Michigan Civil Service Commission

Benchbook for Grievances and Grievance Appeals

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Contents

1 Introduction

1.1 Purpose

Benchbooks assist judges by summarizing areas of the law. When judges must rule on unfamiliar legal issues, a benchbook provides a snapshot of issues and references to relevant law and cases to allow quick decisions or point the way for further research. Benchbooks can also provide parties and advocates insight on how their cases or motions may be decided. This benchbook provides an overview of law that has developed in grievances and grievance appeals to the Michigan Civil Service Commission (MCSC or the commission).

The commission is created by and derives its plenary authority over the classified service from article 11, § 5 of Michigan's constitution. Written decisions from the commission interpret rules and regulations promulgated under its constitutional authority and, when relevant, agency's work rules, policies, procedures, and directives. Footnotes in this benchbook identify rules, regulations, and decisions creating or supporting certain principles. Current rules and regulations are available on the commission's website. Decisions are available in the commission's online decision database, (DSTARS).

This benchbook is not itself authoritative. It merely summarizes rules, regulations, and other controlling authority in grievances and grievance appeals. Parties should therefore not cite this book as binding authority or legal precedent. This book can instead be used as a guide to identify issues and rules, regulations, and decisions that may be relevant to a party's position. Information in the benchbook is accurate as of July 2022, but subsequent rulemaking or administrative decisions may also require consideration.

1.2 Overview of grievances and grievance appeals

The terms *grievance* and *grievance appeal* are sometimes used interchangeably but are distinct actions.

A *grievance* is a filing, authorized in rule 8-1, by a classified employee over an action by an appointing authority or civil service human resources staff acting pursuant to any assignment, authority, or direction of an appointing authority.[1] The appointing authority reviews the grievance and issues a written grievance decision, which is commonly referred to as the answer.[2] There are two grievance steps at the appointing-authority level, step 1 and step 2.[3] The appointing authority's step-2 answer is the "final

[1] Rule 9-1.
[2] Rule 8-1.4(a).
[3] Regulation 8.01, §§ 4.B.1–2.

grievance decision of the appointing authority" from which a grievant may file a *grievance appeal*, if authorized by rule 8-2.[4]

Grievance appeals are filed with the commission through its Civil Service Hearing Office (CSHO).[5] The subject matter of a grievance appeal is limited by rules 8-2.2 and 8-2.3. The CSHO's administrative review officer reviews filings to ensure that the grievant alleged an authorized subject of appeal and has standing to file with the CSHO.[6] Administrative review is limited and cannot render a decision on the merits of a grievance appeal.[7] The administrative review officer also checks filings for other matters such as timeliness and any pending or prior claims to ensure that a grievance appeal is authorized.[8] Authorized grievance-appeal subjects and standing are discussed below.

A grievance appeal that passes administrative review is assigned to a hearing officer who "shall conduct an expeditious review in accordance with the civil service rules and regulations."[9] This usually means an evidentiary hearing on the record.

The hearing officer then issues a written decision setting forth findings of fact, conclusions of law, and any remedial orders.[10] The decision is numbered to denote the year and order of issuance. For example, CSHO 2019-010 would be the CSHO's tenth decision issued in 2019.

1.3 Further proceedings after a grievance appeal

A party that appeared and participated in a grievance appeal may file a further appeal of the CSHO's decision to the commission through the Employment Relations Board (ERB or the board).[11] Proceedings before the ERB are appellate and limited to arguments over the record created at the CSHO level. The ERB does not conduct a new hearing and does not create a new or expanded record.

Appeals over discharge grievance decisions are by right.[12] All other appeals are by application for leave to appeal.[13]

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[4] Rule 8-1.4(b).
[5] The CSHO was known as Hearings, Employee Relations, and Mediation (HERM) from 1994 to 2011, and as the Hearings Office before 1994.
[6] Rule 8-4(a)(1) and (2); regulation 8.01, § 4.C.4.
[7] *See, e.g.*, *Miller v Dep't of Corrections*, ERB 2015-004; *Reynolds v Dep't of Corrections*, ERB 2018-028.
[8] Rule 8-4(b)–(e).
[9] Rule 8-2.4(b).
[10] Rule 8-2.4(c).
[11] Rules 8-2.5 and 8-7; regulation 8.05.
[12] Rule 8-7.2(a), (b).
[13] Rule 8-7.2(c).

After considering an appeal, the ERB issues a written recommended decision to the commission for its review.[14] The commission may approve, reject, or modify, in whole or part, the board's recommendations. If the commission rejects any part of the board's recommendations, the commission may (1) remand to the board or other officer for further action, (2) issue a final decision that rejects or modifies the recommendation of the board, or (3) exercise any other power of the board or commission.[15] Unless the appeal is remanded for further proceedings, the commission's written decision is its final administrative action on the grievance appeal.

A party may file a claim of appeal of a final decision of the commission in circuit court.[16]

2 Basic Requirements

Article 11, § 5 of Michigan's constitution requires that employees aggrieved by the abolition or creation of a position have a right to appeal to the commission through established grievance procedures. The commission has established a grievance process in its rules and in regulation 8.01 to allow both those and other grievances. To file under regulation 8.01, a grievant must have standing (i.e., be authorized to file) and must grieve over a subject matter that can properly be addressed in the forum.

2.1 Standing

Standing means authorization to file an action or claim in a given forum. Standing has been described as a requirement that a party have a substantial personal interest at stake in a case or controversy, as opposed to merely having a generalized interest in the same manner as any citizen would.[17]

Standing to file a grievance or grievance appeal under regulation 8.01 depends in part on whether the employee is in a bargaining unit that has had an exclusive representative designated by the commission.

Employees in bargaining units with no union designated as exclusive representative are called nonexclusively represented employees (NEREs). NEREs have broad standing to file grievances and grievance appeals under the process established by regulation 8.01.[18]

Exclusively represented employees lack standing under regulation 8.01 for most types of grievances and instead usually must use the grievance procedures created in their

[14] Rule 8-7.6.
[15] Rule 1-15.5.
[16] Rule 8-7.9.
[17] *Michigan Coalition of State Employee Unions v Michigan Civil Service Commission,* 465 Mich 212, 215 (2001).
[18] Regulation 8.01, § 4.A.1.

collective bargaining agreements, but there are several exceptions where exclusively represented employees must use the civil service grievance forum. These include grievances over position abolition or creation, over actions that occurred while a NERE, over striking, over rescinded probationary appointments, and over subjects related to staff assignment described in rule 6-9.6(b)(3). Examples:

- The rule reforms of 2019 made employee scheduling, shift assignment, and overtime assignment prohibited subjects of bargaining. These subjects can no longer be included in collective bargaining agreements. Any grievance over overtime assignment, which includes determining which employees are chosen to work overtime, is proper only in the civil service forum under regulation 8.01.[19]

- Rule 6-3.2(b)(3) identifies "[t]he employer's rights under rule 6-4.1(d) to assign staff, including . . . working out of class" as a prohibited subject of bargaining. Perrin's grievance appeal over the Department's WOC assignment decision would therefore implicate the prohibited subject of staff assignment and be barred from being adjudicated under his union's contractual grievance process. Because Perrin's grievance could therefore fit within one of the exceptions requiring an exclusively represented employee's grievance appeal in the civil service forum, the CSHO erred in dismissing the grievance appeal as an unauthorized bargaining-unit-member grievance.[20]

Other grievances involving discipline, compensation, and other permissive subjects must be raised through the contractual process under collective bargaining agreements.

Standing for a grievance appeal also depends on whether the employee has exhausted the grievance steps at the appointing-authority level. An employee may file a *grievance appeal* only after the appointing authority's "final grievance decision."[21] While a grievant may file directly at step 2 for certain disputes,[22] an employee must at a minimum complete the step-2 grievance to gain standing to file a grievance appeal.

Finally, only classified state employees may use the civil service grievance process. Unclassified and Special Personal Services employees lack standing to use the civil service grievance process.[23] Grievances from unclassified or SPS employees are unauthorized in the civil service process and a civil service adjudicating officer lacks jurisdiction over such grievances.

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[19] *Mercado v Dep't of State*, ERB 2020-020.
[20] *Perrin v MDOT*, ERB 2021-030.
[21] Rule 8-2.1; see also, regulation 8.01, § 4.C.1.
[22] Regulation 8.01, § 4.B.1.a.
[23] *Lawrence and Dept't of Attorney General*, ERB 2002-062.

2.2 Authorized grievance subjects

Rule 8-1.3(a) lists the types of grievances permitted at steps 1 and 2. A grievance must allege that the employee is aggrieved by at least one of the following actions of the appointing authority:

(1) Discrimination prohibited by rule 1-8.

(2) Reprisal prohibited by rule 2-10.

(3) Discipline without just cause.

(4) A written reprimand 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 or supplemental military pay to which the grievant is entitled under the civil service rules and regulations.

(8) The actual or anticipated failure or refusal to comply with rule 2-14 or applicable regulations.

(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, § 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.

Rule 8-1.3(b)(1) conditions grievances over expiring limited-term positions on containing an allegation of a violation of rule 1-8 or 2-10.

The commission's rules do not allow employees to use the grievance process to challenge every occurrence that may potentially happen in the workplace.[24] A grievance may only challenge actions by the employee's appointing authority.[25] A grievance cannot be filed against other agencies or used to challenge actions of the commission, its rules, or its rulemaking authority.[26]

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[24] *Dulai v Dep't of Community Health*, CSC 2002-070; *Bohannon v Dep't of Corrections*, CSC 2015-009.

[25] *Leininger v Dep't of Technology, Management and Budget*, ERB 2016-022.

[26] *Livermore v Civil Service Comm and Office of the State Employer*, ERB 2004-007; *Kukec v Dep't of Corrections*, ERB 2004-037; *Leininger v Dep't of Technology, Management and Budget*, ERB 2016-022.

2.3 Authorized grievance-appeal subjects

Actions grievable to the appointing authority under rule 8-1 are not necessarily appealable to civil service. Rule 8-2 states that "a grievant is not authorized to file a grievance appeal unless the grievance alleges" at least one specified subject. Authorized subjects for a grievance appeal under Rule 8-2.2 are:

(a) A tangible adverse employment action resulting from discrimination prohibited in rule 1-8.

(b) A tangible adverse employment action resulting from reprisal prohibited by rule 2-10.

(c) One 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) Unsatisfactory interim rating, as provided in rule 2-3.3 and rule 3-6.4.

(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 is entitled under the civil service rules and regulations.

(g) A tangible adverse employment action has occurred or will occur as the 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 Services, 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.

A hearing officer's jurisdiction to hear a grievance appeal is limited to these authorized subjects and limited by rule 8-2.3, which bars certain appeals by probationary employees without status and over written reprimands unless heightened pleading standards are met.

Lack of jurisdiction over a party or subject matter is grounds to summarily dismiss a grievance appeal.[27] If a grievance appeal does not allege a subject within one of the categories established by rules 8-2.2 or 8-2.3, the hearing officer cannot rule upon the grievance appeal.[28]

Advancing to a hearing before a hearing officer generally requires that the wrong alleged in the initial grievance also constitute a tangible adverse employment action or substantial harm to the grievant. "The grievance procedure established by the commission in chapter 8 of its rules does not allow each and every psychic harm or complaint to receive a full evidentiary hearing. While initial grievances filed with the appointing authority have less demanding pleading requirements, a grievant must allege one of ten specific bases enumerated in Rule 8-2.2 to justify the expense of a hearing and the calling away of all parties from performing their expected duties for the state."[29] "A civil service hearing is not the proper forum to demand extra staff, assignment of work, or any other preferred exercise of management prerogatives. . . . The constitutional role of this commission is not to second-guess or micromanage the administration of the various departments."[30]

A. Tangible adverse employment action

The rules do not define tangible adverse employment action, but published commission and board decisions offer guidance. A tangible adverse employment action is "an act by an employer or employer's agent that objectively, substantially, and negatively affects an employee's job, income, benefits, or employment status."[31] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[32] An adverse employment action is an employment decision that is "materially adverse in that it is more than a 'mere inconvenience or an alteration of job responsibilities.'"[33]

Counselings and written reprimands alone do not constitute tangible adverse employment actions. "Counseling memoranda and written reprimands do not measurably change the employment status or benefits of employees who receive

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[27] Rule 8-4.
[28] *See, e.g., Wasserman v Dep't of Labor and Economic Growth,* HERM 2006-033.
[29] *DeRose v Dep't of Corrections,* CSC 2010-016.
[30] *Spence v Dep't of Corrections*, CSC 2001-041.
[31] *Dulai v Dep't of Community Health*, CSC 2002-070.
[32] *Dulai v Dep't of Community Health*, CSC 2002-070.
[33] *Dulai v Dep't of Community Health*, CSC 2002-070.

them."[34] An allegation of discriminatory intent itself without further alleged adverse impact is also insufficient.[35] "[T]here must be some objective basis for demonstrating that the change is adverse because 'a plaintiff's "subjective impressions…" are not controlling.'"[36]

