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## AUHR 3.15 CIVIL SERVICE APPEALS

### Purpose

This rule outlines the separate but functionally equivalent procedures for civil service appeals as those found in HRAR 3.15 Civil Service Board. Appeals requested by non-represented employees in the Auditor's classified service will be heard by a neutral Hearings Officer independent from the Auditor's Office, in lieu of a board.

Final decisions on appeals are made by the Hearings Officer rather than the City's Civil Service Board to ensure independence from the City Council and City bureaus. The Hearings Officer is not appointed by the Mayor and approved by Council as the Civil Service Board, thus allowing the City Auditor's Office and the Hearings Officer more autonomy and independence when making human resource decisions.

### Types of Appeals

1. Appeals from Disciplinary Action such as suspensions, demotions or discharge.
2. Appeals of Classification Decisions.

Examination appeals do not apply because the Auditor's Office does not use results from written Civil Service exams as a minimum qualification.

All employees who are subject to a collective bargaining agreement will follow the City's HRAR 3.15 instead of this rule.

### Deadlines for Filing Appeals

Requests for all appeals must be filed in writing with Management Services within these time limits:

1. Appeals from Disciplinary Actions: twenty-one (21) calendar days after the effective date of a disciplinary suspension, demotion, or discharge.
2. Appeals of Classification Actions: fourteen (14) calendar days after the effective date of a **final** classification decision. Prior to an appeal, employees must first request the City Auditor reconsider a classification decision.

Time limits in this rule are jurisdictional, and failure to comply with them deprives the Hearings Officer of jurisdiction to hear an appeal. None of the time limits for appeals is subject to the discovery rule. For example, the limitation periods are not tolled until the employee knew or reasonably should have known of a basis to appeal.

Untimely requests for appeals will be denied by the Management Services. If the City Auditor concurs with the denial, employees will be notified that the decision is subject to court review.

### **Selection Process for Hearings Officers**

Appeals will be heard by an independent Hearings Officer. Management Services will solicit proposals from qualified professionals to hear appeals. Proposals will be reviewed by a three-member panel, preferably consisting of one union-represented employee, one non-represented employee, and one at-will employee.

If no Hearings Officer from this selection process is available to hear a case, the Auditor's Office may use an emergency procurement process for a Hearings Officer to ensure a timely hearing. A selection panel preferably comprised of one represented employee, one non-represented employee, and one at-will employee who does not supervise the appellant or otherwise participated in the events leading to the appeal will identify options for Hearings Officers to hear an appeal.

Management Services will prepare a contract for services based on the selection panels' preferred Hearings Officer.

### **Hearings Officer Qualifications**

Hearings Officers should be qualified individuals committed to the principles of a merit based system of employment. For inclusion on the list of independent Civil Service Hearings Officers, individuals must be specialists in the field of employee relations or members of the Oregon State Bar Association or the American Arbitration Association.

### **Appeals from Disciplinary Decisions**

Subject to this administrative rule, the Hearings Officer shall review actions of disciplinary suspension, demotion, or discharge of a permanent, non-probationary employee covered by this Rule, where the employee alleges that the disciplinary action was for a political or religious reason, not for cause, or not

made in good faith to improve public service. Any permanent, non-probationary employee in the classified service of the Auditor's Office who is subject to a disciplinary suspension, demotion, or discharge shall have the right to appeal the action to a Hearings Officer.

1. The employee subject to such disciplinary action must file a written appeal with Management Services within twenty-one (21) calendar days from the effective date of the disciplinary action. The appeal must contain a detailed statement specifying:
  - a. The action being appealed.
  - b. The reasons why the employee believes the action was for a religious or political reason, not made in good faith to improve public service, or not taken for cause.
2. Management Services shall serve the employee's division manager or supervisor and the City Auditor with a copy of the written appeal.

### **Appeals from Classification Actions**

Subject to this administrative rule, a Hearings Officer shall review appeals of classification actions taken by the City Auditor affecting an employee in the classified service, where such action was alleged to be without rational basis, or contrary to law or rule promulgated by the City Auditor for classification, or taken for a political reason.

Any employee covered by the Rule and adversely affected by a change in classification or whose request for a change in classification was denied, and any division manager or supervisor who disagrees with a classification decision by the City Auditor, may have the final decision reviewed by a Hearings Officer.

1. To obtain review, the employee affected, or in the event of an appeal by the employee's division manager or supervisor, the appointing authority must file a written appeal with the Hearings Officer. The appeal must contain a detailed statement specifying:
  - a. That the employee or appointing authority had filed with the City Auditor a written request for reconsideration of the Auditor's classification action within fourteen (14) calendar days after the effective date of the action;
  - b. The date of the Auditor's written decision denying the employee's or appointing authority's request for reconsideration;
  - c. The reasons why the employee or appointing authority believes the action was without a rational basis, contrary to a provision of law or rules

promulgated by the City Auditor for classifications, or taken for a political reason;

- d. The corrective action being requested.
2. The written appeal to the Hearings Officer must be filed within twenty-one (21) calendar days from the Auditor's written decision to deny the request for reconsideration.

### **Notice of Hearings**

The time and place of a hearing will be set by the Hearings Officer and notice of such hearing will be provided through Management Services to the employee, the employee's representative, if any, the City Auditor, and the employee's division manager.

Any party who desires a postponement shall, on receipt of notice of the hearing, make a written request of the Hearings Officer and provide a detailed reason for the request. For reasonable cause shown, the Hearings Officer may grant a postponement and may, at any time, order a postponement on its own motion. In the absence of extraordinary circumstances, the Hearings Officer will not allow more than one postponement.

### **Type of Hearing**

On receiving an appeal request, Management Services will inform the appellant of the choice between an expedited hearing and a formal hearing (as described below). The appellant will have fourteen (14) calendar days to decide and communicate their choice in writing to Management Services. Failure to elect the type of hearing in the allotted time will result in the scheduling of an expedited hearing.

