

PROPOSED RULE AMENDMENTS– FEBRUARY 2010

94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chapter 702 APPEALS OF FINAL DECISIONS OF THE EXECUTIVE DIRECTOR

SUMMARY: This Chapter sets out the process for issuance of decisions by the Executive Director and for appeals of decisions of the Executive Director to the Board of Trustees of the Maine Public Employees Retirement System. It provides for the appointment of a hearing officer to conduct an appeal process and to prepare a recommended decision for consideration and action by the Board.

SECTION 1. Purpose and Scope

The purpose of this Chapter is to set out procedures for reaching final agency action on matters initially decided by the Executive Director of the Maine Public Employees Retirement System ("System" or "MainePERS"). The law governing the System provides that the Executive Director's final decisions may be appealed to the System's Board of Trustees, which has authority and responsibility to render the decision which is final agency action. The laws governing the Maine Judicial and Legislative Retirement Programs link appeals under those Programs to the appeal provisions of the Maine Public Employees Retirement System statutes; thus this Chapter applies to those Programs as well.

It is the Board's intention that this Chapter provide a process which is fair to all parties and which is efficient and effective.

SECTION 2. Authority

The authority for this Chapter is 5 M.R.S.A. §§ 9051 - 9064 and 5 M.R.S.A. § 17451, which provides that an appeal under § 17451 is an adjudicatory proceeding subject to the Administrative Procedure Act and 5 M.R.S.A. § 17106-A.

SECTION 3. Definitions

1. Board. "Board" means the Board of Trustees of the Maine Public Employees Retirement System.
2. Executive Director. "Executive Director" means the Executive Director of the Maine Public Employees Retirement System or his/her decision-making designee.

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3. Hearing officer. "Hearing officer" means an individual designated by the Board to conduct appeal proceedings under this Chapter.
4. Medical Board. "Medical Board" means any Medical Board established under 5 M.R.S.A. § 17106.
5. MainePERS Representative. "MainePERS Representative" means the person or persons advocating for the decision of the Executive Director in an appeal.
6. Participating Local District. "Participating local district" means a local district which has approved the participation of its employees in the Retirement System under 5 M.R.S.A. § 18201.
7. Party. "Party" means the person bringing an appeal and MainePERS, and includes any person who intervenes in an appeal. In an appeal which involves or affects a participating local district, "party" includes the participating local district, regardless whether the participating local district participates as a party in the appeal.
8. Person. "Person" means any individual, partnership, corporation, governmental entity, association or public or private organization of any character, other than the Board or the System.
9. Record. "Record" means those materials required by 5 M.R.S.A. § 9059 and this rule to be compiled in the course of an appeal.
10. Staff. "Staff" means an employee of MainePERS, other than the MainePERS Representative.
11. System. "System" means the Maine Public Employees Retirement System.

SECTION 4. Applicability: Who May Appeal

1. Application. This Chapter applies to appeals to the Board of final decisions of the Executive Director.
2. Who may appeal. A person whose legal rights, duties, or privileges are adversely affected by a decision of the Executive Director may appeal the decision to the Board. A person may represent him/herself or be represented by another person in accordance with 4 M.R.S.A. § 807.

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SECTION 5. Bringing an Appeal

