

# 9.6 Termination and Non-Renewal Appeal Procedure

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## 9.6.1 Persons Eligible to File an Appeal

An appeal hereunder may be filed by any individual described in one of the categories below, hereinafter referred to in this appeal procedure as the "Appellant."

- A. Any tenured, tenure track, or teaching faculty member who has been terminated for cause or whose employment contract has been non-renewed, as long as his or her employment contract does not specifically render this procedure inapplicable; or
- B. Any tenured employee whose tenure has been revoked by Mines.

## 9.6.2 Notice of Appeal

A Notice of Appeal is a written document in letter or memorandum form, which is prepared by the Appellant and filed with the appropriate Mines official to initiate an appeal hereunder. The Notice of Appeal must contain, at a minimum, a concise statement of the matter being appealed as well as the specific grounds for the appeal set forth in sufficient detail to provide Mines with reasonable notice of the substance of the appeal.

In all non-renewals of tenured faculty and all terminations for cause, the Notice of Appeal shall address the matters asserted by Mines as grounds for the decision. If the Appellant believes the asserted grounds are pretextuous, the Appellant shall state such belief and address all other issues, including any constitutional right violations, which the Appellant believes constitute the actual reasons for termination or non-renewal. In all non-renewal appeals by tenure-track and teaching faculty members, the Notice of Appeal must allege violation by Mines of a specific, constitutionally protected right of the Appellant.

## 9.6.3 Procedure for Initiation of Appeals

### A. Place to File Notice of Appeal

A Notice of Appeal shall be addressed to and filed with the office of the Mines official who issued the notification of the action constituting the subject matter of the appeal, hereinafter referred to in this appeal procedure as the "Respondent," who shall be presumed to be acting on behalf of Mines throughout the case. At the time the Notice of Appeal is filed with the Respondent, a copy thereof shall also be filed with the Office of Legal Services.

### B. Time Limitations

All appeals filed pursuant to this procedure must be filed with the Respondent and the Office of Legal Services no later than thirty days following receipt by the Appellant of notification of the action constituting the subject matter of the appeal. If the last day to file a Notice of Appeal, or any other document pursuant to this procedure, happens to fall on a weekend, a holiday, or any day on which Mines is closed, the Notice of Appeal or other document shall be due on the next Mines business day. If a Notice of Appeal is not filed in a timely manner, the Appellant shall forfeit all rights of appeal conferred hereunder. The Respondent shall notify the Appellant in writing if a Notice of Appeal is not received in a timely manner.

### C. Extension of Time Limitations

For good cause, the Appellant may request in writing from the Respondent an additional amount of time within which to file a

Notice of Appeal. However, in order to be considered, a Request for Additional Time must be filed within the time limit for filing the Notice of Appeal. The Respondent shall possess the authority to issue a final ruling on such a request.

### D. Fulfillment of Notice of Appeal Requirements

An attorney from the Office of Legal Services shall examine the Notice of Appeal to determine if the requirements set forth above have been met. If the attorney determines that the Notice of Appeal has not fulfilled the requirements, he or she shall inform the Appellant of the deficiencies in writing within ten business days. The Appellant shall then have the right to correct and re-file the Notice of Appeal.

If the Notice of Appeal was filed in good faith, the Appellant shall have the remainder of the time limit for filing the appeal, if any, plus five additional business days to correct the deficiencies and re-file the Notice of Appeal. If the attorney concludes that the re-filed version of the Notice of Appeal is still deficient, the Appellant may: (1) correct and re-file the Notice of Appeal; or (2) request that the re-filed version along with a written recommendation of the attorney be forwarded to the hearing panel for a decision. If option #1 above is chosen, the Appellant shall have the remainder of the original time limit for filing the appeal, if any, plus five additional business days to correct the deficiencies and re-file the Notice of Appeal. If option #2 above is chosen, the hearing panel must examine the Notice of Appeal and decide that: (1) the Notice of Appeal is not deficient, and the appeal may proceed to hearing; (2) the deficiencies contained in the Notice of Appeal are not fatal, and the appeal may proceed to hearing; or (3) the deficiencies contained in the Notice of Appeal are fatal, and the complaint must be "dismissed with prejudice." If the Notice of Appeal is dismissed with prejudice, it may not be re-filed.

