

TITLE 455. MERIT PROTECTION COMMISSION

CHAPTER 10. MERIT SYSTEM OF PERSONNEL ADMINISTRATION RULES

SUBCHAPTER 1. GENERAL PROVISIONS

455:10-1-2. Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

"Addendum decision" or **"Addendum order"** means a decision or order to add to a previously issued decision or order.

"Administrative Law Judge" means a person appointed by the Executive Director and empowered to preside over prehearing conferences and hearings with power to administer oaths, take testimony, rule on questions of evidence and make final and addendum decisions.

"Adverse action appeal" means an appeal by a permanent classified employee appealing a discharge, suspension without pay or involuntary demotion.

"Affidavit" means a sworn statement, made voluntarily, and taken before a person with authority to administer an oath or affirmation.

"Affidavit of service" means a written statement certifying that a motion, request or other document has been provided to other persons.

"Allegation" means the claims of a party.

"Allege" means to state, assert or charge; to make an allegation.

"Alleged violation appeal" means an appeal in which an allegation is made that a violation of law or rules over which the Commission has jurisdiction has occurred.

"Appeal" means, as a verb, the filing of a petition for appeal, or as a noun, the procedure that takes place after a petition for appeal is filed.

"Appellant" means a party who files a petition for appeal.

"Appellee" means a party against whom an appeal is filed or who is otherwise named or joined as a party.

"Burden of proof" means the obligation of a party to establish alleged fact(s) by a preponderance of evidence.

"Caucus" means a private meeting between an Alternative Dispute Resolution Program facilitator and a party for the purpose of assisting in the resolution of a dispute.

"Commission" means the Oklahoma Merit Protection Commission.

"Commissioners" means the members appointed to the Oklahoma Merit Protection Commission.

"Consolidation" means the combining of appeals containing the same or similar issues but filed by 2 or more appellants into a single appeal.

"Continuance" means a postponement of a matter scheduled by the Commission to a date certain.

"Cross-examination" means the questioning of a witness by a party other than the party calling the witness.

"Deny" means to refuse to grant or accept.

"Deposition" means a method where the sworn testimony of a person is taken. The person who answers the questions is said to be deposed.

"Determination of the Executive Director" means a document which states the issues, findings of fact, conclusions of law and disposition of an appeal.

"Direct-examination" means the questioning of a witness by the party calling the witness.

"Discovery" means to obtain relevant facts and information about the appeal from another party or person.

"Dismiss" means to close without further consideration.

"Employee" or **"State employee"** means *an elected or appointed officer or employee of an agency unless otherwise indicated* [74:840-1.3(2)].

"Evidence" means relevant documents or testimony offered to prove or disprove the existence or non-existence of a fact.

"Ex-parte communication" means communications by anyone with a presiding official on the merits of an appeal which could affect its outcome.

"Executive Director" means the appointing authority of the Oklahoma Merit Protection Commission [Section 840-1.3 of Title 74 of the Oklahoma Statutes].

"Exhibit" means items offered as evidence.

"Expert" means a person knowledgeable in a specialized field, that knowledge being obtained from either education or personal experience.

"Filing" means the receipt of documents by the Commission.

"Final decision" means a determination made by a presiding official after considering the merits, testimony and evidence of an appeal. Final decision also refers to a determination made by the Executive Director to dismiss an appeal.

"Grant" means to give or permit.

"Hearing" means an open, formal proceeding conducted by an Administrative Law Judge, Executive Director or Commissioners to decide an appeal. The proceeding is to provide each party with an opportunity to present evidence in support of their side of the case. The hearing is governed by the Oklahoma Administrative Procedures Act, Sections 309 through 316 of Title 75 of the Oklahoma Statutes.

"Interrogatories" means written questions given to a party or witness. The answers are made in writing under oath.

"Intervenor" means a person or agency permitted to voluntarily enter an appeal as a party.

"Investigative report" means a written account of an investigation to assist the Executive Director in determining whether or not a violation within the Commission's jurisdiction may have occurred.

"Issue" means a disputed point or question on which the parties to an appeal seek a resolution.

"Joinder" means the combining of 2 or more appeals of one appellant.

"Jurisdiction" means the authority of the Commission to complete its duties and responsibilities.

"Jurisdictional limitations" means the statutory restrictions on the scope, time limits, and type of appeals which may be considered by the Commission.

"Merit Rules" or **"Merit Rules for Employment"** means the merit system of personnel administration rules. The merit rules include both the rules in this chapter as adopted by the Merit Protection Commission and the rules in OAC 530 as adopted by the Administrator of the Office of Personnel Management.

"Moot" means no longer in dispute because issues have already been decided or when rendered, a decision could not have any practical effect on the existing dispute.

"Motion" means a request for a ruling to be made by a presiding official or the Commissioners.

"Not sustain" means to deny a request; to deny an appeal.

"Order" means a command or directive given by a presiding official, Executive Director or Commissioners.

"Party" means an Appellant, Appellee or Intervenor.

"Payroll claim protest" means a protest in which an employee challenges the decision that an overpayment or underpayment of salary has been made or a protest of the amount of the alleged overpayment or underpayment.

