

# REGULATION

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<b>Authority:</b> Regulations are issued by the State Personnel Director under authority granted in the Michigan Constitution and the Michigan Civil Service Commission Rules. Regulations are subordinate to the Commission Rules.			
<b>Subject:</b> <b>GRIEVANCE AND GRIEVANCE APPEAL PROCEDURES</b>			

## TABLE OF CONTENTS

<b>1. PURPOSE.....</b>	<b>1</b>
<b>2. CIVIL SERVICE COMMISSION RULE REFERENCE .....</b>	<b>1</b>
<b>3. DEFINITIONS.....</b>	<b>6</b>
<b>4. STANDARDS.....</b>	<b>8</b>
A. Grievance Procedures at Agency Level.....	8
B. Grievance Appeal Procedures in Civil Service.....	10
C. Arbitration Alternative. ....	22
D. Authorized Representation and Administrative Leave. ....	23

## **1. PURPOSE**

This regulation establishes procedures for an employee to (1) file a grievance with an appointing authority and (2) appeal a final grievance decision of the appointing authority to Civil Service staff.

## **2. CIVIL SERVICE COMMISSION RULE REFERENCE**

**Note:** This Section 2 reprints only selected Commission Rules for quick reference by the reader. Additional Rules (that are not reprinted below) may apply. The complete, current version of the Rules can be found at [www.michigan.gov/mdcs](http://www.michigan.gov/mdcs).

### ***Rule 8-1 Grievances***

#### ***8-1.1 Grievance Authorized***

*An employee may file a grievance with an appointing authority, as authorized in the civil service rules and regulations.*

### **8-1.2 Time Limits**

*A grievance must be filed in writing within 14 calendar days after the employee knew of or, in the exercise of reasonable diligence, should have known of the circumstances giving rise to the grievance.*

### **8-1.3 Types of Grievances**

**(a) Types of grievances permitted.** *A grievance must allege that the employee is aggrieved by one or more of the following actions of the appointing authority:*

- (1) Discrimination prohibited by rule 1-8 [Prohibited Discrimination].*
- (2) Reprisal prohibited by rule 2-10 [Whistleblower Protection].*
- (3) Discipline without just cause.*
- (4) Written counseling issued without just cause.*
- (5) The abolition or creation of a position for reasons other than administrative efficiency.*
- (6) An arbitrary and capricious lateral job change resulting in substantial harm.*
- (7) Denial of compensation of supplemental military pay to which the grievant is entitled under the civil service rules and regulations.*
- (8) The actual or anticipated failure of refusal to comply with rule 2-14 [Rights of Employees Absent Due to Service in the Uniformed Service.]*
- (9) Retaliation for the employee's good faith exercise of grievance or technical complaint rights provided in the civil service rules or regulations.*
- (10) An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution (2) a civil service rule or regulation, (3) an agency work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.*
- (11) Any other action for which the civil service rules or regulations specifically permit a grievance to be filed.*

**(b) Limitation on grievances.**

- (1) Grievance not permitted.** *In addition to any other limitations in the civil service rules and regulations, the following limitations on grievances apply unless the grievant alleges that the action violated rule 1-8 or rule 2-10.*
  - (A) SES or SEMAS employee without prior status.** *A member of the senior executive service [SES] or the senior executive management assistant service [SEMAS] who is separated from state employment at the expiration of an appointment cannot grieve the separation if the employee did not have prior status at the time of appointment to the SES or the SEMAS.*
  - (B) Employee in limited-term position.** *An employee in a limited-term position whose appointment is terminated at or before the end of the term of appointment due to lack of work or funding cannot grieve the termination.*
- (2) Management rights.** *Unless specifically authorized in the civil service rules or regulations, an employee cannot grieve the agency's exercise of any of the rights reserved to management in rule 6-4 [Rights of Employer]*

- (3) **Lateral job change.** A grievance regarding a nondisciplinary lateral job change may be grieved only under the provisions of subsection (a)(1), (a)(2), (a)(6), or (a)(7), as appropriate. In addition, a grievance regarding a disciplinary lateral job change may be grieved under the provisions of subsection (a)(3).
- (4) **Technical appointment complaints.** The following complaints cannot be filed as a grievance but must be filed directly with the civil service staff under the technical appointment complaint provisions in rule 8-3 [Technical Complaints]:
- (A) **Unsuccessful candidate.** A complaint by an unsuccessful candidate regarding a technical appointment decision or arising out of the selection, appointment, or certification of a candidate.
- (B) **Employee whose appointment is revoked.** A complaint by an employee whose appointment is revoked in compliance with rule 8-3 [Technical Complaints].

#### **8-1.4 Grievance Decision by Appointing Authority**

- (a) **Grievance review and decision.** The appointing authority shall review the grievance and issue a written grievance decision, as provided in the regulations. If the appointing authority fails to answer the grievance within the time permitted in the regulations, the appointing authority is deemed to have denied the grievance.
- (b) **Appeal of grievance decision.** The final grievance decision of the appointing authority is binding unless the grievant files a timely appeal of the decision, as authorized in rule 8-2 [Appeals of Grievance Decisions] and the civil service regulations.

### **Rule 8-2 Appeals of Grievance Decisions**

#### **8-2.1 Appeal of Grievance Decision to Civil Service Authorized**

A grievant may appeal a final grievance decision of an appointing authority to civil service staff, as authorized in the civil service rules and regulations.

#### **8-2.2 Limitation on Grievance Appeals**

A grievant is not authorized to file a grievance appeal unless the grievance alleges one or more of the following:

- (a) A tangible adverse employment action resulting from discrimination prohibited in rule 1-8 [Prohibited Discrimination].
- (b) A tangible adverse employment action resulting from reprisal prohibited by rule 2-10 [Whistleblower Protection].
- (c) One or more of the following types of discipline imposed without just cause:
- (1) Dismissal.
  - (2) Demotion.
  - (3) Suspension.
  - (4) Reduction in pay.
  - (5) Disciplinary lateral job change.

