

**CAREER SERVICE APPEALS
UNDER SERVICE FIRST**



Public Employees Relations Commission

This document has been prepared by the Public Employees Relations Commission (PERC) to explain the hearing process in career service appeals. It is important to remember that the information presented is general and is intended to cover the usual appeal. The explanations do not cover all possible situations that may arise in a case.

PERC forms and procedures necessarily change over time to accommodate legislative and rule amendments. You should always consult the applicable statutes and rules. It is essential that you read carefully any orders issued in your case. These materials should not be cited or otherwise offered as authority for any legal position.

Stephanie W. Ray, Chair
Charles H. Kossuth, Jr., Commissioner
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CAREER SERVICE APPEALS UNDER SERVICE FIRST

I: INTRODUCTION

This guide will help you determine whether you have the right to appeal a disciplinary action and guide you through the appeal process. It will also help you to decide whether to represent yourself or seek legal representation, and aid you in the preparation and presentation of your case if you choose to represent yourself.

Each year, many employees choose to represent themselves in career service appeals. Others elect to employ an attorney or a non-attorney representative, such as a union representative, to present their cases. The decision as to whether to represent yourself is an individual choice. It depends upon the complexities of the issues and evidence in your case, your ability to prepare and effectively present your position under stressful circumstances, and your financial resources. In considering this last factor, you should be aware that the Commission has no authority to order the agency to pay your attorney's fees and costs even if you succeed in your appeal.

If you do choose to represent yourself, be sure to keep the Commission informed of any changes in your address and phone number. It is important that the Commission be able to contact you concerning your case at all times. Further, you should take care to read and respond to all Commission orders promptly.

If a non-attorney representative represents you in your appeal, your representative may be questioned by the hearing officer prior to hearing to determine whether he or she is qualified. The hearing officer will consider the criteria found in Florida Administrative Code Rule 28 - 106.106(4). You are required to notify the Commission if you change or dismiss your representative or attorney.

II: THE PUBLIC EMPLOYEES RELATIONS COMMISSION

Organization of the Commission

The Public Employees Relations Commission, commonly referred to as "the Commission" or "PERC," was created to assist in resolving disputes between public employers and their employees. The Commission is a three-person panel composed of a chairman and two commissioners. The chairman and the commissioners are appointed to four-year terms by the Governor, subject to confirmation by the Florida Senate.

The Commission employs a staff of hearing officers to conduct hearings in career service appeals. All of the Commission's hearing officers are attorneys who have received special training in how to conduct fair and impartial hearings. Hearing officers are assigned to career service appeals pursuant to a random rotation. The Commission also employs a settlement attorney to help the parties resolve their dispute through settlement, if possible.

The clerk of the Commission and a staff of deputy clerks receive and record any documents filed in career service appeals and maintain the case files. The clerk handles the scheduling of career service appeals.

A variety of Commission staff is available to answer questions you may have concerning the status of your appeal and Commission procedures. The Commission's operator will direct your call to the appropriate person. You should not attempt to telephonically contact the hearing officer assigned to your case, except in an emergency.

Location

The Commission's offices are located in Tallahassee; however, hearings may be held at various locations throughout the state. The Commission's address is:

Public Employees Relations Commission
4050 Esplanade Way
Tallahassee, Florida 32399-0950

Mail or deliver all pleadings and other documents in your case to this address. The Commission's phone number is (850) 488-8641, or SUNCOM 278-8641, and its FAX number is (850) 488-9704. The Commission's offices are open from 8:00 a.m. to 5:00 p.m. (EST), Monday through Friday. The offices are closed on state holidays. The Commission's FAX machine will only receive transmissions when the offices are open.

The Applicable Law

The conduct of your case will be governed by the Uniform Rules of Procedure (Chapter 28 of the Florida Administrative Code), and pertinent provisions of the Florida Statutes, especially Sections 110.227 and 120.57, and Chapter 447, Part II. The Florida Statutes and the Florida Administrative Code are available through the Internet and at the libraries of law schools and courts throughout the state.

The Commission publishes the orders issued in career service cases in the Florida Career Service Reporter (FCSR). The FCSR is organized into annual volumes. Each volume contains an index of cases and a subject-matter digest covering that volume. The digest will help you to find cases that address points of law relating to the issues in your case. There is a cumulative digest, bound separately, which covers the first ten FCSR volumes (1986 - 1995). Copies of the FCSR are available for reference at the Commission's library and at certain other locations.

III: MAIN ISSUES IN CAREER SERVICE APPEALS

Who Can Appeal?

In filing a career service appeal, it is important to first determine whether you are an employee who has the right to bring a career service appeal. The Commission may only review actions taken against persons who have permanent status in a career

service position. Thus, if you are an employee in a position classified as select exempt, senior management, or other personnel services (OPS), you do not have a right to appeal to the Commission. Further, if you are in a career service position but are a trainee or were in your probationary period when the personnel action was taken, you may not appeal the action to the Commission. Moreover, an employee of an employer other than the State of Florida, such as a contractor providing services to a state agency, does not have career service appeal rights. Finally, employees of the state university system and community colleges may not file career service appeals.

What Can Be Appealed?

If you have determined that you are a permanent career service employee with appeal rights, you next must examine whether the personnel action of which you are complaining is one that the Commission is authorized to review. Not every action affecting a career service employee may be appealed. The Commission is authorized to hear appeals of final agency actions establishing reductions in pay, demotions, suspensions, dismissals, and involuntary transfers of more than fifty miles by highway. The scope of this guide is limited to the issues and procedures raised by appeals of disciplinary actions. The issues and procedures for appeals of layoffs, and other non-disciplinary actions may differ. You may not appeal an oral or written reprimand, an adverse performance evaluation, or a change of supervisors. Although the Commission does not have authority to hear appeals of voluntary resignations, if it is alleged that the resignation was not truly voluntary, the Commission will conduct a hearing to determine whether the allegation has been proven, in which case the personnel action will be appealable as a dismissal.

