

# Questions and Answers:

State Personnel Relations Law Appeals

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# Questions and Answers: State Personnel Relations Law Appeals

These questions and answers are provided as an aid to the public in understanding appeals under the State Personnel Relations Law (SPRL). The SPRL gives certain state employees the right to appeal some personnel actions to the Employment Relations Board.

This document is intended only to provide assistance in understanding the basic processes and procedures in SPRL appeals. **This document is not a legal authority and should never be cited. This document is not an official statement of opinion by the Employment Relations Board. These are commonly asked questions and answers intended to assist parties who wish to understand how appeals under SPRL are processed.**

This document is not legal advice. A party with legal questions must seek legal advice from the party's own attorney.

The practices described in this guide may change from time to time as required by changes in the underlying law or changes in ERB structure and practices. To the extent possible, notice of any changes will be provided through ERB's web site:

<http://www.oregon.gov/erb/pages/index.aspx>

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# OVERVIEW AND BACKGROUND

## 1. What is the State Personnel Relations Law (SPRL)?

The State Personnel Relations Law (SPRL), ORS Chapter 240, is the law that governs certain employment-related rights of state employees. The SPRL gives management service and classified state employees who are not represented by a union the right to appeal discipline and other types of personnel actions to the Employment Relations Board.

## 2. Who is covered by the SPRL?

The SPRL applies to some (but not all) employees of the State of Oregon. Generally speaking, management service employees and classified employees of the state who are not represented by a union can file appeals under the SPRL. The SPRL does not apply to local government employees, federal employees or private sector employees.

## 3. Who administers the SPRL?

The Employment Relations Board (ERB or Board) administers and decides appeals and complaints submitted by state employees under the SPRL.

The Board consists of three full-time, quasi-judicial members who are appointed by the Governor and confirmed by the Senate. The Board operates under the provisions of ORS chapter 240 (the State Personnel Relations Law), ORS 243.650 through 243.766 (the Public Employee Collective Bargaining Act), ORS 663.005 through ORS 663.325 (private sector labor law), and ORS 662.405 through 662.455 (relating to the State Conciliation Service).

The Board is supported by three administrative law judges, a hearings assistant, an assistant to the Board, the Mediation and Election Coordinator, and the State Conciliation Service, consisting of the State Conciliator and two state mediators.

## 4. What happens when a SPRL appeal is filed?

When a SPRL appeal is filed, the case is assigned to an administrative law judge (ALJ). The ALJ will process the case. The ALJ will contact the parties to schedule the hearing and may ask the parties if they wish to participate in mediation. The ALJ will rule on any prehearing motions and preside over the hearing.

SPRL hearings are contested case hearings, during which each side presents opening statements, documentary evidence and testimony. The ALJ will conduct the hearing, administer an oath or affirmation for all witnesses, and rule on objections. Both parties may question witnesses. The ALJ may also question witnesses. Closing arguments are made either orally at the end of the hearing, or submitted in writing after the hearing.

Hearings are usually held in the city of the appellant's current or former state employer. If the employee's workplace is or was in Salem, the hearing will be in ERB's hearing room in Salem. If the employee's workplace is outside the Salem area, the hearing may be scheduled for another location (such as a conference room in a state building).

After the hearing, the ALJ will prepare a written recommended order. The recommended order will include findings of fact and conclusions of law. The ALJ may recommend that the appeal be granted, in whole or in part, or dismissed. If the ALJ recommends that the Board grant the appeal, the ALJ will recommend a remedy, which may include reversal of the challenged personnel action, reinstatement to employment, and an award of back pay.

Either party may object to the recommended order by filing written objections. If only one party files objections, the other party may file cross-objections. Objections are not required to be detailed, although it is helpful to the Board if the objecting party identifies specific places in the evidentiary record that support the objection.

If objections are submitted, the three-member Board will offer to schedule oral argument on the objections. A party may elect to submit a written memorandum in lieu of oral argument. In most cases in which objections are submitted, the Board holds oral argument. Oral arguments before the Board are held in ERB's hearing room in Salem.

After the oral argument, the Board will issue a written final order on the appeal. The Board's final order contains a detailed description of the facts of the case and a detailed discussion of the reasons why the Board is granting or dismissing the appeal. Either side may appeal the final order to the Oregon Court of Appeals.

The Board's final orders are posted on its web site at:

<http://www.oregon.gov/ERB/Pages/BoardOrderList.aspx>

## 5. What is an administrative law judge (ALJ)? What is an ALJ's role?

SPRL cases are heard by a staff of three ALJs. Administrative law judges are trained in labor and employment law and have authority in SPRL cases to rule on motions, conduct hearings, make factual findings, and write recommended orders.

When a SPRL appeal is filed, it is assigned to one of the three ALJs on ERB's staff.

## 6. What is the law that applies to SPRL appeals?

The SPRL is contained in ORS chapter 240. These statutes may be found at:

[https://www.oregonlegislature.gov/bills\\_laws/ors/ors240.html](https://www.oregonlegislature.gov/bills_laws/ors/ors240.html)

ERB's administrative rules contain the rules that govern the processing and disposition of SPRL appeals. ERB's administrative rules may be found at:

[http://arcweb.sos.state.or.us/pages/rules/oars\\_100/oar\\_115/115\\_tofc.html](http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_115/115_tofc.html)

ERB publishes its opinions in SPRL cases on its web site. Board orders in SPRL cases may be found at:

<http://www.oregon.gov/ERB/pages/boardorderlist.aspx>

ERB also publishes a digest of its SPRL decisions so that parties in SPRL cases can research how the Board has decided SPRL cases. The SPRL Digest may be found at:

<https://www.oregon.gov/erb/Pages/Appeal.aspx>

## 7. Who can I call for information?

ERB employees are available between 8:00 a.m. and 5:00 p.m. to answer questions (except for the hour between noon and 1:00 p.m., when ERB's offices are closed). Questions may be directed to the following staff members. Their particular areas of responsibility are described below, but any ERB staff member can assist you with any SPRL-related question. If another ERB employee would be able to assist more quickly, the ERB staff member you contact will connect you to the appropriate person.

For general procedural questions and questions related to a case while it is pending before an administrative law judge:

Cynthia Nelson, Hearings Assistant  
(503) 378-3295  
[Cynthia.nelson@ERB.Oregon.gov](mailto:Cynthia.nelson@ERB.Oregon.gov)

For general procedural questions and questions related to a case while it is pending before the Board:

April Bathurst, Legal Secretary to the Board  
(503) 378-3807  
[April.Bathurst@ERB.Oregon.gov](mailto:April.Bathurst@ERB.Oregon.gov)

For general procedural questions and questions related to mediation:

Sabrina Dunsworth, Mediation and Election Coordinator  
(503) 378-6471  
[Sabrina.Dunsworth@ERB.Oregon.gov](mailto:Sabrina.Dunsworth@ERB.Oregon.gov)

Please note that although ERB staff can assist with administrative questions, ERB staff cannot assist parties with planning or preparing an appeal or hearing. ERB staff is not permitted to offer legal advice to parties.

## 8. What laws are not administered by ERB, and who can I call for information about those laws?

The Employment Relations Board does not have jurisdiction over the following types of claims: civil rights, wage and hour issues (such as claims for unpaid wages or unpaid overtime), the Oregon Family Leave Act (OFLA) or the Family Medical Leave Act (FMLA), unemployment compensation, workers compensation, or unsafe work practices or unsafe workplaces. Other agencies administer the laws in these areas. They include:

- For civil rights, wage and hour, and OFLA issues, contact the Oregon Bureau of Labor and Industries:

<http://www.oregon.gov/BOLI/pages/index.aspx>

[mailb@boli.state.or.us](mailto:mailb@boli.state.or.us)

Phone: 971-673-0761

Ore. Relay TTY: 711

Fax: 971-673-0762

- For wage and hour and FMLA issues, contact the United States Department of Labor:

<https://www.dol.gov/>

Phone: 866-4-USA-DOL (1-866-487-2365)

Phone: 877-TTY-5627 (1-877-889-5627)

- For unemployment compensation claims, contact the Oregon Employment Department:

<http://www.oregon.gov/employ/pages/default.aspx>

Phone: 800-237-3710 (in-state only)

Phone: 503-947-1394 (direct)

Fax: 503-947-1472

TTY: 7-1-1

Internet Relay: <http://www.sprintrelayonline.com>

- For questions related to workers compensation coverage or claims, contact the Oregon Workers Compensation Division:

<http://wcd.oregon.gov/Pages/index.aspx>

Phone: 800-452-0288 (toll-free)

Phone: 503-947-7585 (general questions)

Phone: 503-947-7810 (central reception)

Phone: 503-947-7630 (fax)

[workcomp.questions@oregon.gov](mailto:workcomp.questions@oregon.gov)

[wcd.askanauditor@oregon.gov](mailto:wcd.askanauditor@oregon.gov)

- For questions related to unsafe workplaces or unsafe work practices, contact the Oregon Department of Consumer and Business Services/Oregon OSHA:

<http://osha.oregon.gov/Pages/index.aspx>

Phone: 503-378-3272

Phone: 800-922-2689

## 9. Are the parties required to be represented by attorneys?

No. Parties do not need to be represented by an attorney in a SPRL appeal. Many appellants are represented by counsel, but not all. The state is typically represented in SPRL appeals by an Assistant Attorney General from the Oregon Department of Justice. SPRL cases can be complex. An attorney may be helpful in explaining your rights and the procedures.

## TYPES OF APPEALS

### 1. What types of actions can be appealed, and who can appeal them?

Broadly speaking, appeals can be filed by two categories of state workers: management service employees and classified employees who are not represented by a labor organization. Additionally, any state employee can file a complaint alleging that a state entity violated the use of “temporary employment” provisions of ORS 240.309.

The SPRL does not expressly authorize “class action” appeals, or appeals filed by one appellant purporting to represent one or more people who have not filed their own appeals. Appeals that arise out of the same or similar facts may be consolidated so that the evidence is presented in one hearing to one administrative law judge.

## 2. What types of personnel actions can a management service employee appeal?

After completing trial service, a management service employee may appeal the following personnel actions listed in ORS 240.570(3): reprimand, salary reduction, suspension, demotion, removal or dismissal. See ORS 240.570(4). Under the SPRL, a regular status management service employee may be disciplined, removed or dismissed from management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily. See ORS 240.570(3).

A regular status employee in the management service may appeal an assignment, reassignment or transfer. A regular status employee in the management service may also appeal a removal from management service due to reorganization or lack of work. Appeals in these cases must comply with the requirements of OAR 115-045-0021.

An employee in the management service may also appeal a management service removal that also dismisses the employee from state employment for a reason listed in ORS 240.555. A management service employee with restoration rights to the classified service may appeal a removal from the management service that is based on ORS 240.555 (the basis for dismissal from the classified service) and ORS 240.570(3) (the basis for removal from the management service). Appeals in these cases must comply with the requirements of OAR 115-045-0021 (regarding management service removal) and OAR 115-045-0010 (regarding classified employee discipline).

Through its SPRL case law, the Board has defined the standards that it applies to determine whether the employer’s personnel actions with regard to a management service employee comply with the SPRL. The SPRL Digest, available on ERB’s web site, identifies the cases that have discussed and defined these standards. The SPRL Digest can be found at:

<https://www.oregon.gov/erb/Pages/Appeal.aspx>

In addition, the Board’s decisions in SPRL cases from 2004 through the present are published on ERB’s web site, and can be found at:

<http://www.oregon.gov/ERB/pages/boardorderlist.aspx>

**References:** [ORS 240.555](#), [ORS 240.570](#), [OAR 115-045-0021](#), [OAR 115-045-0010](#).

## 3. Are management service reclassifications appealable?

No. Reclassifications and reallocations of management service positions are not listed in ORS 240.570 as the types of personnel actions that can be appealed. The Board dismisses these appeals of reclassifications and reallocations for lack of jurisdiction.

#### 4. Are management service trial service removals appealable?

No. ORS 240.570(3) concerns an appeal of personnel action taken after completion of trial service. The Board dismisses management service appeals of trial-service-personnel actions for lack of jurisdiction.

#### 5. What types of personnel actions can a management service employee not appeal?

Any action not listed under ORS 240.570(3), including:

- Removal from trial service;
- The content or ratings in a performance review, evaluation, or a performance improvement plan;
- Denial of a promotion; and
- Denial of a pay increase.

#### 6. What types of actions can an unrepresented classified employee appeal?

The Board hears appeals filed by classified employees who are not represented by labor organizations. An unrepresented classified employee may appeal discipline, including a pay reduction, suspension, demotion or dismissal. Unrepresented classified employees may be disciplined for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service—the grounds listed in ORS 240.555. These types of appeals must comply with the requirements of OAR 115-045-0010.

Through its SPRL case law, the Board has defined each of the statutory bases for discipline of unrepresented classified employees. The SPRL Digest, available on ERB's web site, identifies the cases that have discussed and defined the statutory bases for discipline.

An unrepresented classified employee may also appeal any personnel action affecting that person (including a trial service removal) that the employee alleges is arbitrary or contrary to law, rule or policy, or taken for political, religious or racial reasons, or because of sex, marital status or age. See ORS 240.086; ORS 240.560(3); OAR 115-045-0020. These types of appeals must comply with the requirements of OAR 115-045-0010.

**References:** [ORS 240.086](#), [ORS 240.560\(3\)](#), [OAR 115-045-0010](#), [OAR 115-045-0020](#).

#### 7. Can a union-represented employee appeal a disciplinary action with ERB?

No. The Board does not have jurisdiction to hear appeals of disciplinary actions filed by employees in certified or recognized collective bargaining units.

A union-represented employee may file other types of appeals (such as an appeal alleging violation of ORS 240.309, which applies to the state's use of temporary employees).

**References:** [ORS 240.307](#); [OAR 115-045-0017](#).

## 8. What is an appeal related to temporary employment?

Any employee may file a complaint alleging violation of ORS 240.309. ORS 240.309 provides that temporary employees may be appointed for the purpose of meeting emergency, nonrecurring or short-term workload needs of the state, and limits the duration of temporary appointments. These types of appeals must comply with the requirements of OAR 115-045-0017.

*References:* [ORS 240.307](#); [OAR 115-045-0017](#).

## 9. What types of actions are not appealable under the SPRL?

The SPRL does not give ERB the jurisdiction to hear appeals from certain types of personnel actions, including the following:

- Appeals challenging actions of non-state employers, e.g., employers not covered by the SPRL;
- Appeals filed by classified employees in certified or recognized bargaining units;
- Appeals by employees in the unclassified service (also referred to by the state as the executive service);
- Appeals by employees in the exempt service (such as part-time members of boards and commissions, judges, referees, and officers and employees of the Legislative Assembly);
- Appeals challenging personnel actions of Oregon Health Sciences University or other Oregon universities with governing boards;
- Trial service removals in the management service;
- Reclassifications and reallocations of positions in the management service;
- The content or ratings in a performance review, evaluation, or a performance improvement plan in the management service;
- Denial of a promotion in the management service; and
- Denial of a pay increase in the management service.

# INITIATING AN APPEAL

## 1. What is an appeal?

To initiate an appeal under the SPRL, the appellant must prepare and file a written appeal. The appeal must be in writing and must contain a detailed description of the action being appealed and the additional information required by the Board's rules.

*References:* [OAR 115-045-0005 through 0021](#).

## 2. Is there a particular format an appellant must use for a SPRL appeal?

No. There are no formal format requirements (such as those required in state and federal court) for SPRL appeals. However, an appeal must be in writing and must describe the personnel action being appealed, the reasons the appellant believes that the action was unlawful, and the corrective action being requested (see OAR 115-045-0010, 115-045-0017, 115-045-0020, or 115-045-0021). Appeals are often submitted in the form of a detailed letter. It is helpful if the appeal attaches the personnel document being appealed, so that the personnel action the appellant is seeking to appeal is clearly identified for the ALJ.

