, they can, of course, be grouped together for the purpose of the referendum. No political subdivision would work out a plan for coverage without first determining that the employees were for such plan. 1955-56 Op. Att'y Gen. No. 6333.

**Scope of gubernatorial powers as to referendums.** - The governor can, within the provisions of the Social Security Act, designate what shall constitute a retirement system for the purpose of a referendum. The governor can designate each political subdivision as a separate retirement system for the purpose of this referendum. 1955-56 Op. Att'y Gen. No. 6333.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 81 C.J.S. Social Security and Public Welfare §§ 28, 38.

## **10-14-11. Social security referendum.**

A referendum for or against participation in the federal old age and survivors insurance embodied in the federal Social Security Act shall be conducted for the employees of a general hospital, or outpatient clinics thereof, operated by a state educational institution named in Article 12, Section 11 of the constitution of New Mexico, if required by federal or state law.

**History:** 1978 Comp., § 10-14-11, enacted by Laws 1978, ch. 167, § 3.

**Social Security Act.** - The provisions of the federal Social Security Act, referred to in this section, appear as 42 U.S.C. § 301 et seq.

## **ARTICLE 15**

### **OPEN MEETINGS**

#### **10-15-1. Formation of public policy.**

A. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. Reasonable efforts shall be made to accommodate the use of audio and video recording devices.

B. All meetings of a quorum of members of any board, commission or other policy-making body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policy-making body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the provision of the Open Meetings Act [this article]. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

C. Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a majority or quorum of the body is in attendance, and any closed meetings, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation which have provided a written request for such notice.

D. The board, commission or other policy-making body shall keep written minutes of all its meetings. The minutes shall include as a minimum the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken which show how

each member voted. All minutes are open to public inspection. Draft minutes shall be prepared within ten working days after the meeting and shall be approved, amended or disapproved at the next meeting where a quorum is present. Minutes shall not become official until approved by the policy-making body.

E. The provisions of Subsections A, B and D of this section do not apply to:

(1) meetings pertaining to issuance, suspension, renewal or revocation of a license except that a hearing at which evidence is offered or rebutted shall be open. All final actions on the issuance, suspension, renewal or revocation of a license shall be taken at an open meeting;

(2) limited personnel matters; provided that for purposes of the Open Meetings Act, "limited personnel matters" means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing. Judicial candidates interviewed by any commission shall have the right to demand an open interview;

(3) meetings for the discussion of bargaining strategy preliminary to collective bargaining negotiations between the policy-making body and a bargaining unit representing the employees of that policy-making body and collective bargaining sessions at which the policy-making body and the representatives of the collective bargaining unit are present;

(4) that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars (\$2,500) that can be made only from one source. The actual approval of purchase of the item is to be made in an open meeting;

(5) meetings subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant;

(6) meetings for the discussion of the purchase, acquisition or disposal of real property or water rights by the public body; and

(7) those portions of meetings of committees or boards of public hospitals which receive less than fifty percent of their operating budget from direct public funds and appropriations where strategic and long-range business plans are discussed.

F. If any meeting is closed pursuant to the exclusions contained in Subsection E of this section, the closure:

(1) if made in an open meeting, shall be approved by a majority vote of a quorum of the policy-making body and the authority for the closure shall be stated in the motion calling

for the vote on a closed meeting and the vote shall be taken in an open meeting and the vote of each individual member is to be recorded in the minutes. Only those subjects announced or voted upon prior to closure by the policy-making body may be discussed in a closed meeting; and

(2) if called for when the policy-making body is not in an open meeting, the closed meetings shall not be held until public notice, appropriate under the circumstances, stating the specific provision of the law authorizing the closed meeting is given to the members and to the general public.

**History:** 1953 Comp., § 5-6-23, enacted by Laws 1974, ch. 91, § 1; 1979, ch. 366, § 1; 1989, ch. 299, § 1.

**The 1989 amendment**, effective June 16, 1989, in Subsection A, added the first sentence, inserted "and the courts" in the third sentence, and added the last sentence; in the first sentence in Subsection B, inserted "including the development of personnel policy, rules, regulations or ordinances" near the middle and "of New Mexico" near the end, and added the last sentence; in Subsection C, added the last sentence; in Subsection D, in the next-to-last sentence, inserted "and shall be approved, amended or disapproved at the next meeting where a quorum is present"; in Subsection E(1), substituted all of the language beginning with "except that a hearing" for "unless a public hearing is requested by the licensee"; in Subsection E(2), inserted "limited" in two places near the beginning, substituted "the Open Meetings Act" for "this Act", and added the last sentence; in Subsection E(5), inserted "subject to the attorney-client privilege" and substituted "threatened" for "threat of litigation"; in Subsection E(6), inserted "or disposal"; added Subsection E(7); in Subsection F(1), added the last sentence; deleted former Subsection F(3) which read "the provisions of this subsection shall not apply to meetings contemplated under Paragraph (5) of Subsection E of this section"; and made minor stylistic changes.

**Purpose of the Open Meetings Act** is to open the meetings of governmental bodies to public scrutiny by allowing public attendance at such meetings, not to unduly burden the appropriate exercise of governmental decision-making and ability to act. *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 631 P.2d 304 (1981).

**Effect on city-owned utility.** - A city-owned electric utility corporation is a governmental board within a statute that requires the governing bodies of municipalities, etc., and all other governmental boards and commissions of state or its subdivisions that are supported by public funds to make all final decisions at meetings open to the public. *Raton Pub. Serv. Co. v. Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966)(decided under prior law).

