

NOTICES OF FINAL RULEMAKING

The Administrative Procedure Act requires the publication of the final rules of the state's agencies. Final rules are those which have appeared in the *Register* first as proposed rules and have been through the formal rulemaking process including approval by the Governor's Regulatory Review Council or the Attorney General. The Secretary of State shall publish the notice along with the Preamble and the full text in the next available issue of the *Register* after the final rules have been submitted for filing and publication.

NOTICE OF FINAL RULEMAKING

TITLE 2. ADMINISTRATION

CHAPTER 5.1. STATE PERSONNEL BOARD

PREAMBLE

1. Sections Affected

R2-5.1-101
R2-5.1-102
R2-5.1-103
R2-5.1-104

Rulemaking Action

Amend
Amend
Amend
New Section

2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statute: A.R.S. § 41-782(C)

Implementing statutes: A.R.S. §§ 41-781, 41-782, and 41-785; and A.R.S. §§ 38-531, 38-532, 38-533, and 38-534

3. The effective date of the rules:

February 7, 2003

4. A list of all previous notices appearing in the Register addressing the final rule:

Notice of Rulemaking Docket Opening: 8 A.A.R. 619, February 8, 2002

Notice of Rulemaking Docket Opening: 8 A.A.R. 1109, March 15, 2002

Notice of Proposed Rulemaking: 8 A.A.R. 962, March 15, 2002

5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:

Name: Judy Henkel, Executive Director

Address: State Personnel Board
1400 W. Washington, Suite 280
Phoenix, AZ 85007

Telephone: (602) 542-3888

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6. An explanation of the rule, including the agency's reasons for initiating the rule:

The Board initiated rulemaking to create a new Section addressing the procedure for filing a prohibited personnel practice complaint, update its rules for clarity and understanding, and amend language to conform with current rule-writing standards.

7. A reference to any study relevant to the rule that the agency reviewed and either relied on in its evaluation of or justification for the rule or did not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

The Board did not rely on any study as an evaluator or justification for the proposed rule.

8. A showing of good cause why the rule is necessary to promote a statewide interest if the rule diminishes a previous grant of authority of a political subdivision of this state:

Not applicable

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9. The summary of the economic, small business, and consumer impact:

It is anticipated that the rules will have minimal, if any, impact on small business or consumers since the proposed rulemaking is intended to clarify existing appeal processes. There will be no economic burden other than the minimal expense to the Board, the Secretary of State's Office, and the Governor's Regulatory Review Council for the rule-making process. Interested individuals will benefit from this rulemaking because the rules will be less confusing to apply and there will be a separate Section that will apply specifically to the procedure for filing a prohibited personnel practice complaint. The rulemaking will not impose any reporting, bookkeeping, or compliance requirements on small businesses.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

Editorial changes were made in order to comply with the Secretary of State's requirements for submission. Upon recommendation from G.R.R.C. staff, a few grammatical/ministerial changes were made in the rules. The changes have been made without changing the substance of the proposed rules. A sentence requiring the appellant/complainant to furnish a copy of the appeal to the respondent was deleted; the sentence requiring all agreements made at a prehearing conference be binding, which was deleted in the proposed rulemaking, was retained; language regarding the mileage reimbursement rate was added; and the circumstances under which an amendment to a complaint could be filed was clarified.

11. A summary of the comments made regarding the rule and the agency response to them:

The Board received comments on its proposed rulemaking from eight state agencies. The following is a description of the comments received and the Board's responses to them:

Rule #	Comments	Rationale	Board Response
Throughout the rules	In every instance throughout the rules, insert a space after the subsection symbol and single space after the period ending a sentence. In the definition Section, the deleted (crossed-out) number should come before the amended number. In the definition Section, underline the number 4 and 5 as they are new text.	In accordance with publication requirements.	Agree. The Board has made technical changes required for submission.
Add in the rules	Add language in the rules regarding the process for consolidating cases.	The parties should be informed of the Board's process for consolidating cases, i.e., which hearing officer is assigned to a case when consolidated with another case assigned to a different hearing officer.	Reject. A rule regarding this topic is not necessary. If this situation arises in a case, the parties would request consolidation in the form of a motion. The Board regards the process of assigning a hearing officer to a consolidated case to be an internal procedure rather than a rule.
R2-5.1-101 (Definition Section)	In the definition for "hearing," replace the word "agency" with the word "respondent." In the definition for "subpoena," add the words "and/or documents" after the word "witness."	The term respondent could refer to any individual as well as the agency. The current definition fails to include documents a party wishes to be provided.	Agree. For consistency this change has been made. Reject. The inclusion of the suggested language would be more appropriate in the term "subpoena duces tecum," which is not defined in these rules. Only terms used throughout the Board's rules need to be defined.