For a whistleblower grievance under rule 2-10.3, a tangible adverse employment action can include threats of discipline.[37]

B. Substantial harm

Substantial harm is a related but separate concept from a tangible adverse employment action. The commission and board have interpreted substantial harm to usually refer to economic harm, such as loss of pay. The board has not ruled out the possibility that substantial harm could include harm to an employee's health.[38] Personal and family care issues are not sufficient by themselves to allow a grievance of a reassignment made for legitimate business reasons.[39]

"A mere allegation of a work rule violation itself does not rise to the level of substantial harm. The evidentiary hearing and grievance appeal processes cannot be used to address every slight, disagreement, or misdeed—real or perceived—experienced by employees. The substantial harm requirement affirms the core purpose of the grievance appeal system to remedy actual harms."[40] A transfer in official workstation itself does not amount to substantial harm.[41] Harm to an employee's health can be considered if harms are substantial, but potential injury alone is not substantial harm.[42]

C. Non-grievable appointing authority decisions

Rule 6-4.1 recognizes appointing authorities' rights to set managerial policy and determine the methods, means, and personnel by which to conduct agency operations. In general, these discretionary actions by appointing authorities are not grievable or reviewable by civil service.[43] For example, "an employee, in general, does not have a right to grieve a reassignment. An employee may grieve a reassignment if the reassignment results in substantial adverse impact to the employee (usually a loss in pay or some benefit). In such a grievance, the employee must prove by a preponderance of the evidence that (1) the employee suffered substantial adverse impact as a result of the reassignment and (2) that the reassignment lacked a rational

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[34] *Dulai v Dep't of Community Health*, CSC 2002-070.
[35] *Dep't of Corrections v Thilly*, ERB 2002-027.
[36] *Dulai v Dep't of Community Health*, CSC 2002-070.
[37] *Grant v Dep't of Corrections*, ERB 2007-052.
[38] *Lance v Dep't of Corrections*, ERB 2009-029.
[39] *Lance v Dep't of Corrections*, ERB 2009-029; *Dep't of Corrections and LeMaire*, ERB 99-056.
[40] *DeRose v Dep't of Corrections*, CSC 2010-016.
[41] *Rager v Dep't of Treasury*, ERB 2003-029.
[42] *Witcher v Dep't of Corrections,* ERB 2009-087.
[43] *Climie v Dep't of Corrections*, CSC 97-09.

basis or was arbitrary and capricious. Management is vested with the power to assign and reassign employees and it may exercise this exclusive discretionary authority without unnecessary interference."[44] "[T]here must be some evidence of measurable adverse impact, such as financial loss, before the employer's duty to defend its reassignment action arises."[45]

Under the rules, several types of discretionary or non-disciplinary actions by appointing authorities are generally not grievable but may be challenged in conjunction with an allegation of prohibited discriminatory or retaliatory motivation. If the original grievance fails to allege prohibited discrimination, then it cannot be appealed on that basis.[46] Examples of actions that are generally not grievable absent this additional allegation include needs-improvement ratings,[47] performance-pay awards,[48] ranking employees for bumping,[49] rescinded probationary appointments or dismissals of employees without status,[50] reappointment to SES or SEMAS positions,[51] expired limited-term appointments,[52] and written reprimands.[53] If mixed motives are involved, an employment action can constitute improper discrimination if a discriminatory motive is "a significant factor in the employer's decision to take the action."[54]

Differential treatment based on union or non-union status is not prohibited discrimination under rule 1-8,[55] but discrimination against members or potential members of unions over exercise of labor rights can be an unfair labor practice under rule 6-11 and addressed through a charge under procedures in regulation 6.02.

D. Other non-grievable decisions

The civil service rules and regulations establish exclusive procedures for many types of employee complaints. A hearing officer has no authority to consider a grievance in these circumstances. These subjects include:

- Group-insurance benefits under regulation 5.18.
- Unfair labor practices under regulation 6.02.
- Representation elections under regulation 6.04.

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[44] *Climie v Dep't of Corrections*, CSC 97-09.
[45] *Dep't of Corrections v LeMaire*, ERB 99-056.
[46] *Mensah v Dep't of Corrections*, ERB 2002-034; *Castillo v Dep't of Corrections*, ERB 2006-054.
[47] Rule 2-3.2(c)(3)(A).
[48] Rule 2-3.2(c)(4).
[49] Rule 2-5.2.
[50] Rule 3-6.4(a), (b)(1).
[51] Rules 4-6.3(b)(3) and 4-7.4(c)(4).
[52] Rule 8-1.3(b)(1)(A).
[53] Rule 8-2.3(b).
[54] *Novak v Dep't of Corrections*, ERB 94-058.
[55] *Bosley v Dep't of Corrections*, ERB 2010-008; *Kukec v Dep't of Corrections*, ERB 2004-037.

- Prohibited-subject-of-bargaining complaints under regulation 6.07.
- Exclusion of positions from bargaining units under regulation 6.08.
- Unauthorized disbursements of funds for personal services outside the classified service under rule 7-9.
- Technical classification and qualification complaints challenging classification of positions, working-out-of-class determinations, credential reviews, or employment sanctions under regulation 8.02.
- Technical disbursement complaints challenging staff decisions approving or disapproving requests to disburse funds for personal services outside the classified service under regulation 8.03.
- Technical appointment complaints challenging selection processes for classified positions or appointments revoked by civil service staff under regulation 8.04.
- Technical military benefit complaints challenging civil service staff decisions on rights and benefits arising out of uniformed service under regulation 8.07.

A hearing officer also lacks authority to enforce state and federal laws but may enforce rules and regulations that provide similar protections.[56]

3 Pleading and Filing Requirements

3.1 Agency-level steps

A. General

Grievances, answers, and grievance appeals are pleadings—formal documents in which a party sets forth or responds to allegations, claims, denials, or defenses. Grievance and grievance appeal pleadings must be signed and in writing on a CS-100 form. Failure to follow all required steps, provide all required information, or timely file may result in summary dismissal.

Each agency must designate step-1 and step-2 officials to respond to grievances. Many agencies have immediate supervisors serve as step-1 officials and a labor-relations

[56] *See, e.g., McLean v Dep't of Corrections*, CSC 99-081 (Workers' Disability Compensation Act); *Rowell v Dep't of Health and Human Services*, ERB 2018-024 (FMLA); *In Re MSEA Grievance LL 15-006*, ERB 2015-027 (Electrical Administrative Act); *Walker and Department of Consumer and Industry Services*, HERM 043-2001 (aff'd CSC 2002-001) (Michigan Minimum Wage Act).

representative in the HR office serve as the step-2 official, but agencies may establish different roles.

B. Step 1

A written grievance on a signed CS-100 form typically must be initially filed with the step-1 official within 14 days after a grievant knew of or reasonably should have known of the basis for the grievance.[57] If a grievant is dismissed, suspended, demoted, laid off, or otherwise aggrieved by an action taken by management above the level of the step-1 official, step 1 may be skipped and the grievance may be filed directly with the step-2 official.[58] Step-1 and step-2 pleadings must include concise statements of the specific relief sought and the factual basis for the grievance that is sufficient to identify the specific violation claimed.[59]

A step-1 official shall hold an informal conference with a grievant, unless the grievant declines to attend.[60] A step-1 official must issue a written answer to a grievant within 14 days after a grievance is filed.[61]

C. Step 2

A grievant who can bypass step 1 or who is unsatisfied with a step-1 official's answer or failure to answer may file a written step-2 grievance on a signed CS-100 form with the step-2 official.[62] If a grievant does not timely file at step 2, a grievance is closed.[63]

If a step-1 official timely issued a written answer, a grievant must file any step-2 grievance within 14 days after issuance. The date issued is presumed to be the date on the answer. If a written answer is not timely issued, the grievance is presumed denied and any step-2 grievance must be filed with the step-2 official within 21 days after the step-1 answer was due.[64]

A step-2 official may hold any conference deemed necessary. [65] If step 1 was skipped, the step-2 official must offer an informal conference to the grievant.[66] Even if a grievance concerns a subject that is not appealable to step 3, the grievance procedure requires that an appointing authority meet with the grievant at step 1 or 2.[67]

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[57] Rule 8-1.2; regulation 8.01, §§ 4.B.1.a–b.
[58] Regulation 8.01, § 4.B.1.a.
[59] Regulation 8.01, §§ 4.B.1.a and 4.B.2.a.
[60] *Aldridge v Dep't of Natural Resources*, CSC 2006-011.
[61] Regulation 8.01, § 4.B.1.
[62] Regulation 8.01, § 4.B.2.a.
[63] Regulation 8.01, § 4.B.2.a.
[64] Regulation 8.01, § 4.B.2.b.
[65] Regulation 8.01, § 4.B.2.c.
[66] Regulation 8.01, § 4.B.2.c.
[67] *Aldridge v Dep't of Natural Resources*, CSC 2006-011.

A step-2 official must issue a written answer to a grievant within 28 days after a step-2 grievance is filed.[68] An appointing authority may amend its step-2 answer at any time before the grievance-appeal hearing.[69]

3.2 Grievance appeal steps

A. General

A grievant who is unsatisfied with a step-2 official's answer or failure to answer may file a written grievance appeal on a signed CS-100 form with the CSHO.[70]

If a step-2 official timely issued a written answer, a grievant must file any step-3 grievance appeal within 28 days after issuance. The date issued is presumed to be the date on the answer. If a written answer is not timely issued, the grievance is presumed denied and any appeal must be filed with the CSHO within 42 days after the step-2 answer was due.[71]

An appeal must include the following on a CS-100 form:[72]

- The grievant's name, employee ID number, employing agency, mailing address, telephone number, and email address.
- Any authorized representative's name, organization, mailing address, telephone number, and email address.
- A complete copy of the grievance chain (all step-1 and step-2 grievances and answers).
- A concise statement of the basis for the appeal, including grounds for appeal that can be appealed under rule 8-2.2.
- A concise statement of the relief sought, which must be within the hearing officer's jurisdiction to grant.

B. Minimum pleading standards

The pleading requirements in the grievance forum are not so strict as to require a perfectly formulated claim at step 1 or 2.[73] If an employee properly raises a potentially grievable issue at the agency level, a grievance-appeal hearing cannot be denied for a pleading defect.[74] But a grievance must minimally plead claims in the initial grievance

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[68] Regulation 8.01, § 4.B.2.d.
[69] *Caldwell v Dep't of Energy, Labor and Economic Growth,* ERB 2009-088; *Moore v Dep't of Corrections*, ERB 2019-023.
[70] Regulation 8.01, § 4.C.1.
[71] Regulation 8.01, § 4.C.2.
[72] Regulation 8.01, § 4.C.3.
[73] *Gartland v Dep't of Corrections*, ERB 2009-042.
[74] *Gartland v Dep't of Corrections*, ERB 2009-042.

to provide basic notice to the appointing authority. An issue that is not raised in the original grievance filing is not preserved and cannot be added later on appeal.[75] Hearing officers should not revive issues abandoned, waived, or not raised by parties.[76] However, a discharged grievant is not precluded from presenting during the grievance and appeal process defenses not offered at the pre-termination conference.[77]

Stricter pleading standards apply to discrimination claims. Prohibited discrimination based on a protected class must be alleged at the departmental stage of a grievance or it is waived.[78] A grievant who failed to identify any protected class as a basis for alleged discrimination could not later appeal under a prohibited-discrimination theory.[79] A grievant alleging prohibited discrimination must also claim adverse treatment because of a protected class, and that others similarly situated but not in the protected class were not adversely treated.[80]

Failure to include required content may result in administrative dismissal, but regulation 8.06 typically requires a deficiency notice and an opportunity for a grievant to correct a deficient filing.[81]

Because an unanswered step-2 grievance may be appealed, a step-2 grievance answer does not prevent an appointing authority from presenting omitted arguments in a grievance-appeal.[82]

In matters where benefits granted under Civil Service rules or regulations are substantially identical, but separate from statutory regimes, under the commission's liberal pleading standards it may be sufficient for minimal pleading requirements to reference claims under the statute itself.[83]

3.3 Appellate review by the board and commission

A hearing officer's decision is final and binding 29 days after it is issued, unless the decision provides for a later effective date or a party files an appeal within 28 days.[84]

A party that appeared and participated in a grievance appeal may file a further appeal of the final decision of the adjudicating officer to the commission.[85] An appeal to the

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[75] *See, e.g., Mensah v Dep't of Corrections*, ERB 2002-034; *Kronk v Dep't of State*, ERB 2002-047.
[76] *Harrison v Dep't of Community Health*, ERB 2015-033.
[77] *Dep't of Insurance and Financial Services v McGlashen*, ERB 2021-007.
[78] *Luman v Dep't of Community Health*, ERB 2004-045.
[79] *Castillo v Dep't of Corrections*, ERB 2006-054.
[80] *Mensah v Dep't of Corrections,* ERB 2002-034.
[81] Regulation 8.01, § 4.C.4.
[82] *Marsh v Dep't of Corrections,* CSC 99-015; *Terry v Dep't of Corrections*, ERB 2000-053.
[83] *Horen v Dep't of Health and Human Services*, ERB 2020-040.
[84] Rule 8-2.6.
[85] Rule 8-2.5.

commission must be filed with the Employment Relations Board, as provided in regulation 8.05, including the filing requirements in § 4.B.

