

# State Police Commission

Post Office Box 66555  
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June 04, 1996

General Circular No. 59

To: State Police Commission Members, Colonel William R. Whittington, Personnel, Legal, Retirement, LSTA, Walter Smith, Floyd Falcon and LSTA Affiliate Presidents

In Re: Amendment of Chapters 1 and 12 of the State Police Commission Rules

The June 17, 1996 meeting of the State Police Commission has been canceled due to the lack of a quorum of members available on that date. Therefore, General Business Agenda items previously scheduled for that date will be considered at the July 15, 1996 meeting.

The State Police Commission will hold a public hearing on Monday, July 15, 1996, at 9:00 a.m. in the Conference Room, Eleventh Floor, Wooddale Towers Building, 1885 Wooddale Boulevard in Baton Rouge, Louisiana to consider amendment of Chapters 1 and 12 of the State Police Commission Rules. The amendments are attached hereto.

Please review this proposal and furnish, in writing, by July 03, 1996, 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. You must notify Gilda Russ by July 03, 1996 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 meeting date.

Sincerely,

*Debra L. Johnson*

Debra L. Johnson  
Director

Attachments

CHAPTER 1

DEFINITIONS

- 1.5.2 a. **Cause** - Conduct which impairs the efficiency of the public service being rendered and which bears a real and substantial relation to the efficient operation of that public service.

## CHAPTER 12

### DISCIPLINARY ACTIONS, REMOVALS AND RESIGNATIONS

#### 12.1 Appointing Authority

A disciplinary action and other action authorized by this chapter may be taken only by the appointing authority.

#### 12.2 Cause; Disciplinary Actions

- (a) A permanent employee may only be disciplined or removed for cause as defined in Rule 1.5.2 a.
- (b) Disciplinary actions include only the following: removals, suspensions without pay, reductions in pay, involuntary demotions and written reprimands.

#### 12.3 Restrictions On Suspensions Without Pay and Reductions In Pay

- (a) Except as provided by Rule 12.4 and 12.5 or as ordered by the Commission or agreed to under Chapter 13 or Chapter 16, a suspension without pay may not exceed 90 consecutive calendar days.
- (b) No disciplinary reduction in pay may bring an employee's pay below the minimum of his pay range or below minimum wage.

#### 12.4 Emergency and Investigatory Suspensions

- (a) Where, in the judgment of the appointing authority, there is reason to suspect that an employee has engaged in conduct which would warrant disciplinary action, and the employee's continued presence on the job or performance of his duties reasonably poses a significant hazard or danger to health or safety or the impairment of the efficiency of the public service, the employee may be verbally suspended with pay.
- (b) When an employee is suspended under the provisions of this rule, if feasible, the employee shall first be informed of the intended suspension and the reasons therefor and the employee shall be given an opportunity to respond verbally at that time. If such is not feasible, or reasonably will significantly endanger the health, safety or efficiency of the public service, such shall not be required and, in that case, the employee shall merely be informed of the suspension.
- (c) A suspension under this rule shall not exceed thirty (30) calendar days without the prior approval of the Director. Upon sufficient reasons provided to her by the appointing authority, the Director may allow an extension of the suspension for an additional thirty (30) calendar days.
- (d) Every employee suspended under this rule shall, within fifteen (15) calendar days following the verbal suspension, be furnished with written reasons therefor, which shall contain all the details required by Rule 12.8 as

is then available to the appointing authority.

- (e) Upon completion of the investigation, the Director and the employee shall be notified in writing of the outcome of the investigation. Should the employee then be suspended without pay, the notification required hereby shall contain all the details required by Rule 12.8.
- (f) Notwithstanding any other provision of these Rules, an emergency or investigatory suspension with pay is not a disciplinary action and may not be appealed to the Commission, except on the basis of discrimination or a violation of the Article or these Rules.

#### 12.5 Suspensions Pending Criminal Proceedings

- (a) Upon the arrest of an employee and the request of the appointing authority, the Commission may allow the suspension of the employee during the pendency of the criminal proceedings. This suspension may be for such duration and under such conditions as the Commission may allow.
- (b) In such cases, the request of the appointing authority shall contain all the details required by Rule 12.8 as is then available to the appointing authority and which will not violate any confidence between the appointing authority and the investigating, arresting and/or prosecuting authority. Such request shall be furnished to the employee at or prior to the time it is furnished to the Commission.
- (c) Prior to allowing a suspension under this rule, the Commission shall allow the employee or his attorney a reasonable opportunity to appear before the Commission and respond.
- (d) Notwithstanding any other provision of these Rules, a suspension pending criminal proceedings is not a disciplinary action and may not be appealed to the Commission, except on the basis of discrimination or a violation of the Article or these Rules.

