

DEPARTMENT OF THE INTERIOR  
**DEPARTMENTAL MANUAL**

Personnel

Part 370 DM Addition to FPM

Chapter 771 Employee Grievances

370 DM 771, 3.1

Subchapter 3. Employee Grievances

3.1 Policy. The Department of the Interior, recognizing the importance of the employee to the organization and the desirability of prompt consideration and disposition of problems affecting his/her status and welfare, has established a procedure for the orderly and equitable handling of grievances in accordance with the standards governing agency grievance procedures issued by the Office of Personnel Management. Employees are free to use this procedure without restraint, interference, coercion, discrimination or reprisal of any kind by any management level.

3.2 Responsibilities.

A. Management. The heads of bureaus and offices will be responsible for administering the employee grievance policy of the Department and for bringing it to the attention of all officers and employees. Authority to administer the policy should be delegated to those officials responsible for the employment and utilization of personnel.

B. Supervisors. It will be the responsibility of supervisors to hear any employee complaints and to try to clarify misunderstandings and make reasonable adjustments to address problems that arise in day-to-day relationships with employees.

C. Director of Personnel. The Director of Personnel reserves the right to assume jurisdiction of a grievance at any stage in the proceedings.

D. Grievance Examiner. The grievance examiner is responsible for making an impartial and objective inquiry as to the merits of a grievance and for providing a report of findings and recommendations to the parties.

E. Grievants. It will be the responsibility of employees who file grievances to comply with appropriate time limits established by the Department, furnish sufficient detail to clearly identify the matter being grieved; and specify the personal relief being requested.

3.3 Definitions.

A. Grievance means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to the employment of the employee(s) which is subject to the control of agency management.

B. Employee may include a current or former employee of the Department for whom a specific remedy can still be appropriately provided. Former employees must file a timely grievance concerning a matter appropriate for review under these procedures prior to separation in order to receive consideration.

C. Bargaining Unit Employee means an employee included in an exclusive bargaining unit as determined by appropriate authority.

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D. Personal Relief means a specific remedy directly benefiting the grievant(s), but may not include a request for disciplinary action for another employee.

E. Grievance File means a separate file subject to the Privacy Act which contains all documents related to the grievance, including but not limited to any statements of witnesses, records or copies thereof, the report of the hearing when one is held, statements made by the parties to the grievance, and the decision.

F. Deciding Official means an official designated to (1) receive and attempt to adjust formal grievances; (2) refer formal grievances to an examiner where necessary; and (3) decide formal grievances on the basis of examiners' reports. In all cases, the deciding official must be at the next higher administrative level than anyone who could have adjusted the grievance under the informal grievance procedure.

G. Days means calendar days.

H. Servicing Personnel Office means the personnel or administrative unit which provides personnel services to the grievant.

3.4 Employees Covered. The grievance procedure is available to all nonbargaining unit employees of the Department, regardless of type and tenure of appointment, except for categories cited in 5 CFR 771.206(b).

3.5 Matters Covered.

A. Except as provided in 370 DM 771, 3.6, the grievance procedure is used to review any matter of concern or dissatisfaction to an employee which is subject to the control of management and for which the employee seeks personal relief; or any matter in which the employee alleges that coercion, reprisal or retaliation has been practiced against him or her.

B. Complaints or appeals covered by other intra-Departmental review methods will be processed in accordance with procedures described specifically for those issues. Among the matters to be reviewed under special procedures are:

- (1) Performance Appraisal (370 DM 430)
- (2) Government Housing and Utilities (41 CFR 114-52.602)
- (3) Divestiture Orders (43 CFR 20.735-43)
- (4) Merit Pay Coverage (370 DM 540)

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- (5) Separation of Probationers (370 DM 315)
- (6) Appeals from Park Police Trial Boards (76 Stat 907)

Use of the procedures identified above, supersedes and substitutes for any other procedures described under this subchapter.

**3.6 Matters Not Covered.**

A. This grievance procedure does not apply to any of the following:

(1) The content of published regulations and policy. As an alternative, an employee's allegation that locally established policy is in conflict with law or regulation of a higher authority may be submitted through his/her servicing personnel office to the office of primary responsibility for its issuance at the bureau or Departmental level for consideration;

(2) A decision which is appealable to the Merit Systems Protection Board, the Office of Personnel Management, or the Equal Employment Opportunity Commission under law or regulations;

(3) Nonselection for promotion from a group of properly ranked and certified candidates;

(4) A preliminary warning notice of an action which, if effected, would be covered under a grievance system or excluded from coverage by 370 DM 771,6A(2);