There is a right to appeal to the commission in all cases where an employee with status (i.e., who has satisfactorily completed an initial probationary period during the current period of state employment) is discharged. This is true whether the adjudicating officer upholds the dismissal or reinstates the employee.[86] A claim of appeal as of right in these cases can be initiated by filing a completed CS-1756 form to the board by email. In all other cases, an application for leave to appeal using a CS-1743 form must be filed by email with the board.[87]

Unless a specific rule establishes a shorter time, an appeal must be received by the board within 28 days after the adjudicating officer's decision.[88] The appellant must serve a copy on all other parties within three days of filing. Proof of service to the board must be demonstrated using either a CS-1740 form or a "cc" to the email filing. A late filing must be accompanied by an affidavit alleging good cause or special extenuating circumstances. An appeal filed more than one year late cannot be heard.[89]

Any other party may file a cross-appeal within 14 days after a claim or application is filed with the board. A cross-appeal must contain (1) a signed concise statement of cross-appeal, (2) a cross-appeal brief, and (3) proof of service. The board cannot recommend additional relief to an appellee beyond that in the hearing officer's decision if a cross-appeal is not filed.[90]

A. Claims of appeal as of right

Appeals are of right only if they involve the disciplinary discharge of an employee who has satisfactorily completed an initial probationary period. In these cases, either the NERE employee or the appointing authority may file an appeal as of right. A claim must clearly identify the decision appealed, including the case name, decision number, and civil service reference number. The appellant's brief supporting the claim must include a statement identifying one or more grounds for modification or reversal, state the law and facts supporting the appellant's argument, and identify the support the appellant relies on. An appellee or cross-appellee may file any response within 28 days after a claim is filed with the board.[91] Additional or rebuttal briefs by any party are not permitted unless specifically requested by the board.[92]

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[86] Rule 8-7.2(a), (b).
[87] Rule 8-7.2(c).
[88] Rule 8-7.3(a).
[89] Rule 8-7.3(c).
[90] *See, e.g., Dep't of Corrections v McDonald*, ERB 2019-003.
[91] Regulation 8.05, § 4.C.
[92] Regulation 8.05, § 4.B.12.

If a dismissed employee is returned to work after a hearing, as a condition of filing a claim of appeal, the appointing authority must either reinstate the grievant or restore the grievant's base pay, medical, dental, and vision insurance.[93] Noncompliance with this requirement can result in dismissal of an appeal.[94]

B. Applications for leave to appeal

For all other appeals, a party aggrieved by a hearing officer's decision must file an application for leave to appeal. An application must clearly identify the decision appealed, including the case name, decision number, and civil service reference number. The appellant must also provide a concise statement of the material events, dates, and decisions leading to the application and explain why (1) the adjudicating officer's decision was erroneous, (2) the decision violated Michigan law, or (3) the question presented is of major significance to the classified service.[95] The appellee may file a response to the application within 28 days of service.[96] Additional or rebuttal briefs by any party are not permitted unless specifically requested by the board.[97]

C. Board recommendations

Upon receipt of a claim or application, and before board review, an administrative officer will review to determine if an appeal may be summarily dismissed. The administrative officer may recommend dismissal if:

- The claim or application is not authorized.
- The commission lacks jurisdiction over the subject matter or a necessary party.
- The claim or appeal is untimely without a legally sufficient excuse.
- Another civil service action pending between the same parties involves substantially the same matter.
- Substantially the same matter was previously adjudicated to finality.
- A party fails to timely perform any act required by rules, regulations, the commission, the board, or the administrative officer.
- The appeal fails to state a claim.[98]

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[93] Rule 8-2.6(b); *Dep't of Corrections v Rohrig*, ERB 2018-029.
[94] *See, e.g., Dep't of Energy, Labor, and Economic Growth v Howie*, ERB 2010-038; *Dep't of Corrections v Rohrig*, ERB 2019-029.
[95] Regulation 8.05, § 4.D.
[96] Regulation 8.05, § 4.D.3.
[97] Regulation 8.05, § 4.B.12.
[98] Regulation 8.05, § 4.E.1–7.

If summary dismissal is not recommended, the board will review the merits of the appeal and then issue a recommendation to the commission, grant the application and conduct further proceedings, or remand the matter. A remand is not appealable.[99]

D. Commission review

Upon receipt of a final board recommendation, the commission automatically reviews the recommendation and issues a final commission decision. No additional action is required—or expected—from the parties and no additional briefs or other filings are authorized.[100]

3.4 Judicial review

After exhausting all administrative steps in the grievance process through the commission, a party may seek judicial review of the commission's decision in the circuit court. The scope of the circuit court's review is established in article 6, § 28 of Michigan's constitution, which allows the court to determine whether the administrative action was authorized by law and, in cases in which a hearing is required, supported by "competent, material and substantial evidence on the whole record."[101] A claim of appeal must be filed within 60 days of the date the commission's decision was issued, must name the Michigan Civil Service Commission, and must be served on the commission at its office in Lansing.[102]

4 Other Procedural Issues

A hearing officer has wide discretion in conducting hearings and pre-hearing matters. This includes administratively dismissing deficient filings, ruling on discovery and other procedural requests, and determining the scheduling of hearings. A hearing officer may communicate privately with a party about scheduling or matters unrelated to a case's facts or merits but *ex parte* discussions of the facts or merits may provide grounds for a new hearing.[103] "Conduct of the hearing… is left to the sound discretion of the HO."[104] A hearing officer may accept testimony by telephone or other electronic means.[105] With the hearing officer's permission, witnesses may testify through internet video-conference software. A hearing officer may receive and consider evidence of

[99] Regulation 8.05, § 4.F.
[100] Regulation 8.05, § 4.P.
[101] *See, e.g., Boyd v Civil Service Comm,* 220 Mich App 226, 232 (1996).
[102] Michigan Court Rule 7.117.
[103] Regulation 8.01, § 4.E.3; *Hammond v Dep't of Public Health*, ERB 93-014.
[104] *Kuri v Dep't of Corrections*, ERB 2002-080.
[105] *Baptist v Dep't of Corrections*, ERB 2003-067.

witnesses by affidavit, giving it weight deemed proper after considering any objection to its admission.[106]

"Civil Service hearings are not subject to the Administrative Procedures Act and are not required to be conducted in accordance with the rules of evidence, even 'as far as practicable.' The 'hearsay rule' is not applicable to Civil Service hearings. In such hearings it is the role of the HO, as the fact-finding arm of the Commission, to gather all relevant evidence. Excluding evidence or failing to consider evidence on the basis of hearsay hampers the ability of the Board and the Commission to be fully informed. While some evidence may be entitled to more weight than other evidence, none can be summarily dismissed or ignored because it is 'hearsay.'"[107]

4.1 Administrative denial

Rule 8-4 permits dismissal of a grievance appeal for the following reasons before a hearing on the merits:

- The grievant is not entitled to file the grievance.
- The subject matter is not reviewable in the forum.
- The commission lacks jurisdiction.
- The filing was untimely.
- Another action is pending or was adjudicated over substantially the same matter.

A CSHO administrative review officer may also dismiss a grievance appeal without a hearing on the merits if the relief sought cannot be granted or if the grievant fails to respond to a written notice or request from civil service staff.[108]

A review under rule 8-4(a) to determine if a matter is appealable is confined to whether the grievant is authorized to file the grievance and whether the subject matter can be considered in the forum, regardless of the claim's apparent strength or weakness.[109] When evaluating a claim's grievability, the CSHO administrative review officer must assume its allegations are true or correct.[110] The administrative review officer cannot render a decision on the merits of a grievance-appeal filing.[111]

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[106] Regulation 8.01, § 4.G.5.
[107] *Dep't of Community Health v Tandy*, ERB 99-106.
[108] Regulation 8.01, § 4.C.4.
[109] *See e.g. Reynolds v Dep't of Corrections*, ERB 2018-028 (*quoting Miller v Dep't of Corrections*, ERB 2015-004).
[110] *Kipp v Dep't of Corrections,* ERB 2008-078.
[111] *See, e.g.*, *Miller v Dep't of Corrections*, ERB 2015-004; *Reynolds v Dep't of Corrections*, ERB 2018-028.

Lack of jurisdiction over a party or subject matter is grounds for summary dismissal of a grievance appeal.[112] If a grievance appeal does not allege or fall within a category established by rule, the hearing officer cannot rule upon the grievance appeal.[113]

Grievances cannot challenge the quasi-legislative acts of the commission.[114]

4.2 Collateral estoppel and res judicata

Basic legal principles such as collateral estoppel and res judicata apply to grievance appeals.[115] Collateral estoppel refers to issue preclusion and prevents relitigating an issue in a subsequent cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was litigated and necessarily determined. Res judicata refers to claims preclusion, which covers the preclusive effect of a judgment on a subsequent proceeding based on the same cause of action.[116]

"In Michigan, *res judicata* applies broadly and to subsequent actions between the same parties 'not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising diligence, might have brought forward at that time.'"[117]

Michigan's courts have found the civil service grievance proceedings sufficiently adjudicatory to collaterally estop later claims in other forums.[118]

4.3 Timeliness

Unless otherwise specifically indicated, time in civil service proceedings is calculated in calendar days.[119] The time limit to file a grievance begins on the grieved action's date. Unless a rule or regulation permits the parties to stipulate to an extension, a deadline to file a document in a civil service proceeding cannot be extended without the prior consent of an authorized civil service officer before the deadline has passed.[120]

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[112] Rule 8-4.
[113] *See, e.g., Wasserman v Dep't of Labor and Economic Growth,* HERM 2006-033.
[114] *See, e.g., Livermore v Civil Service Commission and Office of the State Employer*, ERB 2004-007.
[115] *Baptist v Dep't of Corrections*, ERB 96-092.
[116] *See e.g.*, *Mensah and Dep't of Corrections*, ERB 2002-069.
[117] *Clanton v Civil Service Comm'n,* No. 08-101251, Wayne County Circuit Court (2008) (*quoting Pierson Sand and Gravel, Inc v Keeler Brass Co,* 460 Mich 372, 380 (1999)).
[118] *Devlin v Dep't of Treasury*, ERB 2007-008. *See also Viculin v Dep't of Civil Service*, 386 Mich 375, 393 (1971); *Nummer v Dep't of Treasury*, 448 Mich 534, 542; *Groehn v Corp & Securities Comm*, 350 Mich 250, 261 (1957).
[119] Regulation 8.06, § 2.B.2.
[120] Regulation 8.06, § 3.C.3.

Any late filing must be accompanied by an explanation of either good cause or special extenuating circumstances offered to justify the lateness and allow consideration of the filing.

Those filing late are not "immune from the consequences of the actions or inaction of their representatives."[121] A late filing that would resurrect an otherwise untimely appeal may be treated differently than a filing with no material disadvantage to another party.[122]

A. Good cause

A filing that is up to 28 days late is denied as untimely, unless the filing party establishes good cause that the delay was not due to the filing party's negligence.[123] Rule 9-1 defines good cause as 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 filing or other requirements.

The burden of showing good cause for late filing is on the filing party.[124] "Good cause is sometimes found for unpredictable delays, but rarely, if ever, for excuses based on carelessness."[125] Legitimate confusion over forms or terms used by the department may constitute good cause for an untimely filing.[126] If a grievance appeal does not explain the reason for lateness, the grievant is provided a deficiency notice to correct the failure, consistent with regulation 8.06.[127] Awaiting discovery is not good cause for a late filing.[128]

B. Special extenuating circumstances

A filing that is over 28 days but less than one year late is denied as untimely, unless the filing party establishes special extenuating circumstances.[129] Rule 9-1 defines special extenuating circumstances as a compelling excuse that prevented a timely filing in a matter that arises out of one of the following:

(1) An intentionally or fraudulently misleading action by an appointing authority or a party.

(2) Serious physical or mental incapacity of the person.

(3) Extraordinary unforeseen circumstances outside the control of the person.

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[121] *DeSmith v Michigan Corrections Organization*, ERB 2003-063.
[122] *DeSmith v Michigan Corrections Organization*, ERB 2003-063.
[123] Regulation 8.06, § 3.C.4.a.
[124] *Wickstrom v Dep't of Corrections*, CSC 2002-047.
[125] *DeSmith v Michigan Corrections Organization*, ERB 2003-063.
[126] *Caldwell v Dep't Information and Technology*, ERB 2004-019.
[127] *Garrett v Family Independence Agency*, CSC 2002-049.
[128] *Wickstrom v Dep't of Corrections*, CSC 2002-047.
[129] Regulation 8.06, § 3.C.4.b.