- (6) *Interim rating or unsatisfactory follow-up rating, as provided in rule 2-3.4(d) [Interim and Follow-up Ratings] and rule 3-6.5 [Grievance of Probationary Rating or Discipline].*
- (d) *A tangible adverse employment action caused by the abolition or creation of a position.*
- (e) *An arbitrary and capricious lateral job change resulting in substantial harm.*
- (f) *Denial of compensation or supplemental military pay to which the grievant was entitled under the civil service rules and regulations.*
- (g) *A tangible adverse employment action has occurred or will occur as a result of the actual or anticipated failure or refusal of the appointing authority to comply with rule 2-14 [Rights of Employees Absent due to Service in the Uniformed Service] or applicable regulations.*
- (h) *A tangible adverse employment action taken in retaliation for the employee's good faith exercise of grievance or technical complaint rights provided in the civil service rules or regulations.*
- (i) *An action that substantially harmed the employee and violated (1) article 11, section 5 of the Michigan constitution, (2) a civil service rule or regulation, (3) an agency work rule, or (4) an enforceable written grievance settlement permitted by the civil service rules or regulations.*
- (j) *Any other action for which the civil service rules or regulations specifically permit a grievance appeal to be filed.*

### **8-2.3 Further Limitations on Grievance Appeals**

*The following additional limitations apply to a grievance appeal unless the grievant alleges that a tangible adverse employment action resulted from an action of the appointing authority that violated rule 1-8 [Prohibited Discrimination] or rule 2-10 [Whistleblower Protection]*

- (a) **Probationary employee without status.** *A probationary employee without status cannot appeal the final grievance decision of the appointing authority regarding any of the following:*
- (1) *A probationary rating, an interim rating, or a follow-up rating.*
  - (2) *A decision to extend an employee's probationary term.*
  - (3) *A decision by the appointing authority to discipline the employee, including dismissal, during the probationary period or within 28 calendar days after the end of the probationary period.*
- (b) **Probationary employee with status.** *A probationary employee with status cannot appeal the final grievance decision of the appointing authority regarding a decision to extend the employee's probationary term.*
- (c) **Reprimand or counseling.** *An employee cannot appeal the final grievance decision of the appointing authority regarding a reprimand or counseling.*

### **8-2.4 Civil Service Grievance Appeal Procedures**

- (a) **Regulations.** *The state personnel director shall issue regulations governing the grievance appeal and arbitration procedures.*

- (b) **Referral.** *If a grievance appeal is not administratively dismissed under rule 8-4 [Summary Dismissal], a hearing officer or arbitrator shall conduct an expeditious review in accordance with the civil service rules and regulations.*
- (1) **Hearing officer.** *Unless the grievant elects arbitration under subsection (b)(2), the grievance appeal is referred to a hearing officer designated or appointed by the state personnel director.*
- (2) **Arbitration alternative.** *As an alternative to the referral provided in subsection (b)(1), the grievant may elect to have a grievance appeal heard by an arbitrator.*
- (A) **Cost.** *The grievant and the appointing authority shall share the cost of the arbitration equally.*
- (B) **Applicable rules and regulations.** *An arbitrator shall decide a grievance appeal under the same civil service rules and regulations that would be applicable if the grievance appeal were heard by a hearing officer, except as otherwise specifically provided in the regulations governing arbitration.*
- (c) **Decision.** *At the conclusion of the grievance appeal, the adjudicating officer shall issue a written decision setting forth findings of fact, conclusions of law, and any remedial orders.*
- (1) **Attorney fees and costs prohibited.** *An adjudicating officer cannot award attorney fees, witness fees, costs, or other expenses.*
- (2) **No interest on award.** *An adjudicating officer cannot award interest on any monetary award.*
- (3) **Limitation on damages for limited-term appointments.** *An adjudicating officer cannot award to a grievant in a limited-term appointment, the senior executive service, or the senior executive management assistant service, any damages for any period after the date of expiration of the grievant's term of appointment.*
- (4) **Back-pay awards.** *Any back-pay award is limited to regularly scheduled hours and holidays for which the employee otherwise normally would have been paid. Back-pay may include only the employee's base rate of pay, shift differential authorized in rule 5-4.5 [Shift Differential], and prison employee premiums authorized in rule 5-5 [Additional Compensation: Prison Employees]. A back-pay award cannot include any other pay premium, including overtime, on-call, callback, explosives duty, out-of-state location, or emergency response premiums. All back-pay awards are subject to deduction of the following:*
- (A) *Earnings in other employment or self-employment, except for previously-approved supplemental employment.*
- (B) *Benefits from employer contributory income protection insurance.*
- (C) *Benefits under workers' compensation, unemployment compensation, social security, and social welfare programs.*
- (5) **Leave awards.** *An adjudicating officer may award sick and annual leave credits that would have normally accrued during a period of vacated discipline.*
- (6) **Seniority awards.** *An adjudicating officer may award seniority credit and longevity compensation that would have normally accrued during a period of*

*vacated discipline. Any such seniority credit does not count for classification or qualification purposes.*

#### **8-2.5 Further Appeal to Commission Authorized**

*A party that appeared and participated in a grievance appeal, including an arbitration, may file a further appeal of the final decision of the adjudicating officer to the civil service commission, as provided in the civil service rules and regulations.*

#### **8-2.6 Effective Date of Decision of Adjudicating Officer; Automatic Stay; Exception**

*(a) **Effective date.** A grievance appeal decision is final and binding on the parties 29 calendar days after the date the decision is issued, unless either (1) the decision provides for a later effective date or (2) a party files a further appeal to the civil service commission within 28 calendar days after the date the decision is issued. If a party files a timely appeal to the civil service commission within 28 calendar days after the date the decision was issued, the effective date of the decision is automatically stayed pending further order of the employment relations board or civil service commission.*

*(b) **Exception; grievant's reinstatement ordered.** If a final decision of an adjudicating officer orders an appointing authority to reinstate a grievant who had been dismissed for cause, the appointing authority, as a condition of further appeal to the civil service commission, shall either (1) reinstate the grievant or (2) restore the grievant's base pay and medical, dental, and vision group insurance. The appointing authority shall continue the reinstatement or payment of base pay and benefits while the appeal to the commission is pending, as provided in the civil service regulations.*

### **3. DEFINITIONS**

#### **A. Civil Service Commission Rule Definitions**

1. ***Adjudicating officer** means the state personnel director or other civil service administrative officer, technical review officer, hearing officer, arbitrator, or other officer authorized to make a decision reviewable by the civil service commission.*
2. ***Administrative officer** means the state personnel director or a person authorized by the state personnel director to take administrative action on matters filed with civil service commission.*
3. ***Appointing authority** means each of the following:*
  - (a) A single executive heading a principal department or autonomous entity.*
  - (b) A chief executive officer of a principal department or autonomous entity headed by a board or commission.*
  - (c) The state personnel director.*
  - (d) A person designated by any of the preceding as responsible for administering the personnel functions of the department, autonomous entity, or other agency.*
4. ***Good cause** means an acceptable excuse for failing to file or take other required action timely. Good cause does not include a person's own carelessness, negligence, or inattention to the filing or other requirements.*

