

## PROPOSED AMENDMENTS – JULY 2022

### 94-411 MAINE PUBLIC EMPLOYEES RETIREMENT SYSTEM

#### Chapter 702 APPEALS OF DECISIONS OF THE ~~EXECUTIVE DIRECTOR~~CHIEF EXECUTIVE OFFICER

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**SUMMARY:** This Chapter sets out the process for appeals of decisions of the ~~Executive Director~~Chief Executive Officer to the Board of Trustees (“Board”). It provides for the appointment of a hearing officer to conduct an appeal and to prepare a recommended decision for action by the Board.

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#### 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~~Chief Executive Officer (or designee) of the Maine Public Employees Retirement System (“System” or “MainePERS”). The law governing the System provides that the ~~Executive Director~~Chief Executive Officer’s decisions may be appealed to the Board, which has authority and responsibility to render a decision that will become the final agency action. The person appealing the Decision has the burden to establish, by a preponderance of the evidence, that the ~~Executive Director~~Chief Executive Officer’s Decision is in error. This Chapter applies to appeals by any person aggrieved by a decision of the ~~Executive Director~~Chief Executive Officer.

#### SECTION 2. Authority

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

#### SECTION 3. Definitions

1. **Appeals clerk.** “Appeals clerk” means the dedicated clerk who acts as liaison between the hearing officer and the parties to an appeal. The appeals clerk shall avoid all communication with System staff, or MainePERS representatives, regarding substantive issues for cases on appeal. The appeals clerk shall address all policy and procedural questions to ~~the clerk’s~~her supervisor, the system advisor or Board counsel.
2. **Board.** “Board” means the Board of Trustees of MainePERS.
3. **Board counsel.** “Board counsel” means the attorney general or the designated assistant attorney general assigned to represent the Board and to prepare the Board’s decisions.
4. **~~Executive Director~~Chief Executive Officer.** “~~Executive Director~~Chief Executive Officer” means the ~~Executive Director~~Chief Executive Officer of MainePERS or ~~their~~his/her decision-making designee.

5. **Hearing officer.** "Hearing officer" means an individual who has contracted with designated by the Board to conduct appeal proceedings under this Chapter.
6. ~~**Medical Board.** "Medical Board" means any Medical Board established pursuant to 5-M.R.S. §17106.~~ **Medical review service provider.** "Medical review service provider" means an entity with whom the Chief Executive Officer has contracted for the review of medical records and the provision of recommendations, opinions and certifications by health care providers employed by the entity.
7. **MainePERS or System Representative.** "MainePERS Representative" or "System Representative" means the person or persons advocating for the decision of the ~~Executive Director~~ Chief Executive Officer in an appeal.
8. **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. §18201.
9. **Party.** "Party" means the person bringing an appeal, MainePERS, and any person who intervenes in an appeal. If an appeal involves or affects a participating local district, "party" includes the participating local district, regardless of whether the participating local district actually participates as a party in the appeal.
10. **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.
11. **Record.** "Record" means those materials required by 5 M.R.S. §9059 and this rule to be compiled in the course of an appeal.
12. **Staff.** "Staff" means an employee of MainePERS, other than the MainePERS Representative.
13. **Substantially larger caseload.** "Substantially larger caseload" means that the number of appeals a hearing officer is presiding over is at least five and exceeds the mean hearing officer caseload by at least 30%.
14. **System advisor.** "System advisor" is a System employee who is knowledgeable in System policies, practices and procedures and who is available as an informational resource to assist the hearing officer, the Board and Board counsel. If the hearing officer seeks information from the system advisor, such request shall be in writing and both the request and the response shall be copied to the parties and placed of record.

#### SECTION 4. Applicability: Who May Appeal

1. **Application.** This Chapter applies to all appeals of decisions of the ~~Executive Director~~ Chief Executive Officer to the Board.
2. **Who may appeal.** Any person whose legal rights, duties or privileges are adversely affected by a decision of the ~~Executive Director~~ Chief Executive Officer may appeal the

decision to the Board. A person may ~~but is not required to represent him/herself or~~ be represented by another person in accordance with 4 M.R.S. §807.

