

## **19-718 STATE EMPLOYEE GRIEVANCES AND APPEALS**

### **SCOPE AND PURPOSE**

This Regulation sets forth the procedures for grievances and appeals under the State Employee Grievance Procedure Act (the Act), codified at § 8-17-310 through § 8-17-370 of the South Carolina Code of Laws, as amended.

### **19-718.01 STATEMENTS OF POLICY**

- A. The Office of Human Resources (OHR) shall develop a grievance model policy to assist an agency in its policy development. The Office of Human Resources must review and approve each agency's grievance policy.
- B. Each agency shall develop a grievance policy and established procedures that will ensure timely and equitable treatment for the review of the employee's grievances.
- C. All covered employees are eligible to initiate a grievance or an appeal as specified in the Act.
- D. Teaching and research faculty, professional librarians, academic administrators, and all other persons holding faculty appointments at post-secondary educational institutions, including any branch campuses, shall not be covered by these Regulations but shall be governed by § 8-17-380 of the South Carolina Code of Laws.
- E. No employee shall be disciplined or otherwise prejudiced in employment for exercising rights or testifying under the Act.

### **19-718.02 INTERNAL AGENCY GRIEVANCE PROCEDURES**

- A. Each notice of an employment action that may constitute a grievance under the Act should be in writing. A voluntary acceptance of such an action on the part of a covered employee should also be in writing. The notice must advise the covered employee of the action taken and, except in cases where the action is voluntary as evidenced by a signed statement by the covered employee, should advise of the covered employee's right to initiate a grievance.
- B. Each agency shall establish written internal agency grievance procedures. All provisions shall comply fully with the Act and, as provided for in the Act, be submitted to OHR for approval.
- C. Each agency shall ensure that each covered employee is afforded access to a copy of the agency's internal agency grievance procedures.
- D. Each agency shall ensure that grievance information is recorded accurately and timely as required by the Office of Human Resources.

### **19-718.03 COVERED EMPLOYEES AND THEIR REPRESENTATIVES**

- A. “Covered employee” means a full-time or part-time employee occupying a part or all of an established full-time equivalent (FTE) position who has completed the probationary period and has a “meets” or higher overall rating on the employee’s performance evaluation and who has grievance rights. Instructional personnel are covered upon the completion of one academic year except for faculty at State technical colleges of not more than two full academic years’ duration. If an employee does not receive an evaluation before the performance review date, the employee must be considered to have performed in a satisfactory manner and be a covered employee. This definition does not include employees in positions such as temporary, temporary grant, or time-limited employees who do not have grievance rights.
- B. Throughout the grievance and appeal process, each covered employee may be represented and advised by counsel or other representative or be self-represented.
- C. The Act exempts certain employees from its provisions as noted in § 8-17-370 of the South Carolina Code of Laws.

### **19-718.04 GRIEVANCES**

- A. Grievances shall include terminations, suspensions, involuntary reassignments, and demotions. Reclassifications are considered a grievance only if an agency, or an appeal if the State Human Resources Director, determines that there is a material issue of fact that the action is a punitive reclassification. However, reclassifications, reassignments, and transfers within the same salary range are not adverse employment actions which may be considered grievances or appeals. Promotions are not adverse employment actions which may be considered grievances or appeals except in instances where the agency, or in the case of appeals, the State Human Resources Director, determines that there is a material issue of fact as to whether or not an agency has considered a qualified covered employee for a position for which the employee formally applied or would have applied if the employee had known of the promotional opportunity. When an agency promotes an employee one organizational level above the promoted employee’s former level, that action is not a grievance or appeal for any other qualified covered employee. Salary decreases based on performance are adverse employment actions that may be considered as grievances or appeals. A reduction in force is an adverse employment action considered as a grievance only if the agency, or as an appeal if the State Human Resources Director, determines that there is a material issue of fact that the agency inconsistently or improperly applied its reduction in force policy or plan.
- B. A covered employee must initiate a grievance in writing internally with the agency within 14 calendar days of the effective date of the employment action.
- C. The following examples of employment actions do not constitute a basis for a grievance or an appeal:

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1. A covered employee who voluntarily resigns or voluntarily accepts a demotion, reclassification, transfer, reassignment, or salary decrease shall waive any and all rights to file a grievance or an appeal concerning such actions and the covered employee can rescind such voluntary actions only if the agency head or the agency head's designee agrees;
2. A covered employee whose position is reclassified to a class with a lower salary range shall not have the right to file a grievance or an appeal concerning the reclassification to the State Human Resources Director unless a determination is made that a material issue of fact exists concerning a punitive reclassification; and
3. A covered employee who is promoted and subsequently demoted prior to serving six months of satisfactory service in the class with the higher salary range shall not have the right to file a grievance or an appeal concerning the demotion, unless such demotion is to a class with a lower salary range than the class in which the employee was serving prior to promotion;
4. A covered employee who is promoted and subsequently receives a reduction in pay prior to completing six months of satisfactory service in the class with the higher salary range shall not have the right to file a grievance or an appeal concerning the reduction in pay, unless the action results in a lower rate of pay than that which the employee was receiving prior to promotion;
5. A covered employee who receives an additional job duties or responsibilities salary increase, and subsequently has the additional job duties or responsibilities which justified the salary increase taken away prior to completing six months of service with the additional job duties or responsibilities, shall not have the right to file a grievance or an appeal concerning a salary reduction equivalent to the amount of the additional job duties or responsibilities increase.

### **19-718.05 APPEALS TO THE STATE HUMAN RESOURCES DIRECTOR**

- A. If a covered employee is not satisfied with the agency's final decision concerning his grievance, he may appeal, after all administrative remedies to secure relief within the agency have been exhausted, to the State Human Resources Director who will determine whether to dismiss the appeal or remand or forward the appeal for further action.
- B. A covered employee who wishes to appeal the decision of the agency grievance procedure to the State Human Resources Director shall file an appeal within ten calendar days of receipt of the decision from the agency head or his designee or within 55 calendar days after the employee files the grievance with the agency, whichever occurs later. The covered employee or the employee's representative shall file the request in writing with the State Human Resources Director. Failure to file an appeal with the State Human Resources Director within ten calendar days of the agency's final decision or 55 calendar days from the initial grievance, whichever occurs later, constitutes a waiver of the right to

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appeal. The time periods for appeal to the State Human Resources Director may not be waived.

- C. The Office of Human Resources shall develop standard forms to be used in all appeal procedures.
- D. Upon receipt of an appeal from a covered employee, the State Human Resources Director shall:
  - 1. Acknowledge receipt of the appeal and require that the covered employee submit a standard appeal application form;
  - 2. Upon receipt of the standard appeal application form, notify the agency to furnish the State Human Resources Director a copy of all records, reports, and documentation of the earlier proceedings on the grievance within 15 calendar days following the request, unless an extension is granted; and
  - 3. Determine whether the appeal is timely and complies with the jurisdictional requirements of the Act.
- E. If the State Human Resources Director determines that the appeal is untimely or fails to comply with the requirements of the Act, he will notify the covered employee or his representative that the appeal is denied and no further action will be taken concerning the appeal. As a result of the State Human Resources Director's decision, the covered employee may request reconsideration within 30 calendar days from notification of the decision. A notice of appeal seeking appellate review of the decision may be made by the covered employee to the Administrative Law Court as provided in Sections 1-23-380 (B) and 1-23-600 (D) of the S.C. Code of Laws.
- F. If the State Human Resources Director determines that additional action by the agency is necessary and appropriate, he may remand the appeal to the agency.
- G. If the State Human Resources Director determines that the covered employee has pending related criminal charges against him, the appeal process may be held in abeyance pending the outcome of those charges. If the appeal is held in abeyance, the covered employee or his representative must notify OHR within 30 calendar days after the disposition of the charges has been determined in order to preserve the covered employee's right to further pursue his appeal. Failure to contact OHR within those 30 calendar days will be deemed a waiver and abandonment of the appeal.
- H. If the State Human Resources Director determines that the appeal is timely and complies with the requirements of the Act, he will forward the appeal either (1) to the mediator-arbitrator for mediation-arbitration or (2) after the mediation process has been completed, to the designated panel of the State Employee Grievance Committee [Committee] and Committee Attorney for a hearing, whichever is appropriate based on the type of adverse employment action.

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- I. When an appeal is forwarded to a designated Committee panel, the State Human Resources Director will notify the covered employee and the agency with a statement as to the issues which have been presented by the parties for presentation before the Committee for decision.
- J. The official record on each appeal and all related correspondence and documents shall be maintained in a confidential file by OHR.
- K. The State Human Resources Director will send the notices and correspondence pertaining to an appeal directly to the parties. When a party designates a representative, the State Human Resources Director will send all notices and correspondence to that representative, rather than to the party.