#### 12.6 Non-disciplinary Removals

- (a) An employee may be removed under the following circumstances:
  - 1. When he or she holds more than one position in the state service and the multiple employment causes an employing agency to be liable for overtime payments under the Fair Labor Standards Act and, after having been provided an opportunity to do so, the employee has refused to resign from one of the positions; and
  - 2. When the cause for a dismissal is not the employee's fault or when the employee fails to obtain or loses, as a result of conduct that was not work related, a license, commission, certificate or other accreditation that is legally required for his job.
- (b) An employee removed under this rule shall be furnished with the same notice required for disciplinary removals, and he or she shall have the same right to appeal such as if it were a disciplinary removal.

- (c) When an employee is removed under this rule, the appointing authority shall designate the dismissal as non-disciplinary, and the adverse consequence of Rules 6.5(c), 7.5(a), 7, 8.9(c), 8.13(a), 7, 8.15(d), 8.18(d) and (e), 11.18(b) and 17.24 shall not apply.

#### 12.7 Pre-removal/Pre-discipline Procedure

A permanent employee may not be removed or subjected to any disciplinary action, other than an emergency or investigatory suspension, until he has been given written notice of the proposed action and the reasons therefor, a description of the evidence supporting the proposed action and a reasonable opportunity to respond thereto.

#### 12.8 Written Notice

- (a) Except as provided in Rules 12.4 (d) and 12.5 (b), a permanent employee who is removed or subjected to any disciplinary action shall be given written notice which:

1. states the action which is being taken and the effective date and time thereof;
2. contains such information as will fully inform the employee of the conduct on which the action is based and which will enable him or her to prepare a defense, including, where pertinent, the date, time and place of such conduct and the names of persons directly involved in or affected by such conduct (unless their identities are protected by law, in which case, identification shall be made as permitted by law);
3. contains the following notification: "You have the right to appeal this action to the State Police Commission. The time limits and procedure for appealing are contained in Chapter 13 of the State Police Commission Rules."; and
4. advises the employee that a copy of Chapter 13 of the State Police Commission Rules can be obtained from the State Police Commission and provides the Commission's current mailing address and telephone and fax numbers.

- (d) Written notice is considered given:

1. upon delivery to the employee or a person of suitable age and discretion who resides with the employee; or
2. on the 7th calendar day after it is mailed to the employee, with correct postage, at the most recent address furnished by the employee in writing to the personnel office.

#### 12.9 Letters of Counseling and/or Warning; Responses

- (a) A letter of counseling or warning is not a disciplinary action and shall not be included in any personnel record which is accessible to the public.

Such a letter is not appealable to the Commission except on the basis of

discrimination or a violation of the Article or these Rules.

- (b) The employee may submit a written response to any letter of counseling or warning issued to him or her, and such response shall be attached to each copy of the letter of counseling or warning that is maintained by the employing agency.

#### 12.10 Special Removal of Sick or Disabled Employees

- (a) A permanent employee absent from duty because of a physical and/or mental disability or condition which prevents performance of their usual duties, shall, upon their request to the appointing authority, be placed in an appropriate leave status for a period not to exceed one (1) year.

In the event no other leave status is available to the employee, he or she may be placed on Leave Without Pay during the one (1) year period referred to in the preceding paragraph.

- (b) After such employee has been absent from duty because of such physical and/or mental disability or condition for one (1) year, and the employee has exhausted all of his or her sick leave, the appointing authority, shall, for this reason, remove such employee and shall report such removal, and the reasons therefor, to the Director. Such removal shall not disqualify the former employee from non-competitive reemployment, as provided for by Rule 8.18.
- (c) Notice of the removal of an employee under the provisions of subsection (b) shall be given pursuant to the provisions of Rule 12.8.