**And on city board of education.** - A city board of education is a policymaking body covered by the public meeting law. *State v. Hernandez*, 89 N.M. 698, 556 P.2d 1174 (1976).



**Dental hygiene committee must comply** fully with the Open Meetings Act. 1987 Op. Att'y Gen. No. 87-82.

**To "attend and listen," as used in Subsection A,** means that persons desiring to attend shall have the opportunity to do so, that no one will be systematically excluded or arbitrarily refused admittance, and that the meeting will not be "closed" to the public. Gutierrez v. City of Albuquerque, 96 N.M. 398, 631 P.2d 304 (1981).

**Reasonable public access required.** - A governmental entity must allow reasonable public access for those who wish to attend and listen to its proceedings. Gutierrez v. City of Albuquerque, 96 N.M. 398, 631 P.2d 304 (1981).

**All stages to be open.** - All stages of the meetings must be open to the public because if the body were allowed to conduct a closed meeting in the determination of a matter, and then merely open the meeting to the public and announce its decision, the clear intent of the legislature would be defeated. 1959-60 Op. Att'y Gen. No. 59-105 (decided under prior law).

**Meeting with overflow crowd qualifies as open and public.** - When the size of a crowd exceeds the capacity of the meeting place and every effort is made to allow those who cannot gain entrance to listen to the proceedings, the requirements of this article are satisfied and the meeting qualifies as both open and public. Gutierrez v. City of Albuquerque, 96 N.M. 398, 631 P.2d 304 (1981).

**Denial to citizen of right to address board.** - A local school board president has authority to deny citizens the right to address the local school board during a meeting of the board, if he is authorized to do so by rules promulgated by the board and he does not exercise that authority arbitrarily or capriciously. 1990 Op. Att'y Gen. No. 90-26.

**Where decisions made by telephone, etc.** - Final decisions made by telephone, mail or telegraph are not made at a meeting open to the public within the meaning of the act. A clear intention of the words "meeting open to the public" is to provide a situation where all of the attending members of the board or commission assembled together arrive at final decisions and determinations in such a manner as to allow the press and the general public to be present. Any other interpretation would defeat the legislative intent of the statute. 1959-60 Op. Att'y Gen. No. 59-105 (decided under prior law).

**Recording and broadcasting of meetings.** - News reporters may record public meetings and may later broadcast those recordings, if the recording process does not effectively interfere with certain legitimate governmental interests such as the need to provide for order, decorum, etc. 1973 Op. Att'y Gen. No. 73-10 (decided under prior law).

**Notice of meetings.** - Notice must be posted in a timely manner prior to the anticipated meeting. 1990 Op. Att'y Gen. No. 90-29.

The reasonable notice standard contained in the Open Meetings Act involves an analysis of its substance and procedure, and no hard and fast rule can be applied to what constitutes "reasonable notice" under the Act. 1990 Op. Att'y Gen. No. 90-29.

Procedurally, it is acceptable to post notice in a prominent location like city hall or in the county courthouse. However, where notice has been posted in a prominent location but the public is denied access, such notice is defective and therefore not reasonable. 1990 Op. Att'y Gen. No. 90-29.

It is recommended that public policy-making bodies post notice at least 10 days prior to regular meetings, three days prior to special meetings and as practicable for emergency meetings. However, emergency meetings called with little or no notice must involve issues which, if not addressed immediately by a policy-making body, will threaten the health, safety or property of its citizens. 1990 Op. Att'y Gen. No. 90-29.

A violation of the Open Meeting Act's notice provisions must be considered to be substantial because the Act's policy goals and intent cannot be achieved without sufficient notice. 1990 Op. Att'y Gen. No. 90-29.

**Example where notice reasonable.** - Where notice of the meeting at which a board adopted regulations under the Environmental Improvement Act was mailed at least 10 days prior to the scheduled date to 64 individuals, committees and organizations (including the appellant who had and exercised the opportunity to appear at two preliminary meetings at which evidence was taken regarding the proposed regulations), the notice of these preliminary meetings was published in nine newspapers, a news release was issued on April 16, 1974, giving the time and place of the April 19 meeting and stating that the board would take action on proposed regulations for solid waste and New Mexico's ambient air standard for sulfur dioxide, notice of the meeting, citing a U.P.I. release, appeared in two other papers on April 18, 1974, and April 17, 1974, respectively, and moreover, April 19 was the regular monthly meeting date for the board, it was held that all of these efforts by the board constituted reasonable notice to the public within the meaning of this subsection. *New Mexico Mun. League, Inc. v. New Mexico Env'tl. Imp. Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

**"Limited personnel matters" exception.** - If a public policy-making body desires to meet in executive session to discuss an individual employee's dismissal, promotion, resignation, complaint or shortcomings, then such a meeting could properly be closed pursuant to the "limited personnel matters" exception set forth in Subsection E(2). Conversely, budgetary discussions and the like, while sometimes tangentially related to personnel matters, are not to be held behind closed doors. 1990 Op. Att'y Gen. No. 90-28.

**Reinstatement of termination proceedings after initial ones defective.** - Where the original termination proceedings against a teacher were reversed based upon a procedural defect (failure to comply with this article), the school board was entitled to

reinstate terminational proceedings, correct the procedural defect, and rely upon the same alleged acts of misconduct that had been relied upon in the original proceedings. Board of Educ. v. Sullivan, 106 N.M. 125, 740 P.2d 119 (1987).