### **19-718.06 MEDIATION PRIOR TO STATE EMPLOYEE GRIEVANCE COMMITTEE HEARINGS**

- A. “Mediation” means an alternative dispute resolution process whereby a mediator who is an impartial third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. The process is informal and nonadversarial with the objective of helping the disputing parties reach a mutually acceptable agreement.
- B. Once an appeal has been made to the State Human Resources Director and has been determined to meet the jurisdictional requirements for an appeal to be forwarded to the Committee, the State Human Resources Director shall appoint a mediator to the appeal of the following adverse employment actions: terminations, salary decreases based on performance, demotions, suspensions for more than ten days, and reductions in force when the State Human Resources Director determines there is a material issue of fact regarding inconsistent or improper application of the agency’s reduction in force plan or policy.
- C. The mediator:
  - 1. Shall review the documents which have been submitted by each party to the State Human Resources Director and schedule time(s) and location(s) to meet with both parties, jointly or independently, to attempt to resolve the matter;
  - 2. Has sole authority to determine whether the meeting includes the parties with their representatives, jointly or independently;
  - 3. Should determine when the mediation is not viable, that an impasse exists, or that the mediation should end but the mediation cannot be unilaterally ended without the permission of the mediator; and
  - 4. Should notify each party in writing as to the status of the mediation process no later than ten calendar days prior to the scheduled Committee hearing.

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### D. Mediation Conferences

1. Mediation conferences are confidential and limited to no more than three representatives, including legal counsel and the covered employee, for each party. An observer who has been assigned to conduct mediations for OHR may attend for training purposes if both parties to the mediation concur.
2. The parties or their representatives attending a mediation conference must have full authority to negotiate and recommend settlement.
3. Each covered employee is entitled to representation at the mediation conference and either the covered employee or his representative must attend. If neither the covered employee nor his representative attend a conference, the covered employee is deemed to have waived his rights to pursue the appeal further unless there is reasonable justification for the failure to attend the conference. The State Human Resources Director shall determine whether or not reasonable justification exists based on documents submitted by the parties on this issue and based on other information available relating to the conference. Documents submitted by the parties on the issue of reasonable justification must be received by OHR no later than 14 calendar days from the date of the scheduled conference. Denial of reasonable justification by the State Human Resources Director concludes the processing of the covered employee's appeal.
4. If the dispute is resolved, the mediator will assist the parties in preparing a written agreement to reflect the terms of the resolution and may consult with the attorney for OHR to assist in drafting the agreement.

### E. Confidentiality

1. Any discussions by any of the parties concerned during the mediation process shall be kept confidential and shall not be used or referred to during subsequent proceedings.
2. The mediator may not be compelled by subpoena or otherwise to divulge records or discussions or to testify in regard to the mediation in any adversary proceeding or judicial forum.
3. All records, reports, documents, discussions, and other information received by the mediator while serving in that capacity are confidential.

### **19-718.07 APPEALS FORWARDED TO THE STATE EMPLOYEE GRIEVANCE COMMITTEE**

- A. If a resolution through mediation as required by Section 19-718.06 of the State Human Resources Regulations cannot be accomplished, the State Human Resources Director shall forward the appeal to the designated Committee panel of the Committee.

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B. No more than three representatives, including legal counsel and the covered employee, may be designated by either party to be present during Committee hearings.

### C. Witnesses

1. Notice - After an appeal has been determined to be appealable to the Committee and has been placed on the Committee's docket, the covered employee and the agency, or their designated representatives, shall exchange witness lists which must be received by the other party no later than five calendar days prior to the hearing. The postponement of a hearing does not reinstate any time frame that has already elapsed at the time of the request to reschedule. Witness lists which have not been exchanged as required by this provision and witnesses not included on a properly exchanged list will be excluded at the hearing unless the Committee finds that there has been excusable neglect or that the witness(es) should be admitted in the furtherance of justice.
2. Character Witnesses - No more than two character witnesses for each side will be permitted to testify before the Committee when evidence of character is relevant to the issues. A character witness is defined as a witness offered solely for the purpose of presenting testimony which bears on the positive or negative general character of the covered employee, i.e., the covered employee's reputation for truthfulness, peaceful or violent manner, or other considerations of character which have a bearing on the matter before the Committee.
3. Subpoenas - Only the Committee Chairman or his designee is authorized to issue subpoenas for witnesses at the request of either party. In the event that either party in a case has difficulty in obtaining a witness's agreement to testify, such party must request in writing the issuance of a subpoena which must be received by OHR no later than ten calendar days before the date of the hearing. The postponement of a hearing does not reinstate any time frame that has already elapsed at the time of the request to reschedule. The request for a subpoena must include the name of the witness. The service of the subpoena is the responsibility of the requesting party. When any person fails to comply with a subpoena, the requesting party is responsible for the pursuance and cost of any judicial enforcement of that subpoena. Any reasonable expenses incurred by a subpoenaed witness shall be paid by the requesting party.
4. Sequestration of Witnesses - Witnesses other than representatives that will be witnesses shall be sequestered and shall not be in the hearing room except for preliminary comments, the Committee's opening statement, and that witness's testimony in a public hearing or a hearing held in executive session.
5. Depositions de bene esse - The testimony of a witness may be submitted into evidence in the form of a deposition de bene esse when the attendance of the witness whose testimony is required cannot be had (a) by reason of (i) extreme age, (ii)

