Policy 2104

From Human Resources

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PERSONNEL POLICY MANUAL
MoDOT Personnel Policy Title: Appeal Procedures for Alleged Adverse Employment Actions Resulting From Whistleblower Reporting **Policy Number**: 2104 **Chapter Title**: Audits and Investigations **Effective Date**: April 1, 2004 **Supersedes Policy Number** 2104 **Dated** February 1, 2001
Approved By: Micki Knudsen, Human Resources Director (Signature on file)

POLICY

The Missouri Department of Transportation is committed to ensuring that no employee shall be subjected to disciplinary action, as defined below, for his/her reporting and/or disclosure of any alleged mismanagement, gross waste of state funds, abuse of authority, activities which pose substantial danger to public health or safety, or violations of the law or regulations.

For the purposes of Personnel Policy 2104 only, "disciplinary action" means any dismissal, demotion, transfer, reassignment, suspension, reprimand, or warning of possible dismissal, or withholding of work, whether or not the withholding of work has or will affect the employee's compensation.

ACCOUNTABILITY/RESPONSIBILITY

1. Supervisors or any other department officials shall not prohibit any employee of the department from discussing the operations of the department, either specifically or generally, with any member of the legislature or a representative of the state auditor's office.

2. An employee is required to inform his/her supervisor or other appropriate departmental authority of any requests for information received from the legislature or state auditor regarding department activities. However, an employee is not required to give notice of such legislative requests and/or testimony made until after such information has been reported.

3. An employee is not authorized to represent his/her own personal opinions as those of the department.

4. An employee is not permitted to leave the assigned work area to report alleged offenses during normal work hours without following applicable department rules and personnel policies pertaining to leaves, unless the employee’s presence is requested by a legislator or legislative committee.

5. This personnel policy does not preclude the department from taking disciplinary action against an employee:

a. If the employee knowingly discloses false information;

b. If the information is closed or confidential under the provisions of the open meetings law or any other law;

c. If the disclosure relates to the employee's own violations, mismanagement, gross waste of funds, abuse of authority, or endangerment of public health or safety; or,

d. If the employee fails to notify the supervisor or other appropriate department authority as soon as possible following the report.

GUIDELINES

1. An employee who wishes to appeal disciplinary action pursuant to RSMo 105.055.5 and elects to have his/her case heard as a formal hearing should file an appeal as quickly as possible and not more than 30 calendar days after the disciplinary action. The appeal should be filed, in writing, with the Director of Audits and Investigations, Missouri Department of Transportation, P. O. Box 270, Jefferson City, Missouri 65102. Employees in the office of the Audits and Investigations Unit who want to file an appeal should write to the human resources director at this same address. The parties will thereafter be notified of the name and address of the hearing examiner who will conduct the appeal hearing.

2. The following procedure does not alter the at-will employment status of any employee.

3. Any relief requested by either the employee or the Missouri Department of Transportation (MoDOT), or as required or requested by the hearing examiner, and responses thereto, shall be in writing and submitted to the hearing examiner with a copy served on the opposing party by mailing a copy to that party.

4. Employees may represent themselves and handle their own cases but shall have the right to be represented by a duly licensed attorney. If either the employee or MoDOT is represented by an attorney, an entry of appearance shall be submitted to the hearing examiner. Any copies of writings, motions, or notices required to be served on the opposing party shall be served on the attorney of record for that party. If no entry of appearance has been filed for a party, copies of writings, motions, or notices shall be served on the employee by mail to the employee's last known address or to the Chief Counsel's Office, Missouri Department of Transportation, P.O. Box 270, Jefferson City, Missouri 65102.

5. The hearing examiner shall, as promptly as possible after the time and place of hearing has been determined, mail a notice of hearing to the parties which shall state the time and place of the hearing. No hearing shall be scheduled less than 10 days from the date of the notice unless otherwise agreed to by the parties.

6. If the employee fails to personally appear for the hearing at its scheduled date and time, this will be deemed an abandonment of the employee’s complaint or grievance and the hearing examiner will dismiss the matter.

