

State Police Commission

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August 18, 1995

General Circular No. 49

- To: State Police Commission Members, Colonel Paul Fontenot, Russell Culotta, Fcye Lowe, Walt Smith, William Spencer, Baxter Welch, Walter Smith, Floyd Falcon and LSTA Affiliate Presidents
- Re: Adoption of Rule 2.9.1; Revision of Rule 2.10 (a) and (b); and Repeal of Rules 2.10 (c), (d) and (e)

The State Police Commission will hold a public hearing on Monday, September 18, 1995, at 9:00 a.m. in the Conference Room, Eleventh Floor, Wooddale Towers Building, 1885 Wooddale Boulevard in Baton Rouge, Louisiana to consider adoption, revision and repeal of the following State Police Commission Rules.

2.9.1 Approval by Director of Personal Services Contracts.

All contracts entered into between the Office of State Police and all persons rendering personal services to or on behalf of the Office of State Police shall, prior to the effective date of the contract, be submitted to the Director of the State Police Commission for review. After review in conformity with State Police Commission Rule 3.1 (o), the Director shall either approve or disapprove such and, in the latter event, shall state the position to which such services are or may be assigned.

2.10 Adoption, Amendment or Repeal of Rules; Emergency Rule Changes.

- (a) Except as provided for herein in Rule 2.10 (b), the adoption, amendment or repeal of any rule shall be approved by the Commission only upon thirty (30) days written notice and approval after a public hearing.
- (b) If the Commission finds that an imminent peril to the public health, safety, or welfare or another emergency requires adoption of a rule change without compliance with Rule 2.10 (a), the adoption, amendment or repeal of any rule may be approved by the Commission upon statement of such of record and without compliance with the provisions of Rule 2.10 (a).
- (c) Repealed.

(d) Repealed.

(e) Repealed.

Please review these revisions and furnish, as soon as possible, any comments which you consider pertinent. If you would like to appear before the Commission and present your comments orally, you are invited to do so. Please notify Gilda Russ by September 6, 1995 of your intention to address the Commission in order to be placed on the agenda.

Please post this General Circular prominently so that all employees will receive notice of this hearing.

If any special accommodations are needed, please notify us prior to the hearing date

Sincerely,



Debra L. Johnson
Director

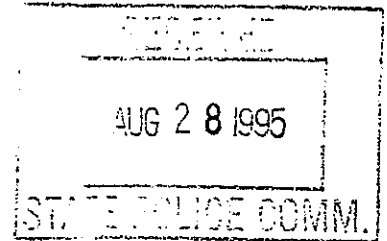


STATE OF LOUISIANA
DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS
PUBLIC SAFETY SERVICES

EDWIN W. EDWARDS
GOVERNOR

COL. PAUL W. FONTENOT
DEPUTY SECRETARY

August 25, 1995



DEBRA L. JOHNSON, Director
State Police Commission
Post Office Box 66555
Baton Rouge, LA 70896-6555

RE: General Circular No. 49

Dear Ms. Johnson:

Your above-captioned circular requested any comments its recipients consider pertinent regarding proposed revisions of two rules, including Rule 2.10, on the Adoption, Amendment or Repeal of Rules, and on Emergency Rule Changes. This comment concerns the proposed changes to Rule 2.10.

While I certainly understand and agree with the desire for a simple and effective method of adopting and amending rules, there are factors, to which I call your attention below, which may complicate matters.

The Louisiana Administrative Procedure Act (APA), dating from 1966, has always included provisions addressing rulemaking by agencies of the State. The APA provides a procedural framework for publishing rules and filing information with the "Department of the State Register". R.S. 49: 952. It has a complicated procedure for adopting and publishing rules. R.S. 49: 953, 954, 954.1, 968.

Whether civil service commissions were exempt from those APA rulemaking provisions under the 1921 Louisiana Constitution, I can't say. However, the 1974 Louisiana Constitution includes a new provision, apparently applicable to civil service commissions as much as other agencies, requiring that rules be set out in Administrative Agency Codes:

Rules, regulations, and procedures adopted by all state administrative and quasi-judicial agencies, boards, and commissions shall be published in one or more codes and made available to the public.

Louisiana Constitution, Article 12, Section 14.
Emphasis supplied. Copy enclosed.

DEBRA L. JOHNSON, August 25, 1995, p. 2

Shortly after the 1974 Constitution went into effect, the Legislature added section 954.1 to the APA, copy enclosed. It established the Louisiana Administrative Code, designed to contain the rules of all Executive Branch agencies, or reference thereto. I suggest that this section is clearly within the authority of the Legislature to implement the then-new constitutional provision on agency rules.

