

NOTICES OF PROPOSED RULEMAKING

Unless exempted by A.R.S. § 41-1005, each agency shall begin the rulemaking process by first submitting to the Secretary of State's Office a Notice of Rulemaking Docket Opening followed by a Notice of Proposed Rulemaking that contains the preamble and the full text of the rules. The Secretary of State's Office publishes each Notice in the next available issue of the *Register* according to the schedule of deadlines for *Register* publication. Under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.), an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for making, amending, or repealing any rule. (A.R.S. §§ 41-1013 and 41-1022)

NOTICE OF PROPOSED RULEMAKING

TITLE 2. ADMINISTRATION

CHAPTER 8. STATE RETIREMENT SYSTEM BOARD

PREAMBLE

1. Sections Affected

R2-8-121
Article 4
R2-8-401
R2-8-402
R2-8-403
R2-8-405

Rulemaking Action

Repeal
New Article
New Section
New Section
New Section
New Section

2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. § 38-714(F)(5)

Implementing statutes: A.R.S. §§ 38-714(F)(1); Title 41, Ch. 6, Art. 10

3. A list of all previous notices appearing in the Register addressing the proposed rule:

Notice of Rulemaking Docket Opening: 9 A.A.R. 5330, December 12, 2003

Notice of Rulemaking Docket Opening: 10 A.A.R. 3759, September 10, 2004

4. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Nancy O. Johnson, Rules Coordinator

Address: Arizona State Retirement System
3300 N. Central, 14th Fl.
Phoenix, AZ 85012

Telephone: (602) 308-5172

Fax: (602) 264-6113

or

E-mail: nancyj@asrs.state.az.us

Name: Susanne Dobel, Manager, External Operations

Address: Arizona State Retirement System
3300 N. Central, 14th Fl.
Phoenix, AZ 85012

Telephone: (602) 240-2039

Fax: (602) 246-6113

E-mail: susanned@asrs.state.az.us

5. An explanation of the rule, including the agency's reasons for initiating the rule:

On November 7, 2000 the Governor's Regulatory Review Council (G.R.R.C.) approved the ASRS 5-Year-Review Report. Noting that R2-8-121 was last amended in 1985, the report found that the current rule conflicts with current statutes and is not clear, concise, or understandable. The report indicated that R2-8-121 would be amended to con-

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form to statutes, board policy and current rulemaking format and style requirements. This rulemaking is in response to the recommendations in that report. R2-8-121 will be repealed, and a new Article 4 will include the subject matter that is currently in R2-8-121. Article 4 will include definitions for the article and will provide more specific procedures for the appeal process.

6. A reference to any study relevant to the rule that the agency reviewed and either proposes to rely on or not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant authority of a political subdivision of this state:

Not applicable.

8. The preliminary summary of the economic, small business, and consumer impact:

Annual costs/revenues changes are designated as minimal when less than \$1,000, moderate when between \$1,000 and \$10,000, and substantial when \$10,000 or greater in additional costs or revenues.

The ASRS will bear moderate to substantial costs for promulgating and enforcing the rules. Costs for promulgating the rules include staff time to write, review, and direct the rules through the rulemaking process. The cost of the Office of Administrative Hearings (OAH) handling the hearings is estimated to be \$500 per day. However, there are a number of benefits to allowing OAH to preside over the evidentiary hearings. It allows the Board to focus on its other fiduciary duties and responsibilities required to preserve and protect the retirement trust fund, while retaining the ability to accept, modify, or reject the OAH recommended decision. It will take less ASRS staff time preparing for the Board meetings, because it will not involve preparing for hearings. Additionally, using a third party (OAH) for all appeals removes any argument that the appellant may make that the appellant is not getting an impartial hearing with the ASRS Board.

The ASRS expects that there is no change to the appellant in the cost of a hearing.

9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:

Name: Nancy O. Johnson, Rules Coordinator

Address: Arizona State Retirement System
3300 N. Central, 14th Fl.
Phoenix, AZ 85012

Telephone: (602) 308-5172

Fax: (602) 264-6113

E-mail: nancyj@asrs.state.az.us

or

Name: Susanne Dobel, Manager, External Operations

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Fax: (602) 246-6113

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10. The time, place, and nature of the proceedings for the adoption, amendment, or repeal of the rule or, if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

The ASRS has scheduled an oral proceeding on the proposed rulemaking:

Date: October 25, 2004

Location: 3300 N. Central
10th Fl. Boardroom
Phoenix, AZ 85012

Time: 2:00 p.m.

The close of record is 5 p.m., Monday, October 25, 2004.

A person may also submit written comments on the proposed rules no later than 5 p.m., Monday, October 25, 2004, to

the individuals listed in items #4 and #9.

11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable.

