

MEMORANDUM

DATE: October 4, 1994

TO: PERSONNEL MANAGEMENT LIAISONS REFERENCE CODE: 94-55

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

Labor Relations Officers  
Personnel Officers

FROM: Department of Personnel Administration  
Legal Division

SUBJECT: Procedures - - Automatic Resignations After Absence Without Leave (AWOL)

The purpose of this memorandum is to provide you with the appropriate procedures to follow in handling an automatic resignation when an employee is Absence Without Leave (AWOL).

Government Code Section 19996.2 (the "AWOL statute") provides, in part, that an employee who is voluntarily or involuntarily AWOL for five consecutive work days is considered to have automatically resigned from state service as of the last day of work.

In the 1980's, several major court cases (Zike, Goggin, and Phillips) superimposed upon the AWOL statute the requirement that an appointing power show that the employee intended to "abandon" his or her position. This typically meant that attempts to locate the employee had to be made, and the appointing power had to determine whether the employee had abandoned his or her position. If the appointing power could not establish abandonment, the AWOL statute was not applied. Appointing powers could initiate adverse actions for the AWOL time, but they could not use the AWOL statute. Also, if the AWOL statute were applied and the employee returned to work after receipt of the notice, the notice was usually rescinded, and the appointing power was left with the adverse action process.

In February 1991, the California Supreme Court decision in Coleman v. Department of Personnel Administration (1991) 52 C.3d 1102 overturned the Zike, Goggin, and Phillips line of cases and made it unnecessary to attempt to locate AWOL employees and prove the employee intended to "abandon" his or her position. The simple requirements outlined in the statute were all that was required. It is now necessary for the appointing power to demonstrate only that the employee missed five consecutive days of work without obtaining leave.

The following process should be followed when applying the AWOL statute:

1. AWOL Notice. A written notice should be sent to the employee's last known address. It should contain the dates of AWOL; the date the AWOL statute will be invoked; the effective date of the automatic resignation (last day worked); the right to request an informal "Coleman" hearing before an impartial and

disinterested decision maker representing the appointing power; the timeframes for requesting the informal "Coleman" hearing and reinstatement; and the right to request reinstatement from the Department of Personnel Administration (DPA). (A sample notice letter is attached to this memorandum.) A "Proof of Personal Service" or "Proof of Service by Mail" must be sent with the notice.

2. Informal ("Coleman") Hearing. The AWOL notice should include an implementation date that allows the employee a reasonable time to request a "Coleman" hearing before the separation is finalized. This hearing is informal and should be conducted by an impartial and disinterested representative of the appointing power. The term "impartial and disinterested" means that the decision maker is someone not involved in the original decision to AWOL the employee. The decision maker must determine if the employee was absent for five consecutive work days and if the absence was without leave. "Leave" does not mean "leave time on the books." It means "*permission* from the employee's supervisor to be absent." Once this determination is made, the decision maker is empowered to sustain or rescind the separation.

Prior to making a final decision, the decision maker may also consider and evaluate the reasons for the absence without leave and why the employee did not obtain leave. The appointing power may reinstate the employee pursuant to Government Code section 19140.

3. Request to DPA for Reinstatement. Government Code Section 19996.2 provides, in part, that DPA may reinstate an employee if "...the employee makes a satisfactory explanation to the department [DPA] as to the cause of his or her absence and his or her failure to obtain leave therefor,..." The employee must request reinstatement within 15 days of the service of the notice of AWOL separation. The request may be made irrespective of whether the employee requested a "Coleman" hearing with his or her appointing power. Formal service is the date the notice was mailed or personally given to the employee. If the employee was not given a notice, the employee has 90 days from the effective date of the separation to request reinstatement. We strongly recommend that notice always be given prior to invoking the AWOL statute.

DPA will schedule a hearing within a reasonable time to examine the reasons for the absence and why leave was not obtained. (The decision maker has already determined that the AWOL occurred; therefore, DPA will not revisit that issue.) If DPA determines that reinstatement is appropriate and that the employee is "ready, willing, and able" to return to work, DPA may reinstate the employee. Back pay is never authorized pursuant to the AWOL statute.

PML No. 94-55  
October 4, 1994  
Page 3

Prior to invoking the AWOL statute, review the applicable Memorandum of Understanding (MOU) to determine if it contains provisions at variance with some of those in this memorandum. As of July 1, 1994, only the MOUs for Bargaining Units 6 and 18 contain provisions which are different from the statutory scheme.

Please contact Joan Branin at (916) 322-4925 if you have questions regarding the AWOL process.



Christopher Waddell  
Chief Counsel

Attachment

Attachment  
PML 94-55  
October 4, 1994

### SAMPLE AWOL NOTICE LETTER

Dear (Employee's Name):

Please take notice that effective (date in the future reasonably calculated to give the employee notice and opportunity to respond) (your department) intends to invoke the AWOL statute (Gov. Code, § 19996.2) because you have been absent without leave for five (5) consecutive working days. You have been absent from (date) to (date), and that absence was without leave.

If you disagree with these facts, you may request an informal hearing to be held prior to (specify the effective date the your department intends to finalize the separation). To request an informal hearing, contact (name, address, phone number of the *Coleman* officer). At the hearing you will have an opportunity to explain why you disagree with this intended decision. If the AWOL separation is finalized, you will be considered to have resigned on (date), your last day of work.

Whether or not you respond to your department to request an informal hearing, you still have the right to file a written request for reinstatement with the Department of Personnel Administration (DPA), 1515 "S" Street, North Building, Suite 400, Sacramento, CA 95814, within fifteen (15) calendar days of service of this notice. You have five (5) additional days if the notice was sent by mail within California. A request for reinstatement is made pursuant to Government Code section 19996.2. If you file a timely request, the DPA or its authorized representative will hold a hearing within a reasonable time.

Sincerely,

(Name)  
(Title)  
(Department)