(5) A return of an officer or employee from the Senior Executive Service to the General Schedule during the one-year period of probation or for less than fully successful executive performance;

(6) An action which terminates a temporary promotion within a maximum period of two years and returns the employee to the position from which the employee was temporarily promoted, or reassigns or demotes the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted;

(7) The content of the critical elements and performance standards of an employee's position;

(8) Non-adoption of a suggestion or disapproval of a quality step increase, performance award, or other kind of discretionary award, including awards of rank for members of the Senior Executive Service;

(9) A merit pay determination or a merit pay increase or the lack of a merit pay increase under the Merit Pay System;

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- (10) The termination of an employee serving a probationary or trial period after initial appointment for unsatisfactory performance or conduct;
- (11) An evaluation of performance for a member of the Senior Executive Service;
- (12) A return of any employee from an initial appointment as a supervisor or manager to a nonsupervisory or nonmanagerial position for failure to satisfactorily complete the probationary period;
- (13) A separation action (other than those affecting certain excepted employees as specified in 370 DM 752), or expiration of a term appointment, or term promotion of any duration;
- (14) An audit or investigation being made of any employee by the Office of Inspector General; the Attorney General; Department of Justice; or the Special Counsel, MSPB;
- (15) Relief specified that is not personal to grievant or is not subject to the control of management;
- (16) Any grievance presented by bargaining unit employees covered by a negotiated grievance procedure or applicants for employment from outside the Department pursuant to 5 CFR 771.204(b).

**3.7 Criteria for Grievance Review**  
the review of grievances:

The following criteria will govern

- A. Prompt and fair consideration of each grievance,
- B. Grievance examination will be carried out by a person(s) who has not been involved in the matter being grieved and who would not be considered to occupy a position subordinate to any official who recommended, advised, made a decision on, or who otherwise is or was involved in the matter being grieved.
- C. Assurance to the grievant of:
- (1) Freedom from restraint, interference, coercion, discrimination or reprisal in presenting a grievance;
- (2) The right to be accompanied, represented, and advised by a representative of his or her own choosing, except that management may disallow the choice of an individual as a representative which would result in a conflict of interest or position, which would conflict with the priority needs of the agency, or which would give rise to unreasonable costs to the Government;
- (3) A reasonable amount of official time to present the grievance if the employee is otherwise in a duty status; and

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(4) The right to communicate with the servicing personnel office and/or counselors of the bureau.

D. Assurance to the employee's representative of:

(1) Freedom from restraint, interference, coercion, discrimination or reprisal; and

(2) A reasonable amount of official time to present the grievance if the representative is an employee of the Department and is otherwise in a duty status;

E. When grievance examination is utilized, establishment of a grievance file which is made available to the grievant and his or her representative for review and comment;

F. After an employee places a grievance in writing the employee is entitled to a written decision which includes a report of findings and reasons for the determination, made by:

(1) An official at a higher level than any official substantively involved in any phase of the grievance, if there is one, than has been involved or

(2) An official(s) designated to determine the disputed facts.

### 3.8 Informal Procedure.

A. Except as indicated in 370 DM 771,3.8B, an employee desiring consideration of a grievance must first seek informal adjustment of the matter through supervisory channels. The initial presentation, which may be oral or written, is normally made to the immediate supervisor. Subsequent presentation must be in writing. When the grievance concerns relationships with, or actions taken by, the immediate supervisor, the grievance may be presented to the next higher level of supervision. (If the grievance is presented orally, the employee must make clear that he/she is presenting a grievance. This is necessary to distinguish grievances from mere inquiries.) Supervisors who receive oral grievances must prepare a written summary of the oral presentation and their decision, providing a copy to the grievant. Presentation of a grievance is subject to the following:

(1) An employee may present a grievance concerning a continuing practice or condition at any time, but must present a grievance concerning a particular act or occurrence within 15 days of the date of the act or occurrence or the date he/she became aware of it. Situations caused by actions which were taken or were identified as of given date, e.g., reprimands, miscredit of leave balances, are not considered continuing conditions for these purposes despite any continuing effects they may have.

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(2) An employee, in presenting a grievance at the informal stage, is entitled to a reasonable amount of official time for presentation if the employee is otherwise in an active duty status.

(3) The deadline for initial filing of a grievance may be extended by the management official receiving the grievance with concurrence of the servicing personnel office. An employee presenting a grievance is entitled to seek advice and assistance from the following:

(a) The servicing personnel office,

(b) The Department's Director for Equal Opportunity or an Equal Employment Opportunity Officer or Counselor designated under provisions of 370 DM 713;

(c) The Departmental Counselor and Deputy and Assistant Counselors designated for their organization under 370 DM 735.

