

**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 Hearing Officer"**~~ **"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 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 formal 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 ~~Hearing Officer~~ 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 formal 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 ~~Hearing Officer~~ Law Judge or Executive Director with the parties to identify the issues, documents, witnesses and motions which will guide the Administrative ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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**" 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.

455:10-1-7. 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 requests, submissions and other communications to the Commission is: Oklahoma Merit Protection Commission, ~~310 NE 28th Street, Suite 201~~ 201 NE 38th Terrace, Suite 5, Oklahoma City, Oklahoma 73105, (405) 525-9144. The Commission's fax number is (405) 528-6245.

(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.

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

455:10-1-10. Forms and instructions

Other chapters in this Title contain references to forms and 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.

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. ~~If any of the jurisdictional requirements are not met, the appellant and the appointing authority shall be notified.~~ 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, not the date it is faxed, 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.

455:10-3-3. Alleged violations of the Oklahoma Personnel Act or Merit Rules

Any person who believes that his or her rights under any law or rule over which the Commission has jurisdiction have been violated may file a petition for appeal with the Commission within the time limits specified in OAC 455:10-3-1.1(1). Pursuant to OAC 455:10-19-35, the Commission shall accept appeals regarding ~~alleged violations of promotion~~ promotional issues, pay movement mechanisms or compensation issues, discipline issues (except discharge, suspension without pay and involuntary demotion), leave issues and the employee service rating system issues only after such issues have been filed and addressed through the internal agency grievance procedure. For further information on these specific issues and the internal agency grievance procedure see OAC 455:10-19. All other issues, including illegal discrimination (Merit Rule 455:10-3-5) and whistleblower (Merit Rule 455:10-3-6) may be filed directly with the Commission.

455:10-3-5. Discrimination

(a) No person in the state service, whether subject to the provisions of the Merit System or in unclassified service, shall be appointed to, demoted or dismissed from any position in the state service, or in any way favored, harassed or discriminated against with respect to employment because of political or religious opinions or affiliations, race, creed, gender, color, ancestry, national origin or by physical handicap so long as the physical handicap does not make the person unable to do the work for which employed [74:840-2.9].

(b) No agency, department, institution board or employee shall:

- (1) separate or refuse to employ any person otherwise qualified on account of age, political or religious opinions or affiliations, race, creed, gender, color, ancestry, national origin or by handicap;
- (2) discriminate for the same reasons in regard to tenure, terms or conditions of employment;
- (3) deny promotion or increase in compensation solely for these reasons;
- (4) publish an offer of employment based on such discrimination;
- (5) adopt or enforce any rule or employment policy which so discriminates as to any employee;
- (6) seek such information as to any applicant or employee [this does not preclude information sought in accordance with any other federal or state statute];

(7) discriminated in the selection of personnel for training solely on such basis [74:954].

(c) ~~For purposes of this section, disparate treatment means treatment which occurs whenever similarly situated persons are treated differently in a similar employment situation.~~

(d) The Commission may use the guidelines for reviewing discrimination complaints as used by the Equal Employment Opportunity Commission (EEOC) and may review court decisions and federal statutes, to include but not limited to, such statutes as the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act, as amended and the Civil Rights Act of 1991.

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)]. 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;
- (2) Reporting any violation of 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 [74:840-2.5(A)]. For purposes of this section only, "others" means persons with authority to take corrective action on the issues discussed.

(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 protected activity or disciplinary action [74:840-2.5(E)]. 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 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) 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) 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, ~~including all institutions in The Oklahoma State System of Higher Education,~~ 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)].

455:10-3-12. Settlement of appeals

Settlement discussions are appropriate and encouraged at any stage of the appeal process. The parties may elect to enter into settlement discussions on their own or through mediation. If settlement is reached and endorsement of the Commission is requested, the agreement shall be put into writing and signed by all parties or representatives. The agreement shall be filed with the Commission and shall be reviewed and approved before dismissal of the appeal will be entertained. If approved, the Commission shall retain jurisdiction to enforce the terms of the agreement over which the Commission has jurisdiction and the agreement shall become part of the record.

SUBCHAPTER 7. INVESTIGATIONS

455:10-7-1. Preliminary investigation

(a) A preliminary investigation shall be conducted upon receipt of a petition for appeal to determine through review of any content in the petition for appeal and attachments: jurisdiction, issues of the appeal, parties to the appeal and whether or not there is evidence to support the allegations.

(b) Clarification of the appeal may be obtained through written questions, interviews or any other methods determined appropriate. Failure of the appellant to appear, respond or provide requested information shall be grounds to dismiss the appeal without further review.

(c) If jurisdictional requirements are not met or if the appellant has not provided evidence to support the allegations, ~~he or she~~ the parties shall be sent a ~~letter of proposed dismissal action~~ copy of the investigative report which shall describe why ~~the~~ proposed dismissal action is being recommended. ~~The appellant~~ Any party may respond, in writing, and provide any additional information within the time limits established for receipt of such information. The time limit for response may be extended for good cause.

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 ~~any~~ persons interviewed and ~~any~~ 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.

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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ Law Judge responsibility.** The Administrative ~~Hearing Officer~~ 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 ~~Hearing Officer~~ Law Judge and not open to the public. The Administrative ~~Hearing Officer~~ Law Judge shall record the conference by audio tape 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 455:10-3-17 normally no less than ~~5~~ 3 calendar days prior to the scheduled conference. A lesser period of time may be permitted for good cause shown. The Administrative ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ Law Judge responsibility.** The Administrative ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ Law Judge shall record the hearing by audio tape recording and such recording shall constitute the transcript 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ 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 ~~Hearing Officer~~ Law Judge to offer testimony and evidence. The Administrative ~~Hearing Officer~~ 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 455:10-3-17 normally no less than 5 3 calendar days prior to the scheduled hearing. A lesser period of time may be permitted for good cause shown. The Administrative ~~Hearing Officer~~ 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 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 judgment.** The Administrative Law Judge may decide appeals based on summary 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.

