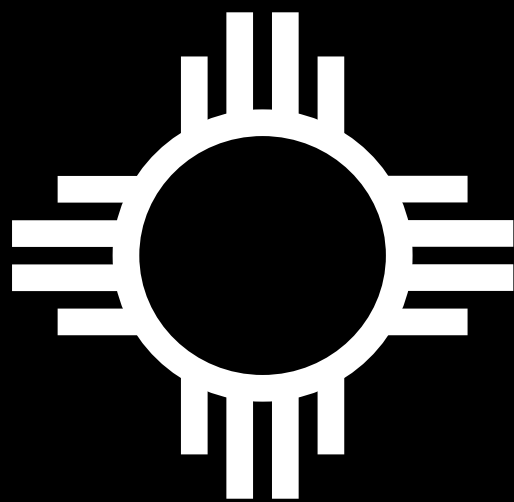


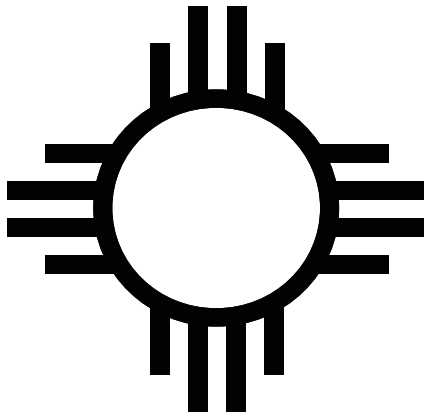
**NEW
MEXICO
REGISTER**



Volume XXIII
Issue Number 21
November 15, 2012

New Mexico Register

**Volume XXIII, Issue Number 21
November 15, 2012**



The official publication for all notices of rulemaking and filings of adopted, proposed and emergency rules in New Mexico

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Administrative Law Division
Santa Fe, New Mexico
2012

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New Mexico Register

Volume XXIII, Number 21

November 15, 2012

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Rules published in this issue of the New Mexico Register are effective on the publication date of this issue unless otherwise specified. “No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act. Unless a later date is otherwise provided by law, the effective date of a rule shall be the date of publication in the New Mexico register.” Section 14-4-5 NMSA 1978.

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Notices of Rulemaking and Proposed Rules

NEW MEXICO OFFICE OF THE STATE ENGINEER

NOTICE OF PROPOSED REGULATIONS AND PUBLIC HEARING

OFFICE OF THE STATE ENGINEER
P.O. BOX 25102
SANTA FE, NEW MEXICO 87504-5102
(505) 827-6150
www.ose.state.nm.us

The State Engineer has released proposed amendments to regulations Governing Hearings Unit Procedures. The proposed amendments were developed to address the conduct of and procedures of hearings before the state engineer conducted pursuant to NMSA 1978, Sections 72-2-16, 72-2-17, and 72-2-18. This rule shall not govern public rulemaking proceedings held pursuant to NMSA 1978, Section 72-2-8, expedited proceedings under NMSA 1978, Section 72-2-9.1, or appeals from a district water master to the state engineer in accordance with NMSA 1978, Section 72-3-3.

Amendments are proposed to clarify the procedures of the Hearings Unit and to replace the existing regulations that are currently filed in the State Records Center as 19.25.2.2 and 19.25.2.4 NMAC. The proposed regulations are available at the Office of the State Engineer in Santa Fe, Albuquerque, Las Cruces, Roswell, Deming, Aztec, and Cimarron. The proposed regulations are also posted on the Office of the State Engineer website and may be accessed as follows:

- a. Start from the OSE home page at www.ose.state.nm.us
- b. On the OSE home page, under the heading of Hot Topics, click on the link for "Proposed Amendments to Hearings Unit Procedures"

To request that a copy of the rules and regulations be sent to you in the mail, please contact Kimberly Ulibarri at 505-827-6146 or email Kimberly.Ulibarri@state.nm.us.

A public hearing will be held on the above described proposed and amended regulations at the New Mexico State Capitol Building (Roundhouse) 490 Old Santa Fe Trail, Room 326, Santa Fe, New Mexico, on Tuesday, December 18, 2012, beginning at 9:00 a.m. Parking is available at the State Capitol parking structure located at 420 Galisteo Street. Any person who is or may be affected by these proposed rules and regulations may appear and testify. If you are an individual

with a disability who is in need of special assistance or accommodation to attend or participate in the hearing, please contact Kimberly Ulibarri at (505) 827-6146. The Office of the State Engineer requests ten days advance notice to provide any special accommodation.

Written comments on the proposed regulations may be submitted to the Office of the State Engineer in Santa Fe or to any of the district offices. Written comments on the proposed rules and regulations may also be mailed to:

Office of the State Engineer
Attn: Kimberly Ulibarri
P.O. Box 25102
Santa Fe, NM 87504-5102

Please submit your written comments to the Office of the State Engineer no later than December 4, 2012. After December 4th, comments should be submitted at the hearing in Santa Fe on December 18, 2012.

End of Adopted Rules Section

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Adopted Rules

NEW MEXICO EDUCATIONAL RETIREMENT BOARD

2.82.1 NMAC, General Provisions, filed 11-16-2001 is repealed and replaced by 2.82.1 NMAC, General Provisions, effective 11-15-2012.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL
RETIREMENT
PART 1 GENERAL
PROVISIONS

2.82.1.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico 87502-0129 [2.82.1.1 NMAC - Rp, 2.82.1.1 NMAC, 11-15-12]

2.82.1.2 SCOPE: This rule addresses the organization and operations of the educational retirement board. [2.82.1.2 NMAC - Rp, 2.82.1.2 NMAC, 11-15-12]

2.82.1.3 STATUTORY AUTHORITY: The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978. [2.82.1.3 NMAC - Rp, 2.82.1.3 NMAC, 11-15-12]

2.82.1.4 DURATION: Permanent [2.82.1.4 NMAC - Rp, 2.82.1.4 NMAC, 11-15-12]

2.82.1.5 EFFECTIVE DATE: November 15, 2012, unless a later date is cited at the end of a section. [2.82.1.5 NMAC - Rp, 2.82.1.5 NMAC, 11-15-12]

2.82.1.6 OBJECTIVE: The purpose of this rule is to establish procedures and functions of the educational retirement board, its director, officers and committees. [2.82.1.6 NMAC - Rp, 2.82.1.6 NMAC, 11-15-12]

2.82.1.7 DEFINITIONS: [RESERVED]

2.82.1.8 BOARD MEMBERS AND OFFICERS: Ex-officio members of the board shall take office upon their qualifying for the offices enumerated in

Section 22-11-3. The board member elected by the New Mexico educational association shall be elected in the manner prescribed by the constitution of that body and shall take office on January 1 following such election. The board member elected by the New Mexico members of the American association of university professors shall be elected in accordance with the constitution of that body and shall take office on July 1 following such election. The board member elected by the New Mexico association of educational retirees shall be elected in the manner prescribed by the constitution of that body and shall take office on July 1 following such election. The board members appointed by the governor shall take office upon their receipt of appointment. All board members shall hold office until their successors qualify regardless of the length of the term and office. At the regular August meeting of each year, the members of the board shall elect a chairman, a vice-chairman, and a secretary. The duties of the officers shall include the following.

A. The chairman shall preside at all meetings of the board.

B. The vice-chairman shall serve as the chairman in the absence of the chairman.

C. The secretary shall attest to the official actions of the board when such is required. The vice-chairman may attest to the official actions of the board in the secretary's absence.

[2.82.1.8 NMAC - Rp, 2.82.1.8 NMAC, 11-15-12]

2.82.1.9 MEETINGS:

A. The New Mexico educational retirement board shall hold regular meetings in the months of February, April, June, August, October and December; provided however, that the board may change the date of a meeting by board action, which action shall be noted in the minutes. Special board meetings may be held in accordance with state law at the call of the chairman or by any three board members. Committee meetings shall be scheduled as directed by the chairman of each committee.

B. Four members of the board shall constitute a quorum at any regular or special meeting.

C. Notice of all meetings of the board and its committees shall be made in accordance with the Open Meetings Act (Chapter 10, Article 15, NMSA 1978) and the Open Meetings Resolution adopted by the board and shall be posted on the board's website and distributed as otherwise directed by the board. Notice shall be given at least eight (8) days in advance of any regular meeting scheduled by the board at its last

meeting. Notice shall be given at least three (3) days in advance of any special meeting called by the chairman or any three members of the board.

D. The chairman shall set the agenda of board meetings; provided however, that if the chairman refuses to place an item on the agenda, three (3) individual board members may petition in writing and place an item on the agenda without the chairman's consent. Committee chairmen shall set the agendas of their respective committees. Notice of agendas shall be made in accordance with the Open Meetings Act and the Open Meetings Resolution adopted by the board and the director shall distribute board and committee agendas to board members, post the agendas to the board's website, and distribute the agendas as otherwise directed by the board.

E. Board members and their designees may attend and participate in any regular or special board meeting by telephone or other electronic device if:

(1) the member or designee cannot attend the meeting due to an emergency or unforeseen circumstance;

(2) the member or designee can clearly be heard by everyone attending the meeting and the member or designee clearly identifies his- or herself before speaking or participating in a vote;

(3) the member or designee has not attended regular meetings electronically more than twice in a rolling twelve (12) month period;

(4) no more than two members or designees who otherwise qualify for participation under this section may do so at the same meeting; and

(5) the member or designee otherwise complies with the Open Meetings Act.

F. Failure of any board member other than state treasurer or secretary of public education to attend four consecutive regular meetings unless such absence is excused by the board at a board meeting will be considered resignation from the board by that board member. Failure of the designee of the state treasurer or the secretary of public education, respectively, to attend four (4) consecutive regular meetings when the state treasurer or the secretary of public education is absent will be considered resignation from the board by that designee. An excused absence must be recorded in the board meeting minutes.

[2.82.1.9 NMAC - Rp, 2.82.1.9 NMAC, 11-15-12]

2.82.1.10 SANCTIONS AND ENFORCEMENT:

A. Any breach of a board

member's fiduciary duty or violation of the rules or policies adopted by the board made known to the board or of which the board becomes aware shall be reviewed by the board. If a majority of the entire board so request, an alleged breach or violation may be investigated by an independent person or entity not otherwise associated or affiliated with any member of the board or the board's staff. Such person or entity shall be selected by at least five board members and designees, if such be sitting for board members.

B. Any hearing addressing an alleged breach of fiduciary duty or violation of the rules or the policies adopted by the board shall be conducted by the entire board, excepting the member accused of such a breach or violation, in accordance with the rule governing administrative appeals adopted by the board prior to the alleged breach or violation having occurred. If the rule governing administrative appeals is amended between the time that an alleged breach of fiduciary duty or violation of such rules or policies occurred and the time of the hearing, the board shall conduct the hearing in accordance with the rule that existed prior to its amendment.

C. Removal of a board member should occur only when necessary for the board to fulfill its fiduciary duty. A decision to remove a board member should be based on a determination that allowing the member to continue to serve on the board would be a violation of the other board members' fiduciary duty and would be detrimental to the educational retirement fund and the board. Removal should not be undertaken solely to inflict a penalty for a board member's past action(s) unrelated to the matter before the board.

(1) Removal is appropriate in instances of gross misconduct, violation of the board member's fiduciary duty, repeated violation of the rules and policies adopted by the board, or failure to fulfill the duties of a board member. "Gross misconduct" is defined as violation of a clearly established rule or policy, dereliction of duty, unlawful behavior involving matters of dishonesty or deception, gross negligence, but not negligence or carelessness.

(2) Removal of a board member other than the state treasurer or the secretary of public education shall occur only after a full investigation, hearing, and an affirmative vote by not less than five board members and designees, if such are sitting for a board member.

(3) The state treasurer and the secretary of public education may be removed from the board only by removal from their respective offices by an authority possessing such power. The board may nevertheless, in compliance with the procedures set forth herein, make a finding that the actions of a state treasurer or a secretary of public

education warrant removal from the board and report such finding to appropriate authorities. A designee of the state treasurer or the secretary of public education, respectively, shall not participate in board discussions or votes related to the board's consideration of a matter pursuant to this subparagraph that involve the board member who named that person as a designee.

(4) The designees of the state treasurer and the secretary of public education, respectively, may be removed from the board in accordance with the procedures set forth herein. A designee so removed may not be reappointed as a designee by either the state treasurer or the secretary of public education.

D. Board members or designees found to be in violation of the rules and policies adopted by the board or who fail to fulfill their duties, or who otherwise conduct themselves in a manner that is not appropriate for a member of a board governing a public pension fund, may be subject to formal reprimand or admonishment by the board. Reprimand or admonishment shall be done upon a public vote of not less than five board members and designees, if such are sitting for board members, and shall be permanently recorded in the board minutes.

(1) The board may choose to reprimand a board member or designee upon determining that the member's or designee's violation of the rules and policies adopted by the board or conduct as a board member warrant censure or reproof but do not warrant removal from the board.

(2) The board may choose to admonish a board member or designee upon determining that member or designee should be advised or cautioned regarding actions such as a failure to fulfill the duties of a board member or conduct that is inappropriate for a member of a board governing a public pension fund.

E. The board may not impose a fine on a board member or designee; however, the board may order a board member or designee to repay expenses paid by the board on behalf of a board member or designee for education or travel where a board member or designee did not fulfill the purpose for which the education or travel expense was provided. In addition, a board member or designee may be required to repay the donor of a gift accepted in violation of Section 22-11-5.1 or the rules and policies adopted by the board.

[2.82.1.10 NMAC - N, 11-15-12]

2.82.1.11 FUNCTION OF THE BOARD:

A. The board shall function primarily as a policy making body and except for such ministerial acts as may be required by law, administrative matters shall

be the responsibility of the director. The board shall adopt administrative rules and regulations through which the director shall implement the policies of the board.

B. In the consideration of cases involving individual members of the educational retirement system, it shall be the stated policy of the board to consider all appeals on their merits, guided by the Educational Retirement Act and the rules or regulations adopted by this board.

C. Pursuant to the board's fiduciary duty to the fund, the board has sole discretion in determining whether there is adequate funding for any proposed change in benefits or the funding formula.

[2.82.1.11 NMAC - Rp, 2.82.1.10 NMAC, 11-15-12]

2.82.1.12 ADMINISTRATIVE BUDGETS:

The director shall prepare budgets and requests for appropriations, which shall be considered and approved by the board prior to submission to the department of finance and administration or legislature.

[2.82.1.12 NMAC - Rp, 2.82.1.11 NMAC, 11-15-12]

2.82.1.13 EMPLOYMENT OF STAFF:

A. The board, at a regular meeting, shall employ a director who shall serve at the pleasure of the board and at a salary to be set by the board.

B. The board shall annually approve an organizational chart coincident with the adoption of the budget. This chart shall include a description of all positions required for the operation of the office, and the director shall be responsible for staffing these positions. This responsibility shall include the authority for the employment, promotion and dismissal of all employees.

[2.82.1.13 NMAC - Rp, 2.82.1.12 NMAC, 11-15-12]

2.82.1.14 INVESTMENT COMMITTEE:

The investments of the fund shall be under the immediate direction of an investment committee composed of the director, the chairman of the board, and two members appointed by the chairman and approved by the board, for terms of one (1) year. The appointments by the chairman shall take place at the regular October meeting each year. The actions of this committee shall be governed by applicable statutes and by rules and regulations relating to investments adopted by the board.

[2.82.1.14 NMAC - Rp, 2.82.1.13 NMAC, 11-15-12]

2.82.1.15 MEDICAL REVIEW COMMITTEE AND APPEAL OF RECOMMENDATIONS:

A. The board shall engage a

medical review committee composed of three physicians well qualified in general medical knowledge. The committee shall review all disability examination reports and advise the board of the nature and extent of disability for all applicants for disability benefits and the nature and extent of disability for those members already approved for benefits when it becomes necessary to determine their continued eligibility. The committee shall also render advice to the board on the selection of physicians or other qualified persons to perform tests and examinations upon applicants for disability, if necessary, and other medical matters.

B. The director may engage physicians and other qualified persons throughout the state to perform tests and examinations upon applicants for disability, if necessary. Results of such examinations shall be reported in detail to, and reviewed by, the medical review committee. The director is authorized to pay a reasonable fee for the reports and examinations requested by the committee.

C. Appeals of recommendations by the medical review committee that the board not grant a disability retirement may be conducted by a panel of three (3) members of the educational retirement board appointed by the chairman and approved by the board. The appointments by the chairman shall take place at the regular October meeting each year. In the event that a member of the appeals panel resigns from the panel, the chairman may appoint a member of the board to serve for the remaining portion of the one (1) year term. The appointment shall become effectively immediately; provided, however, that it shall be subject to approval by the board at its first meeting occurring after said appointment. The actions of this panel shall be governed by the statutes and administrative rules and regulations adopted by the board.

[2.82.1.15 NMAC - Rp, 2.82.1.14 NMAC, 11-15-12]

2.82.1.16 ACTUARY: The director shall recommend an actuarial firm to be engaged for the purpose of performing routine actuarial services and actuarial investigations and evaluations to be provided for in a contract to be approved by the board. [2.82.1.16 NMAC - Rp, 2.82.1.15 NMAC, 11-15-12]

2.82.1.17 CONDUCT OF BUSINESS:

A. The business affairs of the board shall be conducted by the director within the authority outlined by the Educational Retirement Act and rules and procedures adopted by the board.

B. On behalf of the board, the director is authorized to execute vouchers,

delegate others to execute vouchers, buy and sell, or assign, or otherwise acquire or dispose of stocks, bonds, notes, or other securities held by the board, and execute such other documents as may be necessary to the administration of the Educational Retirement Act.

C. The director shall obtain the board's approval before requesting a formal opinion interpreting the law from the attorney general. The director may, however, obtain advice, either oral or written, from the attorney general as the need may arise.

D. A final decision of the director may be appealed by an affected party. All appeals must comply with the following procedure:

(1) The appeal shall be initiated by the affected party serving on the director a notice of appeal within ninety (90) days of the date of the letter in which the member received notice of the director's final decision. The notice of appeal must state the reasons for claiming the denial is improper. If the claimant fails to submit a notice of appeal as provided herein, the director's decision shall constitute the final order of the board.

(2) The appeal shall be heard by a hearing officer designated to represent the board, unless otherwise provided by the board or the rules and regulations adopted by the board.

(3) Procedure.

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

(b) Discovery and evidence.

(i) Following the filing of an appeal, the parties must submit to the hearing officer, with a copy to the other parties, including copies separately addressed to the director and to the general counsel, at least fifteen (15) days prior to the scheduled hearing, any documentary evidence a party may wish to present for consideration at the de novo hearing. The hearing officer may grant a request for extension of time to submit documentary evidence for good cause, if such extension is not prejudicial to another party. This documentary evidence shall include all documents that will be introduced as exhibits at the hearing. Failure to comply with the requirements of this paragraph may result in the appeal proceeding without consideration of that documentary evidence. It shall not be considered error for the appeal to proceed without consideration of documentary evidence where a party did not timely submit such evidence as provided for in this paragraph.

(ii) At the same time documentary evidence is due to be submitted, the director or the general counsel may, but are not required to, file a written response to claimant's notice of appeal.

(iii) Upon the written request of any party, the parties shall provide to the other parties the names and addresses of persons that may be called as witnesses at the hearing.

(iv) Upon the written request of any party, pre-hearing discovery permitted by the rules of civil procedure for the district courts in New Mexico shall be allowed as authorized by the hearing officer. Upon the request of any party in writing, the hearing officer also may authorize depositions.

(v) Upon request, the claimant shall provide to the director authorizations for the release of records regarding the claimant's employment (whether self-employed or as an employee or an independent contractor).

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

(vii) The hearing officer may, upon good cause shown, remand the matter back to the director for reconsideration.

(c) Hearing.

(i) A hearing shall be held within sixty (60) days of receipt of the notice of appeal unless the parties agree to an extension of time and the extension is approved in writing by the hearing officer. The hearing officer also may grant an extension upon good cause shown by one party, without the agreement of other parties. The parties shall be given at least thirty (30) days written notice of the scheduled hearing.

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

(iii) The parties have the right to present argument and evidence orally, to present or cross-examine witnesses, and to be accompanied by counsel.

(iv) Failure of the party bringing the appeal or that party's representative to appear at the hearing, without prior approval from the hearing officer, shall result in automatic final denial of the appeal and any claims previously asserted.

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

(d) Burden of persuasion. Unless otherwise established by law, the party bringing the appeal has the burden of

proving by a preponderance of the evidence the facts relied upon to show that such party is entitled to relief or the benefit denied.

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

(f) Recommended decision.

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

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

(g) Exceptions to recommended decision.

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

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

(iii) Exceptions to a hearing officer's recommended decision shall cite the precise substantive or procedural issue to which exceptions are taken and shall be based solely on the evidence and arguments presented at the hearing.

(iv) Any exception not specifically made shall be considered waived. Any exception that fails to comply with the foregoing requirements may be disregarded.

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

(4) Final action by the board.

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

(b) The board shall not consider

any additional oral argument, evidence or affidavits not in the record before the hearing officer, or pleadings not filed in accordance with these rules.

(c) The board may request that the hearing officer be present at the time the board reviews a recommended decision and may discuss the recommended decision with the hearing officer. The board members may discuss the recommended decision during consideration of the recommended decision and may consult with counsel to the board.

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

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

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

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

E. The rules and procedures of the board may be amended or expanded in the following manner:

(1) At any regular meeting, the board may request the director to prepare amendments or new rules for action at a subsequent meeting of the board.

(2) The director may, at any time, propose amendments or new rules for action at any meeting of the board.

(3) Any proposed amendment or new rule shall be drafted by the director and sent to each board member with the agenda for the meeting at which the proposal will be considered, and all proposed rule changes will be sent to all local administrative units, within a reasonable time, prior to being considered by the board.

F. Interest rates that are to be set by the board under the Educational Retirement Act may be changed at any meeting of the board but shall at a minimum be set at a board meeting held in the final

fiscal quarter of the year.

[2.82.1.17 NMAC - Rp, 2.82.1.16 NMAC, 11-15-12]

HISTORY OF 2.82.1 NMAC:

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

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

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

ERB Rule I, Organization and Operation of the Educational Retirement Board, filed 7-2-82.

History of Repealed Material:

2.82.1 NMAC, General Provisions, filed 11-16-2001 - Repealed effective 11-15-2012 and replaced by 2.82.1 NMAC, General Provisions, effective 11-15-2012.

NEW MEXICO DEPARTMENT OF FINANCE AND ADMINISTRATION LOCAL GOVERNMENT DIVISION

This is an amendment to 2.110.2 NMAC, Sections 7, 14-17, 19, 26 and the attachments, effective November 15, 2012.

2.110.2.7 DEFINITIONS:

A. "Asset management" is a systematic process of maintaining, upgrading, and operating physical assets cost-effectively. It combines engineering principles with sound business practices and economic theory, and it provides tools to facilitate a more organized, logical approach to decision making. It is a planning process that ensures the most value from each asset with a plan to rehabilitate and replace them when necessary. An accurate and up-to-date asset management plan will help communities comply with the Government Accounting Standards Board's Statement #34 (GASB 34), an accounting standard for publicly owned systems.

B. "Council" means the New Mexico community development council.

C. "Department" means the department of finance and administration.

D. "Division" means the local government division.

E. "Low and moderate income person" is a member of a household whose income would qualify as "very low income" under the Section 8 housing assistance payments program. Section 8 limits are based on 50 percent of the county median income. Similarly, CDBG moderate income is based on Section 8 "lower income" limits, which are generally tied to 80 percent of the county median income.

F. "CDBG" means the small cities community development block grant program.

G. "Rural" means a county with a population of less than 25,000 and an incorporated municipality with a population of less than 3,000.

H. "Program income" means amounts earned by a unit of general local government or its sub recipient that were generated from the use of CDBG funds.

I. "Slum area" pursuant to the Metropolitan Redevelopment Act, Section 3-60A-4 NMSA 1978 (as amended), means: "an area within the area of operation in which numerous buildings, improvements and structures, whether residential or nonresidential, which, by reason of its dilapidation, deterioration, age, obsolescence or inadequate provision for ventilation, light, air, sanitation or open spaces, high density of population, overcrowding or the existence of conditions that endanger life or property by fire or other causes, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency or crime and is detrimental to the public health, safety, morals or welfare."

J. "Blighted area" pursuant to the Metropolitan Redevelopment Act, Section [30-A-4] 30-60A-4 NMSA 1978 (as amended), means: "an area within the area of operation other than a slum area that, because of the presence of a substantial number of deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or lack of adequate housing facilities in the area or obsolete or impractical planning and platting or an area where a significant number of commercial or mercantile businesses have closed or significantly reduced their operations due to the economic losses or loss of profit due to operating in the area, low levels of commercial or industrial activity or redevelopment or any combination of such factors, substantially impairs or arrests the sound growth and economic health and well-being of a municipality or locale within a municipality or an area that retards the provisions of housing accommodations or constitutes an economic or social burden and is a menace to the public health, safety, morals or welfare in its present condition and use."

K. "Units of local government": Any incorporated municipality or county.

L. "Councils of governments": A regional association of

municipalities, counties and special districts formed to provide planning and other services to its member organization.

M. "Water association": Political subdivisions of the state organized under Section 3-29-1 through Section 3-29-20, NMSA 1978, the "Sanitary Projects Act" or Section 73-21-1 through Section 73-21-55, NMSA 1978, the "Water and Sanitation District Act".

N. [~~Land grant/merced~~] (~~f~~) "~~Land grant/merced~~" means a political subdivision of the state organized under Section 49-1-1 through 49-1-23, NMSA 1978, Land Grants General Provisions.

O. "Set-aside": means a portion of all CDBG funding received by the CDBG program and the council to be used only for certain set-aside categories that are chosen by the CDBG program and the council.

P. "ICIP": means an infrastructure capital improvement plan. An ICIP is a planning document developed by a unit of local government, water association, or land grant/merced that includes capital improvement priorities over a five-year period and is developed and updated annually. An ICIP includes policy direction, funding time frames, estimated costs, justifications, and details of each specific infrastructure capital improvement project proposed, by year, over the five-year period.

Q. "Non-rural" means a county or an incorporated municipality that does not meet the definition of rural.

[2.110.2.7 NMAC - Rp 2 NMAC 110.2.7, 08-30-01, 12-14-06; A, 09-28-07; A, 10-15-09; A, 11-15-12]

2.110.2.14 R U R A L ALLOCATION

A. A minimum of fifteen percent (15%) of the CDBG allocation will be awarded to counties with a population of less than 25,000 and municipalities with a population of less than 3,000.

B. Rural applicants will compete among themselves for assistance in the community infrastructure, housing, and public facility capital outlay categories.

C. Rural and nonrural applicants will compete for funding from the economic development, emergency, planning and colonias categories on an equal basis.

D. [~~See attachments of rural/urban counties and municipalities.~~] For the purposes of determining population under Subsection A of 2.110.2.14 NMAC, a unit of local government, water association, or land grant/merced must use Section B of Attachment I.

[2.110.2.14 NMAC - Rp 2 NMAC 110.2.14, 08-30-01; A, 08-13-04; A, 11-15-12]

2.110.2.15 P R O G R A M REQUIREMENTS SECTION A: Public participation requirements - Applicants must provide opportunities for public participation in the development of community development goals, objectives, and applications for funding assistance by undertaking the following activities:

A. provide for and encourage citizen participation within their areas of jurisdiction with particular emphasis on participation by persons of low and moderate income;

B. provide citizens with reasonable and timely access to local meetings, information, and records relating to proposed and actual use of funds;

C. provide for technical assistance to groups and representatives of low and moderate income persons that request assistance in developing proposals;

D. {special note}: the level and type of assistance is to be determined by the applicant; and

E. provide for public hearings to obtain citizen participation and respond to proposals and questions at all stages;

F. prior to selecting a project and submitting an application for CDBG funding assistance, eligible applicants must conduct at least one public hearing for the following purposes:

(1) to advise citizens of the amount of CDBG funds expected to be made available for the current fiscal year;

(2) to advise citizens of the range of activities that may be undertaken with the CDBG funds;

(3) to advise citizens of the estimated amount of CDBG funds proposed to be used for activities that will meet the national objective to benefit to low and moderate income persons;

(4) to advise citizens of the proposed CDBG activities likely to result in displacement, and the unit of general local government's anti-displacement and relocation plans;

(5) to obtain recommendations from citizens regarding the community development and housing needs of the community:

(a) After considering all recommendations and input provided at the public hearing(s), the county commission or city/town/village council must select one project for which to submit an application for funding assistance at an official public meeting.

(b) The applicant must conduct a second public hearing to review program performance, past use of funds and make available to the public its community development and housing needs including the needs of low and moderate income families and the activities to be undertaken

to meet such needs.

(c) The second public hearing shall occur prior to the submission of the application for funding assistance.

(d) Public hearing notices must be published in the non-legal section of newspapers, or posted in a minimum of three prominent public places within the project area, with ~~reasonable time and~~ public access. Notice of any public hearing must be published or posted at least ten (10) days in advance of the hearing date. Emergency hearings may be called upon twenty-four hours (24) notice, unless threat of personal injury or property damage requires less notice. Emergency hearings may be called only under unforeseen circumstances, which demand immediate action to protect the health, safety and property of citizens or to protect the applicant from substantial financial loss. All applicants must be in compliance with all other provisions of the Open Meetings Act (NMSA 1978, Section 10-15-1 ~~(F)~~ et. seq.

(e) Evidence of compliance with these regulations must be provided with each application, i.e., hearing notice, minutes of public meetings, list of needs and activities to be undertaken, etc.

(f) Amendments to goals, objectives, and applications are also subject to public participation.

(6) provide for timely written answers to written complaints and grievances within 15 working days where practicable;

(7) identify how the needs of non-English speaking residents will be met in the case of public hearings where a significant number of residents can be reasonably expected to participate.

[2.110.2.15 NMAC - Rp 2 NMAC 110.2.15, 08-30-01; A, 12-1-10; A, 10-17-11; A, 11-15-12]

2.110.2.16 PROGRAM REQUIREMENTS Section B:

Each CDBG application must meet at least one of the three national objectives, low and moderate income benefit, prevention or elimination of slums or blight or urgent need, which are herein described.

A. Low and moderate income benefit - An activity identified as principally benefiting (51%) persons of low and moderate income will be considered eligible only if it meets one of the criteria below:

(1) the activity must be carried out in a neighborhood or area consisting predominantly of persons of low and moderate income and provide services to such persons;

(2) the activity must involve facilities designed for use by a specific group of people or clientele predominantly of low and moderate income; or

(3) the activity must add or

improve permanent residential structures which will be occupied by low and moderate income households upon completion; or

(4) the activity must involve creating or retaining jobs, the majority of which must be for persons of low and moderate income;

(5) ~~[the above]~~ for purposes of Paragraphs (1) - (4) of Subsection A of 2.110.2.16 NMAC, low and moderate income can be substantiated with data from:

(a) the most recent low and moderate income data ~~[from the U.S. census (see attachment A);]~~ derived in accordance with Sections B and C of Attachment I; or

(b) a special survey conducted using HUD approved methodology; see Attachment (A) and (C).

~~[(c) income eligibility requirements consistent with HUD approved income limits. See attachment (C);]~~

B. Prevention or elimination of slums or blight - An activity identified as aiding in the prevention or elimination of a slum or blighted area must meet all of the following five criteria.

(1) The area must be designated by the applicant and must meet a definition of a slum, blighted, deteriorated or deteriorating area under state or local law (see definitions section of 2.110.2 NMAC).

(2) The area must exhibit at least one of the following physical signs of blight or decay.

(a) The area shall possess a substantial number of deteriorated or deteriorating buildings throughout; meaning at least one quarter of all the buildings in the area must be in a state of deterioration.

(b) The area shall possess public improvements throughout the area which must be in a general state of deterioration. For example, it would be insufficient for only one type of public improvement, such as the sewer system, to be in a state of deterioration; rather, the public improvements taken as a whole must clearly exhibit signs of deterioration.

(3) Documentation must be maintained by the applicant on the boundaries of the area and the condition which qualified the area at the time of its designation.

(4) The activity must address one or more of the conditions which contributed to the deterioration of the area.

(5) To comply with this objective on a spot basis outside of a slum or blighted area the proposed activity must be designated to eliminate, specific conditions of blight or physical decay.

(a) acquisition and clearance of blighted properties;

(b) renovation and reuse of abandoned, historic properties;

(c) commercial revitalization through façade improvements;

(d) removal of environmental

contamination on property to enable it to be redeveloped.

C. Urgent need - An activity identified as meeting community development needs having a particular urgency will be considered only if the applicant certifies the following:

(1) that the activity is designed to alleviate existing conditions which pose a serious and immediate threat to the health and welfare of the community;

(2) that the condition(s) to be alleviated is of recent origin, i.e., it developed or became critical within 18 months preceding the certification by the applicant;

(3) that the applicant is unable to finance the activity on its own and other sources of funding are not available;

(4) in addition, verification of the urgency of the need must be provided with written documentation by the appropriate state agency;

(5) planning grants are not allowed under urgent need.

[2.110.2.16 NMAC - Rp 2 NMAC 110.2.16, 08-30-01; A, 10-15-09; A, 12-1-10; A, 11-15-12]

2.110.2.17 APPLICATION REQUIREMENTS

A. Number of applications - All eligible applicants may submit one application for CDBG funding assistance in the infrastructure, public facility capital outlay, or colonias categories.

(1) Planning applicants may submit at anytime an additional application for funding and shall not exceed fifty thousand dollars (\$50,000).

(2) Applications for the economic development, housing or emergency categories may be submitted at any time and shall not exceed five hundred thousand dollars (\$500,000), subject to funding availability.

(3) Counties may submit multiple applications for planning grants for water associations.

(4) Planning, economic development, housing and emergency applications may be submitted, at anytime, even if the applicant has not completed other CDBG projects.

B. Single purpose application - An application for CDBG funding must be limited to a project specific activity or set of activities which address a particular need in a designated target area of a unit of local government. The target area may not be the entire municipality or county.

C. Joint applications - Joint applications will be allowed when two or more eligible applicants within reasonable proximity of each other wish to address a common problem.

(1) One community will be

designated to serve as the lead applicant and will be subject to administrative requirements and to the application limit requirements.

(2) However, other parties to the joint application may submit another application.

(3) Joint applications must satisfy certain federal criteria and must receive division approval prior to submitting an application for funding assistance.

(4) It should be noted that satisfying the required criteria, which is available from the division upon request, may take a significant period of time.

D. Application requirements for the following minimum requirements apply to all applications for CDBG funding:

(1) applications must involve a project that will be fully functional on a stand-alone basis once awarded CDBG and other committed funds have been expended and;

(2) projects shall be completed within twenty-four (24) months (with the exception of planning grants which shall be completed within eighteen (18) months) of an executed grant agreement signed by both parties;

(3) applications may not exceed \$500,000;

(4) if the applicant, after conducting the required public hearing, determines that the previous year's CDBG unfunded application is still a priority, the applicant must submit the original along with a current year's resolution, updated project budget and schedule and any other information required by division staff;

(5) application must be complete, with all documentation provided as listed on the submission and attachment checklist included in the application, otherwise application will be deemed ineligible; application will be returned to the applicant and will not be considered for funding; and

(6) application must include a determination of rural or non-rural status (see Section B of Attachment I).

E. Threshold requirements - To encourage timely completion of projects and to maximize participation the following threshold requirements shall be met by the threshold deadline which is prior to the application deadline.

(1) All projects for the eligible activities in the categories listed in Subsections C, D, E, and I of 2.110.2.11 NMAC must be completed at the time of application. (certificate of occupancy or certification of operation must be in place).

(2) All CDBG program's monitoring findings and concerns, for CDBG projects, must be resolved. The applicants shall submit a letter attaching a copy of the monitoring findings/concerns

and demonstration of clearance of the monitoring findings/concerns by the CDBG program.

(3) The current fiscal operating budget for any local public body as defined in Section 6-6-1 NMSA 1978 (as amended) applying for CDBG funds must be approved.

(4) The local government division financial management bureau will verify that financial quarterly/ monthly reports are current before CDBG applications deadline.

(5) The local government division, budget and finance bureau, shall report the applicant's most current audit filing with the state auditor office for all applicants that are counties and municipalities. ~~[They determine]~~ An applicant must have submitted to the New Mexico state auditor its most current audit(s) that were required to be conducted and submitted for review per the New Mexico state auditor's required report due dates for the previous fiscal year(s). An applicant must be in compliance with the budget certification rule, 2.2.3 NMAC. The CDC will take into consideration whether the counties or municipalities are in compliance with the budget certification rule.

(6) The set aside categories are exempt from threshold requirements set forth in Subsection E of 2.110.2.17 NMAC: planning, economic development, and emergency categories.

F. Matching requirements - In order to assist the council in making funding resources go further and to ensure there is a local investment in applications submitted to the council for funding consideration, the following will be required.

(1) Rural applicants must provide, at a minimum, a 5% cash match during the project period from local, state, federal or other resources, this cannot include local work force or local equipment.

(2) Non-rural applicants must provide, at a minimum, a 10% cash match during the project period from local, state, federal or other resources, this cannot include local work force or local equipment.

(3) Consistent with 2.110.2 NMAC, all applications in the economic development category must provide at least one private dollar for each dollar of CDBG funds requested.

(4) Local funds expended by eligible applicants for engineering, architectural design or environmental reviews prior to project approval can be applied towards the required match.

(5) Applicants may request a waiver of the matching requirement from the council if documentation can be provided which demonstrates the absence of local resources to meet the required match. Criteria used to recommend approval/disapproval will be as follows:

(a) the required match must exceed 5% of the applicant's general fund budget;

(b) the required match must equal or exceed the non-earmarked balance of funds in the applicant's budget.

G. Other funding commitments - If other funding is necessary to make a proposed project feasible, funding commitments or commitments subject to CDBG approval, must be in place and letters of commitments from the funding agency must be submitted with the application.

H. Water conservation and drought commitments - In order to make the state's water supplies go further and to ensure proper levels of preparations are taken locally for periodic droughts, the following is encouraged.

(1) Applicants develop, adopt and submit to the state engineer a comprehensive water conservation ordinance.

(2) Applicants develop, adopt and submit to the state engineer a drought management plan.

(3) The ordinance and plan shall be accompanied by a program for its implementation:

(a) in developing a water conservation ordinance pursuant to this section: applicants shall adopt ordinances and codes to encourage water conservation measures; they shall identify and implement best management practices in their operations to improve conservation of the resources; and

(b) applicants shall consider and incorporate into its plan if appropriate, at least the following:

(i) water-efficient fixtures and appliances, including toilets, urinals, showerheads and faucets;

(ii) low-water-use landscaping and efficient irrigation;

(iii) water-efficient commercial and industrial water-use processes;

(iv) water reuse systems for both potable and non-potable water;

(v) distribution system leak repair;

(vi) dissemination of information regarding water-use efficiency measures, including public education programs and demonstrations of water-saving techniques;

(vii) water rate structures establishing rates or revenues that support the long term operation, maintenance, repair, and replacement of the system or facility and are designed to encourage water-use efficiency and reuse in a fiscally responsible manner and

(viii) incentives to implement water-use efficiency techniques, including rebates to customers or others, to encourage the installation of water-use efficiency and reuse measures;

(c) the council shall encourage the applicant to submit a copy of its water

conservation plan with applications for construction of any facility.

I. Asset management - In order to support the long term operation, maintenance, repair and replacement of system facilities, infrastructure, public facilities, or other eligible activities the following will be required.

(1) In order to ensure water and wastewater infrastructure is managed within a strategic framework driven by program and service delivery needs, communities that implement an asset management program and use that approach as the basis for their rate analysis will be credited in the application process for their achievement. The model for the asset management program is the international infrastructure asset management model, adopted by EPA. This approach includes five core components, which are as follows:

(a) current state of the assets: an asset inventory that includes the following at a minimum: asset name, asset location, asset condition, useful life, and an estimate of replacement value;

(b) level of service: a description of what the utility wishes to provide its customers;

(c) criticality: an evaluation of which assets are critical to the sustained operation of the utility;

(d) life cycle costing: at a minimum, a capital improvement plan that describes the replacement of assets and some consideration of operation and maintenance of the assets;

(e) financing plan: a description of the funding sources that will be used to pay for the capital and operational needs of the utility.

(2) For community infrastructure and public facilities, or other eligible activities an asset management plan will be required to be submitted at the time of application. The approach will follow the same five components described in Subparagraphs (a) - (e) of Paragraph (1) of Subsection I of 2.110.2.17 NMAC above. [2.110.2.17 NMAC - Rp 2 NMAC 110.2.17, 08-30-01; A, 08-13-04; A, 08-15-05; A, 12-14-06; A, 09-28-07; A, 09-30-08; A, 10-15-09; A, 12-1-10; A, 10-17-11; A, 11-15-12]

2.110.2.19 APPLICATION REVIEW AND EVALUATION PROCESS

A. Upon receipt of applications, division staff will review them for eligibility, completeness, feasibility, and compliance and to ensure that all other funding necessary to make the project functional is in place. Applications that are found to be incomplete, ineligible, or not feasible or do not have other funding necessary to make the project functional, will be returned to the applicant and will not

be considered for funding.

B. Applications will be forwarded to appropriate state agencies for technical review and comment. Review agencies may include, but are not limited to, the environment department, department of transportation, department of health, state engineer's office, state agency on aging, economic development department, state fire marshal and governor's commission on disability.

C. Applicants will be allowed to make presentations to the council and division staff at an official council hearing. Testimony related to the application will be presented by an official or designee of the applying entity who may be assisted by technical staff.

D. Division staff will receive comments from state agencies regarding specific projects.

E. The council and division have developed the following rating criteria for evaluation of CDBG applications submitted for funding in the following categories: infrastructure, housing, public facility, capital outlay and colonias application categories. For infrastructure, housing, public facility, capital outlay and colonia application categories, the following nine (9) criteria are used to score the application. In addition, for colonias applications, the applicant needs to fulfill the four conditions in Subsection G of 2.110.2.19 NMAC.

(1) **Description and need** - (5 points) extent to which the project is needed. The more severe the need as documented in the application, the higher the score. It is only necessary to answer the questions on the application that pertain to the appropriate application category and do not answer questions on the application that pertain to other categories.

(2) **Benefit to low and moderate income beneficiaries and appropriateness** - (20 points) extent to which the CDBG application:

(a) documents the number and percentage of low and moderate income beneficiaries, also include race and gender; or

(b) addresses the prevention or removal of slum or blighting conditions; or

(c) addresses conditions which pose a serious and immediate threat to the health and welfare of the community (for emergency applications only).

(3) **Leveraging** - (15 points) extent to which federal, state, and local resources, in addition to the required match, will be used by the applicant for the proposed project. The greater the leveraging, in addition to the required match, the higher the score.

(4) **Citizen participation** - (10 points) extent to which the applicant:

(a) (3 points) has provided

opportunities for public participation in the identification of community development needs;

(b) (3 points) pledges opportunities for active citizen participation during the project, where applicable; and;

(c) (3 points) pledges opportunities for active citizen participation in the implementation of the project, where applicable; and

(d) (1 point): notice of any public hearing has been posted at least ten (10) days in advance of the hearing date.

(5) **Planning** - (10 points) extent to which the applicant:

(a) [(3) points:] (3 points) Applicant has adopted a local ICIP, which has qualified for publication in the most recent local (ICIP) published prior to the CDBG application deadline. Evidence of the adopted ICIP for the current year must be provided as part of the application.

(b) [(3) points:] (3 points) The proposed project has qualified for publication in the most recent ICIP prior to the CDBG application deadline and applicant has selected CDBG as one of its possible funding sources. Evidence of such publication identifying the project and selecting CDBG funds as a possible funding source must be provided with application.

(c) [1 point:] (1 point) Degree to which applicant's proposed project shows consistency with applicant's comprehensive plan.

(d) [1 point:] (1 point) Adopting a drought contingency plan, setting in place various drought management stages and accompanying restrictions on water use.

(e) [1 point:] (1 point) Adopting a water conservation ordinance, setting in place various methods for conserving potable water.

(f) [1 point:] (1 point) Implementing a water conservation ordinance, accompanied by evidence of exercising at least two various methods for conserving potable water.

(6) **Feasibility/readiness** - (20 points) extent to which the project is technically and economically feasible and ready to be implemented. Examples of actions that can be taken prior to submission of the application to receive maximum points are:

(a) (5 points) necessary real property or easements acquired; [(5)]

(b) (5 points) professional services contract executed; [(5)]

(c) (5 points) completed plans, specifications, bid documents, or preliminary engineering reports; [(5)]

(d) (5 points) complete the environmental review process [(5)]

(7) **Cost benefit** - (10 points) number of direct beneficiaries of the project compared to the amount of funds requested.

The higher the number of beneficiaries compared to the amount of funds requested, the higher the score.

(8) User fees and revenues - (10 points)

(a) (1 point) attendance at an asset management training within the last three years that includes the five core components set forth in Subsection I of 2.110.2.17 NMAC [(+1point)]

(b) (2 points) development of an asset management plan that includes some, but not all, of the five core components [(2 points)]

(c) (5 points) development of a complete asset management plan with all five core components [(5 points)]

(d) (10 points) rates developed based on asset management, using the five core components [(+10 points)]

(e) (2 points) rates developed by a rate analysis, excluding asset management or allowance for replacement of reserve funds [(2 points)]

(f) (1 point) rates developed by other [(+1 point)].

(9) Non-funded applicants - (10 points) - Applicants that were not funded in the prior year.

F. Planning criteria category

(1) Description and need - (20 points) extent to which the project is needed. Describe the intent of the project in detail. Describe the local commitment of resources to the planning process; commitment to adopt the plan, either by resolution, rule, policy or ordinance; and commitment to use the results of the planning process in the decision making process.

(2) Benefit to low and moderate income beneficiaries and appropriateness - (20 points) extent to which the CDBG application:

(a) documents the number and percentage of low and moderate income beneficiaries, including race and gender; or

(b) addresses the prevention or removal of slum or blighting conditions.

(3) Leveraging - (15 points) extent to which federal, state, and local resources in addition to the required match, are being used by the applicant for the proposed project. The greater the leveraging, in the addition to the required match the higher the score.

(4) Citizen participation - (10 points) extent to which the applicant:

(a) (3 points) has provided opportunities for public participation in the identification of community development needs;

(b) (3 points) pledges opportunities for active citizen participation during the project, where applicable; [and;]

(c) (3 points) pledges opportunities for active citizen participation

in the implementation of the project where applicable; and

(d) (1 point) notice of any public hearing has been posted at least ten (10) days in advance of the hearing date.

(5) Planning - (20 points) extent to which:

(a) (5 points): Applicant has adopted a local ICIP, which has qualified for publication in the most recent local ICIP published prior to the CDBG application.

(b) (5 points): The proposed project has qualified for publication in the most recent ICIP prior to the CDBG application and applicant has selected CDBG as one of its possible funding sources.

(c) (2.5 points): Degree to which applicant's proposed project shows consistency with applicant's comprehensive plan.

(d) (2.5 points): Adopting a drought contingency plan, setting in place various drought management stages and accompanying restrictions on water use.

(e) (2.5 points): Adopting a water conservation ordinance, setting in place various methods for conserving potable water.

(f) (2.5 points): Implementing a water conservation ordinance, accompanied by evidence of exercising at least two various methods for conserving potable water.

(6) Cost benefit - (10 points) number of direct beneficiaries of the project compared to the amount of funds requested. The higher the number of beneficiaries compared to the amount of funds requested, the higher the score.

(7) Comprehensive plan (5 points) - Does the community have an updated comprehensive plan that is not more than five (5) years old.

G. Colonias criteria category - When submitting a colonias category application, the applicant shall provide documentation to substantiate that a majority of the following conditions exist in the project area:

(1) lack of potable water; or
(2) lack of an adequate sewage system; or

(3) lack of safe, sanitary housing; and

(4) source documentation must also be provided of colonias designation.

H. Economic development rating criteria is included in Section 2.110.2.26.

I. Site visits will be conducted as needed during the life time of the project to verify or review information presented.

J. Division staff will present its recommendations in high, medium and low groupings to the council at least seven days prior to the allocation meeting.

K. Because emergency, economic development, and rural planning projects are received throughout the year, formal staff rating may not be necessary if all other federal and state requirements are met and other applications are not competing for funding assistance.

L. The council delegates to the division director the authority to award, in the division director's discretion, funding for applications for emergency, economic development, and planning projects in compliance with applicable rules and regulations. The division will provide the council with an update on all such awards at each council meeting.