Also note that you may only appeal an agency action, which is **final**. Appeals filed during an agency's pre-determination procedures or before the agency has issued a notice of final action will be dismissed as premature.

Many of the personnel actions that may be appealed to the Commission may also be challenged through grievance procedures. You may not, however, pursue both a career service appeal and a grievance concerning the same personnel action. You must choose which procedure you will use.

When Can You Appeal?

The opportunity to file a career service appeal is not unlimited. Written notice of your appeal must be filed with the Commission within **twenty-one calendar days** from the date on which you received the notice of the final agency action. This means that the notice of your appeal must actually be **received** by the Commission within that twenty-one day period. Note that the timely filing of an appeal is measured by the date of its receipt by the Commission, not the date that the notice of appeal was mailed or the postmark date for its mailing.

The Commission will dismiss appeals filed after this filing period unless you present a compelling equitable reason for your delay by showing that you were misled or lulled into inaction by the agency, that you were in some extraordinary way prevented from asserting your appeal on time, or that you filed your appeal on time but with the wrong agency. This is a hard standard to meet; therefore, it is extremely important that you make sure that your notice of appeal is received by the Commission within the 21-day filing period.

Issues in Disciplinary Actions

For the majority of state employees, the appeal of a disciplinary action raises one main issue: Did the agency have just cause to discipline the employee? If the agency did have cause and the penalty selected is within the range allowed by the agency's rules for the offense proven, the discipline will be affirmed.

If the appealing employee is a correctional or law enforcement officer, a firefighter or a professional health care provider, the case may not only raise the issues of just cause and the conformance of the penalty to the rules, but also the question of whether the penalty that the agency elected to impose should be reduced to a lesser penalty based on an evaluation of the mitigating and aggravating circumstances in the case.

❖ *Cause*

The burden of proving that it had cause for discipline is placed upon the agency. The agency must prove at hearing that you engaged in conduct that violated an established standard of conduct, as described in your notice of final action. Note carefully the standards of conduct or rules that you are charged with violating and the definition of those standards and rules in your employee handbook. If you are contesting cause, you must be prepared to show that either the conduct with which you are charged did not occur, or that it did occur but does not violate the agency's standards of conduct.

❖ *Mitigation*

Where applicable, the employee has the burden of proving facts that justify reduction (mitigation) of the penalty selected by the agency. Among the factors that the Commission may consider as mitigators are the lack of seriousness of the conduct, disparity in treatment of other employees, a previous employment record of significant length or notable quality, the absence of any prior disciplinary record, and extraordinary circumstances which contributed to or diminished the employee's ability to avoid the conduct proven.

In evaluating whether mitigation is appropriate in a case, the Commission will balance any proven mitigators against any aggravating circumstances proven to exist. Some circumstances that may be found to be aggravators include a prior record of discipline, especially for the same offense charged and a particularly serious consequence of the offense relative to the employee's duties and responsibilities. These are not the only mitigators and aggravators that the hearing officer and the Commission may consider when deciding whether a discipline should be reduced. The identification

of circumstances that are truly mitigating and aggravating in nature and the weight to be assigned to those factors is a developing area of the Commission's practice. Thus, the parties should present to the hearing officer any evidence that they feel weighs in favor of or against mitigation.

You are cautioned that cases decided before July 1, 2001, are not reliable guides to how the Commission currently analyzes and decides mitigation issues. A major change in the controlling statutes implemented at that time deleted a requirement that the Commission restrict its consideration to four mitigation criteria defined in the statute. While those four mitigation factors (seriousness, disparate treatment, employment and disciplinary records, and extraordinary circumstances) still survive in those cases in which mitigation is at issue, the Commission is no longer limited to those four factors, and even in the application of those four is no longer constrained by the statutory definitions.

Standard of Proof

A career service case is not a criminal proceeding. Therefore, the agency is not required to prove the charges against you "beyond a reasonable doubt." It must only prove its case by a preponderance of the evidence.

IV. PREHEARING PROCEDURE

Filing Pleadings with the Commission

The documents that the parties file in a legal proceeding are called "pleadings." These may include motions, notices, and responses to orders issued by the Commission or the hearing officer. All pleadings in a career service case must be filed at the Commission's address. See page 2. Most pleadings must be filed by a certain deadline. Generally, the Commission or hearing officer will not consider a late document unless good cause is shown for the delay.

Calculating Deadlines

In calculating any deadline set by a rule or an order, the day of the act from which the deadline begins to run is not included in the time period. So, for example, if exceptions may be filed within fifteen calendar days from the date of a recommended order issued on April 4, you would count the fifteen days by starting on April 5 as day one. The last day of the time period is included, unless it is a Saturday, Sunday, or a legal holiday, in which case the period ends on the next day which is not a Saturday, Sunday, or legal holiday. Saturdays, Sundays, and legal holidays that fall within the time period are counted if the time period is for a certain number of calendar days; Saturdays, Sundays, and legal holidays that fall within the time period are not counted if the time period is for a certain number of business days (when it is not specified whether a certain filing period is calendar days or business days, it is calendar days). Pleadings filed after 5:00 p.m. will be considered to have been filed at 8:00 a.m. on the next business day.

Form of Pleadings

In some cases, the Commission will provide you with a form that you may use to respond to Commission orders. Otherwise, your pleadings should be prepared on white paper measuring 8 ½ by 11 inches. To ensure that your pleadings can be understood and considered, it is important that they be typewritten or printed legibly.

