

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION
CHAPTER 7 STATE PERSONNEL ADMINISTRATION
PART 10 FURLOUGH, REDUCTION IN FORCE, REEMPLOYMENT, SEPARATION WITHOUT PREJUDICE

1.7.10.1 ISSUING AGENCY: State Personnel Board.
[1.7.10.1 NMAC - Rp, 1 NMAC 7.10.1, 07/07/01]

1.7.10.2 SCOPE: All state agencies in the classified service.
[1.7.10.2 NMAC - Rp, 1 NMAC 7.10.2, 07/07/01]

1.7.10.3 STATUTORY AUTHORITY: NMSA 1978, 10-9-10(A); Section 10: NMSA 1978, Section 10-9-19; Section 11: NMSA 1978, Sections 28-15-1 to 28-15-3 and 38 U.S.C. Section 2021; Section 13: NMSA 1978, Section 52-1-25.1.
[1.7.10.3 NMAC - Rp, 1 NMAC 7.10.3, 07/07/01; A, 11/14/02]

1.7.10.4 DURATION: Permanent
[1.7.10.4 NMAC - Rp, 1 NMAC 7.10.4, 07/07/01]

1.7.10.5 EFFECTIVE DATE: 07/07/01 unless a later date is cited at the end of a section.
[1.7.10.5 NMAC - Rp, 1 NMAC 7.10.5, 07/07/01]

1.7.10.6 OBJECTIVE: The objective of Part 10 of Chapter 7 is: to provide a system for employee furlough, and separation upon reduction in force; to provide for reemployment after military service; to provide for injured employees' return to work, and potential separation.
[1.7.10.6 NMAC - Rp, 1 NMAC 7.10.6, 07/07/01]

1.7.10.7 DEFINITIONS:

A. "Furlough" means a temporary placement of an employee in a reduced work hour schedule, which can either be partial or full-time, for lack of work or funds.

B. "Agency hire date" means the date on which an employee's current continuous employment with the agency or its legal predecessor began or, when an agency or organizational unit of an agency is merged with another agency, the date on which the employee began continuous employment with the original hiring agency.
[1.7.10.7 NMAC - Rp, 1 NMAC 7.10.7, 07/07/01]

1.7.10.8 FURLOUGH:

A. In the event of the need for a furlough, an agency shall submit a plan identifying organizational units to be affected by the furlough to the board for approval to effect the furlough. The director may approve such plans if an emergency exists and there is insufficient time for the board to consider such plans.

B. The furlough plan shall affect all employees within the organizational unit impacted to the same extent.

C. No furlough shall exceed 12 months in duration.

D. Employees shall be given at least 14 calendar days written notice of furlough, unless the time limit is waived by the director. Notice shall be served in accordance with the provisions of **1.7.1.10 NMAC**.

E. Employees shall be returned from furlough when the reasons for the furlough cease to exist. Wherever possible, all affected employees shall be returned at the same time, to the same extent.
[1.7.10.8 NMAC - Rp, 1 NMAC 7.10.8, 07/07/01; A, 7-15-05]

1.7.10.9 REDUCTION IN FORCE:

A. An agency may lay off employees only for deletion of positions, shortage of work or funds, or other reasons that do not reflect discredit on the services of the employees.

B. An agency shall identify organizational units for purposes of a layoff and submit a written plan to the board. Such organizational units may be recognized on the basis of geographic area, function, funding source, or other factors. The agency must define the classifications affected within the organizational unit.

C. Upon board approval of a layoff plan, the agency effecting the layoff shall initiate a right of first refusal within the agency. All employees affected by the layoff shall be provided the following rights:

(1) employees to be affected by the reduction in force (RIF) shall be provided the right of first refusal to any position to be filled within the agency for which they meet the established requirements, at the same or lower midpoint than the midpoint of the position the employee currently holds, unless there is an actual layoff candidate exercising RIF rights for that position;

(2) affected employees shall compete only with other employees in the same agency affected by the reduction in force;

(3) the agency's list of eligible candidates for the open positions shall be comprised of those affected employees meeting the established requirements of the position;

(4) employees shall have eleven calendar days from the date of an offer to accept the position unless otherwise agreed; employees who do not accept an offer shall not lose the right of first refusal status to other positions; and

(5) the right of first refusal under *Subsection C of 1.7.10.9. NMAC* shall extend until the first effective date of layoff as defined in the plan.

D. The order of layoff due to reduction in force shall be by service date which is determined based upon the agency hire date. In the event of a tie, the director shall determine an appropriate mechanism for breaking the tie.

E. No employee in career status shall be laid off while there are term, probationary, emergency or temporary status employees in the same classification in the same organizational unit.

F. Employees in career status shall be given at least 14 calendar days written notice of layoff. Notice shall be served according to the provisions of *1.7.1.10 NMAC*.

