

## CHAPTER 21

### AGENCY APPEAL AND GRIEVANCE PROCEDURES

#### Section I - General

1-1. **Purpose.** The purpose of this chapter is to establish policies and procedures pertaining to the adjudication of technician appeals from adverse personnel actions and for consideration of technician grievances.

1-2. **Scope.** The provisions of this chapter apply to all military technicians in non-temporary positions who have completed one year of current continuous technician employment.

1-3. **Appeals System.** Certain technician personnel actions and decisions are by law, executive order or regulation subject to review on appeal. This chapter applies to the same adverse actions covered in Chapter 20. Section II of this chapter lists matters which have been excluded from coverage of this chapter but which are subject to review through other appeal or complaint procedures.

a. **Presentation of Appeal.** An appeal from an adverse action is submitted through channels addressed to The Adjutant General of Alabama, ATTN: NGAL-HRO. The appeal must be, in writing, in military letter format, be signed by the technician and set forth the reasons the technician believes the action or decision was not warranted and the remedy sought, which must be personal to the technician.

b. **Time Limit for Appeals.** Notices of action or decision which are subject to appeal only within a definite time limit will include notification of the appeal right, including the time limit. Unless there is a time limit for appeal, the notice of the action or decision will not include notification of the right to appeal.

c. **Right to a Hearing.** Normally, a technician is entitled to a hearing on an adverse action appeal, if the technician so desires and requests a hearing when offered. The technician must be notified of the technician's right to a hearing or, if applicable, the reasons for the denial of a hearing.

d. **Denial of Hearing.** The Adjutant General of Alabama may deny a technician a hearing when a hearing is impracticable by reason of unusual location or other extraordinary circumstances, or when the technician failed to request a hearing.

e. **Actions or Decisions Subject to Office of Personnel Management (OPM) Review.** Public Law 90-486 provides that any right of appeal which may exist with respect to certain actions or decisions shall not extend beyond The Adjutant General of Alabama. The OPM may not act upon, or review, decisions of The Adjutant General on appeals involving:

(1) Separation of a National Guard technician from civilian employment resulting from loss of National Guard membership.

(2) Separation of a National Guard technician from civilian employment resulting from failure of the technician to meet the military security standards established by the Secretary concerned.

(3) Separation of a National Guard technician for cause.

(4) Actions involving reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation.

1-4. **Grievance System.** There are two grievance systems:

a. **Agency Grievance System.** The Agency grievance system covers any matter of concern or dissatisfaction to a technician except:

(1) Matters for which statutory appeals procedures exist;

(2) Matters covered under the negotiated grievance procedure in a labor agreement.

(3) The content of published Agency policy.

(4) Non-selection for promotion from a group of properly ranked and certified candidates.

(5) An action terminating a temporary promotion with a maximum period of two years and returning the employee to the position from which the employee was temporarily promoted or reassigning or demoting the employee to a different position that is not at a lower grade or level than the position from which the employee was temporarily promoted.

(6) Non-adoption of a suggestion or disapproval of a quality salary increase, or other kind of honorary or discretionary award.

(7) A preliminary warning or notice of a specific action which, if effected, would be covered under the grievance system (e.g., a notice of a proposed reprimand) or would be excluded from coverage under this section (e.g., an advance warning of an unsatisfactory performance rating). However, a general warning that some (unspecified) disciplinary action may be taken if certain deficiencies are not corrected would be covered.

b. **Negotiated Grievance Procedures.** An agreement between an agency and a labor organization provides a negotiated grievance procedure, applicable only to the unit of recognition, for the consideration of certain grievances. The coverage and scope of the procedure is negotiated by the parties to the agreement and specifies what matters are covered.

1-5. **Presentation Without Intervention of the Union.**

a. **Any Grievance or Appellate Rights.** Recognition of the union does not preclude a technician, regardless of whether the technician is in a unit of exclusive recognition, from exercising grievance or appellate rights established by law or regulation, or from choosing his or her own representative in a grievance or appellate action, except when the grievance is covered under a negotiated procedure in a labor agreement.

b. **Grievance Covered Under Negotiated Procedure.** Any technician or group of technicians in the union may present such grievances under the negotiated grievance procedure to management and have them adjusted, without the intervention of the union, as long as the adjustment is not inconsistent with the terms of the agreement and the union has been given opportunity to be present at the adjustment.

