

<b>NORTH CAROLINA DEPARTMENT OF COMMERCE</b>		<b>POLICY # 17</b>
<b>Title: Employee Grievance and Mediation Policy</b>		
<b>Effective Date: MAY 1, 2012</b>	<b>Administering Authority: Human Resources Dir.</b>	
<b>Revisions:</b>		
<b>Statutory Authority (if applicable): G.S. 126</b>		

### **Purpose**

It is the policy of the State Personnel Commission that a grievance procedure shall exist in all agencies to permit the quick and orderly resolution of problems and differences arising between supervisors and employees. The North Carolina Department of Commerce has adopted the following policy to provide a means of communication between employees and supervisors and establish principles of administration to ensure a fair, orderly, and prompt response to employee grievances and complaints. Employees have a right to present grievances or appeals arising out of or due to employment free from interference, restraint, coercion, or reprisal.

### **Policy**

Any career State employee having a grievance arising out of or due to employment shall first discuss the problem or grievance with his/her supervisor or the appropriate supervisor, and follow the grievance procedure established by this agency. Employees alleging discrimination because of age, sex, race, color, national origin, religion creed, handicapping condition (disability) or political affiliation shall have the right to appeal through the agency grievance procedure within the time frame established, or may appeal directly to the State Personnel Commission.

### **Covered Employees**

This policy covers career State employees and employees with permanent position appointments. A career State employee is one who is in a permanent position appointment has been continuously employed by the State of North Carolina in a position subject to the State Personnel Act for the immediate 24 preceding months. Employees with permanent position appointments who have not yet attained career status may appeal final department decisions only to the extent that the North Carolina Department of Commerce's policy allows. This policy does **not** apply to employees exempt from the state personnel act (G.S. 126). Likewise, it does **not** cover probationary employees or trainee employees who have not yet attained one year of continuous State service. Probationary or trainee employees in their first year of service, however, can file a grievance under this policy if alleging actionable discrimination or if alleging that information in the employee's personnel file is inaccurate or misleading.

### **Types of Actions Covered**

Employees have a right to present a grievance free from interference, restraint, coercion, or reprisal. Issues that may be grieved through the agency's policy include the following:

- demotion
- denial of promotional priority (for State employees competing with non-State employees for a job vacancy)
- denial of priority re-employment for reduction-in-force applicants

## **NORTH CAROLINA DEPARTMENT OF COMMERCE**

- disciplinary suspension without pay
- dismissal
- actionable discrimination
- denial of a request for reasonable accommodation
- failure to give policy-making/ exempt status employees appropriate priority consideration
- inaccurate and misleading information in the personnel file
- violation of the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA)
- performance pay disputes:
  - failure to receive an increase for a promotion
  - the amount of performance increase mandated by the General Assembly
  - overall performance appraisal rating of Good, Below Good, or Unsatisfactory
  - Performance pay disputes can be appealed within the North Carolina Department of Commerce but such disputes cannot be appealed outside of the agency

Matters of inherent management rights are not subject to appeal under this policy. These matters include, but are not limited to, such areas as the programs and functions of the agency, standards of service, the utilization of technology, and the assignment and re-assignment of staff to positions and duty stations.

### **Written Warnings**

Written warnings may not be grieved under this policy. Written warnings can be issued for either unsatisfactory job performance (including grossly inefficient job performance) and/or unacceptable personal conduct. Warnings shall include the following information:

- 1) Be in writing and state that it is a warning;
- 2) Tell the specific conduct and/or performance that is the reason for the warning;
- 3) Tell the specific performance and/or conduct improvements that must be made;
- 4) Tell the time within which the employee must show improved performance and/or conduct. If the warning does not include an improvement or correction time frame, unsatisfactory job performance will be reviewed on an ongoing basis, and grossly inefficient job performance or unacceptable personal conduct will be reviewed immediately; and
- 5) Tell the consequences of failing to make the required improvements/corrections.