These sources provide procedural advice on subject matters for which they are responsible and factual information, but do not address the merits of a grievance.

B. An employee presents a grievance directly under the formal procedure described below if it concerns a reprimand or an action which was effected after an advance written notice, with right to reply and contest the action, and a final written decision. The right to reply is considered tantamount to opportunity for informal resolution. In such cases, the grievance may be filed with the servicing personnel office or directly to a deciding official identified in the written decision within 15 days of the effective date of the action.

C. The supervisor to whom a grievance has been presented for informal adjustment will attempt to resolve it as expeditiously as possible, seeking the advice and assistance of others where necessary, and will give the employee a decision on the matter not later than seven (7) days after the date of presentation. If the subject matter required consultation with other supervisors or staff officials, the employee is advised of their participation in the decision. If the relief sought cannot be granted the employee is informed of the time limit within which to request further consideration under the formal procedures and of the name of the official designated to receive the formal grievance. The employee is also given the name of the servicing personnel office which can assist in making such a request.

D. A grievance may NOT be denied in the informal procedure. If the supervisor believes that the grievance is not timely or consists of a matter not covered under the grievance system, the employee must be so advised, but must also be allowed to submit the grievance for a further determination under the formal procedure.

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E. Unless waived by management for a specific reason, a grievant must pursue relief under the informal procedure before advancing a grievance to the formal stage.

**3.9 Formal Procedure.**

A. When an employee receives a decision under the informal procedure which does not satisfy the grievant or when the time limit for management action has expired without a decision, the employee may within five (5) days thereafter submit the grievance for further consideration. The grievance, at this stage, must be in writing signed by the employee or authorized representative (authorized under 370 DM 771,3.18 D) contain sufficient detail to identify and clarify the basis of the grievance (and if applicable explain any efforts to resolve the grievance informally), and specify the relief sought by the employee which must be directly personal to him/her. If the employee has a representative, the representative's name, address and telephone number must be included along with a signed statement authorizing the representative access to the employee's records. Copies of any documents related to the grievance or to the efforts at informal resolution are to be attached if applicable.

**3.10 Initial Processing Under the Formal Procedure.**

A. The grievance is submitted to the servicing personnel office for referral to a deciding official.

B. Promptly upon receipt of a grievance, the personnel office makes a procedural review of acceptability and within seven (7) days takes one of the following actions:

(1) Rejects the grievance if it consists wholly of matters excluded from coverage under the grievance procedures, or if it was not timely filed and the employee did not show good cause for the delay. The employee is notified in writing of the basis for rejection and of the right, if he/she is not satisfied with the determination, to request a review by the bureau personnel officer (See 370 DM 771,3.20 ).

(2) If a bureau requires informal efforts to resolve a grievance and if the employee did not seek informal adjustment before filing the grievance, the grievance is returned to the employee informing him/her of the requirement to use the informal procedure (an exception is found in 370 DM 771, 3.8B). The grievance will also be returned if no personal relief or if improper relief is specified by the grievant.

(3) If the grievance is acceptable, the personnel officer establishes a grievance file and refers it for consideration to the deciding official. (See 370 DM 771,3.19 for contents of grievance file.)

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(4) Failure of the deciding official to respond within twenty (20) days permits escalation of the grievance to the next higher management official, if any, in the organization.

**3.11 Deciding Official.**

A. The deciding official will adjust and decide the grievance unless he/she was directly involved in any informal procedure or took an action or made a decision which is at issue in the grievance. In this event, the deciding official must disqualify himself/herself from the adjustment and decision-making processes and forward the grievance to the next higher administrative level. Bureaus must make written designations of deciding officials under this paragraph.

B. The deciding official is usually the official at the next higher organizational level above the grievant's supervisor. The bureau or office may designate an official to receive and act upon grievances for specified groups of employees. Where appropriate, the grievance may alternately be submitted to the lowest level official with capacity to grant the relief (e.g. a safety or staff official), but not to two deciding officials. Determination of the most appropriate echelon or official to serve as deciding official in a given case is a bureau/office responsibility.

**3.12 Adjustment or Referral to Grievance Examiner.**

A. The deciding official reviews the grievance file to determine what adjustments can be made in a manner acceptable to the employee. If all or part of the relief requested by the employee can be granted, or if any offer of any alternative remedy which might be acceptable to the employee can be made, the deciding official issues an adjustment proposal, in writing, to the employee or representative. If corrective action is ordered, the official implementing the adjustment must notify the deciding official of compliance within a specified time frame. If, on the other hand, the deciding official determines that no adjustment is possible or appropriate, the employee must be informed in writing of the negative determination. In either case, the finding must be transmitted to the employee within twenty (20) days of the date the deciding official receives the grievance file.

