

**TITLE 11        LABOR AND WORKERS COMPENSATION**  
**CHAPTER 21    LABOR UNIONS/LABOR RELATIONS**  
**PART 3         PROHIBITED PRACTICES PROCEEDINGS**

**11.21.3.1        ISSUING AGENCY:** Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM, 87120, (505) 831-5422.

[11.21.3.1 NMAC - N, 3/15/2004]

**11.21.3.2        SCOPE:** The scope of Part 3 of Chapter 21 applies to public employers, public employees and labor organization as defined by the Public Employee Bargaining Act (10-7E1 to 10-7E-26 NMSA 1978).

[11.21.3.2 NMAC - N, 3/15/2004]

**11.21.3.3        STATUTORY AUTHORITY:** Authority for Part 1 of Chapter 21 is the Public Employee Labor Relations Act NMSA Sections 1 through 26 (10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.3.3 NMAC - N, 3/15/2004]

**11.21.3.4        DURATION:** Permanent.

[11.21.3.4 NMAC - N, 3/15/2004]

**11.21.3.5        EFFECTIVE DATE:** March 15, 2004, unless otherwise cited at the end of the section.

[11.21.3.5 NMAC - N, 3/15/2004]

**11.21.3.6        OBJECTIVE:** The objective of Part 3 of Chapter 21 is to set forth an efficient and effective investigative process for collection and evaluating information to determine whether public employers, public employees or labor organizations have engaged in activities or conduct that constitutes a violation of the Public Employee Bargaining Act (Sections 10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.3.6 NMAC - N, 3/15/2004]

**11.21.3.7        DEFINITIONS:** [RESERVED]

[11.21.3.7 NMAC - N, 3/15/2004]

**11.21.3.8        COMMENCEMENT OF CASE:**

**A.** A prohibited practices case shall be initiated by filing with the director a complaint on a form furnished by the director. The form shall set forth, at a minimum, name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed (the respondent) and of its representative if known, the specific section of the act claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party. The complaint shall be signed and dated, filed with the director, and served upon the respondent.

**B.** When an individual employee files a prohibited practices complaint alleging a violation of Subsection F and H of Section 19, Subsection C or D of Section 20 of the act, an interpretation given to the collective bargaining agreement by the employer and the exclusive representative shall be presumed correct.

[11.21.3.8 NMAC - N, 3/15/2004]

**11.21.3.9        LIMITATIONS PERIOD:** Any complaint filed more than six months following the conduct claimed to violate the act, or more than six months after the complainant either discovered or reasonably should have discovered each conduct, shall be dismissed.

[11.21.3.9 NMAC - N, 3/15/2004]

**11.21.3.10        FILING OF ANSWER:**

**A.** Within 15 days after service of a complaint, the respondent shall file with the director and serve upon the complainant its answer admitting, denying or explaining each allegation of the complaint. For purposes of

this rule, the term “allegation” shall mean any statement of fact or assertion of law contained in a complaint. No particular form is required either to state allegations or to answer them.

**B.** If a respondent in its answer admits or fails to deny an allegation of the complaint, the director, hearing examiner or board may find the allegation to be true.

[11.21.3.10 NMAC - N, 3/15/2004]

**11.21.3.11 DEFAULT DETERMINATION:** If a respondent fails to file a timely answer, the director shall serve on the parties a determination of violation by default, based upon the allegations of the complaint and any evidence submitted in support of the complaint.

[11.21.3.11 NMAC - N, 3/15/2004]

**11.21.3.12 SCREENING/INVESTIGATION:**

**A.** Upon receipt of a complaint, the director shall screen the complaint for facial adequacy. If the complaint is facially deficient, the director shall advise the complainant of the deficiency and give the complainant an opportunity to amend the complaint within five days. Absent an amendment curing a facially deficient complaint, the director shall dismiss the complaint, stating the reasons in writing and serving the dismissal on the parties. A complaint that is facially untimely pursuant to Section 9 shall be dismissed.

**B.** After screening a complaint, the director shall investigate the allegations. The director need not await the filing of an answer before commencing the investigation. At the director’s request, the complainant shall immediately present to the director all evidence available to the complainant in support of the complaint, including documents and the testimony of witnesses.

**C.** If a complainant fails to timely produce evidence in support of its complaint pursuant to the director’s request, or fails to produce evidence that in the director’s opinion is sufficient to support the allegations of the complaint, the director shall request the complainant withdraw the complaint within five days and, absent such withdrawal, shall dismiss the complaint stating the director’s reasons in writing and serving the dismissal on all parties.