[1.7.10.9 NMAC - Rp, 1 NMAC 7.10.9, 07/07/01; A, 11/14/02; A, 03/31/04; A, 7-15-05]

1.7.10.10 RETURN FROM REDUCTION IN FORCE:

A. Former employees who were in career status at the time of separation by a reduction in force shall have reemployment rights within the classified service, for a six-month period, under the following provisions:

(1) Former employees shall be returned to work in order of highest service date as determined by *Subsection D of 1.7.10.9 NMAC* to any position to be filled within the agency from which the employee was laid off. The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements;

(2) Reemployment to positions and agencies, other than the agency from which the former employee was laid off, shall extend when any position is to be filled. The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements. If, when an agency intends to fill a position, there is more than one eligible former employee with rights to return to work under this rule, the agency shall select the former employee who is best qualified in the agency's opinion;

(3) Offers of employment shall be made in writing and shall be delivered by a method that provides proof of service or attempted service;

(4) A former employee who is offered and accepts employment after layoff shall occupy the position within 14 calendar days of accepting the offer of employment or forfeit the right to employment ; and

(5) Any former employee who refuses an offer of employment or fails to respond to an offer of employment within 14 calendar days shall be removed from the employment list for the position offered.

B. Former employees returned to work according to the provisions of *Subsection A of 1.7.10.10 NMAC* shall have that period of time they were laid off counted as time in the classified service, shall hold the status of the position in accordance with *1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC* and do not have to serve a new probationary period if reemployed into career status.

[1.7.10.10 NMAC - Rp, 1 NMAC 7.10.10, 07/07/01; A, 11/14/02]

1.7.10.11 REEMPLOYMENT AFTER MILITARY SERVICE: Any employee who separates from the classified service to enter the United States armed forces, national guard, or an organized reserve unit may be reemployed in accordance with the provisions of *38 U.S.C. Section 2021* and *NMSA 1978, Sections 28-15-1 to 28-15-3*.

[1.7.10.11 NMAC - Rp, 1 NMAC 7.10.11, 07/07/01; A, 11/14/02]

1.7.10.12 EARLY RETURN-TO-WORK/MODIFIED DUTY ASSIGNMENTS:

A. Agencies shall implement a policy to enable employees who have been unable to work because of a compensable injury or illness under the workers' compensation act to return to work in a modified duty assignment for up to 6 months and may be extended for a period of up to 6 additional months if substantial progress in the recovery of an injured or ill employee has been demonstrated and it has been anticipated the injured or ill employee will be able to return to full duty within the time frame of the considered extension.

B. The agency shall make a good faith effort to identify and offer modified duty/return to work opportunities to injured or ill employees in accordance with the provisions of *NMSA 1978, Section 52-1-25.1 and NMSA 1978 52-3-49.1*. At the agency's discretion the employee may be assigned to his or her current classification with modified duties or to a temporary assignment comprised of a combination of duties from a variety of positions.

C. Employees on modified duty assignment to a temporary position shall maintain their salary and status for the duration of such temporary assignment.

[1.7.10.12 NMAC - Rp, 1 NMAC 7.10.12, 07/07/01; A, 11/14/02; A, 7-15-05]

1.7.10.13 SEPARATION WITHOUT PREJUDICE:

A. Employees who have suffered an injury or illness which is compensable under the workers' compensation act and are physically or mentally unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, shall be separated from the service without prejudice provided:

(1) the employee has been afforded modified duty in accordance with *1.7.10.12 NMAC*;

(2) the employee has reached maximum medical improvement prior to the completion of up to 12 months of modified duty; or, the employee has not reached maximum medical improvement upon the expiration of up to 12 months of modified duty;

(3) all efforts to accommodate the medical restrictions of the employee have been made and documented; and

(4) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

B. Employees who have suffered an illness or injury that is not compensable under the workers' compensation act and are unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, as a result of the physical or mental disability created by the non job-related injury or illness shall be separated from the service without prejudice provided:

(1) all efforts to reasonably accommodate the medical restrictions of the employee have been made and documented; and

(2) the employing agency has made reasonable efforts to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation; or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

C. Agencies may provide modified duty to employees for a period of up to 4 months during the separation process if required to meet the provisions of this rule.

D. Notice of contemplated separation without prejudice:

(1) to initiate the separation without prejudice of an employee who has completed the probationary period, the agency shall serve a notice of contemplated separation without prejudice on the employee which: describes the circumstances which form the basis for the contemplated separation without prejudice; gives a general explanation of the evidence the agency has; advises the employee of his or her right to inspect and obtain copies of any documentary evidence relied upon; specifies what the contemplated action is; and states that the employee has 11 calendar days from service of the notice to respond in writing to the notice or to request an opportunity for an oral response;

(2) when the notice of contemplated separation without prejudice is served by mail, the employee receiving service shall have 3 additional calendar days in which to file a response;

(3) at the time the notice of contemplated separation without prejudice is served on the employee, the agency shall notify the director and the risk management division of the general services department of the proposed separation without prejudice and submit a copy of the separation notice along with documentation to support efforts to provide modified duty and to support efforts to find other suitable vacant positions.