The rulemaking authority and mechanism of the State Police Commission is described in the Constitution in these brief words:

The commission is vested with broad and general rulemaking and subpoena powers Rules adopted pursuant hereto shall have the effect of law and be published and made available to the public.

Louisiana Constitution, Article 10, Section 48.
Emphasis supplied.

The requirement that SPC rules be published is consistent with that in the above-mentioned Article 12, Section 14, referring to all agencies.

It seems likely to me that SPC rules, like other agency rules, are legislatively intended to be included or referenced in a single agency codal source, the Louisiana Administrative Code. Statutory and jurisprudential authority supports this notion, and the related idea that, as part of the publishing process, civil service rules must be adopted using APA rulemaking procedures. Here are the authorities of which I am aware:

First, the APA itself claims to apply to all State commissions and other agencies, excepting the Legislature, courts, and political subdivisions. R.S. 49: 951(2), 951(6).

Second, in connection with rulemaking procedures, the APA specifically refers to, and only partially exempts, the State Civil Service Commission. It says "The provisions of R.S. 49:968(F)(4)* and 970* shall not be applicable to any rule promulgated by the State Civil Service Commission or the Public Service Commission." R.S. 49: 967(B). (*NOTE: There is no APA section 968(F)(4). However, since the expressed purpose of section 968 is to provide legislative review of rulemaking as an extension of the legislative lawmaking function, it is doubtful that section 968 applies at all to civil service rulemaking. Section 970 allows the Governor to veto or suspend a rule within 30 days of adoption.)

DEBRA L. JOHNSON, August 25, 1995, p. 3

The obvious implication of stating an exception in R.S. 49: 967(B) is that the APA is generally applicable to civil service rulemaking.

Third, the Court of Appeal, First Circuit, citing APA section 967, has indicated that the APA applies to civil service commission proceedings, except where the APA conflicts with the Constitution or civil service rules. Howard v. Housing Authority of New Orleans, 457 So.2d 834 (La.App. 1 Cir. 1984). Extract enclosed.

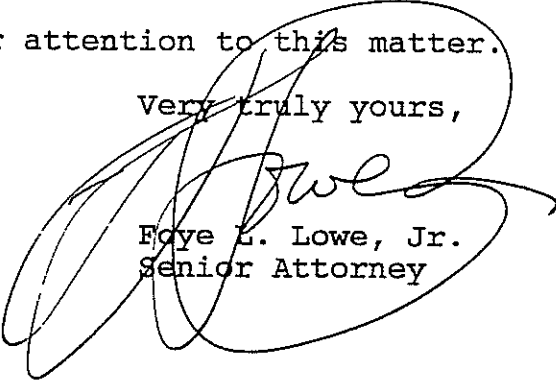
Of course, as in all legal issues, there may be legal sources which may shed a different light on the matter. However, it seems reasonable to me that a strong argument can be made that, as the law stands, civil service rules must be made in compliance with appropriate provisions of the APA.

I'll try to summarize my comment in the following simplification:

The constitution requires administrative rules to be published and readily available to the public in a codal form. Implementing legislation sets up a complex rulemaking and codification procedure under the APA. It is desirable to avoid the complex, burdensome APA rulemaking procedure, so that civil service rules can be responsive to administrative needs and legal developments. Legislative change may be needed to exempt civil service commissions from unnecessary pre-codification rulemaking procedures.

Thank you for your attention to this matter.

Very truly yours,



Eloy L. Lowe, Jr.
Senior Attorney

FLL/ele

Attachments

cc: JAMES C. DIXON, Chief Attorney
CAPT. JOE FOLSE, IA
CAPT. J. T. BOOTH, Op. Dev.

Art. 12, § 11 CONSTITUTION OF 1974

til normal processes of government can be reestablished in accordance with the constitution and laws of the state; and, except as otherwise provided by this constitution, for the prompt and temporary succession to the powers and duties of public offices when incumbents become unavailable to perform their functions.

§ 12. Corporations; Perpetual or Indefinite Duration; Dissolution; Perpetual Franchises or Privileges

Section 12. Neither the state nor any political subdivision shall grant a perpetual franchise or privilege; however, the legislature may authorize the organization of corporations for perpetual or indefinite duration. Every corporation shall be subject to dissolution or forfeiture of its charter or franchise, as provided by general law.

§ 13. Prescription Against State

Section 13. Prescription shall not run against the state in any civil matter, unless otherwise provided in this constitution or expressly by law.

§ 14. Administrative Agency Codes

Section 14. Rules, regulations, and procedures adopted by all state administrative and quasi-judicial agencies, boards, and commissions shall be published in one or more codes and made available to the public.

