



CHAPTER 12: PUBLIC DEFENDER COMMISSION

PART 10: FURLOUGH, REDUCTION IN FORCE, REEMPLOYMENT, SEPARATION WITHOUT PREJUDICE

10.12.10.1 ISSUING AGENCY:

Public Defender Commission

[[10.12.10.1](#) NMAC - N, 7/1/2015]

10.12.10.2 SCOPE:

Applies to current and former employees.

[[10.12.10.2](#) NMAC - N, 7/1/2015]

10.12.10.3 STATUTORY AUTHORITY:

Section 31-15-2.4(B)(6), Section 31-15-7 NMSA 1978, Sections [28-15-1](#) to [28-15-3](#) and 38 U.S.C. Section 2021; Section 13: NMSA 1978, Section [52-1-25.1](#). NMSA 1978.

[[10.12.10.3](#) NMAC - N, 7/1/2015]

10.12.10.4 DURATION:

Permanent

[[10.12.10.4](#) NMAC - N, 7/1/2015]

10.12.10.5 EFFECTIVE DATE:

7/1/2015 unless a later date is cited at the end of a section.

[[10.12.10.5](#) NMAC - N, 7/1/2015]

10.12.10.6 OBJECTIVE:

The objective of Part 10 of Chapter 12 is: to provide a system for employee furlough, and separation upon reduction in force; to provide for reemployment after military service; to provide for injured employees' return to work, and potential separation.

[[10.12.10.6](#) NMAC - N, 7/1/2015]



10.12.10.7 DEFINITIONS:

- A. "Furlough" means a temporary placement of an employee in a reduced work hour schedule, which can either be partial or full-time, for lack of work or funds.
- B. "Agency hire date" means the date on which an employee's current continuous employment with the department or its legal predecessor began.

[[10.12.10.7](#) NMAC - N, 7/1/2015]

10.12.10.8 FURLOUGH:

- A. In the event of the need for a furlough, an agency shall submit a plan identifying organizational units to be affected by the furlough to the chief for approval to execute the furlough.
- B. The furlough plan shall affect all employees within the organizational unit impacted to the same extent.
- C. No furlough shall exceed 12 months in duration.
- D. Employees shall be given at least 14 calendar days written notice of furlough, unless the time limit is waived by the chief. Notice shall be served by certified mail.
- E. Employees shall be returned from furlough when the reasons for the furlough cease to exist. Wherever possible, all affected employees shall be returned at the same time, to the same extent.

[[10.12.10.8](#) NMAC - N, 7/1/2015]

10.12.10.9 REDUCTION IN FORCE:

- A. The department may lay off employees only for deletion of positions, shortage of work or funds, or other reasons that do not reflect discredit on the services of the employees.
- B. The human resource director shall identify organizational units for purposes of a layoff and submit a written plan to the chief. Such organizational units may be recognized on the basis of geographic area, function, funding source, or other factors. The human resource director must define the classifications affected within the organizational unit.
- C. Upon chief approval of a layoff plan, the department shall initiate a right of first refusal within the agency. All employees affected by the layoff shall be provided the following rights:
 - 1) employees to be affected by the reduction in force (RIF) shall be provided the right of first refusal to any position to be filled within the department for which they meet the established requirements, at



the same or lower midpoint than the midpoint of the position the employee currently holds, unless there is an actual layoff candidate exercising RIF rights for that position;

- 2) affected employees shall compete only with other department employees affected by the reduction in force;
 - 3) the list of eligible candidates for the open positions shall be comprised of those affected employees meeting the established requirements of the position;
 - 4) employees shall have 11 calendar days from the date of an offer to accept the position unless otherwise agreed; employees who do not accept an offer shall not lose the right of first refusal status to other positions; and
 - 5) the right of first refusal shall extend until the first effective date of layoff as defined in the plan.
- D. The order of layoff due to reduction in force shall be by service date which is determined based upon the agency hire date. In the event of a tie, the human resource director or chief shall determine an appropriate mechanism for breaking the tie.
- E. No employee in career status shall be laid off while there are term, probationary, emergency or temporary status employees in the same classification in the same organizational unit.
- F. Employees in career status shall be given at least 14 calendar day's written notice of layoff. Notice shall be served by certified mail.