### **Exhibits for Hearings and Other Proceedings**

Documents to be considered by the Hearings Officer as exhibits must be filed in the format specified in the supplemental procedural rules set forth in Appendix B.

On receipt of exhibits filed by either party, Management Services will distribute the exhibits to the Hearings Officer and the opposing party in advance of the scheduled hearing or proceeding.

### **Expedited Hearing**

1. Notice of Hearing: All parties will be notified of the hearing date as soon as possible following the appellant's notice of a request for an expedited hearing to Management Services. Expedited hearings will receive priority for scheduling over formal hearings. There will be at least twenty-one (21) calendar days' notice prior to any hearing date.
2. Expedited hearings shall be informal in nature.
3. No party may be represented by legal counsel at an expedited hearing.
4. Each party shall be allowed up to 90 minutes to present its case, including presentation of witnesses, response to the other party's arguments and questioning the other party's witness. The Hearings Officer, at their sole discretion, may extend the time limits for either party.
5. Exhibits to be considered by the Hearings Officer must be filed by the parties with Management Services fourteen (14) calendar days prior to the date the Hearings Officer is scheduled to hear the appeal. Exhibits not received by Management Services fourteen (14) calendar days prior to the scheduled hearing date will not be considered. The Hearings Officer, in their sole discretion, may waive this requirement at the hearing if good cause is shown.
6. Expedited hearings will normally be open to the public. In disciplinary cases, the Hearings Officer shall excuse all persons from the hearing room except their staff, the parties, and their representatives if a determination has been made by the employee to have the case heard in a closed session, the hearing may be closed to the public.
7. At the conclusion of the hearing, the Hearings Officer shall normally render a "bench" decision, which will be recorded in the minutes of the meeting. The Hearings Officer shall either grant or deny the appeal. See section below on post-hearing remedies.

### **Formal Hearing**

1. Formal hearings shall be initially scheduled as a second priority after expedited hearings. There will be at least sixty (60) calendar days' notice prior to any hearing date.
2. Either party may be represented at the hearing by legal counsel.
3. Exhibits to be considered by the Hearings Officer must be filed by the parties with Management Services thirty (30) calendar days prior to the date the appeal is scheduled to be heard. Documents not received by Management Services thirty (30) calendar days prior to the scheduled hearing date will not be considered. The Hearings Officer, in its sole discretion, may waive this requirement at the hearing if good cause is shown.

4. Each party must provide the Hearings Officer and the other parties with a proposed list of witnesses, including the general topic of the issues that will be addressed, fourteen (14) calendar days prior to the hearing date.
5. General Hearings Procedure:
  - a. The Hearings Officer will open the hearing with a brief introduction of the parties and issues.
  - b. In disciplinary cases, the Hearings Officer shall excuse all persons from the hearing room except their staff, the parties and their representatives, if a determination has been made by the employee to have the case heard in a closed session, the hearing may be closed to the public.
  - c. The parties or their representatives may make opening statements.
  - d. The parties or their representatives may present evidence in support of their respective positions. Opposing parties will be allowed to cross-examine witnesses.
  - e. Parties may make closing statements. However, in disciplinary cases, a party may request to file a post hearing memorandum, and such request shall not be arbitrarily denied. The Hearings Officer may set limits on the size, length, and scope of post hearing memoranda to be filed, as the Hearings Officer deems reasonable and appropriate for the case.
6. **Oaths and Subpoenas.** The Hearings Officer may compel the attendance of witnesses and the production of documents through issuance of subpoenas, either on their own motion or on application of a party in writing and good cause shown. Documents that may be obtained by filing a Public Records Request shall not be subject to subpoena, unless good cause is shown. The Hearings Officer may issue a protective order or take other measures to protect the confidentiality of documents and may require the return of all documents subject to a protective order at the conclusion of the matter. Applications for subpoenas must comply with the supplemental procedural rules set forth in Appendix B. The Hearings Officer or a designee shall administer the oaths to every witness.
7. **Conference During and Prior to Hearings.** During or prior to any proceeding, the Hearings Officer may, at their discretion, call the parties together for a conference or may recess the hearing for such conferences to resolve undisputed or procedural matters. The results of such conference shall be summarized on the record.
8. **Stipulations of Agreed-Upon Facts and Issues.** Unless excused by the Hearings Officer, the parties are required to confer before the hearing to stipulate to agreed-upon facts and issues involved in the controversy. Such

stipulations shall be binding on the parties and may be used as evidence in the case.

9. **Proposed Findings of Fact and Conclusions of Law.** Following the conclusion of the hearing, the Hearings Officer may at their discretion require the prevailing party to serve proposed findings of fact and conclusions of law on the Hearings Officer and all other parties within fourteen (14) calendar days. The opposing party will have fourteen (14) calendar days after service to respond in writing to the proposed findings of fact and conclusions of law to the Hearings Officer and the prevailing party. See section below on post-hearing remedies.
10. **Continuances.** On the motion of a party, or on the Hearing Officer's own motion, if it appears that further testimony or argument should be received, the Hearings Officer may in their discretion continue the hearing for good cause. The date of such continued hearing may be fixed at the time of hearing or later by written notice to the parties.

### **Burden of Proof in Appeal Hearings**

In a hearing on an appeal from a suspension, demotion, or discharge, the appointing authority or designee shall have the burden of proof and the burden of going forward with the evidence. In appeals concerning classification actions and examinations, the party filing the appeal shall have the burden of proof and the burden of going forward with the evidence. The party who has the burden of proof shall present its case first.

### **Standard of Review in Expedited and Formal Hearings**

**Disciplinary Cases.** The Hearings Officer will review the City Auditor's decision and apply the "reasonable employer" standard to determine first whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable.

**Classification Action Appeals.** The Hearings Officer will review the City Auditor's decision to determine whether the decision, as alleged by the appellant, was without a rational basis, contrary to law or rules promulgated for classifications, or taken for a political reason.

The Standard of Review is set out in Appendix A to these rules.

