

## **ARTICLE 7. DISCIPLINE AND APPEALS**

*This is an excerpt from the 2017 LEMSC Rules – LEMSC Version 2017-1105. To see all LEMSC Rules, please click on the Rules tab.*

### **R13-5-701 Causes for Discipline.**

- A.** The causes for discipline for employees are found in A.R.S. § 41-1830.15.
- B.** The causes for discipline for covered employees are found in A.R.S. § 41-773.

### **R13-5-702 Disciplinary Procedures**

- A.** Receiving a complaint. A person may file a complaint with an agency asserting that an employee engaged in activity constituting cause for discipline and requesting that the agency head take appropriate disciplinary action against the employee or covered employee.
- B.** Initiating disciplinary action. An agency head may take appropriate disciplinary action against an employee for any cause listed in A.R.S. § 41-1830.15 or against a covered employee for any cause listed in A.R.S. § 41-773.
- C.** Interview of an employee. In conducting an interview of an employee being investigated for possible disciplinary action, an agency shall comply with A.R.S. § 38-1104.
- D.** Time limit for filing a disciplinary action. An agency shall not file a disciplinary action later than 180 days after the date the agency discovers or should have discovered that the employee engaged in alleged activity constituting cause for discipline. The disciplinary action is deemed to be filed when the notice is filed with the Council.
- E.** Exceptions to the 180-day rule.
  - 1. The time limit in subsection (D) does not run:
    - a. During the time that any criminal investigation or prosecution is pending in connection with the act, omission or other allegation of misconduct; or
    - b. During the period of time in which an employee or covered employee who is involved in the investigation is incapacitated or otherwise unavailable; or
    - c. During the period prescribed in a written waiver of the limitation by the employee or covered employee; or
    - d. During emergencies or natural disasters during the time period in which the governor has declared a state of emergency within the jurisdictional boundaries of the concerned employer; or
    - e. During a multijurisdictional investigation, the time limit may be extended for a period of time reasonably necessary to facilitate the coordination of the employers involved.
  - 2. At the request of an agency, the Council may, upon a showing of good cause, extend the time for an agency to file a disciplinary action up to a maximum of 90 days beyond the original 180-day period.
  - 3. If a manager or supervisor is aware of an employee's alleged actions that constitute a criminal offense but fails to act, the time limit does not run during the period of the manager or supervisor's inaction if the supervisor or manager is disciplined for failure to act and:
    - a. The offense is a misdemeanor involving theft or moral turpitude and is discovered within 180 days after the 180-day period for taking disciplinary action, or
    - b. The offense is a felony.

4. The agency shall maintain documentation to support any exception to the 180-day time limit, including the dates during which the time limit does not run.

**F.** Notice of disciplinary action. An agency head shall serve a written notice on the employee or covered employee within 10 days after the agency files the notice of disciplinary action with the Council. Service shall be completed in accordance with R13-5-104(D). The agency head's notice shall include:

1. A statement of the nature of the disciplinary action;
2. Any prior disciplinary action on which the current discipline is based;
3. The effective date of the action;
4. A specific statement of the causes; and
5. A statement of the employee's or covered employee's right to appeal and the time limit in which the employee or covered employee must file an appeal with the Council under R13-5-703 (A)(B)(C).

**G.** Amended notice of disciplinary action before appeal is filed. At any time before an employee or covered employee files an appeal, the agency head may file with the Council and serve the employee or covered employee or former employee or former covered employee with an amended or supplemental notice of disciplinary action.

**H.** Effect of dismissal. An employee's or covered employee's dismissal from the agency shall entail:

1. Dismissal from all positions held by the employee or covered employee,
2. Removal of the employee's or covered employee's name from all employment or promotional lists, and
3. Termination of the employee's or covered employee's pay on the date of dismissal.

### **R13-5-703 Appeal to the Council by Employees**

**A.** Appealable actions by employees. An employee may appeal any disciplinary action that results in the employee's dismissal, demotion, suspension without pay, forfeiture of accrued leave time, or reduction of pay.

**B.** Form of appeal. To initiate an appeal, an employee shall submit a signed written appeal to the business manager and the agency head. The appeal must state specific facts relating directly to the charges on which the appeal is based.

**C.** Time for appeal. An employee shall file an appeal within 30 days after being served with the notice of disciplinary action.

**D.** Agency responsibility. An agency shall have the burden of going forward with the case once an appeal has been filed. An agency must prove by a preponderance of the evidence that it had just cause to discipline the employee.