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§ 954.1. Louisiana Administrative Code and Louisiana Register; publication; distribution; copies; index; interagency rules

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9:953(C)),

A. The Department of the State Register shall compile, index, and publish a publication to be known as the Louisiana Administrative Code, containing all effective rules adopted by each agency subject to the provisions of this Chapter, and all boards, commissions, agencies and departments of the executive branch, notwithstanding any other provision of law to the contrary. The Louisiana Administrative Code shall also contain all executive orders issued by the governor on or after May 9, 1972, which are in effect at the time the Louisiana Administrative Code is published. The Louisiana Administrative Code shall be supplemented or revised as often as necessary and at least once every two years.

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B. The Department of the State Register shall publish at least once each month a bulletin to be known as the Louisiana Register which shall set forth the text of all rules filed during the preceding month and such notices as shall have been submitted pursuant to this Chapter. It shall also set forth all executive orders of the governor issued during the preceding month and a summary or digest of and fiscal note prepared for each such order as required by the provisions of R.S. 49:215. In addition, the Department of the State Register may include in the Louisiana Register digests or summaries of new or proposed rules; however, if any conflict should arise between the written digest of a rule and the rule, the rule shall take precedence over the written digest.

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C. The Department of the State Register may omit from the Louisiana Register or Louisiana Administrative Code any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the Louisiana Register or Louisiana Administrative Code, as the case may be, contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

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D. One copy, or multiple copies if practical, of the Louisiana Register and Louisiana Administrative Code shall be made available upon request to each agency of the state free of charge and to other persons at prices fixed by the Department of the State Register to recover all or a portion of the mailing and publication costs.

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E. The Department of the State Register shall prescribe a uniform system of indexing, numbering, arrangement of text and citation of authority and history notes for the Louisiana Administrative Code.



F. The Department of the State Register may publish advertisements for bids and other legal notices in the Louisiana Register in addition to other publications thereof required by law.

and Proce-

G. The Department of the State Register is hereby authorized and empowered to promulgate and enforce interagency rules for the implementation and administration of this Section.

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H. The governor shall be the publisher of the Louisiana Administrative Code and Louisiana Register provided for through the Department of the State Register.

Added by Acts 1974, No. 284, § 1, eff. Jan. 1, 1975. Amended by Acts 1975, No. 730, § 1; Acts 1976, No. 279, § 1; Acts 1978, No. 252, § 1; Acts 1982, No. 687, § 1, eff. Aug. 2, 1982.

History and Source of Law

As enacted by Acts 1974, No. 284, § 1, this section read:

"A. The division of administration shall compile, index, and publish a publication to be known as the Louisiana Administrative Code, containing all effective rules adopted by each agency subject to the provisions of this chapter, and all boards, commissions, agencies and departments of the executive branch, notwithstanding any other provision of law to the contrary. The Louisiana Administrative Code shall also contain all executive orders issued by the governor on or after January 1, 1975. The Louisiana Administrative Code shall be supplemented or revised as often as necessary and at least once every two years.

"B. The division of administration shall publish a monthly bulletin to be known as the Louisiana Register setting forth the text of all rules filed during the preceding month, such notices as shall have been submitted pursuant to this Chapter and all executive orders of the governor issued during the preceding month. In addition, the division of administration may include in the Louisiana Register digests or summaries of new or proposed rules; however, if any conflict should arise between the written digest of a rule and the rule, the rule shall take precedence over the written digest.

"C. The division of administration may omit from the Louisiana Register or Louisiana Administrative Code any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the Louisiana Register or Louisiana Administrative Code, as the case may be, contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

"D. One copy, or multiple copies if practical, of the Louisiana Register and Louisiana Administrative Code shall be made available upon request to agencies and officials of the state free of charge and to other persons at prices fixed by the division of administration to cover mailing and publication costs. The division of administration may create a revolving fund to finance publication and distribu-

tion of the Louisiana Register and the Louisiana Administrative Code. In any case, self-generated revenues obtained from the sale or distribution of the Louisiana Administrative Code and the Louisiana Register shall be retained by the division of administration.

"E. The division of administration shall prescribe a uniform system of indexing, numbering, arrangement of text and citation of authority and history notes for the Louisiana Administrative Code.

"F. The division of administration may publish advertisements for bids and other legal notices in the Louisiana Register in addition to other publications thereof required by law.

"G. The division of administration is hereby authorized and empowered to promulgate and enforce interagency rules for the implementation and administration of this section.

"H. The governor shall be the publisher of the Louisiana Administrative Code and Louisiana Register provided for through the division of administration."