1. Notice. In notifying a person whose legal rights, duties or privileges are affected by a final decision of the Executive Director, the System must notify the person of her/his right to appeal to the Board and of the manner in which the right may be exercised. The notice which includes this information must also otherwise comply with 5 M.R.S.A. § 9052.
2. Statement of appeal. A person who wishes to bring an appeal must begin the appeal process by sending to the Board a written statement of appeal. Any reasonably clear statement to the effect that the person wishes to appeal a final decision of the Executive Director and describing that decision is a statement of appeal. The issues that may be the subject of an appeal are those that have been decided by the Executive Director. If the person wishes to raise issues or conditions not previously considered by the Executive Director, those additional issues must be listed in the statement of appeal. The appeal will then be stayed and the matter returned to the Executive Director to rule on the additional issues. If the newly raised issues include listing additional conditions as bases for disability retirement benefits, the statement of appeal shall include an addendum completed and submitted by the appellant accompanied by supporting documentation.
3. Assignment to Hearing Officer. When a statement of appeal is received, the System, in a timely manner, will assign the appeal to a hearing officer, in accordance with Section 8. The System must notify the person bringing the appeal of the assignment. The notice must also briefly outline the appeal process and must inform the person that if s/he fails to appear at any hearing, the appeal may be deemed to have abandoned.
4. Notice to Participating Local District. If the appeal involves a participating local district, the System must notify the participating local district that the appeal has been brought, to whom it has been assigned and that the participating local district is a party to the appeal. The notice must otherwise comply with 5 M.R.S.A. § 9052.

SECTION 6. Choice of Appeal Process

At the pre-hearing conference in an appeal, the appellant shall have the option of choosing one of two appeal processes:

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1. Expedited Appeal. The appellant may choose to pursue his or her appeal of the issues decided in the final decision of the Executive Director by relying solely on the documentary evidence already considered by the Executive Director, in which case it is anticipated that a final decision will be issued by the Board within approximately 90 days of the initial pre-hearing conference described in section 8(3)(C). Under this option, only lay witnesses may provide testimony on behalf of the appellant or the System. The decision to proceed under the expedited appeal process is irrevocable once a hearing has commenced.
2. Unrestricted Appeal. Alternatively, the appellant may choose to raise issues additional to those decided by the Executive Director and/or introduce additional documentary evidence and/or expert testimony in addition to the testimony of lay witnesses and job modification and/or rehabilitation experts. The unrestricted appeal process is anticipated to take substantially longer than the 90 day period envisioned in the expedited appeal process because additional steps are or may be required prior to consideration of the appeal by the hearing officer. An appellant must affirmatively accept that the appeal process is likely to take substantially longer than 90 days in order to proceed under the unrestricted appeal process. Additional steps include, but are not limited to, some or all of the following procedures:
 - A. If the appellant introduces issues not previously decided by the Executive Director, the appeal must be returned to the Executive Director for consideration and the issuance of a final Executive Director decision on these issues. The appeal on the issue(s) originally decided by the Executive Director will be stayed pending a final Executive Director decision on any new issues.
 - B. If the appellant seeks to introduce new documentary medical evidence on the issues already decided by the Executive Director, at the request of the staff, the appeal will be returned prior to hearing to the Executive Director for consideration. The Executive Director will affirm, modify, or reverse the decision that is the subject of the appeal based upon the additional evidence. The Executive Director may submit the new evidence to the medical board and will do so at the earliest possible regularly scheduled meeting of the medical board.
 - C. If either party introduces expert testimony, other parties on request may be entitled at the discretion of the Hearing Officer to

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additional time to prepare cross-examination of the expert and/or the submission of rebuttal expert testimony. Parties are entitled to a rebuttal hearing on request.

The Hearing Officer shall make every effort to move the unrestricted appeal process along as quickly as possible while at the same time assuring adequate procedures to allow a full opportunity for all parties to both raise and scrutinize new issues and evidence.

SECTION 7. Public Interest; Notice

In an appeal which the Executive Director or designee determines to involve the determination of an issue of substantial public interest, notice must be given to the public sufficiently in advance of the hearing date to afford interested parties an adequate opportunity to prepare and submit evidence and to petition to intervene pursuant to 5 M.R.S.A. § 9054. Notice to the public must be given in accordance with 5 M.R.S.A. § 9052(3). If another party asserts that an appeal involves a matter of substantial public interest such that public notice is required and the Executive Director or designee does not agree, the Board will make the determination.