Matters of inherent management rights are not subject to appeal under this policy. These matters include, but are not limited to, such areas as the programs and functions of the agency; standards of service; the overall agency budget; the utilization of technology, and the assignment and re-assignment of staff to positions, duty stations, and shifts, except where such transfers include a demotion to a lower classification.

Written warnings are normally issued by the immediate supervisor after consultation with higher level managers and prior approval from the Human Resources Office. Written warnings will become inactive after eighteen (18) months have passed since the issuance of the warning, and the employee does not have another active warning or disciplinary action which occurred within the last 18 months. A supervisor may choose to inactivate (remove) a written warning any time within the 18-month time period by providing written notification to the employee and the Human Resources Office. While written warnings may not be appealed, any employee who disagrees with the contents of a written warning may write a memo outlining areas of disagreement. This memo shall be attached to the copy of the written warning maintained in the personnel file. Any employee who has questions about written warnings or any other aspect of the disciplinary process may contact the Human Resources Office.

## **NORTH CAROLINA DEPARTMENT OF COMMERCE**

Generally, matters not specifically set out in this policy as those “which can be grieved” cannot be grieved. Specific questions on what is and what is not considered grievable may be directed to the Human Resources Management Office.

### **Inaccurate or Misleading Information in a Personnel File**

Any employee, regardless of length of service, who alleges that written information in the employee's personnel file is inaccurate or misleading, may file a grievance. The grievance must be filed within fifteen **(15) calendar days** of the receipt of the document which the employee believes to be inaccurate or misleading. In the grievance, the employee should specify the information that is inaccurate or misleading. Any employee may examine his/her personnel file by making a request to the Human Resources office any time between the hours of 8:00 a.m. and 5:00 p.m. during a standard work day.

### **Unlawful Discrimination**

An applicant, employee, or former employee who has reason to believe that employment, promotion, training or transfer was denied the employee; or that demotion, reduction-in-force or termination of employment was forced upon the employee for reasons that constitute discrimination, shall have the right to appeal through the departmental grievance procedure within the time frame established by the agency grievance procedure or may appeal directly to the Office of Administrative Hearings. Effective January 1, 2012, the Office of Administrative Hearings makes the final decision in a contested case. Reasons that constitute discrimination include age, race, sex, color, national origin, religion, creed, political affiliation or disabling condition, except where specific age or sex requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, or where specific physical or mental abilities are necessary to perform the essential functions of the job. In order to appeal, the grievant must file a petition for a contested case hearing with the Office of Administrative Hearings within thirty (30) calendar days after receipt of notice of the alleged discriminatory action. The mailing address for OAH is: Office of Administrative Hearings, 1711 New Hope Church Road, Raleigh, NC 27609-6285; telephone (919) 431-3000.

### **Unlawful Workplace Harassment**

An employee, who alleges unlawful workplace harassment and elects to utilize the agency grievance procedure, shall have the right to bypass any step in the agency grievance procedure involving discussions with or review by the alleged harasser. If the employee elects to bypass the supervisor, who is the alleged harasser, the employee should go to the next higher supervisory level and follow the steps outlined below:

1. Submit a written complaint to the Human Resources Director within 30 calendar days of the alleged harassing action. The complaint should be addressed to the appropriate Human Resources Director (call 919-733-2104 or 919-707-1670 for additional contact information). Because of the sensitivity and confidentiality involved and for monitoring purposes, the Human Resources Director assumes ultimate responsibility for contacting and notifying other supervisors and managers who must be consulted.
2. The agency shall take immediate, appropriate, remedial action rendering a written response to the grievant within 60 calendar days from receipt of the written complaint.
3. The agency shall provide a written response to the grievant when the agency has determined what action, if any, will result from the grievant's written complaint. The agency's written response to the grievant must include applicable appeal rights.

## NORTH CAROLINA DEPARTMENT OF COMMERCE

4. After the agency's 60 calendar days response period has expired, the grievant may appeal directly to the Office of Administrative Hearings within 30 calendar days if not satisfied with the agency's response to the complaint.

