

Material Transmitted

None

Material Superseded

HHS Instruction 771-3-60, Requests For Reconsideration

Background

Under HHS Instruction 771-3-60 the Department reserved the right, at its discretion, to reconsider grievance decisions issued under the Instruction. Office of Personnel Management Regulations (5 CFR Part 771) do not provide for appeals of grievance decisions.

Consistent with the continuous improvement initiatives, the Department has decided to discontinue the reconsideration step of the HHS grievance procedure and abolish HHS Instruction 771-3-60.

OPDIVs may establish a reconsideration process within their organization to ensure the objectivity of the Departmental grievance procedure. Instruction 771-3-60 was narrowly drafted to avoid reconsideration in the absence of a clear, specific and substantive violation of law or clearly arbitrary and capricious decision. Therefore, it is recommended that the OPDIVs use these provisions of the Instruction as a guide.

The abolishment of Instruction 771-3-60 will be effective for grievances filed after April 1, 1995.

Thomas S. McFee  
Assistant Secretary for  
Personnel Administration

Distribution: MS (PERS): HRFC-001

Subject: EMPLOYEE GRIEVANCES

- 771-3-00 Purpose, Authority, and Coverage
  - 10 References
  - 20 Summary of Procedures
  - 30 Informal Procedure
  - 40 Formal Procedure
  - 50 General Provisions

Exhibit 771-3-A Sample Grievance Format

Exhibit 771-3-B Sample Decision Format

Exhibit 771-3-C Requesting An Examiner

Exhibit 771-3-D Delegation of Authority

Exhibit 771-3-E Hearing Guidelines

771-3-00 PURPOSE, AUTHORITY, AND COVERAGE

This Instruction sets forth the Departmental grievance procedures. It does not pertain to grievances of bargaining unit employees when the grievances are covered by the grievance procedures negotiated in a labor-management agreement. The Departmental grievance procedures have been established under 5 CFR Part 771, which are regulations issued by the Office of Personnel Management (OPM). This Instruction incorporates those regulations by reference. (A copy of those regulations is contained in Federal Personnel Manual Supplement 990-1, Book III.) For employees and matters covered by the Departmental grievance procedures, see subsections 771-3-50C through E below (pages 8 - 10).

771-3-10 REFERENCES

- A. U.S.C. Chapter 71 (law-- labor-management relations)
  - B. CFR Part 771 (regulations-- agency grievance systems)
  - C. FPM Chapter 771 (OPM issuance on agency grievance systems)
  - D. HHS Instruction 293-1/1613-2 (records disposal)
  - E. HHS Instruction 293-2 (personnel files)
  - F. HHS Instruction 302-1 (excepted positions)
  - G. HHS Instruction 335-1 (reassignment to a position in a different commuting area)
  - H. HHS Instruction 430-2 (performance appraisal--PMRS and SES)
  - I. HHS Instruction 430-4 (performance appraisal--EPMS)
  - J. HHS Instruction 751-1 (official reprimands)
  - K. HHS Instruction 752-1 (adverse actions)
-

(771-3.10 continued) .

- L. HHS Instruction 772-1 (coverage, appeal, and grievance rights)
- M. HHS Instruction 1613-3 (discrimination complaints)

### 771-3-20 SUMMARY OF PROCEDURES

The procedures consist of an informal procedure (Stage 1) and a formal procedure (Stage 2) that includes fact finding by an examiner when appropriate. Exhibits 771-3-A and B contain sample formats that can be used in presenting a grievance or issuing a grievance decision. (Persons not familiar with the general provisions and definitions applicable to the grievance procedures may find it helpful to review section 771-3-SO, General Provisions, [pages 7 through 14] before reading further.)

### 771-3-30 INFORMAL PROCEDURE (Stage 1)

- A. At any time during the informal procedure, the grievance may be resolved either by a written decision that grants in its entirety the personal relief specified by the employee or by a written agreement that is signed by the employee and the grievance official and made part of the record.
- B. The informal procedure applies to all grievances--except that grievances about grievable adverse actions, grievable separations (see subsection 771-3-SOD on pages 8 and 9), and reassignments to a different commuting area under HHS Instruction 335-1 all begin at the formal (Stage 2) procedure.

