



City of Albuquerque

P.O. Box 1293 Albuquerque, New Mexico 87103

CITY OF ALBUQUERQUE PERSONNEL BOARD **RULES OF PROCEDURE FOR APPEALS OF DISCIPLINARY ACTIONS**

1. Purpose

A. The purpose of these rules is to provide uniform procedures for the conduct of grievance hearings by Personnel Hearing Officers and the recommendation of Hearing Officers to the Personnel Board.

B. These rules are made pursuant to specific authority granted to the Personnel Board by the Merit System Ordinance and the Personnel Rules and Regulations and shall not be interpreted to amend or supersede that authority. In the event of any conflict or inconsistency, the language of those provisions shall control.

C. These rules shall apply only to the conduct of grievance hearings wherein the management action questioned by the classified employee resulted in the dismissal, demotion, or suspension of the classified employee for more than five (5) working days.

D. A current version of these rules shall be maintained at the offices of the Clerk of the City of Albuquerque.

2. Request for Hearing and Notice of Setting

A. An employee aggrieved by his or her dismissal, demotion or suspension of more than five (5) working days, shall file a written request for a hearing with the City Clerk within ten (10) City business days. The written request for hearing shall be sent via Certified Mail-

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Revised

Return Receipt Requested, faxed, emailed, or hand-delivered and date stamped within ten (10) City business days of the issuance of the disciplinary decision. Such request for hearing shall identify the action taken and the reasons why the action should not have been taken.

B. The party requesting the hearing shall provide the City Clerk with a mailing address and, if available, an e-mail address. A request for hearing is not valid until received by the City Clerk. Upon receipt of the request for hearing and within ten (10) City business days of receipt, the City Clerk shall designate a hearing officer and schedule the time and place for the hearing. The City Clerk shall mail or hand deliver the notice of hearing to the parties and also shall e-mail a copy of the notice to each party that has provided an e-mail address or whose e-mail address is posted on the City of Albuquerque website. The mailing of the notice to the address provided by the party requesting the hearing constitutes receipt of the notice on the third day after the mailing date. Hand delivery of the notice constitutes receipt of the notice on the date of delivery. Transmission or receipt of an e-mailed copy of the notice shall not change any deadline that applies to a party.

C. As used herein, "City business day" means those days in which the City's administrative offices are open for general business, typically Monday-Friday except for designated City holidays.

D. If a notice period is ten (10) City business days or less, notices transmitted after 4:00 p.m. on City business days or at any time on non-City business days are deemed transmitted on the next City business day.

3. Disqualification of Hearing Officer

A. General rules.

(1) Multiple parties with a common interest in the matter constitute a single party for purposes of this section.

(2) Hearing officers are required to disclose any matter to the parties that could be considered a conflict of interest with their duty to render fair and impartial decisions. Once such a disclosure has been made on the record, the parties to that proceeding may, but are not obligated to, waive such a potential or apparent conflict. If the parties do not waive the potential or apparent conflict, the hearing officer shall recuse himself unless the hearing officer rules that the conflict will not prevent a fair hearing. If the hearing officer recuses himself, the City Clerk shall select an alternate hearing officer and mail or deliver a notice of alternate assignment and resetting to the parties.

B. Peremptory excusal. Each party may peremptorily excuse *one* personnel hearing officer within ten (10) City business days of the receipt of the notice of hearing. The peremptory

excusal shall be filed with the City Clerk and served upon the opposition. Upon receipt of a peremptory excusal, the City Clerk shall select an alternate hearing officer and mail or deliver a notice of alternate assignment and resetting to the parties. Except for non-substantive communication involving scheduling or procedure, a party shall not excuse a hearing officer after the hearing has begun or after the hearing officer has performed any discretionary act in the matter.

(Ord. 2012-024)

4. Filing of Pleadings

A. Pleadings shall be considered filed with the Hearing Officer on the date of delivery to the Clerk of the Personnel Board at the Office of Administrative Hearings.

B. Copies of pleadings shall be served by 1st Class Mail, e-mail, fax, or hand-delivered by the filing party to all parties to the matter.

5. Consolidation and Joinder

The Hearing Officer may consolidate or join cases for any reason if it would expedite final resolution of the cases and would not adversely affect the interests of any of the parties.

6. Pre-Hearing Conference and Order

A. The Hearing Officer may conduct a prehearing conference in order to obtain information necessary to the issuance of a prehearing order. The Hearing Officer may conduct the conference by telephone or direct the parties to submit a stipulated prehearing order rather than appearing for a conference.

B. At the request of either party and at the discretion of the Hearing Officer, a prehearing order may be issued. The prehearing order shall address any matter deemed appropriate by the Hearing Officer and as described in (C) below.