## 9.6.4 Appeal Standards

### A. Reviewable Issues

In all termination for cause appeals, tenure revocation appeals, and non-renewal appeals filed by tenured faculty, the reviewable issues shall be limited to the matters asserted by Mines as grounds for the termination, tenure revocation, or non-renewal. If the Appellant believes the asserted grounds are pretextuous, the Appellant may introduce other issues that are believed to constitute the actual reason for termination. In all non-renewal appeals, an alleged violation of a constitutionally protected right of the Appellant shall be the only issue considered on appeal. However, this appeal procedure is not designed to resolve allegations of unlawful discrimination made by terminated employees. Any appeal that contains such allegations must be filed as a complaint under the Board of Trustees' Unlawful Discrimination Policy and Complaint Procedure.

### B. Burden of Proof

The Respondent shall bear the burden of proof in all termination for cause appeals, tenure revocation appeals, and non-renewal appeals filed by tenured faculty. The Appellant shall bear the burden of proof in all non-renewal and not-for-cause termination appeals filed by tenure-track and teaching faculty members.

### C. Standard of Proof

The standard of proof for all appeals heard pursuant to this procedure shall be the "preponderance of the evidence" standard, as it is generally applied in civil cases. This standard shall be deemed met if the panel believes that it is more likely than not that the facts at issue occurred. The "facts at issue" shall include all facts that are required to be proven by the party bearing the burden of proof in order for such party to prevail.

## 9.6.5 Hearing Panel

All appeals filed hereunder shall be heard by a hearing panel chosen under the supervision of the Associate Vice President for Human Resources pursuant to the method set forth in paragraph A immediately below.

### A. Initial Hearing Panel Selection Criteria

An initial hearing panel of ten individuals shall be selected at random from the employee group of which the Appellant is a member, i.e., academic faculty, administrative faculty, academic faculty of the whole. If the Appellant is an academic faculty member, the initial hearing panel shall be selected from the pool of academic faculty holding a rank equal to or higher than the Appellant. If a particular employee group is too small to contain ten individuals who are available to serve on the hearing panel, a sufficient number of other exempt Mines employees shall be selected on a random basis to serve on the panel. Committee members may be excused on account of conflict of interest, health, or unavoidable absence from campus.

#### 1. Hearing Panel Selection Process

The Appellant and the Respondent shall each disqualify two of the initial panel members. The disqualifications exercised by the parties shall proceed in an alternate fashion beginning with the Appellant. Of the remaining initial panel members, the one chosen last shall serve as an alternate hearing panel member. The other five initial panel members shall constitute the hearing panel for the appeal. An excused initial panel member shall be replaced by another initial panel member chosen in a random drawing prior to the exercise of any disqualifications by either party.

#### 2. Selection of Chief Panel Member

After the hearing panel has been chosen, the panel members shall elect a chief panel member from their number to preside throughout the case.

#### 3. Authority of Chief Panel Member

The chief panel member shall have the authority to (a) issue orders to compel discovery; (b) make rulings on evidentiary objections; and (c) issue any other orders necessary to control the conduct of the hearing and prohibit abusive treatment of witnesses, including removal of disruptive individuals from the hearing room.

#### 4. Role of Alternate Hearing Panel Member

The alternate hearing panel member shall observe, but not actively participate in, all of the proceedings in the case and be prepared to substitute for a panel member who becomes unavailable during any stage of the case due to death, illness, or emergency.

## 9.6.6 Legal Representation

### A. The Appellant

The Appellant may consult with or retain legal counsel at his or her own expense to provide the degree of legal representation desired during the case.

### B. The Respondent

The Respondent may consult with or retain legal counsel to provide the degree of legal representation desired during the case.

### C. The Hearing Panel

The hearing panel shall be represented by a "conflicts counsel" provided by the Office of the Colorado Attorney General.

### D. Peer Counsel

As an alternative to retaining an attorney, the Appellant may, through an appropriate written document, designate a fellow employee to serve as peer counsel to provide moral support or actual representation during the hearing. If so designated and to the extent authorized, the peer counsel may speak on behalf of the Appellant, examine witnesses, deliver opening statement and closing argument, etc.