[2.110.2.19 NMAC - Rp 2 NMAC 110.2.19, 08-30-01; A, 08-13-04; A, 12-14-06; A, 09-28-07; A, 09-30-08; A, 10-15-09; A, 10-17-11; A, 11-15-12]

2.110.2.26 ECONOMIC DEVELOPMENT PROGRAM GUIDELINES:

Within the context of the CDBG program and for purposes of meeting its goals and objectives, economic development can typically be defined as improving a community's economic base by using private and public investments that provide expanded business activity, jobs, personal income and increased local revenues in a defined geographic area.

A. Goals and objectives: The state's CDBG economic development goals and objectives include:

(1) creating or retaining jobs for low- and moderate-income persons;

(2) preventing or eliminating slums and blight;

(3) meeting urgent needs;

(4) creating or retaining businesses owned by community residents;

(5) assisting businesses that provide goods or services needed by, and affordable to low - and moderate-income residents;

(6) providing technical assistance to promote any of the activities under Subsection A, Paragraphs (1) through (5) above.

B. Eligible activities: CDBG eligible activities authorized under Sections 570.200, 570.201, 570.202, 570.203, 570.204, 570.482 and 570.483 of 24 CFR Part 570 of the federal rules and regulations governing the community development block grant program and directly affecting the creation or retention of employment opportunities, the majority of which are made available to low and moderate income persons, may include activities which are carried out by public, private nonprofit, or private for-profit entities when such activities are appropriate.

(1) To meet the needs and objectives of the community economic development plan, a project may include;

acquisition of real property, construction, reconstruction rehabilitation, or installation of public facilities, site improvements, and utilities, and commercial or industrial buildings or structures and other commercial or industrial real property improvements and planning.

(2) Grantees and nonprofit subrecipients may carry out for the purpose of economic development, a wide range of activities such as those listed in Section 570.203.

(3) The for-profit businesses, however, may carry out only the activities listed in that section and rehabilitation activities listed in Section 570.202.

C. Financing policies and techniques: The New Mexico CDBG program, as a development tool, can provide flexibility and take greater risks in its lending policies and financing techniques. For example, the program may:

(1) offer a negotiated period for repayment of principal and interest;

(2) take greater risk than banks are traditionally prepared to take, provided substantial economic development benefits will result if the loan is granted;

(3) leverage capital by reducing risk for commercial lenders and by taking a subordinate;

(4) security/collateral position;

(5) provide more favorable rates and terms than are generally available through conventional sources.

D. Project requirements: Project requirements for eligible CDBG economic development assistance include, but are not limited to:

(1) specific employment commitments for low and moderate income residents, generally with no more than [§35,000] \$50,000 in CDBG funds being used for each job created or retained;

(2) at least 51% of the jobs created/retained must be held or made available to persons of low to moderate income persons;

(3) within six (6) months of completion of the project, the grantee is required to report to LGD, documentation to reflect the total number of jobs created;

(4) a firm commitment for private financial participation in carrying out the proposed project, contingent on award of CDBG funding only, must be included with the application;

(5) a minimum leveraging ratio of 1 new private investment dollars to 1 CDBG dollar is required, {additional leveraging will enhance a project's competitiveness};

(6) an "appropriate" determination that there is a well documented need for CDBG assistance to make the project financing feasible and that the level of assistance requested is commensurate with the public benefits expected to be derived from the economic development project;

(7) evidence of project feasibility including a business plan which contains financial statements, project pro forma (cash flow projections) and specific source and intended use of all funds or assets used in the project;

(8) generally, projects that directly assist in the relocation of a business or industry from one community to another, intrastate or interstate, will be disqualified;

(9) prior to submission of an application, applicants should thoroughly review the credit worthiness of the proposed borrower and should obtain appropriate credit reports, audited financial statements, tax returns and verify collateral.

E. Program income: The community development council has adopted a policy of strongly encouraging and, when possible, requiring applicants in the economic development category to return program income to the state for use in fostering critical economic development opportunities that occur throughout the state. By pooling program income at the state level more of an impact can be made on the overall economic conditions of the state. The Housing and Urban Rural Recovery Act which amended the Housing and Community Development Act of 1974, provides, relative to economic development, specifically the following:

(1) states may require program income to be returned to the state but local governments must be allowed to keep program income when used for the same activity which generated the income (104(i)2);

(2) if the applicant intends to retain program income, a program income utilization plan must be submitted with the application for approval.

F. Application cycle: Applications for economic development can be made at any time, and the division staff has thirty days to review them.

G. Pre-application conference: It is recommended that a preapplication conference be held prior to the submission of the final application to insure that all elements are adequately addressed. The preapplication conference will also provide an opportunity to review any new federal guidelines that may be issued which relate to economic development activities. Contact the LGD, economic development representative for information. More detailed and extensive financial and project data may be required depending on the specific project. In addition, meeting the national objective to benefit low and moderate income requires documentation certifying that the majority of the jobs go to low and moderate income persons or the majority of jobs are considered available to them. Please contact the local government division for a copy of the HUD guidelines.

H. APPLICATION REQUIREMENTS: (These must be included along with the regular CDBG application, and should be submitted in lieu of question #2 in the regular application.)

(1) Economic development plan: The applicant must submit as an attachment to the application a short (5 page maximum) description of its plan for encouraging local economic development. The plan, incorporating references to the proposed project, should include a discussion of the following elements

(a) Need - What are the community's underlying economic problems? Need might include recent major industry shutdowns or extended layoffs, substantial increases in population without a corresponding increase in job opportunities, substantial population decreases due to lack of available or appropriate job opportunities, a lack of industrial diversification, the existence of large numbers of workers in the area with obsolete skills or skills for which there is no current demand, or other problems unique to the applicant's community.

(b) Goals - What is the community attempting to accomplish through its overall economic development program (not just that activity for which CDBG funding is sought)? Goals might include trying to preserve existing businesses or industries, attempting to encourage community growth, attempting to foster industrial diversification, revitalizing the central business district, or creating complementary industries which would provide jobs in the off-season for workers now only seasonally employed.

(c) Resources - What public and private resources, both financial and technical, does the community have available to it to help carry out its economic development program? Resources may be of a wide variety. For example, does the community have a local development corporation or similar body? Has any agency organization assigned staff member(s) to work on economic development activities for a major portion of their time? Has the financial community demonstrated its willingness to participate in development activities? Is there an adequate available labor force to meet the demands of new or expanding businesses and industries? Does the community have some unique development advantages, e.g., location, transportation facilities, industrial park or other plant sites, available raw materials, abundant power supplies, employee training capabilities, a locally-administered revolving loan fund to assist growing businesses or industries, technical assistance programs to help business people deal with marketing, management, or financial planning problems.

(d) Strategy - What strategy is the community using to pursue its economic development goals? Strategy might include

a description of the specific activities that have been identified as components of the community's strategy for encouraging local economic development. For example, which has been assigned first, second, and third priority? How much will each cost? What funding sources have been identified for each? What can or will the local government do to support those activities?

(e) **Results** - What actions has the community already undertaken to implement its economic development plan? What sources of funding were used? What were the results? Results might include a discussion of actions the community has taken to encourage development. For example, has it offered property tax reductions to new or expanding industries? Has it formed a local development corporation or prepared industrial or tourism promotion packages? What results have been achieved? How many new jobs have been created or existing jobs retained? How many new firms have begun operations in the community? How many existing firms have undertaken expansion activities?

(2) Hiring and training plan:

(a) Applicants must establish procedures for the project to ensure preferential recruitment, hiring, and training of local workers, particularly those of low and moderate income.

(b) In the event of a grant award, the applicant's commitment to the hiring plan will be considered binding and will be incorporated by reference in the grant agreement between the local governing body and the local government division.

(3) Private sector commitments:

(a) Applicants must provide evidence of firm commitments of financial resources from the private sector.

(b) Such commitments should be binding, contingent only upon receipt of CDBG funds.

(c) Investments made or costs incurred prior to the grant application are not eligible for use as matching funds or leverage but should be referenced as related to the total project, if applicable.

(4) Public sector commitments:

(a) If public sector resources are to be involved in the proposed economic development project, applicants must demonstrate evidence of a firm commitment of public funds or other resources.

(b) Such commitments should be binding, contingent only upon receipt of CDBG funds to the project.

(c) Evidence may include resolutions or ordinances passed by the local governing body and other appropriate local groups.

(5) Use of CDBG funds for economic development loans (if applicable):

(a) Any project that includes a

loan should provide an explanation of the proposed interest rate, terms and rationale for the proposed financing structure.

(b) Any loan made by a local governing body with CDBG funds as a part of an approved CDBG economic development project must be adequately secured.

(c) Subordinated loans may be made when justifiable and appropriate.

(d) The applicant must include a detailed description of the proposed use of program income. (principal and interest). Applicants are encouraged to designate program income to be returned to the state for future economic development set-aside eligible activities.

(6) Viability of assisted enterprises: Any for-profit entity to be assisted with CDBG funds must document that without participation of CDBG funds the proposed activity would not be feasible and that after receipt of CDBG assistance the enterprise will be viable and self-sustaining. All applicants proposing an economic development activity shall submit the following for any entity to be assisted with CDBG funds.

(a) a business plan which consists of at least a description of the history of the firm, background, and experience of the principals, organizational structure, a description of its major products or services, market area and market share, goals, and planned expansions or changes in operations; the plan should also describe the impact the CDBG project, if funded, would have on the firm's activities;

(b) a three-year to five-year operating plan forecast (profit and loss projection); applicants may use U.S. small business administration (SBA) forms or equivalent;

(c) a monthly cash flow analysis, SBA forms or equivalent.

(d) for any existing business, the two most recent year-end financial statements, including an income statement and balance sheet.

I. RATING CRITERIA:

The selection criteria in the rating and ranking system will give priority to projects which firmly demonstrate the following: need, appropriateness, impact, and benefit to low and moderate income persons. These factors are discussed below and are intended to provide additional information. Since each application will be a unique response to particular community-specific needs, there are no "right" or "wrong" activities or solutions. The ranking of "appropriateness" (and later, of "impact") will necessarily be in part subjective, with the division taking into account not only how well each applicant addresses the problems it has defined, but also how its problems and responses compare with those of other applicants. Responses may vary considerably depending upon the

size and location of the community and the type of project proposed.

(1) NEED - (200 points) - In analyzing an applicant's need for a project, the division will use statistical information provided by the New Mexico department of labor and the U.S. bureau of the census which is uniformly available for all thirty-three (33) counties. Since similar data is not accumulated at the municipal level, cities and towns will be scored with the figures for the county in which they are located. The three factors which will be considered are: the average number of unemployed persons in the county during the last calendar year; the percent of unemployment (average) in the county during the last calendar year; long-term unemployment (measured by average unemployment rates in the county for the last five calendar years).

(a) The data will be calculated and each applicant assigned a relative score.

(b) The division will consider assigning a different score in exceptional cases, where an applicant can conclusively demonstrate that the first two factors used to measure economic need are not reflective of local economic conditions (such as major recent plant closings) and the situation is substantiated by the New Mexico department of labor. A request for consideration of local economic data must be submitted with the CDBG application. The applicant should identify sources of data and define methodologies.

(2) APPROPRIATENESS - (200 points) - Two major factors will be weighted in this ranking category: the soundness of the applicant's economic development plan and the related project for which CDBG funding is sought; the strength of the applicant's hiring and training plan for ensuring that local residents, particularly those of low and moderate income, will be hired to fill the stated number of jobs created or retained as a result of CDBG-funded activities. These two factors will be ranked as follows:

(a) Plan and program - (140 points) - Some factors which might contribute to the achievement of an "outstanding" score are:

(i) that the applicant has developed a complete, well reasoned, appropriate, and achievable plan for dealing with its total economic development needs, taking into consideration all available public and private resources and local capacity;

(ii) that the local governing body has officially adopted the economic development plan as a matter of public policy;

(iii) that the proposed project for which CDBG funding is sought is an integral part of that plan; (it need not be the first priority item identified in the overall plan if other, more appropriate, resources are available and already being used to meet

higher priority items);

(iv) that the applicant has made substantial local efforts to deal with its economic development problems;

(v) that the proposed CDBG project is realistic and workable, and the job savings or creation expected to result from its implementation will occur within a reasonable time following the date of grant award;

(vi) that if income is to be generated by CDBG-funded activities, and retained locally, a plan for the use of that money has been developed and submitted with the application; this plan must include mechanisms established for administration of the funds, (if a revolving loan fund is to be established with program income, procedures must be outlined covering local application processing, time frames, approval, negotiation, pricing, packaging, servicing, etc.);

(vii) that there has been active citizen participation in the development of the economic development plan and in the selection of the CDBG project.

(b) Hiring and training plan - (60 points) - Since a primary goal of CDBG-funded economic development grants is to increase job opportunities for local residents, particularly persons of low and moderate income, it is essential that applicants take every measure to bring about that result. Each applicant must include in its application an employment and training plan to be used in filling jobs created or saved as a result of CDBG activities. Factors which would most likely contribute to the achievement of a high score are:

(i) that the applicant's employment and training plan provides clear, complete procedures for outreach, recruitment, screening, selection, training, and placement of workers which will ensure maximum access of local residents, particularly persons of low and moderate income, to jobs created or saved by the project;

(ii) that attention has been given to necessary supportive services for trainees needing them;

(iii) that a complete training curriculum has been developed and all training resources identified;

(iv) that responsibility has been assigned for all phases of the training program;

(v) that a written agreement to follow the plan has been obtained from each firm expected to benefit directly from the program.

(3) IMPACT - (200 points) - In weighing the anticipated impact of the applicant's proposed CDBG grant activities on the community's identified problems, the following four factors will be considered and

evaluated:

(a) Leverage - (50 points) - In preparing its proposed project budget, the applicant is required to identify all sources of funds to be used and the amounts to be contributed by each. To be eligible for consideration, an applicant must provide at least one private non-CDBG dollars for each dollar of CDBG funds requested (a 1:1 ratio). The non-CDBG funds may come from a variety of private sources, such as new investment by a firm to be assisted, bank loans, or local development corporation loans and debentures. Applicants will be ranked against each other. If, for instance, community A has the highest leverage ratio (\$3 of non-CDBG funds for each \$1 of CDBG funds, a 3:1 ratio) and community B has a 1:1 leverage, community A would receive the maximum score and community B and all other applicants would be relatively scored against community A.

(b) CDBG dollars per job - (50 points) - The applicant is required to specify the number of permanent full-time jobs to be created or retained as a result of the requested CDBG program. In determining an applicant's score in this category, the total CDBG funds to be used (exclusive of administrative funds) will be divided by the total number of full-time jobs expected to result. NOTE: In evaluating an applicant's job creation projections, the local government division will consider the historical relationships of sales, space, and machines to jobs. It will also look at typical ratios for the industry of which the firm to be assisted is a part. Applicants should be prepared to justify job creation claims which substantially exceed industry norms or [\$35,000] \$50,000 per job created or retained.

(c) Type of jobs - (50 points) - Although all new or retained jobs provide some measure of economic benefit to the community, full-time, skilled or semi-skilled positions are more desirable for most workers than part-time jobs or those requiring unskilled labor. One objective of CDBG economic development activities is to foster the creation and retention of permanent, full-time employment with growth potential for persons of low and moderate income, which offers those workers an opportunity for advancement in a firm or industry. Applicants are required to indicate the percentage of jobs to be created or retained which are full-time or part-time, skilled, semi skilled, or unskilled.

(d) Overall economic impact - (50 points) - The applicant must discuss both the direct and indirect effects the CDBG program is expected to have on the community's economy. Some of the factors which will be considered in evaluating impact are:

(i) the size of the

additional payroll expected to be generated for the jobs created or retained by the program;

(ii) the total number of jobs to be created or retained;

(iii) whether the firm to be assisted is a primary industry (producing goods or services mainly to be sold outside the area or state, thereby importing dollars into the community and state);

(iv) whether local property tax revenues will be significantly increased as a result of the proposed business start-up, expansion, retention, etc.;

(v) the applicant demonstrating the greatest positive impact will be scored highest; all other applicants will be ranked correspondingly;

(vi) when applications have been scored in all four categories (leverage, dollars per job, types of jobs, and overall economic impact), those scores will be totaled.

(4) BENEFIT TO LOW AND MODERATE INCOME PERSONS - (200 points)

(a) This ranking criterion assesses the extent to which persons of low and moderate income will directly benefit from the expenditure of CDBG grant funds. To determine this score, the number of jobs to be created or retained and made available to low and moderate income persons will be divided by the total number of jobs to be created or retained as a result of the CDBG program.

(b) The highest score will receive up to a maximum of 200 points and all other applicants will be scored accordingly.

(c) To be eligible for consideration a project must demonstrate that it will benefit principally persons of low and moderate income.

[2.110.2.26 NMAC - Rp 2 NMAC 110.2.26, 08-30-01; A, 12-14-06; A, 09-28-07; A, 10-15-09; A, 10-17-11; A, 11-15-12]

[Continued on page 903]

[Attachment to 2.110.2.14 NMAC

**RURAL COUNTIES (EXHIBIT A)
PER 2000 HUD APPROVED U.S. CENSUS DATA**

COUNTY	LMI Potential Population
CATRON	3,533
CIBOLA	24,524
COLFAX	13,767
DE BACA	2,168
GUADALUPE	4,154
HARDING	810
HIDALGO	5,847
LINCOLN	19,192
LOS ALAMOS	18,251
LUNA	24,764
MORA	5,122
QUAY	9,969
ROOSEVELT	17,249
SIERRA	13,005
SOCORRO	17,501
TORRANCE	16,377
UNION	4,158

URBAN COUNTIES

PER 2000 HUD APPROVED U.S. CENSUS DATA

COUNTY	LMI Potential Population
BERNALILLO	106,157
CHAVES	60,089
CURRY	43,855
DONA ANA	97,616
EDDY	50,905
GRANT	30,399
LEA	53,708
McKINLEY	73,940
OTERO	61,059
RIO ARRIBA	40,729
SANDOVAL	38,504
SAN JUAN	75,489
SAN MIGUEL	28,735
SANTA FE	66,588
TAOS	29,681
VALENCIA	64,781

RURAL MUNICIPALITIES

PER 2000 HUD APPROVED U.S. CENSUS DATA

MUNICIPALITIES	LMI Potential Population
ANGEL FIRE	1,018
ARTESIA	10,860
AZTEC	6,078
BAYARD	2,553
BELEN	6,643
BERNALILLO	6,503
BLOOMFIELD	6,144

BOSQUE FARMS	3,781
CAPITAN	1,453
CARRIZOZO	988
CAUSEY	43
CHAMA	1,319
CIMARRON	927
CLAYTON	2,523
CLOUDCROFT	779
COLUMBUS	1,790
CORONA	253
CORRALES	7,430
CUBA	639
DEMING	13,986
DES MOINES	253
DEXTER	1,181
DORA	127
EAGLE NEST	298
EDGEWOOD	2,024
ELEPHANT BUTTE	1,440
ELIDA	185
ENCINO	90
ESPAÑOLA	9,664
ESTANCIA	1,038
EUNICE	2,569

RURAL MUNICIPALITIES**PER 2000 HUD APPROVED U.S. CENSUS DATA**

MUNICIPALITIES	LMI Potential Population
FLOYD	79
FOLSOM	96
FORT SUMNER	1,160
GALLUP	19,504
GRADY	80
GRANTS	8,329
GRENVILLE	22
HAGERMAN	1,155
HATCH	1,665
HOPE	114
HOUSE	56
HURLEY	1,468
JAL	2,020
JEMEZ SPRINGS	429
LAKE ARTHUR	400
LAS VEGAS	13,874
LOGAN	1,065
LORDSBURG	3,296
LOS ALAMOS	11,902
LOS LUNAS	9,994
LOS RANCHOS DE ALBUQUERQUE	4,951
LOVING	1,327
LOVINGTON	9,307

MAGDALENA	940
MAXWELL	274
MELROSE	736
MESILLA	2,266
MILAN	1,911
MORIARTY	1,738
MOSQUERO	148
MOUNTAINAIR	1,136

RURAL MUNICIPALITIES**PER 2000 HUD APPROVED U.S. CENSUS DATA**

MUNICIPALITIES	LMI Potential Population
PECOS	1,507
PERALTA	3,903
PORTALES	10,153
QUESTA	1,880
RATON	7,061
RED RIVER	517
RESERVE	472
ROY	316
RUIDOSO	7,607
RUIDOSO DOWNS	1,806
SAN JON	286
SAN YSIDRO	159
SANTA CLARA	1,927
SANTA ROSA	2,250
SILVER CITY	10,195
SOCORRO	8,445
SPRINGER	1,252
SUNLAND PARK	13,271
TAOS	4,621
TAOS SKI VALLEY	90
TATUM	717
TEXICO	1,059
TIJERAS	414
TORO	7,029
TUCUMCARI	5,879
TULAROSA	2,828
VAUGHN	599
VIRDEN	135
WAGON MOUND	365
WILLARD	239
WILLIAMSBURG	490

URBAN MUNICIPALITIES**PER 2000 HUD APPROVED U.S. CENSUS DATA**

MUNICIPALITIES	LMI Potential Population
ALAMOGORDO	34,966
CARLSBAD	25,287
CLOVIS	31,940
FARMINGTON	37,104
HOBBS	27,522
ROSWELL	44,261

Attachment I

(Referenced by: 2.110.2.14 NMAC, 2.110.2.16 NMAC, and 2.110.2.17 NMAC)

CDBG projects are designed to meet one of three national objectives: low and moderate income, slum and blight, or emergency. For those projects that are designed to meet the low and moderate income national objective, applicants may choose between two different processes to determine low and moderate income eligibility: 1) conduct a special survey using the HUD approved methodology in accordance with Section A "Survey Methodology" and Section C "HUD Section 8 Income Limits" below; or 2) use the most recent low and moderate income data from section B "American Community Survey" and Section C "HUD Section 8 Income Limits" below.

A. Survey Methodology

The division recommends using the following HUD approved methodology:

This survey methodology was designed by HUD to assist States and entitlement cities in determining whether most of the individuals in a proposed target area are of low and moderate income.

Upon requesting permission to conduct a sample survey, an applicant should indicate the justification for the sample survey. Applicants must provide to the division a map of the project service area, a brief description of the proposed project, and a description of how the six steps described in the suggested methodology will be implemented.

If the applicant conducts a sample survey, such applicant must be prepared to document all efforts. There must be a master list (with telephone numbers, where possible) to match the surveys. The master list must be coded to the individual surveys.

Such documentation must include a separate survey for each household, for unreachables that could not be reached from the universe, and for "nonhouseholds" in the survey area, such as empty lots, business and government property. The sixth step of the methodology provides a complete listing of the information that an applicant must maintain in its files and submit to the division.

The six steps of the survey methodology are located at: http://nmdfa.state.nm.us/cdbg/Information_1.aspx.

B. American Community Survey (ACS)

The U.S. Census Bureau provides a fact finder source for population, housing, economic, and geographic information. This source may be used by applicants to determine eligibility for low to moderate income persons. This source is located at the following website: <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

C. HUD Section 8 Income Limits

HUD Section 8 income limits must be used in conjunction with either the survey methodology or ACS data to determine low and moderate income eligibility. These income limits are located at the following website: <http://www.huduser.org/portal/datasets/il/i112/index.html>.

NEW MEXICO BOARD OF NURSING

This is an amendment to 16.12.2 NMAC, Sections 7, 9, 10, 13, 14 and 15, effective 11-20-12.

16.12.2.7 DEFINITIONS:

A. Definitions beginning with the letter A:

(1) **"actually engaged in nursing"**, employed, engaged, or holding a position which requires licensure or in which the maintenance of licensure as a nurse is expected;

(2) **"administration of medications"**, a process whereby a prescribed drug or biological agent is given to a patient/client by a person licensed or certified by the board to administer medications;

(3) **"advanced practice registered nurse" (APRN)**, a graduate level prepared registered nurse who has completed a program of study in a specialty area in an accredited nursing program, taken a certification examination in the same area, and been granted a license to practice as an advanced practice nurse with an expanded scope of practice; individuals are authorized to practice in the roles of certified nurse practitioner (CNP), certified registered nurse anesthetist (CRNA) and clinical nurse specialist (CNS);

(4) **"affidavit"**, a sworn written statement made to affirm a statement of fact;

(5) **"approval"**, the review and acceptance of a specific activity;

(6) **"approval agency"**, agency, institution or organization with the authorization to award CE credit;

(7) **"approved equivalent"**, a program reviewed and accepted by the board of nursing as meeting necessary regulatory/statutory requirements;

(8) **"assessment"**, the review

and interpretation by a licensed individual of specific data necessary to determine the patient/client's care and treatment needs; (also see data collection);

(9) **"assignment of nursing activity"**, assignment of nursing activity involves appointing or designating another licensed nurse or assistive personnel that is consistent with his/her scope of practice (licensed person) or role description (unlicensed person);

(10) **"audit"**, an examination and verification of CE and practice documents.

B. Definitions beginning with the letter B:

(1) **"basic nursing education"**, the scholastic route to initial licensure;

(2) **"board"**, the New Mexico board of nursing.

C. Definitions beginning with the letter C:

(1) **"certificate"**, a legal document granting permission to an unlicensed person to perform specific functions generally considered the practice of nursing under the direction of a licensed nurse;

(2) **"certification re-activation"**, the process of reactivating a lapsed national advanced practice registered nurse certification program in the specialty area;

(3) **"collaboration"**, practice in conjunction with another health professional;

(4) **"competency"**, competency in nursing is the ability to perform skillfully and proficiently the role of the licensee; the role encompasses essential knowledge, judgment, attitudes, values, skills and abilities, which are varied in range and complexity; competency is a dynamic concept and is based on educational training, preparation, and expertise;

(5) **"consultation"**, to communicate regularly to set goals and objectives and to review and document outcomes;

(6) **"contact hours"**, a unit of measurement to describe an approved, organized learning experience;

(7) **"continuing education"**, planned learning experiences beyond a basic nursing education program; these experiences are designed to promote the development of knowledge, skills and attitudes for the enhancement of nursing practice, thus improving health care to the public;

(8) **"continuing education unit (CEU)"**, ten contact hours of participation in an organized CE experience under responsible sponsorship, capable direction, and qualified instruction.

D. Definitions beginning with the letter D:

(1) **"data collection"**, the process of obtaining information, material, fact or clinical observations which will be used in the assessment process; data collection is not

limited to licensed individuals;

(2) **“delegation”**, the transferring to a competent individual the authority to perform a selected nursing task in a selected situation. The nurse retains accountability of the delegation;

(3) **“department of public safety”**, the New Mexico department of public safety or other state’s department of public safety;

(4) **“direct supervision for graduate permit holders”**, at a minimum, the person responsible for the direct supervision must be in the facility or on the unit with the graduate permit holder observing, directing and evaluating the performance of the permit holder; the supervisor must not be engaged in other activities that would prevent them from providing direct supervision.

E. Definitions beginning with the letter E:

(1) **“educational institution”**, refers to an institution within the educational system which is organized and accredited for teaching and study (university, high school, post-secondary, approved area vocational institution);

(2) **“eligible for graduation”**, individual who has met all the requirements of an educational program.

F. “Final transcript”, an official record of course work and grades, issued by a school, which indicates date of program completion and certificate or degree awarded.

G. “Generally recognized organization”, an association of nurses with common goals and concerns expressed through structured by laws. Rules and regulations, and whose recognition derives from both the profession and the public.

H. [Definitions — H — = Reserved] **“Health care work force data collection”**, an electronic survey, designed to be completed by applicants for licensure or renewal, which includes questions regarding a core essential data set.

I. Definitions beginning with the letter I:

(1) **“inactive list”**, compilation of those licenses that are in good standing but not current;

(2) **“initial license”**, the process of achieving the legal privilege to practice within a professional category upon the completion of all educational requirements and the successful writing of the national licensing examination;

(3) **“institution of higher education”**, college or university.

J. “Jurisdiction”, the licensure or regulatory authoritative body for nursing within a specific geographic area for which there is endorsement in New Mexico.

K. Definitions K - Reserved

L. Definitions beginning

with the letter L:

(1) **“lapsed status”**, a license which was not renewed by the expiration date on the license;

(2) **“legal guardian”**, a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person who is considered incapable of administering his own affairs;

(3) **“letter of authorization”**, a document issued by the board which authorizes an individual to practice nursing in New Mexico under the auspices of an approved preceptorship for an advanced nursing expanded scope of practice prescriptive authority or for an advanced practice nurse from a compact state;

(4) **“license”**, a legal document granting an individual the privilege and authority to engage in the practice of an occupation/profession;

(5) **“licensure by endorsement”**, the process of achieving the legal privilege to practice within a professional category, in New Mexico, by individuals licensed in other jurisdictions, upon fulfilling all requirements set by this state.

M. Definitions beginning with the letter M:

(1) **“medical emergency”**, a situation resulting from a disaster in which the number of persons requiring nursing care exceeds the availability of New Mexico registered nurses or licensed practical nurses;

(2) **“monitoring system”**, a mechanism whereby programs may be approved for CE hours within a geographic area;

(3) **“must”**, a requirement.

N. Definitions beginning with the letter N:

(1) **“national licensing examination”**, examination for licensure as provided by the national council of state boards of nursing, inc.;

(2) **“nationwide criminal history record”**, information concerning a person’s arrests, indictments or other formal criminal charges and any dispositions arising there from, including convictions, dismissals, acquittals, sentencing and correctional supervision, collected by criminal justice agencies and stored in the computerized databases of the federal bureau of investigation, the national law enforcement telecommunications systems, the department of public safety or the repositories of criminal history information of other states;

(3) **“nationwide criminal history screening”**, a criminal history background investigation of an applicant for licensure by examination or endorsement through the use of fingerprints reviewed by the department of public safety and submitted to the federal bureau of investigation, resulting in the generation of a nationwide criminal history

record for that applicant.

O. Definitions O - Reserved

P. Definitions beginning with the letter P:

(1) **“permit-to-practice for GCNSs”**, a document conferring the privilege to practice as a graduate clinical nurse specialist, at a specific place of employment, under the direct supervision of a licensed CNS, CNP or physician; such permits will carry set expiration dates, are not renewable and are not transferable;

(2) **“permit-to-practice for GNs and GPNs”**, a document conferring the privilege to practice nursing at a specific place of employment, under direct supervision of a RN only; such permits will carry set expiration dates, are not renewable or transferable;

(3) **“permit-to-practice for GNPs”**, a document conferring the privilege to practice as a graduate nurse practitioner, at a specific place of employment, under the direct supervision of a physician or a certified nurse practitioner; direct supervision of a physician, licensed CNP or CNS is required for prescription writing; such permit will carry set expiration dates, are not renewable and are not transferable;

(4) **“permit-to-practice for GRNAs”**, a document conferring the privilege to administer anesthesia to any person, as a GRNA, at a specific place of employment, functioning in an interdependent role under the direction of and in collaboration with a licensed physician, osteopathic physician, dentist or podiatrist licensed in New Mexico; such permits will carry set expiration dates, and are not renewable or transferable;

(5) **“post-graduate program”**, any specialized knowledge and skills sought after completion of a basic nursing educational program which does not necessarily lead to an advanced degree;

(6) **“preceptor”**, an individual at or above the level of licensure that an assigned student is seeking, who may serve as a teacher, mentor, role model or supervisor in a clinical setting;

(7) **“prescriptive authority”**, the power to determine the need for drugs, immunizing agents or devices; selecting the remedy and writing a prescription;

(8) **“private practice”**, employment status of an individual nurse who is self-employed.

Q. Definitions Q - Reserved

R. Definitions beginning with the letter R:

(1) **“reactivation”**, the process of making current a license which has been in abeyance as a result of failure to comply with the necessary renewal requirements; this process does not involve board action at

any juncture;

(2) **“recognized national or state institutions/organizations”**, institutions and organizations recognized as providers of CE for nurses;

(3) **“reinstatement”**, the process whereby a license which has been subject to revocation or suspension, is returned to its former status by individual board action; this process always involves board action, and requires filing of a form and payment of the reinstatement fee;

(4) **“relicensure”**, the process of renewal, reactivation or reinstatement of a New Mexico nursing license;

(5) **“refresher course”**, a formal program that has both didactic and clinical components designed to prepare a nurse who has been out of practice to re-enter the profession.

S. Definitions beginning with the letter S:

(1) **“state approved program”**, a basic nursing education program approved or accredited by a state board of nursing or a nationally recognized nursing education accreditation body;

(2) **“shall”**, mandatory; a requirement;

(3) **“should”**, a suggestion or recommendation; not a requirement;

(4) **“sponsor/provider”**, any person, organization, agency, or institution which organizes, develops, implements, and evaluates a CE activity;

(5) **“supervision/direction”**, initial verification of a person’s knowledge and skills in the performance of a specific function or activity followed by periodic observation, direction and evaluation of that person’s knowledge and skills as related to the specific functions or activity;

(6) **“surrogate”**, an individual, other than a patient’s agent or guardian, authorized under the uniform health-care decisions act to make a health-care decision for the patient.

T. “Temporary license”, a nonrenewable, nontransferable document indicating a legal privilege to practice as a RN, LPN, CNP, CNS or CRNA, on a conditional basis for a specific period of time.

U. “Uniform Licensing Act”, New Mexico statute which provides procedures to be utilized in disciplinary proceedings.

V. “Valid practitioner-patient relationship” means a professional relationship between the practitioner and the patient for the purpose of maintaining the patient’s well-being. At minimum, this relationship is an interactive encounter between the practitioner and patient involving an appropriate history and physical or mental examination, ordering labs or diagnostic tests sufficient to make a diagnosis and providing, prescribing or recommending treatment, or referring to other health care providers. A patient record must be generated by the encounter.

[1-1-98; 16.12.2.7 NMAC - Rn & A, 16 NMAC 12.2.7, 7-30-01; A, 12-31-01; A, 1-2-04; A, 02-17-06; A, 6-17-08; A, 5-17-10; A, 11-29-10; A, 11-20-12]

16.12.2.9 FEES: Payment of fees will be accepted in the form specified by the board. Fees are not refundable.

A.	Licensure by examination	\$110
B.	Reexamination fee (RN)	\$60
C.	Reexamination fee (LPN)	\$60
D.	Licensure by endorsement (RN/LPN)	\$110
E.	Renewal	\$93
F.	Reactivation from lapsed status; inactive or returning to state (includes renewal fee)	\$110
G.	Reactivation from lapsed status; <u>renewing late</u> (includes renewal fee)	\$200
H.	Reinstatement of lapsed license following board action	\$150
I.	Reinstatement of current license following board action	\$100
J.	Initial advanced practice licensure (cnp, crna, cns)	\$100
K.	Advanced practice renewal	\$100
L.	Reactivation from lapsed status advanced practice, inactive, returning to state	\$110
M.	Reactivation from lapsed status advanced practice license; <u>renewing late</u>	\$200
N.	Temporary license	\$50

[1-1-98; 16.12.2.9 NMAC - Rn & A, 16 NMAC 12.2.9, 7-30-01; A, 1-2-04; A, 02-17-06; A, 6-17-08; A, 11-20-12]

16.12.2.10 LICENSURE REQUIREMENTS FOR REGISTERED AND PRACTICAL NURSES: Licensure with the New Mexico board of nursing is mandatory and is the responsibility of the individual nurse, pursuant to the Nursing Practice Act. For

states who are a part of the nurse licensure compact, licensure in New Mexico can only be issued to applicants who declare New Mexico as their primary state of residence.

A. Prerequisites for licensure of RNs and LPNs by examination in New Mexico.

(1) Completion of and eligible for graduation from a board approved course of study for the preparation of registered nurses or practical nurses, or an acceptable level of education as determined by the board or graduation from a program which is equivalent to an approved program of nursing in the United States.

(2) RN and PN graduates from non-U.S. nursing programs:

(a) shall have an evaluation of their nursing education credentials sent to the New Mexico board directly from a board recognized educational credentialing agency

(i) the credentialing agency must be a member of a national credentialing organization and must be monitored by an external committee of credentialing experts and nursing educators;

(ii) the credentialing agency must demonstrate the ability to accurately analyze academic and licensure credentials in terms of U.S. comparability, with course-by-course analysis of nursing academic records;

(iii) the credentialing agency must manage the translation of original documents into English;

(iv) the credentialing agency will inform the board of nursing in the event of fraudulent documents;

(v) the credentials report must state the language of nursing instruction and language of textbooks for nursing education; and

(vi) the credentialing agency must only use original source documents in evaluating nursing education and must compare the foreign education to the U.S. education standards.

(b) Puerto Rico applicant’s who are graduates of NLNAC accredited registered nurse program are eligible to sit NCLEX-RN exam;

(c) successful completion of any one of the approved English competency examinations with:

(i) a minimum score of 540 (207 on computerized version) on the test of English as a foreign language (TOEFL) or TOEFL internet-based test (TOEFL IBT) minimal passing standard of 84 overall, with a minimum speaking score of 26, a minimum score of 725 on test of English for international communication (TOEIC) or a minimum score of 6.5 overall with a 7.0 on the spoken portion on the academic version of international English language testing system (IELTS);

(ii) completion of a

nursing program given in English in another country;

(iii) a passing score on a nursing licensure examination which is given in English;

~~(iv) a certificate from the commission on graduates from foreign nursing schools or other agency which indicates successful completion of TOEFL, TOEIC or IELTS.~~

(3) Completion of the required board of nursing application for licensure by examination according to instructions and including the required fee.

(4) Completion of NCLEX application for the testing service according to instructions.

(5) Graduates who have compact state addresses or who declare another compact state as their state of residence on their application will have their application for examination, fingerprint cards and appropriate fees returned to them.

(6) The board shall not approve an application for a license until the applicant provides the following information:

(a) demographics, including race, ethnicity and primary and other languages spoken;

(b) practice status, including but not limited to: active practices in New Mexico and other locations; practice type, practice settings, such as hospital, clinic or other clinical settings;

(c) education, training and primary and secondary specialties;

(d) average hours worked per week and the average number of weeks worked per year in the licensed profession;

(e) percentage of practice engaged in direct patient care and in other activities, such as teaching, research and administration in the licensed profession;

(f) practice plans for the next five years, including retiring from the health care profession, moving out of state or changing health care work hours.

B. Nationwide criminal background check. Applicants for initial licensure in New Mexico are subject to a state and national criminal background check at their cost.

(1) Submit two (2) full sets of fingerprints, completed **finger print certificate form**, signed authorization for criminal background check and fee.

(2) Applications for exam or endorsement will not be processed without submission of fingerprints, **finger print certificate form, authorization for criminal background check form** and fee.

(3) If the criminal background check reveals a felony or violation of the Nursing Practice Act, the applicant/licensee will be notified to submit copies of legal documents and other related information to the board ~~who~~ that will make the

determination if the applicant is eligible for licensure or if disciplinary action will be taken.

C. Complete application for licensure by examination, certification of eligibility for graduation completed by nursing education program or official transcript, fingerprints and fee must be received by the board office prior to being granted permission to take the national licensing examination (NCLEX). Certification of eligibility for graduation completed by nursing education program or official transcript, indicating date requirements for graduation from the nursing program were met and certificate or degree awarded ~~or to be awarded,~~ must be received in the board office directly from the registrar's office.

D. Results of the examination shall be reported to the individual applicant within four (4) weeks following the applicant's examination date. Examination results shall be released to the applicant's nursing program and boards of nursing unless otherwise instructed, in writing, by applicant.

E. An initial license shall be valid for two (2) years.

F. Applications containing fraudulent or misrepresented information could be the basis for denial or revocation of licensure.

G. If the licensure process is not completed, the application becomes null and void one (1) year after date of the application being received at the board.

H. Permits-to-practice may be issued for employment at a specific institution(s) in New Mexico. Permits-to-practice can be emailed, faxed or mailed directly to the New Mexico employing institution(s).

(1) To be eligible for a permit-to-practice, the applicant must:

(a) complete the application process to take the NCLEX within twelve (12) weeks of graduation; the permit to practice for RN and PN graduates of U.S. schools may be issued for a period not to exceed six months from the receipt date of application; permits to practice may not be issued by the New Mexico board of nursing for employment at specific institution(s) in compact states; permits-to-practice will not be issued for applicants who declare residency in other compact states;

(b) RN and PN graduates from non-U.S. nursing programs may be issued a permit-to-practice in New Mexico for a period not to exceed six months from the date of application when requirements are met according to Paragraph (2) of Subsection A of 16.12.2.10 NMAC in this section;

(c) assure that prospective New Mexico employer(s) submit a letter of intent to employ to the board office, on

agency letterhead, indicating the name of a specific New Mexico employer and name and nursing license number of the RN who is responsible for assuring direct supervision by a registered nurse;

(d) submit fingerprint cards and documents and fee to initiate a state and national criminal background check.

(2) Permits-to-practice cannot be transferred or renewed.

(3) Written notification from employer must be made to the board office in case of lost or stolen permit-to-practice.

(4) Permits-to-practice shall be valid until the examination results are disseminated but shall not exceed the expiration date on the permit.

(a) Applicants who ~~fails~~ fail the first or any subsequent examination shall not practice nursing until such time as the applicant passes a nursing licensing examination.

(b) Any applicant who is eligible to write the professional examination but elects to write the practical examination on the basis of practical nursing education equivalency and fails the practical examination shall not be granted graduate nurse status when the applicant applies to write the professional registered nurse examination.

(c) Any applicant who fails to appear for the first examination for which applicant is eligible shall not practice nursing until such time as the applicant passes a licensing examination.

(5) Candidates who were not successful on the *national licensure examination* will receive the results as soon as they are available.

(6) Applicants who hold a graduate permit-to-practice and do not become licensed prior to the expiration date of the permit may not continue to practice as a graduate nurse or graduate practical nurse.

I. Direct supervision for graduate permit holders:

(1) at a minimum, the RN responsible for direct supervision must be in the facility or on the unit with the graduate;

(2) the RN is responsible for observing, directing and evaluating the performance of the graduate;

(3) the RN supervisor must not be engaged in other activities that would prevent them from providing direct supervision.

J. Applicants who fail the examination may apply to retake the examination a maximum of four times per year, but must wait 45 days to retest.

(1) A fee will be charged by the board for all re-examinations.

(2) Applicants for re-examination must meet all NCLEX requirements for retaking the examination.

(3) Applicants who fail the examination up to four times in one year from the date application was received at the

board must now submit a new application for examination, documentation, fingerprint cards and appropriate fees.

K. National council licensing examination.

(1) Applicants for licensure as [RNs] registered nurses shall be required to pass the NCLEX-RN [for RNs].

(2) Applicants for licensure as [PNs] licensed practical nurses shall be required to pass the NCLEX-PN [for PNs].

(3) Applicants observed giving or receiving unauthorized assistance during the taking of the national licensing examination shall be referred to the board by a sworn complaint.

L. Prerequisites for licensure of registered nurses and licensed practical nurses by endorsement.

(1) Verification DIRECTLY from the licensing authority which shall include:

(a) graduation from an approved nursing program or an acceptable level of education as determined by the board or a nursing program which is equivalent to an approved program of nursing in the United States; and

(b) initial licensure by passing a national licensure examination in English or a state constructed licensure examination prior to October 1986.

(2) Applicants from licensing authorities which do not verify graduation from a nursing education program, must assure that a final transcript is sent to the board of nursing DIRECTLY from the educational institution or custodian of records verifying graduation from an approved nursing program or equivalent, or

(3) [Puerto Rico applicants who are graduates of NLNAC accredited registered nurse programs are eligible to sit the NCLEX-RN exam;] Canadian applicants who have been endorsed by another state after passing the Canadian nursing exam in English or the NCLEX are eligible for endorsement into NM.

(4) Complete and submit the required application for licensure by endorsement in accordance with all instructions, including the required fee.

(5) The board shall not approve an application for endorsement until the applicant provides the following information:

(a) demographics, including race, ethnicity and primary and other languages spoken;

(b) practice status, including but not limited to: active practices in New Mexico and other locations; practice type, practice settings, such as hospital, clinic or other clinical settings;

(c) education, training and primary and secondary specialties;

(d) average hours worked per week and the average number of weeks worked per year in the licensed profession;

(e) percentage of practice engaged in direct patient care and in other activities, such as teaching, research and administration in the licensed profession;

(f) practice plans for the next five years, including retiring from the health care profession, moving out of state or changing health care work hours.

(5) (6) Complete and submit two full sets of fingerprints, **finger print certificate form**, the authorization for criminal background check, and the fee in accordance with all instructions found in Subsection B of 16.12.1.10 NMAC.

M. Qualifications for licensure as a RN or [PN] LPN are pursuant to the Nursing Practice Act.

(1) LPN applicants initially licensed after July 1, 1969 must meet the educational requirements.

(2) Military personnel, licensed as LPNs by successful writing of the national licensing examination prior to July 1, 1977, may be licensed in New Mexico by endorsement providing their DD-214 shows the related civilian occupation to be "LPN."

(3) Continuing education is not required for initial licensure by endorsement. CE requirements must be met at the time of the first renewal.

(4) Disciplinary action taken or pending against a nursing license in another jurisdiction, or a conviction of a felony, may result in denial of a license.

[N. A permit-to-practice may be issued to a New Mexico employer(s); for an endorsee who has not declared primary residence in a nurse licensure compact state awaiting results of the national licensing examination or the English equivalent from another country. The following must be submitted to the board:

(1) a completed endorsement application for licensure in accordance with all instructions and fee;

(2) two full sets of fingerprints; fingerprint certification form, the authorization for criminal background check and fee in accordance with all instructions found in Subsection B of 16.12.1.10 NMAC;

(3) written verification must be received DIRECTLY from the licensing authority: (a) that the applicant applied for the licensing examination within twelve (12) weeks of graduation and is eligible for licensure, or (b) that the first licensing examination after completion of nursing education has been applied for or taken;

(4) assure prospective New Mexico employer(s) submits a letter of intent to employ, on agency letterhead, indicating the name of the specific New Mexico employing institution and name and nursing license number of the RN who is responsible for assuring direct supervision by a registered nurse;

(5) meeting all other endorsement

requirements;

(6) a permit-to-practice shall be valid from date of issuance until the applicant's examination results and licensure status have been verified by the other state or country, but shall not exceed six (6) months from the date of graduation.]

[O. N. A temporary license may be issued to an endorsee upon submission of:

(1) a completed endorsement application and required fee in accordance with all instructions;

(2) two full sets of fingerprints, fingerprint certificate form, the authorization for criminal background check and fee in accordance with all instructions found in Subsection B of 16.12.1.10 NMAC;

(3) the board will issue the temporary license to the applicant;

(4) a temporary license is valid for a period not to exceed six (6) months from the date of application, is non renewable and becomes null and void upon issuance of a current license, expiration, or withdrawal by board action;

(5) applicant is responsible for assuring that all requirements have been met and all documents have been received prior to the expiration date of the temporary license;

(6) the discovery of inaccurate or false information, on the licensure application, may be subject to recall of the temporary license by the board and denial of licensure.

[P. O. An initial license shall be valid for two (2) years.

[Q. P. If the licensure process is not completed in one year after date application received by the board, the application becomes null and void [one (1) year after date received by the board].

[R. Q. In case of a medical emergency (as defined in these rules), nurses currently licensed to practice as a RN or LPN in a jurisdiction of the United States may practice in New Mexico without making application for a New Mexico license for a period not to exceed thirty (30) days.

[S. R. Requirements for relicensure and reactivation. Applicants for relicensure and reactivation must meet CE requirements as stated in these rules, pursuant to the Nursing Practice Act [Section 61-3-24 NMSA 1978].

(1) Licensed nurses shall be required to complete the renewal process by the end of their renewal month every two (2) years.

(2) A renewal notice shall be mailed to the licensee at least six (6) weeks prior to the end of the renewal month.

(a) Renewal of license may be accepted no more than sixty (60) days prior to the expiration date of the license.

(b) The board shall not approve an application for a renewal of license

until the applicant provides the following information:

(i) demographics, including race, ethnicity and primary and other languages spoken;

(ii) practice status, including but not limited to: active practices in New Mexico and other locations; practice type, practice settings, such as hospital, clinic or other clinical settings;

(iii) education, training and primary and secondary specialties;

(iv) average hours worked per week and the average number of weeks worked per year in the licensed profession;

(v) percentage of practice engaged in direct patient care and in other activities, such as teaching, research and administration in the licensed profession;

(vi) practice plans for the next five years, including retiring from the health care profession, moving out of state or changing health care work hours.

~~(b)~~ (c) Failure to receive notice renewal shall not relieve the licensee of the responsibility of renewing the license by the expiration date.

~~(c)~~ (d) If the license is not renewed by the end of the renewal month, licensee does not hold a valid license and shall not practice nursing in New Mexico until the lapsed licensed has been reactivated.

~~(d)~~ (e) A reactivation fee will be charged when license has lapsed.