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Rule #	Comments	Rationale	Board Response
R2-5.1-103(A)	<p>Add the word “<i>Request</i>” after “. . . written appeal. . .” in the first sentence.</p> <p>Add the following sentence after A.R.S. § 41-785: “<i>Such appeal request shall not be considered until after the effective date of the action being appealed.</i>”</p>	<p>Will allow state agencies to conclude all internal appeal processes prior to any action taken by the Personnel Board. For example, permanent status employees may request a meeting with the director of the Department of Corrections once they have received the notice to dismiss charges. The employee then appeals to the Board which sets a hearing. If after meeting with the director the director overturns the action, the appeal should be considered null and void by the Board.</p> <p>Additionally, there have been other instances where an employee has appealed a dismissal and then chose to resign in lieu of dismissal, yet the appeal hearing proceeded without a withdrawal on the part of the employee.</p> <p>Believes that delaying a hearing by the Board until <u>after</u> the effective date of any personnel action will preclude unnecessary work on the part of the agency and the Personnel Board.</p>	<p>Reject. Do not believe this is proper. The statute calls for a time to appeal based on a date and also requires the Board to hear a case within a specified time-frame. In the examples given, if the meeting with the director is held off past the ten day period, then the employee may lose the right to appeal. Also, do not understand what effective date would mean other than the date of the action. If an action is suspended after the effective date, by agreement of the parties, then either a withdrawal may be made or a hearing may be held in which the withdrawal may be introduced as evidence.</p>
R2-5.1-103(B)	<p>A time-frame should be added as with other notice requirement.</p>	<p>None given.</p>	<p>Reject. Not necessary; does not clarify rule any further.</p>
R2-5.1-103(C)	<p>A time-frame should be added as with other notice requirement.</p>	<p>None given.</p>	<p>Reject. The time-frame is already addressed in the rule.</p> <p>Statute only requires the Personnel Board to provide a copy of the appeal to the agency; therefore, have removed the first sentence that stated the appellant shall furnish a copy of the appeal to the agency.</p>

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Rule #	Comments	Rationale	Board Response
R2-5.1-103(D)	<p>Would be helpful to include language used in R2-5.1-103(P)</p> <p>In the fifth sentence after the words “. . . <i>if objections are filed . . .</i>” insert “with the Board within 15 days. . .”</p> <p>Should add language that addresses any outcome dispositive ruling on a motion to dismiss by a hearing officer. Should be ruled on by the Board BEFORE the hearing officer proceeds with a hearing. Should be the same in both whistle-blower complaints and in disciplinary appeals.</p>	<p>None given.</p> <p>Clarifies the rule.</p> <p>Would save the parties and Board time and money should the Personnel Board grant the Motion to Dismiss.</p>	<p>Believe these are presently in the proper section.</p> <p>Reject. Does not need clarification. The language already resides in R2-5.1-103(O).</p> <p>Reject. The language is not necessary. If a motion to end a case is granted, it will go to the Board with proposed findings of fact and conclusions of law from the hearing officer. On the other hand, if a motion to end a case is denied, it is not outcome determinative technically; however, the losing party may believe that the outcome has been determined by the motion not being granted. In this condition, the hearing officer should continue with the hearing. To allow otherwise could lead to every motion denied coming before the Board.</p>
R2-5.1-103(H)	<p>Support retaining the current provision in the rule requiring an agreement reached at a prehearing conference to be binding at the hearing, unless there is a prevailing legal requirement for removing the language. Further, an agreement reached by the parties should be honored by all parties unless there is a legal reason for the Board to reject the provisions of the agreement.</p> <p>Do not remove the sentence “<i>Any agreement reached at the conference shall be binding at the hearing.</i>”</p>	<p>The lack of mandatory commitment to keep a prehearing agreement has a chilling effect on the ultimate purpose of the prehearing conference.</p> <p>There is no incentive to try and reach a resolution at a prehearing conference if either party can change their mind. This is the purpose of a prehearing conference.</p>	<p>Agree. It was being removed primarily because the Board felt that inclusion of the specific language was not necessary. However, since there was some concern with the language being removed, the specific language has been left in. No problem with making any prehearing agreements binding.</p> <p>(Same as above.)</p>