B. The notice of adjustment or negative determination must inform the employee of the right to have the grievance reviewed by an examiner if he/she is dissatisfied with the adjustment effort. Employees are given seven (7) days from the date of receipt of the adjustment proposal or negative determination in which to request further review by an examiner. Failure to make such request within the prescribed time limit will result in termination of the grievance for



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failure to prosecute, unless the grievant shows good cause and the deciding official accepts the grievant's late response. The time limit must be clearly stated in the notice of adjustment or negative determination.

C. If the deciding official fails to make any decision, render a negative determination, or offer an adjustment within twenty (20) days from the date the deciding official receives the grievance file, the grievant may request further review by an examiner. This request may be made directly by the grievant to the Chief Personnel Appeals Examiner, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203. The Chief Personnel Appeals Examiner shall request that the deciding official submit the grievance file to the Office of Hearings and Appeals for review by an examiner.

D. Where an employee makes a timely request to the deciding official for review by an examiner, the deciding official has seven (7) days from the date of receipt of the request to contact the Chief Personnel Appeals Examiner, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, for the assignment of a grievance examiner.

E. The deciding official's notification to the Office of Hearings and Appeals (OHA) will be by memorandum and will state the name, title, location, and telephone number of the employee concerned and his/her representative, if any, as well as the employee's bureau official with whom the examiner will have direct communication regarding the scheduling of the hearing or inquiry. The notification should also identify by name, title, and office the deciding official so that the case file can be transmitted by the examiner upon completion of the findings and recommendations. The grievance file is also forwarded by the deciding official to OHA and a copy to the grievant or his/her representative at this time. Field stations of bureaus and offices should channel their requests for examiners through their respective headquarters.

F. The parties may as an alternative invoke the Expedited Inquiry Procedures of Appendix A to this subchapter in order to obtain a quicker resolution.

**3.13 Grievance Examination Procedures** Guidelines for this phase of the process are contained in Appendix A.

**3.14 Dual Processing.** Initiation of a complaint under EEO Complaint procedures, negotiated grievance procedures, or other intra-Departmental complaint systems supersedes, and forecloses advancement of the same matters under this grievance procedure. If the matter being grieved becomes the subject of an EEO complaint by the grievant, the official considering the grievance will terminate its processing and refer it to the bureau Equal Employment Opportunity Officer.

**3.15 Cancellation of Grievance.** A grievance will be canceled:

- A. At the employee's request;
- B. Upon termination of the employee's employment with the Department, unless the personal relief sought may be granted after termination;
- C. Upon the death of the employee unless the grievance involved a question of pay;

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D. For failure to prosecute if the employee does not furnish required information and duly proceed with the advancement of the grievance; or

**3.16 Conduct of Hearings.**

A. If a hearing is held, attendance is limited to persons determined by the examiner to have a direct connection with the grievance. The examiner may exclude any person from the hearing whose presence obstructs the orderly process of the hearing.

B. The hearing should be conducted so that it will bring out pertinent facts and produce pertinent documents. The rules of evidence will not be strictly followed, although reasonable bounds should be maintained on the relevance of the evidence submitted, and unduly repetitious testimony should be excluded. The examiner makes decisions on the admissibility of evidence or testimony.

C. Evidence will primarily be documentary, by interview, through testimony of witnesses by affidavit or by deposition.

(1) Testimony is under oath or by affirmation and both the employee (or representative) and management will be given the opportunity to produce witnesses and to question all witnesses who appear and testify subject to 370 DM 771,3.15C(4).

(2) The Department will not use affidavits to exempt persons from cross-examination. The examiner will not accept an affidavit in lieu of personal testimony for a witness who should have been produced at the hearing. The fact that an employee has already made an affidavit would not be sufficient reason for failing to call that employee as a witness at the hearing. If both parties agree to stipulate that the use of affidavits in lieu of personal testimony from specific witnesses is agreeable, or the witness is deceased or otherwise unavailable, then those witnesses will not be required to appear at the hearing.

(3) The Department will make its employees available as witnesses when requested by the examiner after consideration of a request by the employee or management. If the Department or bureau determines that it is not administratively practicable to comply with the request of the examiner, it will notify the examiner in writing of the reasons for that determination. The examiner may recommend that travel expenses be authorized for the production of employees whose presence is specifically requested by the examiner. If, in the examiner's judgment, compliance with the request is essential to a full and fair hearing, postponement of the hearing may be made until such time as management complies with the requester. If management finds it is not feasible to comply or fails to comply within 15 days, the issue will be referred to the Director of Personnel, who will render a decision on the postponement.