"Petition for Appeal" means the form adopted by the Commission for the filing of an appeal.

"Petition for Reconsideration, Rehearing or Reopening" means a document filed after the final decision on an appeal has been made requesting that the Commissioners rehear, reopen or reconsider the case based on specific grounds as outlined in Section 317 of Title 75 of the Oklahoma Statutes.

"Prehearing conference" means a proceeding conducted by an Administrative Law Judge or Executive Director with the parties to identify the issues, documents, witnesses and motions which will guide the Administrative Law Judge or Executive Director in the conduct of the hearing.

"Preponderance of evidence" means information or evidence which is more convincing or believable than the information or evidence offered in opposition.

"Presiding official" means the Executive Director or a person appointed by the Executive Director to serve the Commission in the capacity of Administrative Law Judge, mediator or other Alternative Dispute Resolution Program arbitrator or facilitator.

"Prima facie case" means a case which on its face is presumed to be true and will prevail until contradicted and overcome by other evidence.

"Protective order" means a directive issued to protect a party or witness from annoyance, embarrassment, oppression or undue burden or expense.

"Quash" means to annul or make void.

"Relevant" means directly related to the issue or issues being examined.

"Remedy" means corrective action sought by or afforded to a party.

"Representative" means the designated agent of record, identified in the petition for appeal or through an entry of appearance or other written means, acting on behalf of a party.

"Stipulation" means a voluntary admission of fact.

"Subpoena" means an order to appear at a certain time and place to give testimony.

"Subpoena Duces Tecum" means an order requiring the production of books, papers and other documents.

"Summary judgement judgment" means a request or decision on issues where there is no dispute of material fact.

"Sustain" means to grant a request; to grant an appeal.

"Testimony" means statements given by a witness under oath or affirmation.

"Violation" means a breach of any law or rule over which the Commission has jurisdiction.

455:10-1-5. Review of Commission records

(a) **Generally.** The Commission supports the public's right to know and be informed about their government. This right must be balanced with the rights of individuals to have adequate protection from clearly unwarranted invasions of personal privacy and assaults on their integrity. Records maintained by the Commission may be inspected and copied during normal business hours in accordance with state and federal laws and the rules in this chapter. Any person wishing to inspect, copy or reproduce records under the control of the Commission shall complete the

Commission's Request for Access to Records form. Sufficient advanced notice shall be given so the essential functions of the Commission shall not be severely disrupted. Appointments are preferred.

(b) **Confidential records.** Access to confidential records shall be limited to officers and employees of state or federal government acting in their official capacities. The extent of access may be limited as determined to be appropriate by the Executive Director.

(1) The following Commission records shall be confidential:

(A) records which relate to internal personnel investigations, including examination and selection for employment, hiring, appointment, promotion, demotion, discipline or resignation. [51:24A.7(A)(1)].

(B) records received from the federal government or records generated or gathered as a result of federal legislation may be kept confidential to the extent required by law.

(C) records specifically required by law to be kept confidential, including records not discoverable under state law, such as material prepared in anticipation of ~~law suit~~ lawsuit or trial, records protected by a state evidentiary privilege, [51:24A.5(1)(a)], records of what happened during executive session. [51:24A.5(1)(b)].

(D) other records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, such as employee evaluations, payroll deductions or employment applications of persons not hired. [51:24A.7(A)(2)].

(E) state employee home addresses, home telephone numbers and social security numbers shall not be open to public inspection or disclosure [74:840-2.11].

(F) see OAC 455:10-7-6 for access to Commission investigative files.

(2) The Executive Director may keep records confidential that are specifically permitted by law to be kept confidential.

(c) **Public records.** All personnel records that are not confidential shall be available for public inspection and copying. Any employee of the state of Oklahoma shall have a right of access to his or her own records on file with the Commission unless a law prohibits it. Public records include, but are not limited to, records of:

(1) employment application of a person who becomes a state official or employee; [51:24A.7(B)(1)]

(2) gross receipts of public funds; [51:24A.7(B)(2)]

(3) dates of employment, title or position; [51:24A.7(B)(3)]

(4) final disciplinary action resulting in loss of pay, suspension, demotion or discharge. [51:24A.7(B)(4)].

(d) **Appeal records.** The records of an active appeal shall be open to inspection only by a party to the appeal or the party's designated representative. The records of an inactive appeal shall be open to inspection in accordance with the Oklahoma Open Records Act and these rules.

(e) **Fees.** ~~Acess to The Commission shall charge a reasonable fee for copies of Commission records shall be subject to the Commission's fee schedule., including~~ A a reasonable search fee may be charged to recover the direct costs of document searches if the request is solely for commercial purposes [51:24A.5(3)(a)] or clearly would cause excessive disruption of the Commission's essential functions. [51:24A.5(3)(b)].

~~(1) Fee for paper photocopies—\$0.25 per copy.~~

~~—(2) Fee for cassette tapes—\$1.00 per tape, plus cassette tape.~~

~~—(3) Search fee shall be determined by multiplying the hours of the search by the Commission employee's hourly rate of pay.~~

455:10-1-7. Organization

(a) The Oklahoma Merit Protection Commission consists of nine members (Commissioners): two members appointed by the President Pro Tempore of the Senate; two members appointed by the Speaker of the House of Representatives; and five members appointed by the Governor. The appointing authority of the Commission is the Executive Director.

