

(PLEASE FIND THE AGENDA/TABLE OF CONTENTS ON PAGE 4.)

REGULAR MEETING OF THE BOARD OF DIRECTORS



**March 3, 2020
9:30 AM
Alfredo R. Santistevan Board Room
NMRHCA Offices, Suite 207
4308 Carlisle Blvd. NE
Albuquerque, NM 87107**

New Mexico Retiree Health Care Authority
Regular Meeting

BOARD OF DIRECTORS

ROLL CALL

March 5, 2020

	Member in Attendance		
Mr. Sullivan, President			
Mr. Montañño, Vice President			
Mr. Crandall, Secretary			
Mr. Propst			
Ms. Goodwin			
Mr. Linton			
Ms. Saunders			
Mr. Eichenberg			
Ms. Larranaga-Ruffy			
Mr. Rael			
Ms. Moon			

NMRHCA BOARD OF DIRECTORS

March 2020

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Regular Meeting of the
NEW MEXICO RETIREE HEALTH CARE AUTHORITY
BOARD OF DIRECTORS

March 5, 2020
9:30 AM

Alfredo R. Santistevan Board Room
NMRHCA Offices, Suite 207
4308 Carlisle Blvd. NE
Albuquerque, NM 87107

AGENDA

		Page
1. Call to Order	Mr. Sullivan, President	
2. Roll Call to Ascertain Quorum	Ms. Beatty, Recorder	
3. Pledge of Allegiance	Mr. Sullivan, President	
4. Approval of Agenda	Mr. Sullivan, President	4
5. Approval of Regular Meeting Minutes February 4, 2020	Mr. Sullivan, President	5
6. Public Forum and Introductions	Mr. Sullivan, President	
7. Committee Reports	Mr. Sullivan, President	
8. Executive Director's Updates	Mr. Archuleta, Executive Director	
a. HR Updates		
b. Legislative		
c. Town of Clayton Program Participation		
d. Rand Hospital Price Transparency Study		
e. Interagency Pharmaceuticals Purchasing Council		18
f. Case No. D101-cv 2019-025446		
g. GAS 75 Employer Allocation Schedules		
h. January 31, 2020 SIC Report		51
9. 2021 Preliminary Plan Discussion	Mr. Archuleta, Executive Director	52
10. Santa Fe Office Lease Agreement (Action Item)	Mr. Kueffer, Deputy Director	56
11. Out-of-State Travel Request (Action Item)	Mr. Kueffer, Deputy Director	65
12. Years of Service and Minimum Age Requirement Rule Change (Action Item)	Mr. Archuleta, Executive Director	66
13. Other Business	Mr. Sullivan, President	
14. Executive Session Pursuant to NMSA 1978, Section 10-15-1(H)(6) To Discuss Limited Personnel Matters	Mr. Sullivan, President	
15. Date & Location of Next Board Meeting	Mr. Sullivan, President	
April 14, 2020, 9:30AM Alfredo R. Santistevan Board Room 4308 Carlisle Blvd. NE., Suite 207 Albuquerque, NM 87107		
16. Adjourn		

ACTION SUMMARY

RETIREE HEALTH CARE AUTHORITY/REGULAR BOARD MEETING

February 4, 2020

<u>Item</u>	<u>Action</u>	<u>Page</u>
APPROVAL OF AGENDA	Approved	3
<u>APPROVAL OF MINUTES:</u> January 7, 2020	Approved	3
<u>PUBLIC FORUM & INTRODUCTIONS</u>	Informational	3
<u>EXECUTIVE DIRECTOR'S UPDATES</u> HR Updates NMAER Temporary Board Appointment 2020 Winter Newsletter Legislative Update Case No. D-101-cv-2019-025446 AG's Office Opioid & Generic Antitrust Litigation Res. 2019-2020-7 Bd of Education of Alamogordo Public School District Dec 31, 2019 SIC Report	Informational	3
PARENTAL LEAVE POLICY EXEC ORDER	Approved	8
FY20 2ND QUARTER BUDGET REPORT	Informational	8
DISPOSAL OF IT EQUIPMENT	Approved	8
OFFICE LEASE RFP	Informational	8
OUT OF STATE TRAVEL REQUEST	Approved	9
FY19 FINANCIAL AUDIT REVIEW	Informational	9
APPEAL RE: ELIGIBILITY: CRAIG O'HARE	Executive session	9-12
ACTION ON APPEAL	Accept appeal, provide coverage effective January 1, 2020	12
EXECUTIVE SESSION: SEALED BID PROPOSALS/MEDICAL DENTAL VISION RFP	Enter into negotiations to determine highest rated vendors	13

MINUTES OF THE
NEW MEXICO RETIREE HEALTH CARE AUTHORITY/BOARD OF DIRECTORS
REGULAR MEETING
February 4, 2020

1. CALL TO ORDER

A Regular Meeting of the Board of Directors of the New Mexico Retiree Health Care Authority was called to order on this date at 9:45 a.m. in the PERA Building, Senator Fabian Chavez, Jr. Board Room, 33 Plaza La Prensa, Santa Fe, New Mexico.

2. ROLL CALL TO ASCERTAIN A QUORUM

A quorum was present.

Members Present:

Mr. Tom Sullivan, President
Mr. Doug Crandall, Secretary
The Hon. Tim Eichenberg, NM State Treasurer
Ms. Jan Goodwin [arrived 10:30 a.m.]
Ms. LeAnne Larrañaga-Ruffy
Mr. Terry Linton
Ms. Pamela Moon
Ms. Therese Saunders

Members Excused:

Mr. Joe Montañó, Vice President
Mr. Lawrence Rael

Staff Present:

Mr. Dave Archuleta, Executive Director
Mr. Neil Kueffer, Deputy Director
Mr. Greg Archuleta, Director of Communication & Member Engagement
Mr. Tomas Rodriguez, IT Director
Ms. Peggy Martinez, CFO
Ms. Judith S. Beatty, Board Recorder

Others Present:

[See sign-in sheet.]

3. PLEDGE OF ALLEGIANCE

Mr. Linton led the pledge.

4. APPROVAL OF AGENDA

Mr. Crandall moved approval of the agenda, as published. Ms. Saunders seconded the motion, which passed unanimously.

5. APPROVAL OF REGULAR MEETING MINUTES: January 7, 2020

Ms. Moon requested that "Association of Counties" be changed to "Bernalillo County" on page 6 under HIPAA Compliance Training, and that the date of the next meeting be changed from February 5 to February 4 on the last page.

Ms. Saunders moved approval of the January 7 minutes, as amended. Mr. Crandall seconded the motion, which passed unanimously.

6. PUBLIC FORUM AND INTRODUCTIONS

Chairman Sullivan stated that people were present to address the board regarding item 8g, and would be given the opportunity to speak from the floor at that time.

7. COMMITTEE REPORTS

Deferred.

8. EXECUTIVE DIRECTOR'S UPDATES

a. HR Updates

Mr. Archuleta presented HR updates.

Mr. Archuleta announced that PERA's HR staff has agreed to assume the duties and responsibilities previously assigned to SPO through the shared service agreement it had with NMRHCA. This is more a cost effective arrangement.

b. NMAER Temporary Board Appointment

Mr. Archuleta stated that Vice President Joe Montañó will not be present for at least the next two meetings. In the meantime, NMAER has appointed Russell Goff to serve in his role until Mr. Montañó is able to return to his regular duties.

c. 2020 Winter Newsletter

Mr. Archuleta stated that the January 2020 employer newsletter spells out the rule changes that go into effect on January 1, 2020, and will be part of a continuing effort to convey information to employers

about the rule changes. NMRHCA has not yet completed the retiree-specific newsletter, however, as it is awaiting the final decision on the RFP so it can provide inside information on the changes people can expect beginning in June. That information will be in the retiree newsletter that goes out in two weeks.

Chairman Sullivan commented that the active employees are a fluid group, and so NMRHCA doesn't know who all of them are. He asked how this information reaches them. Mr. Archuleta responded that all 74 state agencies are considered one employer group, so those employees can be reached through an email blast from DoIT. In addition, NMRHCA posts the information on its website and also sends the information to all 302 employer groups through their payroll people. When the rule changed, the NMRHCA sent notice to all of them, asking them to distribute the information and letting them know what the changes were.

Chairman Sullivan suggested that, in addition to reaching out to the payroll people in each employer group, it may also be important to add the director or president of an association to the contact list.

Ms. Moon said she has never seen the newsletter. She suggested sending it to county managers, city managers and superintendents, among others, and asking them to manage the distribution.

d. Legislative Update

Mr. Archuleta stated that the FY21 appropriation recommendations proposed by the Legislative Finance Committee (LFC) and Executive provided for a range of growth between 0.1 and 4.4 percent for the Healthcare Benefits Administration Program, with the LFC recommendation being greater. The House Appropriations & Finance Committee adopted the Executive recommendation, which provides the NMRHCA almost \$500,000 of growth. This year, NMRHCA expects to spend \$335,000 to \$340,000, so the budget is manageable, and any difference can be accommodated through budget adjustment authority granted in Section 10 of the bill, which states that NMRHCA may request budget increases from other state funds for claims.

Mr. Archuleta said HB 45, the FIR and the bill analysis are included in the board book. Since the board's last discussion, this legislation was unanimously endorsed by the House Labor, Veterans and Military Affairs Committee. He added that the sponsors of the bill, Tomás Salazar and Raymundo Lara, agreed with a request to remove the \$12.3 million appropriation contained in the bill.

e. Case No. D-101-cv-2019-025446

Mr. Archuleta stated that the information from NMRHCA with respect to this case was due on January 15, and a response from the plaintiff was due on February 3. The outcome of the court action will be reported to the board at the next meeting.

f. Attorney General's Office Opioid and Generic Antitrust Litigation

Mr. Archuleta stated that the Attorney General contacted NMRHCA about participating in a class action lawsuit against opioid manufacturers as well as some generic antitrust litigation issues. Agency staff will fully cooperate with the Attorney General's Office.

g. Resolution 2019-2020-7 Board of Education of Alamogordo Public School District

Mr. Archuleta stated that this resolution, adopted by the Board of Education of the Alamogordo Public School District on January 28, proposes a moratorium to pause the NMRHCA healthcare subsidy rule change. It states that New Mexico Schools could potentially lose a high volume of experienced teachers and administrators as an unintended consequence.

As background, Mr. Archuleta said NMRHCA has done some research, and more research needs to be done. He spoke with ERB Executive Director Jan Goodwin, who stated that, on average, about 240 people under the age of 55 retire each year, and 160 of them are in K-12 and the remainder in higher education. As of June 30, 2018, there were 21,386 teachers, although the ERB valuation report states that, as of June 2019, 665 teachers under the age of 55 are eligible to retire next year.

Mr. Archuleta stated that, in July 2013, the board voted to change the rule effective January 1, 2020, implementing the minimum age requirements and increasing the minimum years of service required in order to receive the full subsidy for the program. In the years since then, as the legislation has continued to fail in each year, and as the implementation date approached, it became increasingly evident that additional changes would be necessary. In May 2018, the board voted to initiate the rulemaking process regarding the implementation of a minimum age requirement of 55 and to increase the years of service for the maximum subsidy to 25 years. He reviewed the communication and notification timeline.