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Rule #	Comments	Rationale	Board Response
R2-5.1-103(N) and (D)	(N) addresses proposed findings of fact and refers to (D) as to when the document should be filed. Suggest the following language be added: <i>“If either party wishes to submit proposed findings of fact, they should raise the issue with the hearing officer before the end of the hearing day so that a date for filing can be established.”</i>	Language clarifies the rule.	Reject. No change necessary. The reference to filing before the conclusion of the hearing is clear.
R2-5.1-103(P)	Last sentence “. . . with or without pay for the period and in the amount the Board determines to be proper.”	The word “period” referred to in this sentence should be better defined (i.e., the period in which pay was withheld).	Reject. The change as proposed would preclude giving partial pay and no pay disciplinary actions.
R2-5.1-104(B)	A time-frame should be added as with other notice requirement.	None given.	Reject. Not necessary; would not clarify rule any further.
R2-5.1-104(C)	A time-frame should be added as with other notice requirement.	None given.	Reject. The time-frame is already addressed in the rule. The law only requires the Personnel Board to provide a copy of the complaint to the agency; therefore, will remove the first sentence that states the complainant shall furnish a copy of the complaint to the agency.
R2-5.1-104(D)	Remove this language.	Believes allowing the parties to amend a complaint is a big mistake; the case would go on and on; there would be no limitation; new parties may be pulled into a complaint during the middle of the hearing; could be a very prejudicial issue.	Agree. Additional language has been added to the rule to state that any amendment to a complaint shall relate only to the facts and circumstances under the original complaint and shall not relate to new causes of action.

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Rule #	Comments	Rationale	Board Response
R25.1-104(I)		<p>No need to have a prehearing conference if resolutions reached in the prehearing conference are not binding.</p> <p>An agreement reached at a prehearing conference should be honored by all parties unless there is a legal reason for the Board to reject the provisions of the agreement. The lack of mandatory commitment to keep a prehearing agreement has a chilling effect on the ultimate purpose of the prehearing conference.</p>	Agree. The specific language has been added to be consistent with R2-5.1-103(H). All agreements reached should be honored.
R2-5.1-104(L)	Rate of mileage should be stated, such as " <i>current Arizona DOA mileage reimbursement rate.</i> "	Clarifies the rule.	Agree. Added language to this rule and R2-5.1-103(K) clarifying the mileage reimbursement rate.

12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

None

13. Incorporations by reference and their location in the rules:

None

14. Was this rule previously adopted as an emergency rule?

No

15. The full text of the rules follows:

TITLE 2. ADMINISTRATION

CHAPTER 5.1. STATE PERSONNEL BOARD

ARTICLE 1. GENERAL PROVISIONS

Section

R2-5.1-101. Definitions

R2-5.1-102. Personnel Board Procedures

R2-5.1-103. Appeal Procedures

R2-5.1-104. Complaint Procedures

ARTICLE 1. GENERAL PROVISIONS

R2-5.1-101. Definitions

Unless the context requires otherwise, the following definitions govern in this Chapter:

1. "Agency" for purposes of appeal from a disciplinary action, means an employing state entity that takes taking an appealable disciplinary ~~personnel~~ action against an employee in state service as defined by A.R.S. § 41-762.
2. "Appeal" means a written request filed with the Board by a permanent ~~status~~ employee in state service seeking relief from dismissal, demotion, or suspension of more than 40 working hours.
3. "Appellant" means a permanent ~~status~~ employee in state service who files filing an appeal with the Board.
4. "Complainant" means an employee or former employee as defined in A.R.S. § 38-531 who files a complaint with the Board.
5. "Complaint" means a written request for relief under A.R.S. § 38-532 filed with the Board by an employee or former employee who believes a prohibited personnel action was taken against the employee or former employee as a result of the employee's or former employee's disclosure of information under A.R.S. § 38-532.
- 4-6. "Day" means a calendar day, unless otherwise stated.

- 5-7. "Deposition" means a form of discovery in which testimony of a witness is given under oath or affirmation, subject to cross-examination, and recorded in writing, before ~~a~~ the hearing.
- 6-8. "Hearing" means an administrative proceeding at which the appellant or complainant and the respondent agency are given the opportunity to be heard by oral or written presentation of evidence.
- 7-9. "Hearing officer" means a person employed or appointed by the Board, the Board's chair, or any member of the Board designated by the Board's chair acting as the trier of fact.
- 8-10. "Respondent" means ~~an a state service agency~~ or individual whose interests are adverse to those of an appellant or complainant or who will be directly affected by the Board's decision.
- 9-11. "Subpoena" means a formal legal document issued under authority of the Board to compel the appearance of a witness at a hearing ~~an administrative proceeding~~.

