

## GAO MEMORANDUM

**To:** Brian S. Colón, State Auditor

**Date:** May 7, 2019

**From:** Stephanie W. Telles, GAO

**Subject:** PERA Raises Examination

### Approach

The OSA reviewed the allegations; including its two internal memos and supporting resources: the 2006 New Mexico Statutes, Article 11 — Retirement of Public Officers and Employees Generally, PERA's Board Policies and Procedures.

**Conclusion and Recommendation:** The PERA Board of Trustees (“Board”) must act to clarify existing conflicting guidance.

### Analysis

In consultation with OSA General Counsel there appears to exist noteworthy variances on where the authority of approval lays concerning pay raises, re-classifications, and/or promotions for PERA employees. While the Attorney General did provide an opinion in 1955 stating the authority lays with the board concerning the Executive Director there is no clearly defined rule governing that authority for other exempt employees. Overall, the legality of whether the Executive Director acted out of the scope of his authority in approving the pay raises is indeterminate resulting in an undefined legal conclusion. However, it is reasonable to assert that due to the inconsistencies of rules governing the authority of the board and the Executive Director one can affirm the action taken by the Executive Director was within his understood scope of responsibility and he did not act improperly. Principally and per statute the board promulgates the administrative code and the Board policies and procedures, including the proper delegation of authority to the Executive Director.

Further, based on the historical intent of PERA's Board Policies and Procedures (BPP) and language of current statutes one may interpret the actions by the Executive Director, to approve promotions and pay increases for exempt and classified employees of PERA, as proper and within the scope of duty. Particularly, when one defers to the legal order of authorities. It is clear that attempts have been made to update PERA's statutes, administrative code, and BPP, and to align the scope of duties and provide clarity on the roles and responsibilities of the Executive Director and the Board however, no significant changes have been enacted. It is therefore the opinion of the GAO that the Executive Director acted reasonably and within his understood manner of authority in accordance to the rules governing it. It is further recommended that the Board act immediately to correct the inconsistencies within the structure of its statutes, administrative code, and board policies and procedures to align its rules governing the roles and responsibilities of PERA Executive Director and its Board's authority.

## Memorandum regarding PERA

### **Question:**

Was the Public Employee Retirement Association's (PERA) Board approval needed/required for pay raises, reclassifications, and/or promotions for staff of PERA?

### **Procedures:**

- 1.) The OSA reviewed Section 10, Article 11 of New Mexico Statutes Annotated, "Retirement of Public Officers and Employees Generally".
- 2.) The OSA reviewed the Public Employees Retirement Act (Section 2.80.100 through Section 2.80.2300 NMAC), authorized by NMSA 1978 Sections 10-11-2 and 10-11-130.
- 3.) The OSA reviewed PERA's Board Policies and Procedures approved on March 29, 2001 and corresponding board minutes.
- 4.) The OSA reviewed PERA's Board Policies and Procedures as amended on September 26, 2002 and corresponding board minutes.
- 5.) The OSA reviewed PERA's Board Policies and Procedures as amended on 2011 and corresponding board minutes.
- 6.) The OSA reviewed PERA's Board Policies and Procedures as amended on 2012 and corresponding board minutes.
- 7.) The OSA reviewed PERA's Board Policies and Procedures as amended on 2014 and corresponding board minutes.
- 8.) The OSA reviewed PERA's Board Policies and Procedures as amended January 1, 2015.
- 9.) The OSA reviewed the Attorney General's Opinion No. 55-6070
- 10.) The OSA reviewed Senate Bill 163 of the 2018 Legislative Session.
- 11.) The OSA reviewed Senate Bill 235 of the 2018 Legislative Session.
- 12.) A comparison of New Mexico Educational Retirement Board (ERB) and the New Mexico Public Employees Retirement Association (PERA).

