

Louisiana

SCS

State Civil Service

HR Curriculum
Discipline, Separations,
& Appeals

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Part I – Discipline and Separations: Chapter 12 of the Civil Service Rules

A. Introduction: What is discipline?

1. Process and purpose
2. Four foundations of discipline
 - a. Communication
 - b. Consistency
 - c. Documentation
 - d. Progressive discipline
3. Discipline v. disciplinary action

B. Types of disciplinary actions – Civil Service Rule (CSR) 12.3

1. **Suspension without pay** – the temporary exclusion of the employee from employment for disciplinary reasons
2. **Reduction in pay** – the reduction of an employee's individual pay rate for disciplinary reasons by the employee remains at work in the same job
3. **Involuntary demotion** – a change of a permanent or probationary employee from a position in one job to a position in another job in a pay grade with a lower maximum
4. **Dismissal** – the termination of an employee's employment for disciplinary reasons

Adverse consequences of dismissal (and resignation to avoid dismissal):

- Loss of eligibility for non-competitive reemployment – CSR 23.13(b)
- Loss of eligibility for former pay rate earned – CSR 6.5(c)
- Loss of right to restoration of annual and sick leave balances – CSR 11.18(b)
- Name removed from a department preferred reemployment list – CSR 17.23(e)4
- Rejection of application for employment by the Director or agency – CSR 22.4(d)
- Cancellation of eligibility for employment by the Director – CSR 23.16(a)4

However, dismissal does not affect an employee's retirement eligibility.

C. Who can take disciplinary action? – CSR 12.1

Disciplinary action can only be taken by someone with appointing authority.

- **Appointing authority** – means the agency, department, board, or commission, and the officers and employees thereof authorized by statute or by lawfully delegated authority to make appointments to positions in the State Service.
- **Statutory appointing authority** – the person given the power to appoint employees to positions in the state service by the state constitution or a state statute, usually the law creating the agency or the Executive Reorganization Act – Title 36 of La. Revised Statutes.
- **Lawfully delegated appointing authority** – a person given appointing authority by someone with appointing authority.
- **Authentic act** – written act executed before a notary and two witnesses

D. Who can be disciplined?

Louisiana Constitution of 1974, Article X, § 8

Section 8. (A) Disciplinary Actions. No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the appointing authority.

- **Permanent employees** – have a property right to their jobs. They can only be disciplined for “cause expressed in writing” and their due process rights must be respected, as more fully set forth below.
- **Non-permanent employees** – employees on probationary, restricted, or job appointments. They, along with unclassified employees, are “at-will” employees and can be separated at anytime without cause, as long as laws prohibiting discrimination are not violated. They have no property rights to their jobs, so no legal formalities are required for disciplinary actions or separations. Non-permanent employees are not usually disciplined; they are simply separated.

E. When can you discipline an employee?

An appointing authority can discipline an employee when he has legal cause to do so.

- **“Cause”** – is conduct of the employee that impairs the efficient or orderly operation of the public service. The conduct can be any act or failure to act, and includes all elements of behavior and performance. Cause also includes the requirement that the

severity of the disciplinary action imposed be commiserate with the employee's offense. The impairment to the public service can be actual or potential harm.

- Conduct (what the employee did or did not do) versus impairment (the actual or potential harm to the agency's operations from the employee's conduct) - The agency must be prepared to prove both at an appeals hearing.

Exercise: What is the impairment?

1. Conduct: absence during hurricane preparations at a museum.
Impairment?
2. Conduct: writing threatening remarks on a shared office calendar.
Impairment?
3. Conduct: corrections officer leaving another officer alone with a high-risk inmate.
Impairment?
4. Conduct: refusal to obey a direct order.
Impairment?
5. Conduct: a police officer violating the law.
Impairment?
6. Conduct: abuse of sick leave.
Impairment?
7. Conduct: falsifying job application.
Impairment?
8. Conduct: persistent refusal to perform duties.
Impairment?
9. Conduct: disregarding agency policy.
Impairment?

F. Suspension pending investigation – CSR 12.10

Suspension pending investigation - the temporary exclusion of the employee from employment while the agency conducts an investigation. It is a tool that may be used during the investigation and preparation of a disciplinary action, but it is not a disciplinary action itself. A suspension pending investigation is with pay, as opposed to a disciplinary suspension, which is without pay.

1. Grounds:

An employee can be orally suspended when the appointing authority suspects that the employee has engaged in conduct that, if confirmed, will warrant discipline or removal

AND

the employee's continued presence at work during the investigation and subsequent administrative proceedings is contrary to the best interests of the state.