R2-5.1-102. Personnel Board Procedures

- A. Regular meetings ~~Meetings~~. At each public meeting, the Board shall announce the time and place of its next regular monthly meeting. ~~The Board Notice~~ shall give notice ~~be given~~ as required by law.
- B. Special meetings ~~Meetings~~. The chair of the Board may call special meetings of the Board. ~~The Board Notice~~ shall give notice ~~be given~~ as required by law.
- C. Emergency meetings ~~Meetings~~. In the case of an emergency, the chair or vice chair of the Board may call a meeting. The Board shall give ~~provide~~ notice ~~of the time, place, and agenda of the emergency meeting~~ as required by law.
- D. Agenda. The Board shall consider only matters placed on the agenda. The agenda shall be mailed to each member of the Board at least five ~~5~~ business days before the meeting.
- E. Notice to agencies ~~Agencies~~. At least five ~~5~~ business days before a meeting, the Board shall mail a copy of the agenda to a state agency ~~agencies~~ indicating an interest in receiving the agenda. The Board's failure to mail the agenda, or failure of an agency to receive the agenda, does not affect the validity of the meeting or of any action taken by the Board at the meeting.
- F. Notice to parties. The Board shall give ~~provide the~~ notice of a meeting ~~as required by law~~ to all parties in a ~~contested~~ matter scheduled for a Board meeting.
- G. Minutes. The Board shall record in the Board's minutes the time and place of each meeting of the Board, names of the Board members present, all official acts of the Board, the votes of each Board member except when the acts are unanimous, and, when requested by a member, a member's dissent with the member's reasons. Board staff shall write the minutes and shall present the minutes for approval by the Board members at the next regular meeting. The Board shall provide copies of the approved minutes to the appellant and respondent within seven ~~7~~ days of the regular meeting at which the minutes are approved.

R2-5.1-103. Appeal Procedures

- A. Appeal. A permanent status employee who wishes to appeal a disciplinary ~~personnel~~ action shall, no later than ten ~~10~~ business days from the effective date of the action ~~being appealed~~, file a written appeal with the Board in accordance with A.R.S. § 41-785. The appeal shall include:
1. The appellant's name, address, and telephone number; -
 2. The name of the agency taking the disciplinary action being appealed; -
 3. The name, address, and telephone number of the appellant's representative, if applicable; -
 4. The action requested of the Board; and -
 5. A specific response to the causes for disciplinary action upon which the appeal is based.
- B. Change of address. A party shall notify ~~The parties are responsible for notifying~~ the Board of ~~any~~ a change of address or telephone number.
- C. Routing of appeal. ~~Upon filing the appeal, the appellant shall furnish the respondent with a copy of the appeal. In addition, the~~ The Board shall ~~forward~~ provide a copy of ~~the~~ an appeal to the respondent at the respondent's last known address agency within five ~~5~~ business days from the date of filing.
- D. Hearing officer. The Board or the Board's chair may assign an appeal or may direct staff administratively to assign an appeal to a hearing officer for hearing. When an appeal is assigned to a hearing officer, the hearing officer is the authorized representative of the Board and is fully empowered to grant or refuse extensions of time, to set proceedings for hearing, to conduct the hearing, and to take any action in connection with the proceedings that the Board is authorized by law to take other than making the final findings of fact, conclusions of law, and order. The assignment of an appeal to a hearing officer does not preclude the Board or the Board's chair from withdrawing the assignment and conducting the hearing itself or from reassigning the appeal to another hearing officer.
- E. Hearing officer report. The hearing officer conducting the hearing shall write proposed findings of fact, conclusions of law, and a recommendation, as well as a brief statement of reasons for the hearing officer's findings and conclusions and shall submit to the Board the proposed findings of fact, ~~and~~ conclusions of law, and recommendation within 30 days of the last date of the hearing.
- F. Conclusion of hearing. The Board shall consider the hearing concluded when it receives a copy of the hearing officer's proposed findings of fact, conclusions of law, and recommendation or, if objections are filed, on the date the objections

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are filed. At the discretion of the Board, the ~~The~~ hearing officer may be, but need not be, present during the consideration of the appeal by the Board, and, if requested, shall assist and advise the Board.

