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FREQUENTLY ASKED QUESTIONS REGARDING STATE CIVIL SERVICE DISCIPLINARY APPEALS

How does a disciplinary appeal get started?

After a grievance has gone through step 1 (the appointing authority level) and step 2 (the DPM administrator level) of the grievance procedure, as set forth at § 230.445 (3)(a) and (b), Stats., the grievance may be brought before the Wisconsin Employment Relations Commission as an administrative appeal under § 230.445(3)(c), Stats. An appeal is started when it is filed at the Commission's office, which must happen no later than 14 days after the Appellant receives the DPM administrator's decision. (Or, if the DPM administrator has not issued a written decision within 31 days of receiving the employee grievance, the employee must file an appeal with the Commission no later than 14 days after that 31st day.)

There is no specific form on which an appeal must be filed, but the filing should include the letter of discipline being challenged.

Once the appeal has been filed, the Commission's staff will send an email message to the parties attaching (1) the appeal, (2) an instruction sheet regarding the appeal, and (3) a Preliminary Order from the Hearing Examiner setting a date and time for a prehearing conference call and deadlines related to the discovery process.

What is the filing fee for a state civil service disciplinary appeal?

There is no filing fee for a disciplinary appeal.

Who are the parties to an appeal and who represents each side?

The initiating party, which is usually the employee, is the "Appellant"; and the "Respondent" is the agency that issued the discipline being appealed.

The Respondent typically is represented by an attorney employed by the state. An Appellant may represent him- or herself by appearing "pro se," or the Appellant may use an attorney or non-attorney representative. Throughout the course of the appeal, each party must keep the Hearing Examiner updated as to any change to its representative.

Who is the "Hearing Examiner," and will that person help either party with its case?

The Commission will appoint a Hearing Examiner (a/k/a "Examiner") from its staff of attorneys to hear the appeal on the Commission's behalf. The Examiner's job is to ensure that a fair hearing occurs and that an adequate record of the evidence is made in a case. To do so, the Examiner oversees the process of preparing for hearing and regulates the course of the hearing.

As the neutral decision-maker in a case, the Examiner will not serve as a representative or advocate for either party.

How does a party communicate with the Examiner and the opposing party during the course of an appeal?

The statutes and rules prohibit a party from communicating with the Examiner or any other member of the Commission's staff regarding the merits of a case outside the presence of the other party. § 227.50, Stats., and Wis. Admin. Code § ERC 93.04. For this reason, communications with the Examiner should be initiated via email and should include the other side.

On the other hand, a party is free to communicate at any time with the opposing party in a case without the involvement of the Examiner. If a party is represented by an attorney, any communications should be directed to that attorney.

What happens during the prehearing conference?

The general purpose of the prehearing conference is to make preparations for hearing. To do so, the Examiner may want to discuss matters such as the following:

- The nature of the discipline that is the subject of the appeal;
- A statement of the issue for hearing, which is the formal question to be considered by the Examiner and Commission, typically phrased as follows: "Whether the Respondent Department of [X] had just cause for [*e.g.,* discharging] the Appellant in correspondence dated [X]."
- The date(s) of the hearing, which must be set at the prehearing conference;
- The location for the hearing;
- The witnesses that are likely to be involved in the hearing;
- Whether either party intends to use the discovery process to request documents or other information from the opposing party in preparation for the hearing;
- Whether there is some possibility for resolution of the dispute prior to a hearing.

Prehearing conferences usually occur over the telephone. A Preliminary Order that is emailed to the parties when an appeal begins will provide important instructions regarding the date, time, and call-in numbers for the conference. Although a prehearing conference will typically take less than one-half hour, each party should be available for a full hour in case the conference lasts longer.

What is "discovery" and how does it help a party with its case?

Each party may request information and documents from the other party that are needed to prepare for hearing. This "discovery" process is allowed in administrative hearings under § 227.45(7), Stats., and Wis. Admin. Code § ERC 93.03. Discovery methods and procedures are described at Chapter 804, Stats.

Depending on any restrictions set forth by the Examiner, the following discovery methods may be available:

- "Interrogatories" – specific questions submitted to the other side in writing, which must be responded to in writing and signed under oath (*i.e.,* the person who provided the answers signs the document and that signature is witnessed by a notary);
- "Requests for Production of Documents" – requests for specific documents that are needed to prepare for hearing;
- "Requests for Admissions" – written statements that an opposing party must admit or deny for the purpose of establishing a fact or verifying that a document is authentic;
- "Depositions" – a formal meeting prior to the date of hearing where a party questions a witness under oath and the questions and answers are transcribed by a court reporter. Depositions typically are conducted in-person at a set place and time. Any necessary arrangements must be made by the party taking the deposition.

The Preliminary Order sent to the parties will contain important discovery deadlines. The Examiner will place any necessary limits on discovery during the prehearing conference.

If there is a dispute regarding discovery that the parties are not able to work out between themselves, the Examiner should be contacted.

What will happen at the hearing?

The basic purpose of a hearing is to give each party the opportunity to present the factual evidence relevant to its case. The hearing is an administrative proceeding which is not as formal as a court proceeding but has many of the same elements. Under the direction of the Examiner, witnesses will testify under oath and documentary evidence in the form of exhibits will be presented.

At the beginning of the hearing, the Examiner may give the parties an opportunity to make opening statements. An opening statement is each party's chance to briefly summarize for the Examiner the nature of the dispute and the evidence that will be presented that support that party's position.