~~(e)~~ (f) **Exception:** if renewing, nurses who are mobilized for active duty are not required to renew their license while on active duty, other than training, during a military action. A copy of the mobilization orders must be submitted to the board office prior to expiration of the license. The license extension shall end one month after deployment is concluded. No reactivation fee will be charged when the license is renewed.

(3) Thirty (30) hours of approved CE must be accrued within the 24 months immediately preceding expiration of license.

(a) Certified nurse practitioners must complete a total of 50 hours of approved CE each renewal. A copy of the specialty certification/recertification card or certificate shall be presented at the time of each subsequent renewal.

(b) Certified registered nurse anesthetists must submit a copy of the recertification card issued by NBCRNA for renewal of the CRNA license.

(c) Clinical nurse specialist must complete a total of 50 hours of approved continuing education each renewal. A copy of the specialty certification/recertification card or certificate shall be presented at the time of each subsequent renewal.

(d) **Exception:** if renewing, nurses

mobilized for military action are not required to meet the CE requirements while on active duty, other than training, during a military action. A copy of the mobilization order must be submitted along with the renewal application.

(4) Individuals who reside out-of-state who do not hold primary residence in a nurse licensure compact state, but wish to maintain a current, valid New Mexico license, must meet the same requirements for licensure as licensees residing within the state who have~~declare~~ declared New Mexico as their primary residence.

(5) **Penalty:** failure of licensee to meet the CE requirement for licensure shall result in the license not being renewed, reinstated, or reactivated. When the CE requirement has been met, an application for licensure may be submitted for consideration.

(6) Licenses can be verified by phone verification [or], on the board website or www.nursys.com.

(7) Individuals who are reactivating a license which has been lapsed for four or more years must complete a refresher course that includes both a didactic and clinical component designed to prepare a nurse who has been out of practice to ~~reenter~~ re-enter into practice.

(a) Renewal application, fingerprint cards and appropriate fees must be sent in with reactivation of a lapsed license.

(b) A temporary license will be issued not to exceed six months unless the board of nursing approves an extension to allow the individual to complete the refresher course clinical component. If documentation is not received by the board verifying successful completion of the refresher course prior to the temporary license expiration date, the individual will not be allowed to practice nursing.

(c) Advanced practice nurses who are reactivating an advanced practice license which has been lapsed for four or more years must also complete a refresher course or certification reactivation that is reflective of their specific advanced practice knowledge, skills and expertise. A temporary license will be issued not to exceed one (1) year unless board of nursing approves an extension.

~~(F)~~ S. Requirements for name-address change:

(1) **Address change:** Immediate notification of address change **must be made** to the board office.

(2) **Name change:** Nurse must use name as it appears on current license ~~[name may be changed when license is renewed]~~ until name change is in effect. Name change can be submitted with license renewal or at any given time. Submit a copy of the legal document required for name change (ONLY recorded marriage certificate, divorce decree or court order accepted).

~~(a)~~ Submit a copy of the legal document required for name change (ONLY recorded marriage certificate, divorce decree or court order accepted):

~~(b)~~ Remit the required fee-]

~~(U)~~ T. Reactivation / reinstatement of a lapsed license must meet the requirements for relicensure pursuant to the Nursing Practice Act and these rules. A reactivated or reinstated license shall be valid for two (2) years.

~~(V)~~ U. Inactive status. Licensee may request her/his license be placed on inactive status during the renewal cycle only; however, the licensee may not function in a nursing capacity as a New Mexico licensed nurse until the license is reactivated.

V. The board will collect a standardized core essential data set as required in regulation for examinations and renewals which will be entered into the internal licensing database at the board of nursing.

[1-1-98; 16.12.2.10 NMAC - Rn & A, 16 NMAC 12.2.10, 7-30-01; A, 12-31-01; A, 04-01-02; A, 1-2-04; A, 6-01-04; A, 02-17-06; A, 6-17-08; A, 5-17-10; A, 11-29-10; A, 11-20-12]

16.12.2.13 A D V A N C E D PRACTICE REGISTERED NURSE (APRN) CERTIFIED NURSE PRACTITIONER (CNP):

A. Requirements for licensure of nurse practitioners.

(1) Hold a current, unencumbered RN license from New Mexico or hold a compact multi-state RN license.

(2) Successfully complete a graduate level nursing program designed for the education and preparation of nurse practitioners as providers of primary, or acute, or chronic, or long-term, or end of life health care.

(a) The program must be offered through an accredited institution of higher education or through the armed services.

(b) If the applicant is initially licensed by any board of nursing including the New Mexico board of nursing after January 1, 2001 the program must be at the master's in nursing level or higher. Applicants who do not hold a master's level or higher degree from a nurse practitioner program and were initially licensed by any board before January 1, 2001, must provide verification of NP licensure.

(c) The educational documentation shall verify the date of graduation, credentials conferred and number of supervised clinical hours as a nurse practitioner in the education program.

(3) Provide evidence of successful accomplishment of national certification as a nurse practitioner.

(4) It is the responsibility of the applicant to provide documented evidence

of his/her qualifications for licensure.

(5) Applicants who meet the minimum didactic and pharmacology requirements, but lack the required preceptorship, may be considered for licensure in New Mexico if the applicant provides satisfactory evidence of two (2) years nurse practitioner experience in another jurisdiction.

(6) Nurse practitioners who will be requesting prescriptive authority must also comply with the requirements for prescriptive authority as outlined in these rules.

B. Procedure for licensure as a graduate nurse practitioner. The applicant seeking licensure as a nurse practitioner shall be responsible for providing proof of meeting the requirements for licensure.

(1) The applicant shall complete the New Mexico nurse practitioner licensure application and submit it along with all required documents in accordance with the instructions.

(2) Upon acceptance of the completed application and receipt of all required supporting documents, the file is reviewed for qualifications and compliance with the requirements.

(3) Applicants who do not meet the requirements for licensure may request or be requested to meet with the board or its designee.

(4) Nurse practitioners are not eligible to practice in New Mexico as a certified nurse practitioner until so licensed in accordance with the licensure procedures.

(5) The board may appoint nurse practitioners to the advanced practice committee. These nurse practitioners will provide advice regarding licensure and practice of nurse practitioners.

C. Graduate nurse practitioners permit-to-practice may be issued, upon written request, provided all requirements have been met except national nursing certification.

(1) GNPs must practice under the direct supervision of a physician or New Mexico CNP or CNS in the specialty.

(2) GNPs may prescribe medications only under the direct supervision of a licensed CNP, CNS or a physician, in compliance with these rules. GNPs must fulfill the requirements in this section to prescribe controlled substances.

(3) GNP permits will be issued to the employer.

(4) A letter of verification of intent to employ, on official letterhead including the name of the practice supervisor and the name of the prescription supervisor, is required from each employer. Upon change in employment, the new employer must send the board a letter of intent to employ. The board will then issue a permit to practice at the new place of employment. The permit

will be issued directly to the new employing agency.

(5) The name of the employment institution and the name(s) of the supervisor(s) shall be indicated on the GNP permit.

(6) GNP permits cannot be transferred or renewed.

(7) GNP permits expire on the date specified on the permit. Permits shall be valid not to exceed six months after the date of the national certifying examination. Those who fail the national certifying examination are rendered ineligible to practice as a GNP. It is the responsibility of the GNP to request that the national certifying organization notify the board of nursing of the results of the examination.

D. An initial license to practice as a CNP shall be issued only after receipt by the board of proof of national certification. Such proof must be submitted to the board directly from the certifying agency prior to the expiration of the permit or temporary license.

E. Prerequisites for licensure of CNP by endorsement.

(1) Verification DIRECTLY from the licensing authority, which shall include graduation from a nurse practitioner program.

(2) In lieu of verification of advanced practice licensure for the licensing authority the board will accept:

(a) documentation directly from that licensing authority that the state does not issue advanced practice licensure;

(b) a sworn affidavit from applicant that they practice as an advanced practice nurse with the year practice began, and;

(c) if applicant was licensed by another board after January 1, 2001, submit a transcript from the program directly to the board documenting completion of a nurse practitioner program on the master's or higher level.

(3) Verification from applicant of national certification as a nurse practitioner.

(4) Nurse practitioners who are requesting prescriptive authority must comply with the requirements for prescriptive authority as outlined in these rules.

(5) Complete and submit the required application from licensure by endorsement in accordance with all instructions including the required fee.

(6) Continuing education is not required for initial CNP licensure by endorsement.

F. Qualifications for licensure as CNP are pursuant to the Nursing Practice Act.

(1) Refer to Subsection A of 16.12.2.13 NMAC for licensure requirements.

(2) CE requirements must be met at the time of the first renewal.

(3) Disciplinary action taken or pending against a nursing license in another jurisdiction, or a conviction of a felony, may result in denial of a license.

G. A CNP temporary license may be issued to an endorsee awaiting results on successful completion of national certification.

H. A temporary nurse practitioner license may be issued to an endorsee who:

(1) submits a completed endorsement application and fee in accordance with all instructions;

(2) submits a copy of current national certification as a nurse practitioner; the following exceptions can be made;

(a) nurse practitioners who were licensed by any jurisdiction before December 2, 1985 are not required to hold national certification; or

(b) when the state of former advanced practice licensure does not require national certification; proof of national certification as a nurse practitioner must be submitted to the board before a license will be issued;

(3) the board will issue the temporary license to the applicant;

(4) a temporary license is valid for a period not to exceed six (6) months from the date of application, is non renewable and becomes null and void upon issuance of a current license, expiration, or withdrawal by board action;

(5) applicant is responsible for assuring that all requirements have been met and all documents have been received prior to the expiration date of the temporary license;

(6) the discovery of inaccurate or false information, on the licensure application, may be subject to recall of the temporary license by the board and denial of licensure.

I. An initial nurse practitioner license shall be valid for two (2) years. For nurses from compact states, an NM advanced practice license will be issued with the same expiration date as the RN compact license. A letter of authorization will be issued to NPs who have RN multi-state licensure privileges from another nurse licensure compact state. Official verification to practice is located on the board website.

J. If the licensure process is not completed, the application becomes null and void one (1) year after the date of application being received at the board.

K. Authorization to expand scope of practice or who need recertification.

(1) A letter of authorization will be issued for the CNPs who through additional formal education have expanded their practice into another area of NP practice

or who need practice hours to recertify provided all requirements have been met except national certification.

(2) A letter of verification of intent to provide a preceptorship, on official letterhead including the name of the practice preceptor and the name of the prescription preceptor must be submitted to the board of nursing.

(3) Practice must be under the direct supervision of a physician or licensed New Mexico CNP or CNS in the specialty.

(4) Prescribing may be done only under the direct supervision of a licensed CNP or CNS or a physician in compliance with these rules.

(5) A letter of authorization will be issued to the preceptor.

(6) A letter of authorization cannot be transferred, renewed or a duplicate issued.

(7) A letter of authorization will expire on the date specified.

(a) A letter of authorization shall be valid not to exceed 6 months after the date of the national certifying examination. Those who fail the national certifying examination are rendered ineligible to practice in that area. It is the responsibility of the CNP to request that the national certifying organization notify the board of the results of the examination. A letter of authorization may be valid for a period not to exceed two (2) years.

(b) A letter of authorization shall be valid for 6 months for those applicants recertifying.

(c) A letter of authorization shall be issued for the prescriptive authority preceptorship. This letter will only be valid for the duration of the preceptorship expansion of scope of practice or recertification required hours of practice.

L. Maintaining licensure as a nurse practitioner.

(1) National certification: NPs must maintain national certification. A copy of the specialty certification/recertification card shall be presented at the time of each subsequent renewal. Nurse practitioners licensed by the NM board, after December 2, 1985 are required to be nationally certified in their specialty.

(2) Continuing education.

(a) The CNP shall accrue a total of fifty (50) contact hours of approved CE each renewal period. National certification or recertification as a NP may not be used to fulfill any portion of the CE requirement:

(i) thirty (30) contact hours shall meet the requirements for licensure as a RN, and

(ii) an additional twenty (20) contact hours, 15 of which must be pharmacology are required.

(iii) CNP's with DEA registration and licensure that permits prescribing opioids shall obtain five contact

hours of the 15 currently required in pharmacology to include management of non-cancer pain.

~~(iii)~~ (iv) CNP's from compact states are only required to fulfill CE requirements listed under item (ii) and (iii) of this subparagraph.

(b) The CE shall be in accordance with the requirements as set forth in these rules.

M. Reactivation. To reactivate or reinstate licensure as a nurse practitioner, the nurse must provide evidence of meeting the CE requirements.

(1) NPs licensed by the board after December 2, 1985 must also provide evidence of current national certification.

(2) CNPs who are reactivating an advanced practice license which has been lapsed for four or more years must also complete a refresher course or certification reactivation that is reflective of their knowledge skills and expertise. A temporary license will be issued not to exceed one (1) year, unless the board of nursing approves an extension.

N. Nurse practitioner practice.

(1) The CNP makes independent decisions regarding the health care needs of the client and also makes independent decisions in carrying out health care regimens.

(2) The CNP provides primary or acute, or chronic, or long-term, or end of life health care to meet the health care needs of individuals, families and communities in any health care setting.

(3) The CNP may assume specific functions or perform specific procedures which are beyond the advanced educational preparation and certification for the CNP provided the knowledge and skills required to perform the function or procedure emanates from a recognized body of knowledge or advanced practice of nursing and the function or procedure is not prohibited by any law or statute. When assuming specific functions and performing specific procedures, which are beyond the CNP's advanced educational preparation and certification, the CNP is responsible for obtaining the appropriate knowledge, skills and supervision to ensure he/she can perform the function/procedure safely and competently and recognize and respond to any complications that may arise.

(4) The CNP collaborates as necessary with other healthcare providers. Collaboration includes discussion of diagnosis and cooperation in managing and delivering healthcare.

(5) CNPs who have fulfilled requirements for prescriptive authority may prescribe and distribute dangerous drugs including controlled substances contained in Schedules II through V of the Controlled Substances Act within their clinical specialty

and practice setting.

(a) Requirements for prescriptive authority: In accordance with applicable state and federal laws, the CNP who fulfills the following requirements may prescribe and distribute dangerous drugs including controlled substances included in Schedules II through V of the Controlled Substance Act.

(i) Verifies 400 hours of work experience in which prescribing dangerous drugs has occurred within the two (2) years immediately preceding the date of the application. Individuals who have not fulfilled this requirement must provide documentation of successful completion of 400 hours of prescribing dangerous drugs in a preceptorship with a licensed CNP, CNS or physician. The preceptorship must be completed within six (6) months and a letter of authorization will be issued for the duration of the preceptorship.

(ii) In order to prescribe controlled substances, the CNP must provide the board of nursing with verification of current state controlled substances registration and current DEA number, unless the CNP has met registration waiver criteria from the New Mexico board of pharmacy (Subsection I 16.19.20.8 NMAC). CNPs may not possess, prescribe or distribute controlled substances until they have both a current state controlled substances registration and a current DEA registration.

(iii) Once prescriptive authority requirements are met, the board will notify the board of pharmacy of completion of prescriptive authority requirements.

(b) Formulary. It is the CNP's responsibility to maintain a formulary of dangerous drugs and controlled substances that may be prescribed; the only drugs to be included in the formulary are those relevant to the CNP's specialty and practice setting. The board of nursing reserves the right to audit the formulary of the CNP. Licensees may be subject to disciplinary action by the board of nursing if non compliant with the audit.

(c) Prescription records; written, verbal or electronic prescriptions and orders will comply with state board of pharmacy and federal requirements. All prescriptions will include the name, title, address, and phone number of the prescribing advanced practice registered nurse.

(d) Distributing: CNPs, who have fulfilled requirements for prescriptive authority as stated in these rules, and defined by the board of pharmacy may distribute to their patients dangerous drugs including controlled substances contained in Schedules II through V of the Controlled Substances Act, which have been prepared, packaged, or fabricated by the registered pharmacist or doses which have been pre-packaged by a pharmaceutical manufacturer in accordance

with the Pharmacy Act [61-11-22] and the Drug, Device and Cosmetic Act for the benefit of the public good.

(e) Labeling: CNPs may label only those drugs which the CNP prescribes and distributes to patients under the CNP's care. The medication shall be properly labeled with the patient's name, date of issue, drug name and strength, instructions for use, drug expiration date, number dispensed and name, address and telephone number of the CNP. Labeling may be handwritten or a pre-printed fill-in label may be used. All information shall be properly documented in the patient record.

(f) CNPs who do not plan to prescribe controlled substances but do plan to prescribe dangerous drugs must meet the requirements relative to prescriptive authority except those specifically required for controlled substances.

(g) CNPs may prescribe, provide samples of and dispense any dangerous drug to a patient where there is a valid practitioner-patient relationship as defined in 16.12.2.7 NMAC.

(6) Graduate nurse practitioner (GNP) practice.

(a) GNPs may not distribute medications.

(b) GNPs may practice or prescribe medications only under the direct supervision of a licensed CNP, CNS or physician in the specialty.

(7) To insure competency and safe practice in specific regard to prescription writing practices in the state of NM:

(a) a list of current CNPs and their status with regard to prescription writing shall be distributed at least annually and upon request to the board of pharmacy;

(b) violation of these rules or disciplinary action taken by the board of nursing with regard to controlled substances shall be reported to the board of pharmacy;

(c) the board of nursing shall appoint qualified CNPs in each specialty to serve on the board of pharmacy disciplinary panel as requested by the board of pharmacy. [1-1-98; 16.12.2.13 NMAC - Rn & A, 16 NMAC 12.2.13, 7-30-01; A, 12-31-01; A, 04-01-02; A, 1-2-04; A, 02-17-06; A, 6-17-08; A, 11-29-10; A, 11-20-12]

16.12.2.14 A D V A N C E D PRACTICE REGISTERED NURSE (APRN) CERTIFIED REGISTERED NURSE ANESTHETIST (CRNA):

A. Requirements for licensure as a CRNA.

(1) Hold a current, unencumbered RN license from New Mexico or hold a compact multi-state RN license.

(2) Successfully complete a formal program designed for the education and preparation of certified registered nurse anesthetist. The COA *council on*

accreditation of nurse anesthesia educational programs must accredit the program.

(3) If the applicant is initially licensed by any board of nursing including the New Mexico board of nursing after January 1, 2001, the program must be at the master's level or higher. Applicants who do not hold a master's or higher degree from a nurse anesthetist program and were initially licensed by any board before January 2, 2001, must provide verification of CRNA licensure.

(4) Provide evidence of successful completion of a national certification examination as described by the NBCRNA.

(5) It is the responsibility of the applicant to provide documented evidence of his/her qualification for licensure.

(6) Applicants who will be requesting prescriptive authority must also comply with the requirements for prescriptive authority as outlined in these rules.

B. Procedure for licensure as a graduate. The applicant seeking licensure as a certified registered nurse anesthetist shall be responsible for providing proof of meeting the requirements for licensure.

(1) The applicant shall complete the New Mexico certified registered nurse anesthetist licensure application and submit it along with all required documents, and fee in accordance with the instructions.

(2) Upon acceptance of the completed application and receipt of all required supporting documents, the file is reviewed for qualifications and compliance with the requirements.

(3) Applicants who do not meet the requirements for licensure may request or be requested to meet with the board or its designee.

(4) Certified registered nurse anesthetists are not eligible to practice in New Mexico as certified registered nurse anesthetist until so licensed in accordance with the licensure procedures.

(5) The board may appoint certified registered nurse anesthetists to the advanced practice committee. These nurse anesthetists will provide advice regarding licensure and practice of certified registered nurse anesthetists.

C. Graduate registered nurse anesthetist permit-to-practice may be issued, upon written request, provided all requirements have been met except NBCRNA certification.

(1) A permit may be issued following graduation from an approved school of nurse anesthesia to afford the applicant the opportunity for employment pending dissemination of the national qualifying examination results by the NBCRNA.

(2) GRNAs must function in an interdependent role as a member of a health

care team and practice at the direction of and in collaboration with a physician, osteopathic physician, dentist or podiatrist.

(3) GRNAs may prescribe and administer medications only in collaboration with a physician, osteopathic physician, dentist or podiatrist in compliance with these rules.

(4) GRNAs permits will be issued to the employer(s).

(5) A letter of verification of intent to employ, on official letterhead including the name of the practice supervisor(s) and name of prescription supervisor(s), is required from each employer. Upon change in employment, the new employer must send the board a letter of intent to employ. The board will then issue a permit to practice for the new place of employment. The permit will be issued directly to the new employing agency.

(6) The name of the employment institution and the name(s) of the supervisor(s) shall be indicated on the GRNA permit.

(7) GRNA permits cannot be transferred or renewed.

(8) GRNA permits expire on the date specified on the permit.

(a) Permits shall be valid for approximately 12 months subsequent to the date of graduation from the nurse anesthesia program.

(b) Written proof of application to write the national qualifying exam must be received in the board office within 12 weeks of graduation from the nurse anesthesia program.

(c) Verification that applicant wrote the national qualifying examination, must be received in the board office within 3 weeks subsequent to the date of the examination.

(d) Failure of applicant to write the scheduled qualifying examination or if the exam is failed, will render the applicant ineligible to practice anesthesia in New Mexico and the employer must immediately return the permit-to-permit to the board office. It is the responsibility of the GRNA to request that the national certifying organization notify the board of the results of the examination.

D. A license to practice as a CRNA shall be issued only after receipt by the board of proof of NBCRNA certification. Such proof must be submitted to the board by the certifying agency.

E. Prerequisites for licensure of CRNA by endorsement.

(1) Verification DIRECTLY from the licensing authority, which shall include graduation from a COA *council on accreditation of nurse anesthesia educational program* and a graduate level degree after January 1, 2001.

(2) In lieu of verification of

advanced practice licensure from the licensing authority, the board will accept documentation directly from that licensing authority that the state does not issue advanced practice licensure and a sworn affidavit from applicant that they practice as an advance practice nurse with year practice began.

(3) Verification by applicant of NBCRNA certification/recertification.

(4) Certified registered nurse anesthetists must comply with the requirements for prescriptive authority as outlined in these rules.

(5) Complete and submit the required application for licensure by endorsement in accordance with all instructions including the required fee.

(6) Continuing education is not required for initial CRNA licensure by endorsement.

F. Qualifications for licensure as CRNA are pursuant to the Nursing Practice Act.

(1) Refer to Subsection A, 16.12.2.14 NMAC for licensure requirements.

(2) CE requirements must be met at the time of first renewal. Recertification by NBCRNA will meet the mandatory CE requirements for CRNA licensure. CRNA's with DEA registration and licensure that permits prescribing opioids shall obtain five contact hours to include the management of non cancer pain.

(3) Disciplinary action taken or pending against a nursing license in another jurisdiction, or a conviction of a felony, may result in denial of a license.

G. A CRNA temporary license may be issued, to an endorsee awaiting results on successful completion of NBCRNA certification.

H. A temporary certified registered nurse anesthetist license may be issued to an endorsee who:

(1) submits a completed endorsement application in accordance with instructions and fee;

(2) submits a copy of current NBCRNA council of recertification of nurse anesthetist;

(3) the board will mail the temporary license to the endorsee;

(4) a temporary license is valid for a period not to exceed six (6) months from the date of application;

(5) a temporary license is not renewable and becomes null and void upon issuance of a current license, expiration, or withdrawal by board action;

(6) applicant is responsible for assuring that all requirements have been met and all documents have been received prior to the expiration date of the temporary license;

(7) the discovery of inaccurate

or false information, on the licensure application, may be subject to recall of the temporary license by the board and denial of licensure.

I. An initial certified registered nurse anesthetist license shall be valid for two (2) years. For nurses from compact states, an NM advanced practice license will be issued with the same expiration date as the compact RN license. A letter of authorization will be issued to CRNAs who have RN multi-state licensure privileges from another nurse licensure compact states. Official verification of authorization to practice is available through the board website.

J. If the licensure process is not completed, the application becomes null and void one (1) year after the date received at the board of nursing.

K. Maintaining licensure as a certified registered nurse anesthetist.

(1) National certification: CRNAs must maintain NBCRNA. A copy of the recertification card must be presented at the time of each subsequent renewal.

(2) Continuing education: recertification by NBCRNA is accepted for meeting mandatory CE requirement.

L. Reactivation: to reactivate or reinstate licensure as a certified registered nurse anesthetist

(1) The nurse must provide evidence of current recertification by the NBCRNA.

(2) CRNAs who are reactivating an advanced practice license which has been lapsed for four or more years must also complete a refresher course or certification [reactivation] reactivation that is reflective of their knowledge, skills and expertise. A temporary license will be issued not to exceed one (1) year, unless board of nursing approves an extension.

M. Certified registered nurse anesthetist practice.

(1) The CRNA provides pre-operative, intra-operative and post-operative anesthesia care and related services, including ordering of diagnostic tests, in accordance with the current *American association of nurse anesthetists'* guidelines for nurse anesthesia practice.

(2) The CRNA functions in an interdependent role as a member of a health care team in which the medical care of the patient is directed by a licensed physician, osteopathic physician, dentist or podiatrist licensed in New Mexico.

(3) The CRNA may assume specific functions or perform specific procedures which are beyond the advanced educational preparation and certification for the CRNA provided the knowledge and skills required to perform the function or procedure emanates from a recognized body of knowledge or advanced practice

of nursing and the function or procedure is not prohibited by any law or statute. When assuming specific functions or performing specific procedures, which are beyond the CRNA's advanced educational preparation and certification, the CRNA is responsible for obtaining the appropriate knowledge, skills and supervision to ensure he/she can perform the function/procedure safely and competently and recognize and respond to any complications that may arise.

(4) The CRNA collaborates as necessary with the licensed physician, osteopathic physician, dentist or podiatrist concerning the anesthesia care of the patient. Collaboration means the process in which each health care provider contributes his/her respective expertise. Collaboration includes systematic formal planning and evaluation between the health care professionals involved in the collaborative practice arrangement.

(5) CRNAs who have fulfilled requirements for prescriptive authority may prescribe and administer therapeutic measures, including dangerous drugs and controlled substances included in Schedules II through V of the Controlled Substances Act within the specialty of anesthesia and practice setting.

(a) Requirements for prescriptive authority: in accordance with applicable state and federal laws, the CRNA who fulfills the following requirements may prescribe and administer dangerous drugs including controlled substances included in Schedules II through V of the Controlled Substance Act.

(i) Verifies 400 hours of work experience in which prescribing and administering dangerous drugs has occurred within the two (2) years immediately preceding the date of the application. Individuals who have not fulfilled this requirement must provide documentation of successful completion of 400 hours of prescribing dangerous drugs in a preceptorship with a CRNA or physician. The preceptorship must be completed within six (6) months and a letter of authorization will be issued for the duration of the preceptorship.

(ii) In order to prescribe controlled substances, the CRNA must provide the board of nursing with verification of current state controlled substances registration and current DEA number, unless the CRNA has met registration waiver criteria from the New Mexico board of pharmacy (Subsection I of 16.19.20.8 NMAC). CRNAs may not possess or prescribe controlled substances until they have both a current state controlled substances registration and a current DEA registration.

(iii) Once prescriptive authority requirements are met, the board will notify the board of pharmacy of completion

of prescriptive authority requirements.

(b) Formulary: the formulary will include agents related to the administration of anesthesia and ACLS protocol agents.

(i) All CRNAs must adhere to the current formulary approved by the board of nursing.

(ii) The initial formulary or a formulary with changes will be submitted to the board of medical examiners for a review.

(c) Prescription records: written, verbal or electronic prescriptions and order will comply with state board of pharmacy and federal requirements. All prescriptions will include the name, title, address and phone number of the prescribing advanced practice registered nurse.

(d) Prescribing and administering: CRNAs who have fulfilled requirements for prescriptive authority as stated in these rules as defined by the board of pharmacy may prescribe and administer to their patients dangerous drugs including controlled substances contained in Schedules II through V of the Controlled Substances Act, which have been prepared, packaged or fabricated by a registered pharmacist or doses or drugs that have been prepackaged by a pharmaceutical manufacturer in accordance with the Pharmacy Act [61-11-22] and the New Mexico Drug, Device and Cosmetic Act for the benefit of the public good.

(e) Distributing: CRNAs who have fulfilled requirements for prescriptive authority as stated in these rules may NOT distribute to their patients dangerous drugs including controlled substances contained in Schedules II through V of the Controlled Substances Act.

(f) CRNAs who do not plan to prescribe controlled substances but do plan to prescribe dangerous drugs must meet the requirements relative to prescriptive authority except those specifically required for controlled substances.

(6) Graduate registered nurse anesthetist practice.

(a) GRNAs may NOT distribute medications.

(b) GRNAs may practice or prescribe/administer medications only in collaboration with a physician, osteopathic physician, dentist or podiatrist.

(7) To insure competency and safe practice in specific regard to prescription writing practices in the state of NM.

(a) A list of current CRNAs and their status with regard to prescription writing shall be distributed upon request to the board of pharmacy.

(b) Violation of these rules or disciplinary action taken by the board of nursing with regard to controlled substances shall be reported to the board of pharmacy.

(c) The board of nursing shall appoint as requested, qualified CRNAs to

serve on the board of pharmacy disciplinary panel as requested by the board of pharmacy.

N. A CRNA business entity formed pursuant to the laws of the state of New Mexico is authorized to provide health care services in the state of New Mexico if the health care services are provided by persons who are duly licensed to engage in the practice of nursing pursuant to the provisions of the Nursing Practice Act.

[1-1-98; 16.12.2.14 NMAC - Rn & A, 16 NMAC 12.2.13, 7-30-01; A, 12-31-01; A, 04-01-02; A, 1-2-04; A, 02-17-06; A, 06-17-08; A, 11-29-10; A, 11-20-12]

**16.12.2.15 A D V A N C E D
PRACTICE REGISTERED NURSE
(APRN) CLINICAL NURSE
SPECIALIST (CNS):**

A. Requirements for licensure as a CNS:

(1) hold a current, unencumbered RN license from New Mexico or hold a compact multi-state RN license;

(2) successfully complete a clinical nurse specialist program at the master's or doctoral level in a defined clinical nursing specialty through an accredited institution of higher education; and

(3) provide evidence of successful accomplishment of certification by a national nursing organization, consistent with the defined clinical nursing specialty, which meets criteria as listed below:

(a) successfully complete a national certifying examination in the applicant's area of specialty;

(b) is certified by a national nursing organization;

(4) it is the responsibility of the applicant to provide documented evidence of his/her qualifications for licensure;

(5) any CNS requesting prescriptive authority must also comply with the regulations for prescriptive authority as outlined in these rules.

B. Procedure for licensure as a graduate CNS: applicant seeking licensure as a CNS shall be responsible for providing proof of meeting the requirements for licensure.

(1) The applicant shall complete the New Mexico CNS application and submit it along with all requested documents in accordance with the instructions.

(2) Upon acceptance of the completed application and receipt of all required supporting documents, the file is reviewed for qualifications and compliance with the requirements.

(3) Applicants who do not meet the requirements for licensure may request or be requested to meet with the board or their designee.

(4) CNSs are not eligible to practice in New Mexico as an CNS until so licensed by the New Mexico board in

accordance with licensure procedures.

(5) The board may appoint CNSs to the advanced practice committee. These CNSs will provide advice regarding the licensure and practice of the CNS.

C. Graduate clinical nurse specialist (GCNS) permit to practice.

(1) GCNS permits may be issued upon written request, provided all requirements have been met except certification by a national nursing organization.

(a) GCNSs practice under the direct supervision of another CNS, CNP or physician in the specialty.

(b) GCNSs may prescribe medications only under the direct supervision of a licensed CNS, CNP or physician in compliance with these rules.

(c) GCNS permits will be issued to the employer.

(d) A letter of verification of intent to employ, on official letterhead including the name of the practice supervisor and the name of the prescription supervisor is required from each employer. Upon change in employment, the new employer must send the board a letter of intent to employ. The board will then issue a permit to practice at the new place of employment. The permit will be issued directly to the new employing agency.

(e) The name of the employment institution and the name(s) of the supervisor(s) shall be indicated on the GCNS permit.

(f) GCNS permits cannot be transferred or renewed.

(g) GCNS permits expire on the date specified on the permit. Permits shall be valid not to exceed six months after the date of the national certifying examination. Those who fail the national certifying examination are rendered ineligible to practice as a GCNS. It is the responsibility of the GCNS to request that the national certifying organization notify the board of the results of the examination.

(2) An initial license to practice as a CNS shall be issued only after receipt by the board of proof of certification by a national nursing organization. Such proof must be submitted to the board directly from the certifying agency prior to the expiration of the permit or temporary license.

D. Prerequisites for licensure of CNS by endorsement.

(1) Verification DIRECTLY from the licensing authority which shall include graduation from a clinical nurse specialist program in a defined clinical nursing specialty.

(2) In lieu of verification of advanced practice licensure from the licensing authority, the board will accept:

(a) documentation directly from the licensing authority that the state does not

issue advanced practice licensure; and

(b) a sworn affidavit from applicant that they practice as an advance practice nurse with year practice began.

(3) Verification by applicant of national certification in a clinical specialty area.

(4) Clinical nurse specialist must comply with requirements for prescriptive authority as outlined in these rules.

(5) Complete and submit the required application for licensure by endorsement in accordance with all instructions including the required fee.

(6) Continuing education is not required for initial CNS licensure by endorsement.

E. Qualifications for licensure as a CNS are pursuant to the Nursing Practice Act.

(1) Refer to Subsection A of 16.12.2.15 NMAC for licensure requirements.

(2) CE requirements must be met at the time of the first renewal.

(3) Disciplinary action taken or pending against a nursing license in another jurisdiction, or a conviction of a felony, may result in denial of a license.

F. A CNS temporary license may be issued to an endorsee awaiting results on successful completion of national certification.

G. A temporary clinical nurse specialist license may be issued to an endorsee who:

(1) submits a completed endorsement application in accordance with all instructions and fee;

(2) submits a copy of current national certification in a nursing specialty; when the state of former advanced practice licensure does not require national certification; national certification in a nursing specialty must be submitted to the board before a license will be issued;

(3) the board will mail the temporary license to the applicant;

(4) a temporary license is valid for a period not to exceed six (6) months from the date of application, is non renewable and becomes null and void upon issuance of a current license, expiration, or withdrawal by board action;

(5) applicant is responsible for assuring that all requirements have been met and all documents have been received prior to the expiration date of the temporary license;

(6) the discovery of inaccurate or false information, on the licensure application, may be subject to recall of the temporary license by the board and denial of licensure.

H. An initial clinical nurse specialist license shall be valid for two (2) years. For nurses from compact states,

an NM advanced practice license will be issued with the same expiration date as the compact license. A letter of authorization will be issued to CNSs who have RN multi-state licensure privilege from another nurse licensure compact state. Official verification to practice is located on the board website.

I. If the licensure process is not completed, the application becomes null and void one (1) year after the date of application being received at the board.

J. Authorization to expand scope of practice or who need recertification.

(1) A letter of authorization will be issued for the CNSs who through additional formal education have expanded their practice into another area of CNS practice or who need practice hours to recertify provided all requirements have been met except national certification.

(2) A letter of verification of intent to provide a preceptorship, on official letterhead including the name of the practice preceptor and the name of the prescription preceptor must be submitted to the board of nursing.

(3) Practice must be under the direct supervision of a New Mexico CNS or CNP or physician in the specialty.

(4) Prescribing may be done only under the direct supervision of a licensed CNP or CNS or a physician in compliance with these rules.

(5) A letter of authorization will be issued to the preceptor.

(6) A letter of authorization cannot be transferred, renewed or a duplicate issued.

(7) A letter of authorization will expire on the date specified.

(a) A letter of authorization shall be valid not to exceed 6 months after the date of the national certifying examination. Those who fail the national certifying examination are rendered ineligible to practice in that area. It is the responsibility of the CNS to request that the national certifying organization notify the board of the results of the examination. A letter of authorization may be valid for a period not to exceed two (2) years.

(b) A letter of authorization will be valid for 6 months for those applicants recertifying.

(c) A letter of authorization shall be issued for the prescriptive authority preceptorship. This letter will only be valid for the duration of the preceptorship for expansion of scope of practice or recertification required hours of practice.

K. Maintaining licensure as a clinical nurse specialist.

(1) The CNS shall be nationally certified in the specialty by a nursing organization and maintain national certification. A copy of the specialty certification/recertification card shall be presented at the time of each subsequent

renewal.

(2) Continuing education.

(a) The CNS shall accrue a total of fifty (50) contact hours of approved CE each renewal period. National certification or recertification as a CNS may not be used to fulfill any portion of the CE requirement.

(b) Thirty (30) contact hours, shall meet the requirements for licensure as an RN, and

(c) An additional twenty (20) contact hours, 15 of which must be pharmacology are required.

(d) CNSs with DEA registration and licensure that permits prescribing opioids shall obtain five contact hours of the 15 currently required in pharmacology to include management of non-cancer pain

~~(d)~~ (e) CNSs from compact states are only required to fulfill CE requirement listed under (c) and (d).

~~(e)~~ (f) The CE shall be in accordance with the requirements as set forth in these rules.

(3) Reactivation.

(a) To reactivate or reinstate licensure as a CNS, the nurse must provide evidence of meeting the CE requirements: evidence of current national certification must also be provided.

(b) CNSs who are reactivating an advanced practice license which has been lapsed for four or more years must also complete a refresher course or certification [~~reactivation~~] reactivation that is reflective of their knowledge, skills and expertise. A temporary license will be issued not to exceed one (1) year, unless the board of nursing approves an extension.

L. Clinical nurse specialist practice.

(1) The CNS is a nurse who through graduate level preparation has become an expert in a defined area of knowledge and practice in a selected clinical area of nursing.

(2) The CNS makes independent decisions in a specialized area of nursing practice, using knowledge about the health care needs of the individual, family and community. The CNS collaborates as necessary with other members of the health care team, when the needs are beyond the scope of practice of the CNS.

(3) The CNS may assume specific functions or perform specific procedures which are beyond the advanced educational preparation and certification for the CNS provided the knowledge and skills required to perform the function or procedure emanates from a recognized body of knowledge or advanced practice of nursing and the function or procedure is not prohibited by any law or statute. When assuming specific functions or performing specific procedures, which are beyond the CNS's advanced educational preparation and certification, the CNS is responsible for obtaining the appropriate

knowledge, skills and supervision to assure he/she can perform the function/procedure safely and competently and recognize and respond to any complications that may arise.

(4) Carries out therapeutic regimens in the area of the specialty.

(5) The CNS who has fulfilled the requirements for prescriptive authority in the specialty area may prescribe and distribute therapeutic measures including dangerous drugs and controlled substances contained in Schedules II through V of the Controlled Substance Act within the scope of the specialty practice and setting.

(a) Requirements for prescriptive authority: In accordance with applicable state and federal laws, the CNS who fulfills the following requirements may prescribe and distribute dangerous drugs including controlled substances included in Schedules II through V of the Controlled Substance Act:

(i) verifies 400 hours of work experience in which prescribing dangerous drugs has occurred within the two (2) years immediately preceding the date of application and provide a copy of a transcript documenting successful completion of the a three credit hour pharmacology course, a three credit hour assessment course and a three credit hour pathophysiology course included as part of a graduate level advanced practice nursing education program; forty-five (45) contact hours of advanced level pharmacology continuing education course may be substituted for the academic pharmacology; a certificate of completion must be provided that verifies continuing education, or

(ii) if 400 hours of work experience in which prescribing dangerous drugs cannot be verified, provide a copy of a transcript documenting successful completion of a three credit hour pharmacology course that is included as part of a graduate level advanced practice nursing education program within five years immediately prior to the date of application to the board; forty-five (45) contact hours of advanced level pharmacology continuing education course may be substituted for the academic pharmacology; a certificate of completion must be provided that verifies continuing education; the course must be related to the specialty and contain content in pharmacokinetics, pharmacodynamics, pharmacology of current/commonly used medications and application of drug therapy to the treatment of disease or the promotion of health, and

(iii) provide a copy of a transcript documenting successful completion of a three credit hour assessment course that is included as part of a graduate level advanced practice nursing education program; the course must be related to the specialty and include content supported by

related clinical experience such that students gain knowledge and skills needed to perform comprehensive assessments to acquire date, make diagnoses of health status and formulate effective clinical management plans, and

(iv) provide a copy of a transcript documenting successful completion of a three credit hour pathophysiology course that is included as part of a graduate level advanced practice nursing education program; the course must be related to the specialty and include content in physiology and pathophysiology;

(v) provide a copy of a transcript documenting successful completion of a 400 hour university/college associated preceptor experience in the prescription of dangerous drugs within the two years immediately prior to the date of application to the board, or

(vi) after fulfilling ii, iii, and iv above, upon application to the board, a letter of authorization for a prescriptive authority preceptorship will be issued to complete a preceptorship, which must be completed within six (6) months;

(vii) in order to prescribe controlled substances, the CNS must provide the board of nursing with verification of current state controlled substances registration and current DEA number, unless the CNS with prescriptive authority has met registration waiver criteria from the New Mexico board of pharmacy (Subsection I of 16.19.20.8 NMAC; CNSs may not possess, prescribe or distribute controlled substances until they have both a current state controlled substances registration and a current DEA registration;

(viii) once prescriptive authority requirements are met, the board will notify the board of pharmacy of completion of prescriptive authority requirements.

(b) Formulary. It is the CNS's responsibility to maintain a formulary of dangerous drugs and controlled substances that may be prescribed. The only drugs to be included in the formulary are those relevant to the CNS's area of specialty practice, scope of practice and clinical setting. The board of nursing reserves the right to audit the formulary. Licensees may be subject to disciplinary action by the board of nursing if noncompliant with the audit.

(c) Prescription records: written, verbal or electronic prescriptions and orders will comply with state board of pharmacy and federal requirements. All prescriptions will include the name, title, address and phone number of the prescribing advanced practice registered nurse.

(d) Distributing: CNSs who have fulfilled requirements for prescriptive authority as stated in these rules, may distribute to their patients dangerous drugs including controlled substances contained

in Schedules II through V of the Controlled Substance Act, which have been prepared, packaged, or fabricated by the registered pharmacist or doses which have been pre-packaged by a pharmaceutical manufacturer in accordance with the Pharmacy Act [61-11-22] and the Drug, Device and Cosmetic Act for the benefit of the public good.

(e) Labeling: CNSs may label only those drugs which the CNS prescribes and distributes to patients under the CNS's care. The medication shall be properly labeled with the patient's name, date of issue, drug name and strength, instructions for use, drug expiration date, telephone number of the CNS. Labeling may be handwritten or a pre-printed fill-in label may be used. All information shall be properly documented in the patient record.

(f) CNSs who do not plan to prescribe controlled substances but do plan to prescribe dangerous drugs must meet the requirements relative to prescriptive authority except those specifically required for controlled substances.

(6) Graduate clinical nurse specialist (GCNS) practice.

(a) GCNSs may not distribute medications.

(b) GCNSs may practice or prescribe medications only under the direct supervision of a licensed CNS, CNP or physician in the specialty.

(7) To insure competency and safe practice in specific regard to prescription writing practices in the state of NM:

(a) a list of current CNSs and their status with regard to prescription writing shall be distributed upon request to the board of pharmacy;

(b) violation of these rules or disciplinary action taken by the board of nursing with regard to controlled substances shall be reported to the board of pharmacy;

(c) the board of nursing shall appoint qualified CNSs in each specialty to serve on the board of pharmacy disciplinary panel as requested by the board of pharmacy.

M. Advanced practice committee.

(1) The board may appoint a minimum of a 6-member advisory committee to assist the board in regulating the advanced practice of nursing.

(2) The committee shall assist and advise the board in the review of issues related to the advanced practice of nursing.

(3) The committee shall be composed of representatives from each advanced practice area regulated by the board.

[1-1-98; 16.12.2.15 NMAC - Rn & A, 16 NMAC 12.2.13, 7-30-01: A, 12-31-01; A, 04-01-02; A, 1-2-04; A, 02-17-06; A, 6-17-08; A, 11-29-10; A, 11-20-12]

NEW MEXICO BOARD OF NURSING

This is an amendment to 16.12.9 NMAC, Sections 2, 3, 6, 7, 8, adding new Sections 9, 10, 11 and renumbering and amending Section 12, effective 11-20-12.

16.12.9.2 SCOPE: This rule applies to all advanced practice nurses, including certified nurse practitioners, certified registered nurse anesthetists, and clinical nurse [specialist] specialists with prescriptive authority. [16.12.9.2 NMAC - N, 02-17-06; A, 11-20-12]

16.12.9.3 S T A T U T O R Y AUTHORITY: Section 61-3-1 *et seq.*, authorized the board of nursing to regulate the practice of nursing in the state and the Pain Relief Act, sections 24-2D-1 through 24-2D-6. [16.12.9.3 NMAC - N, 02-17-06, A, 11-20-12]

16.12.9.6 OBJECTIVE: It is the position of the board that certified nurse practitioners, certified registered nurse anesthetists and clinical nurse [specialist] specialists with prescriptive authority have an obligation to treat chronic pain and that a wide variety of medicines including controlled substances and other drugs may be prescribed [for that length of time] after a thorough [medical] evaluation has been completed. [16.12.9.6 NMAC - N, 02-17-06; A, 11-20-12]

16.12.9.7 DEFINITIONS:

A. “Acute Pain” means the normal, predicted physiological response to a noxious chemical or thermal or mechanical stimulus, typically associated with invasive procedures, trauma or disease and generally time limited.

[A:] B. “Addiction” is a neurobehavioral syndrome with genetic and environmental influences that results in psychological dependence on the use of substances for their psychic effects. It is characterized by behaviors that include one or more of the following: impaired control over drug use; compulsive use; continued use despite harm; and craving. Physical dependence and tolerance are normal physiological consequences of extended opioid therapy for pain and should not by themselves be considered addiction.

[B:] C. “Chronic pain” means [a pain state which is persistent and in which the cause of the pain cannot be removed or otherwise treated] pain that persists after reasonable efforts have been made to relieve the pain or its cause and that continues,

either continuously or episodically, for longer than three consecutive months. “Chronic pain” does not, for the purpose of the Pain Relief Act requirements, include pain associated with a terminal condition or with a progressive disease that, in the normal course of progression, may reasonably be expected to result in a terminal condition.

D. “Clinical expert” means a person who, by reason of specialized education or substantial relevant experience in pain management, has knowledge regarding current standards, practices and guidelines.

[E:] E. “Drug abuser” means a person who takes a drug or drugs for other than legitimate medical purposes.

[B:] E. “Pain” means an unpleasant sensory and emotional experience associated with inflammation or with actual or potential tissue damage, or described in terms of such inflammation and damage, which could include acute, persistent or chronic pain.

[E:] G. “Physical dependence” means a state of adaptation that is manifested by a drug-specific withdrawal syndrome that can be produced by abrupt [eassation] cessation, rapid dose reduction, decreasing blood level of the drug, administration of an antagonist, or a combination of these.

H. “ Prescription monitoring program (PMP)” means a centralized system to collect, monitor, and analyze electronically, for controlled substances, prescribing and dispensing data submitted by pharmacies and dispensing practitioners. The data are used to support efforts in education, research, enforcement and abuse prevention.

I. “ Therapeutic purpose” means the use of pharmaceutical and non-pharmaceutical treatments and the spectrum of available modalities that conforms substantially to accepted guidelines for pain management.

[F:] J. “Tolerance” means a state of adaptation in which exposure to a drug induces changes that result in a diminution of one or more of the drug’s effects over time.

[16.12.9.7 NMAC - N, 02-17-06; A, 11-20-12]

16.12.9.8 [GUIDELINES] RULES: The following [guidelines with] rules shall be used by the board to determine whether a [certified nurse practitioner or clinical nurse specialist’s] health care practitioner’s prescriptive practices are consistent with the appropriate treatment of pain.

A. The treatment of pain with various medicines [and/or] or controlled substances is a legitimate [medical] nursing practice when accomplished in the usual course of professional practice. It does not

preclude treatment of patients with addiction, physical dependence [and/or] or tolerance who have legitimate pain. However, such patients do require very close monitoring and precise documentation.

B. Pain management for patients with substance use disorders should include a contractual agreement, the use of drug screens prior to treatment with opiates and during the course of treatment to identify actual drugs being consumed and to compare with patients self reports. If concerns about misuse are identified, the patient will be referred for appropriate consultation, and scheduled for re-evaluation at appropriate time intervals.

[B:] C. The prescribing, ordering, administering or dispensing of controlled substances to meet the individual needs of the patient for management of chronic pain is appropriate if prescribed, ordered, administered or dispensed in compliance with the following.

(1) A practitioner shall complete a history and physical examination and include an evaluation of the patient’s psychological and pain status. The medical history shall include any previous history of significant pain, past history of alternate treatments for pain, potential for substances abuse, coexisting disease or medical conditions, and the presence of a medical indication or contra-indication against the use of controlled substances.