#### 12.11 Resignations

- (a) Upon the termination of the services of a permanent or probationary employee by voluntary resignation, the appointing authority shall request that the employee submit a letter of resignation or complete other appropriate agency "exit" forms. Where it is not possible to secure the letter or form, the appointing authority shall prepare and maintain a written explanation of the reason(s), if known, and the reason that a letter of resignation or exit form was not obtained.
- (b) The resignation of an employee, submitted orally or in writing, shall become an accomplished fact upon:
  1. its acceptance by his appointing authority, notwithstanding that it may include a prospective effective date; or
  2. The occurrence of the effective date and time specified by him in his statement of intention to resign.
- (c) When signed by the appointing authority, a personnel status change form which reports to the Director the resignation of an employee shall constitute one type of acceptance of the resignation.
- (d) An employee may not rescind or withdraw his resignation

1. subsequent to its acceptance by the appointing authority unless the appointing authority agrees thereto;
  2. subsequent to the effective date and time specified in the resignation; or
  3. subsequent to the terminal date and hour specified in the personnel status changed form mentioned in sub-section (c) hereof.
- (e) By mutual agreement between an employee and the appointing authority, an accepted resignation may be withdrawn and rescinded at any time prior to the effective date and time specified by the employee in his the resignation.
- (f) When, after receiving notice that his dismissal has been proposed, an employee resigns to avoid dismissal, the standard Form 1 reporting the resignation shall so indicate and a copy thereof shall be furnished to the employee.

RECEIVED

May 31, 1996

JUN 04 1996

State Police Commission

TO: CAPT. J. T. BOOTH, OP. DEV.  
FROM: FOYE LOWE, LEGAL  
RE: PROPOSED SPC RULE CHANGES, CHAPTERS 1 & 12

I have your May 28 memo, inquiring as to my involvement in responding to the above proposals. Although I have not received a specific assignment to comment on these proposals, I intended to volunteer comments on the new Rules, but have only now put an eye to text and hand to keyboard.

Some various thoughts:

1 On formally defining "cause" in the Rules.

It seems to me the cases reflect that it is not always conduct (in the sense of intentional behavior) which serves to give cause for discipline, especially removal from State Service. For example, a person who is physically or mentally unable to carry out his duties may properly be removed from the Service; there is cause to do so, but he may not have been involved in any misconduct. As another example, when a position or function has been abolished, the employee occupying that position or performing that function may properly be removed from the Service; there is cause to do so, even though his behavior and conduct have been exemplary.

In a key Supreme Court case, the language used by the decision writer is to the effect that "cause" includes conduct, etc. Walters v. Dept. of Police of New Orleans, 454 So.2d 106 (La., 1984), at p. 113.

I think of "cause" as just a legitimate, nondiscriminatory, reason for the action taken - usually related to conduct impairing the Service, but not always.

(And in my view, the employer is constitutionally authorized to exercise managerial discretion, within the bounds set by reasonable minds, as long as the employer has cause for his action.)



It seems to me that the proposed defining of "cause" in the Rules will not lessen, and may well increase, the issues on cause which will be presented in civil service litigation.

2 Rule 12.3, restricting suspension without pay.

Within recent history, the Commission worked at length with the potential discrimination and problems of interpretation involved in setting the usual limit of suspensive time at "90 days". The Commission came up with a limit of 520 working hours, which treated every member of the Service the same, regardless of schedule. Perhaps it would be advantageous to retain the 520 working hours limitation, but set it within 90 consecutive calendar days.

3 Rule 12.4, emergency & investigatory suspensions.

The proposal, in my view, would provide a much-needed tool to promptly take a misbehaving employee off the job in any situation where that action seems appropriate but the posture of the case does not allow the necessary procedures to be taken immediately, whether due to the incompleteness of the investigation, the need for legal processing, or whatnot. (It can take 30 days or so to complete the investigation, make the report, review the report, decide on action, prepare "Loudermill" pre-action notices, wait for response, etc., before a justified suspension can be effected.)

I would comment that only suspension with pay both eliminates the Loudermill problem, and protects the Service from a problematic employee.

I do not understand what is intended by the reference in subsection (c) to removal of an employee under the emergency suspension Rule. I wonder whether resignation under fire is part of the idea.

4 Rule 12.7, "Loudermill" notice.

This Rule, I take it, simply sets out the minimum "Loudermill" procedure, the due process requirement described in the case of that name.

With respect to reprimands only, I question the necessity of such a procedure. (I also question the value of continuing to define reprimands as appealable disciplinary measures.)

Rule 12.11, Resignations.