*References:* [OAR 115-045-0005 through 0021](#).

## 3. How does an appellant file an appeal?

An appeal must be timely filed with the Board or the Board will dismiss the case. An appeal must be in writing and filed not later than 30 calendar days after the effective date of the action being appealed. An appeal is considered “filed” when it is received by the Board or postmarked, if mailed postpaid and properly addressed. A document received by the Board after 5:00 p.m. is considered to be filed on the next business day.

Appeals may be filed by facsimile to the following number 503-373-0021 (there is a \$25 charge for filing documents by facsimile). Appeals may also be filed by email at the following email address: [ERB.Filings@ERB.Oregon.gov](mailto:ERB.Filings@ERB.Oregon.gov). To file a document by email, the document must be attached as a PDF to the email. Once the document is filed, the sender should receive an auto-reply indicating that the email was received. If the sender does not receive an auto-reply shortly after the filing, the sender should contact April Bathurst at 503-378-3807 or by email at [EmpRel.Board@ERB.Oregon.gov](mailto:EmpRel.Board@ERB.Oregon.gov).

Appeals that are faxed or emailed must be received by the Board by 5:00 p.m. to be considered filed that day.

*Reference:* [OAR 115-045-0005](#).

## 4. Is a SPRL appeal a public record, or otherwise available to the public?

Yes. SPRL appeals and SPRL decisions are public records. The Board’s decisions in SPRL cases are published on ERB’s web site at [www.oregon.gov/ERB/pages/boardorderlist.aspx](http://www.oregon.gov/ERB/pages/boardorderlist.aspx).

In addition, most documents admitted into evidence in SPRL appeals and most of the documents in the case file are public records, and may be requested by members of the public.

## 5. What is the deadline for filing an appeal?

An appeal must be filed no later than 30 calendar days after the effective date of the action being appealed.

*Reference:* [OAR 115-045-0005](#).

## 6. Is there a fee required to file an appeal?

No. There is no filing fee to submit a SPRL appeal.

# CASE PROCESSING, SETTLEMENT, AND MEDIATION

## 1. How is the hearing scheduled?

After an appeal is filed with the Board, the appeal is assigned to an administrative law judge (ALJ). The ALJ sends a letter to the appellant and the employer that (a) encloses the appeal letter; (b) asks the parties to confer about a hearing date; and (c) may ask the parties whether they wish to participate in mediation. Parties are expected to comply with any deadlines set by the ALJ in the letter, and may request additional time from the ALJ if needed. Failure to comply with the deadlines or instructions of the ALJ may result in dismissal of the appeal.

The Board's rules require hearings in SPRL cases to occur within 30 calendar days from the date the hearing was filed, unless both parties agree otherwise.

See OAR 115-045-0025(2).

Typically, the parties confer with each other, either by telephone or by email, to discuss whether they both waive the 30-day deadline for the hearing and to identify a range of dates that they are both available for a hearing. One of the parties sends those dates to the ALJ and the ALJ will select a hearing date and notify the parties of the hearing date.

*Reference:* [OAR 115-045-0025\(2\)](#).

## 2. Can I resolve an appeal without a hearing?

Yes. The parties are free to resolve the appeal by negotiating their own resolution. The parties may do so by negotiating with each other, or they may request the assistance of a mediator. ERB will assign a mediator from the State Conciliation Service if requested by the parties. See Questions 4 through 15, below, for more information about mediation.

## 3. Can an appellant request mediation before filing an appeal?

Yes. However, requesting mediation does not toll or postpone the deadline for filing a SPRL appeal.

## 4. What is mediation?

Mediation is a voluntary settlement negotiation. The role of the mediator is to assist the parties in reaching a mutually acceptable resolution of their dispute. The mediator is not a judge and has no authority to force a settlement on the parties.

## 5. How do I request mediation?

Parties may request ERB-provided mediation through the ALJ. If both parties wish to participate, the ALJ will transfer the case to ERB's Conciliation Division, and the State Conciliator will assign a mediator and schedule the case for mediation.

The parties may also choose to hire a private mediator. In that case, the arrangements with the mediator (including the mediator's compensation) are decided by the parties. ERB has no role in assisting parties with finding or retaining a private mediator.

*Reference:* [SPRL Mediation Request Form](#)

## 6. Does mediation postpone a hearing?

Not necessarily. If the parties wish to mediate, the mediation will be scheduled on a day that both parties and the mediator are available. The ALJ will typically ask the parties to waive the 30-day hearing deadline and will either (a) schedule the hearing to occur after the scheduled mediation, or (b) wait to set a hearing date until after the parties have completed mediation.

## 7. Is there a cost for ERB mediation?

There is no cost to the appellant for mediation conducted by a mediator from ERB's Conciliation Service.

## 8. What can I expect in mediation?

After mediation is scheduled, the assigned mediator will contact the parties individually by phone to discuss the dispute and the mediation process, and to answer any questions the parties may have in advance of mediation.

Mediation typically begins in joint session (with both parties in the same room) to review the terms of the mediation consent form and to answer any remaining questions about the process. A copy of ERB's [mediation consent form](#) can be found at the end of this guide.

The mediator may also choose to begin with parties in separate rooms. During the course of mediation, the mediator will determine if and when to meet with the parties jointly or separately, and may also ask to sidebar (have private discussions) with representatives from each party.

Throughout the process, the mediator will seek to understand and communicate each party's concerns and interests. Mediators do not advocate for one party or the other, nor do they impose solutions or make decisions for the parties. The mediator's job is to help the parties develop and evaluate settlement options and find a resolution that will address the needs of both parties.

## 9. Should I bring an attorney?

A party does not need to be represented by an attorney at mediation. However, parties are encouraged to consult with attorneys regarding their legal rights and obligation throughout the mediation process.

## 10. Should I bring someone with me to mediation?

On occasion, a participant in mediation may wish to be accompanied by a non-lawyer, such as a friend or family member. A participant who may wish to be accompanied at mediation should discuss the issue with the mediator before mediation begins. Whether a non-lawyer should attend mediation with a participant is a case-by-case decision.

## 11. What happens if the parties reach a voluntary settlement?

If the appeal is settled through mediation, the parties inform the ALJ of the settlement. If the case settles, and upon the parties' request, the ALJ will consider the appeal withdrawn and notify the parties that the appeal is withdrawn. ERB will take no further action on appeals that are voluntarily settled by the parties and withdrawn.

The parties are not required to use a mediator to settle a case. They may negotiate directly with each other to discuss resolution of a case. If the case resolves through direct negotiations, the parties should promptly notify the ALJ.

## 12. If I participate in mediation and an appeal does not settle, will the mediator tell the ALJ or the Board about the parties' proposals or arguments in mediation?

No. The mediator does not divulge the discussions during mediation with either the ALJ or the Board and cannot be compelled to do so.

## 13. Is mediation confidential?

Mediation communications are confidential to the extent provided in ERB's rules. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing.

*References:* [OAR 115-040-0040 through 115-040-0044](#).

## 14. Do I have to participate in mediation to try to settle an appeal?

No. The parties are always free to discuss settlement of the case at any time. Mediation is not required.

## 15. If the parties want to try to settle an appeal, must that occur before the hearing is scheduled or takes place?

No. The parties are free to discuss settlement of the case at any time, including after the hearing is held.

## 16. Can an appellant withdraw an appeal?

Yes. An appellant may withdraw an appeal by notifying the ALJ and the employing entity that the appeal is withdrawn.

## 17. If an appeal settles, does the Board need to receive a copy of the settlement agreement?

No. The parties do not submit the settlement agreement to the Board. If an appeal settles, the parties notify the ALJ that the parties reached an agreement and the appellant wishes to withdraw the appeal.

# DOCUMENTS SUBMITTED TO THE BOARD

## 1. How do I submit documents to ERB?

Documents required or allowed to be filed or submitted, such as motions or objections to the recommended order, may be filed by mail, email, facsimile, or in person. There is a \$25 charge for each filing by facsimile. Documents received after 5:00 p.m. shall be deemed filed the next business day.

Unless specifically provided otherwise by the Board's rules or by the ALJ, all documents filed shall be served on the named parties or attorney of record and shall include proof of service. Proof of service is a document that identifies when a party was served and the method of service used. Documents may be served by mail, email, facsimile or in person. There is a [proof of service form](#) available for use at the end of this guide and on ERB's web site.

*Reference:* [OAR 115-010-0033](#).

## 2. What does “filing” a document mean?

Filing a document means submitting it to the Board. A document is officially received by the Board when it is “filed” with the Board. The appeal itself will be considered filed when it is received by the Board or postmarked, if mailed postpaid and properly addressed.

*References:* [OAR 115-010-0010\(10\)](#); [OAR 115-010-0033](#); [OAR 115-045-0005](#).

## 3. Is there a fee to file documents with ERB?

No, unless you file a document by facsimile. There is a \$25 charge for each filing by facsimile.

*Reference:* [OAR 115-010-0033\(1\)\(c\)](#).

#### 4. How do I serve the other party?

Serving the other party means filing a document with the Board and simultaneously providing a copy of that document to the other party. Unless specifically provided otherwise by the Board's rules or by the ALJ, all documents filed shall be served on the named parties or attorney of record and shall include proof of service. Proof of service is a document that identifies when a party was served and the method of service. Documents may be served by mail, email, facsimile or in person. See Question 5, below.

*Reference:* [OAR 115-010-0033](#).

#### 5. What is “proof of service”?

Proof of service is a signed document that identifies when a party was served and the method of service. Typically, parties attach proof of service as the last page of the filed document. A proof of service generally states, “I certify that on (date) I served the (name of document) in (name of case) on the following by (first class mail, facsimile, email, hand delivery) at this address: (address of opposing party or attorney).” The filing party signs the proof of service to certify that the party served the opposing party as indicated in the proof of service.

There is a [proof of service form](#) available for use at the end of this guide and on ERB's web site. The use of the form is voluntary. A party may prepare its own proof of service.

*Reference:* [OAR 115-010-0033](#).

#### 6. Is there a required format for briefs submitted to the Board?

Yes. Briefs submitted in SPRL cases must comply with OAR 115-010-0077. The rule requires that briefs be typewritten or printed with double spacing on letter-sized paper, have a caption with the case title and number, and not exceed 30 pages, unless expressly permitted by the Board or ALJ. The rule also requires that once the ALJ establishes a brief filing date, parties must ask the ALJ for an extension of time and provide the ALJ with any other party's position to the extension request.

*Reference:* [OAR 115-010-0077](#).

#### 7. Can I have private communications with only the ALJ and not include the other party?

Generally no, because the Board's rules require disclosure to the other party of private communications (also known as *ex parte* communications), except in certain circumstances permitted by the rules. An *ex parte* communication is an oral or written communication to an ALJ concerning a fact at issue in any matter that is not made in the presence of all parties.

Before service of the notice of hearing, the ALJ may contact a party privately to discuss the appeal or attempt to resolve the dispute.

After service of the notice of hearing, the Board's rules require an ALJ who receives an *ex parte* communication to give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written. The ALJ will provide any party that did not make the *ex parte* communication with an opportunity to respond to the *ex parte* communication.

The required disclosure of *ex parte* communications does not apply to preliminary matters related to the ALJ's initial processing of the appeal, or to requests for subpoenas. It also does not apply to mediation communications.

**Reference:** [OAR 115-010-0110](#).

## 8. Can I have private communications with only a Board Member and not include the other party?

Generally no, because the Board's rules require disclosure of private communications by both Board members and ALJs to the other party, except in circumstances permitted by the rules. See Question 7, above.

**Reference:** [OAR 115-010-0110](#).

# PREHEARING MOTIONS, DISCOVERY, AND PROCEDURES

## 1. Generally, what happens before a hearing in a SPRL case?

SPRL appeals proceed quickly to hearing. In the compressed time between the date the appeal is filed and the date the parties are required to exchange exhibits and witness lists, there is typically only a few weeks or, in some cases, a month or slightly longer. This section describes the events that occur in a case before the hearing.

## 2. What is a prehearing notice from the ALJ?

Before the hearing, the ALJ will send a letter that notifies the parties of the scheduled hearing date and location.

## 3. How do I ask to postpone a hearing?

When the parties agree to a postponement of the hearing, they must promptly submit a written motion for postponement to the ALJ, who has the discretion to grant or deny the request.

If the parties do not agree to a postponement, the party seeking the postponement must submit a motion requesting the postponement. The motion must state the reason for the request and whether the other party objects to the request. There is a [motion to postpone a hearing](#) form available for use at the end of this guide and on ERB's web site.

**References:** [OAR 115-010-0040\(5\)](#), [OAR 115-045-0025](#).

## 4. Can I obtain documents from the other side before the hearing?

Yes. In SPRL proceedings, subpoenas and depositions are potential tools to obtain documents or other evidence before the hearing. In addition, the parties are required to exchange exhibits seven days before the hearing, and therefore receive documents from the other side during that prehearing disclosure of exhibits. For information about these prehearing methods to obtain information, see Questions 5, 6, 7, 8, and 15, below.

Although it is the appellant who typically seeks information from the employer, the obligation to produce information that has been properly requested is reciprocal. The employer may also seek information from the appellant.

## 5. What is a subpoena?

A subpoena is a document that compels the recipient of the document to testify or, in certain circumstances, to produce records. Subpoenas may be issued by attorneys of record in SPRL cases in the manner and form prescribed by ORS 183.440.

The ALJ may issue subpoenas at a party's request. An ALJ will generally not issue a subpoena if party is represented by an attorney or if the party fails to establish that it is necessary for the Board to issue the subpoena on the party's behalf. If a party wishes to request issuance of a subpoena, the party must make a request showing the general relevance and reasonable scope of the evidence sought. The request must identify the case by title and case number, and identify specific witnesses, records and other documents for which a subpoena is requested.

To contest a subpoena, a party must file a motion to quash with the assigned ALJ.

Subpoenas must be served within a reasonable time before the hearing or date designated for the production of records or documents. Because of the short time frames associated with SPRL cases, subpoenas should be requested or issued and served as soon as possible.

*Reference:* [OAR 115-010-0055](#).

## 6. Who can issue a subpoena?

Subpoenas can be issued by attorneys of record in the manner and form prescribed by ORS 183.440. In addition, at a party's request, the ALJ may issue a subpoena, although an ALJ will generally not do so unless the party is not represented by an attorney or the party establishes that it is necessary for the Board to issue the subpoena on the party's behalf (see Question 5, above).

*Reference:* [OAR 115-010-0055](#).

## 7. What is a deposition?

A deposition is a formal procedure during which a party questions a witness under oath. A deposition must take place before an officer authorized to administer oaths under state law, typically a court reporter.

## 8. Can a party take a deposition in a SPRL case?

Yes, although generally depositions are conducted only to perpetuate testimony, which means that the deposition is taken to preserve a witness's testimony. Typically, this occurs only if a witness will be unavailable to testify at the hearing.

To take a perpetuation deposition, the party must file a request in a timely manner to allow the testimony to be taken sufficiently before the hearing so that the written transcript can be prepared for hearing. The party's request must identify the name and address of the witness, the materiality of the testimony, the reason why perpetuation is required, and the time the deposition will be completed. The ALJ will decide whether to allow the requesting party to take the deposition.

Because of the short timelines in some SPRL cases, a request to take the deposition of a witness who will be unavailable to testify at the hearing should be made as soon as possible.

Additionally, the Administrative Procedures Act permits a discovery deposition in a contested case (such as a SPRL appeal) if an ALJ grants a petition for or orders such a deposition. Discovery depositions are depositions taken to learn the substance of a witness's testimony before the witness testifies at hearing. Generally, however, discovery depositions do not occur in SPRL cases.

*References:* [OAR 115-010-0065](#); ORS 183.425.

## 9. What is a motion?

Motions are written requests for a ruling, order or other relief in a case. Examples of motions include a motion to extend a deadline, postpone a hearing, exclude evidence, dismiss a case, enter a protective order, or quash a subpoena.

