

Instruction 771-1: Administrative Grievance Procedure

Issuance Date: 06/05/2008

Material Transmitted:

Department of Health and Human Services (HHS) Instruction 771-1, Administrative Grievance Procedure, dated June 5, 2008.

Material Superseded:

HHS Instruction 771-3, employee Grievances, dated March 7, 1995.

Background:

Consistent with the continuous improvement initiatives, the Department has updated the prior Employee Grievance instruction by replacing it with the Administrative Grievance Procedure. This instruction has been established under the authority of regulations issued by the Office of Personnel Management (OPM) found at Title 5, Code of Federal Regulations, Part 771, Agency Administrative Grievance System.

The instruction clarifies roles and responsibilities for managers when addressing employee grievances. It provides guidance to employee for filing an administrative grievance. It more specifically identifies matters which are grievable and non-grievable.

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Departmental policy.

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SUBJECT: ADMINISTRATIVE GRIEVANCE PROCEDURE

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771-1-00 PURPOSE

This instruction sets forth the Department of Health and Human Services (HHS) Administrative Grievance Procedure. It does not pertain to grievances of bargaining unit employees which are covered by the negotiated grievance procedure in a collective bargaining agreement or to Commissioned Corps Officers. The Departmental grievance procedures have been established under the authority of regulations issued by the Office of Personnel Management (OPM) found at Title 5, Code of Federal Regulations, Part 771, Agency Administrative Grievance System.

771-1-10 COVERAGE AND EXCLUSIONS

A. Coverage

This instruction applies to all HHS civil service employees who are not part of a bargaining unit regardless of grade or tenure. HHS Operating Divisions may supplement the provisions of this instruction with local administrative grievance procedures. Any local administrative grievance procedures must fully comply with the provisions of this instruction, and this instruction is overriding as to matters of administrative grievance policy

B. Exclusions

1. Bargaining unit employees must use the negotiated grievance procedure contained in their respective collective bargaining agreement as the exclusive avenue of redress for matters of concern or dissatisfaction
2. This policy does not apply to grievance procedures for Commissioned Corps Officers.

771-1-20 GRIEVABLE AND NONGRIEVABLE MATTERS

A. Grievable Matters

Except as discussed under Nongrievable Matters, the grievance system is available to resolve matters of concern or dissatisfaction relating to the employment of an individual and under the control of agency management. This includes any matter in which an employee alleges that coercion, reprisal, or retaliation has occurred for using the grievance system.

B. Nongrievable Matters

1. Requests for retroactive promotion or retroactive adjustment of a promotion date when the conditions required for such retroactive action by applicable decisions of the U.S. Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, are not met.
2. A dispute over a matter for which an employee has an entitlement to file an appeal, grievance, or formal challenge in some other forum. This includes matters that are reviewable by the U.S. Merit Systems Protection Board, the Equal Employment Opportunity commission, the Office of Personnel Management, the Comptroller General, and the Federal Labor Relations Authority.
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 or preliminary appraisal.
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 misapplied. "Department" policy means a policy or regulation issued at either the Department level or the Operating Division level. "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 nonselection for competitive promotion from a group of properly ranked and certified candidates under the merit promotion program. However, when the complaint alleges impropriety in the competitive rating, ranking, certification, or selection process, the complaint is covered (i.e., is not excluded).
6. Failure to receive a cash, time off, or honorary award.
7. Matters of concern or dissatisfaction on the part of Officers of the Commissioned Corps of the U.S. Public Health Service
8. Matters involving allegations of discrimination, when a discrimination complaint has been filed concerning the same matter or matters. This does not preclude an employee from filing a grievance and seeking precomplaint equal employment opportunity counselling at the same time. However, at such time that a discrimination complaint is filed, the grievance will be cancelled and the matter will be reviewed under applicable discrimination complaint procedures.
9. Senior Executive Service (SES) performance-based actions such as performance evaluations or the return of an SES career appointee to the General Schedule or another pay system during the 1-year probationary period.