1. Request. The Executive Director or any other person may request the Board to make a determination of substantial public interest.
2. Determination after appeal process has begun. If the Board makes a determination of substantial public interest after the appeal process has begun, the process must be suspended until notice to the public has been given and interested persons have had an adequate opportunity to take action in accordance with this section.

SECTION 8. Hearing Officer

1. Appointment. The Board shall appoint as a hearing officer one or more individuals to perform the duties and exercise the powers set out in this Chapter. As hearing officer, the Board must appoint a person with appropriate experience and/or training, whom the Board judges to be fair, impartial, unbiased, and able to conduct a fair, efficient and effective appeal process.
2. Assignment: Removal: Replacement
 - A. An appeal will be assigned by the System to a hearing officer who has no personal or financial interest, direct or indirect, in the

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appeal or its outcome and who has not been involved directly or indirectly in the matter which is the subject of the appeal. The fact that a hearing officer is the recipient of a MainePERS benefit does not constitute, by itself, direct or indirect personal or financial interest in an appeal or its outcome.

- B. If a party files a timely charge of bias, prejudice or personal or financial interest, either direct or indirect, the hearing officer will promptly determine whether to remove her/himself as hearing officer and will include that determination in the record.
 - C. A hearing officer may also independently decide to remove himself if he determines that he cannot be fair, impartial and unbiased.
 - D. When a hearing officer is removed or cannot continue, the System will assign the appeal to another hearing officer. The new hearing officer will continue with the appeal process unless the hearing officer determines that in order to avoid substantial prejudice to any party it is necessary to start the process anew.
3. Duty and powers of the Hearing Officer. The hearing officer has the duty to render a fair and impartial recommended final decision to the Board on the merits of a matter in accordance with section 15, such that the Board can act within the time period as set out in section 16(1). This recommended decision must be based on the record as a whole and resolve all material issues in the appeal. In lieu of a recommended final decision the hearing officer may recommend dismissal. To this end, the hearing officer has the following powers:
- A. To resolve an appeal without a hearing, provided that the parties agree to dispense with hearing, by
 - (1) a recommended final decision which meets the requirements of section 12, to be acted on by the Board under section 13, on the basis of the documentary materials which constitute the record; or
 - (2) in the case of rescission by the Executive Director of all or part of the decision appealed, of withdrawal by the appellant of all or part of the appeal, or of settlement, a

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recommended dismissal or a consent order as appropriate, to be submitted to the Board for approval; or

- (3) a recommended dismissal, with or without prejudice as circumstances warrant, to be submitted to the Board for approval.
- B. Upon due notice to the parties, to schedule the date, time and place, to change the date, time or place and to continue a pre-hearing conference and/or hearing and/or other conference;
- C. To hold a pre-hearing conference, of which all parties must be notified and at which they may participate, the purposes of which may include
- (1) identification of whether the appellant has chosen an expedited or unrestricted appeal process in accordance with section 6-A and explanation of the consequences of the choice of appeal process,
 - (2) Identification and clarification of issues,
 - (3) development of stipulations of fact and admissions as to facts that are not contested,
 - (4) Identification of witnesses and exhibits, to apprise the parties as fully as is practicable of the nature of the evidence to be offered by all parties and to eliminate as far as possible the element of surprise,
 - (5) identification of witnesses and the manner in which the testimony will be provided as described in section 11(2),
 - (6) identification and resolution of disputes as to production and admissibility of evidence, including the making of evidentiary rulings,
 - (7) any other action that will ensure a fair, efficient and effective appeal process;