12. Incorporation by reference and their location in the rules:

Not applicable.

13. The full text of the rule follows:

TITLE 2. ADMINISTRATION

CHAPTER 8. STATE RETIREMENT SYSTEM BOARD

ARTICLE 1. STATE RETIREMENT DEFINED CONTRIBUTION PROGRAM

Section

R2-8-121. ~~Hearings~~ Repeal

ARTICLE 4. PRACTICE AND PROCEDURE BEFORE THE BOARD

Section

R2-8-401. Definitions

R2-8-402. General Procedures

R2-8-403. Request for an Appeal of an Appealable Agency Action

R2-8-404. Board Decisions on Hearings Before the Office of Administrative Hearings

R2-8-405. Rehearing; Review of a Final Decision

ARTICLE 1. STATE RETIREMENT DEFINED CONTRIBUTION PROGRAM

R2-8-121. ~~Hearings~~ Repeal

~~A. Upon application made, within 90 days of mailing the Board's certification of prior service credit allowance, or receipt of a refund, retirement income, or death benefit payment, or for the purpose of determining any question involving any right, benefit, or obligation of a member, a member may request a hearing limited to the accuracy of the certification or payment, or determination of any question involving any right, benefit, or obligation of such member. Such hearing, if granted, shall be scheduled by the Board upon adequate written notice to the member and may be conducted by the Board or any member thereof. In the event the hearing is held before less than a majority of the Board, a transcript of the record of the hearing shall be made and shall be reviewed by the Board, together with the recommendation of the person conducting the hearing, before a decision is made. The hearing shall be conducted in an informal manner, and the evidentiary rules obtaining in a court of law shall not be adhered to. A decision of the Board adverse to a member may be appealed to the Superior Court of the state of Arizona in accordance with A.R.S. §§ 12-901 through 12-914, providing a hearing had been requested within the time specified.~~

B. ~~Rehearing:~~

- ~~1. Except as provided in paragraph (7), any party in a contested case before the Board who is aggrieved by a decision rendered in such case may file with the Board, not later than ten days after service of the decision, a written motion for rehearing or review of the decision specifying the particular grounds therefore.~~
- ~~2. A motion for rehearing under this rule may be amended at any time before it is ruled upon by the Board. A response may be filed within ten days after service of such motion or amended motion by any other party or the Attorney General. The Board may require the filing of written briefs upon the issues raised in the motion and may provide for oral argument.~~
- ~~3. A rehearing of the decision may be granted for any of the following causes materially affecting the moving party's rights:
 - ~~a. Irregularity in the proceedings before the Board or any order or abuse of discretion, whereby the moving party was deprived of a fair hearing;~~
 - ~~b. Misconduct of the Board, its employees or its hearing officer or the prevailing party;~~
 - ~~c. Accident or surprise which could not have been prevented by ordinary prudence;~~
 - ~~d. Newly discovered material evidence which could not with reasonable diligence have been discovered and produced at the original hearing;~~
 - ~~e. Excessive or insufficient penalties;~~
 - ~~f. Error in the admission or rejection of evidence or other error of law occurring at the hearing;~~
 - ~~g. That the decision is not justified by the evidence or is contrary to law.~~~~
- ~~4. The Board may affirm or modify the decision or grant a rehearing as to all or any of the parties and on all or part of~~

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the issues for any of the reasons set forth in paragraph (3). An order granting a rehearing shall specify with particularity the ground or grounds on which the rehearing is granted, and the rehearing shall cover only those matters so specified.

5. ~~The Board, within the time for filing a motion for rehearing under this rule, may on its own initiative order a rehearing or review of its decision for any reason for which it might have granted a rehearing on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the Board may grant a motion for rehearing, timely served, for a reason not stated in the motion. In either case, the order granting such a rehearing shall specify the ground therefor.~~
6. ~~When a motion for rehearing is based upon affidavits, they shall be served with the motion. An opposing party or the Attorney General may within ten days after such service serve opposing affidavits.~~
7. ~~If in a particular decision the Board makes specific findings that the immediate effectiveness of such decision is necessary for the immediate preservation of the public peace, health and safety and that a rehearing or review of the decision is impracticable, unnecessary or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing, any application for judicial review of the decision shall be made within the time limits permitted for applications for judicial review of the Board's final decision.~~

ARTICLE 4. PRACTICE AND PROCEDURE BEFORE THE BOARD

R2-8-401. Definitions

The following definitions apply to this Article unless otherwise specified:

1. "Appealable agency action" has the same meaning as in A.R.S. § 41-1092.
2. "Board" has the same meaning as in A.R.S. § 38-711.
3. "Director" means the Director appointed by the Board as provided in A.R.S. § 38-715.
4. "Party" has the same meaning as in A.R.S. § 41-1001.
5. "Person" has the same meaning as in A.R.S. § 41-1001.