Certificate of Service

Every document filed in a career service case by either party after the filing of the notice of appeal must be “served” on the opposing party. This means that the person filing the document must provide a copy to the opposing party, either by mail or personal delivery. When you file a document, you must send or deliver a copy to the agency’s attorney, if there is one, or the agency’s representative. The name of the agency’s attorney or representative will be in the prehearing order issued by the hearing officer.

All documents filed with the Commission must contain a statement, called a certificate of service, stating that a copy has been given to the other party, the means by which the copy was delivered, and when this was done. The certificate of service is placed at the end of each document. This is a sample certificate of service:

Certificate of Service

I certify that a true copy of the foregoing has been delivered by [hand or U.S. Mail] to [name and address of agency attorney or representative] this [date] day of [month] , [year] .

Signature

Summary of the Appeal Process

A career service appeal generally proceeds as follows:

- Agency takes final action.
- The employee files notice of appeal.
- A hearing officer is appointed.
- The hearing officer issues a notice scheduling the hearing and requiring the parties to file prehearing statements. Most hearings are scheduled to be conducted within thirty days of the filing of the appeal.
- The parties file a prehearing statement and get witness subpoenas.
- The hearing is held.
- The parties file post-hearing argument and proposed findings of fact within about five days of the hearing (deadline is set at hearing).
- The hearing officer issues a recommended order and submits the case to the Commission.

- The parties file exceptions to the hearing officer's recommended order within **fifteen calendar days** of the date of the recommended order. Oral argument may also be held, if requested by the parties and approved by the Commission.
- The Commission reviews the record and issues a final order within forty-five days from the date of the hearing if no exceptions are filed, or within forty-five days of any exceptions filed or oral argument held.

Filing the Appeal

The first step in a career service appeal is filing a notice of appeal in the proper place within the time limits for doing so. The Commission prints a form that may be utilized for your notice of appeal. (See Figure #1) It is not necessary to utilize the Commission's notice of appeal form; you may file an appeal by providing the following information on any paper:

- Your name, address, and phone number.
- The name, address, and phone number of your attorney or representative, if any.
- A statement that you wish to appeal the agency's action, specifying the kind of action and the agency's name.
- Your signature (or the signature of your representative or attorney, if any).

Deliver two copies of your notice of appeal and two copies of the final action letter to the Commission's office by mail, fax, or in person. You do not need to send a copy of your notice of appeal to the agency; the Commission's clerk will do this for you. Your notice of appeal must be received by the Commission within twenty-one calendar days from the date you received the notice of final action.

Notice of Hearing and Prehearing Statement

The Commission's appeals coordinator will contact the parties to schedule the hearing. The Commission is directed by law to conduct a hearing within **sixty calendar days** of the filing of a notice of appeal. The law also specifies that no extension of time for the hearing may exceed thirty calendar days absent extraordinary circumstances, and no extension of time may be granted without the consent of all parties. The hearing will be scheduled to be conducted in a location near you. The hearing officer who will conduct the hearing may travel to that location, or may preside by telephone or video from Tallahassee.

Sometimes more than a single day is required to complete a hearing. When this happens, the hearing may be continued on the next day. You must be prepared to stay until the hearing is over, even if it extends over several days.

Once a hearing date has been set, the hearing officer will issue a notice of hearing. A sample notice of hearing appears in Figure #2. It is extremely important that you read this notice carefully. The notice will set the date, time, and place of your hearing. The notice of hearing also directs the parties to file prehearing statements. In

most cases, you will be required to provide the following information in your prehearing statement:

- The names and addresses of any witnesses whom you intend to call at hearing, except rebuttal witnesses.
- An indication of whether you require a subpoena for any of your witnesses.
- A brief statement explaining why you believe your appeal should be sustained (why you should win).
- If you are a law enforcement or correctional officer, firefighter, or professional health care provider and you intend to argue that your discipline should be mitigated due to disparate treatment of other employees, you must list the names of those other employees.

The hearing officer will provide you with a form (Figure #3) which may be used for your prehearing statement. Your prehearing statement must be filed with the Commission at least **twelve calendar days** before the hearing date. You must send a copy of your prehearing statement to the agency's attorney or representative and note this in a certificate of service. The agency will provide you with a copy of the prehearing statement that it files with the Commission.

If your hearing is to be conducted by telephone or videoconferencing, the prehearing order will direct the parties to file any exhibits (documents they intend to use as evidence at hearing) with the Commission and deliver copies to each other no later than **seven calendar days** before the hearing.

The hearing officer assigned to your case may issue other prehearing orders requiring additional information. Occasionally these orders require that you provide descriptions of the testimony you expect from each of your witnesses, establish a different schedule for the parties to exchange exhibits, or require that the parties state their position on a particular issue. These orders are intended to clarify the issues and aid in management of the hearing. You should respond to all orders in a timely manner.

Objection to a Telephone Hearing

If your hearing is to be conducted by telephone or video, the notice of hearing that you receive will state this. In a telephone hearing, the hearing officer will be at the Commission's offices in Tallahassee. The Commission's court reporter will be at another location more convenient to the parties. The hearing will be conducted over a speakerphone. You may choose to appear or present witnesses at either location.

If you have a specific objection to having your hearing conducted by telephone, you must file a statement of your objection with the Commission within **ten calendar days** from the date of the notice of hearing. This means that the Commission must receive your objection within those ten days. Your objection must include a clear statement of the facts supporting the objection. The hearing officer will not change a telephone hearing to an on-site hearing based only on a general claim that he or she

needs to be present to observe the witnesses in order to judge the truthfulness of their testimony. If you do not file an objection within the ten-day period, you may not later object to having your hearing conducted by telephone.