#### 1. Presentation

##### a. To Whom Presented

The employee presents the grievance in writing to the Stage 1 Official and provides a copy of the written grievance to the employee's immediate supervisor (when the Stage 1 Official is not the employee's immediate supervisor). (There is no entitlement to an oral grievance presentation.)

The Stage 1 Official is the first official within the Department who has authority over the matter grieved. This is usually the official who made the decision or committed the act or omission about which the employee is dissatisfied. However:

- (1) The appointing official (as distinguished from a selecting official) is the Stage 1 official for a grievance about a vacancy selection under the merit promotion procedures. (An appointing official has authority to approve an SF-50, "Notification of Personnel Action," and usually is the Servicing Personnel Officer.) (For grievability, see 771-3-50E.5 on page 10.)
- (2) The appointing official is the Stage 1 Official for a grievance about a decisions made in the Personnel Office, e.g., a qualifications, determinations, rejection of an application for a position vacancy, or a salary-setting determination.
- (3) For performance appraisal grievances, the official who gave final approval to the summary rating is the Stage 1 Official. (When this official is not the appraising official, he or she may elect to consult with the appraising. official.) Depending on the circumstances of each summary rating, this official could be the appraising official, the reviewing official, or the official with responsibility for the applicable performance awards budget. See 5 CFR Part 430, HHS Personnel Instructions 430-2 and 430-4, and any supplemental-issuances thereto. For EPMS employees, see particularly paragraphs 80A.11 and 12 of HHS Instruction 430-4. For PMRS employees, see particularly paragraphs 80A.8 and 9 Of HHS Instruction 430-2.- -

b. Content

To distinguish mere inquiries from grievances the employee must specifically state in the written grievance that he or she is making a Stage 1 grievance presentation under the Departmental grievance procedures. The written grievance must also furnish sufficient detail to identify clearly the matter being grieved, explain the basis for the grievance, and specify the personal relief (i.e., a specific remedy directly benefiting the grievant) requested by the employee. The grievance should contain all available evidence, documentation, and argument to support the grievance and to justify the personal relief requested. . "(See subsection 771-3-5 on pages 11 and 12 for information on rejection of grievance for failure to meet content requirements.)

c. Time Limit

The Stage 1 presentation must be presented within 30 calendar days after the act or occurrence (or the date the employee became aware of the act or occurrence) that causes the employee to be aggrieved. (See subsection 771-3-50L on pages 11 and 12 for information on rejection of a grievance for failure to meet the time limit.)

d. Waiver of Requirements

Any of the requirements regarding either the content or the time limit for a Stage 1 presentation may be waived at the discretion of the Stage 1 Official if he or she does so in writing.

2. Decision

a. As soon as possible but within 14 calendar days after receipt of the written grievance, the Stage 1 Official informs the employee in writing and in duplicate of the decision and the reasons therefor. This time limit may be extended in writing at the discretion of the employee. When the grievance has not been resolved, the decision states whom the employee must contact to pursue the formal (Stage 2) grievance procedure and that the time limit- for doing so is 14 calendar days after receipt of the Stage 1 decision.

b. Failure to Issue Timely Decision

If the Stage 1 Official fails to issue a decision within the applicable time limit as may be extended, the employee may, at the employees option, either proceed to Stage 2 or await the issuance of the Stage 1 decision.

