



*The examples and best practices listed here are illustrative only, and are intended only for use as general advice. An appeal decision is the product of applying the Civil Service Rules, Article and Constitutional principles of Due Process to the unique facts of each case. Accordingly, these FAQ's and the HR Handbook do not predict or guarantee a particular result.*

**Q. What does a removal do?**

A. Separates an employee for non-disciplinary reasons.

**Q. Do removals under Rule 12.6 require notice of proposed action and an opportunity to respond?**

A. Yes.

**Q. Is a removal the same as a dismissal?**

A. No. A removal separates an employee for generally no-fault, non-disciplinary reasons. A dismissal separates an employee for at-fault disciplinary reasons.

**Q. What is the difference?**

A. A dismissal has other adverse consequences. The dismissed employee loses eligibility for non-competitive reemployment, rehiring at his or her former pay rate, and placement on a department preferred reemployment list. The dismissed employee also loses the right to have annual and sick leave restored. Finally, the appointing authority or the Department of State Civil Service may reject the employee's application or the Department of State Civil Service may cancel the employee's eligibility for employment. [Rule 6.5(c); Rule 22.4(d); Rule 23.16(a)4; Rule 23.13(b); Rule 11.18(b); Rule 17.25(e)4]. None of these adverse consequences applies to an employee removed under Rule 12.6.

**Q. Is a removal a separation without cause?**

A. No, there is cause, but the cause is either not the employee's fault or the underlying cause was not work-related.

**Q. What is the cause?**

A. Rule 12.6(a)1 – medical inability to perform job.

Rule 12.6(a)2 – inability to meet staffing ratios, inability to schedule work or meetings, reduced morale, etc.

Rule 12.6(a)3 – legal inability to perform job.

Rule 12.6(a)4 – financial burden on agency's budget when an employee's entire work period is Fair Labor Standards Act overtime.

Rule 12.6(a)5 – any other cause the agency deems is not the employee's fault.

**Q. Does a removed employee lose retirement eligibility?**

A. No. Retirement eligibility depends on years of service and age. It has nothing to do with the employee's status at the time of retirement.

**Q. What does Rule 12.6(a)1 do?**

A. Allows the removal of an employee who has fewer than 8 hours of sick leave and who cannot perform his duties for medical reasons.

**Q. What is the theory behind this rule?**

A. The rule recognizes that agencies cannot perform any public service without employees who are capable of performing their duties. An employee, incapacitated by illness or accident has no right to remain indefinitely in state service. The rules provide for paid sick leave. When an employee uses up this benefit and the benefits provided by state and federal law, it is a matter of administrative discretion as to how long the agency will allow the employee to retain his position.

**Q. What factors should the agency consider in deciding whether the employee should be removed under Rule 12.6(a)1?**

A. The workload, the employee's anticipated return-to-work date, the employee's performance before becoming ill or injured, whether the employee's position can be filled and, if so, how long it will take, the training curve for the job, and the agency's policy. Ultimately, the question is whether it is better for the agency to wait until the employee can return to work or to hire a replacement.

**Q. Are there any additional issues to consider when deciding whether to remove an employee under Rule 12.6(a)1?**

A. Yes. Potential claims by the employee under federal laws such as the Family and Medical Leave Act and the Americans with Disabilities Act. Consultation with your legal counsel is recommended.

**Q. What if the employee has a few (but less than 8) hours of sick leave on the effective date of removal?**

A. The agency must pay the employee for it.

**Q. May an agency remove an employee under this rule if the employee has annual or compensatory leave remaining?**

A. Annual or compensatory leave balances are not a bar to removal under Rule 12.6(a)1.

**Q. If an employee is able to return to work after the day the agency mailed, hand delivered, or gave the notice of proposed action to the employee, must the agency allow the employee to return to work?**

A. No. However, the agency may do so if it wishes.

**Q. May an agency remove an employee who will never be able to return to work due to illness or injury, but who has sick leave?**

A. No. There is no cause for removal until the employee uses up the disability benefit (sick leave) granted by the rules.

**Q. What does Rule 12.6(a)2 do?**

A. Allows the removal of an employee who accumulates seven or more unscheduled absences in a consecutive 26-week period after the agency gave the employee written notice that his attendance requires improvement and written notice of the sixth unscheduled absence.

**Q. What is the theory behind the rule?**

A. The rule recognizes that agencies cannot perform any public service unless employees come to work and, at some point, unscheduled absenteeism is, in itself, conduct that impairs the efficiency of public service and constitutes cause. The rule defines that point at seven or more absences in a twenty-six week period after the agency has provided the employee the required written notices.