Focus on other activities is not a special extenuating circumstance.[130] If proper information on how to appeal is provided, a lack of knowledge does not amount to special extenuating circumstances.[131] Confusing information on appeal rights provided by the state or an agency's misinterpretation of a grievance's subject matter leading to untimely filing may provide special extenuating circumstances.[132]

C. One-year limit

A filing that is over one year late is untimely and cannot be accepted.[133]

D. Tolling deadlines

An imperfect but timely filing is sufficient to preserve rights if deficiencies are timely remedied.[134] Filing a grievance does not toll deadlines for filings in other concurrent proceedings.[135]

4.4 Representation

Rule 6-5.3(c) limits the individuals who may appear on behalf of an exclusively represented grievant to the grievant or (1) an employee or agent of the employee's exclusive representative, (2) an attorney, or (3) another exclusively represented classified employee in the same bargaining unit.

Rule 6-5.4 limits the individuals who may appear on behalf of a NERE grievant to the grievant or (1) an employee or agent of a limited-recognition organization, (2) an attorney, or (3) another NERE.

It is not an error to exclude a person from representing a party when not specifically allowed in the rule.[136] "The party's choice of representative(s) is generally not challengeable by the other parties."[137]

4.5 Discovery

A hearing officer may (a) order classified employees to appear, testify, and produce evidence under their control and (b) issue subpoenas to other persons.[138] Discovery requests must be submitted in writing at least 21 days before the scheduled hearing or production date, unless good cause is shown.[139]

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[130] *In re Drug Testing Complaint of D. Ariza*, ERB 2017-043.
[131] *In re Benefits Complaint of A. Barclay*, ERB 2015-049.
[132] *Hardy v Dep't of Corrections*, CSC 2017-040.
[133] Regulation 8.01, § 4.D.4.c; regulation 8.06, § 3.C.4.b.
[134] *Jones v Michigan Corrections Organization,* ERB 2012-035.
[135] *In re Technical Qualification Complaint of Ronald Damuth*, ERB 2008-023.
[136] *Molby v Dep't of Natural Resources*, ERB 93-055.
[137] *Kuri and Dep't of Corrections*, ERB 2002-080.
[138] Regulation 8.01, § 4.F.1.
[139] Regulation 8.01, § 4.F.2.

Discovery may include requests to produce relevant documents and records from the opposing party. Discovery requests must be specific; a catch-all request need not be honored.[140] A party may also file a motion to quash an issued discovery order that is irrelevant or directed to an individual without personal knowledge.[141]

Each party shall provide every other party and the hearing officer a copy of each document intended to be introduced in the party's case-in-chief at hearing and a list of the names and titles of all witnesses intended to be called at hearing.[142] The information must either be hand-delivered or emailed 7 days before the hearing or sent by mail or courier at least 14 days before the hearing. Testimony from witnesses not previously identified to the opposing party may be excluded.[143] This requirement does not prevent offering rebuttal evidence or witnesses.

4.6 Available relief

A. Generally

A hearing officer may only grant relief that is specifically authorized in the civil service rules and regulations.[144] If the relief sought is not specifically prohibited, it may be granted if consistent with the general notions of remedy inherent in existing rules.[145] "The CSC has never purported to function like a court with open-ended authority to issue discretionary equitable relief. Relief awarded by the CSC must be tied to a make-whole remedy or other specifically announced authorization."[146]

Attorney fees,[147] witness fees, costs, other expenses, and interest are not permitted relief.[148] A hearing officer lacks authority to order a person's appointment or a position's creation.[149]

Grievants in limited-term appointments, the senior executive service, or the senior executive management assistant service cannot receive any relief for damages accrued after their terms of appointment expire.[150]

A hearing officer has discretion to make all necessary findings of fact, but a grievant has no right to demand specific findings.[151]

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[140] *Dewald v Dep't of Mental Health*, ERB 82-308.
[141] *See, e.g., Bonner v Family Independence Agency*, ERB 2005-031.
[142] Regulation 8.01, § 4.G.4.
[143] *Stonebrook v Dep't of Transportation*, ERB 2013-056.
[144] *Spence v Dep't of Corrections*, CSC 2001-041.
[145] *Dep't of Corrections v Ybarra*, ERB 2009-008.
[146] *In re UAW Grievances 13-HS-COR-34-JC-31, 32, 54, & 55*, SPD 2015-01.
[147] *Spence v Dep't of Corrections*, CSC 2001-041.
[148] Rule 8-2.4(c).
[149] *Dep't of Corrections v Gildersleeve*, ERB 2012-002.
[150] Rule 8-2.4(c)(3).
[151] *Spence v Dep't of Corrections,* CSC 2001-041.

B. Back-pay

Any back-pay award is limited to base pay for regularly scheduled hours and holidays, including shift-differential and prison-employee premiums, but not overtime or other pay premiums.[152] Any back-pay award must be reduced by:

(1) Earnings in other employment or self-employment, except previously approved supplemental employment.

(2) Benefits from employer contributory income-protection insurance.

(3) Benefits under workers' compensation, unemployment compensation, social security, and social welfare programs.

A hearing officer may grant sick and annual leave credits, seniority credit, and longevity compensation that would have accrued but for the vacated discipline.[153] Any awarded seniority credit does not count for classification or qualification purposes.

4.7 Precedential value

Rule 1-3 authorizes the state personnel director to issue regulations deemed necessary or useful. A regulation issued by the director is binding, unless the commission finds that the regulation violates a rule.

Commission decisions have precedential value. Commission decisions are superior to and binding on the board and CSHO; board decisions are superior to and binding on the CSHO. When the commission adopts a decision of the board, the board's decision has precedential weight greater than a CSHO decision, but less than a substantive commission decision.[154] Until all appeals are exhausted, a decision does not have precedential value.[155]

A CSHO decision is not binding on a hearing officer in a future grievance appeal involving similar issues, but it may be instructive as hearing officers must interpret facts and law in accordance with previously approved concepts and factors. "Moreover, only the final decisions of the Commission, and decisions of this Board approved by the Commission, may be correctly characterized as binding precedents."[156] "Decisions of Hearing Officers regarding other appeals can be likewise of persuasive value, but until and unless appealed to and upheld by the Employment Relations Board and the Civil Service Commission, neither have any binding precedential impact."[157]

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[152] Rule 8-2.4(c)(4); *Dep't of Corrections v Mauk*, ERB 2011-047.
[153] Rule 8-2.4(c)(5).
[154] *DeRose v Dep't of Corrections,* CSC 2010-016.
[155] *Perry v Dep't of Corrections*, ERB 2009-89.
[156] *Dep't of Civil Servi*ce *and Hutchens*, ERB 96-069.
[157] *United Technical Employees Association v Dep't of Mental Health*, HERM 097-95.

5 Burdens of Proof

5.1 Establishment

Regulation 8.01, § 4.H establishes burdens of proof in grievance appeals depending on the type of grievance. Regulation 8.01, § 4.G.3 empowers a hearing officer to (a) grant default judgment to the responding party if the party with the burden of proof does not appear or (b) conduct a hearing and grant judgment if the party without the burden of proof does not appear. In grievance appeals, the party with the burden must convince the hearing officer to view the evidence in its favor. The level of proof demanded in grievance appeals is the preponderance-of-the-evidence standard. This requires demonstration that it is more likely than not (i.e., greater than 50%) that the party with the burden has met the standard.

5.2 By grievance-appeal type

A. Prohibited discrimination

If alleging prohibited discrimination, the grievant must prove by a preponderance of the evidence that a tangible adverse employment action was suffered based on discrimination prohibited by rule 1-8.[158] Religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, and disability or genetic information are the protected characteristics that a grievant can allege under rule 1-8.

The commission has generally interpreted its discrimination rule consistent with analogous state and federal discrimination statutes,[159] including the Michigan Elliott-Larsen Civil Rights Act[160] and Title VII of the Civil Rights Act of 1964.[161] A discrimination grievance appeal under rule 1-8 is similar to a discrimination lawsuit filed in state or federal court. The procedures and proofs required for those statutes can offer guidance for claims under rule 1-8.[162]

When reviewing a matter for summary disposition, the grievant must first set forth a *prima facie* case of discrimination by the employer and then the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. If the employer meets this burden, the plaintiff must then prove by a preponderance of the evidence that the reasons offered by the employer were a pretext for discrimination.[163]

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[158] Regulation 8.01, § 4.H.1–2.
[159] *Dulai v Dep't of Community Health*, CSC 2002-070.
[160] MCL 37.2102, *et seq*.
[161] 42 USC 2000e, *et seq*.
[162] *Spence v Dep't of Corrections*, CSC 2001-041 (citing *Hazle v Ford Motor Co*, 464 Mich 456, 466-467 (2001)).
[163] *Spence v Dep't of Corrections*, CSC 2001-041.

This burden-shifting standard does not apply in a hearing on the merits, where the burden rests with the grievant to demonstrate prohibited discrimination occurred. The burden-shifting analysis is limited to summary-disposition contexts.[164] If the grievant can allege facts creating a triable issue, the hearing officer must conduct a hearing and determine whether the grievant can prove by a preponderance of the evidence that the employer discriminated against the grievant in violation of rule 1-8.[165]

"[T]he prohibition on partisan considerations concerns partisan politics and not office politics."[166]

B. Whistleblower protection

In a "whistleblower" grievance under rule 2-10, an employee must allege that the employer retaliated for disclosure of a violation or suspected violation of a state or federal law, lawful regulation or rule promulgated by a political subdivision of the state, or civil service rule or regulation.

Reprisal includes actions such as discharge, threats of discipline, and arbitrary and capricious changes in conditions of employment.[167] Rule 2-10 protects employees who report or are known to the appointing authority to intend to report violations, unless the employee knew the report was false.[168] Mere expression of displeasure or disagreement with an agency's action, without a report of wrongdoing, is not protected activity under rule 2-10.[169]

If alleging reprisal, a grievant must prove by a preponderance of the evidence that a tangible adverse employment action was suffered based on retaliation prohibited by rule 2-10. The concept of tangible adverse employment action in a whistleblower grievance includes threats of discipline or similar employer action.[170]

C. Discipline

When alleging that a dismissal, demotion, suspension, reduction in pay, or disciplinary lateral job change was without just cause, a two-step burden of proof applies:[171]

(1) **Just cause.** The appointing authority must first prove by a preponderance of the evidence that it had just cause to discipline the grievant. Under rule 2-6.1(b), just cause includes (1) failure to carry out duties and obligations imposed by agency management, an agency work rule, or law, including civil

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164 *Spence v Dep't of Corrections*, CSC 2001-041.
165 *Dulai v Dep't of Community Health*, CSC 2002-070.
166 *Mulcahey v Dep't of Natural Resources,* ERB 2003-076.
167 Rule 2-10.3.
168 Rule 2-10.2.
169 *Marschke v Dep't of Corrections*, ERB 2014-07.
170 *Grant v Dep't of Corrections* ERB 2007-052.
171 Regulation 8.01, § 4.H.3.

service rules and regulations, (2) conduct unbecoming a state employee, and (3) unsatisfactory service or performance.

(2) **Discipline.** If the appointing authority proves that it had just cause to discipline, a hearing officer can only alter the discipline imposed if 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.[172]

"[H]earing officers, the ERB, and the commission have consistently considered a penalty's proportionality and consistency of application to evaluate whether discipline was arbitrary and capricious—and not as part of the just-cause determination."[173]

D. Position creation or abolition

If challenging a position's creation or abolition, a grievant must prove by a preponderance of the evidence that (1) the grievant suffered a tangible adverse employment action from the abolition or creation and (2) the position was abolished or created for reasons other than administrative efficiency. [174] "In the grievance appeal hearing, the [agency] must first articulate its reasons of administrative efficiency for abolishing the classified positions in question. The grievants then have the burden of proving by a preponderance of the evidence that the [agency's] proffered reasons were not reasons of administrative efficiency or that the [agency] was motivated by reasons other than administrative efficiency."[175] The burden of proof does not shift to the appointing authority but remains with the grievant.[176]

E. Nondisciplinary lateral job change

If challenging a nondisciplinary transfer, the grievant must prove by a preponderance of the evidence that (1) the grievant suffered substantial harm from the lateral job change and (2) the lateral job change was arbitrary and capricious.[177] A grievant must prove both elements. Proving only one is insufficient.[178]

Procedurally, the employee must first demonstrate that they have been substantially adversely impacted by the reassignment. The burden then shifts to the appointing authority to articulate a rational basis for the reassignment. If there is an insufficient record of substantial adverse impact, it is not necessary to consider whether management had a rational basis for the job change.[179]

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[172] *See, e.g., Ford v Dep't of Treasury,* ERB, 2015-039; *Dep't of Natural Resources v Morrison*, CSC 2015-034.
[173] *Dep't Natural Resources v Morrison*, CSC 2015-034.
[174] Regulation 8.01, § 4.H.4.
[175] *Dep't of Corrections v Price*, ERB 2001-063.
[176] *Dep't of Corrections v Gildersleeve,* ERB 2012-002.
[177] Regulation 8.01, § 4.H.5.
[178] *Witcher v Dep't of Corrections*, ERB 2009-087; *Climie v Dep't of Corrections*, ERB 97-027.
[179] *Dep't of Corrections and Lemaire*, ERB 99-056.