771-3-40 FORMAL PROCEDURE (Stage 2)

A. Presentation

1. Within 14 calendar days after receipt of the Stage 1 decision (or within 14 calendar days after the effective date of a grievable adverse action, a grievable separation, or reassignment to a different commuting area, all of which begin at the formal procedure [see subsection 771-3-30B on page 2]), the employee presents his or her. grievance to the Stage 2 Official in the same manner as in the informal (Stage 1) grievance (and provides a copy of the written grievance to the employee's immediate supervisor when the grievance begins at the formal procedure):

- a. The employee must specifically state in the written grievance presentation that he or she is making a formal (Stage 2) grievance presentation. (There is no entitlement to an oral grievance presentation.) ,
  - b. The presentation must furnish sufficient detail to identify clearly the matter being grieved, explain the basis for the grievance, and specify the personal relief requested by the employee, and should contain all available evidence, documentation, and argument to support the grievance and to justify the personal relief requested.
  - c. The presentation must include a copy of the Stage 1 grievance presentation (if applicable) and a copy of the Stage 1 decision (or state that one was not issued) and should clearly state the reasons for disagreeing with the Stage 1 decision, if one was issued.
  - d. The formal grievance must be limited- to grievable matters that were previously reviewed but not resolved to the employee's satisfaction in the informal grievance procedure.
2. Any of the requirements regarding either the content or the time limit for a Stage 2 presentation may be waived by the Stage 2 Official if he or she specifically does so in writing.

B. Resolution by Written Agreement

At any time during the formal procedure, the grievance may be resolved either by a written decision that grants in its entirety the personal relief requested by the employee or by a written agreement that is signed by the employee and the Stage 2 Official and made part of the record.

C. Decision Without Examiner or Request for Examiner

1. When there are no substantive facts in dispute, the Stage 2 Official may at his or her option either (1) proceed to decision or (2) request an examiner even though substantive facts are not in dispute. As soon as possible but within 25 calendar days after his or her receipt of the formal grievance, the Stage 2 Official shall either issue the written decision in duplicate or request an examiner. The time limit may be extended in writing at the discretion of the employee..

a. Decision Without Examiner

A decision without an examiner shall (after consultation with the Servicing Personnel Office [see subsection 771-3-50.0 on page 13]) be in writing; state that, because there are no substantive facts in dispute, an examiner has not been requested; include a report of findings and the reasons for the decision (OPM Regulation 5 CFR 771.302[f]); and state the right to request reconsideration under the provisions of section 771-3-60, enclosing a copy of that section (see pages 15 -17).

b. Request for Examiner

When the Stage 2 Official is unable to resolve the grievance to the employee's satisfaction and determines either (1) that substantive facts are in dispute or (2) that the Stage 2 Official desires an examiner even though substantive facts are not in dispute, the Stage 2 Official shall request an examiner to make inquiry and provide a report of findings and recommendations. (Exhibit 771-3-C explains how to request an examiner.)

2. Time Limit Not Met

However, if the Stage 2 Official fails to issue a decision within the time limit, as may be extended, or request an examiner, the employee may, at the employees option, either (a) await the issuance of the decision or (b) report the matter in writing to the Head of the requisite HHS Operating Division (for example, Commissioner of Social Security, or Assistant Secretary for Health) or, for the Office of the Secretary, to the Assistant Secretary for Management and Budget. If the matter is referred to the appropriate Operating Division Head, that official or his or her designee shall order expeditious issuance of the decision.

D. The Examiner

1. Appointment of Examiner:

Examiners are normally obtained through procurement sources but in unusual circumstances can be obtained from the Department (see Exhibit 771-3-C).

2. The Inquiry

a. Administrative Arrangements-- The Stage 2 Official or his or her designee shall be responsible for making available such space and other

administrative services, including recording and transcribing services, as the examiner may need to conduct the inquiry.

- b. Method of Inquiry --At the discretion of the examiner, the inquiry may consist of a documentary review, personal interviews, a group meeting, a formal hearing (see Exhibit 771-3-E), or any combination thereof.
- c. Establishment of Grievance File--The examiner will keep the grievance file intact as received from the Stage 2 Official. The examiner will only add to the file, not delete from it or rearrange it. When the examiner has completed the inquiry, he or she shall make all documents in the grievance file available to (1) the employee and (2) the Stage 1 Official (or the Deciding Official for grievable adverse actions and other actions that are grievable beginning at Stage 2 [see subsection 771-3-40A.1 on page 4] for review and written comment unless they waive opportunity for review and comment.
- d. Report of Findings and Recommendation--The examiner normally shall issue the report to the Stage 2 Official as soon as possible but usually no later than 90 calendar days after the examiner's receipt of the grievance. The report is advisory and does not constitute a decision. The examiner shall provide the employee with a copy of the report.