The agency must tell the employee that he is being suspended with pay and the general nature of the conduct being investigated, but the reasons for the suspension do not have to be given in detail. A suspension pending investigation can only be appealed based on discrimination (race, sex, political or religious beliefs) or a rule violation.

A suspension pending investigation cannot exceed 260 hours, and enforced compensatory leave and enforced annual leave cannot be used for the 260-hour period.

2. What happens if you cannot finish the investigation and take the disciplinary action within the 260-hour period?

- Put the employee to work somewhere, doing something.
- Place the employee on enforced compensatory time (K-time) – CSR 21.6(b).
- After the employee has exhausted his K-time, place the employee on enforced annual leave. The employee's annual leave balance cannot be reduced below 240 hours – CSR 11.9.

If the employee is on enforced annual leave for more than 30 days, the agency must give the employee written reasons explaining why the employee is on enforced annual leave. These reasons must be rationally related to a governmental interest.

G. Taking disciplinary action

1. Pre-deprivation/Loudermill procedure – CSR 12.7 – due process requirements

When an appointing authority proposes the discipline or removal of a permanent employee, the employee must be given:

- a. oral or written notice of the proposed action, including the factual basis for and a description of the evidence supporting the proposed action,

AND

- b. a reasonable opportunity to respond.

Giving Written Notice – CSR 12.8.1 (This applies to pre-deprivation/Loudermill letters AND disciplinary letters)

Written notice is considered given:

- a. when it is hand-delivered to the employee, or
- b. when it is hand-delivered to a person of suitable age and discretion who resides with the employee, or
- c. on the 7th calendar day after it was mailed with correct postage to the employee's most recent address furnished in writing or electronically to the agency's human resource office.

Exercise-review of pre-disciplinary procedure

1. The agency must give the employee the _____ for the proposed action. This is the cause and it must be sufficient for the employee to know the charges against him/her.
2. The employee must be given a description of the _____ that supports the agency's proposed disciplinary action.
3. The employee must be given a _____ opportunity to respond to the charges to the decision maker before the decision is made.
4. Inform the employee of the most _____ action that is being proposed.
5. To trigger the adverse consequences of a resignation to avoid dismissal (CSR 12.11(c)), state that the appointing authority is considering taking disciplinary action up to and including _____ in the pre-disciplinary/Loudermill letter.
6. If the pre-deprivation procedure is not conducted in accordance with Civil Service Rules, the disciplinary action will be _____. If you realize that you have not conducted the pre-disciplinary procedure in accordance with the Civil Service Rules, _____ the action and start over.

Exercise: Was the employee given due process?

- Agency sent letter proposing disciplinary action and told employee to respond in writing within 5 days.
- Agency's normal practice was to give a hearing and this employee was only given the opportunity to respond in writing.
- Employee requested a meeting with the appointing authority, but the appointing authority denied the meeting. What if the appointing authority granted the meeting?
- The employee did not respond to the pre-disciplinary/Loudermill letter.
- The employee did not respond in writing, but left a voice mail or sent an e-mail.
- The employee responded, but the response was a day late. How about two weeks late?
- The reason it was late was that he/she was in the hospital.
- The employee's attorney responded on his/her behalf.
- The employee responded and gave additional information, but the agency did not investigate this additional information.
- The additional information would have made a difference if it had been investigated.
- The employee responded to Human Resources.
- The appointing authority never saw the employee's response.
- The appointing authority saw the response and decided to go forward with discipline.
- The appointing authority was the person who had direct knowledge of the employee's action that was the focus of this proposed disciplinary action.
- The employee was given a 5-page letter proposing dismissal for abuse of a client, and then the employee was immediately taken to the appointing authority for an opportunity to verbally respond. Would it make a difference if the letter was one paragraph and proposed a one-day suspension for insubordination?
- The employee was informed that the appointing authority was considering a suspension, and then the employee was dismissed.

2. Disciplinary Letter – CSR 12.8

When an appointing authority has *decided* to discipline a permanent employee, the employee must be given written notice of the action being taken *before the time the action becomes effective*. This letter is called the disciplinary letter.

The disciplinary letter must:

- a. state what action is being taken (i.e., dismissal, suspension, demotion, or reduction in pay) and the effective date and time of the action.
- b. be timely, i.e., given to the employee before the effective date and time of the action.
- c. describe in detail the conduct for which discipline is being imposed—who, what, when, where, why & how. The letter must provide enough information to enable the employee to prepare a defense. Any rules or policies violated by the employee should be identified.
- d. contain the following notice: "You have the right to appeal this action to the State Civil Service Commission within 30 calendar days following the date you receive this notice. The appeal procedure is contained in Chapter 13 of the Civil Service Rules, which is available from the Department of State Civil Service or your Human Resource office."
- e. If prior disciplinary actions and/or improvement letters are being used to support the action, they must be identified. Note that improvement letters may be used only if they were for the same or similar conduct as the current conduct.