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(4) The employee and management may produce witnesses obtained through their own efforts and who are additional to those made available at the examiner's request. However, the examiner has the authority and responsibility to exclude unduly repetitious or immaterial testimony and may therefore, exclude witnesses who have no new testimony to offer.

(5) Both the grievant and management are required to submit a list of potential witnesses to the examiner 10 days prior to the hearing. Potential witnesses will be notified in advance of the possibility of their appearing as witnesses.

(6) Witnesses will be assured freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony. Employees are in a duty status during the time they are made available as witnesses.

(7) The examiner may request further documentation at any stage of a proceeding. Within the time frame for submission, the official from whom the documentation was requested must comply or submit an objection on the ground that the documentation requested is unavailable or the matters described are privileged, irrelevant, or otherwise improper. The examiner may require a grievant receiving sensitive documents to maintain them in confidence.

**3.17 Grievance Decision.**

A. Within 10 calendar days of receipt of the examiner's report, the deciding official must take one of the following actions:

(1) Accept the examiner's recommendation and issue the decision on the grievance;

(2) Grant the remedy sought by the employee, without regard to the examiner's recommendation; or

(3) If a determination is made that the examiner's recommendations are unacceptable, he/she must submit the case for decision to the Director of Personnel. When the Director has had substantive involvement in earlier processing of the grievance, an alternate deciding official at an equivalent or higher level should be designated.

B. The decision on a grievance must be in writing, and must contain the following information:

(1) Findings on all issues covered by the examiner's inquiry;

(2) A statement as to whether the grievance is found to be justified and the specific corrective action to be taken, if any;

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(3) The employee's further review rights, if applicable.

C. A copy of the deciding official's grievance decision should be sent to the examiner and to the Chief Personnel Appeals Examiner.

**3.18 Special Considerations.**

A. Allegations of Unfair Labor Practices. An allegation that management has engaged in an unfair labor practice made in connection with a grievance may, if otherwise grievable, be incorporated into a grievance and processed under a negotiated grievance procedure, or, at the discretion of the aggrieved party, processed under 5 U.S.C. 7116, et. seq., but not under both.

B. Allegations of Discrimination. Whenever an employee makes an allegation of discrimination in connection with a grievance, the official considering it promptly terminates processing the grievance, and refers it to the bureau Equal Employment Opportunity Officer for appropriate action, that is, processing under the discrimination complaint procedures (370 DM 713) or negotiated grievance procedures (if applicable).

C. Negotiated Grievance System. Grievance procedures negotiated under collective bargaining agreements provide for processing of grievances filed by a labor organization, members of the bargaining unit, or their representatives. Such negotiated procedure will be used rather than the Departmental procedure described above. For further information concerning negotiated grievance procedures, refer to 370 DM 711.

D. Representation.

(1) An employee has the right to be accompanied, represented and advised by a representative of his/her choice at any stage of the grievance proceeding. Designation or change of representative must be made in writing to the official to whom the grievance is being presented. If the employee chooses another employee of the Department as representative, and that person is willing to serve, permission must be granted unless such representation would: (a) conflict with the priority needs of the service i.e. by contributing appreciably to neglect of the representative's duties; (b) constitute a clear conflict of position, or conflict of interest; or, (c) cause unreasonable cost to the Government.

(2) If an employee's representative is disallowed for reasons such as described in the preceding paragraph, the employee may request reconsideration by the Director of Personnel. The request must be filed within 10 days of the employee's receipt of notification that the representative has been disallowed.

(3) The Director of Personnel will make a final decision regarding the disallowance no later than 10 days after receipt of the employee's request and pertinent materials from the bureau.

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E. Use of Official Time. A grievant and his/her representative, if an employee of the Department, are entitled to official time in presenting a grievance if they would otherwise be in an active duty status. "Presenting" includes discussions with supervisors in the informal stage, and attendance at any inquiry, or meeting at the formal stage. In its discretion, management may determine other grievance activities for which some amount of official time may be appropriate. If necessary to the presentation of the grievance, the grievant and his/her representative will be permitted a reasonable amount of official time and travel without charge to leave or loss of pay in accordance with pertinent regulations. Any travel on official time must be approved in advance.

