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## **PERB Rule 12. Binding Grievance Arbitration**

*(applicable only to disputes involving Public School Employers, their employees and labor representatives)*

### **12.0 Binding Grievance Arbitration**

PERB Arbitration Policy; Administration of Panel

### **12.1 Scope and Authority**

This rule is issued by the Delaware Public Employment Relations Board (“PERB”) under Title 14, Public Education, of the Delaware Code, as amended. It applies to all arbitrators listed on the PERB Panel of Arbitrators, to all applicants for listing on the Panel, and to all persons or parties seeking selection of an arbitrator by PERB in connection with disputes which are to be submitted to grievance arbitration.

### **12.2 Policy**

a. For those terms and conditions that are negotiated pursuant to Public School Employment Relations Act (14 Del.C. Chapter 40, as amended 2003), public school employers and the exclusive bargaining representative of public school employees shall negotiate written grievance procedures ending in binding arbitration by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement. The written grievance procedures shall be included in any agreement entered into between the public school employer and the exclusive bargaining representative, and shall include:

(1) a provision to limit binding arbitration to claims that the terms of the collective bargaining agreement have been violated, misinterpreted, or misapplied;

(2) a provision to prohibit claims relating to the following matters from being processed through binding arbitration:

(i) dismissal or nonrenewal of employees covered by Chapter 14 of Title 14;

- (ii) dismissal or nonrenewal of employees not covered by Chapter 14 of Title 14 unless the controlling collective bargaining agreement provides that such matters are subject to binding arbitration;
- (iii) Delaware law;
- (iv) rules and regulations of the Delaware Department of Education or State Board of Education;
- (v) the content of or conclusions reached in employee observations and evaluations unless the controlling collective bargaining agreement for employees not covered by Chapter 14 of Title 14 provides that such matters are subject to binding arbitration;
- (vi) federal law;
- (vii) rules and regulations of the United States Department of Education;
- (viii) policies of the local school board; and
- (ix) matters beyond the scope of the public school employer's authority;

(3) a provision to select arbitrators by lottery from a panel of qualified arbitrators designated by the Public Employment Relations Board. In designating the panel, the Public Employment Relations Board shall prefer former judges who served on a Delaware constitutional court or on the United States District Court for the District of Delaware, and shall supplement the panel by adding qualified labor arbitrators;

(4) a provision to empower the Public Employment Relations Board to administer arbitration pursuant to regulations adopted by the Public Employment Relations Board;

(5) a provision to require that disputes relating to whether a matter is arbitrable be ruled upon by the arbitrator prior to hearing the merits of the dispute, and, if the arbitrator determines that the dispute is arbitrable, a provision to require that the same arbitrator schedule a second day of hearing to hear the merits of the dispute;

(6) a provision to assess against the losing party the arbitrator's fees and expenses incurred in determining whether a dispute is arbitrable;

(7) a provision to require that the arbitrator's fees and expenses incurred in deciding the merits of a dispute be evenly divided between the parties.

### **12.3 Administrative Responsibilities**

a. The Public Employment Relations Board is the final agency authority on all questions concerning the Panel and PERB arbitration procedures.

b. The Executive Director shall maintain a Panel of Arbitrators (the Panel); administer the procedures for binding grievance arbitration under the PSERA and select arbitrators by lottery from the Panel for requesting parties.

c. The Executive Director shall:

- (1) Review the qualifications of all applicants for listing on the Panel, interpreting and applying the criteria set forth herein.

- (2) Review the status of all persons whose continued eligibility for listing on the Panel has been questioned.
- (2) Recommend to the PERB the acceptance or rejection of applicants for listing on the Panel, or the withdrawal of listing on the Panel for any of the reasons set forth in Rule 12.4;
- (3) At the request of the PERB, review grievance arbitration policies and procedures and make recommendations regarding such policies and procedures to the PERB.

