

Employee Mediation and Grievance Process

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Policy

It is the policy of State Government that an Employee Mediation and Grievance Process shall exist to allow for prompt, fair and orderly resolution of grievances arising out of employment.

Agencies may choose to adopt the Employee Mediation and Grievance Process, or choose to use the Employee Appeals and Grievance Policy, which does not offer mediation. Agencies shall have the flexibility to decide what grievable issues shall be

Employee Mediation and Grievance Process (continued)

mediated under this policy. Agencies adopting the Employee Mediation and Grievance Process shall establish procedures that include the minimum requirements of this policy.

Objectives

In establishing this policy for the Employee Mediation and Grievance Process, the State Human Resources Commission seeks to achieve these objectives:

- Assure employees have access to grievance procedures to address their grievable issues rapidly, fairly and without fear of reprisal;
 - Contain costs to process grievances; and
 - Resolve workplace issues and problems efficiently and effectively.
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Overview of Employee Mediation and Grievance Process	Informal Meeting with Supervisor	Agencies shall encourage direct communication between employees and supervisors to attempt to address grievances in the spirit of cooperation and compromise.
	Step 1: Mediation	<p>Mediation is the first step in the grievance process and involves the services of a neutral third person that assists an employee and an agency representative in resolving an employee grievance in a mutually acceptable manner.</p> <p>Mediation provides an opportunity for the two parties to openly discuss the grievance and reach a resolution that is mutually acceptable to both the agency and the employee. When mediation results in a resolution of the grievance, parties will sign a Mediation Agreement.</p> <p>If a grievance involves an issue that the agency has identified as not subject to mediation, the employee shall begin the grievance process at Step 2 of this policy.</p>

Employee Mediation and Grievance Process (continued)

**Step 2: Hearing
Officer/Hearing
Panel Review**

In situations where mediation does not produce agreement or if a grievance involves an issue that the agency has identified as not subject to mediation, employees may proceed to Step 2 by presenting the grievance to a Hearing Officer/Hearing Panel within the agency. The Hearing Officer/Hearing Panel will forward a recommendation to the Agency Head for a Final Agency Decision (FAD).

**Step 3: Appeal to
the Office of
Administrative
Hearings**

Employees may appeal the FAD to the Office of Administrative Hearings (OAH) where an Administrative Law Judge will issue a Final Decision and Order.

EXCEPTION: Allegations of illegal discrimination or unlawful workplace harassment are exceptions. Grievances alleging discrimination may, at the grievant's choice, proceed either through the agency procedure OR may proceed directly to the OAH. Complaints of unlawful workplace harassment MUST proceed through the agency's Unlawful Workplace Harassment procedure.

Definitions

Following are definitions of terms used in this policy:

Term	Definition
Agency	A department, university, office, board or commission.
Agency Representative in Mediation	A designated agency representative who will mediate in good faith and will have the authority to reach an agreement on behalf of the agency to resolve a grievance.
Career State employee	A State employee who meets the requirements as specified in the State Human Resources Act.
Grievance	An issue that is defined as grounds for a contested case that may be appealed to the Office of Administrative Hearings.

Employee Mediation and Grievance Process (continued)

Mediation	Mediation is the process where parties involved in a dispute use the assistance of a neutral third party to attempt to resolve their dispute(s) in a mutually acceptable manner. Primary responsibility for resolving the dispute rests with the parties.
Mediation Agreement	A written agreement resulting from the successful resolution of a grievance reached in mediation. The Mediation Agreement is binding on both parties.
Mediator	A mediator is an OSP-approved neutral third party whose role is to guide the mediation process, facilitate communication, and to help the parties generate and evaluate possible outcomes. A mediator does not act as a judge and does not render decisions.