## 10. How do I file a motion?

A party who wishes to submit a motion must file a written motion and submit a copy of the motion directly to the ALJ assigned to the case. A motion must clearly state the name of the party seeking relief, the specific relief sought, and the reasons that the party contends the relief should be granted. Motions are not required to be in any particular form. All motions must be filed with proof of service on the opposing party.

*Reference:* [OAR 115-010-0045](#).

## 11. Am I required to confer with the other party before I file a motion?

Yes, unless the motion is a dispositive motion. Except for motions that would resolve the entire case (such as motions to dismiss), before filing a motion, the party filing the motion must make a good faith effort to confer with the other party to seek resolution of the matter. In the motion, the moving party must describe all the efforts to confer and the outcomes of those efforts.

*Reference:* [OAR 115-010-0045\(2\)](#).

## 12. How do I respond to a motion filed by the other party?

The non-moving party generally may file a response to a motion within 14 days of the date the motion is served. However, given the short time lines associated with SPRL cases, the ALJ may shorten the required time frame.

*Reference:* [OAR 115-010-0045\(3\)](#).

## 13. Can I file a reply brief in support of my motion?

No. The moving party may not file a reply in support of a motion unless the party seeks and obtains permission from the ALJ or the Board to do so or the ALJ or the Board requests a reply.

*Reference:* [OAR 115-010-0045\(4\)](#).

## 14. I want to offer evidence at the hearing by electronic device (such as telephone). What do I need to do?

If a party wishes to offer evidence by an electronic device (such as telephone, video or Internet devices), the party must submit the request to the ALJ 10 business days before the scheduled hearing date. The ALJ has discretion to grant or deny the request. The factors the ALJ may consider are listed in OAR 115-010-0043.

If the ALJ allows a party to offer evidence by electronic device, the party seeking to offer exhibits into evidence during the portion of the case heard by electronic device must provide an original and copy to the Board and a copy to the other party in the case at least five business days before the date of the scheduled electronic device hearing.

*Reference:* [OAR 115-010-0043](#).

## 15. Am I required to exchange exhibits with the other side? If so, when?

Yes. The parties must exchange exhibit lists and exhibits at least seven days before the scheduled hearing, unless the ALJ directs otherwise. If an exhibit is not exchanged with the opposing party by the deadline set by the ALJ, the ALJ may exclude the exhibit unless good cause is shown. Exhibits must be marked and submitted in the manner required by the ALJ. See Question 17, under Hearing Procedures, for information about how to organize and label exhibits.

*Reference:* [OAR 115-010-0068](#).

## 16. Am I required to disclose my witness list to the other side? If so, when?

The parties must submit a witness list to the other party and to the ALJ at least seven days before the scheduled hearing, unless the ALJ directs otherwise. If a witness is not listed on the witness list or the witness list is not timely exchanged with the opposing party, the ALJ may exclude that witness's testimony.

*Reference:* [OAR 115-010-0068\(3\)](#).

# HEARING PROCEDURES

## 1. Are there always hearings in SPRL appeals?

Yes, unless the case is dismissed as untimely or because it challenges a non-appealable action (such as a performance review of a management service employee). The Board does not grant appeals on the basis of a motion (such as a motion for summary judgment).

If you want ERB to decide your SPRL appeal, there must be a hearing. The hearing in a SPRL appeal is conducted by an ALJ, who issues a recommended order after the hearing. (There are no juries in SPRL appeals.) After the recommended order is issued, either party may file objections, and the Board will then hold oral argument. The oral argument consists of legal arguments by the parties—*i.e.*, the parties do not offer new testimony from witnesses or new exhibits.

## 2. Where will the hearing be?

SPRL hearings are typically held in the ERB hearing room in Salem, Oregon. Hearings involving an appellant whose work location was remote from Salem may be held in a location closer to the work site, if funds are available to permit the ALJ to travel and if a suitable hearing location can be located.

## 3. Is the hearing open to the public?

Ordinarily, SPRL hearings are open to the public. Additionally, an ALJ may exclude witnesses from the hearing room during the hearing, while allowing other people to attend.

*Reference:* [OAR 115-010-0020](#).

## 4. Is the hearing recorded?

Yes. The ALJ will make an audio recording of the hearing. The recording is available upon request for a nominal fee.

## 5. When should I arrive for the hearing?

It is helpful to an orderly hearing if the parties arrive at the hearing room at least 30 minutes before the start of the hearing. During this time, the parties can discuss the admission of exhibits, any logistical matters not previously resolved between the parties (for example, whether a witness may need to be called out of order), and any other concerns that will aid in an efficient and orderly hearing.

## 6. What should I expect when I arrive for the hearing?

The parties typically provide exhibits to the ALJ and place one copy of the exhibit notebooks on the witness table. The parties may confer with each other about prehearing issues if they have not previously resolved any outstanding issues (see Question 5 above). The ALJ may also ask the parties if they have any matters to discuss off the record before

the hearing begins. This is the time when the parties may discuss witness scheduling issues, such as whether a witness needs to testify into or over the lunch hour.

## 7. What happens during a hearing?

The ALJ presides over the hearing. The ALJ will swear in the witnesses, rule on objections and motions, and make other decisions about the conduct of the hearing, such as when to start and stop the hearing, when to take breaks, and whether to admit evidence, take witnesses out of order, and reschedule a hearing. The ALJ may also ask the witnesses questions.

SPRL hearings are public hearings. If a party wishes to exclude witnesses, the party should make a request to the ALJ at the beginning of the hearing, before opening statements. The ALJ will decide whether to exclude witnesses from the hearing room.

The ALJ will permit the parties to make opening statements. The party with the burden of proof will present an opening statement first. The other party may make an opening statement at the beginning of the hearing, or may wait to present an opening statement at the beginning of the party's case-in-chief.

The ALJ may permit the party with the burden of proof to present a rebuttal case.

## 8. What is the burden of proof and who has it?

The burden of proof is the obligation to prove a position or fact related to a contested issue. In a hearing on an appeal from a disciplinary action under ORS 240.555 or ORS 240.570(3), the employer has the burden of proof and the burden of going forward with the evidence, and presents its opening statement and case-in-chief first at hearing. The appellant has the burden of proving any affirmative defenses. In all other SPRL appeals, the appellant has the burden of proof and the burden of going forward with the evidence. In those cases, the appellant presents an opening statement and case-in-chief first.

The party with the burden of proof must prove its case by a preponderance of the evidence. A preponderance of the evidence means the greater weight of the evidence. It is such evidence that, when weighed with the evidence opposed to it, has more convincing force and is more probably true and accurate. When a party must prove a claim by a preponderance of the evidence, that party must persuade the factfinder by evidence that makes the factfinder believe the claim is more likely true than not true.

**Reference:** [OAR 115-010-0070\(5\)\(c\)](#).

## 9. Do I have to give an opening statement?

No. Opening statements are not required, although they are helpful to the ALJ because they tell the ALJ what to expect. The party who does not have the burden of proof (such as an appellant in a management service discipline case) may give an opening statement at the beginning of the appellant's case-in-chief, rather than at the outset of the hearing.

## 10. What is a rebuttal case? Am I required to present a rebuttal case?

A rebuttal case is evidence presented by the party with the burden of proof after the responding party puts on its case. Evidence that rebuts evidence presented in a defense case is appropriately presented on rebuttal. A party is not required to present rebuttal evidence.

## 11. What standard of evidence applies?

The evidence standard that applies in SPRL cases is described in OAR 115-010-0050. Evidence of a type commonly relied on by reasonably prudent persons in the conduct of their serious affairs is admissible. Hearsay may be admissible in SPRL hearings. Hearsay evidence is testimony by a witness about an out-of-court statement that the party is offering into evidence to attempt to prove that the assertion in the statement is true. Although hearsay may be admitted by an ALJ, hearsay evidence may not be given the same weight or value by the ALJ or by the Board as other types of evidence.

A party who wishes to object to admission of evidence must object on the record during the hearing. The ALJ will make a ruling or may receive the evidence subject to ruling in the recommended order on the admissibility or exclusion of the evidence.

*Reference:* [OAR 115-010-0050](#).

## 12. When should my witnesses arrive?

The ALJ will expect both parties to present their cases without breaks between witnesses. The parties should have testifying witnesses present in the hearing room (or outside the hearing room, if witnesses are excluded from the hearing) a few minutes before the expected testimony. There are chairs in the hallway outside the ERB hearing room in Salem that excluded witnesses may use while they are waiting to be called to testify. To the extent possible, chairs will be made available in other hearing locations so that excluded witnesses may wait comfortably outside the hearing room.

If a witness needs to be called out of order, the ALJs appreciate the parties working cooperatively to accommodate witnesses' needs.

## 13. Will my witnesses be able to watch the hearing?

Possibly. SPRL hearings are typically open to the public. At a party's request, however, the ALJ may exclude witnesses from the hearing room. If witnesses are excluded, they may not watch the hearing.

## 14. Will the appellant's supervisor or manager testify or be present at the hearing?

Generally, yes. The appellant's supervisor or manager is typically a witness in a discipline case. In addition, the employer typically has a representative present throughout the hearing as the employing agency representative. The agency's human resources director or the appellant's manager typically serves as the employing agency representative at hearing.

## 15. Does the appellant testify at the hearing?

Yes. The appellant is not *required* to testify in the appellant's own case, although in most SPRL cases it may be difficult for the appellant to offer sufficient evidence of the appeal without testifying. The employer typically cross-examines the appellant.

## 16. Can I call the other party's representative as my witness?

A party (except a party appearing *pro se*) may not call the opposing party's representative as a witness, unless the party shows that such testimony is necessary and will not be cumulative or repetitive. A party (except a party appearing *pro se*) wishing to call the opposing party's representative as a witness must file with the Board a notice, and a supporting affidavit, no later than 14 days before the hearing date.

*Reference:* [OAR 115-010-0060](#).

## 17. How should I organize and label my exhibits?

A party offering an exhibit must provide two copies to the ALJ, as well as a copy to the opposing party. (Parties are required to exchange their exhibits by the prehearing deadline set by the ALJ.) To assist the ALJ and the witnesses, the exhibits should be organized in a logical manner, such as chronological order or grouped by topic (such as all personnel discipline documents together, followed by investigation documents, etc.).

Exhibits must be marked for identification. The ALJ's prehearing notice contains instructions for marking exhibits. Each exhibit must be marked with the appropriate letter and number (the ALJ's instructions will provide specific instructions), and each page number of every exhibit must be marked, as shown below:

Exhibit A-1, p. 1 of 15

Exhibit A-1, p. 2 of 15

Exhibit A-1, p. 3 of 15, etc.

Numbering each page of the exhibit allows the parties and the ALJ to quickly find the specific portion of an exhibit referred to by a witness. In addition, page numbering allows the ALJ to refer to specific portions of documents, by page number, in the written recommended order.

Exhibits must be three-hole punched and presented in three-ring notebooks at hearing for ease of use by the parties, the witnesses, and the ALJ.

There are specific requirements for exhibits consisting of material other than documents, exhibits related to voluminous or bulky materials, and transcripts of audio recordings. Those requirements are contained in OAR 115-010-0070(6).

*Reference:* [OAR 115-010-0070\(6\)](#).

## 18. What are stipulated facts?

The parties may stipulate to facts to make the hearing more efficient. Stipulated facts are facts that the parties agree are true, and thus do not need to be proved by submission of evidence at hearing. Stipulated facts are written, signed by both parties, and submitted to the ALJ, typically before the hearing begins.

To make the hearing more efficient, parties may wish to discuss whether to stipulate to the dates and types of previous discipline, the service status of the employee (for example, management service or classified), whether the appellant filed an internal agency grievance and its disposition, the relevant reporting structures, and the job position, title, wages and benefits in effect at the relevant time.

*Reference:* [OAR 115-010-0070](#).

## 19. Should I agree to submit stipulated facts?

Whether to agree to submit stipulated facts is a decision for each party in each case. Parties typically consider whether the presentation of facts through a written stipulation will be more efficient and cost-effective. Some facts—such as an employee’s hire date, dates of promotion, and other simple dates—can reduce the amount of hearing time needed in a case, and allow the parties and the ALJ to focus on the facts genuinely in dispute in a case.

## 20. How do I submit a motion during the hearing?

A motion is a request for any ruling, order, or relief made by a party. A motion may be made in writing, or orally at the hearing. The moving party must briefly identify the grounds for the motion and the order or relief sought. The ALJ may rule on the motion on the record at the hearing, or may reserve ruling until the ALJ issues the recommended order.

*Reference:* [OAR 115-010-0045](#).

## 21. There are confidential documents involved in my case. How do I handle that?

The recommended order and the Board’s final order, as well as documents in ERB’s case file, are typically public records. The recommended order is posted on ERB’s web site until the final order is issued by the Board. When the Board issues the final order, the final order is posted on the web site and the recommended order is removed. Generally, the documents in the case file, such as motions, orders, and correspondence with the ALJ, are public records, and are produced to members of the public if requested.

Because of confidentiality requirements associated with the work of some state agencies (such as medical records of persons in custody, for example, or certain types of information about juveniles in the custody of the Oregon Youth Authority), parties in SPRL cases may present documents to the ALJ to address the confidentiality of certain information. Parties may use motions for protective orders, confidentiality agreements, or other approaches to protect the confidentiality of documents presented at hearing.

## 22. How are closing arguments presented in SPRL appeals?

Closing arguments may be oral or written. If written, the ALJ will establish a schedule for the parties to submit closing briefs. Briefs must adhere to the format and page limits required by OAR 115-010-0077.

*Reference:* [OAR 115-010-0070\(1\)\(e\)](#).

## 23. Are there rules of conduct that apply during a SPRL hearing?

Yes. All parties, attorneys, and spectators must conduct themselves in a respectful manner at hearings. Professionalism and civility are expected. The ALJ may remove from the hearing any person who does not comply with the ALJ's effort to retain order.

*Reference:* [OAR 115-010-0075](#).

# POST-HEARING PROCEDURES

## 1. What happens after the hearing?

After the hearing, the ALJ will issue a recommended order. The recommended order is written and distributed to the parties by the ALJ after the ALJ has reviewed the evidence and the law, and has reached a recommended decision.

## 2. What is the recommended order?

The recommended order is the ALJ's recommendation to the Board about the case. In the recommended order, the ALJ will state the rulings in the case (such as whether the ALJ is admitting evidence that was subject to a party's objection), the findings of fact, and whether the appellant's appeal should be dismissed or, if granted, what remedy is appropriate.

If neither party objects to the recommended order (see the next question, below), the Board will adopt the recommended order as its final order. The Board may designate as non-precedential some or all of a final order adopted after neither party objects.

*References:* [OAR 115-010-0090\(4\)](#), [\(5\)](#).

## 3. What do I do if I don't agree with the recommended order?

If a party wishes to object to the ALJ's recommended order and argue the case before the three-member Board, the party must file written objections to the recommended order. Objections must be filed within 14 days from the date of service of the recommended order.

The Board may extend the time for filing objections upon good cause shown. Objections must be written and specific, and clearly identify which rulings, findings of fact, or conclusions of law should be changed by the Board.

*Reference:* [OAR 115-010-0090\(1\)](#).

#### **4. Can I get a copy of the audio recording of the hearing?**

Yes. The Board will provide a copy of the audio recording for a nominal fee to cover the cost of reproduction.

#### **5. What are objections to the recommended order, and how do I submit them?**

Objections are the party's written list (typically with explanations and argument) of disagreements with the recommended order. A party may object to the ALJ's rulings, to findings of fact, to principles of law, or to errors of analysis or application of the law to the facts. Objections must be written and specific, and clearly identify which rulings, findings of fact, or conclusions of law should be changed by the Board.

If only one party files objections, the other party may file written cross-objections within seven days of service of the objections.