## SECTION 5. Bringing an Appeal

1. **Notice.** When notifying a person whose legal rights, duties or privileges are affected by a decision of the ~~Executive Director~~Chief Executive Officer, the System must advise the person of ~~the her/his~~ right to appeal to the Board and of the manner in which the right may be exercised. This notice must comply with 5 M.R.S. §9052.
2. **Statement of appeal.** A person who wishes to appeal a decision of the ~~Executive Director~~Chief Executive Officer must begin the appeal process by sending a written statement of appeal to the Board. Any reasonably clear statement to the effect that the person wishes to appeal a decision of the ~~Executive Director~~Chief Executive Officer, and identifying that decision, shall be treated as a statement of appeal. The only issues that are the subject of an appeal are those that have previously been decided by the ~~Executive Director~~Chief Executive Officer. If the person wishes to raise issues or conditions not previously considered by the ~~Executive Director~~Chief Executive Officer, those additional issues can be added in accordance with section 6(2) below.
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 will notify the person of the identity of the assigned hearing officer and alternative hearing officers, describe the process for selecting an alternative hearing officer, briefly outline the appeal process and advise that, if the person fails to appear at any hearing, the appeal may be deemed to have been abandoned and the matter dismissed with prejudice.
4. **Notice to Participating Local District.** If the appeal involves an employee of a participating local district, the System will notify the participating local district that the appeal has been brought, identify the employee and hearing officer and advise that the participating local district is a party to the appeal. The notice must comply with 5 M.R.S. §9052.

## SECTION 6. Choice of Appeal Process

At the pre-hearing conference described in section 8(3)(C) of this Chapter, the appellant shall affirmatively elect either the expedited or the unrestricted appeal process. This election becomes irrevocable 10 days after the pre-hearing conference, unless the System agrees to a later request to change the election.

1. **Expedited Appeal.** If the appellant elects the expedited process to pursue an appeal of the issues decided in the decision of the ~~Executive Director~~Chief Executive Officer, the evidence is limited to the appellant's testimony, the testimony of any lay witnesses and the documentary evidence already considered by the ~~Executive Director~~Chief Executive Officer. The parties may not raise any additional issues for decision. It is anticipated that a decision will be issued by the Board within approximately 90 days of the initial pre-hearing conference. Under this option, only non-expert witnesses may provide testimony on behalf of the appellant or the System.

2. **Unrestricted Appeal.** Alternatively, in the unrestricted appeal process, the appellant may raise issues in addition to those decided by the ~~Executive Director~~Chief Executive Officer, and the parties may introduce documentary evidence in addition to the evidence already considered by the ~~Executive Director~~Chief Executive Officer and testimony from expert as well as non-expert witnesses. The unrestricted appeal process is anticipated to take substantially longer than 90 days because some or all of the steps listed below may be required, or duplicated prior to the hearing officer's issuance of a recommended decision. An appellant who chooses to proceed under the unrestricted appeal process must affirmatively accept and acknowledge that this appeal process is likely to take substantially longer than 90 days. The additional steps that might occur in the unrestricted appeal process include, but are not limited to the following:
- A. If the appellant introduces issues not previously decided by the ~~Executive Director~~Chief Executive Officer, the hearing officer will return the appeal to the ~~Executive Director~~Chief Executive Officer for consideration of the new issues and reconsideration of any issues previously decided by the ~~Executive Director~~Chief Executive Officer. The appeal will be stayed pending the issuance of a decision of the ~~Executive Director~~Chief Executive Officer on all issues.
  - B. If the appellant seeks to introduce new documentary medical evidence on any of the issues previously decided by the ~~Executive Director~~Chief Executive Officer, the hearing officer will, at the request of the MainePERS Representative, return the appeal to the ~~Executive Director~~Chief Executive Officer for reconsideration of those issues. The appeal will be stayed pending a reconsidered decision of the issues previously decided by the ~~Executive Director~~Chief Executive Officer. The ~~Executive Director~~Chief Executive Officer may submit the new evidence to the ~~medical review provider~~Medical Board at a regularly scheduled meeting of the Medical Board.
  - C. If any party introduces expert testimony, any other party, upon request to the hearing officer, may be granted 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.