(b) The Commissioners and the Executive Director may take action to carry out the duties of the Commission and to accomplish the objectives of any program or activity within the Commission's jurisdiction and authority.

(c) ~~The address and telephone number for making r~~Requests, submissions and other communications to the Commission is: ~~Oklahoma Merit Protection Commission, 201 NE 38th Terrace, Suite 5 3545 N.W. 58th Street, Suite 360, Oklahoma City, Oklahoma 73105 73112, (405) 525 9144. The Commission's fax number is (405) 528 6245~~ can be accomplished by mail, email, fax, telephone, or personal visit, except where specified in rule or policy pertaining to the Commission's programs and processes.

(d) The normal business hours of the Commission are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays.

455:10-1-10. Forms and instructions

Other chapters in this Title contain references to ~~forms and~~ filing instructions that the Commission uses and requires. Persons may contact the Commission to request ~~blank~~ forms and general information about completing and submitting them.

SUBCHAPTER 3. JURISDICTION, RIGHTS AND PROCESSES

455:10-3-1.1. Time

Time is jurisdictional.

(1) **Alleged violation appeal.** Unless otherwise provided for by statute or the rules in this chapter, an alleged violation appeal shall be filed within 20 calendar days after the alleged violation occurs. The Executive Director may extend this time limit if the appellant demonstrates that he or she filed within 20 calendar days after becoming aware of, or with due diligence, should have become aware of the alleged violation, or for other good cause shown. For information on filing an appeal after a formal grievance see OAC 455:10-19-46.

(2) **Adverse action appeal.** An appeal of a permanent classified employee appealing a discharge, suspension without pay or involuntary demotion shall be filed within 20 calendar days after receipt of the written notice of the action imposed, by certified mail or personal service. This is a statutory time limit and may not be extended. [74:840-6.5(C)].

455:10-3-2. Determining jurisdiction; "file" defined

(a) It is solely the authority of the Commissioners and Executive Director to determine whether or not matters being appealed are subject to the jurisdiction of the Commission. No request for appeal shall be accepted more than 12 months after the event causing the appeal, unless otherwise provided for by any statute. Unless otherwise defined in the rules in this chapter, "file" means receipt by the Commission.

(b) The file date of a document is the date the Commission receives the document or the date it is postmarked, not the date it is faxed, or mailed or postmarked. If the last day for filing is a Saturday, Sunday or legal holiday as proclaimed by the Governor, the file date shall be extended to the end of the next business day.

(c) The Executive Director is authorized to establish guidelines for the electronic filing of documents.

[NEW] 455:10-3-3.1. No jurisdiction over designation of worksite

A state agency shall have sole and final authority to designate the place or places where its employees shall perform their duties. The Oklahoma Merit Protection Commission shall not have the jurisdiction to accept an appeal of an employee resulting from the employing agency transfer of an employee from one county or locality to another, changing the assigned duties of an employee, or relieving the employee from the performance of duty at a particular place and reassigning to an employee duties to be performed at another place, unless an employee asserts that:

1. The action resulted in a change in job classification or reduction of the base salary of the employee;

2. A violation of the provisions of Section 840-2.5 or 840-2.9 of [Title 74] may have occurred; or

3. The action was taken clearly for disciplinary reasons and to deny the employee the right of appeal [74:840-4.19].

455:10-3-4.1. Notice of appeal

Upon receipt of a petition for appeal, ~~it is the Commission's policy to~~ shall send a notice of appeal, ~~with attachments,~~ to the appointing authority or designated representative ~~and any other persons alleged to have violated a law or rule over which the Commission has jurisdiction.~~ The Executive Director may order a person or agency added as a party of record and that person or agency shall be sent a notice of appeal, ~~by certified mail or personal service, with attachments.~~

455:10-3-6. Alleged violations of employee's freedom of expression

(a) **General.** For purposes of this section agency means any office, department, commission or institution of the state government [74:840-2.5(A) ~~(B)~~]. No officer or employee of any state agency shall prohibit or take disciplinary action against employees of such agency, whether subject to the provisions of the Merit System or in unclassified service, for:

(1) Disclosing public information to correct what the employee reasonably believes evidences a violation of the Oklahoma Constitution or law or a rule promulgated pursuant to law;

(2) Reporting ~~any~~ a violation of the Oklahoma Constitution, state or federal law, rule or policy; mismanagement; a gross waste of public funds; an abuse of authority; or a substantial and specific danger to public health or safety;

(3) Reporting such information without giving prior notice to the employee's supervisor or anyone else in the employee's chain of command;

(4) Discussing the operations and functions of the agency, either specifically or generally, with the Governor, members of the Legislature, ~~or others~~ the print or electronic media, or other persons in a position to investigate or initiate corrective action; [74:840-2.5(A)]. For purposes of this section only, "others" means persons with authority to take corrective action on the issues discussed.