A grievant has the right to file a simultaneous complaint under Title VII with the Equal Employment Opportunity Commission (EEOC).

Employee conduct towards an outside vendor or contractor that would constitute unlawful workplace harassment could constitute unacceptable personal conduct. More information can be found in the agency's Unlawful Workplace Harassment Policy.

### **Request for Reasonable Accommodation: Americans with Disability Act (ADA)**

Employees (including temporary, probationary, part-time or full-time regardless of career status) or applicants who are dissatisfied with the decision pertaining to a request for reasonable accommodation may file a grievance in accordance with the agency grievance procedure. Such persons may also appeal directly to the Office of Administrative Hearings no later than 30 calendar days from receipt of the decision.

### **Filing a Grievance**

Any employee who has adverse action taken against them will be given written notice of any applicable appeal rights he/she might have. An eligible employee who wishes to file an appeal internally, under the departmental grievance policy and procedures, must file the grievance within the **fifteen (15) calendar days** of the date the employee learned (or with reasonable effort should have known) of the action being contested. Grievance forms can be obtained by contacting the Human Resources Office at (919) 733-2104, or (919) 707-1670. Forms are also available in the Human Resources Office, which is on the 5th Floor of the DPI Building, 301 N. Wilmington Street, or at the first floor of the Kendall Complex at the Division of Employment Security on Wade Avenue in Raleigh. Grievance forms can be faxed to any employee upon request.

### **How to Obtain Information about the Grievance Policy**

The Human Resources Office will provide information and answer questions about the grievance policy and provide grievance forms. This policy shall be posted in a permanent and conspicuous place in work areas and will be placed on the Commerce Intranet [http://www.nccommerce.com/intranet/policies/HR\\_17.pdf](http://www.nccommerce.com/intranet/policies/HR_17.pdf), which is available to all employees in every work area. New employees will be informed of the policy and grievance procedure during the new employee on-boarding process. All employees will be notified of the grievance policy and procedure changes through email prior to the effective date of the change. The Employee and Management Services Manager or Director of Human Resources Office may be contacted at either (919) 733-2104 or (919) 707-1670.

### **Time Off for Processing Grievances**

Employees shall be allowed time off from regular duties as may be necessary and reasonable for preparation for a grievance, up to a **maximum of eight (8) hours**, without loss of pay, vacation leave, or other time credits. Employees must notify their supervisor in advance and receive prior written approval of the necessity to be absent from work for preparation of the grievance. Subsequent appeals are a continuation of the original grievance, and time spent preparing for each step is cumulative, up to the maximum per grievance of eight hours. Thus, up to eight (8) hours time off is allowed per grievance, not for each step in the grievance process.

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

## **NORTH CAROLINA DEPARTMENT OF COMMERCE**

supervisor's approval. The supervisor, with prior approval from Human Resources, determines if the leave is necessary and reasonable. The Human Resources Office shall provide guidance to employees and supervisors in case of disagreement as to a reasonable amount of time off for this purpose. Documentation of the time required by the presiding official may be requested by the supervisor before leave approval is granted.

### **Human Resources**

Upon receiving a grievance that meets the criteria set forth in this policy, the Human Resources Management Office will ensure the processing according to the agency policy. Should an employee grievance filed with Human Resources not meet the criteria set forth in this policy, the employee will be notified of the reason(s) within the stated timelines for grievances and appeals. Grievances filed and all related information will be analyzed on an annual basis by demographics, division, and nature of issues grieved to insure that departmental policies and procedures are administered fairly and consistently and follow good employee relations practices. The Human Resources Office will respond to all requests for information regarding grievances and appeals and will report this and other relevant information as requested to the Office of State Personnel and other appropriate authorities. The Human Resources Office will maintain all records on grievances filed within the department for a period of at least 18 months.