#### E. Decision After Examiner's Report

The Stage 2 Official shall (after consultation with the Servicing personnel Office [see subsection 771-3-50.0 on page 13]) issue the written decision in duplicate to the employee as soon as possible but within 25 calendar days after receipt of the examiners report and the grievance file. The decision must include a report of findings and the reasons for the decision (OPM Regulation 5 CFR 771.302[f]), and state the right to request reconsideration under the provisions of section 771-3-60, enclosing a copy of that section (see pages 15 - 17). If the Stage 2 Official adopts the examiner's report as the findings and the reasons for his decision, a brief statement to that effect in the decision is sufficient to satisfy the OPM requirement (5 CFR 771.302[f]) for "a report of findings and reasons for the determination." If the decision disagrees with the examiner's recommendation(s) when the examiner's recommendation(s) are favorable to the employee, it shall also give a specific statement of the basis for that disagreement. The time limit may be extended in writing at the discretion of the employee. However, if the time limit, as may be extended, is not met, the procedures indicated in paragraph 771-3-40C.2 on page 6 apply.

#### 771-3-50 GENERAL PROVISIONS



- A. Definitions: The following definitions supplement those contained in OPM Regulation 5 CFR 771.202:

1. Discrimination means discrimination because of race, color, religion, sex, national origin, physical or mental handicap, or age when the complainant is 40 years of age or over.
  2. Stage 1 Official is the first official within the Department with authority over the matter grieved. (It is the matter grieved as such, rather than the relief sought, that determines the Stage 1 Official, although in some instances the relief sought may be identical to the matter grieved.) (For further clarification, see paragraph 771-3-30B.1a on pages 2 and 3.)
  3. Stage 2 Official is the official with delegated authority to issue the formal grievance decision. (Delegations are stated in Exhibit 771-3-D and supplemental issuances by the Department's Operating Divisions.) OPM Regulation 5 CFR 771.302(f)(1) requires that this official must be "at a higher level than any employee involved in any phase of the grievance, except when the [Secretary] has been involved." Similarly, for performance appraisal grievances, OPM Regulation 5 CFR 430.407(e) requires that this official be "a person at a higher level in the organization than the appraising, reviewing, or approving official. . . ."
  4. Employee means the grievant, including the grievant's representative. It does not include Officers of the Commissioned Corps of the U.S. Public Health Service or other employees who are excluded from coverage by OPM Regulations 5 CFR Part 771. -
- B. Agency Coverage: The Department is an "agency" covered by OPM Regulation 5 CFR 771.203.
- C. Employee Coverage: Generally, all nonbargaining unit employees are covered. Bargaining unit employees are covered only when a negotiated grievance procedure does not apply. See OPM Regulation 5 CFR 771.204 and Grievance Coverage below.
- D. Grievance Coverage: See OPM Regulation 5 CFR 771.205. Coverage is extended to the following separation actions only: removals effected against an employee in Schedule A of the excepted service in tenure group I or II who has completed" 1 year of current continuous employment in the same or similar positions (see HHS Instruction 302-1), when the employee is not entitled to appeal to the Merit Systems Protection Board. Also, coverage is extended to bargaining unit employees whose complaints are not covered by the negotiated grievance procedure applicable to their unit and provided the complaint meets the requirements and provisions of the Departmental grievance

system. HHS Instruction 772-1 contains a chart that identifies and summarizes the rights of various employees to appeal or grieve removals, suspensions, reductions in grade and pay, and furloughs of 30 days or less.