(2) A practitioner shall be familiar with and employ screening tools, as well as the spectrum of available modalities for therapeutic purposes, in the evaluation and management of pain. They shall consider an integrative approach to pain management specialists including but not limited to an acupuncturist, chiropractor, doctor of oriental medicine, exercise physiologist, massage therapist, pharmacist, physical therapist, psychiatrist, psychologist or other advanced practice registered nurse.

[2:] (3) A written treatment plan shall be developed and tailored to the individual needs of the patient, taking age, gender, culture, and ethnicity into consideration, with stated objectives by which treatment can be evaluated, e.g. by degree of pain relief, improved physical and psychological function, or other accepted measure. Such a plan should include a statement of the need for further testing, consultation, referral or use of other treatment modalities.

[3:] (4) The practitioner shall provide education and discuss the risks and benefits of using controlled substances with the patient [and/or] or surrogate or guardian, and shall document this in the record.

[4:] (5) Complete and accurate records of care provided and drugs prescribed shall be maintained. When controlled substances are prescribed, the name of the

drug, quantity, prescribed dosage and number of refills authorized should be recorded. ~~[Patients with a history of substance abuse or who are in an environment posing a high risk for misuse or diversion of drugs (e.g., living with a drug abuser, living or working in a place where drugs are available) may require special consideration]~~ Prescriptions for opioids shall include indications for use. For chronic noncancer pain patients treated with controlled substance analgesic(s), the prescribing practitioner shall use a written agreement for treatment with the patient outlining patient responsibilities. As part of a written agreement, chronic noncancer pain patients shall receive all chronic pain management prescriptions from one practitioner and one pharmacy whenever possible.

~~[(5)]~~ (6) The management of patients needing chronic pain control requires monitoring by the attending ~~[and/or]~~ or the consulting practitioner. The practitioner shall periodically review the course of treatment for chronic noncancer pain, the patient's state of health, and any new information about the etiology of the chronic noncancer pain at least every six months. In addition, a practitioner should consult, when indicated by the patient's condition, with health care professionals who are experienced (by the length and type of their practice) in the area of chronic pain control; such professionals need not be those who specialize in pain control. Consultation should occur early in the course of long-term treatment, and at reasonable intervals during continued long-term treatment for assessment of benefit and need, ~~[It is especially important, when treating addicts for legitimate pain apart from their addiction, to obtain a contractual agreement with the patient, appropriate consultation, and to set a schedule for re-evaluation of appropriate time intervals:]~~ at least every six months. Drug screening is recommended and should be conducted when other factors suggest an elevated risk of misuse or diversion.

~~[(6)]~~ (7) If, in a practitioner's ~~[medical]~~ opinion, a patient is seeking pain medication for reasons that are not medically justified, the practitioner is not required to prescribe controlled substances for the patient.

~~[(E)]~~ D. The board will evaluate the quality of care on the following basis: appropriate diagnosis and evaluation; appropriate medical indication for the treatment prescribed; documented change or persistence of the recognized medical indication; and, follow-up evaluation with appropriate continuity of care. The board will judge the validity of prescribing based on the practitioner's treatment of the patient and on available documentation, rather than on the quantity and chronicity of prescribing. The goal is to control the patient's pain for

its duration while effectively addressing other aspects of the patient's functioning, including physical, psychological, social, and work-related factors.

~~[(D)]~~ E. The board will review both over-prescription and under-prescription of pain medications using the same standard of patient protection as a guiding principle.

~~[(E)]~~ E. A practitioner who appropriately ~~[prescribe]~~ prescribes controlled substances and who ~~[follow]~~ follows this section would be considered to be in compliance with this rule and not be subject to discipline by the board, unless there is some violation of the Nursing Practice Act, board rules and Pain Relief Act (24-2 D, 1 to 24-2 D, 6 NMSA 1978). [16.12.9.8 NMAC - N, 02-17-06, A, 11-20-12]

16.12.9.9 PRESCRIPTION MONITORING PROGRAM (PMP) REQUIREMENTS: The intent of the NM board of nursing in requiring participation in the PMP is to assist practitioners in balancing the promotion of the safe use of controlled substances for the provision of nursing care and services with the need to impede illegal and harmful activities involving these pharmaceuticals.

A. A health care provider who holds a federal drug enforcement administration registration and licensure to prescribe opioids shall register with the board of pharmacy to become a regular participant in PMP inquiry and reporting.

B. Upon prescribing, ordering, administering or dispensing a controlled substance, the practitioner shall obtain and review a prescription monitoring report covering at least a one year time period or another state's report, where applicable and available. The practitioner shall be aware of a person currently:

(1) receiving opiates from multiple prescribers;

(2) receiving opiates for more than twelve consecutive weeks;

(3) receiving more than one controlled substance analgesic;

(4) receiving a new prescription for any long-acting controlled substance analgesic formulation, including oral dosage forms and transdermal (e.g. fentanyl) or methadone;

(5) exhibiting potential for abuse or misuse of opiates (i.e. over-utilization, early refills, appears overly sedated or intoxicated upon presentation, or an unfamiliar patient requesting an opiate by specific name, street name, color, or identifying marks, or paying cash when the patient has prescription insurance).

C. Upon recognizing any of the above, the practitioner, using professional judgment, shall take appropriate steps to

avoid or resolve the potential problem. These steps may include requesting and reviewing additional controlled substance prescription monitoring reports or another state's report if applicable and available, or consulting with a pain management specialist or addiction treatment specialist or counseling the patient, which may include termination of treatment. The practitioner shall document steps taken to resolve the potential problem, which may include termination from treatment.

D. After obtaining an initial prescription monitoring report on a patient, the practitioner shall use professional judgment based on prevailing standards of practice in deciding the frequency of requesting and reviewing further prescription monitoring reports or other state's report on that patient. Prescription monitoring reports shall be requested and reviewed a minimum of once every six months during the continuous use of opioids for each established patient. The practitioner shall document the review of these reports. [16.12.9.9 NMAC - N, 11-20-12]

16.12.9.10 NON-CANCER PAIN MANAGEMENT CONTINUING EDUCATION: Any health care provider with a DEA registration and licensure that permits prescribing opioids, shall obtain continuing education on the management of non-cancer pain. These practitioners shall be required to obtain five CE of the 15 CE currently required every two years in pharmacology to include a review of these rules (16.12.9 NMAC) for management of non-cancer pain, an understanding of the pharmacology and risks of controlled substances, a basic awareness of the problems of abuse, addiction and diversion, and awareness of state and federal regulations for the prescription of controlled substances. [16.12.9.10 NMAC - N, 11-20-12]

16.12.9.11 NOTIFICATION: The board shall notify the following persons of the Pain Relief Act and Part 9 of the New Mexico nursing board rule: 16.12.9 NMAC. The board shall notify the following persons of the Pain Relief Act and rules:

(1) health care providers under its jurisdiction; and

(2) a health care provider being investigated by the board in relation to the provider's pain management services.

[16.12.9.11 NMAC - N, 11-20-12]

~~[16.12.9.9]~~ **16.12.9.12 ADVANCED PRACTICE NURSES, REGISTERED NURSES, AND LICENSED PRACTICAL NURSES TREATED WITH OPIATES:** Advanced practice nurses, registered nurses, licensed practical nurses who have chronic pain and are being treated with opiates shall be evaluated by a pain clinic or, by a physician, CRNA, CNP, CNS pain specialist

and must have a complete, independent neuropsychological evaluation, as well as clearance from their practitioner, before returning to or continuing in practice. In addition, they must remain under the care of a physician, CRNA, CNP or CNS for as long as they remain on opiates while continuing to practice.

[16.12.9.12 NMAC - Rn & A, 16.12.9.9 NMAC; 11-20-12]

NEW MEXICO COMMISSION OF PUBLIC RECORDS

This is an amendment to 1.13.10 NMAC, Records Custody, Access, Storage and Disposition, amending Sections 7, 13, 15, and 17, and adding Section 19 effective 11/15/2012.

1.13.10.7 DEFINITIONS:

A. "Accession" means the act and procedures involved in a transfer of legal title and the taking of records or papers into the physical custody of an archival agency and the materials involved in such a transfer.

B. "Administrator" means the state records administrator (Section 14-3-2 NMSA 1978):

C. "Agency" means any state agency, department, bureau, board, commission, institution or other organization of state government, the territorial government and the Spanish and Mexican governments in New Mexico (Section 14-3-2 NMSA 1978):

D. "Custodial agency" means the agency responsible for the maintenance, care, or keeping of public records, regardless of whether the records are in that agency's actual physical custody and control:

E. "Electronic tracking system" means a warehouse management system designed to provide the state records center and archives with the tools necessary to efficiently manage the physical inventory and warehouse activities of the records centers:

F. "Human readable form" means information that can be recognized and interpreted without the use of technology:

G. "Inactive records" means the point during the life cycle of a record at which the record becomes inactive and thus can be transferred from the office of creation to the state records center for storage and subsequent disposition. Records are considered inactive when referred to less than once per year:

H. "ID" means a string of numerals, letters and characters that is used for identification:

I. "Life cycle" means the life span or time period from the creation or receipt of a record through its useful life to its final disposition. The five stages of the life cycle of a record include: creation; distribution and use; storage and maintenance; retention and disposition; and archival preservation for records of historical or information value:

J. "Master microfilm" means the original microform produced from which duplicates or intermediates can be obtained:

K. "Pick-up only personnel" means personnel authorized by a records custodian or record liaison officer only pick-up records from the state records center and archives (state records center):

L. "Public records" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein. (Section 14-3-2 NMSA 1978):

M. "Records" means information preserved by any technique in any medium now known, or later developed, that can be recognized by ordinary human sensory capabilities either directly or with the aid of technology (1.13.70 NMAC):

N. "Records custodian" means the statutory head of the agency using or maintaining the records or the custodian's designee:

O. "Records liaison officer" means a person in an agency responsible for authorizing the transfer, withdrawal or destruction of records and who acts on behalf of the records custodian:

P. "Retention" means the period of time during which records shall be maintained by an organization because they are needed for operational, legal, fiscal, historical or other purposes. Retention requirements are established in records retention and disposition schedules that are approved by the state commission of public records:

Q. "Records retention and disposition schedules" means rules adopted by the state commission of public records pursuant to Section 14-3-6 NMSA 1978 describing records of an agency, establishing a timetable for their life cycle and providing authorization for their disposition:]

A. "Accession" means the act and procedures involved in a transfer of legal title and the taking of records or papers

into the physical custody of an archival agency and the materials involved in such a transfer:

B. "Administrator" means the state records administrator (Section 14-3-2 NMSA 1978):

C. "Agency" means any state agency, department, bureau, board, commission, institution or other organization of state government, the territorial government and the Spanish and Mexican governments in New Mexico (Section 14-3-2 NMSA 1978):

D. "Archives" means the permanent records of the state of New Mexico, which may include government and private collections of the Spanish, Mexican, territorial and statehood periods, assessed to have significant historical value to warrant their preservation by the state of New Mexico. The term also refers to the organizational unit of the SRCA storing these records:

E. "Audit" means a periodic examination of an organization to determine whether appropriate procedures and practices are followed:

F. "Chief records officer" means a person designated by an agency's records custodian to administrate the agency's records management program:

G. "Commission" means the state commission of public records (Section 14-3-2 NMSA 1978):

H. "Custodial agency" means the agency responsible for the maintenance, care, or keeping of public records, regardless of whether the records are in that agency's actual physical custody and control:

I. "Disposition" means final action that puts into effect the results of an appraisal decision for a series of records (i.e., transfer to archives or destruction):

J. "Human readable form" means information that can be recognized and interpreted without the use of technology:

K. "Inactive record" means the point during the life cycle of a record at which the record becomes inactive and thus can be transferred from the office of creation to the state records center for storage and subsequent disposition. Records are considered inactive when referred to less than once per year:

L. "Life cycle" means the life span or time period from the creation or receipt of a record through its useful life to its final disposition. The five stages of the life cycle of a record include: creation; distribution and use; storage and maintenance; retention and disposition; and archival preservation for records of historical or information value:

M. "Master microfilm" means the original microform produced

from which duplicates or intermediates can be obtained.

N. “Microphotography” means the transfer of images onto film and electronic imaging or other information storage techniques that meet the performance guidelines for legal acceptance of public records provided by information system technology pursuant to regulation adopted by the commission.

O. “Non-record” means extra copies of documents kept solely for convenience of reference, stocks of publications, records not usually included within the scope of the official records of an agency or government entity and library material intended only for reference or exhibition. The following specific types of materials are non-records: materials neither made nor received in pursuance of statutory requirements nor in connection with the functional responsibility of the officer or agency; extra copies of correspondence; preliminary drafts; blank forms, transmittal letters or forms that do not add information; sample letters; and reading file or informational files.

P. “Pending litigation” means a proceeding in a court of law whose activity is in progress but not yet completed.

Q. “Pick-up only personnel” means personnel authorized by a records custodian or record liaison officer only pick-up records from the state records center and archives (state records center).

R. “Public records” means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by any agency in pursuance of law or in connection with the transaction of public business and preserved, or appropriate for preservation, by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein (Section 14-3-2 NMSA 1978).

S. “Records” means information preserved by any technique in any medium now known, or later developed, that can be recognized by ordinary human sensory capabilities either directly or with the aid of technology (1.13.70 NMAC).

T. “Records custodian” means the statutory head of the agency using or maintaining the records or the custodian's designee.

U. “Records liaison officer” means a person in an agency responsible for authorizing the transfer, withdrawal or destruction of records and who acts on behalf of the records custodian.

V. “Retention” means the period of time during which records shall

be maintained by an organization because they are needed for operational, legal, fiscal, historical or other purposes. Retention requirements are established in records retention and disposition schedules that are approved by the state commission of public records.

W. “Records retention and disposition schedules” means rules adopted by the state commission of public records pursuant to Section 14-3-6 NMSA 1978 describing records of an agency, establishing a timetable for their life cycle and providing authorization for their disposition.

[1.13.10.7 NMAC - Rp, 1 NMAC 3.2.10.1.7, 6/30/2005; A, 6/29/2007; A, 6/30/2008; A, 11/15/2012]

1.13.10.13 STORAGE OF PAPER RECORDS WITH A FINITE RETENTION AT THE STATE RECORDS CENTER AND ARCHIVES:

A. The state records center and archives (state records center) provides storage to state agencies for inactive public records. Non-record materials shall not be submitted for storage in the records center.

B. Agency's records liaison officers shall complete a storage transmittal form and submit it electronically or manually (hardcopy) to the agency analysis bureau for approval before records can be stored. The form shall contain but is not limited to the following: [agency code; agency name; division name; date prepared;] page number; office location; name and signature of the records liaison officer; records liaison officer telephone number; records liaison officer fax number; schedule item number; record description; disposition trigger date; [destroy date;] disposition date; document beginning and ending range within box; shipment box number and media type.

C. Agencies that elect to have record liaison officers submit storage transmittal forms electronically, shall submit [a written request to the state records center and archives (agency analysis) bureau chief requesting access to the electronic tracking system. The request shall contain but is not limited to the following: agency name; division name, bureau name, record liaison officer's name and contact information. If access is granted the agency analysis bureau shall notify the agency in writing of the password and ID assigned to the record liaison officer.] the storage transmittal form in a file and format that is approved by the state records administrator. The form shall contain but is not limited to the following: name of the records liaison officer, record series number, shipment box number, records description, disposition trigger date, document beginning and ending range within box, record center location and media type.

D. Records will not be

accepted for storage whose retention will be met within 12 months of disposition trigger date.

~~[D:] E.~~ Agencies approved to store records shall be provided with barcode labels by the records center.

~~[E:] F.~~ The barcode labels shall be affixed to the records storage boxes prior to delivery to the records center. The labels shall be placed two to three inches below the handle side of the storage box.

~~[F:] G.~~ The records custodian and records liaison officer shall be notified by the records center when records in storage have met the legal retention period and are eligible for destruction.

~~[G:] H.~~ If an agency does not respond to the records center's notice of records eligible for destruction by the established deadline, the state records center and archives shall charge the custodial agency a storage fee as established in 1.13.2 NMAC, Fees.

[1.13.10.13 NMAC - N, 6/30/2005, A, 6/01/2006; A, 6/29/2007; A, 11/15/2012]

1.13.10.15 STORAGE OF ELECTRONIC MEDIA:

A. An agency shall have an approved imaging plan on file with the state records center and archives (electronic records and micrographic bureau) before electronic media can be stored. For information on imaging plans see 1.14.2.16 NMAC, Microphotography Systems, Microphotography Standards.

B. An agency shall complete a storage transmittal form and submit it to the state records center and archives (agency analysis bureau) for approval. An agency records liaison officer may contact the state records center and archives (records management division) for information and assistance with storage.

(1) The storage transmittal form shall be signed by the agency's records custodian or records liaison officer.

(2) At a minimum, each individual unit (tape, disk, etc.) of electronic media shall be clearly identified with the agency name, record series and disposition date.

~~[C:]~~ Agencies that elect to have record liaison officers submit storage transmittal forms electronically, shall submit a written request to the state records center and archives (agency analysis) bureau chief requesting access to the electronic tracking system. The request shall contain but is not limited to the following: agency name; division name, bureau name, record liaison officer's name and contact information. If access is granted the agency analysis bureau shall notify the agency in writing of the password and ID assigned to the record liaison officer.]

~~[D:] C.~~ Withdrawal and access to electronic retention files shall be through

the standard records center procedure for access and withdrawal of records. For information on record withdrawal procedures see 1.13.10.11 NMAC.

[E.] D. Agencies are responsible for safeguarding against storage media deterioration and technology changes that can leave electronic records inaccessible over a period of time because of hardware or software obsolescence. To eliminate the possibility of creating a situation where information can no longer be retrieved, agencies shall provide for future record accessibility by:

(1) migrating all electronic records when there are major changes to the next generation of hardware or software; or

(2) migrating only current electronic records to new hardware or software, and converting records not migrated to "human readable form"; for additional information, see 1.13.3 NMAC, Management of Electronic Records.

[F.] E. The records custodian and records liaison officer shall be notified by the records center when records in storage have met the legal retention period and are eligible to be transferred to archives or are eligible for destruction.

[1.13.10.15 NMAC - N, 6/30/2005; A, 6/29/2007; A, 6/30/2009; A, 11/15/2012]

1.13.10.17 DISPOSITION:

A. The state records center is responsible for reviewing and applying the appropriate retention to records brought in for storage. The records center shall notify records custodians and records liaison officers when the custodial agency's records are eligible for disposition.

B. The state records administrator shall provide the custodial agency with a report of records eligible for either destruction or transfer to archives. The notice shall contain but not limited to the following; name of agency; agency code; date; number of record series eligible for destruction; method of destruction; location, barcode; record series item number; shipment box number; shipment date; description; and inclusive record series dates.

C. The custodial agency shall assign one individual as chief records officer to coordinate the review of the notice of records eligible for either destruction or transfer to archives with all divisions of the custodial agency. Upon receiving a notification of records eligible for destruction the custodial [agency] agency's chief records officer shall review the report of records to be destroyed and respond by the established deadline.

D. The custodial agency may request an exception to remove records from destruction if; the records identified in the notice are involved in litigation; the

records identified in the notice are involved in active investigation; or the records identified in the notice are involved in an audit. The custodial agency shall submit the request for an exception in writing to the state records administrator and cite the exception (e.g., pending litigation, audit in process, audit pending, etc.).

E. The destruction notice shall have the written approval from the state records administrator with the written consent of the records custodian or designated records liaison officer prior to the execution of the destruction.

F. If an agency does not respond to the records center's notice of records eligible for destruction by the established deadline, the state records center and archives shall charge the custodial agency a storage fee for the storage of records that are eligible for destruction and storage, return of withdrawn boxes and record center disposition services will be suspended. For information on the fee schedule see 1.13.2 NMAC.

[1.13.10.17 NMAC - N, 6/30/2005; A, 11/15/2012]

1.13.10.19 CHIEF RECORDS OFFICER:

A. One chief records officer shall be designated by the agency records custodian.

B. The chief records officer shall the authority to oversee the agency's records management program.

C. The chief records officer shall have the same authorities and responsibilities as a record liaison officer.

D. The chief records officer shall be re-appointed each fiscal year by the record custodian, using a form approved by the state records administrator.

E. The form shall include but not limited to the following: name and signature of the records custodian (executive director or cabinet secretary); name and signature of the chief records officer; division or bureau (if acceptable); agency code; agency name and mailing address; fiscal year of designation; phone number; fax number and e-mail address.

F. If the chief records officer leaves the employment of an agency or is released from records management duties, the agency shall immediately notify the state records center and archives (agency analysis bureau) regarding the change and the records custodian shall appoint a new chief records officer.

G. The chief records officer shall have the following responsibilities:

(1) coordinating the response to disposition notifications (destruction and transfer to archives);

(2) establishing and maintaining a centralized tracking system for the agency's

storage containers (including the containers' indices, metadata and locators) and the disposition of records;

(3) disseminate information on any litigation, a discovery order, subpoena, government investigation or audit;

(4) ensure staff is adequately trained on proper records management practices; and

(5) develop policies and procedures pertaining to records management issues (i.e., handling confidential materials, new hire orientation, email management, disposition of records when an employee leaves the agency, metadata development, etc.).

[1.13.10.19 NMAC - N, 11/15/2012]

NEW MEXICO PUBLIC REGULATION COMMISSION INSURANCE DIVISION

This is an amendment to 13.2.5 NMAC, Sections 25, 26, 27 and 28, effective November 15, 2012.

13.2.5.25 CONDUCT OF INSURER IN CONNECTION WITH THE PREPARATION OF REQUIRED REPORTS AND DOCUMENTS:

A. No director or officer of an insurer shall, directly or indirectly:

(1) make or cause to be made a materially false or misleading statement to an accountant in connection with any audit, review or communication required under this regulation; or

(2) omit to state, or cause another person to omit to state, any material fact necessary in order to make statements made, in light of the circumstances under which the statements were made, not misleading to an accountant in connection with any audit, review or communication required under this regulation.

B. No officer or director of an insurer, or any other person acting under the direction thereof, shall directly or indirectly take any action to coerce, manipulate, mislead or fraudulently influence any accountant engaged in the performance of an audit pursuant to this regulation if that person knew or should have known that the action, if successful, could result in rendering the insurer's financial statements materially misleading.

C. For purposes of Subsection B of this section, actions that, "if successful, could result in rendering the insurer's financial statements materially misleading" include, but are not limited to, actions taken at any time with respect to the professional engagement period to coerce, manipulate, mislead or fraudulently influence an accountant;

(1) to issue or reissue a report on an insurer's financial statements that is not warranted in the circumstances due to material violations of statutory accounting principles prescribed by the commissioner, generally accepted auditing standards, or other professional or regulatory standards;

(2) not to perform audit, review or other procedures required by generally accepted auditing standards or other professional standards;

(3) not to withdraw an issued report; or

(4) not to communicate matters to an insurer's audit committee.

[1/1/94; 13.2.5.25 NMAC - Rn, 13 NMAC 2.5.23 & A, 1/1/2010; 13.2.5.25 NMAC - N, 11/15/2012]

[13.2.5.25] 13.2.5.26 EXEMPTIONS:

A. Upon written application of any insurer, the superintendent may grant an exemption from compliance with any and all provisions of this rule if the superintendent finds, upon review of the application, that compliance with this rule would constitute a financial or organizational hardship upon the insurer.

B. An exemption may be granted at any time and from time to time for a specified period or periods.

C. Within ten days from a denial of an insurer's written request for an exemption from this rule, such insurer may request in writing a hearing on its application for an exemption. Such hearing shall be held in accordance with the New Mexico Insurance Code, Chapter 59A, Article 4, NMSA 1978.

[1/1/94; 13.2.5.26 NMAC - Rn, 13 NMAC 2.5.24 & A, 1/1/2010; 13.2.5.26 NMAC - Rn, 13.2.5.25 NMAC, 11/15/2012]

[13.2.5.26] 13.2.5.27 EFFECTIVE DATES FOR REPORTING REQUIREMENTS:

A. Domestic insurers retaining a certified public accountant on the effective date of this rule who qualifies as independent shall be required to file all reports required by this rule for the year ending December 31, 2010 and each year thereafter, unless the superintendent permits otherwise.

B. Domestic insurers not retaining a certified public accountant on the effective date of this rule who qualifies as independent shall be required to file the following documents with the superintendent for the year ending December 31, 2009:

(1) report of independent certified public accountant;

(2) actual balance sheet

(3) notes to audited balance sheet.

C. For the year ending December 31, 2010 and each year thereafter, such insurers shall file with the

superintendent all reports required by this rule.

D. Foreign insurers shall comply with this rule for the year ending December 31, 2010 and each year thereafter, unless the superintendent permits otherwise. [1/1/94; 13.2.5.27 NMAC - Rn, 13 NMAC 2.5.25; 1/1/2010; 13.2.5.27 NMAC - Rn, 13.2.5.26 NMAC, 11/15/2012]

[13.2.5.27] 13.2.5.28 CANADIAN AND BRITISH COMPANIES:

A. In the case of Canadian and British insurers, the annual audited financial report shall be defined as the annual statement of total business on the form filed by such companies with their domiciliary supervisory authority, duly audited by an independent chartered accountant.

B. For such insurers, the letter of compliance required by 13.2.5.13 NMAC shall state that the accountant is aware of the requirements relating to the annual audited statement filed with the superintendent pursuant to this rule and shall affirm that the opinion expressed is in conformity with such requirements.

[13.2.5.28 NMAC - Rn, 13.2.5.27 NMAC, 11/15/2012]

**NEW MEXICO
PUBLIC REGULATION
COMMISSION
INSURANCE DIVISION**

This is an amendment to 13.2.9 NMAC, Section 8, effective November 15, 2012.

13.2.9.8 ACTUARIAL OPINION OF RESERVES AND SUPPORTING DOCUMENTATION:

A. **Statement of actuarial opinion.** Every property and casualty insurance company doing business in New Mexico, unless otherwise exempted by the [~~domiciliary commissioner~~] superintendent, shall annually submit the opinion of an appointed actuary entitled "statement of actuarial opinion." This opinion shall be filed in accordance with the appropriate national association of insurance commissioners property and casualty annual statement instructions. The request for exemption from this requirement must be made in writing to the New Mexico superintendent before December 31st of each calendar year.

B. **Actuarial opinion summary.**

(1) Every property and casualty insurance company domiciled in New Mexico that is required to submit a statement of actuarial opinion shall annually submit an actuarial opinion summary, written by the company's appointed actuary. This actuarial

opinion summary shall be filed in accordance with the appropriate national association of insurance commissioners property and casualty annual statement instructions and shall be considered as a document supporting the actuarial opinion required in Subsection A of this section.

(2) A company licensed but not domiciled in New Mexico shall provide the actuarial opinion summary upon request.

C. Actuarial report and workpapers.

(1) An actuarial report and underlying workpapers as required by the appropriate national association of insurance commissioners property and casualty annual statement instructions shall be prepared to support each actuarial opinion.

(2) If the insurance company fails to provide a supporting actuarial report or workpapers at the request of the superintendent or the superintendent determines that the supporting actuarial report or workpapers provided by the insurance company is otherwise unacceptable to the superintendent, the superintendent may engage a qualified actuary at the expense of the company to review the opinion and the basis for the opinion and prepare the supporting actuarial report or workpapers.

D. The appointed actuary shall not be liable for damages to any person (other than the insurance company and the superintendent) for any act, error, omission, decision or conduct with respect to the actuary's opinion, except in cases of fraud or willful misconduct on the part of the appointed actuary.

[13.2.9.8 NMAC - N, 07/30/2010; A, 11/15/2012]

**NEW MEXICO
DEPARTMENT OF PUBLIC
SAFETY**

**TRAINING AND RECRUITING
DIVISION**

Law Enforcement Academy

This is an amendment to 10.29.1 NMAC, Section 11, effective 12/15/2012.

10.29.1.11 GROUNDS FOR DENIAL, REVOCATION OR SUSPENSION OF POLICE OFFICER OR TELECOMMUNICATOR CERTIFICATION; REPORTING REQUIREMENTS

A. Authority - In accordance with the provisions of the Law Enforcement Training Act, NMSA 1978, Section 29-7-13 (Repl. Pamp. 1994), the director may seek to deny, suspend or revoke a police officer's certification, if after investigation, and consultation with the employing agency, it is determined that

a police officer has failed to comply with the provisions of the Law Enforcement Training Act concerning qualifications for certification as a police officer in the state of New Mexico.

B. Arrest or indictment on felony charges.

(1) The director upon being notified that a certified peace officer or telecommunicator has been arrested or indicted on any felony charge(s) shall immediately notify the officer or telecommunicator of the intent to suspend the certification of the officer or telecommunicator. The procedures set forth in 10.29.1.12 NMAC shall not apply to the immediate suspension. Notice of the immediate suspension shall be served on the officer or telecommunicator. Upon service of the notice, the officer or telecommunicator shall have 15 days to request to be heard at the next regular meeting of the board. At the meeting, the officer or telecommunicator may present evidence, witnesses and argument as to why their license should not be suspended. The board may deliberate and shall issue a decision on the suspension at the meeting.

(2) The director upon being notified that a certified peace officer or telecommunicator has been convicted on any felony charge(s) shall initiate the revocation process as per 10.29.1.12 NMAC.

[B:] C. Grounds for police officer - The following conduct by a certified police officer may constitute grounds for denial, suspension or revocation of certification under this rule:

(1) subsequent conviction, entry of plea of guilty or entry of plea of nolo contendere to any felony charge;

(2) subsequent conviction, entry of plea of guilty or entry of plea of nolo contendere to any violation of any federal or state law or local ordinance relating to aggravated assault, theft, driving while intoxicated, controlled substances, or other crime involving moral turpitude;

(3) making false statements or giving any false information to the academy in connection with an application for admission/certification;

(4) committing acts which indicate a lack of good moral character, or which constitute dishonesty or fraud, and which adversely affects an officers ability to exercise the duties of a certified law enforcement officer; and

(5) committing acts of violence or brutality which indicate that the officer has abused the authority granted to him or her as a commissioned law enforcement officer in the state of New Mexico;

(6) is found to have committed acts which would be grounds for denial of application for admission under 10.29.1.10 NMAC.

[C:] D. Grounds for telecommunicator - The following conduct by a certified telecommunicator may constitute grounds for denial, suspension or revocation of certification under this rule:

(1) subsequent conviction, entry of plea of guilty or entry of plea of nolo contendere to any felony charge;

(2) subsequent conviction, entry of plea of guilty or entry of plea of nolo contendere to any violation of any federal or state law or local ordinance relating to aggravated assault, theft, driving while intoxicated, controlled substances or other crime involving moral turpitude;

(3) making false statements or giving any false information to the academy in connection with an application for admission/certification;

(4) committing acts which indicate a lack of good moral character, or which constitute dishonesty or fraud, and which adversely affects an telecommunicator's ability to exercise the duties of a certified telecommunicator; and

(5) committing acts which indicate that the telecommunicator has abused the authority granted to a certified telecommunicator in the state of New Mexico;

(6) is found to have committed acts which would be grounds for denial of application for admission under 10.29.1.10 NMAC.

[D:] E. Reports - Any agency employing a certified law enforcement officer or telecommunicator who has committed any act or acts identified in Subsection B or C of 10.29.1.11 NMAC shall report such conduct to the director within thirty (30) days of completing an investigation confirming the alleged misconduct. In every case, alleged misconduct shall be reported to the director if an investigation is ongoing ninety (90) days after the agency receives the initial report of misconduct. An officer or telecommunicator's resignation or termination from employment does not relieve the agency from its duty to file a misconduct report with the academy. All incidents of misconduct shall be reported when a certified officer or telecommunicator is in violation of 10.29.1.11 NMAC. Law enforcement agencies should undertake a timely and thorough investigation to determine whether an allegation of misconduct has been sustained. For the purposes of this section, "misconduct" is defined as any act listed under section 10.29.1.11 NMAC, even if that act results in termination or resignation. The director will establish a reporting form to be used in reporting misconduct. An agency's delay or failure to report misconduct does not divest the board of jurisdiction to take action under Section 29-7-13 NMSA 1978 and Section 29-7C-9 NMSA 1978.

[4-11-93, 10-1-97, 1-1-99; 10.29.1.11 NMAC - Rn, 10 NMAC 29.1.11, 7/1/01; A, 01/01/04; A, 06/17/10; A, 12/15/12]

**NEW MEXICO
DEPARTMENT OF
WORKFORCE SOLUTIONS**

This is an amendment to 11.3.100 NMAC, Sections 1, 6, 7 and 101 through 112, effective 11-15-2012.

11.3.100.1 ISSUING AGENCY:
New Mexico Department of ~~Labor~~
Workforce Solutions, Employment Security
Division, P.O. Box 1928, Albuquerque, NM
87103

[7-15-98; 11.3.100.1 NMAC - Rn & A, 11
NMAC 3.100.1, 01-01-2003; A, 11-15-
2012]

11.3.100.6 OBJECTIVE: To
explain the general New Mexico department
of ~~labor~~ workforce solutions rules and
regulations addressing the Unemployment
Compensation Law.

[7-15-98; 11.3.100.6 NMAC - Rn & A, 11
NMAC 3.100.6, 01-01-2003; A, 11-15-
2012]

11.3.100.7 DEFINITIONS: In
addition to the definitions found in the
individual parts and sections, the following
definitions apply in Parts 100 through 500 of
Title 11, Chapter 3:

A. "Bureau" means the
unemployment insurance bureau of the
employment security division of the New
Mexico department of ~~labor~~ workforce
solutions.

B. "Claim" means a request
for benefits pursuant to the Unemployment
Compensation Law.

C. "Contribution" means
the state unemployment insurance tax
imposed on employers pursuant to the
Unemployment Compensation Law.

D. "Department" means
the New Mexico department of ~~labor~~
workforce solutions.

E. "Division" means
the employment security division of
the New Mexico department of ~~labor~~
workforce solutions, formerly known as
the employment security commission and
formerly known as the employment security
department.

F. "Electronic" means
relating to technology having electrical,
digital, magnetic, wireless, telephonic,
optical, electromagnetic or similar
capabilities.

G. "Electronic form"
means body of information collected by
electronic means, computer program or
other automated means similar to the body of

information collected by a paper document.

H. "E-mail" or "electronic mail" means communications similar to paper letters and memos transmitted electronically for the purpose of communication.

I. "Electronic signature" means electronic symbols or process attached to or logically associated with a record, adopted and executed by an individual with the intent to sign the record or electronic form.

J. "Good cause" means a substantial reason, one that affords a legal excuse, a legally sufficient ground or reason.

K. "IVR" means the interactive voice response system used by the state office claims to process claims.

L. "Password" means a series of letters and numbers intended by the sender and receiver to provide additional security to electronic transmissions. Typically, the password is adopted by the sender and conveyed to the receiver prior to a series of communications. The password is used to verify the [identify] identity of the sender of the communications. The password, along with the sender's "username" can constitute a signature for all legal purposes.

M. "Personal identification number" or "PIN" means a series of letters and numbers intended by the sender and receiver to provide additional security to electronic transmissions. The terms "password" and "PIN" are used interchangeably in the department's rules, regulations and policies.

N. "Rule" and "regulation" are synonymous and refer to provisions of the New Mexico Administrative Code.

O. "Secretary" means the cabinet secretary of the New Mexico department of [labor] workforce solutions or that person's official designee as provided in the department's internal policies and procedures.

P. "Signature" means any means of signature including, but not limited to, manual, facsimile, electronic, digital or other means permitted by law.

Q. "Sole proprietorship" is a business operated by individual whose ownership interest is not held as shares in a corporation, limited liability company, general or limited partnership or limited liability partnership. The use of the terms "sole proprietor" or "sole proprietorship" do not exclude marital community ownership or a marital partnership.

R. "State office claims" means the claims section of the unemployment insurance bureau of the employment security division of the New Mexico department of [labor] workforce solutions.

S. "Tax section" means the tax administration section of the

unemployment insurance bureau of the employment security division of the New Mexico department of [labor] workforce solutions.

T. "The assistant unemployment bureau chief for claims" means that person or that person's official designee.

U. "The assistant unemployment bureau chief for tax" means that person or that person's official designee.

V. "The director of the employment security division" means that person or that person's official designee as provided in the department's internal policies and procedures.

W. "The unemployment insurance bureau chief" means that person or that person's official designee as provided in the department's internal policies and procedures.

X. "Transmit" means any method of communication customary in the business community, including but not limited to U.S. postal service, private courier services, personal delivery and electronic communications such as telephone, facsimile, electronic mail and internet. Unless specifically required by law or department rule, transmissions and communications do not require hard or paper documents. Unless specifically required by law or department rule, the date and time of the receipt of the transmittal by the appropriate department official is the received or filed date.

Y. "Unemployment Compensation Law" means NMSA 1978, Section 51-1-1 et seq. as amended from time to time.

Z. "Username" means the term as commonly used in electronic communication which is an abbreviation of the name of the sender of electronic communications. Typically, the username, which is less secure, is used in conjunction with a password or PIN to provide secure communications between a sender and receiver while allowing the receiver assurances and verification of the identity of the sender.

AA. "Wages" means all remuneration for employment except as provided in these rules or in state and federal statutes applicable to unemployment compensation.

(1) Borrowed monies, including monies borrowed from a 401(K) or other pension account, even if such borrowed money may create a taxable event, shall not be deemed remuneration or wages such as to disqualify the individual from unemployment benefits.

(2) 26 U.S. C. Section 3306(b) (13) of the Internal Revenue Code excludes from the definition of wages "any payment made, or benefit furnished, to or for the

benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127 or 129." Under 26 U.S.C. Section 127 of the Internal Revenue Code, employer-paid education expenses are excludable from the gross income of and wages of an employee if provided under an educational assistance plan. This exclusion applies to both graduate and undergraduate courses and is effective with respect to courses beginning after December 31, 2001. [11.3.100.7 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.100.101 [SERVICES OF REAL ESTATE SALESPERSONS:

~~The exclusion provided by NMSA 1978 Section 51-1-42F(11) (n) applies only to those services performed by a real estate salesperson who is licensed by the New Mexico real estate commission, and only if:~~

~~A. The services are performed for remuneration solely by way of commission; and~~

~~B. The salesperson is not employed by and performing services for an employing unit described in NMSA 1978 Section 51-1-42F(8) or Section 51-1-43:] **FILING DATE:** Any report, response or other document required to be filed by the Unemployment Compensation Law or these rules, and any appeal, notice or other pleading required to be filed with the department shall be deemed filed on the date it is received by the department or, if mailed, as of the date of the postmark on the envelope. If it is postmarked at or prior to the deadline, it will be deemed filed timely if received by the department within a reasonable period of time. Unless otherwise specified by law or rules any report, response document or appeal that is mailed but has no postmark date shall be considered timely if, on the basis of customary mail practice and the actual date of delivery, it may be presumed to have been mailed within the specified time period. If the final day for a report, response document or appeal falls on a date when the department offices are closed, receipt on the first business day thereafter shall be considered timely.~~

[7-15-98; 11.3.100.101 NMAC - Rn, 11 NMAC 3.100.101, 01-01-2003; Repealed, 11-15-2012; 11.3.100.101 NMAC - Rn & A, 11.3.100.104 NMAC, 11-15-2012]

11.3.100.102 [SERVICES PERFORMED FOR A "SCHOOL":

~~The term "school" as used in NMSA 1978 Section 51-1-42F(11)(t) means a public or private, nonprofit educational institution, except an institution of higher education as defined in NMSA 1978 Section 51-1-42F(11)(o):~~

~~A. In which participants, trainees, or students are offered an organized~~

course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by, or under the guidance of an instructor or teacher; and

B. In which the courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation; and

C. Which is approved, licensed or permitted to operate as a school by the New Mexico department of education or other government agency that is authorized within the state to approve, license or permit the operation of a school.]

VALUATION OF REMUNERATION IN KIND:

A. If a claimant receives any wages in a medium other than cash, the reasonable cash value of any remuneration other than cash shall be deemed for all purposes of the Unemployment Compensation Law to be either:

(1) the amount agreed upon between the employing unit and the claimant if the terms of the agreement are reported to the department and the department agrees that such agreed amount or value is reasonable; or

(2) the cash value as shown to the satisfaction of the department.

B. If the department determines that the amount agreed to is unreasonable, or if the employing unit and the individual fail to agree upon an amount, or if the employing unit fails to report the terms of an agreement to the department and fails to show the cash value of such non-cash remuneration prior to the due date of contributions or payment in lieu of contributions with respect to such wages, the department shall fix an amount or value after considering all available information or evidence. The amount fixed by the department shall be deemed for all purposes of the Unemployment Compensation Law to be the cash value of the claimant's wages received in any medium other than cash.

[7-15-98; 11.3.100.102 NMAC - Rn, 11 NMAC 3.100.102, 01-01-2003; Repealed, 11-15-2012; 11.3.100.102 NMAC - Rn & A, 11.3.100.105 NMAC, 11-15-2012]

11.3.100.103 [A P P R O V E D TRAINING:

A. Any claimant may request to receive benefits while attending school for training purposes. The claimant shall make a written application on a form prescribed by the department. The application shall include the following information:

(1) The claimant's work history for the prior two-year period, and a brief description of duties

(2) The reason for the claimant's

unemployment;

(3) The proposed course of training, including a written description of the course of instruction;

(4) The establishment where the claimant will receive training, and

(5) The type of jobs for which the claimant will qualify upon completion of training.

B. Training under any program as provided by federal or state law required for approval as a condition for certification of the Unemployment Compensation Law by the United States Secretary of Labor, shall constitute approved training for purposes of this regulation and the provisions of NMSA 1978 Section 51-1-5E.

C. Other than those training programs identified in Subsection B of 11.3.100.103 NMAC, the department will only approve applications for training in vocational or technical schools or classes which have been approved by the New Mexico department of education or a similar department of another state. The department will not approve:

(1) applications for programs of instruction offered at community colleges, colleges or universities which are primarily intended to lead toward a baccalaureate or higher degree or that have as their purpose the preparation of participants for employment in occupations requiring a baccalaureate or higher degree from institutions of higher education, or

(2) programs of instruction as a regular full-time student, intended to lead toward a secondary diploma.

D. The department will, in addition to Subsection C of 11.3.100.103 NMAC, only approve training programs under the following conditions:

(1) Prospects for continuing employment in the labor market area in which the individual resides or is seeking work and for which the individual is presently suited by training and/or experience are minimal based upon current labor market information and are not likely to improve in the foreseeable future, making a change in occupation necessary for reemployment. Work for which the individual is presently suited by training or experience means "suitable work" as defined in NMSA 1978 Section 51-1-7C.

(2) The claimant must have the required qualifications or aptitudes to successfully complete the training program.

(3) The training program must relate to an occupation or skill for which there are, or are expected to be in the immediate future, reasonable employment opportunities in the labor market area where the individual resides or intends to seek work.

(4) The training program must be

attainable within fifty-two training weeks, and must result in a training certificate. In addition, there must be a reasonable assurance of successful completion of training should the individual's unemployment insurance compensation benefits exhaust prior to completion of the training course

(5) The claimant's application for approval of training, as described Subsection A of 11.3.100.103 NMAC, was submitted and received at one of the workforce development centers of the New Mexico department of labor or equivalent office in another state, prior to the commencement of the training.

E. A claimant whose application for training has been approved shall not be required to make an active search for work during participation in the training program and when between successive terms where the break from school is four weeks or less provided that the claimant submits bi-weekly written verification to the department from the training institution attesting to his attendance and satisfactory progress. Satisfactory progress means that the claimant is passing all of the classes with grades sufficient to qualify for graduation, licensing or certification as appropriate. Benefits shall not be paid for any week in which the claimant fails to timely submit a written verification.

F. At the time a course of training is approved, the department shall notify the training institution of the claimant's status. The notification shall direct the training institution to promptly notify the department in writing if the claimant's attendance or progress becomes unsatisfactory. Unsatisfactory progress means any indication of failure to obtain a passing grade, such as uncompleted work, unsatisfactory test scores or mid-term reports.

G. A claimant enrolled in an approved training program shall promptly notify the department in writing if he discontinues regular attendance of the training program or receives notice of unsatisfactory progress from the training institution. Unsatisfactory progress means any indication of failure to obtain a passing grade, such as uncompleted work, unsatisfactory test scores or mid-term reports.

H. Department approval for training shall automatically end if the claimant discontinues school attendance, drops or changes any classes or fails to maintain satisfactory progress.

I. A claimant enrolled in an approved training program shall have his weekly benefit amount reduced by the amount of any subsistence allowance received on account of participation in training. A subsistence allowance is a direct or indirect payment to the claimant which is

made or usable for routine living expenses not directly associated with participation in training, such as room, board, utilities or general transportation. It does not include reimbursements for any of the direct costs of training such as tuition, books, supplies, tools, transportation to training or the cost of child care during time spent in training. A lump sum payment of a subsistence allowance shall be prorated for the applicable training period.] **AFFIRMATIONS UNDER PENALTY OF PERJURY:**

A. All information and statements required of an individual by the department in furtherance of the department's duties are deemed material.

B. All submissions to the department of information and statements are deemed made as an affirmation or oath under penalty of perjury pursuant to NMSA 1978, Sections 14-13-2 and 30-25-1.

C. All signatures or affirmations requests on department forms whether paper, electronic or voice submission shall carry the warning in substantially the following format: "I solemnly, sincerely and truly declare and affirm that the statements made herein and the information supplied by me are true and correct, with no material omissions, and I do so under the pains and penalties of perjury."

[7-15-98; 11.3.100.103 NMAC - Rn & A, 11 NMAC 3.100.103, 01-01-2003; Repealed, 11-15-2012; 11.3.100.103 NMAC - Rn & A, 11.3.100.106 NMAC, 11-15-2012]

11.3.100.104 [FILING DATE:

Any report, response or other document required to be filed by the Unemployment Compensation Law or these rules, and any appeal, notice or other pleading required to be filed with the department shall be deemed filed on the date it is received by the department or, if mailed, as of the date of the postmark on the envelope. If it is postmarked at or prior to the deadline, it will be deemed filed timely if received by the department within a reasonable period of time. Unless otherwise specified in the Law or rules, any such report, response document or appeal that is mailed but has no postmark date shall be considered timely if, on the basis of customary mail practice and the actual date of delivery, it may be presumed to have been mailed within the specified time period. If the final day for a report, response document or appeal falls on a date when the department offices are closed, receipt on the first business day thereafter shall be considered timely.] **DE MINIMIS AMOUNTS:**

A. Money owed by the department to individuals or entities which amounts are equal to or less than the combined total amount of \$5.00 in any quarter shall be retained on the department's books as a credit to that individual, entity or

account, but no check or payment shall be issued absence a specific request by the party to whom the credit is due.

B. Money owed by individuals or entities to the department which amounts are equal to or less than the combined total amount of \$20.00 will not be billed or invoiced or liens issued, but the amounts due shall be retained on the department's books as a debit owing by that individual, entity or account.

[7-15-98; 11.3.100.104 NMAC - Rn & A, 11 NMAC 3.100.104, 01-01-2003; 11.3.100.104 NMAC - Rn & A, 11.3.100.107 NMAC, 11-15-2012]

11.3.100.105 [VALUATION OF REMUNERATION IN KIND:

A. If an individual receives any part of his wages in a medium other than cash, the reasonable cash value of such remuneration other than cash shall be deemed for all purposes of the Unemployment Compensation Law to be either:

(1) The amount which is agreed upon between the employing unit and such individual if the terms of the agreement are reported to the department and the department agrees that such agreed amount or value is reasonable; or

(2) The cash value as shown to the satisfaction of the department.

B. If the department determines that the amount agreed is unreasonable, or if the employing unit and the individual fail to agree upon an amount, or if the employing unit fails to report the terms of an agreement to the department and fails to show the cash value of such non-cash remuneration prior to the due date of contributions or payment in lieu of contributions with respect to such wages, the department shall fix an amount or value after considering all available information or evidence; and such amount fixed by the department shall be deemed for all purposes of the Unemployment Compensation Law to be the cash value of such wages received in any medium other than cash.]

VERIFICATION OF INFORMATION:

A. The department requires employers, employing units and claimants to provide their federal tax identification numbers or social security numbers as a means of verifying identity and eligibility for benefits under the Unemployment Compensation Law. The department may verify all information submitted by employers, employing units and claimants with that in the possession of other state and federal agencies.

B. An employer or employing unit's failure or refusal to provide the required numbers will result in enforcement action.

C. A claimant's failure or refusal to provide the required numbers will

result in a denial of benefits.