5. **Grievance** means a complaint, authorized in rule 8-1 [Grievances], filed by a classified employee regarding an action by an appointing authority or civil service human resources staff acting pursuant to any assignment, authority, or direction of an appointing authority.
  6. **Hearing officer** means a person authorized by the state personnel director to administer oaths and conduct hearings as provided in the civil service rules and regulations.
  7. **Party** means any of the following persons or organizations:
    - (a) **Party**, in a grievance appeal, means any of the following:
      - (1) The employee who filed the grievance.
      - (2) The appointing authority that issued the final grievance decision being appealed.
- \* \* \*
8. **Special extenuating circumstances** means a compelling excuse for the failure to file a matter timely that arises out of one of the following:
    - (a) An intentionally or fraudulently misleading action by an appointing authority or party that prevented the filing.
    - (b) Serious physical or mental incapacity of the person that prevented the filing.
    - (c) Extraordinary unforeseen circumstances outside the control of the person that prevented the filing.

#### B. Additional Definitions as used in this Regulation

1. **Authorized representative** means a qualified person authorized to appear and receive notices on behalf of and represent the interests of a party in an agency grievance proceeding or Civil Service grievance appeal proceeding.
2. **Contested hearing** means a quasi-judicial proceeding before a hearing officer or arbitrator in which the parties, after notice, may introduce documentary evidence, examine and cross-examine witnesses under oath, and submit arguments.
3. **Group grievance** means grievances by two or more employees with common issues of fact and law that the appointing authority processes in a single agency grievance proceeding.
4. **Mailed** means deposited in a United States Postal Service mail receptacle properly addressed, containing the document to be mailed, and with first-class postage fully prepaid on the envelope.
5. **Member of the family** means a spouse, child, foster child, parent, foster parent, or sibling of the hearing officer or hearing officer's spouse.
6. **Member of the household** means any person (1) living in the household or (2) whose financial or physical care is the principal responsibility, of the hearing officer or hearing officer's spouse.
7. **Postmark** means a date stamp placed on a mailed envelope or a receipt issued by the United States Postal Service indicating the date the envelope was mailed or received by the United States Postal Service for mailing. A postmark does not include a date stamp placed by the sender, such as a postage meter stamp.

8. **Tangible adverse employment action** means an act by an employer or employer's agent that objectively, substantially, and negatively affects an employee's job, income, benefits, or employment status.

#### 4. STANDARDS

##### A. Grievance Procedures at Agency Level.

##### 1. Steps in the Agency Grievance Procedure.

- a. **Agency step 1.** The grievant shall file a written grievance on a form prescribed by Civil Service. The grievance must be filed with the agency official designated to receive the grievance (the "**Step-1 Official**").
- (1) **Time limit for filing a written grievance.** The grievant must file a signed, written grievance no later than **14 calendar days** after the date the grievant became aware of the grievance or, in exercise of reasonable diligence, should have become aware of the grievance. If a grievant does not timely file the written grievance, the grievance is waived, unless the untimeliness is excused as provided in Standard 4.A.3.
- (2) **Answer at step 1.** The Step-1 Official shall hold an informal conference with the grievant, unless the grievant declines to attend, and issue a written answer to the grievant within **14 calendar days** after the grievance is filed.
- b. **Agency step 2.** If the grievant is not satisfied with the written answer of the Step-1 Official, the grievant may appeal the grievance decision to step 2. If a grievant does not timely file an appeal to step 2, the grievance is considered closed on the basis of the step-1 answer.
- (1) **Time limit for filing appeal to step 2.**
- (a) **After step-1 answer.** If the Step-1 Official issues a timely answer, the employee must file a written appeal to the appointing authority or other designated officer (the "**Step-2 Official**") no later than 14 calendar days after the date that the step-1 answer is issued to the grievant. Unless a grievant produces a postmark or other proof of later issuance, the date of issue is presumed to be the date on the written answer.
- (b) **No step-1 answer.** If the Step-1 Official does not answer the grievance in writing within 14 calendar days after the grievance is filed, the Step-1 Official is presumed to have denied the grievance. Thereafter, the grievant is authorized to appeal to the Step-2 Official. An appeal to step 2 must be filed within 21 calendar days after the last day for the Step-1 Official to respond.
- (2) **Answer at step 2.** The Step-2 Official shall hold any conference deemed necessary and issue a written answer to the grievant within 28 calendar days after the appeal to step 2 is filed.
- c. **Appeal of step-2 answer.** If a grievant does not timely file an appeal step 3 with Civil Service, the grievance is considered closed on the basis of the step-2 answer.



2. **Filing Timely.** A grievance or appeal must be filed with the appropriate Step-1 or Step-2 Official before the end of the period specified in this regulation. To be timely, a written grievance or appeal must be **received** in the office of the appropriate Step-1 Official or Step-2 Official before 5:00 p.m. of the last day of the period. Time is counted as provided in Standard B of regulation 8.06 [Computing Time and Filing Documents]. A grievance or appeal must be delivered to the appropriate Step-1 or Step-2 Official by one of the following methods:
  - a. **Delivery.** The document may be delivered in person, by mail, or by other courier to the designated office of the appropriate official.
  - b. **Fax.** If the appropriate official has listed a fax number for receiving grievances, the document may be delivered by fax to that number.
  - c. **E-mail.** If the appropriate official has established an e-mail address for receiving grievances, the document may be delivered by e-mail to that address.
3. **Effect of Late Filing.** To file a grievance at step 1 or step 2 after the established deadline, a grievant must establish good cause or special extenuating circumstances that excuse the late filing. If denying a grievance for untimeliness, a Step-1 or Step-2 Official must evaluate the merits of any excuse for lateness. A grievant may appeal an otherwise appealable grievance to step 3 with Civil Service for a de novo consideration of the excuse.
  - a. **Up to 28 days late.** A filing received up to 28 calendar days late shall be denied as untimely, unless the filing party establishes good cause.
  - b. **Between 29 days and one year late.** A filing received more than 28 calendar days but less than 1 year shall be denied as untimely, unless the filing party establishes special extenuating circumstances.
  - c. **One year or more late.** A filing received 1 year or more late shall be denied as untimely.
4. **Extension of Time to File or Respond.** A grievant and the appropriate Step-1 or Step-2 Official may agree in writing to extend the time to file a grievance, appeal to step 2, or an answer. Extensions cannot exceed 6 months.
5. **Group Grievance.**
  - a. **Joint grievance form.** If two or more employees have a grievance with common issues of fact and law, they may jointly file a single grievance form. Each employee filing a joint grievance must personally sign the grievance form. A joint grievance may be filed at step 1 only if the same Step-1 Official is responsible for responding to all the grievants. Otherwise, the joint grievance must be filed directly at step 2.
  - b. **Agency discretion.**
    - (1) If employees file a joint grievance, the appointing authority may (a) process grievances as a group grievance or (b) process employee's grievances separately.

