

CHAPTER 10 – GRIEVANCES AND APPEALS

10.1 WHO MAY FILE A GRIEVANCE

A permanent State Service employee may file a grievance on those issues listed below, through the grievance procedure.

A probationary employee in a State Service position, or a non-State Service employee in, or applicant for, an authorized employment position in an agency which employs State Service employees may grieve only alleged acts of discrimination based on race, color, religious creed, national origin, sex, age, disability or political affiliation in any personnel action or employment practice.

10.2 GRIEVABLE ISSUES

The following issues are grievable under the State Service grievance procedure:

- A. written reprimands;
- B. application of personnel policies, procedures, rules, regulations and statutes;
- C. acts of reprisal against an employee for using the grievance procedure;
- D. complaints of discrimination on the basis of race, color, creed, sex, religion, national origin, age, disability, or political affiliation;
- E. any matter of concern or dissatisfaction to an employee if the matter is subject to the control of agency management, except those listed in the following section as non-grievable;
- F. performance review ratings to the extent they affect an employee's employment status or compensation;
- G. permanent relocation of an employee as a disciplinary measure, and/or where the employee can present substantive evidence that the management decision to relocate the employee was arbitrary or capricious;
- H. dismissal or adverse action taken against an employee who reports an alleged improper governmental action to a State investigative body as defined in Mississippi Code Annotated § 25-9-171.

10.3 NON-GRIEVABLE ISSUES

The following are non-grievable issues under the State Service grievance procedure:

- A. issues which are pending or have been concluded by direct appeal through administrative or judicial procedures;
- B. temporary work assignments which do not exceed ninety calendar days;

- C. budget and organizational structure, including the number or assignment of employees or positions in any organizational unit;
- D. duties/performance standards established as criteria for performance review;
- E. the selection of an individual by the appointing authority, department head, or designee to fill a position through promotion, transfer, demotion, or appointment unless it is alleged that selection is in violation of a written agency policy or of a MSPB rule on filling vacancies;
- F. internal security practices established by the appointing authority, department head, or designee;
- G. termination or layoff from duties because of shortage of funds or work, material change in duties or organization, or a merger of agencies;
- H. any matter which is not within the jurisdiction or control of the appointing authority;
- I. the content of published agency policy;
- J. an action by an agency pursuant to federal or State law, directives from the Governor's office, or court order;
- K. establishment and revision of the compensation plan, and the policies, procedures, rules and regulations pertaining thereto;
- L. position classifications; and
- M. employee benefits.

10.4 GENERAL INFORMATION

When a conference (due process hearing) has been held prior to an employee being issued a written reprimand, the affected employee may appeal directly to the Employee Appeals Board without exhausting the grievance procedure.

If the employee does not present the grievance within the specified time frame, it is considered waived. If the employee does not advance the grievance to the next step within the specified time frame, the last management decision stands.

If management does not react within the specified time frame, the employee may advance the grievance to the next level unless an extension of time to respond is granted to management by written mutual agreement.

All time limits may be extended by mutual written agreement.

It is the responsibility of the aggrieved employee's supervisor and agency human resources director to make certain that all grievances are handled as quickly as possible and without prejudice.

10.5 GRIEVANCE PROCEDURAL STEPS

10.5.1 Step I

- A. An employee who has a grievable complaint may submit in writing (on the Grievance Form located at <http://www.mspb.ms.gov>) a description of the grievance with all other required information to his or her immediate supervisor within seven working days of becoming aware of the cause of the complaint.
- B. The supervisor is required to conduct an investigation of the grievance and meet with the aggrieved employee within three working days after receipt of the grievance form.
- C. The supervisor is required to give the employee a written response within three working days after the meeting.
- D. The human resources director or designee may assist in the filing of the grievance or answer any questions the employee may have in connection with filing the grievance.

10.5.2 Step II

- A. If not satisfied with the Step I written decision, the employee may indicate (on the same form) the desire to have the grievance advanced to the next step. The grievance must be submitted to the next level of management within three working days following receipt of the Step I supervisor's response.
- B. The Step II supervisor is required to conduct an investigation of the grievance and meet with the aggrieved employee within three working days after receipt of the grievance form.
- C. The Step II supervisor is required to give the employee a written response within three working days after the meeting.