## SECTION 7. Public Interest; Notice

If the ~~Executive Director~~Chief Executive Officer or designee determines that an appeal involves 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. §9054. Notice to the public must be given in accordance with 5 M.R.S. §9052(3). If a party asserts that an appeal involves a matter of substantial public interest, such that public notice is required and the ~~Executive Director~~Chief Executive Officer or designee does not agree, the Board will make the determination in the following manner.

1. **By request.** The ~~Executive Director~~Chief Executive Officer or any other person may request that the Board 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 ~~contract with~~appoint one or more hearing officers to perform the duties and exercise the powers set forth in this Chapter. The hearing officers must have appropriate experience and training, be fair, impartial, unbiased, and demonstrate a continuing ability 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 appeal or its outcome, and who has not been involved directly or indirectly in the matter that 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. The assignment shall be based on balancing caseloads among contracted hearing officers. The appellant within 15 days after notice of the assigned hearing officer may select an alternative hearing officer who has contracted with the Board.
    - (1) The System need not offer as an alternative any hearing officer who has a substantially larger caseload than other hearing officers. The appellant may select a hearing officer who was not offered as an alternative because of a substantially larger caseload if the appellant shows, within the timeframe for selecting an alternative hearing officer, that the hearing officer is uniquely qualified to preside over the appeal.
    - (2) In an appeal with more than one appellant, if the appellants cannot agree on an alternative hearing officer, the hearing officer assigned by the System will serve as hearing officer.
  - B. If a party files a timely allegation of bias, prejudice or personal or financial interest, either direct or indirect, against the hearing officer, the hearing officer will promptly determine whether to remove herself/himself as hearing officer and will include that determination in the record.
  - C. A hearing officer may also independently remove ~~themselves~~herself/himself from the appeal if ~~the hearing officer~~she/he cannot be fair, impartial and unbiased.
  - D. When a hearing officer is removed, terminated or cannot continue, the System will assign the appeal to another hearing officer, and the appellant will have an opportunity to select an alternative hearing officer consistent with paragraph A and section 5(3). The new hearing officer will continue the ongoing 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 decision to the Board in accordance with section 15. 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 decision, the hearing officer may recommend dismissal. The hearing officer has the following powers:
- A. To resolve an appeal without a hearing; provided that the parties mutually agree to dispense with a hearing, by issuing:
    - (1) a recommended decision which meets the requirements of section 15, to be acted on by the Board under section 16, on the basis of the documentary materials which constitute the record; or
    - (2) a recommended dismissal with prejudice to be submitted to the Board for approval if, pursuant to section 6(2), the ~~Executive Director~~Chief Executive Officer issues a decision that favors the appellant, in whole or in part, and the appellant withdraws the appeal with respect to all portions of the decision of the ~~Executive Director~~Chief Executive Officer that are not in the appellant's favor; or
    - (3) a recommended dismissal, with or without prejudice as circumstances warrant, to be submitted to the Board for approval.
  - B. Upon adequate notice to the parties, to schedule the date, time and place or to change the date, time or place and to continue any conference, hearing, or deadline of any nature;<sup>1</sup>
  - C. Generally working through the appeals clerk, to notify parties and 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) determining whether the appellant elects the expedited or unrestricted appeal process in accordance with section 6, and explaining the consequences of the choice of appeal process;
    - (2) identifying and clarifying the issues on appeal and determining whether the appellant intends to introduce issues, not previously considered by the ~~Executive Director~~Chief Executive Officer;
    - (3) developing stipulations of fact and admissions as to facts that are not contested;
    - (4) identifying 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;

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<sup>1</sup> The MainePERS office in Augusta shall be the normal location for hearings, absent a request made in the notice of appeal or at the pre-hearing conference, together with a showing by the requesting party of a compelling need for an alternative venue.

