

ARKANSAS REGISTER

Proposed Rule Cover Sheet



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Name of Department _____

Agency or Division Name _____

Other Subdivision or Department, If Applicable _____

Previous Agency Name, If Applicable _____

Contact Person _____

Contact E-mail _____

Contact Phone _____

Name of Rule _____

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Rule 2014-1

STATE EMPLOYEE DISPUTE RESOLUTION APPEAL RULES AND PROCEDURES

~~I. PURPOSE~~

~~The purpose of these rules and procedures is to establish an appeal process pursuant to Arkansas Code Annotated §§ 21-1-701 *et seq.*, for the prompt review, impartial consideration, and equitable disposition of Arkansas state employee grievances.~~

~~These rules and procedures also encourage alternative resolution among supervisory employees and their employees.~~

~~II. DEFINITIONS~~

~~Administrative Record—The case file specific to each grievance assembled according to the Office of Personnel Management (“OPM”) Administrative Record Rules.~~

~~Administrative Review Hearing—An internal fact-finding hearing before a Hearing Officer(s).~~

~~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 an employee for nonbinding mediation or a review by the State Employee Grievance Appeal Panel of a final decision from the state agency Director/Chairperson/Commissioner.~~

~~Appropriate authority—A state government department, state agency, or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, state agency, investigator, auditor, representative or supervisory employee of the body, state agency, or organization.~~

~~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 state service by the state agency for which he or she is compensated on a full-time basis or on a pro rata basis for whom a class title and pay grade are established in the appropriation act for the state agency in accordance with the Uniform Classification and~~

~~Compensation Act. An employee on initial new hire probationary status is not an employee for purposes of these rules and procedures. An employee does not include a supervisory employee.~~

~~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(s)—An impartial person/panel of persons appointed to review the facts of the grievance and make a recommendation for resolution to the state agency Director/Chairperson/Commissioner.~~

~~Mediation—A collaborative problem-solving and joint decision-making process between the employee and supervisory employee, 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—An agency, board, commission, department, division, or office of state government within the executive branch.~~

~~State Employee Grievance Appeal Panel (“Panel”)—An impartial appeal panel established to review the facts of the grievance and issue a binding decision.~~

~~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 resources.~~

III. — POLICY

~~Employees shall be given the opportunity to resolve grievances they believe adversely affect their employment or working conditions through these established steps and procedures to ensure fair resolution of their grievance within a reasonable period of time.~~

~~The state agency and the employee shall take all reasonable efforts to settle a grievance as quickly as possible. Informal discussion between a supervisory employee and employee is encouraged.~~

~~Participation in the dispute resolution process is voluntary. The dispute resolution process may be terminated by the employee at any stage if an agreement between the parties is reached.~~

~~A party may be represented at each step of the appeal process; however, attorney's fees shall not be awarded.~~

~~An employee shall not be subject to adverse action for utilizing the dispute resolution procedures.~~

IV. — PROCEDURE

Section 1 — Exhaustion of remedies

~~Once an employee has exhausted all of the state agency dispute resolution procedures and is not satisfied with the decision reached by the state agency Director/Chairperson/Commissioner, he or she may appeal, using a form provided by OPM, and request nonbinding mediation or an appeal hearing before the State Employee Grievance Appeal Panel ("Panel").~~

Section 2 — Rights Not Waived

~~An employee who chooses nonbinding mediation as the first appeal step does not waive his or her right to later request an appeal hearing before the Panel.~~

~~Access to any of these procedures does not prohibit an employee from filing a claim under the Arkansas Whistle-Blower Act.~~

~~Access to any of these procedures does not prohibit an employee from utilizing remedies outside these procedures. An employee retains the right to file a complaint with a federal entity or pursue the matter in court.~~

Section 3 — Time Limits to File an Appeal

~~A request for nonbinding mediation shall be filed with the state agency's Grievance Officer no later than fifteen (15) business days of the employee's receipt of the state agency Director's/Chairperson's/Commissioner's decision.~~

~~A request for an appeal hearing before the Panel shall be filed with the state agency's Grievance Officer no later than ten (10) business days of the employee's receipt of~~

~~the state agency Director's/Chairperson's/Commissioner's decision or no later than ten (10) business days of the Non-settlement Agreement in mediation.~~

~~Section 4--Appeal to OPM~~

~~(1) Nonbinding Mediation~~

~~The state agency's Grievance Officer shall timely submit to OPM an employee's request for mediation.~~

~~The nonbinding mediation shall be held within forty five (45) business days of the request to mediate.~~

~~a. Mediators~~

~~OPM shall maintain a roster of mediators certified by the Arkansas Alternative Dispute Resolution Commission from which a mediator shall be selected.~~