[[10.12.10.9](#) NMAC - N, 7/1/2015]

10.12.10.10 RETURN FROM REDUCTION IN FORCE:

- A. Former employees who were in career status at the time of separation by a reduction in force shall have reemployment rights within the department, for a six-month period, under the following provisions:
- 1) Former employees shall be returned to work in order of highest service date as determined by agency hire date to any position to be filled. The position must contain the same or lower midpoint as that held at the time of the former employee's separation, provided the former employee has made application for said position and meets the established requirements;
 - 2) Offers of employment shall be made in writing and shall be delivered by a method that provides proof of service or attempted service;
 - 3) A former employee who is offered and accepts employment after layoff shall occupy the position within 14 calendar days of accepting the offer of employment or forfeit the right to employment; and



- 4) Any former employee who refuses an offer of employment or fails to respond to an offer of employment within 14 calendar days shall be removed from the employment list for the position offered.
- B. Former employees returned to work according to the provisions of these rules shall have that period of time they were laid off counted as time in the department, shall hold the status of the position in accordance with [10.12.2.9](#) NMAC, [10.12.2.10](#) NMAC or [10.12.2.11](#) NMAC and do not have to serve a new probationary period if reemployed into career status.

[[10.12.10.10](#) NMAC - N, 7/1/2015]

10.12.10.11 REEMPLOYMENT AFTER MILITARY SERVICE:

Any employee who separates from the classified service to enter the United States armed forces, national guard, or an organized reserve unit may be reemployed in accordance with the provisions of 38 U.S.C. Section 2021 and Sections [28-15-1](#) to [28-15-3](#) NMSA 1978.

[[10.12.10.11](#) NMAC - N, 7/1/2015]

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

- A. Employees who have been unable to work because of a compensable injury or illness under the workers' compensation act may return to work in a modified duty assignment for up to six months which maybe extended for a period of up to six additional months if substantial progress in the recovery of an injured or ill employee has been demonstrated and it has been anticipated the injured or ill employee will be able to return to full duty within the time frame of the considered extension.
- B. The department shall make a good faith effort to identify and offer modified duty/return to work opportunities to injured or ill employees in accordance with the provisions of Section [52-1-25.1](#) NMSA 1978 and [52-3-49.1](#) NMSA 1978. At the department's discretion the employee may be assigned to his or her current classification with modified duties or to a temporary assignment comprised of a combination of duties from a variety of positions.
- C. Employees on modified duty assignment to a temporary position shall maintain their salary and status for the duration of such temporary assignment.

[[10.12.10.12](#) NMAC - N, 7/1/2015]

10.12.10.13 SEPARATION WITHOUT PREJUDICE:

- A. Employees who have suffered an injury or illness which is compensable under the workers' compensation act and are physically or mentally unable to perform the essential functions of their pre-



injury/pre-illness position, with or without reasonable accommodation, shall be separated from the department without prejudice provided:

- 1) the employee has been afforded modified duty in accordance with these rules;
 - 2) the employee has reached maximum medical improvement prior to the completion of up to 12 months of modified duty; or, the employee has not reached maximum medical improvement upon the expiration of up to 12 months of modified duty;
 - 3) all efforts to accommodate the medical restrictions of the employee have been made and documented; and
 - 4) reasonable efforts to find other suitable vacant positions within the department at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position have been made for which:
 - (a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or
 - (b) the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.
- B.** Employees who have suffered an illness or injury that is not compensable under the workers' compensation act and are unable to perform the essential functions of their pre-injury/pre-illness position, with or without reasonable accommodation, as a result of the physical or mental disability created by the non-job-related injury or illness shall be separated from the department without prejudice provided:
- 1) all efforts to reasonably accommodate the medical restrictions of the employee have been made and documented; and
 - 2) reasonable efforts have been made to find other suitable vacant positions within the agency at the same or lower midpoint than the midpoint of the pre-injury/pre-illness position for which:
 - (a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation; or
 - (b) the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.
- C.** Modified duty may be provided to employees for a period of up to four months during the separation process if required to meet the provisions of this rule.