### **Conclusion:**

Currently, this appears to be a legal 'gray' area, however it is important to note that historically this was more clearly delineated in PERA's Board Policies and Procedures (BPP). PERA's statutes clearly state the Board is responsible for administering and managing PERA including compensation for employed services and other employee benefits. Both PERA's Administrative Code and PERA's statute state that the executive director shall be the chief administrative officer, but neither provide a definition of that title or spell out that position's duties and responsibilities. PERA's original BPP adopted on March 29, 2001 stated that, "the Executive Director has the authority to employ all PERA employees. The Board shall refrain from directly involving itself in the duties of the Executive Director with respect to the hiring, terminating and evaluating PERA staff." The original BPP pertained to all staff of PERA and made it clear that the Executive Director had the authority to hire, fire and evaluate all staff.

The current BPP states under a section titled "Hiring Exempt Employees" that, "[t]he Executive Director has the authority to employ all NMPERA employees, except that the Board requires that the credentials of proposed exempt employees for the positions of Deputy Director of Operations,

Deputy Director of Member Services, Chief Investment Officer and General Counsel be formally presented to and endorsed by a majority of the Board prior to any offer of employment to candidates for such positions.”

In comparison, the New Mexico Educational Retirement Board (ERB)’s statute states salaries shall be fixed by regulation of the board. ERB’s Administrative Code states the director is responsible for staffing positions and explicitly states, “this responsibility shall include the authority for the employment, promotion and dismissal of all employees.”

The OSA recommends that PERA’s Board clarify either the Administrative Code or their current Board Policies and Procedures to clearly define what the duties and responsibilities of the Executive Director are.

An in-depth analysis of our procedures are provided on the following pages.

**Analysis of PERA’s statute:**

Section 10-11-130(A) NMSA 1978 states, “[t]he “retirement board” is created and is the trustee of the association and the funds created by the state retirement system acts and has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the state retirement acts, including, in addition to any specific powers provided for in the Public Employees Retirement Act but without limiting the generality of the foregoing, the power to: (1) administer the state retirement system acts, including the management of the association and making effective the provisions of those acts, as well as to administer and manage any other employee benefit acts as provided by law.”

*The OSA’s observations:* Section 10-11-130(A) created PERA’s board and established that the Board is responsible for managing PERA and administering and managing any other employee benefit acts. This appears to imply that the Board is responsible for managing PERA in all aspects including employee benefits.

Section 10-11-131(C) NMSA 1978 states, “[t]he retirement board shall appoint an executive secretary who shall be the chief administrative officer of the board and the association. The retirement board shall employ professional, technical, clerical and other services as required for the operation of the association. The compensation for employed services shall be fixed by the retirement board.”

*The OSA’s observations:* Section 10-11-131(C) establishes that the board shall employ staff as needed for operation of PERA and for those employed services PERA’s board shall set the compensation for employed services. This appear to imply that the Board is responsible for setting the compensation of employed staff of PERA. PERA’s Statute does not contain a definition of chief administrative officer. Without a definition, one is left to interpret what duties and responsibilities the CAO is tasked with.

### **Analysis of PERA's Administrative Code:**

Section 2.80.1800.8(A) NMAC states, “[t]he executive director shall be the chief administrative officer of the board and of the association. He or she shall attest to official actions of the board when required and shall serve at the pleasure of the board.”

*The OSA's observations:* PERA's Administrative Code does not contain a definition of ‘chief administrative officer’. Wikipedia defines CAO as, “a top-tier executive who supervises the daily operations of an organization and is ultimately responsible for its performance.” Without a definition, one is left to interpret what duties and responsibilities the CAO is tasked with.

Section 2.80.1800.8(C) NMAC states, “[t]he executive director is authorized to perform any acts required of the board pursuant to the proper delegation of authority by the board.”

*The OSA's observations:* PERA's Administrative code does not contain a definition of ‘proper delegation’ and whether this equates to written/documented delegation or if verbal delegation is allowable.

### **Analysis of PERA's Board Policies and Procedures (BPP) approved on March 29, 2001 and corresponding board minutes:**

The March 29, 2001 BPP contained two different sections that covered hiring employees. In Section VII(C) it stated, “Hiring Employees: The Executive Director has the authority to employ all PERA employees. The Board shall refrain from directly involving itself in the duties of the Executive Director with respect to the hiring, terminating and evaluating PERA staff.” In Exhibit 2, Executive Director's Duties & Authority, Section C it stated, “Hiring Exempt Employees, The Executive Director has the authority to hire and fire all NMPERA employees, except that the board requires that the credentials of proposed exempt employees be formally presented to and endorsed by a majority of the board prior to any offer of employment to candidates for such positions.