(4) Taking any of the above actions without giving prior notice to the employee's supervisor or anyone else in the employee's chain of command. [74:840-2.5(B)].

(b) Appeal rights.

(1) Any employee or any former employee aggrieved pursuant to this section may file an appeal with the Commission within 60 calendar days of the alleged disciplinary action [74:840-

2.5~~(E)~~(F)]. This is a statutory time limit and may not be extended.

(2) The appeal shall contain, as a minimum,:

(A) the name of the person(s) alleged to have violated this section;

(B) the disciplinary action taken and when such disciplinary action was taken;

(C) the public information disclosed, to whom it was disclosed, and when it was disclosed; or,

(D) the violation of the Oklahoma Constitution, state or federal law, rule or policy, mismanagement, gross waste of public funds, abuse of authority, or substantial and specific danger to public health or safety reported, to whom it was reported, and when it was reported, or;

(E) the operations and functions of the agency discussed, with whom such discussions were made, and when such discussions took place.

(3) Sufficient evidence or information shall be provided which causes the Executive Director to believe there is a causal connection between the alleged protected activity and the disciplinary action. For purposes of this section, causal connection means such evidence or information which shows that the disciplinary action was taken in relationship to the alleged protected activity.

(c) **Sanctions.** Section 840-2.5~~(F)~~(G) of Title 74 of the Oklahoma Statutes sets out corrective actions and sanctions which may be taken for violation of this section.

(d) **Freedom of expression posting.** Each state agency, department, institution, board and commission in all branches of state government shall prominently post or publish a copy of Section 840-2.5 of Title 74 of the Oklahoma Statutes in locations where it can reasonably be expected to come to the attention of all employees [74:840-2.5~~(C)~~(D)].

455:10-3-15. Transcripts

(a) Hearings ~~and designated Alternative Dispute Resolution Program~~ procedures shall be recorded by ~~audio-tape~~ digital recordings ~~which shall constitute the official transcript.~~ The Commission's recording will serve as the official recording for purposes of creating an official written transcript. The Commission shall prepare a written transcript of the ~~audio-tape~~ recording only upon written request and receipt of a deposit of cash or cashier's check in an amount determined to be appropriate to cover the costs associated with the transcription, except as prohibited by statute.

(b) Upon application, the Commission shall pay transcription costs on behalf of an indigent respondent, if the respondent establishes indigent condition through execution of an *in forma pauperis* affidavit upon a form approved by the Commission. Should the indigent respondent receive a financial recovery, the respondent shall reimburse the Commission from those proceeds. [74:840-1.21].

(c) Any party desiring to have a hearing or Alternative Dispute Resolution Program procedure recorded by a court reporter shall request approval of the presiding official before initiating such action. The party making the request shall bear the associated expenses and costs and shall provide a copy of the written transcript to the Commission at no cost.

455:10-3-17. Continuances

A request for continuance shall be filed in writing and shall include the cause for the request and a statement of agreement or disagreement by the other party(s). A prehearing conference, hearing or Alternative Dispute Resolution Program procedure may be continued or adjourned by the Executive Director or the presiding official for just cause at any time. A continuance shall be granted only in those instances where extraordinary circumstances exist and good cause has been

shown. If granted, a continuance shall be made to a date certain.

(1) If granted on behalf of the Commission or an appellee, and the appellant is subsequently sustained in the appeal, back pay and other benefits shall be awarded for the entire ~~judgment~~ judgment as determined appropriate by the presiding official.

(2) If granted on behalf of the appellant and he or she is subsequently sustained in the appeal, back pay and other benefits shall be awarded only for the period of time that the appellant did not delay the appeal as determined appropriate by the presiding official.

SUBCHAPTER 7. INVESTIGATIONS

455:10-7-2. Directed investigation

(a) **General.** Upon receipt of a petition for appeal or on its own initiative, the Commissioners or Executive Director may direct that an investigation of any agency's employment practices be conducted. The directed investigation is a method to assist in determining whether or not a violation within the Commission's jurisdiction may have occurred. In conducting investigations, the Commission may exercise any statutory authority and may use all powers not otherwise prohibited.

(b) **Extent.** The investigation shall be conducted to the extent necessary to determine whether or not there are reasonable grounds and evidence to believe whether or not the alleged violation(s) may have occurred.

(c) **Requests for information.** The Commission may request responses or information from any agency or person. Written responses and information may be required and may be obtained through written questions, interviews or any other methods determined appropriate. The time limit for submission of responses and information may be extended for good cause.

(1) Failure of an appointing authority, agency representative, or named person to appear, respond or provide requested information may be grounds to believe the alleged violation(s) may have occurred without further review.

(2) Failure of an appellant, or his or her designated representative, to appear, respond or provide requested information shall be grounds to dismiss the appeal without further review.

(d) **Interviews.** Parties and witnesses may be interviewed face-to-face or by telephone to obtain relevant facts and knowledge concerning the issues in dispute. Interviews may be conducted at the Commission office or any other location determined appropriate. A party or witness may have his or her representative in attendance at the interview to act in an advisory role only. The representative shall not have or take an active role in the investigation or interview process.

