# CHAPTER 4-07-20.2
# APPEALS OF DISCRIMINATION OR REPRISAL


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### 4-07-20.2-01. Scope of chapter.

This chapter applies to applicants for positions classified by human resource management services, probationary employees or regular employees in classified positions who want to appeal reprisal or who want to appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 54-44.3-12.2

### 4-07-20.2-01.1. Employees not in the classified service may appeal claims of reprisal.

This chapter also applies to employees not in the classified service who appeal a claim of reprisal under subsection 5 of North Dakota Century Code section 34-11.1-04.

**History:** Effective July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 34-11.1-04(5)

### 4-07-20.2-02. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code chapter 54-44.3, except:

1. "Applicant" means a person who has applied for a position classified by human resource management services and who has complied with the application procedures required by the employing agency.

2. "Date of service" means the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery of electronic means, the date of actual delivery.

3. "Regular employee" means a person who has completed the probationary period and who is or was in a position classified by human resource management services at the time the alleged action occurred.

4. "Reprisal" means an unfavorable employment-related action taken against an applicant or employee by an appointing authority for:

   a. In good faith filing a complaint, or testifying, assisting, appealing, or participating in an investigation, proceeding, hearing, or litigation;

   b. Opposing any unlawful discriminatory practice; or

   c. Exercising the employee's rights under North Dakota Century Code chapter 34-11.1 or section 34-01-20.

5. "Working days" means Monday through Friday exclusive of holidays.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010; July 1, 2026.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 54-44.3-12.2

**4-07-20.2-03. Statutory definitions.**

Unless otherwise defined, or made inappropriate by context, all words used in this chapter have meanings given to them under North Dakota Century Code chapter 14-02.4 and subsection 5 of North Dakota Century Code section 34-11.1-04.

**History:** Effective November 1, 1996; amended effective July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 34-11.1-04(5), 54-44.3-12.2

**4-07-20.2-04. Applicants, probationary employees, or regular employees may appeal reprisal or discrimination in employment.**

Applicants for positions classified by human resource management services and probationary or regular employees in classified positions may appeal reprisal or may appeal discrimination in employment because of race, color, religion, sex, national origin, age, genetics, the presence of any mental or physical disability, status with respect to marriage or public assistance, participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer, or political opinions or affiliations.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 54-44.3-12.2

**4-07-20.2-04.1. Procedure for applicant appeals of discrimination or reprisal in employment to agency appointing authority.**

1. An applicant who has completed a timely and properly completed application for a classified position within an agency and who alleges discrimination or reprisal in employment shall file a written appeal to the agency appointing authority. The letter of appeal must specify what alleged discriminatory or reprisal action against the applicant was taken by the agency. The appeal information must be delivered, mailed, or transmitted by electronic means and must be received in the office of the agency appointing authority by five p.m. within fifteen working days of the alleged discriminatory or reprisal action.

2. The agency appointing authority has fifteen working days from the receipt of the appeal to review the appeal and provide a written response to the applicant.

3. If the applicant does not agree with the response of the agency appointing authority, the applicant may further appeal to human resource management services in accordance with section 4-07-20.2-07.

**History:** Effective July 1, 2008; amended effective July 1, 2010.
**General Authority:** NDCC 54-44.3-12
**Law Implemented:** NDCC 54-44.3-12

**4-07-20.2-05. Completion of agency grievance process prior to appeal to human resource management services.**

A probationary or regular employee shall complete the agency grievance process prior to submitting an appeal to human resource management services for an appeal hearing, unless a waiver is granted as provided for in section 4-07-20.2-06. The employee shall begin the agency grievance procedure within fifteen working days from the date of the alleged discriminatory or reprisal action. Failure to begin the procedure within time limitations may cause the employee to lose the right to appeal to human resource management services. The agency appointing authority or designee, for good cause shown, may waive the time limitations for filing a grievance. Good cause means those circumstances that reasonably and without any fault on the part of the grievant prevented the filing of a grievance in a timely fashion. In no event may a grievance be deemed timely after sixty days have elapsed from the date of the employer action. If an agency does not have an established written grievance procedure, the employee shall submit the appeal to human resource management services within fifteen working days from the date of the alleged discriminatory or reprisal action.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 54-44.3-12.2