**Correction of procedural error.** - A local school board's procedural error in, following private deliberations, issuing its written decision affirming a teacher's dismissal without convening an open meeting and without a public announcement of the vote, may be corrected by holding a prompt public meeting, affording the teacher an opportunity to be present, and publicly voting on and ratifying its decision. Kleinberg v. Board of Educ., 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988).

**No general right of public sector collective bargaining.** - It would be incorrect to infer that by including a provision allowing closed meetings to discuss strategy preliminary to collective bargaining negotiations, Paragraph E(3) of this section, the legislature recognized the general right of public sector collective bargaining. To the contrary, that provision was enacted only because the legislature specifically had authorized cities to bargain collectively with transit workers in 3-52-14 to 3-52-16 NMSA 1978. 1987 Op. Att'y Gen. No. 87-41.

**The Las Cruces Selection Advisory Committee** is a policy-making body for purposes of the Open Meetings Act. 1990 Op. Att'y Gen. No. 90-27.

**Law reviews.** - For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 229.

Construction and application of exemptions, under 5 USCS § 552b(c), to open meeting requirement of Sunshine Act, 82 A.L.R. Fed. 465.

73 C.J.S. Public Administrative Law and Procedure § 19.

### **10-15-1.1. Short title.**

Chapter 10, Article 15 NMSA 1978 may be cited as the "Open Meetings Act".

**History:** 1978 Comp., § 10-15-1.1, enacted by Laws 1979, ch. 366, § 2; 1989, ch. 299, § 2.

**The 1989 amendment**, effective June 16, 1989, substituted "Chapter 10, Article 15 NMSA 1978" for "Sections 10-15-1 through 10-15-4 NMSA 1978".

### **10-15-2. State legislature; meetings.**

A. All meetings of a quorum of members of any committee or policymaking body of the state legislature held for the purpose of discussing public business or for the purpose of

taking any action within the authority of or the delegated authority of such committee or body are declared to be public meetings open to the public at all times.

B. The provisions of Subsection A of this section shall not apply to matters relating to personnel, or matters adjudicatory in nature, or any bill, resolution or other legislative matter not yet presented to either house of the legislature or general appropriation bills.

C. For the purposes of this section, "meeting" means a gathering of the members called by the presiding officer of a standing committee.

**History:** 1953 Comp., § 5-6-24, enacted by Laws 1974, ch. 91, § 2.

**Where open meetings not required.** - The open meetings requirement as defined in this section does not apply to a caucus of the majority party of the house of representatives. 1976 Op. Att'y Gen. No. 76-21.

### **10-15-3. Invalid actions; standing.**

A. No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policy-making body shall be valid unless taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policy-making body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of Section 10-15-1 NMSA 1978.

B. All provisions of the Open Meetings Act [this article] shall be enforced by the attorney general or by the district attorney in the county of jurisdiction. However, nothing in that act shall prevent an individual from independently applying for enforcement through the district courts.

C. The district courts of this state shall have jurisdiction, upon the application of any person to enforce the purpose of the Open Meetings Act, by injunction, mandamus or other appropriate order. The prevailing party in that legal action shall be awarded court costs.

D. No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.

**History:** 1953 Comp., § 5-6-25, enacted by Laws 1974, ch. 91, § 3; 1989, ch. 299, § 3.

**The 1989 amendment,** effective June 16, 1989, rewrote this section to the extent that a detailed comparison would be impracticable.

**Employment offer from two commissioners.** - The action of two county commissioners orally extending an offer of a two-year employment was without statutory authority because it was not made at a duly constituted meeting of the board

and, thus, it was not a valid act capable of binding the county. *Trujillo v. Gonzales*, 106 N.M. 620, 747 P.2d 915 (1987).

#### **10-15-4. Penalty.**

Any person violating any of the provisions of Section 10-15-1 or 10-15-2 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.

**History:** 1953 Comp., § 5-6-26, enacted by Laws 1974, ch. 91, § 4; 1989, ch. 299, § 4.

**The 1989 amendment**, effective June 16, 1989, substituted "Section 10-15-1 or 10-15-2 NMSA 1978" for "Section 1 or 2 of this act" and "five hundred dollars (\$500)" for "one hundred dollars (\$100)".

## **ARTICLE 16 CONFLICT OF INTEREST**

#### **10-16-1. Short title.**

This act [10-16-1 to 10-16-15 NMSA 1978] may be cited as the "Conflict of Interest Act".

**History:** 1953 Comp., § 5-12-1, enacted by Laws 1967, ch. 306, § 1.

**Scope of act.** - The Conflict of Interest Act applies only to state agencies and that term would not include a county commission. 1969 Op. Att'y Gen. No. 69-135.

**Effect on school districts.** - It would not have been necessary to enact 22-21-1 NMSA 1978 of the public school code if the Conflict of Interest Act applied to school districts. 1969 Op. Att'y Gen. No. 69-19.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 63A Am. Jur. 2d Public Officers and Employees §§ 321 to 323, 325.