The Human Resources Office shall submit this policy for review by the Office of State Personnel on March 1 of each even-numbered year to insure that it is in compliance with current state law and rules. This plan will be reviewed annually to determine implementation of goals and procedures.

### **Grievance and Appeal Procedures**

#### **Informal Meeting with Supervisor**

The North Carolina Department of Commerce encourages direct communication between employees and supervisors as the first method of attempting to address grievances in the spirit of cooperation and compromise.

#### **Step 1 – Mediation**

Mediation is the first step in the grievance process and involves the services of neutral third person(s) that will serve as mediators. Mediation provides an opportunity for the two parties to openly discuss the grievance with the goal of reaching a resolution that is mutually acceptable to both the employee and the agency. 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.

To initiate a grievance, the employee must file notice of the grievance, outlining what act or acts are the basis for the grievance, and the relief requested. The Human Resources Office must receive this notice within **15 calendar days** of the contested action. Completed grievance forms can be sent to the Commerce Human Resources Office, which is located on the 5th floor of the Education Building at 301 N. Wilmington Street in Raleigh. The mailing address is:

NC Department of Commerce  
Human Resources Office  
Attention: Employee and Management Services Manager  
4306 Mail Service Center  
Raleigh NC 27699-4306  
FAX: 919.715.3183

## **NORTH CAROLINA DEPARTMENT OF COMMERCE**

### **Assignment of Mediator(s)**

The North Carolina Department of Commerce will only use OSP approved mediators. The OSP mediation coordinator will identify and contact mediators to facilitate the mediation. OSP will utilize co-mediators whenever possible.

### **Designation of Management Representative**

The Employee and Management Services Manager will notify the management representative to serve as the respondent for the mediation.

### **Participation by Parties**

The designated management representative serving as the respondent must participate in the mediation in good faith and shall have the authority to negotiate an agreement on behalf of the agency to resolve the grievance. The Employee and Management Services Manager shall notify the OSP Personnel Officer in advance if circumstances prevent the representative from attending a scheduled mediation. The employee must participate in good faith to resolve the grievance, attend the mediation as scheduled and notify Human Resources in advance if circumstances prevent the employee from attending a scheduled mediation. Failure to make such an advanced notification shall cause the employee to forfeit his/her rights to the grievance process.

### **Representation by Other Individuals**

Representatives, advisors and attorneys are not allowed to appear in person to represent either party during a mediation session. 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 advice regarding the terms of the agreement.

### **Recording of Sessions**

Audiotape, videotape or other automated recording are not allowed during the mediation session.

### **Mediation Agreement**

When mediation results in a resolution of the grievance, both parties will sign a Mediation Agreement and receive signed copies. The Mediation Agreement is binding on both parties. A Mediation Agreement may not exceed the scope of the parties' authority and may not contain any provision contrary to State Personnel Commission rules, and applicable State and federal law. A copy of the signed Mediation Agreement will be maintained on file in the agency for not less than 3 years. A Mediation Agreement will not transfer to another agency if the employee transfers.

### **Mediation Impasse**

When mediation does not result in an agreement (impasse), an employee may proceed to Step 2 of the grievance process. This impasse is the conclusion of Step 1 of the OSP grievance procedure. An employee may appeal to Step 2 following an impasse.

### **Confidentiality of Documents**

Except for the Mediation Agreement, 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. The Mediation Agreement and any attachments are considered public records as settlement documents pursuant to G.S. 132-1.3.

All mediation forms and mediation process steps can be downloaded from the following website:  
<http://www.osp.state.nc.us/hr/mediation/mediation.htm> .

# NORTH CAROLINA DEPARTMENT OF COMMERCE

## Step 2- Appeals

Employees 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).

Depending upon whether or not the employee and the employee's organizational unit reports to the Secretary of Commerce, the Step 2 appeal will follow one of two tracks.