Covered Issues

Following are issues that may be grieved and who may grieve:

Covered Persons	Grievable Issues
Career State employees or former career State employees	<ul style="list-style-type: none"> • Dismissal, demotion, or suspension without pay without just cause • Denial of promotion due to failure to post • Failure to give promotional priority over outside applicants • Failure to give RIF reemployment consideration • Failure to give policy-making/confidential exempt status priority reemployment consideration
Any State employee or former State employee	<ul style="list-style-type: none"> • Denial of request to remove inaccurate or misleading information from personnel file • Policy-making designation • Discrimination in denial of promotion, transfer, or training; or retaliation in selection for demotion, RIF or termination • Denial of veteran's preference regarding initial employment and other employment actions.
Any applicant for State employment	<ul style="list-style-type: none"> • Denial of veteran's preference in initial State employment • Denial of employment on the basis of illegal discrimination

Employee Mediation and Grievance Process (continued)

Any State employee	<ul style="list-style-type: none"> • A false accusation about political threats or promises • Violation of the Fair Labor Standards Act, Age Discrimination Act, Family and Medical Leave Act or Americans with Disabilities Act (except for employees in exempt policy-making positions).
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Advisory Note: The list of covered persons above is based on those defined by the State Human Resources Act as having the right of appeal. No agency can prevent covered persons from filing a grievance based on the issues listed above. Some of the listed issues may require mediation as the first step; others may not allow mediation as the first step. For issues which the agency has determined are not subject to mediation, these issues must begin with Step 2. Agencies may also permit grievances to be filed that are based on issues other than those listed. These grievances would not be appealable to the Office of Administrative Hearings. The agency grievance procedure must provide information on other issues that are grievable, how to file a grievance for those issues, and the time frames which apply.

Flexibility

Agencies shall have the flexibility to decide which grievable issues will not be subject to mediation. In addition, agencies may choose to mediate nongrievable issues by developing internal agency policies and procedures outside the scope of this policy. Agencies may request to utilize approved mediators serving in the OSP Mediator Pool for mediating nongrievable issues. In such situations, OSP and the requesting agency shall work out a mutually acceptable process to access the mediator pool of resources.

INFORMAL MEETING WITH SUPERVISOR

For all grievable issues, the employee is encouraged to first attempt to resolve a grievable issue with their immediate or other appropriate supervisor in the employee's chain of command

Advisory Note: Employees alleging illegal discrimination or retaliation shall be able to choose to follow the agency grievance procedure, including mediation, or choose to appeal directly to the Office of Administrative Hearings. However, employees should be aware that the timeframes

Employee Mediation and Grievance Process (continued)

which allow the employee 30 days to file a grievance alleging discrimination must be adhered to whether they choose to follow the agency grievance procedure, including mediation, or whether they choose to appeal directly to the Office of Administrative Hearings by filing a petition for a contested case hearing. The 30 day timeframe is not applicable to discrimination complaints filed with the Equal Employment Opportunity Commission.

Advisory Note: Employees alleging unlawful workplace harassment or retaliation concerning unlawful workplace harassment **must** follow the procedure established in the agency Unlawful Workplace Harassment Policy in order to bring a subsequent appeal to the Office of Administrative Hearings. That policy includes the right to by-pass any step in the agency's grievance procedure involving discussions with or review by the alleged harasser. The agency is required to complete processing of an allegation of unlawful workplace harassment or retaliation within 60 days. Nothing in this policy extends the amount of time an agency has in which to complete a review of such an allegation, even if the employee chooses mediation as an option in the agency's Unlawful Workplace Harassment Policy.

STEP 1 – MEDIATION PROCEDURE

Where an agency has designated an issue as subject to mediation, mediation is Step 1 in the Employee Mediation and Grievance Process. Mediation follows unsuccessful attempts by employees to resolve grievable issues with their immediate or other appropriate supervisor in the employee's chain of command. An employee must begin the grievance process by filing a grievance in accordance with the agency's grievance procedure. An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance or after unsuccessfully attempting to resolve the grievance informally, whichever is longer.

Purpose of Mediation

The purpose of mediation is to provide a non-adversarial way of resolving grievances by use of an alternative dispute resolution process. Parties are encouraged to reach a mutually acceptable resolution of grievances.

Employee Mediation and Grievance Process (continued)

Mediation Process

The Office of State Human Resources (OSP) will establish a process to assign mediators to grievances within a timely manner. The mediation process shall be concluded within 45 calendar days from the filing of the grievance unless the parties agree in writing to a longer period of time.