F. Compensation

If alleging a denial of compensation, the grievant must prove 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.[180] "Compensation" is not limited to money or wages and may include other items of value due an employee, such as paid leave. For example, alleged improperly charged sick leave was considered a grievable harm in a grievance appeal. [181]

G. Service rating

If an unsatisfactory service rating is challenged as without just cause, the appointing authority must prove by a preponderance of the evidence that it had just cause to issue the rating.[182] Summary disposition is appropriate if the party with the burden of proof does not make a prima facie case.[183] "The [hearing officer] and the Board cannot rely on intuition or hunches about the service rating process and training given to employees. The appointing authority must present evidence establishing the basis for discipline and the employee's failures."[184]

H. Performance-pay evaluation

Performance-pay programs consist of base-salary increases and lump-sum awards administered within established pay ranges in designated classifications in accordance with regulations approved by the state personnel director. If alleging a less-than-satisfactory overall performance-pay evaluation was without just cause, the appointing authority must prove by a preponderance of the evidence that it had just cause to issue an overall less-than-satisfactory evaluation.[185]

I. Rescinded probationary appointment

If an appointment's rescission during a probationary period is challenged and the grievant was demoted to a classification level not less than that occupied when appointed:

(1) The appointing authority must first articulate the reasons for rescinding the probationary appointment and demoting the grievant.

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[180] Regulation 8.01, § 4.H.6.
[181] *Spence v Dep't of Corrections*, CSC 2001-041.
[182] Regulation 8.01, § 4.H.7.
[183] *Surratt v Dep't of Mental Health,* ERB 86-117.
[184] *Dep't of Information Technology v Umstead*, ERB 2010-053.
[185] Regulation 8.01, § 4.H.8.

(2) The grievant must then prove by a preponderance of the evidence that the rescission and demotion (1) were arbitrary and capricious or (2) violated rule 1-6, 1-8, or 2-10.[186]

"If the employer satisfies its initial showing, the burden then shifts to the grievant to prove (not merely articulate) by a preponderance of the evidence that the rescission was (1) arbitrary and capricious or a (2) violation of Rule 1-6's merit principle. These two prongs are closely related; an arbitrary and capricious decision is one that has no legitimate business purpose or is not based on reason or fact. It is also one where the grievant produces evidence proving the employer's articulated reasons to be factually untrue or pretext for some impermissible reason for the rescission. This could include reasons that violate Rule 1-6's requirement that all appointments, demotions, etc., and all measures used to reach those decisions, must be based on merit, efficiency, and fitness, as provided in the civil service rules and regulations. The current application of the concept of the merit principle as applied to probationary periods for new appointments focuses more so on the 'fitness' aspect. Fitness is determined, post-hire or promotion, by appraising the employee's work and adjustment during probationary periods which are the opportunity to prove themselves on the job."[187]

J. General grievance appeal

Unless otherwise specifically provided in civil service rules or regulations, a grievant must prove by a preponderance of the evidence both of the following:

(1) The grievant was substantially harmed by an appointing authority's action.

(2) That action violated (1) article 11, § 5, of the Michigan constitution, (2) a civil service rule or regulation, (3) an agency work rule, or (4) an enforceable written grievance settlement between the grievant and appointing authority permitted by civil service rules or regulations.[188]

6 Discipline

6.1 Just cause

An appointing authority may discipline a classified employee for just cause, which includes the following:

(1) Failure to carry out the duties and obligations imposed by agency management, an agency work rule, or law, including the civil service rules and regulations.

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[186] Regulation 8.01, § 4.H.9.
[187] *Struble v Dep't of Health and Human Services,* CSHO 2017-031.
[188] Regulation 8.01, § 4.H.10.

(2) Conduct unbecoming a state employee.

(3) Unsatisfactory service or performance.[189]

Just cause for discipline generally falls into two categories: misconduct-based and performance-based.

A. Misconduct

Discipline may be issued for misconduct at work and in some circumstances for misconduct outside work that rises to the level of conduct unbecoming a state employee.

For misconduct at work, an agency usually must provide evidence of its expectations, the communication of those expectations to the employee, and the employee's violation of those expectations. If those expectations were communicated as a violation of an agency work rule and that work rule is not admitted into evidence, discipline may be overturned.[190] The notion of the wrongness of some misconduct may be "so engrained that an employer need not warn an employee of consequences for engaging in [them]."[191]

Discipline may be overturned if a policy is ambiguous or if it is unclear on the evidence in the record whether the employee actually violated a policy.[192] A manager's single misstatement of a communicated work rule alone can be insufficient to render the rule a nullity or prevent discipline for violations of the rule.[193]

While there is no statute of limitations on addressing prior misconduct, an agency's delay in addressing an issue or knowing acceptance for several years can undercut subsequent attempts to discipline an employee based on otherwise improper actions.[194] During the grievance process, an appointing authority cannot add new violations or acts that were not included in the initial disciplinary process as a basis to support discipline.[195] Unless otherwise authorized by rule or regulation, an employer must provide notice to an employee of charges and possible penalties before a disciplinary

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[189] Rule 2-6.1.

[190] *See, e.g., Dep't of Corrections v Baptist*, ERB 2004-022; *Henius v Dep't of Community Health*, CSHO 2014-013.

[191] *See, e.g., Worthen v Accident Fund of Michigan*, CSC 94-003.

[192] *See, e.g., Arlt v Dep't of Treasury*, CSHO 2014-015; *Chadwick v Dep't of Community Health*, CSHO 2012-079; *Wenzel v Dep't of Corrections*, CSHO 2012-033.

[193] *O'Donnell v Dep't of Community Health*, ERB 2003-064.

[194] *See, e.g., Howie and Dep't of Energy, Labor and Economic Growth*, HERM 2010-006.

[195] *Dep't of Corrections v Baptist*, ERB 2002-022.

conference where discipline is imposed.[196] Failure to do so may result in vacating discipline.[197]

A hearing officer cannot uphold discipline after finding that the department failed to establish a fundamental element of the charged violations at hearing.[198]

In some circumstances, misconduct outside work may rise to the level of conduct unbecoming a state employee and allow discipline to the extent that the conduct "adversely affects the morale or efficiency of the governmental entity or tends to adversely affect public respect for state employees and confidence in the provision of governmental services."[199] This could include an employee's speech and speech related conduct that "undermined his professional character and reputation, adversely affected the Department's internal operations, and had a tendency to destroy public respect for the Department and confidence in the Department's ability to provide services."[200]

Criminal convictions also may constitute conduct unbecoming to support discipline.[201]

B. Performance

Discipline may also be issued for poor performance. An unsatisfactory interim rating is used to discipline an employee for poor performance and can be issued anytime.[202] "[T]here is no absolute requirement that an employee be placed on a conditional service rating *at all* prior to the imposition of discipline. There are occasions when a single act by an employee with an otherwise clean record may be just cause for immediate dismissal without any formal advance notice or evaluation period."[203] But, "[w]here the performance or conduct at issue is not that which demands immediate removal from the workplace, corrective measures and progressive discipline are required, especially for a long-term employee with a spotless record."[204] An appointing authority may dismiss an employee when issuing an unsatisfactory interim rating or may establish a follow-up rating period for further observation.[205] "An employee can be terminated without a follow-up rating period for an interim service rating."[206] "A

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196 Rule 2-6.2(b)(3).

197 *Dep't of Management and Budget and Holcomb*, ERB 2010-024; *Perry v Dep't of Technology, Management and Budget,* CSHO 2013-044.

198 *Naidow v Dep't of Corrections*, ERB 97-018.

199 *Shirvell v Dep't of Attorney General,* 308 Mich App 702 (2015); *see also Dep't of Corrections and Hill*, ERB 2005-009.

200 *Shirvell v Dep't of Attorney General,* 308 Mich App 702 (2015).

201 *See, e.g., Enszer v Dep't of Corrections*, ERB 2009-053; *Dep't of Corrections v Wiley*, ERB 2008-033; *Belin and Dep't of Corrections*, ERB 2005-010; *Horton and Dep't of Corrections*, CSC 2001-042.

202 Rule 2-3.3(a).

203 *Ettinger v Dep't of Education*, CSC 97-08.

204 *Dep't of Corrections and Smith*, ERB 2004-038.

205 Rule 2-3.3(b).

206 *Dep't of Energy, Labor and Economic Growth v Robinson*, ERB 2011-029.

follow-up period... is the maximum period to establish satisfactory performance, not the minimum time allowed before review."[207]

An appointing authority must communicate performance expectations to employees and the failure to submit evidence that those expectations were shared with an employee can result in the reinstatement of a discharged employee.[208] In addition to counselings, reprimands, and ratings, notice can also be documented through contemporaneous minutes, contemporaneous memoranda, and testimony.[209] An agency can lack just cause to discharge "when documentation was too vague to put the employee on notice of either specific performance failings or expected corrective actions."[210] But "[t]he rules and regulations do not require that specific assignments be introduced at hearing to support discharge for poor performance, if by other means the department can show just cause by a preponderance of the evidence,"[211] and "lack of detailed written records documenting meetings between [a] grievant and his supervisors does not provide sufficient grounds" to overturn discharge when the department demonstrates just cause by other evidence.[212] "Ignoring required duties while on an interim service rating… is unreasonable behavior. Dismissal is appropriate in such cases."[213] An agency is "not required to demote… in lieu of discharge."[214] An interim rating must address ongoing issues and cannot rely only on issues occurring and resolved during a previously concluded rating period.[215] Civil service and its hearing officers cannot micromanage an agency's performance expectations of its employees.[216] lack of detailed written records documenting meetings between the grievant and his supervisors does not provide sufficient grounds for the Board to find reversible error when the Department still demonstrated just cause by other evidence.

C. Absences

An employee's failure to report to work or provide notice of absence is just cause for discipline under rule 2-6.1(b).[217] A disciplinary conference is not required for an employee who fails to report to work for three or more consecutive scheduled workdays without being on approved leave.[218]

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[207] *Jones v Dep't of Corrections*, ERB 2003-058.
[208] *Dep't of Information Technology v Umstead*, ERB 2010-053.
[209] *Dep't of Information Technology v Umstead*, ERB 2010-053.
[210] *Dep't of Energy, Labor and Economic Growth v Robinson*, ERB 2011-029.
[211] *Lustig v Dep't of Health and Human Services*, ERB 2017-042.
[212] *Welch v Dep't of Health and Human Services*, ERB 2021-008.
[213] *Dep't of Energy, Labor and Economic Growth v Robinson*, ERB 2011-029.
[214] *Hanson v Dep't of Transportation*, ERB 2014-032.
[215] *Brown-Brandon v Dep't of Corrections*, CSHO 2014-075.
[216] *Welch v Dep't of Health and Human Services*, ERB 2021-008.
[217] *Bevier v Dep't of Technology Management and Budget*, ERB 2017-011.
[218] Rule 2-6.2(b)(3).

6.2 Suspension for investigation

An appointing authority may suspend an employee with or without pay for up to seven days to conduct an investigation.[219] Within seven days, the appointing authority shall (1) reinstate the employee, (2) discipline the employee, or (3) extend the investigative suspension with pay. If extended, a disciplinary conference is not required, but the appointing authority shall give the employee written notice of the reasons for the extension.

An employee charged with a criminal offense may be suspended with or without pay.[220] The appointing authority is not required to hold a pre-suspension disciplinary conference before imposing the suspension but must give the employee written notice. At the employee's request, the appointing authority shall meet with the employee to review the suspension. A suspension for criminal charges may remain in effect until the earlier of (1) the appointing authority imposing discipline or (2) the employee giving written notice to the appointing authority of the criminal charges' final resolution. If the employee gives written notice before the appointing authority has imposed discipline, the appointing authority may continue the suspension as allowed for investigation. Under rule 2-6.4, a seven-day suspension without pay to investigate begins after the appointing authority receives notice of the resolved criminal charges.[221] Resolution of charges in the employee's favor does not prohibit discipline for the same conduct.[222]

"All employees, even those on suspension, are subject to the Commission's supplemental employment and conflict of interest rules."[223]

6.3 Burden of proof in disciplinary appeals

As discussed above, regulation 8.01 sets forth a two-step burden-of-proof framework in discipline appeals for non-probationary employees:

(1) The appointing authority must prove just cause to discipline by a preponderance of the evidence.

(2) If just cause is proven, 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.

