

## **POST SUSPENSION OF A MEMBER OF THE AMERICAN LEGION OR LEGION FAMILY**

Of late, there have been many posts, within the Department of Texas, which have imposed suspensions of various individuals from the post for various lengths of time for various “alleged” infractions. These suspensions have been imposed upon Legionnaires, Auxiliary members, Sons of the American Legion members, and other members of the American Legion family of organizations. The procedures which have been followed are universally incorrect. For that reason, this guideline is being provided.

Let us begin by explaining why the procedures **must be followed**. In the 14<sup>th</sup> Amendment of the Constitution of the United States of America, there is a clause, called the “due process clause”, which states the following: “...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” At first reading of this portion of the 14<sup>th</sup> Amendment, one might say, “What does that have to do with the American Legion, which is not a state?” The answer is that the Constitution of the United States of America is referred to as a “living document”, which means the Supreme Court of the United States of America is continuously interpreting what it means, thereby making the plain language mean more or less than it appears to on its face. The “due process clause” has been extended to schools, abortion clinics, election recounts, and virtually any activity which might exist. It has been extended to various organizations, similar to THE AMERICAN LEGION, necessitating THE AMERICAN LEGION to put procedures in place to insure that any person, accused of any misconduct, would receive due process of law.

The following language may be found in UNIFORM CODE OF PROCEDURE OF THE AMERICAN LEGION DEPARTMENT OF TEXAS:

### **“II. EXPULSION OR SUSPENSION OF A MEMBER OF THE AMERICAN LEGION, DEPARTMENT OF TEXAS**

“Pursuant to the provisions of Article VIII of the Constitution of The American Legion, Department of Texas, and the provisions of Article IV of the National By-Laws of The American Legion, the following practice and procedure in the expulsion or suspension of a Member of American Legion shall be followed in the Department of Texas.

#### **“1. Process**

“a. The accuser or accusers must be members of the same post as the accused, except that any Legionnaire may cause charges to be filed by the District, Division or Department Commander through the Post Commander of the accused for an incident involving the accuser occurring at any Legion activity outside of, or within the jurisdiction of the accused's post. A charge must be filed within one (1) year of the incident, or it will be barred by limitations.

“b. The first process in all actions of expulsion or suspension against a member of The American Legion in good standing shall be by filing with the adjutant of the post written charges in triplicate, properly verified by affidavit of the accuser or accusers.

## **"2. Writ - When Returnable When Written Charges Are Filed**

"The Post Adjutant shall issue a writ dated upon the day it shall be issued and signed with the Post Adjutant's name, directed to the Post Sergeant at Arms (or some other member of the post in good standing), commanding the Post Sergeant at Arms to summon the accused to appear at the post meeting place at the next regular meeting (providing fifteen (15) days have intervened), to admit or deny the charges.

## **"3. Service - Return**

"It shall be the duty of the Post Sergeant at Arms, or the member appointed in the Post Sergeant at Arms place, to serve the writ so issued delivering to the member a verified copy of the charges filed. The Post Sergeant at Arms shall endorse upon said writ the time and manner of serving it and immediately thereafter file the same with the Post Adjutant.

## **"4. Alias Writ**

"Whenever it shall appear by the return that the accused is not found fifteen (15) days, or more, previous to the regular post meeting, the Post Adjutant, at the request of the accuser, shall issue another writ and so on until service is had.

## **"5. Failure to Make Return**

"If the Post Sergeant at Arms, or the member to whom a summons is delivered, shall neglect or refuse to make the return of same within the time required in Paragraph 4., another summons shall be issued directed to some member in good standing for service as here-in-above set forth.

## **"6. Service by Publication**

"Whenever the accuser shall file with the Post Adjutant of the post in which the charges are pending, an affidavit showing that the accused has gone out of the state or on due inquiry cannot be found or is concealed within the state so that process cannot be served upon him/her, and stating the place of residence of such accused, if known, or that upon diligent inquiry his/her place of residence cannot be ascertained the Post Adjutant shall cause publication to be made in the county where the post is located and if there be no newspapers published in said county, then in the nearest newspaper published in the state containing notice of the pendency of such charges before said post, the names of the accused and the accuser, and the time and place of the hearing of said charges. Within ten (10) days of the first publication of such notice the Post Adjutant shall send a copy thereof by mail addressed to the accused if his/her place of residence is stated in said affidavit; said notice shall be published at least once a week for three (3) successive weeks.