<b>Panel of Arbitrators; Admission and Retention</b>
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## **12.4 Panel and Status of Members**

a. PERB shall designate a Panel of arbitrators consisting of persons who meet the criteria for listing contained in 12.5 and who remain in good standing. The Panel shall include not less than ten arbitrators and may be increased as necessary.

b. *Adherence of Standards and Requirements.* Persons listed on the Panel shall comply with PERB rules and regulations pertaining to arbitration and with such guidelines and procedures as may be issued by the Executive Director. Arbitrators shall conform to the ethical standards and procedures set forth in the Code of Professional Responsibility for Arbitrators of Labor Management Disputes (“Code of Professional Responsibility”), as approved by the National Academy of Arbitrators, Federal Mediation and Conciliation Service, and the American Arbitration Association.

c. *Status of Arbitrators.* Persons who are listed on the Panel and are selected to hear arbitration matters do not become employees of PERB and/or the State of Delaware by virtue of their selection. Following selection, the arbitrator's relationship is solely with the parties to the dispute, except that arbitrators are subject to certain reporting requirements and to standards of conduct as set forth herein.

d. *Role of PERB:* PERB has no power to:

1. Influence, alter, or set aside decisions of arbitrators on the Panel;
2. Compel, deny, or modify payment of compensation to an arbitrator.

e. *Nominations and Panels.* Upon receipt of a written request to arbitrate from parties to a collective bargaining agreement, the Executive Director will select an arbitrator, by lottery, pursuant to Rule 12.10 or 12.16. The selection of an arbitrator does not constitute a determination by PERB that an agreement to arbitrate exists; nor does such action constitute a ruling that the matter in controversy is arbitrable under any agreement.

f. *Rights of Persons Listed on the Panel.* No person shall have any right to be listed or to remain listed on the Panel. PERB retains exclusive authority and responsibility to assure that the needs of the parties using its services are served. To

accomplish this purpose, PERB may establish procedures for the selection of Panel arbitrators which include consideration of such factors as background and experience, availability, acceptability, and geographical location. PERB may also establish procedures for the removal from the Panel of those arbitrators who fail to adhere to provisions contained in these rules.

## **12.5 Listing on the Panel; Criteria for Listing and Retention**

Persons seeking to be listed on the Panel must complete and submit an application form which may be obtained from the Executive Director. Upon receipt of an executed application, the Executive Director will review the application, assure that it is complete and make such inquiries as are necessary. The Executive Director will review the completed application under the criteria in this section, and will forward to the PERB his or her recommendation as to whether or not the applicant meets the criteria for listing on the Panel. The PERB shall make all final decisions as to whether an applicant may be listed on the Panel. Each applicant shall be notified in writing of the PERB's decision and the reasons therefore.

a. *General Criteria.* Applicants for the Panel will be listed on the Panel upon a determination that they are experienced, competent, and acceptable in decision-making roles in the resolution of labor relations disputes.

b. *Proof of Qualification.* Qualifications for listing on the Panel may be demonstrated by submission of five (5) arbitration awards prepared by the applicant while serving as an impartial arbitrator of record chosen by the parties to labor disputes arising under collective bargaining agreements. Experience as a former judge who served on a Delaware constitutional court or on the U.S. District Court for the District of Delaware, or experience in relevant positions in collective bargaining, or as a hearing examiner in labor relations controversies will be considered in lieu of the required awards.

c. *Advocacy.* Any person who at the time of application is an advocate as defined in paragraph (c)(1) of this section, must agree to cease such activity before being recommended for listing on the PERB Panel. Any person who does not divulge his or her advocacy at the time of listing or who becomes an advocate while listed on the Panel, shall be recommended for removal by the Executive Director after the fact of advocacy is revealed.

(1) *Definition of Advocacy.* An advocate is a person who represents employers, labor organizations, or individuals as an agent, employee, attorney, or consultant, in matters of labor relations, including but not limited to the subjects of union representation and recognition matters, collective bargaining, arbitration, unfair labor practices, equal employment opportunity, and other areas generally recognized as constituting labor relations. The definition includes representatives of employers or employees in individual cases or controversies involving worker's compensation, occupational health or safety, minimum wage, or other labor standards matters. This definition of advocate also includes a person who is directly associated with an advocate in a business or professional relationship as, for example, partners or employees of a law firm. Consultants engaged only in joint education or training or other non-adversarial activities will not be deemed as advocates.

d. *Duration of Listing, Retention.* Listing on the Panel shall be by decision of the PERB based upon the recommendations of the Executive Director. The Executive Director may recommend, and the PERB may remove, any person listed on the Panel, for violation of this rule and/or the Code of Professional Responsibility. Notice of cancellation or suspension shall be given to a person listed on the Panel whenever a Panel member:

- (1) No longer meets the criteria for admission;
- (2) Has become an advocate as defined in paragraph (c)(1) of this section;
- (3) Has been repeatedly or flagrantly delinquent in submitting awards;
- (4) Has refused to make reasonable and periodic reports in a timely manner to PERB, as required in these rules, concerning activities pertaining to arbitration;
- (5) Has been the subject of complaints by parties who use PERB services, and the Executive Director after appropriate inquiry, concludes that just cause for cancellation has been shown;

e. The Executive Director may, at his or her discretion, conduct an inquiry into the facts of any proposed removal from the Panel. An arbitrator listed on the Panel may only be removed after 60-day notice and an opportunity to submit a response or information showing why the listing should not be canceled. The Executive Director may recommend to the PERB whether to remove an arbitrator from the Panel. All determinations to remove an arbitrator from the Panel shall be made by the PERB. Removals may be for a period of up to two (2) years, after which the arbitrator may seek reinstatement.

f. The Executive Director may suspend for a period not to exceed 180 days any person listed on the Panel who has violated any of the criteria in paragraph (d) of this section. Arbitrators shall receive written notice of a suspension. They may appeal a suspension to the PERB. The decision of the PERB shall constitute the final action of the agency.

## **12.6 Inactive Status**

A member of the Panel may request that he or she be put in an inactive status on a temporary basis because of ill health, vacation, schedule, or other reasons.

<b>Procedures for Arbitration Services</b>
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## **12.7 Freedom of Choice**

Nothing contained in this part should be construed to limit the rights of parties who use PERB arbitration services to jointly select an arbitrator acceptable to them. Once a request is made to PERB, all parties are subject to the procedures contained in this part.

## **12.8 Procedures for Requesting an Arbitrator**

a. The Office of the Executive Director has been delegated the responsibility for administering all requests for arbitration services. Requests should be addressed to the Delaware Public Employment Relations Board, Arbitration Services, 4th Floor, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware, 19801.

b. Upon receipt of a Request for Arbitration, the Executive Director will select an arbitrator by lottery from the Panel and notify the parties. The parties may request selection of an arbitrator either jointly or unilaterally. Selection of an arbitrator is nothing more than a response to a request. It does not signify the adoption of any position by the PERB regarding the arbitrability of any dispute or the terms of the parties' contract.

c. PERB reserves the right to decline to service any requests from parties with a demonstrated history of nonpayment of arbitrator fees or other behavior which constrains the spirit or operation of the arbitration process.

d. The parties are required to use the Request for Arbitrator Form which is included as Attachment M to these Delaware PERB Rules and Regulations and is also available from Delaware PERB, 4th Floor, Carvel State Office Building, 820 N. French Street, Wilmington, Delaware, 19801, or by calling (302) 577-5070. Requests for Arbitration that do not contain all required information requested on the form may be rejected.

## **12.9 Arbitrability**

a. Disputes relating to whether a matter is arbitrable will be ruled upon by the arbitrator prior to hearing the merits of the dispute. If the arbitrator determines that the dispute is arbitrable, the same arbitrator shall schedule a second day of hearing to hear the merits of the dispute.

b. The losing party shall be responsible for paying the arbitrator's fees and expenses incurred in deciding issues of arbitrability.

## **12.10 Selection of Arbitrators**

a. Upon receipt of a Request for Arbitration, the Executive Director will select an arbitrator from the PERB Panel, by lottery, as required by 14 Del.C. §4013 (c)(3). The Executive Director will contact the randomly selected arbitrator to confirm that the arbitrator has available hearing dates within sixty (60) days. In the event that the arbitrator is not available for hearing within sixty (60) days, the Executive Director shall continue to make random selections by lottery, until an arbitrator is identified with hearing availability within sixty (60) days.

b. Upon confirming the availability of the selected arbitrator, the Executive Director shall make a formal written appointment of the arbitrator, which shall include contact information for the parties. The arbitrator, upon notification of appointment, shall

communicate with the parties within 14 days to arrange for preliminary matters, such as the date and place of hearing. If the parties settle a case prior to the hearing, the parties must inform the arbitrator as well as the Executive Director. Consistent failure to follow these procedures may lead to a denial of future PERB arbitration service.

c. All letters issued by the Executive Director appointing an arbitrator will have an assigned PERB case number. All future communications between the parties, the arbitrator and the PERB should refer to this case number. Copies of any correspondence confirming a scheduled hearing should be provided to PERB.

d. The appointment of an arbitrator in no way signifies a determination on arbitrability or an interpretation of the terms and conditions of the collective bargaining agreement. The resolution of such disputes rests solely with the arbitrator.