Because the Respondent has the "burden" to prove just cause, the Respondent will have the first opportunity to question witnesses and present documentary evidence. Once the Respondent has finished, the Appellant will have the same opportunity to put on a case. Each party will have the opportunity to cross examine the other party's witnesses after each witness has provided direct testimony. The Examiner also may ask questions of the witnesses.

The hearing will last until all of the evidence has been gathered, and it is often difficult to anticipate how long this process will take. If the parties have another day of hearing scheduled, the Examiner will determine when it is necessary to break for the day.

Will the hearing be tape recorded or transcribed?

Parties can elect to hire a court reporter to make a transcription of the hearing. In the event that arrangements for a court reporter have not been made, the hearing will be tape recorded by the Examiner. A party may purchase copies of the recording from the Commission for a fee of $25.00 per day of hearing or may listen to the recording at the Commission's office free of charge.

What rules of evidence apply during the hearing?

As established under § 227.45(1), Stats., these are the evidentiary rules for administrative hearings:

- The common law and statutory rules of evidence generally *will not* apply;
- The Examiner *will* admit evidence that has "reasonable probative value";
- The Examiner *will not* admit evidence that is immaterial, irrelevant, or unnecessarily repetitious;
- The parties *are* allowed to make "objections" to alert the Examiner to any problems with the testimony or exhibits or to raise any other concerns;
- The parties *are* allowed to make "offers of proof" to describe evidence that was offered but not admitted into the record by the Examiner.

How does a party get witnesses to come to the hearing?

The Examiner has the authority to direct state employees to attend and provide testimony at hearing by issuing "letters of appearance." Likewise, the Examiner has the authority to issue subpoenas directing individuals who are not state employees to do so. The Examiner will set a deadline by which any letters of appearance or subpoenas must be requested. Any request must provide the physical mailing and email address for each witness. Letters of appearance will be sent by the Examiner directly to employee-witnesses, but a party is responsible for serving any subpoena it has requested. WERC Examiners typically will not issue subpoenas for attorney representatives who are statutorily authorized to do so themselves.

As an alternative, a party may informally ask its witnesses to come to the hearing to provide testimony. If a witness fails to show up at the hearing as promised, however, the party likely will not have another opportunity to have that witness testify.

Do Appellants and witnesses lose pay or have to take paid leave while participating in appeal proceedings?

Appellants and state employees who serve as witnesses at hearings cannot lose state salary or be required to take leave for time spent participating in prehearing conferences and hearings. Wis. Admin. Code § ERC 91.13.

Is there reimbursement for the expense of travelling to a hearing?

A state employee who attends hearing as the Appellant is entitled to reimbursement by the employing agency. Wis. Admin. Code § ERC 91.13(1). A state employee who attends a hearing as a witness is entitled to the compensation specified at Wis. Admin. Code § ERC 91.13(2). Any person who is not a state employee and who appears at hearing by order to provide testimony is entitled to receive fees and mileage as provided at § 230.44(4)(b), Stats.

Under what legal standard is an appeal evaluated?

Under § 230.24(1)(a), Stats., a disciplinary decision that is the subject of an appeal will be evaluated under a "just cause" standard. As a general matter, this standard results in an evaluation of the following questions:

1. Whether the Appellant committed the conduct set forth in the letter of discipline;
2. If the conduct occurred, whether it constituted just cause for discipline;
3. If the conduct constituted just cause for discipline, whether the discipline was excessive.

The burden will be on the Respondent to prove these things.

Do parties have an opportunity to make arguments that support their positions in a case?

After facts are established during the evidentiary (*i.e.*, witness and exhibit) part of the hearing, the parties will have an opportunity to make arguments as to what the facts show. Arguments are made either orally at the end of the hearing or in writing sometime after the hearing. The Examiner will determine whether oral or written arguments are appropriate and will establish any deadlines for submitting arguments.

What information will be considered when the decision is made?

The "record" of a case is the information that will be considered when a decision is made. The record consists of any testimony provided at the hearing, any documentary evidence presented by the parties, and any arguments submitted by the parties. At hearing, the Examiner will resolve any disputes about what evidence should be accepted into the record. The Examiner and the Commission are not allowed to consider any material outside the record when making a decision in a case.

Who makes the decision on a disciplinary appeal, and is that decision final?

After holding a hearing and reviewing the evidence and arguments of the parties, the Examiner issues a "Proposed Decision and Order." The parties will then have an opportunity to file written objections to the Proposed Decision and Order. After the time passes for any objections to be submitted, the Commission will issue a final decision.

A final decision in a case is subject to rehearing and judicial review under the procedures set forth at Chapter 227, Stats.

How will the parties hear about the decision?

Both the Examiner's Proposed Decision and Order and the Commission's final Decision and Order will be in writing. These documents will be sent to the parties via email (for the Proposed Decision and Order) and via certified mail (for the final Decision and Order).

Are attorney fees available?

Attorney fees are available to an Appellant only under very narrow circumstances. Specifically, an Appellant is able to recover attorney fees only if it is determined that the Respondent was not substantially justified in taking its position in the case. § 227.485, Stats.

What if a party wants to resolve a case prior to going to hearing?

If both parties agree to it, there may be an opportunity to resolve a case through mediation. The Examiner assigned to a case may serve as mediator, or the parties can request that another member of the Commission's staff serve as mediator. Mediation will only work if the parties are able to arrive at a compromise resolution. If mediation is not effective and the Appellant still wants to pursue the appeal, the case may proceed to hearing.

Any party interested in mediation should raise that issue with the Examiner.

Where can more information be found about disciplinary appeals?

All statutes and administrative rules relevant to disciplinary appeals, including those cited here, may be found at the WERC website at werc.wi.gov.

The WERC website also has a database of prior state civil service appeal decisions.