455:10-9-3. Affidavits

(a) This section shall not limit the authority of the Commission to compel any witness to appear and offer testimony. Upon written request and approval by the Administrative ~~Hearing Officer~~ Law Judge an affidavit may be used when a witness or party is unable to attend or testify because of age, illness, infirmity, imprisonment or other good reason.

(b) This section shall also apply to the taking of affidavits through the Alternative Dispute Resolution Program procedures.

455:10-9-4. Closing the record

The record shall be closed when each party has had an opportunity to be heard and present evidence. If the final decision is based on summary judgment or if the Administrative ~~Hearing Officer~~ Law Judge requires the parties to submit briefs or additional information, the record shall be closed on the date established for the receipt of submissions. Once the record is closed, no additional evidence or arguments shall be considered. This section shall also apply to the closing of a record through the Alternative Dispute Resolution Program procedures.

455:10-9-5. Decisions

The Administrative ~~Hearing Officer~~ Law Judge shall file a final decision with the Commission within 10 calendar days after the record is closed. The final decision shall include findings of fact and conclusions of law, written in clear and concise language.

(1) The Executive Director shall issue the final decision to each party, by personal service or certified mail, within 5 calendar days after receipt.

(2) The decision of the Administrative ~~Hearing Officer~~ Law Judge shall be final and conclusive except as provided in the Administrative Procedures Act and OAC 455:10-3-20.

SUBCHAPTER 11. DISCIPLINE

455:10-11-2. Purpose

The rules in this subchapter provide standards and guidelines for applying prompt, equitable and suitable discipline. These rules pertain to probationary and permanent classified employees unless otherwise specified by law or the rules in this subchapter. ~~An appointing authority may elect to use the procedures to address discipline of other employees.~~

455:10-11-9. Statistics

- (a) The appointing authority shall maintain statistical information about the number and nature of formal disciplinary actions.
- (b) The appointing authority shall provide to the Commission, on a fiscal year basis, a discipline report containing the following information:
 - (1) the number of formal disciplinary actions taken, by type of discipline;
 - (2) the pay band, sex and race of each employee receiving formal discipline.
- (c) The discipline report for the previous fiscal year shall be filed with the Commission no later than August 1 of each year.
- (d) Appointing authorities ~~who fail to provide statistical information shall be reported as having had no disciplinary actions for the agency during the fiscal year the report was due~~ shall submit a report even if no disciplinary actions occurred during the relevant time period.

SUBCHAPTER 17. ALTERNATIVE DISPUTE RESOLUTION

455:10-17-1. Purpose, use and scope of Alternative Dispute Resolution Program

- (a) **General.** *The Oklahoma Merit Protection Commission shall establish and maintain a mandatory Alternative Dispute Resolution Program and shall adopt and promulgate such rules as may be necessary for the implementation and management of the program* ~~{74:841.13C(A)}~~ [74:840-6.1(A)] .
- (b) **Purpose.** *A purpose of the Alternative Dispute Resolution Program is to provide an economical means and access to effective alternative dispute resolution services to all state agencies and employees* ~~{74:841.13C(B)}~~ [74:840-6.1(B)] . Alternative Dispute Resolution (ADR) gives state agencies, employees and applicants for state employment an alternate means to resolve appeals, disputes and conflicts. ADR affords the parties to an appeal the same equity and impartiality as the hearing process while offering faster, less costly and more flexible ways to resolve disputes. ADR is designed for laypeople (people who are not attorneys) to use.
- (c) **Use.** *The Oklahoma Merit Protection Commission may require employees and agencies to utilize the Alternative Dispute Resolution Program to resolve disputes brought before the Commission pursuant to Sections* ~~841.13~~ 840-6.5 *and* ~~841.15~~ 840-6.6 *of Title 74 of the Oklahoma Statutes* ~~{74:841.13C(C)}~~ [74:840-6.1(C)] . The Executive Director shall determine if ADR is appropriate to resolve any appeal. In making the decision to use ADR, the types of issues to be decided,

applicable laws and rules, time factors, the efficient and timely resolution of the appeal, Commission resources and costs and party interests shall be considered.

(d) **Processes.** The negotiation conference shall be considered an appropriate procedure to seek the resolution of any appeal. Thereafter, ADR shall:

(1) not automatically be considered for an adverse action appeal from a permanent classified employee of discharge, suspension without pay of 4 calendar days or more or involuntary demotion. After If settlement is not reached at the negotiation conference, such appeals shall be set for prehearing conference and hearing before an Administrative Law Judge. This shall not preclude the employee or the agency from requesting the appeal be resolved through further ADR.

(2) not automatically be considered for an alleged violation appeal in which a determination has been made that a violation of Title 74 O.S., Section ~~841.7~~ 840-2.5, commonly known as the "Whistleblower statute", may have occurred. After If settlement is not reached at the negotiation conference, such appeals shall be set for prehearing conference and hearing before an Administrative Law Judge. This shall not preclude a party to the appeal from requesting the appeal be resolved through further ADR.

(3) be considered appropriate to resolve an adverse action appeal from a permanent classified employee of suspension without pay of 3 calendar days or less.

(4) be considered appropriate to resolve a payroll claim protest.

(5) be considered appropriate to resolve all other alleged violation appeals in which a determination has been made a violation within the Commission's jurisdiction may have occurred.

(e) **Party request.** Any party to an appeal may request the appeal be resolved through ADR and may also request a particular procedure be used. The decision as to the resolution method and which particular procedure shall be used rests with the Executive Director.

455:10-17-2. Alternative Dispute Resolution advantages

There are many advantages to ADR. The advantages generally recognized are the economics of time and money; the expertise of a neutral ~~third-party~~ facilitator; confidentiality; the opportunity for a "day in court"; the direct involvement of the parties involved and the preservation of working relationships.