- (2) If employees file separate grievances with common issues of fact and law, the appointing authority may process the multiple grievances as a single group grievance.
6. **Skipping Step 1.** A grievant may file a grievance directly at step 2 if the grievant was dismissed, suspended without pay, demoted, laid off, or otherwise aggrieved by an action taken by management above the level of the Step-1 Official. If a grievance is filed directly at step 2, the step-2 procedures and time frames apply. However, the Step-2 Official or a designated official must hold an informal conference with the grievant before issuing the step-2 answer, unless the grievant declines to attend.
7. **Eligibility.** The grievance procedure established in this regulation is available to employees for grievances related to activities that occurred while employed as nonexclusively represented employees (NERE). Exclusively represented employees may only file grievances related to (1) the creation or abolishment of classified positions for reasons other than administrative efficiency and (2) timely grievances arising during a prior period of employment as a NERE.

## B. Grievance Appeal Procedures in Civil Service.

### 1. Filing a Grievance Appeal.

- a. **Authorized.** If a grievant is not satisfied with the step-2 answer or the Step-2 Official fails to issue a timely answer, the grievant may appeal the final grievance decision to the Civil Service hearings office. An appeal is filed when **received** by Civil Service, as provided in Regulation 8.06.
- b. **Time limit to appeal to Civil Service.**
- (1) **After Step-2 Answer.** If the Step-2 Official issues a timely written grievance decision at step 2, the grievant must file an appeal to the Civil Service hearings office no later than 28 calendar days after the date the step-2 answer was issued. Unless a grievant produces a postmark or other proof of later issuance, the date of issue is presumed to be the date on the written answer.
- (2) **No Step-2 answer.** If the Step-2 Official fails to issue a timely grievance decision at step 2, the Step-2 Official is presumed to have denied the grievance. Thereafter, the grievant is authorized to appeal to the Civil Service hearings office. An appeal to Civil Service must be filed within 42 calendar days after the last day for the Step-2 Official to respond.
- c. **Contents of the appeal.** The appeal must include all of the following:
- (1) A listing of the grievant's (1) name, (2) employee identification number, (3) employing agency, (4) mailing address, (5) telephone number, (6) e-mail address, and (7) authorized representative, if any.
- (2) If the grievant has an authorized representative, a listing of the authorized representative's (1) name, (2) organization, (3) mailing address, (4) telephone number, (5) fax number, and (6) e-mail address.
- (3) A complete copy of the grievance chain including the original grievance and any appeals and responses issued by Step-1 and Step-2 Officials.
- (4) A concise statement of the basis for the grievance appeal.

## 2. Late Appeal.

a. **Action by administrative officer.** A grievance appeal that is untimely filed must be accompanied by a written explanation for the late filing. If a late filing is not accompanied by a written explanation, the administrative officer shall send a deficiency notice seeking an explanation. If the grievant fails to respond to a deficiency notice or if the offered explanation fails to establish the required good cause or special extenuating circumstances, the administrative officer shall dismiss the grievance appeal as untimely.

(1) **Up to 28 days late.** A grievance appeal filed up to 28 calendar days late shall be denied as untimely, unless the filing party establishes good cause.

(2) **Between 29 days and one year late.** A grievance appeal filed more than 28 calendar days but less than 1 year late shall be denied as untimely, unless the filing party establishes special extenuating circumstances.

(3) **One year or more late.** A grievance appeal filed 1 year or more late shall be denied as untimely.

b. **Decision by hearing officer.**

(1) If the administrative officer cannot decide the issue of good cause or special extenuating circumstances based on the written explanation provided by the grievant, the administrative officer shall refer the issue to a hearing officer for resolution.

(2) If the administrative officer finds good cause or special extenuating circumstances and accepts a late appeal, any party may request that the assigned hearing officer review the finding *de novo*.

3. **Administrative Review of Grievance Appeal.** A Civil Service administrative officer will review all grievance appeals filed.

a. **Dismissal by administrative officer.** The administrative officer may summarily dismiss a grievance appeal for any of the following reasons:

(1) **Not authorized.** The adjudicating officer lacks authority to consider the grievance appeal under the Civil Service rules and regulations because (a) the grievant is not authorized to file the grievance or grievance appeal or (b) the subject matter of the grievance appeal is not reviewable in the grievance appeal forum.

(2) **Lack of jurisdiction.** Civil Service lacks jurisdiction over a necessary party or over the subject matter of the grievance or grievance appeal.

(3) **Untimeliness.** The grievance or grievance appeal was untimely.

(4) **Another action pending.** Another Civil Service action has been initiated between the same parties involving substantially the same grievance or grievance appeal.

(5) **Barred by prior claim.** Substantially the same grievance or grievance appeal was adjudicated to finality in the Civil Service system in another action between the same parties.