The floor was opened to public comment.

Public Education Secretary-Designate Ryan Stewart said he has heard concerns from people across the state about this rule change. He said there is a deep and growing worry about the impact that the rule change may have on incentivizing many experienced educators to leave the classroom earlier than they otherwise would have. He said there is a critical shortage of highly qualified educators in the state already; and as they retire, there are not enough experienced educators to replace them. This will be especially crucial if they retire midyear. He asked the board to consider postponing this to allow time to study how the rule change may impact the schools.

Bethany Jarrell, Vice President of NEA New Mexico and a child educator in Alamogordo, read an official statement from NEA New Mexico. She said the Public Education Department reported to them that it lost 2,521 teaching positions from 2014 to 2020. She said there has not been a similar reduction in students, however. She said the new rule change passed in November 2018, and the adopted rule change effective January 1, 2021, will further exacerbate the teacher shortage crisis. In addition, NMRHCA failed to communicate this message to the New Mexico Public School Insurance Authority; had it done that, NMPSIA's quarterly newsletter would have been able to notify its membership about the impending change. She said the NMRHCA website posted the information and included it in its newsletter, but the newsletter isn't sent out to current active educators and other state employees. In October 2019, NMRHCA staff presented to 150 educators at NEA New Mexico's delegate council; and while the staff discussed the solvency issue, "not one word" was mentioned about the rule change. She said NEA NM supports the increased employee-employer contribution, but not anything that will cause teachers to flee the schools in New Mexico. She said NEA NM opposes the proposed timeline, and requested grandfathering Tier 1 members who are caught in the position of being eligible for retirement and full benefits, but not full medical subsidy. She requested that the effective date be pushed back by six months.

Mr. Archuleta clarified that, with respect to the presentation he made to the NEA New Mexico delegate council, he recalled specifically mentioning the rule change, because people approached him after the meeting to discuss it further and to also ask whether or not NMRHCA would be able to make a presentation at the Central Consolidated Schools, which he agreed to do.

Mr. Archuleta stated that, while the most recent investment report is positive, rough times are coming, and the opportunity to weather that storm will be better served by the minimum age and increased years of service requirement. NMRHCA has been strongly criticized for not implementing this in the past; and if it does not receive an increase before FY 2023, staff will have to come forward with recommendations for significant reductions in the pre-Medicare retiree subsidies in the range of 15-16 percent for retirees or else increasing the minimum age to 65.

Responding to Chairman Sullivan on what impact a six-month delay would have on the solvency of the fund, Mr. Archuleta said Segal is in the process of doing those calculations and he would provide them as soon as they were available.

Chairman Sullivan said he would recommend putting this on next month's agenda, although in no way was he suggesting that NMRHCA change direction, given the push by the Legislative Finance Committee to adopt it.

Mr. Linton asked if it would be possible to delay the implementation of the rule for six months for educators only.

Mr. Archuleta responded that if the board wanted to delay implementation for six months, he would recommend doing it for everyone. He expressed concern, though, about making a change based on the hardship expressed by one school district.

Mr. Crandall asked if this would mean going through the whole rulemaking process all over again, and Mr. Archuleta responded that he believed so.

Mr. Crandall said that, as a fiduciary, his concern is to the fund. He said he was sorry New Mexico couldn't pay its teachers, but it wasn't within his authority to use a healthcare fund to solve a problem, and he wasn't sure it was legal to do that.

Responding to Mr. Eichenberg, board legal counsel Justin Horwitz said he believed that NMRHCA would have to go through the whole rulemaking process again in order to change the effective date, but he would research this further.

Mr. Crandall asked how many people would be affected by extending the date six months. Mr. Archuleta responded that, on average, 240 people per year under age 55 retire, 160 in K-12 and 80 in higher education. Mr. Crandall expressed concern about reopening the rulemaking process for such a small group of people; and as was the case the last time, the agency would not receive any support for it.

Mr. Archuleta noted that 668 people under 55 are eligible to retire next year.

[Ms. Goodwin arrived at the meeting.]

Colleen Tagle, Deputy Superintendent for Alamogordo Public Schools, said that most people who spoke at the 2018 rulemaking hearing said they didn't know about the rule change, and then there was a dearth of information that came after that about how people would be affected, which she found "shocking." She said she has repeatedly struggled to get information for the Alamogordo Schools employees who are retiring because of this rule. She said this is happening at the same time the state is changing the formula on how it compensates school districts, which is heavily weighted toward experienced teachers, at the same time that they're being driven out and being replaced with less experienced teachers. She added that she was "astonished" that NMRHCA still didn't have the numbers from the actuary on what the impact would be if the rule were held off for six months, since this has been discussed for months.

Ms. Tagle stated that the agency got support from everybody for HB 45 because of the NMRHCA's messaging about it, but now it is moving the goalposts for people just as they are getting close to retirement, and that has created a lack of trust. She said, "People and financial planners across the state would tell you grab the benefit now, sit out a year and come back, and that is prudent financial planning, and it's all I can recommend for people who have devoted their careers for our students."

Chairman Sullivan asked Ms. Tagle if she is talking about people who are planning to retire and now are going to be forced to retire without healthcare, or is this about people that were originally planning to retire and then go back to work a year later, i.e., "double-dipping."

Ms. Tagle responded that people who are acting in their own self-interest, which is to cover unpredictable and skyrocketing costs for their own families, shouldn't be faulted for retiring now and locking in the subsidy that was promised to them.

Mr. Archuleta said NMRHCA reminds people that the statute is very specific, and that this benefit could be modified or extinguished at any point. It is not meant to provide any kind of contractual obligation to the folks who are paying into the program.

Ms. Goodwin said the ERB is asking its actuaries to prepare a calculator that the members can use to see if they are better off retiring now, continuing to work, or retiring now and going back to work. She said it might be helpful if the ERB were to ask its actuaries what impact the ability to retire at 55 would have on future funding, since this would help her respond to the issues raised by Deputy Superintendent Tagle.

Chairman Sullivan suggested placing this on next month's agenda as a placeholder for possible action, but with no prediction on what the board would decide. He asked what kind of timeline was involved for any rule change.

Mr. Horwitz said he would put together a timetable for the board.

Mr. Crandall asked if extending this by six months will make the teachers happy, or is this saying that they don't like the idea at all, because there's a big difference between the two.

Jerrett Perry, Superintendent, Alamogordo Public Schools, said pushing this out to July 2021 would "at least gives me a fighting chance to be in compliance with Yazzie Martinez."

Mr. Crandall asked Mr. Perry if he supported the July 1, 2021 deadline. Mr. Perry responded that he would “certainly be in support of that.”

Chairman Sullivan asked NEA NM representative Bethany Jarrell if she supported this, as well. He said the concern is that people aren’t going to be satisfied with the six months and will return later and ask for another extension. Ms. Jarrell responded, “At the very minimum, we need to at least do the six months.” Mr. Crandall asked Ms. Jarrell what the NEA’s position was, and Ms. Jarrell said she would have to go back and ask, but six months would be the minimum. Mr. Crandall said that was his concern. He commented, “It’s either acceptable or it’s not.” Ms. Jarrell said the NEA NM president was traveling but would probably be present at the March meeting “for us to have that discussion.”

h. December 31, 2019 SIC Report

Mr. Archuleta reported that the SIC report reflects a \$780 million balance as of December 31.

9. PAID PARENTAL LEAVE POLICY EXECUTIVE ORDER 2019-036

Mr. Archuleta said NMRHCA is currently authorized 26 full-time employees and an approved salaries and benefits budget totaling \$2,028,000. Referring to a detail by line item, he said NMRHCA does not anticipate a significant or material reduction in productivity as a result of implementing this executive order, and requested approval to implement the Order, effective today.

Mr. Crandall asked if this is irrevocable, and Mr. Archuleta responded that it is not, and that the board can modify its policies and procedures at any time.

Mr. Crandall moved to support the Executive Director’s recommendation. Ms. Saunders seconded the motion, which passed unanimously.

10. FY20 2ND QUARTER BUDGET REPORT

Mr. Archuleta reviewed the budget report, noting an overall increase in revenues of 5.3 percent.

11. DISPOSAL OF IT EQUIPMENT

Mr. Kueffer presented this report. He said the items slated for disposal include workstations, printers, monitors and servers. All of the hard drives are destroyed by a company that provides a certificate of destruction. He asked for approval to dispose of the items.

Mr. Linton moved for approval. Ms. Goodwin seconded the motion, which passed unanimously.

12. OFFICE LEASE RFP

Mr. Archuleta reported that PERA staff met with GSD, and there is no longer a need to issue an RFP, as they have found an ideal location in the Albuquerque area for PERA and the NMRHCA to co-locate.

13. OUT-OF-STATE TRAVEL REQUEST

Mr. Kueffer requested approval for him and Mr. Archuleta to attend the SALGBA 2020 National Conference April 5-8, 2020, in Louisville.

Mr. Linton so moved. Ms. Moon seconded the motion, which passed unanimously.

14. FY19 FINANCIAL AUDIT REVIEW

Moss Adams representatives Kory Hoggan and Aaron Hamilton presented this report on the recently completed audit.

-- No exceptions were noted and there were no qualifications to the opinion. On the internal controls, no material weaknesses or significant deficiencies were noted.

-- Funded status rose from 13 percent to 19 percent in 2019. The primary driver of this change was the decrease of \$1.3 billion in the net OPEB liability related to actuarial assumption changes.

-- The Plan was not adequately funded at its inception, and at 19 percent, it is underfunded and presents a risk of not being able to maintain long-term sustainability. Management and those charged with governance of the Plan should work with legislators and other funding sources to develop a funding policy to improve the funded status and position the Plan for long-term sustainability.

Mr. Hamilton said another audit of the employer allocation schedules is ongoing. He presented a proposed timeline.

Ms. Moon commented that the user groups would be very appreciative if the allocation schedule could be distributed as soon as possible after the Office of the State Auditor returns it.

15. HEARING OF APPEAL REGARDING ELIGIBILITY: CRAIG D. O'HARE

Ms. Goodwin disclosed that she has known Mr. O'Hare for several years in a professional relationship, but has had no contact with him regarding this appeal.

[Mr. O'Hare, attorneys and staff were sworn a few minutes into this presentation.]

Mr. O'Hare stated that his official retirement date was September 1, 2019, and 31 days from that was October 2, 2019, which he understands to be the deadline as established in NMAC 2.8.1. When he received his application, staff rejected it as being too late. He submitted it on December 3, and staff referenced NMAC 2.8.1. Mr. Archuleta's response to his appeal also cited NMAC 2.8.1 as the reason for the rejection. Mr. O'Hare said he doesn't disagree with that assessment, as his application was submitted too late pursuant to the language in NMAC 2.8.1. The basis of his appeal is that he fully complied with the deadlines and other NMRHCA application submittal requirements as they are written online and in hard copy sent to him when he originally submitted the application on December 3.