(1) The Commission may make a record of the interview session by ~~audio-tape~~ digital recording. The person being interviewed may also tape record his or her interview session.

(2) Commission interview ~~tape~~ recordings ~~shall be maintained in the investigative file and~~ shall be confidential pursuant to Section 24A.7(A)(1) of Title 51 of the Oklahoma Statutes. The person interviewed may request a copy of the ~~audio-tape~~ recording of his or her interview in accordance with OAC 455:10-1-5.

455:10-7-4. Investigative report

An investigative report of the preliminary investigation, directed investigation or fact finding conference shall be issued and include a summary of the appeal, issues of the appeal, findings of fact and a recommendation for the disposition of the appeal. The report shall also include a reference to persons interviewed and documents used in making the findings of fact. The purpose of the report shall be to assist the Executive Director in determining whether or not a violation within the Commission's jurisdiction may have occurred. ~~An investigative report shall not be a part of the appeal record.~~

(1) A copy of the investigative report shall be issued to each party and within 10 calendar days after the issue date of the report, any party may file a response and include any additional relevant information to be considered. The time limit for response may be extended for good cause.

(2) Any party filing a response or providing additional information should provide a copy to all other parties.

455:10-7-6. Investigative file

Documents obtained during the course of a directed investigation or fact finding conference shall be maintained in an investigative file. The investigative file shall be confidential pursuant to Section 24A.7(A)(1) of Title 51 of the Oklahoma Statutes and the rules in this chapter. A party to the appeal or his or her designated representative may review the documents in the investigative file and listen to ~~audio-tape~~ a recording of his or her interview. This review shall be limited to the time between the issue date of the investigative report up to 10 calendar days after the issue date of the Determination of the Executive Director. ~~Thereafter, the investigative file shall be destroyed.~~ See OAC 455:10-1-5 for information on access to Commission records.

SUBCHAPTER 9. HEARING PROCESS

455:10-9-1. Prehearing conference

(a) **Purpose.** The Executive Director may schedule a prehearing conference on any appeal set for hearing. The conference provides an opportunity for the parties to clarify, isolate and dispose of procedural matters prior to the hearing.

(b) **Party responsibility.** Each party shall be present, on time and prepared. Failure to do so may result in dismissal of the appeal or other sanctions unless good cause is shown. Prior to the prehearing conference each party shall file with the Commission and provide to each other party and the Administrative Law Judge a copy of:

(1) a brief statement of his or her respective case, to include a list of stipulations and requested remedy;

(2) a list of any witnesses who have direct knowledge of the facts surrounding the issues of the appeal and who are expected to be called at the hearing. The list shall include a brief statement of the testimony each witness will offer. The list may be amended, with the approval of the Administrative Law Judge, before the hearing date;

(3) a list of any documents and exhibits and the original or a copy of each document or exhibit to be offered into evidence at the hearing. The list may be amended, with the approval of the Administrative Law Judge, before the hearing date;

(4) a list of any witnesses for whom a subpoena is required. The list shall include each witness's name, address and a brief statement of the testimony to be offered by each witness. Subpoenas shall not be issued by the Commission without this information. The list may be amended, with the approval of the Administrative Law Judge, up to 10 calendar days before the hearing date; and

(5) any requirements or requests for discovery. Discovery shall be requested and completed in accordance with OAC 455:10-13-1.

(c) **Representation.** Each party to the appeal may have a representative to speak and act on his or her behalf.

(d) **Administrative Law Judge responsibility.** The Administrative Law Judge shall:

(1) consider, facilitate and rule on settlement;

(2) consider any matters which will aid in the fair and prompt resolution and disposition of the appeal;

(3) hear and rule on pending requests or motions;

(4) rule on whether or not witnesses have knowledge of the facts at issue;

(5) rule on whether or not documents and exhibits are relevant;

(6) rule on whether or not discovery requests and other motions and requests are relevant;

(7) strike or deny witnesses, documents, exhibits, discovery requests and other requests or motions which are cumulative, not relevant or not material; used as a means of harassment; unduly burdensome or not timely filed.

(e) **Conference.** The conference shall be informal, structured by the Administrative Law Judge and not open to the public. The Administrative Law Judge shall record the conference by ~~audio tape~~ digital recording.

(1) **Notice.** Each party shall be notified of the date, time and location at least 7 calendar days prior to the scheduled conference.

(2) **Location.** The conference shall be conducted at the Commission offices or any other location determined appropriate.

(3) **Witnesses.** Witnesses shall not appear or present evidence at the conference.

(4) **Continuance.** A request for continuance shall be filed in accordance with OAC 455:10-3-7 normally no less than 3 calendar days prior to the scheduled conference. A lesser period of time may be permitted for good cause shown. The Administrative Law Judge, or in his or her absence, the Executive Director, shall rule on the request and in no case shall a combination of continuances of the prehearing conference exceed a total of 30 calendar days except for good cause shown.

(f) **Conclusion.** The Administrative Law Judge shall end the conference when preparation for the hearing is complete, unless sooner terminated as a result of settlement or for other just cause.