- E-G.** Time for hearing. The Board shall hold a hearing on an appeal within 30 days from receipt by the Board of an appeal unless the Board finds good cause to extend the time.
- F-H.** Notice of hearing. The Board shall provide the appellant and respondent with written notice of the time, date, and place of hearing of an appeal, and the name of the hearing officer at least 20 days before the date of the hearing.
- G-I.** Nature of hearing; rules of evidence. Every hearing shall be open to the public unless the appellant requests a confidential hearing. If the ~~disciplinary~~ hearing involves evidence the state is precluded by law from disclosing, the Board or the Board's hearing officer shall grant a request for a confidential hearing by the respondent state agency. The appellant, respondent, or hearing officer may request that portions of the record hearing be sealed or adequately protected if testimony of a witness ~~certain witnesses~~ is of a sensitive nature. Any party may be self-represented or may designate a representative as provided by law. Every hearing shall be conducted in an impartial manner as a quasi-judicial proceeding. All witnesses shall testify under oath or by affirmation, and a record of the proceeding shall be made and kept by the Board for three ~~3~~ years. Hearings shall be conducted in a manner that ascertains ~~so as to ascertain~~ the substantial rights of the parties. The Board, a Board member, or a hearing officer is not bound by common law, ~~or~~ statutory rules of evidence, ~~or~~ ~~by~~ technical or formal rules of procedure, ~~except~~ the rule of privilege as recognized by law.
- H-J.** Prehearing conference ~~conferences~~. The Board or the Board's hearing officer may require the appellant and respondent ~~both parties~~ to attend a prehearing conference. Any agreements reached at that conference shall be binding at the hearing.
- I-K.** Exhibits. A party introducing an exhibit shall furnish the Board or the Board's hearing officer and the opposing party with a copy of the exhibit before or at the beginning ~~commencement~~ of the hearing.
- J-L.** Exclusion of witnesses. Upon the motion of an appellant or respondent, the hearing officer, in the hearing officer's discretion, may exclude from the hearing room any witness who is not under examination. The hearing officer shall not exclude a party to the hearing proceeding or a party's representative conducting the case.
- K-M.** Witness fees. Witnesses, other than state employees, when subpoenaed to attend a hearing are entitled to the same fee as is allowed witnesses in civil cases in the Arizona Superior Court. If the hearing officer, on the hearing officer's own motion, subpoenas a witness, fees and mileage shall ~~may~~ be paid from funds of the Board upon presentation of a duly executed claim. If the appellant or respondent subpoenas a witness, the fees and mileage shall be paid by the party requesting the witness. Reimbursement to state employees subpoenaed as witnesses is limited to payment of mileage by the party requesting the witness. Mileage shall be paid at the current Arizona Department of Administration reimbursement rate.
- L-N.** Enforcement of subpoenas. If enforcement of a subpoena for appearance of a witness is necessary, enforcement proceedings shall be taken to Superior Court by the party requesting enforcement, and enforcement shall be determined by the Superior Court and not the Board. The party requesting enforcement shall name the Board ~~shall be made as~~ a party to any proceedings. The Board ~~and~~ shall follow any orders entered by the court.
- M-O.** Depositions. Either party may request that a witness' deposition be used as evidence if the presence of a witness cannot be procured at the time of hearing. The hearing officer shall grant or deny the request.
- N-P.** Proposed findings of fact. Both appellant and respondent may have the right to file with the Board proposed findings of fact and conclusions of law for the benefit of the hearing officer. If either the appellant or the respondent party chooses to file proposed findings of fact and conclusions of law, the filing shall take place before the conclusion of the hearing as defined in subsection ~~(F)(D)~~.
- O-Q.** Objections to findings. The Board shall send ~~transmit~~ a copy of the hearing officer's proposed findings of fact, conclusions of law, and recommendation to the appellant and respondent. The appellant or respondent may file written objections, but (not post-hearing evidence), to the hearing officer's proposed findings of fact or conclusions of law with the Board within 15 days from ~~of~~ receipt of the hearing officer's proposed findings of fact and conclusions of law and shall serve copies of the objections upon the other party and the Board. The Board shall not consider untimely objections ~~not timely filed~~.
- P-R.** Personnel Board decision. Within the time ~~time-frame~~ required by law, the Board shall notify the appellant and respondent of the time and place of the Board meeting at which the appeal will be decided. The Board may affirm, reverse, adopt, modify, supplement, ~~amend,~~ or reject the hearing officer's proposed findings of fact and conclusions of law in whole or in part, may recommit the matter to the hearing officer with instructions, may convene itself as a hearing body, or may make any other appropriate disposition of the appeal as allowed by law. The Board shall make a decision on the appeal in an open meeting within 45 days after the conclusion of the ~~a~~ hearing and shall send a copy of the decision to the appellant and respondent by certified mail, return receipt requested. If the Board orders the respondent to reinstate the appellant, it may also order the respondent to reinstate the appellant with or without back pay ~~for the period and~~ in the amount and for the period ~~amounts~~ the Board determines to be proper.
- S.** Appeal of Board decision in court. The appellant or respondent may appeal the Board's decision to the Superior Court as provided in A.R.S. § 41-785.

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R2-5.1-104. Complaint Procedures