- (5) identifying witnesses and the manner in which the testimony will be provided as described in section 11(2);
  - (6) identifying any potential parties to the adjudication whose joinder may foster economy, efficiency and fairness;
  - (7) identifying and resolving disputes as to production of documents and admissibility of evidence, including the making of evidentiary rulings; and
  - (8) any other action that will encourage and maintain a fair, efficient and effective appeal process.
- D. To order, where relevant and useful, one or more independent medical evaluations, for which the System will, to the extent reasonably practicable, provide the names of three appropriately qualified health care providers, 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;
- E. To return to the ~~Executive Director~~Chief Executive Officer or designee for consideration, any issue raised for the first time in the appeal process, as required pursuant to section 6(2)(A);
- F. To rule on any request at any conference, during the hearing or at any other time during the appeal process, prior to delivery of the recommended decision to the Board;
- G. Generally working through the appeals clerk, 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. §17451;
- H. To issue subpoena(s) 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, or otherwise inadmissible, in accordance with 5 M.R.S. §9060 and section 12 of these rules;
- I. After the close of the evidence, the parties' receipt of a hearing transcript, if any, and the issuance of an ~~Executive Director~~Chief Executive Officer's reconsidered decision as described in section 14, to request that the parties submit briefs on the issues not decided by the ~~Executive Director~~Chief Executive Officer in the appellant's favor, and to request or allow the parties to make oral argument to the hearing officer, when the hearing officer deems oral argument to be necessary or useful;
- J. To refer or re-refer to the ~~medical review service provider~~Medical Board any matter involving medical evidence, questions or issues;
- K. To ascertain the rights of the parties, to identify and notify all parties that may be affected by a decision, 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 parties and witnesses in making full and free statements in order to develop all issues which may govern the outcome of the appeal;

- L. To administer oaths or affirmations to all witnesses in all hearings;
- M. To regulate the presentation of evidence, including questioning of witnesses and the participation of parties, in order to ensure an adequate and comprehensive record of the proceedings and to avoid repetition and delay;
- N. To examine witnesses and ensure that relevant evidence is admitted in the record;
- O. To determine the credibility of witnesses and to decide the weight to be given to testimony and all other evidence;
- P. To take official notice of facts in accordance with 5 M.R.S. §9058, and parties shall be copied with the facts noticed, and the source of those facts, which shall be placed of record;
- 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. §9059;
- S. To consult with the Board's counsel on legal issues; provided that, when an appeal raises issues of equity or constitutionality, the hearing officer must consult with the Board's counsel.
- T. To consult with the System advisor if the hearing officer requires information concerning general System structure, policies or practices if the hearing officer determines that such consultation would be helpful to a determination of the issues on appeal.
- U. 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~~Chief Executive Officer's case;
2. Pre-hearing conference. Participate in the pre-hearing conference;
3. Present witnesses. Present and examine witnesses when appropriate;
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 MainePERS staff, and by documentary evidence.

## SECTION 10. Default

1. **Failure to appear.** Except as provided in subsection 2 below, if an appellant fails to participate in a scheduled conference, appear at hearing, or otherwise fails to prosecute his or her case, the appellant may be deemed by the hearing officer to have abandoned the appeal. The hearing officer will so notify the appellant in writing. If within 10 business days of receipt of the notice, the appellant submits information which demonstrates, in the judgment of the hearing officer, that she or he had good cause for failure to appear, the hearing will be rescheduled. On the 11<sup>th</sup> day following receipt of the notice by appellant and without suitable response, the decision of the ~~Executive Director~~**Chief Executive Officer** will become final and the hearing officer will issue a recommended dismissal with prejudice to the Board.
2. **Hearing in the absence of the appellant.** A hearing may be held in the absence of the person appealing when:
  - A. The person requests or agrees to a hearing in ~~their~~**her/his** absence; or
  - B. The hearing officer, at ~~their~~**his or her** discretion, proceeds 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 and Conduct of Hearings.** ~~During the state of emergency declared by the Governor in accordance with Title 37-B, section 742 due to the outbreak of COVID-19 and continuing for 30 days thereafter, all hearings will be conducted using audio or video conferencing.~~ Testimony may be provided telephonically, by deposition, by video, by a sworn written statement, or, after the requirement to conduct hearings using audio or video conferencing has expired, in person, at the discretion of the hearing officer. With the exception of sequestered witnesses, all participants in a hearing conducted by audio or video conferencing must be able to hear the other participants. Parties must ensure that witnesses who provide sworn written statements or testimony be available for cross-examination during the hearing, although the cross-examination of expert witnesses may, at the request of a party, take place at a different time.
3. **Irrelevant or repetitious evidence.** Evidence which is irrelevant or unduly repetitive may be excluded.
4. **No formal rules of evidence.** Formal rules of evidence are not required and 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 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 initiative 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 when official notice is taken and shall afford the parties an opportunity to contest the reliability, substance and/or materiality of the material noticed.
10. **Rebuttal Evidence.** To the extent that the appellant testifies or introduces evidence on matters or facts not previously known to the System, the hearing officer may, at the request of the MainePERS Representative, hold the record open for a reasonable period in order to allow the System to offer rebuttal evidence.

