

**TITLE 10        PUBLIC SAFETY AND LAW ENFORCEMENT**  
**CHAPTER 4     DISTRICT ATTORNEYS**  
**PART 10       APPEALS AND ADJUDICATION**

**10.4.10.1       ISSUING AGENCY:** Administrative Office of the District Attorneys  
[10.4.10.1 NMAC - N, 06/30/2010]

**10.4.10.2       SCOPE:** This rule sets for the rules for the establishment, maintenance and administration of an equitable appeals and adjudication process which is applicable to covered positions in the offices of the district attorneys and the administrative office of the district attorneys.  
[10.4.10.2 NMAC - N, 06/30/2010]

**10.4.10.3       STATUTORY AUTHORITY:**

A.        Section 36-1-25 NMSA 1978 which, among other things, authorizes the duly appointed director of the administrative office of the district attorneys to appoint necessary personnel and assign their duties within the administrative office of the district attorneys;

B.        Section 36-1-26 NMSA 1978 which, among other things, requires the director of the administrative office of the district attorneys to develop uniform systems for use by district attorney offices with respect to personnel matters;

C.        Section 36-1A-2 NMSA 1978 of the District Attorney Personnel and Compensation Act, Sections 36-1A-1 through 36-1A-15 NMSA 1978, which, among other things, created the District Attorney Personnel and Compensation Act to establish for all district attorneys a uniform, equitable and binding system of personnel administration;

D.        Section 36-1A-8 NMSA 1978 which, among other things, requires the district attorneys to promulgate personnel rules, with the assistance of the director of the administrative office of the district attorneys as authorized by Subsection I of Section 36-1-26 NMSA 1978, which among other things requires the director of the administrative office of the district attorneys to perform such other duties in furtherance of the administration of the business of the district attorneys as directed by the elected or appointed district attorneys; and

E.        Section 36-1A-8 (B) (9) NMSA 1978 which requires the promulgation of district attorney personnel rules governing an appeal process to review a disciplinary action solely involving suspension, demotion or termination.

[10.4.10.3 NMAC - N, 06/30/2010]

**10.4.10.4       DURATION:** Permanent

[10.4.10.4 NMAC - N, 06/30/2010]

**10.4.10.5       EFFECTIVE DATE:** June 30, 2010, unless a later date is cited at the end of a section.

[10.4.10.5 NMAC - N, 06/30/2010]

**10.4.10.6       OBJECTIVE:** To establish for all district attorneys a uniform, equitable and binding system of personnel administration.

[10.4.10.6 NMAC - N, 06/30/2010]

**10.4.10.7       DEFINITIONS:** [RESERVED]

[See 10.4.1.7 NMAC]

**10.4.10.8       APPEALS PROCEDURE:**

A.        Covered employees who have been demoted, dismissed or suspended have the right to appeal to the board for a public hearing before the board or before a state-personnel- office designated hearing officer within thirty (30) calendar days of the effective date of the disciplinary action.

B.        The appeal notice and supporting documents shall be directed to the president of the New Mexico district attorneys personnel review board. Upon receipt of the appeal, the president shall forward a copy to the members of the personnel review board.

C.        In the event the appellant elects a state-personnel-designated hearing officer, the board shall promptly make that request to the state personnel office and promptly execute any and all documents necessary to implement this election. The state personnel office shall promptly arrange for the hearing officer without charge.

This officer shall have all of the rights, duties and responsibilities provided to the board by the District Attorney Personnel and Compensation Act. This hearing officer's decision shall be binding and of the same force and effect as if the board itself had rendered the final decision.

D. In the event the appellant elects a hearing before the board, the president of the personnel review board shall inform the other board members and the affected parties of the time and place of the hearing; and the president or their designee shall preside over all proceedings pertaining to each appeal. A sitting board member who is the employer of the appellant must excuse themselves from hearing the appeal. The president of the board may designate a hearing officer who may be a member of the board to preside over and take evidence at any hearing pursuant to such appeal. This hearing officer shall prepare and submit to the board a summary of the evidence taken at the hearing and proposed findings of fact. The board shall render a final decision on the appeal, which shall include findings of fact and conclusions of law. If a hearing is continued, the same three (3) members who started to hear the appeal shall serve until the conclusion of the appeal process. The president of the personnel review board shall inform the other board members and the affected parties of the time and place of the hearing; and the president or their designee shall preside over all proceedings pertaining to each appeal. A sitting board member who is the employer of the appellant must excuse himself/herself from hearing the appeal. The president of the board may designate a hearing officer who may be a member of the board to preside over and take evidence at any hearing pursuant to such appeal. This hearing officer shall prepare and submit to the board a summary of the evidence taken at the hearing and proposed findings of fact. The board shall render a final decision on the appeal, which shall include findings of fact and conclusions of law. If a hearing is continued, the same three (3) members who started to hear the appeal shall serve until the conclusion of the appeal process.