(1) **Time and money.** The advantage of saving time and money is the most alluring. For example, resolving within weeks differences arising out of ordinary employment transactions, as opposed to months of legal litigation, obviously produces savings. Legal costs are reduced. The time necessary for an employee or agency to continually monitor the problem is eliminated and the aggravation flowing from unresolved problems is eliminated.

(2) ~~Third party facilitator~~ **Facilitator.** The expertise of a neutral ~~third-party~~ facilitator is an advantage that cannot be ignored. A facilitator has hands-on experience on the issues in dispute and has been trained by the Commission. The facilitator can get to and address the issues in dispute without legal perspectives.

(3) **Confidentiality.** The advantage of a confidential procedure is often overlooked. Problems of adverse publicity and the element of embarrassment over the dispute can be avoided.

(4) **Day in court.** ADR affords the parties an opportunity to tell their side of the dispute. The parties have their "day in court" which allows their anger and emotions to subside and the healing

process to begin.

(5) **Direct involvement.** ADR allows agency supervisors and managers to become involved more quickly in settling disputes. Often the dispute is between employees, supervisors and managers who have an ongoing working relationship. The preservation of this relationship is beneficial to everyone and an early resolution of the dispute is highly desirable.

455:10-17-3. Negotiation conference

(a) **General.** The negotiation conference provides an opportunity for the parties to present and discuss settlement with each other and a neutral ~~third-party~~ Alternative Dispute Resolution Program (ADRP) facilitator in order to resolve the issues of an appeal. The parties may discuss, negotiate and settle any differences or issues in reaching a resolution of the appeal. The Executive Director may schedule a negotiation conference:

- (1) on an alleged violation appeal, after a determination has been made a violation within the Commission's jurisdiction may have occurred;
- (2) on a payroll claim protest, after a properly filed protest has been presented to the Commission;
- or
- (3) on an adverse action appeal, after a determination has been made the appeal is timely filed and the Commission has jurisdiction.

(b) **Party responsibility.** Each party shall be present and on time. Failure to do so may result in dismissal of the appeal or other sanctions unless good cause is shown. Each party is expected to negotiate in good faith, without time constraints, and put forth his or her best efforts with the intention to settle, if possible. Even if the parties do not reach a complete settlement, they may reach agreement on various issues.

- (1) Each party to the appeal shall speak for himself or herself.
- (2) The appointing authority may name a spokesperson to speak and act on behalf of the agency. The spokesperson shall have knowledge of the incidents surrounding the appeal and shall have settlement authority. The appointing authority shall not name a legal representative to act in this capacity unless the legal representative has knowledge of the incidents surrounding the appeal.

(c) **Party submissions.** At the conference each party shall provide to the ADRP facilitator a copy of a proposed settlement offer.

(d) **Representation.** Each party to the appeal may have a representative accompany him or her to the conference to act in an advisory role only. A representative shall not be allowed to interrogate or question any party and shall not otherwise have or take an active role in the conference.

(e) **Facilitator.** The ADRP facilitator shall:

- (1) take an active role in the conference to aid the parties in the discussion of settlement and resolution of the appeal;
- (2) have the flexibility to adapt the conference to the situation at hand;
- (3) have the authority to require any party to produce documents for review at the conference if to do so will aid in the discussion of settlement and resolution of the appeal. Documents produced and reviewed at the conference shall not become part of the appeal record at that time; and
- (4) terminate the conference because of the disruptive behavior or conduct of a party or representative and may order sanctions if appropriate.

- (5) not be assigned to preside over any further ADR procedures on the same matter.
- (f) **Conference.** The conference shall be informal, structured by the ADRP facilitator, and not open to the public. The conference shall be a confidential procedure and shall not be filmed or taped.
- (1) **Notice.** At least 7 calendar days before the scheduled conference, the Commission shall notify the parties of the date, time and location of the conference.
 - (2) **Location.** The conference shall be held at the Commission office or any other location determined appropriate.
 - (3) **Witnesses.** Witnesses shall not appear or give testimony at the conference.
 - (4) **Caucus.** The ADRP facilitator may call a caucus at any stage of the conference.
 - (5) **Continuance.** A request for continuance shall normally be filed in writing no less than 3 calendar days before the scheduled negotiation conference date accordance with OCA 455:10-3-17. A less period of time may be permitted for good cause shown.
 - (A) The Executive Director shall rule on the request and shall grant a request only in those instances where extraordinary circumstances exist and good cause has been shown.
 - (B) A continuance shall be granted to a date certain and in no case shall a combination of continuances of the negotiation conference exceed a total of 30 calendar days except for good cause shown.
- (g) **Agreement.** If agreement between the parties is reached, it shall be reduced to writing and signed by each party and the ADRP facilitator. The agreement shall be reviewed and approved by the ~~Commission~~ Executive Director before dismissal of the appeal shall be entertained. If approved, the Commission shall retain jurisdiction to enforce the terms of the agreement over which the Commission has jurisdiction. The agreement shall become part of the appeal record.
- (h) **Conclusion.** The ADRP facilitator shall end the negotiation conference when an agreement is reached and reduced to writing. If an agreement is not reached, the ADRP facilitator shall end the conference when he or she determines settlement is not possible, unless sooner terminated for just cause. If agreement is not reached:
- (1) an adverse action appeal of a discharge, involuntary demotion or suspension without pay of 4 calendar days or more, shall continue on for a prehearing conference and hearing.
 - (2) an alleged violation appeal, payroll claim protest or adverse action appeal of a suspension without pay of 3 calendar days or less shall continue on for a preparation conference and further ADRP procedures.