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[219] Rule 2-6.4.
[220] Rule 2-6.5.
[221] *Baptist v Dep't of Corrections*, ERB 2003-051.
[222] *Baptist v Dep't of Corrections*, ERB 2003-051.
[223] *Bost v Dep't of Management and Budget*, ERB 2000-031.

"[T]he quantum of proof in a dismissal grievance is only a preponderance of evidence, whereas, in a criminal trial the burden is the much heavier reasonable doubt standard."[224]

A penalty's proportionality and the consistency of its application is part of the analysis to determine if it was arbitrary and capricious.[225] The burden of proof in alleging disparate treatment in discipline is on the employee.[226] A finding by the hearing officer of mitigating factors alone does not warrant modification of a chosen discipline.[227] "When evaluating the proportionality of a disciplinary penalty, one factor to consider is whether the penalty clearly exceeds the range of penalties generally recognized as fair and reasonable for the misconduct alleged.... In the end, the commission... must rely on its collective judgment and experience to determine when a particular penalty is so harsh as to be beyond the range of generally accepted permissible discipline and, therefore, arbitrary and capricious."[228]

"The concept of 'just cause' implies not only that the appointing authority have 'cause' for disciplining an employee, but also that the discipline imposed be 'just' in relation to the cause. That is, there must be a reasonable proportionality between the misconduct and the penalty for that misconduct."[229]Arbitrary is "'[W]ithout adequate determining principle . . . Fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.'" Capricious is "'[A]pt to change suddenly; freakish; whimsical; humorous.'"[230]

"A single incident of misconduct may be so gross and egregious as to warrant dismissal. However, where an employee's previous record is unblemished, … a department's failure to consider progressive discipline renders its decision-making arbitrary."[231] "The *Battiste* decision has consistently been interpreted to require an appointing authority to consider progressive discipline, when appropriate. That consideration must be undertaken in good faith and be congruent with our 'just cause' system of discipline."[232] "[T]hat a penalty less than dismissal must be considered… is only true where a long-term employee has a spotless record."[233]

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[224] *Miller v Dep't of Corrections*, ERB 93-083.
[225] *Dep't of Natural Resources v Morrison*, CSC 2015-034; *Dep't of Corrections and Ybarra*, ERB 2007-036.
[226] *Dep't of Corrections v Hill*, ERB 2005-009.
[227] *Lewis v Dep't of Corrections*, ERB 97-046.
[228] *See, e.g., Baker v Dep't of Consumer and Industry Services*, CSC 2001-043; *Horton v Dep't of Corrections*, CSC 2001-042; *Dep't of Natural Resources v Morrison*, ERB 2015-034.
[229] *Dep't of Corrections v Puls*, CSC 2001-005.
[230] *See e.g., Dep't of Corrections v James,* CSC 2012-021; *Dep't of Corrections v Puls*, CSC 2001-005.
[231] *Battiste v Dep't of Social Services* 154 Mich App 486, 493 (1986).
[232] *Dep't of Corrections v Puls*, CSC 2001-005.
[233] *Wilson v Dep't of Corrections*, ERB 98-166.

"If an appointing authority establishes a mandatory dismissal penalty for a first offense, it must give prior written notice of the mandatory penalty to its employees."[234] "If [an agency] fails to give notice that it intends to impose a mandatory dismissal penalty, the [agency] cannot impose the penalty of dismissal without first considering the imposition of lesser penalties."[235]

"[A] supervisor… is held to a higher standard of conduct than line workers."[236] Status as an enforcement official may reasonably form the basis for holding an employee to a higher standard of conduct when determining discipline.[237] Human-resources staff can be held to a higher standard of conduct, particularly as related to falsifying HR records.[238]

Rescission of a probationary appointment is generally not a disciplinary matter subject to grievance appeal. An initial probationary employee does not have just-cause employment rights to challenge the merits of a discharge.[239] An initial probationary employee may, however, file a grievance appeal challenging a rescission alleged to constitute prohibited discrimination or retaliation. For any such probationary grievance appeal, the burden rests with the separated employee to demonstrate by a preponderance of the evidence that the adverse action violated rule 1-8 or 2-10.[240]

Similarly, an employee in a promotional probationary period in a new classification generally cannot challenge the rescission of that promotional appointment if returned to the former level, except as a violation of rule 1-8 or 2-10, in which case the burden of proof rests with the employee. If, however, a probationary appointment is rescinded and the appointee is returned to a level lower than that previously occupied, the rescission is disciplinary, and the employer bears the burden of demonstrating just cause to discipline.[241]

6.4 Modifying discipline

If a grievant carries the burden of proof to show that imposed discipline violated a civil service rule or regulation, (2) violated an agency work rule, or (3) was arbitrary and capricious, the hearing officer may modify discipline. Any such modification is subject to review upon appeal and may be modified.[242] If the agency proved just cause, the hearing officer may modify discipline only "to a type of tangible discipline that the

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[234] Rule 2-6.1(e).

[235] *Sanders v Dep't of Corrections*, ERB 98-027. *See also Battle v Dep't of Corrections, ERB 2012-058; Fockler v Dep't of Transportation*, CSHO 2011-056.

[236] *Dep't of Corrections v Gonzales*, ERB 2011-038. *See also Dep't of Corrections v James*, CSC 2012-021.

[237] *Dep't of Treasury v Thomas*, ERB 2011-001.

[238] *Family Independence Agency v Akers*, ERB 2002-026.

[239] Rule 8-2.3(a).

[240] Regulation 8.01, §§ 4.H.1–2.

[241] *Stonebrook v Michigan Dep't of Transportation*, CSC 2014-053.

[242] Regulation 8.05, § 4.O.1.

appointing authority could have imposed."[243] A hearing officer may not modify discharge to a suspension with a length determined by the amount of time between discharge and the hearing officer's decision.[244]

The primary responsibility to determine the severity of a penalty rests with the appointing authority.[245] A hearing officer can only modify the penalty if, under all the circumstances of the case, the grievant proved that the penalty is arbitrary and capricious. "If the penalty is not proven arbitrary and capricious, the hearing officer is obligated to uphold the penalty, even if the hearing officer personally disagrees with the penalty. The hearing officer may not simply substitute his or her personal managerial judgment or brand of industrial justice for that of the appointing authority." [246] Likewise, a grievant's disagreement with a chosen discipline is not an adequate basis to show arbitrariness or capriciousness. "If the appointing authority imposes a penalty that is not arbitrary and capricious and the hearing officer nonetheless modifies the penalty, the hearing officer has prejudiced the substantial rights of the appointing authority and is subject to reversal…."[247]

7 Position Creation and Abolition

Article 11, § 5 of Michigan's constitution provides that "appointing authorities may create or abolish positions for reasons of administrative efficiency without the approval of the commission. Positions shall not be created nor abolished except for reasons of administrative efficiency. Any employee considering himself aggrieved by the abolition or creation of a position shall have a right of appeal to the commission through established grievance procedures." Whether an agency has abolished a position is independent of any administrative functions that civil service may perform memorializing such abolishment.[248]

An "appointing authority may abolish a position for reasons of administrative efficiency, including, for example, lack of work, lack of adequate funding, change in agency mission, or reorganization of the work force."[249] Cost savings can constitute administrative efficiency.[250] "'Administrative efficiency' and 'reduced expenditures' are not synonymous. In fact, the former can exist without the latter."[251] "The general rule

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[243] *Dep't of Corrections v McDonald*, ERB 2019-003.
[244] *Worthen v Accident Fund*, CSC 95-001; *Lemon v Dep't of Corrections*, CSC 99-055.
[245] *Dep't of Corrections v James*, CSC 2012-021; *Dep't of Corrections v Wiley*, ERB 2008-033.
[246] *Dep't of Corrections v James*, CSC 2012-021; *Dep't of Corrections v Wiley*, ERB 2008-033; and, *Dep't of Corrections v Johnson*, ERB 2020-035.
[247] *Dep't of Corrections v James*, CSC 2012-021; *Dep't of Corrections v Wiley*, ERB 2008-033.
[248] *Dep't of Corrections v Howard*, ERB 2012-075.
[249] Rule 4-4.1.
[250] *Marschke v Dep't of Corrections*, ERB 2014-007.
[251] *Hutchinson v Dep't of Mental Health*, 108 Mich App 725, 729 (1981).

is, however, that ulterior motives will not invalidate an otherwise valid decision to terminate a position due to administrative efficiency. While it is true that good faith must be shown before a position may be abolished, good faith is established by a showing that the abolishment of the position was justified by economy and efficiency. This can be shown by proof that the duties were not assigned to another person after the position was abolished."[252] "[T]he power of the Civil Service Commission to 'regulate all conditions of employment in the classified service' does not preclude the Legislature from eliminating a position once it is classified as within the civil service system…."[253]

7.1 Burden of proof in position-abolishment appeals

The grievant bears the burden of showing that a position was abolished for reasons other than administrative efficiency by a preponderance of the evidence.[254] "In the grievance appeal hearing, the [department] must first articulate its reasons of administrative efficiency for abolishing the classified positions in question."[255] "When an abolished position's duties are assumed by two existing positions, . . . that appears to be the definition of administrative efficiency."[256] Cost savings may also be evidence that an abolishment was for reasons of administrative efficiency.[257]

"The grievants then have the burden of proving by a preponderance of the evidence that the [agency's] proffered reasons were not reasons of administrative efficiency or that the [agency] was motivated by reasons other than administrative efficiency."[258] There are two methods to prove that a position was abolished for reasons other than administrative efficiency: (1) implied bad faith and (2) impermissible motivation.[259] If multiple factors lead to the abolishment or creation of a position, the principal factor is controlling.[260]

"[A]bsent evidence of the proverbial smoking gun nature (such as an admission by a [department] administrator that the Grievants' positions were abolished for nefarious reasons or other reasons not sounding in administrative efficiency), the only way to test whether the reasons proffered by the [department] were a pretext to cover improper actions would be to permit Grievants to challenge the sufficiency of those reasons. The grievants had the burden of proving that the [department's] stated reasons for abolishing their positions were untrue or that the [department] had other,

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[252] *Hutchinson v Dep't of Mental Health*, 108 Mich App 725, 731 (1981).
[253] *Civil Service Commission v Dep't of Labor*, 424 Mich 571 (1986).
[254] Regulation 8.01, § 3.H.4.
[255] *Dep't of Corrections v Price*, ERB 2001-063.
[256] *Marschke v Dep't of Corrections*, ERB 2014-007.
[257] *Howard v Dept' of Corrections*, ERB 2014-027.
[258] *Dep't of Corrections v Price*, ERB 2001-063.
[259] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012.
[260] V*on der Heyden v Dep't of Public Health*, CSC 96-01.

impermissible reasons for abolishing the grievants' positions. The very purpose of the grievance process is to test the [department's] reasons for abolishing… positions against the constitutional "reasons of administrative efficiency" standard."[261]

Whether a challenged abolishment achieved administrative efficiency, or whether greater administrative efficiency could have been achieved through another process, is irrelevant. "The function of the Hearing Officer is to determine reason or motive. The Constitution does not require the employer to establish that the net balance of effect achieved by the creation or abolishment actually was an additional increment of administrative efficiency. A grievant's showing that the employer's managerial judgment was faulty would not be relevant. The Hearing Officer is not the proper judge of whether administrative efficiency was achieved, nor whether an alternative course might have produced a greater increment of administrative efficiency. The grievant must show that an ulterior motive on the part of the employer was instrumental in causing it to abolish the position."[262]

7.2 Implied bad faith

"A grievant may prove a constitutional violation by showing that the grievant's position was abolished and substantially all of the grievant's job duties were transferred to a newly created position occupied by another employee."[263] A grievant may also prove bad faith by showing that the department, upon informing an employee being laid off that a position would be abolished, "never intended to actually abolish the position and that . . . the Department intended from the outset to refill the position in nearly identical form and substance."[264] "[G]ood faith is established by a showing that the abolishment of the position was justified by economy and efficiency. This can be shown by proof that the duties were not assigned to another person after the position was abolished."[265] "[T]wo positions are substantially similar only if they have all, or nearly all, the same principal job duties."[266] In determining whether two positions are substantially similar, the positions' authority, reporting relationships, and classifications are also relevant factors.[267]

"If the grievant proves bad faith on the part of the employer, the grievant need not also prove that the employer had any specific impermissible motivation (such as political animus) for acting in bad faith."[268]

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[261] *Dunn-Hansen v Dep't of Corrections*, ERB 2003-077.
[262] *Veeder and Dep't of Mental Health*, ERB 84-160.
[263] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012.
[264] *Horan and Dep't of Commerce*, ERB 93-006.
[265] *Hutchinson v Dep't of Mental Health*, 108 Mich App 725, 729 (1981).
[266] *Devlin v Dep't of Labor and Economic Growth*, ERB 2007-013.
[267] *Devlin v Dep't of Labor and Economic Growth*, ERB 2007-013.
[268] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012.

