

## State Human Resources Commission Review of Contested Cases/Remedies

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The following policies will govern the review by the State Human Resources Commission of employee grievance contested cases and the availability of remedies in such cases.

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### Exercise of Commission Discretion

The State Human Resources Commission will weigh all relevant factors and circumstances in employee contested cases, including factors of mitigation and justification, in making a decision in a contested case of whether disciplinary action was imposed for just cause.

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### Situations in which Attorney's Fees May Be Awarded

Attorney's fees may be awarded by the commission only in the following situations:

- the grievant is reinstated to the same or similar position from either a demotion or a dismissal;
- the grievant is awarded back pay from either a demotion or a dismissal, without regard to whether the grievant has been reinstated;
- the grievant is determined, by the Commission or by the agency's internal grievance procedure, to have been discriminated against in violation of G. S.

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- 126-16 or subjected to unlawful workplace harassment in violation of G.S. 126-36;
- the grievant is awarded back pay as the result of a successful grievance alleging a violation of G. S. 126-7.1;
  - the grievant is the prevailing party in the final appeal of a Commission decision; or
  - any combination of the above situations.

Attorney's fees may be awarded when any of the above situations occur, either within the agency internal grievance procedure, in an appeal to the State Human Resources Commission or in an appeal of a Commission decision.

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### Attorney's Fees May Be Awarded as a Result of a Settlement

Attorney's fees may be awarded as the result of settlement in the grievance procedure, either in the agency internal procedure or at the Personnel Commission level, providing such fees are explicitly incorporated as a part of a written settlement agreement signed by both parties. Attorney's fees shall not be awarded as the result of a settlement unless such fees are a specific part of the written settlement agreement.

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### Back Pay

The Personnel Commission has the authority to award full or partial back pay in all cases in which back pay is a requested or possible remedy. The Personnel Commission may award full or partial back pay regardless of whether reinstatement is ordered.

Gross back pay shall always be reduced by any interim earnings, except that interim earnings from employment which was approved secondary employment prior to dismissal shall not be set off against gross back pay. Any unemployment insurance paid to the employee shall also be deducted from the gross back pay amount due. All applicable state and federal withholding taxes, including social security taxes shall be paid from the reduced gross back pay due; reduced gross back pay being gross back

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pay due minus interim earnings or unemployment insurance received. The employee's regular retirement contribution shall be paid on the total, unreduced amount of gross back pay due.

Back pay shall include payment for all holidays which the grievant would have been paid for except for the interruption in employment status. Holiday premium pay shall never be a part of any back pay award. Shift premium pay shall be a part of a back pay award, if the grievant would have been entitled to such pay in the absence of the interruption in employment. This benefit shall not be applicable in cases involving a failure to hire or a failure to promote.

Employees shall not be entitled to any discretionary pay which may or may not have been awarded to them in the absence of the interruption in employment (for example, performance-based increases). Back pay shall include any across the board compensation which would have been included in the grievant's regular salary except for the interruption in employment. This includes one-time "bonuses", across the board legislative increments or across the board legislative pay increases.

If the grievant's longevity eligibility date occurred during the period of interrupted employment, back pay shall include the difference between the pro-rated longevity payment made at dismissal and the amount of longevity pay that would have been payable had employment not been interrupted. If the grievant is reinstated prior to his longevity date, no adjustment for longevity pay shall be made in the back pay award. The pro-rated longevity payment made at the time of dismissal shall be deducted from the full amount otherwise payable on the next longevity eligibility date.

Back pay must be applied for on Office of State Human Resources form PD-14. Copies of this form are available from the Office of State Human Resources, Personnel Commission Staff. [PD-14 Statement of Back Pay](#) One component of the decision to

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award back pay shall be evidence, if any, of the grievant's efforts to obtain available, suitable employment following separation from state government.

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### Front Pay

Front pay is the payment of an amount to an employee above the regular salary, such excess amount representing the difference between the employee's salary in the current position and a higher salary determined to be appropriate due to a finding of discrimination or unlawful workplace harassment. Front pay may also result from an order of reinstatement to a position of a particular level, which the agency is unable to accommodate immediately. Front pay shall be paid for such period as the agency is unable to hire, promote or reinstate the employee to a position at the level ordered by the Personnel Commission. Front pay shall terminate upon acceptance or rejection of a position consistent with the order of the Commission. Front pay shall be available as a remedy in cases involving hiring, promotion, demotion or dismissal. Front pay shall be payable under the same conditions as back pay except that the only deductions from front pay shall be for usual and regular deductions for state and federal withholding taxes and employee's retirement contribution. There may also be a deduction for other employment earnings, whether paid by the state or another employer, so as to avoid unjust enrichment of the grievant. Shift premium pay and holiday premium pay shall not be available on front pay. Submission of a form PD 14 is not required for front pay.

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### Leave

An employee shall be credited on reinstatement with all vacation leave which would have been earned except for the interruption in employment. An employee shall be credited on reinstatement with all sick leave which would have been earned except for the interruption in employment.

The decision as to whether or not to allow the reinstated employee to purchase back the vacation leave paid out in a lump sum at dismissal is within the discretion of the agency. A failure to allow such repurchase is not grievable. Employees reinstated from dismissal

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shall have their former balance of sick leave at dismissal reinstated, in addition to the credit for sick leave which would have been earned except for the dismissal.

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### Health Insurance

Employees reinstated from dismissal shall be entitled to either retroactive coverage under the state health insurance plan or to reimbursement up to the amount the state contributes for employee only coverage. The employee shall have the right to elect between these two choices, provided that if the employee elects reimbursement the employee may do so only if the employee had secured alternate health insurance coverage during the period of interruption of employment. The employee shall not be reimbursed for the cost of coverage of dependents or spouse during the period between dismissal and reinstatement. It is the responsibility of the employee to provide proof of insurance expenses incurred during the period of unemployment.