67 C.J.S. Officers and Public Employees §§ 34, 89, 204.

#### **10-16-2. Definitions.**

As used in the Conflict of Interest Act [10-16-1 to 10-16-15 NMSA 1978]:

A. "business" means a corporation, partnership, sole proprietorship, firm, organization or individual carrying on a business;

B. "confidential information" means information which by law or practice is not available to the public;

C. "controlling interest" means an interest which is greater than twenty percent;

D. "employee" means any person who has been elected to, appointed to or hired for any state office and who receives compensation in the form of salary or is eligible for per diem or mileage, but excluding legislators and judges;

E. "employment" means rendering of services for compensation in the form of salary as an employee;

F. "financial interest" means an interest held by an individual, his spouse or minor children which is:

(1) an ownership interest in business; or

(2) any employment, or prospective employment for which negotiations have already begun;

G. "official act" means an official decision, recommendation, approval, disapproval or other action which involves the use of discretionary authority, except the term does not mean an act of the legislature or an act of general applicability; and

H. "standards" means the conduct required by the Conflict of Interest Act.

**History:** 1953 Comp., § 5-12-2, enacted by Laws 1967, ch. 306, § 2; 1979, ch. 350, § 1.

**Where scope of section limited.** - The Conflict of Interest Act does not apply to employees of school districts or other similar political subdivisions of the state. 1969 Op. Att'y Gen. No. 69-19.

**Employees of school districts do not hold a "state office."** 1969 Op. Att'y Gen. No. 69-19.

**Members of racing commission are within purview of conflict laws as employees.** 1979 Op. Att'y Gen. No. 79-15.

**New Mexico municipal self-insurers' fund.** - The New Mexico municipal self insurers' fund, formed under the provisions of 11-1-3 NMSA 1978, authorizing governing bodies to exercise joint powers, and Article 62, Chapter 3 NMSA 1978, governing municipal insurance, is an "agency," as defined in this section and is, therefore, subject to audit by the state auditor under 12-6-3 NMSA 1978. 1987 Op. Att'y Gen. No. 87-65.

### **10-16-3. Gifts.**

A. No employee or legislator shall request or receive and accept a gift or loan for himself or another if:

(1) it tends to influence him in the discharge of his official acts; or

(2) he, within two years, has been involved in any official act directly affecting the donor or lender or knows that he will be involved in any official act directly affecting the donor or lender.

B. This section does not apply in the case of:

(1) an occasional nonpecuniary gift, insignificant in value;

(2) an award publicly presented in recognition of public service;

(3) a commercially reasonable loan made in the ordinary course of business by an institution authorized by the laws of the state to engage in the business of making loans; or

(4) a political campaign contribution, provided that such gift or loan is actually used in a political campaign.

**History:** 1953 Comp., § 5-12-3, enacted by Laws 1967, ch. 306, § 3.

**Free passes for racing commissioners disallowed.** - When the members of the racing commission distribute free passes which the tracks must honor they are requesting a benefit for themselves or for those upon whom they wish to confer a benefit from persons who are directly affected by their official acts, which is the kind of activity the Conflict of Interest Act is intended to prevent. 1979 Op. Att'y Gen. No. 79-15.

**Public Employees Retirement Board members could not accept expense-paid trip.** - Public Employees Retirement Board members could not accept an offer of an expense-paid trip to Columbus, Ohio to be hosted by Public Employees Benefit Services Corporation. 1989 Op. Att'y Gen. No. 89-21.

#### **10-16-4. Disqualification.**

A. An employee shall disqualify himself from participating in any official act directly affecting a business in which he has a financial interest.

B. If the public interest so requires, the governor may make an exception from this section for an employee, by expressing the exception and the reasons for it in writing. The exception shall be effective when the employee files this writing with the secretary of state.

**History:** 1953 Comp., § 5-12-4, enacted by Laws 1967, ch. 306, § 4.

**State Transportation Authority member** should recuse himself when a conflict arises between the authority's official acts and his own financial interests. When the public

interest requires the participation of a member who has a conflict of interest with the particular official act, the member should ask the governor for a specific exception. If the public interest so requires, the governor should grant the exception. 1987 Op. Att'y Gen. No. 87-71.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - What constitutes acts affecting personal financial interest within meaning of 18 USCS § 208(a), penalizing participation by government employees in matters in which they have personal financial interest, 59 A.L.R. Fed. 872.

### **10-16-5. Acquiring financial interest.**

No employee shall acquire a financial interest at a time when he believes or has reason to believe that it will be directly affected by his official act.

**History:** 1953 Comp., § 5-12-5, enacted by Laws 1967, ch. 306, § 5.

### **10-16-6. Confidential information.**

No legislator or employee shall use confidential information acquired by virtue of his state employment or office for his or another's private gain.

**History:** 1953 Comp., § 5-12-6, enacted by Laws 1967, ch. 306, § 6.

### **10-16-7. Contracts involving employees.**

A state agency shall not enter into any contract with an employee of the state or with a business in which the employee has a controlling interest, involving services or property of a value in excess of one thousand dollars (\$1,000), when the employee has disclosed his controlling interest unless the contract is made after public notice and competitive bidding; provided that this section does not apply to a contract of official employment with the state or to contracts made pursuant to the provisions of the University Research Park Act [21-28-1 to 21-28-25 NMSA 1978].

**History:** 1953 Comp., § 5-12-7, enacted by Laws 1967, ch. 306, § 7; 1983, ch. 90, § 1; 1989, ch. 264, § 26.

**The 1989 amendment**, effective April 5, 1989, added all of the language beginning with "or to contracts" at the end of the section.

### **10-16-8. Contracts involving former employees.**

A state agency shall not enter into a contract with, nor take any action favorably affecting, any person or business which is:



A. represented personally in the matter by a person who has been an employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the employee; or

B. assisted in the transaction by a former employee of the state whose official act, while in state employment, directly resulted in the agency's making that contract or taking that action.