*Reference:* [OAR 115-010-0090\(1\)](#).

#### **6. How do I ask the Board to review a recommended order if I don't agree with it?**

A party who seeks Board review of a recommended order must file objections. See Questions 3 and 5, above.

*Reference:* [OAR 115-010-0090\(1\)](#).

#### **7. What happens if the other party filed objections, and I did not file objections?**

If only one party files objections, the other party may file written cross-objections within seven days of service of the objections.

*Reference:* [OAR 115-010-0090\(2\)](#).

#### **8. What happens at oral argument before the Board?**

If objections to the recommended order are filed and the parties wish to present oral argument, the Board will schedule oral argument on the objections.

Oral arguments before the Board occur in the Board hearing room in Salem. At oral argument, the parties present legal arguments to the Board. The parties are not permitted to offer additional documentary evidence or testimony. Each party may present for 20 minutes.

At oral argument, the Board Chair will open the hearing and typically ask the parties if there are any preliminary matters before the hearing begins. If not, the objecting party will present oral argument first. The objecting party may reserve some of the 20-minute presentation time to offer rebuttal argument after the non-objecting party's argument. The Board members may ask the parties to respond to specific questions about the record in the case or the application of the law or principles from SPRL decisions to the facts found by the ALJ.

## 9. What is a Memorandum in Aid of Oral Argument?

A party may submit a written argument in aid of oral argument. This document (in the form of a legal brief) is written argument intended to assist the Board to understand the facts and law at issue in the case. Memoranda in aid of oral argument may not exceed 25 pages.

*Reference:* [OAR 115-010-0095\(2\)](#).

## 10. Is there a required format for a Memorandum in Aid of Oral Argument?

Yes. This document (in the form of a legal brief) must be typewritten, double-spaced on letter sized paper, and no more than 25 pages, unless the Board approves a longer page limit.

*References:* [OAR 115-010-0095\(2\)](#); see also [OAR 115-010-0077](#) (general format for briefs).

## 11. When is a Memorandum in Aid of Oral Argument due?

A memorandum in aid of oral argument must be filed with the Board at least five days before the date set for oral argument.

*Reference:* [OAR 115-010-0095\(2\)](#).

## 12. What is a Memorandum in Lieu of Oral Argument?

A party may submit a written argument in lieu of oral argument. When a party submits this type of memorandum, the party is relying on written argument to present the party's arguments to the Board. The party does not participate in oral argument.

*References:* [OAR 115-010-0095\(1\)](#); see also [OAR 115-010-0077](#) (general format for briefs).

## 13. Is there a required format for a Memorandum in Lieu of Oral Argument?

Yes. This document (in the form of a legal brief) must be typewritten, double-spaced on letter sized paper, and no more than 30 pages, unless the Board approves a longer page limit.

*References:* [OAR 115-010-0095\(1\)](#); see also [OAR 115-010-0077](#) (general format for briefs).

## 14. When is a Memorandum in Lieu of Oral Argument due?

A memorandum in lieu of oral argument must be filed with the Board at least five days before the date set for oral argument.

*Reference:* [OAR 115-010-0095\(1\)](#).

## 15. What is a final order?

After oral argument, the full Board will make a decision about the appeal. At least two Board Members must agree to the majority opinion.

When the Board reaches a decision, it will issue a written order. Like the recommended order, the Board's final order will list the findings of fact and the reasons for the Board's decision. If the Board concludes that the state proved its case, the Board will dismiss the appeal. If the Board finds in favor of the employee, the Board will typically order a remedy (see Questions 16 through 18, below).

## 16. What can the Board order or award the appellant in a SPRL case?

If the Board finds in favor of the appellant, the Board will issue a remedy. Remedies in SPRL cases include reversing the personnel action. Remedies may include reinstating the appellant to employment, removing discipline from the appellant's file, or requiring the employer to reimburse the appellant for back pay and benefits (such as reimbursement for an unpaid suspension overturned by the Board).

The Board does not order reimbursement of attorney's fees or costs incurred in the appeal. Each party pays its own attorney's fees and costs. The Board also does not order sanctions or penalties.

## 17. Can the Board require the employer to rehire an appellant?

Yes. The Board has the authority to order an employer to reinstate an employee to a former position if the removal or dismissal did not comply with the SPRL.

## 18. Does the Board order the losing party to pay the prevailing party's fees or costs?

No. The Board does not order one party to pay the other party's attorney's fees or costs. Each party must pay its own attorney and its own costs (such as the costs of copying exhibits, serving subpoenas, and providing statutorily required witness fees to witnesses subpoenaed to testify at the hearing).

## 19. What can I do if I disagree with the final order?

A party can file a petition with the Board for reconsideration or rehearing, or the party can file an appeal with the Oregon Court of Appeals.

## 20. What is a Petition for Reconsideration?

A petition for reconsideration asks the Board to reconsider a ruling, finding of fact, or conclusion of law in a final order.

When the Board issues a final order without a preceding recommended order (for example, when a SPRL case is dismissed by the Board before the ALJ held a hearing), the Board will generally grant a request for reconsideration and grant oral argument.

When the Board issues a final order after a recommended order was issued by the ALJ, a petition for reconsideration should be limited to (a) a claim of factual error; (b) a claim that there has been a change in the statutes or case law since the issuance of the final order that affects the case; or (c) a claim that the Board erred in construing or applying the law.

*Reference:* [OAR 115-010-0100\(3\)](#).

## 21. When is a Petition for Reconsideration due?

A petition for reconsideration must be filed within 14 days of the date of service of the Board order.

*Reference:* [OAR 115-010-0100\(1\)](#).

## 22. What is a Petition for Rehearing?

A petition for rehearing is a petition that asks the Board to return the case to the ALJ so that a party can submit additional evidence. Petitions for rehearing are granted only if the petitioning party would be unduly prejudiced if the petition were denied. If the basis for the petition is based on previously unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the hearing.

*Reference:* [OAR 115-010-0100\(2\)](#).

## 23. When is a Petition for Rehearing due?

A petition for rehearing must be filed within 14 days from the date of service of the Board order.

*Reference:* [OAR 115-010-0100\(1\)](#).

## 24. Can I appeal a final order?

Yes. A final order can be appealed to the Oregon Court of Appeals. Information about the Oregon Court of Appeals may be found at the court's web site at:

<http://courts.oregon.gov/COA>

## 25. How long does an appeal with the Oregon Court of Appeals take?

Appeals filed with the Oregon Court of Appeals take approximately one year or longer.

## 26. Will the decision in my SPRL appeal be publicly available?

Yes. The Board's SPRL decisions are posted on the ERB's web site at:

<http://www.oregon.gov/ERB/pages/boardorderlist.aspx>

Decisions issued by the Oregon Court of Appeals are also publicly available on the court's web site.

<http://courts.oregon.gov/COA>

## GLOSSARY OF COMMON TERMS

**Administrative Law Judge (or ALJ):** The representative of ERB who administers a SPRL appeal, conducts the hearing, and prepares the recommended order.

**Appeal:** The document filed by the state employee or former employee to initiate a SPRL appeal.

**Appellant:** The party who files an appeal in a SPRL case.

**The Board:** The three-member Employment Relations Board, which issues final orders in SPRL cases.

**Classified Service:** The portion of the state work force that consists of all positions in the state service that are not in the unclassified, exempt, or management service.

**Conclusion of Law:** A legal conclusion that the administrative law judge (in the recommended order) or the Board (in the final order) reaches in the case, such as, "The removal of appellant from the management service was not consistent with ORS 240.570(3)."

**Contested Case Hearing:** The trial-like hearing, including opening statements, examination and cross-examination of witnesses, and closing arguments, held in SPRL cases.

**Cross-Objections:** The document filed by a party who did not initially object to the recommended order when the other party did object.

**Exempt Service:** The positions held by elected officials, judges, employees of the state courts, and officers and employees of the legislative assembly.

**Final Order:** An order prepared by the three-member Employment Relations Board. A final order may be appealed to the Oregon Court of Appeals.

**Finding of Fact:** A fact that the administrative law judge (in the recommended order) or the Board (in the final order) finds has been proven in the case.

**Management Service:** The portion of the state work force that consists of all positions *not* in the unclassified service (sometimes called executive service), the classified service, or the exempt service. Employees in the management service are those employees who have been determined to be confidential employees, supervisory employees or managerial employees.

**Mediation:** Voluntary facilitated settlement negotiations, facilitated by a private mediator (hired by the parties) or by a mediator supplied by the Conciliation Service of ERB.

**Motion:** A written request for a ruling, order, or other relief.

**Notice of Hearing:** The formal document issued by the administrative law judge assigned to a SPRL case that notifies the parties of the hearing date and location and identifies prehearing requirements and deadlines (such as the deadlines for exchange and submission of witness lists, exhibit lists, and exhibits).

**Objections to the Recommended Order:** The document filed by a party if the party wants the Board to hold oral argument in the case and review the findings of fact, conclusions of law, and remedy recommended by the administrative law judge.

**Oral Argument:** The hearing before the three-member Employment Relations Board, during which the Board hears legal arguments presented by the parties about the findings of fact, conclusions of law, and remedy recommended by the administrative law judge in the recommended order.

**Proof of Service:** The document filed with each brief, motion, or submission to ERB in a case that identifies how and when the filing party provided a copy of the document to the other party in the case. There is a proof of service form available for use at the end of this guide and on ERB's web site.

**Pro Se:** A party who is not represented by an attorney during the case.

**Recommended Order:** The order prepared by the administrative law judge that contains recommended findings of fact and conclusions of law and a recommended remedy. A party may ask the three-member Employment Relations Board to review a recommended order. The order resulting from the Board's review is called the final order.

**Remedy:** The relief recommended by the administrative law judge or ordered by the Board, which may include reinstatement, reversal of discipline, and an award of back pay and benefits.

**Respondent:** The employer in a SPRL case. The respondent is the employing agency, department, board or commission.

**Restoration Right:** The right some employees in the management service have to return to an immediate prior regular status in the classified service if removed from the management service pursuant to ORS 240.570(3).

**SPRL:** The State Personnel Relations Law, ORS Chapter 240.

**Unclassified Service:** The portion of the state work force that consists of positions listed in ORS 240.205—for example, full-time board or commission members appointed by the governor, executive officers for boards and commissions, department heads, principal assistants and deputy administrators, physicians, dentists, lawyers, and members of the Oregon State Police. The Department of Administrative Services refers to high-level executive managers as the "executive service," which is part of the unclassified service.

# SAMPLE: SPRL MEDIATION REQUEST FORM

## STATE OF OREGON ERB Mediation Request Form For Appeals under the STATE PERSONNEL RELATIONS LAW (SPRL)

A request for mediation in a SPRL case may be made through the assigned Administrative Law Judge or by downloading this form and mailing, faxing or e-mailing it to the address below. You may also request mediation using a different format; however, the data requested in this form should be included. All correspondence should be submitted to:

**ERB Conciliation Service**  
528 Cottage St. NE, Suite 400  
Salem, OR 97301-3807  
([ERB.Filings@ERB.Oregon.gov](mailto:ERB.Filings@ERB.Oregon.gov); Fax: 503-373-0021; Phone: 503-378-6471)

1. Name and address of State Agency:	2. Name, address, phone, fax and e-mail address of Appellant (employee):
3. Name, address, phone, fax and e-mail for the Agency's Representative:	4. Name, address, phone, fax and e-mail address of Appellant's Representative, if any:
5. Date appeal filed:	6. Do both parties agree to mediation? <input type="checkbox"/> Yes <input type="checkbox"/> No
7. Name of Administrative Law Judge (ALJ):	8. Has the ALJ set a hearing date? <input type="checkbox"/> Yes <input type="checkbox"/> No If "Yes", hearing date is:
9. Action(s) being appealed (attach a copy of the appeal):	10. Possible meeting dates/times, and/or restrictions on same:

11. Names and/or Signatures:

\_\_\_\_\_

For the State of Oregon\*

\_\_\_\_\_

Date

\_\_\_\_\_

Employee or Employee's Representative\*

\_\_\_\_\_

Date

\*All parties must agree to mediation in SPRL cases. Evidence of such agreement must be submitted to ERB, either in the form of a request signed by both parties or by separate communications from each party indicating their agreement.

This form is to be used to request for mediation of an appeal filed by a State of Oregon employee under ORS 240.560 or 240.570 only. All parties must agree to mediation in a SPRL appeal. Requests for mediation may also be made through the assigned ALJ.

### **INSTRUCTIONS FOR THE SPRL MEDIATION REQUEST FORM**

1. The name and address of the State agency for which the employee works/worked.
2. The name, mailing address, phone number, fax number and email for Appellant/Employee.
3. The name, mailing address, phone number, fax number and email of the Agency's contact person.
4. The name, mailing address, phone number, fax number and email of the Appellant's representative (if any).
5. The date the appeal was filed.
6. In SPRL cases, both parties **MUST** agree to mediation.
7. The name of the Administrative Law Judge (ALJ) that has been assigned to the appeal.
8. The date of a hearing if one has been set by the ALJ.
9. A short statement of the action(s) being appealed.
10. Possible meeting dates or dates parties are not available.
11. Sign or e-sign and date the request.

Note: Mediation services for State agencies and their employees are provided for through an inter-agency assessment; there are no additional costs for these services.

If you have any questions, email [emprel.board@oregon.gov](mailto:emprel.board@oregon.gov).

# SAMPLE: ERB MEDIATION CONSENT AGREEMENT



## OREGON EMPLOYMENT RELATIONS BOARD CONCILIATION SERVICE MEDIATION AGREEMENT (SAMPLE)

The undersigned parties hereby acknowledge agreement to receive mediation services provided by (*State Mediator*), of the Oregon Employment Relations Board. The parties further agree to the following rules for the dispute involving the (*Mediating parties and ERB Case Number*) in the mediation held on (*mediation date*).

**MEDIATION:** Mediation is a voluntary settlement negotiation and the role of the mediator is to assist the parties in reaching a mutually acceptable resolution of their dispute. The mediator is not a judge and has no authority to force a settlement on the parties. All parties acknowledge that should they reach a settlement as a result of these mediation sessions, they do so as their own free and voluntary act.

**CONSULTING WITH ATTORNEYS:** Each party is encouraged to consult with an attorney and/or union or management representative regarding their legal rights and obligations throughout the mediation process. The parties acknowledge that the mediator does not represent the parties, is not giving legal advice to them, nor acting as their legal counsel in any manner.

**MEDIATOR IMMUNITY:** All parties acknowledge that the mediator is acting on behalf of the State Conciliation Service, selected by the parties to provide the mediation services. The mediator shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a settlement, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

**CAUCUSES:** The mediator may hold sessions with only one party. These "caucuses" are designed to improve the mediator and the party's understanding of their position. Information gained by the mediator through a caucus is confidential unless the party agrees otherwise.

**CONFIDENTIALITY:** Mediation communications are confidential to the extent provided in agency rules OAR 115-040-0040 to 115-040-0044, a copy of which is available from the ERB offices. Except to the extent provided in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing.

**MEDIATION FEES:** The cost of grievance mediation for a local government employer and the exclusive representative is \$250 per party. Mediation services for State of Oregon agencies and unions representing State employees are provided through an inter-agency assessment.

\_\_\_\_\_  
(Name of Employer)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name of Appellant)

\_\_\_\_\_  
(Date)

# SAMPLE: MOTION TO POSTPONE HEARING

## Oregon Employment Relations Board – Motion to Postpone Hearing

Name of Case: _____
Case No.: _____
Administrative Law Judge: _____

**Motion filed by (Party Name):** \_\_\_\_\_

<p>1. The hearing in this case is scheduled for: _____</p> <p>2. The moving party requests that the hearing be postponed to: _____</p> <p>3. The reason for the request is (<i>attach additional page(s) if necessary</i>): _____ _____ _____</p> <p>4. Before filing a motion to postpone a hearing, the moving party must make a good-faith effort to confer with the other party (or parties) in the case regarding the request to postpone. See OAR 115-010-0045(2). Describe below (1) your efforts to confer with the other party (e.g., when and how you contacted them), and (2) the position(s) of the other party (or parties) regarding your request to postpone the hearing (e.g., the other party agrees to the request, objects to the request, or has no objection to the request). _____ _____ _____</p>
--

*When you file this motion with the Board, you must also serve a copy of the motion to the other party (or parties). See OAR 115-010-0033(2).*

By signing below, I certify that I made a good faith effort to confer with the opposing party to seek resolution of this request to postpone the hearing, and that I accurately described the other party's response above.