## **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. The System must provide to the person bringing the appeal a copy of the relevant portions of the record without charge.
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 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, and not otherwise excludable, the hearing officer must submit the subpoena for approval by the Attorney General or Deputy Attorney General who is not involved in the appeal.
4. **Requirements.** A subpoena shall comply with the requirements of 5 M.R.S. §9060.

**SECTION 13. Hearings recorded**

1. All hearings will be recorded in a form susceptible to transcription.
2. A copy of the transcript of a hearing or of expert testimony taken pursuant to section 11(2) will be provided to the parties.

**SECTION 14. Reconsideration by the ~~Executive Director~~Chief Executive Officer**

After the close of the evidence and the parties' receipt of any transcript, the ~~Executive Director~~Chief Executive Officer 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. If new grounds for affirming a decision adverse to the appellant are articulated by the ~~Executive Director~~Chief Executive Officer at this stage of the process, the hearing officer shall allow the parties a reasonable time to present additional evidence relevant to the issues raised in the ~~Executive Director~~Chief Executive Officer's reconsidered decision. If, after receiving the appeal evidence and any transcripts, the ~~Executive Director~~Chief Executive Officer consults with the medical review provider~~Medical Board~~, the 10-day period described above begins to run upon the ~~Executive Director~~Chief Executive Officer's receipt of the medical review provider's reports~~Medical Board's memorandum~~.

**SECTION 15. Recommended decision of the hearing officer**

1. **Contents.** Following the hearing or, if the parties have agreed to waive hearing, following review of the documentary and testimonial record, and following the issuance of the ~~Executive Director~~Chief Executive Officer's reconsidered decision, the hearing officer will prepare a recommended decision, which will include:
  - A. A clear statement of the subject(s) of the appeal and of the issues which must be resolved to decide the appeal;
  - B. A listing of the date, place of hearing, and participants at the hearing or, if no hearing was held, a statement that the parties agreed to proceed without a hearing or other explanation;
  - C. A listing of all evidence admitted and 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 decision;
  - E. A clear statement of result resolving all issues under consideration; and
  - 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 furnish a copy of the recommended decision to each of the parties for comment. A party's comments must be in writing and must be received within the time period set by the hearing officer.
- B. If a party believes that the hearing officer's decision contains one or more errors of law, or that the hearing officer has exceeded ~~their~~his or her jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party shall so advise the hearing officer in that party's written comments. Identification of the error(s) by specific record citation is required.
- C. The hearing officer may, but is not required to, modify the recommended decision in response to the parties' comments. If in the judgment of the hearing officer, the previously issued recommended decision is substantially modified, the hearing officer will send the recommended decision as modified to the parties for further comment, as provided in paragraph A.
- D. The hearing officer will submit the recommended decision, as originally prepared and as modified, together with the written comments made by the parties, to the Board clerk. Where the recommended decision is not modified, the hearing officer will also deliver to the Board clerk ~~her~~his written response to the parties' written comments. Upon transmittal to the Board, the decision of the hearing officer constitutes the recommended final decision of the hearing officer.
- E. If a party believes that the recommended final decision of the hearing officer contains one or more errors of law, or that the hearing officer has exceeded ~~their~~his or her jurisdiction, or that there is no support in the record for the factual findings of the hearing officer, the party must so notify the Board in writing so that the notification is received by the Board within 10 days after that party's receipt of the recommended final decision, specifying the error(s) by specific citation to the record. In the event no written comments are received by the Board as specified herein, the Board will be compelled to accept the recommended final decision pursuant to 5 M.R.S. §17106-A and will not schedule consideration of the appeal or permit oral argument by the parties.

