

MEMORANDUM

TO: Chairman Edward R. Tallon, Sr.

FROM: Division of State Human Resources Director Karen Wingo

SUBJECT: Laws, regulations, and lawsuits related to human resources decisions

DATE: January 2, 2020

- 1) Please provide a list of employment related cases during the last ten years in which the director of a state agency was personally named in a lawsuit. Also, please provide a copy of the complaint in each action and result of the action.**

The Department of Administration's Division of State Human Resources (DSHR) is not in possession of the information. The Insurance Reserve Fund, housed in the State Fiscal Accountability Authority (SFAA), is better suited to assist with this matter.

- 2) Please provide statutes and regulations applicable to the following related to (1) demotions; (2) promotions; and (3) terminations of at-will and non at-will state employees:**
 - a. Circumstances under which it can occur;**
 - b. Personnel who have authority to do it (e.g., does it have to be the immediate supervisor or can it be someone above the immediate supervisor); and**
 - c. Ways in which the employee's annual Employee Performance Management System report is utilized in the decision, if at all.**

Based on DSHR's call with Committee staff last week, please find the response to this set of questions answered collectively in response to question 3 below.

As background, the chapters of the South Carolina Code that cover most human resources' related actions are found in Section 8-11 and Section 8-17. A complete copy of the State Human Resources Regulations can be found at the following link:

https://www.admin.sc.gov/sites/default/files/state_hr/State%20Human%20Resources%20Regulations.pdf



3) Under what circumstances can a state agency terminate an employee immediately (at-will and non at-will)? Who can terminate an employee immediately (e.g. does it have it to be the direct supervisor or can it be someone above the direct supervisor)?

Almost all state employees are “at-will” employees. The only exceptions are those that have an employment contract in place. This is usually restricted to faculty members at colleges and universities, athletic coaches, etc.

When most people refer to “at-will” vs. “non at-will” employees they are generally referring to employees who have grievance rights under the State Employee Grievance Procedure Act. The term “covered” refers to employees who have grievance rights under the Grievance Procedure Act and “not-covered” are those who do not. Even employees with grievance rights, however, are still “at-will” employees since no employment contract is in place. For more information about the grievance procedure, please see: https://admin.sc.gov/dshr/state_ee_grievance_procedure

Whether an employee can be terminated immediately (without notice) depends on the reason for the termination and the agency’s policy. The two main reasons for termination are enumerated below. It is important to note that employees may also be terminated as the result of their position being eliminated due to a Reduction in Force (RIF) but these decisions are not based on the performance or conduct of the individual and, therefore, are not discussed below.

Termination for Disciplinary Reasons

Terminations for disciplinary reasons related to behavior include: excessive absenteeism, insubordination, stealing, workplace violence, sleeping while on duty, etc.

There is no state statute or regulation that requires employees, whether covered or not covered, be given notice of their termination for disciplinary reasons. Any requirement of prior notice is at the agency’s discretion and should be documented in each agency’s progressive discipline policy. Most employees would be aware, however, that termination is a possibility because terminations for disciplinary reasons almost always involve some sort of investigation or, at the very least, a conversation with the employee concerning the behavior.



Even in cases of extremely outrageous behavior, for example workplace violence, it is unlikely an agency would terminate on the spot. It is more likely the agency would suspend the employee immediately pending investigation and only terminate at the conclusion of the investigation.

In most cases, agencies attempt progressive discipline prior to termination but the DSHR Model Progressive Discipline Policy and most agency policies allow for an agency to terminate for a first offense based on the specific circumstances of the event.

Termination Related to Performance

There is no state statute or regulation which requires that a non-covered employee be given notice prior to their termination for performance reasons. It is best practice, however, to attempt to coach an employee to improve their performance prior to terminating.

Termination of a covered employee for performance related issues is governed by the applicable agency's Employee Performance Management System (EPMS) policy. State Human Resources Regulation Section 19-715.01(A) requires that DSHR review and approve each agency's EPMS policy and that each policy include a Substandard Performance Process. For an agency's policy to be approved, the substandard process must include a requirement that the covered employee be provided notice of poor performance and the opportunity to improve their performance prior to being terminated or otherwise removed from their position.

The process required to address poor performance is specific and requires that a Warning Notice of Substandard Performance be issued prior to issuing an unsuccessful (or equivalent) performance rating to a covered employee. This notice should be issued whenever an employee's performance in any essential job function or objective that significantly impacts performance is considered inadequate.

The notice provides for a period of not less than 30 days and not more than 120 days for the employee to improve their performance. The employee and their manager draft a work improvement plan which clearly identifies the applicable performance deficiencies and the performance expectations. The manager and employee are required to hold regularly scheduled meetings during the warning notice period to discuss the employee's progress toward improving the performance. These meetings are documented, and copies are



provided to the employee. If the employee's performance does not improve to an acceptable level prior to the end of the review period they are removed from the position. The only exception to this is if an employee has received two warning notices of substandard performance in the previous 365-day period. If this is the case the employee may be removed from the position if their performance falls to an unacceptable level without going through a third substandard performance process.