In this section as set forth in Acts 1974, No. 284, "January 1, 1975" was substituted for "the effective date of this section" in the second sentence of subsec. A and capitalization and punctuation changes were made on authority of R.S. 24:253.

The 1975 amendment changed the date at the end of the second sentence of subsec. A from "January 1, 1975" to "May 9, 1972"; added "which are in effect at the time the Administrative Code is published" to the same sentence; substituted, in the first sentence of subsec. B "at least once each month a bulletin" for "a monthly bulletin", and "which shall set forth" for "setting forth"; and substituted, in the first sentence of subsec. D "to each agency of the state" for "to agencies and officials of the state", and "to recover all or a portion of the mailing and publication costs" for "to cover mailing and publication costs"; and deleted the second and third sentences of subsec. D relating to a revolving fund for financing publication and distribution and retention of self-generated revenues by the division of administration (see 1974 note, ante, for text of the deleted sentences).

WEST'S
LOUISIANA STATUTES
ANNOTATED

REVISED STATUTES

Official Classification

Sections 49:1 to 51:470

Volume 27A

1995

Cumulative Annual Pocket Part

Replacing 1994 pocket part supplementing 1987 main volume

**Includes laws through the 1994
Regular and Fourth Extraordinary Sessions**

WEST PUBLISHING CO.
ST. PAUL, MINN.

...three sentences from ... (i), the remaining ... 386 were designated as item ... from Act 119 was design- ... pursuant to the statutory revi- ... Louisiana State Law Insti-

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...ublication in the Louisiana ... except that:

(2) Subject to applicable constitutional or statutory provisions, an emergency rule shall become effective on the date of its adoption, or on a date specified by the agency to be not more than sixty days future from the date of its adoption, provided written notice is given within five days of the date of adoption to the governor of Louisiana, the attorney general of Louisiana, the speaker of the House of Representatives, and the president of the Senate, and the Department of the State Register as provided in R.S. 49:953(B). Such emergency rule shall not remain in effect beyond the publication date of the Louisiana Register published in the month following the month in which the emergency rule is adopted, unless such rule and the reasons for adoption thereof are published in said issue; provided, however, that any emergency rule so published shall not be effective for a period longer than one hundred twenty days, except as provided by R.S. 49:967 (D), but the adoption of an identical rule under Paragraphs (1), (2) and (3) of Subsection A of R.S. 49:953 is not precluded. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

Amended by Acts 1990, No. 248, § 1; Acts 1990, No. 1085, § 1, eff. July 31, 1990.

Historical and Statutory Notes

Acts 1990, No. 248, § 1, in par. B(2), inserted "except as provided by R.S. 49:967(D)," in the second sentence and made nonsubstantive punctu- ation changes.

Acts 1990, No. 1085, § 1, eff. July 31, 1990, in par. B(2), inserted "the speaker of the House of Representatives, and the president of the Senate," into the first sentence.

Both Acts 1990, No. 248, § 1 and Acts 1990, No. 1085, § 1, effective July 31, 1990 amended par.

B(2). On authority of R.S. 24:253 the amendments were merged by printing the paragraph as set out in Act 1085, and inserting in the penultimate sentence, "except as provided by R.S. 49:967(D)" from Act 248.

Uniform Law:

This section is similar to § 4 of the Uniform State Administrative Procedure Act. See 15 Uni- form Laws Annotated, Master Edition.

Notes of Decisions

Disapproval by legislative committee 4
Fiscal impact statement 3

that it was in fact adopted. Bower v. Schumpert Medical Center, App. 2 Cir.1993, 618 So.2d 600.

3: Fiscal impact statement

1. Compliance with statutory requirements

Racing Commission's list of designated referees testing facilities complied with procedural rules; list was not a "rule," required to be adopted and promulgated in accordance with statute. Broussard v. Louisiana State Racing Com'n, App. 4 Cir.1993, 619 So.2d 668.

Promulgation of a proposed rule cannot proceed without fiscal and economic impact statements which are acceptable to, and approved by, the Legislative Fiscal Office. Op.Atty.Gen., No. 87-752, Nov. 9, 1987.

Proposed rules or changes to existing rules should state the fiscal impact of the proposal regardless of the fact that the rule is merely implementing some procedural requirement. Op.Atty. Gen., No. 87-752, Nov. 9, 1987.

Louisiana Patient's Compensation Fund (PCF) failed to comply with Louisiana Administrative Procedure Act requirements for as to its rule regarding nonpayment of relatives for nursing care or custodial care rendered to patient; notice requirement was not complied with and rule was never promulgated in Louisiana register, and there were no documents indicating when rule was approved or any written data in the record showing:

4. Disapproval by legislative committee

Any rule adopted in a group of rules by the Louisiana Motor Vehicle Commission which contains provisions declared invalid by the legislative subcommittee with the concurrence of the governor is invalid in its entirety. Op.Atty.Gen., No. 84-286, March 29, 1984.