**History:** 1953 Comp., § 5-12-8, enacted by Laws 1967, ch. 306, § 8; 1983, ch. 90, § 2.

### **10-16-9. Contracts involving legislators.**

A state agency shall not enter into any procurement contract for services, construction or items of personal property with a legislator or with a business in which the legislator has controlling interest, in excess of one thousand dollars (\$1,000), where the legislator has disclosed his controlling interest unless the contract is made after public notice and competitive sealed bidding or competitive sealed proposal in accordance with the provisions of the Procurement Code.

**History:** 1953 Comp., § 5-12-9, enacted by Laws 1967, ch. 306, § 9; 1989, ch. 143, § 1.

**The 1989 amendment**, effective June 16, 1989, substituted the present provisions for "A state agency shall not enter into any contract of purchase with a legislator or with a business in which such legislator has controlling interest, involving services or property in excess of one thousand dollars (\$1,000) where the legislator has disclosed his controlling interest, unless the contract is made after public notice and competitive bidding. As used in this section contract shall not mean a lease."

**School districts are "state agencies"** covered by the Conflict of Interest Act. 1989 Op. Att'y Gen. No. 89-34.

**Contracts with nonprofit organizations.** - The Conflict of Interest Act does not disqualify or restrict a nonprofit organization's ability to enter into contracts with state agencies managed by a board of directors having as one of its members a state legislator. 1990 Op. Att'y Gen. No. 90-17.

New Mexico Const., art. IV, § 28 precludes a nonprofit organization from entering into a contract with the state or a state agency if the organization, within one year of entering the contract, had as a director a member of the legislature and the contract was authorized during that member's term. 1990 Op. Att'y Gen. No. 90-17.

**Legislator is subject to restrictions when he sells products.** - A legislator can sell products to a state agency on an open account or collect-on-delivery basis only under contracts of less than \$1,000.00. In addition, a legislator would remain subject to N.M. Const., art. IV, § 28, so that he could not make any sales during his term or one year

afterwards if the sales were authorized by law during his term. 1989 Op. Att'y Gen. No. 89-34.

**Legislator may bid on state contracts**, if there was public notice of the bid and the bidding was competitive. 1967 Op. Att'y Gen. No. 67-133.

**Company owned by legislator may bid on state contracts.** - Unless otherwise prohibited by N.M. Const., art. IV, § 28, a company owned by a legislator may bid on contracts to supply state agencies with materials and supplies under the competitive bid process set forth in the Procurement Code. 1989 Op. Att'y Gen. No. 89-34.

**A legislator's company can bid as general contractor on state construction projects** only if the project was not authorized during, or within one year of, his service in the legislature. If the contract on which the legislator's company bids is one authorized by statutes enacted more than one year before his service in the legislature and is worth more than \$1,000.00, then he must give public notice of his bid, and the state agency must comply with the special procedures contained in the Conflict of Interest Act. 1989 Op. Att'y Gen. No. 89-34.

**When business owned by legislator acts as subcontractor.** - If a business owned by a legislator bids on a contract with the state as a subcontractor and is a party to the contract, then the business is subject to the same limitations that apply when it acts as general contractor. If, however, the business only contracts with the general contractor and does not enter into any contract with the state, then the restrictions of this section no longer control. However, even though a subcontractor may not be subject to the Conflict of Interest Act, it still may be indirectly interested in a state contract and subject to the prohibition contained in N.M. Const., art. IV, § 28. 1989 Op. Att'y Gen. No. 89-34.

**Public defenders.** - New Mexico Const., art. IV, § 28 would prohibit contract between public defender department and legislator if the legislator was in office in 1968 when the original Indigent Defense Act was passed, regardless of whether public notice and competitive bidding are used. 1979 Op. Att'y Gen. No. 79-23.

The public defender's office may not award state representatives professional service contracts unless solicitation for competitive bids is done, in accordance with the Procurement Code. 1987 Op. Att'y Gen. No. 87-67.

**Legislator is not prevented from serving as member of peanut commission** by this section. 1979 Op. Att'y Gen. No. 79-34.

**Conflict of interest is not affected if bond proceeds involved.** - Any potential conflict of interest is not affected if a contract or project is funded with local bond proceeds rather than state money. 1989 Op. Att'y Gen. No. 89-34.

**Damages.** - A legislator and other directors of a nonprofit organization may be found liable for damages for breach of fiduciary duty if they intentionally enter into a contract which is invalid under N.M. Const., art. IV, § 28. 1990 Op. Att'y Gen. No. 90-17.

### **10-16-10. Disclosures.**

A. Every employee who has a financial interest which he believes or has reason to believe may be affected by actions of the state agency by which he is employed shall disclose the precise nature and value of such interest. The disclosures shall be made in writing to the secretary of state before entering state employment, and during the month of January every year thereafter.

B. Every legislator who has a controlling interest or a financial interest exceeding ten thousand dollars (\$10,000) in a business which is regulated by official acts of the state shall disclose the precise nature and value of such interest. Disclosure shall be made to the secretary of state during the month of January of each year of the term for which he was elected.

C. The information on the disclosures, except for the valuations attributed to the reported interests, shall be made available by the secretary of state for inspection to any citizen of this state. The valuation shall be confidential except for official removal or impeachment proceedings.

D. Except for legislators or employees removable only by impeachment, the filing of disclosures pursuant to this section is a condition of entering upon and continuing in state employment.