One type of acceptance of a resignation is the completion (by the Human Resources Management office) of a personnel status change form used to report such matters to the Director. The proposed Rule makes this acceptance official when the form is "signed by the appointing authority". Although the term "appointing authority" is defined broadly to mean the "department", in some contexts it is read to mean the Deputy Secretary or his formal designee. If the Rule contemplates strict formality, i.e., signing by a particular person rather than preparation in the usual course of business, it seems likely that oversights will occur and litigation will hinge on questions such as who signed and who was authorized to sign and how was authorization to sign indicated.

This proposal also requires reporting that an employee has resigned after being notified that his dismissal is proposed. Some inequity results between otherwise similar situations when one employee manages to resign before receiving formal notice (per proposed Rule 12.7) of the intention to remove him from the Service, but another employee does not decide to resign until after such notice. It seems to me that if one employee's record is to reflect resignation in the face of pending disciplinary measures, the other ought to as well, with the understanding that both could place a statement in the record as to their reasons for resigning.

Summary comment.

Overall, it is my impression that the proposed Rules are a step in the right direction.

cc: JAMES C. DIXON, Supervising Attorney  
HOWARD P. ELLIOTT, General Counsel  
DEBORAH JOHNSON, Director  
NORMAN ERSHLER, Counsel

RECEIVED

JUN 24 1996

MEMORANDUM

State Police Commission

TO: Chairman and Members, State Police Commission  
Debra Johnson, Executive Director, State Police Commission

FROM: Norman W. Ershler, Chief Counsel

RE: Revisions - SPC Chapter 12; May 31, 1996 Memorandum - Foye Lowe

DATE: 7 June 1996

Point No. 1

In his May 31, 1996 Memorandum to Capt. J. T. Booth, Foye Lowe makes a number of comments concerning the proposed revision of Chapter 12 of the Rules State Police Commission. In response, I offer these observations.

Mr. Lowe is concerned that a formal definition of "cause" will restrict or interfere with an appointing authority's power to discipline or remove an employee.

Pursuant to the Louisiana Constitution, an employee may not be "disciplined" or subjected to a "disciplinary" removal except for cause. "Cause", as used in the Constitution and the SPC Rules has been defined by the courts in the same way as it is defined in the proposed revision of SPC Rule 1. Further, proposed Rules 12.6 and 12.10 allow for "non-disciplinary" removals, which, I believe, adequately addresses Mr. Lowe's concerns in this regard.

Upon review of Mr. Lowe's comments and the proposed Chapter 12 revisions, however, I have concluded that, to avoid any confusion, the proposed revision to Rule 12.6 (a)(2) might be amended to remove the word "cause" and substitute the word "reason". Also, an employee might be reduced in pay or involuntarily demoted, because of the loss of a license, commission, certificate or other accreditation which is legally required for his or her job, I would suggest the further amendment of proposed rule 12.6 (a) as follows:

\*\*\*\*\*

12.6 Non-disciplinary Removals, Reductions in Pay or  
Involuntary Demotions

An employee may be removed, reduced in pay or involuntarily demoted under the following circumstances:

(a) An employee may be:

1. Removed when he or she holds more than one position in the state service and the multiple employment causes an employing agency to be liable for overtime payments under the Fair Labor Standards Act and,

after having been provided an opportunity to do so, the employee has refused to resign from one of the positions; and

2. Removed, reduced in pay or involuntarily demoted when the reason for such is not the employee's fault or when the employee fails to obtain or loses, as a result of conduct that was not work related, a license, commission, certificate or other accreditation that is legally required for his job.

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Point No. 2

Mr. Lowe is correct, in order to avoid a discriminatory effect, suspensions are now restricted to 520 working hours. I agree that this should be retained, and I would therefore suggest that the proposed revision of Rule 12.3 be amended to substitute "520 working hours" for "90 consecutive calendar days".

Point No. 3

As the proposed revision to Rule 12.4 allows a 30 day extension of the initial 30 day suspension with pay, I believe that Mr. Lowe's concerns in this regard are not justified and that the proposed rule should not be further amended.

I wholly fail to understand Mr. Lowe's comments regarding subsection (c), as this portion of the proposed rule makes no mention of "removal of an employee under the emergency suspension Rule."

Point No. 4

As to Mr. Lowe's comment questioning whether "Loudermill" proceedings should pertain to reprimands, I believe that the constitution requires that any discipline should be preceded by some form of fact finding process. And, as "Loudermill" does not require a full evidentiary hearing process, I see no reason why some inquiry and an opportunity to respond should be provided prior to the reprimand of a trooper.

