Tennessee's TEAM Act

A New Day in Public Sector Employment Law

By Mark C. Travis

After 70 years of doing things differently, the TEAM Act now provides objective and performance-based hiring and retention procedures for more than 40,000 Tennessee employees.

On April 24, 2012, Gov. Bill Haslam signed the Tennessee Excellence, Accountability and Management (TEAM) Act into law.[1] Recognizing that in the next five years almost 40 percent of state employees will become eligible for retirement, in signing the law the governor emphasized "our responsibility to build a top-notch workforce for the future." The governor also stressed that for decades, employment decisions in state government had been based solely on seniority, with job performance never being considered. He said "we have to do better."

Tennessee's civil service law was originally enacted in 1939. This legislation provided for competitive testing, a Civil Service Commission, and a personnel system "based on merit principles and scientific methods."[2] Beginning in the 1990s, many states began to reform their traditional personnel systems through measures such as broader salary structures, increased management discretion, reduction of job classifications, increased flexibility in downsizing and privatization, and decreased emphasis on the use of seniority in employment decisions. Until this initiative from the Haslam administration, Tennessee had not participated in this wave of reform.

Designed with input from various organizations, including the Tennessee State Employees Association, and passed with significant bipartisan legislative support, the act provides for a new classification and hiring system, an overhaul of the performance evaluation system for state employees, new procedures for administering reductions-in-force (RIF), and a streamlined appeals process. Addi-

tionally, although not specifically referenced in the act, an employee mediation process is established through regulations implemented by the Department of Human Resources. The effective date of the substantive provisions of the act is Oct. 1.

Substantive Provisions

Employment Classification. The act divides "state service" employment into the "preferred service" and the "executive service." Executive service employees include those who are appointed by the governor; deputy and assistant commissioners, and their employees who serve in a confidential capacity; wardens of correctional facilities and chief officers of mental health institutes; heads of divisions or major units within an agency or regional directors for a state agency who develop or implement policy; highest-ranking agency employees dealing with public information and legislative affairs, fiscal and budget matters, security or internal affairs, information technology, and human resources; and licensed physicians and attorneys. All executive service employees are considered "at-will" and serve at the pleasure of the commissioner or agency making the individual's appointment (i.e., "appointing authority"). All other full-time positions in state government are considered in the "preferred service."[3]

Hiring Practices. The act creates a new hiring system that requires agencies to define minimum qualifications and specifically identify the knowledge, skills, abilities and competencies required for each position. Position openings must be announced and held open for a minimum of one week. Any applicant who meets the minimum qualifications for a position will be put on a list of eligible candidates for consideration by the agency, the agency must interview at least three candidates, and one of the three must be hired within 30 days. As with current law, assessments utilized in the hiring process are not considered public records. Additionally, veterans and their spouses are to receive preference in hiring and promotion decisions over nonveterans with equal minimum qualifications, knowledge, skills, abilities and competencies. Further, the act requires a minimum probationary employment period of one year. Only after satisfactory completion of the probationary period can an employee become a preferred service employee with the ability to appeal certain disciplinary actions.

Performance Evaluations. The act calls for an evaluation system containing performance standards and expected outcomes that are specific, measurable, achievable, relevant and time-sensitive ("SMART" goals). These evaluations are to be completed at least annually and can be used to determine salary increases and decreases, granting or denial of promotions, and in determining candidates for transfer, demotion, dismissal or reduction-in-force. The commissioner of the Department of Human Resources is charged with establishing the performance evaluation system, and each appointing authority is responsible for reporting its evaluations to the Commissioner of Human Resources on an annual basis. July 1, 2013, is the first day the new performance evaluation system can be used to address reductions-in-force or merit pay. These evaluations are not considered public records.

