

FILED MAR 11 2014

IN THE SUPREME COURT OF THE OSAGE NATION
PAWHUSKA, OKLAHOMA

By



In re:

)

)

Rules of Court¹

Employee Grievances

)

RULES OF COURT GOVERNING EMPLOYEE GRIEVANCES

Rule 1. Employee Appeals

1.1. Authority

Pursuant to 19 ONC § 3-104(D)(3)(B), the Osage Nation Trial Court is responsible for appeals from employee grievance decisions. For purposes of this rule, a “grievance decision” is the final decision of the branch of the Osage government for which no further appeals within that branch exist.

1.2. Hearing Officers

Grievance filed with the Trial Court shall be assigned to an Associate Judge retained to review employee grievances. All conflict of interest rules shall apply.

Rule 2. Hearing Procedures

2.1. General Information

Hearings before the Court shall be closed to any non-party and intended to obtain information related to the grievance matter. The Court shall not require persons to be represented by legal counsel. A hearing under this provision is to enable the Hearing Officer to obtain information related to the grievance matter, and may or may not include questions presented by the employee or supervisor.

The decision issued by the Court shall be a public document and shall constitute precedent for future decisions.

2.2. Filing a Petition

All grievance petitions must contain the following minimum information, and must be filed within ten (10) calendar days of receipt of the grievance decision; provided, that the time period to appeal any grievance decision issued ten (10) calendar days prior to the effective date of this Rule is extended to ten (10) calendar days after said effective date:

- (a) Employee’s name, address, date of birth;
- (b) Copy of written disciplinary decision;
- (c) Name of supervisor, and those persons in the line of authority up to, and including, the highest office in the branch of the Osage government in which the disciplinary action originated;

(d) A statement that the grievance decision is eligible for appeal under the Pay for Performance Act, as amended, and the provisions of the Osage Nation Merit Based Human Resources System Policies and Procedures in effect at the time of the original disciplinary action; and

(d) Grievant's signature along with the date the petition was signed.

2.3. Title of Grievance Matter

Grievance matters shall be titled as "In re: Grievance of [Name], Employee."

2.4. Notice; Hearing Date

The Court Clerk shall mail to all parties the Notice of Receipt of Filing and copy of the filing by certified mail/return receipt requested, by personal service by the Osage Nation Police Department, by process server or by any individual over 18 who is not a party to the grievance. The Notice shall identify a hearing date and time at least 20 but no later than 30 calendar days after filing. The Notice shall identify the following information:

(a) A demand to have all records, except unrelated confidential records, copied and forwarded to the Court no later than three (3) calendar days after receipt of Notice. If unrelated confidential records are not forwarded, the Human Resources Department shall indicate that this group of records has been withheld and were not part of the disciplinary decision-making process.

(b) The date, time and location of the hearing and the names of all parties ordered to attend.

(c) Identification of the Hearing Officer.

2.5. Written Statements

The employee and supervisor may submit a written, signed statement. The written statement may contain arguments regarding the grievance matter, including facts, law or regulation applied, and other matters pertinent to the grievance matter. Supporting documents may also be attached.

2.6. Hearing Record.

The hearing record shall include the following information:

(a) Employee file, excluding unrelated confidential information;

(b) New information, provided that any new information must not have been known and/or available at the time of the original disciplinary action; and

(c) Written statements and supporting documents submitted by the employee and supervisor.

2.7. Witnesses

The employee and the supervisor may call witnesses; provided that, the Hearing Officer may limit the number of witnesses in the interest of avoiding repetitive or unrelated testimony. Either party may compel a witness to appear by way of a subpoena issued by the Court Clerk.

2.8. Documents

All documents, other than the employee file and written statements, must be filed at least five (5) business days prior to the scheduled hearing. Documents must be originals or certified as true and correct copies of originals.

2.9. Prohibited Information

The Hearing Officer may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, repetitive, not timely exchanged consistent with the Hearing Officer's orders, or otherwise for just cause. The Hearing Officer may exclude evidence regarding any theory (for example, retaliation, discrimination, or inconsistent management actions) not raised in the original grievance filing or timely-filed amendment thereto.

2.10. Hearing Record Review

The Trial Court Clerk shall assemble the confidential hearing record, which shall be available to the parties for review at least three (3) working days prior to the hearing. Hearing records are not public records and may not be removed from the Court's premises. They shall be returned at the close of the hearing and deliberations. The hearing record shall be confidential and any copies destroyed except the original hearing record and the decision issued by the Court. The hearing record shall be maintained in a sealed, confidential file at the Trial Court at the conclusion of the hearing and shall remain sealed unless otherwise directed by Court order.

2.11. Hearing Procedures

The following procedures shall be applied in hearings in the interests of obtaining information or allowing information to be clearly understood. However the Hearing Officer may allow reasonable deviations from this hearing procedure for good cause.

(a) Introduction of Hearing Officer and swearing in of the employee, supervisor, Human Resources Department representative and any witnesses. The Hearing Officer, after calling the hearing to order, shall ask all parties to introduce themselves for the record, ask all witnesses to identify themselves, and identify that the hearing record has been received. The Hearing Officer shall determine jurisdiction before proceeding. If the Hearing Officer finds that the Court lacks jurisdiction, he must enter a written order to that effect and advise the parties of their right to appeal his order.