### Step 2: Appeal for Commission Employees

Commerce employees locating in the following "Type II" commissions are housed in the Department of Commerce for administrative purposes, but are not directly accountable to the Secretary of Commerce. These Commissions include: ABC Commission, Cemetery Commission, Credit Union Division, Industrial Commission, Utilities Commission, Utilities Commission-Public Staff, and the REA Administration. Pursuant to G.S. 62-14 and 143B-431, these Commissions are empowered to employ, direct and supervise professional and technical personnel, and are not accountable to the Secretary of Commerce in their exercise of these functions. For this reason, Step 2 of the Commerce Department Grievance Policy is not applicable to grievances involving the Commissions noted above. Should mediation not result in agreement, the employee has the right to pursue a Step 3 appeal to the State Personnel Commission, which is filed with the Office of Administrative Hearings. Employees pursuing a Step 3 appeal will find procedural information on Form H-06A, which must be submitted to the Office of Administrative Hearings. If a Commission employee desires to file a Step 3 appeal, Form H-06A is to be submitted by the grievant directly to the Office of Administrative Hearings within 30 days of the receipt of the Step 1 final agency decision. An attachment to this policy (page 6) states the procedure for filing with the Office of Administrative Hearings.

### Step 2: Appeal for Employees Reporting to the Secretary of Commerce

In situations where mediation does not produce agreement, or if a grievance involves an issue that the agency had not identified as subject to mediation, the employee may appeal to a Grievance Committee, which is appointed by the Employee and Management Services Manager or the Director of Human Resources. The Step 2 appeal must be received in writing by the Commerce Human Resources Office within 5 working days after the conclusion of mediation, or upon receiving the Step 1 decision, if the dispute is not subject to mediation. In addition to submitting the Grievance form, the employee shall provide four (4) copies of any supporting documentation to his/her case with the grievance form: three copies for the committee's review and one copy for management. The Human Resources Office will supply the employee with a copy of management's supporting documentation at least 10 calendar days prior to the scheduled hearing.

The employee may contact the Employee and Management Services Manager for assistance in preparing the request and summary data of the facts of the appeal. The Employee and Management Services Manager shall transmit the request to the Grievance Committee. Each party shall be notified at least ten (10) working days in advance of the scheduled date of the hearing. Neither the employee nor management may be represented by an attorney at the Step 2 hearing. In cases where an employee has a disability, he/she may request reasonable accommodations as defined by the Americans with Disabilities (ADA) law as applicable.

## NORTH CAROLINA DEPARTMENT OF COMMERCE

A hearing with the Agency Grievance Committee must be scheduled within 60 days after receipt of the request unless otherwise agreed upon by both parties. The Secretary shall reserve the right to appoint a Hearing Officer in lieu of the Grievance Committee to conduct a formal hearing, interview all parties involved, and submit a formal recommendation to the Secretary for final decision.

### **Grievance Committee Composition**

The appropriate Human Resources Director or the Employee and Management Services Manager will appoint members to the Agency Grievance Committee. The Agency Grievance Committee shall consist of three (3) members from diverse functional areas of responsibility within the Department who are not from the same operational unit as the employee appealing. The committee shall not be made up entirely of supervisory or administrative personnel. The demographics of the committee should reflect the demographics of the agency personnel pool to the extent possible, and the employee, particularly where actionable discrimination is alleged. The employee shall be allowed the opportunity to eliminate one member of the Agency Grievance Committee if the employee believes that person cannot render an unbiased decision. The employee will have five (5) working days from the receipt of the list of committee members to make changes to the committee.

If a committee member is eliminated, the appropriate Human Resources Director shall select a replacement to the committee. The Human Resources Director and members of the Human Resources staff shall not actively participate in the deliberations of the committee, although they may be present during these deliberations. The members of the committee are free to ask the Human Resources facilitator for guidance on interpretation of Human Resources policies. The Human Resources Director or Employee and Management Services Manager shall designate a committee chair, subject to the approval of the committee. At the conclusion of the hearing, it will be the responsibility of the grievance committee chairperson to inform the Director of Human Resources of the details of the grievance and the committee recommendation. The Human Resources Director shall then forward the committee recommendation to the Secretary for the final agency decision. The Secretary will review all relevant information and issue a final agency decision within fifteen (15) calendar days from the date the Secretary receives the report of the Agency Grievance Committee.