~~A mediator shall not be employed by the state agency that is a party to the mediation.~~

~~b. Representation~~

~~A party may be represented by an attorney or other representative at the mediation. The attorney or representative may speak on behalf of a party.~~

~~c. Matters eligible for nonbinding mediation~~

~~(a) Termination;~~

~~(b) Demotion;~~

~~(c) Suspension for fourteen (14) or more days; or~~

~~(d) If the employee has been subject to adverse action by his or her state agency for:~~

~~1. Communicating in good faith to an appropriate authority:~~

~~a. The existence of waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or~~

~~b. A violation or suspended violation of a law, rule, or regulation adopted under the laws of this state or a political subdivision of the state;~~

~~2. Participating or giving information in an investigation, hearing, court proceeding, legislative or other inquiry, or in any form of administrative review; or~~

~~3. Objecting or refusing to carry out a directive that 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.~~

~~d. Confidentiality~~

~~The mediation shall be confidential; however, any Settlement or Non-settlement Agreement is subject to the Freedom of Information Act.~~

~~e. Results~~

~~The results of the mediation, whether a Settlement Agreement or Non-settlement Agreement is reached, shall be reported to OPM within one (1) business day of the conclusion of the mediation.~~

~~f. Settlement Agreement~~

~~If the parties reach a resolution in the nonbinding mediation, OPM shall review the Settlement Agreement to ensure it complies with the Uniform Classification and Compensation Act.~~

~~If any money is involved in the Settlement Agreement, the CFO of the State shall review to ensure it complies with any state law or DFA regulations.~~

~~After both OPM and the CFO of the State approve the Settlement Agreement, the matter shall be considered resolved and final.~~

~~If OPM or the CFO does not approve the Settlement Agreement, the Agreement shall be referred back to the parties for a revised Settlement Agreement.~~

~~g. Non-settlement Agreement~~

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

~~h. Proposed Resolution~~

~~In determining the proposed resolution, the mediator shall 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~~
- ~~3. 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 practice; or~~
 - ~~c. That the decision was not in accordance with law.~~

~~The proposed resolution shall not become a part of the Administrative Record.~~

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

(2) Appeal Hearing Before the Panel

~~The state agency's Grievance Officer shall notify OPM of the employee's request for an appeal hearing before the Panel.~~

a. On the record

~~The employee may choose to have the matter decided on the record.~~

~~If the employee chooses this option, and the state agency agrees, then neither party shall be allowed to present any witness testimony or offer any additional evidence.~~

~~If the state agency or the Panel disagrees to having the matter decided on the record, then an appeal hearing shall be conducted.~~

b. Panel

~~OPM shall assign each case to three members of the Panel. One member of the Panel shall be an attorney, licensed to practice law in this State, and who shall be a current state employee having knowledge in the area of employment law. The other two members shall be current state employees. No Panel member shall be an employee of the state agency that is a party to the grievance.~~

~~No member of the Panel may participate in any proceedings in which such Panel member may have a conflict of interest. Should a Panel member be unable to participate on an assigned case, OPM shall have the authority to assign a substitute provided the substitute meets the same qualifications of the originally assigned member.~~

c. Submission of Administrative Record

~~The state agency's Grievance Officer shall provide OPM an electronic copy of the Administrative Record within ten (10) business days of scheduling the hearing. No paper copies shall be accepted, unless the document or any attachments are unable to be submitted electronically or a Grievance Officer requests to submit paper copies. Failure to timely submit a complete Administrative Record may result in an adverse decision against the state agency.~~

d. Appeal hearing

~~The hearing shall be conducted within forty five (45) business days of OPM's notification of the appeal. A hearing shall not be postponed or delayed merely to accommodate a party, unless a party presents to OPM compelling circumstances warranting a postponement or delay. The final decision to postpone or delay shall be at the discretion of OPM.~~

e. Default decision

~~The failure of a party to appear for an appeal hearing shall result in a default decision in favor of the opposing party, provided that the party did not give notice to OPM within three (3) business days of the appeal hearing of his or her non appearance.~~

~~f. Time limit for case presentation~~

~~Generally, each party shall be given one and a half (1 ½) hours to present their case; however, the Panel has the discretion to allow each party additional time during the hearing.~~

~~g. Stipulations~~

~~The parties shall stipulate to all relevant facts which are not in controversy. The stipulations shall be submitted in writing to OPM no later than three (3) business days prior to the appeal hearing. Stipulations may be submitted orally to the Panel at the start of the appeal hearing.~~

~~h. Discovery~~

~~A party may obtain information regarding any matter, not privileged, which is relevant to the issues in the grievance, whether it relates to the claim or defense of the party or to the claim or defense of any other party. A party shall make a request for such information to the appropriate person.~~