I also certify that I have served a copy of this motion to the other party (or parties) on [date]\_\_\_\_\_, by the following means [identify (1) the method of service, and (2) the address, email, or fax number used]:

\_\_\_\_\_.

Filed by [print name]: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

# SAMPLE: PROOF OF SERVICE FORM

## Oregon Employment Relations Board – Proof of Service

Appellant's Name: _____
Name of Case: _____ Case No.: _____
Administrative Law Judge: _____

Name of Party Serving Documents: _____
Attorney for Party Serving Documents: _____

On [Date]: \_\_\_\_\_ I served the following document(s):

Document Title: _____
Document Title: _____
Document Title: _____

On the following person(s): \_\_\_\_\_

Name of Organization or Department: _____
Street Address: _____
City: _____ State: _____ Zip Code: _____
Email Address:* _____
Fax:** _____

\*Required if served electronically. \*\*Required if served by facsimile.

### Method of Service [Check all that apply]:

- \_\_\_\_\_ **By Personal Service:** I personally delivered the above document(s) to the person above at the address listed above.
- \_\_\_\_\_ **By U.S. Mail:** I enclosed the above document (s) in a sealed envelope addressed to the address above and deposited with the United States Postal Service with postage fully prepaid.
- \_\_\_\_\_ **By Overnight Delivery:** I enclosed the above document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the address above. I placed the envelope or package for collection at an office or regularly utilized drop box of the overnight delivery carrier.
- \_\_\_\_\_ **By Facsimile:** I faxed the above document(s) to the fax number listed above.
- \_\_\_\_\_ **By Electronic Mail:** I caused the above document(s) to be sent to the persons at the electronic service address listed above.

I certify that the contents of this form are true and correct to the best of my knowledge, and that this form was completed on the date below:

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

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# EXCERPTS FROM THE STATE PERSONNEL RELATIONS LAW (SPRL)

**240.005 Short title.** This chapter shall be known as the State Personnel Relations Law. [Amended by 1979 c.468 §2]

**240.010 Purpose of chapter.** The general purpose of this chapter is to establish for the state a system of personnel administration based on merit principles. [Amended by 1979 c.468 §3]

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**240.015 Definitions.** As used in this chapter, unless the context clearly requires otherwise:

- (1) "Administrator" means the Administrator of the Personnel Division.
- (2) "Appointing authority" means an officer or agency having power to make appointments to positions in the state service.
- (3) "Board" means the Employment Relations Board.
- (4) "Class" or "classification" means a group of positions in the state classified service sufficiently alike in duties, authority and responsibilities that the same qualifications may reasonably be required for, and the same schedule of pay can be equitably applied to, all positions in the group.
- (5) "Division" means, except in the phrase "division of the service," the Personnel Division referred to in ORS 240.055.
- (6) "Division of the service" means a state department or any division or branch thereof, any agency of the state government, or any branch of the state service, all the positions in which are under the same appointing authority.
- (7) "Job-sharing position" means a full-time position in the classified service that is classified as one that may be held by more than one individual on a shared time basis whereby the individuals holding the position work less than full-time.
- (8) "Regular employee" means an employee who has been appointed to a position in the classified service in accordance with this chapter after completing the trial service period.
- (9) "State service" means all offices and positions in the employ of the state other than those of commissioned, warrant and enlisted personnel in the military and naval services thereof. However, as provided in ORS 396.330, the term includes members of the Oregon National Guard or Oregon State Defense Force who are not serving pursuant to provisions of Title 10 or 32 of the United States Code and who are employed as state employees in the Oregon Military Department. [Amended by 1959 c.690 §1; 1969 c.80 §30; 1975 c.147 §9; 1979 c.302 §4; 1979 c.468 §4a; 1995 c.114 §1; 2005 c.22 §182]

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**240.060 Employment Relations Board; qualification of members; outside activities.**

- (1) The Civil Service Commission that has functioned under this chapter shall be continued as a board of three members to be known as the Employment Relations Board. Each member of the board shall be a citizen of the state known to be in sympathy with the application of merit principles to public employment and shall be of recognized standing and known interest in public administration and in the development of efficient methods of selecting and administering personnel. In the selection of the members of the Employment Relations Board, the Governor shall give due consideration to the interests of labor, management and the public. Each member of the board shall be trained or experienced in labor-management relations and labor law or the

administration of the collective bargaining process. No member of the board shall hold, or be a candidate for, any public office.

(2) Except as provided in subsection (3) of this section, a member of the board shall not hold any other office or position of profit, pursue any other business or vocation, or serve on or under any committee of any political party, but shall devote the member's entire time to the duties of the office of the member.

(3) A member of the board may:

(a) Serve as an arbitrator, fact finder or mediator for parties located outside of the State of Oregon;

(b) Teach academic or professional classes for entities that are not subject to the board's jurisdiction;

(c) Have a financial interest but an inactive role in a business unrelated to the duties of the board; and

(d) Publish, and receive compensation or royalties for, books or other publications that are unrelated to the member's duties, provided that activity does not interfere with the performance of the member's duties.

(4) A member of the board shall be on leave status or act outside of normal work hours when pursuing any activity described in subsection (3)(a) and (b) of this section. [Amended by 1969 c.80 §32; 1973 c.536 §26; 1975 c.147 §10; 1977 c.808 §1; 1999 c.248 §1]

**240.065 Appointment; terms; vacancies.** (1) The members of the Employment Relations Board shall be appointed by the Governor for a term of four years.

(2) Each member shall be appointed for a term ending four years from the date of the expiration of the term for which the predecessor of the member was appointed, except that a person appointed to fill a vacancy occurring prior to the expiration of such term shall be appointed for the remainder of the term. Appointments to the board by the Governor are subject to confirmation by the Senate in the manner provided in ORS 171.562 and 171.565. [Amended by 1969 c.80 §34; 1973 c.536 §27; 1973 c.792 §6a; 1977 c.808 §2; 1991 c.67 §59]

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**240.080 Chairperson appointed by Governor; meetings; quorum; hearings.** The Governor shall appoint one of the members of the Employment Relations Board as chairperson, who shall serve for a term not to exceed four years. The chairperson shall be the chief administrative officer of the board. The board shall meet at such times and places as are specified by call of the chairperson or a majority of the board. All hearings shall be open to the public. A majority of the members of the board constitutes a quorum for the transaction of business. Any agent designated by the board to make investigations and conduct hearings may administer oaths and affirmations, examine witnesses and receive evidence. [Amended by 1973 c.536 §29; 1977 c.808 §4]

**240.086 Duties of board; rules.** The duties of the Employment Relations Board 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.

(2) Review and enforce arbitration awards involving employees in certified or recognized appropriate collective bargaining units. The awards shall be enforced unless the party against whom the award is made files written exceptions thereto for any of the following causes:

(a) The award was procured by corruption, fraud or undue means.

(b) There was evident partiality or corruption on the part of the arbitrator.

(c) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party were prejudiced.

(d) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(e) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award.

(f) The arbitrators awarded upon a matter not submitted to them, unless it was a matter not affecting the merits of the decision upon the matters submitted.

(g) The award is in violation of law.

(3) Adopt such rules or hold such hearings as it finds necessary to perform the duties, functions and powers imposed on or vested in it by law. [1969 c.80 §35a (enacted in lieu of 240.085); 1971 c.575 §5; 1975 c.605 §14; 1979 c.468 §5]

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## CATEGORIES OF SERVICE; CLASSIFICATION AND COMPENSATION PLANS

### **240.190 Policy on comparability of value of work and compensation and classification.**

(1) It is declared to be the public policy of the State of Oregon to attempt to achieve an equitable relationship between the comparability of the value of work, as defined in ORS 292.951, performed by persons in state service and the compensation and the classification structure within the state system. To further the effort to achieve and maintain equity for undervalued jobs and job classifications, the state shall employ a neutral and objective method of determining the comparability of the value of work. The first priority in attaining equitable relationships shall be achieving compensation equity for the most undervalued classes in the lowest salary ranges.

(2) State management, in each branch of government, shall, when establishing or modifying personnel plans and policies in compensation and classification matters, or in collective bargaining, arbitration and grievance procedures, hold equity in compensation and classification matters as an important consideration. Where applicable, an exclusive representative of a collective bargaining unit shall hold the same considerations to achieve consistency with the policies stated in this section and ORS 292.951 to 292.971.

(3) No employee shall have wages decreased in order to achieve the policy set forth in this section. [1983 c.814 §1; 1987 c.772 §2]

**Note:** 240.190 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 240 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**240.195 Categories of positions in state service.** Positions in the service of the state are divided into the following categories:

(1) The classified service as provided in ORS 240.210.

(2) The unclassified service as provided in ORS 240.205.

(3) The exempt service as defined in ORS 240.200.

(4) The management service as provided in ORS 240.212. [1955 c.738 §1; 1981 c.409 §1]

**240.200 Exempt service.** The exempt service shall comprise:

- (1) Officers elected by popular vote and persons appointed to fill vacancies in elective offices.
- (2) Members of boards and commissions who serve on a part-time basis and who, if compensated, receive compensation on a per diem basis.
- (3) Judges, referees, receivers, jurors and notaries public.
- (4) Officers and employees of the Legislative Assembly.
- (5) Persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation or examination on behalf of the Legislative Assembly or a committee thereof, or by authority of the Governor.
- (6) Any other position designated by law as exempt. [1955 c.738 §2; 1969 c.80 §48; 1969 c.199 §17; 1975 c.427 §1; 1983 c.763 §29]

**240.205 Unclassified service.** The unclassified service shall comprise:

- (1) One executive officer and one secretary for each board or commission, the members of which are elected officers or are appointed by the Governor.
- (2) The director of each department of state government, each full-time salaried head of a state agency required by law to be appointed by the Governor and each full-time salaried member of a board or commission required by law to be appointed by the Governor.
- (3) The administrator of each division within a department of state government required by law to be appointed by the director of the department with the approval of the Governor.
- (4) Principal assistants and deputies and one private secretary for each executive or administrative officer specified in ORS 240.200 (1) and in subsections (1) to (3) of this section. "Deputy" means the deputy or deputies to an executive or administrative officer listed in subsections (1) to (3) of this section who is authorized to exercise that officer's authority upon absence of the officer. "Principal assistant" means a manager of a major agency organizational component who reports directly to an executive or administrative officer listed in subsections (1) to (3) of this section or deputy and who is designated as such by that executive or administrative officer with the approval of the Director of the Oregon Department of Administrative Services.
- (5) Employees in the Governor's office and the principal assistant and private secretary in the Secretary of State's division.
- (6) The director, principals, instructors and teachers in the school operated under ORS 346.010.
- (7) Apprentice trainees only during the prescribed length of their course of training.
- (8) Licensed physicians and dentists employed in their professional capacities and student nurses, interns, and patient or inmate help in state institutions.
- (9) Lawyers employed in their professional capacities.
- (10) All members of the Oregon State Police appointed under ORS 181A.050.
- (11) The Deputy Superintendent of Public Instruction appointed under ORS 326.300 and associate superintendents in the Department of Education.
- (12) Temporary seasonal farm laborers engaged in single phases of agricultural production or harvesting.
- (13) Any individual employed and paid from federal funds received under a federal program intended primarily to alleviate unemployment. However, persons employed under this subsection shall be treated as classified employees for purposes of ORS 243.650 to 243.782.
- (14) Managers, department heads, directors, producers and announcers of the state radio and television network.
- (15) Employees, including managers, of the foreign trade offices of the Oregon Business Development Department located outside the country.

(16) Any other position designated by law as unclassified. [Amended by 1953 c.699 §3; 1955 c.738 §4; 1957 c.597 §1; 1959 c.230 §1; 1959 c.566 §4; 1961 c.645 §1; 1965 c.405 §2; 1969 c.80 §49; 1969 c.199 §18; 1969 c.564 §3; 1969 c.599 §§66a,66b; 1971 c.301 §19; 1971 c.467 §25c; 1975 c.3 §1; 1975 c.393 §1a; 1975 c.427 §2a; 1977 c.271 §1; 1979 c.747 §1; 1979 c.468 §11; 1981 c.518 §3; 1981 s.s. c.3 §40; 1983 c.763 §30; 1985 c.388 §1; 1985 c.565 §38; 1991 c.149 §3; 1991 c.887 §2; 1993 c.741 §19; 1995 c.612 §13; 2001 c.883 §42; 2007 c.858 §61; 2009 c.562 §17; 2011 c.9 §28; 2011 c.547 §40; 2011 c.731 §8]

**240.210 Classified service.** The classified service comprises all positions in the state service existing on June 16, 1945, or thereafter created and which are not listed in ORS 240.200, 240.205 or 240.212. [Amended by 1955 c.738 §7; 1981 c.409 §2]

**240.212 Management service.** The management service shall comprise all positions not in the unclassified or exempt service that have been determined to be confidential employees, supervisory employees or managerial employees, as defined in ORS 243.650. [1981 c.409 §6; 1995 c.286 §25]

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**240.240 Application of chapter to unclassified or management service.**

(1) The unclassified service or, except as provided in ORS 240.250, the management service shall not be subject to this chapter, except that employees and officers in the unclassified or management service shall be subject to the laws, rules and policies pertaining to any type of leave with pay except as otherwise provided in subsections (4) and (5) of this section, and shall be subject to the laws, rules and policies pertaining to salary plans except as otherwise provided in subsections (3) and (5) of this section.

(2) With regard to any unclassified or management service position for which the salary is not fixed by law, and except as otherwise provided in subsections (3) and (5) of this section, the Personnel Division shall adopt a salary plan which is equitably applied to various categories in the unclassified or management service and is in reasonable conformity with the general salary structure of the state. The division shall maintain this unclassified and management salary plan in accordance with the procedures established for the classified salary plan as provided in ORS 240.235.

(3) The Secretary of State and the State Treasurer, for the purpose of maintaining a salary plan for unclassified and management service positions in their departments, may request the advice and assistance of the division.

(4) With regard to unclassified instructors and teachers under annual teaching contracts for an academic year in the school operated under ORS 346.010, arrangements for leave with pay shall be established by the Department of Education.