**History:** 1953 Comp., § 5-12-10, enacted by Laws 1967, ch. 306, § 10.

### **10-16-11. Codes of conduct.**

A. The head of every executive agency and institution of the state shall draft a code of conduct for all employees in that agency or institution. The code of conduct shall prescribe standards in addition to those set forth in the Conflict of Interest Act [10-16-1 to 10-16-15 NMSA 1978] which are peculiar and appropriate to the function and purpose for which the agency or institution was created or exists. Such codes, upon approval of the governor, shall further govern the conduct of the employees of that agency or institution, and except for those employees removable only by impeachment, shall, if violated, constitute cause for dismissal, demotion or suspension. All codes approved by the governor shall be filed with the secretary of state and shall be open to public inspection.

B. Codes of conduct shall be reviewed from time to time, and amendments submitted to the governor for his approval, and after approval the amended code shall be filed as provided in Subsection A of this section.

C. Codes of conduct shall be submitted by the head of every executive agency and institution of the state to the governor by September 1, 1969. The head of any newly created agency or institution shall within the first ninety days of the agency's or institution's existence submit its code of conduct to the governor.

**History:** 1953 Comp., § 5-12-11, enacted by Laws 1967, ch. 306, § 11; 1969, ch. 93, § 1.

**School districts not affected.** - School districts do not come within this provision of the Conflict of Interest Act. 1969 Op. Att'y Gen. No. 69-19.

### **10-16-12. Disclosure for persons on retainer or on contract.**

Any individual, not an employee, who directly or through a business in which such individual has a financial interest, or any business which receives more than five thousand dollars (\$5,000), in any one twelve-month period, in the aggregate from one or more state agencies by contract for professional services rendered such agencies, shall disclose such fact in writing to the secretary of state, together with the names of the agencies for which such services were rendered and the total amounts paid by each agency.

**History:** 1953 Comp., § 5-12-12, enacted by Laws 1967, ch. 306, § 12.

### **10-16-13. Prohibited bidding.**

No state agency shall accept any bid from a person who directly or indirectly participated in the preparation of specifications on which the competitive bidding was held.

**History:** 1953 Comp., § 5-12-13, enacted by Laws 1967, ch. 306, § 13.

**School district not state agency.** - "State agency" as used in the Conflict of Interest Act does not apply to school districts. 1969 Op. Att'y Gen. No. 69-19.

**Where section not violated.** - If the state purchasing agent secures free technical assistance from a supplier in order to aid in preparing specifications, this act is not violated. 1967 Op. Att'y Gen. No. 67-118.

**Scope of "person".** - "Person" as used in this section includes any person, corporation, partnership or other legal entity. 1967 Op. Att'y Gen. No. 67-118.

### **10-16-14. Enforcement procedures.**

A. If the attorney general determines that there is sufficient cause to file a complaint against a legislator or an employee removable only by impeachment, he shall refer the matter to the house of representatives of the state legislature. If within thirty days after

such referral, the house of representatives has neither formally declared that the charges contained in the complaint are not substantial nor instituted hearings on the complaint, the attorney general shall make public the nature of the charges, but he shall make clear that the merits of the charges have never been determined. Days during which the legislature is not in session shall not be included in determining the thirty-day period.

B. Violation of the provisions of the Conflict of Interest Act [10-16-1 to 10-16-15 NMSA 1978] by any employee, other than those covered by Subsection A of this section is grounds for dismissal, demotion or suspension.

**History:** 1953 Comp., § 5-12-14, enacted by Laws 1967, ch. 306, § 14.

### **10-16-15. Standing in court.**

Any group of twenty or more members of both houses of the legislature composed of no less than eight from each of the two largest political parties has standing in court to bring the appropriate civil action to enforce compliance by a state agency, employee, legislator or individual with any provision of the Conflict of Interest Act [10-16-1 to 10-16-15 NMSA 1978].

**History:** 1953 Comp., § 5-12-15, enacted by Laws 1967, ch. 306, § 15.

### **10-16-16. Medicaid; human services department employees; standards of conduct; enforcement.**

A. As used in this section:

(1) "business" means a corporation, partnership, sole proprietorship, firm, organization or individual carrying on a business;

(2) "department" means the human services department;

(3) "employee" means any person who has been appointed to or hired for any department office connected with the administration of medicaid funds and who receives compensation in the form of salary;

(4) "employee with responsibility" means an employee who is directly involved in or has a significant part in the medicaid decision-making, regulatory, procurement or contracting process; and

(5) "financial interest" means an interest held by an individual, his spouse or minor child which is:

(a) an ownership interest in business; or

(b) any employment or prospective employment for which negotiations have already begun.

B. No employee with responsibility shall for twenty-four months following the date on which he ceases to be an employee act as agent or attorney for any other person or business in connection with a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program with respect to which the employee made any investigation, rendered any ruling or was otherwise substantially and directly involved during the last year he was an employee and which was actually pending under his responsibility within that period.

C. No department secretary, income support division director or medical assistance bureau chief or their deputies shall for twelve months following the date on which he ceases to be an employee participate in any manner with respect to a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program and pending before the department.

D. No employee with responsibility shall participate in any manner with respect to a judicial or administrative proceeding, application, ruling, contract, claim or other matter relating to the medicaid program and involving his spouse, minor child or any business in which he has a financial interest unless prior to such participation:

(1) full disclosure of his relationship or financial interest is made in writing to the secretary of the department; and

(2) a written determination is made by the secretary that the disclosed relationship or financial interest is too remote or inconsequential to affect the integrity of the services of the employee.

