

**Judicial Merit Commission – Regular Quarterly Meeting
Tang Conference Room, Law Library, Third Floor
101 West Jefferson, East Court Building
Tuesday, March 3, 2009**

General Session Meeting Minutes

The Judicial Merit Commission met on Tuesday, March 3, 2009, for its regularly scheduled quarterly meeting. The meeting was conducted in the Tang Conference Room located at 101 W. Jefferson, East Court Building, Law Library, 3rd Floor.

I. Meeting Convened

The meeting was called to order at 1:00 p.m. with the following members in attendance: Commissioners Thomas J. Davis (Chair), N. Joseph Cayer, Robert Oberstein, Carol Smetana, and Maria Hoffman. Also in attendance were Phillip E. Hanley, Secretary to the Commission, Billie Berry, Human Resources Specialist, Danna Quinn, Assistant Human Resources Director, Gary Bridget, Employee Relations Administrator, and Alisa Blandford, Assistant Attorney General.

II. Approval of Quarterly General Session Meeting Minutes

The Chair entertained a motion to approve the minutes of the December 2, 2008, Quarterly General Session meeting minutes.

Motion: Commissioner Oberstein moved to approve the minutes of the December 2, 2008, Quarterly General Session as redacted. Commissioner Cayer seconded the motion. The minutes were unanimously approved.

III. Appeals Pending Final Decision

Joan W. Brown v. Judicial Branch Trial Courts - Secretary Hanley advised mediation in this matter was held before the EEOC on February 10, 2009. The mediation was attended by Secretary Hanley and Assistant Attorney General Alisa Blandford. The mediation was suspended to allow Ms. Brown time to submit additional medical documentation.

Discussion ensued regarding the scheduled date for receipt of the documentation. It was determined that a definitive date had not been established for receipt of the documents. The Commission recommended that, in the future, a firm date be established before the mediation session concludes for receipt of any documentation.

Robert Amavisca v. Adult Probation Department - The hearing in this matter was held on January 14, 2009. The Hearing Officer's report and recommendation has been received and any opposition to the hearing officer's report is due by March 9.

Teri Menke v. Adult Probation – Ms. Menke, an Adult Probation Officer, was terminated on January 26, 2009, and has filed an appeal. The hearing has been scheduled for March 25, 2009 before Hearing Officer Douglas Erickson.

IV. Revision to Suspension Procedure/Rules

Secretary Hanley provided a copy of the Arizona Administrative Code, §R2-5.1-101. Definitions, Item 2 which states: “‘Appeal’ means a written request filed with the board by a permanent employee in state service seeking relief from dismissal, demotion, or suspension of more than 40 working hours.” In accordance with this statute, and in an effort to be consistent with other state agencies, Secretary Hanley stated the Judicial Branch requests the Merit Commission consider a change to the rules that “only suspensions in excess of 40 hours may be appealed to the Merit Commission”. Secretary Hanley stated this request is being made in an effort to conserve resources and administrative time in processing and handling appeals.

Discussion ensued. The Commission inquired as to whether such a change was in accordance with the State’s Executive Order wherein different agencies act in concert, and meet and confer over wages, hours and working conditions. Assistant Attorney General, Alisa Blandford advised that the statute mandates the levels of discipline that one can appeal. It was therefore her belief that a state agency could not enter into an informal agreement that would alter the meaning of the statute.

Further discussion ensued regarding the number and length of suspensions the Judicial Branch issues per year and what recourse employees would have who received suspensions of 40 hours or less if this rule was put into effect. Secretary Hanley said that a small number of suspensions were issued per year. He also stated there would be no recourse for suspensions of 40 hours or less. However, it was suggested that an internal review process could be established whereby those employees would have an internal structure as a recourse for their grievances.

Further discussion ensued. It was the opinion of the Commission that staff provided insufficient evidence to show administrative convenience or cost savings sufficient to justify adopting the recommended rule. The Commission stated its main concern was fairness in the workplace and balked at the idea that an employee would have no recourse to disciplinary actions. The Commission further stated there should be compelling reason or some demonstration that a significant problem exists to justify changing an existing rule.

It was also the Commission’s view that creating an internal review procedure would not reduce costs because it would require diverting employees from their regular duties to oversee this review process. However, the Commission advised it would reconsider the request if there was some alternative review process for employees who may receive suspensions of 40 hours or less, but did not want the option to be no recourse at all. All agreed.

V. Update on Hearing Extensions and Mediation Procedure

Commissioner Davis stated the Commission had previously discussed a 60-day time limit as a total number of days for extensions; however, a question remained as to the number of times a party could ask for an extension.

Secretary Hanley stated that in accordance with the Merit Rules, a hearing must commence within 45 days after the assignment of the hearing officer. In addition, the Hearing Officer Handbook, Section VIII states: "It is the Commission's policy to grant continuances only when absolutely necessary. . . . The Hearing Officer has the authority to grant or deny requests for continuances and to set a hearing date if the parties are unable to arrange a mutually agreeable date and time, except that no hearing may extend beyond the 60th day after the first day of hearing without prior approval of the Commission." He believed this would limit the number and length of extensions.