Preparing for Hearing

The hearing is your only chance to present your case to the hearing officer. You must have all of your witnesses and evidence prepared and be ready to present your case on the date of the hearing. If you fail to appear at the hearing and do not have a valid legal reason for your absence, the case will be dismissed and you will not have a second chance to present your side. The Commission will schedule a new hearing after a non-appearance only if your absence was caused by circumstances beyond your control or excusable neglect, you act with due diligence to explain your absence and seek a new hearing, and the documents in the case so far indicate that there is some merit to your appeal.

❖ *Witnesses and subpoenas*

You should be sure that your witnesses will be available on the hearing date and you should be sure that you know what their testimony will be. If you do not know what a witness will say in response to your questions, you might mistakenly present evidence that is harmful to your case. Further, if an intended witness does not have a clear memory of the events, you may not want them to testify.

To ensure that a witness will appear at hearing, it is often advisable to request that the Commission issue a subpoena for that witness. A subpoena is a command from the Commission for the witness to appear at the hearing to present testimony. You may also request a subpoena duces tecum, which commands a witness to appear with certain papers, documents, or other things described in the subpoena.

The issuance of subpoenas may be requested in your prehearing statement, or by a separate written request to the Commission's clerk. The subpoenas will be mailed to you. It is your responsibility to ensure delivery of the subpoenas to the named witnesses by personal or certified mail service. Service can be made by a process server, a law enforcement officer, or any other person who is not a party to the case and who is at least eighteen years of age. As the appealing employee, you cannot hand-deliver subpoenas in your own case. A letter accompanying the subpoenas describes the procedures for serving subpoenas and the fee that must be paid to some witnesses at the time of serving their subpoenas.

If a person whom you have served with a subpoena does not appear at the hearing, you can compel their attendance by petitioning the circuit court to enforce the subpoena. To do this, you must provide the hearing officer with proof that the subpoena was lawfully served on the person.

❖ *Documentary Evidence*

In preparing your case, you may want to look at agency documents. In most cases, agency records are available pursuant to the Public Records Act, Chapter 119, Florida Statutes. The hearing officer will not require the agency to provide records to you unless you have first requested the records from the agency pursuant to the Public Records Act and been refused.

At hearing, you will be allowed to present both testimonial evidence and documentary evidence, also known as “exhibits.” If you intend to present exhibits, it is advisable to organize them prior to hearing in the order you plan to present them at hearing. Make sure that you have copies of each exhibit for yourself, the agency’s attorney, and the hearing officer.

❖ *Motions*

Motions are requests by the parties that the hearing officer or the Commission take certain action in a case. For example, you would file a motion if you wished to delay the date of your hearing. Motions are usually presented in written form; however, oral motions may be made during a hearing. Before filing any motion, you should advise the agency’s attorney or representative of your intention to file the motion and the contents of your motion. You must report in your motion whether the agency has any objection to the request you are making. The agency is also required to contact you to determine your position on any motion it files with the Commission, except a motion to dismiss the case.

Your written motion must contain:

- A heading that identifies the parties and the case number.
- A concise statement of the action you desire the Commission or hearing officer to take and the facts justifying the requested action.
- A statement that you have conferred with the agency’s attorney or representative and whether the agency has any objection to your motion.
- A certificate of service.
- Your signature.

You may attach to your motion documents that support the request you are making. Your motion must be filed with the Commission and a copy delivered to the agency. If your motion requests an extension of some deadline which has been set, for example, the time in which you must file your prehearing statement, your motion must be received by the Commission before the expiration of that deadline.

If time permits, the agency may file a response to any motion that you file. Likewise, you may respond to any motion filed by the agency. Your response to a motion must be filed within seven calendar days after the date of service noted in the certificate of service at the end of the agency’s motion.

❖ *Settlement Negotiations*

The Commission's clerk is available to assist in the settlement of career service cases. The clerk will contact you, or you may reach him by calling the telephone number given in your notice of hearing. The clerk will assist you in identifying the strengths and weaknesses of your case and will communicate any settlement offers and the responses to those offers between you and the agency. The clerk will not discuss the content of settlement negotiations with the hearing officer or the Commission and does not have any influence upon the outcome of your case if it goes to hearing.

❖ *Continuances*

Continuance, or postponement and rescheduling, of career service hearings is not favored by the Commission. Not only is the availability of continuances limited by the law, but also it is generally in the interest of all parties to avoid delay in resolving a career service appeal. Therefore, the hearing officers rarely grant lengthy continuances, repeated continuances, or continuances requested immediately prior to, or on the day of, hearing. A hearing officer will usually grant one short continuance to an employee, if the request is made far enough in advance of the scheduled hearing date and the agency agrees to the continuance. Even with the consent of the agency, a hearing date may not be extended more than thirty days unless justified by extraordinary circumstances.

Continuances should be requested in a motion to the hearing officer. The motion should state the reasons for the requested delay and the length of delay desired. If you are requesting a continuance, you are required to contact the agency's lawyer to determine the agency's position on the motion. You must state in your motion that the agency's lawyer has been contacted and whether he or she opposes the continuance.

V. THE HEARING

The Players

The hearing will be conducted by a hearing officer. Also present in the hearing room will be a court reporter who is paid by the Commission to make a record of everything that is said in the hearing room. Note that while the Commission pays the court reporter to record the hearing, he will not transcribe his notes and produce a transcript unless paid by one of the parties to do so.

The court reporter can accurately record the speech of only one person at a time. So, please do not speak while someone else is speaking. It is also important that both you and your witnesses speak loudly and clearly to enable the court reporter to hear and understand both the questions and the answers. A gesture, a nod, or an "uh-huh" cannot be recorded by the court reporter. Witnesses who respond in this manner should be asked to make a verbal response so that the record is clear.