Mr. O'Hare pointed out three areas in both the written application materials and the website, which makes it very clear that he met the deadlines as they were written in NMRHCA materials. He cited a document titled, "Important Information You Need to Know in Preparing Your General Enrollment

Application as a Retiree,” where it states under Enrollment, “You must enroll within 31 days following either your last day of current medical insurance coverage or your retirement date that is on record with your retirement board, whichever is later.” When he left county employment three years ago, he obtained ACA coverage because he was not eligible to retire and get his pension and NMRHCA coverage because he was only 57 years of age, had 20 years of service, and he needed to wait until he turned 60 in order to start qualifying for his pension and coverage. He said the citation is fairly clear. In addition, under Important Notices, Deadline for Application, it says, “It is best to submit your application in the applicable documents listed below at least one month, but not to exceed 60 days, prior to your last day of coverage.” In this case, his coverage was the ACA, and not the coverage provided to him by the employer because he had, in his mind, left county government three years earlier. Finally, on the website, under Enrollment, it states, “You must enroll within 31 days following either your last day of current medical insurance coverage or your retirement date, whichever is later.” He said he would argue that he met one of those two conditions.

Mr. O’Hare said the written materials online and sent with the application packet are apparently not in conformance with the language in NMAC 2.8.1, because he believes that the general enrollment application materials are written for one type of retiree, and probably the majority of the NMRHCA retirees, who are still working for city, county or state government and are getting close to their retirement date, and they still have insurance coverage covered by their employer. He said the fact that these written materials within the NMRHCA instruction packet do not include that qualifier that says they mean the medical insurance coverage currently being provided by the employee’s employer, makes this in non-conformance with NMAC 2.8.1. for someone in his particular situation.

Mr. O’Hare said it is not reasonable, appropriate, or fair to reject his application based on NMAC 2.8.1 given that he submitted his application in full compliance with guidelines and instructions provided to retirees by the NMRHCA. Nowhere in the application materials is NMAC 2.8.1 cited, let alone a link provided for retirees to review. Therefore, it is not reasonable for retirees to somehow magically know that the written application guidelines provided by the NMRHCA are not in conformance with a formal NMAC rule of which they are unaware.

There were no questions of Mr. O’Hare.

Mr. Archuleta responded that, on July 15, 2016, the board voted to approve staff recommendations for changes to the program regarding eligibility requirements specific to establishing an open enrollment period every other year. On November 15, 2016, a public hearing was held to receive oral or written comments on the proposed amendment to the rule. No written or oral comments were received; and on December 6, the board unanimously voted to approve the rule change establishing an open enrollment period establishing January 1, 2017, and every second year thereafter, as an open enrollment period. He cited Section 2.81.6.8, paragraph B, and stated that Mr. O’Hare’s coverage was not the result of anything other than a decision to no longer participate on the plan he had through the exchange.

Mr. Archuleta stated that the general enrollment application instructions state, under deadline for application, “General enrollment applications are due in our office within 31 days of your last date of insurance coverage through your employer, however, it is best to submit your application at least one month before but not to exceed 60 days before your last date of coverage.” Information contained in the rule provided by NMRHCA to applicants makes reference to the insurance coverage through an employer and should operate as providing notice to applicants that the employer would be their government employer given the context and type of service that NMRHCA provides. Based on the information

provided by Mr. O'Hare, it is uncertain that his prior insurance was through an employer, let alone a government employer. He has indicated that his insurance is through the Affordable Care Act and it does not appear that it is linked to an employer-based plan. As stated in his appeal, he left government employment in November 2016 and became eligible to receive a pension in September 2019 after turning 60 years old the previous month. From our perspective, the deadline for Mr. O'Hare to submit his enrollment application was October 1, 2019. Notwithstanding the facts of this case, relevant case law states that the acts of representations of government employees cannot operate to bind an agency in a manner contrary to law.

Mr. Archuleta stated that NMRHCA staff tries to be helpful and encourages applicants to reach out to the agency with questions, and it is responsive to those questions. The case at issue is an unfortunate result, and staff plans to investigate ways to avoid these kinds of occurrences moving forward. He said the fact remains that Mr. O'Hare is ineligible and must wait until the next open enrollment period to submit an application for coverage through the NMRHCA. He requested that the board uphold staff's decision.

Responding to Ms. Goodwin, Mr. Archuleta said the next open enrollment period is January 1, 2021. Because there isn't an open enrollment period in 2020, in order to pick up coverage, Mr. O'Hare would have had to have signed up by October 1, 2019.

Mr. O'Hare clarified that he first sat down with these application materials in July or August of 2019, and he was making a decision about whether to stay on the ACA through the remainder of the calendar year or whether he wanted to sign up with NMRHCA insurance as soon as he could, say, October 1. When he read the provision that said, "You must enroll within 31 days following either your last day of current medical insurance coverage or your retirement date, whichever is later." He made the decision to stay on the ACA because the premium was fairly low and he had paid all of his calendar year deductibles, so was probably looking at being in a better situation to stay where he was until January 1, 2020. He didn't want the board to think he was "late to the 8 ball" with respect to getting around to filling out the application; he deliberately relied on the information in the NMRHCA materials to make a conscious decision to wait until the fall to apply for coverage starting January 1.

Mr. O'Hare said Mr. Archuleta's comments mirror the response to him in his appeal, "which is simply that the rules are the rules are the rules, NMAC rules prevail, it doesn't matter whether Retiree Health Care Authority informational materials are not in conformance with those rules, it just matters that you didn't follow the rules whether we made you aware of them or not." He said there is no citation of those rules, and the closest thing to them is the caveat at the beginning of the page under "important information you need to know," which states, "This informational sheet is intended as a summary to and not a replacement of provisions in the Retiree Health Care Act or New Mexico Retiree Health Care Authority rules and regulations, which can be found on the NMRHCA website." He stated, however, that they were not on the website, "so even the slightest, vaguest reference to the rules can't even be accessed on the NMRHCA website."

In granting this appeal, Mr. O'Hare asked the board to recognize that, with a reasonable person's standard in mind, he did comply with the guidelines and deadlines in the written materials, and to recognize that compliance with the NMRHCA written materials is sufficient to grant acceptance of his or anybody's else's application, even if it is contrary to NMAC 2.8.1. Regardless of the decision, he asked the board to direct staff to resolve the problem in the informational materials, because there are probably others who did not speak up and appeal this. He said he is looking at an added cost of \$3,000 to \$4,000 a year because of this decision.

Chairman Sullivan asked what the impact would be on the agency by granting this appeal. Mr. Archuleta responded that it would be hard to gauge what the impact would be with one more member added to their 64,000+ member file of applicants, so he saw no significant financial impact on solvency, although it would probably have some bearing on the agency's ability to deny coverage in the future to people who failed to meet the NMAC-required deadlines.

Mr. Linton commented that the agency's liability is unlimited and the appellant could have huge medical bills between now and January 2021.

Ms. Goodwin moved to enter executive session to discuss this matter. Ms. Larrañaga-Ruffy seconded the motion, which passed on the following roll call vote:

For: Chairman Sullivan; Ms. Goodwin; Mr. Linton; Ms. Saunders; Mr. Eichenberg; Ms. Larrañaga-Ruffy; Ms. Moon.

Against: None.

[The board was in executive session from 11:30 until 12:00 p.m.]

17. ACTION ON APPEAL REGARDING ELIGIBILITY: CRAIG D. O'HARE

Ms. Goodwin moved to come out of executive session. Mr. Linton seconded the motion, which passed unanimously.

Chairman Sullivan stated that the only matter discussed in executive session was the appeal.

Mr. Linton moved to accept the appeal regarding the eligibility of Craig O'Hare and to provide coverage commencing January 1, 2020.

Mr. Linton asked legal counsel Peter Kelton of the Rodey Firm to review the findings.

Mr. Kelton stated that there was one change to the draft findings: Finding 4 has been changed to read, "Mr. O'Hare was eligible for coverage through NMRHCA at the time he left his government employment at Santa Fe County."

Mr. Kelton read the conclusions and recommendations:

- Item 1: Mr. O'Hare's deadline to apply for health insurance benefits from NMRHCA as a retiree was January 1, 2020, due to exceptional circumstances and Mr. O'Hare's good faith attempt to comply with the application requirements for coverage through NMRHCA.
- Item 2: Mr. O'Hare will receive health insurance benefits from NMRHCA effective January 1, 2020.

Ms. Goodwin seconded the motion, which passed by voice vote, with Ms. Larrañaga-Ruffy dissenting.

18. OTHER BUSINESS

None.

19. EXECUTIVE SESSION

Pursuant to NMSA 1978, Section 10-15-1(H)(6) Contents of Competitive Sealed Proposals Solicited Pursuant to the Procurement Code

Mr. Linton moved to enter executive session to discuss the RFP. Ms. Goodwin seconded the motion, which passed on the following roll call vote:

For: Chairman Sullivan; Ms. Goodwin; Mr. Linton; Ms. Saunders; Mr. Eichenberg; Ms. Larrañaga-Ruffy; Ms. Moon.

Against: None.

[The board was in executive session from 12:05 until 12:35 p.m.]

20. MEDICAL, DENTAL, VISION RFP

Ms. Moon moved to come out of executive session. Mr. Linton seconded the motion, which passed unanimously.

Chairman Sullivan stated that the only matter discussed in closed session was the Medical, Dental, and Vision RFP.

Ms. Saunders moved to accept staff's recommendation to enter into negotiations to determine the highest rated vendors for medical, dental and vision. Ms. Larrañaga-Ruffy seconded the motion, which passed unanimously.

**21. DATE AND LOCATION OF NEXT BOARD MEETING:
MARCH 3, 2020, 9:30 A.M.
ALFREDO R. SANTISTEVAN BOARD ROOM, STE. 207
4308 CARLISLE BLVD., N.E.
ALBUQUERQUE, NM, 87107**

ADJOURN

Meeting adjourned at 12:40 p.m.

Accepted by:

Tom Sullivan, President

Jane Horvath
February 27, 2020

Report to the New Mexico Interagency Pharmaceutical Purchasing Council
Policy Recommendations
for IPPC Consideration

Why have drugs become so expensive?