(5) With regard to unclassified positions in the Oregon Business Development Department's foreign offices, the salary plan and arrangements for leave with pay shall be established by the Director of the Oregon Business Development Department. [1955 c.738 §5; 1969 c.80 §54; 1971 c.695 §2; 1975 c.427 §4; 1981 c.409 §3; 1985 c.121 §1; 1991 c.149 §4; 1995 c.612 §14; 2007 c.858 §62; 2009 c.562 §18]

**240.245 Application of chapter to exempt service.** The exempt service shall not be subject to the provisions of this chapter, except that, with regard to any position for which salaries are not fixed by law, the officer authorized by law to appoint or fill such position shall maintain a salary plan equitably applied to the exempt position and in reasonable conformity with the general salary structure of the state. [1955 c.738 §3; 1969 c.80 §55]

**240.250 Rules applicable to management service.** The Personnel Division shall adopt rules, policies and procedures necessary for the management service. The rules may cover any wages, hours, terms and conditions of employment addressed by this chapter, even if, absent the rule, those wages, hours, terms and conditions would not otherwise apply to the management service. The rules shall further merit principles in the examination, selection and promotion of individuals for the management service. [1981 c.409 §7; 1985 c.121 §2]

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**240.307 Procedure for enforcement of ORS 240.309; rules.** (1) Any complaint alleging violation of ORS 240.309 shall be filed with the Employment Relations Board.  
(2) Any employee may file a complaint with the board alleging violation of ORS 240.309.  
(3) If the employee makes a prima facie case showing that the employer has violated ORS 240.309, then the burden of rebutting the prima facie case is on the employer.  
(4)(a) Any employer found to be in violation of ORS 240.309 by the board may be required to pay any affected employee damages for any loss of wages, benefits and rights. The board may also require the agency to discontinue the improper practices.  
(b) Any award granted to an affected employee by the board shall be in addition to any penalty imposed under ORS 240.990.  
(5) Subject to the requirements of ORS 183.452, the state agency need not be represented by legal counsel in these proceedings before the Employment Relations Board. The board may adopt, by rule, special informal proceedings to review these matters and may, in its discretion, rely on any grievance procedure records developed by the state agency. If the board adopts a rule under this subsection, the employer shall not be required to comply with ORS 183.452 (2)(b) for hearings conducted under the board rule. Any court review of the board's decision under this section shall give special deference to the informality of the proceedings in reviewing the sufficiency of the record. [1990 c.3 §3; 1999 c.448 §7]

**240.309 Temporary appointments; limitations; duration; extension; periodic reports; post-audit review; investigation; exceptions.** (1) Temporary employment shall be used for the purpose of meeting emergency, nonrecurring or short-term workload needs of the state.  
(2) A temporary employee may be given a nonstatus appointment without open competition and consideration only for the purposes enumerated in this section. Temporary appointments shall not be used to defeat the open competition and consideration system.  
(3) A temporary employee may not be employed in a permanent, seasonal, intermittent or limited duration position except to replace an employee during an approved leave period.  
(4) Employment of a temporary employee for the same workload need, other than for leave, may not exceed six calendar months. The decision to extend the period of employment may be delegated by the Personnel Division of the Oregon Department of Administrative Services to other state agencies. Approval to extend shall be allowed only upon an appointing authority's finding that the original emergency continues to exist and that there is no other reasonable means to meet the emergency. Agency actions under this subsection are subject to post-audit review by the Oregon Department of Administrative Services as provided in ORS 240.311.  
(5) Employment of a temporary employee for different workload needs shall not exceed the equivalent of six calendar months in a 12-month period.  
(6) A temporary employee shall not be denied permanent work because of the temporary status. Temporary service shall not be used as any portion of a required trial service period.

(7) The Personnel Division of the Oregon Department of Administrative Services shall report the use of temporary employees, by agency, once every six months, including the duration and reason for use or extensions, if any, of temporary appointments. The reports shall be made available upon request to interested parties, including employee organizations. If any interested party alleges misuse of temporary employees, the division shall investigate, report its findings and take appropriate action.

(8) The Department of Justice may use temporary status appointments for student law clerks for a period not to exceed 24 months.

(9) The chief administrative law judge of the Office of Administrative Hearings may use temporary status appointments for student law clerks for a period not to exceed 24 months. Student law clerks appointed under this subsection may not act as administrative law judges or conduct hearings for the Office of Administrative Hearings.

(10) The Public Utility Commission may use temporary status appointments for student law clerks for a period not to exceed 24 months.

(11) A state agency may use temporary status appointments for a period not to exceed 48 months for student interns who are enrolled in high school or who are under 19 years of age and are training to receive a General Educational Development (GED) certificate. Student interns are not eligible for benefits under ORS 243.105 to 243.285. [1985 c.635 §3; 1990 c.3 §1; 1993 c.98 §5; 1993 c.724 §12; 2001 c.312 §1; 2003 c.75 §20; 2009 c.177 §1]

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**240.316 Trial service; regular status; procedures for transfer, demotion and separation of employees.** (1)(a) Persons initially appointed to or promoted to a permanent or seasonal position in state service shall be subject to a trial service period.

(b) An appointing authority has the discretion to subject an employee to a trial service period when:

(A) A management service employee or a classified, unrepresented employee transfers to a different agency;

(B) A management service employee or a classified, unrepresented employee transfers back to the same agency after an absence of more than one year;

(C) A former management service employee or former classified, unrepresented employee is reemployed by the same agency after an absence of more than one year; or

(D) A former management service employee or former classified, unrepresented employee is reemployed by a different agency.

(c) Any employee who serves the trial service period designated by the Personnel Division or a delegated operating agency for a given classification or as described in paragraph (b) of this subsection shall be given regular employee status.

(2) Employees who have acquired regular status will not be subject to separation except for cause as defined by ORS 240.555 or lack of work, curtailment of funds, or reorganization requiring a reduction in force.

(3) Procedures shall be established by the division to provide for the layoff and opportunity for reemployment of employees separated for reasons other than cause, which shall take into account the needs of the service, qualifications, quality of performance, relative merit and length of service.

(4) Procedures shall also be established by the division for the transfer, discipline or demotion of employees for the good of the service or separation of employees whose conduct or performance

continues to be improper or inadequate after reasonable attempts have been made to correct it, where appropriate. [1979 c.468 §23; 1981 c.155 §1; 1989 c.134 §1; 1989 c.890 §11]

**240.321 Collective bargaining; effect of collective bargaining agreements on personnel rules; grievance procedures.**

(1) All collective bargaining between the state and its agencies and any certified or recognized exclusive employee representative of classified employees shall be under the direction and supervision of the Director of the Oregon Department of Administrative Services.

(2) Notwithstanding any of the provisions of ORS 240.235, 240.306, 240.316, 240.430 and 240.551, employees of state agencies who are in certified or recognized appropriate bargaining units shall have all aspects of their wages, hours and other terms and conditions of employment determined by collective bargaining agreements between the state and its agencies and the exclusive employee representatives of such employees pursuant to the provisions of ORS 243.650 to 243.762, except with regard to the recruitment and selection of applicants for initial appointment to state service.

(3) The provisions of rules adopted by the Oregon Department of Administrative Services, the subjects of which are incorporated into collective bargaining agreements, shall not be applicable to employees within appropriate bargaining units covered by such agreements.

(4) The department shall ensure the speedy resolution of employee grievances by adopting a grievance procedure resulting in a final employer determination within 60 days of the filing of a written grievance, with appeal thereafter to the Employment Relations Board, the Civil Rights Division of the Bureau of Labor and Industries, or other appropriate review agency. Employees in collective bargaining units shall have their grievances resolved as provided for by the collective bargaining agreement. [1979 c.468 §24; 1997 c.23 §1]

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## EMPLOYER-REQUESTED INTERVIEWS

**240.406 Right of unclassified or exempt employee to be accompanied to employer-**

**requested interview.** An employee in the state service employed in an unclassified or exempt position who is not a confidential employee, managerial employee or supervisory employee, as defined in ORS 243.650, and who is not represented by an exclusive representative as defined in ORS 243.650 may be accompanied by an individual selected by the employee to be present during any interview with the employee requested by the appointing authority, manager or supervisor of the employee. [2011 c.687 §6]

## REMOVAL DURING TRIAL SERVICE; SEASONAL EMPLOYEES; MERIT RATINGS

**240.410 Removals during trial period.** At any time during the trial service period, the appointing authority may remove an employee if, in the opinion of the appointing authority, the trial service indicates that such employee is unable or unwilling to perform duties satisfactorily or that the habits and dependability of the employee do not merit continuance in the service. [Amended by 1979 c.468 §15]

**240.425 Regular seasonal employees.** Positions which occur, terminate and recur periodically and regularly regardless of the duration thereof shall be designated by rule, policy or procedure of the Personnel Division as seasonal positions. An employee who satisfactorily serves in a seasonal position the trial service period designated by the division or a delegated operating agency for the classification to which the seasonal position is allocated is entitled to permanent status as a regular seasonal employee. [Amended by 1969 c.80 §70; 1981 c.156 §1]

**240.430 Merit ratings.** In cooperation with appointing authorities, the Personnel Division shall establish a system of merit ratings to determine the quality of performance and relative merit of employees in the classified service. [Amended by 1969 c.80 §71; 1979 c.468 §16]

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**240.555 Suspension, reduction, demotion or dismissal.** The appointing authority in any division of the service may suspend, reduce, demote or dismiss an employee thereof for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service. [Amended by 1969 c.80 §77; 1975 c.427 §11; 1979 c.468 §17]

**240.560 Appeal procedure.** (1) A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the Employment Relations Board not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The appeal must be in writing. The appeal is timely if it is received by the board or postmarked, if mailed postpaid and properly addressed, not later than 30 days after the effective date of the reduction, dismissal, suspension or demotion. The board shall hear the appeal within 30 days after the board receives the appeal, unless the parties to the hearing agree to a postponement. The board shall furnish the division of the service concerned with a copy of the appeal in advance of the hearing.

(2) The hearing shall be conducted as provided for a contested case in ORS chapter 183.

(3) If the board finds that the action complained of was taken by the appointing authority for any political, religious or racial reasons, or because of sex, marital status or age, the employee shall be reinstated to the position and shall not suffer any loss in pay.

(4) In all other cases, if the board finds that the action was not taken in good faith for cause, it shall order the immediate reinstatement and the reemployment of the employee in the position without the loss of pay. In lieu of affirming the action, the board may modify the action by directing a suspension without pay for a given period, and a subsequent restoration to duty, or a demotion in classification, grade or pay. The findings and order of the board shall be certified in writing to the appointing authority and shall be forthwith put into effect by the appointing authority. [Amended by 1957 c.205 §1; 1959 c.689 §6; 1969 c.80 §78; 1971 c.734 §35; 1975 c.427 §12; 1977 c.400 §1; 1977 c.770 §6; 1993 c.778 §24; 2003 c.213 §1]

**240.563 Judicial review.** Judicial review of orders under ORS 240.560 shall be as provided in ORS chapter 183. [1971 c.734 §31]

**240.570 Classified employee filling position in unclassified, exempt or management service.**

(1) Positions in the unclassified, management and exempt services may be filled by classified employees. After an employee is terminated from the unclassified or exempt service or removed from the management service, for reasons other than those specified in ORS 240.555, the state agency that employed the employee before the appointment to the unclassified, exempt or management service may, at the agency's sole discretion, restore the employee to a position held in the agency before the appointment if the employee meets the position requirements. If an employee is restored to a former position, the employee is subject to any applicable agency collective bargaining agreement.

(2) An appointing authority may assign, reassign and transfer management service employees for the good of the service and may remove employees from the management service due to reorganization or lack of work.

(3) A management service employee is subject to a trial service period established pursuant to rules of the Personnel Division under ORS 240.250. Thereafter, the management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or may be

removed or dismissed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily.

(4) Management service employees who are assigned, reassigned, transferred or removed, as provided in subsection (2) of this section, and employees who are disciplined, removed or dismissed from the management service as authorized in subsection (3) of this section may appeal to the Employment Relations Board in the manner provided by ORS 240.560.

(5)(a) Management service employees with immediate prior former regular status in the classified service who are removed from trial service pursuant to ORS 240.410 have a right to be restored to their former positions.

(b) Except as provided in paragraph (a) of this subsection, management service employees with immediate prior former regular status in the classified service who are appointed to the management service and who have not been dismissed from the management service for a reason specified in ORS 240.555:

(A) Prior to January 1, 2015, have the right to restoration to the classified service for three years from the date of appointment to the management service.

(B) After December 31, 2014, have no right to restoration to the classified service. [1955 c.738 §6; 1979 c.468 §18; 1981 c.409 §4; 1985 c.121 §3; 1987 c.269 §1; 2005 c.766 §1; 2014 c.22 §1]

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**240.590 Reemployment of employee in exempt service.** An employee in the exempt service who has been employed full-time for at least 12 months consecutively in such service may be noncompetitively reemployed in a position for which qualified within two years from the date of separation, if separated from state service in good standing. However, such reemployment shall occur only after current bargaining unit members have exhausted any rights under an applicable collective bargaining agreement. [1985 c.635 §5]

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## PROHIBITED CONDUCT

**240.710 Certain acts unlawful.** (1) No person shall make any false statement, certificate, mark, rating or report with regard to any test, certification, or appointment made under this chapter, or in any manner commit or attempt to commit any fraud preventing the impartial execution of this chapter and the rules.

(2) No person shall, directly or indirectly, give, render, pay, offer, solicit or accept any money, service or other valuable consideration for or on account of any appointment, proposed appointment, promotion or proposed promotion to, or any advantage in, a position in the classified service.

(3) No employee of the Personnel Division, examiner or other person shall defeat, deceive or obstruct any person in the right of the person to examination, eligibility, certification or appointment under this chapter, or furnish to any person any special or secret information for the purpose of affecting the rights or prospects of any person with respect to employment in the classified service. [Amended by 1969 c.80 §80]

**240.750 When discipline action not to be retained in personnel file.** No copy of a personnel discipline action that has been communicated orally or in writing to the employee and subsequently reduced in severity or eliminated through collective bargaining, grievance or personnel process shall be placed or otherwise retained in the personnel file of the employee unless agreed to by the employer and the employee. [1985 c.813 §2]

**Note:** 240.750 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 240 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

## MISCELLANEOUS

**240.850 Policy on work environments; duties of state agencies.** It is the policy of the State of Oregon to encourage cooperative, participatory work environments and team-based management practices in all state agencies. To that end, when feasible and appropriate, state agencies shall:

- (1) Delegate responsibility for decision-making and service delivery to the lowest possible level;
- (2) Involve all workers, especially frontline workers, in the development and design of processes and program improvements;
- (3) Simplify and eliminate internal administrative rules and policies that unduly impede the attainment of the agency's mission and delivery of services;
- (4) Eliminate layers of organizational hierarchies;
- (5) Envision state government as a high performance organization in which training and technology are viewed as an investment in the workforce; and
- (6) Promote continuous improvement of state services through the involvement of all workers in process design and performance-based outcome development. [1993 c.724 §13b]

**Note:** 240.850 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 240 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**240.855 Telecommuting; state policy; agencies to adopt written policies; biennial report.**

- (1) As used in this section:
  - (a) "State agency" means any state office, department, division, bureau, board and commission, whether in the executive, legislative or judicial branch.
  - (b) "Telecommute" means to work from the employee's home or from an office near the employee's home, rather than from the principal place of employment.
- (2) It is the policy of the State of Oregon to encourage state agencies to allow employees to telecommute when there are opportunities for improved employee performance, reduced commuting miles or agency savings.
- (3) Each state agency shall adopt a written policy that:
  - (a) Defines specific criteria and procedures for telecommuting;
  - (b) Is applied consistently throughout the agency; and
  - (c) Requires the agency, in exercising its discretion, to consider an employee request to telecommute in relation to the agency's operating and customer needs.
- (4) Each state agency that has an electronic bulletin board, home page or similar means of communication shall post the policy adopted under subsection (3) of this section on the bulletin board, home page or similar site.
- (5) The Oregon Department of Administrative Services, in consultation with the State Department of Energy, shall provide a biennial report to the Joint Committee on Technology, or a similar committee of the Legislative Assembly, containing at least the following:
  - (a) The number of employees telecommuting;
  - (b) The number of trips, miles and hours of travel time saved annually;
  - (c) A summary of efforts made by the state agency to promote and encourage telecommuting;
  - (d) An evaluation of the effectiveness of efforts to encourage employees to telecommute; and
  - (e) Such other matters as may be requested by the committee. [Formerly 283.550]

**Note:** 240.855 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 240 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

## PENALTIES

**240.990 Penalties.** (1) Subject to ORS 153.022, any person who willfully violates any provision of this chapter or of the rules thereunder commits a Class A misdemeanor.

(2) Any person who fails to appear in response to a subpoena or to answer any question or produce any books or papers pertinent to any investigation or hearing authorized by this chapter commits a Class A misdemeanor.