Point No. 5

In order to avoid a conflict with other SPC rules which apply to employees in a probationary status, and the extension of such status, proposed Rule 12.10 allows the same benefits to permanent employees. This rule does contemplate that a covered employee may be placed on annual leave during the one year period.

I believe that Mr. Lowe's point regarding the use of sick leave is well taken, and I would therefore suggest that the proposed revision of Rule 12.10 be amended to require the use of sick leave first and then other available leave, as follows:

- (a) A permanent employee absent from duty because of a physical and/or mental disability or condition which prevents performance of their usual duties, shall, upon their request to the appointing authority, first be placed in sick leave status and thereafter in an appropriate leave status for a period not to exceed one (1) year.

Point No. 6 (Rule 12.11, Resignations)

This proposed rule revision contemplates the customary procedure now used by the appointing authority and the Human Resources Department. The proposed rule would allow acceptance of a resignation by the signing of a personnel status change form: by the appointing authority or others (usually in the Human Resources Department) customarily designated by the appointing authority to sign such forms. I see no problem with the proposed rule as written.

If you have any questions about these proposed rule revisions prior to the July 17, 1996 hearing, please let me know.

# State Police Commission



Post Office Box 66555  
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May 21, 1996

General Circular No. 59

To: State Police Commission Members, Colonel William R. Whittington, Personnel, Legal, Retirement, LSTA, Walter Smith, Floyd Falcon and LSTA Affiliate Presidents

Re: State Police Commission Meetings

The following dates have been scheduled for Fiscal Year 1996/1997 meetings of the State Police Commission. Returns on subpoenas *duces tecum* will be conducted at 8:00 a.m., with general business and appeal matters commencing at 9:00 a.m.

July 15, 1996	January 27, 1997
August 19, 1996	February 17, 1997
September 16, 1996	March 17, 1997
October 21, 1996	April 21, 1997
November 18, 1996	May 19, 1997
December 16, 1996	June 16, 1997

If you wish to address the Commission at one of these meetings, you must notify my office no later than ten days prior to the date of the meeting, in order that you may be placed on the agenda.

Sincerely,

*Debra L. Johnson*

Debra L. Johnson  
Director

# State Police Commission



Post Office Box 66555  
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June 04, 1996

General Circular No. 59

To: State Police Commission Members, Colonel William R. Whittington, Personnel, Legal, Retirement, LSTA, Walter Smith, Floyd Falcon and LSTA Affiliate Presidents

In Re: Amendment of Chapters 1 and 12 of the State Police Commission Rules

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Please review this proposal and furnish, in writing, by July 03, 1996, 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. You must notify Gilda Russ by July 03, 1996 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 meeting date.

Sincerely,

*Debra L. Johnson*

Debra L. Johnson  
Director

Attachments

CHAPTER 1

DEFINITIONS

- 1.5.2 a. **Cause** - Conduct which impairs the efficiency of the public service being rendered and which bears a real and substantial relation to the efficient operation of that public service.



## CHAPTER 12

### DISCIPLINARY ACTIONS, REMOVALS AND RESIGNATIONS

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- (b) When an employee is suspended under the provisions of this rule, if feasible, the employee shall first be informed of the intended suspension and the reasons therefor and the employee shall be given an opportunity to respond verbally at that time. If such is not feasible, or reasonably will significantly endanger the health, safety or efficiency of the public service, such shall not be required and, in that case, the employee shall merely be informed of the suspension.
- (c) A suspension under this rule shall not exceed thirty (30) calendar days without the prior approval of the Director. Upon sufficient reasons provided to her by the appointing authority, the Director may allow an extension of the suspension for an additional thirty (30) calendar days.
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is then available to the appointing authority.

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  - 2. When the cause for a dismissal is not the employee's fault or when the employee fails to obtain or loses, as a result of conduct that was not work related, a license, commission, certificate or other accreditation that is legally required for his job.
- (b) An employee removed under this rule shall be furnished with the same notice required for disciplinary removals, and he or she shall have the same right to appeal such as if it were a disciplinary removal.

- (c) When an employee is removed under this rule, the appointing authority shall designate the dismissal as non-disciplinary, and the adverse consequence of Rules 6.5(c), 7.5(a), 8.9(c), 8.13(a), 8.15(d), 8.18(d) and (e), 11.18(b) and 17.24 shall not apply.