- No serious constraint on manufacturer price setting or price increases
 - Patent thickets
 - Unrelenting pressure on stock price
 - Focus on small population treatments (rare diseases)
 - Unparalleled political power
 - Price increases help competitors
 - General market disfunction
- Misaligned incentives and policies in the market
 - Rebates instead of on-invoice discounts
 - From academic bench science to the supply chain to PBMs –
 - Everyone benefits from higher prices because revenue is a percentage of price
- Who doesn't benefit from high drug prices
 - Patients
 - Health plans
 - Government programs

Context

- Other states share New Mexico's concern about prescription drug spending
- NM SB131 gave the IPPC an agenda consistent with what other states are working on:
 - **Align state (and local) government funded healthcare for more market leverage**
 - **Consolidate drug procurement for state (and local) government purchasers**
 - **Try value-based contracting for high cost drugs**
 - **Understand the role of 340B discount drug program in state healthcare systems**
 - **Evaluate multi-state purchasing strategies**
 - **Bring private and public sectors together for new drug financing or drug procurement strategies**

IPPC Member Distinctions

- Payers/Health Plans
 - Reimburse pharmacies, physicians, facilities for drugs dispensed or administered (ingredient cost reimbursement)
 - Reimbursement pharmacies, physicians, facilities for professional services required to dispense or administer
- Purchasers
 - Buy and take ownership of the drug product
 - Resale to institutions that dispense or administer the product
 - Dispense or administer product to patient
 - Bill payer for ingredient cost and professional services
- Hybrids
 - Hospitals and other facilities that purchase but also run [employee] health plans

Traditional Payer Cost Control Tools

- Benefit design tools
 - Formulary – Open/Closed
 - Preferred Drugs/Tiering
 - Prior Authorization
 - Step Therapy
 - Quantity Limits
- Use benefit design tools to move market share
 - Basis of manufacturer rebate agreements

Purchaser Market-Based Cost Control Tools

- Wholesaler purchasing
 - Volume
- Manufacturer Negotiations
 - Prefer the product
 - Exclude competitors (move market share for manufacturer)
 - Manufacturer agreements are fulfilled by wholesalers

Initial Payer Data

10 IPPC Payer PBM Contractors

- The 10 health plans represented by IPPC members include 3 Medicaid MCOs and Medicaid Fee for Service
- 5 Express Scripts contracts (ES is owned by the health insurer, Cigna)
 - All 5 Express Scripts contracts are with New Mexico government employee health plans
- 1 Optum Rx contract (Optum is owned by the health insurer, UnitedHealth)
 - Medicaid managed care plan
- 2 Prime Therapeutics contracts (Prime has been purchased by Express Scripts)
 - UNM employee health plan
 - Medicaid managed care plan
- 1 Envolve Pharmacy Services contract
 - Medicaid managed care plan
- 1 Conduent contract
 - Medicaid fee for service

COSTLIEST DISEASE STATES REPORTED BY IPPC PLANS	# OF IPPC PLANS REPORTING DISEASE STATE AS ONE OF 5 MOST COSTLY	HIGHEST SPEND RX ASSOCIATED WITH TOP SPEND DISEASE CONDITIONS	
DIABETES	10	Trulicity (3 plans) Humalog (1 plans) Novolog (2 plans)	Lantus (1 plan) Levemir (1 plan) Basaglar (2 plans)
CANCER	8	Revlimid (4 plans) Imbruvica (2 plans)	Imbrance (1 plan)
INFLAMMATORY	8	Humira Pen (9 plans) Enbrel SureClick (1plan)	Stelara (2 plans)
HIV	7	No HIV Rx was reported in top 5 highest spend Rx for any plan	
MULTIPLE SCLEROSIS	5 (all employer plans)	Gilenya (2 plans) Tecfidera (2 plans)	Aubagio (1 plan)
HEPATITIS C	3 (all Medicaid)	Mavyret (4 plans)	
SUBSTANCE ABUSE TREATMENT	3 (Medicaid)	Suboxone (3 plans)	
ASTHMA	2 (all Medicaid)	No asthma/COPD Rx was reported in top 5 highest spend Rx for any plan	
BLOOD THINNERS	1 (employer)	Xarelto (1 plan) Eliquis (1 plan)	
HEMOPHILIA	1 (employer)	Kovaltry (1 plan) Idelvion (1 plan)	Adynovate (1 plan)
PAIN	1 (Medicaid)	No pain Rx was reported in top 5 highest spend Rx for any plan	
SEIZURES	1 (Medicaid)	No anti-convulsant Rx was reported in top 5 highest spend Rx for any plan	
INFECTIONS	1 (employer)	No anti-infective Rx was reported in the top 5 highest spend Rx for any plan	

IPPC Payer Average Rebates as % of Pharmacy Spend

- Express Scripts Plans (employer plans) -- 23.7% to 32.6%
- Prime Therapeutics (employer plan) – 10.7%
- Average rebate percentage is not correlated to size of plan/number of covered lives
- All 6 Employer plans all had the following diseases in their 5 most costly medical conditions
 - Diabetes
 - Autoimmune
 - Cancer
- 5 Employer plans reported these diseases in their top 5 most costly medical conditions:
 - Multiple Sclerosis
- Common PBM contractor, common highest spend diseases, but diverse average rebate percentages

Medicaid Average Rebate Percentages

- Medicaid managed care plans have low average rebates amounts
 - MCO Rx utilization is submitted to State and used to bill for federal law rebates.
 - Manufacturers are not inclined to provide significant price concessions for the same drugs twice
- Medicaid Fee for Service (FFS)
 - Average rebate is 20% of total pharmacy spend
 - This seems very low.
 - Nationally, rebates offset 50% of the pharmacy spend
 - Federal data show a much higher level of rebates as a percent of spend for State

Purchaser Data

Department of Health

- Purchaser
 - For outpatient health clinics
 - Accesses federal deep discount 340B program
 - 340B pricing are probably the lowest prices in the country
 - Operates a warehouse
 - Cardinal Health wholesaler supplier via MMCAP
 - Residential facilities (veterans, behavioral health, substance abuse treatment)
 - In-house pharmacy services
 - Cardinal health is wholesaler via MMCAP
 - Additional notes:
 - Veterans facility can access US VA pricing
 - Sequoyah facility uses Pharmerica for prescriptions/billing residents with health coverage, and Diamond pharmacy for in-house Rx stocking
 - Turquoise Lodge stocks about 300 drugs for common conditions. No HIV or specialty meds
 - Los Lunas community facility contracts for pharmacy services – Rx Innovations based in NM

Children Youth and Families Department

- Juvenile Justice residential facilities
 - In-house pharmacy services
 - Sapphire Pharmacy via MMCAP
 - Off-patent drugs are the major expense
 - Skin conditions, infections, asthma

Department of Corrections

- Wexford Health contracted for all medical care
 - Boswell Pharmacy is Wexford subcontractor
 - Boswell stocks some on-site medicines
 - Boswell does prescription fulfillment for medicines not stocked on site
- Hepatitis C, diabetes and inflammatory conditions are highest spend drugs.

Recommendations

Payers

Pharmacy Benefit Manager Contract

1. Independent review existing PBM contracts
 1. Formulary and formulary structure
 2. Contract provisions that may disadvantage a payer
 3. Contract termination provisions
 4. Pharmacy network participation requirements and reimbursement methodology
2. Independent review of financial performance of each contract
3. Review/compare procurement rules of different departments/agencies
4. Evaluate feasibility and benefits of consolidated PBM contracting
 1. Consider a 'reverse auction'
 2. Consider Northwest Consortium
5. Ensure that PBM provisions do not punish lower cost drug offerings

340B Implications for Public Payers

1. Understand which facilities and commercial pharmacies participate in 340B program
2. Understand how much of payer outpatient pharmacy spend is the result of a medical service at a 340B entity
3. Determine if there is an opportunity for government payers to share in the savings of government 340B providers
 1. 300 hospital 340B outpatient specialty medicine clinics in New Mexico
 2. 366 community health centers in New Mexico

Pharmacy Reimbursement

- Do payers reimburse national chain pharmacies and independent pharmacies the same for brand and/or generic drugs?
- Can government payers create differential payments based on actual acquisition costs?
- Independent pharmacies and regional chains have higher drug acquisition costs than national chains.
- If national chains were reimbursed less and independents reimbursed more, there could be a savings
 - Even if the reimbursement change is budget neutral, there would be greater fairness in the reimbursement system.

Selected Providers for Administration of Specialty Drugs

- Explore whether government payers could/should collectively establish 'centers of excellence' for the administration of certain drug treatments?
- Centers of excellence would be 340B participating facilities
 - Centers of excellence would share in the savings of the 340B drug products
 - Centers of excellence would benefit from service volume
- Payers may make other concessions to centers of excellence such as increased procedure reimbursement, fewer utilization management protocols applied to the treatment

Track Development of Non-Profit Drug Manufacturing

- CivicaRX
 - Private label distributor
 - Intent to become a manufacturer
 - Generic drugs important for inpatient care that are in recurring shortage
- 18 Blue Cross Blue Shield plans will support retail generic drugs
 - Affiliated with CivicaRx
 - Retail generic drug manufacture
 - Private label distribution
 - New Mexico BCBS?
- State of California, Office of Pharmaceutical Acquisition Services

Recommendations

Medicaid

Medicaid Considerations

- Establish supplemental rebate agreements
- Participate in a consolidated IPPC PBM procurement structured as a supplemental rebate agreement for Medicaid
- Participate in any Centers of Excellence program established by the IPPC
- Determine compliance with federal 340B billing rules
- Assess financial implications of generic dispensing
- Evaluate whether to carve out pharmacy from managed care contracts

Recommendations

Facilities

Off-Site Pharmacy Services

- IPPC purchasers use 3 different pharmacy services
 - Boswell Pharmacy (Corrections)
 - Supply on-site stock and individual prescription fulfillment
 - Hep C treatments, Humira, Lantus
 - Innovations Rx (Dept of Health Los Lunas residential facility)
 - Prescription fulfillment
 - Top spend Rx?
 - Sapphire Pharmacy (CYFD Juvenile Justice)
 - Supply on-site stock
 - Symbicort, generics for asthma and skin disorders
- Compare contracts, dispensing fees/stocking fees, ingredient costs
- Compare with Cardinal Health wholesaler contract with current pharmacy services contracts
 - Can DoC stock high spend medicines on-site if Cardinal represents savings?

340B Drug Discount Program

- Are State purchasers maximizing 340B participation?
 - Review 340B eligibility
 - Check status of all Department of Health clinics
- Can residential facilities have residents treated at any of the 366 health clinics or 300 hospital outpatient specialty clinics in New Mexico?
 - “Regular” patients of a 340B clinic can be treated with 340B discount drugs

Recommendations

Broad-based Ideas

Multi-Agency Ideas

- Create Statewide office of prescription drug procurement and negotiations
 - Unified multi-agency contracting for off-site pharmacy services
 - Unified PBM contracting
 - Negotiate with 340B providers on behalf of state payers and residential facilities
 - Could include commercial plans and ERISA plans
- Washington State Healthcare Authority – unified formulary
 - Medicaid, state employee and retirees, school employees, workers comp
- Massachusetts State Office of Pharmacy Services
- California General Services Office of Pharmaceutical Services

Multi-Agency Ideas

- High Risk Insurance Pool for Rare Disease Treatments
 - Coverage of high cost, rare condition treatments
 - Express Scripts/Cigna offering to ERISA plans
 - Could include commercial plans and ERISA plans
- Incentivize enrollees to purchase from Canada or Mexico
 - Utah
 - CanaRx

Create a Prescription Drug Affordability Board

- Analogous to state oversight of public services
- Focus on drugs with costs that impede patient access and payer ability to finance
- Statewide upper payments limits for certain drugs
- 2 states enacted, 12 state bills this year, MN Governor's Healthcare Task Force recommendation

States have been here before

- MMCAP (renamed infuse-mn), 1985
- 1980's manufacturer refusal to negotiate with Medicaid lead to the Medicaid drug rebate program, 1990
- State supplemental Medicaid rebate contract pools 2003, 2005, 2005
- Northwest Consortium, 2006
- State interagency collaboration
 - MA State Office of Pharmacy Services 1992
 - Washington Health Care Authority (unified formulary Medicaid, state employees, school employees and workers comp)
 - CA Pharmaceutical Collaborative/Office of Pharmaceutical Acquisition Services

States Then and Now

- Many state efforts in early 2000's faded
 - PBM offerings started to fill the need states had
 - PBM consolidation created the market strength states were trying create
- State efforts that persist today address both purchasers and payers
- States and others are innovating in this space again

Thank You!