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sickness or infirmity, or (iii) indispensable absence on public official duty, (b) as a result of verification of his intended absence from the State before the appeal can be heard by the designated Committee panel, or (c) when such witness may be without the limits of the State. If the parties cannot agree to the use of a deposition de bene esse, the party desiring to submit the deposition de bene esse may request permission from the Committee Chairman or his designee and the Committee Attorney to submit the deposition de bene esse. The party opposing the submission will be permitted an opportunity to respond to the request. The request and the response may be made either in writing before or verbally at the hearing. When the parties agree upon, or a party's request is granted for the use of, a deposition de bene esse, notice must be exchanged as to the time of the deposition de bene esse to allow all interested parties to attend and participate. No other types of depositions, including discovery depositions, are permitted.

### D. Documents

1. Submission to OHR and Exchange by the Parties - Any records, reports, and documentation submitted by either party to be forwarded to the Committee prior to the hearing must be received by OHR no later than 15 calendar days prior to the hearing. The postponement of a hearing does not reinstate any time frame that has already elapsed at the time of the request to reschedule. Those documents submitted by both parties will be provided by OHR to committee members prior to the hearings and considered to be the record during the hearing and marked into evidence as Committee Exhibit I. Each covered employee granted a hearing before the Committee will receive a copy of the records, reports, and documentation submitted by the agency. In like manner, a copy of any records, reports, and documentation filed by a covered employee will be sent to the agency.
2. Subpoenas - Only the Committee Chairman or his designee is authorized to issue subpoenas for files, records, and documentation on the grievance at the request of either party. In the event that either party in a case has difficulty in obtaining the production of files, records, and documentation on the grievance, such party must request in writing the issuance of a subpoena which must be received by OHR no later than ten calendar days before the date of the hearing. The postponement of a hearing does not reinstate any time frame that has already elapsed at the time of the request to reschedule. The request for a subpoena must include a description sufficiently specific to identify the documents in question and the name of the custodian of the documents in question. The service of the subpoena is the responsibility of the requesting party. When any person fails to comply with a subpoena, the requesting party is responsible for the pursuance and cost of any judicial enforcement of that subpoena. Any reasonable expenses incurred in the production of the documents shall be paid by the requesting party. Subpoenaed documents shall be received by the requesting party no later than five calendar days prior to the hearing.
3. Committee Exhibit I

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- a. The State Human Resources Director shall arrange for the reproduction of records, reports, and documentation timely submitted by both parties and make this information available, prior to the date of the hearing, to the designated Committee panel and Committee Attorney for that hearing.
- b. The documents transmitted by the State Human Resources Director to the designated Committee panel and Committee Attorney must be marked into evidence as "Committee Exhibit I" during the Committee Chairman's opening statement at the beginning of the hearing unless excluded by the Committee Attorney based on a prior objection raised by either party.

### E. Panel Hearings

1. **Scheduling and Notice** - The State Human Resources Director shall establish a date, time, and place for the hearing of each appeal and provide reasonable notice to the covered employee, agency, designated Committee panel, and Committee Attorney. Prior to the commencement of the hearing, the State Human Resources Director has the authority to grant a postponement based upon extenuating circumstances such as illness or death.
2. **Executive Session Hearings** - All hearings before the State Employee Grievance Committee shall be in executive session unless the employee requests a public hearing in accordance with the Freedom of Information Act prior to the designated Committee panel voting to go into executive session. If the hearing is held in executive session, only the designated Committee panel, the parties involved in a hearing, the Committee Attorney, and persons approved by the designated Committee Chairman may attend.
3. **Committee Members**
  - a. The Committee shall consist of at least 18 and not more than 24 members who must be appointed by the Budget and Control Board in accordance with the Act.
  - b. The State Human Resources Director may divide the Committee into panels of five members to sit at hearings and designate a member to serve as the presiding officer and a member to serve as secretary at all panel hearings.
  - c. A chairman shall be elected from the membership of the Committee each year after approval of membership of new members by the Budget and Control Board. A meeting for election of a chairman shall be held as soon as practicable after appointments are made.
  - d. A quorum of a panel shall consist of at least three Committee members. No hearings may be conducted without a quorum.