10.5.3 Step III

- A. If the second step written response is not acceptable to the employee, the employee should specify (on the same form) the desire to advance the grievance to the third step and forward the grievance to the next level of management within three working days after receipt of the Step II response.
- B. The Step III supervisor is required to conduct an investigation of the grievance and meet with the aggrieved employee within five working days after receipt of the grievance form.
- C. The Step III supervisor is required to give the employee a written response within five working days of the meeting.

10.5.4 Step IV

- A. If the third step does not resolve the grievance, the employee should use the same form to advance the grievance to the fourth step and forward the grievance to the agency head within three working days after receipt of the Step III response.
- B. Agencies with no Step III level of management would handle the responsibilities of Step IV after Step II procedures have been exhausted and the Step II supervisor would be required to follow the procedures of Step III(C) in issuance of the requisite written response.
- C. The Step IV supervisor or designated representative is required to review the grievance and relevant information and meet with the employee within seven working days after receipt of the grievance form.
- D. The Step IV supervisor or designated representative is required to give the employee the final agency decision concerning the grievance within seven working days after the meeting.

10.5.5 Special Procedure for Claims of Harassment or Discrimination

If the employee's grievance is a complaint of unlawful discrimination or harassment and the source of the alleged discrimination or harassment is in the employee's chain of command, the employee may skip the source of the alleged discrimination or harassment's level of management by proceeding to the next step in the process and filing the grievance directly with the harassing supervisor's supervisor. If the alleged source of the harassment is the employee's agency head, then the employee may contact the MSPB Executive Director for assistance and may be advised to file an appeal directly with the Employee Appeals Board without exhausting agency level remedies.

10.5.6 Time Limit

If a grievance is not presented within the time limits as set forth above, it will be considered waived. If a grievance is not advanced to the next step within the specified time limit or an agreed extension thereof, it will be considered settled on the basis of the supervisor's, appointing authority's or designee's last answer. If the supervisor, appointing authority, or designee does not answer the grievance within the specified time limit, the employee may elect to treat the relief requested as denied at that step and immediately appeal the grievance to the next step. Time limits on each step may be extended by mutual written agreement of the parties involved.

10.6 AMERICANS WITH DISABILITIES ACT GRIEVANCE PROCEDURE

- A. Any applicant for an employment position or employee who has reason to believe that they have been unlawfully discriminated against by a State agency on the basis of disability may file a grievance in accordance with this separate Grievance Procedure. Implementation of this separate Americans with Disabilities Act Grievance Procedure is not intended to prohibit an applicant or State employee from utilizing the existing

grievance procedures. Grievants are not required to exhaust this separate ADA Grievance Procedure prior to filing a complaint with an applicable federal agency.

- B. The ADA Grievance Procedure begins with the individual who is filing the grievance preparing and submitting a written Statement. The Statement should contain the name, address, and telephone number of the individual or their authorized representative filing the complaint; a brief and specific description of the situation, incident, or condition being grieved and reasons therefore; identity of the grievant; identity of witnesses, if any; the remedy the individual is seeking; and the signature of the individual filing the grievance properly dated by this individual.
- C. The grievance should be submitted to the human resources director or ADA coordinator of the agency where the alleged discrimination occurred within seven working days of when the grievant became aware of the cause of the complaint.
- D. The agency's human resources director, ADA coordinator, or a designee will have three working days to provide to the grievant a written acknowledgment of the grievance.
- E. The agency human resources director, ADA coordinator, or a designee will promptly conduct a review of the issues involved in the grievance. If a resolution of the grievance is mutually agreeable by the parties involved, the agency human resources director or ADA coordinator will facilitate arrangement of the resolution and make a record of this agreement. If no resolution is possible, the human resources director, ADA coordinator, or a designee will provide a written response to the grievant outlining all of the relevant issues concerning the grievance. This response shall be approved by the agency head or appointing authority and must be completed no later than fifteen working days from the agency's receipt of the grievance.
- F. If a grievance is not presented within the time lines as set forth herein above, it will be considered waived absent an extension by written mutual consent. If the human resources director, ADA coordinator, or designee does not answer or acknowledge receipt of the grievance within the specified time lines, the grievant may elect to treat the grievance as denied at that point and immediately appeal the grievance to the Employee Appeals Board unless an extension of time is granted to the human resources director, ADA coordinator, or designee to respond by written mutual agreement.