The March 13, 2001 Rules and Administration Committee (RAC) meeting minutes discussed how much weight the policies and procedures would have and it was stated, “if the Board adopts them as policies and guidelines, a public hearing is not required. If, however, the Board wants to consider them as rules, a public hearing is required. Mr. Hoffman asked whether the rules would have less effect if they were approved as policies and procedures. Ms. Hughes said that would depend on the weight placed on them by the Board. There was Committee consensus that the rules be adopted as guidelines and, in the future, be considered for promulgation as rules.”

The March 13, 2001 RAC meeting minutes then discussed provisions of the BPP and it was stated, “Chair Adams objected to the inclusion of PERA-exempt employees being governed by the policies. She said the Executive Director should be included, but not the exempt employees. The current exempt positions were identified. Chair Adams stated that all PERA employees are governed by the administrative and personnel policies. There was Committee consensus to eliminate references to the PERA-exempt employees throughout these guidelines.” There was discussion about the Executive Director sections which stated, “Section VII, Executive Director, under paragraph C, Chair Adams said she was concerned with the notion that credentials of proposed exempt employees had to be formally presented to and endorsed by the Board. She said

the clause gives the Board power in hiring personnel, which then removes accountability from the Executive Director. Mr. V. Montoya said he wanted to review the credentials of classified employees and participate in the hiring of exempt positions especially. Mr. Jorgensen said she would like to see credentials, but agreed it may not be advisable for the Board to approve or endorse candidates. Mr. Hoffman agreed with Chair Adams that the Board would be compromising the Director's position. Mr. Chavez introduced the following that, "Paragraph VII. C. was revised as follows: 'the Executive Director has the authority to hire and fire all PERA employees. The Board shall refrain from directly involving itself in the duties of the Executive Director with respect to the hiring, dismissing, and evaluation of PERA staff.'" It was then resolved that the Board Policies be approved as amended and the motion passed unanimously.

At the March 29, 2001 PERA board meeting minutes the board unanimously voted to approve the BPP. The OSA reviewed the board policies and procedures approved on March 29, 2001 and found Section VII(C) stated, "Hiring Employees: The Executive Director has the authority to employ all PERA employees. The Board shall refrain from directly involving itself in the duties of the Executive Director with respect to the hiring, terminating and evaluating PERA staff."

*The OSA's observations:* It appears that the RAC members and PERA board members at that time were in agreement that they did not want to remove accountability from the Executive Director and the language agreed upon did explicitly provide the Executive Director the authority to hire and fire all PERA employees. Moreover, there was explicit language in the BPP that the board would refrain from directly involving itself in the duties of the Executive Director which included hiring, firing, and evaluating employees. This language was silent on compensation, however it would appear that the act of hiring employees is inclusive of compensation and benefits for that position.

**Analysis of PERA's Board Policies and Procedures (BPP) approved on September 26, 2002 and corresponding board minutes:**

The September 26, 2002 BPP contained two different sections that covered hiring employees. In Section VII(C) it stated, "Hiring Employees: The Executive Director has the authority to employ all PERA employees. The Board shall refrain from directly involving itself in the duties of the Executive Director with respect to the hiring, terminating, and evaluating PERA staff." In Exhibit 2, Executive Director's Duties & Authority, Section C it stated, "Hiring Exempt Employees, The Executive Director has the authority to employ all NMPERA employees, except that the board requires that the credentials of proposed exempt employees for the positions of Deputy Director of Operations, Deputy Director of Member Services, Director of Investments and General Counsel be formally presented to and endorsed by a majority of the board prior to any offer of employment to candidates for such positions."