- (6) **Failure to Respond.** The grievant fails to respond to a deficiency notice issued by Civil Service staff.
- b. **Dismissal by hearing officer.** If the administrative officer does not summarily dismiss a grievance appeal, a party may file a motion for summary dismissal with the assigned hearing officer.
4. **Mediation.** The administrative officer or hearing officer may require mediation of a grievance appeal. A person assigned to conduct a mediation cannot (1) be assigned as the hearing officer in the same matter or (2) later testify regarding any statement of a party or offer of settlement made during the mediation.
5. **Civil Service Grievance Appeal Procedures.** If the administrative officer does not summarily dismiss, the grievance appeal is assigned to a hearing officer for disposition. The hearing officer shall conduct a fair, impartial, and expeditious review and disposition of the grievance appeal in accord with rules 8-1 and 8-2 and this regulation.
6. **Limitation on Communications.** A hearing officer and a party or representative shall not communicate privately on the facts or merits of a pending matter. The hearing officer and a party or representative may communicate privately as necessary for scheduling and administrative matters unrelated to the merits or facts.
7. **Disqualification of Hearing Officer.**
- a. **Who may raise.** A party or the hearing officer may raise the issue of disqualification of a hearing officer.
- b. **Grounds.** A hearing officer shall be disqualified when the hearing officer cannot impartially decide a matter. Specific grounds include, but are not limited to, the following:
- (1) The hearing officer is personally biased or prejudiced for or against a party or representative.
  - (2) The hearing officer has been consulted by a party or representative regarding the pending matter before assignment of the matter.
  - (3) The hearing officer has been employed by a party or representative in any private matter in the previous five years. Appointment as a neutral arbitrator in a private or public arbitration is not disqualifying employment.
  - (4) The hearing officer, the hearing officer's spouse, or a member of the family or household of either is (a) a party, (b) a party's representative, or (c) a person with more than a *de minimis* interest that the proceeding could substantially affect.
- c. **Timing.** A motion to disqualify must be filed within **14 calendar days** after the moving party discovers or, in the exercise of reasonable diligence, should have discovered the ground for disqualification.
- d. **Ruling.**
- (1) The challenged hearing officer shall decide the motion.

- (2) If the challenged hearing officer denies the motion, the moving party may request in writing that the State Personnel Director exercise superintending control and disqualify the challenged hearing officer.
  - (3) A request by the moving party must be filed with the State Personnel Director within **7 calendar days** after the date the challenged hearing officer denied the motion.
  - (4) The State Personnel Director's decision on the motion is final.
- e. **Motion granted.** When a hearing officer is disqualified, an administrative officer shall assign the grievance appeal to another hearing officer.
8. **Prehearing Conference.** The hearing officer may conduct a prehearing conference in person or by telephone to consider any matters that will facilitate the fair and expeditious disposition of the grievance appeal, including, for example, the following:
  - a. Simplifying issues.
  - b. Obtaining stipulations and admissions of fact and documents to avoid unnecessary proofs.
  - c. Identifying material facts in dispute.
  - d. Scheduling matters.
  - e. Prehearing exchange of documents.
9. **Submissions to Hearing Officer; Proof of Service.** If a party submits any written material to the hearing officer, the party shall also serve a complete copy of the material on every other party at the same time. The submitting party shall certify in writing that every other party has been served and the manner of service.
10. **Summary Disposition without a Hearing.** If there is no genuine issue as to any material fact, the hearing officer may decide the matter without a contested hearing based on the grievance record and written submissions of the parties, including affidavits.
11. **Hearing Procedures.** If the grievance appeal is not decided on summary disposition, a hearing officer shall conduct a contested hearing under the following general procedures:
  - a. **Time for hearing.** The hearing officer shall fix the date, time, and place for each hearing.
  - b. **Postponements.** Except for a serious emergency, a request to postpone a scheduled hearing must be filed at least **14 calendar days** before the scheduled hearing. A hearing officer may postpone a hearing at the request of a party if there is sufficient justification.
  - c. **Absence of a party or representative.** A hearing may proceed in the absence of a party or representative who fails to appear and did not obtain a postponement.
    - (1) If the party with the burden of proof fails to appear, the hearing officer may grant a default judgment to the responding party.

- (2) If the responding party fails to appear, the hearing officer shall make an award in favor of the party with the burden of proof if that party introduces sufficient evidence to justify an award. Any award must be consistent with applicable Civil Service rules and regulations.
- d. **Prehearing exchange of documents and witness lists.** When a hearing is scheduled, a party shall provide every other party (1) a copy of each document that the party intends to introduce into evidence in the party's case-in-chief and (2) a written list of the names and titles of all witnesses the party intends to call to give evidence at the hearing. The copies and list must be delivered in person, by fax, or by e-mail to all other parties at least 7 calendar days before the hearing. Alternatively, the copies and list may be mailed to all other parties by first-class U.S. mail or sent by other courier at least 14 calendar days before the hearing. This section does not prohibit a party from introducing rebuttal evidence or witnesses.
  - (1) **Previously provided documents.** A party is not required to provide an advance copy of any document previously exchanged in the grievance.
  - (2) **Security risk.** If an appointing authority intends to call as a witness any prisoner or other person involuntarily committed to the custody of a state agency, the witness may appear by telephone unless the hearing is held where the witness is located.
- e. **Evidence.** At the hearing, the hearing officer shall provide the parties a reasonable opportunity to present evidence, examine and cross-examine witnesses, and present argument. The hearing officer may swear witnesses, take testimony, receive evidence, including opinion evidence, and take such other actions necessary to fairly consider the claims of the parties. The hearing officer may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after considering any objection made to its admission. The rules of evidence do not apply, but the hearing officer may refuse to take or admit evidence that is repetitive, irrelevant, unreliable, or speculative.
- f. **Hearing record.** The hearing record shall include the following:
  - (1) The grievance chain, with all written grievances and grievance answers.
  - (2) Documents admitted into evidence by the hearing officer.
  - (3) Sworn testimony of witnesses.
  - (4) Briefs and motions filed by the parties.
  - (5) All written orders and decisions of the hearing officer.
- g. **Civil Service rules and regulations.** The hearing officer may judicially note Civil Service rules and regulations. Civil Service rules and regulations need not be admitted into evidence unless there is a genuine dispute regarding the authenticity or text of the rule or regulation.
- h. **Agency work rules.** Agency work rules must be admitted into evidence.