Location and Timing

Mediations shall be conducted in a location approved by the mediator and shall be scheduled for an amount of time determined by the mediator to be sufficient. Mediations may be recessed by the mediator and reconvened at a later time.

Limited to OSP Approved Mediators

OSP will establish a procedure to qualify and assess mediators. Only OSP-approved mediators will mediate grievances presented by state agency employees.

Who will attend mediation?

- A designated agency representative with the authority to reach an agreement will attend on behalf of the agency.
- Emergency substitution of a mediator must be approved by the OSP Mediation Administrator or designee.
- OSP Mediation Administrator and designees may attend as observers.
- Representatives, advisors and/or attorneys are not permitted to attend.

Audiotape, videotape or other automated recordings are not permitted.

Attorneys

Because mediation is Step 1 of the internal agency grievance process, attorneys are not permitted to participate directly in the process. However, because a mediation that resolves an employee's grievance will result in a Mediation Agreement, either party may ask for a recess at any time during the mediation in order to obtain legal advice regarding the terms of the Mediation Agreement.

Employee Mediation and Grievance Process (continued)

What happens at the end of mediation?

At the end of mediation, the mediator will prepare either a Mediation Agreement that is signed by the parties, or a statement that mediation did not result in resolution.

When mediation resolves a grievance, the following shall occur:

- Employee and agency representative sign a Mediation Agreement.
- Each party receives a copy of the signed Mediation Agreement.
- Mediation agreements shall be maintained on file for not less than 3 years.
- Mediation agreements do not transfer to another agency should the employee transfer.
- Mediation agreements shall be binding on both parties.

Advisory Note: Mediation agreements are considered public documents under G.S. 132-1.3.

Limitations on a Mediation Agreement

Parties to the mediation cannot enter into an agreement that would exceed the scope of their authority. The Mediation Agreement will:

- Serve as a written record;
- Not contain any provision contrary to OSP policies and rules, and applicable state and federal law; and
- Not be transferable to another state agency.

When mediation resolves a grievance but it is later determined that one or more provisions of the Mediation Agreement do not comply with OSP policies or rules, applicable state or federal law, the parties are encouraged to return to mediation to resolve those issues that can be resolved by the parties.

Advisory Note: Any resolution achieved through mediation, to the extent that it involves a grievance or a contested case issue, is to be treated as a settlement agreement and, as such, is subject to approval by the State Human Resources Director and/or the State Human Resources Commission as outlined in the section entitled "Settlements" at the end of this policy.

Employee Mediation and Grievance Process (continued)

Post-Mediation

Breach of a Mediation Agreement

Employees and supervisors who breach a mediated agreement may be subject to disciplinary action up to and including dismissal based on unacceptable personal conduct.

What happens to other documents used in mediation?

Except for the Mediation Agreement itself, all other documents generated during the course of mediation and any communications shared in connection with mediation are intended to be confidential to the extent provided by law.

What happens if a grievance is not resolved by mediation?

When mediation does not result in agreement, the employee may proceed to Step 2 in the grievance process following written notice to the employee that mediation did not result in resolution of the grievance.

RESPONSIBILITIES

Employee Responsibilities

Each employee is responsible for:

- Making a good faith effort to mediate disputes;
- Attending mediations as scheduled by the agency; and
- Notifying agency personnel in advance when circumstances prevent the employee from attending a scheduled mediation.

An employee who has an unexcused failure to attend mediation as scheduled may not proceed with the grievance process.

Employee Mediation and Grievance Process (continued)

Agency Responsibilities

Each agency is responsible for:

- Administration of the mediation program within the agency;
- Appointing an agency intake coordinator who will be responsible for organizing the mediation process;
- Determining suitable locations for conducting mediations;
- Ensuring confidentiality of the mediation to the extent provided by law;
- Scheduling only OSP-approved mediators for each mediation session;
- Providing mediators for the OSP mediator pool as needed based on proportional requirements of the agency;
- Reimbursing mediators for travel and other expenses at state approved rates and covering any administrative costs associated with mediation.
- Designating management personnel, such as human resources personnel and legal counsel, to be available to answer questions that may arise during the mediation process;
- Designating agency representatives who will mediate in good faith and who will have the authority to reach an agreement on behalf of the agency to resolve a grievance;
- Submitting data to OSP for the purpose of evaluating the mediation process for cost containment and resolution of grievances efficiently and effectively; and
- Submitting to OSP a copy of all Mediation Agreements executed by the agency.