The "Four Corners" Rule – CSR 13.19(m): "... [the] charges expressed in writing by the appointing authority as cause for demotion, suspension, dismissal, or other action, shall not be accepted as prima facie true. Evidence shall not be received from an appointing authority to supplement or enlarge the charges contained in such written document..." SO: If it is not in the disciplinary letter, it cannot be used!

Delivery of disciplinary letters: Civil Service Rule 12.8.1, Giving Written Notice, discussed above, applies to the delivery of disciplinary letters as well as pre-deprivation/Loudermill letters.

When is written notice considered given?

Upon delivery to the employee. If by hand-delivery, have the employee sign for it, or if the employee refuses to sign for it, have the person who delivered it so note on the letter.

Upon delivery to a person of suitable age and discretion who resides with the employee (domiciliary service) – use this as a last resort...something always goes wrong.

On the 7th calendar day after it is mailed to the employee, with correct postage, at the most recent address that has been furnished in writing to the personnel office (including via LEO). If you have more than one mailing address, mail to all addresses.

Make a copy of the envelope (with postage) before you mail the letter and get a certificate of mailing.

Do not use certified mail, return receipt requested, as the only means of mailing. If you send letter by certified mail, also send by regular mail.

Exercise: Did the employee have prospective notice?

- Disciplinary letter dated July 1, 2010, states action is effective immediately.
 - Does it make a difference if it was mailed or hand-delivered, if so why?

- Disciplinary letter dated June 1, 2010, reduction in pay effective June 2010.
- Disciplinary letter dated November 1, 2010, termination effective October 31, 2010.
- Disciplinary letter mailed October 1, 2010, action effective October 6, 2010.
- Disciplinary letter mailed October 1, 2010, action effective October 8, 2010.
- Disciplinary letter mailed October 1, 2010, action effective October 1, 2010.
- Disciplinary letter hand-delivered October 1, 2010, action effective October 1, 2010.
- Disciplinary letter dated June 1, 2010, action effective at 4:30 p.m., hand-delivered at 4:35 p.m.
- Disciplinary letter dated June 1, 2010, action effective 4:30 p.m., hand-delivered at the beginning of the employee's shift on June 1, 2010.

3. Severity of penalty

The penalty imposed must be proportional to the employee's offense.

Generally, the more severe the impairment to the state service caused by the employee's conduct, the more severe the penalty.

Other factors to consider:

- Whether the agency had previously disciplined the employee (Cumulative discipline)
- Whether the agency has previously counseled or reprimanded the employee for the same or similar conduct
- The employee's length of service
- The agency's usual penalty for the same conduct

The Commission and its Referees have a duty to decide whether the punishment imposed by the agency is commensurate with the employee's dereliction, so if a penalty is too severe it will be reduced on appeal.

4. Other issues in disciplinary actions

Condonement – when an appointing authority knows about the employee's misconduct but consciously decides not to take action, or addresses the misconduct with a non-disciplinary measure. Condoning the action may prevent that appointing authority from later taking action based on the misconduct. Condonement by someone who is not an appointing authority has no effect.

Disparate treatment/discrimination – can be a defense to a disciplinary action. It can occur when the appointing authority treats similarly situated employees differently. But: the employees must be truly similarly situated for the defense to apply, as differences as to offense, degree of culpability, disciplinary record, employee performance, etc., can justify different treatment.

Double Jeopardy – generally, an employee cannot be disciplined twice for the same offense. But: double jeopardy only applies if the first action was actually a disciplinary action: suspension without pay, reduction in pay, demotion, or dismissal. It is also not double jeopardy when a disciplinary action is reversed on appeal for a procedural defect and the agency redoes the action, as long the penalty is not increased.

Cumulative Discipline – using prior disciplinary action to enhance the penalty for the current conduct. This does not constitute double jeopardy. The prior disciplinary action does not have to be for the same conduct as the current disciplinary action to use it for penalty enhancement purposes.

5. Procedural Defects and fixing them; modification of actions – CSR 15.10

Procedural defects – lack of appointing authority, failure to provide notice of proposed action and an opportunity to respond, failure to provide prior written notice before disciplinary action becomes effective, failure to provide detailed reasons supporting disciplinary action.