D. Notice of contemplated separation without prejudice:

- 1)** to initiate the separation without prejudice of an employee who has completed the probationary period, the department shall serve a notice of contemplated separation without prejudice on the employee which: describes the circumstances which form the basis for the contemplated separation without prejudice; gives a general explanation of the evidence the agency has; advises the employee of his or her right to inspect and obtain copies of any documentary evidence relied upon; specifies what the contemplated action is; and states that the employee has 11 calendar days from service of the notice to respond in writing to the notice or to request an opportunity for an oral response;
- 2)** when the notice of contemplated separation without prejudice is served by mail, the employee receiving service shall have three additional calendar days in which to file a response;
- 3)** at the time the notice of contemplated separation without prejudice is served on the employee, the department shall notify the risk management division of the general services department of the proposed separation without prejudice and submit a copy of the separation notice along with documentation to support efforts to provide modified duty and to support efforts to find other suitable vacant positions.

E. Response to notice of contemplated separation without prejudice:

- 1)** a representative of the employee's choosing may respond in writing to the notice of contemplated separation without prejudice on behalf of the employee and shall be subject to the same timelines stated herein and any final decision made will be binding on the employee directly;
- 2)** if there is a request for an oral response to the notice of contemplated separation without prejudice, the department shall meet with the employee within 11 calendar days of a request for an oral response, unless the employee and the department agree in writing to an extension of time; a representative of the employee's choosing may represent the employee and shall be subject to the same timelines stated herein and any final decision made will be binding on the employee directly;
- 3)** the purpose of the oral response is not to provide an evidentiary hearing but is an opportunity for the employee to present his or her side of the story; it is an initial check against mistaken decisions, essentially a determination of whether there are reasonable grounds to support the proposed involuntary separation without prejudice.

F. Notice of final separation without prejudice:

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



- 2) if the employee has filed a written response or has been provided an opportunity for oral response, the agency shall issue a notice of final separation without prejudice no later than 11 calendar days from the date of receipt of the response;
- 3) the notice of final separation without prejudice shall:
 - (a) specify the action to be taken;
 - (b) describe the circumstances which form the basis for the separation without prejudice, which may not include allegations not included in the notice of contemplated separation without prejudice;
 - (c) give a general explanation of the evidence the agency has;
 - (d) specify when the final separation without prejudice will be effective, which must be at least 24 hours from the time of service of the notice of final separation without prejudice;
 - (e) inform the employee that the final separation without prejudice may be appealed to the chief with a written statement of the grounds for the appeal delivered to the human resources office in Santa Fe, New Mexico, and received by the human resource director within 30 calendar days of the effective date of the separation without prejudice; and
 - (f) the adjudication process is outlined in **10.12.12 NMAC**.

[**10.12.10.13 NMAC** - N, 7/1/2015]

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

- A. A former employee who has separated from the department due to job-related injury or illness and who has received or is due to receive benefits under the Workers' Compensation Act shall have reemployment rights in accordance with the provisions of Section **52-1-50.1 NMSA 1978** and Section **52-3-49 NMSA 1978** under the following provisions:
 - 1) Reemployment rights under this rule are extended only to employees of the department at the time of the job-related injury or illness and are provided only for positions which contain the same or lower midpoint as that held at the time of separation.
 - 2) To initiate reemployment rights under this rule, the former employee must notify the human resource director in writing of their desire to be reemployed. The notification shall include the positions and locations, which the former employee is willing to accept, and an appropriate application for employment.
 - 3) The department must receive certification in writing from the treating health care provider that the former employee is fit to carry out the essential functions of the position with or without reasonable accommodation without significant risk of re-injury or relapse to illness.



- 4) When the department is to fill a vacant position which is a position and location indicated by the former employee, the department shall offer the job to the former employee provided:
 - (a) the employee meets the established requirements and can perform the essential functions of the job, either with or without reasonable accommodation, or
 - (b) the employee holds qualifications and abilities necessary for successful job performance and can perform the essential functions of the job, either with or without reasonable accommodation.
- 5) Former employees reemployed in accordance with these provisions will hold the status of the position in accordance with these rules [10.12.2.9](#) NMAC, [10.12.2.10](#) NMAC or [10.12.2.11](#) NMAC and do not have to serve a probationary period if they were in career status at the time of separation.
- B. The risk management division of the general services department shall be notified immediately of any injured or ill former employee who applies for a position and subsequently declines a job offer.

[[10.12.10.14](#) NMAC - N, 7/1/2015]