R2-8-402. General Procedures

In computing any time period, parties shall exclude the day from which the designated time period begins to run. Parties shall include the last day of the period unless it falls on a Saturday, Sunday, or legal holiday. When the time period is 10 days or less, parties shall exclude Saturdays, Sundays, and legal holidays.

R2-8-403. Request for an Appeal of an Appealable Agency Action

- A.** A person who is not satisfied with a decision by the Director in an appealable agency action may file a Request for an Appeal, in writing, with the Director. The request shall include the following:
 1. The name and mailing address of the member, employer, or other person filing the request;
 2. The name and mailing address of the attorney for the person filing the request, if applicable;
 3. A concise statement of the reasons for the appeal.
- B.** The person requesting a hearing shall file the Request for an Appeal with the ASRS Office of the Director within 30 days after receiving a decision of the Director and a Notice of an Appealable Agency Action. The date the request is filed is established by the Director's date stamp on the face of the first page of the request.
- C.** Upon receipt of the Request for an Appeal, the ASRS shall notify the Office of Administrative Hearings, as required in A.R.S. § 41-1092.03.

R2-8-404. Board Decisions on Hearings before the Office of Administrative Hearings

A recommended decision from the Office of Administrative Hearings that is sent to ASRS at least 30 days before the Board's next regular monthly meeting, shall be reviewed by the Board at that monthly meeting. At that monthly meeting, the Board shall render a decision to affirm, reverse, adopt, modify, supplement, amend or reject the findings of fact, conclusions of law and recommendations in whole or in part. If the Board modifies or rejects a recommended decision, the board shall state the reasons for the modification or rejection. The Board shall deliver the Board's final decision to the Office of Administrative Hearings within 5 days after the monthly meeting at which the Board made the final decision.

R2-8-405. Rehearing; Review of a Final Decision

- A.** Except as provided in subsection (H), any party in an appealable agency action aggrieved by a final decision may file with the Board a written motion for rehearing or review of the final decision specifying the particular grounds not later than 30 days after service of the decision.
- B.** A party may amend a motion for rehearing or review at any time before the Board rules on the motion. A party may then respond within 15 days after service of a motion or amended motion. The Board may require the filing of written briefs upon the issues raised in the motion and may provide for oral argument.
- C.** The Board may grant a rehearing or review of a decision for any of the following causes materially affecting the moving party's rights:

1. Irregularity in the administrative proceedings of the agency or its hearing officer, or the prevailing party, or any order or abuse of discretion, that deprives the moving party of a fair hearing;
 2. Misconduct of the Board, the Office of Administrative Hearings hearing officer, or the prevailing party;
 3. Accident or surprise that could not have been prevented by ordinary prudence;
 4. Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original hearing;
 5. Excessive or insufficient penalties;
 6. Error in the admission or rejection of evidence or other errors of law occurring at the administrative hearing;
 7. That the Board's decision is a result of passion or prejudice; or
 8. That the decision is not justified by the evidence or is contrary to law.
- D.** The Board may affirm or modify the decision or grant a rehearing or review to all or any of the parties on all or part of the issues for any of the reasons in subsection (C). An order granting a rehearing or review shall specify with particularity the grounds for the order.
- E.** Not later than 10 days after the decision, the Board may, after serving each party notice and opportunity to be heard, order a rehearing or review of its decision for any reason for which it might have granted a rehearing or review on motion of a party. After giving the parties or their counsel notice and an opportunity to be heard on the matter, the Board may grant a motion for rehearing or review for a reason not stated in the motion. In either case, the order granting a rehearing or review shall specify the grounds on which it is granted.
- F.** When a motion for rehearing or review is based upon an affidavit, the affidavit shall be served with the motion. An opposing party may, within 15 days after service, serve an opposing affidavit. The Board may extend the period for serving an opposing affidavit for not more than 20 days for good cause shown or by written stipulation of the parties. A reply affidavit may be permitted.
- G.** The Board shall rule on the motion within 15 days after the response to the motion is filed or at the Board's next meeting after the response to the motion is received, whichever is later. If no response to the motion is filed, the Board shall rule on the motion within five days after the expiration of the response period, or at the Board's next meeting after the expiration of the response period, whichever is later.
- H.** If the Board makes a specific finding that the immediate effectiveness of a particular decision is necessary for the preservation of the public peace, health, and safety and that a rehearing or review of the decision is impracticable, unnecessary, or contrary to the public interest, the decision may be issued as a final decision without an opportunity for a rehearing or review. If a decision is issued as a final decision without an opportunity for rehearing or review, an application for judicial review of the decision may be made within the time limits permitted for applications for judicial review of the Board's final decisions.