

## **CHAPTER 10 – GRIEVANCES AND APPEALS**

### **10.7 APPEALS**

#### **Mississippi Employee Appeals Board**

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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.

## **XXV. Review by the EAB**

- A. Any party aggrieved by the final written decision and order of a presiding hearing officer entered on the hearing of an appeal may file a written Request for Review by the EAB.
- B. The request must be filed within fifteen days after the date the final order is filed. The request will include specific reasons, including whether the:
  - 1. Findings are in error;
  - 2. Decision is contrary to the law; or
  - 3. Procedural decisions were in error.

- C. Any party may file a written brief to be considered by the EAB. Simultaneous briefs must be filed within thirty days of the request for review. The briefs may reference evidence contained in the electronic record by identifying the witnesses and the substance of their testimony.
- D. The EAB shall base its review on:
  - 1. The pleadings;
  - 2. Any documentary evidence received and filed for record at the hearing;
  - 3. The recording of the hearing; and
  - 4. Briefs of the parties, if filed.
- E. The EAB shall issue a final written decision and order on the review within thirty days after the final filing date for all documents to be considered on review.

#### **XXVI. Judicial Review**

Any party aggrieved by a final written decision and order of the EAB may appeal such order in the manner provided by applicable laws and statutes.

#### **XXVII. Assessment of Fees and Costs**

- A. The Administrative Office shall have the authority to establish reasonable fees and assess reasonable costs of conducting appeals.
- B. If a party requests a transcript, the Administrative Office may contract with a third party to prepare it. It is the responsibility of the party requesting the transcript to pay any costs associated with preparation of the requested transcript.
- C. Upon proper payment, the Administrative Office will certify this transcript to the appropriate court, as required by applicable laws, statutes, and rules.
- D. Administrative Office copy fees:
  - 1. Regular copies: \$1.00 per page.
  - 2. Orders from minute books: \$5.00 minimum

#### **XXVIII. Judicial Conduct**

- A. The hearing officers shall be guided by and subject to the Mississippi Rules of Court, Code of Judicial Conduct (Adopted by the Mississippi Supreme Court April 4, 2002).
- B. No Hearing Officer shall be removed from office during his or her term except by a finding of misfeasance, malfeasance, or nonfeasance in office.

**XXIX. Amendment of Rules; Validity of Rules; Enforcement of Rules**

- A. The MSPB may amend these rules or promulgate new rules.
- B. If any one or more of these rules is found to be invalid by any court of competent jurisdiction, such finding shall not affect the validity of any other of these rules.
- C. The EAB shall have the authority, duty, and responsibility to abide by and enforce these rules.