F. Selection of Examiner and Expenses.

(1) When an examiner is retained from the Office of Hearings and Appeals, the salary of the examiner will be paid by the Office of Hearings and Appeals. Except for expenses such as attorney's fees, stenographic fees, salaries of witnesses other than Departmental employees, etc., incurred by the employee in preparing and presenting his/her case, all expenses incurred in the conduct of a hearing or inquiry, including the transcript costs, salary and travel expenses of Government employees called as witnesses, and the travel expenses of the examiner, will be borne by the bureau or office in which the grievance arose.

(2) It is the responsibility of the Office of Hearings and Appeals to provide qualified employee grievance examiners who will direct and conduct the inquiry into employee grievances within the Department.

(3) In the event that an employee grievance arises in the Office of Hearings and Appeals, or the Office of the Solicitor, or when the Secretary or Under Secretary is to serve as deciding official, a fully qualified examiner will be named from outside the Department by the Director, OHA. The findings and recommendations of such examiner, and the transcript of any hearings will be served upon the employee and forwarded to the designated deciding official for final determination.

(4) Such an examiner will be paid on the basis of each hearing day, plus reasonable study time.

(a) Study time will include the written decision on the cases heard. A normal hearing day will be from 9:30 a.m. to 12:30 p.m. and 1:30 p.m. to 4:30 p.m. and be held on Federal premises.

(b) Fee schedule for hearings and study time will be based on predetermined amounts that distinguish fees as follows:

- per half-day of hearing if one or two cases are heard,
- per day of hearing if one or two cases are heard, or

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- per hour for study time, if involved.

(c) Travel expenses will be paid when the hearing is scheduled away from the examiner's normal base of doing business. Car expenses will be paid at the current GSA rate per mile. If overnight stay is required, the examiner shall be paid for lodging and meals consistent with prescribed GSA allowances.

(d) If hearings are cancelled by the parties and the examiner is notified at least forty-eight (48) hours prior to the scheduled beginning of the hearings, the examiner will be paid a predetermined amount. If the examiner appears at the hearing and a case is settled or cancelled by the parties without a hearing, the examiner will be paid a predetermined amount plus any travel and lodging expenses incurred. The examiner will bill the employing office of the grievant through OHA, for the total fee and expenses. The parties will give the examiner the name, position, and address of their designated local representatives to whom the examiner will forward copies of billings and reports.

**3.19 Grievance File.**

A. A grievance file must be established for each grievance accepted under the formal procedure. The file will be maintained and disclosed consistent with the Privacy Act and the Freedom of Information Act. The grievance file established by the employee's personnel office is available to the employee and representative and must not contain any document that is not available to the employee. It will ultimately contain:

- (1) The written complaint;
- (2) A written summary of action and results, or lack of action, during the informal procedure if informal processing was pursued;
- (3) Copies of advance notice, replies and final decision notice where an adverse action is involved;
- (4) Copies of letters of reprimand, warning, etc., where such matters are at issue;
- (5) Copies of personnel action documents, where appropriate;
- (6) The complete hearing record, if one is conducted;
- (7) The examiner's summary of an inquiry, if one were held;
- (8) The examiner's findings and recommendations;
- (9) The written decision of the deciding official, or a statement of reasons for referring the grievance to higher authority for decision.

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**3.20 Examiner's Report.**

A. After the employee and or representative have been given an opportunity to review the grievance file, the examiner must prepare a report of findings and recommendations. The report must show a determination of the factual issues in the grievance, based on analysis of evidence secured through the inquiry, and review of the grievance file. For each relevant and timely issue the examiner must analyze and weigh the evidence.

B. If the examiner finds that the employee has a reasonable basis for his/her grievance, the examiner must then consider whether the adjustment the employee has requested is reasonable and should be recommended.

C. The examiner's findings for each relevant and timely issue may be organized along the following lines: (1) identification of the issue, (2) analysis and weighing of evidence pertinent to the issue, and (3) statement of whether the employee's grievance is valid and the requested adjustment is appropriate with reasons for the findings and recommendations.

D. If the examiner excluded any matter raised in the grievance because the matter was not covered under the grievance system, the report should explain why he/she believes it is not covered.

E. The examiner must submit the grievance file containing the report of findings and recommendations to the deciding official and must furnish the employee or representative a copy of the report within 30 days after conclusion of the inquiry or receipt of a transcript, if a hearing transcript is required.

F. If the examiner finds programmatic or management deficiencies unrelated to the issues under review and which have no impact on the recommendations made, these should be brought to the attention of the deciding official in a separate memorandum which is not to be a part of the grievance file.