At the September 10, 2002 Rules and Administration Committee Meeting, the BPP was discussed again and it was stated, "Ms. Pittard said the PERA Board Policy requires the credentials of all PERA exempt employees be formally presented to the Board and endorsed by a majority of the Board prior to an offer of employment. She said that at present there were eight exempt positions to which the policy applies. Amending the policy limits the requirement for prior Board

endorsement of offers of employment to the positions of Deputy Director of Operations, Deputy Director of Member Services, Director of Investments and General Counsel. It would allow employment of the two staff attorneys, the Executive Director's administrative assistant and the comptroller without prior Board approval. Mr. Varela requested that the terms 'fire and hire' be eliminated from the policy and replaced with 'employ and terminate'. Mr. Hoffman moved to support staff's proposed policy replacing 'hire' with 'employ.' The motion was seconded by Mr. Chavez and passed by unanimous vote."

**Analysis of PERA's Board Policies and Procedures (BPP) approved on March 31, 2011 and corresponding board minutes:**

A review of the changes adopted on March 31, 2011 pertained to Section I (General Guidelines) and Section IV (Board Education/Travel). It does not appear there were any changes pertaining to hiring/compensation of employees or the Executive Director.

A review of the changes adopted on May 26, 2011 pertained to Section V (Insider Trading). It does not appear there were any changes pertaining to hiring/compensation of employees or the Executive Director.

A review of the changes adopted on June 24, 2011 pertained to Section II (Board's Role and Duties) and Section III (Standards of Conduct). It does not appear there were any changes pertaining to hiring/compensation of employees or the Executive Director.

A review of the changes adopted on July 28, 2011 pertained to Section VI (Sanctions & Enforcement) and Section VIII (Board-Staff Communication). It does not appear there were any changes pertaining to hiring/compensation of employees or the Executive Director.

PERA was unable to locate Section VII of the 2011 BPP as amended by the board. PERA provided the remaining 2011 BPP they had on file.

*The OSA's observations:* The OSA was unable to determine precisely when Section VII of the BPP was changed, but sometime between 2003 and 2011 exhibit 2 pertaining to hiring exempt employees, replaced Section VII (C) which previously related to hiring employees.

**Analysis of PERA's current Board Policies and Procedures (BPP) approved on March 26, 2014:**

Under Section II of the BPP titled, "Board's Roles and Duties", it states, "Delegate execution of established Board policy and strategic objectives to the Executive Director and through the Executive Director, re-delegation to the employees of PERA."

*The OSA's observations:* This appears to imply that the Board has delegated authority to the Executive Director to execute the provisions of the BPP.

Under Section VII, and the section titled "Hiring Exempt Employees" it states, "[t]he Executive Director has the authority to employ all NMPERA employees, except that the Board requires that the credentials of proposed exempt employees for the positions of Deputy Director of Operations, Deputy Director of Member Services, Chief Investment Officer and General Counsel be formally

presented to and endorsed by a majority of the Board prior to any offer of employment to candidates for such positions.”

*The OSA's observations:* This appears to imply that the Executive Director has the authority to employ all NMPERA employees except when employment involves the above 4 exempt positions, in which case, the Board must approve their credentials. The BPP is silent on what it means to “employ all NMPERA employees.” The Cambridge English Dictionary defines ‘employ as “to have someone work or do a job for you and pay them for it.”

#### **Analysis of PERA board minutes pertaining to the passage of the BPP in March 2001:**

The OSA reviewed the 2011 amendments and noted the changes did not pertain to Section VII and the Executive Director. The OSA reviewed the 2012 amendments to the BPP and noted the changes pertained to Section VII, however only as it pertained to the performance evaluation of the Executive Director. The OSA reviewed the 2014 amendments to the BPP and noted the changes did not pertain to Section VII and the Executive Director.

#### **Analysis of the New Mexico Attorney General Opinion No. 55-6070:**

This opinion related to the question of “does the public employees’ retirement board have the authority to classify and fix the salary of the Executive Secretary in the absence of a classification of that position by the State Personnel Board?”

Section 10-11-2.1 NMSA 1978 states, “with reference to the public employees retirement association, “executive secretary” means “executive director”.

The Attorney General concluded that, “the only reasonable conclusion is that the Retirement Board, who by the wording of the statute quoted is authorized to fix and pay the compensation for such services, must be the proper Board for fixing the salary for this position. It is, therefore the opinion of this office that the Retirement Board has the authority to fix the salary of the Executive Secretary of such Board, and in the absence of any attempt of the State Personnel Board to classify the position and fix the salary of the Executive Secretary, no consent or approval from said Board is required.”