E. Violation of any of the provisions of this section by an employee is grounds for dismissal, demotion or suspension. A former employee who violates any of the provisions of this section shall be subject to assessment by the department of a civil money penalty of two hundred fifty dollars (\$250) for each violation. The department shall promulgate regulations to provide for an administrative appeal of any assessment imposed.

**History:** Laws 1980, ch. 86, § 1.

**Cross-references.** - As to state assistance to individuals eligible for medicaid, see 27-2-16 NMSA 1978.

## **ARTICLE 17**

### **MISCELLANEOUS PROVISIONS**

### **10-17-1. [County, municipal and educational boards; monthly summary of minutes; contents.]**

That on or before the tenth day of each month there shall be prepared by each board of county commissioners in this state, by the council, commission or trustees of every city, town or village in this state, and by every board of education in this state, a summary of the minutes of all meetings held by such board during the preceding calendar month, such summary to mean a full and correct account of all business transacted by such boards and commissions, showing all matters presented, the action taken thereon, or other disposition thereof, and a statement of all moneys received by any such boards or commissions during the preceding calendar month, showing the source from which received and the amount received from each source, and a detailed statement of all expenditures made during such preceding calendar month, including a list of all warrants issued, to whom issued, the amount of each warrant and the purpose for which the warrant was issued.

**History:** Laws 1939, ch. 220, § 1; 1941 Comp., § 10-505; 1953 Comp. § 5-6-5.

**Cross-references.** - For annual publication of proceedings of county commissioners, see 4-38-9 NMSA 1978.

For annual publication of receipts and expenditures of board of county commissioners, see 4-38-27 NMSA 1978.

For publication of proceedings, see 14-11-11 NMSA 1978.

**Legislative intent.** - There is nothing in this act indicating a legislative intent that it apply to the board of regents or other governing bodies of state colleges and universities. In the absence of any such expression, it must be presumed that the legislature intended that the act apply only to those boards and commissions specifically mentioned. 1939-40 Op. Att'y Gen. No. 39.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties §§ 84 to 86; 62 C.J.S. Municipal Corporations § 409; 78 C.J.S. Schools and School Districts § 125.

### **10-17-2. [Filing summary of minutes; furnishing to legal newspapers.]**

Such summary of minutes shall be filed with the clerk of each board mentioned in Section 1 [10-17-1 NMSA 1978] hereof and such summary shall be a public record and open to inspection of the public, provided, however, that a copy thereof shall be by the board or commission mailed to each and every legal newspaper published in the county for such use as such newspaper may see fit.

**History:** Laws 1939, ch. 220, § 2; 1941 Comp., § 10-506; 1953 Comp., § 5-6-6.

**Cross-references.** - For definition of "legal newspaper," see 14-11-2 NMSA 1978.

For publication of board proceedings, language requirements, see 14-11-11 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties §§ 84 to 86; 62 C.J.S. Municipal Corporations § 409; 78 C.J.S. Schools and School Districts § 125.

### **10-17-3. Publication of list of expenditures monthly.**

On or before the tenth day of each month there may be published in a legal newspaper published in the county where such board or commission is situated, by the council, commission or trustees of every city, town or village in this state, and by every board of education in this state, a summary of expenditures made during the preceding calendar month, which shall include a list of the total expenditures during the month and the amount spent in connection with each budgetary item and a summary of all receipts; provided, however, that the publication herein mentioned shall be made only at the discretion of the council, commission or trustee of every city, town or village, and board of education in this state if they shall deem the said publication necessary in the public interest.

**History:** Laws 1939, ch. 220, § 3; 1941 Comp., § 10-507; Laws 1947, ch. 189, § 1; 1953, ch. 84, § 1; 1953 Comp., § 5-6-7.

**Cross-references.** - For payment for required publications of county, municipal, or school board, see 14-11-9 NMSA 1978.

**Publication not mandatory.** - It is not mandatory that the commission make a monthly publication of its receipts and expenditures. 1957-58 Op. Att'y Gen. No. 57-126.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties §§ 84 to 86; 62 C.J.S. Municipal Corporations § 409; 79 C.J.S. Schools and School Districts § 345.

### **10-17-4. County and precinct officers; monthly financial statements; audit.**

All county and precinct officers except justices of the peace shall file monthly statements with the county clerk on the first Monday of each month, showing in detail the amounts of all public money received and disbursed by them. The statements shall be verified by the officers making them and the board of county commissioners shall audit and adjust them in accordance with the facts.

**History:** 1953 Comp., § 5-6-8, enacted by Laws 1961, ch. 212, § 10.



**Repeals and reenactments.** - Laws 1961, ch. 212, § 10, repeals 5-6-8, 1953 Comp., relating to filing of monthly statements showing money received or disbursed by county officers, and enacts the above section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 20 C.J.S. Counties § 196.

### **10-17-5. [Delivery of lawbooks, records and documents to successors; exception.]**

All public officers of this state who may have received lawbooks, as such officers, are hereby required to turn over the same to their successors, as also the records and all other documents relative to their respective offices: provided, that the members of the legislature shall not be included in this section.

**History:** Laws 1854-1855; C.L. 1865, ch. 92, § 20; C.L. 1884, § 1741; C.L. 1897, § 2557; Code 1915, § 3985; C.S. 1929, § 96-135; 1941 Comp., § 10-510; 1953 Comp., § 5-6-9.

**Cross-references.** - For county surveyor to deliver books to successor, see 4-42-4 NMSA 1978.

For county treasurer to deliver books and papers to successor, see 4-43-4 NMSA 1978.