**4-07-20.2-06. Waiver of agency grievance procedure.**

A waiver of the agency grievance procedure is allowed by mutual agreement of the probationary or regular employee and appointing authority. The waiver must be signed by both parties within fifteen working days of the alleged discriminatory or reprisal action. Upon obtaining the waiver, the employee may appeal directly to human resource management services in accordance with section 4-07-20.2-07.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 54-44.3-12.2

**4-07-20.2-07. Procedure for appeals of discrimination or reprisal to human resource management services.**

1. A probationary or regular employee shall file the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure or within fifteen working days from the date of the waiver. An additional fifteen working days is not available if the requested waiver is denied. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.

2. An applicant shall file the appeal form by delivery, mail, or transmittal by electronic means, and the form must be received in the human resource management services office by five

p.m. within fifteen working days of the service of notice of the agency appointing authority's response to the alleged discriminatory or reprisal action. The date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.

3. An employee in a nonclassified position may appeal claims of reprisal by filing the properly completed prescribed appeal form with the director, human resource management services. The appeal form must be delivered, mailed, or transmitted by electronic means and must be received in the human resource management services office by five p.m. within fifteen working days of service of the notice of results of the agency grievance procedure, or within fifteen working days of the date of the reprisal action if an agency does not have an established grievance process. When an employee is using an agency internal grievance procedure, the date of service of the notice shall be considered to be the date the notice was mailed or the date transmitted by electronic means, or absent proof of the date of mailing or delivery through electronic means, the date of actual delivery. The agency shall prepare a certificate of service, or provide reliable means, to show proof of the date of mailing, transmittal by electronic means, or hand delivery.

4. The director, human resource management services, shall within two working days submit a written request to the director, office of administrative hearings, to conduct a hearing on behalf of human resource management services and shall forward a copy of the appeal form to the affected appointing authority.

5. The administrative law judge shall initially consider whether the appeal was filed within required time limitations. If the administrative law judge determines the time limitations have not been met, the administrative law judge shall prepare an appropriate order dismissing the appeal, which shall be final, and provide a copy of it to the parties. The administrative law judge may, for good cause shown, waive the time limitations for filing an appeal. Good cause means those circumstances that reasonably and without any fault on the part of the appellant prevented the filing of an appeal in a timely fashion. In no event may an appeal be deemed timely after sixty days have elapsed from the date of the employer action.

6. The administrative law judge shall consider whether human resource management services has jurisdiction over the subject matter of the appeal and whether all rules and regulations were followed in the internal agency grievance process. If the administrative law judge is unable to establish whether human resource management services has jurisdiction over the subject matter of the appeal or whether the appropriate rules were followed, a hearing may be conducted to ascertain the facts related to those issues.

7. If the administrative law judge determines that human resource management services does not have jurisdiction in the matter of the appeal, the administrative law judge shall prepare findings of fact and conclusions of law, if appropriate; issue a final decision dismissing the appeal; and provide a copy of them to the parties.

8. If it is determined that human resource management services has jurisdiction over the appeal, the administrative law judge shall schedule a hearing. The administrative law judge shall conduct the hearing and related proceedings, receive evidence related to the issues, prepare findings of fact and conclusions of law, and issue a final decision.

9. The administrative law judge shall notify the employee or the applicant and the affected appointing authority of the final decision by sending each of them the findings of fact, conclusions of law, and final decision. Notification shall be accomplished in the same manner as for notification of final orders required by subsection 3 of North Dakota Century Code

section 28-32-39. The parties shall implement the final decision within any time periods specified by the administrative law judge.

10. The administrative law judge shall return the completed appeal file to human resource management services.

11. Any party to the appeal may review the recordings of the hearing by making a request to human resource management services.

**History:** Effective November 1, 1996; amended effective July 1, 2004; July 1, 2008; July 1, 2010.
**General Authority:** NDCC 54-44.3-12(1)
**Law Implemented:** NDCC 34-11.1-04(5), 54-44.3-12.2