10. A decision to grant or deny an SES pay rate increase.
11. The Establishment of a Performance Improvement Plan following an unacceptable rating.
12. An action which terminates a temporary or term promotion and which returns the employee to the position from which the employee was temporarily promoted or to a similar position at the same grade where the employee was informed in advance that the promotion is only temporary.
13. Failure to grant a recruitment, retention, or relocation bonus.
14. Separation or termination of an employee for unsatisfactory performance or misconduct during a probationary or trial period.
15. The return of an employee from an initial appointment as a supervisor or manager to a non-supervisory or non-managerial position for failure to complete the supervisor or managerial probationary period satisfactorily.
16. Separation of employees serving under Schedule A, B, or C appointments (excepted service appointments).

771-1-30 REFERENCES

- A. Title 5, Code of Federal Regulations, Part 771, Agency Administrative Grievance System
- B. Title 5, Code of Federal Regulations, Part 1201, Practices and Procedures (Merit Systems Protection Board)

771-1-40 DEFINITIONS

- A. **Grievance:** A matter of concern or dissatisfaction presented by an employee for which personal relief is requested and could be granted. Personal relief must constitute action concerning the employee presenting the grievance and cannot be an action concerning or against another employee.
- B. **Informal Grievance:** A matter of concern or dissatisfaction presented by an employee at the first stage of the grievance process.
- C. **Formal Grievance:** A matter of concern or dissatisfaction presented by an employee in writing at the final stage of the grievance process.
- D. **Stage One Official:** The first official within the Department with authority over the matter at issue in the grievance. (It is the matter at issue rather than the relief sought that determines the Stage One Official)
- E. **Stage Two Official:** The official with delegated authority to issue the formal grievance decision. This official must be "at a higher level than any employee involved in any phase of the grievance, except when the Head of a Staff Division or Operating Division has been involved." Similarly, for performance appraisal grievances, this official must be

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a person at a higher level in the organization than the appraising, reviewing, or approving official.

- F. **Discrimination:** Discrimination means illegal 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.

771-1-50 RESPONSIBILITIES

- A. Assistant Secretary for Administration and Management (ASAM), Office of Human Resources (OHR), is responsible for:

1. Updating and maintaining this policy.
2. Advising Operating Human Resources Organizations on the administration and operation of grievance systems.
3. Reviewing and approving all Alternative Dispute Resolution (ADR) Systems prior to implementation and ensuring that the systems comply with all applicable statutes, regulations, and policies.

- B. Operating Divisions (OPDIVs) and Staff Divisions (STAFFDIVs) are responsible for:

1. Ensuring that all grievances presented get a thorough and meaningful review, and that employees who file grievances receive a final written decision that fully explains whether the relief requested will be granted or not and the reasons for that decision.
2. Making final grievance decisions in regard to grievances presented by employees of the OPDIV or STAFFDIV (a sample format for a grievance decision is enclosed as Exhibit B).
3. Drafting any local supplemental administrative grievance procedures.
4. Designing, implementing, and maintaining any ADR System made available to OPDIV or STAFFDIV employees as an alternative to the Administrative Grievance System. Any ADR implemented is supplemental to the Administrative Grievance System and its use must be optional for employees. In addition, any ADR, prior to implementation, must be submitted to the Assistant Secretary for Administration and Management for review prior to implementation.

- C. Operating Human Resources Organizations are responsible for:

1. Administering the Administrative Grievance System for their component(s).
2. Ensuring that formal grievances are processed in accordance with this instruction and any applicable local procedures.
3. Making available copies of this instruction and any local grievance procedures to all employees to whom human resources services are provided.
4. Advising employees of the procedures for filing a grievance and their rights and responsibilities in doing so.

5. Advising managers on issues presented in grievances and whether types of relief requested can or cannot be granted.
 6. Drafting correspondence and decision letters for use by managers in processing and deciding grievances.
- C. HHS Employees are responsible for:
1. Following the provisions of this instruction when constructively presenting grievances for consideration (a sample format for a proper grievance submission is enclosed as Exhibit A)
 2. Adhering to the time limits specified in this instruction at each stage of the grievance process.
 3. Designating a representative in writing when a third party representative is desired.
 4. Cooperating in the grievance process and providing any possible information or testimony that will aid in resolving employee grievances.