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1. states the action which is being taken and the effective date and time thereof;
2. contains such information as will fully inform the employee of the conduct on which the action is based and which will enable him or her to prepare a defense, including, where pertinent, the date, time and place of such conduct and the names of persons directly involved in or affected by such conduct (unless their identities are protected by law, in which case, identification shall be made as permitted by law);
3. contains the following notification: "You have the right to appeal this action to the State Police Commission. The time limits and procedure for appealing are contained in Chapter 13 of the State Police Commission Rules."; and
4. advises the employee that a copy of Chapter 13 of the State Police Commission Rules can be obtained from the State Police Commission and provides the Commission's current mailing address and telephone and fax numbers.

- (d) Written notice is considered given:

1. upon delivery to the employee or a person of suitable age and discretion who resides with the employee; or
2. on the 7th calendar day after it is mailed to the employee, with correct postage, at the most recent address furnished by the employee in writing to the personnel office.

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- (a) A letter of counseling or warning is not a disciplinary action and shall not be included in any personnel record which is accessible to the public.

Such a letter is not appealable to the Commission except on the basis of

discrimination or a violation of the Article or these Rules.

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- (c) Notice of the removal of an employee under the provisions of subsection (b) shall be given pursuant to the provisions of Rule 12.8.

#### 12.11 Resignations

- (a) Upon the termination of the services of a permanent or probationary employee by voluntary resignation, the appointing authority shall request that the employee submit a letter of resignation or complete other appropriate agency "exit" forms. Where it is not possible to secure the letter or form, the appointing authority shall prepare and maintain a written explanation of the reason(s), if known, and the reason that a letter of resignation or exit form was not obtained.
- (b) The resignation of an employee, submitted orally or in writing, shall become an accomplished fact upon:
  1. its acceptance by his appointing authority, notwithstanding that it may include a prospective effective date; or
  2. The occurrence of the effective date and time specified by him in his statement of intention to resign.
- (c) When signed by the appointing authority, a personnel status change form which reports to the Director the resignation of an employee shall constitute one type of acceptance of the resignation.
- (d) An employee may not rescind or withdraw his resignation:

1. subsequent to its acceptance by the appointing authority unless the appointing authority agrees thereto;
  2. subsequent to the effective date and time specified in the resignation; or
  3. subsequent to the terminal date and hour specified in the personnel status changed form mentioned in sub-section (c) hereof.
- (e) By mutual agreement between an employee and the appointing authority, an accepted resignation may be withdrawn and rescinded at any time prior to the effective date and time specified by the employee in his the resignation.
- (f) When, after receiving notice that his dismissal has been proposed, an employee resigns to avoid dismissal, the standard Form 1 reporting the resignation shall so indicate and a copy thereof shall be furnished to the employee.

RECEIVED

May 31, 1996

JUN 04 1996

State Police Commission

TO: CAPT. J. T. BOOTH, OP. DEV.  
FROM: FOYE LOWE, LEGAL  
RE: PROPOSED SPC RULE CHANGES, CHAPTERS 1 & 12

I have your May 28 memo, inquiring as to my involvement in responding to the above proposals. Although I have not received a specific assignment to comment on these proposals, I intended to volunteer comments on the new Rules, but have only now put an eye to text and hand to keyboard.

Some various thoughts:

1 On formally defining "cause" in the Rules.

It seems to me the cases reflect that it is not always conduct (in the sense of intentional behavior) which serves to give cause for discipline, especially removal from State Service. For example, a person who is physically or mentally unable to carry out his duties may properly be removed from the Service; there is cause to do so, but he may not have been involved in any misconduct. As another example, when a position or function has been abolished, the employee occupying that position or performing that function may properly be removed from the Service; there is cause to do so, even though his behavior and conduct have been exemplary.

In a key Supreme Court case, the language used by the decision writer is to the effect that "cause" includes conduct, etc. : Walters v. Dept. of Police of New Orleans, 454 So.2d 106 (La., 1984), at p. 113.

I think of "cause" as just a legitimate, nondiscriminatory, reason for the action taken - usually related to conduct impairing the Service, but not always.

(And in my view, the employer is constitutionally authorized to exercise managerial discretion, within the bounds set by reasonable minds, as long as the employer has cause for his action.)

It seems to me that the proposed defining of "cause" in the Rules will not lessen, and may well increase, the issues on cause which will be presented in civil service litigation.