7. At the hearing:

a. Oral evidence shall be taken only on oath or affirmation.

b. Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him/her to testify, and to rebut the evidence against him/her.

c. A party who does not testify in his/her own behalf may be called and examined as if under cross-examination.

d. All proceedings and the hearing will be recorded and preserved. A copy of the transcript of such proceedings shall be made available to any interested party upon the payment of a fee which shall in no case exceed the reasonable cost of preparation and supply.

e. Records and documents which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference.

f. The hearing examiner shall take official notice of all matters of which the courts take judicial notice. They may also take official notice of technical or scientific facts, not judicially cognizable, within their competence, if they notify the parties, either during a

hearing or in writing before a hearing, or before findings are made after hearing, of the facts of which they propose to take such notice and give the parties reasonable opportunity to contest such facts or otherwise show that it would not be proper for the hearing examiner to take such notice of them.

g. Evidence to which an objection is sustained shall, at the request of the party seeking to introduce the same, or at the instance of the hearing examiner, nevertheless be heard and preserved in the record, together with any cross-examination with respect thereto and any rebuttal thereof, unless it is wholly irrelevant, repetitious, privileged, or unduly long.

h. Any evidence received without objection which has probative value shall be considered by the hearing examiner along with the other evidence in the case. The rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions. Irrelevant and unduly repetitious evidence shall be excluded.

i. Copies of writings, documents and records shall be admissible without proof that the originals cannot be produced, if it shall appear by testimony or otherwise that the copy offered is a true copy of the original, but the hearing examiner may, nevertheless, if they believe the interests of justice so require, sustain any objection to such evidence which would be sustained were the proffered evidence offered in a civil action in the circuit court. If they do sustain such an objection, they shall give the party offering such evidence reasonable opportunity and, if necessary, opportunity at a later date, to establish by evidence the facts sought to be proved by the evidence to which such objection is sustained.

j. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

k. The results of statistical examinations or studies, or of audits, compilations of figures, or surveys, involving interviews with many persons, or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures, or survey, including the nature and extent of the

qualifications of the maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility.

l. Any party desiring to introduce an affidavit in evidence at the hearing may serve, on all other parties, copies of such affidavit in the manner hereinafter provided, at any time before the hearing, or at such later time as may be stipulated. Not later than seven days after such service, or at such later time as may be stipulated, any other party may serve on the party who served such affidavit an objection to the use of the affidavit or some designated portion or portions thereof on the ground that it is in the form of an affidavit; provided, however, that if such affidavit shall have been served less than eight days before the hearing such objection may be served at any time before the hearing or may be made orally at the hearing. If such objection is so served, the affidavit, or the part thereof to which objection was made, may not be used except in ways that would have been permissible in the absence of this subdivision; provided, however, that such objection may be subsequently waived by the party making the same. Failure to serve an objection as aforesaid, based on the ground aforesaid, shall constitute a waiver of all objections to the introduction of such affidavit, or of the parts thereof with respect to which no such objection was so served, on the ground that it is in the form of an affidavit, or that it constitutes or contains hearsay evidence, or that it is not, or contains matters which are not the best evidence, but any and all other objections may be made at the hearing. Nothing herein contained shall prevent the cross-examination of the affiant if present in obedience to a subpoena or otherwise and if present, affiant may be called for cross-examination during the case of the party who introduced the affidavit in evidence. If the affidavit is admissible in part only, it shall be admitted as to such part without the necessity of preparing a new affidavit. The manner of service of such affidavit and of such objection shall be by delivering or mailing copies thereof to the attorneys of record of the parties being served, if any, otherwise, to such parties, and such service shall be deemed complete upon mailing. Nothing in this subdivision shall prevent any use of affidavits that would be proper in the absence of this paragraph.

m. MoDOT will present its case first but this does not shift any burden of proof on the employer. After an employee presents his/her position, the employer will be allowed the opportunity to rebut same with additional evidence.

8. Any party may take and use depositions in the same manner, upon and under the same conditions, and upon the same notice, as is or may hereafter be provided for with respect to the taking and using of depositions in civil actions in the circuit court.

9. The hearing examiner shall, upon request of any party, issue subpoenas and shall in a proper case issue subpoenas duces tecum. Subpoena duces tecum shall be issued only by order of the Commission or a member thereof. Subpoenas other than subpoenas duces tecum shall on request of any party be issued with the name of the witness, and the date for appearance is blank, but the date shall be filled in by such party before service. Subpoenas shall extend to all parts of the state, and shall be served and returned as in civil actions in the circuit court. The witness shall be entitled to the same fees and, if compelled to travel more than 40 miles from his/her place of residence, shall be entitled to the same tender of fees for travel and attendance, and at the same time, as is now or may hereafter be provided for witnesses in civil actions in the circuit court, such fees to be paid by the party subpoenaing him/her, except where the payment of such fees is

otherwise provided for by law. The Commission shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found, for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefore shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court.

10. As soon as practical after receipt of the transcript and briefs of the parties, if any, the hearing examiner shall submit to each member of the Commission a proposed report and order.

11. As soon as practical after receipt of the proposed report and order, the members of the Commission shall review and the Commission shall then render its final decision in writing. The hearing examiner shall forward, as soon as practical after the Commission's decision, a copy of the decision to the employee or his/her attorney and to the director of audits and investigations.

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