## Conduct of Witnesses, Parties, and the Public During Hearings

All parties, their representatives, witnesses and spectators shall conduct themselves in a respectful manner. Demonstrations of any kind will not be permitted. Failure to comply with this rule or with the Hearings Officer's effort to maintain order and proper decorum are grounds for removal from the hearing. Refusal of a witness to answer any question ruled to be proper shall, in the discretion of the Hearings Officer, be grounds for striking all testimony previously given by the witness.

## Post Hearing Procedures

**Decisions.** Decisions of the Hearings Officer shall in all cases be based solely on the record made at the hearing and on applicable law and other legal authorities relevant to the dispute. Decisions shall include rulings on motions and evidentiary matters, findings of fact, and conclusions of law.

- a. At the conclusion of hearings of appeals of disciplinary actions, the Hearings Officer shall state the time in which a written decision will be issued. The written decision shall include Findings of Fact, Conclusions of Law, and the Final Order.
- b. At the conclusion of hearings of appeals concerning classification, a decision may be issued. However, in all appeals of classification decisions by the Auditor, the Hearings Officer shall issue a written decision within thirty (30) days following the hearing.

## Post Hearing Remedies

**Classification Appeals:** If in an appeal from a classification decision the Hearings Officer concludes that the allegations in the appeal are correct, the Hearings Officer shall set aside the classification decision and remand the decision back to the City Auditor for further review. The Hearings Officer's order of remand shall specify and explain the reasons for the Hearings Officer's action.

**Appeals from Suspensions, Demotions and Discharges:** If the Hearings Officer finds that the discipline was warranted, the Hearing's Officer shall confirm the action taken. If the Hearing's Officer finds that some discipline was warranted, but that the discipline imposed was too severe, the Hearings Officer may reduce or otherwise modify the discipline to a level it deems appropriate for the offense and reinstate the employee with or without back pay on terms and conditions that the Hearings Officer may establish. If the Hearings Officer finds that no discipline was warranted, the Hearings Officer shall reinstate the employee with back pay and with those fringe benefits that were lost as a result of the

discipline. Deductions for unemployment compensation and other interim income received shall be ordered as determined by the Hearings Officer.

**Effect of Hearings Officer's Decisions:** Decisions are final and binding on the parties, subject to an appeal to Circuit Court by writ of review under ORS 34.010 *et seq.*

**Appeal of Hearings Officer's Decisions:** The final decision of the Hearings Officer shall be subject to review by the Circuit Court by writ of review under ORS 34.010 *et seq.*

### **Record of Proceedings**

The record of each appeal hearing shall include but not be limited to:

1. A statement identifying the dispute;
2. All written materials offered to the Hearings Officer unless withdrawn by the offering party with the approval of the Hearings Officer;
3. The Hearings Officer's final written decision;
4. The recording of the hearing, which shall be either a verbatim written record or mechanical recording.

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### **Human Resources Rule Information and History**

Questions about this administrative rule may be directed to the [Management Services Division](#) of the Auditor's Office.

Adopted by the City Auditor December 11, 2017.

Adapted from City of Portland Human Resources Administrative Rule 3.15 Civil Service Board.

Adopted by Council March 6, 2002, Ordinance No. 176302.

Last revised April 25, 2016.

## APPENDIX A

### I. The Standard of Review

The following is a discussion of the standard of review that will apply to the Hearings Officer for Civil Service Appeals from the Auditor's Office. This appendix includes a review of the State Personnel Law and Employment Relations Board decisions, which the Hearings Officer can rely on in performing the appellate function. The Auditor's Office is not covered by City Charter Chapter 4, but what is excerpted here describes the basis for the functionally equivalent protections required in Charter Chapter 2 for City Auditor's Office employees who are covered by this Rule. Where Charter Chapter 4 identifies the Civil Service Board, the City Auditor's Office uses an independent Hearings Officer as its equivalent.

#### 1. Classification Action Appeals

Section 4-402 of the revised Charter provides in relevant part:

Section 4-402. **Duties of the Board.** The duties of the Board shall be:

- (1) Review classification actions taken by the Director affecting an employee in the classified service, where the employee alleges such action to be without a rational basis or contrary to law or rule or taken for political reason and remand back to the Director of Human Resources for further review and action.

The language above quoted, which defines the City Civil Service Board's authority, was based on, and is, in essence, the same language found in ORS 240.086, which governs the power of the Employment Relations Board (ERB) in reviewing classification appeals by employees of the State of Oregon. In relevant part, ORS 240.086 provides:

"The duties of the [ERB] shall be to:

- (1) Review any personnel action affecting an employee who is not in a certified or recognized appropriate collective bargaining unit, that is alleged to be arbitrary, or contrary to law or rule, or taken for political reason, and set aside such action if it finds these allegations to be correct." (emphasis added).

The ERB decision that applies and discusses the operative language in ORS 240.086, which is quoted and underscored above, is in the case of Gladys Patterson v. Department of Fish and Wildlife, ERB Case No. 1431 (December 1983). About its authority, ERB says the following:

"This is the first position allocation [reclassification] appeal from a classified state employee to come before this Board since extensive amendments to state personnel law by the 1979 Legislative Assembly\*\*\*. Unchanged by the amendments, however, were the grounds on which this Board may review personnel actions, namely that such actions be 'alleged to be arbitrary or contrary to law or rule or taken for political reason'\*\*\*." ORS 240.086(a). Appellant here appeals to us on the ground that Respondent's action in refusing her request for reclassification to accounting Clerk 2 was arbitrary.\*\*\*

It is not for this Board to decide whether Respondent's decision in allocating Appellant's position was the correct one (i.e. whether we would have selected a different classification), but rather whether there is a rational basis to support the decision which respondent has made. This is the test of 'arbitrariness' which we have followed pursuant to Paul v. Personnel Division\*\*\*. The court there said:

'The word "arbitrary" is not a catchall provision. It may not be used as the vehicle for a policy decision. Rather, it applies to action which is taken without cause, unsupported by substantial evidence, or non-rational. Its typical application is in cases where there is no evidentiary basis for the challenged personnel action.'