The employee shall be provided a written response within fifteen (15) calendar days from the date the Secretary receives the committee's report, or be advised as to the conditions which prevent an answer within fifteen (15) calendar days and told when an answer may be expected. The written response shall also include the employee's appeal rights, if applicable.

### **Step 3: Appeal to the State Personnel Commission**

Any employee, who does not agree with the final agency decision **AND** has attained career status as defined earlier in this policy, may appeal this decision **within 30 days of receipt** directly to the Office of Administrative Hearings. An Administrative Law Judge will render a Final Decision.

**EXCEPTION: Allegations of actionable discrimination or unlawful workplace harassment are exceptions. Grievances alleging actionable discrimination may, at the grievant's choice, proceed either through the agency procedure or may proceed directly to the Office of Administrative Hearings. Complaints of unlawful workplace harassment must proceed through the agency's Unlawful Workplace Harassment procedure and be completed within 60 days.**

### **Appeal to the Office of Administrative Hearings**

Any **applicant** for employment with the Department of Commerce or any current employee (regardless of length of service), who has reason to believe that employment, promotion, training or transfer was denied him/her; or that demotion, reduction-in-force or termination of employment was forced upon him/her due

## NORTH CAROLINA DEPARTMENT OF COMMERCE

to age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition except where specific age, sex, or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient job performance, shall have the right to appeal through the agency grievance procedure or may appeal directly to the Office of Administrative Hearings. The right to appeal shall be without fear of reprimand, reprisal or retaliation.

Grievances that allege actionable discrimination may, at the election of the employee, proceed through the agency procedure or may proceed directly to the Office of Administrative Hearings. **An employee who chooses to bypass the agency's internal grievance procedure and appeal directly to the Office of Administrative Hearings must do so within 30 calendar days of notice of the alleged discriminatory action.**

An employee who alleges unlawful workplace harassment and elects to utilize the agency grievance procedure shall have the right to bypass any step in the agency grievance procedure involving discussions with or review by the alleged harasser. Please see Department Policy on Unlawful Workplace Harassment for further information.

Employees alleging actionable discrimination who decides to exhaust the agency's internal grievance procedures must abide by all of the requirements as noted in the Grievance and Appeal Procedure: Non-Discrimination. Should the issue remain unresolved upon completion of the internal process, a direct appeal alleging actionable discrimination must be filed with the Office of Administrative hearings **within 30 calendar days** after the receipt of the agency's final decision. Grievances filed on an untimely basis must be dismissed. Allegations of actionable discrimination raised more than 30 calendar days after receipt of the occurrence of the alleged discriminatory act must be dismissed as untimely.

### **Procedure for Appeal to the Office of Administrative Hearings**

A petition for a contested case hearing (Form H-06A) must be filed within 30 days of the final agency decision or within 30 days of the action or omission giving rise to the right of appeal at:

Office of Administrative Hearings  
1711 New Hope Church Road  
6714 Mail Service Center  
Raleigh NC 27699-6714  
(919) 431-3000

Forms may be secured from the Office of Administrative Hearings (OAH) or State Personnel Commission (SPC):

State Personnel Commission  
116 W. Jones Street  
Administration Building  
1331 Mail Service Center  
Raleigh NC 27603-1331  
(919) 733-7112

The hearings are conducted by the Office of Administrative Hearings. Hearing procedures may be obtained by contacting:

**NORTH CAROLINA DEPARTMENT OF COMMERCE**

Chief Hearings Clerk  
Office of Administrative Hearings  
1711 New Hope Church Road  
6714 Mail Service Center  
Raleigh NC 27699-6714  
(919) 431-3000