D. The provision of a false identification number or a false social number by any employers, employing units or claimants may result in criminal liability. [7-15-98; 11.3.100.105 NMAC - Rn & A, 11 NMAC 3.100.105, 01-01-2003; 11.3.100.105 NMAC - Rn & A, 11.3.100.108 NMAC, 11-15-2012]

11.3.100.106 [AFFIRMATIONS UNDER PENALTY OF PERJURY:

A. All information and statements required of an individual by the department in furtherance of the department's duties are deemed material.

B. All submissions to the department of information and statements are deemed made as an affirmation or oath under penalty of perjury pursuant to NMSA 1978, Sections 14-13-2 and 30-25-1.

C. All signatures or affirmations requests on department forms whether paper, electronic or voice submission shall carry the warning in substantially the following format: "I solemnly, sincerely and truly declare and affirm that the statements made herein and the information supplied by me are true and correct, with no material omissions, and I do so under the pains and penalties of perjury."]

AVAILABILITY AND CONFIDENTIALITY OF DEPARTMENT RECORDS:

A. The Public Records Act permits the inspection of public records of this state "except as otherwise provided by law." NMSA 1978, Section 14-2-1(8). NMSA 1978, Section 51-1-32 requires that "information obtained from employers, employing units or claimants pursuant to the administration of the Unemployment Compensation Law and determinations as to the benefit rights of any claimant are confidential and shall not be open to inspection in any manner revealing the claimant's employer's or employing unit's identity except that such information may be made available to those designated persons and agencies, and for the purposes specified in regulations issued by the secretary."

B. The department's files and records, including but not limited to investigation reports, statements, memoranda, correspondence or other data, regardless of the media on which stored, pertaining to matters under consideration or scheduled for hearing, other departmental proceeding or judicial appeal shall be available for inspection and copying, at any reasonable time by the employing unit or individual who is a party to any proceeding before the department.

C. The contents of the department's files and records shall not be released to any person except the employers, employing units or claimants to whom the file or record pertains or the employers',

employing units' or claimants 'authorized representative, and then, only upon a signed, written release, court order, grand jury subpoena or search warrant. Except in instances of court orders, grand jury subpoenas and search warrants, if more than one party is named in the file or record sought, both parties must sign a consent to the release of the file or record if it is sought for any purpose other than a proceeding before the department.

D. With the consent and approval of the secretary and upon advice of the department's general counsel, the contents of the department's files and records may be released to law enforcement agencies for the purpose of criminal investigations and child support proceedings.

E. From time to time, the department may enter into agreements to exchange information with other government agencies and with non-government providers of public assistance, which agreements may provide for the exchange of information otherwise confidential under NMSA 1978, Section 51-1-32. The conveyance of this information is for the purpose of obtaining information necessary for the department to provide services to its customers or so that other agencies can provide public assistance benefits to the individuals about whom the information pertains. In such instances, every reasonable effort shall be made to maintain the confidentiality of the information exchanged.

F. Unless otherwise provided by statute or a written agreement provided in Subsection E of 11.3.100.106 NMAC, the department shall charge the indicated fees for copies of department files and records:

(1) audio tape, \$3.00 per tape;
 (2) video tape, \$5.00 per tape;
 (3) floppy disc, \$1.00 per disc;
 (4) CD or DVD disc, \$5.00 per disc;

(5) printed paper copies, \$1.00 of first page of file or request; 50 cents per page thereafter up to 100 copies; 25 cents all copies thereafter within the same file or request;

(6) staff research time, \$20.00 per hour for all time in excess of one hour spent in locating or reviewing a file prior to copying;

(7) employment or income verification, whether or not copies are requested, \$6.00; and

(8) any other request shall be charged at a reasonable rate for the equipment, staff and other resources used to provide the copies.

[11.3.100.106 NMAC - N, 01-01-2003; 11.3.100.106 NMAC - Rn & A, 11.3.100.109 NMAC, 11-15-2012]

11.3.100.107

[DE MINIMIS

AMOUNTS:

A. Amounts owed by the department to individuals or entities which amounts are equal to or less than the combined total amount of \$5.00 in any quarter shall be retained on the department's books as a credit to that individual, entity or account, but no check or payment shall be issued absence a specific request by the party to whom the credit is due.

B. Amounts which are equal to or less than the combined total amount of \$20.00 owed by individuals or entities to the department will not be billed or invoiced or liens issued, but the amounts due shall be retained on the department's books as a debit owing by that individual, entity or account.] **WEBSITE:**

A. For the convenience of the department, its employees, its customers and the general public, the department operates and maintains one or more websites to provide a portal to services offered by the department. The website contains original material pages and material developed by the department as well as commercially prepared software systems acquired to provide access to services that support the Workforce Investment Act and the department's mission. The department website also features links to the websites of other providers who also offer services that are related or complementary to the services offered by the department.

B. Binding agreement: Use of the department's website constitutes acceptance as a contract of the published terms and conditions as provided in this rule and as published on the website from time to time.

C. General disclaimer: The department shall attempt to ensure that the information on the website is accurate by continuously updating the information. The department does not warrant or guarantee that the information is free from error. The website is a work in progress, under constant development in order to better serve the website users. The department accepts no liability for any loss or damage, direct, indirect, consequential or otherwise, incurred in the reliance on the material, information or programs provided on the website.

D. Public information: Information on the website is public information pursuant to the Public Records Act, NMSA 1978, Section 14-2-1 through 14-2-12.

E. Property of the department: All the material, information or programs on the department website are the property of the department unless otherwise specified. The material, information or programs on the department website:

(1) are provided as a public service for informational and educational purposes

only.

(2) are not intended as legal advice of any kind.

(3) may be used only for the purpose of gaining general information or for nonprofit purposes.

(4) is for public use and may be duplicated and disseminated for non-commercial purposes so long as not subject to another's copyright; any such duplication or dissemination must be accompanied by a citation acknowledging the department as the source of the information and the department's copyright and trademark notices;

(5) may not be used for commercial purposes of any kind without the written permission of a division director or higher officer of the department except that employment listings may be used by individual website users for obtaining employment.

F. Copyright notice: All copyrightable text, graphics, design, selection and arrangement of information is protected by copyright (2011, New Mexico department of workforce solutions).

G. Third party links: The department website provides links to third party websites and vice versa as a courtesy and convenience to the department's website users. The department is not responsible for the content or condition of third party websites. The department has no responsibility or liability to users for the content or accuracy of websites linked from this page or websites that provide a link to this page. The department does not endorse the views, products or services of third party websites. The department has no responsibility for the privacy practices or internal content of linked sites. The provision of a link provides no assurance that the linked site has a privacy policy similar to the department's privacy policy.

H. Privacy: The department is committed to maintaining the privacy of the personal information of those persons who access and use the department's website. The department is committed to maintaining the security of its computer system.

(1) Monitoring: The department's computer system including the website is monitored to ensure proper operation, to verify the functioning of applicable security features and for similar purposes.

(2) Personally identifiable information: For the purpose of the website, "personally identifiable information" means information collected on-line that could serve to identify an individual, including, but not limited to:

(a) first and last name;

(b) physical address;

(c) e-mail address;

(d) telephone number;

(e) social security number;
 (f) tax identification number;
 (g) credit card information;
 (h) bank account information;
 (i) any combination of information that could be used to determine identity.

(3) Except where specified, website users need not provide personally identifiable information to visit the department website or download information from the website.

(4) Any personally identifiable information provided to the department will be used solely by the department, its agents, contractor and employees in accordance with NMSA 1978, Section 14-8-21, unless the information is designated as a public record under the Public Records Act.

(5) Unless the user chooses to provide the information for a specific purpose, personally identifiable information is not collected and maintained by the department.

(6) Personally identifiable information may be required to qualify or determine eligibility for certain government services.

(7) The department shall take reasonable precaution to protect the confidentiality of personally identifiable information from loss, misuse, alteration or disclosure to unauthorized persons.

(8) Unless otherwise prohibited by state or federal law or applicable rules and regulations, an individual may access and correct personally identifiable information whether or not the access was created by accident, unauthorized access or a change in circumstances.

(9) E-mail or other forms of information requests sent to the department website may be saved and used to respond to the request, to forward the request to the appropriate agency, communicate updates of information or to provide the department's webmaster with valuable customer feedback to assist in improving the website.

(10) Despite all precautions, the department does not guarantee or warrant users of the website against hardware failure, unauthorized intrusion or other technical problems that might affect privacy and confidentiality.

(11) To maintain the website user's privacy, the department requires the use of a password before accessing any personal or account information. The department shall provide methods for the assignment of user names and passwords in a manner customary in the industry from time to time.

I. Trespass: The department shall use all legally available means to prevent, monitor and investigate any attempt to deface, delete, modify or misappropriate the department's website, server, database, information system or other department technology asset.

J. Finality: No information provided to the department through this electronic medium is final until the department transmits a confirmation to the website user.

K. Publication of an amendment to website policy: A copy of this rule shall be published on the website. From time to time, the department may heighten, but shall not decrease the privacy policy without amendment of this rule.

[11.3.100.107 NMAC - N, 01-01-2003; 11.3.100.107 NMAC - Rn & A, 11.3.100.110 NMAC, 11-15-2012]

11.3.100.108 [VERIFICATION OF INFORMATION SUBMITTED; TAX IDENTIFICATION AND SOCIAL SECURITY NUMBER REQUIRED:

The department requires employers and employing units and claimants to provide their federal tax identification numbers or social security numbers as a means of verifying identity and eligibility for benefits under the Unemployment Compensation Law. The department may verify all information submitted with that in the possession of other state and federal agencies:

A. An employer or employing unit's failure or refusal to provide the required numbers will result in enforcement action.

B. A claimant's failure or refusal to provide the required numbers will result in a denial of benefits.

C. The provision of a false identification number or a false social number could result in criminal liability.] **DIGITIZED SIGNATURES:** [RESERVED]

[11.3.100.108 NMAC - N, 01-01-2003; 11.3.100.108 NMAC - Rn & A, 11.3.100.111 NMAC, 11-15-2012]

11.3.100.109 [AVAILABILITY AND CONFIDENTIALITY OF DEPARTMENT RECORDS:

A. Reconciliation of Public Records Act, NMSA 1978 Section 14-2-1 through 14-2-12 and the confidentiality provisions of NMSA 1978 Section 51-1-32: NMSA 1978 Section 14-2-6(E), defines "public records" as "all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical form or characteristics, that are used, created, received maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained." The Public Records Act permits the inspection of public records of this state "except as otherwise provided by law," NMSA 1978 Section 14-2-1(8). NMSA 1978 Section 51-1-32 requires that "information obtained from any employing unit or

individual pursuant to the administration of the Unemployment Compensation Law and determinations as to the benefit rights of any individual are confidential and shall not be open to inspection in any manner revealing the individual's or employing unit's identity except that such information may be made available to those designated persons and agencies, and for the purposes specified in regulations issued by the secretary."

B. Consistent with the provisions of NMSA 1978 Section 51-1-32, department files and records, including but not limited to investigation reports, statements, memoranda, correspondence or other data, regardless of the media on which stored, pertaining to matters under consideration or scheduled for hearing, other departmental proceeding or judicial appeal shall be available for inspection and copying, at any reasonable time by the employing unit or individual who is a party to any proceeding before the department.

C. The contents of department files and records shall not be released to any person except the employing unit or the individual to whom the file or record pertains or that employing unit or individual's authorized representative, and then, only upon a signed, written release, court order, grand jury subpoena or search warrant. Except in instances of court orders, grand jury subpoenas and search warrants, if more than one party, such as an employer and an employee, are named in the file or record sought, both parties must consent to the release of the file or record if it is sought for any purpose other than a proceeding before the department.

D. With the consent and approval of the secretary, upon advice of the department's general counsel, the contents of the departments files and records may be released to law enforcement agencies for the purpose of criminal investigations and child support proceedings.

E. From time to time, the department may enter into agreements to exchange information with other government agencies and with non-government providers of public assistance, which agreements may provide for the exchange of information otherwise confidential under NMSA 1978 Section 51-1-32. The conveyance of this information is for the purpose of obtaining information necessary for the department to provide services to its customers or so that other agencies can provide public assistance benefits to the individuals about whom the information pertains. In such instances, every reasonable effort shall be made to maintain the confidentiality of the information exchanged.

F. Unless otherwise provided by statute or a written agreement provided in Subsection E of 11.3.100.108, the department shall charge the indicated

fees for copies of department files and records on the following media:

- _____ (1) audio tape, \$3.00 per tape;
- _____ (2) video tape, \$5.00 per tape;
- _____ (3) floppy disc, \$1.00 per disc;
- _____ (4) CD or DVD disc, \$5.00 per disc;
- _____ (5) printed paper copies, \$1.00 of first page of file or request; 50 cents per page thereafter up to 100 copies; 25 cents all copies thereafter within the same file or request;
- _____ (6) staff research time, \$20.00 per hour for all time in excess of one hour spent in locating or reviewing a file prior to copying;
- _____ (7) employment or income verification, whether or not copies are requested, \$6.00; and
- _____ (8) any format not listed above shall be charged at a reasonable rate for the equipment, staff and other resources used to provide the copies.]

ELECTRONIC TRANSACTIONS: Official communications with the department shall contain all material customarily found on paper forms. Additionally, electronic forms and records used by the department shall clearly indicate the purpose of the form, instructions for completion and submission electronically, information on receiving assistance by telephone or e-mail, require the submission of a valid e-mail address, telephone number or United States postal service address at which the sender can be contacted regarding the information submitted and the purpose underlying the submission of the information. A person choosing to communicate with the department electronically bears the responsibility of ensuring that the information submitted and the methods by which the person can be contacted are accurate. The use of a person's name, identifying information, username and password or PIN in electronic and other communications with the department is deemed a signature for all legal purposes. Persons using a means of electronic communication shall be advised that the submission of the information using the identifier is deemed a binding signature. [11.3.100.109 NMAC - N, 01-01-2003; 11.3.100.109 NMAC - Rn & A, 11.3.100.112 NMAC, 11-15-2012]

11.3.100.110 [WEBSITE:

A. For the convenience of the department, its employees, its customers and the general public, the department operates and maintains one or more websites to provide a portal to services offered by the department. The website contains original material pages and material developed by the department as well as commercially prepared software systems acquired to provide access to services that support the Workforce Investment Act and the

Department's mission. The department website also features links to the websites of other providers who also offer services that are related or complementary to the services offered by the department.

B. **Binding Agreement:** Use of the department's website constitutes acceptance as a contract of the published terms and conditions as provided in this rule and as published on the website from time to time.

C. **General Disclaimer:** The department shall attempt to ensure that the information on the website is accurate by continuously updating the information. The department does not warrant or guarantee that the information is free from error. The website is a work in progress, under constant development in order to better serve the website users. The department accepts no liability for any loss or damage, direct, indirect, consequential or otherwise, incurred in the reliance on the material, information or programs provided on the website.

D. **Public Information:** Information on the website is public information pursuant to the Public Records Act, NMSA 1978 Section 14-2-1 through 14-2-12.

E. **Property of the department:** All the material, information or programs on the department website are the property of the department unless otherwise specified. The material, information or programs on the department website:

(1) Are provided as a public service for informational and educational purposes only.

(2) Are not intended as legal advice of any kind.

(3) May be used only for the purpose of gaining general information or for nonprofit purposes.

(4) May be copied or distributed only if credit is attributed to the department by using the proper trade mark, NMWORKS™.

(5) Is for public use and may be duplicated and disseminated for non-commercial purposes so long as not subject to another's copyright. Any such duplication or dissemination must be accompanied by a citation acknowledging the department as the source of the information and the department's copyright and trademark notices.

(6) May not be used for commercial purposes of any kind without the written permission of a division director or higher officer of the department except that employment listings may be used by individual website users for obtaining employment.

F. **Copyright Notice:** All copyrightable text, graphics, design, selection and arrangement of information is

protected by copyright (2000, New Mexico Department of Labor) and the department's trademark, NMWORKS™.

G. **Trademark Notice:** NMWORKS™ is a trademark of the department, which identifies the department, and in conjunction with the goodwill of the department, its reputation. The department trademark NMWORKS™ is the subjects of pending applications and may not be used without credit given by use of the proper mark. The trademark includes the word NMWORKS™ and the related logo. The trademarked name and logo may not be used without prior express written permission.

H. **Third Party Links:** The department website provides links to third party websites and vice versa as a courtesy and convenience to the department's website users. The department is not responsible for the content or condition of third party websites. The department has no responsibility or liability to users for the content or accuracy of websites linked from this page or websites that provide a link to this page. The department does not endorse the views, products or services of third party websites. The department has no responsibility for the privacy practices or internal content of linked sites. The provision of a link provides no assurance that the linked site has a privacy policy similar to the department's privacy policy.

I. **Privacy:** The department is committed to maintaining the privacy of the personal information of those persons who access and use the department's website. The department is committed to maintaining the security of its computer system.

(1) **Monitoring:** The department's computer system including the website is monitored to ensure proper operation, to verify the functioning of applicable security features and for similar purposes.

(2) **Personally identifiable information:** For the purpose of the website, "personally identifiable information" means information collected on-line that could serve to identify an individual, including, but not limited to:

- _____ (a) First and last name;
- _____ (b) Physical address;
- _____ (c) E-mail address;
- _____ (d) Telephone number;
- _____ (e) Social security number;
- _____ (f) Tax identification number;
- _____ (g) Credit card information;
- _____ (h) Bank account information;
- _____ (i) Any combination of information that could be used to determine identity.

(3) Except where specified, website users need not provide personally identifiable information to visit the department website or download information from the website.

(4) Any personally identifiable

information provided to the department will be used solely by the department, its agents, contractor and employees, unless the information is designated as a public record under the Public Records Act.

(5) Unless the user chooses to provide the information for a specific purpose, personally identifiable information is not collected and maintained by the department.

(6) Personally identifiable information may be required to qualify or determine eligibility for certain government services.

(7) The department shall take reasonable precaution to protect the confidentiality of personally identifiable information from loss, misuse, alteration or disclosure to unauthorized persons.

(8) Unless otherwise prohibited by state or federal law or applicable rules and regulations, an individual may access and correct personally identifiable information whether or not the access was created by accident, unauthorized access or a change in circumstances.

(9) E-mail or other forms of information requests sent to the department website may be saved and used to respond to the request, to forward the request to the appropriate agency, communicate updates of information or to provide the department's webmaster with valuable customer feedback to assist in improving the website.

(10) Despite all precautions, the department does not guarantee or warrant users of the website against hardware failure, unauthorized intrusion or other technical problems that might affect privacy and confidentiality.

(11) To maintain the website user's privacy, the department requires the use of a password before accessing any personal or account information. The department shall provide methods for the assignment of user names and passwords in a manner customary in the industry from time to time.

J. Trespass: The department shall use all legally available means to prevent, monitor and investigate any attempt to deface, delete, modify or misappropriate the department's website, server, database, information system or other department technology asset.

K. Finality: No information provided to the department through this electronic medium is final until the department transmits a confirmation to the website user.

L. Publication of and Amendment to Website policy: A copy of this rule shall be published on the website. From time to time, the department may heighten, but shall not decrease the privacy policy without amendment of this rule.]

[RESERVED]

[11.3.100.110 NMAC - N, 01-01-2003; A,

11-15-2012]

11.3.100.111 [DIGITIZED SIGNATURES:] [RESERVED]

[11.3.100.111 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.100.112 [ELECTRONIC TRANSACTIONS:]

Pursuant to the Uniform Electronic Transmission Act as adopted by the state of New Mexico, NMSA 1978 Sections 14-16-1 to 14-16-19 (2001), the department has developed procedures for communications by electronic means. Official communications with the department shall contain all material customarily found on paper forms. Additionally, electronic forms and records used by the department shall clearly indicate the purpose of the form, instructions for completion and submission electronically, information on receiving assistance by telephone or e-mail, require the submission of a valid e-mail address, telephone number or United States postal service address at which the sender can be contacted regarding the information submitted and the purpose underlying the submission of the information. A person choosing to communicate with the department electronically bears the responsibility of insuring that the information submitted and the methods by which he can be contacted are accurate. The use of a person's name, identifying information, username and password or PIN in electronic and other communications with the department is deemed a signature for all legal purposes. Persons using a means of electronic communication shall be advised that the submission of the information using the identifier is deemed a binding signature.]

[RESERVED]

[11.3.100.112 NMAC - N, 01-01-2003; A, 11-15-2012]

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

This is an amendment to 11.3.200 NMAC, Sections 1, 6, 202, and 205 through 207, effective 11-15-2012.

11.3.200.1 ISSUING AGENCY: New Mexico Department of ~~[Labor]~~ Workforce Solutions, Employment Security Division, P.O. Box 1928, Albuquerque, NM 87103

[7-15-98; 11.3.200.1 NMAC - Rn & A, 11 NMAC 3.200.1, 01-01-2003; A, 11-15-2012]

11.3.200.6 OBJECTIVE: To explain the procedures and requirements governing promulgation, adoption, amendment and appeal of rules and

regulations for the New Mexico department of ~~[labor]~~ workforce solutions employment security division.

[7-15-98; 11.3.200.6 NMAC - Rn & A, 11 NMAC 3.200.6, 01-01-2003; A, 11-15-2012]

11.3.200.202 SUBMISSION BY INTERESTED PERSONS:

Prior to the adoption, amendment or repeal of any rule or regulation, the secretary shall conduct a public hearing and afford all interested persons a reasonable opportunity to submit data, views and arguments orally or in writing concerning the proposed action; however, if the secretary finds that oral presentation is unnecessary or impracticable, ~~[he]~~ the secretary may require submission to be made in writing.

[7-15-98; 11.3.200.202 NMAC - Rn & A, 11 NMAC 3.200.202, 01-01-2003; A, 11-15-2012]

11.3.200.205 FILING AND EFFECTIVE DATE:

The secretary shall file each rule or regulation, amendment or repeal thereof in accordance with the State Rules Act, and each rule or regulation, amendment or repeal shall be effective [as of the date of filing or as otherwise provided in the rules] after it is filed with the state records center and published in the New Mexico register. The secretary shall publish in the New Mexico register, in full or in part, all adopted rule or regulation, amendments or repeals.

[7-15-98; 11.3.200.205 NMAC - Rn & A, 11 NMAC 3.200.205, 01-01-2003; A, 11-15-2012]

11.3.200.206 PETITIONS FOR ADOPTION, AMENDMENT OR REPEAL OF RULES AND REGULATIONS:

A. Any interested person may petition the secretary requesting the promulgation, amendment or repeal of any rule.

(1) ~~[Where the petition requests the promulgation of a rule, the requested or proposed rule must be set out in full. The petition must also include all of the reasons for the requested rule]~~ When any person is requesting the promulgation of a rule, the individual shall submit a petition which sets forth in full the proposed rule and includes all of the reasons for the promulgation of the requested rule.

(2) ~~[Where the petition requests the amendment or repeal of a rule presently in effect, the rule or portion of a rule must be set out as well as a suggested amended form, if any. The petition must set out all of the reasons for the requested amendment or repeal of the rule.]~~ When any person requests the amendment or repeal of a rule or portion of a rule presently in effect, the individual

shall submit a petition which sets forth in full the proposed amendment or repeal and includes all of the reasons for the proposed amendment or repeal.

B. All petitions shall be considered by the secretary who may, in [his] the secretary's discretion, order a hearing for the further consideration and discussion of the requested promulgation, amendment, repeal or modification of any rule.

C. Within sixty days after submission of a petition, the secretary shall either deny the petition in writing, stating the reasons for the denial, or initiate rule making proceedings in accordance with Sections 11.3.200.201, 202 and 203 NMAC.

[7-15-98; 11.3.200.206 NMAC - Rn & A, 11 NMAC 3.200.206, 01-01-2003; A, 11-15-2012]

11.3.200.207 DECLARATORY

RULINGS: [~~Any person may petition the secretary for a declaratory ruling as to the applicability of any provision of the Unemployment Compensation Law or any rule or regulation promulgated thereunder to the petitioner whose interests, rights or privileges will be significantly affected thereby. The secretary shall consider the petition and within a reasonable time shall:~~

~~A. Issue a declaratory ruling; or~~

~~B. Notify the petitioner that no declaratory ruling is to be issued; or~~

~~C. Set a reasonable time and place for hearing argument upon the matter and give reasonable notification to the petitioner and any other person or persons named as a party to the proceedings or affected by the declaration, of the time and place for such hearing and of the issue involved:~~

~~(1) If a hearing is conducted, the secretary shall, within a reasonable time, issue a declaratory ruling or notify the petitioner that no declaratory ruling is to be issued.~~

~~(2) No declaratory ruling shall prejudice the rights of persons not parties to the proceeding:~~

~~D. Hearings on declaratory rulings shall be conducted in the manner provided in 11.3.500 NMAC:]~~

~~A. Any person whose interests, rights or privileges will be significantly affected by any provision of the Unemployment Compensation Law or any rule or regulation promulgated thereunder may petition the secretary for a declaratory ruling as to the applicability of to the law, rule or regulation.~~

~~B. Any person requesting a declaratory ruling shall submit a petition which sets forth the issues for which a declaratory ruling is requested.~~

~~C. The secretary shall consider the petition and within sixty days~~

~~after submission of a petition notify the petitioner that no declaratory ruling is to be issued; or set a reasonable time and place for a public hearing upon the matter and give reasonable notification to the petitioner and the public of the time and place for such hearing and of the issue involved.~~

~~D. If a hearing is conducted, the secretary shall, within sixty days after the hearing, issue a declaratory ruling or notify the petitioner and the public that no declaratory ruling is to be issued.~~

[7-15-98; 11.3.200.207 NMAC - Rn & A, 11 NMAC 3.200.207, 01-01-2003; A, 11-15-2012]

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

This is an amendment to 11.3.300 NMAC, Sections 1, 6, 7 and 301 through 327, effective 11-15-2012.

11.3.300.1 ISSUING AGENCY:

New Mexico Department of [Labor] Workforce Solutions, Employment Security Division, P.O. Box 1928 Albuquerque, NM 87103.

[7-15-98; 11.3.300.1 NMAC - Rn & A, 11 NMAC 3.300.1, 01-01-2003; A, 11-15-2012]

11.3.300.6 OBJECTIVE:

The purpose of this rule is to provide clarification of the Unemployment Compensation Law. This rule assists claimants and employers in better understanding how specific sections of the law are administered by the department. The rule also assists claimants and employers to better comply and better understand the department's procedures.

[5-15-97, 7-15-98; 11.3.300.6 NMAC - Rn & A, 11 NMAC 3.300.6, 01-01-2003; A, 11-15-2012]

11.3.300.7 DEFINITIONS: [RESERVED]

A. "Additional claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a period of employment other than self-employment which occurred subsequent to the date of filing the last initial, additional or reopened claim.

B. "Agent state" means any state in which an individual files a claim for benefits from another state or states.

C. "Alternate base period" means the last four completed quarters immediately preceding the first day of the claimant's benefit year.

D. "Base period and benefit year" means the base period and benefit year applicable under the unemployment

compensation law of the paying state.

E. "Base period", also called the "regular base period", means the first four of the last five completed quarters as provided in NMSA 1978 Section 51-1-42 A or the alternate base period.

F. "Benefits" means the compensation payable to an individual with respect to his unemployment, under the unemployment insurance law of any state."

G. "Claimant" means an individual who has filed an initial claim, additional claim or reopened claim for unemployment compensation benefits and this filing is within a benefit year or other eligibility period.

H. "Combined-wage claimant" means a claimant who uses wages from more than one state to establish monetary entitlement to benefits and who has filed a claim under this arrangement.

I. "Educational or training institution or program" means any primary school, secondary school or institution of higher education, public or private, which offers instruction, either for a fee or without charge, and which requires attendance at classroom instruction to receive the instruction.

J. "Employment" means all services which are covered under the unemployment compensation law of a state, whether expressed in terms of weeks of work or otherwise.

K. "Full-time employment" means the normal full-time hours customarily scheduled and prevailing in the establishment in which an individual is employed, but in no event less than 32 hours per week.

L. "Good cause" means a substantial reason, one that affords a legal excuse, a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the party's failure to keep the department directly

and promptly informed by written, signed statement of the claimant's, employer's or employing unit's correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

M. "Initial claim" means a new claim application submitted by the claimant to establish a benefit year and to obtain a determination of weekly and maximum benefit amounts.

N. "Instruction" means all teaching or opportunity for learning whether of a vocational or academic nature.

O. "Interstate benefit payment plan" means the plan approved by the interstate conference of employment security agencies as approved by the United States secretary of labor under which benefits shall be payable to unemployed individuals absent from the state or states in which benefit credits have been accumulated.

P. "Interstate claimant" means an individual who claims benefits under the unemployment insurance law of one or more liable states through the facilities of an agent state. The term "interstate claimant" shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the division finds that this exclusion would create undue hardship on such claimants in specified areas.

Q. "Last employer" means the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or in the event of a separation for lack of work, the employer or employing unit from which the claimant separated if the claimant, subsequent to the separation for reasons other than lack of work, has not worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant's weekly benefit amount.

R. "Liable state" means any state against which an individual files, through another state, a claim for benefits.

S. "Paying state" means the state against which the claimant is filing that actually issues the benefit check.

T. "Real estate salesperson" means an individual who is licensed by the New Mexico real estate commission.

U. "Regular base period" means the first four of the last five completed quarters as provided in NMSA 1978 Section 51-1-42 A or the alternate base period.

V. "Reopened claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a continuous period of unemployment for which the claimant did not file timely

continued claims and during which the claimant either remained unemployed or had a period of self-employment since last reporting on this claim.

W. "State" means the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

X. "Student" means any individual enrolled in an educational or training institution or program.

Y. "Transitional claim" means a claim filed to request a determination of eligibility and establishment of a new benefit year having an effective date within a seven-day period immediately following the benefit year ending date and a week for which compensation or waiting week credit was claimed; i.e. continuous certification.

Z. "Wages" means all remuneration for services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash.

AA. "Week of unemployment" means any week of unemployment as defined in the law of the liable state from which benefits with respect to such week are claimed.

[11.3.300.307 NMAC - N, 11-15-2012]

11.3.300.301 FILING INITIAL, ADDITIONAL AND REOPENED CLAIMS:

[A. — As used in 11.3.300.301 NMAC:

(1) "Claimant" means an individual who has filed an initial claim, additional claim or reopened claim for unemployment compensation benefits and this filing is within a benefit year or other eligibility period:

(2) An "initial claim" means a new claim application submitted by the claimant to establish a benefit year and to obtain a determination of weekly and maximum benefit amounts:

(3) An "additional claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a period of employment other than self-employment which occurred subsequent to the date of filing the last initial, additional or reopened claim:

(4) A "reopened claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a continuous period of unemployment for which the claimant did not file timely continued claims and during which the claimant either remained unemployed or had a period of self-employment since last reporting on this claim:

(5) "A transitional claim" means a claim filed to request a determination

of eligibility and establishment of a new benefit year having an effective date within a seven-day period immediately following the benefit year ending date and a week for which compensation or waiting week credit was claimed; i.e. continuous certification.]

[B:] A. Unless otherwise prescribed, any claimant wishing to claim benefits shall register for work, file an initial, additional, transitional or reopened claim for benefits and provide the name and address of his last employer. [For purposes of this section, "last employer" means:

(1) the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or

(2) in the event of a separation for lack of work, the employer or employing unit from which the claimant separated for reasons other than lack of work if the claimant, subsequent to his separation for reasons other than lack of work, has not worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant's weekly benefit amount.] The "last employer" means the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or in the event of a separation for lack of work, the employer or employing unit from which the claimant separated if the claimant, subsequent to the separation for reasons other than lack of work, has not worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant's weekly benefit amount.

[C:] B. The date of filing of any initial, additional or reopened claim shall be the Sunday of the week in which filed. Upon a showing of good cause, any initial claim or additional claim may be back-dated to the Sunday of the week immediately following the week in which the claimant was separated, and any reopened claim may be back-dated up to a maximum of twenty-one days from the preceding Sunday of the date of the request for back-dating. "Good cause," as used in [this section] 11.3.300.301 NMAC, exists when it is established that factors or circumstances beyond the reasonable control of the claimant caused the delay in filing. All requests for back-dating or post-dating shall include a fact-finding report.

[7-15-98; 11.3.300.301 NMAC - Rn & A, 11 NMAC 3.300.301, 01-01-2003; A, 11-15-2012]

11.3.300.302 FILING CONTINUED CLAIMS: In order to establish and maintain eligibility for benefits or for waiting-period credit during a continuous period of unemployment a claimant shall not be

subject to an administrative penalty pursuant to Subsection C of 11.3.300.314 NMAC and shall continue to report weekly as directed and file continued claims for benefits through the interactive voice response (IVR) system, or through the internet. The [assistant unemployment bureau chief for claims] department may approve paper certification where [that person] the department deems it necessary to provide prompt, appropriate, accurate, efficient service to a claimant. [5-15-97; 11.3.300.302 NMAC - Rn & A, 11 NMAC 3.300.302, 01-01-2003; A, 11-15-2012]

11.3.300.303 TIMELY RESPONSE TO REQUEST FOR INFORMATION:

A. Any response to a request for additional information from the department prior to issuance of an initial determination must be received by the department at the [state office claims] department within ten (10) calendar days from the date transmitted. The response may be transmitted in writing, by facsimile, by electronic mail or by telephone to the [state office claims] department.

B. The ten (10) calendar days period shall begin to run on the first day after the date the request was transmitted to the claimant or to the employer. If the tenth calendar day falls on a date when the department offices are closed, receipt on the first business day thereafter shall be timely. [7-15-98; 11.3.300.303 NMAC - Rn & A, 11 NMAC 3.300.303, 01-01-2003; A, 11-15-2012]

11.3.300.304 LATE FILING OF CONTINUED CLAIMS:

A. If the department finds good cause for a claimant's failure to timely file [his] a continued claim, the claimant may file a late continued claim provided the certification is filed not later than the thirteenth day following the last day of the week requiring the certification.

B. A certification not processed due to a department request for additional information from the claimant shall be considered timely if the requested information is received by the [state office claims] department no later than ten (10) calendar days after the request for additional information is transmitted to the claimant. [7-15-98; 11.3.300.304 NMAC - Rn & A, 11 NMAC 3.300.304, 01-01-2003; A, 11-15-2012]

11.3.300.305 ALTERNATE BASE PERIOD:

A. "Base period", also called the "regular base period", means the first four of the last five completed quarters as provided in NMSA 1978 Section 51-1-42 A or the alternate base period.

B. "Alternate base period"

means the last four completed quarters immediately preceding the first day of the [individual's] claimant's benefit year.

C. Application of alternate base period: If a claimant is determined ineligible because the [individual] claimant does not have sufficient wages during the base period to qualify for benefits and is not eligible for a regular claim in any other state or a combination of states and the claimant's work history reflects that the claimant may qualify using the alternate base period, the department will [advise the claimant that he may elect to file a reconsideration of the wages regarding the wages in the "regular base period" or he may elect to utilize the "alternate base period" by affirmatively declining reconsideration or failing to apply for reconsideration within the time limits provided in Subsection C of 11.3.500.8 NMAC.] utilize the "alternate base period" to determine if the claimant is eligible for benefits. If the department applies the "alternate base period" and the wages for the most recent quarter have not yet been reported by the employer or processed by the department, the claimant will be required to provide proof of wages consisting of payroll [check] checks ("check stubs"), W-2s or an appropriate affidavit. If the employer's reported wages are available for the most recent quarter, proof is not required from the claimant. On its own initiative and within its own discretion, if and when the department receives new or additional information regarding wages, it may initiate a reconsideration of the regular base period.

[D. Reconsideration of regular base period: If the claimant elects to file a request for reconsideration of the base period and is determined monetarily ineligible, the claimant will then be provided with the option to file under the "alternate base period".

E. Election final: If the claimant elects to use the alternate base period, once elected, the claimant may not change his election to the primary or regular base period regardless of whether such a change would provide higher or lower benefits.]

[F] D. Effect of election: Wages that fall within the regular base period or the alternate base period established pursuant to [this section] 11.3.300.305 NMAC are not available for reuse in qualifying for a subsequent benefit year.

[G.] E. Procedure:

(1) Upon receipt of the claimant's documentary evidence of wages within the timeframe required, wages will be processed by the department and used on the claim.

(2) Upon processing of the most recent quarter's wages, a "notice of initial determination of benefits" will be issued utilizing the wage information provided by the claimant for the alternate base period.

(3) [Employers will be notified of the wages used for the alternate base period on the "notice to employer of claim determination", which may include wages based upon proof provided by the claimant. The employer will have 15 calendar days from date of transmission of determination to provide the actual wages or to object to the wages being used on the claim, and may also protest charges based upon the reason for separation pursuant to Sections A and C of 11.3.500.8 NMAC.] If the claimant fails to provide documentary evidence of wages within the timeframe required, the original "notice of initial determination of benefits" will become final.

(4) Employers will be notified of the wages used for the alternate base period on the notice to employer of claim determination, which may include wages based upon proof provided by the claimant. The employer will have ten (10) calendar days from date of transmission of determination to provide the actual wages or to object to the wages being used on the claim, and may also protest charges based upon the reason for separation pursuant to Subsections A and C of 11.3.500.8 NMAC.

[H. The provisions of this section apply to all claims filed on or after January 1, 2004.]

[5-15-97; 11.3.300.305 NMAC - Rn, 11 NMAC 3.300.305, Repealed 01-01-2003; N, 7-1-2003; A, 11-15-2012]

11.3.300.306 CLAIM REGISTRATION FORM:

Unless otherwise prescribed, claims for regular benefits shall be made on the claims application form [Form ES-400] or unemployment benefits application, giving all information required thereby. A claimant shall also separately register for work, which includes completion of an orientation if applicable, with the department within fourteen [business] (14) calendar days. If the claimants fail to register, including completing the orientation, their benefits [may] shall be temporarily withheld until they comply unless good cause for the failure to register and complete the orientation is shown.

[7-15-98; 11.3.300.306 NMAC - Rn & A, 11 NMAC 3.300.306, 01-01-2003; A, 06-30-2010; A, 11-15-2012]

11.3.300.307 WAITING PERIOD CREDIT AND CONTINUED CLAIM FORM:

Unless otherwise prescribed, waiting-period credit or continued claims for benefits for unemployment shall be made through IVR, internet, on paper or as otherwise provided by the department from time to time, providing the information [is in substantially the same form as that on the certification form, Form ES-408,] setting forth that:

A. the [claimant] claimants continue [his] their claims for benefits;

B. [he is] the claimants are unemployed or partially unemployed;

C. [he registers] they register for work;

D. since [he last registered] they last registered for work [he has] they have performed no services and earned no wages, except as indicated;

E. [he is] they are able to work, available for work and actively seeking work; and

F. such other information as is required by the department from time to time;

G. the claimants shall provide to the department claimants' most current address which can be any one of the following: mailing address, physical address or electronic mail address;

H. within five (5) days of any change of address, the claimants shall provide the department an updated address; claimants' failure to provide updated address information may result in benefits being suspended until the department receives a current address.

[7-15-98; 11.3.300.307 NMAC - Rn & A, 11 NMAC 3.300.307, 01-01-2003; A, 11-15-2012]

11.3.300.308 [SEPARATION REPORTS AND EMPLOYER NOTICE OF CLAIM] CLAIM DETERMINATION:

A. NOTICE TO EMPLOYER OF FILING OF CLAIM: Whenever [an individual] a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to [his] the claimant's last known employer, at the address of the employer as registered with the department, if so registered, and, if not registered, to the address provided by the claimant, a dated notice of the filing of the claim and a fact-finding questionnaire. The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to [state office claims] the department within ten (10) calendar days from the date of the transmittal of the notice of claim. Unless excused by the department, the response must be an electronic transmittal.

B. REQUEST FOR ADDITIONAL INFORMATION: Prior to issuance of a determination [pursuant to Subsection C of 11.3.300.308 NMAC;] the department may request additional information from the employer, the claimant or witnesses by telephone, fax, electronic mail or other written report relative to the separation of the claimant from employment. Information obtained by telephone shall be fully documented by the department's

representative, and may be used as evidence in any determination or decision [of such] regarding the claim.

C. I N I T I A L DETERMINATION: [When a non-monetary issue is not raised in an application for unemployment compensation benefits and the employer's response is not received by the state office claims within ten calendar days after the transmission of the notice of claim, a determination shall be made based upon the information on the application. Payment of benefits may be commenced without further notice.] A determination on any claim for unemployment benefits shall be transmitted only after a department representative has evaluated the claim.

(1) [The ten-day period shall begin to run on the day after the notice of claim was transmitted as indicated on the application. If the tenth calendar day shall fall on the weekend or on a holiday, the reply shall be timely if received at the state office claims on the following business day.] When a non-monetary issue is not raised in an application for unemployment compensation benefits and the employer's response is not received by the department within ten (10) calendar days after the transmission of the notice of claim, a determination shall be made based upon the information on the application. Payment of benefits may be commenced without further notice.

(2) [The employer's failure to transmit a substantive response to the notice of claim within the ten-day period shall be an irrevocable waiver of the employer's right to be heard before a determination is made, and benefits charged to the employer's account as a result of the determination shall remain charged, unless reversed upon a showing of good cause. If the claimant is subsequently disqualified from the receipt of benefits, the employer will remain liable for any benefit charges incurred to date of disqualification in the absence of a showing of good cause by the employer.] The ten-day (10) period shall begin to run on the day after the notice of claim was transmitted to the employer as indicated on the application. If the tenth calendar day shall fall on the weekend or on a holiday, the reply shall be timely if received by the department on the following business day.

(3) After the ten-day (10) period has passed, the department shall immediately transmit to the parties the determination and the reason for it, and shall advise the parties of the right to appeal that determination pursuant to these rules.

(4) [When a separation issue is timely raised, a determination shall be transmitted only after a department representative has adjudicated the claim.] If the claimant is subsequently disqualified from the receipt of benefits, the employer will remain liable for any benefit charges

incurred to the date of disqualification unless, upon appeal, the employer established good cause for the employer's failure to transmit a substantive response to the notice of claim within the ten-day period, provided that, in no event shall an employer be liable for more than ten weeks' worth of benefits charges pursuant to 11.3.300.308 NMAC as a penalty for its failure to respond to the claim in a timely manner.

(5) Notwithstanding any other provisions in 11.3.300.308 NMAC, an employer which displays a pattern of failure to respond adequately or timely to requests from the department relating to claims for unemployment insurance benefits shall not be relieved of benefit charges pursuant to Paragraph (4) of Subsection C of 11.3.300.308 NMAC.

D. REDETERMINATION: [A redetermination of a non-monetary determination shall be made only by the department employee who made the initial determination.] A redetermination may be issued only if all the following criteria are met:

(1) The [adjudicator] department perceives the need for reconsideration either as a result of a protest by an interested party [or on the adjudicator's own initiative] due to new or additional information received. Examples of the type of errors which may prompt a redetermination are misapplication or misinterpretation of the law, mathematical miscalculation; an additional fact not available to the [adjudicator] department at the time of the determination excluding those facts the employer and claimant had the opportunity to provide prior to the initial determination, a mailing of a notice to the wrong employer or address, an [ES-442 discrepancy, a key punch or coding error. A "late protest" means an untimely protest that is accepted based on good cause for the untimely presentation of the protest] employer's timely response statement disputing a claim for benefits or coding error.

(2) All evidence and records [must be] are re-examined.

(3) A written redetermination notice is issued to the claimant and any other interested party, and is documented in the department records.

(4) A redetermination can be issued no later than the twentieth calendar day from the original determination date or twenty days from the date of the first payment [deriving] derived from the original determination, whichever event occurs latest. [The date of the first payment is deemed the original determination date when a late protest is received within twenty days of the first payment.]

(5) [All determinations must be approved by the assistant unemployment bureau chief for claims except in instances where the determination where payment has

been made. In the event that the first payment date is deemed the original determination date, the adjudicator] The department may issue a redetermination [without the prior approval of the assistant unemployment bureau chief for claims;] provided that the [ES-442] employer's statement was received [with] within the statutory time limits and within less than twenty calendar days from the date of the first payment.

(6) [If the claimant has begun collecting benefits and, as a result of redetermination, will be denied benefits, the claimant shall be advised of this fact prior to issuance of the redetermination.] If the claimant began collecting benefits and as a result of redetermination will be denied benefits, the claimant shall be advised.

E. STOPPING PAYMENT DUE TO ADMINISTRATIVE ERROR: Once an initial determination is made [pursuant to this section] and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard pursuant to [Subsection A of 11.3.300.308 NMAC] 11.3.300.500.9 NMAC. When payments are made as a result of administrative error by the department and are clearly not authorized by law, rule or regulation or any determination made pursuant to Subsection C of 11.3.300.308 NMAC, such payment shall not be deemed to have been made pursuant to a determination of eligibility [; and the department may stop such payments without prior notice and without an opportunity to be heard. For purpose of this section, "administrative error" refers solely to payments made as a result of handling or processing errors, mistakes or omissions by the department which are unrelated to or are inconsistent with specific eligibility determinations made in accordance with Subsection C of 11.3.300.308 NMAC of this rule].

F. EMPLOYER'S NOTICE OF A LABOR DISPUTE: When there is a strike, lock-out or other labor dispute, the employer shall file with the department after the commencement of such activity, and upon the demand of the department, a report of the existence and nature of the labor dispute, and the number of persons affected; and shall promptly provide the names, social security numbers and work classifications of all individuals unemployed due to the labor dispute, and whether and in what manner each individual is participating in the dispute or has a direct interest in the outcome.

G. TERMINATION OF CONTINUED CLAIMS: Payment of continued benefits to any person who has been determined eligible to receive benefits on an initial claim in accordance with 11.3.300.308 NMAC shall not thereafter be terminated without notice and an opportunity

for a fact-finding interview.

[7-15-98; 11.3.300.308 NMAC - Rn & A, 11 NMAC 3.300.308, 01-01-2003; A, 11-15-2012]

11.3.300.309 BENEFITS FOR PARTIAL UNEMPLOYMENT:

A. P A R T I A L L Y UNEMPLOYED [INDIVIDUAL] INDIVIDUALS: [An individual is] Individuals are partially unemployed in any week in which [his] their usual full-time employment is reduced to less than the normal full-time hours customarily scheduled and prevailing in the establishment in which [he is] they are employed, and [his] their wages fall below [his] their weekly benefit amount, due to the employer having less than full-time work for [him] them. For [a] partially unemployed [individual] individuals whose wages are paid on a weekly basis, a week of partial unemployment shall consist of [his] their pay period week, a calendar week or some other period designated by the department.

B. NOTICE OF REDUCED EMPLOYMENT: On the next payday after any week for which an employee's work has been reduced by the employer to less than [four full days or the standard] 32 hours [hours], [his] their employer shall notify [him that he] them that they may file a claim by contacting the department for a week of partial unemployment. This notice, and similar notices required for weeks of reduced employment thereafter, shall be posted prominently in the place of employment in a form as directed by the department. The first notice and each subsequent notice should show the [employee's] employees' gross wages for the week in order to establish what, if any, benefits may be due [him] them. On notice from the department, the employer shall furnish [; as may be directed;] such other information as may be necessary in any case to insure the proper payment of benefits. If the employer fails to notify the [employee of his] employees of their rights under the law regarding reduced employment, the [employee] employees may file for benefits at any time. Once the [employee has] employees have received notice from the employer, [he be may] they may be denied benefits if [he has] they have earned five times the weekly benefit amount after notification.

C. EMPLOYER RECORDS IN CONNECTION WITH PARTIAL UNEMPLOYMENT: In addition to the requirements set forth in 11.3.400.401 NMAC, [each employer] all employers shall keep [his] their payroll records in such form that it would be possible from an inspection thereof to determine [for any employee who] which employees may be eligible for partial benefits;

(1) wages earned by weeks as described in Subsection A of 11.3.300.309 NMAC;

(2) whether any week was in fact a week of less than full-time work; and

(3) time lost, if any, by [each such worker] workers due to [his] their unavailability for work.

[7-15-98; 11.3.300.309 NMAC - Rn & A, 11 NMAC 3.300.309, 01-01-2003; A, 11-15-2012]

11.3.300.310 INTERSTATE CLAIMS: [This section governs the department in its administrative cooperation with other states adopting a similar rule or regulation for the payment of benefits to interstate claimants, any provision of any other rule to the contrary notwithstanding.

A. DEFINITIONS: As used in 11.3.300.310 NMAC, unless the context clearly requires otherwise:

(1) "Agent state" means any state in which an individual files a claim for benefits from another state or states.

(2) "Benefits" means the compensation payable to an individual with respect to his unemployment, under the unemployment insurance law of any state.