There is here a rational, evidentiary basis for respondent's decision that Appellant's position should be classified as that of Accounting Clerk 1\*\*\*." (pages 7-8) (emphasis added)

Along the same vein, in a more recent reclassification appeal, Barbara Rice v. Corrections Division, ERB Case No. 1475, (1985) the ERB said the following about its appellate role:

"Accordingly, this Board consistently has held that an agency classification decision will be upheld unless there is no evidentiary basis to support it. Gladys Patterson v. Department of Fish and Wildlife, Case No. 1431 (1983); Ruth Haucke v. Employment Division, Case No. 1075 (1981). In other words, the agency will prevail unless the evidence is so slim as to require a directed verdict for the appellant were the matter being tried before a jury." (page 8)

In addition to hearing appeals concerning classification matters, it is also ERB's duty to hear appeals by non-union State employees in discipline cases. The ERB applies the "no reasonable employer" standard, but only in the disciplinary cases. Brown v. Oregon College of Education, 52 Or. App. 251 (1981). Disciplinary appeals are discussed in further detail below.

The important point here is that there is a major difference between the "no reasonable employer standard" applicable in disciplinary appeals, and the "without a rational basis" or "on an arbitrary basis" test applied by the ERB (and to be applied by the City Auditor's Civil Service Hearings Officer) for classification appeals.

The primary distinction between the two tests is the extent to which the Hearings Officer or the ERB may substitute its judgment for that of management where there is evidence to support management's position. As the ERB explained in Gladys Patterson v. Department of Fish and Wildlife, supra, a classification decision by the employer must be "upheld unless there is no evidentiary basis to support it." In other words, if there is some evidence to support it, the decision must stand. As also further explained above, the standard for classifications appeals may not be used by the ERB or the Hearings

Officer as the vehicle for a policy decision. Classification policy is for the employer.  
Gladys Patterson v. Fish & Wildlife, supra.

## 2. Disciplinary Action Appeals

City Charter Section 4-402(2) provides the duties of the Board shall be to review suspension, demotion, or discharge of permanent employees in the classified service when employees allege discipline was not for cause. If an employee's allegations are found to be correct, reinstatement may be ordered under terms and conditions as may be deemed appropriate by the Board.

Since the case of Sherris v. City of Portland, supra, the City Civil Service Board has endeavored to determine whether the discipline imposed was "for cause." The City Civil Service Board is edified by the approach of the ERB in reviewing disciplinary appeals in the State's "merit system." The ERB applies the "no reasonable employer" standard. In Oregon School Employees Association v. Klamath County School District, 9 PECBR 8832 (1986), the ERB said the following about the "no reasonable employer" standard.

\*\*\*\*In judging discipline cases under the State Personnel Relations Law, this Board applies a 'no reasonable employer' standard, as explicated by the Court in Brown v. Oregon College of Education, 53 Or App. 251 (1981). We also have applied that standard in cases under the Public Employee Collective Bargaining Act (PECBA) to modify discipline and to reverse a discharge. We believe that the reasonable employer's standard comprehends the generally accepted elements used by arbitrators or others in making just cause determinations. Consequently, when confronted with (1)(g) complaints concerning 'for cause' discipline questions, this Board will use the reasonable employer standard to determine: first, whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable." Brown, supra, 52 Or App. at 260. (page 8850) (emphasis added)

Quoting from the Brown case, the ERB gave the following overview of the "no reasonable employer" standard:

"There is no explicit and comprehensive recipe that describes the traits of the reasonable employer. The ingredients must be discerned, and sometimes inferred, from a variety of sources. The Oregon Legislature, courts and this Board have enunciated some of the traits possessed by the reasonable employer; for example, it:

"Does not take action based on political, religious or racial reasons, or because of sex, marital status, or age;

"Disciplines in good faith and for cause;

"Does not impose sanctions disproportionate to the offense or discipline for inconsequential offenses;

“Considers the employee’s length of service and prior service record, warns employees about what conduct is improper and generally is consistent in applying disciplinary sanctions;

“Takes disciplinary action in a timely manner;

“Gives an employee who is being dismissed notification of the charges against him and of the kinds of sanctions being considered, and at least an informal opportunity to refute the charges to someone authorized to make or effectively recommend the final decision;

“Bears the burden of proving all elements necessary to justify the discipline exacted; and

“Adopts and enforces reasonable regulations governing the work and conduct of its employees and imposes appropriate forms of discipline where it has good cause.

“My own experience in the field of employment relations and a review of some literature in the field lead me to conclude that the reasonable employer also incorporates other traits. For example, it:

“Makes a fair and objective investigation before administering discipline, except in extraordinary circumstances; obtains substantial evidence before imposing sanctions; uses progressive discipline, except where the offense charged is gross or the employee’s behavior probably will not be improved through such measures; and does not, through its own actions, exacerbate disciplinary problems.” Brown at 8 9; footnotes omitted. (pages 8851 and 8852)

As ERB’s decision above quoted indicates, the principles of “progressive discipline” have relevance in the “no reasonable employer” standard. On this score, a significant case is Oregon School Employee’s Association, Chapter 89 v. Rainer School District 13, ERB Case No. UP 85 85 (appeal to Court of Appeals pending), wherein the ERB said the following about “progressive discipline”:

“Complainant argues that Gamble’s termination was not justified because the District failed to use progressive discipline. The Contract does not specify what progressive discipline steps, if any, are required. This Board has previously held that the ‘reasonable employer’ used progressive discipline ‘except where the offense charged is gross or the employee’s behavior probably will not be improved through such measures.’ But the concept of progressive or corrective discipline as a component of just cause, does not require an employer to follow some lock step progression of disciplinary measure before it may legitimately discharge an employee. Where a contract is silent concerning any requirement for specific disciplinary steps, the progressive discipline component of just cause may be satisfied by corrective measures that put the employee on notice that further misconduct may result in the discipline ultimately imposed and that give the employee a reasonable opportunity to modify his behavior. Gamble was warned in

writing that his chronic tardiness could lead to dismissal ('gravest consequences'). The changes in his hours of work and the time clock requirement, although not normally regarded as disciplinary measures, were imposed by the supervisor in an attempt to correct the tardiness problem. We find that the warnings given to Gamble and the opportunity provided him to correct his behavior were sufficient to comply with the contractual just cause requirement." (pages 25 26).