[10.4.10.8 NMAC - N, 06/30/2010]

**10.4.10.9 ADJUDICATION PROCEDURE:** All adjudication procedures apply similarly to all presiding hearing officers.

A. Consolidation or joinder of cases:

(1) The board or the state personnel office designated hearing officer may consolidate cases in which two or more appealing employees have cases containing identical or similar issues.

(2) The board or the state personnel office designated hearing officer may join the appeals of an appellant who has two or more appeals pending.

(3) The board or the state personnel office designated hearing officer may consolidate or join cases if it would expedite final resolution of the cases and would not adversely affect the interests of the parties.

B. Motions:

(1) Any defense, objection, or request that can be determined on the merits prior to a hearing may be raised by motion before the deadline set by the board or by the state personnel office designated hearing officer, unless good cause is shown for the delay.

(2) Responses to any motions shall be filed according to a schedule set by the board or by the state personnel office designated hearing officer.

(3) During the course of a hearing, motions may be renewed or made for the first time, if such a motion then becomes appropriate.

(4) The board or the state personnel office designated hearing officer may rule on all non-dispositive motions.

C. Sanctions: The board or the state personnel office designated hearing officer may impose sanctions upon the parties as necessary to serve the cause of justice including, but not limited to, the instances set forth below.

(1) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, a request for admission and/or production of witnesses, the board or the state personnel office designated hearing officer may:

(a) draw an inference in favor of the requesting party with regard to the information sought;

(b) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon testimony relating to the information sought;

(c) permit the requesting party to introduce secondary evidence concerning the information sought; and

(d) strike any part of the pleadings or other submissions of the party failing to comply with such request.

(2) The board or the state personnel office designated hearing officer may refuse to consider any motion or other action which is not filed in a timely fashion.

(3) The board or the state personnel office designated hearing officer may dismiss an appeal with prejudice or rule for the appellant if a party fails to defend or prosecute an appeal.  
[10.4.10.9 NMAC - Rp, NMDAA 91-1.9.01, 9.02, 9.03, 06/30/2010]

**10.4.10.10 PRE-HEARING CONFERENCE:**

A. At the pre-hearing conference, the parties shall submit to the board or the state personnel office designated hearing officer a proposed pre-hearing order which shall contain at least:

- (1) a statement of any contested facts and issues;
- (2) stipulation of those matters not in dispute;
- (3) identity of all witnesses to be called and a brief summary of their testimony;
- (4) a list of exhibits;
- (5) requests for subpoenas; and
- (6) a tentative hearing date.

B. The board or the state personnel office designated hearing officer, in cooperation with the parties, may further revise the pre-hearing order.

C. Any discussion concerning possible settlement of the appeal shall not be a part of the pre-hearing order nor may it be introduced at the hearing.

[10.4.10.10 NMAC - Rp, NMDAA 91-1.9.04, 06/30/2010]

**10.4.10.11 ADDITIONAL WITNESSES:** Witnesses who were not identified at the prehearing conference must be identified to the opposing party and the board or the state personnel office designated hearing officer at least three (3) working days prior to the hearing. The board or the state personnel office designated hearing officer may waive this rule for good cause.

[10.4.10.11 NMAC - Rp, NMDAA 91-1.9.05, 06/30/2010]

**10.4.10.12 SUBPOENAS:**

A. The board and the state personnel office designated hearing officer have the power to subpoena witnesses and compel the production of books, papers, and any other materials pertinent to any investigation or hearing.

B. Subpoenas must be hand delivered.

C. In order to compel attendance at a hearing, the subpoena shall be received by the witness at least seventy-two (72) hours prior to the time the witness is to appear. The board or the state personnel office designated hearing officer may waive this rule for good cause shown.

D. Employees under subpoena shall be granted administrative leave.

[10.4.10.12 NMAC - Rp, NMDAA 91-1.9.06, 06/30/2010]

**10.4.10.13 HEARINGS:**

A. Notice of hearing shall be made by certified mail with return receipt requested at least fourteen (14) calendar days prior to the hearing, unless otherwise agreed to by the parties and the board or the state personnel office designated hearing officer.

B. The hearing shall be open to the public, unless the parties agree that it shall be closed.

C. A party may appear at the hearing through a representative, provided such representative has made a written entry of appearance prior to the hearing date.

D. The board or the state personnel office designated hearing officer may clear the room of witnesses not under examination, if either party so requests, and any person who is disruptive. The district attorney is entitled to have a person in the hearing room during the course of the hearing, even if the person will testify in the hearing.

E. The district attorney or his representative may make an opening statement. The appellant may then make an opening statement or wait until the district attorney is through presenting his/her case.

F. The district attorney shall present his/her evidence first.

G. Oral evidence shall be taken only under oath or affirmation.

H. Each party shall have the right to:

- (1) call and examine witnesses and introduce exhibits;
- (2) cross-examine witnesses;
- (3) impeach any witness; and
- (4) rebut any relevant evidence.