E. Exclusions: See OPM Regulation 5 CFR 771.206. Also excluded are the following:

1. Requests for retroactive promotion or retroactive . adjustment of a promotion date when the conditions required for such retroactivity by applicable decisions of the Comptroller General of the United States are not met. These conditions, generally. stated, are: (1) a specific date for promotion was approved by an appointing official (as distinguished, from selecting and re-commending officials) but thereafter the promotion was not processed because of administrative oversight or error or (2) the promotion was withheld in specific violation of provisions of statute, Executive order, or labor-management agreement when the provisions have mandatory effect. See Comptroller General 4(C.G.) Decisions B-190408 of December 21, 1977; B-183969 of July 2, 1975; B-194122 of June 5, 1979; and 52 C.G. 631 (1973).
2. Matters (e.g., acts, failures to act, or failures to meet standards in a critical job element) that are included as the basis -(e.g., reasons, charges, or specifications) for a personnel action under Part 752 or Part 432 of OPM Regulations 5 CFR that is appealable to the Merit Systems Protection Board.
3. A performance progress review, documentation of performance, the methods used to appraise performance during the appraisal period (including the methods used to conduct and document a performance progress review), as well as any tentative, preliminary appraisal under Instruction 430-2 or Instruction 430-4 (but the above are reviewable when included in a grievance about a summary rating [see paragraph 80A.11 of Instruction 430-2 and paragraph 80A.14 of Instruction 430-4]).
4. Complaints about the content of published Department policy when the complaint is a disagreement with the policy rather than a complaint that a policy has been misinterpreted or misapplied. "Department" policy means a policy or regulation issued at either the Department level; the Operating Division level; or in a labor-management agreement under 5 U.S.C. Chapter 71, regardless of the level at which the agreement was negotiated. (However, grievances about the latter usually fall under a negotiated grievance procedure rather than under the Departmental grievance procedure.) "published" policy means a policy issued for distribution in writing by a legitimate authority and does not include unwritten practices or customs.

5. Complaints about failure to receive a noncompetitive promotion or nonelection for competitive promotion from a group of properly ranked and certified candidates under the merit promotion program. . However, when the complaint alleges preelection or impropriety in the competitive-ranking, certification, or selection process, the complaint is covered (i.e., is not excluded). (For corrective actions, "see Appendix A of Chapter 335, Federal Personnel Manual.
- F. Use of Official Time: The Department interprets the phrase "to present the grievance," in OPM Regulation 5 CFR 771.3020 to mean: "to present the grievance and to prepare that portion of the grievance which the employee could not normally be expected to prepare outside of the employees' regular work hours
- G. Travel, Per Diem, and Contractual Costs: The employing organization of the employee must pay (either directly or by reimbursement) the travel, per diem, and contractual or procurement costs of examiners and employees required by proper authority for grievance proceedings. However, travel and per diem payments are not authorized for an employee's representative who is not an employee of this Department. The Department may but is not obliged to make travel and per diem payments for an employee's representative who is an employee of this Department. Private individuals (i.e., not civilian employees of the Federal Government) may be paid travel and per diem in lieu of subsistence under 5 U.S.C. 5703, when the examiner has determined that their testimony as a witness is substantial, material and necessary and that an affidavit will not adequately suffice (48 C.G.110 and 644). Payment by the Department for costs incurred - by the employee for representation is not authorized.
- H. Assurance to Employee and Representative: The employee and representative are assured of the rights stated in OPM Regulation 5 CFR 771.302.
- I. Disallowance of Representative: The official who may disallow the employee's choice of representative under OPM Regulation 5 CFR 771.302(c)(2) is the grievance official, i.e., the Stage 1 or Stage 2 Official depending upon the stage at which the grievance currently is under review.
- J. Labor Consultation or Negotiation: All management officials are reminded that, in the implementation of this Instruction, they must comply fully with the requirements of The Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5 of the U.S. Code and related amendments to 5 U.S.C. 5596(b)-- the Back-Pay Act) concerning: consultation or negotiation, as appropriate.
- K. Availability of Procedures: Each Servicing Personnel Office shall make available to the employees it services copies: of this Instruction.