## **CONCLUSION**

Whereas the appellate jurisdiction and authority of the Hearings Officer will be limited in classification matters, the Hearings Officer's authority in disciplinary cases will remain substantial. Since the "no reasonable employer" standard embodies the principles of "just cause," there is a body of ERB decisions, and decisions by arbitrators nation wide, court decisions concerning employee discipline and arbitral treatises on employee discipline, such as Elkouri and Elkouri's How Arbitration Works, 8th edition, which are appropriate for the Hearings Officer to refer to when reviewing discipline cases.

**APPENDIX B**  
**UNIFORM SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE**  
**FOR CIVIL SERVICE APPEALS BEFORE THE HEARINGS OFFICER**

**1. GENERAL PROVISIONS**

**1.01 AUTHORITY AND APPLICATION**

These rules are promulgated under the authority of the City Auditor.

**1.02 SCOPE AND PURPOSE**

The purpose of these rules is to provide a uniform practice and procedure for processing all appeals within the jurisdiction of the Hearings Officer appointed under the authority of City of Portland Charter Chapter 2. These rules supplement the provisions of Auditor's Human Resources Administrative Rule 3.15 – Civil Service Appeals (AUHR 3.15).

**2. DEFINITIONS**

The following definitions shall apply to these supplemental rules and to AUHR 3.15:

**Appellant** shall mean the party that files an appeal before the Hearings Officer.

**Applicant** shall mean the Appellant, the Appellant's representative or the Respondent's representative who applies for issuance of a subpoena.

**AUHR** means the City Auditor's Human Resources Administrative Rules.

**Authorized representative** is defined as a representative over the age of eighteen (18) who is not a party to the action and who is authorized to accept delivery of a subpoena on behalf of a subpoenaed party.

**Address of Record** shall mean the physical office or interoffice address of record for Management Services:

Physical office: 1221 SW Fourth Avenue  
Room 310  
Portland, Oregon 97204  
Interoffice: 131/320

**Certificate of Service** shall mean a document filed with Management Services that certifies that a copy of the document has been served on the opposing party.

**City** shall mean the City of Portland.

**Days** shall mean calendar days except when specifically noted otherwise. When counting to determine a deadline, count every day, including intermediate Saturdays, Sundays, and paid holidays, unless the deadline falls on a Saturday, Sunday or paid holiday. If the deadline to

file or serve a document falls on a Saturday or Sunday or paid holiday, the period of time for which to perform the act shall extend to the next day the City is open for regular business. Paid Holiday is defined as any holiday that is recognized and observed by the City as provided for in AUHR 6.02.

**Discovery rule** is defined as a rule that tolls the limitations of time period in which to file an appeal.

**Good cause** is defined as a substantial and compelling reason and may include but is not limited to a reason that is beyond the control of a party. Whenever a party is required to show good cause, the Hearings Officer will consider whether there is good cause on a case-by-case basis with an aim toward making decisions as consistent and uniform as possible.

**Hearings Officer** shall mean a neutral party that has been empowered to conduct a hearing.

**HRAR** or **HRARs** shall mean the City's Human Resources Administrative Rule(s).

**Jurisdiction** means the power or authority given to the Hearings Officer to hear and determine the merits of an appeal pursuant to the authority of the City Charter and AUHR 3.15.

**Management Services** shall mean the administrative support division within the Auditor's Office.

**PDF format** is defined as a document that is in Portable Document Format.

**Representative** shall mean the attorney for the Appellant, the Respondent's non-attorney representative or the Attorney representing the Respondent.

**Respondent** shall mean the entity that the appeal is filed against. Generally, this is the City Auditor.

**Stipulation** shall mean a set of facts or issues that are agreed on by the Appellant and Respondent.

**With prejudice** means that a final determination on the merits has been issued, and the Appellant is forbidden from again pursuing the same appeal against the same Respondent.

### **3. FILING AND SERVICE OF DOCUMENTS**

#### **3.01 FILING DOCUMENTS WITH MANAGEMENT SERVICES**

Whenever these rules or AUHR 3.15 require the parties to file a document with Management Services, filing may be accomplished by one of the following methods:

1. By e-mail to the Chief Deputy Auditor and the Management Services Administrative Specialist;

2. By the City's interoffice mail system at Management Services' interoffice address of record; or
3. By hand delivery, U.S. first class mail, registered mail or certified mail at Management Services' physical office address of record.

Parties may not file a document by e-mail if the number of pages exceeds 50.

### **3.02 FILING AND SERVICE DATE**

- A. Documents filed by e-mail, interoffice mail, or hand delivery shall be deemed filed on the date Management Services receives the document, provided that the document is received on or before 5:00 p.m. Documents received by e-mail or hand delivery after 5:00 p.m. shall be deemed as filed on the next business day. Documents filed by mail shall be deemed filed on the date that the envelope is postmarked.
- B. When these uniform supplemental rules or AUHR 3.15 require a party to serve a copy of a document on the opposing party, the filing party shall serve the document at the opposing party's address of record by e-mail, hand delivery, U.S. first class mail, certified mail or registered mail. Parties may not serve documents by e-mail if the number of pages exceeds 50. Service shall be complete as described in Section 3.02 A.

### **3.03 FORMS AND FILING REQUIREMENTS**

- A. All documents served or filed must be dated and signed by the party or Representative submitting the document. Documents served or filed by e-mail must be in PDF format.
- B. Forms are provided in fillable PDF format and are posted on the City Auditor's website under the "Civil Service Appeals Forms" for the convenience of all parties. Parties may choose not to use the forms provided that documents filed with Management Services are in the same or similar format as the forms provided.