1-6. **Right to Seek Advice.**

a. Sometimes an employee has a valid reason for not taking a grievance to his or her immediate supervisor. The agency grievance system, therefore, provides an opportunity for an employee to communicate with and seek advice from:

(1) The Human Resources Office;

(2) The Equal Employment Opportunity Officer or counselor designated under Chapter 28; and

(3) A supervisory or management official of higher rank than the employee's immediate supervisor.

b. The provision for communication with agency officials does not necessarily mean face-to-face consultation. If the employee desires to communicate with officials who are located in another geographic area, the employee could do so by telephone or letter. The employee would not be entitled, as a matter of right, to official travel time to make a personal visit although the agency could allow it if the time necessary to make the trip was considered reasonable. The agency would determine whether to reimburse the employee for travel expenses, since OPM regulations do not anticipate the necessity for travel in connection with a grievance and do not cover the matter of reimbursement.

1-7. **Definitions.** As used in this chapter, the term:

a. **Appeal** means a request by an employee for reconsideration of a decision to take adverse action against him or her.

b. **Appellate decision** means a decision made by an appellate level which completes action on an appeal at that level by sustaining the original decision, reversing the original decision, or modifying the original decision by substituting a less severe action.

c. **Appellate level** means an agency administrative level with authority to act on an appeal. This authority specifically includes the authority to sustain the original decision, reverse the original decision, and modify the original decision by substituting a less severe action.

d. **Days** means calendar days.

e. **Employee** includes a former employee of an agency.

f. **Examiner** means a person used by an agency to hold a hearing on an appeal or to conduct an inquiry on a grievance.

g. **Grievance** means a request by an employee or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management. Grievance pertaining to National Guard technicians may include but are not limited to such matters as:

- (1) Working conditions and environment;
- (2) Relationships with supervisors and with other technicians and officials;
- (3) Management decisions specifically covered by a State's grievance procedures;
- (4) Implementation of personnel policies.

Technician grievances may not include questions of policy in the areas itemized above. They may, however, include questions of the application of the policy to an individual or a group of technicians.

h. **Original decision** means a decision by an agency to take adverse action against an employee.

i. **Technicians** means all personnel employed under 32 U.S.C., 709.

1-8. **Freedom from Reprisal or Interference.** A technician and the technician's representative, must be free to use the appeal or grievance systems without restraint, interference, coercion, discrimination, or reprisal.

1-9. **Representation.** An employee has the right to present an appeal or a grievance without representation, except when the grievance is covered under a negotiated grievance procedure in an existing labor agreement. The employee also has the right to be accompanied, represented, and advised by a representative of his or her choice at any stage of the proceeding. An employee may change representative, but to do so the employee should notify the agency of the change in writing. A person chosen by the employee as his or her representative must be willing to represent the employee. In addition, the representative must be free to do so, e.g., not be disqualified because of conflict of position or unavailable to serve in that capacity because of priority needs of the service or unreasonable costs to the Government. The representative may be another employee in the Federal service or maybe outside the Federal service.

1-10. **Official Time for Presentation.** A technician must be given a reasonable amount of official time to present his or her appeal or grievance if the technician is otherwise in an active duty status. A technician's representative, if an employee of The Adjutant General and is otherwise in an active duty status, must be given a reasonable amount of official time to present an appeal or grievance. The technician and/or representative will be granted up to four hours in the preparation of an appeal or grievance. However, no travel expense, compensatory time, or per diem travel allowance will be authorized.

1-11. **Allegations of Unfair Labor Practices (ULP).** When an allegation of an unfair labor practice is made in a matter which is covered by an agency appeals system under this chapter, that allegation is incorporated in the appeal and processed under this chapter. When an allegation of an unfair labor practice is made in a matter which is covered by an agency grievance system under this chapter, the employee may elect either to initiate a grievance or to file an unfair labor practice complaint with the Federal Labor Relations Authority. If the employee elects to initiate a grievance, the unfair labor practice allegation is incorporated in the grievance and processed under this chapter. If the employee elects to file a complaint, all other issues involved in addition to the unfair labor practice allegation are incorporated in the complaint.

1-12. **Open Record.** The appeal file or the grievance file (the official record of the appeal or grievance) is an open record. It is open to review by the employee and his or her representative and must not contain any document that is not available to the employee. Material which cannot be disclosed to the employee or the designated representative, cannot be included in the file. Information to which the examiner is exposed which cannot be made available to the employee in the form in which it was received must be included in the file in a form which the employee can review or must not be used.