10.7 APPEALS

Mississippi Employee Appeals Board

Ingrid Dave Williams, Chief Hearing Officer (1st Supreme Court District)
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INTRODUCTION

In 1980 the Mississippi State Legislature mandated the creation of the Mississippi Employee Appeals Board (hereinafter referred to as the “EAB”) in order to provide a fair and impartial forum in an informal and expeditious manner beyond the agency level for consideration of employee and job applicant grievances. The EAB consists of three Hearing Officers who provide employees of the State of Mississippi an opportunity, in compliance with the EAB’s rules, to appeal agency level decisions adversely affecting the employee’s service.

DEFINITIONS

“Agency” means the State agency against which an employee or job applicant is filing an appeal.

“Administrative Office” means the office that receives, maintains, and provides data regarding the filings and other matters before the Employee Appeals Board.

“Administrative Office Notice” means the process of informing the parties of action by a presiding hearing officer. Notice may be given electronically, including facsimile notice, or by any other method reasonably calculated to effect actual notice. This definition applies to notices of hearings, orders, decisions, and other pertinent documents.

“EAB” means the three hearing officers presiding *en banc*.

“File” means submitting pleadings and other documents to the Administrative Office. Filing may be accomplished electronically, including fax, by certified mail or personal delivery, or any other method specified by the presiding hearing officer. The date of filing is the date of receipt by the Administrative Office of the document. When a document is filed electronically, filing is considered accomplished on the date the electronic message is sent as indicated by the electronic message.

“Hearing Officer” means one of the individual hearing officers appointed pursuant to Mississippi Code Annotated § 25-9-129.

“Parties” mean the person or persons filing an appeal and all agencies against which an appeal is filed.

“Presiding hearing officer” means the chief hearing officer when the EAB hears a matter *en banc* or the hearing officer assigned to an appeal.

“Serve” means giving notice of a filing to all other parties. Service may be accomplished electronically, by certified mail, personal delivery, or any other method specified by the Administrative Office. The date of service will be determined by the date indicated on the serving party’s certification.

ADMINISTRATIVE RULES

I. Notice of Appellants’ Rights

Each agency shall give notice to all applicants and employees of their rights regarding appeals and shall make available copies of these administrative rules.

II. Time Calculations

In computing any period of time prescribed or allowed by these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, legal holiday or any other day the Administrative Office is in fact closed, in which event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday or other day the Administrative Office is closed. Intermediate Saturdays, Sundays and legal Holidays shall be excluded in the computation when the period of time prescribed or allowed is less than ten days. In the event any legal holiday falls on a Saturday or Sunday, the legal holiday will be observed as mandated by law.

III. Who May Appeal; Actions Which May Be Appealed

- A. A permanent State Service employee may appeal any action adversely affecting his or her compensation or employment status after exhausting applicable agency grievance procedures.
- B. A permanent State Service employee may appeal any grievable action and/or a disciplinary action. (See Section 10.1 – 10.6 of the *Mississippi State Personnel Board Policy and Procedures Manual*).
- C. No person may appeal a non-grievable action. (See Section 10.3 of the *Mississippi State Personnel Board Policy and Procedures Manual*).
- D. A permanent State Service employee, probationary employee in a State Service position, or non-State Service employee in, or applicant for, an authorized employment position in an agency which employs State Service employees, may appeal alleged acts of

discrimination based on race, color, religion, national origin, sex, age, disability, or political affiliation in any personnel action or unlawful employment practice.

- E. A permanent State Service employee, probationary employee in a State Service position, or non-State Service employee in, or applicant for, an authorized employment position in an agency which employs State Service employees, may appeal alleged acts of retaliation based upon the employee or applicant's reports of alleged improper government action to a State investigative body.
- F. An employee may appeal the decision that he or she is not eligible to receive donated leave because the injury or illness of the employee or member of the employee's immediate family is not, in the appointing authority's determination, a catastrophic injury or illness.