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- e. Whenever an appeal before the Committee is initiated by or involves an employee of an agency of which a Committee member also is an employee or involves another impermissible conflict of interest, the Committee member is disqualified from participating in the hearing.
4. Committee Attorney
    - a. The Budget and Control Board is authorized to request assignment by the Attorney General of one or more of his staff attorneys admitted to practice law in South Carolina to serve in the capacity of Committee Attorney. If the Attorney General is not able to provide sufficient legal staff for this purpose due to an impermissible conflict of interest, the Budget and Control Board, with the approval of the Attorney General, is authorized to secure other qualified attorneys to serve as Committee Attorney.
    - b. The Committee Attorney shall determine the order and relevance of the testimony and the appearance of witnesses, and shall rule on all motions and all legal issues.
  5. Continuances and Postponements
    - a. Panel hearings will be conducted on the date and at the time scheduled unless the Committee, acting collectively or through its designated Committee Chairman, upon commencement of a hearing, grants a postponement based upon extenuating circumstances.
    - b. Each covered employee is entitled to representation at the panel hearing and either the covered employee or his representative must attend. If neither the covered employee nor his representative attend the panel hearing, the covered employee is deemed to have waived his rights to pursue the appeal further unless there is reasonable justification for the failure to attend the panel hearing. The State Human Resources Director shall determine whether or not reasonable justification exists based on documents submitted by the party on this issue and based on other information available relating to the panel hearing. Documents submitted by the party on the issue of reasonable justification must be received by OHR no later than 14 calendar days from the date of the scheduled panel hearing. Denial of reasonable justification by the State Human Resources Director concludes the processing of the covered employee's appeal.
    - c. If the agency fails to appear at the panel hearing without reasonable justification, the designated Committee panel will base its decision on a review of Committee Exhibit I and a presentation of the case by the covered employee.
  6. Administrative Assistance, Recordings of Hearings, and Transcripts
    - a. The State Human Resources Director shall provide to the Committee from the resources of OHR such administrative and clerical services as may be required.

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- b. All proceedings before the Committee shall be recorded by OHR. The recording shall be preserved in accordance with the retention schedule of OHR.
  - c. The covered employee or the agency who first files the notice of appeal seeking appellate review of a Committee decision is responsible for preparation of a transcript and paying the costs of preparation of a transcript of the hearing required for certification of the record to the Administrative Law Court. In addition, the appealing party is responsible for all costs associated with providing the record on appeal for the Administrative Law Court.
7. Submission of Witness and Representative Lists to Committee - At the beginning of the hearing, each party shall provide to the secretary of the designated Committee panel a list of representatives and witnesses. Representatives who will testify must be listed as both a representative and a witness. Witness lists which have not been exchanged as required by Section 19-718.07 C. 1. of the State Human Resources Regulations and witnesses not included on a properly exchanged list will be excluded at the hearing unless the Committee finds that there has been excusable neglect or that the witness(es) should be admitted in the furtherance of justice.
  8. Conduct of Hearings - The presiding Committee Chairman shall conduct the grievance hearing in an equitable, orderly, and expeditious fashion. The Committee will give effect to rules of privilege recognized by law. The parties shall be bound by the decisions of the presiding officer or Committee Attorney insofar as such hearings are concerned.
  9. Opening Statements and Order of Presentation of the Case
    - a. The designated Committee Chairman shall open the hearing by explaining the procedures to be followed in the hearing.
    - b. Each party shall be given an opportunity to make an opening statement.
    - c. The covered employee shall present his case first, followed by the agency.
  10. Direct and Cross Examinations
    - a. The testimony of witnesses shall be under oath or affirmation.
    - b. Each party shall have the right to examine and cross-examine witnesses, as appropriate.
    - c. The designated Committee Chairman, the Committee Attorney, or any member of the designated Committee panel may direct questions to any party or witness at any time during the proceedings.