Jane Horvath

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New Mexico Retiree Health Care Authority (CP)

Change in Market Value

For the Month of Jan 2020

(Report as of February 19, 2020)

Investment Name	Prior Ending Market Value	Contributions	Distributions	Fees	Income	Gains-Realized & Unrealized	Market Value
Core Bonds Pool	157,996,440.01	-	-	-	441,901.33	3,269,421.65	161,707,762.99
Credit & Structured Finance	110,810,257.66	-	-	-	128,792.49	658,928.77	111,597,978.92
NM Retiree Health Care Authority Cash Account	-	-	-	-	-	-	-
Non-US Developed Markets Index Pool	107,341,655.01	-	-	-	59,793.52	(2,304,955.29)	105,096,493.24
Non-US Emerging Markets Index Pool	77,570,840.18	-	-	-	28,295.92	(3,685,196.86)	73,913,939.24
Private Equity Pool	84,695,050.86	-	-	-	18,620.10	(148,593.39)	84,565,077.57
Real Estate Pool	76,763,498.67	-	-	-	302,584.72	(343,213.09)	76,722,870.30
Real Return Pool	35,673,553.77	-	-	-	53,163.83	(239,216.08)	35,487,501.52
US Large Cap Index Pool	114,036,428.52	-	-	-	137,958.47	(138,481.40)	114,035,905.59
US Small/Mid Cap Pool	15,337,587.28	-	-	-	7,729.14	(759,776.55)	14,585,539.87
Sub - Total New Mexico Retiree Health Care	780,225,311.96	-	-	-	1,178,839.52	(3,691,082.24)	777,713,069.24
Total New Mexico Retiree Health Care /	780,225,311.96	-	-	-	1,178,839.52	(3,691,082.24)	777,713,069.24

Review of Board Actions 2015 - 2020

Background: The items listed below provide detailed information regarding specific actions taken by the Board of Directors, since 2014 (effective January 1, 2015) to improve the solvency of the program, reduce its unfunded liabilities and accommodate changing market conditions:

Effective January 1, 2020 Plan:

Trust Fund Balance: \$717.7 million

Solvency Projection: 2044

1. Increased pre-Medicare rates by 7 percent and Medicare rates by 5 percent
2. Implementation of the Patient Assistance Program – capping insulin copays @ \$25 for 30-day supply and \$75 for 90-day supply
3. Medicare Advantage rate changes -2 to 0%

Effective January 1, 2019 Plan:

Trust Fund Balance: \$633.4 million

Solvency Projection: 2037

1. Increased pre-Medicare rates by 8 percent and Medicare rates by 6 percent
2. Engagement in Value Based Purchasing Arrangements
 - a. Bundled payment agreements for hernias, laparoscopic cholecystectomies, shoulder arthroscopies, and knee arthroscopies
 - b. Introduction of 3 Tier Coverage through BCBS (Blue Preferred/Preferred Provider/Non-Preferred Provider)
3. Prescription drug copay increase for formulary/non-formulary brand drugs:

	2018		2019		Change	
Plans	Non-Specialty/Specialty					
	30%	30%	30%	30%	NA	NA
	\$25 Min	\$50 Min	\$30 Min	\$60 Min	\$5 Min	\$10 Min
Formulary	\$50 Max	\$100 Max	\$60 Max	\$120 Max	\$10 Max	\$20 Max
	50%	50%	50%	50%	NA	NA
	\$40 Min	\$100 Min	\$50 Min	\$100 Min	\$10 Min	NA
Non-Formulary	\$100 Max	\$150 Max	\$125 Max	\$250 Max	\$25 Max	\$100 Max

4. Addition of SaveOn Program – copay offset program
5. Addition of Naturally Slim Program – Wellness
6. Pilot Project w/Grand Rounds

Effective January 1, 2018 Plan:

Trust Fund Balance: \$551.4 million

Solvency Projection: 2035

Pre-Medicare/Medicare

1. Increased pre-Medicare rates by 8 percent and Medicare rates by 6 percent
2. Expanded Value Option Resources to include BlueAdvantage (BAV) Network
3. Increase Cost Sharing/Narrow Network on Prescription Plan (Pre-Medicare/Supplement)
4. Voluntary Smart90 – Long-term medications

Medicare

5. Medicare Default Strategy
 - a. Presbyterian Pre-Medicare Members to UnitedHealthcare Plan I (revised)
 - b. BCBS and NM Health Connections to Humana Plan I

No action necessary

6. Market Check Agreement - Pre-Medicare/Medicare
7. Basic life insurance coverage phase out begins

Effective January 1, 2017:

Trust Fund Balance: \$464.5 million

Solvency Projection: 2036/2030 revised

Pre-Medicare

1. Eliminated Premier Plus Plan
2. Migrated Premier Plus Participants into Premier Plan
3. Created Value Plan
4. Adjusted rates commensurate with New Risk Pools

	2016	2017
a. Premier Plus – Retiree	\$326	NA
Premier Plus – Spouse	\$516	NA
Premier PPO – Retiree	\$175	\$225
Premier PPO – Spouse	\$331	\$400
Value HMO – Retiree	NA	\$175
Value HMO – Spouse	NA	\$331

 Premier PPO: Presbyterian – NM Residents Only
 BCBS – Nationwide including NM

 Value HMO: Presbyterian – NM Residents Only
 NM Health Connections – NM Residents Only

5. Plan Enhancements
 - a. Increased annual out-of-pocket maximum of Premier Plan by \$500 to \$4,500 to include \$800 deductible as well as medical copayments to maximum calculation creating net positive for high-cost members
 - b. Implemented first dollar coverage (waive deductible and coinsurance) on all plans for advanced radiology services (CT, MRI and PET scans) received at free-standing imaging centers with \$100 copayment and \$125 for the Value Plan

- c. Implemented first dollar coverage (waive deductible and coinsurance) on all plans for physical therapy services as an alternative to surgery with same copayment as PCP visit with a maximum of 4 copayments per course of treatment

Medicare

1. Commitment to increase member awareness of Medicare Advantage offering through newsletters, website and seminars/workshops throughout 2017
2. All members will maintain the ability to select any eligible Medicare Plan
3. Members who do not make an active choice will be defaulted into the most appropriate Medicare Advantage offering when they turn 65 beginning January 2018
4. Increased Medicare Supplement rate by 6 percent

All Self-Insured Prescriptions Plans

1. Eliminated coverage for drugs available over the counter (OTC)
 - a. Primarily antihistamines (i.e. Clarinex), inhalable nasal steroids (i.e. Nasonex) and proton pump inhibitors (i.e. Nexium)

All

1. Eliminated Multiple Dependent Subsidy (12.5 percent in 2016)
2. Implemented Open Enrollment Period
 - a. Except for IRS Section 125 qualifying events enrollment into NMRHCA programs is not allowed outside of open enrollment period every other year

Effective January 1, 2016:

Trust Fund Balance: \$431.6 million

Solvency Projection: 2035

1. Increased pre-Medicare rates by 8 percent and Medicare rates by 6 percent
2. Decreased pre-Medicare spousal subsidy by 2 percent (from 38 percent to 36)
3. Decreased pre-Medicare retiree subsidy by 1 percent (from 65 percent to 64)
4. Reduced multiple dependent subsidy by 12.5 percent (from 25 percent to 12.5)
5. Implemented timeline for phasing out subsidy of \$6,000 basic life policy beginning in 2018
6. Implemented enhanced wellness program with financial incentives

Effective January 1, 2015:

Trust Fund Balance: \$376.8 million

Solvency Projection: 2033

1. Increased pre-Medicare rates by 8 percent and Medicare rates by 5 percent
2. Decreased pre-Medicare spousal subsidy by 2 percent (from 40 percent to 38)
3. Instituted minimum age of 55 in order to receive subsidies (except: PERA enhanced plans) after January 1, 2020
4. Increased years of service requirement for maximum subsidy from 20 to 25 (except: PERA enhanced plans) after January 1, 2020
5. Addition to 5-year Strategic Plan: conversion of basic life insurance to supplemental life

Funded Status and Upcoming Changes

1. House Bill 45 boosting employee and employer contributions will add an additional \$23 – 24 million in recurring revenue to the program
2. Solvency Projection assumed End-of-Year Invested Assets totaling \$775 million --- end of January balance totaled \$777 million
3. Beginning July 1, 2020 – new rates for dental and vision contracts
4. Beginning January 1, 2021 – new rates for Medicare Advantage contracts
5. Beginning January 1, 2021 – “grandfathered” retirees will pay 100 percent of basic life insurance cost

2021 Considerations

1. Revised defaulting Medicare Advantage defaulting strategy based on 2019 RFP results
2. Pre-Medicare retiree subsidy adjustments
3. Pre-Medicare spouse/domestic partner subsidy adjustments
4. Rate adjustments commensurate with loss ratios
5. Medical plan changes/new plan
6. Prescription drug plan changes/new tier

Santa Fe Office Lease (Action Item)

Background: In September 2015, the New Mexico Retiree Health Care Authority (NMRHCA) moved its Santa Fe office location from 801 W. San Mateo, Santa Fe 87505 and co-located with the Public Employees Retirement Association (PERA) at 33 Plaza La Prensa. This agreement resulted in a significant improvement to the work environment for the Santa Fe office employees and an improved customer service experience for our mutual clients. The term of the initial agreement was for 2 years and renewal for up-to an additional 3 years and expires at the end of August 2020.

Given the mutual benefit of our existing arrangement, NMRHCA and PERA staff, through the General Services Department, Facilities Management Division would like to establish a new agreement for up-to 20 years, beginning September 1, 2020. The agreement includes a 3% annual escalation increase, which would maintain significant savings compared to the previous agreement over the next 20 years.

Requested Action

NMRHCA staff respectfully requests approval to enter into a new lease agreement (Lease Record 2020-0024), as shown on the proceeding pages.



STATE OF NEW MEXICO
 GENERAL SERVICES DEPARTMENT
 Facilities Management Division
 2542 Cerrillos Road, Building T-187
 Santa Fe, New Mexico 87505



This lease, Lease
made and entered into

Record #**2020-0024**, is
in triplicate between,

Public Employees Retirement Association, "Lessor" and **New Mexico Retiree Health Care Authority**, "Lessee" an agency or instrumentality of the State of New Mexico, pursuant to GSD Rule **1 NMAC 5.21** and amendments thereto and **approved by Facilities Management Division Director or Designee**, "FMD".