771-1-60 GENERAL PROVISIONS

- A. Use of Official Time: Employees will be authorized a reasonable amount of work time to present a grievance and to prepare that portion of the grievance which the employee could not normally be expected to prepare outside of his or her regular work hours.
- B. Rejection of Grievance: A grievance may be rejected, either in whole or in part, as appropriate, at any stage by a grievance official (i.e., by the Stage One or Stage Two 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 presentation in the manner required at Stage One or Stage Two herein.
 2. Does not furnish sufficient detail to identify clearly the matter of concern or dissatisfaction at issue.
 3. Does not specify the personal relief sought.
 4. Consists of a matter or matters that are excluded by this instruction or are not subject to the control of Department management.
 5. Is made by an employee or nonemployee who is not covered by this instruction.
 6. Is not timely.
- C. Disallowance of Representative: A grievance official may disallow an employee's choice of representative when that representative is an HHS employee and is either a subordinate of the grievant or is in the grievant's supervisory chain, or when serving as a representative in the grievance would constitute a conflict of interest based on the individual's official position with HHS.

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- D. **Travel, Per Diem, and Contractual Costs:** The employing organization of the employee must pay (either directly or by reimbursement) any travel, per diem, and contractual or procurement costs of factfinders and employees required by proper authority for grievance proceedings. However, travel and per diem payments will not be authorized for an employee's representative who is not an employee of HHS.
- E. **Cancellation of Grievance:** A grievance may be cancelled, either in whole or in part, 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.
 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 Benefits that could be granted to a designated beneficiary or the employee's estate.
 4. For failure of the employee to furnish required information.
 5. For failure of the employee to duly proceed with advancement of the grievance.
 6. A cancellation decision will be made in writing, will provide an explanation of why the cancellation was made in accordance with applicable portions of this instruction, and will become part of the grievance file.

771-1-70 INFORMAL RESOLUTION

Operating Divisions and Staff Divisions are granted the authority to establish an Alternate Dispute Resolution process as mentioned in section 771-1-50 of this instruction. It is encouraged that employees and supervisors first seek the use of an Alternative Dispute Resolution process.

This process is available to help resolve disputes quickly at the earliest possible stage. The ADR is a voluntary program that uses mediation to provide an opportunity to be heard and to facilitate resolution of a dispute in a manner satisfactory to all involved. Any employee, supervisor, or manager can request mediation if they face an issue or concern that needs to be resolved. Participation in ADR is voluntary and confidential. This process should be mutually agreed upon prior to its use.

771-1-80 PROCEDURES

The HHS administrative grievance procedures consist of an informal procedure (Stage One) and a formal procedure (Stage Two) that include fact-finding when appropriate. Exhibits A. and B. contain sample formats that can be used in presenting a grievance or issuing a grievance decision.

A. Informal Procedure (Stage One)

1. 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 requested by the grievant or by a written agreement that is signed by the grievant and the grievance official and made part of the record.
2. The informal procedure applies to all grievances, except that grievances about non-appealable adverse actions, non-appealable separations, and reassignments all begin at the formal procedure (Stage Two).
3. Presentation of an informal grievance: The grievant must present the grievance in writing to the Stage One Official and provide a copy of the written grievance to his or her immediate supervisor (when the Stage One Official is not the employee's immediate supervisor). There is no entitlement to an oral grievance presentation, unless otherwise mutually agreed upon by the Stage One Official and at the grievant request. Oral grievance presentations must be followed up in writing and comply with the prescribed time frame below.
4. The Stage One Official is the first official within the Department who has authority over the matter at issue. This is usually the official who made the decision or committed the act or omission about which the employee is dissatisfied. However:
5. A human resources official (as distinguished from a selecting official) will serve as the Stage One Official for a grievance about rating or ranking under competitive procedures. A human resources official is also the Stage One Official for any grievance about a decision made in the Operating Human Resources Organization, e.g., a qualifications determination, rejection of an application for a position vacancy, or a discretionary pay setting determination.
6. For grievances concerning performance ratings, the official who gave final approval to the summary rating is the Stage One Official. When this official is not the rating official, he or she may elect to consult with the rating official. Depending on the circumstances of each summary rating, this official could be the rating official, the reviewing official, or the official with responsibility for an applicable performance awards budget, if he or she had discretionary approval authority over final performance ratings.
7. To distinguish mere inquiries or correspondence from grievances, the grievant must specifically state in the written grievance that he or she is making a Stage One grievance submission under this instruction. The written grievance must also furnish sufficient detail to identify clearly the matter at issue, explain the basis for the grievance, and specify the personal relief (i.e., a specific remedy directly benefiting the grievant) requested. Failure to state personal relief that is viable will be grounds for rejecting the grievance. The grievance should contain all available evidence, documentation, and argument to support the grievance and to justify the personal relief requested.
8. Time Limits: The Stage One presentation must be submitted within 30 calendar days after the act or occurrence (or the date the employee became aware of the act or occurrence) that