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- d. Each party may object to testimony, questions, or documents.
11. Evidentiary Matters - Evidentiary matters as governed by the South Carolina Administrative Procedures Act will apply in hearings before the Committee.
  12. Interpretations from OHR - The designated Committee Chairman of a designated Committee panel may request information or assistance in interpretations of rules and Regulations from the State Human Resources Director.
  13. Closing Statement
    - a. Before closing the hearing, the designated Committee Chairman shall allow the parties to make a closing statement.
    - b. The covered employee will have the option of closing first or last.
- F. Written Committee Decisions
1. The designated Committee panel shall retire into a separate executive session, without the parties present, to receive legal advice from the Committee Attorney and consider the evidence. The Committee Attorney may be present during the Committee's deliberations on its decision only upon the request of the designated Committee Chairman. No vote by the designated Committee panel may be taken in executive session.
  2. The vote of each member of the designated Committee panel on the merits of the appeal shall be recorded.
  3. Decisions of the Committee shall be determined by a simple majority of those members who heard the appeal.
  4. Within 20 calendar days of the conclusion of the hearing, the designated Committee panel shall make its final written decision.
  5. The final decision of the Committee as it relates to an appeal shall include the (1) findings of fact, (2) statements of policy and conclusions of law, and (3) the Committee's decision.
  6. As governed by the provisions of the Act, the Committee may sustain, reject, or modify a grievance hearing decision of an agency.
  7. Any member agreeing with the majority decision but differing with the rationale may prepare a concurring decision. Any member voting in the minority may prepare a dissenting opinion.

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8. The Committee Attorney or the attorney for OHR or both may assist the Committee in the preparation of its findings of fact, statements of policy, and conclusions of law.
9. The decision of the Committee shall be transmitted to the State Human Resources Director for notification of the covered employee and the employing agency or their representatives.
10. As a result of this final written decision, either the covered employee or the agency may request reconsideration within 30 calendar days from receipt of the decision.
11. The designated Committee panel shall request assistance from the Committee Attorney or the attorney for OHR or both in the preparation of a written response to a request for reconsideration.
12. If no request for reconsideration is made or when a response is made to a request for reconsideration, the Committee decision is final in terms of administrative review.

### **19-718.08 APPEALS FORWARDED TO A MEDIATOR-ARBITRATOR**

- A. “Mediation-arbitration” means an alternative dispute resolution process that provides for the submission of an appeal to the mediator-arbitrator, an impartial third party who conducts conferences to attempt to resolve the grievance by mediation and render a decision that is final and binding on the parties if the appeal is not mediated.
- B. The State Human Resources Director shall forward to a mediator-arbitrator all appeals which meet jurisdictional requirements and relate to the appeal of the following adverse employment actions: lack of promotional consideration and punitive reclassifications when the State Human Resources Director determines there is a material issue of fact regarding these issues, suspensions for ten days or fewer, and involuntary reassignments. In these cases, the arbitration decision is final in terms of administrative review.
- C. Selection and Assignment of the Mediator-Arbitrator
  1. The mediator-arbitrator must be assigned by the State Human Resources Director and shall serve as an impartial third party to hold conferences to encourage and facilitate the resolution of the appeal and, if the appeal is not resolved, issue a decision which determines whether the covered employee substantiated that the agency’s decision was not reasonable.
  2. The State Human Resources Director shall maintain a pool of qualified mediator-arbitrators trained by OHR in alternative dispute resolution, grievance, and related human resources issues.
  3. The State Human Resources Director shall have the discretion to assign either two mediator-arbitrators, one to serve as mediator during the mediation phase and one to serve as arbitrator during the arbitration phase, or one mediator-arbitrator to serve as

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both mediator and arbitrator. If the State Human Resources Director assigns one mediator-arbitrator to serve as both mediator and arbitrator or an individual to serve as only the arbitrator during the arbitration phase, the following shall apply:

- a. The State Human Resources Director shall send simultaneously to each party a list of five names of potential mediator-arbitrators from the pool along with a description of the professional experience of each potential mediator-arbitrator.
- b. Each party shall have five calendar days from the date of receipt of the names in which to strike up to two names and return the list to the State Human Resources Director.
- c. If OHR does not receive the list from the party within five calendar days from the date the party received the list, all persons named in the list shall be deemed acceptable.
- d. From among the persons who have been approved on both lists, the State Human Resources Director shall appoint a mediator-arbitrator for that appeal. If the parties fail to agree on any of the persons named, or if the State Human Resources Director determines that an acceptable mediator-arbitrator from the list submitted to the parties is unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the State Human Resources Director shall have the authority to make an assignment from among other members of the mediator-arbitrator pool without the submission of additional lists.