**3.21 Review of Grievance Decisions.**

A. When a grievance is denied, employees may request review of the rejection of their grievance on procedural grounds, by the bureau personnel officer, if that party has not previously had substantive involvement in the case. Information copies of the review decisions must be sent the Director of Personnel.

B. There is no right to further review of a grievance decision by the Department or the Merit Systems Protection Board. Employees may, however, request review by the Director of Personnel when:

(1) The grievance is rejected, canceled for failure to prosecute, or otherwise terminated without a decision on its merits by a deciding official at a higher echelon than the bureau personnel officer, or the bureau personnel officer has previously had substantive involvement in the merits of the case, and cannot impartially offer the review under 370 DM 771,3.20 A above.

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(2) The grievance involved a loss of pay e.g. a suspension, AWOL charge, etc., and the final decision of the deciding official does not grant the remedy sought.

C. Requests for review by the Director of Personnel must be submitted within 15 days of receipt of a rejection notice or decision letter.

**3.22 Separation Hearings.**

A. When separated for cause, including performance deficiencies, a nonpreference "career-type" employee in the excepted service who has completed one year of current continuous service in the same or similar positions and whose position has been specifically included by the Bureau head or higher authority as covered under the procedures of 370 DM 752, is accorded a right to a formal hearing conducted by a grievance examiner. This right does not apply to an employee whose appointment is made by and with the advice and consent of the Senate or whose position is of a confidential, policy making or policy advocating character.

B. The reconsideration right granted by 370 DM 315,8.4 A. to competitive service employees terminated during the probationary period does not entail a right to a formal hearing.

**3.23 Bureau Modifications.** Requests for bureau modifications to the foregoing requirements should be sent the Director of Personnel for approval prior to implementation.



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A-I Processing by the Examiner.

A. As soon as possible after receipt, the examiner reviews the grievance file, eliminates from consideration any matters not covered under the grievance system, and notifies the parties accordingly. For matters covered under the system, the examiner conducts an inquiry of a nature and scope appropriate to the issues involved. At the examiner's discretion the inquiry may consist of:

- (1) The securing of additional documentary evidence;
- (2) Personal interviews;
- (3) A group meeting;
- (4) A hearing; (when necessary to obtain the facts and when issues as described in B(5) below are present); or
- (5) Any combination of (1) through (4).

B. The following characteristics of types of inquiry may be useful as a general guide to help assure that comparable inquiry is made for comparable matters.

(1) Securing of Documentary Evidence. In a sense, every grievance may involve the securing of some kind of documentary evidence which would be considered by an Examiner. An inquiry conducted primarily on documentary evidence would involve decisions concerning which regulation is applicable and decisions where there is no real dispute of fact.

Characteristics:

- Issues concern claim of improper application or interpretation of policies and regulations established by another office at a higher level.
- The application or interpretation requires specialized knowledge or judgment to ensure accuracy and consistency. There is essential agreement about the facts.

(2) Personal Interviews. An inquiry consisting primarily of personal interviews usually involves problems arising out of the employee's immediate work environment. The need for documentary evidence is minimal.

Characteristics:

- unfavorable work environment
- situations within the employee's work group

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- impact of local policies, regulations or directives
- local managers have discretion and are free from specific outside requirements

(3) Group Meeting. It is rare for a group meeting to be the only method of inquiry. As a technique, it would probably be combined with personal interviews and, perhaps, documentary evidence. Issues to be covered in a group meeting usually involve opinions or judgments which are subjective in nature as opposed to serious disputes of facts which are better handled at a hearing.

Characteristics:

- issues involving attitudes and opinions rather than regulatory or policy questions per se
- issues where the manager (supervisor) has discretion and is free from specific outside requirements
- issues concerning less severe disciplinary actions

(4) A Combination of the Above. Combinations of securing documentary evidence, personal interviews and a group meeting usually involve complex issues.

Characteristics:

- improper application, interpretation of policy and regulations
- improper application, interpretation of procedures, in combination with subjective consideration or evaluation of employee qualifications, capabilities, potentials or behavior.

(5) Hearing. The decision to conduct a hearing involves the determination by the grievance examiner that it is the only way to satisfactorily resolve a complex dispute with serious disagreement of fact by witnesses. The decision to schedule a hearing is not the prerogative of the grievant. Concurrence of the Chief Personnel Appeals Examiner, OHA must be secured before a hearing is scheduled.

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While there may be preliminary interviews, meetings or obtaining of documentary evidence, a hearing is intended to be a last resort method of developing the facts at issue.