(3) A state officer or employee who fails to comply with any provision of this chapter or of any rule, regulation or order thereunder is subject to all penalties and remedies provided by law for failure of a public officer or employee to do an act required of a public officer or employee by law.

(4) Any person who is convicted of a Class A misdemeanor under this chapter shall, for a period of five years, be ineligible for appointment to or employment in a position in the state service, and if the person is an officer or employee of the state, shall be deemed guilty of malfeasance in office and shall be subject to forfeit of the office or position. [Amended by 1999 c.1051 §301; 2011 c.597 §172]

# EXCERPTS FROM THE EMPLOYMENT RELATIONS BOARD'S ADMINISTRATIVE RULES

## DIVISION 10

### GENERAL/POLICY AND DEFINITIONS

#### **115-010-0000 Purpose of Rules**

The purpose of these rules is to implement and give effect to the provisions of state law in achieving the following objectives:

(1) To provide uniform procedures to resolve questions of representation, unit clarification and deauthorization.

(2) To remedy statutorily defined unfair labor practices.

(3) To render assistance to employers and employee organizations in resolving their differences without resort to strikes, lockouts or other forms of conflict.

(4) To foster and protect a merit system of personnel administration in state government.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-010-0005 Statutory Authority for Rules**

These rules are adopted under the authority provided by ORS 240.086(3) and 243.766(7).

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 2-2014, f. 8-20-14, cert. ef. 9-3-14; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-010-0010 Definition of Terms**

As used in these rules, unless the context requires otherwise:

- (1) "Appeal" means any request for review of a personnel action under ORS ch 240.
- (2) "Appellant" means a person who requests review of a personnel action under ORS ch 240.
- (3) "Appointing Authority" is defined in ORS 240.015.
- (4) "Board" means the Employment Relations Board.
- (5) "Board Agent" means any employee designated by the Board to act on its behalf.
- (6) "Business day" means Monday through Friday, but does not include any holiday as defined by ORS 187.010 and ORS 189.020, or any day that the Board is closed.
- (7) "Class" or "Classification" is defined in ORS 240.015(4).
- (8) "Complainant" means a party who has filed an unfair labor practice complaint or a complaint alleging a violation of ORS 240.309.
- (9) "Conciliator" means the head of the State Conciliation Service.
- (10) "Date of Filing" means the date received by the Board. A document received after 5 p.m. is considered to be filed on the following business day.
- (11) "Date of Service" means the date sent to another party or the date of personal service.
- (12) "Day" means calendar day unless otherwise specified.
- (13) "Demotion," for purposes of action brought under ORS ch 240, means the voluntary or involuntary movement of an employee from a position in one classification to a position in another classification having a lower salary range number.
- (14) "Management Service" is defined in ORS 240.212.
- (15) "Party" is any person, labor organization or employer filing a petition, complaint, charge or State Personnel Relations Law appeal with the Board; any person, labor organization or employer named as a party in a petition, complaint, charge or State Personnel Relations System appeal, or any other person, labor organization or employer whose timely motion to intervene has been granted. Where applicable, "party" also is a person, labor organization or employer under Division 40 of these rules.
- (16) "Personnel Action," for purposes of appeals brought under ORS ch 240, means any action taken with reference to an applicant, employee or position.
- (17) "Petitioner" means a party who files a petition with the Board.
- (18) "Recommended Order" means the Order of an Administrative Law Judge or Board Agent consisting of proposed rulings on motions and evidentiary matters, findings of fact, conclusions of law, and a recommended order.
- (19) "Regular Employee" means an employee who has been appointed to a position in the state service in accordance with state law after successfully completing a trial service period or who has been otherwise granted regular status through specific provisions of law.
- (20) "Respondent" means a party who is required to respond to a complaint, petition, charge, or appeal.
- (21) "Showing of interest" means the evidence of support that a petitioner must show in a proposed bargaining unit before its petition will be acted on. The showing may be made by original authorization cards or petitions, both of which must include a statement of a desire by affected employees to be represented by the petitioner for purposes of collective bargaining and that must be signed and dated by employees in the proposed unit during the 180 days preceding the filing of the petition; by dues records or payroll deduction records showing the employees to be current members of a petitioning organization; or, by an existing or the most recently expired bargaining agreement applicable to the bargaining unit, to which the petitioning organization was a party. A showing of interest in support of objections to a petition for certification without an election shall comply with OAR 115-025-0075.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 3-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0012 Computation of Time**

Unless otherwise specifically provided in these rules, time will be computed by excluding the first day and including the last day unless the last day falls upon a legal holiday, Saturday, or a day when the office is closed before the end of or all of the normal workday, in which case the last day also is excluded.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 2-2011(Temp), f. 8-25-11, cert. ef. 9-1-11 thru 12-31-11; ERB 4-2011, f. 12-28-11, cert. ef. 12-29-11; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0020 Board Meetings and Contested Case Hearings**

Ordinarily, contested case hearings shall be open to the public. When circumstances warrant, the Board may close contested case hearings. The Board shall meet at such times and places as specified by the chair or at the request of two members of the Board. Advance notice of the time and place of each meeting shall be given to each Board member. Two members shall constitute a quorum.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 192.610 - 192.690, 240.080

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 3-1998, f. & cert. ef. 1-26-98; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0025 Record of Public Meetings**

Any minutes of Board public meetings and proceedings shall be approved by the Board.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240, 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0032 Board Public Records**

(1) Inspection. Any record of the Board that is defined as a public record under ORS 192.410 to 192.505, and that is not exempt from disclosure, shall be available for inspection by members of the public at the office of the Board, in Salem, Oregon. All requests for inspection or copies of Board public records must be made in writing. Inspection of such records will be permitted:

- (a) During normal work hours of the Board; and
- (b) At reasonable times, provided there is no undue disruption of the work of the Board or its agents.

(2) Custodians and Certification:

(a) The Board's Business Operations Administrator is designated as the custodian of Board public records.

(b) The custodian shall certify, upon request, released copies of Board public records as true copies.

(3) The Board may assess a fee to provide public records. The requesting party must agree to pay the fee before the records will be made available. The amount of the fee will be the actual cost to locate, compile, make available for inspection, prepare copies (whether in paper, audio, microfilm, machine readable format, or other format), and deliver the public records.

(4) The actual cost described in section (3) of this rule include:

- (a) \$1.50 per page for copies of any Board transcript or document of public record that is certified as a true copy;
- (b) \$0.25 cents per page for copies of documents that are not certified, including paper, electronic, or facsimile copies;

- (c) \$15 for a copy of the first compact disk (CD) recording of a hearing and \$10 for each subsequent CD;
  - (d) \$15 for a computer disk containing copies of Board forms;
  - (e) \$150 per calendar year to receive copies of final Board Orders once a month; and
  - (f) \$150 per calendar year to receive a copy of arbitration awards.
- (5) No fees will be charged to state agencies for providing copies of Board transcripts, tapes, Orders or any document or exhibit included in a case record that is not exempt from disclosure.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 192

Hist.: ERB 4-1980, f. 8-15-80, ef. 8-18-80; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 1-1988, f. & cert. ef. 4-25-88; ERB 2-1989, f. 11-28-89, cert. ef. 12-4-89; ERB 2-1993, f. & cert. ef. 12-15-93; ERB 3-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 3-1998, f. & cert. ef. 1-26-98; ERB 3-2007, f. 12-17-07, cert. ef. 12-26-07; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0033 Filings and Service of Documents**

- (1)(a) Any document required or allowed to be filed with the Board or served on a party may be filed or served by mail, email, facsimile (fax) or in person. The Board shall post on its website the street address for personal delivery, the mailing address for filing by mail, the telephone number for filing by fax, and the email address (or other method) to be used for electronic filing.
- (b) A complaint or answer will not be considered filed until the filing fees required by ORS 243.672(3) have been paid.
- (c) The Board will charge \$25 for each facsimile filing.
- (d) Documents received after 5 p.m. shall be deemed filed with the Board the next business day.
- (2) Unless otherwise stated in these rules or directed by the Board or Board Agent, all documents filed with the Board shall be served on the named parties or a representative of record and shall include proof of service.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0035 Use of Board Agents**

The Board may assign a Board Agent to hold any hearing that the Board is authorized to hold. Typically, the Board will assign an Administrative Law Judge (ALJ) as the Board Agent to conduct hearings and issue Recommended Orders.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0040 Time, Place, and Notice of Hearings**

- (1) The Board Agent shall set the time and place for hearing and serve a notice of hearing containing such information on all interested parties at least ten days before the hearing date, unless otherwise agreed to by the parties.
- (2) The notice is not a part of the hearing record, and any party wishing to rely on a notice as an exhibit shall make an appropriate submission at the hearing.
- (3) Notice for Hearings on Representation Petitions under Division 25. When a valid petition has been filed and objections or intervening petitions have been timely filed, the hearing generally will be held within 21 days after the objection period ends. In addition to the requirements of subsection (1) of this section, the notice shall include:
- (a) a description of any proposed bargaining unit(s) that may be involved; and
  - (b) any objector(s) or intervenor(s).

(4) Notice for Hearings on Complaints under Division 35. The hearing will be set within 20 days from the date of service of the complaint, unless both parties agree to a later date, and the Board Agent approves.

(5) Postponements. Postponement requests are subject to the approval of the Board or Board Agent, who may also postpone a scheduled hearing, subject to the time restrictions of section (4) of this rule. In determining whether to grant a postponement request, the Board or Board Agent will consider the promptness of the request. Any postponement request shall state:

(a) the reason for the request; and

(b) whether the other party agrees, objects, or has no objection to the request.

(6) Consolidation or Severance of Cases. The Board or Board Agent may consolidate or sever cases or charges for purposes of conducting a hearing or issuing a Recommended Order.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0043 Hearings by Electronic Devices**

(1) The Board or Board Agent has the discretion to conduct a hearing or portion of a hearing by an electronic device, such as telephone, video, and Internet devices.

(2) A party seeking to have a hearing or to offer evidence by an electronic device shall make the request at least ten days before the scheduled hearing date. Less notice may be allowed, if the Board or Board Agent determines that there is good cause for the late notice.

(3) In determining whether to grant a request that all or part of a hearing be conducted by an electronic device, the Board or Board Agent shall consider the circumstances of the particular case including:

(a) The amount of notice given;

(b) The availability of equipment;

(c) The length of hearing;

(d) The amount of documentary evidence to be utilized during the proposed testimony;

(e) The number and location of witnesses;

(f) The degree to which witness credibility is at issue;

(g) The hardship on the parties or witnesses;

(h) Any objections of an opposing party; and

(i) The cost to the Board.

(4) The Board may conduct oral argument, under OAR 115-010-0095, or conduct other business through hearings held by an electronic device.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 243

Hist.: ERB 1-1982, f. & ef. 1-19-82; ERB 2-1993, f. & cert. ef. 12-15-93; ERB 1-2000, f. & cert. ef. 12-1-00; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0045 Motions**

(1)(a) A request for any ruling, order, or other relief may be made by filing a typewritten motion. The motion need not be in any particular form.

(b) Motions to Intervene. Any motion to intervene must be filed with the Board or Board Agent at least seven days before the hearing. The motion shall state the grounds on which the motion should be granted. The decision to grant or deny the motion rests within the discretion of the Board or Board Agent. A filing fee of \$300 must be paid by the intervenor when the motion is filed. The motion will not be considered filed until the fee is paid.

- (2) Before filing any motion, other than a dispositive motion (e.g., a motion to dismiss), the moving party shall make a good-faith effort to confer with the non-moving party to seek resolution of the matter. The motion must describe all efforts and the result of the effort.
- (3) Any response to a motion must be filed within 14 days of the date the motion is served, unless another date is set by the Board or Board Agent.
- (4) A reply from the moving party to the response is allowed only when requested or authorized by the Board or Board Agent.
- (5) Motions made at hearing may be stated orally on the record, and shall briefly identify the grounds for the motion and the order or relief sought.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240, 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 2-2014, f. 8-20-14, cert. ef. 9-3-14; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0050 Rules of Evidence**

Except for hearings conducted under the rules for Divisions 60 and 70, the following rules of evidence apply:

- (1) Evidence of a type commonly relied on by reasonably prudent persons in conduct of their serious affairs shall be admissible.
- (2) Irrelevant, immaterial or unduly repetitious evidence shall be excluded.
- (3) All offered evidence, not objected to, may be received by the Board or Board Agent subject to the Board or Board Agent's discretion to exclude irrelevant, immaterial or unduly repetitious matter.
- (4) Evidence objected to may be received by the Board Agent with rulings on its admissibility or exclusion to be made at the time a Recommended Order is issued.
- (5) Rights of Party not Answering or Failing to Specifically Deny an Allegation. If the respondent fails to file a timely answer, it will not be allowed to present evidence at the hearing as to the facts alleged, unless it can establish good cause. Respondent will be restricted to making legal arguments.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0055 Subpoenas**

- (1) A subpoena for the attendance of witnesses or for the production of records or other documents may be issued by an attorney of record in the manner and form prescribed by ORS 183.440.
- (2) On its own motion, the Board or Board Agent may issue such a subpoena.
- (3) The Board or Board Agent generally will not issue a subpoena on a party's request, unless the party is not represented by an attorney or the party establishes that it is necessary for the Board to issue the subpoena on the party's behalf.
- (4) Subpoenaed witnesses shall receive fees and mileage as prescribed by ORS 44.415 for witnesses in civil proceedings. The fees and mileage shall be paid by the person that asks for the subpoena to be issued.
- (5) All subpoenas shall be served within a reasonable time before the hearing or date designated for the production of records or documents.
- (6) Any party desiring to contest a subpoena issued in any hearing of the Board may do so by filing a motion to quash.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1982, f. & ef. 1-19-82; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 1-1988, f. & cert. ef. 4-25-88; ERB 1-2000, f. & cert. ef. 12-1-00; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0060 Witnesses**

- (1) All testimony to be considered at a hearing, except matters officially noticed or entered by stipulation, shall be sworn or affirmed.
- (2) Refusal of a witness to answer any question ruled to be proper shall, in the discretion of the Board or Board Agent, be grounds for excusing the witness or striking any or all testimony given by the witness.
- (3) A party may not call the opposing party's representative as a witness, unless it shows that such testimony is necessary and will not be cumulative or repetitive. Notice of intention to call the opposing party's representative as a witness, together with a supporting affidavit, must be filed with the Board no later than 14 days before the hearing date.
- (4) Subsection (3) of this rule does not apply to a party appearing pro se.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1994, f. 6-23-94, cert. ef. 7-1-94; ERB 2-1998, f. & cert. ef. 1-26-98; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0065 Depositions**

The Board or Board Agent may order the taking of depositions for perpetuation of testimony. A request for deposition to perpetuate testimony shall be filed with the Board in a timely manner so that, if ordered, it can be taken in sufficient time to be prepared for use in any hearing scheduled on a complaint or petition, unless all parties agree to a continuance to accomplish same. The request shall set forth the name and address of the witness, materiality of testimony, reasons why perpetuation of such testimony is required, and specify the time that the deposition will be completed. The request shall ask for an order that the testimony of such witness be taken at no expense to the Board, before an officer authorized to administer oaths under state law, and shall set forth the name of such officer, and the time and place for said deposition.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 3-1998, f. & cert. ef. 1-26-98; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0068 Prehearing Procedures**

- (1) The Board or Board Agent may convene prehearing conferences with the parties' representatives for the purpose of:
  - (a) Scheduling hearing dates, witnesses for hearing and further prehearing conferences;
  - (b) Disposing of pending motions;
  - (c) Formulating and simplifying issues;
  - (d) Discussing settlement of any or all of the issues;
  - (e) Avoiding submission of unnecessary or cumulative exhibits or other evidence;
  - (f) Stipulating to facts;
  - (g) Discussing the need for any special hearing procedures; and
  - (h) Discussing any other matters that may assist in the disposition of the matter.
- (2) At the discretion of the Board or Board Agent, the prehearing conference may be held by telephone or in person and may be recorded.
- (3) Each party shall provide a witness list to the other parties and the Board Agent. Each party shall also provide an exhibit list and exhibits to any other party. These documents must be received no later than seven days before the scheduled hearing, unless the Board Agent directs otherwise.