Lessor and Lessee agree as follows:

1. **Leased Premises.** In consideration of the terms and conditions in this lease, Lessor leases to Lessee, and Lessee Leases from Lessor, those Leased Premises with appurtenances, located at: **33 Plaza La Prensa, Santa Fe, NM** depicted in yellow on the floorplan attached hereto as Exhibit A, "Leased Premises" and situated in the County of **Santa Fe**, New Mexico.
 - a. Include description of property including legal description where readily available, inventory of Lessor's furnishings and other property associated with the Leased Premises which shall remain on premises:
N/A
 - b. Square Footage of Lease Premises:
 - i. Leasable: 470
 - ii. Usable: 470
 - c. Parking – total number of parking spaces: **N/A** (undesignated parking sufficient to accommodate Lessee's use of leased premises)
 - i. Designated General Public: **N/A**
 - ii. Secured Parking for State Vehicle Fleet: **N/A**
 - iii. Secured Parking for Employees, if applicable: **N/A**
 - iv. Oversized/Pull through Parking, if applicable: **N/A**
 - v. Other: **N/A**
 - vi. ADA Parking, as required by City, State and Federal laws and regulations.
 - d. Lessee's Hours of Operation: **Monday through Fridays;
8:00 am to 5:00 pm**
2. **Term.** The Initial Term of this lease shall be for **120 months**, or Ten (10) years as follows:
 - a. Beginning on: **September 1, 2020 and**
 - b. Terminating on: **August 31, 2030**

3. **Rent.** Lessee and Lessor understand that rent shall not be paid prior to the completion of the renovations and the occupancy of the Leased Premises by the Lessee.

In consideration of this lease, Lessor and Lessee agree to the following rent schedule, understanding that term dates may be amended based on the actual and mutually agreed upon occupancy date.

Option Years	Year	Term Dates		LSF	Total Annual Rent	Monthly Rent
	1	09/01/20	08/31/21	470.0	\$8,346.84	\$695.57
	2	09/01/21	08/31/22	470.0	\$8,597.25	\$716.44
	3	09/01/22	08/31/23	470.0	\$8,855.16	\$737.93
	4	09/01/23	08/31/24	470.0	\$9,120.82	\$760.07
	5	09/01/24	08/31/25	470.0	\$9,394.44	\$782.87
	6	09/01/25	08/31/26	470.0	\$9,676.28	\$806.36
	7	09/01/26	08/31/27	470.0	\$9,966.56	\$830.55
	8	09/01/27	08/31/28	470.0	\$10,265.56	\$855.46
	9	09/01/28	08/31/29	470.0	\$10,573.53	\$881.13
	10	09/01/29	08/31/30	470.0	\$10,890.73	\$907.56
*	11	09/01/30	08/31/31	470.0	\$11,217.45	\$934.79
*	12	09/01/31	08/31/32	470.0	\$11,553.98	\$962.83
*	13	09/01/32	08/31/33	470.0	\$11,900.60	\$991.72
*	14	09/01/33	08/31/34	470.0	\$12,257.62	\$1,021.47
*	15	09/01/34	08/31/35	470.0	\$12,625.34	\$1,052.11
**	16	09/01/35	08/31/36	470.0	\$13,004.10	\$1,083.68
**	17	09/01/36	08/31/37	470.0	\$13,394.23	\$1,116.19
**	18	09/01/37	08/31/38	470.0	\$13,796.05	\$1,149.67
**	19	09/01/38	08/31/39	470.0	\$14,209.94	\$1,184.16
**	20	09/01/39	08/31/40	470.0	\$14,636.23	\$1,219.69
*First Option Years **Second Option Years						

The total rent for the initial term is: **\$95,687.17**. Cost escalation is **3% annual increases** to be added to the annual operating cost beginning on the first day of the 13th month of occupancy and annually thereafter.

The Lessee has the sole responsibility for paying rent. Lessor should anticipate a delay in the first rent payment of each new fiscal year (July payments). The Department of Finance and Administration closes out all accounts for the fiscal year at that time and all payments may be delayed.

4. **Option to Renew.** In partial consideration for rent paid under this lease, Lessor grants Lessee, its successors and assignees two 5-year options to renew this lease. The renewals shall be for a term not to exceed the initial term and shall be subject to the same terms and conditions set forth in this lease for the original term, except as may be provided otherwise in this lease with regard to rent. Lessee may exercise the options, if any, by giving Lessor written notice at least thirty days prior to the expiration of the current term. Initial term and any renewal terms shall not exceed 20-years.

5. **Holding Over.** Lessee's holding over or continued use or occupancy shall be construed as a month to month tenancy and the monthly rent shall remain the same as the last date of the expired term and is subject to the same terms and conditions set forth in this lease as may be amended.
6. **Use of Leased Premises.** Lessee shall use the Leased Premises for purposes of carrying on state business. More particularly, Lessee shall use the Leased Premises for, among other things: [Office space to support Retiree Health Care Authority employees.](#)

Lessor agrees that the Leased Premises are suitable for this (these) purpose(s) or has revealed to Lessee any reasons Lessor knows of or reasonably should know of why the Leased Premises might not be suitable for such purpose(s).

7. **Condition of Leased Premises.** Lessor warrants that the Leased Premises are in good and safe condition, structurally sound and of safe design and that they comply with all applicable building codes, ordinances, rules and regulations, except as noted: No Exceptions

Any defects of which the Lessor is aware shall be rectified prior to the inception of this lease or within sixty (60) days thereafter. Failure to correct any dangerous condition constitutes a substantial breach.

8. **Accessibility to the Disabled.** The Lessor warrants that the Leased Premises shall meet standards consistent with the Americans with Disabilities Act (ADA) within sixty (60) calendar days of the execution of this lease. The Lessor also warrants that the Leased Premises will be maintained in compliance with these standards.
9. **Delivery of possession.** Lessor warrants that the Leased Premises will be vacant and will put Lessee in possession upon completion of the required renovations. Lessee will be kept informed as to the progress of the renovations.
10. **Damage to Leased Premises.** If at the inception of this lease or at any time thereafter (including any renewal) all or any part of the Leased Premises shall be so damaged or destroyed through any cause, other than Lessee's willful act as to be rendered unfit for Lessee's occupancy, in Lessee's judgment, Lessee may declare this lease terminated and rent shall be payable only to the date of the damage. Alternatively, Lessee, in its sole discretion, may continue to occupy any portion useful to it, and the rent shall abate in proportion to the portions not useful to Lessee.

If at the inception of this lease or at any time thereafter (including any renewal) all or any part of the Leased Premises shall be so slightly damaged through any cause, other than Lessee's willful act, ordinary wear and tear or repair subject to routine maintenance, as not to be rendered unfit for Lessee's occupancy, in Lessee's judgment, Lessor shall repair the Leased Premises with all reasonable promptness, at Lessor's expense, and the rent shall abate fairly until repairs are completed. However, if Lessor fails to promptly commence or to expeditiously complete repairs necessary to restore the Leased Premises to their former condition, Lessee may declare this lease terminated and rent, including any fair abatement thereof, shall be payable only to the date of termination. Alternatively, if Lessor fails to promptly commence or to expeditiously complete repairs, Lessee, in its sole discretion, may perform or cause to be performed such repairs, and may deduct the costs from rent, including any fair abatement.

Lessee's decision as to whether all or any part of the Leased Premises is fit or unfit for occupancy shall be final, but Lessee's decision shall be reasonable in the circumstances.

11. **Alterations.** Lessee shall obtain the Lessor's written permission before making any alterations or improvements of a permanent nature.

12. **Ownership of Improvements.** All alterations and improvements made to or placed in the Leased Premises by Lessee are and shall remain the Lessee's property except as the parties mutually agree otherwise in writing, if such alterations and improvements can be removed without undue damage to the Leased Premises and are, in fact, removed by Lessee prior to termination of this lease or any renewal thereof or within a reasonable time after termination. Alterations and improvements of a permanent nature which cannot be removed without undue damage to the Leased Premises shall become Lessor's property except as the parties mutually agree otherwise in writing.
13. **Condition of Leased Premises upon Surrender.** At the termination of this lease, Lessee shall surrender the Leased Premises in the condition in which they were at the inception of this lease, excepting:
- deterioration caused through reasonable use and ordinary wear and tear;
 - alterations, improvements or conditions made with Lessor's written approval; and
 - any change, damage or destruction not resulting from Lessee's willful act.
14. **Payment of Assessments, etc.** Lessor shall pay as they become due all assessments, charges, mortgages, liens and taxes payable in respect to the Leased Premises during the term of this lease. If Lessor defaults in paying any such amounts, Lessee, in its sole discretion, may pay any assessment, charge, mortgage, lien or tax. Upon doing so, Lessee shall be subrogated to the creditor's rights and may deduct the cost of such payment from rent.
15. **Utilities, Janitorial Services and Supplies.** Lessor agrees to provide the following at Lessors expense:
- Gas, Electric, Water, Sewer, Refuse Disposal Services, as applicable to the Leased Premises; and
 - Janitorial Supplies and Services. Other duties to be performed "snow & other debris removal.
16. **Right of Entry.** Lessor or his agent has a right to enter upon the Leased Premises to inspect, to make repairs and for other reasonable purposes, with Lessee's permission, which shall not be unreasonably withheld. In an emergency, such as fire, Lessor or his agent may enter the Leased Premises without securing Lessee's prior permission, but shall give Lessee notice of entry as soon thereafter as practicable.
17. **Duty to Maintain Leased Premises.**
- Lessor has the duty to reveal to Lessee all structural defects of which he knows or reasonably should know, and to repair all structural defects on the Leased Premises;
 - Lessor has the duty to repair and maintain the Leased Premises, including but not limited to the: roof, windows, grounds, parking lots, sidewalks, doors and lighting in safe condition and in good repair and condition. Lessee has the duty to inspect and notify Lessor of any defective exterior conditions;
 - Lessor has the duty to repair and maintain the Leased Premises, including but not limited to the: cooling system, heating system, plumbing, lighting, doors, flooring, wall finishes, except as otherwise provided in Paragraphs **10. Damage to Leased Premises** and **13. Condition of Leased Premises upon Surrender.**

If, after written notification, the Lessor fails to perform required maintenance in a timely fashion, the Lessee may abate rent and/or perform the maintenance and withhold the cost of the maintenance from the Lessor.

18. **Right to Assign or Sublease.** Lessee has the right to assign or sublease the Leased Premises or any part of them to other state agencies or to qualified tenants for any remaining term of this lease. Lessee shall notify Lessor immediately upon execution of any sublease or assignment, or at such other time as may be provided in this lease. Lessee's obligation to pay the portion of the rent represented by the sublease or assignment shall cease upon the furnishing of such notice to Lessor.