2 Rule 12.3, restricting suspension without pay.

Within recent history, the Commission worked at length with the potential discrimination and problems of interpretation involved in setting the usual limit of suspensive time at "90 days". The Commission came up with a limit of 520 working hours, which treated every member of the Service the same, regardless of schedule. Perhaps it would be advantageous to retain the 520 working hours limitation, but set it within 90 consecutive calendar days.

3 Rule 12.4, emergency & investigatory suspensions.

The proposal, in my view, would provide a much-needed tool to promptly take a misbehaving employee off the job in any situation where that action seems appropriate but the posture of the case does not allow the necessary procedures to be taken immediately, whether due to the incompleteness of the investigation, the need for legal processing, or whatnot. (It can take 30 days or so to complete the investigation, make the report, review the report, decide on action, prepare "Loudermill" pre-action notices, wait for response, etc., before a justified suspension can be effected.)

I would comment that only suspension with pay both eliminates the Loudermill problem, and protects the Service from a problematic employee.

I do not understand what is intended by the reference in subsection (c) to removal of an employee under the emergency suspension Rule. I wonder whether resignation under fire is part of the idea.

4 Rule 12.7, "Loudermill" notice.

This Rule, I take it, simply sets out the minimum "Loudermill" procedure, the due process requirement described in the case of that name.

With respect to reprimands only, I question the necessity of such a procedure. (I also question the value of continuing to define reprimands as appealable disciplinary measures.)

It seems to me it will be somewhat difficult to distinguish appealable formal reprimands from non-appealable letters of counseling and warning, which are authorized in proposed Rule 12.9. Both have to be taken by the "appointing authority", under proposed Rule 12.1. The main distinction would seem to be whether the letter winds up in the Human Resources office files or not.

As you likely know, the civilian commission has set up a system allowing nondisciplinary letters of counseling, warning, and reprimand. The reprimanded employee can respond in writing, and a copy of the response must be kept with each copy of the reprimand. That system seems to work.

Perhaps if formal reprimands are to serve as the basis for progressive discipline which escalates rapidly, all the way to removal if appropriate, there is a good reason to keep them as appealable disciplinary measures. And certainly there may be other concerns of which I am unaware. Maybe a discussion on the overall scheme of discipline would be helpful.

5 Rule 12.10, Out-of-sick-leave removal.

Rules other than 12.10 restrict the use of leave. Is the intention of this Rule to supersede those other Rules? Is annual leave considered "appropriate" leave, if the employee has run out of sick leave? (Or are the only appropriate forms of leave considered sick leave and leave without pay?) There is an implication that annual leave is not only authorized, but required to be allowed. (This implication is contained in the phrase, "In the event no other leave status is available to the employee, he may be placed on Leave Without Pay".)

It seems to me that a priority of leave use ought to be established: use sick leave first, then annual leave, then leave without pay. Otherwise, the DiBenedetto situation arises in which the employee refuses to take sick leave, to prevent one of the preconditions for his removal.

At the end of a year, if the employee still has unused sick leave, and still can't work, he should be allowed to continue on sick leave until it has been exhausted. If he is out of sick leave at the end of the year (or shorter period based on an articulated reason such as the urgency of the need to fill the position plus inability to expand the table of organization), he would be removed from the Service and replaced.



Rule 12.11, Resignations.

One type of acceptance of a resignation is the completion (by the Human Resources Management office) of a personnel status change form used to report such matters to the Director. The proposed Rule makes this acceptance official when the form is "signed by the appointing authority". Although the term "appointing authority" is defined broadly to mean the "department", in some contexts it is read to mean the Deputy Secretary or his formal designee. If the Rule contemplates strict formality, i.e., signing by a particular person rather than preparation in the usual course of business, it seems likely that oversights will occur and litigation will hinge on questions such as who signed and who was authorized to sign and how was authorization to sign indicated.

This proposal also requires reporting that an employee has resigned after being notified that his dismissal is proposed. Some inequity results between otherwise similar situations when one employee manages to resign before receiving formal notice (per proposed Rule 12.7) of the intention to remove him from the Service, but another employee does not decide to resign until after such notice. It seems to me that if one employee's record is to reflect resignation in the face of pending disciplinary measures, the other ought to as well, with the understanding that both could place a statement in the record as to their reasons for resigning.

Summary comment.