Reductions-in-Force (RIFs). Layoffs and furloughs may be implemented because of lack of funds, a reduction in spending authorization, lack of work, efficiency or other material change in duties or organization. The act sets forth a new procedure for implementing RIFs. Through Dec. 21, 2013, the notice period for announcing RIF's is 60 days. After Jan. 1, 2014, the notice period for a RIF is reduced to 30 days.[4] The act establishes the order of layoff by requiring that employee job performance will be the primary factor for consideration.[5] After job performance, seniority, abilities and disciplinary record are to be considered.[6] The Department of Human of Resources is required to keep a list of all preferred service employees laid off as a result of a RIF. For a period of one year following the layoff, if there is a job opening in the same classification, the department is required to notify the employee of the opening, extend the employee an invitation to apply, and grant the employee an interview. Similarly, if an employee is laid off and the position is reinstated within one year of the time of the layoff, the employee may apply for the reinstated position and is guaranteed an offer of employment.

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Compensation Plan and Merit Pay. The Commissioner of the Department of Human Resources is charged with developing a comprehensive compensation plan for all position classifications in state service, as well as a merit pay system. The merit pay system is to be based on objectively measureable criteria, and every employee is to be considered eligible to receive merit pay

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pursuant to rules established by the Department of Human Resources.

Transfers. An employee may be transferred from one department to another with the approval of the employee's appointing authority and the Commissioner of the Department of Human Resources. A transfer can be made for any reason these authorities consider to be "for the good of the service." Significantly, transfers are not subject to the new complaint and appeal procedures set forth in the act and discussed in more detail below.

Demotions. Any change of an employee from a position in one class to a position in a class of lower rank is considered to be a demotion, unless it is at the employee's request or due to a change in the organizational structure, abolishment of a position, a reduction-in-force, organizational necessity, or a change in the employee classification plan.

Suspensions. An appointing authority can suspend an employee without pay, for disciplinary purposes, for any length of time the authority considers appropriate, not exceeding 30 days in any 12-month period. A disciplinary suspension may be extended during the pendency of an appeal, as outlined below.

Progressive Discipline. Supervisors are charged with maintaining proper job performance and implementing corrective disciplinary action for employees under the supervisor's direction. Upon written application by an employee, any written warning in the employee's personnel file is to be expunged from that record, so long as there have been no further disciplinary actions related to the same issue. Ultimately, a preferred service employee may be dismissed, demoted, or suspended for cause, or "for the good of the service." Any dismissal of a preferred service employee takes effect immediately after the employee receives notice of the action, although the employee's compensation is to continue for 10 days following the dismissal. Whenever an employee is dismissed for cause, the notice of termination must outline the reasons for the dismissal.

Procedural Provisions

Board of Appeals. The act replaces the previous Civil Service Commission with a nine-member Board of Appeals, which is charged with hearing and disposition of appeals filed pursuant to the complaint process outlined in the act. Members of the Board of Appeals are appointed by the governor, who is directed to strive for geographic, racial and gender diversity in the selection process. The governor is authorized to remove a member of the Board of Appeals for cause.

Complaint and Appeal Procedure. For decades, the existing law and regulations provided for a five-step grievance procedure culminating in a hearing before an administrative law judge with appeal to the Civil Service Commission. In addition to dismissals, suspensions, and demotions, previous law authorized grievances and appeals based upon geographic transfer, noncompliance with a reduction-in-force plan, prohibited political activity, and certain performance evaluations. The new act significantly streamlines the time and scope of this process.

Initially, an employee in the preferred service is entitled to file a complaint relative only to a dismissal, demotion or suspension of three days or more.[7] The employee's complaint must identify the law, rule, or policy that was allegedly violated. Further, the employee's complaint must be filed no later than 14 days after the employee became aware, or reasonably should have been aware, of the alleged violation.[8] The employee's failure to timely file the complaint is considered to constitute a waiver of the claim. In order to be considered "filed," the complaint must be received in a written or electronic format by employee's appointing authority, the Commissioner of the Department of Human Resources, or the Board of Appeals (depending upon the applicable step in the process as outlined below). The steps of the complaint and appeal process are as follows:

- **Step I: Appointing Authority.** Step I requires the complaint to be filed with the employee's appointing authority. The appointing authority (or his designee) is required to conduct an investigation, meet with the employee in person, and issue a decision within 15 days of receipt of the complaint. If the appointing authority fails to issue a decision within that 15-day period, the employee may proceed to Step II.
- **Step II: Commissioner of the Department of Human Resources.** If the appointing authority does not find in favor of the employee, an appeal may be filed with the Commissioner of the Department of Human Resources within 14 days of the Step I decision. The Commissioner of the Department of Human Resources is required to review the Step I decision and issue a decision within 30 days. If the commissioner fails to issue a decision within that 30-day period, the employee may proceed to Step III.
- **Step III: Board of Appeals.** Any party dissatisfied with the Step II decision (either the employee or the state agency) may appeal to the board of appeals within 14 days after receipt of the Step II decision. Within 10 days after receipt of the appeal, the administrative law judge (ALJ) assigned to assist the board of appeals with the appeal is required to review the procedural requirements of the complaint and appeal, and if those are satisfied, a hearing before the board of appeals will be conducted. If any procedural requirements have not been met, the appeal is to be dismissed.

The hearing before the board of appeals requires a panel of at least three members of the board, assisted by an ALJ. The ALJ is charged with assisting the board by ruling on procedural questions of law and the admissibility of evidence, swearing witnesses, and advising members of the board on the law relative to the case. ALJ's are not to take part in the determination of any questions of fact. The hearing is to be conducted and a final decision issued within 120 days after the filing of the appeal. In order to ensure strict compliance with this requirement, the act imposes the following procedural requirements

- A pre-hearing conference is to be conducted within 20 days after the filing of the appeal, at which time the date for the hearing will be set.
- All discovery is to be completed within 60 days after the appeal is filed.
- All motions must be ruled on no later than 30 days prior to the hearing.
- Extensions on the deadlines are only to be granted in extraordinary circumstances.
- Decisions of the board of appeals are subject to judicial review pursuant to the Uniform Administrative Procedures Act. Additionally, the board of appeals may award attorney's fees and costs to an employee who is successful in their appeal. If the employee is successful in obtaining reinstatement to a position from which the employee was terminated, the reinstatement is required to be to a position in the county in which the employee was employed at the time of termination. The agency is required to comply with any award of attorney's fees, back pay, or reinstatement within 30 days of the final order.

Mediation

Although not required by the act, the Department of Human Resources has implemented a mediation program to aid in the administration of the new law. The program was designed based upon research of several other states' programs that authorize the use of mediation in employee complaint processes. Experience and empirical evidence from those programs have been shown to reduce the number of formal complaints and to provide a quick and less costly method of resolving internal employee disputes, while improving employee satisfaction, productivity and efficiency.

The Tennessee program applies to all employees in state service, both preferred and executive, but exempts those offices and agencies excluded by the principal act. Notably, the mediation program supplements but does not replace the complaint and appeal procedures in the act, and does not toll or otherwise affect the time requirements in the act. Similarly, participation in the mediation process does not preclude independent disciplinary action. Employees are authorized to use the process free of retaliation, and employees are not required to use accrued leave in order to participate in the process, subject to the approval of their supervisor or appointing authority. The process is voluntary and any employee is free to refuse to participate or withdraw from the process at any time.

Scope of the Program. Mediation is available for any "workplace issue," which includes:

- Disciplinary actions involving suspensions, demotions or terminations
- Violations of law or policy related to discrimination or harassment
- Involuntary transfer of more than 50 miles
- Prohibited political activity
- Any other workplace issue involving relational, communication or values conflict in state government employment

Conversely, mediation is not available for the following issues:

- Actions involving probationary employees
- Non-selection for promotion
- Reductions-in-force
- Shift, post and overtime assignments
- Work assignments outside the employee's assigned job classification
- Salary ranges assigned to the employee's job classification
- Administration of salary increases
- Classification of position
- Denial of leave requests except for annual and sick leave
- The construction of agency rules or policies

The Mediation Process. The process is initiated by the employee filing a request for mediation with the Department of Human Resources on a form prescribed by the department. The form provides for a brief description of the dispute and the identity of the other involved party. A representative of the department then makes a preliminary determination of whether the employee and the dispute are covered by the rule. If that requirement is satisfied, the department representative contacts the other involved employee identified on the form and attempts to secure agreement to participate in the mediation process. If agreement is secured, a co-mediation team of two state-affiliated mediators are appointed to conduct the mediation, which is to be scheduled at a mutually convenient time and location. In order to provide a measure of neutrality, the rules provide that while conducting the mediation, the mediators are not considered to be acting in a supervisory or managerial capacity with the State of Tennessee.