- A.** Complaint. A state employee or former employee who wishes to file a complaint shall, no later than ten days from the effective date of the alleged prohibited personnel practice that is the subject of the complaint, file a written complaint with the Board in accordance with A.R.S. § 38-532. The complaint shall include:
1. The complainant's name, address, and telephone number;
 2. A clear and concise statement of the facts constituting the alleged prohibited personnel practice;
 3. The name of the state agency or state employee believed to have knowingly committed the prohibited personnel practice;
 4. The date and place of the alleged prohibited personnel practice; and
 5. The name, address, and telephone number of the complainant's representative, if applicable.
- B.** Change of address. A party shall notify the Board of a change of address or telephone number.
- C.** Routing of complaint. The Board shall provide a copy of a complaint to the respondent at the respondent's last known address within five business days from the date of filing.
- D.** Amending a complaint. A complainant may move to amend a complaint. An amendment shall relate only to the facts and circumstances under the original complaint and shall not relate to new causes of action. The hearing officer shall grant or deny the motion or shall refer the motion to the Board for disposition.
- E.** Hearing officer. The Board or the Board's chair may assign a complaint or may direct staff administratively to assign a complaint to a hearing officer for hearing. When a complaint is assigned to a hearing officer, the hearing officer is the authorized representative of the Board and is fully empowered to grant or refuse extensions of time, to set proceedings for hearing, to conduct the hearing, and to take any action in connection with the proceedings that the Board is authorized by law to take other than making the final findings of fact, conclusions of law, and order. The assignment of a complaint to a hearing officer does not preclude the Board or the Board's chair from withdrawing the assignment and conducting the hearing itself or from reassigning the complaint to another hearing officer.
- F.** Hearing officer report. The hearing officer conducting the hearing shall write proposed findings of fact, conclusions of law, and a recommendation, as well as a brief statement of reasons for the hearing officer's findings and conclusions and shall submit to the Board the proposed findings of fact, conclusions of law, and recommendation within 30 days of the last date of hearing.
- G.** Conclusion of hearing. The Board shall consider the hearing concluded when it receives a copy of the hearing officer's proposed findings of fact, conclusions of law, and recommendation or, if objections are filed, on the date the objections are filed. At the discretion of the Board, the hearing officer may be, but need not be, present during the consideration of the complaint by the Board, and, if requested, shall assist and advise the Board.
- H.** Time for hearing. The Board shall hold a hearing on a complaint within 30 days from receipt by the Board of a complaint unless the Board finds good cause to extend the time.
- I.** Notice of hearing. The Board shall provide the complainant and respondent with written notice of the time, date, and place of hearing of a complaint, and the name of the hearing officer at least 20 days before the date of the hearing.
- J.** Nature of hearing; rules of evidence. Every hearing shall be open to the public unless the complainant requests a confidential hearing. If the hearing involves evidence the state is precluded by law from disclosing, the Board or the Board's hearing officer shall grant a request for a confidential hearing by the respondent. The complainant, respondent, or hearing officer may request that portions of the record be sealed or adequately protected if testimony of a witness is of a sensitive nature. Any party may be self-represented or may designate a representative as provided by law. Every hearing shall be conducted in an impartial manner as a quasi-judicial proceeding. All witnesses shall testify under oath or by affirmation, and a record of the proceeding shall be made and kept by the Board for three years. Hearings shall be conducted in a manner that ascertains the substantial rights of the parties. The Board, a Board member, or a hearing officer is not bound by common law, statutory rules of evidence, or technical or formal rules of procedure, except the rule of privilege as recognized by law.
- K.** Prehearing conference. The Board or the Board's hearing officer may require the complainant and respondent to attend a prehearing conference. Any agreements reached at that conference shall be binding at the hearing.
- L.** Exhibits. A party introducing an exhibit shall furnish the Board or the Board's hearing officer and the opposing party with a copy of the exhibit before or at the beginning of the hearing.
- M.** Exclusion of witnesses. Upon the motion of a complainant or respondent, the hearing officer, in the hearing officer's discretion, may exclude from the hearing room any witness who is not under examination. The hearing officer shall not exclude a party to the hearing or a party's representative.
- N.** Witness fees. Witnesses, other than state employees, when subpoenaed to attend a hearing are entitled to the same fee as is allowed witnesses in civil cases in the Arizona Superior Court. If the hearing officer, on the hearing officer's own motion, subpoenas a witness, fees and mileage shall be paid from funds of the Board upon presentation of a duly executed claim. If the complainant or respondent subpoenas a witness, the fees and mileage shall be paid by the party requesting the witness. Reimbursement to state employees subpoenaed as witnesses is limited to payment of mileage by the party requesting the witness. Mileage shall be paid at the current Arizona Department of Administration reimbursement rate.