### D. Mediation-Arbitration Conferences

1. The mediator-arbitrator shall review the documents which have been submitted by each party to the State Human Resources Director and shall schedule time(s) and location(s) to meet with both parties, jointly or independently.
2. No more than three representatives, including legal counsel and the covered employee, may be designated by either party to be present during mediation-arbitration conferences. An observer who has been assigned to conduct mediation-arbitrations for OHR may attend for training purposes if both parties to the mediation-arbitration conference concur.
3. Each covered employee is entitled to representation at the conference and either the covered employee or his representative must attend. If neither the covered employee nor his representative attend a conference, the covered employee is deemed to have waived his rights to pursue the appeal further unless there is reasonable justification for the failure to attend the conference. The State Human Resources Director shall determine whether or not reasonable justification exists based on documents submitted by the parties on this issue and based on other information available relating to the conference. Documents submitted by the parties on the issue of reasonable justification must be received by OHR no later than 14 calendar days from

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the date of the scheduled conference. Denial of reasonable justification by the State Human Resources Director concludes the processing of the covered employee's appeal.

4. If the agency fails to appear at a conference without reasonable justification, the mediator-arbitrator will base an arbitration decision on a review of the documents which have been submitted by each party to the State Human Resources Director and a presentation of the case by the covered employee.
5. The parties or their representatives attending a conference must have full authority to negotiate and recommend settlement.

### E. Mediation Phase

1. The mediator-arbitrator has sole authority to determine whether conferences during the mediation phase include the parties with their representatives, jointly or independently.
2. Initially, the mediator-arbitrator will attempt to assist the parties as a mediator in reaching a voluntary mutual resolution of the appeal.
3. The mediation phase cannot be unilaterally ended nor the arbitration phase begun without the permission of the mediator-arbitrator.
4. If the dispute is resolved, the mediator-arbitrator will assist the parties in preparing a written agreement to reflect the terms of the resolution and may consult with the attorney for OHR to assist in drafting the agreement.

### F. Arbitration Phase

1. If the mediator-arbitrator determines that the parties are unable to reach a resolution of the appeal by mediation during, but no later than, the 20 calendar days immediately following the initial conference with either or both parties, then the mediator-arbitrator shall notify the parties that the arbitration phase will proceed, as appropriate.
2. Procedures for Arbitration Phase
  - a. During the arbitration phase, the parties will be allowed to submit to the mediator-arbitrator a concise written summary of the relevant issues involved in the appeal, notarized statements, and other additional documents. The parties must have provided the other party and the mediator-arbitrator with the written summary of relevant issues, any notarized statements from individuals who have knowledge about the issues on appeal, and other related documents concerning the appeal prior to the arbitration conference. The time for the exchange by the parties and submission to the mediator-arbitrator of the written summary of relevant issues,

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notarized statements, and other related documents will be determined by the mediator-arbitrator.

- b. During the arbitration phase, the mediator-arbitrator will allow each party a maximum of two hours to present his appeal, with the covered employee presenting his case first. Either the party or one of his representatives shall be designated as the spokesperson during the conference. No testimony will be allowed and others in attendance will not be allowed to speak or ask questions during the presentation of information. The parties may use the designated time to present any oral arguments concerning the issues on appeal. The covered employee may reserve a portion of the two hours to reply to the agency's contentions. This reply is limited only to information presented orally by the agency and shall not exceed one-half of the total time for the presentation of information. In extenuating circumstances, the mediator-arbitrator may increase or decrease the time each party has to present his appeal at the conference during the arbitration phase.
- c. The other party and his representatives may be present when a party presents his appeal during the arbitration phase.
- d. Conformity to legal rules of evidence shall not be necessary during the arbitration phase.
- e. At any time before the mediator-arbitrator makes a final arbitration decision, the mediation phase may be reopened at his initiative, or at his discretion upon request of a party.
- f. The mediator-arbitrator shall transmit to both parties a final written decision based on all documents properly submitted by both parties and the oral arguments presented during the arbitration phase within 45 calendar days after the mediator-arbitrator initially meets with either or both parties. This 45-day period may be extended by the State Human Resources Director under extenuating circumstances. When the expiration of this 45-day period occurs during the seven day waiting period required under the Older Workers Benefit Protection Act before a written agreement becomes effective, the State Human Resources Director will extend the 45-day period one day for each day remaining in the seven day waiting period.
- g. As a result of this final written decision, either the covered employee or the agency may request reconsideration by the mediator-arbitrator within 30 calendar days from receipt of the decision.
- h. The mediator-arbitrator shall request assistance from the attorney for OHR in the preparation of his final written decision and his written response to a request for reconsideration.