The agency's lawyer, the agency's representative, and witnesses for both parties will also be present at hearing. There is a rule that the parties may invoke to exclude the witnesses from the courtroom except when they are testifying. This is the rule of sequestration. The rule also provides that the witnesses may not talk with each other about the case during the course of the hearing. This is done so that each witness gives her own version of the events to which she is testifying as she remembers them, without influence from other witnesses' testimony.

The rule must be invoked by one or both of the parties. If one of the parties chooses to invoke the rule, the hearing officer will instruct the witnesses on the meaning of the rule and dismiss them from the hearing room prior to taking testimony. The appealing employee and the agency's representative may remain in the hearing room even if they intend to testify in the case.

A Word About Decorum

Although the hearing process and confronting evidence regarding alleged misconduct is a stressful and emotionally charged experience for many employees, you will be able to best present your case if you remain calm, listen attentively to the hearing officer, and speak in a polite manner. You should avoid arguing with the hearing officer, the agency's attorney, or the witnesses. Neither party is permitted to speak to the hearing officer about the case unless the other party is included in the discussion.

Prehearing Conference

At the beginning of the hearing, the hearing officer may conduct a prehearing conference. At the conference, the hearing officer will usually ask the parties to stipulate, or agree, that certain facts are true. Entering into stipulations is intended to simplify and speed up the hearing because it will not be necessary for the parties to present evidence on these agreed-upon facts. A typical stipulation might agree that the employee had permanent status in a career service position at the time of the discipline. The parties might also stipulate to the employee's date of hire or length of employment, the contents of the employee's prior disciplinary record, or any other factual matters not in dispute.

During the prehearing conference, the parties may also have an opportunity to exchange exhibits that they plan to introduce at hearing. After examination of each other's proposed exhibits, the parties will be asked whether they will stipulate to the admission of those exhibits into evidence. Those exhibits that are agreed upon will be numbered and marked for admission into the record. The hearing officer may also ask the parties to identify the witnesses which they intend to call at hearing and summarize the expected testimony of each witness. Finally, at the prehearing conference the parties may be asked whether they wish to invoke the rule of sequestration. You should be prepared to decide at that time whether you wish to have the witnesses excluded from the hearing room.

Opening of Hearing

Following the prehearing conference, the hearing officer will commence the hearing with an opening statement which identifies the case and instructs the parties as to their burdens of proof and the manner in which the hearing will be conducted. In this opening portion of the hearing, you should be prepared to do the following:

- State your name and mailing address for the record.
- State your agreement to any stipulations that were developed during the prehearing conference.
- State your agreement to the admission of any of the agency's exhibits to which you stipulated during the prehearing conference.
- If you are a law enforcement or correctional officer, a firefighter, or a professional health care provider, state whether you are also contesting that, even if there was cause for your discipline, the penalty imposed was too severe.

The hearing officer will also ask you to examine the disciplinary notices (the predetermination notice and the final action letter) to determine which of the statements contained in those notices are in dispute. You should be prepared to state whether you agree with or dispute each of the statements set forth in the notices. The hearing officer will now be prepared to begin hearing witness testimony. Since the hearing officer has read the disciplinary documents, your appeal form, and the prehearing statements, it is not necessary for the parties to present an opening statement "setting the stage" for their case.

Examination of Witnesses

The order in which the parties will proceed for the presentation of their cases will have been explained to you by the hearing officer at the opening of the hearing. The majority of career service appeal hearings proceed in the following order.

❖ *The Agency Presents its Case on Cause for Discipline*

First, the agency presents its evidence on the issue of whether it had cause to discipline you. During this portion of the hearing, the agency will call its witnesses and present any documentary evidence it has to establish its case. You will have the opportunity to cross-examine each of the agency's witnesses. It is important that you ask questions of the witness to bring forth the witness's testimony on a certain point. Do not merely make statements concerning what you believe to be the truth of the matter. Your statements made during the questioning of a witness are not evidence which the hearing officer can consider in finding the facts of your case. Following cross-examination, the agency will have a chance to ask further questions to attempt to rebut any evidence brought out in your cross-examination. When the agency has finished presenting this evidence, it will advise the hearing officer that it rests its case.

❖ *The Employee Presents Defense and Evidence on Mitigation*

Next, it will be your turn to present any evidence you have to contradict or cast doubt upon whether the agency had cause to discipline you. This is also the time to present any evidence you have which indicates that the penalty selected by the agency is outside the range for your offense. If you are a law enforcement or correctional officer, a firefighter or a professional health care provider, you must also present any evidence that you have concerning any mitigating circumstances present in your case, unless you have waived the issue of mitigation. In putting on your case, you will be allowed to call witnesses and present documentary evidence. The agency will be allowed to cross-examine each of your witnesses. Following cross-examination, you will have an opportunity to ask questions of each of your witnesses to rebut any testimony brought out on cross-examination.

❖ *The Agency Presents Rebuttal*

When you have completed the presentation of your evidence, the agency will have an opportunity to present any rebuttal witnesses. The testimony of these witnesses is restricted to new evidence rebutting matters raised in your case. The agency will not be allowed to merely repeat testimony already heard from its witnesses when they testified in the presentation of the agency's case. As always, you will have an opportunity to cross-examine the agency's witnesses.

Exhibits

Some exhibits may be admitted by stipulation at the beginning of the hearing. Any other documents that you want the hearing officer to consider in reaching his decision must be entered into evidence during the hearing. See the section on reopening the record for a discussion of the difficulty of submitting documents after the close of the hearing.

If your hearing is conducted by telephone or video technology, the hearing officer will not be present at the hearing site. Therefore, it is important that you provide copies of your intended exhibits to the hearing officer and the agency at least seven days before the hearing date, as required by the prehearing order.