(3) "Interstate benefit payment plan" means the plan approved by the interstate conference of employment security agencies as approved by the United States secretary of labor under which benefits shall be payable to unemployed individuals absent from the state or states in which benefit credits have been accumulated.

(4) "Interstate claimant" means an individual who claims benefits under the unemployment insurance law of one or more liable states through the facilities of an agent state. The term "interstate claimant" shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the division finds that this exclusion would create undue hardship on such claimants in specified areas.

(5) "Liable state" means any state against which an individual files, through another state, a claim for benefits.

(6) "State" means the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

(7) "Week of unemployment" means any week of unemployment as defined in the law of the liable state from which benefits with respect to such week are claimed;]

[B:] A. REGISTRATION FOR WORK:

(1) Each interstate claimant shall be registered for work, through any public employment office in the agent state when and as required by the law, regulations, rules, policies and procedures of the agent state. The registration shall be accepted as meeting

the registration requirements of the liable state.

(2) Each agent state shall report, to the liable state [~~in question,~~] whether each interstate claimant meets the registration requirements of the agent state.

~~[C.]~~ B. BENEFIT RIGHTS OF INTERSTATE CLAIMANTS:

(1) If a claimant files a claim against any state, and it is determined by such state that the claimant has available benefit credits in such state, then claims shall be filed only against such state as long as benefit credits are available in that state. Thereafter, the claimant may file claims against any other state in which [~~there are~~] the claimant has available benefit credits.

(2) For purposes of this rule, benefit credits shall be deemed to be unavailable whenever benefits have been exhausted, terminated, or postponed for an indefinite period or for the entire period in which benefits would otherwise be payable, or whenever benefits are affected by the application of a seasonal restriction.

~~[D.]~~ C. CONTINUED CLAIMS FOR BENEFITS:

(1) Any claim for benefits or for waiting-period credit shall be filed by an interstate claimant on the IVR or internet in accordance with uniform procedures developed pursuant to the interstate benefit payment plan. The claim shall be filed in accordance with the type of week in use in the agent state. Any adjustments required to fit the type of week used by the liable state shall be made by the liable state on the basis of consecutive claims filed.

(2) The claim shall be filed in accordance with the agent state's rules or regulations for intrastate claims.

(a) With respect to claims for weeks of unemployment in which [~~an individual is~~] claimants are not working for [~~his regular employer~~] their regular employers, the liable state shall, under circumstances which it considers good cause, accept a continued claim filed up to one week or one reporting period late. If a claimant files more than two weeks late, an initial interstate claim must be used to begin a claim series, and no continued claim for a past period shall be accepted.

(b) With respect to weeks of unemployment during which [~~an individual is~~] claimants are attached to [~~his regular employer~~] their regular employers, the liable state shall accept any claim which is filed within the time limit applicable to such claims under the law of the agent state.

~~[E.]~~ D. DETERMINATIONS OF CLAIMS:

(1) The agent state shall, in connection with each claim filed by an interstate claimant, ascertain and report to the liable state such facts relating to the claimant's availability for work and

eligibility for benefits as are readily determinable in and by the agent state.

(2) The agent state's responsibility and authority in connection with the determination of interstate claims shall be limited to investigation and reporting of relevant facts. The agent state shall not refuse to take an interstate claim.

~~[F.]~~ E. A P P E L L A T E PROCEDURES:

(1) The agent state shall afford all reasonable cooperation in the taking of evidence and the holding of hearings in connection with appealed interstate benefit claims.

(2) With respect to the time limits imposed by the law of a liable state other than New Mexico, upon the filing of an appeal in connection with a disputed benefit claim, whether or not the appeal is timely shall be determined by the liable state by reference to that state's law, regulations, rules, policies and procedures. In interstate appeals in which New Mexico is the liable state, whether or not the appeal is timely shall be determined by reference to relevant provisions of the New Mexico Unemployment Compensation Act and current department rules applicable to intrastate appeals.

~~[G.]~~ E. EXTENSION OF INTERSTATE BENEFIT PAYMENTS TO INCLUDE CLAIMS TAKEN IN AND FOR CANADA: This rule shall apply [~~in all its provisions~~] to claims taken in and for Canada.

[7-15-98; 11.3.300.310 NMAC - Rn & A, 11 NMAC 3.300.310, 01-01-2003; A, 11-15-2012]

11.3.300.311 COMBINED-WAGE CLAIMS:

[~~This section governs the department in its administrative cooperation with other states subscribing to the interstate arrangement plan for combining employment and wages as approved by the United States secretary of labor.~~] All combined-wage claims shall be subject to the provisions of the interstate arrangement for combining employment and wages, the interstate benefit payment plan, the regulations and guidelines prescribed by the United States secretary of labor, and the applicable provisions of the Unemployment Compensation Law and division regulations which apply to claims for and payment of regular unemployment compensation.

[~~A.~~] DEFINITIONS: As used in 11.3.300.311 NMAC,

(1) "Agent state" means any state in which an individual files a claim for benefits from another state or states.

(2) "Combined-wage claim" means a claim filed under this arrangement using wage credits from more than one state.

(3) "Combined-wage claimant" means a claimant who uses wages from more than one state to establish monetary

entitlement to benefits and who has filed a claim under this arrangement:

(4) "Paying state" means the state against which the claimant is filing that actually issues the benefit check.

(5) "State" means the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

(6) "Transferring state" means a state in which the combined-wage claimant had covered employment and wages within the base period of the paying state which can be transferred to establish a claim. Wages from more than one transferring state can be used to establish a combined-wage claim.

(7) "Employment and wages":

(a) "Employment" means all services which are covered under the unemployment compensation law of a state, whether expressed in terms of weeks of work or otherwise.

(b) "Wages" means all remuneration for such employment except as otherwise defined more fully in the statutes and clarified in these rules.

(8) "Base period and benefit year" means the base period and benefit year applicable under the unemployment compensation law of the paying state.]

~~[B.]~~ A. FILING OF CLAIMS:

(1) [~~The general rule:~~] An unemployed [~~individual~~] claimant who has covered employment and wages in more than one state has the right to combine such wages and employment in the base period of one state if the combination will provide benefits for which [~~he~~] the claimant could not otherwise qualify or will increase the benefits for which [~~he~~] the claimant qualifies in a single state. The claimant must file a combined-wage claim if [~~he~~] the claimant is eligible to do so rather than claim extended benefits. If [~~he~~] the claimant wishes, the claimant has the right to reject a combined-wage and file against a state in which [~~he~~] the claimant is separately eligible or to cancel the combined-wage claim and file no claim.

(2) Restrictions on combined-wage claims:

(a) any unemployed [~~individual~~] claimant who has covered employment [~~in two or more states,~~] in New Mexico and in another state may file a combined-wage claim unless:

(i) [~~he~~] the claimant has established a valid claim under any other state;

(ii) the benefit year has not ended; and

(iii) there are still unused benefit rights; a claimant will not be considered to have unused benefit rights on a prior claim if all benefits have been exhausted or benefits have been denied by a seasonal restriction or benefits have been

postponed for an indefinite period or for the remainder of the benefit year;

(b) if ~~[an individual]~~ a claimant files a combined-wage claim, all wages and employment in all states in which ~~[he]~~ the claimant worked during the base period of the paying state must be included except employment and wages which are not transferable under the provisions of Subsection C of 11.3.300.311 NMAC ~~[of this rule]~~.

~~[C.]~~ B. RESPONSIBILITIES OF NEW MEXICO WHEN TRANSFERRING WAGES:

(1) Wages earned in New Mexico in covered employment during the base period of the combined wage claim filed by a claimant will be promptly transferred to the paying state.

(2) Wages earned in New Mexico will not be transferred if the employment and wages have been:

(a) transferred to another paying state and have not been returned unused, or which have been previously used by New Mexico as the basis for a monetary determination which establishes a benefit year, or

(b) cancelled or are otherwise unavailable to the claimant as a result of a monetary determination by New Mexico prior to its receipt of the request for transfer, if such determination has become final or is the subject of a pending appeal; if the appeal is finally decided in favor of the combined-wage claimant, any employment and wages deemed eligible for use as wages in establishing monetary eligibility will be transferred to the paying state.

~~[D.]~~ C. NON-MONETARY ELIGIBILITY DETERMINATION: When a combined-wage claim is filed, the law and eligibility requirements of the paying state apply even if an issue has been previously adjudicated by a transferring state.

~~[E.]~~ D. CONDITIONS FOR WITHDRAWAL OF A COMBINED WAGE CLAIM: A combined-wage claimant may withdraw ~~[his or her]~~ the combined-wage claim any time before the monetary determination of the paying state becomes final, provided that the combined-wage claimant:

(1) repays in full any benefits paid to ~~[him]~~ the claimant; or

(2) authorizes the state against which ~~[he]~~ the claimant will claim benefits to withhold and forward to the former paying state a full repayment of benefits.

~~[F.]~~ E. RECOVERY OF PRIOR OVERPAYMENTS: If there is an overpayment outstanding in the transferring state, including New Mexico, and such transferring state so requests, the overpayment shall be deducted from any benefits the paying state would otherwise pay to the combined-wage claimant on

the combined-wage claim except to the extent prohibited by the law of the paying state. The paying state shall transmit the amount deducted to the transferring state or credit the transferring state's required reimbursement under the arrangement. This paragraph shall apply to overpayments only if the transferring state certifies to the paying state that the determination of overpayment was made within three years before the combined-wage claim was filed and that repayment is legally required and enforceable against the combined-wage claimant under the law of the transferring state.

~~[G.]~~ E. NOTIFICATION AND APPEALS:

(1) A combined-wage claimant will receive a monetary determination notice from the paying state once the wage information from all states is received. The claimant has the right to appeal any aspect of ~~[his]~~ the monetary entitlement. The appeal may be against either the paying state or the transferring state depending upon which agency issued the determination which the combined-wage claimant considers adverse to ~~[his]~~ the claimant's interest. If the transferring state refused to transfer wages because the wage credits were cancelled under a disqualification or because the work was not covered, the combined-wage claimant will be sent an appealable determination by the transferring state.

(2) Except as provided in Subparagraph b of Paragraph 2 of Subsection G of 11.3.300.311 NMAC, where the claimant files ~~[his]~~ a combined-wage claim in the paying state, any protest or appeal shall be in accordance with the law of such state.

(a) Where the combined-wage claimant files ~~[his]~~ a combined-wage claim in a state other than the paying state or under the circumstances described in Subparagraph b of Paragraph 2 of Subsection G of 11.3.300.311 NMAC ~~[below]~~, any protest or appeal shall be in accordance with the interstate benefit payment plan.

(b) To the extent that any protest or appeal involves a dispute as to the coverage of the employing unit or services in the transferring state or otherwise involves the amount of wages subject to transfer, the protest or appeal shall be decided by the transferring state in accordance with its law. [7-15-98; 11.3.300.311 NMAC - Rn & A, 11 NMAC 3.300.311, 01-01-2003; A, 11-15-2012]

11.3.300.312 EXTENDED BENEFIT CLAIMS AND PAYMENT:

A. APPLICATION OF OTHER RULES: The pertinent provisions of the law and rules that apply to regular claimants apply also to claimants for extended claims insofar as such rules

pertaining to regular claimants are not inconsistent with the provisions of this rule.

B. FILING CLAIMS: ~~[Unless otherwise prescribed, an "exhaustee" as defined in NMSA 1978 Section 51-1-48(H)(5), may claim extended benefits by contacting a customer service representative, registering for work and filing a claim for extended benefits.]~~ Unless otherwise prescribed, a claimant who, has received all of the regular benefits that were available to the claimant under the Unemployment Compensation Law or any other state law and is an "exhaustee" as defined in NMSA 1978, Section 51-1-48(H) (5), may apply for extended benefits by filing an extended benefits claim via internet or by contacting the department. The claim shall become effective as of the Sunday of the week in which filed, provided that the claim may be back-dated to the Sunday of the week immediately following the week which exhausted benefit entitlement if the failure to file is determined to be with good cause.

C. CLAIM DETERMINATION AND NOTICE: Upon receipt of a claim for extended benefits the department will issue a determination on the right to extended benefits and transmit a notice thereof to the claimant. The determination may be appealed in the manner prescribed for regular benefit determination appeals.

D. CONTINUED CLAIMS: Any ~~[individual]~~ claimant, in order to claim weekly-extended benefits, shall file the continued claim as directed ~~[and when instructed by the customer service representative when instructed to do so]~~ by the department.

E. RELIEF FROM CERTAIN ELIGIBILITY REQUIREMENTS: ~~[An individual]~~ A claimant, who claims extended benefits, will not be required to:

(1) ~~[to]~~ be unemployed for a waiting-period of one week; or

(2) ~~[to]~~ perform services in employment as designated in NMSA 1978 Section 51-1-5(B), before extended benefits are paid.

F. REQUIREMENT FOR ADDITIONAL INITIAL CLAIMS: ~~[An individual]~~ A claimant, whose benefit year expires within ~~[such]~~ an extended benefit period must file an initial claim for regular benefits at the end of ~~[his]~~ that current benefit year and, if a new benefit year is not established, at the beginning of each calendar quarter during the period to determine if ~~[he]~~ the claimant has sufficient wage credits in covered employment to establish a new regular claim.

[7-15-98; 11.3.300.312 NMAC - Rn & A, 11 NMAC 3.300.312, 01-01-2003; A, 11-15-2012]

11.3.300.313 "WEEK" DEFINED:

A. WEEK OF UNEMPLOYMENT. Weeks of unemployment and claims [therefore] shall be on a calendar week basis, except as prescribed in the case of partial unemployment, or as the department may direct otherwise in any case where it appears some other "week" may better secure the full payment of benefits when due.

B. CONDITIONS FOR ESTABLISHMENT: [~~The calendar week within which an individual becomes unemployed and in which he earns less than his weekly benefit amount shall be credited as a week of unemployment.~~] The calendar week within which the claimant becomes unemployed and in which the claimant earns less than the claimant's weekly benefit amount shall be credited as a week of unemployment.

C. "WEEK" IN MORE THAN ONE BENEFIT YEAR: A week of unemployment shall be deemed to be within that benefit year which includes the greater part of such week.

D. WEEK OF DISQUALIFICATION: With respect to acts and periods of disqualification under NMSA 1978 Section 51-1-7, which occur or commence before the commencement of any week of unemployment as defined in [~~this Section~~] 11.3.300.313 NMAC and Subsection A of 11.3.300.309 NMAC, "week" means the calendar week in which the disqualifying act or event occurs. [7-15-98; 11.3.300.313 NMAC - Rn & A, 11 NMAC 3.300.313, 01-01-2003; A, 11-15-2012]

11.3.300.314 F R A U D U L E N T CLAIMS:

A. NMSA 1978 Section 51-1-38(D) of the Unemployment Compensation Law provides: "Notwithstanding any other provision of the Unemployment Compensation Law, including the provisions of [~~NMSA 1978 Section 51-1-8(f)~~] Subsection J of Section 51-1-8 NMSA 1978, if any individual claiming benefits or waiting period credits shall, in connection with such claim, make any false statement or representation, in writing or otherwise, knowing it to be false or shall knowingly fail to disclose any material fact in order to obtain or increase the amount of a benefit payment, such claim shall not constitute a valid claim for benefits in any amount or for waiting period credits but shall be void and of no effect for all purposes. [~~In addition to any other penalties provided herein, the entire amount of the benefits obtained by means of such claim shall be subject to recoupment by deduction from the claimant's future benefits or it may be recovered as provided for the collection of past due contributions in accordance with NMSA 1978 Section 51-~~

~~1-36(B).] The entire amount of the benefits obtained by means of such claim shall be, in addition to any other penalties provided herein, subject to recoupment by deduction from the claimant's future benefits or they may be recovered as provided for the collection of past due contributions in Subsection B of Section 51-1-36 NMSA 1978." The terms used in NMSA 1978, Section 51-1-38(D) mean:~~

(1) "False" means a statement contrary to fact.

(2) "Knowingly" means the person making the statement, at the time it was made, knew the statement to be false or should have known it to be false because [~~he~~] the person had no reasonable basis for believing it to be true.

(3) "Knowingly fails to disclose any material fact" means the claimant deliberately withholds information which [~~he~~] the claimant knows should be disclosed to the department.

(4) "Material fact" means the fact affects the eventual outcome of a transaction. A fact which, if known, would result in a determination adverse to the claimant is a material fact. A fact is not material if the failure to disclose it or the intentional misstatement of it would not cause injury. A fact which, if known, would not cause a denial or reduction of benefits or disqualification from receipt of benefits is not a material fact.

(5) "With intent to obtain benefits" means the claimant intended the statement to assist the claimant to obtain benefits. In the absence of facts to indicate otherwise, when concealment of a material fact by willful misstatement or nondisclosure occurs in connection with a claim for benefits, it is assumed that the claimant's intent was to obtain or increase the amount of a benefit payment. When facts are established which indicate a different intent, the conclusions as to the claimant's intent shall be based on consideration of all the facts and not merely an assumption.

B. [~~A claimant who inadvertently makes a mistake or omission or who does not understand his responsibility or the questions asked of him, and, on the basis of information previously given him by the department, cannot reasonably be expected to understand his responsibility shall not be subject to the provisions of NMSA 1978 Section 51-1-38(D).~~] Claimants who inadvertently make a mistake or omission on the basis of information previously given them by the department, cannot reasonably be expected to understand their responsibility shall not be subject to the provisions of NMSA 1978 Section 51-1-38(D).

C. The department shall impose an administrative penalty pursuant to NMSA 1978 Section 51-1-38(A) for each week that a claimant knowingly

makes a false statement or representation or knowingly fails to disclose a material fact to obtain or increase the amount of a benefit payment. Administrative penalties shall be imposed as follows:

(1) for each week of unreported or underreported earnings, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of fifty-two weeks; from the date of the determination or the date the claimant is next determined entitled to benefits;

(2) for each false statement on separation, eligibility, refusal of work and other issues, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of fifty-two weeks; from the date of the determination or the date the claimant is next determined entitled to benefits; and

(3) [~~a claimant shall forfeit all benefit rights for fifty-two weeks from the date of the determination or the date he is next determined entitled to benefits, whichever comes latest in any case where he fraudulently obtained or increased benefits in two or more separate offenses.] In any case where a claimant fraudulently obtained or increased benefits in two or more separate offenses, the claimant shall forfeit all benefit rights for fifty-two weeks from the date of the determination or the date the claimant is next determined to be entitled to benefits.~~

D. The department shall demand immediate repayment of any overpayment established pursuant to NMSA 1978 Section 51-1-38(D). A warrant of levy and lien shall be filed in all cases where the overpayment is not repaid immediately. Recovery of the overpayment may be by any means permitted by law. Recovery of fraudulent overpayments may include court awarded costs. The court costs awarded by the court shall be added to the overpayment and shall be collected in the same manner as the underlying overpayment.

E. Restitution of an amount overpaid to a claimant due to fraudulent misrepresentation or failure to disclose a material fact shall not preclude the department from [~~instituting~~] requesting criminal proceedings against such claimant. [7-15-98; 11.3.300.314 NMAC - Rn & A, 11 NMAC 3.300.314, 01-01-2003; A, 11-15-2012]

11.3.300.315 R E T I R E M E N T INCOME:

A. [~~Each eligible individual receiving a periodic retirement income financed in whole or in part by a base period employer shall have his weekly benefit amount reduced by the prorated amount of the base period employer's contribution to the periodic pension or retirement payment.] Each eligible claimant who, pursuant to a pension or retirement plan financed in~~

whole or in part by a base-period employer of the claimant shall have the weekly benefit amount reduced, but not below zero, by the prorated amount of the pension, retirement pay, annuity or other similar periodic or lump-sum payment that exceeds the percentage contributed to the plan by the eligible claimant. The maximum benefit amount payable shall also be reduced to an amount not more than twenty-six times the reduced weekly benefit amount. For purposes of [this section] Subsection A of 11.3.300.315 NMAC, periodic retirement income is not deemed "received", if, under the time period allowed by the Internal Revenue Code, 26 U.S.C. Section 3405 and related provisions, that amount is placed in a non-taxable qualifying retirement account.

B. [An individual's] A claimant's, monthly pension or retirement payment shall be multiplied by 12, then divided by 52 to determine the amount of pension or retirement income attributed to a week.

C. A lump-sum pension or retirement payment shall be considered a periodic payment and the amount divided by 52 and allocated on a weekly basis beginning with the last week worked prior to [retirement] separation from employment. [7-15-98; 11.3.300.315 NMAC - Rn & A, 11 NMAC 3.300.315, 01-01-2003; A, 11-15-2012]

11.3.300.316 DETERMINATION OF ELIGIBILITY OF FULL-TIME STUDENTS:

A. [The availability of full-time students, except for students in approved training in accordance with NMSA 1978 Section 51-1-5(E) and 11.3.100.103 NMAC, shall be determined in accordance with the provisions of NMSA 1978 Section 51-1-5(E) and the provisions of this section.] Except for students in approved training in accordance with NMSA 1978 Section 51-1-5(E) and 11.3.100.103 NMAC, the availability of unemployment compensation benefits for full-time students shall be determined in accordance with the provisions of NMSA 1978 Section 51-1-5(E) and 11.3.300.316 NMAC.

B. The general requirement: Any [claimant] claimants enrolled in an educational or training institution or program in a course of study [providing instruction of twelve or more classroom hours per week, or the equivalent thereof, and is able to work and is available for work and is] who are able to work and are available for work and are actively seeking permanent full-time work or part-time work in accordance with Subsection I of Section 51-1-42 NMSA 1978, will not be denied from receiving benefits or waiting period credit.

C. [Time spent attending

classes and doing homework may be restrictions on availability for full-time or part-time, permanent work which must be overcome to establish eligibility for benefits.] Any [claimant] claimants enrolled in an educational or training institution or program [on a full-time basis] who can demonstrate by credible evidence that [he is] they are unequivocally attached to the labor force and available for full-time or part time permanent work for which [he is] they are presently qualified without regard to the hours spent in attending classes or doing homework will not be subject to denial if all of the following requirements are met:

(1) While working full-time or part-time and attending school, [he] they became unemployed for reasons not attributable to the schooling and the hours of school attendance have not changed substantially since becoming unemployed, or [he] they began attending school after becoming unemployed and no rearrangement of [his] their school hours would be required to accommodate [his] their normal and customary working hours.

(2) For school terms commencing after the filing of the unemployment claim, the [claimant is] claimants are required to submit to the department a completed student questionnaire, a schedule of classes and, if required by the department, an authorization of release of school records prior to the commencement of each school term. For school terms commencing prior to the filing of the unemployment claim, a student questionnaire and schedule of classes may be verified by the department prior to issuance of a determination that the [claimant is] claimants are available for full-time or part-time permanent work for the school term covered on the student questionnaire notwithstanding [his] their status as [a] full-time [student] students.

(3) Full time school is defined as 12 or more credit hours during a regular school term; 6 or more credit hours for summer term or graduate school or as defined by the school or training institution.

D. A determination of eligibility made in accordance with Subsection C of 11.3.300.316 NMAC [of this rule] shall apply only to the semester or period covered on the student questionnaire.

E. A claimant who receives a determination pursuant to Subsection C of 11.3.300.316 NMAC [of this rule] shall promptly transmit to the department any changes to class schedule during the school term. If the claimant adds or changes any classes, [his] the claimant's eligibility shall be subject to redetermination pursuant to Subsection C of 11.3.300.316 NMAC [of this rule] and Subsection A of 11.3.300.308 NMAC.

[F. Definitions: As used in NMSA 1978 Section 51-1-5(H) and this

rule:

(1) "full-time student" means any individual enrolled in twelve or more hours of instruction per week or the equivalent thereof;

(2) "educational or training institution or program" means any primary school, secondary school or institution of higher education, public or private, which offers instruction, either for a fee or without charge, and which requires attendance at classroom instruction to receive the instruction; and

(3) "instruction" means all teaching or opportunity for learning whether of a vocational or academic nature.

G. A contributing employer's account will not be charged any portion of benefits paid for a claimant who is attending school on a full-time basis.]

[7-15-98; 11.3.300.316 NMAC - Rn & A, 11 NMAC 3.300.316, 01-01-2003; A, 7-1-2003; A, 11-15-2012]

11.3.300.317 WAGES IN LIEU OF NOTICE, BACK PAY FOR LOSS OF EMPLOYMENT, OR VACATION PAY AND BENEFIT RIGHTS:

Except for payments through a court for time spent in jury service, all remuneration for services actually performed in any week for which benefits are claimed including wages in lieu of notice, back pay for loss of employment and vacation pay and wages [as defined in NMSA 1978 Section 51-1-42(T)] for any period for which the individual has been determined to have a definite return-to-work date of four weeks or less are deductible [in accordance with NMSA 1978 Section 51-1-4(B)(2)] from any benefits otherwise payable to a claimant for the week or weeks covered by such payments; a claimant who receives such payments cannot establish a waiting period credit or receive benefits for the week or weeks covered by such payments, if such payments equal or exceed the [individual's] claimant's weekly benefit amount. When a claimant leaves work voluntarily without good cause connected with work or is discharged for misconduct connected with work or fails without good cause to apply for or accept an offer of suitable work and receives remuneration for services actually performed in any week for which benefits are claimed, wages in lieu of notice, back pay for loss of employment or vacation pay for any period for which the [individual] claimant has a definite return-to-work date covering a period of time subsequent to the week in which the separation from employment occurs or the offer of suitable work was made, such payments cannot be used to meet the requirement of remuneration in employment equal to or exceeding five times the weekly benefit amount of the claim to restore eligibility following a disqualification from benefits under the provisions of NMSA

1978 Sections 51-1-7(A), 51-1-7(B) or 51-1-7(C).
[7-15-98; 11.3.300.317 NMAC - Rn & A, 11 NMAC 3.300.317, 01-01-2003; A, 11-15-2012]

11.3.300.318 BENEFITS DUE DECEASED PERSONS:

A. If prior to [his] the claimant's death, a claimant had filed a weekly certification, for benefits which were unpaid at the time of [his] the claimant's death, the benefits shall be paid to the deceased claimant's court-appointed executor, administrator or personal representative. If the deceased claimant's next of kin demonstrates, to the secretary's satisfaction, that the court appointment of a fiduciary is impractical or legally unnecessary, then the benefits shall be paid to the next of kin. The order of priority for such payment shall be:

(1) one-half to the surviving spouse, if residing with the deceased claimant at the time of death, and one-half to the natural parent or physical custodian of any minor children or any dependent disabled adult children of the deceased claimant (if more than one, per capita by children and not per stirpes);

(2) if no minor children and no dependent disabled adult children of the deceased claimant, all to the surviving spouse; if no surviving spouse, all equally

(3) to the surviving adult children; if no surviving adult children, all equally

(4) to the surviving parents; if no surviving parents, all equally

(5) to the surviving [~~brothers and sisters; if no surviving parents~~] siblings; if no surviving siblings, all

(6) to the deceased claimant's heirs at law as provided in the New Mexico Probate Code, NMSA 1978 Sections 45-2-101 through 45-2-114.

B. [~~The secretary is not bound to follow such order of priority if to do so appears inequitable.~~] Whenever there is more than one legal heir in any of the above classes, payment may be made to any one of such group as agent for the others upon submission of proper evidence of authority and identification.

C. Application for payment of benefits must be made in writing and on the prescribed form within six months of the death of the decedent and must be accompanied by a certified copy of the death certificate. The application form shall set forth that the individual died intestate, that no executor, administrator or personal representative has been appointed to administer the deceased claimant's estate, and the relationship of the person to the deceased. Any outstanding [~~warrants~~] payments representing benefits claimed must accompany the application for payment

for re-issuance.

D. Unless, within the time prescribed herein a claim is made for benefits due a deceased claimant by one of the parties herein authorized to make such claim, any [~~warrants~~] payments issued directly to the deceased claimant shall be canceled, and any additional benefit payments due to the deceased claimant for weeks of unemployment prior to [his] the claimant's death shall be canceled, and all sums represented by benefits payable to the deceased claimant prior to [his] the claimant's death shall remain a part of the unemployment compensation fund.

[7-15-98; 11.3.300.318 NMAC - Rn & A, 11 NMAC 3.300.318, 01-01-2003; A, 11-15-2012]

11.3.300.319 STANDARDS FOR WAGES ELIGIBLE TO PURGE BENEFIT DISQUALIFICATION; BONA FIDE EMPLOYMENT:

In determining whether a claimant has earned wages to requalify for benefits after imposition of a disqualification under the provisions of NMSA 1978 Section 51-1-7, the following shall apply:

A. Wages required to requalify will include both insured and noninsured wages, but will not include earnings from self-employment or earnings excluded under the provisions of 11.3.300.317.NMAC.

B. The wages must have been earned for work performed subsequent to the effective date of the disqualification.

C. The proof required to establish wages for requalification may consist of check stubs or other payment records, employer statement or W-2 form if the W-2 establishes that the wages were paid after the effective date of the disqualification. When employers' quarterly wage reports available in the division show the contended wage items, the department may accept the report as proof of wages. If necessary for a determination under Subsection B of 11.3.300.319, the period during which the wages were earned shall be established by other proof.

D. Except for wages of which the division has knowledge through employers' quarterly wage reports, the burden of establishing requalifying wages shall rest on the claimant. The department may, as it deems appropriate, assist the claimant in the verification of wages which the claimant states [~~he or she~~] that the claimant has earned but of which [~~he or she~~] the claimant has no proof or insufficient proof, by contacting the employers.

E. The wages must have been earned in "bona fide" employment. The basic test to determine whether employment is "bona fide" to purge a disqualification is whether the total facts lead a reasonable

person to conclude that the [~~individual~~] claimant was in good faith genuinely attached to the labor market as opposed to bogus employment or the performance of some inconsequential service entirely unrelated to any valid job search. [~~An individual~~] A claimant is not engaged in bona fide employment when the service is performed for the purpose of purging a disqualification. No fixed rule can govern when employment is "bona fide," but the following factors shall be considered by the department:

(1) whether a valid, arms-length employer-employee relationship exists; this excludes self-employment and incidental cash payments for services reportedly performed for relatives and friends;

(2) whether the work is of the type of which the claimant would accept referral on a full-time basis or for repeated temporary durations;

(3) whether the work bears any relation to the claimant's main occupational skills;

(4) whether the work is of the type that employers generally offer in the job market;

(5) whether the work is related to the particular employer's normal activity and customarily offered to the working public by this employer;

(6) whether the employer is registered for employment purposes with appropriate taxing and licensing authorities;

(7) the nature of the work, concerning hours to be worked, where the work is performed, and rate of pay;

(8) whether the employer can produce payroll records to substantiate the amount of payment and appropriate tax withholding information;

(9) whether the wages for the employment were equivalent to the claimant's wages in [~~his or her~~] the claimant's usual occupation or last preceding employment; and

(10) the manner in which the work was obtained, and the nature and extent of the claimant's search for work.

[7-15-98; 11.3.300.319 NMAC - Rn & A, 11 NMAC 3.300.319, 01-01-2003; A, 11-15-2012]

11.3.300.320 WORK SEARCH REQUIREMENT:

A. WORK SEARCH CONTACTS: To qualify for continued benefits, an intrastate claimant must:

(1) actively seek work by contacting a minimum number of different employers each week as directed by department representatives; a claimant may contact the same employer more than one time during a given week, but it will be considered as only one of the minimum number of contacts required; a claimant may

list the New Mexico ~~[department of labor workforce development centers]~~ department of workforce solutions workforce connection centers, the New Mexico state personnel office (SPO), America's job bank, Workforce Investment Act (WIA) partners and similar programs as approved from time to time by the department as valid work search contacts for each week of claim certification;

(2) seek work on days within the week for which benefits are being claimed; claimants must seek work with a minimum number of different employers each week but it is not mandatory that they seek work on different days of the week; or

(3) be a member of a union with a hiring hall and meet the union requirements for job referral or placement; a union with a hiring hall is one that actively seeks to place its members in employment;

(4) in order to qualify for continued benefits, interstate, if New Mexico is the liable state, claimants must[-

~~_____ (a) seek work within the week for which benefits are being claimed; and~~

~~_____ (b) actively seek work by contacting a minimum of two different employers each week, or if a union member, actively seek work by contacting the union as required by the union in order to be eligible for job referral/placement; interstate claimants are not required to sign a work search plan.] seek work within the week for which benefits are being claimed and actively seek work by contacting a minimum of two different employers each week, or if a union member, actively seek work by contacting the union as required by the union in order to be eligible for job referral/placement; interstate claimants are not required to sign a work search plan;~~

~~[(c)] (5) claimants filing through the interactive telephone system (IVR) or internet must keep a record of the name, address and telephone number or electronic mail address of each employer contacted; this information must be provided to department representatives upon request; the claimant must provide the requested information no later than ten (10) calendar days from the date of the department's request; failure to provide the required information without good cause may delay benefits or result in a denial; the claimant must provide adequate information to allow verification of the contact; if a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits; such benefits would constitute an overpayment which would be recouped pursuant to NMSA 1978 Section 51-1-38; any denial imposed for failure to provide the required information may be appealed pursuant to 11.3.300.500.9 NMAC.~~

~~[(d)] (6) [a-claimant] claimants filing through the interactive telephone system or internet may be told [his] the~~

~~claimant's continued claim cannot be processed further until [he] the claimant talks with a department representative; if a department representative is not available at the time of the claimant's initial telephone call, the claimant must contact a department representative at the telephone number given within [5 work days] seven (7) calendar days in order to resolve the potential issue; failure to contact the department representative as instructed may delay benefits or result in a denial; in addition, [the claimant will not be permitted to file continued claims by telephone] payment will not be released to the claimant until the issue is resolved.~~

~~B. [WORK—SEARCH WARNING. Prior to the denial of benefits, a documented warning shall be transmitted to the claimant whose work search is deemed inadequate or invalid. One warning shall be allowed for each type of infraction. An infraction, which occurs in two different weeks but on the same certification, will be considered as one infraction. If the claimant fails to meet a work search requirement on a subsequent certification following a prior documented warning, a denial will be issued. An "infraction" is a violation of the applicable rule.] A claimant whose work search is deemed inadequate or invalid shall be denied benefits for the week in question. A rebuttable presumption that the claimant failed to meet the active work-search requirements for that week will be raised in all cases where a claimant's work search is deemed inadequate or invalid. In order to overturn the denial of benefits the claimant shall provide proof that the claimant did meet the active work-search requirements for that week. If a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits. Such benefits would constitute an overpayment which would be recouped pursuant to NMSA 1978, Section 51-1-38. Any denial imposed on the basis of an inadequate or invalid work search may be appealed pursuant to 11.3.300.500.9 NMAC.~~

~~C. [WORK—SEARCH WAIVER. NMSA 1978 Section 51-1-5(A) (3) requires that an unemployed individual shall be eligible to receive benefits in a particular week only if able and available for work and actively seeking permanent and substantially full-time or part-time work in accordance with the terms, conditions, and hours common in that occupation or business. The secretary may waive this requirement for individuals who] The department may waive the work search requirements for claimants who the department determines are on temporary lay-off status from their regular full-time employment upon receipt of an assurance from the employer that the lay-off shall not exceed four weeks or upon receipt of an express offer in writing of substantially full-time work which will begin~~

~~within a period not exceeding four weeks. [A waiver made in accordance with this rule] Such waivers shall apply only to the four-week period covered on the determination. A claimant who receives a determination granting a waiver for the four-week period shall promptly transmit any change to [his] the claimant's recall date or start date to [state office claims] the department. The claimant's eligibility shall then be subject to redetermination pursuant to Subsection A of 11.3.300.308 NMAC.~~

~~[5-15-97; 7-15-98; 11.3.300.320 NMAC - Rn & A, 11 NMAC 3.300.320, 01-01-2003; A, 7-1-2003; A, 11-15-2012]~~

11.3.300.321 REEMPLOYMENT SERVICES: ~~[Effective November 24, 1994,]~~ An unemployed ~~[individual] claimant~~ shall be eligible to receive benefits with respect to any week only if ~~[he] the claimant~~ participates in reemployment services such as job search assistance services, if the ~~[individual] claimant~~ has been determined to be likely to exhaust regular benefits, and needs reemployment services pursuant to a profiling system established by the department, unless the department determines that:

A. this ~~[individual] claimant~~ has completed such services; or

B. there is justifiable cause for the claimant's failure to participate in such services; and

C. the claimant is able, available and actively seeking permanent, full-time or part-time work of at least twenty ~~(20) hours per week.~~

~~[7-15-98; 11.3.300.321 NMAC - Rn & A, 11 NMAC 3.300.321, 01-01-2003; A, 11-15-2012]~~

11.3.300.322 C L A I M CANCELLATIONS:

A. An initial or amended monetary determination, ~~[form—ES-405,]~~ notice of initial determination of benefits, may be canceled by the claimant at any time even though final, provided that no ~~[disqualification] disqualifying determination regarding a separation or suitable work issue~~ has been issued nor any benefits paid on the claim. Requests for cancellation must be made by the claimant or his authorized representative in the manner prescribed by the department and signed ~~electronically or in writing~~ by the claimant or the authorized representative of the claimant.

B. A request to change the date of a claim is deemed a request to cancel a claim and file a new claim. ~~[Subsection A of 11.3.300.322 NMAC applies to situations where a claimant desires to change the date of a claim.]~~

(1) In some situations where claims are filed near the end of a quarter, the

delay in the [of] filing of a claim for a week or two may increase the claimant's weekly benefits. If this is the situation, the [customer service representative] department will not suggest or accept a request for monetary reconsideration.

(2) Only if the claimant does not qualify for benefits using the base period consisting of the first four of the last five completed quarters will the base [periods] period be changed [pursuant to 11.3.300.305 NMAC].

(3) In situations where claimants might be benefited by a delayed filing, [the customer service representative] the department will advise the claimant that the claim determination will not show any wages for the first quarter and that this is not an error. If using the new base period will cause an increase in the weekly benefit amount, the [customer service representative] department will make an effort to advise the claimant of [his] this option to file a [post-dated] claim at a future date.

C. [Notwithstanding the provisions of Subsection A of 11.3.300.322 NMAC,] Claimants who are eligible to file a combined wage claim may cancel such claim when New Mexico is the paying state if benefits have been paid on the combined wage claim. Cancellation will be authorized only if the claimant agrees in the manner prescribed by the department to reimburse all benefits paid by cash or by authorizing any other state to deduct the amount due from any benefit payments to which the claimant is entitled. Requests for cancellation must be made in the manner prescribed by the department signed electronically or in writing by the claimant or the authorized representative of the claimant. [7-15-98; 11.3.300.322 NMAC - Rn & A, 11 NMAC 3.300.322, 01-01-2003; A, 7-1-2003; A, 11-15-2012]

11.3.300.323 VOLUNTARY WITHHOLDING OF FEDERAL INCOME TAX:

A. The department shall provide each individual filing a new claim for unemployment compensation [on or after January 1, 1997,] with the following information in documented form:

(1) unemployment compensation is subject to federal, state and local income tax;

(2) requirements exist under federal law pertaining to estimated tax payments;

(3) [the individual] a claimant may elect to have federal income tax deducted and withheld from [the individual] the claimant's unemployment compensation payments at the amount specified in the federal Internal Revenue Code, 26 U.S.C. Section 3402(p) (2); and

(4) [the individual] a claimant is

permitted to change a previously elected withholding status one time during each benefit year.

B. Amounts deducted and withheld from unemployment compensation benefits shall remain in the unemployment compensation fund until transferred to the internal revenue service as a payment of income tax.

C. The department shall follow all procedures specified by the United States department of labor and the internal revenue service pertaining to the deducting and withholding of federal income tax.

D. Amounts shall be deducted and withheld for the purpose of federal income tax payments only after amounts are deducted and withheld for any overpayments of unemployment compensation benefits, child support obligations and food stamp over-issuances required to be deducted and withheld under the Unemployment Compensation Law.

[5-15-97; 7-15-98; 11.3.300.323 NMAC - Rn & A, 11 NMAC 3.300.323, 01-01-2003; A, 11-15-2012]

11.3.300.324 OVERPAYMENTS:

~~A. Uncollectible overpayments~~

~~(1) Stale overpayments: The department may, at its sole option, determine that is it not economically efficient to actively pursue collection of overpayments which are more than 10 years old or less than \$50 and more than 7 years old; however, to the extent required by law, these debts will remain on the department's books as debts owing the department.~~

~~(2) Otherwise uncollectible debts: From time to time, the department may, at its discretion determine that is it not economically efficient to actively pursue collection of certain overpayments due to the claimant's situation or the department's resources. The overpayment remain an obligation owed by the claimant to the department. The department may cease or forbear active collection activities for either finite period or an indefinite period depending on the circumstances. The department's discretion in this matter is final.~~

~~B. "Double affirmation" means a situation in which a claimant has received benefits through a decision which was subsequently affirmed by either the appeal tribunal or the board of review. If either the appeal tribunal or the board of review affirmed or approved the payment of benefits, even if such determination is later reversed, no action shall be taken to recover the benefits paid to the claimant. Double affirmation does not mean a situation in which the claimant appeals the initial determination denying benefits; the appeal tribunal approves benefits; the employer appeals; the board of review remands to the~~

~~appeal tribunal where the employer then fails to appear.] COLLECTIONS:~~

~~A. Deferred collections: From time to time, the department may, at its discretion determine that is it not economically efficient to actively pursue collection of certain overpayments due to the claimant's situation or the department's resources. The department may cease or forbear active collection activities for either finite period or an indefinite period depending on the circumstances. However, overpayment debts will remain on the department's books as an obligation owed by the claimant to the department. The department's discretion in this matter is final.~~

~~B. "Double affirmation" means a situation in which a claimant has received benefits through a decision of the appeal tribunal which was subsequently affirmed by the secretary, the board of review or a court decision. In these situations, no action shall be taken to recover the benefits paid to the claimant even if such determination is later reversed. A remand by the appeal tribunal, secretary or the board of review for an additional hearing due to a determination of "good cause" for a failure to appear or any other reasons does not constitute a ruling in favor of the claimant for the purpose of the double affirmation rule.~~

~~[11.3.300.324 NMAC - N, 01-01-2003; A, 11-15-2012]~~

11.3.300.325 OVERPAYMENTS AND WAIVER OF OVERPAYMENTS PURSUANT TO THE TRADE ACTS AND TEMPORARY EXTENDED UNEMPLOYMENT COMPENSATION ACTS:

~~A. [In accordance with the provisions of 20 CFR 617.55, as amended from time to time, the department authorizes the waiver of overpayments paid under the Trade Acts, the Trade Adjustment Assistance (TAA) or Trade Readjustment Assistance (TRA);] The department shall use the process set forth herein to implement the waiver of overpayments paid under the Trade Acts, the Trade Adjustment Assistance (TAA), Trade Readjustment Assistance (TRA) or the Temporary Extended Unemployment Compensation (TEUC) Acts under the following circumstances:~~

~~(1) When a decision of the department results in an overpayment, an appealable determination and a request for waiver of repayment of an overpayment will be mailed to the individual. The individual seeking a waiver of an overpayment must apply in the form [prescribed] mailed by the department within [14] fourteen (14) calendar days after the issuance and transmission by the department of the overpayment determination.~~

~~(2) The application for waiver will~~

be approved if the department determines that:

(a) the application was made timely;

(b) payment was made without the fault of the individual seeking the waiver; and

(c) requiring repayment would be contrary to equity and good conscience.

(3) The department's affirmative finding of any one of the following factors of fault precludes a waiver:

(a) that the individual knowingly made a material misrepresentation, which misrepresentation resulted in the overpayment; or

(b) that the individual knowingly failed to disclose a material fact, which failure to disclose resulted in the overpayment; or

(c) that the individual knew or should have known that he was not entitled to the payment; or

(d) that the department has previously issued a determination of fraud in regards to the overpayment.

(4) The department shall consider the following factors in determining whether, in equity and good conscience, the department should require repayment:

(a) whether the overpayment was the result of a decision on appeal;

(b) whether the individual was given notice that repayment would be required in the event of reversal on appeal;

(c) whether the recovery of the overpayment would cause an extraordinary and lasting financial hardship to the individual, resulting in the individual's inability to obtain minimal necessities of food, medicine and shelter for at least ~~[30]~~ thirty (30) days and period of financial hardship lasting at least ~~[3]~~ three (3) months, and

(d) whether, if recoupment from other benefits is proposed, the length of time of extraordinary and lasting financial hardship shall be the longest potential period of benefit entitlement as seen at the time of the request for waiver of determination.

(5) In determining whether fraud has occurred, the department shall consider the following factors:

(a) whether the individual knowingly made, or cause another to make, a false statement or representation of a material fact resulting in the overpayment;

(b) whether the applicant knowingly failed, or caused another to fail, to disclose a material fact resulting in the overpayment.

B. If a determination of fraud is made, the individual shall be ineligible for any further TAA ~~[or]~~, TRA or TEUC benefits and shall be ineligible for waiver of any overpayment.

C. A finding that the overpayment was not the result of a decision

on appeal or that the recovery would not cause extraordinary and lasting financial hardship shall preclude a waiver.

D. If an individual fails, without good cause, to complete training, a job search or a relocation, any payment to such individual that is not properly and necessarily expended in attempting to complete the activity shall constitute an overpayment. Such overpayments shall be recovered or waived according to the standards of fault, equity and good conscience contained in ~~[this section]~~ 11.3.300.325 NMAC.

E. In any event, no repayment shall be required or deduction made until a notice and an opportunity for fair hearing have been provided to the applicant in accordance with 11.3.500 NMAC, a determination has been issued by the department, and the determination has become final.

[11.3.300.325 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.300.326 DOMESTIC ABUSE:

~~[A. Voluntary leaving as protection from domestic abuse:~~

~~(1) An individual is eligible for waiting period credit or benefits if that individual voluntarily leaves work due to circumstances directly resulting from domestic abuse;~~

~~(2) For purposes of this section, "domestic abuse" means abuse as defined in NMSA 1978 Section 40-13-2 (1995), and includes but is not limited to any incident by a household member against another household member resulting in:~~

- ~~(a) physical harm;~~
- ~~(b) severe emotional distress;~~
- ~~(c) bodily injury or assault;~~
- ~~(d) a threat causing imminent fear of bodily injury by any household member;~~
- ~~(e) criminal trespass;~~
- ~~(f) criminal damage to property;~~
- ~~(g) repeatedly driving by a residence or work place;~~
- ~~(h) telephone harassment;~~
- ~~(i) stalking;~~
- ~~(j) harassment, or~~
- ~~(k) harm or threatened harm to children.~~

~~(3) For purposes of this section, "household member" means a spouse, former spouse, family member, including relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, intimate partner or a person with whom the claimant has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for purposes of this section.~~

~~(4) Factors to be considered in determining if claimant voluntarily leaves work as a result of domestic violence include but are not limited to whether:~~

~~(a) claimant reasonably fears domestic abuse at or en route to or from claimant's place of employment; or~~

~~(b) claimant reasonably is required to relocate to another geographic area to avoid future domestic abuse; or~~

~~(c) claimant reasonably believes that leaving employment is necessary for the future safety of the claimant or the claimant's family due to the domestic abuse; or~~

~~(d) the abuse itself interfered with claimant's ability to work, travel or prepare for work; or~~

~~(e) claimant reasonably left the labor market to escape such abuse; or~~

~~(f) the abuse occurred at claimant's place of employment; or~~

~~(g) the abuser's relatives or friends or the abuser were co-workers of claimant or otherwise present at the worksite; or~~

~~(h) claimant informed the employer and gave the employer the opportunity to ameliorate the domestic abuse within a reasonable period of time, but the employer would not or could not do so; or~~

~~(i) claimant has filed a civil or criminal proceeding against an alleged abuser; however nothing in this provision shall not be construed as requiring the filing of a civil or criminal proceeding as a prerequisite to establishing the existence of domestic violence.~~

~~(5) When determining whether an individual has experienced domestic abuse for purposes of unemployment insurance benefits, the claimant shall provide legal and medical documentation and a sworn statement by the claimant regarding the situation satisfactory to the department. The documentation shall be of a competent nature, reasonably susceptible to verification and bearing an indicia of credibility, including but not limited to police or court records or other documentation from a shelter worker, attorney at law, member of the clergy, physician or other medical or mental health practitioner from whom claimant has sought assistance for the domestic abuse. Upon review of the claimant's documentation, the department may require additional supporting documentation if the department representative reviewing the claim believes the claimant's initial documentation is lacking credibility or warrants verification.~~

~~B. Procedure:~~

~~(1) The existence of domestic violence shall be established by a preponderance of the evidence.~~

~~(2) To be eligible for benefits as a result of domestic violence, claimant must have been determined to be monetarily eligible for unemployment insurance compensation benefits.~~

~~(3) Claimant must indicate at the time of filing the claim that the reason for leaving employment was as a result of qualifying domestic abuse.~~

(4) Claimant must provide evidence tending to prove the existence of qualifying domestic abuse within 10 days of the filing of the claim.