7.3 Impermissible motivation

"Mich Const article 11, § 5, lists the following constitutionally impermissible considerations: No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations. While the Constitution explicitly lists these three impermissible bases for personnel transactions, it also prohibits the creation or abolition of positions for reasons other than administrative efficiency, which would include other demonstrably arbitrary and capricious motivations reflecting a disregard of administrative efficiency in the decision to abolish or create a position." [269]

A grievant may also prove a constitutional violation by showing that the appointing authority was motivated to create or abolish a position by a particular impermissible reason other than administrative efficiency, such as political or personal animosity toward the grievant.[270]

8 Equal Employment Opportunity

8.1 Discrimination

Rule 1-8.1 prohibits adverse actions based on "religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, or, consistent with state and federal law, disability or genetic information." The commission has interpreted its rule prohibiting discrimination consistent with analogous state and federal antidiscrimination statutes, including the Michigan Elliott-Larsen Civil Rights Act and federal Civil Rights Act.[271]

"To make a prima facie case of discrimination at the first and second step of the grievance process, a grievant must claim membership in one or more of the 12 protected classes of persons, claim adverse treatment because of the protected class status, and that others similarly situated but not in the protected class were not so adversely treated."[272] Even if a prima facie case is made, the grievant must still prove at hearing by a preponderance of the evidence that a tangible adverse employment action was suffered and that the adverse action resulted from the alleged discrimination.[273]

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[269] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012.
[270] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012; *Von der Heyden v Dep't of Public Health*, CSC 96-01.
[271] *See, e.g., Thilly v Dep't of Corrections*, ERB 2002-027; *Dulai v Dep't of Community Healt*h, CSC 2002-070.
[272] *Mensah v Dep't of Corrections*, ERB 2002-034.
[273] *See, e.g., Dulai v Dep't of Community Healt*h, CSC 2002-070; *Spence v Dep't of Corrections*, CSC 2001-041.

A primary motivation of the creation of the commission was preventing partisan personnel actions in the classified service. "Appointments to the classified service may not be based on partisan considerations."[274] While the commission is constitutionally charged with preventing partisan considerations in the classified state civil service, it has no authority over regulating conditions of employment in the unclassified service. "Positions may be exempted from the classified service for any reason, including partisan political reasons. Moreover, the commission should not inquire into the general motivations, political or otherwise, that underlie the executive's decision about which duties should be included in the unclassified service. The constitution gives to the governor and to the departments considerable discretion and power to organize the executive branch. That discretion and power include the right to determine which duties are to be entrusted to unclassified appointees."[275] It is not necessary to plead a specific political affiliation to receive a hearing claiming partisan discrimination.[276]

Differences in compensation between NEREs and represented employees is not impermissible discrimination based on union status that can be grieved but should be addressed through the pay-setting process.[277]

8.2 Harassment

A. Definition

Rule 1-8.3(a) prohibits discriminatory harassment in the classified service. Rule 9-1 defines discriminatory harassment as unwelcome advances, requests for favors, and other verbal or physical conduct or communication based on religion, race, color, national origin, age, sex, sexual orientation, height, weight, marital status, partisan considerations, disability, or genetic information under any of the following conditions:

(1) Submission to the conduct or communication is made a term or condition, either explicitly or implicitly, to obtain employment.

(2) Submission to or rejection of the conduct or communication by a person is used as a factor in decisions affecting the person's employment.

(3) The conduct or communication has the purpose or effect of substantially interfering with the person's employment or creating an intimidating, hostile, or offensive employment environment.

Under rule 1-8.3(b), employees are required to report any discriminatory harassment suffered or observed to the appointing authority, which must then investigate the

[274] *Von der Heyden v Dep't of Public Health*, CSC 96-01.
[275] *Von der Heyden v Dep't of Public Health*, CSC 96-01.
[276] *Dep't of Labor and Economic Growth v Petersen*, ERB 2007-012.
[277] *Chapman v Dep't of Corrections*, CSC 2002-074.

report.[278] It is insufficient for a classified employee to use the general civil service grievance procedure to satisfy the requirement to give notice of discriminatory harassment.[279]

"[T]hat a relationship commences voluntarily does not necessarily mean it is not unwelcome. Particularly where a superior-subordinate relationship is involved, a trier of fact should determine whether the relationship was indeed unwelcome, and whether it was inappropriately used by the superior to impact the employment relationship."[280]

"[A] single act by a manager ordinarily cannot—by itself—create a hostile work environment."[281]

"It is not necessary… to prove that [the harasser] knew that [the harassed] was offended by his acts. Rather, it is necessary… to prove that [the harasser's] behavior was objectively offensive to a "reasonable person."[282] "There are some comments—racial or religious slurs, sexually denigrating comments, and abusive personal attacks based on other protected characteristics—that societal norms and general decency identify as discriminatory harassment, with or without active protest from the victim."[283]

B. Investigations

Each appointing authority has a duty to make a good faith effort to eliminate discriminatory harassment in the workplace. [284] All reports of harassment, irrespective of source or wishes of the person making the report, must be investigated.[285] Rule 1-8.3(c)(2) requires that appointing authorities take appropriate corrective and remedial action if discriminatory harassment is found even if the grievance is not appealable.[286]

8.3 Accommodating disabilities

A. Definition

Civil service staff and appointing authorities shall accommodate a person with a disability, consistent with state and federal law.[287] Rule 9-1 defines disability as "A physical or mental impairment that substantially limits one or more major life activities,

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278 *Dulai v Dep't of Community Health* CSC 2002-070.
279 *Darden v Dep't of Consumer and Industry Services,* CSC 2002-046.
280 *Dep't of Corrections v Bruggeman*, ERB 99-021 (emphasis in original).
281 *Dep't of Corrections v Thilly*, ERB 2002-027.
282 *Gannon v Dep't of Corrections*, ERB 97-076.
283 *Heikkinen v Dep't of Military and Veterans Affairs*, ERB 2013-059.
284 Regulation 1.03, § 4.B.1.
285 Regulation 1.03, §§ 4.B.2 and 4.C.1.a(1).
286 *Dulai v Dep't of Community Health*, CSC 2002-070.
287 Rule 1-8.2.

a record of such an impairment, or being regarded as having such an impairment, as defined in state or federal law."[288]

B. Application

A request for reasonable accommodation must be based on a disability as defined by rules and regulations.[289] Accommodations must be requested or no obligation to accommodate exists.[290] There is no obligation to displace an existing employee or revisit an appointment that has not yet been effectuated to accommodate a disabled employee.[291] "It is obvious that no reasonable accommodation is ever permanent. The needs of both the employee and the employer invariably will change over time in ways not contemplated at the time the accommodation is first made. A reasonable accommodation that is permanent and inflexible is, by its nature, not 'reasonable.'"[292] "Although it is recognized that accommodations have to be considered on a case-by-case basis, all cases need to be evaluated using similar standards of review."[293]

8.4 Retaliation

In addition to whistleblower protections under rule 2-10, as discussed in § 5.2.B above, rule 8-1.3(a)(9) permits grievances based on an allegation of retaliation for the employee's good faith exercise of grievance or technical complaint rights provided in the civil service rules or regulations.

"To establish a prima facie case of retaliation, the complaining party must show: (1) engagement in a protected activity; (2) that the activity was known by the employer; (3) that the employer took an employment action adverse to the complainant; and (4) that there was a causal connection between the protected activity and the adverse employment action."[294] The complainant has the burden to prove by a preponderance of the evidence that the appointing authority's action was motivated by retaliation.[295]

"Retaliation in the form of an involuntary reassignment becomes a (retaliatory) disciplinary reassignment only when the appointing authority either labels the reassignment as disciplinary or imposes the reassignment in conjunction with other discipline, such as a written reprimand."[296]

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[288] Rule 9-1.
[289] *Spence v Dep't of Corrections*, CSC 2001-041.
[290] *Clover v Dep't of Transportation*, ERB 2014-04.
[291] *Dep't of Corrections v Mellendorf*, CSC 2000-001.
[292] *Gregory-Branson v Dep't of Community Health*, CSC 97-10.
[293] *Dep't of Corrections v Burns*, ERB 99-076.
[294] *Lance v Dep't of Corrections*, ERB 2009-029.
[295] *Kunze v Dep't of Corrections*, ERB 2003-045.
[296] *Lance v Dep't of Corrections*, ERB 2009-029.

Allegations of retaliation for whistleblowing by an exclusively represented employee are properly brought in the grievance forum provided under the collective bargaining agreement.[297]

9 Compensation

The commission has established a compensation schedule, which sets salary ranges for all classification levels in the classified service. Any grievance over a denial of compensation need not separately allege substantial harm or a tangible adverse employment action.[298]

A "promise" of compensation by someone without authority to bind the employer or that is forbidden by long-established written policy is unenforceable.[299] An appointing authority cannot override the unambiguous language in the compensation plan by agency work rule or procedure.[300]

9.1 Overtime

Federal law, regulation 5.02, and collective bargaining agreements may require that employees receive overtime pay for time in pay status in excess of established thresholds. An appointing authority may also request prior approval from civil service to provide overtime pay to employees who are not normally eligible for overtime.

An appointing authority may require employees to work overtime and ensure that employees do not work unauthorized overtime. Under regulation 5.02, the overtime rate is one-and-one-half times the employee's regular rate (i.e., the base rate of pay plus any premiums except overtime premiums).

An appointing authority must establish policies and procedures to schedule and authorize overtime and must pay for all overtime worked by eligible employees, even if not authorized. As administratively feasible, overtime must be scheduled as equally as practical among employees who normally perform the duties.

Under regulation 5.02, if notice of changes to regularly or previously scheduled hours is not given by 96 hours before a biweekly pay period starts, all hours outside the schedule for an employee with a normal schedule are paid at the overtime rate.

Under rule 8-2.4(c)(4), overtime is not recoverable in an award of back-pay.[301]

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[297] *Palmatier v Dep't of State Police*, ERB 98-091.
[298] Rule 5-3; *Gartland v Dep't of Corrections*, ERB 2008-085.
[299] *Johns v Dep't of Natural Resources*, ERB 99-012.
[300] *Million v Dep't of Corrections*, ERB 94-084.
[301] *Dep't of Corrections v Mauk*, ERB 2011-047.

9.2 On-call, callback, and compensatory time

A. On-call

An appointing authority may require an employee to be on call (i.e., in a scheduled state of availability to return to duty) consistent with the requirements of state employment and regulation 5.02. Eligible employees scheduled for on-call duty are compensated at the rate of one hour of straight-time pay for each five hours of on-call duty. An employee may only receive payment in cash and an appointing authority must make a good-faith effort to pay for on-call time in the next biweekly paycheck. An employee who is called back to work while on call does not receive on-call payment for hours and is instead paid consistent with the regulations on callback pay. An appointing authority may request prior approval from civil service to provide on-call pay to employees who are not normally eligible.

An employee scheduled by an appointing authority for on-call duty must remain available through a pre-arranged means of communication. An employee in on-call duty status who is not available when contact is attempted or who is not able to report, ready to work, within the prescribed time period is not eligible for on-call compensation for that day and may be subject to discipline.

B. Callback

Eligible employees required to report to duty outside normal working hours are in callback status and paid at their overtime rate for hours worked. An employee called back is guaranteed a minimum of three hours pay, unless called back to duty within three hours of regular working hours. An appointing authority may request prior approval from civil service to provide callback pay to employees who are not normally eligible.

The employer may call an employee back to duty and schedule callback duty as necessary in the manner most advantageous to the employer and consistent with the requirements of state employment and the public interest. An agency must establish written policies to authorize and pay for callback duty.

C. Compensatory time

Under regulation 5.02, an appointing authority may establish a system to accrue and track compensatory time instead of receiving overtime payment if agreed to before the work is performed. An appointing authority may request prior approval from civil service to establish a system of comp time for employees who are not normally eligible.

10 Leaves of Absence

10.1 Paid leaves

An appointing authority may (1) authorize full or partial salary payments to an employee to attend school, visit other governmental agencies, or undertake any other systematic improvement of the knowledge or skills required in the employee's work and (2) grant paid administrative leave with full service and benefit credits for necessary absence from duty for which annual, sick, or other leave with pay is not applicable.[302] An appointing authority must also grant administrative leave if specifically required by civil service rule or regulation.