An agency employee designated to attend mediation on behalf of the agency who has an unexcused failure to attend mediation as scheduled may be subject to disciplinary action.

Office of State Human Resources Responsibilities

The Office of State Human Resources (OSP) shall be responsible for:

- Appointment of the OSP Mediation Administrator as program manager;
- Development of mediation program policies, procedures and forms;

Employee Mediation and Grievance Process (continued)

- Development of an OSP-approved mediator pool and identification of qualified mediators outside state government to augment the OSP- approved mediator pool as necessary;
 - Identifying mediator training requirements;
 - Development of the OSP Mediator Code of Conduct; and
 - Conducting on-going studies/analysis to evaluate program effectiveness.
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STEP 2 – GRIEVANCE PRESENTED FOR HEARING

Requirements for Employees to Access Step 2

The employee must comply with the following agency requirements before proceeding to Step 2.

- Meet with the immediate supervisor or other appropriate supervisor in the chain of command to attempt to resolve the grievance; and
- Demonstrate a good faith effort to resolve the grievance by attending mediation (Step 1).

At Step 2 of the Grievance Process, the employee may present the grievance orally to a reviewer or reviewers outside the chain of command, e.g., Hearing Officer or Hearing Panel.

Agency Procedural Requirements for Employee Mediation and Grievance Policy

The following are minimum procedures for an agency grievance process:

- The agency grievance procedure shall state the issues that, in addition to those listed in the State Human Resources Act, may be grieved at the agency level.
- The agency grievance procedure shall list clearly which issues are subject to mediation (Step 1) and which issues shall proceed directly to a grievance hearing (Step 2).
- The agency grievance procedure shall encourage direct communication between employees and their immediate supervisor or other appropriate supervisor in the chain of command to attempt to resolve the grievance.

Employee Mediation and Grievance Process (continued)

- All decisions issued by the agency after the discussion between the employee and the immediate supervisor or other appropriate supervisor in the chain of command shall be in writing and a copy provided to the employee.
- For those issues subject to mediation, the agency grievance process shall require both the employee and an agency representative to mediate a dispute by attending a scheduled mediation.
- If mediation does not result in agreement, the employee is entitled to proceed to Step 2. The agency will notify the employee within 10 days of the unsuccessful mediation of the option to present the grievance orally to a reviewer or reviewers outside of the chain of command, e.g., Hearing Officer or Hearing Panel.
- The employee shall have the right to challenge whether the person, or body of persons outside of the chain of command review level, can render an unbiased recommendation. The agency procedure shall establish a process for the challenge as well as the procedure for selection of a replacement reviewer, when necessary.
- The agency shall set up time limits for appeal and for the employee and the agency to respond to each other during the grievance procedure. The agency may not set any time limit for itself that is more than twice the time limit established for employees.
- An employee filing a grievance shall do so not later than 15 calendar days after the last incident for which the employee is filing the grievance unless the internal agency procedure provides for a longer period.
- Neither party to the grievance can be represented by attorneys or other persons during the internal agency grievance procedure or during any mediation procedure.

Agency Responsibilities for Employee Mediation and Grievance Policy

Each agency shall:

- Create and maintain a Employee Mediation and Grievance Process which is in compliance with the Office of State Human Resources policy and shall:

Employee Mediation and Grievance Process (continued)

File the Employee Mediation and Grievance Process by January 1 of each even-numbered year for approval by the State Human Resources Commission,

OR

File any modification(s) since the last approved procedure prior to the changes becoming effective,

OR

Submit a certified statement that no changes have been made to the agency grievance procedure since the last approved procedure.

- Include in its procedure the effective date of the procedure and the effective date of any changes to the procedure.
- Outline ways of notifying all existing employees and new hires of any change to the agency grievance procedure, no later than 30 days prior to the effective date of the change.
- Submit the procedure to the State Human Resources Commission at least one month before the meeting at which approval is sought.
- Continuously evaluate the agency grievance procedure's effectiveness in achieving stated goals.
- Submit a grievance report semiannually or as requested by the Office of State Human Resources. These reports are due the first business day of January and July in the format specified by the Office of State Human Resources.