§ 954.1. Louisiana Administrative Code and Louisiana Register; publication; distribution; copies; index; interagency rules

[See main volume for A and B]

C. The Department of the State Register shall publish such rules, notices, statements, and other such matters as submitted by the rulemaking agency without regard to their validity. However, the State Register may omit from the Louisiana Register or Louisiana Administrative Code any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on

application to the adopting agency, and if the Louisiana Register or Louisiana Administrative Code, as the case may be, contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

Amended by Acts 1993, No. 119, § 1.

D. One copy, or multiple copies if practical, of the Louisiana Register and Louisiana Administrative Code shall be made available upon request to state depository libraries free of charge, and to other agencies or persons at prices fixed by the department of the state register to recover all or a portion of the mailing and publication costs. Notwithstanding the provisions of R.S. 49:951(2) of this Chapter to the contrary, the department of the state register shall provide free copies of the Louisiana Register and the Louisiana Administrative Code to the David R. Poynter Legislative Research Library, the Senate Law Library, and the Huey P. Long Memorial Law Library.

Amended by Acts 1988, No. 604, § 1, eff. July 14, 1988; Acts 1988, No. 937, § 1, eff. July 26, 1988; Acts 1990, No. 9, § 2.

[See main volume for E to H]

Historical and Statutory Notes

Subsection D was amended by Acts 1988, No. 604, § 1, eff. July 14, 1988, and Acts 1988, No. 937, § 1, eff. July 26, 1988. On authority of R.S. 24:253, the text of subsec. D as set forth in Acts 1988, No. 937, § 1 (the first sentence of which was substantially identical to the text of subsec. D as set forth in Acts 1988, No. 604, § 1) was printed, and a comma was inserted following "free of charge" and "prices" was substituted for "price" in the first sentence therein. See main volume for prior text of subsec. D.

The 1990 amendment, in the second sentence of subsec. D, substituted "David R. Poynter" for "House".

The 1993 amendment, in subsec. C, inserted the first sentence relating to publication of agency submissions without regard to their validity; and substituted, at the beginning of the second sentence, "However, the State Register" for "The Department of the State Register".

§ 954.2 Unified Oil and Gas Development Regulatory Index; summary

A. All regulatory agencies which have authority to issue or promulgate any general or special rule or regulation, or which issue, monitor compliance with, or otherwise regulate any permit or license, relative to oil and gas development, all as defined in this Section, shall index and summarize the rules or regulations in a manner which, if the language of the rule or regulation has general applicability to other types of businesses or other situations, plainly state or otherwise indicate:

- (1) The extent of their applicability to oil and gas development.
- (2) The types of permits or licenses which will be required, or which may be required, of any entity in the oil and gas development business.

B. Such index and summaries shall be filed with the office of the commissioner of conservation within the Department of Natural Resources, hereafter referred to as "the commissioner", by December 1, 1992. The commissioner shall make a written acknowledgment of his receipt of the index and summaries and the date thereof.

C. Any agency required to index and summarize its rules and regulations related to oil and gas development shall also file with the commissioner the information required in Subsection A regarding any agency rule or regulation which is finally promulgated or adopted after December 1, 1992, within twenty days of such final promulgation or adoption, along with an indication of its place in the index and summary previously filed with the commissioner.

D. The commissioner may make a written critique of any submission of an index and summaries which the commissioner determines to be unclear or confusing as it relates to oil and gas development, which critique shall contain reasons and/or clarifying questions. The agency shall respond to the critique in a form acceptable to the commissioner within twenty days. It is the intention of this Section that the various departments and offices which have authority to issue rules and regulations under law retain that authority. The commissioner shall only have the authority under this Section to critique submitted indexes and summaries so as to require a satisfactory response to his written reasons or questions concerning how they relate to oil and gas development.

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application that Mrs. Kyle did not possess the minimum qualifications for the Attorney V classification.

A public hearing was held by the Civil Service Commission on March 2, 1983. Mrs. Kyle was never made a party to this proceeding. In fact, she was subpoenaed as a witness and then sequestered from the hearing rendering her unable to participate in any way. The Commission, while finding no discrimination or other ill practices by the appointing authority, nevertheless, proceeded to render a decision which demoted Mrs. Kyle on the grounds that she did not possess the minimum qualifications for an Attorney V classification. The decision specifically provided, "... The promotion and pay change effective November 11, 1982 for Dorothy J. Kyle is therefore rescinded as if it had never been granted."