Objections

At hearing, either party may object to the form or the substance of a question asked by the opposing party. Your objections should be addressed to the hearing officer, not the agency's attorney. It is important to state your objection before the witness has answered the objectionable question. If the agency objects to a question that you have posed, you will have an opportunity to respond to the objection. State the basis for your objection or your response to an objection as clearly and simply as possible. The hearing officer will not expect you to know legal terminology and the rules of evidence. However, she cannot grant your objection or agree with you in denying an objection to a question you have posed if she cannot understand your argument.

Your Testimony

An employee who is representing himself may testify by taking the oath as a witness and presenting a narrative statement of the facts and events that he knows to be true. As with any witness, the employee will then be subject to cross-examination by the agency's attorney. Following cross-examination, the employee will be afforded the opportunity to make a further statement under oath rebutting or explaining the answers that he gave on cross-examination.

Telephone Testimony

A witness's testimony may be taken by telephone from a location other than the Commission's offices or the hearing site. If you want to present a witness's testimony by phone from a remote location, you must arrange for a notary public to be physically present with the witness to administer the oath and verify the witness's identity.

Closing Statements

At the end of the hearing, after all of the testimony and other evidence has been presented, the parties will be offered the opportunity to either immediately present a brief oral closing statement, sometimes called closing argument, or submit a written argument at a later date. The employee and the agency's attorney each make their own decision, so one party may choose to present an oral argument while the other waits to file a written argument. You may choose to do neither, but you may not choose to do both. Your argument, whether oral or written, should aim to help the hearing officer to understand the meaning of the evidence presented at hearing. Your argument must be based solely on that evidence and may not refer to or seek to introduce new evidence or facts not proven during the hearing. The hearing officer will tell you the deadline for filing written arguments in your case. Remember to mail or deliver a copy of your argument to the agency's attorney and note this in a certificate of service.

VI. POST-HEARING PROCEDURES

Proposed Findings of Fact

All parties, even those who choose to make an oral closing argument, may file proposed findings of fact for the hearing officer to consider. Your proposed findings of fact should be brief statements of the facts proven by evidence presented at hearing that you feel show that the agency either did not have cause to discipline you or, if you are a law enforcement or correctional officer, firefighter or professional health care provider, prove that your discipline should be mitigated.

Hearing Officer's Recommended Order

Within fifteen days after the hearing, the hearing officer will issue a recommended order. You will receive a copy of this order by mail. The recommended order will contain the hearing officer's findings of fact, a discussion of how the law applies to those facts, and the resulting conclusions of law. If the hearing officer has been called upon to decide between two or more conflicting versions of the events which led to your discipline, an explanation for how he decided which version to believe (his credibility determination) will also be included in the order.

Exceptions

At the same time that the hearing officer's recommended order is issued to the parties, it is also submitted to the Commission for its consideration. The Commission may choose to accept the hearing officer's recommendation or may reach a different conclusion. To assist the Commission in reviewing the recommended order, the parties are given the opportunity to file exceptions to that order. If you disagree with any significant aspect of the hearing officer's findings of fact or conclusions of law, you should file exceptions. This is your only chance to bring to the Commission's attention any dispute that you might have with the hearing officer's recommended order or the hearing procedure that led to that order.

Exceptions to the recommended order must be filed with the Commission within **fifteen calendar days** from the date of issuance of the recommended order. The Commission routinely grants short extensions of time for the filing of exceptions; however, a request for an extension of time must be received by the Commission prior to the expiration of the original time period. The request must state that you have contacted the agency and present the agency's position on the extension you seek. Remember to mail or deliver to the agency's lawyer or representative a copy of any exceptions or request for extension of time which you file with the Commission and include a certificate of service. Because the Commission is required to issue its final order within forty-five days of the hearing if no exceptions are filed, it is not possible to extend the time for filing exceptions beyond a few days before that deadline.

For ease of consideration by the Commission, exceptions should be organized in numbered paragraphs. Exceptions to findings of fact should include the number of the hearing officer's finding to which exception is taken and refer specifically to the evidence that supports the exception and contradicts the hearing officer's finding. If the pertinent evidence is contained in testimony, you should refer to the pages of the transcript that contain that testimony.

Any party may file a response to exceptions filed by the opposing party within ten days from the date given on the certificate of service on the exceptions.

❖ *The Need for a Transcript*

The Commission can reject or modify a hearing officer's finding of fact **only** if it can determine that the finding is not supported by competent, substantial evidence presented at hearing. The Commission cannot make this determination without first reviewing the entire evidentiary record, including a transcript of the evidentiary hearing. Similarly, without first reviewing a complete transcript, the Commission is forbidden by law from rejecting or altering the hearing officer's recommended penalty, including the recommendation as to whether to mitigate your discipline and, if so, how much to reduce it. Therefore, if you wish the Commission to consider exceptions challenging the hearing officer's findings of fact or recommended penalty, you must ensure that the Commission has been provided with a complete hearing transcript.

The Commission does not purchase transcripts, and it will not have access to a transcript unless one of the parties purchases and files one. If you file exceptions to the hearing officer's findings of fact or recommended penalty and the Commission has not been provided with a transcript, the Commission will be unable to grant those exceptions. The court reporter will generally be able to provide a transcript within seven working days of receiving your order. This means that, unless you ordered the transcript on the date of the hearing, you may not receive the transcript until after the deadline for filing exceptions. You should not delay the filing of your exceptions awaiting a transcript. Because of the Commission's tight timelines for resolving career service appeals, it is recommended that you prepare and file your exceptions in a timely manner and then supplement those exceptions with citations to the transcript when you receive the transcript from the court reporter.