10.2 Unpaid leaves

A leave of absence without pay expires on the date established by the appointing authority, unless extended. If an employee on an unpaid leave of absence does not return to work by the leave's end, the employee is separated. Upon a leave's expiration or the employee's return, the employee is returned to the formerly occupied or an equivalent position. If demoted during the leave, the employee is returned to the demoted position. If the employee's position was eliminated during the leave, the employee is returned in accordance with employment-preference rights. Departments have considerable discretion in determining whether to grant leaves of absence or extend previously granted medical leaves.[303]

A. Non-medical leave

An appointing authority may grant an employee a non-medical leave of absence without pay and without loss of employment status for further education or other appropriate nonmedical reasons.[304]

An employee also may be granted a leave of absence for appointment to serve in an unclassified position.[305]

B. Medical leave

An appointing authority may grant a medical leave of absence without pay for up to six months to an eligible employee whose sick leave is exhausted.[306] An employee does not receive pay, service credit, fringe benefits, or leave accruals during an unpaid medical leave, except that health-insurance benefits are continued if and while the leave also qualifies as an FMLA leave. An employee is eligible for a medical leave only

[302] Rule 2-11.
[303] *Garrison v State Accident Fund*, ERB 95-074.
[304] Rule 2-12.1.
[305] Rule 1-9.
[306] Rule 2-12.2.

if the employee has the equivalent of at least six months' full-time employment. If an employee requests an extension before a leave expires, an appointing authority may extend the leave to a maximum of one year in length. Any medical leave beyond one year requires the state personnel director's written approval. Unless an appointing authority adopts a separate work rule, no more than 12 months of medical leave may be used during any five-year period.

C. FMLA leave

Family Medical Leave Act (FMLA) leave may be taken for (1) a serious health condition that makes the employee unable to perform the functions of the employee's position, (2) care for the employee's spouse, parent, or child with a serious health condition, (3) birth of a child and care for the newborn child, (4) placement with the employee of a child for adoption or foster care, or (5) any qualifying exigency arising out of the fact that a spouse, child, or parent of the employee, who is on covered active duty or has been notified of an impending call or order to covered active duty in the armed forces. To be eligible for FMLA leave, an employee must have been employed for at least 12 months and worked at least 1,250 hours in the previous 12-month period. An employee is entitled to 12 workweeks of FMLA leave during a 12-month period beginning when FMLA is first taken. FMLA leave can be consecutive, cumulative, or intermittent, depending on the basis for the leave. FMLA military caregiver leave of up to 26 workweeks during a 12-month period may also be available to eligible employees.

FMLA leave must be requested during employment; it cannot be used as a defense after discipline occurs.[307] FMLA rights are not enforceable in a grievance action.[308]

10.3 Waived-rights leave

An unpaid waived-rights leave can protect a classified employee's continuous service, seniority, and any benefits connected with length of service, but does not guarantee an employee a right to return.[309] An employee on a waived-rights leave who returns to the classified service before the leave expires is not considered to have had a break in service; an employee who does not return before the leave expires is separated. An employee does not accrue any annual, sick, or other leave during a waived-rights leave. An agency is not required to return an employee to the former or a similar position during or upon expiration of a waived-rights leave.[310]

An appointing authority may grant a waived-rights leave for up to one year to an employee with the equivalent of at least six months' full-time employment. Appointing

[307] *Bevier v Dep't of Management Technology and Budget*, ERB 2017-011.
[308] *Rowell v Dep't of Health and Human Services*, ERB 2018-024.
[309] Rule 2-13.
[310] *Olivarez v Michigan Workforce Development Agency*, CSHO 2014-065.

authorities may extend for an additional year if the state personnel director is noticed, but the director's written approval is required for any extension beyond a total of two years.[311]

11 Staff Assignment

11.1 Layoff

An employee may be laid off for reasons of administrative efficiency, including, for example, lack of work, lack of adequate funding, change in agency mission, or reorganization of the work force.[312] An employee who is laid off is entitled to prior written notice.[313]

An appointing authority may place an employee on one or more temporary layoffs, but temporary layoffs must be at least one workday and cannot exceed 20 total workdays in a fiscal year.[314] A temporary layoff does not affect service time, insurance, or leave accruals, and bumping and recall rules do not apply.[315]

11.2 Employment preference

The exercise of employment preference under the rules and regulations is also known as bumping. Regulation 2.01 defines bumping as "the process through applying employment preference by which an employee displaces another employee or is placed in a vacant position." Unless otherwise provided in an approved agency layoff plan, an employee can only bump within the employee's current (1) principal department or autonomous entity, (2) county of employment, and (3) employee status code. In addition to the current class, an employee may bump to other class series where the employee attained status (i.e., satisfactorily completed a probationary period) during the current employment period. Bumping cannot be into positions (1) at a higher level, (2) with a selective position requirement or subclass code that the employee does not meet, or (3) protected from employment preference (e.g., SES, SEMAS, and Group-4 classifications).[316]

Employment preference is determined by an employee's continuous service hours with any ties broken based on an evaluation of merit by the appointing authority.

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[311] Regulation 2.03, § 4.F.1.
[312] Rule 2-4.1.
[313] Rule 2-4.2.
[314] Rule 2-4.4(b).
[315] Rule 2-4.4(c).
[316] Rule 2-5.1(a).

11.3 Recall

An employee is eligible to be placed on a recall list only if the employee (1) gained status from an indefinite appointment and (2) is laid off, demoted, or otherwise displaced for reasons of administrative efficiency.[317]

A person may be removed from a recall list for any of the following reasons:[318]

- Appointment.
- Failure to respond to an inquiry regarding possible employment.
- Indication of lack of interest in an employment opportunity.
- Failure to accept employment.
- Separation or retirement from state service.
- Evidence that the person is unable to perform satisfactorily, with or without reasonable accommodations, the essential duties of the job.
- Evidence of conduct that indicates that the person is unfit or unsuitable for appointment.
- Conduct that violates rule 3-1.5.
- Expiration of recall rights.

11.4 Transfer

Lateral job change is defined as "the authorized movement of an employee to a different position (1) in the same classification or (2) in a different classification at the same classification level."[319] An appointing authority has discretion to unilaterally implement a lateral job change within an agency.[320] A lateral job change between agencies also requires the agreement of the employee and state personnel director.[321] In either instance, it is required that "(1) the employee previously attained status in the classification, (2) the job change is based on the civil service preauthorized lateral job change list, or (3) the employee meets the civil service qualification requirements." Voluntary demotions may also be implemented with the employee's written agreement.[322]

"A reassignment becomes a 'disciplinary reassignment' only when the appointing authority either labels the reassignment as 'disciplinary' or imposes the reassignment in conjunction with other discipline (such as a written reprimand). It is precisely this *formal* disciplinary characterization and its punitive connotations that change an

[317] Rule 3-2.2.
[318] Rule 3-2.4.
[319] Rule 9-1.
[320] Rule 3-3.6.
[321] Rule 3-3.5.
[322] Rules 3-3.5 and 3-3.6.

ordinary nonreviewable reassignment into a 'disciplinary reassignment' subject to civil service review."[323] A disciplinary reassignment is governed under the just-cause standard.[324]

"A shift change is considered a lateral job change because it moves the employee to a different position in the same classification."[325]

11.5 Scheduling

An overtime-eligible employee's work schedule may be changed temporarily.[326] For these employees with work schedules, the schedule must be posted or notice must be given at least 96 hours before a biweekly work period begins. If the employee's set schedule is changed during a biweekly work period or within 96 hours before a pay period begins, the employee is eligible for overtime premium for all hours worked outside the employee's original or normal work schedule.

In determining if scheduling is arbitrary, "[s]cheduling acceptable levels of staffing is necessarily an inexact science because operational needs cannot be known two to six weeks in advance. The use of overtime and other rescheduling frequently occurs because of administrative leave, sick leave, annual leave, or training."[327] "[A]n appointing authority can create and consistently enforce expectations for time and attendance. The Department has the right to schedule employees and expect them to adhere to that schedule.[328]

12 Drug and Alcohol Testing

12.1 Employees

Rule 2-7.1 prohibits classified employees from consuming alcohol or drugs while on duty, reporting or being on duty with a prohibited level of alcohol or drugs in their bodily fluids, refusing to submit to a required drug or alcohol test, interfering with any testing procedure, or tampering with a test sample. All employees are subject to drug testing when authorized by rule or regulation.

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[323] *Dep't of Corrections v Clarke*, CSC 2001-007.
[324] *Dep't of Corrections v Clarke*, CSC 2001-007.
[325] *Lance v Dep't of Corrections*, ERB 2009-029.
[326] Regulation 5.02, § 3.a.2.d(1).
[327] *Dep't of Corrections v Tigues*, ERB 2000-073.
[328] *Dep't of Corrections v Gerou*, ERB 2016-010.

A. Reasonable-suspicion testing

An employee must submit to a drug or alcohol test if there is reasonable suspicion that the employee engaged in prohibited drug or alcohol activity.[329]

Rule 9-1 defines reasonable suspicion as "a belief, drawn from specific objective facts and reasonable inferences drawn from those facts in light of experience, that an employee is using or may have used drugs or alcohol in violation of an agency work rule or a civil service rule or regulation." By way of example only, reasonable suspicion may be based upon any of the following:

(a) Observable phenomena, such as direct observation of drug or alcohol use or physical symptoms or manifestations of being impaired by, or under the influence of, a drug or alcohol.

(b) A report of on-duty or sufficiently recent off-duty drug or alcohol use from a credible source.

(c) Evidence that an individual tampered with a drug or alcohol test during state employment.

(d) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs or alcohol while on duty, on the employer's premises, or operating the employer's vehicle, machinery, or equipment.

The smell of a drug can be sufficient to support reasonable suspicion.[330] Loud, profane language, being upset and irritated with a request to use the usual mechanism for an annual-leave request, and the strong odor of alcohol may all support reasonable suspicion.[331]

B. Self-reporting

Rule 2-7.5 allows employees to voluntarily disclose a problem with controlled substances or alcohol twice during their career. If the disclosure occurs before the event resulting in testing, the employee cannot be disciplined for the disclosure. A reporting employee is allowed a leave of absence to seek treatment before returning to work. Upon return, the employee remains subject to all testing requirements and may be disciplined based on any subsequent drug or alcohol test, including a follow-up test. The self-reporting provisions must be affirmatively used; an appointing authority's alleged constructive knowledge of a drug or alcohol problem is insufficient to prevent discipline. "There is no standing self-report."[332]

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[329] Rule 2-7.2.
[330] *Bach v Dep't of Licensing and Regulatory Affairs*, ERB 2017-061.
[331] *O'Donnell v Dep't of Community Health,* ERB 2003-064.
[332] *Radashaw v Dep't of Corrections*, ERB 2009-060.

C. Random testing

Rule 2-7.2 permits drug and alcohol testing if an employee is selected on a random-selection basis in a test-designated position. In reviewing the reasonableness of a testing policy, the extent of the intrusion upon the privacy interest of the individuals being tested must be weighed against the promotion of the government's proffered special need to conduct the tests.[333]

D. Medical determinations

While the opinions of medical review officers are entitled to deference, it is not clear error or arbitrary for a hearing officer to adopt or weigh the medical opinions of other witnesses.[334] Failing to complete a drug or alcohol test without a medical explanation can be considered refusal to test.[335]

E. Procedural considerations

The results of a drug or alcohol test may be excluded as a basis for discipline if a grievant proves by a preponderance of the evidence that the test was not performed according to required procedures.[336] Minor flaws in the testing procedure will not invalidate a positive drug test.[337]

12.2 New hires

Testing of new hires is not grievable but can be challenged under a separate process to the state personnel director under regulation 2.10. There is no duty of the employer to bargain with a union over prospective employees' drug testing.[338]

13 Legal Representation

Under rule 2-19, if "an employee is named in any civil claim or action alleging negligence or other actionable conduct arising out of employment in the classified service, the employee may request that the appointing authority provide the services of an attorney at state expense to represent the employee. If the appointing authority determines either (1) that the conduct alleged occurred during the course of the employee's employment and within the scope of the authority delegated to the employee or (2) that the employee's conduct occurred during the course of the employee's employment and the employee had a reasonable belief that the employee's conduct was within the scope of authority delegated to the employee, the employee is

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[333] *UAW v Winters*, 385 F.3d 1032 (CA 6, 2004).
[334] *Dep't of Corrections v Reynolds*, ERB 2018-006; *Dep't of Corrections and Nelson*, ERB 2009-027.
[335] *LaPlante v Dep't of Corrections*, ERB 2014-017.
[336] *Dep't of Corrections and Hoeft*, ERB 2002-016.
[337] *McKinley and Dep't of Corrections*, ERB 2002-006.
[338] *Michigan State Employees Association v Dep't of Corrections*, ERB 90-046.

entitled to legal representation at state expense." The attorney general must first be asked to provide any representation and decline before different counsel can be hired.[339]

If both criteria in the rule are met, legal representation or reimbursement for legal fees is required.[340] An appointing authority is not required to investigate a claim that on its face does not allege actions taken as part of an employee's duties.[341] "It was not appropriate to provide attorney fees for an employee defending himself in private litigation for acts the employer considered outside the scope of his authority.[342]

An appointing authority is not required to provide representation to an employee in a criminal matter.[343]

[339] Rule 2-19(a).
[340] *Dep't of Consumer and Industry Services v Baker,* ERB 2001-059.
[341] *Chapman v Dep't of Corrections*, ERB 2007-030.
[342] *Dep't of Corrections v Hall*, ERB 99-034.
[343] Rule 2-19(b).