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### Voluntary Programs or Benefits

Voluntary programs or benefits (such as the 401K program, voluntary health and life insurance programs or deferred compensation) are the choice of the employee and are the employee's responsibility. Such voluntary programs or benefits are not addressed by any awards under these regulations and Chapter 126, but may be governed by contractual provision with non-state agencies. Retroactive contributions or membership in any such program shall not be part of any remedy awarded by an agency or the State Human Resources Commission. To the extent that retroactive coverage or membership is available, the grievant is responsible for any action seeking to obtain such benefits.

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### Interest

The state shall not be required to pay interest on any back pay award.

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### Reinstatement

As used in this policy, reinstatement means the return to employment of a dismissed employee, in the same or similar position, at the same pay grade and step which the

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employee enjoyed prior to dismissal. Reinstatement may also refer to the promotion of a demoted employee to the same pay grade and step as the employee was demoted from.

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### **Recommendation of Disciplinary Action**

The State Human Resources Commission shall have the authority to recommend to the respondent agency that disciplinary action be imposed as a result of any employee's failure to observe state policy and procedures in effecting disciplinary actions and dismissals.

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### **Removal of Material from Personnel File**

The State Human Resources Commission shall have the authority to order the removal of any material in a personnel file which it finds to be inaccurate or misleading.

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### **Causes for Reinstatement**

The State Human Resources Commission shall order reinstatement from dismissal or demotion only upon a finding of lack of substantive just cause or discrimination or unlawful workplace harassment prohibited by G.S. 126-16 or G.S. 126-36. For the purpose of this policy, and in addition to those matters normally constituting just cause, failure to issue the required number and kind of warning or other disciplinary actions prior to dismissal for job performance shall also be considered to constitute a lack of substantive just cause.

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### **Remedies for Procedural Violations**

Failure to give written notice of applicable appeal rights in connection with a dismissal, demotion or suspension without pay shall be deemed a procedural violation. The sole remedy for this violation shall be an extension of the time in which to file an appeal. The extension shall be from the date of the procedural violation to no more than 30 calendar days from the date the employee is given written notice of applicable appeal rights.

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Failure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation. The Personnel Commission, in its discretion, may award back pay, attorney's fees, or both for such a violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as the Commission determines, in its discretion, to be appropriate under all the circumstances.

Failure to conduct a pre-dismissal conference shall be deemed a procedural violation. Further, the remedy for this violation shall require that the employee be granted back pay from the date of the dismissal until a date determined appropriate by the commission in light of the purpose of pre-dismissal conference. Reinstatement shall not be a remedy for lack of a pre-dismissal conference.

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### Suspension Without Pay

The State Human Resources Commission shall order back pay in those cases in which it is determined that a suspension without pay lacked substantive just cause or was an act of discrimination prohibited by G.S. 126-16 or unlawful workplace harassment prohibited by G.S. 126-36.

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### Discrimination Or Unlawful Workplace Harassment

In those cases in which the Personnel Commission finds an act of discrimination or unlawful workplace harassment prohibited by G. S. 126-16, G. S. 126-36 or G.S. 126-36.1, the Commission may order reinstatement, back pay, transfer, promotion, or other appropriate remedy. The Commission shall also have the authority in such cases to order other corrective remedies to ensure that the same or similar discriminatory or harassing acts do not recur.

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### Remedies: Salary Adjustment

No department, agency or institution may use within-grade salary adjustments as a method of resolving any grievance, contested case or lawsuit without advance notice to the Office of State Human Resources and the specific, written approval of the State

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Human Resources Director and the State Human Resources Commission. The only exception shall be such an adjustment in the context of a front pay award ordered by the State Human Resources Commission pursuant to this policy. Any within-grade salary adjustment proposed to be approved by the State Human Resources Director and the State Human Resources Commission must be in compliance with existing salary administration policies or shall have prior approval as an exception to or waiver from such policies.

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### Settlements/Consent Agreements in Grievances, Contested Cases

Any settlement or consent agreement in a grievance or contested case which requires the processing of personnel action forms by the Office of State Human Resources must be approved by the Office of State Human Resources before such personnel actions forms will be processed. Approval by the Office of State Human Resources shall be indicated by the signature of the State Human Resources Director or his designee in an appropriate place on the settlement or consent agreement. This provision shall not be construed to require Office of State Human Resources approval of a settlement in which the only portion requiring approval is the awarding of attorney's fees to the employee's attorney by the State Human Resources Commission. This provision shall also not be construed to require approval of any settlement the terms of which allow an employee to substitute a resignation for a dismissal and to withdraw a grievance or a contested case action.

Prior approval from the Office of State Human Resources and the State Human Resources Commission must be secured when any provision of a settlement or consent agreement in a grievance or contested case requires an exception to or variance from existing personnel policy. This compliance shall be in addition to the requirements of this policy. Any settlement or consent agreement which contains a provision which requires an exception to or variance from existing personnel policy must be reviewed and approved by the State Human Resources Commission prior to the processing of any personnel action forms by the Office of State Human Resources action forms, required

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by the provisions of any settlement or consent agreement which has not been approved by the Office of State Human Resources or the State Human Resources Commission as required by policy, shall not be processed by the Office of State Human Resources and shall be returned to the agency without action. Any settlement or consent agreement which does not require action by the Office of State Human Resources or the State Human Resources Commission does not require the approval of either body to be effective.

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