Reopening the Record

On occasion, a party will ask the Commission to reopen the record after the hearing so that additional evidence may be entered into the record and considered in the case. The Commission is reluctant to reopen a record after the hearing because it prolongs the case. The Commission will consider the following factors in deciding whether to grant a motion to reopen the record:

- Whether the evidence which is sought to be admitted is newly discovered and was not available or discoverable with due diligence prior to the hearing;
- Whether the motion to reopen the record is opposed;
- Whether granting the motion would delay resolution of the case; and
- What impact, if any, the admission of such evidence will have on the material factual determinations made by the hearing officer.

If you are seeking to reopen the record, you should take care to explain in your motion why you could not have found and presented this evidence at the hearing and how the evidence could change one of the hearing officer's critical findings of fact. Because reopening the record is difficult, you should make every effort to discover and present all relevant evidence at hearing. Further, if you are seeking to have the Commission consider supplemental documents after the hearing record has been

closed, it is important that you submit those documents with a motion to reopen the record, not merely file the documents alone or attach them to your exceptions.

Commission Deliberations and Oral Argument

Soon after exceptions and responses to them have been filed, or the time for these filings has expired, the Commission will meet to decide your case. The hearing officer assigned to your case will not be a part of this meeting and will not discuss your case with the Commission. The Commission's decision is based only on the record before it, including exhibits, a transcript (if one has been filed), the hearing officer's recommended order, and any exceptions and responses to exceptions which have been filed. The Commission's case deliberations are not open to the public or the parties.

The Commission will occasionally schedule oral argument in a case, either at the request of a party or on its own initiative. If you wish to request an oral argument before the Commission, file your request at the same time as your exceptions. Generally, a request for oral argument is only granted when a case presents a novel legal issue. This is not an opportunity to present additional evidence but, rather, to present further argument on the points raised in the exceptions. If oral argument is granted in your case, the Commission's staff will consult with both parties to determine a mutually agreeable date. Oral argument is almost always held at the Commission's offices in Tallahassee. You may participate by telephone.

Final Order

You can expect the Commission to enter an order resolving the merits of your appeal within forty-five days of the hearing or, if exceptions are filed or oral argument is held, within forty-five days of those events. If the Commission upholds the agency's disciplinary action, it will issue a final order dismissing your appeal. If, however, the Commission determines that you should not have been disciplined or that your punishment was too severe, the Commission's order will reverse or reduce the discipline. In either of these cases, the Commission's order will also award appropriate remedies, which may include back pay and reinstatement of leave. If either party disagrees with the Commission's decision, they may appeal the order to a district court of appeal within thirty days.

VII. REMEDIES

Reinstatement

When the Commission concludes that an employee has been dismissed without just cause, or that an employee's dismissal should be reduced to a lesser discipline, it will order the agency to reinstate the employee to her former position, or to a position that has the same degree of responsibility as her former position. An employee who feels that the position to which the agency proposes to reinstate him is not comparable

to his former position may enforce the Commission's order directing reinstatement in the circuit court of the judicial circuit in which he resides.

Back Pay

Upon concluding that an employee has been discharged or suspended without cause, that a dismissal should be mitigated to a lesser discipline, or that a suspension should be shortened, the Commission may order the agency to provide the employee with back pay and benefits for the period of time that the Commission has concluded that the employee should not have been dismissed or suspended. Thus, if the Commission reduces a thirty-day suspension to ten days, it will usually direct the agency to provide the employee with twenty days of back pay and benefits.

This means that the agency is required to pay to the employee the income that they would have earned during that period, less taxes and other deductions, and less any earning which the employee had during that period which she would not have earned if her employment with the agency had not been disrupted. The agency will also be required to credit the employee with any leave time that she would have earned if she had been at work during that period. The agency may also be required to reimburse the employee for insurance premiums that it should have covered and other benefits not paid due to the now-revoked discipline. Calculation of the amount of back pay and benefits due an employee is sometimes a matter of dispute that may require additional proceedings to resolve.

A dismissed employee is required to seek other work to offset his income loss while pursuing a career service appeal. In calculating the amount of back pay to which an employee is entitled after reversal of a dismissal, the Commission will grant full back pay for the first thirty days of unemployment. After that initial period, the Commission will only grant back pay for those periods in which the employee can prove that he was involved in a good faith job search. Proof of a job search requires records of the means that the employee used to try to find work, applications submitted, and interviews in which the employee participated. Therefore, it is important to look for work and keep a record of your efforts.

VIII. APPEAL OF COMMISSION ORDERS

Appeal

Commission final orders may be appealed to the Florida district courts of appeal. You may bring your appeal either in the court of appeal for the district in which you reside or in the First District Court of Appeal in Tallahassee. An appeal is started by filing a notice of appeal with the Commission and the court within **thirty days** of the date of the final order. The Commission has no authority to grant extensions of this filing deadline, and it is strictly enforced by the courts.

Except in cases of indigency, the court will require a filing fee and the Commission will require payment for preparation of the record on appeal. The procedure for obtaining a certification of indigency is found in Section 57.081, Florida Statutes. The procedures and practice governing court appeals exceed the scope of this guide. They are set forth in the Florida Rules of Appellate Procedure and Sections 120.68 and 447.504, Florida Statutes.

**STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION
CAREER SERVICE
APPEAL FORM**

I _____ a _____
(Name - Print or Type) (Job title or classification)

wish to appeal _____ by _____
(Kind of action) (Name of agency)

I received notification of this action on _____
(Date)

Give a brief description of why you wish to appeal.

Your mailing address:

Telephone number (between 8 a.m. and 5 p.m.)

FAX number (between 8 a.m. and 5 p.m.)

Signature (Employee)

Date

Name and mailing address of
your Attorney or Representative:

Telephone number (between 8 a.m. and 5 p.m.)