*The OSA's observations:* This opinion was strictly limited to the compensation of the Executive Director and did not address other staff of PERA.

#### **Analysis of Senate Bill 163, Legislative Session 2018:**

This proposed bill wanted to amend the Public Employees Retirement Act to state that, “each year, the retirement board, in consultation with the executive director of the association, shall establish a framework for the compensation of the association’s chief investment officer and other investment staff.” This proposed bill would have also amended Section 10-9-5 NMSA 1978 which lists those positions considered exempt and would have allowed for, “the chief investment officer of the public employees retirement association and those subject to the investment-performance-based compensation framework.” A review of this bill showed that this bill was postponed indefinitely at the 2018 legislative session.

Furthermore, a review of a letter dated January 23, 2018 from the Executive Director to the PERA Legislative Committee with a copy to PERA's board under the 'introduced legislation' section it stated, ""SB 163, introduced by Senator Munoz: Exempts certain ERB and PERA employees from the State Personnel Act: The legislation will exempt ERB and PERA Investment staff from the State Personnel Act thereby allowing the ERB and PERA Boards to establish staffing levels and terms of employment, including compensation, for affected staff. SB 163 has been referred to the Senate Committees Committee, the Senate Public Affairs Committee and the Senate Finance Committee." The language of the bill appeared to agree with the statutory responsibility of the board as outlined above regarding the Board establishing staffing levels and terms of employment including compensation. At the January 25, 2018 board meeting where a motion to support SB 163 was introduced, Board member Ms. Naranjo Lopez stated, "she was not in agreement with this bill and offered that public employment is not the same as employment within the private investment industry. She mentioned PERA's \$6 billion unfunded liability and said discussing increasing salaries and decreasing the COLA greatly concerned her." The motion to support SB 163 passed by majority [7-3] with members Naranjo Lopez, French and Cordova voting against it.

*The OSA's observations:* It appears that this legislative fix indirectly acknowledges that the Executive Director of PERA has been responsible for terms of employment for including compensation and this bill attempted to remedy this by explicitly stating the board would establish staffing levels, terms of employment and compensation of investment staff. If PERA's board had been responsible for setting staffing levels and compensation from its creation, it would appear this bill would not have been introduced.

#### **Analysis of Senate Bill 235, Legislative Session 2019 and the fiscal impact report:**

The majority of this bill appears nearly identical in substance to the Senate Bill 163 from the 2018 Legislative session. However, in the 2018 legislative session, there was no fiscal impact report produced.

The fiscal impact report for SB 235 introduced in the 2019 Legislative session stated, "PERA and ERB investment staff are currently exempt from the State Personnel Act. Because investment staff are already considered at will employees, their removal from the State Personnel Act will not result in a loss to employee protections. SB235 will allow the board of PERA and ERB to create a salary plan for their investment staff independently of the governor's exempt salary plan." A review of this bill showed that this bill passed the Senate, but died in the house in the 2019 legislative session.

*The OSA's observations:* For two years in a row, a legislative bill was proposed to amend the statute so that any ambiguity over who was responsible for setting staffing levels and compensation would be resolved and put the authority and responsibility solely on the PERA board.

#### **A comparison of ERB to PERA:**

A more detailed comparison is provided in the table below. In summary, ERB's statute and administrative code are more definitive regarding whether or not board approval is necessary for compensation of staff. ERB's statute states salaries shall be fixed by regulation of the board. ERB's Administrative Code states the director is responsible for staffing positions and explicitly states,



“this responsibility shall include the authority for the employment, promotion and dismissal of all employees.” ERB’s board policies and procedures only appeared to pertain to Board matters and did not mention the executive director.