The Commission requested the exact start and end dates be included on all correspondence to all parties in a hearing. In addition, the stipulation that no continuances will be allowed beyond 60 days from the start date of a hearing without prior approval of the Commission must also be included. The Commission stated in an effort to ensure an expeditious process, it would only grant continuances when absolutely necessary.

Secretary Hanley also reported that the Judicial Branch followed up on information concerning best practices of the EEOC mediation process as requested by the Commission. Letters of inquiry were sent to sixteen different agencies, merit commissions, and individual HR Directors requesting information as to their procedure in handling EEOC complaints received in the middle of merit commission appeals. Only three responses had been received which were not particularly helpful.

Commissioner Oberstein stated he recalled the issue was that if someone filed an internal appeal, and then filed an external appeal, specifically with the EEOC, should the Commission shut down the internal process until EEOC completes, and if there are portions of the internal appeal that are not EEOC related, do they proceed?

Commissioner Davis stated his understanding was that the EEOC has broad powers and their authority would supersede the Commission's authority. His question arose from the fact that cases are often complicated and the EEOC may treat only some portion of the subject matter in dispute. If the subject matter that the EEOC does not retain jurisdiction over falls within the Commission's jurisdiction, how should the Commission proceed?

Secretary Hanley stated his preference would be to allow both processes to continue at the same time. He stated that he believes it is possible that a discharged employee will exercise his or her rights under the appeal process before the Commission and file a complaint with the EEOC or Attorney General's Office as well. He stated, in that instance, he would be inclined to allow both processes to run their course independent of one another.

It was suggested that the Commission and staff might consider contacting the EEOC directly regarding what the best practice is because they are the ones who deal with this issue and would have a better insight into the process.

VI. Final review of revised Judicial Merit Commission Decision Summary

Secretary Hanley stated the Judicial Merit Commission Decision Summary aimed to serve as a method of documenting the Commission's decision in appeal matters rather than simply relying on the minutes. Commissioner Davis stated that the Commission agreed the document would be a cover sheet summary. The Commission adopted the cover sheet summary as an administrative document for staff use.

VII. Final review of Judicial Merit Commission Decision and Order

Commissioner Davis advised that the proposed Judicial Merit Commission Decision and Order will be used as a template to establish a record of the Commission's decisions during an appeal. All of the language in the document will not be used but will be tailored for each individual appeal. Discussion ensued regarding suggested revisions to the wording in the document.

The Commission advised staff that the language and sentence structure on the second page of the document was confusing. The Commission requested the document be revised to clearly indicate whether the court service is entitled to offset income earned during separation against any award of back wages and benefits. As a determining guide, it was suggested that the policy which determines secondary, authorized and unauthorized employment for the Judicial Branch be referenced in the revised document. The Commission asked staff to provide a revised draft for its review and consideration.

VIII. Update on Unemployment Insurance Compensation when awarding back wages

Commissioner Oberstein thanked staff for providing the cases cited in counsel's report of December 1, 2008. He stated the cases were helpful and some did indicate that unemployment insurance could be offset against back wages. Commissioner Oberstein stated he also consulted the Arizona Unemployment Insurance Benefits Guide. The Guide indicated that under the Employment Security Law of Arizona a person receiving unemployment insurance must report to the Arizona Department of Economic Security any and all payment for work during the unemployment claim period. As a result, he stated he would be very comfortable offsetting unemployment insurance in awarding back wages.

Commission Oberstein suggested the following for consideration and discussion as boilerplate language: "In the event an employee gets put back to work, and they have collected unemployment insurance, that their reinstatement, as well as their back pay, are contingent upon the employee reporting the back pay and the result of the reinstatement to the Department of Economic Security and working it out with them".

Discussion ensued regarding the boilerplate language and monitoring and overseeing employees in an effort to ensure they abide by that rule. The Commission agreed its final order would include a notice to the employee that the Department of Economic Security would be notified of their reinstatement, the time period of that reinstatement and of any back wages received that should be offset against whatever unemployment insurance collected.

IX. Executive Session

The Commission held no Executive Session.

X. Call to the Public

None.

XI. Future Agenda Items

1. Further Amendments to the Decision and Order.
2. Provide copies of revised RIF policy.

XII. Meeting Adjournment

The Chair entertained a motion to adjourn.

Motion: Commissioner Smetana moved to adjourn the meeting. The motion was seconded by Commissioner Cayer. Motion unanimously approved. The meeting was adjourned at 2:55 p.m.

Respectfully submitted,

Billie J. Berry
Staff to the Commission

For

Phillip E. Hanley
Secretary to the Commission

Next Meeting: Tuesday, June 2, 2009 @ 2:00 p.m. in the Tang Conference Room