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- D. To return to the Executive Director or designee any issue raised for the first time in the appeal process, as required pursuant to section 6-A.B.(1);
- E. To rule on any request that may be made at the pre-hearing conference, other conference, during the hearing or at any other time during the appeal process prior to delivery of the recommended final decision to the Board;
- F. To set the time for all filings, appearances, and other actions by any party or parties in connection with the appeal process, in accordance with 5 M.R.S.A. § 17451;
- G. To issue a subpoena on request of a party or to deny a request when the hearing officer determines that the testimony or evidence is not relevant to any issue of fact in the hearing, in accordance with 5 M.R.S.A. § 9060 and section 11;
- H. After the close of the evidence, receipt by the parties of a transcript as provided for in section 13, if any, and the issuance of an Executive Director reconsideration final decision, if any, as described in section 14, to request written statements of issues, memoranda or briefs, and to request or allow parties to make oral arguments;
- I. To order, where relevant and useful, one or more independent medical evaluations, for which the System will provide the names of three appropriately qualified physicians or, when relevant, psychologists, among whom the person appealing will choose and to whom the person will go for evaluation, the costs of which will be paid by the system;
- J. To refer or re-refer to the Medical Board any matter involving medical evidence, questions or issues;
- K. To ascertain the rights of the parties, and to ensure that all parties have a full opportunity to present their claims orally or in writing and to secure witnesses and evidence to establish their claims, and to assist all those present in making a full and free statement of the facts in order to bring out all issues which may govern the outcome of the appeal;

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- L. To administer oaths or affirmations to all witnesses in all hearings;
- M. To regulate the presentation of evidence, including questioning of witnesses, and to otherwise regulate the participation of parties, for the purposes of ensuring an adequate and comprehensive record of the proceedings and of avoiding repetition and delay;
- N. To examine witnesses and ensure that relevant evidence is incorporated into the record;
- O. To determine the credibility of witnesses, to decide what weight is to be given to their testimony, and to decide what weight is to be given to other evidence;
- P. To take official notice of facts in accordance with 5 M.R.S.A. § 9058;
- Q. To rule on the admissibility of evidence;
- R. To ensure that a complete record is made of the hearing, including recording in accordance with 5 M.R.S.A. § 9059;
- S. To consult with the Board's counsel on legal issues; provided that, when an appeal raises issues of estoppel or constitutionality, the hearing officer must consult with the Board's counsel.
- T. To recommend dismissal in the event an appellant fails to appear at a hearing, or otherwise fails to prosecute the appeal, unless there is a showing of good cause under Section 10.

SECTION 9. Duties and Responsibilities of the MainePERS Representative

The MainePERS Representative shall:

1. Organize case. Organize the presentation of the Executive Director's case;
2. Pre-hearing conference. Participate in the pre-hearing conference;
3. Present witnesses. Present witnesses when appropriate;

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4. Provide records. Ensure that relevant records of the System are present at the hearing and that other parties have adequate opportunity to examine the records prior to and during the hearing;
5. Introduce records. Introduce into evidence relevant System records and documents; and
6. Provide evidence. Present and establish relevant facts and circumstances by oral testimony, including that of staff itself, and by documentary evidence.

SECTION 10. Default

1. Failure to appear. If a person who brought an appeal fails to appear at hearing, the appellant may be deemed by the hearing officer to have abandoned the appeal. The System will so notify the person in writing. If within 10 business days of receipt of the notice, the person submits information which demonstrates, in the judgment of the hearing officer, that she or he had good cause for failure to appear, the appeal will be reinstated. On the 11th day following receipt of the notice, the decision of the Executive Director will become final.
2. Hearing in the absence of the person appealing. A hearing may be held in the absence of the person appealing when
 - A. The person requests or agrees to a hearing in her/his absence; or
 - B. The hearing officer determines to proceed with the hearing as the alternative to a default.

SECTION 11. Evidence

1. Admissibility. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.
2. Testimony. Lay witnesses may provide testimony orally before the hearing officer. Expert testimony may be provided telephonically or in-person by deposition, or by a sworn written statement. All witnesses who provide sworn written statements or testimony must be available for cross-examination at the hearing, although the cross-examination of expert witnesses will, at the request of a party, take place at a later date.