## 9.6.7 Pre-Hearing Procedures

### A. Acknowledgment of Notice of Appeal

As soon as practicable after receipt of the Notice of Appeal and completion of the examination of legal sufficiency, the Respondent shall send a letter to the Appellant acknowledging timely receipt and the legal sufficiency of the Notice of Appeal. This section shall not apply if the Notice of Appeal was untimely or legally insufficient.

### B. Setting of Hearing Date

After a chief panel member has been chosen, a hearing date shall be set with reasonable consideration given to the schedules of the individuals concerned. The chief panel member shall set a date for the hearing, which shall occur no more than ninety days after the date upon which the hearing panel was selected. Once set, the hearing date may be rescheduled only with the concurrence of the Appellant, the Respondent, and the chief panel member.

### C. Pre-Hearing Discovery

Informal discovery, or the voluntary exchange between the parties of information relevant to the case, is encouraged. If the parties cannot resolve such issues informally, either party may move the chief panel member up to fifteen days prior to the hearing date to enter an order compelling discovery upon a showing of the relevance of the requested information and the necessity of such information to case preparation. The other party may oppose such request by showing that the requested information is irrelevant, unnecessary to the moving party's case preparation, or privileged according to law.

### D. List of Hearing Issues

After examining the pre-hearing statements of both parties, the hearing panel shall prepare a list of issues to be resolved through the hearing and distribute such list to the parties no later than two business days prior to the hearing date. The panel may list issues contained in the pre-hearing statement of either party. The list of issues generated pursuant to this paragraph shall be binding upon the subsequent hearing and shall form the standard against which all relevancy arguments shall be weighed.

## 9.6.8 Pre-Hearing Statements

### A. Contents of Pre-Hearing Statements

Each party shall file a pre-hearing statement containing the following components:

- Summary of the Argument:** A concise statement summarizing the case from the position of the submitting party;
- List of Issues:** A list of the issues that the submitting party wishes the hearing panel to resolve;
- List of Witnesses:** A list of witnesses to be presented at the hearing along with a summary of the anticipated testimony of each witness; and
- Photocopies of Exhibits:** Photocopies of each exhibit to be presented at the hearing.

### B. Deadlines for Pre-Hearing Statements

The Appellant shall file a pre-hearing statement with the hearing panel and provide a copy to the opposing party no later than ten business days prior to the hearing date. The Respondent shall file

a pre-hearing statement with the hearing panel and provide a copy to the opposing party no later than eight business days prior to the hearing date. If the hearing date is rescheduled, these time limits shall apply to the rescheduled hearing date.

**C. Limitations Imposed by Pre-Hearing Statements**

Neither party shall make an argument during the hearing that is inconsistent with the arguments set forth in the summary of the argument section of his or her pre-hearing statement. Neither party shall introduce any witnesses or exhibits at the hearing that are not listed in his or her pre-hearing statement. All exhibits listed in the pre-hearing statements shall be deemed genuine and admissible unless successfully challenged prior to the hearing.

**D. Amendments to Pre-Hearing Statements**

Up to five business days prior to the hearing date, either party may request the chief panel member to permit amendments to his or her pre-hearing statement upon a showing of good cause and lack of prejudice to the opposing party. Any party filing an amended pre-hearing statement shall provide a copy thereof to the opposing party no later than the filing deadline imposed by the order permitting the amendment.

## 9.6.9 Hearing Procedures

**A. Presumption of Open Hearing**

Subject to limitations imposed by the capacity of the hearing room, the hearing shall be open to the public. For good cause, either party may request that the hearing be closed to the public. The chief panel member may grant such a request only if the non-requesting party does not object.

**B. Sequestration of Witnesses**

Upon the request of either party, the chief panel member shall direct that all individuals scheduled to appear as witnesses in the hearing may not be present in the hearing room except when testifying.

**C. Order of Presentation**

The party bearing the burden of proof, hereinafter referred to in this appeal procedure as the "Initial Party, shall present his or her case-in-chief first. After this case has been presented, the party who does not bear the burden of proof, hereinafter referred to in this appeal procedure as the "Other Party," shall present his or her case-in-chief.