C. At a minimum, the prehearing order shall:

(1) Identify any contested facts and issues;

- (2) Secure stipulation of those matters not in dispute;
- (3) Review any requests for discovery and set a deadline for any discovery allowed;
- (4) Set a deadline for disclosure of witnesses to be called and exhibits to be introduced.
- (5) Discuss any prehearing motions and determine the manner in which they will be heard or acted upon; and
- (6) Determine the approximate length of the hearing and schedule the hearing date(s).

7. Discovery

A. Upon written request by any party, and after entertaining any objections to discovery requests, the Hearing Officer may order either party to produce for inspection and copying any records, papers, documents, or other tangible evidence in the possession of or available to that party.

B. No additional discovery shall be allowed except by order of the Hearing Officer.

8. Motions

A. Unless pre-hearing Order directs otherwise, any defense, objection, or request that can be determined prior to the hearing on the merits may be raised by filing a written motion at least fifteen (15) calendar days prior to the hearing on the merits

B. Any response to a motion shall be filed within ten (10) calendar days after the filing of the motion.

C. The Hearing Officer shall rule on all non-dispositive motions as soon as practicable. At the option of the Hearing Officer, dispositive motions may be reported to the Personnel Board for decision prior to the full hearing on the merits or taken under advisement to be reported as part of the final Hearing Officer's recommendation.

D. Any motion or response shall not exceed seven (7) pages.

9. Witnesses

A. Witnesses shall be identified in accordance with the prehearing order or other order of the Hearing Officer. If no prehearing order has been entered, all witnesses must be identified in writing at least five (5) calendar days prior to the hearing. Witnesses not designated in accordance herewith shall not be permitted to testify except at the discretion of the Hearing Officer for good cause shown.

B. City employees designated by either party as witnesses shall be relieved from their normal duties for a period of time necessary to testify if employee is on duty at the time employee is required to be at the hearing. A party designating a witness who is not a City employee is responsible for the appearance of that witness.

C. The Hearing Officer shall issue subpoenas for witnesses and evidence and shall swear in all witnesses.

10. Hearings

A. All reasonable efforts shall be made to conclude the hearing within two (2) consecutive days.

B. A party may appear at the hearing through a representative, provided such representative has given written notice of appearance at least three (3) calendar days prior to the hearing date.

C. The Hearing Officer shall clear the room of witnesses not under examination except that parties and their representatives are entitled to remain in the hearing room during the course of the hearing, even if such persons may testify in the hearing.

D. The Hearing Officer is responsible for the control and decorum of the hearing room. The Hearing Officer may take any action he deems necessary to effectuate a full, fair, impartial and expeditious hearing. Upon written request by the Hearing Officer and for good cause shown, the Board may prohibit any person from appearing before a Hearing Officer for a period of time set by the Board after a full hearing before the Personnel Board.

E. The City shall present its case first and shall have the burden of proving by a preponderance of the evidence that discipline was imposed on the grievant for justifiable cause.

F. Prior to presenting its evidence, the Department may present a brief opening statement. The grievant may make an opening statement after the employing department or before the presentation of grievant's case in chief.

G. Oral evidence shall be taken only under oath or appropriate affirmation.

H. Each party shall have the right to:

- (1) call and examine witnesses;
- (2) cross-examine witnesses;
- (3) introduce exhibits;
- (4) impeach any witness;
- (5) introduce evidence relevant to the choice of discipline;
- (6) present any rebuttal evidence.

I. It is the policy of the Board that hearings operate in accordance with the common law evidentiary standards applicable to administrative hearings. The hearing shall be conducted in an orderly and informal manner without adherence to the technical rules of evidence required in judicial proceedings.

J. The Hearing Officer may admit and give probative effect to any evidence, including affidavits, as the Hearing Officer deems appropriate. The Hearing Officer shall exclude incompetent, immaterial, irrelevant, or unduly cumulative testimony. Documentary evidence may be received in the form of copies or excerpts unless the source of the information or other circumstances indicates lack of trustworthiness.

K. The Hearing Officer may take judicial notice of matters and shall apply the rules of privilege in the same manner as the court of this state.

L. The Hearing Officer shall only admit evidence relevant to the grievance and discipline imposed.

M. The hearing shall be open to the public. However, upon motion by either party, and for good cause shown, the Hearing Officer may order that a hearing be closed to the public.

N. The Federal Department of Transportation's (DOT) Office of Drug and Alcohol Policy and Compliance, 49 C.F. R. § 40.323(b), provides that information regarding drug and alcohol test results pertaining to safety sensitive employees, as designated by DOT Regulations, cannot be disclosed in an open meeting without first obtaining permission from a grievant to disclose the results.

(1) In the event that such permission is not granted by a grievant, the drug or alcohol test results of a grievant shall be released only to the parties in the proceeding and to the hearing officer. The hearing officer shall review the test results *in-camera*.