IV. Exhaustion of Remedies

- A. No person may file an appeal with the Administrative Office until all applicable agency-level grievance procedures have been exhausted in accordance with MSPB policies, rules and regulations.
- B. Except as authorized under federal law, no aggrieved party may file a petition for judicial review with a court of competent jurisdiction until a final written decision and order of the EAB has been filed by the Administrative Office.

V. Perfection of Appeal by Timely Filing

- A. All appeals shall be initiated by filing a written Notice of Appeal with the Administrative Office. Notice of Appeal forms shall be made available by the Administrative Office to all State agencies and employees.
- B. A Notice of Appeal must be filed within fifteen days after the date a person receives written notice of the final decision of an alleged grievable action or within fifteen days of the first attempted delivery date by certified mail, return receipt requested, whichever occurs first.
- C. A non-refundable fee of one hundred dollars (\$100.00) in the form of a cashier's check, bona fide attorney's check, or money order made payable to the "Mississippi Employee Appeals Board" shall be filed by the appealing party with each Notice of Appeal. Cash or personal checks will not be accepted.

VI. Content of Notice of Appeal

- A. The Notice of Appeal shall contain:
 - 1. The names and mailing addresses of all parties and, if known, the names and mailing addresses of their attorneys, if any;
 - 2. If applicable, the appealing party's (i) employing agency, (ii) assigned work station (town, city, county) and organizational location (office, bureau, division,

branch) within employing agency, (iii) immediate supervisor, (iv) job title, (v) date of hire, and (vi) date of termination;

3. A statement, in sufficient detail, of the facts upon which the appeal is taken, including the effective date of any alleged grievable action, and why such action is in error;
 4. A statement of the final action taken and/or decision made as a result of the agency-level grievance proceedings, including the effective date of such final action;
 5. A statement of the relief requested.
- B. The Notice of Appeal shall be accompanied by copies of all documents related to the appeal in the possession of the employee. Such documents, when applicable, shall include, but not be limited to, performance review documents, correspondence between the appealing party and the responding agency, written reprimands, grievance forms, pre-disciplinary notice, and final disciplinary notice.

VII. Jurisdiction

When an appeal is filed, a presiding hearing officer shall determine whether or not he or she has jurisdiction. If not, the appeal shall be dismissed.

VIII. Parties

Unless the Notice of Appeal names some other respondent, the appealing party's employing state agency shall be considered the only respondent.

IX. Filing of Pleadings and Other Documents; Copies to Be Made Available

- A. All pleadings, briefs, requests, and other correspondence shall be filed with the Administrative Office. When an appeal is filed, the Administrative Office shall assign it a docket number.
- B. All pleadings and other documents filed in the appeal shall be entered on a docket to be maintained by the Administrative Office. The Administrative Office shall make a notation of the filing date on all such pleadings and other documents.
- C. Copies, including certified copies, of pleadings and other documents filed in the appeal shall be made available by the Administrative Office to either party at a reasonable fee.
- D. Copies of any and all pleadings, briefs and requests filed by any party to an appeal must be served on every other party or his or her attorney. All such documents must contain a certification executed by the serving party identifying the parties served, the manner of service and the date of service.
- E. All pleadings, briefs, and requests filed by any party to an appeal must be signed by such party or his or her attorney and must specify the assigned docket number.

X. Administrative Office

- A. When an appeal is filed, the Administrative Office shall give notice to the employing agency and any other appropriate party.
- B. The Administrative Office will give notice to the parties of any orders, including those for prehearings, hearings, and motions.
- C. The Administrative Office may create and disseminate forms to expedite the appeals process and assist the parties.

XI. Assignment of Cases; Scheduling of Prehearing Conference; Full Board Review

- A. The chief hearing officer shall assign prehearing procedures and cases to the hearing officers in a manner that is most efficient and effective to hear and decide cases.
- B. When, in the opinion of the chief hearing officer, the issues and circumstances of an appeal warrant that the hearing be conducted before the EAB instead of a single hearing officer, he or she may issue an order or notice to that effect.
- C. Once a case is filed, at the discretion of the presiding hearing officer a pre-hearing conference may be conducted no later than 60 days after the date of filing. The purpose of the prehearing conference is to simplify the issues, procedures, and evidence in order to fairly hear and decide the case.