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### G. Confidentiality

1. The conferences with the parties are confidential and limited to the parties and their representatives, but other persons may attend with the permission of the parties and the mediator-arbitrator.
2. The mediator-arbitrator may not be compelled by subpoena or otherwise to divulge any records or discussions or to testify in regard to the mediation-arbitration in any adversary proceeding or judicial forum.
3. All records, reports, documents, discussions, and other information received by the mediator-arbitrator while serving in that capacity are confidential, except the documents which have been submitted by each party shall be the record during appellate review to the Administrative Law Court.

### **19-718.09 APPELLATE REVIEW OF ANY FINAL DECISION**

Either party may seek appellate review to the Administrative Law Court from a final decision by the State Human Resources Director denying an appeal or by the State Employee Grievance Committee or mediator-arbitrator.

- A. A notice of appeal seeking appellate review to the Administrative Law Court must be initiated within 30 calendar days from receipt of the decision.
- B. A notice of appeal seeking appellate review of the final decision may be made by the covered employee to the Administrative Law Court as provided in Sections 1-23-380 (B) and 1-23-600 (D) of the S.C. Code of Laws.
- C. Only after an agency submits a written request to OHR seeking approval of the Budget and Control Board may the agency file a notice of appeal seeking appellate review to the Administrative Law Court. However, the agency may perfect the appeal only upon approval of the Board.
- D. The covered employee or the agency who first files the notice of appeal seeking appellate review of a Committee decision is responsible for preparation of a transcript and paying the costs of preparation of a transcript of the hearing required for certification of the record to the Administrative Law Court.
- E. The record for appellate review of a decision made by a mediator-arbitrator shall be limited to the documents which have been submitted by each party and the final written decision of the mediator-arbitrator.
- F. The covered employee or the agency who first files the notice of appeal seeking appellate review of a final decision by (1) the State Human Resources Director denying an appeal; (2) the State Employee Grievance Committee; (3) a mediator-arbitrator, is responsible

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for any costs associated with providing the certification of record for the Administrative Law Court.

- G. Neither the Board nor OHR nor the State Human Resources Director nor the Committee nor the mediator-arbitrator may be named in the notice of appeal to the Administrative Law Court to be allowed to intervene to participate in the appeal for appropriate reasons including their interest in defending their policies.

### **19-718.10 COMPUTATION OF BACK PAY**

- A. Reinstatement of pay resulting from a reversed disciplinary action shall be less any other related income, such as unemployment compensation, workers' compensation, State retirement benefits, and wages, received during the period of time in which the pay was deducted and shall be accomplished in the following manner:
1. The covered employee shall submit to the agency a notarized statement of any wages earned during the interim period of disciplinary action;
  2. The agency shall submit a written request for the covered employee's reinstatement of pay and a statement of back pay due, less any other related income, such as unemployment compensation, workers' compensation, State retirement benefits, and wages, to the State Human Resources Director;
  3. Any unemployment compensation earned by the employee will be verified by OHR through the Employment Security Commission. The amount of unemployment compensation provided by the Employment Security Commission will be used in determining the final back pay amount.
  4. The computation of back pay must be in accordance with guidelines provided by the Office of the Comptroller General; and
  5. The State Human Resources Director must approve the amount of reinstatement pay due the employee. That approval is not subject to administrative appeal and will constitute the final administrative decision.
- B. The above procedure shall be followed in reversed disciplinary actions resulting from both agency internal grievance procedures as well as appeals at the State level.
- C. The intent of this Regulation is only to make the employee whole as if the disciplinary action had not occurred.

### **19-718.11 APPROVAL OF PERSONNEL SETTLEMENTS**

It is the policy of the Budget and Control Board that personnel settlement proposals be presented to the Board for approval as outlined in the following:

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- A. In all situations where a personnel settlement has not been negotiated or approved by the Office of the Attorney General under a plan approved by the Office of the Attorney General;
- B. In all human resources-related matters, after review and recommendation by the State Human Resources Director, excluding settlements which have been negotiated and approved by the Workers' Compensation Commission, Employment Security Commission, or South Carolina Human Affairs Commission; and
- C. In all other situations where specific approval of the Budget and Control Board would be necessary to disburse funds mentioned under the settlement proposal.
  - 1. All personnel settlement proposals shall contain such information as the Budget and Control Board or its designee specifies.
  - 2. The State Human Resources Director may review and approve any personnel settlement of \$10,000 or less.