## **Section II - Appeals System**

2-1. **General.** Certain agency actions and decisions are by law, executive order, or regulation, subject to an appeal and/or review of a higher agency.

a. **Adverse Actions.** Appeals on adverse actions (disciplinary and non-disciplinary removals, suspensions, furloughs without pay, and reductions in rank or pay) are covered in Chapter 20.

b. **Position Classification Appeals.** Classification appeals are discussed in Chapter 22.

c. **Reduction in Force Actions.** Appeals to reduction in force actions are discussed in Chapter 24.

d. **Political Activity Decisions.** Appeals to political activity decisions are discussed in Chapter 17.

e. **Salary Retention Decisions.** Appeals to salary retention decisions are discussed in Chapter 6.

f. **Restoration Appeals.** Appeals to restoration decisions are discussed in Chapter 16.

g. **Health Benefits Appeals.** Appeals to health benefits decisions are discussed in Chapter 12.

h. **Group Life Insurance Appeals.** Appeals to group life insurance decisions are discussed in Chapter 11.

i. **Performance Rating Appeals.** Appeals to performance rating decisions are discussed in Chapter 9.

j. **Retirement Appeals.** Appeals to retirement decisions are discussed in Chapter 13.

k. **Back Pay Decisions.** Appeals to back pay decisions are discussed in chapter 6.

l. **Withholding Within-Grade Increase.** Appeals to decisions to withhold within-grade increases are covered in chapter 9.

2-2. **The Appeal.** The appeal must be in writing, in military letter format, and will contain the following:

a. State clearly the basis for the appeal.

b. State the appropriate chapter of the Technician Personnel Manual and the action which is being appealed.

c. Evidence to support the appeal.

d. A copy of the decision that is being appealed.

e. A statement of reasons why the technician believes the appeal should be sustained.

f. It will include a request for a hearing if the technician desires and is entitled to one.

2-3. **Time Limit for Filing Appeal.** A technician may file an appeal at any time after receipt of the notice of original decision but no later than 15 calendar days after the effective date of the adverse action except a technician may appeal the official classification of his position at any time.

2-4. **Official Time to Prepare Appeal.** Both technicians who appeal and technicians who act as representatives will make arrangements with appropriate supervisors for the use of official time (up to four hours to prepare the appeal).

2-5. **Termination of Appeal.**

a. **At Employee's Request.** An employee may terminate his or her appeal under the agency appeals system at any time. An employee's request to discontinue the appeal should be complied with.

b. **For Failure to Prosecute.** If an employee does not furnish required information or otherwise does not proceed with the advancement of the appeal in a timely manner, the agency may terminate the appeal for failure to prosecute. However, instead of terminating for failure to prosecute, the agency may process the appeal to completion if the information available is sufficient for proper adjudication. An appeal terminated for failure to prosecute may be reopened at the agency's discretion upon a showing by the employee that circumstances beyond the employee's control prevented the employee from prosecuting the appeal.

c. **By Appeal to the Office of Personnel Management.** If the employee has not received an agency appellate decision after 60 days from the date of filing the appeal with the agency, the employee may terminate the appeal to the agency by appealing to the OPM. If the OPM accepts the appeal for adjudication, the appeal to the agency is terminated automatically.

d. **Notice of Termination.** The agency must notify the employee and the employee's representative promptly in writing of the termination of the appeal. If the appeal is terminated for failure to prosecute, the notice must also inform the employee of his or her right to appeal to the OPM no later than 15 days after the employee receives the notice.

2-6. **Death of Employee.** A proper appeal filed before the death of the employee must be processed to completion and adjudicated. If appropriate, the deciding official may provide for amendment of the agency's records to show retroactive restoration and the employee's continuance on the rolls in an active duty status to the date of death.

### **Section III - Agency Grievance System**

#### **3-1. Grievance Covered.**

a. Except as provided in paragraph b below, the grievance procedures will be used to review any matter of personal concern or dissatisfaction to an employee which is related to his or her employment and subject to the control of management.

b. The grievance procedure is not used to review:

(1) Any matter which is subject to final administrative review outside The Adjutant General of Alabama under law or the regulations of the OPM.

(2) Non-selection for promotion from a group of properly ranked and certified candidates.