## **SECTION 16. Action by the Board**

- 1. If the Board is compelled to adopt the recommended final decision of the hearing officer pursuant to 5 M.R.S. §17106-A(1), the Board will do so during its monthly meeting, as time permits, and will not schedule consideration of the appeal or permit oral argument by the parties.
- 2. If a party believes an error exists in the recommended decision pursuant to 5 M.R.S. §17106-A and the alleged error has not been resolved by the hearing officer, that party shall notify the Attorney General's Office, to the attention of MainePERS Board counsel, so that the notification is received within 10 days of that party's receipt of the recommended final decision.
  - A. The Board or Board counsel may on its own initiative, determine that an error pursuant to 5 M.R.S. §17106-A exists in the recommended final decision.

3. Upon review of the record, the Attorney General or designee shall notify the parties, prior to the scheduled Board consideration, whether the Board will be advised that an error of law exists in the recommended final decision.
4. If the Attorney General or designee recommend that the Board find one or more errors in the recommended final decision as described in 5 M.R.S. §17106-A(1), then the following procedures will be followed.
  - A. **Board Consideration.** The Board will consider the recommended final decision, together with the allegation of error(s), on a timely basis and, for an appellant who has chosen the expedited appeal process, will issue a decision within 90 days of the initial pre-hearing conference, when possible.
  - B. **Recommended final decision and record.** In advance of Board consideration, a copy of the recommended final decision with the parties' comments and Board counsel's recommendation, will be forwarded to each Board member.
  - C. **Statement by party.** A party who is present at a scheduled consideration may not offer evidence but may make a statement of position not to exceed 15 minutes in length. Such statement of position may address the alleged error(s) pursuant to 5 M.R.S. §17106-A(1). When a party's statement of position relies on specific 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.
  - D. **Hearing officer present.** If requested by the Board, the hearing officer may be present at the scheduled consideration to assist the Board.
  - E. **Action after consideration.** After considering the recommended final decision, the Board may:
    - (1) adopt the recommended final decision as delivered;
    - (2) modify the recommended final decision;
    - (3) 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; or
    - (4) reject the recommended final decision in whole or in part and issue an amended Board decision;
5. Board counsel will draft the decision and order. A decision as issued by the Board under this Section is the final administrative decision in the appeal.

### **SECTION 17. Attorney's Fees**

1. The System is required to pay attorney's fees, up to a total of \$12,000, if an attorney has represented the appellant on appeal of a disability retirement decision and obtained a favorable result. A favorable result is a reversal of a decision of the Board or Chief Executive Officer that results in the grant of benefits to the appellant or otherwise materially advantages the appellant.
2. Attorney's fees under this section may be awarded by a Court on judicial review of a Board decision or by the hearing officer in the case where a decision of the Chief Executive Officer has been reversed by the Board or the Chief Executive Officer.
3. Application to a hearing officer for attorney's fees must be made no later than 30 days after receipt of the Board decision or the dismissal of the appeal following reversal by the Chief Executive Officer.
  - A. The application must be accompanied by proof of the fee arrangement and a statement of attorney's fees incurred in the appeal. The statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and a statement of the attorney's customary billing rate for similar work.
  - B. The hearing officer may grant the application based on the proof submitted or may hold a hearing and receive argument orally, in writing, or both.
  - C. A decision on an attorney's fee application may be appealed to the Board, who shall affirm the decision unless it is not supported by the record as a whole, the Board is advised by Attorney General that the hearing officer has made an error of law, or the decision exceeds the authority or jurisdiction conferred upon the hearing officer.
    1. The process for Board review shall be consistent with section 16 above to the extent applicable.
    2. The Board's decision constitutes final agency action.

## STATUTORY AUTHORITY:

5 M.R.S. §§ 9051-9064, 17103(4), 17106-A, 17106-B and 17451

## EFFECTIVE DATE:

June 30, 1992

## AMENDED:

March 2, 1994

April 30, 1995

## EFFECTIVE DATE (ELECTRONIC CONVERSION):

May 5, 1996

## NON-SUBSTANTIVE CORRECTIONS:

October 3, 1996 - minor spelling and format

AMENDED:

January 5, 1997

May 9, 2007, filing 2007-183

REPEALED AND REPLACED:

March 31, 2010 – filing 2010-108

AMENDED:

December 20, 2013 – filing 2013-296

April 14, 2020 – Section 11(2), filing 2020-095 (EMERGENCY)

July 18, 2020 - Section 11(2), filing 2020-159