## **12.11 Conduct of Hearings**

a. The conduct of the arbitration proceeding is under the arbitrator's jurisdiction and control, and the arbitrator's decision shall be based upon the evidence and testimony presented at the hearing or otherwise incorporated in the record of the proceeding.

b. *Representation:* Any party may be represented in a grievance arbitration proceeding by counsel or other authorized representative.

c. *Stenographic Record:* Any party wishing a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of such arrangement in advance of the hearing. The requesting party or parties shall pay the cost of the record. Whenever a stenographic record is made of a hearing, a copy of the transcript shall be provided to the arbitrator.

d. *Interpreters:* Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service, unless otherwise agreed to by the parties.

e. *Attendance at Hearings:* The arbitrator shall have the power to require the sequestration of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

f. *Witness Expenses:* The expenses of witnesses for either side shall be paid by the party producing such witnesses.

g. *Postponements:* The arbitrator may, for good cause, postpone the hearing upon the request of a party or upon his or her own initiative and shall postpone when all of the parties agree thereto.

h. *Oaths:* The arbitrator may require witnesses to testify under oath administered by any duly qualified person, and, if required by law or requested by either party, shall do so.

i. *Order of proceedings:* A hearing shall be opened by the recording of the date, time, and place of the hearing and the presence of the arbitrator, the parties and counsel, if any; and by the receipt by the arbitrator of the demand and answer, if any, or the submission. Exhibits may, when offered by either party, be received in evidence by the

arbitrator. The names of all witnesses and exhibits in the order received shall be made part of the record. The arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs.

j. *Arbitration in the Absence of a Party or Representative:* An arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party present to submit such evidence as may be required for the making of an award.

k. *Evidence:* The parties may offer such evidence as is relevant and material to the dispute, and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator may subpoena witnesses and documents independently or upon the request of any party. The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of the arbitrator and all of the parties, except where any of the parties is absent in default or has waived the right to be present.

l. *Evidence by Affidavit and Filing of Documents:*

The arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as he or she determines to be proper after consideration of any objection to its admission. All documents that are not filed with the arbitrator at the hearing, but arranged at the hearing or subsequently by agreement of the parties, shall be provided to all parties. All parties shall be afforded opportunity to examine such documents.

m. *Inspection:* Whenever the arbitrator deems it necessary, he or she may make an inspection in connection with the subject matter of the dispute after written notice to the parties, who may, if they so desire, be present at the inspection.

n. *Closing of Hearing:* The arbitrator shall inquire of all parties whether they have any further proof to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearings closed. If briefs or other documents are to be filed, the hearing shall be declared closed as of the final date upon which such documents are received by the arbitrator.

o. *Reopening of Hearing:* The hearing may be reopened for good cause by the arbitrator or on the motion of either party at any time before the award is made. The arbitrator may reopen the hearing and shall have forty-five (45) days from the closing of the reopened hearing record to issue an award.

## **12.12 Decision and Award**

a. Arbitrators shall issue awards no later than forty five (45) days from the date of the closing of the record as determined by the arbitrator, unless otherwise agreed upon by the parties or specified by the collective bargaining agreement or law. However, failure to meet the forty-five (45) day deadline will not invalidate the process or award. Failure to render timely awards reflects upon the performance of an arbitrator and may lead to removal from the PERB Panel.

b. *Form of award:* The award shall be in writing, signed by the arbitrator, and shall be accompanied by an opinion, unless the parties have advised the arbitrator that a written opinion is not necessary.

c. *Award upon Settlement:* If the parties settle their dispute during the course of the arbitration, the arbitrator may, upon request, set forth the terms of the agreed settlement in the form of an award.

d. *Delivery of the Award:* Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the arbitrator, addressed to the party at its last known address or to its representative; personal service of the award; or the filing of the award in any other manner that is permitted by law.