[11.21.3.12 NMAC - N, 3/15/2004]

**11.21.3.13 APPEAL TO BOARD OF DIRECTOR’S DISMISSAL:**

**A.** The director’s decision to dismiss a complaint shall be subject to board review by the complainant filing with the board and serving upon the other parties a notice of appeal within 10 days following service of the dismissal decision. In its appeal, the complainant shall state the particular findings or conclusions of the director to which it takes exception and shall identify specific evidence that the complainant presented or offered to the director which supports the complainant’s position on appeal.

**B.** Within 10 days after service of a notice of appeal, any other party may file and serve a response to the appeal.

**C.** The board may consider the case on the papers filed with it or, in its discretion, may also hear oral argument. The board shall issue its decision affirming the director’s dismissal, ordering further investigation, or setting a hearing as soon as feasible following its consideration of the appeal but in any event no later than its next or the following regular meeting. The board may approve and incorporate in its decision all or any part of the director’s dismissal decision.

[11.21.3.13 NMAC - N, 3/15/2004]

**11.21.3.14 NOTICE OF HEARING:** If the director, following investigation and the filing of an answer, believes that there is sufficient evidence that the respondent has committed a prohibited practice to warrant a hearing, the director shall designate a hearing examiner, set a hearing, and serve a notice of the hearing upon all parties. The director shall dismiss the complaint or set a hearing within 30 days of filing of the complaint. A hearing shall be scheduled within 45 days of the filing of the complaint.

[11.21.3.14 NMAC - N, 3/15/2004]

**11.21.3.15 PRE-HEARING SETTLEMENT EFFORTS:**

**A.** Following service of a notice of hearing and before commencement of the hearing, the director shall attempt to settle the complaint with the parties. If the parties achieve a settlement, they shall reduce it to writing and submit it to the director for approval.

**B.** If the complaint cannot be settled by the parties prior to the hearing, the matter shall proceed to hearing. However, the complaint may be settled by the parties at any time prior to hearing.

**C.** The director or hearing examiner may submit a proposed settlement agreement to the board for its approval before the settlement becomes final.

**D.** The complainant may withdraw the complaint at any time prior to hearing, without approval by the director or the board. After commencement of the hearing, the complaint shall not be withdrawn or settled without the approval of the hearing examiner. After a hearing examiner's report has been issued, a complaint may not be withdrawn without board approval.

[11.21.3.15 NMAC - N, 3/15/2004]

#### **11.21.3.16 PROHIBITED PRACTICES HEARINGS:**

**A.** In the absence of an approved settlement agreement, the hearing examiner shall conduct a formal hearing, assigning the burden of proof and the burden of going forward with the evidence to the complainant, as stated in 11.21.1.22 NMAC.

**B.** The hearing examiner may examine witnesses called by the parties, call additional witnesses, or call for the introduction of documents.

[11.21.3.16 NMAC - N, 3/15/2004; A, 7/1/2020]

**11.21.3.17 BRIEFS:** The filing of post-hearing briefs shall be permitted on the same basis as provided by 11.21.2.20 NMAC for briefs in representation cases.

[11.21.3.17 NMAC - N, 3/15/2004; A, 6/14/2013]

**11.21.3.18 HEARING EXAMINER REPORTS:** The hearing examiner shall issue a "report and recommended decision" within the same time limits and following the same requirements provided in 11.21.2.21 NMAC for hearing examiner reports in representation cases.

[11.21.3.18 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020]

#### **11.21.3.19 APPEAL TO BOARD OF HEARING EXAMINER'S RECOMMENDATION:**

**A.** Any party aggrieved by the hearing officer's recommendation may obtain board review by filing with the board and serving on the other parties a notice of appeal within 10 days following service of the hearing officer's report. The notice of appeal shall specify which findings, conclusions, or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that supports each exception.

**B.** Any other party may file a response to notice of appeal within 10 days of service of the notice of appeal.

**C.** The board may determine an appeal on the papers filed or, in its discretion, may also hear oral argument. The board shall decide the appeal and issue its decision within 60 days of the notice of appeal. The board may issue a decision adopting, modifying, or reversing the hearing examiner's recommendations or taking other appropriate action. The board may incorporate all or part of the hearing examiner's report in its decision.

