

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (Applies to employees filing grievances on or after August 21, 2013)

Contents:

[Exercise of Discretion](#)

[Mediation/Settlements/Consent Agreements in Grievances and Contested Cases](#)

[Back Pay](#)

[Front Pay](#)

[Leave](#)

[Health Insurance](#)

[Interest](#)

[Reinstatement](#)

[Causes for Reinstatement](#)

[Suspension without Pay](#)

[Discrimination or Retaliation](#)

[Voluntary Programs or Benefits](#)

[Remedies for Procedural Violations](#)

[Remedies: Salary Adjustment](#)

[Certain Remedies Not Available](#)

[Situations in which Attorney Fees May Be Awarded](#)

[Attorney Fees May Be Awarded as a Result of a Settlement](#)

[Establishment of Reasonable Attorney's Fees](#)

[Grievance Reports by Agencies and Universities](#)

The following policies shall govern the review of employee grievance by State Agencies and the Office of State Human Resources and the availability of remedies for those grievances.

Exercise of Discretion

Decision makers considering employee grievances concerning disciplinary action shall weigh all relevant factors and circumstances, including factors of mitigation and justification, when making a decision as to whether there is just cause for disciplinary action.

Mediation/Settlement/Consent Agreements in Grievances, Contested Cases

Any mediation agreement, settlement agreement, or consent agreement in a grievance or contested case that requires the entering of data into human resources and payroll information system used by agencies with employees subject to Chapter 126, must be

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

approved by the Office of State Human Resources for compliance with all rules in Title 25 of the North Carolina Administrative Code before the agency enters the data.

Data is required to be entered into the human resources and payroll information system by an agency when it determines that an action must be taken that affects classification, salary, leave, demotion, reassignment, transfer, or for any other human resources action, except where the only personal action taken as a result of the settlement is the substitution of a resignation for a dismissal.

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 or by other means acceptable to the Office of State Human Resources Director. 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 policy 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.

The provisions of 25 NCAC 01A .0104 (EXCEPTIONS AND VARIANCES) must be complied with when any provision of a settlement or consent agreement in a grievance or contested case requires an exception to or variance from the Commission's rules or policy. This compliance shall be in addition to the requirements of this policy. Any agreement that contains a provision that requires an exception to or variance from existing human resources policy must be reviewed and approved by the Office of State Human Resources Director prior to the processing of any human resources action forms by the Office of State Human Resources or the university human resources and payroll system.

Requests to enter data into the State's human resources and payroll system that are required by the provisions of any settlement or consent agreement that has not been

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

approved by the Office of State Human Resources as required, shall not be processed by the human resources and payroll information system used by agencies with employees subject to Chapter 126, and shall be returned to the agency without action.

Back Pay

Back pay may be awarded in all cases in which back pay is warranted by law. An award of full or partial back pay is not dependent upon 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, if unemployment benefits were not taxed when received by the employee. 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 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

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

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 calculated and submitted to the Office of State Budget and Management for approval. One component of the decision to award back pay shall be evidence, if any, of the grievant's efforts to obtain available, suitable employment following separation from state government.

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. An award of front pay may result from a finding of discrimination, or 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 appropriate level and as warranted by law. Front pay shall terminate upon acceptance or rejection of a position offered which meets the agency's legal obligation. 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.

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

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 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.

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.

Interest

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

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

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 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.

Causes for Reinstatement

Reinstatement from dismissal, suspension, or demotion is only appropriate upon a finding of lack of substantive just cause (25 NCAC 1J .0604) or discrimination prohibited by G.S. 126-16 and 126-34.02. For the purpose of this policy, and in addition to those matters normally constituting just cause under 25 NCAC 1J .0604, 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.

Suspension Without Pay

Back pay shall be ordered 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. 126-34.02.

Discrimination or Retaliation

Back pay, reinstatement, transfer, promotion, or other appropriate remedies, including other corrective remedies to ensure that the same or similar discriminatory or retaliatory acts do not recur, may be awarded where discrimination or retaliation in violation of G.S. 126-16 and G.S. 126-34.02 are found.

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

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

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 to an employee. To the extent that retroactive coverage or membership is available, the grievant is responsible for any action seeking to obtain such benefits.

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. Reinstatement shall not be an appropriate remedy for the failure to give written notice of applicable appeal rights.

Failure to give specific reasons for dismissal, demotion or suspension without pay shall be deemed a procedural violation for which back pay, attorney's fees, or both may be awarded for such a violation. Back pay or attorney's fees, or both, may be awarded for such a period of time as is determined to be appropriate under all the circumstances. Reinstatement shall not be an appropriate remedy for the failure to give specific reasons for disciplinary action so long as substantive just cause for disciplinary action existed.

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 to be appropriate by the commission in light of the purpose of pre-dismissal conference. Reinstatement shall not be an appropriate remedy for lack of a pre-dismissal conference.

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

Remedies: Salary Adjustment

No department, agency or institution may use within-grade or within-range 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 Human Resources Director. The only exception shall be such an adjustment in the context of a front pay award pursuant to this policy. Any within-grade salary adjustment proposed to be approved by the State Human Resources Director must be in compliance with existing salary administration policies or shall have prior approval as an exception to or waiver from such policies.

Certain Remedies Not Available

Chapter 126 does not provide for an award of punitive, exemplary, or other damages as remedies in appeals brought solely under Chapter 126, with the exception of grievances arising under Article 14 of Chapter 126.

Situations in which Attorney's Fees May Be Awarded

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

- the grievant is reinstated; or
- the grievant receives back pay from either a demotion or a dismissal.

Attorney's fees may be awarded when any of the above situations occur, either within the agency internal grievance procedure, or in an appeal of a Final Agency Decision.

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 after the appeal of a Final Agency Decision,

Grievance Review by State Agencies and the Office of State Human Resources and Available Remedies (continued)

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.

Establishment of Reasonable Attorney's Fees

Legal and witnesses' fees incurred in connection with a grievance resolved at the agency level or a contested case may only be reimbursed where an employee is reinstated or receives back pay. Legal fees must be at a reasonable hourly rate 1) based on the prevailing market rate and 2) no higher than the hourly rate set in the fee agreement between the parties. Legal fees must be documented by an itemized, per activity accounting of all full or partial hours expended, and must be supported by a copy of the fee agreement between the parties entered into prior to the date of the first fee incurred. Any reimbursement must be capable of substantiation by receipts or other documentation.

Grievance Reports by Agencies and Universities

Every agency and university shall, semi-annually and as otherwise requested by the Office of State Human Resources, compile information on employee grievances. The Office of State Human Resources shall make reports to the full State Human Resources Commission at its February and August meetings based upon the information supplied in these semi-annual agency reports. Every agency and university shall enter and maintain all grievance data on a monthly basis in the State's HR/Payroll system or in another compatible format.