Mrs. Kyle subsequently appealed this decision by the Commission and also applied to this court for a stay of execution.¹ On July 12, 1983, this court ordered that a writ of mandamus be issued staying that portion of the decision of the Commission which might require Mrs. Kyle to reimburse the agency for the pay change effective November 11, 1982, until further order of the court.

Appellant filed in this court contemporaneously with her appeal the peremptory exception of nonjoinder of an indispensable party.

A review of the record reveals the fact that the Commission did not follow its own prescribed procedures for demoting a Civil Service employee. The Commission proceeded to rescind Mrs. Kyle's promotion even though she was not made a party to a hearing that originated as a discrimination action initiated by Mr. Donchess. This assumption of power not only violates procedural due process but also the Commission's own rules.

A review of the Civil Service Rules reveals that the Commission had two options. The Commission, under Ch. 16 of the Civil

1. We specifically note that although appellant was not a party to the original hearing, this case is properly before us through appellant's use of La.C.C.P. art. 2086. This article provides that "a

Service Rules, could have conducted a preliminary investigation to ascertain whether Mrs. Kyle was qualified for an Attorney V classification. Mrs. Kyle would have been made a respondent and given the opportunity to defend her position at a public hearing. The Commission also had the option to remand the issue of Mrs. Kyle's qualifications to the appointing authority. The appointing authority could then, under Ch. 12 of the Civil Service Rules, demote Mrs. Kyle, but only for cause. Mrs. Kyle would be provided written detailed reasons for the action taken along with written notice of her right to appeal the action to the Commission within 30 days. Under either of the above alternatives Mrs. Kyle would be a party to the proceedings and given the opportunity to defend. Accordingly, we reverse the decision of the Commission that retroactively rescinded Mrs. Kyle's promotion without her being made a party to the proceedings in accordance with the Civil Service Rules.

For the foregoing reasons, the decision of the Commission is reversed. All costs of this appeal are to be borne by the Commission.

REVERSED.



Wayne HOWARD

v.

HOUSING AUTHORITY OF
NEW ORLEANS.

No. 83 CA 1143.

Court of Appeal of Louisiana,
First Circuit.

Oct. 9, 1984.

Public employee was discharged from employment on charges of unauthorized

person who could have intervened in the trial court may appeal, whether or not any other appeal has been taken."

Conflicts w/ CONSTIT or Comm'n Rules

HOWARD v. HOUSING AUTHORITY OF NEW ORLEANS La. 835

Cite as 457 So.2d 834 (La.App. 1 Cir. 1984)

absence from assigned work area, unauthorized use of agency vehicle, and falsification of work reports. The Civil Service Commission upheld termination, and employee appealed. The Court of Appeal, Lanier, J., held that: (1) letter of termination set forth with required particularity charges against employee; (2) agency's alleged failure to comply with subpoena duces tecum was not prejudicial error; (3) witnesses against employee were not required to sign letter of termination; (4) evidence was sufficient to support charges; and (5) penalty of discharge from employment was reasonable.

Affirmed.

1. Officers and Public Employees ⇐69.8

Purpose of rule requiring that public agency give employee statement in writing of detailed reasons for its proposed removal of employee is to apprise employee in detail of charges and to limit any subsequent proceedings to stated reasons.

2. Evidence ⇐268

Evidence of anonymous phone call to agency which informed it that agency employee was not at his proper place of work did not constitute inadmissible hearsay, inasmuch as such evidence was not introduced to show truth of matters alleged in call, but only to demonstrate why agency officials sought to check on employee's whereabouts.

3. Officers and Public Employees ⇐69.8

Letter notifying public employee of his termination on charge of unauthorized absence did not violate rule requiring detailed statement of reasons for action merely because it made reference to anonymous phone call informing agency that employee was not at his assigned station, inasmuch as evidence of anonymous phone call was not used to prove charges against employee, but was offered only to show what caused agency officials to commence investigation.

4. Officers and Public Employees ⇐72(1)

Where counsel for removed agency employee merely stated at hearing that he was not satisfied with agency's compliance with subpoena duces tecum and that it would be difficult to proceed, but did not ask for sanctions against agency or continuance to secure necessary records, he thereby waived his objection to agency's response.

5. Officers and Public Employees ⇐72(2)

Agency's failure to produce records requested by discharged employee was not prejudicial error, where failure in no way affected employee's ability to establish fact for which evidence was sought.

6. Officers and Public Employees ⇐69

Rules established by State Civil Service Commission have effect of law, and even prevail over acts of legislature which may be in conflict with them. LSA-Const. Art. 10, § 10(A), (A)(4).