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3. Irrelevant or repetitious evidence. Evidence which is irrelevant or unduly repetitious may be excluded.
4. No formal rules of evidence. Formal rules of evidence need not be observed.
5. Weight of evidence. The fact that evidence is admitted shall not limit the authority of the hearing officer to determine the weight to be given the evidence.
6. Hearsay. Hearsay evidence shall not be excluded simply because of its hearsay nature. The hearing officer will, in accordance with law, determine the weight to be given to hearsay evidence.
7. Rules of privilege. Rules of privilege as provided in the Maine Rules of Evidence, Article 5, shall be observed.
8. Stipulation of facts. When all parties stipulate to a fact, the hearing officer may make a finding of fact on the basis of the stipulation. Signed statements or on-the-record oral statements by parties are sufficient as stipulations.
9. Official notice of facts. The hearing officer may take official notice of a fact upon her/his own motion or at the request of a party. Official notice may be taken of any fact of which judicial notice could be taken, and in addition, of any general or technical matter within the specialized experience or knowledge of the hearing officer, and of any statutes, rules and non-confidential public records. The hearing officer will notify the parties of any material of which s/he takes official notice and shall afford the parties an opportunity to contest the substance or materiality of the material noticed.

SECTION 12. Discovery and Subpoenas

1. Access to System documents and records. A party must have an adequate opportunity prior to hearing and at the hearing to examine all of the System's documents and records to be offered as evidence at the hearing. The System must provide to the person bringing the appeal a copy of the relevant portions of the record without charge.

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2. Request for subpoenas. Any party may request the issuance of a subpoena by presenting the request to the hearing officer. The request must contain:
 - A. The name and address of the party requesting the subpoena; and
 - B. The name and address of the person to be subpoenaed, or other place where the person to be subpoenaed may be found; and
 - C. A brief statement as to why the testimony or evidence of the person to be subpoenaed is relevant to an issue of fact in the appeal.
3. Issuance on approval. If the hearing officer determines that the request seeks testimony or evidence relevant to an issue of fact in the appeal, the hearing officer must submit the subpoena for approval by a Deputy Attorney General who is not involved in the appeal. The request shall be approved if the evidence or testimony sought reasonably appears to be relevant to the appeal.
4. Requirements. A subpoena shall comply with the requirements of 5 M.R.S.A. § 9060.

SECTION 13. Hearings recorded

1. All hearings will be recorded in a form susceptible to transcription.
2. If staff, the hearing officer or the Board requests a transcript of the hearing, or if staff requests a transcript of expert medical testimony under subsection 3, a copy of the transcript will be provided to each party for the cost of the copy plus mailing costs.
3. Any transcript of expert oral medical testimony requested by staff will be made available prior to cross examination of the expert medical witness.
4. When a transcript is not requested under subsections 2 or 3 above, any other party may request a transcript of the hearing and the cost of producing the transcript on a non-expedited basis, including copying and mailing costs, shall be borne equally by the System and the party requesting the transcript. If any party requests an expedited transcript, the full additional cost for expediting the transcription will be borne solely by that party.

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5. When no request has been made under subsections 2, 3, or 4 above and a party desires a transcript to be available to the Board at Its consideration of a recommended final decision of the hearing officer, the party must request the transcript no later than 3 days after the party receives notice that the recommended final decision of the hearing officer has been sent to the Board. This request may delay the Board's consideration of the recommended final decision.

SECTION 14. Reconsideration by the Executive Director

After the close of the evidence by the hearing officer, the receipt by the parties of any transcript that has been requested and the receipt by the Executive Director of any consultation by the medical board, the Executive Director shall have 10 working days to reconsider all of the evidence and affirm, or reverse in whole or in part, the decision that is the subject of the appeal. No new grounds for affirming a decision adverse to the appellant may be articulated by the Executive Director at this stage of the process.