Characteristics:

- suspensions of 14 days or less and other cases of loss of pay such as AWOL charges
- violations of employee statutory or regulatory rights
- separations of certain excepted employees covered in 370 DM 752

C. Management officials and employees will cooperate with the examiner in promptly providing such assistance as the examiner deems necessary for the inquiry. The examiner schedules proceedings so that, whenever possible, the inquiry is begun within 21 days after the date the grievance is assigned. Delays in the proceedings will be held to an absolute minimum.

D. In order to insure completely fair and impartial consideration by the examiner, ex parte communications to the examiner by any parties to the grievance are prohibited.

E. The examiner is vested with delegated authority to administer an oath or affirmation, to rule on offers of proof, to receive relevant evidence and to regulate the course and conduct of the inquiry.

F. The examiner will permit the grievant to appear in person to present the grievance, if a hearing is held. However, there may be occasions by reason of unusual location or other extraordinary circumstances that a personal presentation is not administratively feasible. In such an event, the examiner should state why the grievant was not present and certify that the written presentation includes all pertinent facts.

G. When the examiner holds a group meeting or hearing, a labor organization which holds exclusive recognition for the unit in which the employee works is given the opportunity to have an observer present. The observer is permitted to state the views of the union at an appropriate time as determined by the examiner. The right of the labor organization to be present must not impair the right of the employee to handle his/her own grievance and to choose his/her own representative.

H. The burden of proof will be carried by the grievant unless the issue grieved is a disciplinary or adverse action in which case the party who initiated the challenged action bears the burden of proof. In the latter situation, management must establish the facts it asserts by a preponderance of evidence demonstrating that its action was for such cause as would promote the efficiency of the service,

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and it is the responsibility of grievants to support any claim made in his/her defense.

I. The examiner's opinion may not be substituted for the judgment of management in initiating or choosing a disciplinary action unless there is evidence that management acted arbitrarily or unreasonably.

J. In recommending any reduction of a disciplinary penalty, the examiner should find persuasive evidence that the severity of discipline imposed was not reasonable in view of: (1) the gravity of the offense; (2) past practice in enforcing the rule, (c) the employee's past record and length of service; and/or (4) mitigating circumstances not previously considered by management in determining the penalty.

K. The examiner will hold the inquiry as near the place to where the grievance occurred as practicable and shall conduct the inquiry expeditiously and in a manner to obtain a clear understanding of the facts. The inquiry may be conducted at another site for the convenience of the parties.

**A-2 Record of Hearing.**

A. If a hearing is held, the examiner will determine whether the hearing will be reported by verbatim transcript or written summary. The examiner must include all pertinent documents submitted to and accepted into the hearing record. When the hearing is reported verbatim, the examiner will make the transcript a part of the record of the proceedings.

B. When the hearing is not reported verbatim, the examiner must have a suitable summary of the pertinent testimony prepared. If the parties agree to the summary, they should sign it. If they do not agree with it, they should submit written exceptions which, together with the summary, must be part of the hearing record.

C. The examiner must include the record of the hearing in the grievance file. The employee or representative will be given a copy of a summary of the hearing and the report of the examiner's findings and recommendations. They may also review the transcript.

**A-3 Expedited Hearing Procedure.**

A. Notwithstanding any other provisions of this subchapter, the following expedited hearing procedure may be used with mutual consent of both the deciding official and the grievant:

- (1) The inquiry will be informal
- (2) No brief shall be filed or transcripts made

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- (3) There shall be no formal evidence rules
- (4) Each party's case shall be presented by a previously designated representative.
- (5) The examiner will have the obligation of assuring that the necessary facts and considerations are brought before him/her by the representatives in the most expeditious manner.
- (6) A single case should normally not require more than four (4) hours to be heard with each party being allowed up to two (2) hours to examine witnesses and to make opening and closing statements. The examiner shall ensure that the length of the inquiry is not unnecessarily extended because of irrelevant or repetitious testimony etc.
- (7) Either party may present "expert" witnesses to testify. The commonly-accepted definition of an expert will be used to determine whether the proposed witness can be considered an expert; i.e., one who may have no firsthand knowledge of the case, but who has special skill, training, or experience in a particular field, and without whose technical assistance the examiner may be unable to understand the relationship between the facts and the conclusions to be drawn from those facts. The party presenting such an expert will bear liability for any expenses and fees incurred.
- (8) The examiner will be urged to issue a bench decision at the inquiry but, in any event, shall render the decision within forty-eight (48) hours after conclusion of the hearing. This decision shall be based on the record developed by the parties before and at the inquiry and shall include a brief written explanation of the decision.
- (9) These expedited procedures supersede and substitute for the customary grievance examination procedures.