7. Evidence ⇐77(1)

Failure to call witness who possesses knowledge of facts pertinent to case and whose absence is not satisfactorily explained results in inference that witness' testimony would be adverse.

8. Officers and Public Employees ⇐72(2)

Referee's reference to fact that neither employee nor certain agency official were called to testify at hearing on employee's removal did not warrant reversal of decision upholding removal, where comment was merely one of regret that available evidence to explain language of letter of termination was not presented by either side.

9. Officers and Public Employees ⇐72(2)

Erroneous first person references in agency's letter of termination to employee did not warrant reversal of decision upholding his termination, where letter did specifically advise employee of nature of disciplinary charges, date, time, and place of misconduct, and persons who could be called to testify about misconduct.

10. Officers and Public Employees ⇨69.8

It is not necessary to list witnesses in agency's letter of termination of employee unless they are directly involved in or directly affected by misconduct with which employee is charged.

11. Officers and Public Employees ⇨69.8

Where witnesses who appeared and testified against agency employee at hearing on his removal were listed in letter of termination, their testimony was not precluded merely because they did not sign letter; there was no requirement that letter of termination be signed by witnesses.

12. Officers and Public Employees ⇨72(2)

Fact that letter of termination of agency employee erroneously indicated that certain agency official was present to witness employee's unauthorized absence was not prejudicial error, where actual misconduct of employee was otherwise stated in sufficient detail.

13. Officers and Public Employees ⇨69.7

Legal cause for disciplinary action against public employee exists when conduct complained of impairs efficiency of the public service and bears real and substantial relation to efficient and orderly operation of public service in which employee is engaged.

14. Officers and Public Employees ⇨72(2)

Burden of proof on appeal in disciplinary action against public employee, as to facts, is on appointing authority; charges must be proven by preponderance of evidence, which means evidence that is of greater weight or more convincing than that offered in opposition to it.

15. Officers and Public Employees ⇨72(2)

Final decision of State Civil Service Commission is subject to review by Court of Appeal upon any question of law or fact. LSA-Const. Art. 10, § 12(A).

16. Officers and Public Employees ⇨72(2)

Where referee or Civil Service Commission hearing appeal of public employee's removal heard testimony of witnesses and observed their appearance and demeanor, standard of appellate review of facts used by Court of Appeal is same standard used in reviewing decisions from district courts; factual determinations of Commission will not be set aside unless they are shown to be manifestly erroneous, i.e., clearly wrong.

17. Officers and Public Employees ⇨72(2)

When Civil Service Commission hearing appeal of public employee only reviews transcripts or listens to taped testimony, its ability to assess weight of evidence is no different from that of appellate court, and, in such situation, Court of Appeal must only determine sufficiency and preponderance of evidence.

18. Officers and Public Employees ⇨72(1)

In public employee's appeal from his termination on charge of unauthorized absence, evidence was insufficient to establish his contention that he got sick on the job and only went to his home to get medicine for his asthma condition.

19. Officers and Public Employees ⇨69.7

Fact that public employee was paid for eight hours work on date he was subsequently found to have committed unauthorized absence did not preclude him from being charged with falsification of work report, where, at time of payment, no decision had been made on unauthorized absence charges.

20. Officers and Public Employees ⇨72(1)

In public employee's appeal from his termination of employment, evidence that employee and co-worker to whom agency vehicle had been assigned were found together away from their assigned station supported finding that employee aided and abetted co-worker in unauthorized use of agency vehicle.

21. Officers and Public Employees ⇨69.7

Agency's minor error in designating address of assigned work area did not render its termination of employee for unauthorized absence improper, in light of evidence that employee had been at home when he was scheduled to be at different work area.

22. Officers and Public Employees ⇨69.7

Repeated infractions by public employee may justify his dismissal.

23. Officers and Public Employees ⇨69.7

Evidence of public employee's prior suspensions, reprimands, or poor service ratings may be included in letter of dismissal, as they are relevant to ultimate question of whether employee was dismissed for cause, or they may be considered in determining appropriate punishment.

24. Officers and Public Employees ⇨72(2)

Public employee's prior suspension for unauthorized use of agency vehicle was properly admitted in employee's appeal from his removal on subsequent charges of unauthorized absence and unauthorized use of vehicle to show that employee had direct personal knowledge of what constituted unauthorized use of vehicle and as relevant to issue of appropriate punishment.

25. Officers and Public Employees ⇨69.8

Fact that letter informing public employee of prior suspension did not contain notice of his right to appeal did not preclude proof of prior suspension in regard to employee's termination on basis of later charges.

26. Officers and Public Employees ⇨72(1)

Civil Service Commission has much discretion in determining appropriate disciplinary action against public employee when legal cause for such has been established.