(3) A grievance that has been processed under a negotiated grievance procedure, or one over the interpretation or application of a negotiated agreement.

(4) An action terminating a temporary promotion within a maximum period of two years and returning the employee to the position from which he or she was temporarily promoted or to an equivalent position.

(5) Non-adoption of a suggestion or disapproval of a quality increase, performance award or other kind of honorary or discretionary award.

(6) A preliminary warning or notice of an action which if effected would be covered by the grievance procedure or excluded from coverage under (1) of this paragraph.

(7) Actions or decisions taken under the Personnel Security Program.

(8) Any matter for which other appeal or complaint systems are prescribed.

(9) Separation actions of any kind.

3-2. **Employees Covered.** This grievance procedure is available to all employees of the Alabama National Guard Technician Program.

### 3-3. **Informal Procedures.**

a. Except as indicated in paragraph b below, an employee desiring consideration of a grievance under this chapter must first seek informal adjustment of the matter through supervisory channels. Initial presentation, which may be oral or written, is normally made to the immediate supervisor. When the complaint concerns relationships with or actions taken by a supervisor, the dissatisfaction may be presented to the next level supervisor in the chain of command. An employee may present a grievance concerning a continuing practice or condition at any time, but must present a grievance concerning a particular act or occurrence within 30 days of the date of that act or occurrence, or the date the employee became aware of it. An employee, in presenting a grievance, is entitled to communicate with and seek advice from:

- (1) The Human Resources Officer.
- (2) The Equal Employment Opportunity Officer or Counselor.
- (3) A supervisory or management official of higher rank than the immediate supervisor.

b. An employee may present a grievance directly under the formal procedures in Chapter 20 if it concerns an action which was effected through an advance written notice, with right to reply and contest the action, and a final written decision.

c. The supervisor to whom a grievance has been presented for informal adjustment will attempt to resolve it as expeditiously as possible, seeking the advice and assistance of others where necessary, and will give the employee his or her decision on the matter not later than five work days after the date of presentation. If the subject matter required consultation with other supervisors or staff officials, the employee is advised of their participation in the decision. If the adjustment sought cannot be granted, the employee is informed of the reasons and right to request further consideration under the formal procedures below. The employee is also given the name of the Human Resources Office representative who can assist him or her in making such a request. If the grievance and the decision were communicated orally, the supervisor prepares a memorandum for the record explaining the issues and the action the supervisor took on the matter, and retains it with the NGB Form 904-1, Supervisor's Record of Technician Employment.

d. A grievance may not be rejected in the informal procedure for any reason. If the supervisor believes the grievance is not timely or consists of a matter not covered under the grievance system, the employee should be so advised. The employee must be allowed to submit his or her grievance for a determination under the formal procedure if the employee insists.

3-4. **Formal Procedure.** When an employee receives a decision under informal procedures which does not satisfy the grievance, or when the time limit for management action has expired without a decision, the employee may within ten days thereafter submit the grievance in mili-

tary letter format, Subject: Grievance, for further consideration. The grievance must be in writing signed by the employee, contain sufficient detail to identify and clarify the basis of the grievance, explain the efforts made to resolve the grievance informally, and specify the relief sought by the employee which must be directly personal to him or her. If the employee has a representative, the representative's name, address, and telephone number are also included. Copies of any documents related to the grievance or to the efforts at informal resolution are attached. The grievance is submitted to The Adjutant General of Alabama, ATTN: NGAL-HRO.

3-5. **Group Grievance.** Employees may join in submitting a grievance as a group, provided that all employees are serviced by the personnel office and that the issues in the grievance and the remedy sought are identical for each. A group grievance is processed as a single grievance in the name of one employee designated by the others to act for them. All employees joining in the grievance must be identified, however, and all employees in the group must sign the grievance at the stage it is placed in writing. If the employees do not designate an individual to carry the grievance, communications will be addressed to the employee whose name appeared first in the grievance. An employee may withdraw from a group grievance, in writing, at any time before a decision is rendered; however, he or she may not then initiate the same or a substantially similar grievance under the grievance procedure. A decision rendered on a group grievance applies to all employees in the group and each is provided a copy of the decision.