**E.** Effect of appeal. The Council shall determine whether the employing agency has proven by a preponderance of the evidence that the employing agency had just cause to discipline the employee. The Council shall reverse the decision of the agency head if the Council finds that just cause did not exist for any discipline to be imposed and, in the case of dismissal or demotion, return the employee to the same position the employee held before the dismissal or demotion with or without back pay. On a finding that the agency has not proven just cause to discipline the employee by a preponderance of the evidence, the Council may recommend a proposed disciplinary action in light of the facts proven.

**F.** Agency action after receiving a decision or recommendation. The agency head or the agency head's designee shall accept, modify or reverse the Council's decision or accept, modify or reject

the Council's recommendation within fourteen days of receipt of the findings or recommendation from the Council. The decision of the agency head is final and binding. The agency head shall send a copy of the agency's final determination to the employee.

**G.** Amended notice of disciplinary action after employee files an appeal. If good cause exists, an agency head may file with the Council a motion to amend the notice of disciplinary action. The motion shall be filed no later than fourteen days before the hearing.

**H.** Notice of hearing. The Council shall notify the parties of the time and place of the hearing.

**I.** Failure to appear. If a party, without good cause, fails to appear at the time and place set for a hearing, the Council may find in favor of the appearing party.

**J.** Conduct of hearings. The Council shall sit as a whole at a hearing, unless a Council member declares a conflict or is unable to attend. Only a Council member who was present at a hearing may participate in making the decision. Council members may administer oaths, issue subpoenas for the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or outside the state to be taken in the manner prescribed by law for depositions in civil cases in the Superior Court of this state.

**K.** Witness fees. Witnesses at a hearing, other than employees, are entitled to the fees allowed witnesses under A.R.S. § 12-303.

**L.** Payment of witness fees. If the Council subpoenas a witness on its own initiative, the Council shall pay the witness' fees and mileage. The requesting party shall pay the fees for subpoenaed witnesses. An employee appearing as a witness on duty shall receive travel expenses from the agency and shall not be entitled to witness fees.

**M.** Discovery.

1. Within three business days after receiving a written request from the employee, the agency shall provide a complete copy of the investigative file, as well as the names and home or work mailing addresses of all persons interviewed during the course of the investigation, to the employee. For the purpose of this subsection, hand-written notes substantially incorporated within a report are not considered part of the investigation file.
2. Within 20 days after receiving the investigative file, the employee shall provide all material relating to the defense of the employee to the agency head.
3. After initial discovery, each party shall provide all new material relating to the case to the other party within 10 days after receipt.
4. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal was filed, no later than 10 business days before the hearing, the agency and the employee shall exchange copies of any documents that may be introduced at the hearing and that have not been previously disclosed.
5. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal is filed, no later than 10 business days before the hearing, the agency and the employee shall exchange the names of all witnesses who may be called to testify. A witness may be interviewed at the discretion of the witness. The parties shall not interfere with any decision of a witness regarding whether to be interviewed. An agency shall not discipline, retaliate against, or threaten to retaliate against, any witness for agreeing or not agreeing to be interviewed or for testifying or providing evidence in the hearing.
6. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal was filed, no later than 10 business days before the

hearing, the agency and the employee shall provide all documents that will be used at the hearing and a list of intended witnesses to the office of the Council.

7. If a party fails to provide material as required, the Council may preclude its use at the hearing.

**N. Motions.** All motions shall be in writing and filed no later than 20 days prior to the hearing. A response shall be filed in writing within 10 days after service of the motion. The chair may designate one or more members of the Council to hear and rule on a motion, except a motion to dispose of the case requires a vote of a majority of the Council.

**O. Pleadings.** The Council may strike a pleading not filed in accordance with this Section.

**P. Depositions:**

1. On the motion of a party, the Council may order the deposition of a witness under the following circumstances:

- a. The witness does not reside within the State or is out of state,
- b. The witness is too ill to attend the action before the Council, or
- c. The deposition is for the purpose of discovery in preparing a case before the Council.

2. The requesting party shall pay the expense of any deposition. An employee of the agency is not entitled to a witness fee for giving a deposition.

3. The deposition of a witness who is unavailable to appear at a hearing may be used in evidence by either party or the Council.

**Q. Open hearings.** The Council's hearings shall be open to the public. The Council may, upon request of a party, exclude non-testifying witnesses from the hearing. The Council may keep excluded witnesses separated and prevent them from communicating with each other until all are examined.

