

Department of Finance and Administration

Office of Personnel Management

Policy Title: **Dispute Resolution (Grievance)**

Policy Number: **63**

Authority: **Ark. Code Ann. § 21-1-701 et seq.**

Revised: **July 1, 2017**

To provide for a dispute resolution process to be established by the Office of Personnel Management (OPM).

Administrative Record: The case file specific to each grievance assembled according to OPM's Administrative Record Rules.

Adverse action: To discharge, threaten, or otherwise discriminate or retaliate against a public employee in any manner that affects the employee's employment, including compensation, job location, rights, immunities, promotions, or privileges.

Appeal: A written request by a party to OPM for a review of a final decision from the state agency's internal grievance process.

Appropriate authority: A state, county, or municipal government department, agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, investigator, auditor, representative or supervisory employee of the body, agency, or organization. Appropriate authority includes but is not limited to, the office of the Attorney General, the office of the Auditor of State, the Arkansas Ethics Commission, the Legislative Joint Auditing Committee and the Division of Legislative Audit, and the offices of the various prosecuting attorneys having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.

Communicating in good faith: Making a verbal or written report at a time and in a manner that gives a state agency reasonable notice of the need to correct a waste or violation.

Disciplinary action: Termination, suspension, involuntary demotion, written reprimands, and non-new-hire probation.

Dispute resolution: A procedure that allows parties to constructively manage conflicts through grievances or mediation.

Employee: A person regularly appointed or employed in a position of a state service by a state agency for which he or she is compensated on a full-time basis or on a pro rata basis; and a class title and pay grade are established in the appropriation act for the agency or institution in accordance with the Uniform Classification and Compensation Act. Employee does not include a supervisory employee. Employee does not include individuals who are on initial new-hire probationary status.

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Grievance: A complaint by an employee regarding a disciplinary action, discrimination, harassment, or the approval/denial of compensatory time made by the supervisory employee, but not including compensation and conditions which are beyond the control of the state agency or are mandated by law.

Grievance Officer: The person designated by the state agency as having the responsibility for acting as the liaison between the employee and the state agency.

Mediation: A collaborative problem-solving and joint decision-making process, through utilization of a third-party neutral (Mediator).

Party: The employee affected by a state agency decision or the state agency that made the decision at issue in the grievance.

State agency: A board, commission, department, division, or office of state government within the executive branch. State agency does not include an institution of higher education, a public school district, the Arkansas Highway and Transportation Department, and the Arkansas State Game and Fish Commission.

State Employee Grievance Appeal Panel: An impartial appeal panel established to review the facts of the grievance and issue a binding decision; referred to as the Panel.

Supervisory employee: An individual having authority in the interest of a state agency to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees of the state agency; or if his or her exercise of authority requires the use of independent judgment and is not of a merely routine or clerical nature, the responsibility to direct other employees of the state agency by which he or she is employed.

Violation: An infraction or a breach which is not of a merely technical or minimal nature of a state statute or regulation, of a political subdivision ordinance or regulation, or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer.

Waste: A public employer's conduct or omissions which result in substantial abuse, misuse, destruction, or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision's resources.

Agency Procedures

Each state agency shall develop dispute resolution rules and procedure regarding the filing, hearing, adjudication, and appeal of grievances and submit their rules to OPM for

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approval and implementation. Each state agency must provide a copy of the approved policy to each of its employees.

Appeal Mediation

At the conclusion of a state agency grievance hearing, a party may file a written request for nonbinding mediation no later than fifteen (15) business days after receipt of the final decision from the state agency grievance hearing. Nonbinding mediation shall be conducted within forty-five (45) days of receiving such a request.

The following matters are subject to consideration for mediation:

1. Termination;
2. Demotion;
3. Suspension for fourteen (14) or more days; or
4. If an employee is subject to adverse action by his or her state agency for:
 - (a) Communicating in good faith to an appropriate authority the existence of waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or a violation or suspected violation of a law, rule, or regulation adopted under the laws of this state or a political subdivision of the state;
 - (b) Participating or giving information in an investigation, hearing, court proceeding, legislative or other inquiry, or in any form of administrative review; or
 - (c) Objecting or refusing to carry out a directive the employee reasonably believes violates a law, rule, or regulation adopted under the authority of the laws of the state or a political subdivision of the state.