455:10-17-4. Preparation conference

- (a) **General.** The Executive Director may schedule a preparation conference on any appeal set for Alternative Dispute Resolution. The preparation conference provides an opportunity for the parties to discuss and present their respective cases with each other and ~~a neutral third party~~ an Alternative Dispute Resolution Program (ADRP) facilitator in order to clarify, isolate and dispose of procedural issues before any further ADRP procedure. The Executive Director may schedule a preparation conference after a negotiation conference and before any other ADR procedure is used.
- (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 preparation

conference each party shall file the original with the Commission and provide to the ADRP facilitator and each other party a copy of:

- (1) a brief statement of his or her respective case, to include a list of what he or she will agree to and the remedy he or she is seeking;
- (2) a list of witnesses who have direct knowledge of the facts surrounding the issues in dispute. The list shall include a brief statement of the testimony each witness has to offer;
- (3) a list of those witnesses and the address for each witness for whom a subpoena is required;
- (4) a list of documents associated with the issues in dispute. The original or a copy of each document shall be attached to the list; and
- (5) any requirements for discovery.

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

(d) **Facilitator.** The ADRP facilitator shall:

- (1) take an active role in the conference and maintain neutrality and impartiality at all time;
- (2) have the flexibility to adapt the conference to the situation at hand;
- (3) consider any matters which will aid in the fair and prompt resolution and disposition of the appeal, including settlement;
- (4) rule on whether witnesses have direct knowledge of the issues in dispute;
- (5) rule on whether documents are directly related to the issues in dispute;
- (6) rule on whether discovery requests or other requests or motions are relevant;
- (7) strike or deny witnesses, documents, discovery requests or any other requests or motions if they are:
 - (A) cumulative, not relevant or not material;
 - (B) used as a means of harassment;
 - (C) unduly burdensome; and
 - (D) not timely filed.
- (8) terminate the conference for the disruptive behavior or conduct of a party or representative; and
- (9) prepare a preparation conference order which shall record the actions taken and any agreements reached. The preparation conference order shall control the subsequent course of any further ADRP procedure.

(e) **Conference.** The preparation conference shall be informal, structured by the ADRP facilitator and not open to the public. The ADRP facilitator shall record the conference by audio tape recording.

- (1) **Notice.** At least 7 calendar days before the scheduled conference, the Commission shall notify the parties of the date, time and location of the conference.
- (2) **Location.** The conference shall be conducted at the Commission office or any other location determined appropriate.
- (3) **Witnesses.** Witnesses shall not appear or give testimony at the conference.
- (4) **Continuance.** A request for continuance shall normally be filed in writing no less than 3 calendar days before the scheduled conference date accordance with OAC 455:10-3-17. A lesser period of time may be permitted for good cause shown.

(A) The ADRP Facilitator shall rule on the request and shall grant a request only in those instances where extraordinary circumstances exist and good cause has been shown.

(B) A continuance shall be granted to a date certain and in no case shall a combination of continuances of the preparation conference exceed a total of 30 calendar days except for good cause shown.

(f) Conclusion.

(1) The ADRP facilitator shall end the preparation conference when preparation procedures are completed, unless sooner terminated for other just cause.

(2) The ADRP facilitator may provide the Executive Director any other relevant information to assist in the disposition of the case.

455:10-17-5. Summary conference

(a) **General.** The summary conference provides an opportunity for each party to present oral argument (explanation) and offers of proof (documentation), in a limited amount of time, of his or her respective case for decision by a ~~neutral third party~~ an Alternative Dispute Resolution Program (ADRP) facilitator or a panel of ~~neutral third party~~ ADRP facilitators. Proof is presented, but no formal rules of evidence apply. The Executive Director may schedule a summary conference after a preparation conference.

(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 accompany him or her to the conference to speak and act on his or her behalf.

(d) **Facilitator.** The Executive Director may assign a single ~~neutral third party~~ ADRP facilitator or a panel of three ~~neutral third party~~ ADRP facilitators. If the Executive Director assigns a panel, he or she shall name a chair ADRP facilitator who shall be responsible for administrative matters. The ADRP facilitator(s) shall:

(1) take an active role in the conference to determine the facts and maintain neutrality and impartiality at all times;

(2) have the flexibility to adapt the conference to the situation at hand;

(3) consider any matters which will aid in the fair and prompt resolution and disposition of the appeal, including settlement;

(4) provide each party an opportunity to explain and present documents in support of his or her respective case;

(5) rule on the relevancy of evidence; and

(6) terminate the conference because of the disruptive behavior or conduct of a party or representative.

(e) **Conference.** The conference shall be informal, structured by the ADRP facilitator(s) and open to the public. The conference shall be recorded by audio tape recording.

(1) **Notice.** At least 7 calendar days before the scheduled conference, the Commission shall notify the parties of the date, time and location of the conference.

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

- (3) **Witnesses.** Witnesses shall not appear or give testimony at the conference.
- (4) **Time.** Each party shall be limited to no more than 2 hours for the presentation of his or her case.
- (5) **Record of documents.** The ADRP facilitator(s) shall maintain a record of documents to reflect all documents submitted at the conference as offers of proof (documentation).
- (6) **Continuance.** A request for continuance shall normally be filed in writing no less than 3 calendar days before the scheduled summary conference date in accordance with OAC 455:10-3-17. A lesser period of time may be permitted for good cause shown.
 - (A) The ADRP facilitator(s), or in his or her absence, the Executive Director, shall rule on the request and shall grant a request only in those instances where extraordinary circumstances exist and good cause has been shown.
 - (B) A continuance shall be granted to a date certain and in no case shall a combination of continuances of the summary conference exceed a total of 30 calendar days except for good cause shown.
- (7) **Closing.** The ADRP facilitator(s) shall close the conference after each party has presented his or her case, unless sooner terminated for other just cause.
- (f) **Proposed order.** The ADRP facilitator(s) shall file a proposed order with the Commission within 10 calendar days after the conference is closed. The proposed order shall include findings of fact and conclusions of law. Findings of fact shall be written in clear and concise language.
 - (1) The Executive Director shall issue the proposed order to the parties within 5 calendar days after the proposed order is filed.
 - (2) Within 10 calendar days after the issue date of the proposed order, any party may file a response and include any additional relevant information for consideration by the ADRP facilitator(s). The time limit may be extended for good cause.
 - (3) Any party filing a response or providing additional relevant information should provide a copy to all other parties.
- (g) **Final order.** The ADRP facilitator(s) shall review the available relevant evidence, including but not limited to, the petition for appeal, oral arguments (explanations), offers of proof (documentation), the proposed order, any responses and additional relevant information filed in response to the proposed order, and applicable laws and rules.
 - (1) Within 10 calendar days after the time limit for receipt of responses to the proposed order, the ADRP facilitator(s) shall file a final order with the Commission. The final order shall include findings of fact and conclusions of law. Findings of fact shall be written in clear and concise language.
 - (2) The Executive Director shall issue the final order to the parties within 5 calendar days after the final order is filed.
 - (3) The final order shall be final and conclusive except as provided in the Administrative Procedures Act and this Chapter.