455:10-9-2. Hearing

(a) **Purpose.** The hearing provides each party the opportunity to present witnesses and evidence in support of his or her respective case for decision by an Administrative Law Judge. Hearings shall be conducted in accordance with the Oklahoma Personnel Act, the Administrative Procedures Act and the rules in this chapter.

(b) **Party responsibility.** Each party shall be present, on time and prepared. Failure to do so may result in dismissal of the appeal or other sanctions unless good cause is shown.

(c) **Representation.** Each party to the appeal may have a representative to speak and act on his or her behalf.

(d) **Administrative Law Judge responsibility.** The Administrative Law Judge shall rule on questions of admissibility of evidence, competency of witnesses and any other matters or questions of law.

(e) **Process.** The hearing shall be formal, structured by the Administrative Law Judge and open to the public. Parts of a hearing may be ordered closed when evidence of a confidential nature is to be introduced or where to do so would be in the best interests of a party, witness, the public or other affected persons. The Administrative Law Judge shall record the hearing by ~~audio tape~~ digital recording and such recording shall constitute the ~~transcript~~ official recording of the hearing.

(1) **Notice.** Each party shall be notified of the date, time and location at least 7 calendar days prior to the scheduled hearing.

(2) **Location.** The hearing shall be held at the Commission offices or any other location determined appropriate. At the prehearing conference any party may request the hearing be changed to a more convenient location. The Administrative Law Judge shall rule on the request and may change the location when to do so is in the best interests of the Commission and parties. The Administrative Law Judge shall be compensated for travel, per diem and other associated costs by the appointing authority if the location is changed at his or her request.

(3) **Witnesses.** Each party may call witnesses who have been approved by the Administrative Law Judge to offer testimony and evidence. The Administrative Law Judge shall administer an oath or affirmation to the witness and may question the witness at any stage of the hearing.

(4) **Continuance.** A request for continuance shall be filed in accordance with OAC 455:10-3-7 normally no less than 3 calendar days prior to the scheduled hearing. A lesser period of time may be permitted for good cause shown. The Administrative Law Judge shall rule on the request and in no case shall a combination of continuances of the hearing exceed a total of 30 calendar days except for good cause shown.

(f) **Burden of proof.** The following burdens of proof shall also apply to appeals heard through the Alternative Dispute Resolution Program as well as the hearing process.

(1) **Adverse action appeal.** The burden of proof shall be upon the appointing authority who must prove his or her case by a preponderance of the evidence.

(A) Upon a finding that just cause existed for the adverse action and the discipline imposed was just, a presiding official shall affirm the decision of the appointing authority.

(B) Upon a finding that just cause did not exist for the adverse action, a presiding official may order the reinstatement of the employee, with or without back pay and other benefits. A presiding official may also order that documentation of the adverse action be expunged from any and all of the employee's personnel records.

(C) Upon a finding that just cause existed for the adverse action, but did not justify the severity of the discipline imposed, a presiding official may order reduction of the discipline or other corrective action. A presiding official shall, as a minimum, consider the following circumstances in ordering the reduction of discipline: the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency; the previous employment and disciplinary records of the employee; and mitigating circumstances.

(D) A presiding official who orders reinstatement with back pay and other benefits under (B) or (C) above, may consider the deduction of any income the employee may have received for the period of time the employee was not performing his or her duties.

(2) **Alleged violation appeal.** The burden of proof shall be upon the appellant who must prove his or her case by a preponderance of the evidence. Upon a finding that a violation within the Commission's jurisdiction did occur, a presiding official may order the appointing authority to take the necessary corrective action or report the findings to any other appropriate authorities for further action. Corrective action shall be limited to issues submitted for decision, shall be consistent with applicable statutes and rules and shall be limited to action which makes the person harmed by the violation whole as if the violation had not occurred.

(3) **Payroll claim protest.** In payroll claim protests of overpayment, the burden of proof shall be upon the appointing authority who must prove his or her case by a preponderance of the evidence. In payroll claim protests of underpayment, the burden of proof shall be upon the appellant who must prove his or her case by a preponderance of the evidence. The presiding official may determine the amounts paid or not paid in error; determine dates of overpayments or underpayments; determine options available for repayment; affirm the protest of the appellant; affirm the decision of the appointing authority and order corrective action.

(g) **Order of procedure.** The party with the burden of proof shall present his or her case first and the opposing party may respond. A presiding official shall have the authority to alter the order of procedure. This order of procedure also applies to appeals heard through the Alternative Dispute Resolution Program.

(h) **Summary judgement judgment.** The Administrative Law Judge may decide appeals based on summary judgement judgment when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved.

SUBCHAPTER 11. DISCIPLINE

455:10-11-1. General

Each appointing authority shall establish written policies and procedures for progressive discipline of employees according to the rules established by the Oklahoma Merit Protection Commission [74:840-6.3(A)]. Each appointing authority is responsible for developing and maintaining a safe and productive work environment. Each appointing authority and each supervisor is responsible for promptly applying discipline when necessary that is equitable and suitable for the offense considering the circumstances.