(5) Claimant will be entitled to receive benefits retroactively to the date of filing if adequate documentation is received within this time period.

(6) Only an alleged victim of domestic violence may obtain benefits under this provision; an alleged perpetrator may not.

(7) If no documentation is received within the specified period, an initial determination will be issued denying the claim on the basis of domestic abuse.

(8) If claimant subsequently submits documentation tending to demonstrate the existence of domestic abuse, a determination will be made on the basis of the documentation submitted. Claimant will not be entitled to receive benefits retroactively to the date of filing but will be entitled to receive benefits retroactively to the date of submission of the documentation supporting domestic violence.

(9) If proven, an initial determination will be issued identifying domestic abuse as the reason for the separation.

C. A contributing employer's account will not be charged any portion of benefits paid as a result of a separation determined to have been as a result of domestic abuse.]

A. A claimant is eligible for waiting period credit or benefits if the claimant voluntarily leaves work due to circumstances directly resulting from domestic abuse.

(1) "Domestic abuse" means abuse as defined in NMSA 1978 Section 40-13-2 (1995), and includes but is not limited to any incident by a household member against another household member resulting in: physical harm; severe emotional distress; bodily injury or assault; a threat causing imminent fear of bodily injury by any household member; criminal trespass; criminal damage to property; repeatedly driving by a residence or work place; telephone harassment; stalking; harassment, or harm or threatened harm to children.

(2) "Household member" means a spouse, former spouse, family member, including relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, intimate partner or a person with whom the claimant has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member.

B. DOCUMENTATION: The claimant shall provide documentation satisfactory to the department for the determination of whether the claimant has experienced domestic abuse for purposes

of unemployment insurance benefits. The documentation shall be of a competent nature, reasonably susceptible to verification and bearing indicia of credibility. The documentation shall include a sworn statement by the claimant regarding the domestic abuse. The documentation may include information from individuals or organizations from whom the claimant has sought assistance for the domestic abuse, including but not limited to police or court records, documentation from a shelter worker, attorney at law, a member of the clergy, physician or other medical or mental health practitioner. If upon review of the claimant's documentation, the department determines that further verification is warranted, the department may require additional supporting documentation.

C. DETERMINATION: To be eligible for benefits as a result of domestic violence, the department must determine that the claimant is monetarily eligible for unemployment insurance compensation benefits. The existence of domestic violence shall be established by a preponderance of the evidence.

(1) Factors to be considered in determining if claimant voluntarily leaves work as a result of domestic violence include but are not limited to whether: claimant reasonably fears domestic abuse at or en route to or from claimant's place of employment; claimant reasonably is required to relocate to another geographic area to avoid future domestic abuse; claimant reasonably believes that leaving employment is necessary for the future safety of the claimant or the claimant's family due to the domestic abuse; the abuse itself interfered with claimant's ability to work, travel or prepare for work; claimant reasonably left the labor market to escape such abuse; the abuse occurred at claimant's place of employment; the abuser's relatives or friends or the abuser were co-workers of claimant or otherwise present at the worksite; claimant informed the employer and gave the employer the opportunity to ameliorate the domestic abuse within a reasonable period of time, but the employer would not or could not do so; claimant has filed a civil or criminal proceeding against an alleged abuser; however nothing in this provision shall be construed as requiring the filing of a civil or criminal proceeding as a prerequisite to establishing the existence of domestic violence.

(2) Claimant must indicate at the time of filing the claim that the reason for leaving employment was as a result of qualifying domestic abuse.

(3) Claimant must provide evidence tending to prove the existence of qualifying domestic abuse within ten (10) days of the filing of the claim.

(4) Claimant will be entitled to

receive benefits retroactively to the date of filing if adequate documentation is received within ten (10) days of the filing of the claim.

(5) If no documentation is received within ten (10) days of the filing of the claim, an initial determination will be issued denying the claim on the basis of domestic abuse.

(6) If claimant subsequently submits documentation tending to demonstrate the existence of domestic abuse, a determination will be made on the basis of the subsequent documentation submitted. Claimant will not be entitled to receive benefits retroactively to the date of filing but will be entitled to receive benefits retroactively to the date of submission of the subsequent documentation supporting domestic abuse.

(7) Only an alleged victim of domestic abuse may obtain benefits under this provision; an alleged perpetrator may not.

D. If domestic abuse is proven, a determination will be issued identifying domestic abuse as the reason for the separation and a contributing employer's account will not be charged any portion of benefits paid.

[11.3.300.326 NMAC - N, 7-1-2003; A, 11-15-2012]

11.3.300.327 DEPENDENTS' ALLOWANCE:

[A. The dependents' allowance: As provided in NMSA 1978 Section 51-1-4 (2003), A claimant is entitled to receive benefits in the amount of \$15.00 for each unemancipated child, up to a maximum of four children, and not to exceed fifty percent of the claimant's weekly benefit amount:

B. Asserting the dependents allowance claim: To be eligible for dependents' allowance, the claimant shall declare the dependents' allowance on the date that the claimant files an initial claim for the benefit year. The time for declaration may not be extended except for good cause.

C. Eligibility: Within 14 days of an application for the dependant allowance, the claimant must supply verification that, for each person for whom the allowance is claimed, that:

(1) the person is the claimant's child; and

(2) is under the age of 18; and

(3) the person is unemancipated; and

(4) the child is:

(a) in fact dependent on and wholly or mainly supported by the claimant; or

(b) in the legal custody of the claimant pending adjudication of a petition for adoption filed in a court of competent jurisdiction; or

(c) the subject of a decree or order from a court of competent jurisdiction requiring the claimant to contribute to the dependent's support; and no other individual is receiving benefits for that child:

D. Definitions for purposes of this section:

(1) "Child" means a person:

(a) who is related to the claimant within the third degree of consanguinity; or

(b) who is a stepchild of the claimant:

(i) by virtue of the claimant's marriage to the child's biological or legal parent;

(ii) which biological or legal parent has sole or primary legal and physical custody of the child;

(iii) which child physically resides with the claimant; or

(c) who is in the claimant's legal or physical custody pursuant to a decree or order from a court of competent jurisdiction including but not limited to orders of custody, guardianship, conservatorship, trusteeship or foster care.

(2) "Wholly or mainly supporting" means that the claimant who is applying for the dependents' allowance is in fact furnishing contemporaneously more than 50% of the actual cost of support for the dependent regardless of the legal obligation of another to provide such support. "Cost of support" includes but is not limited to a reasonable pro-ration of the expenses of shelter (including but not limited to household grocery, toiletries, household cleaning products, rent or mortgage payments, customary utilities such as water, sewer, gas, electricity and basic telephone), school expenses of the child (including but not limited to tuition, books, clothing and supplies for special school or educational activities), medical and dental expenses including actual payments and payments of insurance premiums; payment of expenses related to any special needs of the child.

E. The claimant has the burden of establishing to the satisfaction of the department that the claimant is actually furnishing more than one-half of the cost of support of the child.

F. No fixed dollar amount shall be used to make the determination regarding support.

(1) The department may consider the cost of food, clothing, education, medical care and the proportionate share of fixed expenses including but not limited to shelter and other related expenses for the support of the dependent child.

(2) The department may also use any child support worksheets utilized by a court of competent jurisdiction in determining the amount of child support due each parent.

G. Verification:

(1) Claimant shall not be eligible to claim a dependents' allowance for any person unless the dependent has been issued a social security number or other federal identification sufficient for purposes of verification.

(2) A claimant who is otherwise eligible for benefits and who has not yet submitted the required dependents' allowance verification shall not be paid the dependents' allowance unless and until verification satisfactory to the department is presented within the applicable time period.

(3) Upon receipt of verification, the dependents' allowance shall be paid retroactively.

H. Changes in eligibility:

(1) During the life of the claim, should claimant become entitled to a dependents' allowance, claimant may request from the department that the dependents' allowance be granted. Claimant will be required to provide proof that the dependent for whom the benefit is being sought was not a dependent at the time of the filing of the initial claim. The department will issue a written determination whether claimant is granted or denied the dependents' allowance.

(2) During the life of the claim, should claimant no longer be entitled to claim a dependents' benefit for one or more of the dependents for whom claimant is receiving the dependents' allowance, claimant is required to report to the department within five days any such change in circumstances. A claimant who fails to report such change in circumstances may be assessed an overpayment.

(3) Should the circumstances of who provides support for the dependent change during the life of the claim, the claimant shall inform the department within 5 days of the change of circumstances.

I. One allowance per dependent:

(1) Only one claimant may receive a dependents' allowance for any specific dependent.

(2) Multiple claims:

(a) In the event two claimants each assert entitlement to receive the dependents' allowance for the same child, upon notification of the dispute, the department shall continue making payments to the claimant who initially demonstrated entitlement to receive benefits for the dependent.

(b) A later claimant may demonstrate superior entitlement to claim the dependents' allowance for a child by producing documentation showing that the later claimant has a paramount right to claim the dependents' allowance, including but not limited to:

(i) A custody decree or from a court of competent jurisdiction finding that the dependent child is or should

be in the primary physical custody of the later claimant or that the later claimant is obligated to provide more than 50% of the dependent child's support; and that

(ii) The later claimant is in fact the primary physical custodian of the dependent child or is in fact providing more than 50% of the dependent child's support.

(iii) A custody decree or from a court of competent jurisdiction or similar document including, but not limited to IRS form 8332, finding that the later claimant is entitled to claim the child as a dependent for official purposes.

(c) An initial determination of eligibility for supplemental weekly benefits for dependents will be made as soon as possible after the request for such benefits is filed. A written determination will be rendered granting or denying benefits for dependents and identifying the amount.

(d) Once a claimant has been determined to be entitled to the dependents' allowance, that determination will remain in effect for the life of the claim, subject to the provisions of Subsection G of 11.3.300.327 NMAC.

J. Payment of regular benefits will not be delayed due to any delay in processing the application for dependent benefits:

K. A contributing employer's account will not be charged any portion of benefits paid for the dependents' allowance.

L. The provisions of this section apply to all claims filed on or after January 1, 2004.]

A. A claimant is entitled to receive benefits in the amount of \$25.00 for each unemancipated child, up to a maximum of two children, and not to exceed fifty percent of the claimant's weekly benefit amount.

B. The claimant shall declare the dependents' allowance on the date that the claimant files an initial claim for the benefit year.

C. Within fourteen (14) days of an application for the dependents' allowance, the claimant must supply verification that, for each child for whom the allowance is claimed, the child is the claimant's child, under the age of 18, unemancipated and the child is:

(1) in fact dependent on and wholly or mainly supported by the claimant; or

(2) in the legal custody of the claimant pending adjudication of a petition for adoption filed in a court of competent jurisdiction; or

(3) the subject of a decree or order from a court of competent jurisdiction requiring the claimant to contribute to the dependent's support; and no other individual is receiving dependents' allowance benefits

for that child under the Unemployment Compensation Law.

D. Definitions: "Child" means a person:

(1) who is related to the claimant within the third degree of consanguinity; or

(2) who is a stepchild of the claimant by virtue of the claimant's marriage to the child's biological or legal parent and that biological or legal parent has sole or primary legal and physical custody of the child and the child physically resides with the claimant; or

(3) who is in the claimant's legal or physical custody pursuant to a decree or order from a court of competent jurisdiction including but not limited to orders of custody, guardianship, conservatorship, trusteeship or foster care;

(4) "wholly or mainly supporting" means that the claimant who is applying for the dependents' allowance is in fact furnishing contemporaneously more than 50% of the actual cost of support for the dependent.

E. The claimant has the burden of establishing to the satisfaction of the department that the claimant is actually furnishing more than one-half of the cost of support of the child.

F. No fixed dollar amount shall be used to make the determination regarding support.

(1) The department considers "cost of support" to include but is not limited to a reasonable proration of the expenses of shelter (including but not limited to household grocery, toiletries, household cleaning products, rent or mortgage payments, customary utilities such as water, sewer, gas, electricity and basic telephone), school expenses of the child (including but not limited to tuition, books, clothing and supplies for special school or educational activities), medical and dental expenses including actual payments and payments of insurance premiums; payment of expenses related to any special needs of the child.

(2) The department may also use any child support worksheets utilized by a court of competent jurisdiction in determining the amount of child support due from each parent.

G. Verification:

(1) Claimant shall not be eligible to claim a dependents' allowance for any person unless the dependent has been issued a social security number or other federal identification sufficient for purposes of verification.

(2) A claimant who is otherwise eligible for benefits and who has not yet submitted the required dependents' allowance verification shall not be paid the dependents' allowance unless and until verification satisfactory to the department is presented.

(3) Upon receipt of verification within fourteen (14) days of the application the dependents' allowance shall be paid retroactively to the date of the application.

(4) If the claimant submits verification after fourteen (14) days, the claimant will not be entitled to receive benefits retroactively to the date of the application but will be entitled to receive benefits retroactively to the date of submission of verification satisfactory to the department.

H. Changes in eligibility:

(1) During the life of the claim, should claimant become entitled to a dependents' allowance, claimant may request from the department that the dependents' allowance be granted. Claimant will be required to provide proof that the dependent for which the benefit is being sought was not a dependent at the time of the filing of the initial claim. The department will issue a written determination whether claimant is granted or denied the dependents' allowance.

(2) During the life of the claim, should claimant no longer be entitled to claim a dependents' benefit for one or more of the dependents for whom claimant is receiving the dependents' allowance, claimant is required to report to the department within five (5) days any such change in circumstances. A claimant who fails to report such change in circumstances may be assessed an overpayment.

(3) Should the circumstances of who provides support for the dependent change during the life of the claim, the claimant shall inform the department within five (5) days of the change of circumstances.

I. Multiple claims: Only one claimant may receive a dependents' allowance for any specific dependent. In the event two claimants each assert entitlement to receive the dependents' allowance for the same child, upon notification of the dispute, the department shall continue making payments to the claimant who the department initially determined was entitled to receive benefits for the dependent. A later claimant may demonstrate superior entitlement to claim the dependents' allowance for a child by producing documentation showing that the later claimant has a paramount right to claim the dependents' allowance, including but not limited to:

(1) a custody decree or order from a court of competent jurisdiction finding that the dependent child is or should be in the primary physical custody of the later claimant or that the later claimant is obligated to provide more than 50% of the dependent child's support and that the later claimant is in fact the primary physical custodian of the dependent child or is in fact providing more than 50% of the dependent child's support;

(2) a custody decree or order from a court of competent jurisdiction or similar

document including, but not limited to IRS form 8332, finding that the later claimant is entitled to claim the child as a dependent for official purposes.

J. An initial determination of eligibility for supplemental weekly benefits for dependents will be made as soon as possible after the request for such benefits is filed. A written determination will be rendered granting or denying benefits for dependents and identifying the amount.

K. Once a claimant has been determined to be entitled to the dependents' allowance that determination will remain in effect for the life of the claim, subject to the provisions of Subsection H of 11.3.300.327 NMAC.

L. Payment of regular benefits will not be delayed due to any delay in processing the application for dependent benefits.

M. A contributing employer's account will not be charged any portion of benefits paid for the dependents' allowance.

[11.3.300.327 NMAC - N, 7-1-2003; A, 11-15-2012]

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

This is an amendment to 11.3.400 NMAC, Sections 6, and 402 through 404, 406, 408, 410, 412, 413, 415, 417, 419 through 421 and 425 effective 11-15-2012.

11.3.400.6 OBJECTIVE: The purpose of these rules is to provide clarification of the Unemployment Compensation Law. These rules assist employers and claimants in better understanding how specific sections of the law are being administered by the department. The rules also assist employers in better compliance and provide understanding of the department's procedure necessary to meet its requirements.

[7-15-98; 11.3.400.6 NMAC - Rn & A, 11 NMAC 3.400.6, 9-1-2001; A, 11-15-2012]

11.3.400.402 IDENTIFICATION OF EMPLOYEES: Each employer shall report an employee's social security account number in making any report required by the department with respect to such employee. If the employee has no such number, the employer shall request the employee show [him] the employer a receipt issued by the social security administration acknowledging that the employee has filed an application for an account number. The receipt shall be retained by the employee. In making any report required by the department with respect to such an employee, the employer shall report the date of issue of the receipt, its termination date, the address of the issuing office, and the name and address of the

employee exactly as shown in the receipt. [7-15-98; 11.3.400.402 NMAC - Rn & A, 11 NMAC 3.400.402, 9-1-2001; A, 11-15-2012]

11.3.400.403 POSTING OF

NOTICES: Each employer, including each person or entity which has elected, with the approval of the department, to become an employer, shall post and maintain printed notices to individuals in its employ informing them that they are covered under the provisions of the Unemployment Compensation Law of New Mexico. Such notices shall also include information as to the employees' rights to benefits and instructions as to the procedure for registering for work and filing claims for benefits. No such notice may be posted or maintained by any person or entity to whom an unemployment insurance account has not been assigned by the department or who has ceased to be an employer. Such notices shall be furnished by the department in such numbers as the department may determine to be necessary and shall be posted and maintained in conspicuous places near the location where the workers' services are performed. The department may furnish other notices, including those containing either information as to employees' rights to benefits or instructions as to the procedure for registering for work and for filing claims for benefits [may be furnished by the department]. These notices shall be posted or made available by each employer so that an employee entitled to benefits is informed of his rights to benefits and the means of attaining them.

[7-15-98; 11.3.400.403 NMAC - Rn & A, 11 NMAC 3.400.403, 9-1-2001; A, 11-15-2012]

11.3.400.404 WAGE AND CONTRIBUTION REPORTS BY EMPLOYING UNITS:

A. **WAGE AND CONTRIBUTION REPORT FILING REQUIREMENTS:** An employer's wage and contribution report must be filed on a form prescribed by the department or a reasonable facsimile of the prescribed form on or before the last day of the month immediately following the end of the calendar quarter. If the due date falls on a Saturday, Sunday or legal holiday, the report is due on the next department business day. A wage and contribution report must be filed even though no wages were paid or no contribution or tax is due for the quarter unless the employer's liability has been terminated or suspended pursuant to NMSA 1978 Section 51-1-18. Each wage and contribution report must include only wages, as the term is defined in NMSA 1978 Section 51-1-42(T), paid during the quarter being reported. Corrections of errors made

on previously submitted reports must be submitted separately on a form prescribed by the department.

B. **S I G N A T U R E REQUIREMENTS ON WAGE AND CONTRIBUTION REPORTS:** Wage and contribution reports must have an appropriate signature by the owner, partner, corporate officer or a designated representative of the employer. If the employer appoints a designated representative who is not an employee, a power of attorney authorizing the designated representative to sign the reports must be filed with the department. Unsigned or improperly signed reports that are returned to the employer for proper signature will not be considered valid or filed until they are properly signed and returned to the department.

C. **WAGE DETAIL REPORTING REQUIREMENTS:** ~~[Employers who are reporting two hundred fifty or more employees in any calendar quarter must file their quarterly wage and contribution report on magnetic media or other electronic means, using a format prescribed by the department. Employers reporting less than two hundred fifty employees in a calendar quarter may elect to use magnetic, or other means specified by the department, reporting. Reports that contain extraneous information, are incomplete or otherwise prepared improperly are not acceptable and will be returned to the employer and become subject to the penalties prescribed in NMSA 1978 Section 51-1-12.]~~ All employers must file their quarterly wage and contribution report electronically, using one of the acceptable formats prescribed by the department or directly on-line. Reports that contain extraneous information, are incomplete or otherwise submitted or prepared improperly will not be acceptable and will be rejected and become subject to the following penalties:

(1) if the required report for any calendar quarter is not filed within ten (10) days after due date, a penalty of fifty dollars (\$50.00) is to be paid by the employer;

(2) if the contributions due on such report are not paid in full within ten (10) days after due date, an additional penalty of five percent but not less than twenty-five dollars (\$25.00) is to be paid by the employer on any such contributions remaining unpaid;

(3) if any payment required to be made by the Unemployment Compensation Law (51-1-1 NMSA 1978) is attempted to be made by check which is not paid upon presentment, a penalty of twenty-five dollars (\$25.00) shall be paid by the employer; and

(4) in no case shall any penalty as herein provided or as imposed by this section be assessed for any quarter prior to the six completed calendar quarters immediately preceding the quarter in which the employer shall be determined subject to

the Unemployment Compensation Law; and in no case shall a penalty for late reporting or late payment of contribution be imposed if, in the opinion of the secretary, an employer's late reporting, late payment of contribution, or both, was occasioned by circumstances beyond the control of the employer, who in good faith exercised reasonable diligence in an effort to comply with the reporting and contribution payment provisions of the Unemployment Compensation Law.

D. **ESTIMATED WAGE AND CONTRIBUTION REPORTS:** If an employer fails or refuses to make reports in a manner as prescribed in Subsection C of 11.3.401.404 NMAC showing what the employer claims for the amount of contributions which it believes to be due, the department's representative shall estimate the amount according to the process described in Subsection E of 11.3.401.404 NMAC. After the estimated contribution is calculated, the department shall mail a notice to the employer advising it that the department is estimating the amount of contribution due, providing the estimated amount and advising that ten (10) days after the notice is given, the lien will be recorded. After the ten (10) days provided in the notice has elapsed, the lien shall be recorded. Upon issuance, the department shall cause the warrant of levy and lien to be recorded in same manner as any other warrant issued by the department. If the employer does not make a showing to the satisfaction of the secretary that the estimated contribution is incorrect within thirty days after the warrant of levy and lien is filed with the county clerk, then the estimated amount shown in the warrant shall be and become the amount of the contribution due for the period stated in the warrant. If thereafter, the department should receive from the employer reports for the estimated quarters containing different amounts, the estimation of the contribution due shall not be altered, and the employer shall remain liable for the amount assessed. ~~[The information provided by the employer on the report, ES 903(B), as to individual employees shall be entered in the department's records]~~ The information provided by the employer as to individual employees shall be on a report form prescribed by the department and shall be entered in the department's records.

E. **E S T I M A T I O N PROCESS:** The estimated contribution shall be one and one-half times higher than the highest contribution reported in any quarter in the most recent two years or eight quarters in which wage reports were filed. If no wage and contribution report has been filed since the employer was determined liable or if the employer has never submitted a report to determine liability to the department, no estimations shall be done unless required to clear an unemployment insurance claim.

F. ADMINISTRATIVE ERROR: At any time, the department may correct any error the unemployment insurance assistant bureau chief for the tax section determines has been made even if notifications have been given, estimations made or contributions paid pursuant to the notifications. By way of example and not by limitation, such internal errors may be the result of an estimation that has been made after notice was mailed to an incorrect address, mailed to a deceased or incapacitated natural employer, estimations otherwise imposed without proper notice to the employer, estimations imposed due to misinformation in a wage claim which precipitated the establishment of an incorrect account, or other incidents of human or computer error or excusable neglect within the department. Estimations may be removed only pursuant to the written authorization of the unemployment insurance assistant bureau chief for the tax section.

[7-15-98; 11.3.400.404 NMAC - Rn & A, 11 NMAC 3.400.404, 9-1-2001; A, 01-01-2003; A, 11-15-2012]

11.3.400.406 DUE DATE FOR PAYMENT OF CONTRIBUTIONS; NOTICE OF DELINQUENCY; INTEREST AND PENALTIES:

A. All contributions shall become due on and shall be paid on or before the last day of the month immediately following the close of the calendar quarter for which they are payable, and any employer failing to pay any contribution when due shall be delinquent. Before the thirtieth day of such employer's delinquency under this rule, the department shall mail to [him] the employer at the address registered for [him or to his] the employer or to the employer's last known address - a notice of delinquency. The failure of the department to mail, or the failure of the employer to receive any report or notice, or the failure of the department to locate or contact an employer and inform [him] the employer of the existence of the Unemployment Compensation Law of New Mexico or [his] the employer's obligations thereunder, shall not affect the employer's liability for any contribution, interest or penalty. Interest and penalties shall be assessed from and after the due date in accordance with the Unemployment Compensation Law of New Mexico.

B. Whenever the [unemployment insurance assistant bureau chief for the tax section] department finds that the collection of contributions from any particular employer may be jeopardized by delaying the collection thereof until the date otherwise prescribed, [he] the department may advance the due date of such employer's contributions to such date, succeeding the period with respect to which they have accrued, as [he] the department

deems advisable, or may in [his] the department's discretion, upon such finding prescribe payment of contributions from such employer monthly rather than quarterly. Monthly contributions shall become due on and shall be paid on or before the fifteenth day of the month next following the close of the month for which they are payable. Contributions not paid on or before the due date shall become delinquent and interest and penalties shall be assessed from and after the due date.

C. The [assistant unemployment insurance bureau chief for the tax section may, at his discretion] department may, at its discretion, furnish an employer written permission to pay delinquent contributions in installments. Any arrangement for payment in installments must make provision for the payment of interest on the past due delinquent contribution balances from the due date through the ending date on which such installment is paid. In the event that such employer fails to pay an installment in full when it becomes due, the entire unpaid balance of contributions, interest and penalty will become due. No written permission for the payment of contributions shall preclude collection action pursuant to NMSA 1978 Section 51-1-36 against such employer.

[7-15-98; 11.3.400.406 NMAC - Rn & A, 11 NMAC 3.400.406, 9-1-2001; A, 11-15-2012]

11.3.400.408 P A Y M E N T OF CONTRIBUTIONS FOR UNCOMPLETED CALENDAR QUARTERS:

Contributions shall be payable for any expired part of an uncompleted calendar quarter with respect to wages for employment in such period in any case where an employer, by reason of the removal from the state, discontinuance, sale, or other transfer of [his] the employer's business has ceased to employ individuals in employment. Such contributions shall become due and payable not later than thirty days after the removal, discontinuance, sale or other transfer of the employer's business; provided that where an application for transfer of the employer's account is filed within said 30-day period, it must be accompanied by all quarterly reports and payments as required by 11.3.400.415 and 416 NMAC. Interest shall be assessed from and after said due date. Penalties shall be assessed in accordance with law.

[7-15-98; 11.3.400.408 - Rn, 11 NMAC 3.400.408, 9-1-2001; A, 11-15-2012]

11.3.400.410 EXTENSION OF DUE DATE FOR FILING QUARTERLY REPORTS OR PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS: [Upon written application to the unemployment

~~insurance assistant bureau chief for the tax section, establishing to his satisfaction] Upon written application to the department establishing to the department's satisfaction that good cause exists therefore, an extension not to exceed thirty (30) days may be granted with respect to the date when the employer's quarterly wage and contribution report or payment of contributions or payments in lieu of contributions shall become due and be paid. Such application must be filed prior to the regular due date. For purposes of [this rule, good cause] 11.3.400.410 NMAC, "good cause" means unavoidable circumstances which render the employer's records incomplete or inaccessible for the preparation of the report and computation of the contributions due within the time otherwise prescribed and it shall not include any dilatory act or negligence by the employer.~~

[7-15-98; 11.3.400.410 NMAC - Rn & A, 11 NMAC 3.400.410, 9-1-2001; A, 11-15-2012]

11.3.400.412 IMPOSITION OF PENALTIES FOR LATE REPORTS AND LATE PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:

Penalties shall be imposed and payable in accordance with [NMSA 1978 Section 51-1-12] Subsection C of 11.3.400.404 NMAC for failure to file any quarterly wage and contribution report or failure to pay contributions or payment in lieu of contributions when due.

[7-15-98; 11.3.400.412 NMAC - Rn & A, 11 NMAC 3.400.412, 9-1-2001; A, 11-15-2012]

11.3.400.413 PROCEDURE FOR RELIEF FROM PENALTIES:

[A. — An employer aggrieved by the imposition of penalties for late reports or late payment of contributions or payments in lieu of contributions may, within fifteen days following the mailing of notice thereof, file a written application for relief with the assistant unemployment insurance bureau chief for the tax section. A request for relief must state with particularity wherein the employer feels the imposition of penalties is in error and any facts or evidence in support of the request.

B. — The — assistant unemployment insurance bureau chief for the tax section may, at his discretion, review the application on the record and facts and evidence submitted, or may schedule an informal conference in accordance with Subsection C of 11.3.500.512 NMAC.

C. — In any case where the employer is dissatisfied with the decision of the assistant unemployment insurance bureau chief for the tax section, the employer may, within fifteen calendar days from the date of mailing of the decision, file an appeal

with the appeal tribunal for the department in accordance with 11.3.500.8 NMAC governing benefit determination appeals. 11.3.500 NMAC governing benefit appeals shall apply to and govern the adjudication of all such appeals.

~~D. The secretary shall not permit taxpayers and their representatives to bypass the normal procedures of the department to obtain relief from penalties directly from the secretary.]~~

A. An employer aggrieved by the imposition of penalties for late reports or late payment of contributions or payments in lieu of contributions may, within fifteen (15) days following the mailing of notice thereof, file an appeal with the appeal tribunal for the department in accordance with 11.3.500 NMAC.

B. The secretary shall not permit taxpayers and their representatives to bypass the normal procedures of the department to obtain relief from penalties directly from the secretary.

[7-15-98; 11.3.400.413 NMAC - Rn & A, 11 NMAC 3.400.413, 9-1-2001; A, 01-01-2003; A, 11-15-2012]

11.3.400.415 EXPERIENCE RATING OF EMPLOYERS: This rule shall govern the experience rating provisions of NMSA 1978 Section 51-1-11.

A. DEFINITIONS: For purposes of 11.3.400.415 NMAC, the following definitions shall apply:

(1) The "total assets in the fund" means all contributions collected, (except those contributions collected pursuant to contribution schedule B of NMSA 1978, Section 51-1-11), all payments in lieu of contributions collected or due from nonprofit organizations or governmental units and accounts receivable for federal shareable benefits for periods through the computation date of June 30.

(2) "Last annual payrolls" means the total payrolls as reported by all employers subject to contributions for the twelve-month period ending December 31 prior to the computation date [except that, for rate year 2004, "last annual payrolls" means total payrolls as reported by all employers subject to contributions for the twelve-month period ending December 31, 2000].

(3) The "employer reserve" for each employer shall be the excess of employer's total contributions paid less total benefit charges computed as a percentage of the employer's "average payroll" reported for contributions. The "employer reserve" total contributions for each employer shall not include payments made pursuant to contribution schedule B of NMSA 1978, Section 51-1-11. Each "employer reserve" account percentage shall be rounded to the nearest one-tenth of one percent.

(4) Payments made pursuant to

contribution schedule B of NMSA 1978, Section 51-1-11 are not reportable for Federal Unemployment Tax Act (FUTA) tax credit purposes and are not considered in the calculation to determine the "employer reserve."

B. ELIGIBILITY OF EMPLOYER'S ACCOUNT FOR COMPUTED RATE BASED ON BENEFIT EXPERIENCE. For purposes of the interpretation and application of NMSA 1978 Section 51-1-11E, no employer's experience rating account shall be deemed to have been chargeable with benefits throughout the preceding thirty-six consecutive calendar month period ending on a computation date as defined in NMSA 1978 Section 51-1-11H(3)(d), unless as of such computation date, the department finds that the employer paid wages in employment during any part of the first calendar quarter of the three and one-half year period ending on such computation date and that the payment of such wages was not interrupted for nine or more consecutive calendar quarters, or by termination of coverage under NMSA 1978 Section 51-1-18; provided, all quarterly wage and contribution reports received by the department by July 31 following the computation date will be considered in computing the rate for the succeeding calendar year.

~~[C. The amendment to Paragraph (2) of Subsection A of 11.3.400.415 NMAC, "except that, for rate year 2004, "last annual payrolls" means total payrolls as reported by all employers subject to contributions for the twelve-month period ending December 31, 2000" is adopted as an emergency measure to implement legislative changes enacted by the New Mexico legislature in 2003. The emergency provision will remain in place indefinitely, but its effect will be for the calendar years 2003 and 2004. Notice and hearing on the promulgation of the emergency measure shall occur after the enactment as required by Sections 201 and 205 of 11.3.200 NMAC in that the amended rule shall be published on the department's website within seven days of the effective date and in the next available publication of the New Mexico register.]~~

[07-15-98; 11.3.400.415 NMAC - Rn & A, 11 NMAC 3.400.415, 09-01-2001; A, 01-01-2003; A, 08-27-2003; A, 07-16-2007; A, 11-15-2012]

11.3.400.417 EXPERIENCE HISTORY TRANSFERS:

A. TOTAL EXPERIENCE HISTORY TRANSFERS:

(1) ACQUISITION OF ALL EMPLOYING ENTERPRISES: A total experience history transfer is available to a successor enterprise only in the situation where the successor has acquired all of

the predecessor's business enterprise and, where the predecessor, immediately after the business transfer as defined in 11.3.400.416 NMAC, ceases operating the same enterprise except for liquidation purposes.

(a) In the sale of a business enterprise, the phrase "all assets" includes the transfer of a favorable experience history.

(b) In the sale of a business enterprise, the phrase assumption of "all liabilities" includes an unfavorable experience history and any unpaid contributions.

(2) NOTIFICATION BY SUCCESSOR: A successor who has acquired all of the predecessor's employing enterprises shall notify the department of such acquisition, in writing, on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise or enterprises. Upon receipt of such notification, the department shall furnish a statement of account to the predecessor and the successor, if the predecessor is delinquent in either submitting wage and contribution reports or the payment of contributions.

(a) A successor who has acquired all of the predecessor's employing enterprises shall notify the department of such acquisition, in writing, on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise or enterprises.

(b) If the successor employer fails to notify the department on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition, when the department receives actual notice of the transfer, the department shall effect the transfer and shall impose a penalty of \$50.00 upon the successor.

(c) Notice of the transfer must be received by the department during the calendar year of the transaction transferring the employing enterprises.

(3) LIQUIDATION WAGES: Liquidation wages reported by the predecessor and contributions paid by the predecessor for liquidation wages shall be credited to the successor's account for experience rating purposes.

(4) WRITTEN DETERMINATION TO SUCCESSOR AND PREDECESSOR: The department shall issue a written determination to the successor and predecessor approving or disapproving the total history transfer. All such determinations shall be subject to the provisions of 11.3.500.512 NMAC governing appeals of contribution or tax determinations.

~~[(a) Failure to timely dispute or appeal a determination approving a~~

~~transfer without good cause will deprive the predecessor of the previous favorable experience history.~~

~~_____ (b) Failure to timely notify the department or dispute or appeal a denial of the transfer of a favorable experience transfer without good cause will deprive the successor business of the opportunity for the transfer of the favorable experience history transfer.] Failure to timely appeal a denial of the transfer of a favorable experience transfer without good cause as provided in 11.3.400.417 NMAC, will deprive the successor business of the opportunity for the transfer of the favorable experience history transfer.~~

(5) Predecessor resumes or continues in business: If the predecessor owner operates a new or different business enterprise upon or after the business transfer, the predecessor shall be assigned a new account number and a standard rate in accordance with the provisions of NMSA 1978 Section 51-1-11E.

B. O U T - O F - S T A T E EXPERIENCE HISTORY TRANSFERS, PROCEDURE:

(1) An employing enterprise moving a business into New Mexico; the "out-of-state entity" may seek a transfer of the enterprise's experience history from the predecessor state.

(2) At any time during the application process, until the close of the 15 day appeal period after determination, the employing enterprise may withdraw its application for an out-of-state history transfer and accept New Mexico rate for new businesses.

(3) Upon making application for an out-of-state experience rate transfer, the employing enterprise will temporarily be issued a standard rate in accordance with the provisions of NMSA 1978 Section 51-1-11E until the out-of-state experience history transfer is completed.

(4) The initial registration must specify that the employing enterprise seeks an out-of-state experience history transfer. No retroactive requests will be entertained.

(5) The initial registration and application must be made within 30 days of commencing business within the state of New Mexico.

(6) To be eligible for the out-of-state transfer, the employing enterprise must have been in operation for at least three full calendar years in the predecessor state.

(7) The out-of-state employing enterprise must physically close its operation in entirety in the predecessor state and complete all liquidation within six months of opening the New Mexico operation.

(8) The business enterprise opened in New Mexico must be of the same type and nature as the enterprise operated in the predecessor state.

(9) If the entity owning the business enterprise maintains other businesses in the predecessor state, only the experience history attributable to the enterprise actually relocated to New Mexico may be transferred.

(10) Within 20 days of submitting the application for an out-of-state experience history transfer, the employing enterprise shall submit a full and complete account history for at least the immediate three calendar years. This history must include:

(a) the number of workers laid off at the time the out-of-state entity closed its operation in the predecessor state;

(b) the nature of the business being transferred including a statement demonstrating that the out-of-state enterprise and the proposed New Mexico enterprise are of the same nature and type;

(c) copies of the periodic wage reports submitted to the predecessor state for at least three full calendar years plus the current year immediately preceding the transfer application.

(11) The account history must be validated, certified and exemplified by the monitoring agency of the predecessor state where the wages were reported; it shall include certified copies of tax rate notices from the predecessor state for each of the last four years in which the employing enterprise was in business in the predecessor state.

(12) The account history shall include benefits paid and charged or non-charged and be based on wages paid prior to the transfer. The charges and non-charges shall be transferred to the New Mexico account history.

(13) The out-of-state employing enterprise must provide documentation, verified by counterpart agency in the predecessor state, comparable to the New Mexico department of [Labor] workforce solutions, that the employing enterprise has no taxes, interest, penalties or other fees due.

(14) When transferring from a non-reserve ratio state, the out-of-state employing enterprise transferring must provide entire history record.

(15) From the department's approved list, the employing enterprise shall engage an independent accounting firm to convert the transferred history into the factors used to measure experience in New Mexico.

(16) The transferred and converted experience history may be accepted by the department but is subject to audit by the department either before the transfer is approved or up to one year after the transfer is approved.

(17) To be eligible for a reduced rate, a employing enterprise must have been in operation for at least four complete calendar years plus the current year. If an out-of-state employing enterprise applying

for a transfer has been in operation for at least three, but not four full calendar years, in the predecessor state, the record from the predecessor state may be transferred, but a reduced rate will not be available until the employing enterprise has been in business for four full calendar years, combining the time in business in the predecessor state and in New Mexico.

(18) Notification to the other state and treatment of account history: Upon acceptance of the transfer application, the department will notify its counterpart agency in the predecessor state of the acceptance of the transfer application.

(19) Upon approval of the experience history transfer, the employing entity's contribution rate will be adjusted retroactively to the appropriate rate.

(20) After receiving notification of the approved transfer, the employing enterprise must submit an updated status report in the form designated by the department within 30 days.

(21) The provisions of this subsection apply to all out-of-state transfer requests filed on or after January 1, 2004.

C. P A R T I A L EXPERIENCE HISTORY TRANSFERS:

(1) NOTIFICATION BY SUCCESSOR AND SUBMISSION OF JOINT APPLICATION FORM: A successor entity acquiring one or more, but less than all of the employing enterprises of a predecessor entity, shall notify the department of such acquisition, in writing, on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise. Upon receipt of such notification, the department shall furnish the prescribed application form. The application shall be endorsed by the predecessor. The endorsed application and quarterly wage and contribution reports for each calendar quarter involved in the transfer must be filed with the department within thirty days from the date of delivery or mailing of the application by the department. Upon a showing of good cause, the assistant unemployment insurance bureau chief for the tax section may extend the due date for the filing of the endorsed application and quarterly wage and contribution reports for an additional thirty days provided that the request for an extension of time is filed in writing on or before the regular due date. For purposes of Paragraph (1) of Subsection C of 11.3.400.417 NMAC, "good cause" means unavoidable circumstances which renders the predecessor employing enterprise's records incomplete or inaccessible for the preparation of the endorsed application and quarterly wage and contribution reports within the time otherwise prescribed and "good cause" shall not include any dilatory act or negligence by the employer.

Information with respect to the predecessor and successor employing enterprises necessary to a department determination of the existence of all of the facts requisite to department approval or disapproval shall be given as prescribed by such forms or as requested by the department. Employers shall have the right to a seated interview at the local workforce development center or the state office where they will be provided assistance as necessary to complete the application.

(2) **WRITTEN DETERMINATION TO SUCCESSOR:** The department shall issue a written determination to the successor approving or disapproving the partial history transfer. All determinations disapproving the partial history transfer shall be subject to the provisions of 11.3.500.512 NMAC governing appeals of contribution or tax determinations.

D. DETERMINATION OF CONTRIBUTION RATES AFTER TOTAL OR PARTIAL EXPERIENCE HISTORY TRANSFER: For the period from the effective date of the transfer to the following January 1, the rate shall be determined as follows:

(1) If the successor is a liable employer and rated for the calendar year on the effective date of the transfer, there will be no change in rate determined for the successor's account as a result of the transfer.

(2) If the successor is a liable employer and has not been rated during the calendar year in which the transfer occurred, the rate shall be computed from the successor's prior history combined with the acquired total or partial history.

(3) If the successor is not a liable employer on the effective date and a new account is established:

(a) the rate of the predecessor or combined predecessors will apply to the new account in the case of a total experience transfer; and

(b) a rate based on experience of the separate schedule of employment and related benefits charged will apply to the new account in the case of a partial experience transfer.

(4) A new rate based on experience of the remaining schedule of employment and related benefits charged will apply to the predecessor account from the effective date of the transfer to current year in the case of a partial experience transfer.

E. CHARGING OF BENEFITS AFTER TRANSFER: Benefits paid subsequent to the effective date of a partial or total experience history transfer shall be charged to the successor's account if the base period wages were transferred to the successor.

[07-15-98; 11.3.400.417 NMAC - Rn & A,

11 NMAC 3.400.417, 09-1-2001; A, 07-01-2003; A, 07-16-2007; A, 11-15-2012]

11.3.400.419 CHARGING OF

BENEFITS: Whenever a claimant files a new claim for benefits and is found by the department to have sufficient base period wages to entitle him the claimant to benefits if otherwise eligible, the department shall issue a "notice to employer of claim determination" [~~form ES-957~~] on a form prescribed by the department, to each base period employer unless that employer was also the claimant's last employer and has been sent notice pursuant to 11.3.300.308 NMAC. The notice to each employer will give the name and social security account number of the claimant, the claim date and the amount of wages paid by that employer in each quarter of the base period.

A. NOTICE TO EMPLOYER OF CLAIM DETERMINATION -- RESPONSE REQUIRED: [~~Notwithstanding the fact that a prior determination has been made by the department that benefits paid to the designated claimant during a benefit year with respect to which a contributing employer was either a last or base period employer will not be charged to the employer's account, benefits paid to the claimant will be charged to the employer's account unless he responds to the "notice to employer of claim determination", form ES-957, as directed within ten days from the date shown on the notice, setting forth:~~

(1) the date on which the claimant's employment with the employer was terminated;

(2) full particulars relating to the fact of the claimant's separation, showing that the claimant left the employment of the contributing employer voluntarily for a cause not attributable to the employer or was discharged from such employment for misconduct connected with his work;

(3) that a prior determination that the contributing employer's account would not be chargeable was made by the department at the time of the claimant's separation from employment with that employer;

(4) such other information as called for in the notice.] Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to the claimant's last known employer, at the address of the employer as registered with the department, if so registered, and, if not registered, to the address provided by the claimant, a dated notice of the filing of the claim and a fact-finding questionnaire. The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to the department within

ten (10) calendar days from the date of the transmittal of the notice of claim. Unless excused by the department, the response must be an electronic transmittal.

B. PRIOR DETERMINATION OF ELIGIBILITY FINAL: If a prior, final determination has been made by the department that the claimant did not voluntarily leave his claimant's employment with the employer for a cause not attributable to the employer, or that he the claimant was not discharged for misconduct connected with his claimant's work, or that the employer is no longer an interested party to proceedings on the claim because of failure to respond within the time allowed to on the "notice to employer of claim for benefits" [~~form ES-442~~] issued at the time of the claimant's separation, that determination will remain final and binding for purposes of making a determination in response to the "notice to employer of claim determination" [~~form ES-957~~] on the chargeability of the employer's account for benefits payable to the claimant.

C. MULTIPLE PERIODS OF EMPLOYMENT WITH SAME EMPLOYER: If the individual had more than one period of employment and termination of employment with the same base period employer during and after the current and past five quarters, the employer must include in the report:

(1) the date on which each period of employment terminated;

(2) full particulars as to the circumstances of the termination including the reason given by the individual for leaving the employment or the nature of the individual's actions for which he was discharged, or the reason the claimant was laid off, as the case may be.

D. CONCURRENT EMPLOYMENT WITH TWO OR MORE EMPLOYERS: Where an individual works concurrently for two or more employers and becomes unemployed from one or more, but one or more of the concurrent employers continues to furnish that individual substantially the same amount of work, benefits shall not be charged to that employer or those employers who continue to furnish the claimant substantially the same amount of employment during such period of unemployment as long as the individual is receiving benefits based on base period earnings, in whole or in part, from the former concurrent employers. Those employers who continue to furnish the claimant work must respond to the "notice to employer of claim determination" [~~form ES-957~~] within fifteen ten (10) days from the date shown on the notice setting forth the number of hours per week the claimant worked during the current and two preceding quarters.

E. CHARGING UNDER COMBINED WAGES: Benefits paid to a

claimant based on wage credits from one or more states combined with New Mexico shall not be charged to an employer's account when no benefits have been paid upon the sole basis of wage credits in New Mexico.

F. NOTICE OF DEPARTMENT'S DETERMINATION: Upon receipt of the employer's response to the "notice to employer of claim determination" [~~form ES-957, within the time prescribed~~] within ten (10) days, the department shall make a determination with respect to relief from the charging of benefits, and shall promptly notify the employer if it is determined that the employer's account will be charged for benefits paid. The determination shall become final unless the employer files an application for appeal, setting forth the reasons therefore, within [ten] fifteen (15) days from the date shown on the determination.

[7-15-98; 11.3.400.419 NMAC - Rn & A, 11 NMAC 3.400.419, 9-1-2001; A, 01-01-2003; A, 11-15-2012]

11.3.400.420 EMPLOYER ELECTIONS TO COVER MULTI-STATE WORKERS:

A. This rule shall govern the department in its administrative cooperation with other states subscribing to the interstate reciprocal coverage arrangement, hereinafter referred to as "the arrangement".

B. As used in 11.3.400.420 NMAC the following words and terms shall have the following meaning, unless the context clearly indicates otherwise:

(1) "Agency": Any officer, board, commission, or other authority charged with the administration of the unemployment compensation law of a participating jurisdiction.

(2) "Interested jurisdiction": Any participating jurisdiction to which an election submitted under this rule is sent for its approval; and "interested agency" means the agency of such jurisdiction.

(3) "Jurisdiction": Any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or, with respect to the federal government, the coverage of any federal unemployment compensation law.

(4) "Participating jurisdiction": A jurisdiction whose administrative agency has subscribed to the arrangement and whose adherence thereto has not terminated.

(5) "Services customarily performed by an individual in more than one jurisdiction" are services performed in more than one jurisdiction during a reasonable period, if the nature of the services gives reasonable assurance that they will continue to be performed in more than one jurisdiction or if such services are required or expected to be performed in more than one jurisdiction

under the election.

C. Submission and approval of coverage elections under the arrangement.

(1) Any employing unit may file an election, on a form provided by the division, to cover under the law of a single participating jurisdiction all of the services performed for ~~[him] the employer~~ by any individual who customarily works for ~~[him] the employer~~ in more than one participating jurisdiction.

(2) Such an election may be filed, with respect to an individual, with any participating jurisdiction in which:

(a) any part of the individual's services is performed;

(b) the individual resides; or

(c) the employing unit maintains a place of business to which the individual's services bear a reasonable relation.

(3) The agency of the elected jurisdiction shall initially approve or disapprove the election.

(4) If such agency approves the election, it shall forward a copy thereof to the agency of each other participating jurisdiction specified thereon, under whose unemployment compensation law the individual or individuals in question might, in the absence of such election, be covered. Each such interested agency shall approve or disapprove the election, as promptly as practicable; and shall notify the agency of the elected jurisdiction accordingly.

(5) In case its law so requires, any such interested agency may, before taking such action, require from the electing employing unit satisfactory evidence that the affected employees have been notified of, and have acquiesced in, the election.

(6) If the agency of the elected jurisdiction, or the agency of any interested jurisdiction, disapproves the election, the disapproving agency shall notify the elected jurisdiction and the electing employing unit of its action and of its reason therefore.

(7) Such an election shall take effect as to the elected jurisdiction only if approved by its agency and by one or more interested agencies.

(8) An election thus approved shall take effect, as to any interested agency, only if it is approved by such agency.

(9) In case any such election is approved only in part, or is disapproved by some of such agencies, the electing employing unit may withdraw its election within ten days after being notified of such action.