**D. Outline of Hearing**

The hearing shall proceed according to the following general outline:

1. Initial Party's Opening Statement
2. Other Party's Opening Statement (unless reserved)
3. Initial Party's Case-in-Chief
4. Other Party's Opening Statement (if reserved)
5. Other Party's Case-in-Chief
6. Initial Party's Rebuttal Case (unless waived)
7. Other Party's Rebuttal Case (only if Initial Party presents a rebuttal case and unless waived)
8. Initial Party's Closing Argument
9. Other Party's Closing Argument
10. Initial Party's Rebuttal Argument (unless waived)

**E. Case-in-Chief Procedure**

During a party's case-in-chief, that party may testify, examine other witnesses, or introduce documents as evidence to the hearing panel. Arguments shall not be made by a party or a representative of a party during the case-in-chief, but shall instead be reserved for the closing argument. Hearing panel members may interject questions at any time.

**F. Witness Examination Procedure**

Each witness shall be directly examined by the party on whose behalf the witness has appeared to testify. Upon the conclusion of the directed examination of each witness the opposing party shall be permitted the right of cross-examination. The chief panel member may permit re-direct and re-cross examination. However, an identical examination procedure shall be utilized for all witnesses testifying during the same hearing.

**G. Inapplicability of Strict Evidentiary Rules**

Strict legal evidentiary rules shall not apply during the hearing. The chief panel member shall rule on the admissibility of disputed evidence with the primary consideration given to the relevance, reliability, and probative value of proffered evidence.

## 9.6.10 Post-Hearing Procedures

**A. Recommendation of the Hearing Panel**

After the conclusion of the hearing, the hearing panel shall confer among themselves and vote upon a recommended course of action. The panel members holding a majority point of view shall designate a member of their group to write a recommendation reflecting their opinion. Panel members holding a minority point of view may issue a dissenting recommendation in a similar fashion.

**B. Contents of Recommendation**

The recommendation of the hearing panel shall include the following components:

1. **Statement Regarding Burden of Proof:** A statement regarding whether or not the hearing panel believes that the burden of proof borne by the Initial Party has been sustained;
2. **Findings of Fact:** A list of the relevant facts found by the hearing panel upon which the recommendation is based;
3. **Legal Conclusions:** A list of the legal conclusions of the hearing panel upon which the recommendation is based; and
4. **Recommended Course of Action:** A statement regarding the action that is being recommended by the hearing panel.

**C. Issuance of Recommendation**

The recommendation of the hearing panel shall be issued to the parties and delivered to the President of Mines along with the panel's case file within ten business days after the conclusion of the hearing. If the President is the Respondent or the initiating party of a termination for cause, the Chairman of the Board shall substitute for the President throughout the remainder of this appeal procedure.

**D. Issuance of Presidential Decision**

The President shall examine the case file, consider the recommendation of the hearing panel, and issue a final written decision in the matter. The President shall possess the authority to affirm, reverse, or modify the recommendation of the hearing panel, or to remand the matter to the panel for further proceedings or consideration. The decision of the President shall be delivered to the parties and the hearing panel within fifteen days from the date of the President's receipt of the case file and recommendation from the hearing panel, unless the President is unavailable for a significant amount of time during this period.

**E. Presidential Unavailability**

The term "unavailable," as utilized in this paragraph and paragraph D immediately above, shall be defined to mean out of town, medically incapacitated, or engaged in important Mines business to the extent that sufficient time cannot be devoted to decision making hereunder. If the President is unavailable for a significant period of time during the decision-making period, a letter shall be sent to the parties advising them of that fact as well as the anticipated

date of presidential availability. In such event, the decision shall be due fifteen days from the date upon which the President becomes available. The President shall be the sole judge of unavailability hereunder.

**F. Appeal of Final Decision of Mines**

The decision issued by the President shall constitute the final decision of Mines regarding the matter being appealed. There shall be no further appeal from the final decision of Mines. If the Appellant is aggrieved by the final decision of Mines, he or she may pursue other available legal remedies.