19. **Duty to Insure.**

- a. During the term of this lease and any extension thereof, Lessee shall provide coverage for liability of Lessee and its "public employees," as defined in the Tort Claims Act, and for its personal property and tenant's improvements and betterments, as required by New Mexico law.
- b. At all times during the term of this lease and any extension thereof, Lessor shall maintain in force a policy or policies of insurance providing:
 - i. comprehensive general liability coverage of not less than \$1,000,000 limit per occurrence, including coverage for property damage, bodily injury and wrongful death. Such insurance policy or policies shall name the "State of New Mexico, its branches, agencies, instrumentalities and public employees" as additional insured on the endorsements; and
 - ii. an extended coverage endorsement or "All Risk" policy insuring for fire, lightning, vandalism, malicious mischief, loss of rents and other normal extended coverage for at least 80% of the replacement value of the premises, .
- c. Lessor releases and discharges the Lessee and its "public employees" as defined in the Tort Claims Act from any and all claims, damages and causes of action arising out of any damage to or destruction of the leased premises where such damage or destruction was not caused by the willful act of Lessee or any of its "public employees."
- d. Lessor shall provide certificates of coverage or proof of self-insurance evidencing compliance with this section which shall be attached to this lease at the time of execution. Lessor shall notify Lessee within ten days after cancellation or expiration of any required coverage.

20. **Right to Terminate upon Breach of Condition or Agreement.** Either party may terminate this lease upon the other party's substantial breach of any term or condition contained in this lease, provided that the breaching party shall be given thirty (30) days from the receipt of written notice of a substantial breach to cure the breach or to begin and proceed, with due diligence, to cure a breach that cannot be cured within thirty (30) days. In the event of a substantial breach, the non-breaching party shall give the breaching party written notice that describes the nature of the breach and notifies the breaching party that, unless the breach is cured within the time limits contained herein, the lease shall terminate without further notice at the end of the cure period. Upon termination of the lease, the Lessee shall surrender the Leased Premises to the Lessor and shall be obligated to pay rent only to the date of surrender.

21. **Special Damages.** If through Lessor's willful breach of any term or condition, Lessee must vacate or cannot take possession of the Leased Premises, Lessee may recover, in addition to any other damages, special damages, including the cost of employee time lost, moving costs and all other reasonably ascertainable costs connected with relocating to another premises.

22. **Lease Binding on Heirs, etc.** This lease is binding upon the heirs, executors, administrators, personal representatives, assignees and successors-in-interest of the parties.

23. **Amendments.** This lease shall not be altered or amended except by instrument in writing executed by the parties and approved by FMD.

24. **Address for Notices, Payment of Rent, etc.** Notices required under this lease and rental payments shall be made at the following physical and email addresses by written notice to Lessor, Lessee and FMD:

- a. **Lessor:**

Public Employees Retirement Association
Attn: Renada Peery-Galon
33 Plaza La Prensa Santa Fe, NM 87507
Telephone number: (505) 476-9304
Email: renada.peery-galon@state.nm.us

- b. **Lessor Payments:** Public Employees Retirement Association
Attn: Renada Peery-Galon
33 Plaza La Prensa
Santa Fe, NM 87507
Telephone number: (505) 476-9304
Email: renada.peery-galon@state.nm.us
- c. **Lessee:** New Mexico Retiree Health Care Authority
Attn: David Archuleta
33 Plaza La Prensa
Santa Fe, NM 87507
Telephone number: (505) 222-6400
Email: david.archuleta@state.nm.us
- d. **Lessee, Lease Monitor:** New Mexico Retiree Health Care Authority
Attn: David Archuleta
33 Plaza La Prensa
Santa Fe, NM 87507
Telephone number: (505) 222-6416
Email: david.archuleta@state.nm.us
- e. **Notices Only:** Facilities Management Division
Attn: Asset Management Bureau, Leasing
P.O. Box 6850
Santa Fe, NM 87502
Telephone number: 505-827-2141

25. **Merger of Prior Agreement.** This lease incorporates all of the conditions, agreements and understandings between the parties concerning the subject matter of this lease, and all such conditions, agreements and understandings have been merged into this written lease. No prior condition, agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this written lease.
26. **Certificates and Documents Incorporated.** All certificates and documentation required by the provisions of this lease shall be attached to the lease at the time of execution, and are hereby incorporated in this written lease to the extent they are consistent with its terms and conditions. The following documents shall be attached hereto and incorporated herein for the existing building: N/A
27. **Early Termination.** This lease shall terminate prior to the end of the term set forth in Paragraph 3 of this lease, without penalty to the Lessee, upon the occurrence of one or more of the following events:
- The New Mexico Legislature fails to grant sufficient authority and appropriations to the Lessee to carry out the terms and conditions of this lease;
 - The Governor of New Mexico, pursuant to Executive Order, or the New Mexico Legislature, pursuant to statute, eliminates or transfers employees or functions of the Lessee; or
 - The State of New Mexico builds a new building or purchases an existing building and includes space in such new or existing building for the Lessee.

Upon the occurrence of one or more of the above events, this lease shall terminate when required by law or upon the Facilities Management Division Director giving the Lessor ninety (90) days written notice, whichever occurs first. The Facilities Management Division Director's decision as to whether one or more of the above events has occurred shall be final and binding upon the parties to this lease.

This amendment has been reviewed and approved as to form by:

By: _____ Date: _____
General Counsel or Designee

Designee Printed Name and Title: _____

LESSEE: NEW MEXICO RETIREE HEALTH CARE AUTHORITY

By: _____ Date: _____
Executive Director or Designee

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

The forgoing instrument was acknowledged before me this _____ day of _____, _____,
by _____, on behalf of _____.

Notary Signature My commission Expires: _____

This lease shall not be binding or effective until approved by the Facilities Management Division Director.

APPROVED: FACILITIES MANAGEMENT DIVISION

By: _____ Date: _____
Anna Silva, Director or Designee

Designee Printed Name and Title: _____

Out-of-state Travel Request (Action Item)

Background. Express Scripts has extended an invitation to NMRHCA for folks to attend the annual Government Advisory Panel (GAP) and Express Scripts Outcomes Symposium. The GAP and Outcomes Symposium provides an opportunity to learn about the latest trends, network with benefit administrators from both public and private organizations across the nations and learn about the solutions being used to address current and future challenges.

A finalized agenda has not been published as of February 26, 2020. However, the registration link announces presentations from Dan Buettner, Founder of Blue Zones and New York Times best-selling author, as well as James Hamblin CEO of Globotronics International Corp and author focused on behavior health. This conference will allow board members and staff to engage with experts, experience the latest innovations, and network with 600+ benefit leaders.

Previous year's presentations and topics included:

- A New Solution for Rare Disease Cost and Care Management
- Better Care of Lower Costs? Achieving Both With Value Based Strategies
- Let's Get Right to the Point (Of Care!) Enabling Physicians, Improving Outcomes
- Stop, Collaborate and Listen: Working Together To Prevent Rare Disease Costs From Mounting
- Cracking the Code on Gene Therapies
- Taking on Healthcare's Toughest Challenge...Human Behavior
- Q&A: How the Quality and Accountability of Your Pharmacy Network Impact Your Plan
- Is Your Medicare Plan Stuck in Neutral? Strategies To Position For Competitive Growth
- Having a No Cost-Containment Plan...Has a Cost
- The New Frontier: Transforming Drug Therapies From Treatments to Cures
- No More Sugar-Coating: An End-to-End Diabetes Management Approach
- A Patient Killer: What Are You Doing To Combat Opioid Abuse
- A View From the Hill: Understanding Healthcare Policy Today and Tomorrow

Requested Action. NMRHCA staff respectfully requests permission to attend the Express Scripts Government Advisory Panel (GAP) Meeting and Outcomes Symposium in Lake Buena Vista, FL on May 11 -14.

Memorandum

TO: NM Retiree Health Care Authority Board

FROM: Luis G. Carrasco, Esq.
Justin A. Horwitz, Esq.

SUBJECT: Rulemaking Requirements

DATE: February 26, 2020

You have sought our advice as to whether a proposed amendment to Rule 2.81.11 NMAC (the “Rule”) to change the effective date of the 2018 amendments thereto from January 1, 2021 to July 31, 2021 may be adopted without initiating a new rulemaking process. You also asked for a timeline for implementation of such an amendment in the event that initiating a new rulemaking process is required. As explained in greater detail below, amending the Rule to delay the effective date of the 2018 amendments to the Rule to July 31, 2021 (or any other date) will require the NM Retiree Health Care Authority Board (the “Board”) to initiate a new rulemaking process to implement such a change. As we have concluded that a new rulemaking process is required, the timeline upon which the Board can expect to promulgate a rule to delay the effective date of the 2018 amendments to the Rule is approximately 74 days.

Background

NMSA 1978, Section 10-7C-7(E), (M) (1998) authorizes the Board to “promulgate and adopt necessary rules, regulations and procedures for implementation of the Retiree Health Care Act [NMSA 1978, Sections 10-7C-1 to – 16 (1990, as amended through 2009) (the “RHCA”)]” and to “promulgate and adopt rules and regulations governing eligibility, participation, enrollment, length of service and any other conditions or requirements for providing substantially equal treatment to participating employers.” In 2002, pursuant to the RHCA, and in order to implement it and to make its applicability to participating employers substantially equal, the Board promulgated the Rule.

In 2018, the Board promulgated certain amendments to the Rule (the “2018 Amendments”) which established a minimum age for certain employees who become eligible for enrollment into the NM Retiree Healthcare Authority (“NMRHCA”) health care program on or after January 1, 2021 (and their eligible dependents) and establishing the percentages of the subsidy contributed by the NMRHCA to the monthly premium according to the corresponding number of years of credited service with an NMRHCA-participating employer for such enrollees. The Board promulgated the 2018 Amendments in accordance with the requirements of the State Rules Act,

February 26, 2020

Page 2

NMSA 1978, Sections 14-4-1 to -11 (1967, as amended through 2017) (the “Rules Act”). Currently, the 2018 Amendments are scheduled to take effect on January 1, 2021. Due to unanticipated complications with enforcing the 2018 Amendments on January 1, 2021, the Board has inquired about delaying the effective date of the 2018 Amendments to the Rule to July 31, 2021.

Analysis

The New Mexico Legislature, through enactment of the State Rules Act, has provided a process that state governmental entities, including the NMRHCA and the Board, must follow when engaging in rulemaking. See NMSA 1978, § 14-4-2(A) (2017) (defining the term “agency” to mean any “**agency, board, commission, department, institution or officer of the state government** except the judicial and legislative branches of the state government.”) (emphasis added); § 14-4-5(A) (2017) (“Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided in the [] Rules Act.”)¹; § 14-4-5(B) (2017) (“An agency shall not adopt a rule until the public comment period has ended.”); § 14-4-5(D) (2017) (“Within fifteen days after adoption of a rule, an agency shall file the adopted rule with the state records administrator or the administrator’s designee and shall provide to the public the adopted rule.”); § 14-4-5(E) (2017) (“A proposed rule shall not take effect unless it is adopted and filed within the time limits set by this section.”).