If procedural defects are discovered by the agency before action becomes effective – rescind the action under CSR 15.10, and start over. A more severe penalty may be imposed as long as the initial action was rescinded before its effective date.

After effective date of action – rescind action with approval of the Director of State Civil Service, and start over. The new penalty cannot be more severe than the one initially imposed.

After appeal filed – rescind action with approval of the Commission or a Referee. The new penalty cannot be more severe than the one initially imposed.

If the Commission or a Referee reverses a disciplinary action due to a procedural defect, the agency can redo the disciplinary action without violating the prohibition against double jeopardy. The new penalty cannot be more severe than the one initially imposed.

Timeline of disciplinary actions (applies to CSR 12.6 removals too)

1. Pre-deprivation letter is given to the employee by the agency, which specifies when the employee's response to the letter is due. The Civil Service Rules do not specify a response time, but due process requires a reasonable time. Generally, a week to respond would always be reasonable; less than three days would rarely be reasonable.
2. Employee responds, or the response time lapses without the employee responding. The appointing authority considers the employee's response, if any, and decides what action to take, or not to take action.
3. The deprivation (disciplinary or removal) letter is given to the employee before the action's effective date and time. If the letter is hand-delivered to the employee, the action can be made effective immediately. If the letter is mailed, the action should be made effective no earlier than the seventh calendar day following mailing.
4. Under the above timelines, an agency can dismiss an employee in five days: pre-deprivation letter hand-delivered on Monday, employee response due by Thursday, dismissal letter hand-delivered on Friday and made effective immediately.

H. Improvement letters – CSR 12.9

Letters issued by the appointing authority to attempt to improve an employee's conduct, such as warnings, counseling, reprimands and supervisory plans.

The employee may respond in writing, and the response must be attached to all copies of the improvement letter kept by the agency.

May be used to enhance penalty for later same or similar conduct, but only if the improvement letter advised the employee of possible later use and his right to respond to the improvement letter.

Improvement letters are not disciplinary actions, and are only appealable based on discrimination or a rule violation. They are not publically accessible until used in support of a later disciplinary action.

I. Suspension pending criminal proceedings – CSR 12.5

Not a disciplinary action, but is a suspension without pay that lasts until the criminal case in resolved. It can only be done with Commission approval.

The criminal conduct must constitute grounds for dismissal, and the appointing authority must be unable to obtain sufficient information to institute dismissal proceedings. An indictment or a bill of information must have been filed, i.e., criminal proceedings must have been instituted; an arrest is not enough.

The appointing authority requests the suspension pending criminal proceedings from the Commission in writing. The request must explain:

1. why the employee's conduct is cause for dismissal,
2. why the employee cannot be allowed to work in any capacity,
3. why the agency cannot obtain sufficient information to institute dismissal proceedings.

The request must also provide documentation that an indictment or bill of information has been filed.

Before approving the suspension pending criminal proceedings, the Commission must give the employee a copy of the agency's request and give him a reasonable opportunity to respond.

The Commission expects the agency to pursue every alternative before requesting approval for a suspension pending criminal proceedings, such as detailing or reassigning the employee to another position, changing the employee's duty station or shift, enforced annual leave, suspension pending investigation, etc.

J. Non-disciplinary removals – CSR 12.6

A removal is the separation from employment of an employee for non-disciplinary reasons. There is legal "cause", but unlike disciplinary actions, the cause is not the employee's fault, or the underlying cause is not work-related. The employee must be given pre-deprivation/Loudermill procedure under CSR 12.7 and prior written notice of his/her removal under CSR 12.8. There are five grounds for removal under CSR 12.6.

1. Exhaustion of sick leave – an employee may be removed when on the date the pre-deprivation/Loudermill letter is mailed, hand-delivered or orally given, he/she:

a. has less than 8 hours of sick leave

AND

b. is unable to perform the essential functions of their job due to illness or medical disability.

Note that applicable state and federal laws prohibit the removal of an employee for exhaustion of sick leave until the employee has exhausted his/her benefits under the Family and Medical Leave Act (FMLA) or if the employee can return to work with reasonable accommodations under the Americans with Disabilities Act.

2. Excessive unscheduled absences – an employee may be removed after being given written notice that his attendance requires improvement and a copy of CSR 12.6, when the employee has seven (7) or more unscheduled absences during any consecutive 26-week period. The employee must be given written notice each time he/she incurs a 6th unscheduled absence during any consecutive 26-week period.