L. Rejection of Grievance: A grievance may be rejected, either wholly or partially, as appropriate, at any stage by a grievance official (i.e. by the Stage 1, or Stage 2 Official depending upon the stage at which the grievance. is being reviewed) when the grievance:

1. Does not specifically state that it is a grievance representation in the manner required at Stage 1 by ,subparagraph 771-3-30B.lb (see page-3) and at Stage 2 by subparagraph 771-3-40A.la (see page 4) or
2. Does not furnish sufficient detail to identify clearly the matter being grieved or
3. Does not specify the personal relief sought or
4. Consists of a matter or matters that are either not covered by the Departmental Grievance Procedure or are not subject to the control of Department management or
5. IS made by an employee or nonemployee who is not covered by the Departmental Grievance Procedure or
6. Is not timely.

A rejection decision will cite the relevant section(s) of this Instruction, together with the relevant section(s) of 5 CFR Part 771 as may be appropriate, and will provide an explanation of why the cited sections are applicable to the rejection.

The rejection decision also will state the right to request reconsideration under the provisions of section 771-3-60 and will enclose a copy of section 771-3-60 (see pages 15 - 17).

M. Cancellation of Grievance: A grievance may be cancelled, either wholly or partially as appropriate, by the employee upon written notification to the appropriate grievance official (the written notification must be made a part of the grievance file). Also, a grievance may be cancelled by the appropriate grievance official (i.e., depending upon the stage at which the grievance is being reviewed):

1. At the employee's request or
2. Upon termination of the employee's employment with the Department, unless the personal relief sought by the employee can be granted after termination of employment with the Department

3. Upon the death of the employee, unless the grievance involves a question of pay or
4. For failure of the employee to furnish required information or
5. For failure of the employee to duly proceed with advancement of the grievance or
6. As indicated in N below.

A cancellation decision by a grievance official will cite the relevant section(s) of this Instruction, together with the relevant section(s) of 5 CFR Part 771 as may be appropriate, and will provide an explanation of why the cited sections are applicable to the rejection.

Except in situations covered by M3 above, a cancellation decision also will state the right to request reconsideration under the provisions of section 771-3-60 and will enclose a copy of section 771-3-60 (see pages 15-17).

N. Allegations of Discrimination

Complaints of discrimination are excluded from grievance coverage by OPM Regulation 5 CFR 771.206(c)(ii). Accordingly a grievance concerning a matter or matters about which the employee has filed a formal complaint of discrimination must be rejected, either wholly or partially as appropriate. (When an employee submits a grievance on more than one matter but files a formal discrimination complaint on less than all matters of the grievance, only those matters for which discrimination has been alleged must be rejected.) When an employee files a formal discrimination complaint about a matter or matters for which a grievance has been submitted, the employee must so inform the appropriate grievance official; failure to do so shall result in cancellation of the grievance in its entirety for failure to provide required information. However, a grievance may not be rejected or cancelled because the employee seeks precomplaint counseling under Instruction 1613-3, and the employee is not obliged to inform the grievance official that precomplaint counseling has been sought

O. Preparation of Response to Grievance

The Stage 2 Official in the formal grievance procedure must contact the Servicing Personnel Office before taking action on an employee's grievance so that the Servicing Personnel Office will be informed and can advise and assist the official, if necessary, in making a timely and complete response to the grievance. Stage 1 Officials in the informal grievance procedure should consult with the Servicing Personnel Office, if they need advice or assistance in responding to an employees grievance.

P. Maintenance of Grievance File

1. A grievance file must be established at the time the first decision is issued. As the processing of the grievance continues, copies of all relevant material must be added to the file. At both stages of the grievance process, the employee has the right to submit relevant materials for inclusion in the official grievance file.
2. When the grievance case has been completed, the file will be retained in the Servicing personnel Office. (See HHS Instructions 293-1 and 293-2 for maintenance and disposal.)