455:10-11-4. Progressive discipline

(a) *Progressive discipline is a system designed to ensure not only the consistency, impartiality and predictability of discipline, but also the flexibility to vary penalties if justified by aggravating or mitigating conditions. Typically, penalties range from verbal warning to discharge, with intermediate levels of a written warning, suspension or demotion. Absent mitigating circumstances, repetition of an offense is accompanied by a generally automatic progression to the next higher level of discipline [74:840-6.3(B)].*

(b) Based on relevant circumstances, a single incident may justify a higher step of discipline without proceeding through lower steps of discipline.

455:10-11-14. Causes for discharge, suspension without pay or involuntary demotion

Any employee in the classified service may be discharged, suspended without pay for not to exceed sixty (60) calendar days, or demoted by the agency, department, institution, or officer by whom employed, for misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or of the rules prescribed by the Office of Personnel Management or by the Oklahoma Merit Protection Commission, conduct unbecoming a public employee, conviction of a crime involving moral turpitude, or any other just cause [74:840-6.5(C)].

455:10-11-17. Discharge

(a) **General.** A permanent classified employee may be discharged for any of the reasons set forth in OAC 455:10-11-14.

(b) **Pretermination hearing.** Before any permanent classified employee may be terminated, the employee shall be afforded a pretermination hearing to be held before the appointing authority or his or her designee. A pretermination hearing shall not be required if the employee is being terminated as part of a reduction-in-force as provided for in Title 74 O.S., Section 840-2.27C.

(1) **Purpose.** The purpose of a pretermination hearing is to provide the appointing authority or his or her designee with information from which a determination may be made as to whether or not reasonable grounds exist to believe that the charges against the employee are true and whether or not the grounds support the proposed termination.

(2) **Notice.** Notice of the pretermination hearing shall be provided to the employee by personal service or certified or registered mail at least seven calendar days before the scheduled pretermination hearing. Pending completion of this notice and the pre-termination hearing, an

employee may be suspended with pay in accordance with rules adopted by the Administrator of the Office of Personnel Management. The notice shall include, as a minimum:

(A) the statute, rule, policy, practice or procedure of work performance or behavior which was violated and cause for the proposed action;

(B) all grounds for the proposed action;

(C) a summary of evidence or physical evidence to support each of the stated grounds for the proposed action;

(D) a statement of the employee's right to be represented, by an attorney or other person of his or her choice, at the pre-termination hearing; and

(E) date, time and location of the pre-termination hearing.

(3) **Disciplinary certificate.** *The appointing authority shall file in the employee's official personnel file at least seventy-two (72) hours before each pretermination hearing, a certificate to be included in the record stating what disciplinary actions have been taken to comply with progressive discipline prior to the pretermination hearing and proposed termination and further certifying that all mandatory progressive discipline actions as required by statute or rule have been taken before pretermination hearing; provided, said certificate shall not be required where grounds for proposed termination are for commission of a criminal offense and/or acts involving moral turpitude [74:840-6.4(B)(3)].*

(4) **Hearing.** The pretermination hearing need not be a full evidentiary hearing and formal rules of evidence shall not apply. The pretermination hearing shall be recorded ~~by audio tape~~ in its entirety. The employee shall be provided a copy of the ~~tape recording~~, at no cost, if the employee appeals to the Commission and requests a copy. A copy ~~of the tape~~ shall be provided as soon as possible but no later than 14 calendar days after the request is made.

(5) **Legal review.** *Following the pretermination hearing, if recommendation for termination is made, recordings of the pretermination hearing and all evidence in support thereof, shall be reviewed for legal sufficiency by the appointing agency director or his or her designee before termination is final [74:840-6.4(B)(7)].*

(c) **Final action.** Within ten working days after the pretermination hearing the employee shall be provided written notice of the final action, by personal service or certified or registered mail. If the decision is made to proceed with the termination, the notice shall include, as a minimum:

(1) the statute, rule, policy, practice or procedure regarding work performance or behavior which was violated and cause for the termination;

(2) all grounds for the termination;

(3) a citation of the law or rule under which the termination is being taken;

(4) effective date of the termination;

(5) a citation of any other informal or formal discipline which was used in the decision to administer the termination; and

(6) a statement of the employee's right to file an appeal with the Commission, the 20 calendar day time limit for the Commission's receipt of the appeal and the address of the Commission; and

(7) a copy of the Commission's petition for appeal form.

SUBCHAPTER 15. ATTORNEY FEES AND COSTS

455:10-15-4. Request

A request for the award of attorney fees or costs shall be filed with the Commission within 10 calendar days after the issue date of the final decision and shall include an affidavit of service

to all other parties. This time limit is statutory and may not be extended [74:840-6.8(B)].

(1) **Grounds.** The request shall specifically state why an award of attorney fees or costs should be made and shall be supported by evidence to substantiate the request and evidence to determine whether or not the amount claimed is reasonable.

(2) **Evidence.** Evidence submitted with the request shall include, as a minimum:

(A) adequate time records so the reasonableness of the claimed fee can be ascertained;

(B) a copy of any fee agreement between the attorney and the client or any fee agreement between the attorney and any organization, union or association representing the client;

(C) the attorney's customary billing rate for similar work, provided the attorney has a billing practice to report;

(D) evidence of the prevailing community rate sufficient to establish a market value for the services rendered;

(E) specific evidence of the prevailing rate for similar work of attorneys of comparable experience and reputation; and

(F) specific detailed documentation identifying the actual costs associated with the request.