Who can terminate an employee immediately (e.g., does it have to be the direct supervisor, or can it be someone above the direct supervisor)?

There is no state statute or regulation which governs who has the authority to terminate an employee immediately. This is governed by the agency's progressive discipline and EPMS policies and the established internal processes and procedures.

In general, however, most agencies require approval of the agency director or other senior staff prior to terminating an employee. Most also require that the agency's human resources office review the circumstances of a termination prior to the employee being terminated. If a situation occurred and it was necessary to remove an employee from agency property immediately, their supervisor, or other more senior employee, likely has the authority to suspend the employee immediately pending investigation. This would probably only occur in the most extreme cases in which there was a safety or security concern. Approval would likely need to be obtained from agency leadership and possibly agency human resources as quickly as is practicable.

Grievance Appeals

During the call with Committee staff, we discussed grievances and grievance appeals. As background, a covered employee must file a grievance in writing with the agency in accordance with his/her agency's grievance policy prior to filing an appeal to the State Human Resources Director. This grievance must be submitted in writing within 14 calendar days of the effective date of the adverse action or when the employee receives notification of the action, whichever is later. A grievance cannot be filed prior to the effective date of the adverse action.

An agency should process an employee's grievance within 45 calendar days after the employee files the grievance. If the agency fails to make a final decision within 45 calendar



days, it is considered an adverse decision and the covered employee may appeal to the State Human Resources Director. If the agency does not make a final decision within 45 calendar days, the agency should continue its internal grievance process and render a final decision even if the employee submits an appeal to the State Human Resources Director.

After a covered employee has completed the internal grievance process with their agency, or the time for the agency to respond to the grievance has passed, the covered employee may file an appeal with the State Human Resources Director.

According to the State Employee Grievance Procedure Act, an employee may file an appeal in writing either within 10 calendar days of receipt of the agency's final decision or within 55 calendar days after filing the grievance within the agency, whichever is later. The employee must submit a written request to the State Human Resources Director to initiate an appeal.

For more information on the employment actions that are grievable and the grievance appeal process, please visit the following link:

https://www.admin.sc.gov/sites/default/files/state_hr/SC%20State%20Employee%20Grievance%20Procedure.pdf

The chart below outlines the type of adverse employment actions appealed in FY18-19.
Adverse Employment Actions Appealed

Adverse Action	Number of Appeals Received
Termination	39
Suspension of Less Than 10 Days	14
Demotion	4
Constructive Discharge	2
Lack of Promotional Consideration	1
Loss of Bonus	1
Retaliation	1



Unknown <i>(The appeal was filed with no adverse action identified and the appellant did not respond to attempts to contact them.)</i>	1
Total Appeals to State HR Director	63

Every year, most appeals accepted by the State Human Resources Director are resolved through mediation. Below is a chart of the percentage of appeals resolved through mediation for the last five fiscal years.

Percentage of Appeals Resolved Via Mediation

Fiscal Year	Percentage Resolved Through Mediation
2014-2015	65%
2015-2016	57%
2016-2017	51%
2017-2018	66%
2018-2019	72%

Finally, below is a chart that summarizes the outcomes of appeals forwarded to an arbitrator or the State Employee Grievance Committee for the last five fiscal years:

Outcomes of Forwarded Appeals

Fiscal Year	Agency Action Overturned	Agency Action Upheld
2014-2015	1	19
2015-2016	2	17
2016-2017	0	18



2017-2018	4	14
2018-2019	3	6

Employee Relations Training

Employee relations issues are often complex and may be difficult for agencies to appropriately address. To assist agencies in resolving employee relations issues, particularly those related to employee conduct concerns, DSHR is developing a four-hour structured forum to present agency employee relations and human resource leadership personnel with best practice information related to the following topics:

- Progressive Discipline
 - Focused on pitfalls of disciplinary action and suggestions for appropriate documentation.
- Investigations
 - Focused on who should conduct the investigation, who to interview, the types of evidence to gather, and the documentation needed.
- Grievance and Appeal Process
 - Focused on how to respond to a request for information from DSHR, how to prepare for a mediation and common errors agencies make while administering discipline or during the grievance and appeal process which may increase their liability.
- Coaching Managers
 - Focused on providing guidance to HR personnel on how to coach managers to handle employee conflict and communicate effectively with the hopes of improving the workplace environment and avoiding the escalation of employee issues.

Two sessions of “Best Practices in Employee Relations” will be presented during calendar year 2020 on dates to be determined. The target audience is HR Directors and Employee



Relations Managers. Offering two sessions will provide more opportunities for all current Employee Relations Managers and HR Directors to attend.

Beginning in calendar year 2020, one session of “Best Practices in Employee Relations” will be offered each calendar year to provide the opportunity for employees new to Employee Relations, new to an HR Director role or new to state government to attend. In addition, one additional forum will be presented each year to cover new employee relations related trends, an educational topic not covered in the “Best Practices in Employee Relations” session, or any state government specific topics that may arise. The intent is for these to be four-hour sessions as well.

As always, please let me know if you have any questions regarding the information provided in response to the Committee’s questions or if I can be of further assistance.