27. Officers and Public Employees ⇨72(2)

Decision of Civil Service Commission assessing disciplinary penalty is question

of law and fact subject to review by Court of Appeal. LSA-Const. Art. 10, § 12(A).

28. Officers and Public Employees ⇨72(1)

Except where it is in conflict with Constitution or civil service rules, Louisiana Administrative Procedure Act is applicable to proceedings of Civil Service Commission. LSA-R.S. 49:967.

29. Officers and Public Employees ⇨72(2)

In judging Civil Service Commission's exercise of its discretion in determining appropriate punishment for public employee, Court of Appeal shall not modify or reverse Commission's judgment unless it is arbitrary, capricious, or characterized by abuse of discretion. LSA-R.S. 49:964, subd. G(5).

30. Officers and Public Employees ⇨69.7

Public employee was properly discharged from employment for absenting himself from his assigned place of work, participating in unauthorized use of agency vehicle, and falsifying his work records to secure payment for work not performed.

Joel P. Loeffelholz, Jacobs, Loeffelholz & Trestman, New Orleans, for appellant.

Dennis Dannel, Gerdes & Valteau, New Orleans, for appellee.

Robert R. Boland, Jr., Civil Service Legal Counsel, Dept. of State Civil Service, Baton Rouge, for Herbert L. Sumrall.

Before COLE, CARTER and LANIER, JJ.

LANIER, Judge.

This is an appeal from a decision of the State Civil Service Commission (Commission) which affirmed the action of the Housing Authority of New Orleans (HANO) terminating a classified employee.

PROCEDURAL FACTS

By letter dated July 2, 1982, Wayne Howard was terminated effective that date

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ty is a question of law and fact and is subject to review by this court. La. Const. of 1974, art. X, § 12(A). Except where it is in conflict with the Constitution or Civil Service Rules, the Louisiana Administrative Procedure Act is applicable to proceedings of the Commission. La.R.S. 49:967; *Smith v. Department of Health and Human Resources*, 416 So.2d at 96. In most administrative proceedings, there is a right to appellate review from the appointing authority to the district court. La.R.S. 49:964. However, appeals from the Commission bypass the district court and come directly to this court. La. Const. of 1974, art. X, § 12(A). La.R.S. 49:964(G) defines the standards for appellate review by the district court when an appeal comes from an agency to it. Similar provisions have not been made in the Administrative Procedure Act for appeals to a court of appeal. La.R.S. 49:965. By analogy, the same standard of appellate review should be applicable. Accordingly, we hold that in judging the Commission's exercise of its discretion in determining an appropriate punishment, this court shall not modify or reverse the Commission's judgment unless it is arbitrary, capricious or characterized by abuse of discretion. Cf. La.R.S. 49:964(G)(5); *Walters v. Department of Police of the City of New Orleans*, 454 So.2d 106 (La. 1984); *Newman v. Department of Fire*, 425 So.2d 753 (La.1983); R. Force and L. Griffith, *The Louisiana Administrative Procedure Act*, 42 La.L.Rev. 1227, 1284-5 (1982). After reviewing the record, pursuant to this standard, we find that the Commission's assessment of punishment was not arbitrary, capricious or an abuse of discretion.

These assignments of error are without merit.

DECREE

For the foregoing reasons, the rulings of the Commission are affirmed at the appellant's costs.

AFFIRMED.

STATE of Louisiana

v.

Marshall SMITH.

No. 84 KA 0042.

Court of Appeal of Louisiana,
First Circuit.

Oct. 9, 1984.

Defendant was convicted upon guilty plea by the Nineteenth Judicial District Court, Parish of East Baton Rouge, Leo P. Higginbotham, J., of possession of a controlled dangerous substance, sentenced to four years, and he appealed. The Court of Appeal, Savoie, J., held that the sentence was neither grossly disproportionate to the severity of the crime nor a needless imposition of pain and suffering.

Affirmed.

1. Criminal Law ⇐1178

Assignment of error which was not briefed on appeal was considered abandoned. Uniform Rules, Courts of Appeal, Rule 2-12.4, 8 LSA-R.S.

2. Criminal Law ⇐986.2(4)

Trial court's consideration of criminal activity for sentencing purposes is not limited to convictions. LSA-C.Cr.P. arts. 894.1, 894.1, subd. B (7).

3. Criminal Law ⇐986(3), 1086.13

Trial court need not articulate every aggravating and mitigating circumstance for imposing sentence; record need only reflect the trial court adequately contemplated statutory sentencing guidelines. LSA-C.Cr.P. art. 894.1.

4. Criminal Law ⇐986(3)

Trial judge's articulation of his reasons for imposition of four-year sentence for