- Q.** Enforcement of subpoenas. If enforcement of a subpoena for appearance of a witness is necessary, enforcement proceedings shall be taken to Superior Court by the party requesting enforcement, and enforcement shall be determined by the Superior Court and not the Board. The party requesting enforcement shall name the Board as a party to any proceedings. The Board shall follow any orders entered by the court.
- P.** Depositions. Either party may request that a witness' deposition be used as evidence if the presence of a witness cannot be procured at the time of hearing. The hearing officer shall grant or deny the request.
- Q.** Proposed findings of fact. Both complainant and respondent may file with the Board proposed findings of fact and conclusions of law for the benefit of the hearing officer. If either the complainant or the respondent chooses to file proposed findings of fact and conclusions of law, the filing shall take place before the conclusion of the hearing as defined in subsection (G).
- R.** Objections to findings. The Board shall send a copy of the hearing officer's proposed findings of fact, conclusions of law, and recommendation to the complainant and respondent. The complainant or respondent may file written objections, but not post-hearing evidence, to the hearing officer's proposed findings of fact or conclusions of law with the Board within 15 days from receipt of the hearing officer's proposed findings of fact and conclusions of law and shall serve copies of the objections upon the other party and the Board. The Board shall not consider untimely objections.
- S.** Personnel Board decision. Within the time required by law, the Board shall notify the complainant and respondent of the time and place of the Board meeting at which the complaint will be decided. The Board shall determine the validity of the complaint and whether a prohibited personnel practice was committed against the employee or former employee as a result of the employee or former employee's disclosure of information of a matter of public concern. If the Board determines a prohibited personnel practice was committed as a result of disclosure of information by the employee or former employee, the Board shall act in accordance with the requirements of A.R.S. § 38-532.
- T.** Appeal of Board decision in court. The complainant or respondent may appeal the Board's decision to the Superior Court as provided in A.R.S. § 38-532.

NOTICE OF FINAL RULEMAKING

TITLE 3. AGRICULTURE

**CHAPTER 9. DEPARTMENT OF AGRICULTURE
AGRICULTURAL COUNCILS**

PREAMBLE

- 1. Sections Affected**

R3-9-201	Re-number
R3-9-201	New Section
R3-9-202	Re-number
R3-9-202	Amend
R3-9-203	New Section
R3-9-204	New Section
- 2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statute: A.R.S. § 3-584(C)

Implementing statutes: A.R.S. §§ 3-584, 3-586, 3-587, 3-591, 3-592, and 41-1092.01
- 3. The effective date of the rules:**

December 11, 2003, when approved by Council and filed with the Office of the Secretary of State. The Arizona Grain Research and Promotion Council requests an immediate effective date as provided under A.R.S. § 41-1032(A)(4). This rulemaking provides a benefit to the public by clarifying the location of Council records and the process by which they may be reviewed and copied. The process by which a producer may request a refund of assessed fees is provided in greater detail and will assist both producers and the Council to handle a refund issue in a timely manner. There are no penalties to which the public is subject as a result of this rulemaking.

The Arizona Grain Research and Promotion Council is required by its implementing statutes to provide specific information to the regulated community. Implementation of this rulemaking presents the material concisely and in conformance with the current publication standards of the Office of the Secretary of State. The regulated community will benefit from immediate access to the detailed information now provided by these rules.

4. A list of all previous notices appearing in the Register addressing the final rule:

Notice of Rulemaking Docket Opening: 8 A.A.R. 2398, May 31, 2002

Notice of Proposed Rulemaking: 8 A.A.R. 3686, August 30, 2002

5. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:

Name: Sherry D. Blatner, Rules Specialist

Address: Arizona Department of Agriculture
1688 W. Adams, Room 235
Phoenix, AZ 85007

Telephone: (602) 542-0962

Fax: (602) 542-5420

E-mail: sherry.blatner@agric.state.az.us

6. An explanation of the rule, including the agency's reasons for initiating the rule:

This rulemaking modernizes and clarifies the existing rule by adding:

- A definitions Section,
- A Section establishing a hearing process that conforms with procedures of the Office of Administrative Hearings, and
- A Section advising the public of the location of Council records and how to access the records.

Additionally, language usage is conformed to the current publication standards of the Office of the Secretary of State.

7. A reference to any study relevant to the rule that the agency reviewed and either relied on in its evaluation of or justification for the rule or did not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None

8. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

9. The summary of the economic, small business, and consumer impact:

A. *The Arizona Grain Research and Promotion Council and the Arizona Department of Agriculture.*

The Council and the Department will incur modest expenses related to educating the regulated community on the amendments.

B. *Political Subdivision.*

Other than the Council and the Department, no political subdivision is affected by this rulemaking.

C. *Businesses Directly Affected By the Rulemaking.*

Sellers and purchasers of grain sold through commercial channels are regulated by these rules. The amendments provide stylistic changes, no change will result in any economic consequence.

The regulated community the Council serves, and their attorneys, will be beneficially affected by the use of the uniform administrative procedures of the Office of Administrative Hearings.

10. A description of the changes between the proposed rules, including supplemental notices, and final rules (if applicable):

Minor technical and grammatical changes were made in response to suggestions from Council staff.

11. A summary of the comments made regarding the rule and the agency response to them:

The Council received no comments on the rules.