SECTION 15. Recommended Final Decision of the Hearing Officer

1. Contents. Following the hearing or, if the parties have agreed to dispense with hearing, following review of the documentary record, and following the issuance of the Executive Director's reconsidered decision, the hearing officer will prepare a recommended final decision, which will include:
 - A. A clear statement of the matter which is the subject of the appeal and of the issues which must be resolved to decide the appeal;
 - B. A listing of the date and place of hearing and participants at the hearing or, if no hearing was hold, a statement that the parties agreed to proceed without a hearing;
 - C. A listing of all evidence upon which the recommended final decision is based;
 - D. Findings of fact, which must be sufficient to apprise the parties of the basis for the recommended final decision;
 - E. A clear statement of result resolving all issues under consideration;

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- F. A clear explanation of the reasoning underlying the result, including references to applicable law and rules.
- 2. Comments, modification, and delivery to the Board
 - A. The hearing officer will send a copy of the recommended final decision to each of the parties for comment. A party's comments must be in writing and must be received by the time set by the hearing officer.
 - B. The hearing officer may, but is not required to, modify the recommended final decision in response to the parties' comments. If in the judgment of the hearing officer the earlier issued recommended final decision is substantially modified, the hearing officer will send the recommended final decision as modified to the parties for further comment, as provided in paragraph A.
 - C. The hearing officer will deliver copies of the recommended final decision, as originally prepared and as modified, to the Board. The hearing officer will deliver with the recommended final decision the written comments made by the parties. Where the recommended final decision is not modified, the hearing officer may also deliver her/his written response to the parties' written comments.

SECTION 16. Action by the Board

- 1. Board Consideration. The Board will consider the recommended final decision on a timely basis and, for an appellant who has chosen the expedited appeal process, as often as possible issue a final decision within 90 days of the initial pre-hearing conference in the appellant's appeal or as close to this time as possible. A party may request that consideration be scheduled at a specific time. The Board may, but is not required to, grant the request.
- 2. Recommended decision and record. In advance of consideration, a copy of the recommended final decision must be sent to each Board member, with parties' comments as provided in Section 15.
- 3. Statement by party. A party who is present at consideration may not offer evidence but may make a statement of position not to exceed 15 minutes in length. When a party's statement of position relies on specific

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portions of the record, the party must provide copies of the relevant portions to the Board and other parties at least 5 days prior to the date for consideration by the Board.

4. Hearing officer present. If requested by the Board, the hearing officer may be present to assist the Board.
5. Action after consideration. After considering the recommended final decision, the Board may
 - A. Adopt the recommended final decision as delivered;
 - B. Modify the recommended final decision;
 - C. Send the recommended final decision back to the same hearing officer if possible or a replacement hearing officer for the taking of further evidence, for additional consideration of issues, for reconsideration of the application of law or rules, or for such other proceedings or considerations as the Board may specify;
 - D. Reject the recommended final decision in whole or in part and decide the appeal itself on the basis of the existing record;
 - E. Unless the Board undertakes reconsideration under subsection 6, a decision as adopted by the Board under paragraphs A - D is the final administrative decision in the appeal.
6. Reconsideration of Board's final decision
 - A. On request of a party or on its own motion, and prior to the expiration of the time period established by the Maine Administrative Procedures Act for seeking judicial review of final agency action or the filing of a petition for judicial review, whichever is earlier, the Board may undertake reconsideration of a decision made under subsection 5
 - (1) when there is relevant new evidence that it was impossible for the party seeking to offer the evidence to have presented earlier, or
 - (2) to correct procedural error or other error of law that the Board determines would affect the outcome of the case.

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- B. Having decided to reconsider a final decision, the Board may
- (1) send the issue or issues raised back to the same hearing officer if possible or a replacement hearing officer for further proceedings or other action as the Board may direct, or
 - (2) address and resolve the issues itself by the taking of additional evidence in proceedings conducted in accordance with this Chapter or by other action to correct procedural error or error of law.

EFFECTIVE DATE: June 30, 1992

AMENDED: March 2, 1994

AMENDED: April 30, 1995

AMENDED: January 5, 1997

AMENDED: May 9, 2007

REPEALED AND REPLACED: