

# NOTICES OF SUPPLEMENTAL PROPOSED RULEMAKING

After an agency has filed a Notice of Proposed Rulemaking with the Secretary of State's Office for *Register* publication and filing and the agency decides to prepare a Notice of Supplemental Proposed Rulemaking for submission to the Office, the Secretary of State shall publish the Notice under the Administrative Procedure Act (A.R.S. § 41-1001 et seq.). Publication of the Notice of Supplemental Proposed Rulemaking shall appear in the *Register* before holding any oral proceedings (A.R.S. § 41-1022).

## NOTICE OF SUPPLEMENTAL PROPOSED RULEMAKING

### TITLE 13. PUBLIC SAFETY

#### CHAPTER 5. LAW ENFORCEMENT MERIT SYSTEM COUNCIL

##### PREAMBLE

**1. Register citation and date for the original Notice of Proposed Rulemaking:**

5 A.A.R. 2644, August 13, 1999

**2. Sections Affected**

**Rulemaking Action**

R13-5-101	New Section
R13-5-104	New Section
R13-5-204	New Section
R13-5-305	New Section
R13-5-316	New Section
R13-5-503	New Section
R13-5-505	New Section
R13-5-602	New Section
R13-5-702	New Section
R13-5-703	New Section

**3. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statute: A.R.S. § 41-1830.12(A)

Implementing statutes: A.R.S. § 41-382(19)(a), 41-1714, 41-1830.11, 41-1830.12, 41-1830.13, and 41-1830.14

**4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name: Capt. C. H. Johnston, Business Manager

Address: Law Enforcement Merit System Council

P.O. Box 6638

Phoenix, Arizona 85005

Telephone: (602) 223-2286

Fax Number: (602) 223-2096

**5. An explanation of the rules, including the agency's reasons for initiating the rules:**

The Law Enforcement Merit System Council (Council) is proposing to repeal its present rules and concurrently replacing the old rules with new rules. The present rules were adopted in 1968 and have undergone minor revisions since then, but they are outdated and difficult to administer. As agreed during the 5-year review of these rules, the Council proposes to adopt new rules conforming to contemporary rulemaking policies, format, and style. The new rules will incorporate applicable federal regulations and some of the Council's past interpretations of the rules. The

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new rules will establish a comprehensive personnel system that can be applied to any agency brought under the purview of the Law Enforcement Merit System Council.

**6. An explanation of the substantial change which resulted in this supplemental notice:**

A public hearing was held on September 22, 1999. Comments were received from attorneys of the Arizona Highway Patrolmen Association at the public meeting. Discussion on these comments resulted in changes being made to the proposed rules. Additional recommendations were considered at a public meeting on November 18, 1999 that resulted in a few insignificant changes. It was determined that the changes made as a result of the September 22, 1999, meeting were significant and the rules needed to be published in the Administrative Register by the Secretary of State again. The changes that amount to a substantial change are:

**R13-5-602(H).** The “arbitrary and capricious” standard was determined to be too narrow. This was changed to “is not supported by substantial evidence”. This would provide further protections for the employee. Further, it was felt that the narrower standard of “arbitrary and capricious” would effectively eliminate the value of the grievance process.

**R13-5-702(C)(3)(b).** It appears that if a manager or supervisor believes that a misdemeanor may have been committed by an employee, that the 120 day limit will not run. Concerned that simple matters that historically are civil in nature can also be construed to be criminal in nature. Example given of an employee making improper use of government property. The Council agreed and amended this section by adding the phrase “involving theft or moral turpitude” after the word “misdemeanor”. This limits the type of misdemeanor that would result in suspending the time limit for investigating the incident.

**R13-5-703(H).** The feeling was that the department has the burden of going forward and the burden of proving by a preponderance of the evidence on the issues to be addressed. After studying the question, it was decided to create a new subsection to cover the question. R13-5-703(D) was created to place this responsibility on the agency, R13-5-703(H) was left unchanged. The addition of this new subsection did result in the renumbering of all subsections that followed subsection “D”.

**R13-5-703(Q).** As a result of the previous change, this now becomes R13-5-703(R). The feeling was that any information exchanged or elicited through the process of a settlement should be precluded for use in a subsequent Merit System Council hearing. The concern was that comments made in negotiations may come back to haunt an employee when such comments were made during “good faith” negotiations. The Business Manager was instructed to obtain the proper language from the Rules of Criminal Procedure and insert it in this section. This language was taken from rule 17.4(f) of the Rules of Criminal Procedure.

Because the record had not officially been closed, additional comments were received through November 18, 1999. At a Council meeting on November 18, 1999, additional changes were made to the following sections:

**R13-5-101(21):** This definition was changed to make it clear that paid leave taken was to be included in the definition of “compensation”. It also made it clear that accrued holiday leave was to be considered as compensation.

**R13-5-101(44):** This definition was changed to make it clear that an employee required to work unusual shift work would be properly compensated by accruing a holiday leave day if such holiday fell on the employee’s regular day off.

**R13-5-104(I):** This section was amended by adding the words “or pregnancy” to the equal employment provision.

**R13-5-204:** The language, “consistent with federal regulations under the Fair Labor Standards Act, Arizona Revised Statutes, and this Chapter” was inserted into the last paragraph to clarify that the agency must comply with the Fair Labor Standards Act or other statutory requirements.

**R13-5-305(F)(4):** a sentence was added to make it clear that the Business Manager would process any challenge to a promotional process consistent with the procedures established in R13-5-302.

**R13-5-316(F):** This change amounted to language change to make it clearer that an employee would obtain permanent status if the manager failed to extend or reject the probationary period.

**R13-5-503(F):** This section was changed to make it more consistent with FLSA rules.

**R13-5-505(C):** This section was changed to make it more consistent with FLSA rules.

**7. A showing of good cause why the rules are necessary to promote a statewide interest if the rules will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**8. The preliminary summary of the economic, small business, and consumer impact:**

Repeal of the Council’s out-dated administrative rules (submitted in a separate proposal and published in 5 A.A.R.

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2486, August 6, 1999) and adoption of revised administrative rules will result in additional costs to the Department of Public Safety due to the increase in annual leave benefits and in allowing the retention of accrued sick leave upon transfer from another state agency. The change in the retention of accrued sick leave benefits will bring the Department of Public Safety in line with the current rules of the Department of Administration, State Personnel Division. This will enhance the Department's ability to recruit qualified candidates who have previous state service. The rules will not apply to small businesses or consumers, but will apply to agency employees and applicants for employment. Revisions to the rules will improve readability and make the rules easier to use.

**9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:**

Name: Capt. C.H. Johnston, Business Manager  
Address: Law Enforcement Merit System Council  
P. O. Box 6638  
Phoenix, Arizona 85005  
Telephone: (602) 223-2286  
Fax Number: (602) 223-2096

**10. The time, place, and nature of the proceedings for the adoption, amendment, or repeal of the rules or, if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rules:**

No public meeting will be scheduled to receive public comment at this time. Anyone wishing to request an oral proceeding on the proposed amended rules, or submit written comment, may do so by sending such request to the person listed in Item #9 of the Notice of Supplemental Rulemaking on or before January 17, 1999. The record will be closed on January 21, 1999, after which no comments will be accepted concerning the proposed rules.

**11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

Not applicable.

**12. Incorporations by reference and their location in the rules:**

Not applicable

**13. The full text of the changes follows:**

**TITLE 13. PUBLIC SAFETY**

**CHAPTER 5. LAW ENFORCEMENT MERIT SYSTEM COUNCIL**

**ARTICLE 1. GENERAL PROVISIONS**

Section

R13-5-101. Definitions

R13-5-104. General Information

**ARTICLE 2. INVESTIGATION AND HEARINGS**

Section

R13-5-204. Work Hours and Work Options

**ARTICLE 3. CLASSIFICATION**

Section

R13-5-305. Promotions

R13-5-316. Probation

**ARTICLE 5. GENERAL ENTRANCE AND PROMOTION PROVISIONS**

Section

R13-5-503. Annual Leave

R13-5-505. Compensatory Leave

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ARTICLE 6. GENERAL APPOINTMENT PROVISIONS

Section

R13-5-602. Council Review

ARTICLE 7. GENERAL EMPLOYEE CONDUCT PROVISIONS

Section

R13-5-702. Disciplinary Procedures

R13-5-703. Appeals to the Council

ARTICLE 1. GENERAL PROVISIONS

**R13-5-101. Definitions**

In this Chapter, unless otherwise specified, the following terms mean:

1. No change
2. No change
3. No change
4. No change
5. No change
6. No change
7. No change
8. No change
9. No change
10. No change
11. No change
12. No change
13. No change
14. No change
15. No change
16. No change
17. No change
18. No change
19. No change
20. No change
21. "Compensation" means the amount of money paid for each hour worked and paid leave taken and includes time off received instead of money for overtime and holidays worked or accrued.
22. No change
23. No change
24. No change
25. No change
26. No change
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41. No change
42. No change
43. No change
44. "Holiday leave" means the leave time accrued by an employee due to working a state holiday or accrued when the holiday falls on a day the employee is not scheduled to work or is on paid sick leave. Holiday leave may be included in annual leave time.
45. No change

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- 46. No change
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- 91. No change

**R13-5-104. General Information**

- A.** No change
- B.** No change
- C.** No change
- D.** No change
- E.** No change
- F.** No change
- G.** No change
- H.** No change
- I.** Equal employment. The Council, the agency head, and agency employees shall not discriminate in any aspect of employment on the basis of race, color, religion, sex, national origin, age, disability, or pregnancy.
- J.** No change

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ARTICLE 2. INVESTIGATION AND HEARINGS

**R13-5-204. Work Hours and Work Options**

Work hours and work breaks. An agency head may establish different working hours for certain work groups and shifts in order to meet the needs of the agency. In doing this, the agency head should consider such factors as clean air directives, telecommuting, and flexible work hours. An agency head shall establish a policy for "on-duty" and "off-duty" time consistent with federal regulations under the Fair Labor Standards Act, Arizona Revised Statutes, and this Chapter and provide procedures for recording time worked and leave taken by an employee.

ARTICLE 3. CLASSIFICATION

**R13-5-305. Promotion**

**A.** No change

**B.** No change

**C.** No change

**D.** No change

**E.** No change

**F.** Inspecting an examination. Within 10 days after taking a written promotional examination, a competitor may request permission from the Business Manager to inspect a copy of the exam for the purpose of identifying items the competitor believes are incorrect.

1. The Business Manager shall arrange an inspection of an exam during business hours, in an agency office, and in the presence of the Business Manager or an employee authorized by the Business Manager.

2. The competitor shall advise the Business Manager of the questions or answers challenged.

3. The competitor may make notes concerning items the competitor plans to challenge but shall not otherwise copy questions in the examination.

4. The competitor may file a written notice with the Business Manager questioning items in the examination and explaining the basis for any challenge. The Business Manager shall process the challenge consistent with the procedures in R13-5-302.

**G.** No change

**H.** No change

**I.** No change

**J.** No change

**K.** No change

**L.** No change

**M.** No change

**N.** No change

**O.** No change

**P.** No change

**Q.** No change

**R.** No change

**R13-5-316. Probation**

**A.** No change

**B.** No change

**C.** No change

**D.** No change

**E.** No change

**F.** Permanent status by default. An employee shall achieve permanent status by default if the employee's manager either fails to extend or reject the probationary period prior to the last day of the employee's probation.

**G.** No change

**H.** No change

**I.** No change

**J.** No change

**K.** No change

**L.** No change

**M.** No change

**N.** No change

ARTICLE 5. GENERAL ENTRANCE AND PROMOTION PROVISIONS

**R13-5-503. Annual Leave**

**A.** No change

**B.** No change

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- C. No change
- D. No change
- E. No change
- F. Compensation for unused leave. Upon separation from agency employment, an employee is paid for any unused annual leave remaining in the employee's account at the average rate received by the employee in the last 3 years of the employee's employment or the employee's current rate of pay, whichever is higher.

**R13-5-505. Compensatory Leave**

- A. No change
- B. No change
- C. Payment upon separation. Upon separation from an agency, an employee shall be paid for any accrued compensatory leave remaining in the employee's account at the average rate received by the employee in the last 3 years of the employee's employment or the employee's current rate of pay, whichever is higher.

**ARTICLE 6. GENERAL APPOINTMENT PROVISIONS**

**R13-5-602. Council Review**

- A. No change
- B. No change
- C. No change
- D. No change
- E. No change
- F. No change
- G. No change
- H. Decision. The Council shall state its decision in an open meeting. The Council shall sustain the agency's action on the grievance unless it finds the agency's denial is not supported by substantial evidence or is inconsistent with Council rules.

**ARTICLE 7. GENERAL EMPLOYEE CONDUCT PROVISIONS**

**R13-5-702. Disciplinary Procedures**

- A. No change
- B. No change
- C. No change
  - 1. No change
  - 2. No change
  - 3. If a manager or a supervisor is aware of the employee's alleged actions that constitutes criminal offense but fails to act, the 120-day time limit does not run during the period of the manager or supervisor's inaction, if:
    - a. No change
    - b. The offense is a misdemeanor involving theft or moral turpitude and is discovered within 120 days after the end of the 120-day period for taking disciplinary action.
    - c. No change
- D. No change
- E. No change
- F. No change