**R. Minor discipline hearings.** When the Council hears appeals of suspension without pay of 24 hours or less or the deduction of 24 hours or less from an employee's annual leave balance, each party shall have no more than three hours to present evidence unless the Council allows more time to assure a fair hearing.

**S. Legal counsel or representative.** Before the hearing of any appeal, each party shall designate its legal counsel or representative for the record. The Council shall advise each party without legal counsel that the party may obtain and be represented by counsel at the hearing. At the request of a party, the Council may postpone the hearing for a reasonable length of time to allow a party to obtain legal counsel.

**T. Presentation of evidence.** Both parties may present evidence and witnesses either personally or through a representative. The Council shall exclude evidence irrelevant to the causes set forth in the notice of disciplinary action.

**U. Settlement of disputes.** If requested by the employee, the parties shall submit the terms of settlement to the Council. If the Council approves the settlement, the settlement becomes final. If no settlement is reached, or if the proposed settlement is revoked or rejected by the Council, or withdrawn by either party, or if the settlement agreement is later vacated or reversed by a court, neither the settlement discussion nor any resulting agreement shall be admissible against the employee in any hearing before the Council on the matter.

**V. Decision.** In arriving at a decision, the Council may consider any disciplinary action taken within the previous 10 years against the employee, if the information is introduced at the hearing. The Council's decision shall contain findings of fact and its order for disposition of the case.

### **R13-5-704 Rehearing of Council Decision Regarding Employees**

#### **A. Motion for rehearing.**

1. Except as provided in subsection (C), any party in a contested case or appealable agency action may file a written motion for rehearing within 30 days after service of the decision. The requesting party shall specify the grounds for a rehearing, as provided in subsection (B). A respondent may file a response to the motion within 15 days after service.
2. A party filing a post-hearing motion shall include references to the record where appropriate.
3. The Council may require the parties to file written memoranda upon the issues raised in the motion and may permit oral argument.
4. The Council may grant a rehearing on all or part of the issues. If a rehearing is granted, the Council shall specify the grounds for the rehearing, and the rehearing shall cover only those matters.

#### **B. Basis for a rehearing. The Council may grant a rehearing for any of the following causes:**

1. The Council acted in an arbitrary or capricious manner or abused its discretion;
2. Misconduct of the Council or the prevailing party;
3. Newly discovered material evidence which, with reasonable diligence, could not have been discovered and produced at the original hearing;
4. Error in the admission or rejection of evidence or other errors of law occurring at the hearing or during the progress of the action;
5. The decision was not supported by the evidence; or
6. The decision is contrary to law.

**C. Decisions not subject to rehearing.** The Council may issue a decision as final upon making a specific finding that a decision's immediate effectiveness is necessary for the preservation of the public peace, health, or safety, or that a rehearing of the decision is impractical, unnecessary, or contrary to the public interest.

### **R13-5-705 Time Limits**

Computation of time limits. In computing any period of time prescribed or allowed by this Chapter the day of the act or event from which the designated period or time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

### **R13-5-706 Appeal to the Council by Covered Employees**

**A. Appealable actions by covered employees.** A covered employee may appeal dismissal from covered service, suspension for more than 40 working hours, or involuntary demotion resulting from disciplinary action.

**B. Form of appeal.** To initiate an appeal, a covered employee shall submit a signed written appeal to the business manager and the agency head. The appeal must state specific facts relating directly to the charges on which the appeal is based.

**C. Time for appeal.** A covered employee shall file an appeal within 10 working days after the effective date of the action.

**D. Agency responsibility.**

1. When a covered employee is dismissed, involuntarily demoted, or suspended for more than 40 working hours, the employing agency shall notify the Business Manager in writing of this action and provide related documentation within 5 business days.
2. An agency shall have the burden of going forward with the case once an appeal has been filed.
3. An agency must prove by a preponderance of the evidence that it had just cause to discipline the covered employee.

**E. Effect of appeal.** The Council shall determine whether the employing agency has proven by a preponderance of the evidence that the employing agency had just cause to discipline the covered employee. The Council shall reverse the decision of the agency head if the Council finds that just cause did not exist for any discipline to be imposed and, in the case of dismissal or demotion, return the covered employee to the same position the covered employee held before the dismissal or demotion with or without back pay. On a finding that the agency has not proven just cause to discipline the covered employee by a preponderance of the evidence, the Council may recommend a proposed disciplinary action in light of the facts proven.