## 12. Orders of Appearance, Subpoenas, and Discovery.

- a. **Authority of adjudicating officer.** To obtain relevant and material evidence necessary to decide pending matters, a Civil Service adjudicating officer may order persons to appear and give testimony or produce any evidence, including books, records, papers, correspondence, or documents in the person's possession or under the person's control.
- b. **Orders of appearance for classified employees.**
  - (1) **Requirements.** An adjudicating officer may issue an order to require a classified employee to appear to give testimony or produce evidence on request of a party or the adjudicating officer's own motion. A party requesting an order of appearance must make the request in writing at least 21 calendar days before the scheduled appearance date. The adjudicating officer may issue an order on a late request only if the requesting party demonstrates good cause.
  - (2) **Service of order.** An order of appearance must be served on the classified employee to whom it is directed. If a party requests the order, that party is responsible for serving the order. If the adjudicating officer issues the order on the officer's own motion, Civil Service staff is responsible for serving the order. If a party seeks to serve an employee of an appointing authority, the appointing authority is not required to disclose home addresses, but shall deliver the order to the employee on request of the party.
  - (3) **Appearance of classified employees by order.** All classified employees, as a part of their official duties, shall appear as directed by an adjudicating officer.
    - (a) An appointing authority shall release the employee from regularly scheduled work without loss of regular pay or leave credits for necessary travel and attendance to comply with the order of the adjudicating officer unless an emergency or critical safety concern prohibits releasing the employee. The employee is not entitled to overtime pay or travel expenses.
    - (b) A classified employee ordered to produce evidence in the person's possession or under the person's control shall produce the evidence as ordered, even if the employee or the employee's appointing authority objects to the order. If the employee or the employee's appointing authority objects to the order, either may file a written objection at least 7 calendar days before the date the documents are to be produced. The hearing officer shall hear the objections and rule on them before requiring the employee to release the evidence.
  - (4) **Voluntary appearance of classified employees.** A witness may voluntarily appear at the request of a party. A classified employee who is a necessary witness and appears at the request of a grievant shall be released from regularly scheduled work without loss of regular pay or leave credits for the period of necessary travel and attendance at a Civil Service hearing. The witness is not entitled to overtime pay or travel expenses.

c. **Orders to agencies.**

- (1) **Requirements.** An adjudicating officer may issue an order of appearance to an agency to provide testimony or produce any evidence, including books, records, papers, correspondence, or documents possessed by or under the control of the agency. The order may be issued at the request of a party or on the adjudicating officer's own motion.
  - (a) Before a party requests an order of appearance, the party must seek the voluntary agreement of the agency to appear. The party must affirmatively state in its request for an order of appearance that the party requested the appointing authority of the agency to voluntarily comply with the request and the appointing authority refused.
  - (b) A party requesting an order of appearance must make the request in writing at least 21 calendar days before the scheduled appearance date. The adjudicating officer may issue an order on a late request only if the requesting party demonstrates good cause.
- (2) **Service of order.** An order of appearance must be served on the office of the appointing authority of the agency to which it is directed. If a party requests the order, that party is responsible for serving the order. If the adjudicating officer issues the order on the officer's own motion, Civil Service staff is responsible for serving the order.
- (3) **Appearance of agency.** An agency shall comply with an order of appearance and provide one or more witnesses or produce the evidence as ordered unless it files an objection to the order at least 7 calendar days before the witness or evidence is to be produced.
- (4) **Sanctions.** If an agency flagrantly and wantonly refuses to comply with an order of the adjudicating officer and the requesting party is materially disadvantaged by the refusal, the adjudicating officer may impose appropriate sanctions, up to and including dismissal of any claims or defenses of the offending agency.

d. **Subpoenas.**

- (1) **Subpoenas authorized.** An adjudicating officer may issue a subpoena to require the attendance and testimony of any person not a classified employee and the production of any evidence not in the possession or control of a party, classified employee, or agency. A subpoena commands the person to whom directed to attend and testify at the Civil Service proceeding, produce the things designated, or give a deposition.
- (2) **Requirements.** When necessary to obtain relevant and material evidence to resolve a matter, an adjudicating officer, upon the officer's own motion or on the written request of any party, may issue a subpoena requiring the attendance and testimony of any person not a classified employee and the production of any evidence in the person's possession or under the person's control.
- (3) **Applications and review.** An application by a party for a subpoena is normally reviewed and acted upon by the hearing officer assigned to the



matter. However, in the absence of an assigned hearing officer, another adjudicating officer may grant or deny the request of a party. When available, the assigned hearing officer may reexamine the decision.

- (4) **Service, proof.** A subpoena may be served at any place within the state. The party requesting the subpoena is responsible for service of the subpoena. Service must be made by delivery of a copy to the person served. A subpoena must be served personally by an individual of suitable age and discretion who is not a party to the grievance appeal. Verified proof of service must be filed with the adjudicating officer.
  - (5) **Notice to other parties.** The party requesting the subpoena shall mail or send by other courier to every other party a copy of the subpoena within 24 hours after service on the person to whom it is directed.
  - (6) **Costs.** The cost of service and witness and mileage fees are borne by the party who requested the subpoena. If a subpoena is issued upon motion of the hearing officer, the costs are borne by Civil Service. Witness and mileage fees are the same as are paid to witnesses in the circuit courts of this state.
  - (7) **Revocation.** Any person served with a subpoena who does not intend to comply with the subpoena shall, within 7 calendar days after the date of service, petition in writing to revoke the subpoena. A petition to revoke is filed with the Civil Service hearings office and referred to the adjudicating officer for ruling. The person filing a petition to revoke shall serve a copy of the petition on the party who requested the subpoena. Notice of the filing of a petition to revoke must also be promptly given by Civil Service staff to the party at whose request the subpoena was issued. The hearing officer may revoke a subpoena if the evidence required to be produced does not relate to the matter in issue, if the subpoena does not describe the requested evidence with sufficient particularity, or if the subpoena is invalid for any other sufficient reason.
  - (8) **Testimony not required.** A party at whose request a subpoena was issued is not obligated to call the witness or present the witness for cross-examination.
  - (9) **Compliance.** If a person served with a subpoena fails to comply with the subpoena, the party on whose behalf it was issued may file a petition in the Michigan circuit court for an order requiring compliance. If a circuit court petition is filed, the hearing officer may adjourn the proceedings or take other action deemed appropriate. If the hearing goes forward, the hearing officer may presume that the evidence or testimony of a witness who failed to comply with the subpoena would be adverse to any party who is responsible for the failure or refusal of a witness to testify.
- e. **Discovery of medical information.**
- (1) When a mental or physical condition of a party is in controversy, the hearing officer may order the prehearing discovery of medical information about the condition. Medical information subject to discovery includes, but is not limited to, medical records in the possession and

control of a party, physician, hospital, or other custodian, including the Employee Services Program.