Overall, it is my impression that the proposed Rules are a step in the right direction.

cc: JAMES C. DIXON, Supervising Attorney  
HOWARD P. ELLIOTT, General Counsel  
DEBORAH JOHNSON, Director  
NORMAN ERSHLER, Counsel

RECEIVED

JUN 24 1996

MEMORANDUM

State Police Commission

TO: Chairman and Members, State Police Commission  
Debra Johnson, Executive Director, State Police Commission

FROM: Norman W. Ershler, Chief Counsel

RE: Revisions - SPC Chapter 12; May 31, 1996 Memorandum - Foye Lowe

DATE: 7 June 1996

Point No. 1

In his May 31, 1996 Memorandum to Capt. J. T. Booth, Foye Lowe makes a number of comments concerning the proposed revision of Chapter 12 of the Rules State Police Commission. In response, I offer these observations.

Mr. Lowe is concerned that a formal definition of "cause" will restrict or interfere with an appointing authority's power to discipline or remove an employee.

Pursuant to the Louisiana Constitution, an employee may not be "disciplined" or subjected to a "disciplinary" removal except for cause. "Cause", as used in the Constitution and the SPC Rules has been defined by the courts in the same way as it is defined in the proposed revision of SPC Rule 1. Further, proposed Rules 12.6 and 12.10 allow for "non-disciplinary" removals, which, I believe, adequately addresses Mr. Lowe's concerns in this regard.

Upon review of Mr. Lowe's comments and the proposed Chapter 12 revisions, however, I have concluded that, to avoid any confusion, the proposed revision to Rule 12.6 (a)(2) might be amended to remove the word "cause" and substitute the word "reason". Also, an employee might be reduced in pay or involuntarily demoted, because of the loss of a license, commission, certificate or other accreditation which is legally required for his or her job. I would suggest the further amendment of proposed rule 12.6 (a) as follows:

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12.6 Non-disciplinary Removals, Reductions in Pay or  
Involuntary Demotions

An employee may be removed, reduced in pay or involuntarily demoted under the following circumstances:

(a) An employee may be:

1. Removed when he or she holds more than one position in the state service and the multiple employment causes an employing agency to be liable for overtime payments under the Fair Labor Standards Act and,

after having been provided an opportunity to do so, the employee has refused to resign from one of the positions; and

2. Removed, reduced in pay or involuntarily demoted when the reason for such is not the employee's fault or when the employee fails to obtain or loses, as a result of conduct that was not work related, a license, commission, certificate or other accreditation that is legally required for his job.

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Point No. 2

Mr. Lowe is correct, in order to avoid a discriminatory effect, suspensions are now restricted to 520 working hours. I agree that this should be retained, and I would therefore suggest that the proposed revision of Rule 12.3 be amended to substitute "520 working hours" for "90 consecutive calendar days".

Point No. 3

As the proposed revision to Rule 12.4 allows a 30 day extension of the initial 30 day suspension with pay, I believe that Mr. Lowe's concerns in this regard are not justified and that the proposed rule should not be further amended.

I wholly fail to understand Mr. Lowe's comments regarding subsection (c), as this portion of the proposed rule makes no mention of "removal of an employee under the emergency suspension Rule."

Point No. 4

As to Mr. Lowe's comment questioning whether "Loudermill" proceedings should pertain to reprimands, I believe that the constitution requires that any discipline should be proceeded by some form of fact finding process. And, as "Loudermill" does not require a full evidentiary hearing process, I see no reason why some inquiry and an opportunity to respond should be provided prior to the reprimand of a trooper.

Point No. 5

In order to avoid a conflict with other SPC rules which apply to employees in a probationary status, and the extension of such status, proposed Rule 12.10 allows the same benefits to permanent employees. This rule does contemplate that a covered employee may be placed on annual leave during the one year period.

I believe that Mr. Lowe's point regarding the use of sick leave is well taken, and I would therefore suggest that the proposed revision of Rule 12.10 be amended to require the use of sick leave first and then other available leave, as follows:

- (a) A permanent employee absent from duty because of a physical and/or mental disability or condition which prevents performance of their usual duties, shall, upon their request to the appointing authority, first be placed in sick leave status and thereafter in an appropriate leave status for a period not to exceed one (1) year.

Point No. 6 (Rule 12.11, Resignations)

This proposed rule revision contemplates the customary procedure now used by the appointing authority and the Human Resources Department. The proposed rule would allow acceptance of a resignation by the signing of a personnel status change form by the appointing authority or others (usually in the Human Resources Department) customarily designated by the appointing authority to sign such forms. I see no problem with the proposed rule as written.

If you have any questions about these proposed rule revisions prior to the July 17, 1996 hearing, please let me know.