

# Department of Finance and Administration

## Legislative Impact Statement

**Bill: HB1205**

**Bill Subtitle: AN ACT CONCERNING STATE EMPLOYEE GRIEVANCES AND POSSIBLE RELIEF FOR GRIEVANCES, INCLUDING WITHOUT LIMITATION CREDIT UNDER A RETIREMENT SYSTEM.**

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### **Basic Change :**

Rep. Nickels,

This bill provides a statutory appeal process for a state employee following the state employee grievance procedure established by executive order. At the option of the employee, the employee may appeal using the arbitration process or a mediation process. The final decision through the arbitration process is not appealable. An employee who considers mediation unsuccessful may elect to then pursue the arbitration process.

An employee may appeal any of the following:

- termination
- demotion
- suspension of 14 or more days
- adverse action that affects the employee's employment taken by the employee's agency for actions that are defined in the Arkansas Whistle-Blower Act.

The bill authorizes the Arkansas Alternative Dispute Resolution Commission ( the "Commission") to establish fees and fines by rules for their costs of maintaining lists of arbitrators and to collect a fee to "provide arbitrators" . The bill does not provide who pays the fees or what the rate charged will be. There is no explanation of the "fines" that the Commission can establish.

The bill states that the employee and the agency shall select an arbitrator from the list provided by the Commission. There is no guidance should the employee and the agency not be able to agree on an arbitrator.

The arbitrator is not required to be an attorney but should have a background in employer and employee relations.

The appeal to the arbitrator may be *de novo* or on the record.

An agency decision can be sustained only if the decision is supported by:

- Substantial evidence if the appeal concerns an employee's unacceptable performance;
- Preponderance of the evidence if the appeal concerns other than the employee's unacceptable performance.

An agency decision cannot be sustained if the employee demonstrates any of the following:

- Harmful error in the agency's procedures in arriving at the decision. What constitutes a harmful error is not defined.
- Decision was based on a prohibited personnel practice
- Decision was not in accordance with the law.

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An employee who prevails on appeal (arbitration) may be awarded

- Attorney's fees, as deemed appropriate by the arbitrator, and
- Restoration to previous employment position.

Additionally, at the arbitrator's discretion, the employee may be awarded any pay or allowances that the employee would have earned during the period affected by the personnel action reduced by any amount the employee earned from other employment, as well as annual and sick leave credit and state retirement credit, and interest compounded daily on the amount of the award.

An arbitrator may grant an injunction to remain in effect until the final decision of the arbitrator if the arbitrator determines that the employee might suffer irreparable harm or damage pending the decision. The bill provides no information or explanation regarding this provision, including whether the standards to determine possible irreparable harm would be legal standards or what sort of actions would be enjoined.

There are various time periods established by the bill for the taking of various actions, including the following:

- The employee must file an appeal within 30 days of the conclusion of the state employee grievance procedures.
- The arbitrator must conduct the appeal within 45 days of the date the appeal is filed.
- The arbitrator must issue a decision within 20 days of the date of hearing (if *de novo*) or review of the record.
- If an award exceeds \$10,000, OPM must file a report with the Claims Review Subcommittee within 30 days after the arbitrator's final decision as a referral to the General Assembly for an appropriation. If less than \$10,000, the agency pays the award.
- An employee who requests an appeal following unsuccessful mediation must file the appeal within 10 days of the mediation.

Rules are required to be promulgated, by DFA regarding appeals, and by the Commission regarding the selection of arbitrators.

Appeals under the procedures established in the bill will first be accepted by OPM July 1, 2015.

### **Revenue Impact :**

Additional costs will be incurred to pay the cost for the use of arbitrators and to pay any awards made by the arbitrators.

### **Taxpayer Impact :**

State employees will be provided with an additional avenue to challenge decisions to terminate, demote, or suspend the employee.

### **Resources Required :**

Unknown

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**Time Required :**

Unknown

**Procedural Changes :**

Additional rules must be adopted to establish a system for arbitration of a disciplinary action resulting in the termination, demotion or suspension of a state employee.

**Other Comments :**

Page 2, line 8, "16-7-108" should be "16-7-208"

**Legal Analysis :**

This bill would add a section to Arkansas Code, Title 21, Chapter 1 to provide for binding arbitration of employee grievances after the completion of current grievance procedures. The bill would also amend Title 16, Chapter 7 to permit the Alternative Dispute Resolution Commission to assemble a list of eligible arbitrators and charge necessary fees for maintaining the list.

Section 3, 21-1-701. The definitions for "adverse action" and "appropriate authority" are incorporated from 21-1-602 and do not seem to carefully address the subject of the bill.

Section 3, 21-1-701. The definition for "supervisory employee" should be clarified. A low ranking supervisor can issue discipline, but generally must first obtain permission.

Section 3, 21-1-703. The service of representing the employee, in a labor contract, would be filled by a union representative. Union representatives and other public service actors have been used in the state's grievance proceedings to represent employees.

The award of attorney's fees, if the employee elects to use the services of an attorney seems inappropriate in an arbitration setting. It would ultimately be costly for employees and the state.

The bill should establish who pays the fees for an arbitrator and what the rate charged will be. Any "fines" that the Commission can establish should be outlined.

Guidelines should be established in the bill concerning a definition of "harmful error"; the arbitrator's possible award of attorney's fees, pay and allowances; and the arbitrator's ability to grant an injunction including what sort of actions will be enjoined.