- (2) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to the party's mental or physical condition. A privilege not timely asserted is waived in the proceeding.
- (3) Unless the hearing officer orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion prevents discovery of medical information, the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or medical or physical condition.

f. **Employee Services Program.**

- (1) A hearing officer shall not issue any order regarding any professional assessment or counseling services provided by the Employee Services Program unless the employee receiving the services has signed a written release authorizing the disclosure of such information.
- (2) If a party refuses to sign a written release and prevents the disclosure of medical information about a mental or physical condition in contention, the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or medical or physical condition.
- (3) Employees of the Employee Services Program shall comply with any order of a hearing officer accompanied by a properly authorized release.

13. **Standards and Burden of Proof.** The burden of proof in a grievance appeal is allocated as follows:

- a. **Discrimination.** If a grievant alleged discrimination prohibited by rule 1-8 [Prohibited Discrimination], the grievant has the burden of proving by a preponderance of the evidence that the grievant suffered a tangible adverse employment action as a result of discrimination prohibited by rule 1-8.
- b. **Whistleblower.** If the grievant alleged a reprisal prohibited by rule 2-10 [Whistleblower Protection], the grievant has the burden of proving by a preponderance of the evidence that the grievant suffered a tangible adverse employment action as a result of retaliation prohibited by rule 2-10.
- c. **Discipline.** If the grievant alleged dismissal, demotion, suspension, reduction in pay, or disciplinary lateral job change without just cause, the burden of proof is as follows:
  - (1) **Just cause for discipline.** The appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to discipline the grievant.
  - (2) **Discipline.** If the appointing authority proves that there was just cause to discipline the grievant, a hearing officer cannot alter the discipline imposed unless the grievant proves by a preponderance of the evidence that the particular discipline imposed (1) violated a Civil Service rule or regulation, (2) violated an agency work rule, or (3) was arbitrary and capricious.

- d. **Abolition or creation of position.** If the grievant was aggrieved by the creation or abolition of a position, the grievant has the burden of proving by a preponderance of the evidence that (1) the grievant suffered a tangible adverse employment action as the result of the abolition or creation of a position and (2) the position was abolished or created for reasons other than administrative efficiency.
- e. **Nondisciplinary lateral job change.** If the grievant was aggrieved by a nondisciplinary lateral job change, the grievant has the burden of proving by a preponderance of the evidence that (1) the grievant suffered substantial harm as a result of the lateral job change and (2) the lateral job change was arbitrary and capricious.
- f. **Compensation.** If the grievant alleged a denial of compensation, the grievant has the burden of proving by a preponderance of the evidence that the grievant was denied compensation to which the grievant was entitled under a Civil Service rule or regulation.
- g. **Service rating.** If the grievant alleged that the appointing authority issued an unsatisfactory service rating without just cause, the appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to issue the unsatisfactory service rating.
- h. **Evaluation.** If the grievant alleged that the appointing authority issued a less-than-satisfactory overall performance-pay evaluation without just cause, the appointing authority has the burden of proving by a preponderance of the evidence that there was just cause to issue an overall less-than-satisfactory evaluation.
- i. **General grievance appeal.** Unless otherwise specifically provided elsewhere in Civil Service rules or regulations, a grievant has the burden of proving by a preponderance of the evidence both of the following:
  - (1) The grievant was substantially harmed by an action of the appointing authority.
  - (2) The action complained of violated one or more of the following:
    - (a) Article 11, section 5, of the Michigan Constitution.
    - (b) A Civil Service rule or regulation.
    - (c) An agency work rule.
    - (d) An enforceable written grievance settlement between the grievant and the appointing authority permitted by Civil Service rules or regulations.
- j. **Rescission of probationary appointment.** If a grievance alleged that the appointing authority rescinded an appointment during a probationary period and demoted the grievant to a classification level not less than the level occupied at the time of the probationary appointment:
  - (1) The appointing authority must first articulate the reasons for rescinding the probationary appointment and demoting the grievant.

- (2) The grievant must prove by a preponderance of the evidence that the rescission and subsequent demotion (1) were arbitrary and capricious or (2) violated rule 1-6 [Merit, Efficiency, and Fitness], 1-8 [Prohibited Discrimination], or 2-10 [Whistleblower Protection].

#### 14. Decision.

- a. **Final decision.** The hearing officer shall issue a written decision setting forth the hearing officer's findings of fact, conclusions of law, and any remedial orders. If the decision disposes of the grievance appeal, the decision is final unless a party files a timely claim of appeal or an application for leave to appeal to the Civil Service Commission.
- b. **Remand decision.** If the hearing officer remands the matter to the agency for further proceedings and does not retain jurisdiction, the remand decision is appealable as a final decision. If the hearing officer remands the matter to the agency and retains jurisdiction, the decision is appealable only as an interlocutory order.

#### 15. Awards.

- a. **Prohibitions.** A hearing officer cannot award any of the following:
  - (1) Attorney fees.
  - (2) Witness fees.
  - (3) Costs or other expenses.
  - (4) Interest on any monetary award.
- b. **Back pay and benefits.** An award of back pay and other benefits, even when not expressly stated in the decision, is subject to civil service rules and regulations and subject to the following deductions, when appropriate:
  - (1) Earnings in other employment or self-employment, except for previously-approved supplemental employment.
  - (2) Benefits from employer contributory income protection insurance.
  - (3) Benefits received under workers' compensation, unemployment compensation, social security, and social welfare programs.
  - (4) Paycheck withholding required under federal, state, and local law.
  - (5) The employee's share of the cost of any group insurance plan.
  - (6) Retirement benefits, including disability retirement benefits.
- c. **Expiring appointments.** If the grievant is in a limited-term appointment, the Senior Executive Service, or the Senior Executive Management Assistant Service, damages, including pay and benefits, cannot be awarded for any period after the scheduled date of expiration of the term of appointment, unless specifically authorized in a Civil Service rule.

#### 16. Effective Date of Decision.

- a. **Effective date.** A grievance appeal decision becomes final and binding on the parties 29 calendar days after the date the decision of the adjudicating officer is issued, unless the decision provides for a later effective date.