(4) A party that fails to comply with prehearing requirements set forth in the rule or ordered by the Board or Board Agent shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown.

(5) The Board or Board Agent may rule before hearing on one or more of the claims or defenses, or a portion of any claim or defense, asserted in a complaint or answer. The Board or Board Agent may defer issuing a proposed order on any such prehearing ruling until after a hearing is held and a Recommended Order is issued on remaining claims or defenses.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 2-1993, f. & cert. ef. 12-15-93; ERB 2-2014, f. 8-20-14, cert. ef. 9-3-14; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0070 Conduct of Hearings**

(1)(a) The Board or Board Agent will open the hearing with a brief introduction of parties and issues.

(b) Parties shall enter appearances at the beginning of the hearing.

(c) Parties may make opening statements.

(d) Parties may present evidence in support of their respective positions. Parties shall be allowed to cross-examine witnesses and object to offered evidence.

(e) A party may make oral or written closing argument.

(2) Conference During Hearing. In any proceeding, the Board or Board Agent may call a conference. The results of such conference shall be stated on the record.

(3) Stipulation as to Facts. The parties to any proceeding or investigation may, by stipulation and subject to approval by the Board or Board Agent, agree on any fact. A stipulation shall be binding on the parties and may be regarded and used as evidence at hearing.

(4) Continuances. The Board or Board Agent may continue a hearing. The date of a continued hearing may be fixed at the time of the initial hearing or by later written notice to the parties.

(5) Burden of Proof:

(a) Representation, clarification and unit redesignation hearings are investigatory. Their purpose is to develop a full factual record. There is no burden of proof. The Board or Board Agent shall determine the order of presentation of evidence and may examine witnesses, require the production of documents and call witnesses not called by the parties.

(b) Unfair labor practice complaint hearings are adversarial. The complainant has the burden of proof and the burden of going forward with the evidence. The respondent has the burden of proving affirmative defenses, if any.

(c) In a hearing on an appeal from a disciplinary action under ORS 240.555 or ORS 240.570(3), the respondent shall have the burden of proof and the burden of going forward with the evidence. The appellant shall have the burden of proving affirmative defenses. In all other ORS ch 240 cases, the appellant shall have the burden of proof and the burden of going forward with the evidence, and the respondent shall have the burden of proving affirmative defenses.

(6) Exhibits:

(a) A party intending to offer exhibits shall, where practicable, have them marked for identification and presented to any opposing party and the Board or Board Agent in a prehearing conference with the Board or Board Agent before the opening of any hearing.

(b) A party offering an exhibit shall provide two copies to the Board or Board Agent and a copy to any opposing party before seeking its admission into evidence. A failure to comply with this subparagraph shall result in the exhibit not being admitted, unless good cause is shown.

(c) A party seeking to offer an object other than a document shall provide a photograph of that object, which will be received in lieu of the object. A copy of the photograph must be provided to any other party.

(d) A party relying on voluminous or bulky documents shall provide the Board or Board Agent and any other party with written excerpts of matters therein that are being relied on.

(e) A party wishing to submit a transcript of an audio recording as an exhibit must also submit a notarized statement from the transcriptionist that the document is a verbatim transcript of the audio recording. A copy of the audio recording and transcript must be provided to the opposing party no less than 14 days before the first day of hearing.

(7) If a party chooses to have a certified transcript of the hearing prepared, the Board will be provided, at no charge, with a certified copy of such transcript.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 4-1980, f. 8-15-80, ef. 8-18-80; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 1-1988, f. & cert. 4-25-88; ERB 1-1991, f. 11-21-91, cert. ef. 12-1-91; ERB 2-1998, f. & cert. ef. 1-26-98; ERB 2-2014, f. 8-20-14, cert. ef. 9-3-14; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0075 Conduct at Hearing**

All parties to hearings, their counsel, and spectators shall conduct themselves in a respectful manner. Failure to comply with the Board Agent's effort to retain order is grounds for removal from the hearing.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0077 Briefs**

(1) Briefs must be captioned with the Board case title and number, and must be typewritten or printed with double spacing on letter-sized paper.

(2) Briefs must substantially comply with the following format:

(a) Brief statement of pertinent facts;

(b) Statement and discussion of disputed issues supported by available precedent; and

(c) Concise summary of reasons for granting requested relief.

(3) Briefs shall not exceed 30 pages, unless expressly permitted by the Board or Board Agent.

(4) Once the Board Agent establishes a brief filing date, parties must ask the Board Agent for an extension of time. Parties must provide the Board Agent with any other party's position to the extension request. An opposed extension request will be granted only for good cause.

(5) The Board or Board Agent may disregard any brief (or portion of a brief) that fails to comply with this rule.

(6) Reply briefs will not be accepted, unless expressly permitted by the Board or Board Agent.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 4-1980, f. 8-15-80, ef. 8-18-80; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 2-1998, f. & cert. ef. 1-26-98; ERB 2-2014, f. 8-20-14, cert. ef. 9-3-14; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0080 Board Employees as Witnesses**

A Board employee may not be called and may not appear as a witness in a case before the Board, without approval of the Board.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0085 Recommended Order**

Unless a majority of the Board hears the case or considers the entire record, the Board Agent shall issue a Recommended Order and serve a copy on each party.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 4-1985, f. 10-29-85, ef. 10-31-85; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0090 Objections to Board Agent's Recommended Order**

(1) The parties shall have 14 days from the date of service of a Recommended Order to file specific written objections with the Board. Upon good cause shown, the Board may extend the time for filing objections.

(2) If one party has filed objections as set forth in subsection (1), but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections.

(3) If a party fails to comply with subsections (1) and (2) of this rule, then any objections or cross-objections shall be deemed invalid and disregarded by the Board in making a final determination in the case.

(4) If no objections are timely filed, then the Board shall adopt the Recommended Order as the Final Order.

(5) Where the Board adopts a Recommended Order under section (4) of this rule, that Final Order is precedential unless the Board determines to make some or all of that Final Order non precedential.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0095 Board Review**

(1) If timely objections are filed, parties will be given an opportunity to present oral argument to the Board. If a party desires to submit written argument in lieu of oral argument, it must be filed with the Board at least five days before the date set for argument. The written argument shall be typewritten, double-spaced on letter-sized paper, and no more than 30 pages, unless the Board approves a greater page limit.

(2) When oral argument is provided, a party may submit a written memorandum in aid of oral argument. Any such written memorandum must be filed with the Board at least five days before the date set for oral argument. Any memorandum shall be typewritten, double-spaced on letter sized paper, and no more than 25 pages, unless the Board approves a greater page limit. The Board may strike any memorandum in aid of oral argument that does not comply with these rules.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0100 Petitions for Reconsideration or Rehearing**

(1) A party has 14 days from the date of service of a Board order to petition for reconsideration or rehearing. Any petition for reconsideration or rehearing must specifically state the ground(s) for the petition.

(2) Petition for Rehearing.

(a) A petition for rehearing asks the Board to return the matter to the ALJ for the purpose of submitting additional evidence.

(b) A petition for rehearing shall be granted only if the petitioner establishes that the petitioner would be unduly prejudiced if the petition was denied. If the basis for the petition is based on previously

unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the hearing.

(3) Petition for Reconsideration.

(a) A petition for reconsideration asks the Board to reconsider a ruling, finding of fact, or conclusion of law in a Final Order.

(b) In a case where a Final Order is issued without a Recommended Order, the Board shall generally grant a party's request for reconsideration and grant oral argument.

(c) In a case where a Final Order is issued following a Recommended Order, a petition for reconsideration should be limited to:

(A) A claim of factual error;

(B) A claim that there has been a change in the statutes or case law since the issuance of the Final Order that affects the case; or

(C) A claim that the Board erred in construing or applying the law. A claim addressing legal and factual issues already argued and addressed in the Final Order is disfavored.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 2-1998, f. & cert. ef. 1-26-98; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0103 Amicus Curiae**

(1) The Board will accept amicus curiae briefs that are received by the Board (and served on all parties) within 21 days after objections to the Recommended Order are filed with the Board, or, when an appellate court has remanded the matter to the Board, within 14 days of the appellate judgment. The Board may extend the filing date at its discretion.

(2) An amicus brief must be typewritten with double spacing on letter-sized paper and no more than 20 pages.

(3) Amicus curiae shall not be allowed to orally argue the case, unless authorized by the Board.

(4) The Board, at its discretion, may invite the filing of amicus curiae briefs. In such circumstances, the Board will set a briefing schedule.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-010-0110 Ex Parte Communications**

(1) An *ex parte* communication is an oral or written communication to a Board member or Board Agent concerning a fact at issue in any matter before the Board or Board Agent that is not made in the presence of all parties.

(2) If a Board member or Board Agent receives an *ex parte* communication during the pendency of a matter, the Board member or Board Agent shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party that did not make the *ex parte* communication with an opportunity to respond to the *ex parte* communication.

(3) The mere noting of such *ex parte* communications in the record will not be considered evidence of the facts in dispute unless otherwise agreed by all parties to the case. The Board or Board Agent shall rely only on the admissible evidence of record in determining the merits of any disputed issue in a case.

(4) This rule shall not apply to mediation communications. This rule shall also not apply to matters presented or obtained during preliminary investigation of the petition, complaint, objections, or

challenge, made by Board Agents before the service of the notice of hearing in a case, and shall not apply to requests for subpoenas.

Stat. Auth.: ORS 240.086(3), 243.766(7)

Stats. Implemented: ORS 240 & 243

Hist.: ERB 4-1980, f. 8-15-80, ef. 8-18-80; ERB 1-2016, f. 11-9-16, cert. ef. 2-1-17

## **DIVISION 45**

### **APPEALS, HEARINGS AND INVESTIGATIONS IN THE STATE SERVICE UNDER THE STATE PERSONNEL RELATIONS LAW**

#### **115-045-0000 Definition of Terms**

See OAR 115-010-0010.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1982, f. & ef. 1-19-82; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 1-1998, f. & cert. ef. 1-26-98; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-045-0002 Computation of Time**

See OAR 115-010-0012.

Stat. Auth.: ORS 243

Stats. Implemented: ORS 240.086(3)

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-045-0005 Filing of Appeals**

An appeal must be in writing and filed not later than 30 days after the effective date of the action being appealed. An appeal shall be considered filed when it is received by the Board or postmarked, if mailed postpaid and properly addressed. Amendments or supplements to appeals will be accepted only on a showing of good cause. Failure to timely file may result in dismissal of the appeal.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 9-1985, f. 10-29-85, ef. 10-31-85; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01; ERB 1-2003(Temp), f. & cert. ef. 8-1-03 thru 1-31-04; Administrative correction 8-2-04; ERB 1-2005, f. & cert. ef. 1-24-05; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-045-0010 Regular Employee Appeals from Suspension, Reduction in Pay, Demotion and Dismissal Actions**

An appeal under ORS 240.560 must contain a detailed statement specifying:

- (1) The action being appealed;
- (2) The reasons why appellant believes the action was not in good faith for cause or was taken for political, religious or racial reasons, or because of sex, marital status or age; and
- (3) The corrective action being requested.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1982, f. & ef. 1-19-82; ERB 9-1985, f. 10-29-85, ef. 10-31-85; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01; ERB 1-2002, f. & cert. ef. 5-21-02; ERB 1-2003(Temp), f. & cert. ef. 8-1-03 thru 1-31-04; Administrative correction 8-2-04; ERB 1-2005, f. & cert. ef. 1-24-05; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

#### **115-045-0017 Appeals Concerning Temporary Appointments**

(1) A complaint filed under ORS 240.307 that alleges a violation of ORS 240.309 (temporary appointment duration) must be in writing and must contain a detailed statement specifying:

- (a) The action being appealed;

- (b) The reason complainant believes that the action violates ORS 240.309; and
  - (c) The corrective action being requested.
- (2) The complaint must be filed with the Board no later than 30 days after the employee knew or reasonably should have known of the alleged violation.

Stat. Auth.: ORS 240.086(3)

Stats. Implemented: ORS 240.086(1) & 240.309

Hist.: ERB 2-1990, f. 11-8-90, cert. ef. 11-19-90; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-045-0020 Other Appeals from Other Personnel Actions**

- (1) Pursuant to ORS 240.086, a classified employee not in a bargaining unit may appeal any personnel action affecting the person (including trial service removals) that is alleged to be arbitrary or contrary to law, rule or policy, or taken for political reasons.
- (2) The appeal must be in writing and must contain a detailed statement specifying:
- (a) The action being appealed;
  - (b) The reasons why the appellant believes the action was arbitrary, contrary to law, rule or policy, or taken for political reasons; and
  - (c) The corrective action being requested.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1982, f. & ef. 1-19-82; ERB 9-1985, f. 10-29-85, ef. 10-31-85; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01, Renumbered from 115-045-0015; ERB 1-2001, f. 2-16-01, cert. ef. 7-1-01; ERB 1-2002, f. & cert. ef. 5-21-02; ERB 1-2003(Temp), f. & cert. ef. 8-1-03 thru 1-31-04; Administrative correction 8-2-04; ERB 1-2005, f. & cert. ef. 1-24-05; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-045-0021 Dismissal Appeals by Management Service Employees with Immediate Prior Regular Classified Service**

An appeal under ORS 240.570 shall comply with OAR 115-045-0005 and must contain a detailed statement specifying:

- (1) The action being appealed;
- (2) The reason(s) why the employee believes that the action violated ORS 240.570 (and any related statute); and
- (3) The corrective action being requested.

Stat. Auth.: ORS 240.086(3) & 243.766(7)

Stats. Implemented: ORS 240

Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 1-1982, f. & ef. 1-19-82; ERB 9-1985, f. 10-29-85, ef. 10-31-85; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01, Renumbered from 115-045-0010; ERB 1-2003(Temp), f. & cert. ef. 8-1-03 thru 1-31-04; Administrative correction 8-2-04; ERB 1-2005, f. & cert. ef. 1-24-05; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-045-0025 Hearings**

- (1) The Board Agent may investigate and attempt to resolve the dispute with the parties. If the case cannot be resolved within a reasonable time, the Board Agent will schedule a hearing.
- (2) Time and Place of Hearings. The time and place of hearing will be set by the Board Agent. At least ten days before the hearing, the Board Agent will serve a notice of the hearing on the parties. The Board Agent will also provide the agency head and any other interested party with a copy of the notice. Unless the parties agree otherwise, the initial hearing date will be set within 30 days from the date that the appeal was filed.
- (3) Postponements. When the parties to a hearing agree to a postponement, they shall promptly submit a written request for postponement to the Board Agent, who has the discretion to grant or deny the request.

Stat. Auth.: ORS 240.086(3) & ORS 243.766(7)  
Stats. Implemented: ORS 240  
Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 6-1995, f. 11-30-95, cert. ef. 12-1-95; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01; ERB 1-2002, f. & cert. ef. 5-21-02; ERB 1-2003(Temp), f. & cert. ef. 8-1-03 thru 1-31-04; Administrative correction 8-2-04; ERB 1-2005, f. & cert. ef. 1-24-05; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17

### **115-045-0030 Conduct of Hearings**

Unless the context requires otherwise, OAR 115-010-0040 through 115-010-0110 apply to cases under this Division.

Stat. Auth.: ORS 240.086(3) & ORS 243.766(7)  
Stats. Implemented: ORS 240  
Hist.: ERB 1-1980, f. & ef. 1-9-80; ERB 9-1985, f. 10-29-85, ef. 10-31-85; ERB 2-2000, f. 12-1-00, cert. ef. 7-1-01; ERB 8-2016, f. 11-9-16, cert. ef. 2-1-17