



## State of New Mexico Office of the State Auditor

May 7, 2019

*Via E-mail*

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**Re: PERA Raises, FY20 Operating Budget, and Fiduciary Duties**

Dear PERA Board of Trustees,

The Office of the State Auditor (OSA) received complaints containing allegations of fraud and misconduct, including with regard to pay increases of PERA executive staff and its Executive Director. Based on the information received and evaluated at this time related to allegations of improper pay raises, the OSA did not review supporting information that would have substantiated the allegations. However, what was identified is actual conflict between the applicable statutes, administrative code rules, and policies and procedures of the PERA Board of Trustees (“Board”). The Board should take immediate steps to resolve the conflict between applicable law, administrative rules, and Board policies and procedures to prevent these issues from recurring.

While the OSA’s oversight role is not a position where it is proper to comment on the optics of the matter and the propriety of whether the raises were appropriate, the timing and nature of the dispute as it relates to public trust and confidence is problematic. The Board should implement a system for review of salaries and pass an appropriate budget that serves its membership and satisfies its

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fiduciary duties. Notwithstanding, based upon a full examination of the applicable governing statutes, administrative code rules, and Board policies and procedures in reference to the complaints, the OSA's review of available evidence suggests that the Executive Director acted reasonably and within his authority in meeting with and obtaining Board approval for the proposed raises. However, the Board has the authority to appoint the Executive Director and set salary; as such, the Board, acting as a whole can determine what salary it deems appropriate for those positions. NMSA 1978, § 10-11-131(B) and (C). The Board's policies and procedures, at Section VII(D), state the Executive Director "has the authority to employ all NMPERA employees." Finally, the Administrative Code 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." 2.80.1800.8(A) NMAC. The OSA further notes due to inconsistencies within the structure of applicable statutes, administrative code rules, and Board policies and procedures, the Board should take immediate action to provide clear alignment between Board policies and procedures and applicable legal authority. The Board has the authority to rescind pay raises it deems inappropriate or no longer supports. Further, there should be a process applied, which provides a vehicle to approve pay increases under its purview. I have attached the OSA's conclusion to its review of the complaints at issue for reference.

Additionally, I received Board Chair Dr. Kohlasch's letter dated April 29, 2019, and want to stress the importance of the Board acting as a whole to satisfy its duties. I am extremely concerned with the Board's failure to uphold its fiduciary responsibilities. Dr. Kohlasch reported in the communication the Board's failure to approve and submit PERA's Operating Budget for FY 2020 by the statutory deadline of May 1, 2019. As of last fiscal year, 2018, the PERA Fund's fiduciary net position was over \$16 billion with a funded ratio of 71.6% (New Mexico PERA Comprehensive Annual Financial Report 2018). This failure to act to submit the budget by the statutory due date was reckless or negligent, or both, and coupled with the Board's lack of focus on its fiduciary responsibilities puts our retirees and future generations of retirees at risk. The Board's behavior is unacceptable and harms the fund's membership.

Because the fiduciary relationship between the Board and its members is one of trust and confidence, I am particularly concerned about the consequences of the Board's inaction and the result it may have on the fund in light of its potential breach of duties. New Mexico's constitution (Art. XX, Sec. 22) provides that all funds, assets, proceeds, income, contributions, gifts and payments from any source whatsoever paid into or held by a public employees retirement system or an educational retirement system created by the laws of New Mexico shall be held by each respective system in a trust fund to be administered and invested by each respective system for *the sole and exclusive benefit* of the members, retirees and other beneficiaries of that system. It also provides that the retirement board of the public employees retirement system and the board of the educational retirement system shall be the trustees for their respective systems and have the *sole and exclusive fiduciary duty and responsibility* for administration and investment of the trust fund held by their respective systems. Fiduciary duties are the highest level of duties, and require the

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persons acting in a fiduciary capacity to act solely on behalf of the members and other beneficiaries on matters within the scope of the fiduciary relationship. The Board members are strictly accountable for this stewardship and are required to demonstrate the requisite care, loyalty, and impartiality. The same Section of the State Constitution also provides that plan members who meet the minimum service requirements of an applicable retirement plan acquire a vested property right with due process protections under the New Mexico and United States Constitutions. The Board's conduct could be deemed to be in violation of its fiduciary duties to the members.

Further, under NMSA 1978, Section 10-11-130, the retirement board "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 system acts, including, in addition to any specific powers provided for in the Public Employees Retirement Act but without limiting the generality of the forgoing, the power to ... make and execute contracts; ... [and] make and adopt such reasonable rules as may be necessary or convenient to carry out they duties of the retirement board and activities of the association ...." It is essential that the Board promptly act to rectify the potential breach of its duties.

I understand a Special Board meeting has been scheduled for Tuesday, May 7, 2019, and I am hopeful the Board will take all necessary steps during this meeting to become compliant with its obligations under applicable authority and duties owed to its members. If you have any questions, do not hesitate to contact me at (505) 476-3800.

Thank you.

Sincerely,



Brian S. Colón, Esq.

New Mexico State Auditor

cc: PERA Solvency Task Force, Diego Arencon (diego.arencon@state.nm.us)  
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