In conducting the mediation, the

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rules require that the appointing authority (or his designee) must attend, and an agreement to mediate must be executed by all participants. Each party is authorized to have a representative present, although that representative is only allowed to participate in an advisory capacity, and not as an advocate. If an agreement is reached, it must be approved by the appointing authority, and any participant is authorized to have their representative review any settlement agreement prior to signing. The agreement does not become a part of the employee's personnel file, although if the mediation involves an appeal to the Board of Appeals, the agreement must be provided to the board.

The issue of confidentiality raises unique issues in the mediation of public sector employment complaints. While confidentiality is typically a cornerstone of the mediation process generally, there is currently no exception in the Tennessee Open Records Act that would render mediation documents confidential. Accordingly, the rules provide and the mediation agreement reflects that to the extent permitted by law, the Department of Human Resources will attempt to maintain the confidentiality of all documents related to the mediation process, and further that any verbal communication made during the mediation process shall be held in confidence by the participants and the mediator and not utilized in any subsequent proceeding. The agreement to mediate also provides that the parties agree not to subpoena the mediator or his notes in any subsequent proceeding unless that proceeding involves misconduct by the mediator or enforcement of the settlement agreement.

Training and Certification. The program designed by the Department of Human Resources is modeled after the "shared neutral" programs utilized in the federal sector and in several other states with employee mediation programs. Under this type of program, the agency responsible for administration of the mediation program maintains a list of appropriately trained mediators who are available to conduct mediations of state employee complaints. When a request for mediation is filed, the program administrator selects a team of two mediators from departments or agencies other than the one in which the involved parties are employed. These employee-mediators generally serve without additional compensation, subject to the consent of the head of their department or agency.

This is essentially how the Tennessee program is designed. The mediation rule provides that the Department of Human Resources will maintain a list of state-affiliated mediators approved to conduct mediations under the program. The program requires that no mediator can serve in a case involving a workplace issue in the same department or agency in which the mediator is employed. Any state employee desiring to be listed on the panel must have satisfactorily completed training for listing as a Rule 31 General Civil Mediator, approved by the Alternative Dispute Resolution Commission of the Tennessee Supreme Court. In addition to the required training, any mediator desiring to be listed on the panel must have the permission and support of their appointing authority, and the approval of the Commissioner of the Department of Human Resources. In anticipation of the implementation of the act and the mediation program, the department has already completed the required training for the first group of mediators that will be utilized in the administration of the program.

Conclusion

For more than 70 years, Tennessee state government operated under an antiquated patchwork of laws and regulation with respect to its human resource management and civil service law. The TEAM Act provides objective and performance-based hiring and retention procedures, an efficient complaint and administrative appeal procedure, and an employee mediation process — all of which have significance to attorneys in both the public and practice sectors who deal with this segment of the Tennessee workforce. With more than 40,000 Tennessee employees now covered by the new TEAM Act, its significance cannot be overstated.

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Notes

1. Public Chapter 800 (2012).
2. Public Chapter 221 (1939).
3. The law does not apply to employment in the legislative or judicial branch, constitutional officers, the University of Tennessee or Board of Regents systems, the Tennessee Higher Education Commission, the Tennessee Advisory Commission on Intergovernmental Relations, or the Tennessee Housing Development Agency.
4. The notice period is reduced to 14 days if the State's "rainy day fund" falls below $200 million.
5. Seniority will be the primary consideration in establishing the order of layoff until July 1, 2013.
6. For purposes of seniority consideration in layoffs, veterans are credited with an additional 60 months of seniority.
7. If the suspension is less than three days, the employee's right to appeal terminates with Step II of the appeal procedure outlined below.
8. No remedy granted under the appeal procedure can extend back more than 30 days prior to the filing of the complaint.