Q. Requests for Procedural Interpretations

1. Employees and management officials shall make their requests for interpretations on the procedures in this Instruction to their Servicing Personnel Offices (SPO).
2. Appropriate officials in a SPO may make requests for interpretations on the procedures in this Instruction to the Director, Division of program Coordination, Office of Human Resource Programs (formerly, Division of Employee Appeals, Office of Personnel Systems Integrity), Office of the Assistant Secretary for Personnel Administration.
  - a. Any question orally submitted shall not be deemed to be a request for official interpretation. -
  - b. A request for an official interpretation shall be in writing and addressed to the Director, Division of Program Coordination. .
  - c. The Director may decline to answer questions not relating to a specific, actual situation or when insufficient facts are presented.

A request for a procedural interpretation shall not extend any time limit in the processing of a grievance under this Instruction unless agreed to in writing by the grievant and the appropriate grievance official (i.e., Stage 1 or Stage 2 Official as applicable).

(THIS SPACE HAS BEEN DELIBERATELY LEFT BLANK.)



### REQUESTING AN EXAMINER

- A. This Exhibit incorporates the information contained in former HHS Circular 771-29 of May 31, 1984.
- B. Effective June 8, 1984, the Department discontinued receiving and acting on requests for examiners to conduct inquiries into and provide reports of findings and recommendations on formal grievances.
- C. A Formal Grievance Official desiring an examiner may submit a requisition (Form HHS-393 or equivalent) to the appropriate procurement official of his or her organization (see sub-section 50.G of Instruction 771-3) to purchase the services of an examiner (the names, addresses and telephone numbers of some qualified examiners, if desired, can be obtained by contacting the Division of Program Coordination, Office of Human Resource Programs, Office of the Assistant Secretary for Personnel Administration, on FTS 475-0104; additional sources are the American Arbitration Association and other qualified organizations and individuals.) Qualified current HHS employees may serve as examiners provided they have not been involved in the matter being grieved and do not occupy a position subordinate to any official who recommended, advised, influenced, or made a decision on--or otherwise is or was involved or has a personal interest in--the matter being grieved (5 CFR 771.302[b]).
- D. Heads of Operating Divisions are authorized to establish a more centralized or different system of providing examiners for grievances within the jurisdiction of their respective Operating Divisions.
- E. In unusual circumstances and upon written request from a Head of Operating Division or Regional Director, the Office of the Assistant Secretary for Personnel Administration may provide an examiner from its staff. The request must be addressed to the Assistant Secretary for Personnel Administration and must state the unusual circumstances for the request.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

---

## Memorandum

Date November 26, 1985

From Assistant Secretary for  
Personnel Administration

Subject Delegation of Authority to Issue Grievance Decisions  
Under HHS Personnel Instruction 771-3

To Heads of Operating Divisions  
Assistant Secretary for Management and Budget  
Director, Office of Child Support Enforcement  
Deputy Assistant Secretary for Personnel Administration  
Regional Directors, Regions VI, VIII, IX, and X

1. Under the authority vested in the Assistant Secretary for Personnel Administration, by memorandum from the Secretary dated January 24, 1983, I hereby delegate to Heads of Operating Divisions (OPDIVs), including the Assistant Secretary for Management and Budget (ASMB) for the Office of the Secretary, and the Director, Office of Child Support Enforcement (OCSE), the authority to issue informal and formal grievance decisions under HHS Personnel Instruction 771-3 on matters within their management control.
2. I hereby delegate the authorities cited above to the Regional Directors for matters within their management control involving the personnel staffs of each Indian Health Service (IHS) Area that has its Area Office in their respective regions. For matters within his/her management control involving the personnel staff of the National Hansen's Disease Center, I hereby delegate the authorities cited above to the Regional Director in Region VI. The authorities for these personnel staffs must be redelegated and further redelegation authorized. Redelegation is to be from the Regional Directors to the Regional Personnel Officers, who are to redelegate to the IHS Area Directors and to the Director of the National Hansen's Disease Center for matters within their management control involving their personnel staffs.
3. The Deputy Assistant Secretary for Personnel Administration shall exercise, on a Departmentwide basis, authority to:

- a. Make informal and formal grievance decisions for the Secretary on any grievance about a matter initially under the management control of the Head of an Operating Division, the ASMB, or the Director, OCSE, when the grievance procedures require referral to an authority above their organizational level.
  - b. Reconsider for the Secretary any final grievance decisions made under HHS Personnel Instruction 771-3, within the Department, except those made by the Secretary, Under Secretary, or Assistant Secretary for Personnel Administration.
4. With regard to the authority to make informal decisions on employee grievances, the first official within the Department with authority over the matter grieved is authorized to make a decision on a grievance at the informal level of the Department's grievance procedures (i.e., to be the Stage 1 Official). An administrative superior (with authority over the matter grieved) of the Stage 1 Official may exercise the authority instead of the Stage 1 Official if the administrative superior chooses to do so.
5. In any particular grievance, the official with the authority to make the formal decision (i.e., to be the Stage 2 Official):
- a. Must not be an official who previously made a decision on the adverse action, separation, or reassignment to a Position in a different commuting area that is being grieved.
  - b. Must not be an official who issued a decision under the informal grievance procedure.
  - c. Must have authority over the matter grieved.
  - d. Must be an official at a higher level than any employee involved in any phase of the grievance, except when the Secretary is involved (5 CFR 771.302[f]).

An administrative superior (who meets the above requirements) of the Stage 2 Official may exercise the authority instead of the Stage 2 Official if the administrative superior chooses to do so.

6. When the head of an OS Staff Division has made an informal decision on a grievance (or has made a decision on an adverse action, separation, or reassignment to a position in a different commuting area under HHS Personnel Instruction 335-1 that is being grieved), the ASMB has authority to exercise all

of the grievance, personnel, and management authorities (except for those retained by the Secretary) necessary for making a decision at the next higher level of the Departments grievance procedures..

7. Requirements and instructions for exercising this authority are contained in HHS Personnel Instruction 771-3, 5 CFR Part 771, and Chapter 771 of the Federal Personnel Manual.
8. This delegation does not pertain to grievance decisions made under the grievance procedures of labor-management . agreements (i.e., under negotiated grievance procedures), which are governed by the terms, authorities, and conditions of the applicable labor-management agreements.
9. The authority delegated in paragraph 3a above may not be redelegate; the authority in 3b above may be redelegate except for final grievance decisions that are reversed, or modified upon reconsideration. The authority delegated in paragraph 1 above may be redelegate and further re delegation is authorized. All redelegations must be in writing in memorandum format and, except for 3b above, published as supplements to the HHS Personnel Manual.
10. This delegation is effective immediately. It supersedes the ASPER delegation memorandum of August 19, 1985, Subject: Delegation of Authority to Issue Grievance Decisions Under HHS Personnel Instruction 771-3. However, existing redelegations made under that memorandum which are consistent with the provisions of this delegation will continue in effect until new redelegations are made under the authority of this memorandum.

Thomas S. McFee .

## HEARING GUIDELINES

When a hearing is held, the examiner will conduct the hearing to conform with the following guidelines:

1. Attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the grievance, except that a labor organization that holds exclusive recognition for the unit in which the employee is located shall be given an opportunity to be represented.
2. The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.
3. Rules of evidence are not applied strictly, but the examiner may exclude irrelevant or unduly repetitious testimony.
4. Decisions on the admissibility of evidence or testimony are made by the examiner.
5. Testimony is under oath or affirmation. .
6. The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.
7. The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.
8. Both parties are entitled to produce witnesses.
9. Management shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or management."
10. If management determines that it is not administratively practicable to comply with request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiners judgment compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as management complies with his request.
11. Employees are in a duty status during the time they are made available as witnesses.

12. The examiner, on behalf of management, will assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.
  
13. A verbatim transcript or written summary of the hearing will be prepared, including all pertinent documents submitted to and accepted by the examiner. When the hearing is reported verbatim, the examiner will make the transcript a part of the record of the proceedings. When the hearing is not reported verbatim, a suitable summary constitutes the report of the hearing and is made a part of the record of the proceedings. If the examiner and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any part of the summary and those written exceptions and the summary constitute the report of the hearing and are made a part of the record of the proceedings.