	PERA	ERB
Statute pertaining to employees	Section 10-11-130(A) NMSA 1978 states, “[t]he “retirement board” is created and is the trustee of the association and the funds created by the state retirement system acts and has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the state retirement acts, including, in addition to any specific powers provided for in the Public Employees Retirement Act but without limiting the generality of the foregoing, the power to: (1) administer the state retirement system acts, including the management of the association and making effective the provisions of those acts, as well as to administer and manage any other employee benefit acts as provided by law.”	Section 22-11-6(A) NMSA 1978 states, “[t]he board shall: (1) properly and uniformly enforce the Educational Retirement Act; (2) hire employees and delegate administrative authority to these employees.”
Statute pertaining to the Executive Director	Section 10-11-131(C) NMSA 1978 states, “[t]he retirement board shall appoint an executive secretary who shall be the chief administrative officer of the board and the association.”	Section 22-11-7(A) NMSA 1978 states, “[t]he board shall employ an educational retirement director. The director shall be the administrative officer for the board in carrying out the provisions of the Educational Retirement Act and shall have those additional duties provided in the rules of the board.”
Statute pertaining to salaries	Section 10-11-131(C) NMSA 1978 states, “The retirement board shall employ professional, technical, clerical and other services as required for the operation of the association. <u>The compensation for employed services shall be fixed by the retirement board.</u> ”	Section 22-11-10 NMSA 1978 states, “[t]he <u>amount of salaries and fees to be paid by the board shall be fixed by the regulation of the board.</u> Salaries and fees paid, and all other necessary expenditures of the board, shall be paid out of the fund unless otherwise provided by law.”

Administrative Code pertaining to the Executive Director	Section 2.80.1800.8(A) NMAC states, “[t]he Executive Director shall be the chief administrative officer of the board and of the association. He or she shall attest to official actions of the board when required and shall serve at the pleasure of the board.”	2.82.1.13(A) NMAC states, “[t]he Board, at a regular meeting, shall employ a director who shall serve at the pleasure of the board and at a salary to be set by the board.”
Administrative Code pertaining to staff	Section 2.80.1800.8(C) NMAC states, “[t]he Executive Director is authorized to perform any acts required of the board pursuant to a proper delegation of authority by the board.”	2.82.1.13(B) NMAC states, “[t]he board shall annually approve an organizational chart coincident with the adoption of the budget. This chart shall include a description of all positions required for the operation of the office, and <u>the director shall be responsible for staffing these positions. This responsibility shall include the authority for the employment, promotion and dismissal of all employees.</u> ”

## Memorandum #2 regarding PERA

### **Question:**

Was the Public Employee Retirement Association's (PERA) Board approval needed/required for the 2% pay raise given to Executive Director (ED) Wayne Propst in 2018? For other pay raises/promotions given to the ED since his hiring in 2012 was Board approval needed/required?

### **Procedures:**

- 1.) The OSA reviewed Section 10, Article 11 of New Mexico Statutes Annotated, "Retirement of Public Officers and Employees Generally".
- 2.) The OSA reviewed the Public Employees Retirement Act (Section 2.80.100 through Section 2.80.2300 NMAC), authorized by NMSA 1978 Sections 10-11-2 and 10-11-130 and PERA's Board Policies and Procedures as amended January 1, 2015.
- 3.) The OSA reviewed the Attorney General's Opinion No. 55-6070.
- 4.) The OSA reached out to the Department of Finance and Administration regarding the 2% raise and the legislative intent.
- 5.) The OSA reviewed the pay raise given to Wayne Propst in 2014 and the pay raise given to the former Executive Director Terry Slattery, for historical context.

### **Conclusion:**

The OSA reviewed House Bill 2 and reached out to the State Budget Division, DFA, SPO, and the LFC for guidance on the implementation of the 2% pay raise and if the legislative intent included exempt employees. It appears that exempt employees were allowed by House Bill 2 to receive the 2% pay raise. The OSA reviewed the provisions of House Bill 2 and noted the following (page 197 of the PDF): Section 8(A)(3) states, "twelve million six hundred thousand dollars (\$12,600,000) to provide incumbents in agencies governed by the State Personnel Act, the New Mexico state police career pay system, attorney general employees, workers' compensation judges and executive exempt employees with an average salary increase of two percent." It does not appear that PERA board approval was needed for the 2% legislative pay increase effective in 2018.

