

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: **September 1, 2017**

The Officer of Personnel Management (OPM) is charged with establishing a statewide dispute resolution (grievance) process, including developing procedures for filing and adjudicating grievances and rules to follow for appeals.

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

Administrative Review: The fact-finding process conducted at the state agency by a Hearing Officer or Committee.

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, either for a final determination or an appeal hearing.

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

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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.

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.

Hearing Officer/Committee: An impartial person or committee appointed by the agency director to preside over the administrative review hearing and make a recommendation to the agency director.

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 (SEGAP): 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.

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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.

Whistle-Blower Hearing

Act 791 of 2017 establishes an additional step to those listed below. If an employee has been terminated and is alleging the termination is adverse action for one of the following protected activities:

- (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;
- (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; or
- (d) Reporting a loss of public funds under Ark. Code Ann. § 25-1-124.

The employee may request a hearing by submitting the appropriate filing documentation to the agency's grievance officer who will then notify OPM of the request for a hearing. Along with the filing documentation, the employee must include evidence that he or she committed one of the above protected activities prior to the termination. If the employee fails to provide the evidence or provides insufficient evidence, OPM can deny the request for a hearing.

If the employee provides sufficient evidence, OPM will schedule the hearing to be held within fifteen (15) business days of the request. The hearing will take place prior to any steps pursuant to the agency's internal procedures and will be conducted by SEGAP. If the employee can show that a reasonable person would conclude that the agency terminated the employee as a result of the employee's activities under the Whistle-Blower law, SEGAP will order that the employee either be 1) reinstated to his or her position until the conclusion of the grievance; or 2) reinstated and placed on administrative leave until the conclusion of the grievance.

An employee who files an appeal under this step does not waive the right to file a claim under the Arkansas Whistle-Blower Act. For more information about Whistle-Blower Protection, see Policy #22.

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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 approval and implementation. Each state agency must provide a copy of the approved policy to each of its employees. The procedure must, at a minimum, contain the following steps:

1. A state employee must submit the grievance paperwork to the agency's grievance officer within five (5) business days of receiving or becoming aware of a disciplinary action or being the subject of alleged discrimination/harassment.
2. The agency's grievance officer determines whether the complaint meets the eligibility requirements and can proceed through the agency's grievance procedure. If the grievance officer determines it does not meet the requirements and is not grievable, the employee must be notified in writing of the right to request a final decision to be made by SEGAP.
3. If the grievance officer determines the complaint meets the requirements and is eligible to proceed, the employee may choose mediation or an administrative review hearing as the first step. If the employee chooses mediation, this must be the first step of the agency's procedure. An employee cannot request mediation at the agency after the administrative review hearing.
4. If mediation is selected and results in a settlement agreement, the decision is final and binding and the matter is considered closed. If mediation results in a non-settlement, the employee may request an administrative review hearing.
5. The administrative review hearing will either have a hearing officer or committee serve as the fact-finder and issue a recommendation to the agency director. At the administrative review hearing, witnesses may present testimony and parties may present documentation that, if accepted, will become part of the administrative record (case file).
6. The agency director will issue a final written decision in a timely manner (typically no longer than five (5) business days).
7. If the employee is unsatisfied with that decision, he/she may request an appeal to OPM and must submit the appeal documentation to the agency grievance officer. The appeal steps and timeframes are listed below.

An employee should contact their human resource office for specific information about the agency's grievance procedure.

Appeal Mediation

After the agency's director has issued a final decision, a party may file a written request for nonbinding mediation no later than fifteen (15) business days after receipt of the

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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 alleges he or she is subject to adverse action by his or her 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;
 - (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; or
 - (d) Reporting a loss of public funds under § 25-1-124.

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.

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:

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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 according 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 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.

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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) business days 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.