**R13-5-703. Appeals to the Council**

- A. No change
- B. No change
- C. No change
- D. Agency responsibility. An agency shall have the burden of going forward with the case once an appeal has been filed. An agency must prove the cause for disciplinary action by a preponderance of the evidence.
- E. Effect of appeal. The Council shall determine whether the cause for the disciplinary action is supported by law and the evidence. The Council may sustain, modify or rescind the disciplinary action. If the disciplinary action is rescinded, the Council shall order the agency head to reinstate the employee and to pay the employee accumulated back pay.
- F. Amended notice of disciplinary action after employee files an appeal. If good cause exists, an agency head may file with the Council a motion to amend the notice of disciplinary action. The motion shall be filed no later than 30 days before the hearing.
- G. Notice of hearing. The Council shall notify the parties of the time and place of the hearing.
- H. Failure to appear. If a party, without good cause, fails to appear at the time and place set for a hearing, the Council may find in favor of the appearing party.
- I. Conduct of hearings. The Council may sit as a whole at a hearing, or the chair may designate one or more of its members to hold the hearing. A record of the hearing shall be reviewed by a majority of the Council prior to making a decision in those cases where only one member has been designated to hear a case. The member or members designated to preside at

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a hearing may administer oaths, issue subpoenas and require attendance of witnesses and the production of books or papers. The member or members designated to preside may also cause the depositions of witnesses residing within or outside the State to be taken in the manner prescribed by law for like depositions in civil cases in the Superior Court of this State.

- J.** Witness fees. Witnesses at a hearing, other than employees, are entitled to the fees allowed witnesses under A.R.S. §12-303.
- K.** Payment of witness fees. If the Council subpoenas a witness on its own initiative, the Council shall pay the witness' fees and mileage. The requesting party shall pay the fees for subpoenaed witnesses. Employees appearing as witnesses on duty shall receive travel expenses from the agency and shall not be entitled to witness fees.
- L.** Discovery.
1. Within 20 days after receiving a notice of appeal, the agency shall provide all material relating to the case, including all investigation materials, to the employee. For the purpose of this rule, hand-written notes substantially incorporated within a report shall not be considered investigation materials.
  2. Within 20 days after receiving the agency's discovery, the employee shall provide all material relating to the defense of the employee to the agency.
  3. After initial discovery, each party shall provide all new material relating to the case to the other party within 10 days after receipt.
  4. If a party fails to provide material as required, the Council may preclude its use at the hearing.
- M.** Motions. All motions shall be in writing and filed no later than 20 days prior to the hearing. A response shall be filed in writing within 10 days after service of the motion. The chair may designate one or more members of the Council to hear and rule on a motion, with the exception of a motion to dispose of the case. A motion not filed in accordance with this rule may be precluded by the Council.
- N.** Depositions:
1. On the motion of a party, the Council may order the deposition of a witness under the following circumstances:
    - a. The witness does not reside within the state or is out of state.
    - b. The witness is too ill to attend the action before the Council, or
    - c. The deposition is for the purpose of discovery in preparing a case before the Council.
  2. The requesting party shall pay the expense of any deposition. An employee of the agency is not entitled to a witness fee for giving a deposition.
  3. The deposition of a witness who is unavailable to appear at a hearing may be used in evidence by either party or the Council.
- O.** Open hearings. The Council's hearings shall be open to the public. The Council may, upon request of a party, exclude non-testifying witnesses from the hearing. The Council may keep excluded witnesses separated and prevent them from communicating with each other until all are examined. The Council may conduct a hearing in executive session under ARS §38-431.03 (A) (1).
- P.** Legal counsel or representative. Before the hearing of any appeal, each party shall designate its legal counsel or representative for the record. The Council shall advise each party without legal counsel that the party may obtain and be represented by counsel at the hearing. At the request of a party, the Council may postpone the hearing for a reasonable length of time to allow a party to obtain legal counsel.
- Q.** Presentation of evidence. Both parties may present their evidence and witnesses either personally or through their chosen representative. The Council shall exclude evidence irrelevant to the causes set forth in the notice of disciplinary action.
- R.** Settlement of disputes. The parties may agree to settle any matter pending before the Council. The parties shall submit the terms of settlement to the Council. If the Council approves the settlement, the settlement becomes final. If no settlement is reached, or if the proposed settlement is revoked or rejected by the Council, or withdrawn by either party, or if the judgment is later vacated or reversed by the court, neither the plea discussion nor any resulting agreement or judgment shall be admissible against the employee in any hearing before the Council on this matter.
- S.** Decision. The Council shall render a decision within 30 days after a hearing. In arriving at a decision, the Council may consider any prior disciplinary actions taken within the previous 10 years against the employee, providing the information is introduced at the hearing. The Council shall state its decision in an open meeting and shall issue the decision in writing within a reasonable time after the hearing. The Council's decision shall contain findings of fact and its order for disposition of the case.