3-6. **Acceptance or Rejection of Grievance.** Promptly on receipt of a grievance filed under the formal procedure, the Human Resources Officer, acting for The Adjutant General of Alabama, reviews it and within five work days takes one of the following actions:

a. Rejects the grievance if it consists wholly of matters excluded from coverage of the grievance procedures, or if it was not timely filed and the employee did not show good cause for the delay. The employee is notified in writing of the basis for the rejection. If appropriate, the notice also includes advice to the employee of any other procedure available for resolution of his dissatisfaction.

b. If the employee did not seek informal adjustment before filing the grievance, returns the grievance to the employee and informs the employee of the requirement that he or she use the informal procedure.

c. If the grievance is acceptable, the Human Resources Officer establishes a grievance file, and refers it for consideration to The Adjutant General or to another official with authority to adjust the grievance in the manner requested by the employee.

3-7. **Adjustment or Referral of Grievance.** Unless the deciding official rejects or returns the grievance as provided in paragraph b above, he or she must attempt to resolve the grievance. If the deciding official cannot resolve the grievance in a manner acceptable to the employee, the deciding official must refer the grievance for inquiry by a hearing examiner.

3-8. **Selection of Examiner.** The agency must select a fair, impartial, and objective examiner who meets the standards for examiners of the National Guard Bureau.

3-9. **Grievance File.**

a. When the examiner begins an inquiry, the examiner must establish an employee grievance file. This is an independent file, separate and distinct from the Official Personnel Folder. The grievance file is the official record of the grievance proceedings and must contain all documents related to the grievance including:

- (1) Statements of witnesses.
- (2) Records or copies of records.
- (3) Reports of any personal interviews or group meetings.
- (4) The record of the hearing if a hearing is held.
- (5) The examiner's report of findings and recommendations.

(6) The deciding official's statement of why he or she did not accept the examiner's recommendations if the deciding official refers the grievance to a higher level for decision.

- (7) A copy of the grievance decision.

3-10. **Inquiry by Examiner.**

a. **General.** Before the examiner begins an inquiry, he or she must eliminate from consideration any matters not covered under the grievance system. For matters covered under the system, the examiner must conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. At the examiner's discretion, the inquiry may consist of:

- (1) The securing of documentary evidence
- (2) Personal interviews
- (3) A group meeting
- (4) A hearing; or
- (5) Any combination of the above.

b. **Labor Organization Representatives.** A labor organization which holds exclusive recognition for the unit in which the employee is included must be given an opportunity to be

represented at formal discussions between management and employees or other employee representatives concerning grievances. This includes the opportunity to be represented at any group meeting or hearing held by the examiner. When a labor organization representative participates in a group meeting or hearing, the labor representative does so as a representative of the labor organization and not of the employee. The right of the labor organization to be represented must not impair the right of the employee to handle the grievance in the employee's own way if the employee wishes and to choose his or her own representative.

**c. The Hearing.**

(1) Conduct of Hearing. If the examiner holds a hearing, the conduct of the hearing and the production of witnesses must conform with the requirements for hearings under agency appeals procedures, except as provided in paragraph b above.

(2) Record of Hearing. The examiner must determine whether to have a verbatim transcript or a written summary made of the hearing. If a summary is prepared, the parties should either sign it, if they agree to it, or submit in writing their exceptions, if they do not agree to it. Any written exception to a summary must be made part of the record of the hearing. The examiner must include the record of the hearing in the grievance file. There is no requirement that either the employee or the employee's representative be given a copy of the transcript or summary.

**d. Review of Grievance File.** When the examiner has completed the inquiry, the examiner must make all documents in the grievance file at that time available to the employee and the employee's representative for review and comment. Their comments, if any, must be included in the file.

3-11. **Grievance Decision.** The reviewing official may accept the examiner's recommendations and issue the decision on a grievance, except that:

a. If the reviewing official decides to grant the relief sought by the technician, the reviewing official shall issue the decision accordingly without regard to the examiner's recommendations.

b. If the reviewing official determines that the examiner's recommendations are unacceptable, the reviewing official shall transmit the grievance file with a specific statement of the basis for that determination to The Adjutant General. The reviewing official will also furnish the technician and the technician's representative a copy of that statement.

c. The decision on the grievance shall be in writing and shall contain findings on all issues covered by the examiner's inquiry.

d. Ordinarily, grievance procedures should provide for no more than two levels of decision above the supervisor or other official with whom a technician has discussed the grievance informally. The final decision on a grievance rests with The Adjutant General unless the grievance is resolved at a lower level in favor of the technician.