E. Response to notice of contemplated separation without prejudice:

(1) a representative of the employee's choosing may respond in writing to the notice of contemplated separation without prejudice on behalf of the employee;

(2) if there is a request for an oral response to the notice of contemplated separation without prejudice, the agency shall meet with the employee within 11 calendar days of a request for an oral response, unless the employee and the agency agree in writing to an extension of time; a representative of the employee's choosing may represent the employee;

(3) the purpose of the oral response is not to provide an evidentiary hearing but is an opportunity for the employee to present his or her side of the story; it is an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to support the proposed involuntary separation without prejudice.

F. Notice of final separation without prejudice:

(1) if the employee does not respond to the notice of contemplated separation without prejudice the agency shall issue a notice of final separation within 11 calendar days following the response period;

(2) if the employee has filed a written response or has been provided an opportunity for oral response, the agency shall issue a notice of final separation without prejudice no later than 11 calendar days from the date of receipt of the response;

(3) the notice of final separation without prejudice shall:

(a) specify the action to be taken;

(b) describe the circumstances which form the basis for the separation without prejudice, which may not include allegations not included in the notice of contemplated separation without prejudice;

(c) give a general explanation of the evidence the agency has;

(d) specify when the final separation without prejudice will be effective, which must be at least 24 hours from the time of service of the notice of final separation without prejudice;

(e) inform the employee that the final separation without prejudice may be appealed to the board with a written statement of the grounds for the appeal delivered to the state personnel office in Santa Fe, New Mexico, and received by the director within 30 calendar days of the effective date of the separation without prejudice; and

(f) the adjudication process is outlined in **1.7.12 NMAC**.

[1.7.10.13 NMAC - Rp, 1 NMAC 7.10.13, 07/07/01; A, 11/14/02; A, 06/08/04; A, 10/29/04; A, 7/15/05; A, 5/15/07; A, 12/1/10]

1.7.10.14 REEMPLOYMENT OF JOB-RELATED INJURED OR ILL FORMER EMPLOYEES:

A. A former employee who has separated from the service due to job-related injury or illness and who has received or is due to receive benefits under the Workers' Compensation Act shall have reemployment rights in accordance with the provisions of *NMSA 1978, Section 52-1-50.1 and NMSA 1978 Section 52-3-49*, under the following provisions:

(1) Reemployment rights under **1.7.10.14 NMAC** are extended only by the agency employing the former employee at the time of the job related injury or illness and are provided only for positions which contain the same or lower midpoint as that held at the time of separation.

(2) To initiate reemployment rights under this rule, the former employee must notify the agency in writing, with a copy to the office, of their desire to be reemployed. The notification shall include the positions and locations, which the former employee is willing to accept, and an appropriate application for employment.

(3) The agency must receive certification in writing from the treating health care provider that the former employee is fit to carry out the essential functions of the position with or without reasonable accommodation without significant risk of re-injury or relapse to illness.

(4) When the agency is to fill a vacant position which is a position and location indicated by the former employee, the agency shall offer the job to the former employee provided:

(a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or

(b) the agency certifies that the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.

(5) Former employees reemployed in accordance with the provisions of *Subsection A of 1.7.10.14 NMAC* will hold the status of the position in accordance with *1.7.2.9 NMAC, 1.7.2.10 NMAC or 1.7.2.11 NMAC* and do not have to serve a probationary period if they were in career status at the time of separation.

B. The risk management division of the general services department and the office shall be notified immediately of any injured or ill former employee who applies for a position and subsequently declines a job offer. [1.7.10.14 NMAC - Rp, 1 NMAC 7.10.14, 07/07/01; A, 11/14/02; A, 12/1/10]

HISTORY OF 1.7.10 NMAC:

Pre-NMAC History:

Material in this part was derived from that previously filed with the commission of public records - state records center and archives as:

- SPB Rule 14, Separation and Demotions, filed 08-31-87;
- SPB-16, Furlough and Reduction in Force, filed 04-04-90;
- SPB 14, Furlough, RIF, Reemployment, filed 12-15-92;
- SPB 14, Furlough, Reduction in Force, Reemployment, filed 03-18-94.

History of Repealed Material:

1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97.

Other History:

- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 01-12-96 replaced SPB 14, filed 03-18-94;
- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 05-02-96;
- 1 NMAC 7.13, Furlough, Reduction in Force, Reemployment, filed 05-02-96 replaced by 1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97;
- 1 NMAC 7.10, Furlough, Reduction in Force, Reemployment, filed 06-13-97 replaced by 1.7.10 NMAC, Furlough, Reduction in Force, Reemployment, effective 07/07/01.