455:10-17-6. Binding Arbitration conference

- (a) **General.** The binding arbitration conference provides an opportunity for each party to present

witnesses and evidence in support of his or her respective case for decision by ~~a neutral third party~~ an Alternative Dispute Resolution Program (ADRP) facilitator or a panel of ~~neutral third parties~~ ADRP facilitators. Proof is presented but no formal rules of evidence apply. The Executive Director may schedule a binding arbitration conference after a preparation conference.

(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 accompany him or her to the conference to speak and act on his or her behalf.

(d) **Facilitator.** The Executive Director may assign a single ~~neutral third party~~ ADRP facilitator or a panel of three ~~neutral third party~~ ADRP facilitators. If the Executive Director assigns a panel, he or she shall name a chair ADRP facilitator who shall be responsible for administrative matters. The ADRP facilitator(s) shall:

- (1) take an active role in the conference to determine the facts and maintain neutrality and impartiality at all times;
- (2) have the flexibility to adapt the conference to the situation at hand;
- (3) consider any matters which will aid in the fair and prompt resolution and disposition of the appeal, including settlement;
- (4) provide each party an opportunity to present his or her case;
- (5) rule on whether witnesses, documents, requests or motions are relevant; and
- (6) terminate the conference because of the disruptive behavior or conduct of a party or representative.

(e) **Conference.** The conference shall be informal, structured by the ADRP facilitator(s) and open to the public. The conference shall be recorded by audio tape recording.

(1) **Notice.** At least 7 calendar days before the scheduled conference, the Commission shall notify the parties of the date, time and location of the conference.

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

(3) **Witnesses.** Witnesses shall not be present during the conference except when giving testimony. The ADRP facilitator(s) shall put the witness under oath or affirmation and may ask questions of the witness at any point.

(4) **Record of documents.** The ADRP facilitator(s) shall maintain a record of documents to reflect all documents submitted at the conference as exhibits.

(5) **Record of witnesses.** The ADRP facilitator(s) shall maintain a record of witnesses to reflect all witnesses called and giving testimony at the conference.

(6) **Continuance.** A request for continuance shall normally be filed in writing no less than 5 calendar days before the scheduled binding arbitration conference date in accordance with OAC 455:10-3-17. A lesser period of time may be permitted for good cause shown.

(A) The ADRP facilitator(s), or in his or her absence, the Executive Director, shall rule on the request and shall grant a request only in those instances where extraordinary circumstances exist and good cause has been shown.

(B) A continuance shall be granted to a date certain and in no case shall a combination of

continuances of the binding arbitration conference exceed a total of 30 calendar days except for good cause shown.

(7) **Closing.** The ADRP facilitator(s) shall close the conference after each party has presented his or her case, unless sooner terminated for other just cause.

(f) **Proposed order.** The ADRP facilitator(s) shall file a proposed order with the Commission within 10 calendar days after the conference is closed. The proposed order shall include findings of fact and conclusions of law. Findings of fact shall be written in clear and concise language.

(1) The Executive Director shall issue the proposed order to the parties within 5 calendar days after the proposed order is filed.

(2) Within 10 calendar days after the issue date of the proposed order, any party may file a response and include any additional relevant information for consideration by the facilitator. The time limit may be extended for good cause.

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

(g) **Final order.** The ADRP facilitator(s) shall review the available relevant evidence, including but not limited to, the petition for appeal, evidence submitted at the conference, the proposed order, any responses and additional relevant information filed in response to the proposed order, and applicable laws and rules.

(1) Within 10 calendar days after the time limit for receipt of responses to the proposed order, the ADRP facilitator(s) shall file a final order with the Commission. The final order shall include findings of fact and conclusions of law. Findings of fact shall be written in clear and concise language.

(2) The Executive Director shall issue the final order to the parties within 5 calendar days after the final order is filed.

(3) The final order shall be final and conclusive except as provided in the Administrative Procedures Act and this Chapter.

455:10-17-7. Non-binding arbitration conference

(a) **General.** The non-binding arbitration conference provides an opportunity for each party to present witnesses and evidence in support of his or her respective case for decision by ~~a neutral third party~~ an Alternative Dispute Resolution Program (ADRP) facilitator or a panel of ~~neutral third party~~ ADRP facilitators. Proof is presented but no formal rules of evidence apply. The Executive Director may schedule a non-binding arbitration conference after a preparation conference.

(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.

(1) Each party to the appeal shall speak for himself or herself.

(2) The appointing authority may name a spokesperson to speak and act on behalf of the agency. The spokesperson shall have direct knowledge of or involvement in the incidents surrounding the appeal. The appointing authority shall not name a legal representative to act in this capacity unless the legal representative has direct knowledge of or involvement in the incidents surrounding the appeal.

(c) **Representation.** Each party to the appeal may have a representative accompany him or her to the

conference to act in an advisory role only. A representative shall not be allowed to interrogate or question any party or witness and shall not otherwise have or take an active role in the conference.