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caused the employee to be aggrieved. Any of the requirements regarding either the content or the time limit for a Stage One submission may be waived at the discretion of the Stage One Official for good cause.

9. Decision: As soon as possible, but no later than 15 calendar days after receipt of the written grievance, the Stage One Official must inform the employee in writing of the decision and the reasons therefore. This time limit may be extended for good cause, provided the grievance official advises the grievant that the decision will be delayed and the expected date of the decision. Examples of good cause for this purpose include:
 - a. the grievance official is on leave or travel and will be unavailable, or
 - b. there are pressing mission requirements which will preclude the grievance official from providing attention to the grievance. Stage One grievance decisions must be made no later than 30 calendar days from the submission of the grievance when the time limit has been extended for good cause. When the grievance has not been resolved, the decision must state whom the employee must contact to pursue the formal (Stage Two) grievance process and that the time limit for doing so is 15 calendar days after receipt of the Stage One decision.
10. Failure to Issue Timely Decision: If the Stage One Official fails to issue a decision within the applicable time limits, the grievant may, at his or her option, proceed directly to Stage Two within 15 calendar days of the expiration of the time limit.

B. Formal Procedure (Stage Two)

1. Presentation of a formal grievance: Within 15 calendar days after receipt of the Stage One decision or the expiration of the Stage One time limits (or within 15 calendar days after the effective date of a final decision of a suspension, separation, or reassignment, all of which begin at the formal stage, the grievant must present his or her grievance to the Stage Two Official in the same manner as in the Stage One process and provide a copy of the written grievance to his or her immediate supervisor, when the grievance begins at the formal stage. The employee must specifically state in the written grievance presentation that he or she is making a formal (Stage Two) grievance presentation. There is no entitlement to an oral grievance presentation, unless otherwise mutually agreed upon by the Stage Two Official and at the grievant request. Oral grievance presentations must be followed up in writing and comply with the prescribed time frames. The presentation must furnish sufficient detail to identify clearly the matter at issue, explain the basis for the grievance, specify the personal relief requested by the grievant, and should contain all available evidence, documentation, and argument to support the grievance and to justify the personal relief requested. The presentation must include a copy of the Stage One grievance presentation (if applicable) and a copy of the Stage One decision (or state that one was not issued) and should clearly state the reasons for disagreeing with the Stage One decision, if one was issued.
2. 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 grievant, or by a written agreement that is signed by the employee and the Stage Two Official and made part of the record..