(2) Audio recordings and minutes taken during testimony pertaining to a grievant's drug or alcohol test shall be taken separately from the public record and subsequently sealed. Such recordings shall not be considered public record in accordance with of the Inspection of Public Records Act, 1979 NMSA § 14-2-1(b)(12). The evidence containing test results shall be separated from the public record and shall be sealed. The test results shall remain sealed unless a court of proper jurisdiction orders otherwise.

O. The Hearing Officer shall not participate in any adjudicatory proceeding if, for any reason, the Hearing Officer cannot provide a fair and impartial hearing to either party.

P. No person shall discuss the merits of any pending adjudicatory proceeding with the designated Hearing Officer or a member of the Personnel Board unless either parties or their representatives are present.

11. Post-Hearing Briefs

The Hearing Officer may require or permit written closing arguments, post-hearing briefs and proposed findings of fact and conclusions of law. If post-hearing pleadings are allowed, the record of the hearing shall remain open until the pleadings are filed. Unless otherwise agreed to by the Hearing Officer, such pleadings must be filed within fifteen (15) calendar days of the close of the hearing.

12. Recommended Decision

The Hearing Officer shall normally submit the Hearing Officer's findings of fact, proposed conclusions of law and a recommended decision to the Board within thirty (30)

calendar days after the record of the hearing is closed. The Hearing Officer shall serve a copy of the recommended decision on the parties.

13. Decision of the Board

A. A quorum of the Board shall normally act within thirty (30) calendar days of receiving the recommendations of the Hearing Officer by meeting to deliberate in executive session. When deliberating, the Board may only consider the hearing record and the Hearing Officer's findings of fact, proposed conclusions of law, and recommended decision. The Board shall not consider any evidence, pleadings or affidavits not in the record before the Hearing Officer. The Board may request the Hearing Officer's presence to discuss the Officer's recommendation when the Board meets in open session.

B. A final decision shall not be issued until a majority of a quorum of the Board decides to: ~~accept or reverse the discipline imposed; or, remand the matter to the Hearing Officer for further proceedings or a more detailed report.~~

(1) Accept the recommendation of the Hearing Officer by accepting the Hearing Officer's Proposed Findings of Fact and entering conclusions of law consistent with the findings;

(2) Reverse or modify the recommendation of the Hearing Officer by making its own Findings of Fact consistent with the evidence and entering conclusions of law consistent with the findings; or

(3) Remand the matter to a Personnel Hearing Officer for further hearing.

C. Decision by the Board is the final step in the grievance process and appeal of an adverse decision shall be taken to the State District Court within thirty (30) calendar days of the decision.

D. A copy of the Board's final decision shall be maintained at the offices of the Clerk of the City of Albuquerque.

E. Copies of the Board's decision shall be emailed -to the parties or sent via 1st Class mail if no email exists.

14. Implementation of Decision

A. The Board order shall be implemented as follows:

1. In the event that there is no appeal of the Board's decision to reinstate an employee, the effective date of reinstatement shall be the date of the Board's vote for reinstatement, unless otherwise directed by the Board.

2. Back-Pay: The City shall tender any back pay awarded to a grievant within seven (7) calendar days of its receipt of the grievant's sworn statement in "B" hereunder.

B. In the event the Board's order includes any back pay, the grievant shall provide the City with a sworn statement of gross earnings and unemployment compensation received since the effective date of the disciplinary action. The City shall be entitled to offset earnings and unemployment compensation received during the period covered by the back pay award against the back pay due.

C. The Hearing Officer shall retain jurisdiction of the case for the purpose of resolving any disputes regarding back pay. It is the City's position that benefits to be reinstated reasonably ought to include those benefits accrued to an employee as a function of his/her employment with the City in a particular classification and pay grade. These include:

1. Base Pay
2. Vacation Accrual
3. Sick Leave Accrual
4. PERA Co-payments made by the City
5. Health/Life Insurance Payments made by the City
6. Contractual Based Seniority (if applicable)
7. Longevity pay (if applicable)
8. Differential Pay for Shift Assignment
9. Temporary Upgrade Pay

Other remuneration may be distinguished from the previous listing in that it is not guaranteed to employee members of a classification and pay grade, but granted to a limited number of some employees, based upon management's perception of the City's need at a specific time and place. These benefits include:

1. Overtime
2. Standby Time

15. Hearing Record

The official record of any hearing before the Hearing Officer shall be taken either by stenographic transcript or audio tape, digital or other reliable means of recording at the discretion of the Hearing Officer, by a certified court reporter or certified tape monitor. In the event that a party elects to appeal an adverse final decision of the Board, the cost and responsibility for submission of the record on appeal to the appropriate court shall be borne by the party bringing the appeal.