(d) **Facilitator.** The Executive Director may assign a single ~~neutral third party~~ ADRP facilitator or a panel of three ~~neutral third party~~ ADRP facilitators. If the Executive Director assigns a panel, he or she shall name a chair ADRP facilitator who shall be responsible for administrative matters. The ADRP facilitator(s) shall:

- (1) take an active role in the conference to determine the facts and maintain neutrality and impartiality at all times;
- (2) have the flexibility to adapt the conference to the situation at hand;
- (3) consider any matters which will aid in the fair and prompt resolution and disposition of the appeal, including settlement;
- (4) provide each party an opportunity to present his or her case;
- (5) rule on whether witnesses, documents, requests or motions are relevant; and
- (6) terminate the conference because of the disruptive behavior or conduct of a party or representative.

(e) **Conference.** The conference shall be informal, structured by the ADRP facilitator(s) and open to the public. The conference shall be recorded by audio tape recording. Court reporters shall not normally be appropriate to record the conference.

(1) **Notice.** At least 7 calendar days before the scheduled conference, the Commission shall notify the parties of the date, time and location of the conference.

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

(3) **Witnesses.** Witnesses shall not be present during the conference except when giving testimony. The ADRP facilitator(s) shall put the witness under oath or affirmation and may ask questions of the witness at any point.

(4) **Record of documents.** The ADRP facilitator(s) shall maintain a record of documents to reflect all documents submitted at the conference as exhibits.

(5) **Record of witnesses.** The ADRP facilitator(s) shall maintain a record of witnesses to reflect all witnesses and giving testimony at the conference.

(6) **Continuance.** A request for continuance shall normally be filed in writing no less than 3 calendar days before the scheduled non-binding arbitration conference date in accordance with OAC 455:10-3-17. A lesser period of time may be permitted for good cause shown.

(A) The ADRP facilitator(s), or in his or her absence, the Executive Director, shall rule on a request and shall grant a request only in those instances where extraordinary circumstances exist and good cause has been shown.

(B) A continuance shall be granted to a date certain and in no case shall a combination of continuances exceed a total of 30 calendar days except for good cause shown.

(7) **Closing.** The ADRP facilitator(s) shall close the conference after each party has presented his or her case, unless sooner terminated for other just cause.

(f) **Proposed order.** The ADRP facilitator(s) shall file a proposed order with the Commission within 10 calendar days after the conference is closed. The proposed order shall include findings of fact and

conclusions of law. Findings of fact shall be written in clear and concise language.

(1) The Executive Director shall issue the proposed order to the parties within 5 calendar days after the proposed order is filed.

(2) Within 10 calendar days after the issue date of the proposed order, any party may file a response and include any additional relevant information for consideration by the ADRP facilitator(s). The time limit may be extended for good cause.

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

(g) **Final order.** The ADRP facilitator(s) shall review the available relevant evidence, including but not limited to, the petition for appeal, evidence submitted at the conference, the proposed order, any responses and additional relevant information filed in response to the proposed order, and applicable laws and rules.

(1) Within 10 calendar days after the time limit for the receipt of responses to the proposed order, the ADRP facilitator(s) shall file a final order with the Commission. The final order shall include findings of fact and conclusions of law. Findings of fact shall be written in clear and concise language.

(2) The Executive Director shall issue the final order to the parties within 5 calendar days after the final order is filed.

(3) The final order shall become final, conclusive and enforceable unless a rejection is filed in accordance with OAC 455:10-17-7(h) below.

(h) **Rejection of final order.** Within 10 calendar days after the issue date of the final order, any party may file a request for rejection and request the matter be heard through a hearing. The request for rejection shall include an affidavit of service to all other parties.

(1) Within 7 calendar days after receiving a timely filed request for rejection, the Executive Director shall schedule the matter for a prehearing conference and hearing.

(2) If after the hearing, the final decision to sustain or deny the appeal is the same as the final decision in the non-binding arbitration conference, or if the filing party fails to advance or gain in the decision, the party filing the request for rejection shall bear the costs of the hearing.

(i) **Costs.** For purposes of this section, costs of the hearing shall include costs to the Commission, costs of witnesses appearing at the hearing and reasonable attorney fees and costs. Reasonable costs and attorney fees shall be determined according to OAC 455:10-15-3 and OAC 455:10-15-4.

(1) Within 10 calendar days after the final decision is issued, a request for award of attorney fees and costs associated with the hearing may be filed for decision by the Administrative Law Judge. The request shall be filed according to OAC 455:10-15-5.

(2) Within 10 calendar days after receipt of a request, the Administrative Law Judge shall file an addendum decision in accordance with OAC 455:10-15-6.

(3) The amount of award determined by the Administrative Law Judge shall be final and conclusive except as provided in the Administrative Procedures Act and this Chapter.

455:10-17-8. ~~Voluntary mediation~~ Oklahoma State Shared Mediation Program (OSSMP)

(a) **General.** The Oklahoma State Shared Mediation Program (OSSMP) is a project of the Commission to provide mediation as an alternative means to resolve disputes in the state workplace. The purpose of

the OSSMP is to resolve disputes at the earliest possible time to increase the quality of communication with the workforce, to maintain a productive work environment and to reduce the costs and time involved with formal processes. The Commission will establish guidelines for use of the OSSMP. Voluntary mediation
The OSSMP provides an opportunity for agencies and employees to voluntarily settle appeals, grievances and other employment disputes and conflicts. ~~After a request for voluntary mediation is accepted and agreement of the participants is made,~~ the Executive Director may schedule a voluntary mediation session. It is not necessary for a petition for appeal or internal agency grievance to be filed before requesting or using ~~voluntary mediation~~ the OSSMP.

(b) **Participant responsibility.** The participants shall be present and on time. Failure to do so may result in dismissal of the ~~request for voluntary mediation session~~. Each participant shall mediate in good faith, without time constraints, and put forth their best efforts with the intention of reaching settlement, if possible. Even if the participants do not reach a complete settlement, they may reach agreement on various issues.

(1) Each participant shall speak for himself or herself.

(2) If the appointing authority is involved in the dispute or conflict, he or she may name a spokesperson to speak and act on behalf of the agency. The spokesperson shall have knowledge of the incidents surrounding the dispute and shall have settlement authority. The appointing authority shall not name a legal representative to act in this capacity unless the legal representative has knowledge of the incidents surrounding the dispute.