The Hearings Officer has the discretion to not consider documents that are not filed in the proper format.

- C. As soon as reasonably possible, a Representative is required to file a Notice of Appearance with Management Services, and a form is provided on the Auditor's website. The contact information in each Notice of Appearance shall constitute each party Representative's address of record and preferred method of delivery of service for purposes of these rules. In the event an Appellant is unrepresented, the contact information on the Appellant's Notice of Appeal shall serve as the Appellant's address of record and preferred method of delivery of service.
- D. With the exception of a Notice of Appeal and exhibits, all documents filed with Management Services must include a Certificate of Service in the format provided on the Auditor's website.

#### **4. FILING OF AN APPEAL**

- A.** The form and content of an appeal must comply with the provisions set forth in AUHR 3.15. An Appellant may use the Notice of Appeal form.
- B.** In accordance with AUHR 3.15, an appeal shall not be considered filed unless it has been filed with Management Services.

#### **5. HEARINGS OFFICER JURISDICTION**

##### **5.01 REVIEW OF APPEALS**

The Hearings Officer is limited to hearing appeals that fall within the scope of AUHR 3.15. Furthermore, the time limits specified in AUHR 3.15 for filing an appeal to the Hearings Officer are jurisdictional in nature. Failure to comply with the time limits specified in AUHR 3.15 means that the Hearings Officer lacks jurisdiction to hear the appeal. The time limits specified in AUHR 3.15 are not subject to the discovery rule.

##### **5.02 PROCESS OF REVIEW TO DETERMINE HEARINGS OFFICER JURISDICTION**

- A.** Per AUHR 3.15, the Hearings Officer may on its own motion determine whether an appeal involves legal issues that require resolution before the Hearings Officer schedules a hearing.
- B.** On receipt of an appeal request to the Hearings Officer, Management Services shall review the appeal to determine if there is a question whether the Hearings Officer has jurisdiction over the appeal.
- C.** If Management Services determines that there is a question whether the Hearings Officer has jurisdiction over an appeal, the appeal is untimely, or that the appeal does not fall within the scope of AUHR 3.15, Management Services shall notify the Appellant and serve a copy of the notification on the Respondent's Representative and Hearings Officer.
- D.** The Appellant shall have fourteen (14) days from the date Management Services notifies the Appellant to file a written statement, along with exhibits, if applicable, with Management Services. The Appellant's written statement is limited to seven (7) pages, exclusive of exhibits, and is limited to the issue of whether the Hearings Officer has jurisdiction to hear the Appellant's appeal.
- E.** The Respondent shall have fourteen (14) days from the date the Appellant files the Appellant's written statement, along with exhibits, if applicable, to file a responsive written statement with Management Services. The Respondent's written statement is limited to seven (7) pages, exclusive of exhibits, and is limited to the issue of whether the Hearings Officer has jurisdiction to hear the Appellant's appeal.

- F. The procedure for filing exhibits set forth in Section 6.03 of these rules applies to exhibits to be submitted with a written position statement concerning a jurisdictional issue.
- G. On timely receipt of an Appellant's written statement, Management Services shall schedule a meeting so that the Hearings Officer can determine the sole issue of whether the Hearings Officer has jurisdiction over the appeal. No witness testimony shall be taken at the meeting unless the Hearings Officer, in its discretion, decides testimony will be useful.
- H. If an Appellant fails to file a written statement within fourteen (14) days of the date Management Services notifies the Appellant that the Hearings Officer may lack jurisdiction, the Hearings Officer will automatically dismiss the appeal for lack of jurisdiction.
- I. The Hearings Officer's Order of Dismissal for lack of jurisdiction is final subject to a request for writ of review in accordance with ORS 34.010-34.100.

### **5.03 NOTIFICATION PROCESS WHEN AN APPEAL MEETS JURISDICTIONAL REQUIREMENTS**

- A. If an appeal meets jurisdictional requirements, Management Services shall notify the Appellant of the choice between an expedited hearing or a formal hearing. Information regarding the difference between an expedited hearing and a formal hearing is defined in AUHR 3.15.
- B. The Appellant must file a Notice of Election of Hearing with Management Services within fourteen (14) days of the date Management Services notifies the Appellant of his or her hearing options. A Notice of Election form is provided on the Auditor's website.
- C. Per AUHR 3.15, failure to file a Notice of Election of Hearing with Management Services within the time frame required will result in the scheduling of an expedited hearing. Parties may not be represented by legal counsel at an expedited hearing.
- D. On timely receipt of a Notice of Election of Hearing, or in the case where fourteen (14) days has elapsed without timely receipt of a Notice of Election of Hearing, Management Services shall schedule the hearing within the time frame required by AUHR 3.15 and shall serve a Notice of Hearing on all parties at their address of record.

## **6. PRE-HEARING PROCEDURES**

### **6.01 GENERAL WRITTEN COMMUNICATIONS**

All written communications to Management Services on behalf of the Hearings Officer must be copied to the opposing party to avoid the appearance of ex parte communications. If Management Services receives a written communication from one party that has not been copied to the other party, Management Services, at the Hearings Officer's discretion, may

notify the party that the written communication may not be received or considered by the Hearings Officer until it has been copied to the other party.

#### **6.02 PUBLIC RECORDS FOR COPYING AND INSPECTION**

- A.** Per AUHR 3.15, documents that may be obtainable by filing a Public Records Request shall not be subject to subpoena unless good cause is shown.
- B.** Parties may file a Public Records Request through the City's GovQA system.
- C.** If a party is unable to obtain documents by filing a Public Records Request, the party may file an application for issuance of a subpoena to obtain the documents. Parties that apply for issuance of a subpoena for production of documents must comply with the application process outlined in Section 6.06 and Section 6.07 of these rules. The Hearings Officer may issue a protective order or take other measures to protect the confidentiality of documents.