XII. Prehearing Conference

- A. When a prehearing conference is conducted, the presiding hearing officer may order from the parties any such matters as may resolve, simplify and/or expedite the appeal, including but not limited to a pre-hearing statement, dispositive motions, and statements regarding possible settlement, and may order any other preliminary matter be brought forward at that time at the discretion of the presiding hearing officer.

XIII. Prehearing Order

After a prehearing conference, the presiding hearing officer will issue a prehearing order.

XIV. Motions

- A. Parties may file written motions, including requests for continuance, with the Administrative Office. The request must state the grounds, whether the party desires a hearing, and any relief requested. The other parties shall have ten days after service of the motion on the parties to respond to such motion. The presiding hearing officer assigned to the case will promptly act upon the request. Motions not filed in a timely manner pursuant to this rule will be heard only at the discretion of the presiding hearing officer.
- B. Motions for continuance will be granted only for good cause.

- C. Except for extraordinary reasons, motions for continuance may not be filed any later than fourteen days before the scheduled hearing.

XV. Witnesses

- A. Each party shall file a list of witnesses such party will call to testify at the hearing. If the presiding hearing officer does not order the filing of witness lists at a different time, then each party must file a witness list in compliance with this rule no later than ten (10) days prior to the date of the hearing. The list shall contain for each witness:
 - 1. Name;
 - 2. Employer;
 - 3. Street address of employer; and
 - 4. Brief summary of testimony to be given.
- B. The issuance of subpoenas to compel the attendance of witnesses shall be governed by Rule XVI.

XVI. Subpoenas

- A. The presiding hearing officer shall have the authority to issue subpoenas in connection with a hearing.
- B. To compel the attendance of a witness, or witnesses, any party to an appeal may file with the Administrative Office a written Request for Issuance of Subpoenas. Each request shall contain for each witness:
 - 1. Name;
 - 2. Street address where the witness may be readily found for service of the subpoena (If the only available address is a route number or box number, the party requesting the subpoena must provide complete and accurate directions for locating the witness.); and
 - 3. Brief statement supporting the relevance and materiality of the testimony of the witness to the appeal.
- C. To compel the production of documentary evidence, any party to an appeal may file with the Administrative Office a written Request for Issuance of Subpoena Duces Tecum. Each request shall specify:
 - 1. Name of person who is to produce such documentary evidence;
 - 2. Street address where such person may be readily found for service of the subpoena (If the only available address is a route number or box number, the

party requesting the subpoena must provide complete and accurate directions for locating the witness.); and

3. Brief statement supporting the relevancy and materiality of the documentary evidence to the appeal.
- D. Each request must be filed no later than twenty days prior to the hearing date to ensure timely service. Requests for subpoenas must be served on every other party or his or her attorney. A party shall be given at least ten days to produce documentary evidence pursuant to a subpoena.
- E. A subpoena may be served as provided by the Mississippi Rules of Civil Procedure.
- F. If the requesting party desires the Administrative Office to forward the subpoenas, once issued, to the appropriate office for service by the county sheriff, a fee of thirty-five dollars (\$35.00) for each person to be subpoenaed shall accompany the request. The fee must be in the form of a cashier's check, bona fide attorney's check, or money order made payable to the sheriff of the county where the person to be subpoenaed may be found. In the event that additional subpoenas are required at the same address, a fee of one dollar (\$1.00) each shall accompany these requests. If the requesting party does not specify where the issued subpoenas should be sent, the Administrative Office will return the issued subpoenas to the requesting party for service.
- G. In case of the failure of any person to comply with any subpoena issued by the presiding hearing officer, the requesting party may invoke the aid of any court of this state of general jurisdiction. The court may thereupon order such person to comply with the requirements of the subpoena. Failure to obey the order of the court may be punished by the court as contempt thereof.