**F. Agency action after receiving a decision or recommendation.** The agency head or the agency head's designee shall accept, modify or reverse the Council's decision or accept, modify or reject the Council's recommendation within fourteen days of receipt of the findings or recommendation from the Council. The decision of the agency head is final and binding. The agency head shall send a copy of the agency's final determination to the covered employee.

**G. Notice of hearing.** The Council shall notify the parties of the time and place of the hearing.

**H. Failure to appear.** If a party, without good cause, fails to appear at the time and place set for a hearing, the Council may find in favor of the appearing party.

**I. Conduct of hearings.** The Council shall hear the appeal within 30 days of the receipt of the appeal. The Council shall sit as a whole at a hearing, unless a Council member declares a conflict or is unable to attend. Only a Council member who was present at a hearing may participate in making the decision. Council members may administer oaths, issue subpoenas for the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or outside the state to be taken in the manner prescribed by law for depositions in civil cases in the Superior Court of this state.

**J. Witness fees.** Witnesses at a hearing, other than covered employees, are entitled to the fees allowed witnesses under A.R.S. § 12-303.

**K. Payment of witness fees.** If the Council subpoenas a witness on its own initiative, the Council shall pay the witness' fees and mileage. The requesting party shall pay the fees for subpoenaed witnesses. A covered employee appearing as a witness on duty shall receive travel expenses from the agency and shall not be entitled to witness fees.

**L. Discovery.**

1. Within three business days after receiving a written request from the covered employee, the agency shall provide a complete copy of the investigative file, as well as the names and home or work mailing addresses of all persons interviewed during the course of the investigation, to the covered employee. For the purpose of this subsection, hand-written notes substantially incorporated within a report are not considered part of the investigation file.
2. Within 20 days after receiving the investigative file, the covered employee shall provide all material relating to the defense of the covered employee to the agency head.

3. After initial discovery, each party shall provide all new material relating to the case to the other party within 10 days after receipt.
4. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal was filed, no later than 10 business days before the hearing, the agency and the covered employee shall exchange copies of any documents that may be introduced at the hearing and that have not been previously disclosed.
5. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal is filed, no later than 10 business days before the hearing, the agency and the covered employee shall exchange the names of all witnesses who may be called to testify. A witness may be interviewed at the discretion of the witness. The parties shall not interfere with any decision of a witness regarding whether to be interviewed. An agency shall not discipline, retaliate against, or threaten to retaliate against, any witness for agreeing or not agreeing to be interviewed or for testifying or providing evidence in the hearing.
6. No later than five business days before the hearing, or if the hearing is scheduled more than 20 days after the notice of appeal is filed, no later than 10 business days before the hearing, the agency and the covered employee shall provide all documents that will be used at the hearing and a list of intended witnesses to the office of the Council.
7. If a party fails to provide material as required, the Council may preclude its use at the hearing.

**M. Motions.** All motions shall be in writing and filed no later than 20 days prior to the hearing. A response shall be filed in writing within 10 days after service of the motion. The chair may designate one or more members of the Council to hear and rule on a motion, except a motion to dispose of the case requires a vote of a majority of the Council.

**N. Pleadings.** The Council may strike a pleading not filed in accordance with this Section.

**O. Depositions:**

1. On the motion of a party, the Council may order the deposition of a witness under the following circumstances:
  - a. The witness does not reside within the State or is out of state,
  - b. The witness is too ill to attend the action before the Council, or
  - c. The deposition is for the purpose of discovery in preparing a case before the Council.
2. The requesting party shall pay the expense of any deposition. A covered employee of the agency is not entitled to a witness fee for giving a deposition.
3. The deposition of a witness who is unavailable to appear at a hearing may be used in evidence by either party or the Council.

**P. Open hearings.** The Council's hearings shall be open to the public. The Council may, upon request of a party, exclude non-testifying witnesses from the hearing. The Council may keep excluded witnesses separated and prevent them from communicating with each other until all are examined.

**Q. Legal counsel or representative.** Before the hearing of any appeal, each party shall designate its legal counsel or representative for the record. The Council shall advise each party without legal counsel that the party may obtain and be represented by counsel at the hearing. At the request of a party, the Council may postpone the hearing for a reasonable length of time to allow a party to obtain legal counsel.

**R.** Presentation of evidence. Both parties may present evidence and witnesses either personally or through a representative. The Council shall exclude evidence irrelevant to the causes set forth in the notice of disciplinary action.