- b. **Stay of effective date.** If a party files an appeal to the Civil Service Commission within 28 calendar days after the date the decision was issued, the decision is automatically stayed pending further order of the Employment Relations Board or Civil Service Commission.
- c. **Dismissal grievances.** If a final decision of an adjudicating officer orders an appointing authority to reinstate a grievant who had been dismissed for just cause, the appointing authority, as a condition of further appeal to the Civil Service Commission, must do one of the following:
- (1) **Temporary reinstatement.** Temporarily reinstate the grievant to a position at the classification and level (1) held when the grievant was dismissed or (2) ordered for reinstatement by the adjudicating officer.
  - (2) **Temporary restoration of base pay and benefits.** Temporarily restore the grievant's base pay and medical, dental, and vision group insurance, at the level in effect when dismissed.
    - (a) The temporary restoration of base pay and benefits does not reinstate the grievant to employment in the classified service.
    - (b) During a period of temporary restoration of base pay and benefits, the grievant is not entitled to any leave credit, retirement credit, longevity credit or payment, additional compensation, increases in base pay, severance pay, expense reimbursement, or any other additional compensation or benefit.
  - (3) If, after appeal, the decision reinstating the grievant is affirmed, the appointing authority shall provide the remainder of any back pay award, with credit given for any base pay and benefits temporarily restored pending appeal, unless the Civil Service Commission or a court of competent jurisdiction orders otherwise.
- d. **Back pay pending appeal.** The appointing authority is not required to pay an award of back pay or benefits until there is a final, nonappealable decision of the Civil Service Commission or a court of competent jurisdiction affirming an award of back pay.
17. **Confidentiality.** Except for the record and published civil service decisions, all files of the Civil Service Commission and its adjudicating officers relating to grievance appeals, including, but not limited to, internal correspondence, research, staff analyses, and draft decisions, are confidential and not open to the public.
18. **Other Administrative Proceedings.** The procedures established in this regulation for the conduct of hearings may be used in other civil service proceedings where a contested hearing is authorized to the extent that they are not incompatible with requirements in the civil service rules and regulations for those proceedings. In civil service proceedings where a contested hearing is not authorized, the adjudicating officer may use these procedures to the extent that they are not incompatible with the subject matter and conduct of the investigation.

**C. Arbitration Alternative.**

1. **Filing Grievance Appeal to Arbitration.** A grievant may elect to have a grievance appeal heard by an arbitrator rather than a hearing officer appointed by Civil Service. A grievant electing arbitration must first file the grievance appeal with Civil Service in compliance with standards 4.B.1, 4.B.2, and 4.B.3 of this regulation. If the grievant's first filing with Civil Service does not clearly indicate that the grievant elects the arbitration alternative, the grievant waives the arbitration alternative and the grievance appeal must be heard by a hearing officer appointed by Civil Service.
2. **Pre-arbitration Conference.** If the administrative officer does not summarily dismiss the grievance appeal, the administrative officer shall schedule a pre-arbitration conference of the parties within 28 calendar days after the date the grievance appeal was filed. The parties may explore conciliation, stipulate as to issues and facts, and coordinate selection of the arbitrator. After the conference, the administrative officer shall certify the grievance appeal to arbitration.
3. **Selection of Arbitrator.** Within 14 calendar days after the administrative officer mails or sends by other courier the certification, the grievant must file a request with the selecting agency or acknowledge acceptance of a mutually agreed arbitrator. Unless the parties agree otherwise, the arbitrator shall be selected and the hearing conducted under the rules of the American Arbitration Association that are not inconsistent with the Civil Service rules and regulations. The Federal Mediation and Conciliation Service or Michigan Employment Relations Commission may be used by mutual agreement.
4. **Conduct of Arbitration.**
  - a. **Cost.** The grievant and appointing authority shall share the cost of the arbitration equally.
  - b. **Applicable law.** An arbitrator shall decide a grievance appeal under the same substantive Civil Service rules and regulations that would apply if the grievance appeal were heard by a Civil Service hearing officer under rule 8-2 and this regulation.
  - c. **Record.**
    - (1) The arbitration must be recorded so that a verbatim transcript of the arbitration proceedings can be made, if necessary.
    - (2) The arbitrator must retain all original documents, exhibits, pleadings, orders, and decisions. If a party appeals the arbitrator's final decision, the arbitrator shall provide the original documents, exhibits, pleadings, orders, and decisions to the Employment Relations Board on request of the appellant.
  - d. **Decision.** The arbitrator shall issue a written decision setting forth the arbitrator's findings of fact, conclusions of law, and any remedial orders. A remedial order cannot exceed the scope of remedies available to a Civil Service hearing officer. The decision of the arbitrator is final unless a party files a timely claim of appeal or application for leave to appeal to the Civil Service Commission.

**D. Authorized Representation and Administrative Leave.**

1. **By nonexclusively represented employees.** A NERE who files a grievance or is a party in a Civil Service grievance appeal proceeding may represent himself or herself or may designate as an authorized representative (1) an employee or agent of a limited-recognition organization, (2) an attorney, or (3) another classified NERE, subject to any limitations in the rules or regulations.
  - a. **Administrative leave.** An agency shall release a NERE who files or is a party in a Civil Service grievance appeal proceeding from regularly scheduled work without loss of regular pay or leave credits for necessary travel to and attendance at grievance procedure meetings or proceedings scheduled by the employer or Civil Service.
    - (1) If a representative is an employee of the same agency, the appointing authority shall release the representative from regularly scheduled work without loss of normal pay or leave credits to attend grievance procedure meetings and proceedings scheduled by the employer or Civil Service.
    - (2) If the representative is an employee of a different agency, the representative may be absent from the workplace to attend grievance meetings and hearings only if the representative's appointing authority has approved annual or personal leave.
  - b. **Limitations.**
    - (1) Administrative leave for investigations by a grievant or representative is not authorized.
    - (2) Overtime, consultation time over 15 minutes, and expenses, including travel expenses, are not authorized. To the extent practical, meetings should be scheduled during the grievant's workday.
    - (3) An appointing authority may limit the granting of administrative leave to three spokespeople from among group grievants.
2. **By exclusively represented employees.** If an exclusively represented employee files a grievance regarding a prohibited subject of bargaining under an exclusive Civil Service procedure, the employee may represent himself or herself or may designate as an authorized representative (1) an employee or agent of the employee's exclusive representative, (2) an attorney, or (3) another exclusively represented classified employee who is member of the same bargaining unit, subject to any limitations in the rules or regulations.

**CONTACT**

Questions regarding this regulation should be directed to the Office of the General Counsel, Civil Service Commission, P.O. Box 30002, 400 South Pine Street, Lansing, Michigan 48909; or by telephone, at 517-373-3024.