(b) Upon a finding of jurisdiction, the Hearing Officer shall briefly identify the disciplinary action and request all parties to wait outside the hearing room

until called. An employee may request that he and the supervisor remain present in the hearing room and be allowed to ask questions of the witnesses and of each other. If the employee or supervisor has counsel, the representatives shall be included, and shall be authorized to ask questions on behalf of the represented party. The Hearing Officer shall grant a request to remain in the hearing room unless doing so may present a security risk, and may not exclude the supervisor if the employee is allowed to remain (or vice-versa).

(c) The Hearing Officer shall call each person to testify individually in the following order:

1. Employee, who shall be asked if he or she wishes to give an opening statement prior to questions;
2. Supervisor, who shall be asked if he or she wishes to give an opening statement prior to questions;
3. Human Resource Department representative, who shall be asked questions by the Hearing Officer. The Human Resource Department representative shall not be required, and shall not be compelled, to give an opinion regarding the action taken, or the reasons for that action;
4. Witnesses, who shall be asked questions by the Hearing Officer and each party, unless the questions become repetitive, irrelevant or otherwise unrelated to the matter. If multiple witnesses are listed, the employee witnesses shall be called first, and then the supervisor witnesses shall be called. The employee and supervisor may identify the order in which their witnesses should be called. If a witness appears on both lists, the witness shall be called with both the employee and the supervisor witnesses;
5. Employee, who shall be asked questions by the Hearing Officer, and then shall be asked if he or she wishes to give a closing statement;
6. Supervisor, who shall be asked questions by the Hearing Officer, and then shall be asked if he or she wishes to give a closing statement;

(d) After the final statement is concluded, the Hearing Officer shall notify the parties that the hearing has been concluded.

(e) Only allegations stated in the grievance shall be reviewed and considered. New arguments not raised in the grievance shall not be considered.

(f) The supervisor bears the burden of proving, by preponderance of the evidence, that the disciplinary action was reasonable and in compliance with all applicable personnel policies and procedures.

- (g) The Hearing Officer, in his or her sole discretion may suspend the Rules of Evidence for good cause and in the interests of justice.

Rule 3. Relief Authorized; Decision; Appeals

3.1 Relief authorized

In general, the Hearing Officer is not limited to the specific relief requested by the employee in the grievance (if any), as long as the relief granted is consistent with law and policy adopted by each branch. When the grievance involves a disciplinary matter, the Hearing Officer may uphold or reverse the disciplinary action challenged by the grievance, or in appropriate circumstances, modify the action or may order the reinstatement of a grievant terminated for disciplinary reasons with or without conditions and/or a probationary period. The Court shall also address whether the employee, if reinstated, is entitled to full or partial back pay if the policies and procedures are silent.

3.2. Decision

The Hearing Officer shall issue a written decision within ten (10) calendar days of the close of the hearing, which shall include the pertinent facts, identification of pertinent documents and applicable law or regulation, and a written determination. The decision shall be mailed certified mail-return receipt requested, and by regular mail, to the employee, supervisor and Human Resource Department. All decisions shall be placed in the employee's file.

3.3 Attorneys fees and costs shall not be awarded to either party.

Rule 4. Framework for Review of Grievance Decisions

4.1 The Hearing Officer shall review the facts *de novo* to determine (a) whether the employee engaged in the behavior described in the disciplinary action; (b) whether the behavior constituted misconduct, (c) whether the discipline was consistent with law and policy; and (d) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.

4.2 "Mitigating circumstances" include, but are not limited to:

- (a) Lack of Notice: The employee did not have notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with it. However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the employer may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

(b) Inconsistent Application: The discipline is inconsistent with how other similarly situated employees have been treated under similar circumstances absent a change in law or policy.

(c) Improper Motive: The discipline was based upon improper motive, such as retaliation or discrimination, unless the supervisor can demonstrate a legitimate reason for disciplinary action unrelated to the improper motive.

4.3 The Hearing Officer shall give due consideration to management's right to exercise its good faith business judgment in employee matters and the management's right to manage its operations in accordance with acceptable industry standards. Therefore, if the hearing officer finds that (a) the employee engaged in the behavior described in the notice of the disciplinary action, (b) the behavior constituted misconduct, and (c) the discipline was consistent with law and policy, the discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

4.4 Non-disciplinary actions shall be reviewed to determine whether they were arbitrary and capricious, which means the conscious disregard of the facts or without a reasoned basis.

Rule 5. Appeals

The Court's decision may be appealed to the Osage Nation Supreme Court if a Notice of Appeal is filed and served to all parties within ten (10) calendar days of date of the hearing decision. In the interests of justice, all appeals shall be expedited and resolved without oral argument. The Supreme Court shall only determine whether there was an abuse of discretion of the Hearing Officer. The Supreme Court shall issue its decision in writing. Cases appealed to the Supreme Court become public record unless sealed by the Supreme Court. When the grievance originated within the Judicial Branch, the Chief Justice shall recuse and identify another judge to sit by designation so as to constitute a full panel.

Ordered this 11th day of March, 2014.



Meredith D. Drent
Chief Justice

¹ The Chief Justice is responsible for promulgating Rules of Court under 5 ONC § 1-118.