STEP 3 – APPEAL TO THE OFFICE OF ADMINISTRATIVE HEARINGS

Agency Requirements for Employee Appeal of Final Agency Decision (FAD)

The agency shall issue the final agency decision (FAD) in writing. If the employee has the right to appeal, the employee shall be informed:

- that the appeal is made by filing a petition for a contested case hearing with the Office of Administrative Hearings, and
- that appeal to the Office of Administrative Hearings must be filed within 30 days after the employee receives the FAD or after the action which triggers the right of appeal.

Employee Mediation and Grievance Process (continued)

Requirement for Employee to Access Step 3

At Step 3 of the Employee Mediation and Grievance Process, the employee may appeal the Final Agency Decision (FAD) to the Office of Administrative Hearings. An Administrative Law Judge will issue a Final Decision and Order.

The employee must comply with the following minimum agency requirements before proceeding to Step 3:

- Attempt to resolve a grievance issue with their immediate or other appropriate supervisor in the employee's chain of command;
- For issues subject to mediation; demonstrate a good faith effort to resolve the grievance by attending mediation (Step 1)
- Present the case to a Hearing Officer or Hearing Panel (Step 2). The Hearing Officer must have been afforded the opportunity to forward a recommended decision to the Agency Head; and
- The Agency Head must have been afforded a reasonable period of time to render a Final Agency Decision.

Time Limits

A final agency decision (FAD) must be issued within a reasonable period of time from the date the grievance is filed or the employee may, if eligible, appeal to the Office of Administrative Hearings without receiving a FAD.

For cases involving discharge or demotion of a career State employee for disciplinary reasons, the reasonable period of time is 90 days from the filing of the grievance to the issuance of the FAD. For all issues except demotion or dismissal, a reasonable period of time for an employee to receive a FAD is 120 days from the time the grievance was filed. The employee and the agency may mutually agree to extend the time in either case.

Advisory Note: If the employee cannot obtain the FAD within a reasonable period of time, the employee's right of appeal shall be governed by G.S. 126-34.1 and G.S.150B-23(f).

Employee Mediation and Grievance Process (continued)

Discrimination Special Provisions

An employee alleging illegal discrimination has the right to bypass the internal agency grievance procedure, including mediation, and appeal directly to the Office of Administration Hearings. In order to appeal to the Commission, the employee must file a petition for a contested case hearing alleging discrimination within 30 calendar days after receiving notice of the alleged discriminatory action.

However, if the employee chooses to use the agency's internal grievance procedure, the employee must appeal the alleged discriminatory act within the time frames set by the agency grievance procedure.

Leave

To prepare for participation in the internal agency grievance procedure, including mediation, an employee shall be allowed up to a maximum of 8 hours of leave time off from the employee's duties. The employee must request and receive approval in advance before taking this leave. This leave is granted without loss of the employee's pay, vacation or other time credits. For participation in contested case hearings, or other administrative hearings, the employee may request necessary time away from work without use of vacation or other time credits. This request is subject to the supervisor or personnel officer's approval. The supervisor or personnel officer determines if the leave is necessary and reasonable. Documentation of the time required by the presiding official may be requested by the supervisor before leave approval is granted.

RESPONSIBILITIES

Office of State Human Resources Responsibilities

The Office of State Human Resources shall:

- Review each proposed Employee Mediation and Grievance Process for conformity with OSP policies and rules, and applicable state and federal law;
- Present the procedure to the State Human Resources Commission for consideration and approval at its next available scheduled meeting; and

Employee Mediation and Grievance Process (continued)

- Provide consultation and technical assistance to agencies as needed.
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Settlements

If a grievance is settled or a Mediation Agreement has been reached and the settlement requires a personnel transaction to be processed, except where the only personnel action is the substitution of a resignation for a dismissal, the approval of the State Human Resources Director is required.

AND

If the settlement or Mediation Agreement involves an exception to any State Human Resources Commission policy, the approval of the State Human Resources Commission is also required.