XVII. Failure to Appear at Hearing

If any party, without good cause, fails to appear at a hearing, the presiding hearing officer may order such sanction as the hearing officer deems appropriate, including, but not limited to, reimbursement by the missing party of reasonable costs incurred by other parties as a result of attendance or dismissal of the appeal.

XVIII. Conduct of Hearing

- A. The purpose of the hearing is to ascertain the truth.
- B. It is the responsibility of the presiding hearing officer to develop the record to ascertain the truth; this includes questioning witnesses.
- C. The hearing is *de novo*, affording the appealing party all procedural due process.
- D. The responding agency may have a representative, in addition to its attorney, remain in the hearing room during the entire course of the hearing, even though the representative may testify. The appealing party may remain in the hearing room throughout the

hearing. The presiding hearing officer has authority to control the presence of witnesses in the hearing location.

- E. The presiding hearing officer is authorized to administer oaths and affirmations and will take testimony under such oaths and affirmations.
- F. Parties may be represented by counsel licensed to practice in Mississippi.
- G. The presiding hearing officer will afford the parties, witnesses, and representatives respect and fairness consistent with their duty to maintain decorum and exercise due diligence.
- H. The presiding hearing officer is authorized to sanction parties and representatives for inappropriate behavior and failure to follow these rules. Such sanctions include but are not limited to: default, taking a negative inference, or limiting evidence, provided his or her reasons for taking such action are in the record.

XIX. Evidence

- A. Hearings shall be informal, and technical rules of evidence shall be relaxed.
- B. All witnesses shall testify under oath and shall be subject to cross-examination.
- C. All parties shall have the opportunity to respond and present evidence and argument on all relevant issues. All relevant evidence is admissible, but the presiding hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The presiding hearing officer shall exercise reasonable control over the manner and order of cross-examining witnesses and presenting evidence to make the cross-examination and presentation effective for ascertaining the truth, avoiding needless consumption of time, and protecting witnesses from harassment or undue embarrassment.
- D. In the appeal of formal disciplinary action, the presiding hearing officer shall hear or receive evidence on only those reasons and allegations contained in the responding agency's final disciplinary notice to the employee of such action.
- E. Documents received into evidence by the presiding hearing officer shall be marked by him or her, or under his or her direction, and filed for the record of the appeal.
- F. Rebuttal and surrebuttal evidence may be heard in the discretion of the presiding hearing officer.
- G. Summations of the evidence and the law may be heard in the discretion of the presiding hearing officer.

XX. Order of Proof; Burden of Proof

- A. At the hearing, the matter should be heard as directed by the presiding hearing officer in his or her sole discretion.
- B. An appealing party shall have the burden of proving that the reasons stated in the notice of the agency's final decision are not true or are not sufficient grounds for the action taken.

XXI. Preservation of Record of Hearing; Transcription of Record of Hearing

All hearings and prehearing matters shall be electronically recorded. It is the responsibility of the Administrative Office to record the proceedings. The responding agency, or agencies, shall be assessed a reasonable fee to defray the cost of recording the hearing. Upon request and at a reasonable cost, the Administrative Office will provide electronic copies to the parties.

XXII. Order to be Filed upon Completion of Hearing

Upon conclusion of the appeal hearing, and after all evidence has been presented, the presiding hearing officer, within a reasonable time thereafter, shall prepare and file a written decision and order.

XXIII. Compliance with Order

- A. All parties shall promptly comply with all orders of the EAB, unless a timely appeal of the decision has been filed by the employer.
- B. Within thirty days, the parties will certify that they have either complied with the order or have appealed it.

XXIV. Relief to be Granted

- A. The order may reinstate a prevailing party into employment with his or her responding agency and restore all his or her employee rights and benefits including back pay, medical leave, and personal leave. The order may also restore retirement benefits provided the integrity of such benefits remains uncompromised in accordance with all applicable laws, policies, rules, and regulations.
- B. The order may modify an action of a responding agency but may not increase the severity of such action on the appealing party. If the responding agency has acted in accordance with the published policies, rules and regulations of the MSPB, and if the personnel action taken by the responding agency is allowed under said policies, rules and regulations, the order shall not alter the action taken by the agency, including, but not limited to, the compensation paid to the employee.