(c) **Representation.** Each participant may have a representative accompany him or her to the ~~voluntary~~ mediation session to act in an advisory role only. A representative shall not be allowed to interrogate or question any participant and shall not otherwise take or have an active role in the ~~voluntary~~ mediation session.

(1) Any participant at the ~~voluntary~~ mediation session without a representative must consent to allowing the attendance of a representative for any other participant.

(2) A representative shall be subject to the laws, rules, terms and conditions governing ~~voluntary~~ mediation, including but not limited to, confidentiality.

(3) A representative need not be an attorney.

(d) **Mediator.** The mediator shall be a ~~neutral third party~~ assigned by the Executive Director. The mediator shall:

(1) take an active role in the session and maintain neutrality and impartiality at all times;

(2) have the flexibility to adapt the session to the situation at hand;

(3) aid the ~~parties~~ participants in the discussion of settlement and resolution of the issues in dispute; and

(4) terminate the session because of the disruptive behavior or conduct of a participant or representative.

(e) **Time limits.** After acceptance of a request for ~~voluntary~~ mediation, any applicable time limits shall be tolled pending completion of the ~~voluntary~~ mediation process.

(f) **Referral.** In an effort to make ~~voluntary~~ mediation available to the widest possible audience, the Commission shall accept referrals from the Commission staff, Administrative Law Judges, appointing authorities, agency grievance managers, supervisors and individual employees.

(g) **Request.** A request for ~~voluntary~~ mediation shall include:

- (1) the name, address and work telephone number of the person making the request and the names, addresses and work telephone numbers of those involved in the dispute or conflict;
- (2) a description of any internal agency grievance or other complaint pending on the issues in dispute; and
- (3) signature of the person making the request.
 - (A) submission of the Commission's Request for Mediation of Grievance or Request for Mediation Services shall satisfy this requirement;
 - (B) If ~~voluntary~~ mediation is requested by an agency grievance manager or decision maker in the internal agency grievance process, the agency grievance manager shall notify the employee of the request; and
 - (C) If ~~voluntary~~ mediation is requested by an employee and an internal agency grievance is pending, the employee shall notify the agency grievance manager of the request.

(h) Intake.

- (1) The Commission shall conduct an intake interview upon receipt of a request for ~~voluntary~~ mediation to determine if:
 - (A) the matter in dispute or conflict is appropriate for ~~voluntary~~ mediation;
 - (B) the persons involved in the dispute or conflict are correctly identified;
 - (C) the persons involved in the dispute or conflict are willing to mediate; and
 - (D) any person involved in the dispute or conflict will have a representative in attendance at the session.
- (2) The Commission's Mediation Intake form shall be completed by the person conducting the intake with a recommendation to accept or reject the request. The Executive Director shall review the recommendation and accept or reject the request.
 - (A) If rejected, the person making the request and the persons involved in the dispute or conflict shall be contacted and notified.
 - (B) If accepted, the Executive Director shall assign a mediator.

(i) Session. The ~~voluntary~~ mediation session shall be informal, structured by the mediator and not open to the public. The session shall be a confidential procedure and shall not be filmed, taped or otherwise recorded. Participants and representatives shall respect and maintain the confidentiality of the session.

- (1) **Notice.** At least 3 calendar days before the scheduled session, the Commission shall notify the parties of the date, time and location of the session.
- (2) **Location.** The session shall be held at the Commission office or any other location determined appropriate.
- (3) **Witnesses.** Witnesses shall not appear or give testimony at the session.
- (4) **Agreement to mediate.** Before the session begins the participants and representatives shall sign the Commission's Agreement to Mediate form.
- (5) **Caucus.** The mediator may call a caucus at any stage of the session.
- (6) **Continuance.** A request for continuance shall normally be filed in writing no less than 3 calendar days before the scheduled voluntary mediation session date in accordance with OAC 455:10-3-17. A lesser period of time may be permitted for good cause shown.

- (A) The Executive Director shall rule on the request and shall grant a request only in those

instances where extraordinary circumstances exist and good cause has been shown.

(B) A continuance shall be granted to a date certain and no case shall a combination of continuances of voluntary mediation exceed a total of 30 calendar days except for good cause shown.

(j) **Agreement.** If an agreement is reached, it shall be reduced to writing and signed by each participant and the mediator. The agreement shall be reviewed and approved by the Executive Director before it can become final or before dismissal of an appeal shall be entertained.

(1) If an agreement is reached and approved by the Executive Director, the Commission shall conduct two follow-ups to determine the success of the voluntary mediation session.

(A) The first follow-up shall be conducted between 30 and 45 days after the agreement is approved.

(B) The second follow-up shall be conducted between 75 and 90 days after the agreement is approved.

(2) The Commission's Case Follow-Up Report form shall be used to record any complaints, concerns or compliments expressed by the participants during the follow-ups.

(k) **Conclusion.** The mediator shall end the session when an agreement is reached and reduced to writing. If an agreement is not reached, the mediator shall end the session when any participant elects to not continue or when in the judgment of the mediator, agreement is not possible, unless sooner terminated for the disruptive behavior or conduct of a participant or representative.

SUBCHAPTER 19. INTERNAL AGENCY GRIEVANCE RESOLUTION PROCEDURES

PART 1. GENERAL PROVISIONS

455:10-19-2. Purpose

(a) The rules in this subchapter provide standards and guidelines for the prompt and equitable resolution of employment disputes and grievances at the lowest possible level within the employing agency. These rules pertain to probationary and permanent classified employees.

(b) An appointing authority may elect to ~~use~~ adopt these procedures, or other procedures, to address disputes of other employees. Any such procedures shall be separate and apart from the grievance procedure and shall not automatically give jurisdiction of the issues in dispute to the Commission.