The New Mexico Attorney General Opinion No. 55-6070 clearly stated that the "Board has the authority to fix the salary of the Executive [Director]." The OSA reviewed the 10% pay increase provided to Wayne Propst in 2014 and the 10% pay increase provided to Terry Slattery in 2005 and noted that in both instances, it appears that after the entire PERA board met in executive session and conducted the annual evaluation of the Executive Director that the Board Chair then drafted a letter to the DFA cabinet secretary and requested a pay increase. It is unclear what was discussed in Executive Session for either Executive Directors. It is unclear and needs to be clarified by PERA is the process for promotions/raises of the Executive Director.

The OSA recommends that PERA's Board clarify either the Administrative Code or their current Board Policies and Procedures to clearly define what the process is for pay increases for the Executive Director and whether full board approval will be required in future letters to the DFA Cabinet Secretary.

An in-depth analysis of our procedures are provided on the following pages.

**Analysis of PERA’s statute:**

Section 10-11-131(C) NMSA 1978 states, “[t]he retirement board shall appoint an executive secretary who shall be the chief administrative officer of the board and the association. The retirement board shall employ professional, technical, clerical and other services as required for the operation of the association. The compensation for employed services shall be fixed by the retirement board.”

*The OSA’s observations:* Section 10-12-131(C) establishes that the board shall employ staff as needed for operation of PERA and for those employed services PERA’s board shall set the compensation for employed services. This appear to imply that the Board is responsible for setting the compensation of employed staff of PERA including the Executive Director.

**Analysis of PERA’s Administrative Code and PERA’s current Board Policies and Procedures (BPP) approved on March 26, 2014:**

Section 2.80.1800.8(A) NMAC states, “[t]he executive director shall be the chief administrative officer of the board and of the association. He or she shall attest to official actions of the board when required and shall serve at the pleasure of the board.”

*The OSA’s observations:* PERA’s Administrative Code does not contain a definition of ‘chief administrative officer’. PERA’s Administrative Code does not provide any additional guidance on compensation paid to the Executive Director. PERA’s BPP does not provide additional guidance on the salary/compensation of the Executive Director.

**Analysis of the New Mexico Attorney General Opinion No. 55-6070:**

This opinion related to the question of “does the public employees’ retirement board have the authority to classify and fix the salary of the Executive Secretary in the absence of a classification of that position by the State Personnel Board?”

Section 10-11-2.1 NMSA 1978 states, “with reference to the public employees retirement association, “executive secretary” means “executive director”.

The Attorney General concluded that, “the only reasonable conclusion is that the Retirement Board, who by the wording of the statute quoted is authorized to fix and pay the compensation for such services, must be the proper Board for fixing the salary for this position. It is, therefore the opinion of this office that the Retirement Board has the authority to fix the salary of the Executive Secretary of such Board, and in the absence of any attempt of the State Personnel Board to classify the position and fix the salary of the Executive Secretary, no consent or approval from said Board is required.”

*The OSA’s observations:* The New Mexico Attorney General opined that PERA’s board has the authority to fix the salary of the Executive Director.

**Analysis of the pay raise given to Wayne Propst in March 2014 and analysis of the pay raise given to Terry Slattery in November 2005:**

On March 26, 2014, former PERA Board Chair Patricia French wrote a letter to DFA Secretary Thomas Clifford requesting a 10% salary increase for Wayne Propst. The OSA reviewed the September 28, 2017 PERA board minutes and noted that the board entered executive session to discuss the annual evaluation of the Executive Director.

On November 29, 2005, former PERA Board Chair David Baca wrote a letter to DFA Secretary James Jimenez requesting a 10% performance based salary increase for Terry Slattery. The OSA reviewed the November 17, 2005 and July 28, 2005 PERA board minutes and noted that in each meeting the board entered executive session to discuss the annual evaluation of the Executive Director.

*The OSA's observations:* In both instances, it appears that after the entire PERA board met in executive session and conducted the annual evaluation of the Executive Director that the Board Chair then drafted a letter to the DFA cabinet secretary and requested a pay increase. It is unclear what was discussed in Executive Session for either Executive Directors.