**D.** If notice of appeal is not filed within the time set out in Subsection A of 11.21.3.19 NMAC, the hearing examiner's report and recommended decision shall be transmitted immediately to the board which may pro forma adopt the hearing examiner's report and recommended decision as its own. In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding board precedent.

[11.21.3.19 NMAC - N, 3/15/2004]

**11.21.3.20 RELIEF FROM PROHIBITED PRACTICES DETERMINATION:** A party may move to set aside a default determination entered against it within 30 days after the service thereof. Said motion shall be served upon all other parties and shall set out in detail the reasons in support thereof. Upon finding good cause for the motion and within 30 days of the filing of such motion, the director or board shall order such further proceeding

as it deems appropriate. The failure to act within 30 days after the filing of such motion shall constitute a denial of the motion.

[11.21.3.20 NMAC - N, 3/15/2004]

**11.21.3.21 ADMINISTRATIVE AGENCY DEFERRAL:** Where the board becomes aware that a complainant has initiated another administrative or legal proceeding based on essentially the same facts and raising essentially the same issues as those raised in the complaint, the board may take any of the following actions, at the board's discretion:

**A.** The board may hold the proceedings under the act in abeyance pending the outcome of the other proceeding.

**B.** The board may go forward with its own processing. In so doing, the board may request that the other proceedings be held in abeyance pending outcome of the board proceeding.

In the event that the resolution of the proceedings in such other forum is contrary to the act, or all issues raised before the board are not resolved, the board may proceed under the provisions of 11.21.3 NMAC.

**C.** For purposes of this rule, "board" shall mean the board or the director.

[11.21.3.21 NMAC - N, 3/15/2004]

**11.21.3.22 ARBITRATION DEFERRAL:**

**A.** If the subject matter of a prohibited practices complaint requires the interpretation of a collective bargaining agreement; and the parties waive in writing any objections to timeliness or other procedural impediments to the processing of a grievance, and the director determines that the resolution of the contractual dispute likely will resolve the issues raised in the prohibited practices complaint, then the director may, on the motion of any party, defer further processing of the complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

**B.** Upon its receipt of the arbitrator's award, the complaining party shall file a copy of the award with the director, and shall advise the director in writing that it wishes either to proceed with the prohibited practice complaint or to withdraw it. The complaining party shall simultaneously serve a copy of the request to proceed or withdraw upon all other parties.

**C.** If the complaining party advises the director that it wishes to proceed with the prohibited practices complaint, or if the board on its own motion so determines, then the director shall review the arbitrator's award. If in the opinion of the director, the issues raised by the prohibited practices complaint were fairly presented to and fairly considered by the arbitrator, and the award is both consistent with the act and sufficient to remedy any violation found, then the director shall dismiss the complaint. If the director finds that the prohibited practice issues were not fairly presented to, or were not fairly considered by, the arbitrator, or that the award is inconsistent with the act, or that the remedy is inadequate, then the director shall take such other action deemed appropriate. Among such other actions, the director may accept the arbitrator's factual findings while substituting legal conclusions and remedies pursuant to Subsection F of Section 10-7E-9 NMSA 1978 appropriate for the prohibited practice issues.

**D.** In the event that no arbitrator's award has been issued within one year following deferral under this rule, then the director may, after notice and in the absence of good cause shown to the contrary, dismiss the complaint.

**E.** The director's decision either to dismiss or further process a complaint pursuant to this rule may be appealed to the board under the procedure set forth in 11.21.3.13 NMAC. Interim decisions of the director under this rule, including the initial decision to defer or not to defer further processing of a complaint pending arbitration, shall not be appealable to the board.

[11.21.3.22 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020]

History of 11.21.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records-state records center and archives:

PELRB 3, Prohibited Practices Proceedings, filed 3/18/1993.

History of Repealed Material: 11 NMAC 21.3, Prohibited Practices Proceedings (filed 6/24/1996), repealed as a result of the internal duration of rule, stated as 7/1/1999.

Other History:

PELRB 3, Prohibited Practices Proceedings, filed 3/18/1993 was renumbered and replaced by 11 NMAC 21.3, Prohibited Practices Proceedings, filed 6/24/1996.

11 NMAC 21.3, Prohibited Practices Proceedings, filed 6/24/1996, was replaced by 11.21.3 NMAC, Prohibited Practices Proceedings, effective 3/15/2004.

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