#### **6.03 FORMAT OF EXHIBITS FOR MEETINGS AND HEARINGS**

- A.** With the exception of exhibits for pre-hearing motions, all exhibits to be considered by the Hearings Officer for an expedited hearing, a formal hearing or a public meeting must be filed in the following format:
  - 1) Documents must be filed with a Table of Contents that lists and briefly describes each document.
  - 2) Each exhibit must be separated by indexed tabs and clearly marked with an exhibit number.
  - 3) Each party must file two (2) sets of copies of their exhibits with Management Services. Exhibits shall not be filed by e-mail or facsimile. Per AUHR 3.15, Management Services distributes exhibits to the Hearings Officer and to the opposing party.
- B.** A checklist that provides guidance for preparing exhibits is provided on the Auditor's website.

#### **6.04 UNTIMELY OR IMPROPER FILING OF EXHIBITS**

Exhibits that are not filed within the time frames or format required by AUHR 3.15 and these uniform supplemental rules will not be considered by the Hearings Officer unless good cause for untimely or improper filing can be shown.

#### **6.05 PRE-HEARING MOTIONS**

- A.** All pre-hearing motions shall be filed with Management Services in the format provided on the Auditor's website.
- B.** Unless the number of pages for exhibits exceeds 50 pages, the procedure for filing exhibits set forth in Section 6.03 A. of these rules does not apply to exhibits for pre-hearing motions. A party may attach copies of exhibits to each party's motion or written

objection to pre-hearing motion. In the event a party's exhibits exceed 50 pages, the party must file the exhibits in the format outlined in Section 6.03 A. of these rules.

- C. If the pre-hearing motion is for postponement of a hearing or for an extension of time, the moving party must show good cause why the hearing date should be postponed or why the party should be allowed an extension of time, unless both parties mutually agree to a postponement or to allow for an extension of time. In any event, it is within the Hearings Officer's discretion to grant or deny a motion for postponement of a hearing or for an extension of time.
- D. The opposing party shall have seven (7) days from the date a pre-hearing motion is filed to file any written objections with Management Services in the format posted on the Auditor's website. The opposing party shall attach any exhibits the party wishes the Hearings Officer to consider with the written objections.
- E. If, in the discretion of the Hearings Officer, oral argument is necessary, Management Services shall schedule a date and time for oral argument and shall notify all parties of such date and time.
- F. Management Services shall schedule a date and time for the Hearings Officer to issue a ruling on the motion. The Hearings Officer may consider an opposing party's failure to file written objections as evidence that the opposing party has no objection to the motion.
- G. The Hearings Officer, in its discretion, may waive the requirements of this section for motions made for an extension of time or for postponement of a hearing.

#### **6.06 APPLICATION FOR SUBPOENAS**

- A. Pursuant to AUHR 3.15, subpoenas to compel the attendance of a witness or for production of documents for a hearing may be issued on application of either party on a showing of good cause. Good cause for issuance of a subpoena for production of documents includes a showing that the Applicant used due diligence to comply with Section 6.02 of these rules prior to filing a subpoena application. Absent such a showing, the Hearings Officer may deny the Applicant's subpoena application, to the extent it seeks records that may be subject to or attainable through a public information request.
- B. An Applicant must comply with the following process to request issuance of subpoenas:
  - 1) An Applicant must file a separate application for each subpoena requested in the format provided on the Auditor's website.
  - 2) An Applicant must complete all information for the subpoena in the format provided on the Auditor's website.
  - 3) Subpoena application(s) to compel the attendance of a witness must be filed with Management Services no later than twenty-one (21) days in advance of the

date of the scheduled hearing if the hearing is an expedited hearing, and no later than thirty (30) days in advance of the hearing if the hearing is a formal hearing.

- 4) Subpoena application(s) to compel production of documents must be filed with Management Services as soon as reasonably possible, and in any event, no more than seven (7) days of the date the Applicant learns that the Applicant is unable to obtain the requested documents through a public information request.
- 5) The opposing party shall have three (3) days from the date a subpoena application is filed to file any written objections with Management Services.
- 6) The Hearings Officer may consider an opposing party's failure to file written objections to subpoena application(s) as evidence that the opposing party has no objection to the issuance of the requested subpoena(s).
- 7) If a subpoena application has been filed outside of the time frame required by these rules, the Hearings Officer may deny the application.
- 8) If the Hearings Officer determines that the Applicant's subpoena application(s) shall be granted, the Hearings Officer shall issue the subpoena(s) as soon as reasonably possible or no later than five (5) business days from the date the Hearings Officer decided the application(s) should be granted.
- 9) If the Hearings Officer denies the Applicant's subpoena application(s), the Hearings Officer will provide the reason(s) for the denial. The decision is final.

#### **6.07 VALID SERVICE OF SUBPOENAS**

If the Hearings Officer grants an Applicant's subpoena application(s), the Applicant must comply with the following process for service of the subpoena(s):

- A.** An Applicant shall be responsible for obtaining issued subpoena(s) from Management Services.
- B.** The Applicant shall be responsible for serving the subpoena(s).
  - 1) If the subpoena is to compel witness testimony, service of the subpoena must be made sufficiently in advance of the date of the hearing to allow the witness a reasonable time for preparation and travel to the place of attendance.
  - 2) If a subpoena is for production of documents, service of the subpoena must be made sufficiently in advance to allow for production of the documents prior to the date all hearing documents must be filed with the Board Administrator.
- C.** If an Applicant is unable to personally serve the subpoena(s), service shall be made by any person over the age of eighteen (18) who is not a party to the appeal. The Applicant must certify under penalty of perjury that the person who effectuated service is over the age of eighteen (18) and is not a party to the appeal.