A “rule” means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law **and amendments thereto** or repeals and renewals thereof, issued or promulgated by any agency **and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. . . .**” NMSA 1978, § 14-4-2(F) (2017) (emphasis added); see also Bokum Resources Corp. v. N.M. Water Quality Control Comm’n, 1979-NMSC-090, ¶ 42, 93 N.M. 564 (“A standard is a rule, if the proper procedure has been followed in promulgating it.”). For purposes of the Rules Act, “rulemaking” means “the process for adoption of a new rule or the **amendment, readoption or repeal of an existing rule.**” NMSA 1978, § 14-4-2(G) (2017) (emphasis added). Given the Rules Act’s provisions described above, that the Board would not be considering an entirely new rule, but rather, an amendment to an existing rule to provide for a delayed implementation date, is not a sufficient basis to permit the Board to disregard the requirements of the Rules Act. Similarly, because any amendment to delay implementation of the 2018 Amendments would affect agencies other than NMRHCA, affect persons who are not

¹ The Rules Act permits the promulgation of emergency rules, which are not subject to its ordinary rulemaking procedures, but only where the time required to complete the ordinary procedures would: (1) cause an imminent peril to the public health, safety or welfare; (2) cause the unanticipated loss of funding for an agency program; or (3) place the agency in violation of federal law. NMSA 1978, § 14-4-5.6(A) (2017). The circumstances described to us regarding the need for delaying the effective date of the 2018 Amendments do not appear to satisfy these criteria.

February 26, 2020

Page 3

members or employees of the NMRHCA, and would affect persons served by the NMRHCA, attempts to effectuate such a delay must be taken via the rulemaking process set forth in the Rules Act.

It is well-established law that administrative agencies such as NMRHCA and the Board may engage in rulemaking so long as they act within their authority and consistent with applicable statutory requirements. “An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.” N.M. Bd. of Pharmacy v. N.M. Bd. of Osteopathic Medical Examiners, 1981-NMCA-034, ¶ 8, 95 N.M. 780. “The Legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed. In New Mexico, action taken by a governmental agency must conform to some statutory standard . . . or intelligible principle.” Rivas v. Bd. of Cosmetologists, 1984-NMSC-076, ¶ 3, 101 N.M. 592 (citing State ex rel. Lee v. Hartman, 1961-NMSC-171, 69 N.M. 419 and State Park & Recreation Comm’n v. N.M. State Auth., 1966-NMSC-033, 76 N.M. 1). The Rules Act establishes the statutory standards for state governmental agencies exercising their authority to engage in rulemaking. As such, the Board should take care to ensure that any action it may take to delay the effective date of the 2018 Amendments does not offend any statutory limitations on its rulemaking authority, including the procedural requirements expressed in the Rules Act.

The courts of New Mexico have not hesitated to hold state agencies accountable for adhering to the Rules Act when necessary. In Rivas, the New Mexico Board of Cosmetologists (the “Cosmetology Board”) repealed a regulation that would have allowed the appellees to obtain a cosmetology license under reciprocity considerations and be protected against charges of employing an unlicensed cosmetologist. Id. at ¶ 5. The Cosmetology Board, however, failed to file the repeal with the State Records Administrator, as required by the Rules Act. Id. at ¶ 10; see also NMSA 1978, § 14-4-2(D) (2017) (“‘proposed rule’ means a rule that is provided to the public by an agency for review and public comment prior to its adoption, amendment or repeal, and for which there is specific legal authority authorizing the proposed rule[.]”); § 14-4-5(D), (E) (2017) (“A proposed rule shall not take effect unless it is adopted and filed [with the state records administrator] within the time limits set by this section.”). The Cosmetology Board subsequently denied one of the appellees’ cosmetology license application and suspended the other’s ownership license on the basis that the regulation that would have required it to grant the cosmetology license and refrain from suspending the ownership license had purportedly been repealed. On appeal, the Supreme Court ruled that the repeal of the regulation “was a nullity by virtue of the [Cosmetology] Board’s failure to file the repeal with the State Records Administrator.” Rivas at ¶ 11. In essence, the state’s highest court failed to recognize the validity of a rulemaking due to the promulgating agency’s failure to follow all procedures spelled out by the Rules Act. Thus, in order to protect the validity of any potential delay of the 2018 Amendments effective date, the Board must follow the Rules Act’s requirements for amending rules as closely as possible.

February 26, 2020

Page 4

Having arrived at the conclusion that the Board must undertake a new rulemaking that comports to all of the Rules Act’s procedural requirements, we now examine those requirements with specificity. As an initial consideration, it is important to note that the New Mexico Legislature amended the Rules Act in 2017 to provide specific timing and procedural requirements beyond those previously mentioned herein. As part of these amendments, the legislature directed the attorney general to adopt default procedural rules for public rule hearings for agencies that have not adopted their own procedural rules, such as the NMRHCA. NMSA 1978, § 14-4-5.8 (2017) (“No later than January 1, 2018, the attorney general shall adopt default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the [] Rules Act. Each agency may adopt its own procedural rules, or continue in effect existing rules, which shall provide at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general. . . .”). In early 2018, the attorney general promulgated its Default Procedural Rule for Rulemaking, 1.24.25.1 NMAC (the “Default Rule”), which applies to the NMRHCA because it has adopted no such rule of its own. See 1.24.25.8(A) NMAC. As such, our discussion of the procedural requirements NMRHCA must follow incorporates requirements under both the Rules Act and the Default Rule.

Requirement 1 – Initiation of the Rulemaking Process by Agency

Under the Default Rule, for agencies subject to the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013) (“OMA”), including NMRHCA and the Board, the decision to initiate the rulemaking process must be an action taken by vote of the public body in open session. 1.24.25.9(A) NMAC. Authorizing the initiation of the rulemaking process at a meeting of the Board held in accordance with OMA’s requirements is thus the first step in the process.

Requirement 2 – Providing Notice of the Rulemaking

Once the Board authorizes the initiation of the rulemaking process, NMRHCA must then publicly post a notice for a rule hearing, publish the proposed rule for comment, and set a public rule hearing in accordance with the Rules Act and any other applicable law. 1.24.25.9(A), (B). The notice must be provided to the public no less than 30 calendar days prior to the public rule hearing and in accordance with the Rules Act. 1.24.25.12 NMAC; § 14-4-5.2(A) (2017) (“Not later than thirty days before a public rule hearing, the agency proposing the rule shall provide to the public and publish in the New Mexico register a notice of proposed rulemaking . . .”);

Requirement 3 – Written Comment Period

Once notice of the proposed rulemaking is made available to the public and published, a period of at least 30 days must be allowed in which any person may submit information and/or

February 26, 2020

Page 5

comments on the proposed rule. NMSA 1978, § 14-4-5.3(A) (2017) (“The notice of proposed rulemaking shall specify a public comment period of at least thirty days after publication in the New Mexico register during which a person may submit information and comment on the proposed rule. . . .”). The 30-day public comment period begins after publication of the notice in the New Mexico register and issuance of the rulemaking notice; the Board may not adopt the proposed rule before the end of the public comment period. See 1.24.25.12(A) NMAC. During the public comment period, a person may submit (via mail or electronic means) written comments on the proposed rule, which are made part of the record. Written comments may be submitted through the end of the public comment period. See 1.24.25.12(B) NMAC. All written comments must be posted on the NMRHCA’s website as soon as practicable, but not more than 3 business days following receipt to allow for public review; such written comments shall also be available for public inspection at the NMRHCA’s main office. See 1.24.24.12(D) NMAC.

Requirement 4 – Public Hearing

Before adopting a proposed rule, the Board must hold at least one public rule hearing at which all interested persons are provided a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. See 1.24.25.13(A) NMAC; NMSA 1978, § 14-4-5.3(B) (2017) (“At the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing. . . .”). The public hearing can be held before the Board or it may designate an individual hearing officer to preside over the hearing. 1.24.24.13(B) NMAC. The hearing shall be open to the public, but is not subject to OMA unless conducted by a quorum of the Board. See 1.24.25.13(G) NMAC; NMSA 1978, § 14-4-5.3(C) (2017) (“The public rule hearing shall be open to the public and be recorded.”).

Requirement 5 – Review of Rulemaking Record (only if public hearing conducted by hearing officer rather than Board)

Once the public comment period and the public hearing have concluded, the complete rulemaking record shall be compiled and forwarded to the members of the Board with sufficient time to review. 1.24.25.14(B) NMAC. The complete rulemaking record includes public notices of the rulemaking, lists of individuals to whom notice was mailed or sent electronically, the proposed rule in underline and strikethrough format; any written comments submitted during the comment period prior to the rule hearing and any written comment, document, or other exhibit entered into the record during the rule hearing. 1.24.25.14(A) NMAC. Members of the Board must familiarize themselves with the rulemaking record before rendering a decision on the proposed rule. 1.24.25.14(B) NMAC; see also NMSA 1978, § 14-4-5.4(A) (2017) (“An agency shall maintain a rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference in the proposed rule shall be readily available for public inspection in the central office of the agency and available for public display on the state sunshine portal. . . .”).

February 26, 2020

Page 6

Requirement 6 – Adoption, Amendment or Rejection of Proposed Rule

Once the previous requirements have been completed and the record of the rulemaking proceeding is prepared, the Board may adopt, amend or reject the proposed rule. Amendments to the proposed rule must fall within the scope of the noticed rulemaking. 1.24.25.14(C) NMAC. Adoption of a proposed rule must occur during a public meeting of the Board that complies with OMA. See 1.24.25.14(D) NMAC and OMA. The date of adoption of the proposed rule shall be the date the concise explanatory statement is signed by the agency, unless otherwise specified in the concise explanatory statement. 1.24.25.14(E) NMAC; NMSA 1978, § 14-4-5.5 (2017) (“At the time it adopts a rule, an agency shall provide to the public a concise explanatory statement . . .”).

Requirement 7 – Filing and Publication

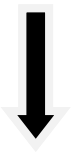
The agency must file the adopted rule with the state records administrator and provide to the public the adopted rule and concise explanatory statement in accordance with the Rules Act within 15 calendar days of the adoption of the proposed rule. 1.24.25.15(A) NMAC. The adopted rule’s effective date is the date of publication in the New Mexico register, unless another date is stated in the agency’s concise explanatory statement, or otherwise provided by law. 1.24.25.15(B) NMAC.

For the Board’s information and convenience, we have attached a chart illustrating the rulemaking process and providing a general timeline for properly completing the rulemaking process. The chart is attached hereto as **Exhibit A**. It should be noted that the chart contemplates that the Board would delegate to an individual hearing officer the authority to conduct the public hearing, which it has authority to do. It is also an option for the Board to preside over the public hearing, which would eliminate the need to compile and submit the record to the Board prior to taking action on the proposed rule. If the Board elects to preside over the public hearing, the process could be shortened by up to approximately two weeks.

Exhibit A

- 1.** Authorization to Initiate Rulemaking Process (Board Meeting)

(Approx. 2 Weeks)



- 2.** Provide Notice of Rulemaking/Publish Proposed Rule/Commence Written Comment Period

(31 Days)



- 3.** Public Hearing (By hearing officer)/Submission of Record to Board/Preparation of Concise Written Statement

(Approx. 2 Weeks)



- 4.** Adoption of Proposed Rule

(15 Days)



- 5.** Filing and Publication of Adopted Rule

(Rule becomes effective on date of publication in NM Register or on date specified in Concise Written Statement)