A party may be represented by an attorney or other representative in the nonbinding mediation.

An employee requesting or agreeing to nonbinding mediation shall not waive his or her right to file a claim under the Arkansas Whistle-Blower Act.

OPM shall maintain a roster of qualified mediators. A mediator is not required to be an attorney, but shall:

1. Be certified in mediation by the Arkansas Alternative Dispute Resolution Commission;
2. Not be employed by the state agency that is a party to the nonbinding mediation; and
3. Have a background in employer and employee relations.

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If the parties reach a resolution in the nonbinding mediation, the director of the state agency that is a party to the nonbinding mediation must report the resolution in writing to OPM and the matter will be considered resolved and final.

If the parties are unable to reach a resolution in the nonbinding mediation, the mediator must report his or her suggested resolution to the Director of the Department of Finance and Administration within ten (10) business days of the nonbinding mediation.

In determining the suggested resolution, the mediator will consider:

1. What action, if any, is in the best interests of the efficient administration of the state agency;
2. Whether the state agency's decision is supported by:
 - (a) substantial evidence, if the action was based on an employee's unacceptable performance; or
 - (b) a preponderance of the evidence, if the action was based on factors other than an employee's unacceptable performance; and
1. Whether the employee shows:
 - (a) harmful error in the state agency's procedures in arriving at the decision;
 - (b) that the decision was based on a prohibited personnel practice; or
 - (c) that the decision was not in accordance with law.

A party may request with the Grievance Officer an appeal hearing before the Panel within ten (10) business days of the employee's receipt of the final decision from the agency or the Non-settlement in mediation.

Appeal Hearing

An employee may file a request for an appeal hearing before the Panel with the state agency's Grievance Officer no later than ten (10) business days of receipt of the agency's nonbinding mediation.

The Panel will consist of three (3) state employees; however, no member of the Panel shall be an employee of the state agency that is a party to the grievance. One member shall be an attorney, licensed to practice law in Arkansas. The other two members shall be current state employees having knowledge in the area of employment law.

A party may request that the appeal be conducted on the record and no party will be allowed to present any witness testimony or offer any additional evidence. If a party objects to the matter being decided on the record then an appeal hearing will occur.

The appeal hearing shall be conducted within forty-five (45) business days of OPM's notification of the appeal request. A hearing will not be postponed or delayed to

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accommodate a party unless compelling circumstances are presented warranting a postponement.

The failure of a party to appear for an appeal hearing will result in a default decision in favor of the opposing party, provided that the party has not given notice of his or her non-appearance due to compelling circumstances.

A party may be represented by an attorney or other representative at the appeal hearing. Each party shall be given one and a half (1 1/2) hours to present their case. The Panel has the discretion to grant additional time during the hearing.

Arkansas Rules of Evidence will be applied informally. A party is allowed to present witnesses at the appeal hearing; however, a party is encouraged to call only those witnesses necessary to the case.

The Panel's standard of review is whether the state agency's action is supported by a preponderance of the evidence.

In all cases before the Panel, except discrimination and other non-disciplinary matters, the state agency shall proceed first. The employee shall then be given the opportunity to refute, contradict, or discredit the state agency's case.

In cases of discrimination and other non-disciplinary matters, the employee must prove that his or her grievance resulted from discrimination rather than some valid reason. If the employee fails to provide such evidence, the Panel shall rule in favor of the state agency. If the Panel determines that the employee has produced such evidence, the state agency shall articulate some legitimate non-discriminatory reason for the action it took. If the state agency meets this burden, the employee shall prove that the state agency's proffered reason is pretextual.

All appeal hearings are open to the public and recorded. A party who requests a copy of the hearing recording shall have a copy made at that party's expense. Payment shall be made in advance.

The fact-finding hearing may be terminated at any stage should an agreement between the parties be reached. An employee shall not be subject to adverse action for utilizing the dispute resolution procedures.

After the conclusion of the appeal hearing, a party may request within five (5) business days of receipt of the Panel's Order an appeal to the Chief Fiscal Officer of the State for a final and binding decision. The opposing party may file a response within five (5)

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business of receipt of the appeal. A hearing will not be conducted and the CFO will only review the Administrative Record and appeal statements.

OPM shall maintain a copy of all Administrative Records.