For delivery of copies of 1978 Compilation to successor, see 12-1-4 NMSA 1978.

For record books of county clerk delivered to successor, see 14-8-9 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 211.

### **10-17-6. Repealed.**

## **ANNOTATIONS**

**Repeals.** - Laws 1978, ch. 130, § 5, repeals 5-6-10, 1953 Comp. (10-17-6 NMSA 1978), relating to delivery of supreme court reports and statutes, effective March 6, 1978.

### **10-17-7. [Shortages in accounts of public officers; compromise prohibited.]**

It shall hereafter be unlawful for any state official, district attorney, board of county commissioners or other official charged with the collection of any indebtedness, or the prosecution of any suit for the collection of any indebtedness due to, or claimed by the state, any county, city, town, precinct or school district, from any public official or the sureties on his official bond, to compromise, satisfy or discharge such indebtedness in

favor of such official or sureties, except upon payment in full of the amount claimed to be due, or of the amount for which judgment is rendered by a court of competent jurisdiction.

**History:** Laws 1893, ch. 5, § 1; C.L. 1897, § 3193; Code 1915, § 1864; C.S. 1929, § 39-113; 1941 Comp., § 10-512; 1953 Comp., § 5-6-11.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 215.

### **10-17-8. [Shortage compromises declared invalid; recovery of full payment; limitation of action.]**

Any compromise, satisfaction or discharge of indebtedness prohibited by the preceding section [10-17-7 NMSA 1978] of this article is hereby declared to be invalid, and shall not be held a bar to any suit for the collection thereof, and suit may be brought at any time within four years from the date of any such compromise, satisfaction or discharge to enforce the payment thereof, notwithstanding any existing law of limitation.

**History:** Laws 1893, ch. 5, § 2; C.L. 1897, § 3194; Code 1915, § 1865; C.S. 1929, § 39-114; 1941 Comp., § 10-513; 1953 Comp., § 5-6-12.

**Purpose of sections.** - The object of this section and 10-17-7 NMSA 1978 is to exclude a special class of claims from the general statutes of limitation, whether existing at the time this act (10-17-7, 10-17-8 NMSA 1978) was passed or subsequently enacted. State v. Roy, 41 N.M. 308, 68 P.2d 162 (1937).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 216.

### **10-17-9. [Defaulting officers; auditor's transcript of account; purpose.]**

Whenever any revenue officer or other person responsible for public money has neglected or refused or shall in future neglect or refuse to pay over to the state treasurer the sum or balance for which he is accountable, and which is due to the state, upon the settlement of his accounts, it shall be the duty of the state auditor to make a transcript of the account of such officer or person, with the state, showing the sum due the state by such officer or person, which said account shall be certified as true and correct, as taken from the books of the auditor, and shall be signed by said auditor and sealed with his official seal, and if he shall have no official seal, with his private seal, and the auditor shall transmit the same immediately, together with correct copies of any other document, bond, obligation or other instrument of writing, signed, sealed and certified as aforesaid, to the district attorney or attorney general to be used in the prosecution of such judge, officer, individual and their sureties, if they have such sureties.

**History:** Laws 1869-1870, ch. 39, § 1; C.L. 1884, § 2284; C.L. 1897, § 3195; Code 1915, § 1866; C.S. 1929, § 39-115; 1941 Comp., § 10-514; 1953 Comp., § 5-6-13.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 215.

### **10-17-10. [Prosecution for shortage; proof required; judgment; execution.]**

Such prosecution shall be brought for the whole sum due and the interest accrued, and it shall be sufficient to prove the amount of the debt, and the fact that the securities were the securities of the said officer or individual prosecuted, and judgment shall be given against said officer or individual and their said securities for the sum so due and interest according to law, and execution shall thereupon be issued against all the parties so tried, in favor of the state.

**History:** Laws 1869-1870, ch. 39, § 2; C.L. 1884, § 2285; C.L. 1897, § 3196; Code 1915, § 1867; C.S. 1929, § 39-116; 1941 Comp., § 10-515; 1953 Comp., § 5-6-14.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 216.

### **10-17-11. [Institution of shortage prosecution; admissible evidence.]**

When any party shall be liable to be prosecuted under the provisions of this and the two preceding sections [10-17-9, 10-17-10 NMSA 1978], it shall be the duty of the district attorney to immediately commence a suit in favor of the state against said party and his securities for the sum due and interest according to law, and in the trial of any cause now or that may be hereafter pending against any officer or person and their securities, the certified transcript of the account of said officer or individual provided for by said sections and the certified copies of any other document, bond, obligation or other instrument of writing sealed, signed and certified in conformity with the said sections, or the originals, shall be admitted as evidence of such debt or liability of said officer or individual, and their securities, and the court trying the cause shall give judgment and issue execution in conformity to said evidence.

**History:** Laws 1869-1870, ch. 39, § 3; C.L. 1884, § 2286; C.L. 1897, § 3197; Code 1915, § 1868; C.S. 1929, § 39-117; 1941 Comp., § 10-516; 1953 Comp., § 5-6-15.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees § 216.

### **10-17-12. [Willful neglect of duty; penalty.]**

When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be deemed a misdemeanor, punishable by imprisonment in the county jail for not less than ten nor more than sixty days or by a fine of not less than \$100, nor more than \$500.

**History:** 1941 Comp., § 10-517, enacted by Laws 1951, ch. 13, § 1; 1953 Comp., § 5-6-16.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 67 C.J.S. Officers and Public Employees §§ 255 to 263.