**Q. May an agency include in its orientation package a notice that all unscheduled absences for all employees will be counted under Rule 12.6(a)2?**

A. No. The rule requires individual notice to employees whose attendance is problematic.

**Q. When the employee completes the first 26-week period, does he get a “clean slate” and start with a new 26-week period?**

A. No. It is a rolling, consecutive 26-week period.

**Q. Are there any additional issues to consider when deciding whether to remove an employee under Rule 12.6(a)2?**

A. Yes. Potential claims by the employee under federal laws such as the Family and Medical Leave Act and the Americans with Disabilities Act. Consultation with your legal counsel is recommended.

**Q. What is an unscheduled absence?**

A. One for which the employee did not obtain approved leave in accordance with the agency’s policy before the absence.

**Q. May an agency, by policy, define an unscheduled absence as one for which approved leave was not obtained by close of business on the last day worked before the absence?**

A. Yes.

**Q. If an employee calls-in sick on Monday and remains ill until the following Monday, is that five unscheduled absences?**

A. No. It would be one unscheduled absence. A continuous absence for the same reason is one unscheduled absence regardless of its duration.

**Q. If an employee calls-in sick on Monday and says she will be out until Thursday, then calls-in on Thursday and says she cannot come to work because her car will not start, and calls-in on Friday to say she cannot come to work because her child is sick, how many unscheduled absences is that?**

A. Three.

**Q. Must the agency give the employee written notice of each unscheduled absence?**

A. No. The rule requires the agency to give the employee written notice each time the employee accumulates a sixth absence in any consecutive 26-week period.

**Q. Must an agency pay an employee if he is absent without approved leave?**

A. No. Rule 11.27(g) allows an appointing authority to place an employee on leave without pay for an unapproved absence. An absence is unapproved if the employee did not follow agency policy for obtaining approved leave. Rule 11.7, Rule 11.13, and Rule 21.6 allow (but do not require) the appointing authority to grant approved leave after-the-fact.

**Q. Does approval of leave after the fact prevent an absence from being counted as unscheduled under Rule 12.6(a)2?**

A. No. The absence was still unscheduled.

**Q. Under Rule 12.6(a)2, can an agency count an employee's absence for his own illness as unscheduled?**

A. Yes.

**Q. If the employee provides a doctor's certificate that verifies that an absence was due to illness, can the agency still count the absence as unscheduled?**

A. Yes.

**Q. Must an agency have a policy to use Rule 12.6(a)2?**

A. No. However, some agencies choose to adopt a policy to ensure appropriate consistency throughout the agency as to what is unscheduled and what constitutes "prior approval."

**Q. What does Rule 12.6(a)3 do?**

A. It allows the removal of an employee who fails to obtain or, because of conduct that was not work-related, loses a license, commission, certificate, or other accreditation that is legally required for the job.

**Q. What are some examples?**

A. An employee who must drive to perform his duties who loses his driver's license due to a weekend DWI arrest.

An agency's lawyer whose license is suspended for taking funds from a private practice client.

A police officer for a hospital who loses his commission because of felony conviction for off-duty conduct.

**Q. What if the conduct was work-related?**

A. Dismissal is appropriate.

**Q. Are the minimum qualifications in the job specifications "legally required for the job"?**

A. Yes.

**Q. Are the Commission's mandatory training requirements (Rule 22.10) "legally required for the job"?**

A. Yes.

**Q. If an appointing authority establishes a mandatory training program for its employees, would this be "legally required for the job"?**

A. No. For this rule, the requirement must come from a law or something having the effect of law. However, the agency could discipline the employee for failing to take the required training.

**Q. If an agency is separating a permanent employee because he lacks the minimum qualifications, should the agency dismiss or remove the employee?**

A. If the employee falsified or misrepresented qualifications to get an appointment, dismissal is appropriate. If the employee did not falsify or misrepresent qualifications, but the person assessing them misunderstood or made a mistake, a removal under Rule 12.6(5) would be appropriate.

**Q. What does Rule 12.6(a)4 do?**

A. Allows the removal of an employee whose multiple state jobs cause the state to have to pay Fair Labor Standards Act overtime.

**Q. How can that happen?**

A. Under the Fair Labor Standards Act, the state is a single employer. Therefore, if a non-exempt employee has a full-time job and a part-time job, the first hour on the part-time job will be Fair Labor Standards Act overtime.

**Q. Which employer can remove the employee?**

A. The one that is paying the Fair Labor Standards Act overtime.

**Q. Do both jobs have to be classified jobs?**

A. No, a full-time unclassified job and a part-time classified job can cause the overtime liability.

**Q. Are there any other requirements for a removal under Rule 12.6(a)4?**

A. The employee must have refused to resign from one of the positions.

**Q. What does Rule 12.6(a)5 do?**

A. Allows an agency to remove rather than dismiss an employee when there is cause, but the agency believes the reason is not the employee's fault. For example, when employees could not return to work after Hurricane Katrina because their children were already in school in Texas, the Department of State Civil Service urged agencies to use Rule 12.6(a)5 rather than dismiss the employees for job abandonment.