455:10-19-3. Definitions

In addition to words and terms defined in the Merit System of Personnel Administration Rules, the following words and terms, when used in this subchapter, shall have the following meaning unless the text clearly indicates otherwise.

"Accept" means a determination by an agency grievance manager that issue(s) meet jurisdictional requirements ~~and have or will be forwarded to a decision-maker.~~

"Deny" means to refuse to grant a remedy requested, to determine an issue to be without merit or to end a grievance without further consideration.

"Grant" means to find an issue to have merit and to give an appropriate remedy.

"Grievance" means a request for relief in an employment matter made by an employee, or a group of employees, which affects them and which is subject to control of the appointing authority. For purposes of grievances, an employee may be a probationary or permanent classified employee, ~~former classified employee or any other employee of the agency the appointing authority has authorized to use the internal agency grievance resolution procedure.~~

"Jurisdiction" means the authority to decide an issue within the agency grievance procedure. The time limit to file a grievance, an employee's eligibility to use the agency grievance procedure and the issues raised are general factors in determining agency jurisdiction.

"Reject" means a determination by an agency grievance manager that a grievance or an issue does not meet agency jurisdictional requirements.

"Remedy" means the corrective action(s) sought by an employee or offered by a decision-maker or appointing authority.

"Toll" means to temporarily stop or suspend applicable time limits.

455:10-19-5. Statistics

- (a) The appointing authority shall maintain summary and statistical information about the number, nature and outcome of all formal grievances filed [74:840-6.2(I)].
- (b) The appointing authority shall provide to the Commission, on a fiscal year basis, a grievance report containing the following information:
 - (1) the number of grievances filed, resolution time for each grievance and the nature and outcome of each grievance; and
 - (2) the pay band, sex and race of each employee filing a grievance.
- (c) The grievance report for the previous fiscal year shall be filed with the Commission no later than August 1 of each year.
- (d) Appointing authorities ~~failing to provide statistical information shall be reported as having had no formal grievances for the agency during the fiscal year the report was due~~ shall submit a report even if no grievance actions occurred during the relevant time period.

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 action 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 job family descriptor* [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 job family descriptor* [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 level for which duties were performed on a regular and consistent basis* [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* [74:840-4.3(B)]. An employee may allege a violation of any 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 ~~an alleged violation of 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 mechanism and other compensation issues only after such complaint has been reviewed in the formal grievance procedure.

455:10-19-42. Filing time

(a) A formal grievance shall be filed:

- (1) within 20 calendar days of the date of the act or incident; or
- (2) within 20 calendar days of the date the employee becomes aware of or, with reasonable effort, should have become aware of a grievable issue.

(b) The appointing authority may extend the time limit for filing a formal grievance if the employee shows that he or she could not have otherwise timely filed or if the employee provides evidence that he or she was making a good faith effort to resolve the dispute informally or for other good cause shown. The decision to extend the filing time shall not automatically give jurisdiction of the issues in dispute to the Commission.

PART 7. GRIEVANCE PROCEDURE

455:10-19-61. Step one - informal discussion

(a) The purpose of the informal discussion shall be to provide the employee and his or her supervisor an opportunity to address and resolve concerns and complaints at the lowest level possible. The effort to resolve disputes at this level may include, but is not limited to, the use of mediation.

(b) An employee who has a grievable issue shall promptly bring the dispute to the attention of his or her supervisor. The employee and the supervisor shall strive to informally resolve the dispute.

(c) If the supervisor is unable to resolve the dispute because it is not within his or her control or authority, the supervisor shall attempt to determine who can resolve the dispute and give that person an opportunity to resolve the dispute informally or advise the employee to proceed to Step 2.

455:10-19-64. Use of voluntary mediation

(a) Employees, supervisors, appointing authorities and grievance managers ~~may~~ are encouraged to use ~~the Commission's Voluntary Mediation Program~~ mediation as a means of resolution at any step of the internal agency grievance procedure.

(b) Applicable grievance time limits shall be tolled if a request for voluntary mediation ~~services~~ is received by the Commission ~~made~~. The tolling time shall begin as soon as mediation is requested and shall end:

- (1) ~~once the Commission determines~~ it is determined the participants are not willing to use the voluntary mediation services; or
- (2) upon conclusion of the voluntary mediation session or at such time that any participant withdraws from participating in the voluntary mediation session.

(c) ~~The Commission shall notify the~~ agency grievance manager shall be notified of the tolling time as soon

as possible and practical.

SUBCHAPTER 21. PRESIDING OFFICIALS, REPRESENTATIVES, WITNESSES AND PARTIES

455:10-21-1. Administrative ~~Hearing Officers~~ Law Judges

(a) **General.** Administrative ~~Hearing Officers~~ Law Judges shall be assigned by the Executive Director to preside over prehearing conferences and hearings. An Administrative ~~Hearing Officer~~ Law Judge shall be fair and impartial and take all necessary action to avoid delay in the resolution and disposition of an appeal. An Administrative ~~Hearing Officer~~ Law Judge shall have all powers necessary to that end which are not otherwise prohibited. An Administrative ~~Hearing Officer~~ Law Judge shall be subject to the Commission Code of Conduct for Administrative ~~Hearing Officers~~ Law Judges.

(b) **Withdrawal.** An Administrative ~~Hearing Officer~~ Law Judge shall withdraw from any appeal in which he or she can not be fair and impartial. The Executive Director shall be immediately notified of the withdrawal and reason for such withdrawal.

(c) **Disqualification.** A party to an appeal may file a request seeking the disqualification of an Administrative ~~Hearing Officer~~ Law Judge on the basis of inability to be fair or impartial. The request shall specifically state the reasons for such request and shall be filed as soon as the party making the request has reason to believe there is a basis for the disqualification and shall include an affidavit of service to all other parties. The Administrative ~~Hearing Officer~~ Law Judge shall be provided an opportunity to respond. The Executive Director shall rule on the request and the decision is final and conclusive except as provided for the in the Administrative Procedures Act and OAC 455:10-3-20.