12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

None

13. Incorporations by reference and their location in the rules:

None

14. Was this rule previously made as an emergency rule?

No

15. The full text of the rules follows:

TITLE 3. AGRICULTURE

**CHAPTER 9. DEPARTMENT OF AGRICULTURE
AGRICULTURAL COUNCILS**

ARTICLE 2. ARIZONA GRAIN RESEARCH AND PROMOTION COUNCIL

Section

R3-9-201. Definitions

~~R3-9-201.~~ R3-9-202. Fees - ; Grain Assessment and Refund

R3-9-203. Hearings

R3-9-204. Records

ARTICLE 2. ARIZONA GRAIN RESEARCH AND PROMOTION COUNCIL

R3-9-201. Definitions

In addition to the definitions in A.R.S. § 3-581, the following term applies to this Article:

“Department” means the Arizona Department of Agriculture.

~~R3-9-201.~~R3-9-202. Fees - ; Grain Assessment and Refund

A. The fee payable to the Arizona Grain Research and Promotion Council for each hundredweight of grain sold in Arizona shall be at the rate of 2¢ per hundredweight as provided in A.R.S. § 3-587. The Arizona Grain Research and Promotion Council shall assess a fee of two cents per hundredweight of grain sold in Arizona as prescribed under A.R.S. § 3-587.

B. The first buyer shall remit the fee to the Arizona Department of Agriculture Phoenix Office. The first buyer shall include with the fee the End of Month First Buyer and Remittance Report Form, approved by the Arizona Grain Research and Promotion Council, amended February 9, 1993. The form, which is incorporated herein by reference, does not include any later amendments or editions of the incorporated matter and is on file with the Office of the Secretary of State or may be obtained from the Arizona Department of Agriculture Phoenix Office. The form shall be signed by the first buyer or by a person who the first buyer has designated in a document filed with the Department.

The person who pays the fee required under subsection (A) shall ensure that:

1. The grain assessment fee is remitted to the Council; and

2. The following information is provided to the Council on a form obtained from the Department:

a. First buyer’s name, address, and telephone number;

b. Report date and months covered by the report;

c. Total amount remitted to the Council for the reporting period;

d. Producer’s name, address, and telephone number;

e. Type of grain and tonnage by grain type; and

f. First buyer’s or designee’s signature.

C. To request a refund, a producer shall submit a notarized Refund Request Form to the Arizona Department of Agriculture Phoenix Office. This form, approved by the Council and amended February 9, 1993, is incorporated herein by reference and does not include any later amendments or editions of the incorporated matter. The form is on file with the Office of the Secretary of State or may be obtained from the Arizona Department of Agriculture Phoenix Office. The refund request shall be accompanied by a notarized purchase statement which has been signed by the first buyer or by a person who the first buyer has designated in a document filed with the Department.

Refund.

1. A producer may request a refund as prescribed under A.R.S. § 3-592 and shall provide the following information to the Council on a form obtained from the Department:

a. Producer’s name, address, telephone number, and signature;

b. Name of the first buyer;

c. Amount of grain sold subject to the refund request; and

d. First buyer’s or designee’s notarized signature confirming the purchase, funds withheld, and date remitted to the Council.

2. An executive committee member shall authorize a refund as prescribed in A.R.S. § 3-592 if the person requesting the refund complies with the requirements of subsection (B)(1).

R3-9-203. Hearings

A. The Council shall use the uniform administrative procedures of A.R.S. Title 41, Chapter 6, Article 10 to govern any hearing before the Council required under A.R.S. § 3-591.

B. A party may file a motion for rehearing or review under A.R.S. § 41-1092.09.

- C.** The Council shall grant a rehearing or review of an administrative law decision for any of the following causes materially affecting the moving party's rights:
1. The decision is not justified by the evidence or is contrary to law;
 2. There is newly discovered material evidence that could not with reasonable diligence have been discovered and produced at the original proceeding;
 3. One or more of the following deprived the party of a fair hearing:
 - a. Irregularity or abuse of discretion in the conduct of the proceeding;
 - b. Misconduct of the Council, the administrative law judge, or the prevailing party; or
 - c. Accident or surprise which could not have been prevented by ordinary prudence; or
 4. Excessive or insufficient sanction.
- D.** The Council may grant a rehearing or review to any or all of the parties. The rehearing or review may cover all or part of the issues for any of the reasons stated in subsection (C). An order granting a rehearing or review shall particularly state the grounds for granting the rehearing or review, and the rehearing or review shall cover only the grounds stated.

R3-9-204. Records

The Department shall retain the Council's records as prescribed in A.R.S. § 3-586. A record may be reviewed at the Department's main office, Monday through Friday, except an Arizona legal holiday, during the hours of 8:00 a.m. to 5:00 p.m. A copy of a record will be provided according to the provisions of A.R.S. § 39-121 et seq.