~~i. Rules of Evidence and Procedure~~

~~The Arkansas Rules of Evidence may be applied informally for the purpose of efficiency of the hearing process. The Arkansas Rules of Evidence may be considered by the Panel in determining the relevancy and proper weight to apply to evidence. The Panel may request the filing of additional information or documents from any party prior, during, or following the appeal hearing.~~

~~j. Witnesses~~

~~Each party shall be responsible for providing reasonable notice to the Grievance Officer of his or her witness list. There is no limit to the number of witnesses; however the parties are encouraged to cooperate to ensure that only those witnesses necessary to the case are called to testify. The appearance of any agency witness shall be the responsibility of the Grievance Officer. The appearance of any non-agency witness shall be the responsibility of the party requesting such person's appearance.~~

~~If a witness is not physically available on the date of the hearing, his or her testimony may be taken via telephone or any other method that would allow the parties the opportunity to question the witness.~~

~~In the event the state agency shall refuse an employee's request that a specific witness be allowed time off work to attend the hearing, the employee may notify OPM prior to the appeal hearing. OPM shall determine whether the testimony of such prospective witness can be obtained via telephone or any other method that would allow the parties the opportunity to question the witness.~~

~~The state agency's Grievance Officer shall provide the witness list to OPM no later than three (3) business days prior to the appeal hearing.~~

~~The Panel may request the presence of any state employee thought to have information relevant to the case. A witness shall not be paid any witness fees.~~

~~All witnesses shall give an affirmation of their testimony and shall submit to questioning by the adversary party. Members of the Panel may question any party or witness at any time during the proceedings.~~

~~k. Burden of Proof~~

~~In all cases before the Panel, except discrimination and other non-disciplinary actions, 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 actions, the employee must prove that his or her grievance resulted from discrimination or other motive 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.~~

~~l. Standard of Review~~

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

~~The Panel shall only consider the information contained in the record and any additional evidence or testimony offered by the employee that could not have reasonably been presented at the Administrative Review hearing. The state agency may present additional witnesses or exhibits only as a rebuttal to the employee's case presentation. The Panel may request additional information to supplement the Administrative Record.~~

~~If a party presents new evidence that is accepted by the Panel, the evidence shall become a part of the Administrative Record.~~

~~m. Invoking the Rule~~

~~A party or the Panel may "Invoke the Rule", excluding all non-party witnesses from the hearing room unless they are testifying.~~

~~n. Public hearing~~

~~The hearing shall be open to the public and recorded. Any party desiring a copy of the tapes of a hearing shall have the copy available at the requesting party's expense. Any party desiring a certified transcript of the hearing will have a transcript made at the requesting party's expense. Payment shall be made in advance.~~

~~o. Executive Session~~

~~At the conclusion of the hearing, the Panel shall consider the hearing closed and adjourn into executive session. The Panel shall announce their decision on the record the same day as the appeal hearing.~~

~~p. Decision~~

~~The decision of the Panel is not required to be unanimous. The Panel shall issue a written decision within seven (7) business days of the conclusion of the hearing and forward the decision to OPM. The decision shall be binding on the parties.~~

~~Section 5 -- CFO Appeal~~

~~If a party is not satisfied with the decision reached by the Panel, he or she may file an appeal to the Chief Fiscal Officer ("CFO") of the State within five (5) business days of the party's receipt of the Panel's written decision.~~

~~The state agency's Grievance Officer shall provide a copy of the appeal to the other party. The non-appealing party may file a response to the appeal within five (5) business days of receipt of the appeal.~~

~~All appeals to the CFO shall be determined solely on the Administrative Record. The CFO shall review the Administrative Record, including the appeal and any response to the appeal, and shall determine whether the Panel's decision is clearly erroneous.~~

~~The CFO's decision shall be issued to both parties and/or their representatives within ten (10) business days of receipt of the appeal or response to the appeal, whichever is later. The CFO's decision shall be binding on both parties and the matter shall be considered final.~~

~~OPM shall maintain the Administrative Record of all cases.~~

Issued this _____ day of June 2014 in the City of Little Rock, Pulaski County, Arkansas.

Richard A. Weiss, Director

Arkansas Department of Finance and
Administration

Timothy J. Leathers, Deputy Director/Commissioner of
Revenue

Arkansas Department of Finance and Administration

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____
DIVISION _____
PERSON COMPLETING THIS STATEMENT _____
TELEPHONE NO. _____ FAX NO. _____ EMAIL: _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- a) How the additional benefits of the more costly rule justify its additional cost;
- b) The reason for adoption of the more costly rule;
- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.