FAX number (between 8 a.m. and 5 p.m.)

Signature

Date

(Attorney or Representative)

Note important information on back of form.
Send 2 copies of completed form and 2 copies of the notice of final action to:

Public Employees Relations Commission

4050 Esplanade Way

Tallahassee, Florida 32399-0950

Phone (850) 488-8641

FAX (850) 488-9704

Figure #1
(2 sided Form)

IMPORTANT INFORMATION
REGARDING
CAREER SERVICE APPEALS

Chapter 110, Florida Statutes, provides that a career service employee may appeal the following matters to the Public Employees Relations Commission:

Dismissal

Suspension

Demotion

Reduction in pay

Complaints of retirement or
transfer of career service
employees 65 or older

Complaints of age discrimination

Transfer of more than 50 miles
by highway

The Commission Clerk is available to assist you in filling out this form or answer any questions you may have regarding this appeal by calling (850) 488-8641.

This appeal must be received by the Commission within 21 calendar days after the date you received the notice of final action. You must send two completed copies of this form and two copies of the notice of final action.

A copy of your appeal will be sent to the agency by the Commission.

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

	:	
Employee,	:	Case No. CS-
v.	:	<u>NOTICE OF HEARING AND</u>
Agency.	:	<u>PREHEARING ORDER</u>
_____	:	

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 110.227, 447.207(8), and 447.503(4) and (5), Florida Statutes (2008), an evidentiary hearing will be conducted on the issues raised by this appeal on ■, at ■, in the ■. You must be prepared to present all of your evidence at that time. If additional hearing time is necessary, your hearing may continue on the following day. You must be prepared for this possibility.

If the Employee fails to appear within a reasonable time of the scheduled start of the hearing on his/her appeal, I will close the record without taking evidence and will issue an order recommending that the appeal be dismissed, unless the failure to appear was due to an emergency. If the Agency fails to appear, I will recommend that the appeal be sustained, unless the failure to appear was due to an emergency.

The Commission settlement attorney is available at (850) 488-8641, Ext. 127. The settlement attorney will contact you; however, you may initiate contact at any time after you receive this notice. If you have any questions concerning Commission procedure, contact the Appeals Coordinator at (850) 488-8641, Ext. 126.

All parties are advised to read Chapter 447, Part II, Florida Statutes, Section 110.227, Florida Statutes, and the Uniform Rules of Procedure in Chapter 28, Florida Administrative Code.

CS-

The Agency is ordered to have the Employee's official personnel file or a certified copy of that file at the hearing.

At least **twelve** days before the hearing, the parties must file with the Commission and deliver to each other a prehearing statement identifying any witnesses to be called at hearing, except rebuttal witnesses. Also, the Employee must briefly state why the appeal should be sustained. You may use the enclosed form for your prehearing statement.

If you are a law enforcement or correctional officer, firefighter, or professional health care provider pursuant to Section 110.227, Florida Statutes (2001), and intend to argue that a similarly situated employee was given less severe discipline, you must provide the name of that employee with a notice "disparate treatment" at least five days before the hearing. Failure to do so may result in disallowance of that evidence.

The only documents automatically in the record are the pre-determination notice, if any; the notice of final action; and the written appeal. All other evidence must be placed in the record by a party at the hearing. Also, the Employee should be ready at the beginning of the hearing to identify those facts asserted in the pre-determination notice (if any) and notice of final action with which the Employee disagrees.

If you intend to submit a tape recording as evidence, you must prepare a verbatim transcript of the recording and deliver it to the opposing party and to me so that it is received at least **three** days before the hearing. Upon request, the recording must be made available for examination by the opposing party before the hearing. It is the responsibility of the opposing party to check the accuracy before the hearing, if it intends to challenge the correctness of the transcript.

The Employee has the right to examine and copy public records at a reasonable time and under reasonable conditions before the hearing by asking the agency having custody of the records to make them available.

The hearing in this case will be recorded by a Commission-employed court reporter. The Commission will not provide a transcript of the hearing to the parties. However, you may purchase a transcript directly from the court reporter.

For testimony taken by telephone from a witness not at the hearing site, a notary public must be physically present with the witness to administer the oath. It is the responsibility of the party calling the witness to ensure that a speakerphone and a notary are available at the witness' location.

CS-

In accordance with the Americans With Disabilities Act, persons needing a special accommodation to participate in this proceeding should contact the Commission's Clerk no later than **seven** days prior to the proceeding. The Clerk can be reached at 4050 Esplanade Way, Tallahassee, Florida 32399-0950; or at telephone numbers (850) 488-8641; 1-800-955-8771 (TDD), or 1-800-955-8770 (voice), via Florida Relay Service.

ISSUED and MAILED to all parties this _____ day of , 2009.

Hearing Officer

**STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION**

4050 Esplanade Way
Tallahassee, Florida 32399-0950
Telephone Number (850) 488-8641 – Suncom 278-8641
Facsimile Number (850) 488-9704 – Suncom 278-9704

Employee,	:	CASE NO.
v.	:	EMPLOYEE'S PREHEARING STATEMENT
Agency.	:	
<hr style="border: 0.5px solid black;"/>		

You are ordered to provide a prehearing statement to the representative of the agency and send a copy to the Commission at least twelve days before the hearing. You may use this form to provide the information required to be in the statement.

1. List any witnesses to be called at hearing, except rebuttal witnesses, and indicate whether you need a subpoena for each witness. (Use another sheet if necessary.)

NAME	ADDRESS	SUBPOENA YES/NO
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Figure #3
(2 sided Form)

PERC Form 25 (Rev. 01/09)

2. Give a brief statement explaining why your appeal should be sustained.