(3) **Response.** Any party may file a response in opposition to the request within 10 calendar days after the date the request is filed with the Commission. The response shall include an affidavit of service to all other parties. This time limit is statutory and may not be extended [74:840-6.8(B)].

(4) **Rejection.** Requests and responses which are not timely filed or do not meet the requirements of this section shall be rejected by the Commission.

SUBCHAPTER 19. INTERNAL AGENCY GRIEVANCE RESOLUTION PROCEDURE

PART 1. GENERAL PROVISIONS

455:10-19-1. General

The Oklahoma Merit Protection Commission shall establish standard internal agency grievance resolution procedures for classified state employees [74:840-6.2(A)]. It is the Commission's policy to seek resolution of disputes at the lowest level possible. The Commission will not normally intervene when the issues in dispute are being addressed through the internal agency grievance resolution procedure.

PART 5. GRIEVANCE PROVISIONS

455:10-19-35. Grievance

(a) **General.** The resolution of disputes is advocated within the agency before appeals are filed with the Commission.

(b) **Promotion.** Any employee who feels that he or she has not been treated fairly with regard to a promotional action has the right to file a formal grievance. The Commission will accept an appeal regarding a promotional issue only after such complaint has been reviewed in the formal grievance procedure [74:840-4.15(C)].

(c) **Classification.** *An employee has the right and responsibility to file a classification grievance, as provided by law and rule, when duties performed on a regular and consistent basis do not conform to the class specification [74:840-4.3(B)].*

(1) *Employees shall be classified in accordance with the work they are assigned on a regular*

and consistent basis as an integral part of their normal work assignment and class specification [74:840-4.3(B)]. Any employee who believes he or she is not classified in accordance with the work assigned on a regular and consistent basis as an integral part of his or her work assignment and job family descriptor, has the right to file a formal grievance.

(2) An employee is entitled to the compensation assigned to the job family descriptor for which duties were performed on a regular and consistent basis as determined by the Office of Personnel Management [74:840-4.3(B)]. Any employee who believes he or she is entitled to compensation for having performed duties on a regular and consistent basis which do not conform to the job family descriptor for the position he or she occupies or occupied, has the right to file a formal grievance.

(3) The appointing authority and employee shall attempt to resolve these disputes through the formal grievance procedure.

(4) If the dispute can not be resolved, the resolution decision by the appointing authority shall be to advise the employee to complete an Office of Personnel Management (OPM) Classification or Allocation Dispute Review Request form (OPM-70) pursuant to rules adopted by the Administrator of the Office of Personnel Management.

(5) Agency classification and reclassification decisions shall not be subject to appeal to the Oklahoma Merit Protection Commission. However, the involuntary removal of a permanent employee in permanent status in a job family level to a lower level in the same job family or to another job family level assigned a lower pay band shall be considered a demotion. Such action may be appealed by the employee to the Oklahoma Merit Protection Commission [74:840-4.3(B)]. An employee may allege a violation of law or rule over which the Commission has jurisdiction in the classification and reclassification process pursuant to OAC 455:10-3-3.

(d) Discipline. Any employee who has reason to believe that discipline imposed was not uniform, appropriate or in compliance with the agency progressive discipline policy, has the right to file a formal grievance. The Commission will accept an appeal regarding a discipline issue (except suspension without pay, involuntary demotion or discharge) only after such complaint has been reviewed in the formal grievance procedure.

(e) Leave. Any employee who feels that he or she has not been treated fairly with regard to annual, sick or any other leave accrual, accumulation, use or eligibility (including leave without pay and leave sharing), has the right to file a formal grievance. The Commission will accept an appeal regarding leave issues only after such complaint has been reviewed in the formal grievance procedure.

(f) Employee service rating system. Any employee who disagrees with his or her individual service rating has the right to file a formal grievance.

(1) The Commission will accept, for alternative dispute resolution only, a complaint involving disagreement with the individual service rating only after such complaint has been reviewed in the formal grievance procedure.

(2) The Commission will accept an appeal of alleged violation of the Oklahoma Personnel Act or Merit Rules in regard to the employee service rating system only after such complaint has been reviewed in the formal grievance procedure.

(3) Alleged violations of Title 74 O.S., Section 840-2.5 and Section 840-2.9 in regard to the employee service rating system may be appealed directly to the Commission.

(g) Discrimination. Complaints of illegal discrimination, including sexual harassment, are subject to the internal agency grievance resolution procedure. The appointing authority may adopt special procedures for addressing and resolving discrimination complaints. Any such procedures shall comply with federal laws and rules, the Oklahoma Personnel Act and the rules

in this subchapter.

(h) **Pay movement mechanisms and other compensation issues.** Any employee who feels that a violation of law, rule, policy or practice has occurred with regard to pay movement mechanisms or other compensation issues, has the right to file a formal grievance. The Commission will accept an appeal regarding pay movement mechanisms and other compensation issues only after such complaint has been reviewed in the formal grievance procedure.