An unscheduled absence occurs when an employee is absent from work without having obtained approved leave prior to the absence. Approval of leave, after the fact, to cover an unscheduled absence shall not prevent the absence from being considered unscheduled. A continuous absence for the same reason is one unscheduled absence, regardless of its duration.

3. Employee's failure to obtain license, commission, certificate or accreditation that is legally required for the job, or the loss of the license, commission, certificate or accreditation due to the employee's non-work related conduct.

4. Employee has two state jobs and it is causing overtime issues, and he/she refuses to resign from one of the jobs.

5. When there is cause for dismissal, but the cause is not the employee's fault.

Exercise: unscheduled absences

An employee calls-in sick on Monday and says she will be out sick until Thursday.

On Thursday, she calls-in and says she cannot come to work because her car will not start.

On Friday, she calls-in and says she cannot come to work because her child is sick.

Assuming neither the employee nor the child had a FMLA-qualifying condition, how many unscheduled absences is that?

K. Resignations – CSR 12.11

Resignation is the separation from employment at the employee's request.

Resignations can be oral or written. If oral, it must be documented by the person who received it.

A resignation becomes effective on the date and time specified by the employee.

Once the appointing authority accepts a resignation, it cannot be modified or withdrawn by the employee unless the appointing authority agrees.

After an employee receives notice (pre-deprivation/Loudermill) that his/her dismissal has been proposed, the resignation must be coded as a resignation to avoid dismissal.

The Commission or a Referee will rescind a resignation if it was involuntary, i.e., obtained by fraud, duress, coercion, mistake or other vices of consent.

Giving the employee the option of resigning or being dismissed is not coercion.

Part II – Appeals: Ch. 13 of the Civil Service Rules

A. State Civil Service Commission

Louisiana Constitution of 1974, Art. 10, § 12(A) grants the Commission the exclusive power and authority to hear and decide appeals from classified state employees.

The procedure applicable to appeals is contained in Chapter 13 of the Civil Service Rules.

B. Who can file an appeal? – CSR 13.10

- Permanent classified state employees who have been subjected to disciplinary action: suspension without pay, reduction in pay, demotion, or dismissal.
- Permanent classified state employees who have been removed from their positions under CSR 12.6.
- Classified state employees, with or without permanent status, who been discriminated against in any employment action or decision based on their political or religious beliefs, race, or sex.
- Classified state employees, with or without permanent status, who have been adversely affected by a violation of the Civil Service Rules and/or Article.

C. Deadlines for filing appeals – CSR 13.12

Disciplinary actions and removals – Employee must file appeal within 30 calendar days of his receipt of disciplinary/removal letter.

If agency failed to give employee disciplinary/removal letter, or gave it to employee late, then employee must file appeal within 30 calendar days of when employee learned that action had occurred. If the agency fails to include the required notice of appeal rights, then the employee has 30 calendar days after the agency gives him the notice of appeal rights. If the disciplinary/removal letter is amended, corrected, modified, etc. the employee has 30 calendar days after the last letter if received.

Actions other than disciplinary actions and removals - Employee must file appeal within 30 calendar days of when employee learned that action had occurred.

In no event can an appeal be filed later than 365 days from the effective date of the action, regardless of the employee's knowledge that the action had occurred.

All appeals must be received by DSCS OR be postmarked by the U.S. Post Office by the due date.

Agency grievances do not stop the clock.

If the last day to file an appeal is a holiday – that is the last day – no extensions.

D. Appeal requirements – CSR 13.11

- Formal requirements and actual practice

E. How appeals are processed

- From filing to finality

F. How agency HR can help move an appeal along

- Upon docketing
- Upon receipt of a show-cause order or notice
- Upon receipt of hearing notice
- Upon receipt of a subpoena letter
- Upon receipt of notice that the hearing has been continued

G. How hearings are conducted

H. Tips for testifying

I. Why agencies lose appeals

- Procedural Errors
- Agency did not have a case to begin with
- Agency did not prove charges at the hearing
- Penalty problems

J. What to do if you lose

- Expungement
- Attorney's fees: CSR 13.35
- Back pay: CSR 13.38

K. How to win appeals

- Follow the rules
- Exercise good judgment in taking disciplinary actions
- Bring enough proof to the hearing

L. Settlements – How agency HR can help

M. Resources for more information

- Chapters 12 and 13 of the Civil Service Rules – available on DSCS's website: <http://www.civilservice.la.gov>. Appeal decisions and annotations to the Civil Service Rules are available there too.
- Sign up to receive electronic notification of new appeal decisions at http://doa.louisiana.gov/oes/listservpage/dscsnotify_listserv.asp.