3. **Decision Without Factfinding:** When there are no substantive facts in dispute, the Stage Two Official may, at his or her option, proceed to a decision based on the record at hand. A decision without factfinding shall (after consultation with the Operating Human Resources Organization): be in writing; state that, because there are no substantive facts in dispute, factfinding has not been requested; and include a summary of findings and the reason(s) for the decision.
4. **Request for Factfinding:** When the Stage Two Official is unable to reach a decision based on the record at hand; he or she has the option of requesting factfinding and designating an employee to serve as Factfinder. The Factfinder may be any HHS employee who was not involved in the matter at issue in the grievance and who is at an appropriate grade level. Normally, the Factfinder will be another employee who is part of the Stage Two Official's organization who is impartial and who is at the same grade level as the Stage One Official or higher. The Factfinder must 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 at issue in the grievance. The designation of an individual as grievance Factfinder will be made in writing and a copy will be furnished to the grievant at the time of the designation.
5. **Fact-finding Inquiry:** The Stage Two Official or his or her designee shall be responsible for making available space and any other administrative services required that the Factfinder may need to conduct an appropriate inquiry. At the discretion of the Factfinder, the inquiry may consist of a documentary review, personal interviews, a group meeting, or any combination thereof. Factfinders are authorized to take written, signed statements from individuals who have information pertinent to the grievance. Because the grievance procedure is purely an administrative process without any further third party review, such statements need not be sworn or notarized. A simple signature of the individual making the statement will suffice. The Factfinder will keep the grievance file intact as received from the Stage Two Official. The Factfinder will only add to the file, not delete from it or rearrange it. When the Factfinder has completed the inquiry, he or she shall make all documents in the grievance file available to both the grievant and the Stage One Official (or the Deciding Official for non-appealable adverse actions and other actions that begin at Stage Two) for review and written comment, unless they waive opportunity for review and comment.
6. **Report of Findings and Recommendations:** The Factfinder will normally issue the report to the Stage Two Official as soon as possible but no later than 60 calendar days after the receipt of the grievance for factfinding. The report is advisory and any recommendations made are not binding on the Stage Two Official. The Factfinder shall provide the grievant with a copy of the report at the same time it is provided to the Stage Two Official.
7. **Decision After Examiner's Report:** The Stage Two Official shall (after coordination with the Operating Human Resources Office) issue a written decision to the grievant as soon as possible, but no later than 30 calendar days after receipt of the Factfinder's report and the final grievance file. The decision must include a report of findings and the reasons for the

decision. The Stage Two grievance decision is the final decision of the Department of Health and Human Services in the grievance. There is no right to request reconsideration of a grievance decision or to appeal to a third party.

771-1-90 REPORTING AND ACCOUNTABILITY

- A. OPDIVs and STAFFDIVs are responsible for:
1. Establishing a grievance file at the time the first decision is issued.
 2. Ensuring that copies of all relevant materials are added to the file as the processing of the grievance continues.
 3. Ensuring that the employee has the right to submit relevant materials for inclusion in the official grievance file at both stages of the grievance process.
- B. Operating Human Resources Organizations are responsible for:
1. Ensuring compliance with all provisions of this instruction in the processing of administrative grievances.
 2. Retaining the final grievance case file after the Stage Two decision has been rendered or the grievance has otherwise been closed.
 3. Preparing any necessary reports regarding the administrative grievance system.

Exhibit A: SAMPLE GRIEVANCE FORMAT

DATE:

FROM:

SUBJECT:

To: Address a Stage One grievance to the first official within the organization with authority over the matter at issue. If you do not know who that official is, ask your immediate supervisor or consult with your Human Resources Office.

1. This is a Stage_____ grievance under the (Insert Agency) Administrative Grievance System.
2. The matter(s) that aggrieve(s) me occurred on [give date(s)] and is/are described in detail as follows: [Furnish sufficient detail to clearly identify the matter at issue. Fully explain the basis for your grievance and provide all available evidence, documentation, and rationale to support your grievance and the relief that you seek.]
3. The personal relief I seek is: [Specify clearly. If it is already stated or implied above, restate it here]. [NOTE: "Personal relief" means a specific remedy directly benefiting you and not an action concerning or against someone else.]

[Signature]

[Attachments: (It is preferable to identify any attachments.)]

[NOTE: It is preferable to make personal delivery when practicable. When mailing is used, the postmark usually determines the date of filing of the grievance.

Exhibit B: SAMPLE DECISION FORMAT

FROM:

SUBJECT: Your Stage ____Grievance [indicate stage 1 or 2]

TO:

1. I received your Stage ____grievance on _____[date].
2. My decision is: [State the decision and include a summary of findings and the reasons for the decision.]
3. NOTES:
 - a. If you have no authority over the matter(s) at issue, state that you have forwarded the grievance to the appropriate official (give name and address).
 - b. If the decision is to reject or cancel the grievance, state specifically the reasons why.
 - c. If the decision is to grant the personal relief sought, be specific in describing it to avoid future disputes as to its meaning or implementation.
 - d. If the decision is to not grant the personal relief sought, include a summary of findings and reasons for your decision on the matter(s) at issue.
 - e. If this is a Stage One decision, state how the employee may pursue the matter(s) at the next level.

[Signature]

[Attachments: (it is preferable to identify any attachments.)]