- D. An Applicant must pay attendance fees and travel expenses to all witnesses who have been subpoenaed to testify in accordance with ORS 44.415(1) (<http://www.oregonlaws.org/ors/44.415>). Service of witness fees is not required for subpoenas for production of documents, unless the subpoena is to compel both attendance at the hearing to testify and for production of documents.
- E. An Applicant shall accomplish valid service of a subpoena by one of the following methods:
  - 1) By hand delivering a copy of the subpoena to the subpoenaed party or the authorized representative for the subpoenaed party personally and providing at the same time the fees to which the subpoenaed party is entitled, if applicable.
    - a. Service of a subpoena by hand delivery is effectuated on the date that the subpoenaed party or authorized representative signs a confirmation receipt in the format provided on the Auditor's website.
  - 2) By delivering a copy of the subpoena by certified or registered mail with receipt delivery and signature requested to the subpoenaed party's business address, along with the fees to which the subpoenaed party is entitled, if applicable.
    - a. Service by certified or registered mail is effectuated on the date that the return receipt is signed by the subpoenaed party or is signed by the authorized representative for the subpoenaed party.
- F. Once service of a subpoena is effectuated, the Applicant must file a Proof of Service with Management Services in the format provided on the Auditor's website. An Applicant must attach to the Proof of Service to the original subpoena along with documentation that establishes the date, time and method of service.

#### **6.08 STIPULATION OF AGREED-ON FACTS AND ISSUES**

Pursuant to AUHR 3.15, unless excused by the Hearings Officer, parties are required to meet and confer prior to the date of a hearing to stipulate to agreed-on facts and issues. The process for such meetings is as follows:

- A. Management Services will schedule the meeting for a date and time that is mutually agreed on by all parties.
- B. Management Services or a designee shall facilitate the meeting. All facts and issues that are agreed on shall be recorded in the format provided on the Auditor's website.
- C. Per AUHR 3.15, the stipulations of facts and issues shall be entered as evidence at the hearing and are binding on all parties.

## **6.09 PRE-HEARING CASE CONFERENCES**

The Hearings Officer may, in its discretion, schedule pre-hearing case conferences to resolve issues not covered by these rules prior to the date of a hearing. If, in the Hearings Officer's discretion, a pre-hearing case conference is necessary, Management Services shall schedule a date and time for the pre-hearing case conference and shall notify all parties of such date and time.

## **6.10 PRE-HEARING DISMISSAL OF AN APPEAL**

Aside from dismissal for lack of jurisdiction, the Hearings Officer may issue a Final Order dismissing an appeal before a hearing has been conducted for any of the following reasons:

- A.** A voluntary withdrawal of appeal has been filed by the Appellant or the Appellant's representative. In the event an Appellant wishes to withdraw an appeal, the Appellant shall file a Voluntary Withdrawal of Appeal and Order of Dismissal in the format provided on the Auditor's website.
- B.** The Appellant and the Respondent settle the appeal by mutual agreement. In the event an appeal is settled by mutual agreement, a Stipulation and Order of Dismissal shall be filed with Management Services in the format provided on the Auditor's website.
- C.** On the scheduled hearing date, an Appellant fails to appear within thirty (30) minutes of the scheduled time of the hearing. If the Appellant fails to appear, the following process shall apply:
  - 1)** An Appellant may file a Motion to Reopen Hearing with Management Services in the format provided on the Auditor's website. The Appellant must show good cause for the Appellant's failure to appear at the date and time of the hearing.
  - 2)** A Motion to Reopen Hearing must be filed with Management Services within seven (7) days of the date the hearing had been scheduled to be conducted.
  - 3)** Management Services shall schedule a date and time for the Hearings Officer to rule on the Motion to Reopen Hearing, unless, in the Hearings Officer's discretion, the Hearings Officer determines that oral argument is necessary before ruling on the motion.
  - 4)** If, in its discretion, the Hearings Officer decides oral argument is necessary, Management Services shall schedule a date and time for oral argument and shall notify all parties of such date and time.
  - 5)** The Hearings Officer may consider the Appellant's failure to appear for a scheduled oral argument on a Motion to Reopen Hearing as evidence in determining whether there is good cause for the Appellant's failure to appear at the date and time of the hearing.

- 6) On a showing of good cause, the Hearings Officer may excuse an Appellant's failure to appear, and the hearing will be rescheduled.

#### **6.11 EFFECT OF PRE-HEARING DISMISSAL OF APPEALS**

1. Appeals dismissed because of a Voluntary Withdrawal of Appeal or Stipulation of Dismissal are with prejudice and cannot be refiled. However, such dismissal of appeals is subject to the right to request writ of review in accordance with ORS 34.010-34.100.
2. If an appeal is dismissed because the Appellant does not file a Motion to Reopen Hearing within the time frame required by these rules or because the Appellant fails to show good cause for the Appellant's failure to appear at the hearing, the Hearings Officer's Order of Dismissal shall become final and is with prejudice. The Appellant's failure to appear at the date and time of the scheduled hearing shall be considered a default and a waiver of all rights except the right to request writ of review in accordance with ORS 34.010-34.100.

### **7. HEARING PROCEDURES**

#### **7.01 HEARING FORMAT**

- A. Although hearings are generally informal in nature, hearings shall be conducted in a manner deemed to make the relevant evidence most readily and efficiently available for the Hearings Officer to consider and provide both parties with a fair opportunity to be heard.
- B. For expedited hearings, each party is limited to 90 minutes to present their case per AUHR 3.15.
- C. For formal hearings, the Hearings Officer, in its discretion, may impose limits on the length of each party's presentation and the number of witnesses each party may call to testify at the hearing.
- D. The Hearings Officer may limit any party's direct or cross-examination of any witness if the Hearings Officer deems the examination or testimony redundant, irrelevant, immaterial, or otherwise unhelpful to the Hearings Officer in determining the issues.
- E. The general order of a hearing is outlined in AUHR 3.15 under General Hearings Procedure. The order of a hearing may be modified or a different order established, if the Hearings Officer deems it necessary for the efficient, clear and fair representation of the evidence.

#### **7.02 WITNESS FAILURE TO APPEAR**

If a party moves to postpone or continue a hearing because a witness fails to appear at the scheduled date and time, the moving party must show good cause why the hearing should be postponed or continued. Good cause includes a showing that the moving party used due diligence to comply with Sections 6.06 and 6.07 of these rules. Absent such a showing, the Hearings Officer may deny the party's motion.