e. *Expenses:* Arbitration expenses incurred in deciding the merits of a dispute, other than the cost of the stenographic record, but including required traveling and other expenses of the arbitrator, as well as the expenses of any witness or the cost of any proof produced at the direct request of the arbitrator, shall be evenly divided between the parties. Arbitration expenses incurred in determining whether a dispute is arbitrable shall be paid by the losing party in accord with section 12.9 (b) herein.

f. The parties should inform the Executive Director whenever an award is unduly delayed. The arbitrator shall notify the Executive Director if and when the arbitrator

(1) cannot schedule, hear, and/or render decisions promptly, or

(2) learns a dispute has been settled by the parties prior to the decision.

g. Within fifteen (15) days after an award has been issued to the parties, the arbitrator shall advise the Executive Director that the case has been processed to completion.

h. While PERB encourages the publication of arbitration awards, arbitrators should not publicize awards if objected to by one of the parties.

### **12.13 Fees and Charges of Arbitrators**

a. All arbitrators listed on the Panel may charge a per diem and other predetermined fees for services, if the amount of such fees have been provided in advance to PERB. Each arbitrator's maximum per diem and other fees will be sent to the parties when an arbitrator is appointed. The arbitrator shall not change any fee or add charges without giving at least 30 days advance written notice to PERB. Arbitrators with dual business addresses must bill the parties for expenses from the least expensive business address to the hearing site.

b. Arbitrators shall divulge all charges to the parties immediately upon appointment.

c. PERB requests that parties notify the Executive Director of any arbitrator's deviation from the policies expressed in these rules. While PERB does not resolve individual fee disputes, repeated complaints concerning the fees charged by an arbitrator will be brought to the attention of the Executive Director for consideration. Similarly, repeated complaints by arbitrators concerning non-payment of fees by the parties may lead to the denial of services or other actions by the PERB.

## **12.14 Reports and Biographical Sketches**

a. Arbitrators listed on the Panel shall execute and return all documents, forms and reports required by PERB. They shall also keep PERB informed of changes of address, telephone number, availability, and of any business or relationship which involves labor-management relations or which creates or gives the appearance of advocacy as defined in Section 12.5 (c ) (1).

b. PERB will provide, upon request, biographical sketches on each person admitted to the Panel from information supplied by applicants. Arbitrators may request revision of biographical information at later dates to reflect changes in fees, the existence of additional charges, or other relevant data. PERB reserves the right to decide and approve the format and content of biographical sketches.

<b>Expedited Arbitration</b>
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## **12.15 Policy**

In an effort to reduce the time and expense of some grievance arbitrations, PERB is offering expedited procedures that may be appropriate in certain cases that do not involve complex or unique issues. Expedited Arbitration is a mutually agreed upon process whereby arbitrator appointments, hearings and awards are acted upon quickly by the parties, PERB, and the arbitrators. The process is streamlined by mandating short deadlines and eliminating requirements for transcripts, briefs and lengthy opinions.

## **12.16 Procedures for Requesting Expedited Arbitration**

a. With the exception of the specific changes noted in this section, all PERB rules and regulations governing arbitration services shall apply to Expedited Arbitration.

b. Upon receipt of a joint Request for Appointment of an Arbitrator indicating that expedited services are desired by both parties, the Executive Director will appoint an arbitrator using the process defined by section 12.10 above, except that the Executive Director shall establish that the selected arbitrator is available to conduct the arbitration within 30 days.

## **12.17 Arbitration Process**

a. Once notified of the expedited case appointment by the Executive Director, the arbitrator shall contact the parties within seven (7) calendar days.

b. The parties and the arbitrator must schedule a hearing within 30 days of the appointment date.

c. Absent mutual agreement, all hearings will be concluded within one day. No transcripts of the proceedings will be made and the filing of post-hearing briefs will not be allowed.

d. All awards must be completed within seven (7) working days after the hearing. These awards are to be brief, concise, and will not require extensive written opinion or research time.

### **12.18 Proper Use of Expedited Arbitration**

a. PERB reserves the right to cease honoring requests for Expedited Arbitration if a pattern of misuse of this process becomes apparent. Misuse may be indicated by the parties' frequent delaying of the process or referral of inappropriate cases.

b. Arbitrators who exhibit a pattern of unavailability for appointments or who are repeatedly unable to schedule hearings or render awards within established deadlines will, after written warning, be considered ineligible for appointment for this service.