D. Effective period of elections.

(1) Commencement.

(a) An election duly approved under this rule shall become effective at the beginning of the calendar quarter in which the election was submitted, unless

the election, as approved, specified the beginning of a different calendar quarter.

(b) If the electing unit requests an earlier effective date than the beginning of the calendar quarter in which the election is submitted, such earlier date may be approved solely as to those interested jurisdictions in which the employer had no liability to pay contributions for the earlier period in question.

(2) Termination.

(a) The application of an election to any individual under this rule shall terminate, if the agency of the elected jurisdiction finds that the nature of the services customarily performed by the individual for the electing unit has changed, so that they are no longer customarily performed in more than one participating jurisdiction. Such termination shall be effective as of the close of the calendar quarter in which notice of such finding is mailed to all parties affected.

(b) Except as provided in Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, each approved election shall remain in effect through the close of the calendar year in which it is submitted, and thereafter until the close of the calendar quarter in which the electing unit gives written notice of its termination to all affected agencies.

(c) Whenever an election hereunder ceases to apply to any individual, under Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, the electing unit shall notify the affected individual accordingly.

E. Reports and notices by the electing unit.

(1) The electing unit shall promptly notify each individual affected by its approved election, on a form approved by the elected jurisdiction, and shall furnish the elected agency a copy of such notice.

(2) Whenever an individual covered by an election hereunder is separated from ~~[his] the individual's~~ employment, the electing unit shall again notify ~~[him] the individual~~, forthwith, as to the jurisdiction under whose unemployment compensation law ~~[his] the individual's~~ services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, the electing unit shall notify ~~[him] the individual~~ as to the procedure for filing interstate benefit claims.

(3) The electing unit shall immediately report to the elected jurisdiction any change which occurs in the conditions of employment pertinent to its election, such as cases where an individual's services for the employer cease to be customarily performed in more than one participating jurisdiction or where a change in the work assigned to an individual requires ~~[him] the individual~~ to perform services in a new participating jurisdiction.

F. Approval of reciprocal coverage elections. The authority to approve or disapprove reciprocal coverage elections in accordance with this rule shall be exercised by the assistant unemployment insurance bureau chief for the tax section. [7-15-98; 11.3.400.420 NMAC - Rn & A, 11 NMAC 3.400.420, 9-1-2001; A, 01-01-2003; A, 11-15-2012]

11.3.400.421 EMPLOYERS ELECTING COST BASIS FINANCING AND GROUP ACCOUNTS:

A. DEFINITIONS. Where used in 11.3.400.421 NMAC words and phrases shall have the following meanings, unless otherwise indicated:

(1) "Account" means the employer account, identified by an account number, established and maintained for each employer, or employer member of a group account, for the purpose of determining liability for payments in lieu of contributions, and from which benefits to eligible claimants can be determined.

(2) "Group account" means the account, identified by an account number, established for two or more employers whose application to become liable for payments in lieu of contributions and for sharing the cost of benefits paid by them, has been approved by the department in accordance with NMSA 1978 Section 51-1-13E.

(3) "Group member" means any employer who has become associated with another or others to form a group account.

(4) "Taxable year" means the calendar year beginning the first day of January and ending the thirty-first day of December.

B. CHARGING OF BENEFITS: Any benefits or any portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer who has elected to become liable for payments in lieu of contributions, shall be reimbursed by the employer in accordance with NMSA 1978 Section 51-1-13B(4), and any benefits or portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer while the employer was subject to contributions pursuant to NMSA 1978 Section 51-1-18A, shall be charged to the experience rating account of the employer as provided in NMSA 1978 Section 51-1-11B.

C. DUE DATES OF WAGE AND CONTRIBUTION REPORTS AND PAYMENTS IN LIEU OF CONTRIBUTIONS: Each employer who has elected to become liable for payments in lieu of contributions shall submit a wage and contribution report ~~on form ES-903A~~ on a form prescribed by the department, each calendar quarter with respect to wages paid in such quarter. Said wage and contribution report shall be submitted on or before the

end of the month following the close of the calendar quarter to which the wage and contribution report applies. The wages so reported shall not be used for computation of rates as provided for employers subject to contributions.

D. SUBMISSION OF WAGE AND CONTRIBUTION REPORTS FOR GROUP ACCOUNTS: The quarterly wage and contribution report required of each group member of a group account shall be transmitted by the group representative with a statement listing each wage and contribution report and showing total wages paid by each group member. The payments in lieu of contributions required of each group member shall be transmitted by the group representative, together with all amounts owing by all the group members, within thirty days after transmission by the department of a statement showing the payments in lieu of contributions owing. Each report and any payments required of each employer or group member not transmitted within the time specified will be delinquent and penalties and interest as provided by the Unemployment Compensation Law shall be assessed from and after the delinquent date.

E. EXTENSION OF TIME TO SUBMIT REPORTS: Upon written application, transmitted prior to the due date, by an employer, group member, or group account representative establishing to the satisfaction of the department that good cause exists, excluding any dilatory act, negligence or lack of funds on the part of the employer, an extension, not to exceed thirty days, may be granted by the department with respect to the due date of the wage and contribution report or payment.

F. TERMINATION OF RIGHT TO MAKE PAYMENTS IN LIEU OF CONTRIBUTIONS: If, after due notice, any employer who has elected to become liable for payments in lieu of contributions remains delinquent for payments or interest or penalty, the department shall transmit a determination to said employer of pending termination of the organization's election to make payments in lieu of contributions for the next calendar year. If payment is not forthcoming within thirty days from the date of said notice, the department shall transmit a final determination to such employer that election has been terminated for the next calendar year.

G. REQUIREMENTS FOR SURETY BOND: At the discretion of the department, termination of an organization's election to make payments in lieu of contributions shall continue effective for any succeeding calendar year unless the employer provides a surety bond acceptable to the department and underwritten by a corporate surety authorized to transact business in New Mexico; or an agreement of cash collateral assignment, executed

with a state or national bank or federally insured savings association authorized to do business in New Mexico, as trustee, in a form prescribed by the department. Interest, if any, accumulating on the cash collateral assignment shall accrue to the employer. Said surety or cash bond shall be in the amount of not more than 2.7% of the taxable wages paid for employment subject to the Unemployment Compensation Law by the employer in the four quarter period immediately preceding the date of notice of termination was issued and shall be released by the department only when no further delinquency for payment in lieu of contributions of the employer exists.

H. ESTABLISHING ACCOUNTS, PROVIDING FOR ADDITIONS AND WITHDRAWALS OF GROUP MEMBERS: The department, upon receipt of properly completed form [ES-802,] prescribed by the department bearing the endorsement of each group member, accompanied by any forms enumerated therein or otherwise requested in writing, shall establish a group account and notify the group representative of the effective date as provided in NMSA 1978 Section 51-1-13E. The group account shall remain in effect for a period of not less than two calendar years, ending on December 31, and thereafter, until terminated at the discretion of the department, or by approval by the department, of an application from the group received on or before December 1, immediately preceding the calendar year in which termination is desired. Upon establishment and after termination of the group account, each group member, group account and group account representative shall be fully liable for:

(1) any payment in lieu of contributions, penalties or interest required under NMSA 1978 Section 51-1-13E, for the period during which any benefits or portion thereof are payable on the basis of wage credits earned during the period the claimant's base period employer was a group member; and

(2) the performance of the group representative.

I. ADDITIONS OF GROUP MEMBERS: Any nonprofit organization liable for payments in lieu of contributions which becomes subject to the Unemployment Compensation Law on or after January 1, 1972, may, with the approval of the department, be added to an existing group account if the department receives an application as called for in Subsection H of 11.3.400.421 NMAC not later than thirty days prior to the beginning of the calendar year for which the application is to be effective.

J. ACQUISITION OF GROUP MEMBERS: Any nonprofit organization liable for payments in

lieu of contributions which acquired the organization, trade or business, or substantially all the assets thereof, of a group member who because of the transaction no longer employs workers in employment will be a group member of the group account to which [his] the predecessor belonged provided the department receives an application as called for in Subsection H of 11.3.400.421 NMAC not later than thirty (30) days after the date of the transaction.

K. WITHDRAWAL OF GROUP MEMBERS: A member may withdraw or be removed from a group account only at the end of a calendar year provided written application for withdrawal or removal is received by the department not later than thirty days prior to the first day of the following calendar year. Such withdrawal or removal of a member from a group account shall not be effective until approved by the department. No group member may withdraw or be removed from a group account unless it has been a member of such group account for at least two calendar years as of the effective date of the withdrawal or removal; except that a member may withdraw or be removed from a group at any time if the group member:

(1) has permanently ceased to employ workers in employment; or

(2) has ceased to be an employer exempt under Section 3306 (c) (8) of the federal Unemployment Tax Act; or

(3) has, in accordance with NMSA 1978 Section 51-1-13A (2), terminated its election to be liable for payments in lieu of contributions; or

(4) has for a period of two successive quarters been delinquent in its payment of assessments under the group plan for benefits chargeable to its account. [7-15-98; 11.3.400.421 NMAC - Rn & A, 11 NMAC 3.400.421, 9-1-2001; A, 01-01-2003; A, 11-15-2012]

11.3.400.425 NOTICE OF TAX DETERMINATIONS FINAL AND APPEALS:

A. Finality of decision: The department shall give written notice to any employer, employing unit or claimant of every determination made by the [tax section] department which could alter or affect the employer's or employing unit's tax liability or the claimant's monetary eligibility under the law. Such determination shall be deemed to be the final decision of the department, unless [a request for review and re-determination is initiated pursuant to Subsection B of 11.3.400.425 NMAC or] an appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC.

~~[B. Request for review and redetermination: Any claimant, employer or employing unit aggrieved by a tax section determination may, within~~

~~fifteen days following the transmission of the notice of determination, request a review and redetermination by the assistant unemployment insurance bureau chief for the tax section. A request for review must state with particularity the basis on which the party seeking review feels the determination is in error and any additional facts or evidence the party intends to raise in support of the request. The assistant unemployment insurance bureau chief for the tax section may, at his discretion, review the matter on the facts and evidence already submitted, may schedule a conference with the aggrieved party or parties or otherwise communicate seeking commentary or may refer the matter to the appeal tribunal for a hearing in accordance with the rules governing adjudicatory hearings.~~

~~C. Informal conference procedure and decision: Any tax conference scheduled by the assistant unemployment insurance bureau chief for the tax section shall be conducted informally. Within twenty days after the conference, the assistant unemployment insurance bureau chief for the tax section shall issue a written decision, affirming, reversing or modifying the determination in question. The decision shall be transmitted to all parties and shall inform them that it will become final and binding if no appeal is filed within fifteen days of its transmittal in accordance with section B of 11.3.500, NMAC.]~~

~~[D.] B. Stay pending appeal: Legal action, including the issuance of [10-day notices] ten (10) day notices and warrants of lien and levy, shall not be taken on accounts [who] that have an appeal pending within the department.~~

[11.3.400.425 NMAC - N, 01-01-2003; A, 11-15-2012]

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS

This is an amendment to 11.3.500 NMAC, Sections 1, and 7 through 14, effective 11-15-2012.

11.3.500.1 ISSUING AGENCY: New Mexico Department of [Labor] Workforce Solutions, Employment Security Division, P.O. Box 1928, Albuquerque, NM 87103

[11.3.500.1 NMAC - Rp, 11 NMAC 3.500.1, 01-01-2003; A, 11-15-2012]

11.3.500.7 DEFINITIONS:

[B.] A. "Adjudicatory body" means the appeal tribunal, the board of review or other commissions or body within the department holding an adjudicatory hearing.

[A.] B. ["Adjudicatory hearing" means a judicial or quasi-judicial hearing

upon either the law or the evidence or both.] "Adjudicatory hearing" means a judicial or quasi-judicial hearing upon either the law or the evidence or both which allows the parties to present evidence, objections to evidence, documents and witnesses as well as cross-examine opposing parties' witnesses and evidence.

C. "Authorized representative" means an individual who, by virtue of his position within the department, is designated by the secretary to perform certain specific tasks on behalf of the department.

D. "Double affirmation" means [if a prior determination or decision allowing benefits is affirmed by a decision of the department, including the board of review or a reviewing court, no action to recover benefits paid to a claimant shall be taken if there is a subsequent disqualification. NMSA 1978 Section 51-1-8J. A remand by the secretary or the board of review due to a failure to appear does not constitute a ruling in favor of the claimant for the purpose of the double affirmation rule.] a situation in which a claimant has received benefits through a decision of the appeal tribunal which was subsequently affirmed by the secretary, the board of review or a court decision. In these situations, no action shall be taken to recover the benefits paid to the claimant even if such determination is later reversed. A remand by the appeal tribunal, secretary or the board of review for an additional hearing due to a determination of "good cause" for a failure to appear or any other reasons does not constitute a ruling in favor of the claimant for the purpose of the double affirmation rule.

E. "Good cause" means a substantial reason, one that affords a legal excuse, a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the party's failure to keep the department directly

and promptly informed by written, signed statement of the claimant's, employer's or employing unit's correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

F. "Precedent manual" means a compilation of decisions of the appeal tribunal and board of review designated significant by the [department] secretary or the general counsel, but with the parties' names and identifying information redacted and removed.

G. "Administrative law judge" means the individual whose job it is to conduct appeal tribunal hearings and make decisions on unemployment insurance eligibility or employer charges. This term is synonymous with the term "hearing officer" as set forth in NMSA 1978, Section 51-1-8. [11.3.500.7 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.8 PRESENTATION OF APPEALS OF INITIAL DETERMINATIONS:

A. Claims: Any interested party aggrieved by a determination of the [claims-section] department is entitled to file an appeal. Any written communication clearly demonstrating a desire to appeal a determination of the [claims-section] department will be regarded as an appeal. Any written communication intended as an appeal shall be transmitted to the department by U.S. mail, by fax or by electronic filing using the department's claims processing website. All appeals should be transmitted to the department in a format indicating the interested party's desire to appeal. For any issues of timeliness with regard to faxed appeals, the time and date affixed on the [cover page by the recipient's transmitting device] department's receiving device will be presumptively the date and time of submission. For any issues of timeliness with regard to appeals submitted via U.S. mail, the postmark date on the appeal envelope will presumptively be the date and time of submission. For any issues of timeliness with regard to appeals filed electronically through the department's claims processing website, the date and time that the department's website "stamps" the appeal will be presumptively the date and time of submission.

B. Tax: In any case where a party is dissatisfied with the decision of [the assistant unemployment insurance bureau chief for the tax section as provided in Section C of 11.3.400.425 NMAC, the party may, within fifteen calendar days from the date of transmission of the assistant unemployment insurance bureau chief's decision, file an appeal with the appeal tribunal for the department. Except that, in

any case where no facts are in dispute and further hearing will serve no useful purpose; the assistant unemployment insurance bureau chief for the tax section may transmit the matter directly to the appeal tribunal for an administrative decision stating that there are no facts in dispute and the parties have agreed that the case is to be submitted to the board of review for issuance of a final administrative decision. All interested parties will be given notice of any hearing or review before the appeal tribunal or board of review as provided more fully elsewhere in Part 500 of 11.3 NMAC.] the department, the party may, within fifteen (15) calendar days from the date of transmission of the department's decision, file an appeal with the appeal tribunal for the department. All interested parties will be given notice of any hearing or review before the appeal tribunal or board of review as provided for in 11.3.500.9 and 11.3.500.12 NMAC.

C. Unless otherwise provided by statute or a specific rule of the department, the time for the appeal of any determination from one level to another within the department is fifteen (15) calendar days from the date of the transmission of the decision or determination, with the first day commencing on the calendar date after the date of transmission.

D. The time for filing any appeal within the department may be extended only upon a showing of good cause. [11.3.500.8 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.9 ADJUDICATORY PROCEEDINGS GENERALLY:

A. Right to representation: In any adjudicatory hearing before the department:

(1) Any party may represent himself or be represented by an attorney at law or by any other person qualified to represent the party in the matters under consideration. The secretary may bar attorneys and authorized representatives from appearing on behalf of others in proceedings before the department if, [in] the attorney or authorized representative's previous' conduct has established to the department's satisfaction that the attorney or authorized representative is unlikely to provide competent representation in future proceedings.

(2) A partnership may be represented by any of its employees, members or duly authorized representative. A corporation or association may be represented by an officer, employee or any duly authorized representative. Any governmental entity may be represented by an officer or employee or any other authorized person.

(3) The presiding officer, including

the secretary may, for lack of qualifications or other sufficient cause, bar any person from representing any party, in [which event] such circumstances, the reasons for such bar shall be set out in the record of proceedings.

B. The unauthorized practice of law: Any party may be represented by an attorney at law licensed to practice in the courts of this state. A representative or agent other than licensed attorneys may represent any party only to the extent that such participation does not constitute unauthorized practice of law under the statute and rules of the courts of the state of New Mexico.

C. Copies: Consistent with the provisions of NMSA, 1978 Section 51-1-32 and 11.3.100.109 NMAC, while any proceeding before the department is ongoing or within the period for appeal, a party to such proceeding may request and receive from the department, without charge, one set of copies of the department files and records, including but not limited to investigation reports, statements, memoranda, correspondence, tape recordings or transcripts of hearings or other data, pertaining to matters under consideration or scheduled for hearing or other proceeding. Thereafter, copies shall be charged at the department's usual rate for copying.

D. Notice of hearing: Upon the scheduling of an adjudicatory hearing before the appeal tribunal on any appeal, a notice of the hearing shall be transmitted to all interested parties at least ten (10) calendar days prior to the date of the adjudicatory hearing and shall include:

(1) a statement of the time, place and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a short and plain statement of the foreseeable issues so that all parties have sufficient notice to afford each party reasonable opportunity to prepare; if any issue cannot be stated in advance of the hearing, it shall be stated as soon as practicable; in all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after statement or amendment to afford all parties reasonable opportunity to prepare.

(4) Any party to an appeal before the appeal tribunal may elect, using the self-service feature of the claims processing website, to have all notices of hearing for that appeal delivered electronically rather than by paper notice through the mail. Such electronic notification shall be deemed legally sufficient notice for all purposes and the party electing that electronic notification will be deemed to have acknowledged their responsibility to exercise due diligence in checking the website for notifications.

For parties electing electronic notification, such notification shall continue until the party has taken all necessary steps change their notification preference using the self-service feature of the website. Until the party's notification preference has been changed, that party's obligation to exercise due diligence in checking the website for notifications will remain in effect.

E. Pre-hearing procedure generally:

(1) Stipulations: The parties to an appeal, with the consent of the appeal tribunal, may stipulate in writing to any or all facts involved. The appeal tribunal may decide the appeal on the basis of such stipulation, or, in its discretion, may set the appeal down for hearing and take such further evidence, as it deems necessary, to enable it to determine the appeal. Stipulations will only be accepted if executed on a form approved by the department. A stipulation by the employer is not a guarantee that a claimant will be eligible for payment. The claimant shall only be eligible if the facts to which the employer stipulates provide a sufficient basis under the Unemployment Compensation Law to approve a claim for payment and the claimant is otherwise eligible to receive payment, i.e., has no other basis for disqualification or denial.

(2) Authority of authorized representatives regarding the gathering of evidence, issuing subpoenas, authorizing depositions, and administering oaths and affirmations: Authorized representatives of the department may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, documents, papers or other objects necessary and relevant to any proceeding before it or its authorized representative. An authorized representative may administer oaths and affirmations, and certify to official acts. An authorized representative in any proceeding ~~[before him]~~ may authorize the taking of depositions of witnesses, including parties within or without the state, in the same manner as provided by law for the taking of depositions in civil actions in the district court, and the deposition may be used in the same manner and to the same extent as permitted in the district court.

F. Subpoenas:

(1) "Subpoena" means an official directive or order by ~~[a hearing officer]~~ an administrative law judge or quasi-judicial official directing the recipient to appear and testify as a witness. The subpoena may require ~~[the witness]~~ witnesses to bring documents with ~~[him when he comes]~~ them when they come to testify.

(2) The department's authority to issue subpoenas is found at NMSA, 1978 §51-1-8(L) and 51-1-28. Department

subpoenas can be served personally at least five (5) days prior to the appearance or by certified mail posted at least ~~[10]~~ ten (10) days prior to the appearance date.

(3) Issuance and challenges to subpoenas: The adjudicatory body or other authorized representative of the department may issue subpoenas to compel attendance of witnesses and production of records in connection with proceedings before the adjudicatory body or department. NMSA 1978 Sections 51-1-28 & 29.

(a) Who may request: Any party to an adjudicatory proceeding may make written application to the applicable adjudicatory body for the issuance of a subpoena.

(b) Contents of requests for subpoena: The party seeking the subpoena must reasonably identify and specify the evidence or documents sought and show the relevance of such evidence or documents to the issue under consideration. The proposed subpoena shall show upon its face the name and address of the party at whose request the subpoena was issued.

(c) Decision regarding issuance of subpoena: The adjudicatory body, at its discretion, may issue the subpoena upon the written application or may schedule a hearing or conference on the application to hear argument and objections from interested parties for the purpose of determining whether the subpoena should issue. If such a hearing is held, the adjudicatory body may make a ruling on the record during the hearing, or may, in its discretion, issue a written decision, informing the parties of the decision and of their right to further appeal.

(d) Challenge to issued subpoena or a request to quash: Any witness summoned may petition the department to ~~[vacate]~~ quash or modify a subpoena served on the witness. The department shall give prompt notice of such petition to all interested parties. After the investigation or hearing, whichever the department considers appropriate, it may grant the petition in whole or part, or it may deny the petition upon a finding that the testimony or the evidence required to be produced does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested, or for any other reason that justice requires.

(e) Appeal of disputes: The stated reason for the request for the subpoena and the stated reason for the opposition as well as the ~~[hearing officer's]~~ administrative law judge's decision in regard to the subpoena shall be part of the record on appeal.

(f) Order of protection: If the department denies the petition to quash the

subpoena, the aggrieved party may petition the district court of either the county where he resides, or, in the case of a corporation, the county where it has its principal office, or the county where the hearing or proceeding will be held, for an order of protection.

(g) Witness fees and mileage: If a written request to the secretary is made prior to appearing to testify or within [5] five (5) days after testifying, witnesses, other than parties to a proceeding or the parties' designated agents or representatives, subpoenaed for any appeal tribunal hearing or other department proceeding may be paid witness and mileage fees by the department. Mileage and witness fees may be permitted as is deemed reasonable by the secretary based on the specific witness' situation but in no event will a witness be paid more than the statutory amount allowed witnesses appearing in the district courts of this state.

(h) Sanctions to compel compliance with subpoenas: In case of failure to comply with any subpoena issued and served under the department's statutory authority or for the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before an adjudicatory body of the department, the department may apply to the district court either in the county of the person's residence or in the county where the hearing or proceeding is being held, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. The prevailing party is entitled to costs of the enforcement proceeding.

(i) Sanctions against parties for witnesses' failure to comply with subpoenas: When a subpoenaed witness fails to attend or testify, if a party exercises substantial control or influence over the witness, such as an employee, ~~[friend or]~~ relative of a party employer or a ~~[friend or]~~ relative of a party claimant, the adjudicatory body can deem that, if the witness had appeared and testified, the testimony would have been unfavorable to the party controlling or influencing the witness.

(j) If a party or a subpoenaed witness fails or refuses to produce records or documentary evidence pursuant to an order or subpoena of the adjudicatory body, the adjudicatory body can deem that, if the records or documentary evidence had been produced, the evidence would have been unfavorable to the party failing or refusing to produce the records or documentary evidence or to the party controlling or influencing the witness who failed or refused to produce the records or documentary evidence.

G. Disqualification of board of review members and appeal tribunal ~~[hearing officers]~~ administrative law judges: An appeal tribunal ~~[hearing officer]~~ administrative law judge or board

of review member shall withdraw from any proceeding in which [he] the appeal tribunal administrative law judge or board of review member cannot accord a fair and impartial hearing or consideration and from any proceeding in which [he] the appeal tribunal administrative law judge or board of review member has an interest. Any party may request a disqualification of an appeal tribunal [hearing officer] administrative law judge or board of review member on the grounds of the person's inability to be fair and impartial, by filing an affidavit or written statement or making a statement on the record with the appeal tribunal or board of review promptly upon the discovery of the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. The disqualification shall be mandatory if sufficient factual basis is set forth in the affidavit of disqualification. If a board of review member is disqualified pursuant to this regulation, the remaining board of review members may appoint an appeal tribunal [hearing officer] administrative law judge or other qualified department representative to sit on the board of review for the proceeding involved. The grant or denial of a requested disqualification can be considered in an appeal on the merits.

H. Attorneys at law and authorized representatives: Prior to or at the commencement of any adjudicatory hearing, all attorneys at law or other authorized representatives shall file a written entry of appearance which shall be made a part of the record and a copy shall be furnished by the attorney or representative to the opposing party. The entry of appearance shall be signed by the attorney at law or authorized representative, whose mailing address, telephone number and other contact addresses shall be provided. An attorney or representative who has provided notice of representation will be deemed to continue such representation until a written notification of the withdrawal of such representation is provided to all parties, the [hearing officer] administrative law judge or the board of review. Even if an attorney or authorized representative has entered his appearance on behalf of a party, the party may appear on his own behalf without the attorney or authorized representative.

I. Ex parte communications: No party or representative of a party or any other person shall communicate off the record about the merits of the case with the cabinet secretary, any [hearing officer] administrative law judge or board of review member who participates in making the decision for any adjudicatory hearing, unless the communication is written and a copy of the communication is transmitted to all interested parties to the proceeding. The cabinet secretary,

any [hearing officer] administrative law judge, board of review member or their representatives shall not communicate off the record about the merits of an adjudicatory hearing with any party or representative of a party or any other person, unless a copy of the communication is sent to all interested parties in the proceeding.

J. Requirements for hearing evidence or reviewing record: The cabinet secretary, board of review member or appeal tribunal [hearing officer] administrative law judge shall not participate in any decision for any adjudicatory hearing unless [he] the cabinet secretary, board of review member or appeal tribunal administrative law judge has heard the evidence or reviewed the record.

[11.3.500.9 NMAC - N, 01-01-2003; A, 11-15-2012]

**11.3.500.10 H E A R I N G
PROCEDURE BEFORE
[ADJUDICATORY BODIES OF
THE DEPARTMENT] THE APPEAL
TRIBUNAL:**

[A. Continuance, adjournment and reopening of adjudicatory hearings

(1) An adjudicatory hearing before an appeal tribunal hearing officer or the board of review or a review before the board of review, for good cause shown, may be continued or adjourned upon the request of a party or upon the appeal tribunal's or board of review's own motion, at any time before the hearing is concluded. A claimant's right to a prompt determination of his eligibility and payment of benefits shall not be impaired by undue delay of proceedings:

(2) If the party appealing or any other party fails to appear at any scheduled adjudicatory hearing, the appeal tribunal or board of review in the absence of notice from such party, may, in its best judgment, either adjourn the hearing until a later date or proceed to render its decision on the record and the evidence then before it. Any decision shall be subject to rehearing before the tribunal or board of review upon a showing within fifteen days after its date that there was good cause for the party's failure to appear:

(3) A reopening of any adjudicatory hearing shall be granted upon showing of good cause, including good cause for not appearing at the scheduled hearing, or may be ordered on the appeal tribunal's or board of review's own motion for good cause. A request for reopening shall be made as soon as reasonably possible but in no event later than fifteen days after the decision of the appeal tribunal or board of review was mailed. An untimely request for reopening shall be heard by the appeal tribunal on the reason for the untimely request for the rehearing. If the hearing officer finds

good cause for the late request, the request to reopen shall be set for hearing. If the hearing officer finds good cause for failing to appear, the merits of the appeal shall be set for hearing. Either party may file an appeal of any written decision issued by the hearing officer to the secretary:

(4) A request for a continuance, adjournment or reopening shall be made to the appeal tribunal hearing officer or the board of review as identified on the notice of hearing or notice of review. Such requests shall be transmitted to the appeal tribunal or board of review respectively. Notice of the date, time and place of a reopened, postponed or adjourned hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard.]

A. Conduct of adjudicatory hearings:

(1) Adjudicatory hearings before the appeal tribunal shall be conducted in such a manner that all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained. All hearings and proceedings will be conducted informally in such a manner as to ascertain the substantial rights of the parties and will not be governed by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure, but the procedures shall afford the parties equally and impartially the right to:

(a) call and examine witnesses, cross examine witnesses;

(b) introduce exhibits and offer rebuttal evidence;

(c) object to questions and to the introduction of improper or irrelevant testimony or evidence; and

(d) submit written expositions of the case, within the discretion of the administrative law judge.

(2) The appeal tribunal, on its own initiative:

(a) may examine parties and witnesses;

(b) require additional evidence as it finds necessary to the determination of the issues before it;

(c) may exclude testimony and evidence which it finds to be incompetent, irrelevant or otherwise improper by standards of common reasonableness;

(d) if it deems appropriate, the appeal tribunal may permit opening and closing statements.

B. Opportunity for fair hearing: In conducting adjudicatory hearings, the [board of review or] appeal tribunal shall afford all parties an opportunity for a full and fair hearing including an opportunity to respond and present evidence and argument on all issues involved; provided that the term "adjudicatory hearing" as used in this rule

does not apply to fact-finding interviews conducted by the department representative for purposes of making an initial determination of eligibility for benefits or liability for contributions, payments in lieu of contributions, interest or penalties under the Unemployment Compensation Law.

[C. ~~Conduct of adjudicatory hearings~~

~~(1) Adjudicatory hearings before the adjudicatory bodies of the department shall be conducted in such a manner that all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained. All hearings and proceedings will be conducted informally in such a manner as to ascertain the substantial rights of the parties and will not be governed by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure, but the procedures shall afford the parties equally and impartially the right to:~~

~~(a) call and examine witnesses; cross examine witnesses;~~

~~(b) introduce exhibits and offer rebuttal evidence;~~

~~(c) object to questions and to the introduction of improper or irrelevant testimony or evidence;~~

~~(d) make closing statements; and~~

~~(e) submit written expositions of the case, within the discretion of the hearing officer.~~

~~(2) The adjudicatory body, on its own initiative:~~

~~(a) may examine parties and witnesses;~~

~~(b) require additional evidence as it finds necessary to the determination of the issues before it;~~

~~(c) may exclude testimony and evidence which it finds to be incompetent, irrelevant or otherwise improper by standards of common reasonableness.~~

~~(d) If it deems appropriate, the adjudicatory body may permit opening statements.]~~

C. Continuance, adjournment and reopening of adjudicatory hearings:

(1) An adjudicatory hearing before an appeal tribunal administrative law judge, for good cause shown, may be continued or adjourned upon the request of a party or upon the appeal tribunal's own motion, at any time before the hearing is concluded. A claimant's right to a prompt determination of claimant's eligibility and payment of benefits shall not be impaired by undue delay of proceedings.

(2) If the party appealing or any other party fails to appear at any scheduled adjudicatory hearing, the appeal tribunal may, in its best judgment, either adjourn the hearing until a later date or proceed to render

its decision on the record and the evidence then before it. Any decision shall be subject to reopening before the appeal tribunal upon a showing within fifteen (15) days after the date of the decision that there was good cause for the party's failure to appear.

(3) A reopening of any adjudicatory hearing shall be granted upon showing of good cause, including good cause for not appearing at the scheduled hearing, or may be ordered on the appeal tribunal's, the board of review's or the secretary's own motion for good cause. A request for reopening shall be made as soon as reasonably possible but in no event later than fifteen (15) days after the decision of the appeal tribunal was mailed.

(4) A request for a continuance, adjournment or reopening shall be made to the appeal tribunal administrative law judge as identified on the notice of hearing. If the administrative law judge finds good cause for failing to appear, the merits of the appeal shall be set for hearing. Notice of the date, time and place of a reopened, postponed or adjourned hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard. The administrative law judge shall issue a decision approving or denying a request for a continuance adjournment or reopening. Either party may file an appeal of any written decision issued by the administrative law judge to the secretary.

(5) A request for reopening made later than fifteen (15) days after the decision of the appeal tribunal was mailed shall be heard by the secretary or the board of review on the reason for the untimely request for the reopening. If the secretary or the board of review finds good cause for the late request, the merits of the appeal shall be set for hearing before the appeal tribunal. Notice of the date, time and place of a reopened hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard.

D. Authority over conduct of adjudicatory hearings. The [adjudicatory body] appeal tribunal shall have and shall exercise full authority over the conduct and behavior of parties and witnesses appearing before it to insure a fair, orderly adjudicatory hearing and an expeditious conclusion of the proceedings.

E. Mode of hearings:

(1) The [adjudicatory body] appeal tribunal may conduct the adjudicatory hearing by telephone or in person at the discretion of the [adjudicatory body] appeal tribunal. The mode of conducting the hearing will be as indicated in the notice setting the hearing.

(2) Notice of telephone hearing: If the hearing is to be by telephone, the notice shall so inform the parties and will include instructions for informing the [hearing officer] administrative law judge

of the necessary telephone numbers. If the hearing is a telephonic hearing, no party or representative will be permitted to attend in person. If the hearing is an in-person hearing, at the discretion of the [hearing officer] administrative law judge, a party, witness or representative will be permitted to appear telephonically.

(3) Request for change in mode of hearing: Prior to the time that the hearing is scheduled, a party may request that a hearing be conducted by telephone or in person. A party shall state the reasons for the request on the record or in writing. If another party objects to the request, the hearing officer will grant or deny the request either on the record or in writing. Both the reason for the request and the ruling shall be part of the record on appeal.]

F. Exhibits:

(1) Exchange of exhibits prior to hearings: At least 24 hours prior to any hearing, a party seeking to introduce exhibits shall submit to the [hearing officer] administrative law judge the documents or copies thereof that [he] the party may seek to introduce.

(a) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the other party. The copies shall be transmitted by the offering party in a manner to insure their receipt by the other party at least 48 hours prior to the date and time of the scheduled hearing.

(b) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the [hearing officer] administrative law judge. The copies shall be transmitted by the offering party in a manner to insure their receipt by the other party at least 24 hours prior to the date and time of the scheduled hearing. In no event shall the administrative law judge be provided copies of exhibits not previously transmitted by the offering party to the opposing party.

(i) In no event shall the hearing officer be provided copies of exhibits not previously transmitted by the offering party to the opposing party.

(ii) The hearing officer may require the offering party to number the pages of a voluminous exhibit such as a personnel file or employment manual. Failure to sequentially number the pages of a voluminous exhibit will be grounds to deny the admission of the exhibit.]

(c) Documents not submitted in accordance with this subsection shall be denied admission and denied consideration by the department:

(i) unless it is apparent that the particular document was previously seen by the party whose interest is affected, that party acknowledges having seen the document and has no objection to its admission; or

(ii) the [hearing officer in

his:] administrative law judge, in the judge's discretion, determines that fundamental fairness and the proper administration of the Unemployment Compensation Law requires the admission of the document.

(d) In any case where the [hearing officer] administrative law judge determines that documentary evidence will be admitted over the objection of a party that [he] the party has not had an opportunity to review and consider the evidence, a reasonable continuance shall be granted by the [hearing officer] administrative law judge to give the objecting party an opportunity to review the evidence.

(2) Marking exhibits: All exhibits tendered to the [hearing officer] administrative law judge shall be separately marked for identification. The employer's exhibits shall be denoted E-1, E-2, E-3 and so forth; the claimant's exhibits shall be denoted C-1, C-2, C-3 and so forth. A file, such as a personnel file, containing voluminous documents need not be separately marked, but the pages shall be individually numbered by the offering party prior to admission. Failure to sequentially number the pages of a voluminous exhibit will be grounds to deny the admission of the exhibit.

(3) Exhibits admitted and considered by the [hearing officer] administrative law judge shall be individually identified on the record.

(4) Exhibits denied admission: The reason for the denial of admission of tendered exhibits shall be clearly stated on the record. Typical, but not exclusive, reasons for the denial of admission of an exhibit is lack of relevancy, immateriality, redundancy and voluminous unnumbered pages or documents. Solely for the purpose of appeal on the issue of improper denial of admission of exhibits,] Exhibits offered and denied admission shall be retained in the record, but shall not form the basis for the decision of the administrative law judge. The written decision shall reiterate the statement of exhibits denied admission and the basis for the denial.

G. Record of hearings:

(1) Proper record: The [adjudicatory body] appeal tribunal shall ensure that all of the testimony, objections and motions or other matters in connection therewith are fully and accurately recorded, in such a manner that a complete and accurate transcript can be rendered therefrom as needed [~~;- provided only that the board of review need not prepare a record of its deliberations, but only of its actual decision].~~

(2) The record in an adjudicatory hearing shall include:

(a) all documents in the [claim or tax file] department's files, pleadings, motions and previous rulings;

(b) documentary evidence received or considered;

(c) a statement of matters officially noticed;

(d) questions, tenders of evidence, offers of proof, objections and rulings thereon in the form of a tape recording or transcript;

(e) findings and conclusions; and

(f) any decision, opinion or report by the cabinet secretary, board of review members or appeal tribunal [hearing officer] administrative law judge conducting the hearing.

(3) Tape or digital recordings: The department deems that a tape or digital recording of a proceeding made on the department's system is [an adequate] the official recording of the record.

(a) Inaudible [tape] recording: If the tape or digital recording or a significant portion of it is demonstrated as inaudible or otherwise unusable, if the parties do not stipulate as to the matters which would have appeared on the [tape] recording if usable, the [adjudicatory body] appeal tribunal may order a rehearing de novo of all matters or of only the matters which were on the unusable portions of [tape] recording.

(b) Official transcript: The department or either party, at the party's expense, may prepare a typed transcript of any such tape recording for the use of the parties. Any typed transcript prepared by the department or under its supervision may be designated by the [adjudicatory body] appeal tribunal as the official transcript. Typed transcripts prepared by a party shall not be deemed official transcripts unless such transcript was transcribed with the department's consent and prepared either in-person or from a department tape by an individual approved by the department.

(c) Availability of tapes: Upon written application, for good cause shown, a duplicate copy of the [tape] recording of all testimony, objections and motions or other matters will be supplied to any party to the proceeding. Unless the applicant is entitled to the a copy of the [tape] recording without charge or otherwise shows good cause as to why [he] the party should not be charged as provided in 11.3.100.109 NMAC, the applicant may be required to [either] pay for a copy of the [tape or to furnish cassette tapes for the duplication] recording.

~~{(d) Other records of adjudicatory hearings: Except by agreement or stipulation by the parties or upon application showing good cause, no other record of an adjudicatory hearing shall be made in the sole interest of one party, by a reporter or recording device of any description. A finding of good cause and permission to a party to employ such means of making his own record shall include the party's certification that, in keeping with Section NMSA 1978 Section 51-1-32, no such record or any information therefrom shall~~

~~be disclosed or open to public inspection or used for any other purpose in any manner revealing the identity of the parties or the nature of the issues.]~~

H. Factual information to be considered: All evidence, including any records, investigation reports and documents in the possession of the adjudicatory body which the department desires to avail itself as evidence in making a decision, shall be made a part of the record in the proceedings, and no other factual information or evidence shall be considered, except as provided in this section. Documentary evidence may be received in evidence in the form of copies or excerpts or by specific citation to page numbers in published documents.

I. Briefs or memoranda of law, requested findings of fact and conclusions of law: At any time during an adjudicatory hearing and prior to a decision, the parties may be afforded a reasonable opportunity to submit briefs or memoranda of law, proposed findings of fact and conclusions of law, together with supporting reasons including citations to the record and copies of case law, for the consideration of the adjudicatory body.

J. Official notice: Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the board of review or appeal tribunal [hearing officer] administrative law judge, but whenever any such member or officer takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the adjudicatory hearing, but before the final decision, and any party shall, on timely request, be afforded an opportunity to show the contrary.

K. Specialized knowledge of department: The experience, technical competence and specialized knowledge of the department and its staff may be utilized in the evaluation of the evidence by the adjudicatory bodies of the department.

L. Decision of the [adjudicatory body] appeal tribunal:

(1) Decision in writing: Following the conclusion of an adjudicatory hearing on an appeal, the [adjudicatory body] appeal tribunal shall promptly announce its decision on the case. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by the [hearing officer or board of appeal members] administrative law judge who heard the appeal.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

(3) The residuum rule shall apply in the issuance of all decisions. This rule requires that the decision of the department's

~~[adjudicatory body] appeal tribunal~~ be supported by "substantial evidence", that is evidence which would ~~[support a verdict] be~~ admissible in a court of law. ~~[For example, controverted hearsay testimony does not qualify as substantial evidence. Trujillo v. Employment Sec. Com'n of NM, 94 N.M. 343, 610 P.2d 747 (1980).] A decision of the appeal tribunal cannot be made on the basis of controverted hearsay evidence alone; there must be a residuum of legal evidence which would be admissible in a court of law.~~

(4) Where an appeal was not filed within the statutory appeal period, the ~~[adjudicatory body] appeal tribunal~~ shall, after review of the record, ~~[-enter an order dismissing the appeal or] conduct~~ an evidentiary hearing with notice to all interested parties to determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that ~~[includes an order of dismissal or denial of] denies~~ a request for reopening shall include the ~~[adjudicatory body's] appeal tribunal's~~ findings and conclusions for the ~~[dismissal or] denial~~.

(5) Publication of decision: Copies of any decision issued by the ~~[adjudicatory body] appeal tribunal~~ shall be promptly transmitted to all interested parties to the appeal.

M. Remand by ~~[adjudicatory body] appeal tribunal~~: The ~~[adjudicatory body] appeal tribunal~~ may, in its discretion, remand any issue developed from evidence presented at the hearing or apparent from the existing record to the ~~[claims examiner or tax representative or appeal tribunal] department~~ with an order directing that a determination be made with regard to that issue or that additional procedures be taken to perfect a determination already issued or to make other disposition in the matter.

[11.3.500.10 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.11 R E M O V A L

ACTIONS: At the order of the secretary, any proceeding before the ~~[claims examiner, tax representative] department~~ or the appeal tribunal may be removed to the board of review. Such removed actions shall be presented, heard and decided by the board of review in the manner prescribed for ~~[adjudicatory] appeal tribunal~~ hearings.

[11.3.500.11 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.12 PRESENTATION OF FURTHER APPEALS:

A. An interested party aggrieved by a decision of the appeal tribunal is entitled to appeal to the cabinet secretary. A written communication clearly demonstrating a desire to appeal a determination to the cabinet secretary

shall be filed with the department. The information submitted with the appeal shall include a clear statement of the relevant facts and a clear statement of the party's basis for appeal.

B. Secretary decision: The secretary shall review the application and shall, within fifteen (15) days after receipt of the application for appeal, either affirm the decision of the ~~[hearing officer] administrative law judge~~, remand the matter to the ~~[adjudicatory body] appeal tribunal~~ for an additional hearing or new decision, remand to the ~~[claims section or tax section] department~~ for further investigation and determination, or refer the decision to the board of review for further review and decision on the merits of the appeal. Issues of timeliness shall be decided by the secretary, who may refer the decision to the board of review.

(1) Decision in writing: Following the conclusion of a review on an appeal, the cabinet secretary shall issue ~~[his] a~~ decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by cabinet secretary.

(2) Findings of fact shall be based exclusively on the record and matters officially noted.

(3) Publication of decision: Copies of any decision issued by the secretary shall be promptly transmitted to all interested parties to the appeal.

C. If the secretary takes no action within fifteen (15) days of receipt of the application for appeal and review, the decision will be promptly scheduled for review by the board of review as though it had been referred by the secretary.

D. All appeals from a decision of the appeal tribunal filed more than fifteen (15) days from the date of the appeal tribunal's decision shall be referred to the secretary, who may refer the decision to the board of review. In addition to the information required by Subsection A of 11.3.500.12 NMAC, all late appeals shall contain a concise statement setting forth the reasons for the late appeal. The secretary, or the board of review if the case has been referred to the board, may extend the time for filing any appeal from a decision of the appeal tribunal only upon showing of good cause.

E. Notice of review before the board of review ~~[-Notice of the scheduling of any appeal by the board of review] shall~~ be mailed to all interested parties ~~[at least ten calendar days before the date of review by the board. Such notice shall include the same information as specified in Subsection D of 11.3.500.9 NMAC.] informing them that, unless a hearing is granted pursuant to the Subsection A of 11.3.500.13 NMAC, no additional evidence shall be taken and all parties will have the opportunity to submit~~

written statements, briefs or memorandum of law explaining why the decision of the appeal tribunal should be affirmed or reversed.

F. Applications for leave to participate or intervene in an appeal: An interested party, if aggrieved by a decision of the appeal tribunal, but not a party to the proceeding before the appeal tribunal, may apply for leave to participate or intervene in an appeal before the board of review. The party applying for leave to participate or intervene in an appeal before the board of review shall file with the board of review an application for leave to join an appeal setting forth his interest in the matter appealed. The board of review shall have the discretionary power to approve or reject any such application.

[11.3.500.12 NMAC - N, 01-01-2003, A, 02-14-2011; A, 11-15-2012]

11.3.500.13 THE BOARD OF REVIEW:

A. The board of review's authority: In every case referred to the board of review by the secretary from an appeal tribunal decision ~~[-in its discretion,] the board of review may, in its discretion,~~ hear and decide the case upon the record; it may entertain ~~[oral or] written~~ arguments, or, after notice to all parties and in accordance with ~~[the department's rules governing the conduct of adjudicatory hearings,] 11.3.500.9 NMAC~~ it may conduct a hearing and take additional evidence before it.

B. Review of the record as an appellate or reviewing body: As a general practice and unless the board of review gives specific notice to the contrary, the board sits in its capacity as an appellate or reviewing body. As such, it reviews the record; it does not receive new evidence.

C. Remand by board of review to the appeal tribunal or ~~[claims examiner or tax section] the department~~: With an order directing that a determination or decision be made with regard to that issue, or that additional procedures be taken to perfect a determination or decision already issued, or to make other disposition in the matter, as the board of review, in its discretion, may deem necessary, the board of review may remand any claim or an issue involved in a claim; any issue developed from evidence presented at the hearing or apparent from the existing record:

(1) To the appeal tribunal for the taking of additional evidence or a hearing de novo. Hearings conducted by the appeal tribunal pursuant to a remand by the board of review shall be conducted after notice to all parties and in accordance with ~~[the department's rules governing the conduct of adjudicatory hearings] 11.3.500 NMAC~~. Unless directed otherwise by the board of review, the appeal tribunal shall issue

a decision based upon the entire record before it, including the record of all the prior hearings. Parties to any additional hearing shall have the right to review the appeal tribunal [tape] recording made at any prior evidentiary hearing.

(2) To the [claims—examiner or tax representative] the department for fact-finding and issuance of an initial determination.

D. Appeals by the secretary: Within fifteen (15) days from the date of issuance of any decision by the appeal tribunal, the secretary, on [his own] the secretary's motion, may request the board of review to review a decision of an appeal tribunal [hearing officer] administrative law judge, which the secretary believes to be inconsistent with law or the applicable rules of interpretation or which is not supported by the evidence. In such situations[; may in its discretion;] the board of review may, in its discretion, take additional evidence, review the matter on the record or remand the matter to the appeal tribunal for an additional evidentiary hearing.

E. Decision by the board of review:

(1) Decision in writing: Following the conclusion of a review on an appeal, the board of review may take the appeal under advisement, may order a transcript of proceedings for review may afford the parties an opportunity to file memorandum briefs and proposed findings of fact and conclusions of law; or the board may issue its decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed the members of the board who heard or reviewed the appeal. If a decision of the board of review is not unanimous, the decision of the majority shall control. The minority may file a dissent from such decision.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

(3) Where an appeal was not filed within the statutory appeal period, the board of review shall [~~proceed as provided in Paragraph 4 of Subsection E of 11.3.500.10 NMAC~~], after review of the record, determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that denies a request for reopening shall include the board of review's findings and conclusions for the denial of the reopening.

(4) Publication of decision: Copies of any decision issued by the board of review shall be promptly transmitted to all interested parties to the appeal.

[11.3.500.13 NMAC - N, 01-01-2003; A, 11-15-2012]

DECISIONS: Copies of all decisions of the cabinet secretary, board of review and appeal tribunal shall be kept on file in accordance with the state records center retention requirements at the department's office in Albuquerque, New Mexico. [~~Such decisions shall be open for inspection but without in any manner revealing the names of the parties or witnesses involved.~~] A compilation of decisions of the appeal tribunal and board of review designated significant by the secretary or the general counsel, but with the parties' names and identifying information redacted and removed shall be open for inspection. The redacted decisions shall be filed chronologically but, from time to time, may be indexed by topic and offered as a precedent manual.

[11.3.500.14 NMAC - N, 01-01-2003; A, 11-15-2012]

End of Adopted Rules Section

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