I. The hearing shall be conducted in an orderly and informal manner without adherence to the rules of evidence required in judicial proceedings. However, at least some non-hearsay evidence must support the decision reached.

J. The board or the state personnel office designated hearing officer may admit all evidence, including affidavits, if it is the type of evidence upon which responsible persons are accustomed to rely in the conduct of business. The board or the state personnel office designated hearing officer shall exclude immaterial, irrelevant or unduly cumulative testimony.

K. The board or the state personnel office designated hearing officer may take administrative notice of those matters of which courts of this state may take judicial notice.

L. The rules of privilege shall be effective to the extent that they are required to be recognized in civil actions in the district courts of the state of New Mexico.

M. The board or the state personnel office designated hearing officer shall consider only those allegations against the appellant included in the notice of final action.

N. The hearing shall be recorded by a sound-recording device under the supervision of the board or the state personnel office designated hearing officer.

O. The board or the state personnel office designated hearing officer may require post-hearing briefs and proposed findings of fact and conclusions of law.

P. Upon hearing the evidence and statements of the parties and after the necessary deliberation, the board shall issue a written decision within twenty (20) working days after the close of the record and send copies to the parties and their representatives. The decision, which shall be based upon the preponderance of the evidence, shall order either corrective action or dismissal of the appeal. The decision of the board or the state personnel office designated hearing officer shall be final. No further administrative appeal is authorized.

[10.4.10.13 NMAC - Rp, NMDAA 91-1.9.07, 06/30/2010]

#### **10.4.10.14 REINSTATEMENT:**

A. If the board or the state personnel office designated hearing officer finds that the action taken was without just cause, the board or the state personnel office designated hearing officer may modify the disciplinary action or order the reinstatement of the appellant to his or her former position or to a position of like status and pay.

B. When the board or state personnel office designated hearing officer orders reinstatement of an appellant, the reinstatement shall be effective within thirty (30) calendar days after service of a written copy of the decision on the affected party. The board or the state personnel office designated hearing officer may award back pay as of the date of the dismissal, demotion or suspension or as of such later date as the reinstatement order may specify.

[10.4.10.14 NMAC - Rp, NMDAA 91-1.9.08, 06/30/2010]

#### **10.4.10.15 HEARING OFFICER:**

A. The hearing officer shall not participate in any adjudicatory proceeding if, for any reason, the hearing officer cannot afford a fair and impartial hearing to either party. Either party may ask to disqualify the designated hearing officer for cause by filing an affidavit of disqualification within fourteen (14) calendar days of the pre-hearing order. The affidavit must state the particular grounds for disqualification. The designated hearing officer shall rule on motions for disqualification and an appeal of the ruling may be made to the board within fourteen (14) calendar days of the hearing officer's ruling.

B. Appeals from employees of the district attorney's office shall be heard by the board, a member of the board designated as hearing officer or a state personnel office designated hearing officer.

C. The hearing officer may dismiss an appeal with prejudice in accordance with the provisions of a settlement agreement approved by the hearing officer or upon the filing of a motion to withdraw the appeal at any time before the deadline for the completion of discovery.

D. The hearing officer may dismiss an appeal with prejudice upon the filing of a motion to withdraw the appeal after the deadline for the completion of discovery upon such terms and conditions as the hearing officer deems proper, up to and including the assessment of costs.

E. Persons shall not discuss the merits of any pending hearing or proceeding with the designated hearing officer or member of the board unless both parties, or their representatives, are present.

[10.4.10.15 NMAC - N, 06/30/2010]

#### **10.4.10.16 APPEAL TO DISTRICT COURT:**

A. Any party aggrieved by the decision of the board or the state personnel office designated hearing officer made pursuant to this part may appeal the decision to the district court in the district in which they reside, is employed or maintains a principal office or to the district court for the district of Santa Fe county. The appeal shall be initiated by filing a notice of appeal with the clerk of the appropriate district court within thirty (30) days after the service on that party of a written copy of the final decision of the board or the state personnel office designated hearing officer. Upon appeal the district court shall affirm the decision of the board or the state personnel office designated hearing officer unless the decision is found to be:

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

B. An appeal from the decision of the district court may be taken to the court of appeals in accordance with the rules of civil procedure.

[10.4.10.16 NMAC - N, 06/30/2010]

**HISTORY OF 10.4.10 NMAC:**

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

NMDAA 90-1, New Mexico District Attorney's Association Personnel Rules and Regulations for New Mexico District Attorneys Association, filed 2/22/90.

NMDAA 91-1, Personnel and Compensation Plan for the Employees of the District Attorneys of the State of New Mexico, filed 6/11/91.

**History of Repealed Material:**

NMDAA 91-1, Personnel and Compensation Plan for the Employees of the District Attorneys of the State of New Mexico, filed 6/11/91 - Repealed effective 06/30/2010.