## **"7. Charges**

"The accuser or accusers shall set forth the charges of disloyalty, neglect of duty, dishonesty or conduct unbecoming a member of The American Legion (implicitly the Auxiliary, Sons, Riders or other class of person being entitled in an AMERICAN LEGION activity) in terms of simplicity and understanding, in order that the accused may properly prepare a defense. Charges shall be consistent with Article IV, National By-Laws of The American Legion.

## **"8. Accused To Enter His/Her Appearance**

"Before the accused defends in his/her own proper person, or through his/her counsel, he/she shall enter his/her appearance by filing a written answer to said charges on or before the date of the regular meeting to which he/she has been summoned to appear; or a verbal answer at the regular meeting which will be included in the minutes of the meeting.

## **"9. Failure To Answer**

"If the accused fails to answer the charges, in manner and form as herein last set forth, the charges and matters and things therein stated shall be taken as confessed and the Executive Committee shall enter an order of reprimand, suspension or expulsion, a copy of which, certified to by the Post Adjutant, shall be forwarded to the accused.

## **"10. Date Of Trial**

"Whenever the accused enters his/her appearance by filing an answer to the charges preferred, the entire proceedings shall automatically be continued until the trial date set by the Post Officers and Executive Committee, at which time the trial shall be had.

## **"11. Continuance**

"Either party may apply for a continuance before the day set for trial; however, it shall be accompanied by a written motion, supported by affidavit, or the party so applying. Good and substantial cause must exist before said motion is granted. The presiding Post Judge Advocate shall pass on said motion.

## **"12. Trial - Post Judge Advocate To Preside**

"A. The Post Judge Advocate shall preside at the trial. The Post Judge Advocate shall have power and authority to pass upon the materiality and relevancy of all the evidence presented. The Post Judge Advocate shall swear witnesses prior to their given testimony, and shall have general power to prescribe the necessary and reasonable rules and regulations for the orderly procedure of said trial. (i.e. Oath: Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?) The Post Judge Advocate shall have the power to direct a dismissal of the charges filed by the accuser when the charges are frivolous, or filed for harassment, or do not state a specific charge, upon motion of the accused.

"B. If the Post membership or Executive Committee is the accuser the Executive Committee shall appoint a prosecutor to present the case. If an individual is the accuser, said individual may appoint a representative to prosecute the case.

### **"13. Post Judge Advocate Vacancy**

"In case of death, removal, vacancy, resignation or disability of the Post Judge Advocate, it shall be the duty of the Post Commander, when duly notified by the Post Adjutant, to appoint a special Post Judge Advocate to fill the vacancy. Such special Post Judge Advocate so appointed shall have the authority, rights and powers of a duly elected Post Judge Advocate.

### **"14. Members of the Post to Act as Jurors**

"Nine (9) members of the Post, but in no event, less than six (6) members, excluding officers and members of the Post Executive Committee, shall be selected to act as jurors, as set out below, to ascertain, under the guidance of the trial Post Judge Advocate, the truth of the charges preferred. The jury's province is strictly limited to questions of fact, and within that province they are further restricted to the exclusive consideration of the specific charges and the evidence that has been proven by the testimony and documents or other evidence as may be given or supplied by the witnesses during the trial. Their decision shall be reduced to writing and filed with the Post Adjutant, who, in turn, shall enter the same in the post records. The jury's verdict shall state, as signed to by each juror, whether the accused is "Guilty" or "Not Guilty" as charged, and for each charge. If found "Guilty", a further determination shall be made in writing, as to the punishment, i.e., whether to expel from membership, suspend from membership for a specified time, or for a formal reprimand.

"The selection of the initial jury panel shall be accomplished by the presiding Post Judge Advocate requesting the Post Sergeant at Arms to summon all of the membership present, but excluding post officers and executive committeemen, and in sufficient number to result in an initial jury panel of at least Eighteen (18) members, and then place the names of such members in an enclosed container such that Eighteen (18) names can be drawn by lot. Such members drawn shall be listed in the sequence drawn. The accuser and accused shall question and voir dire this initial Eighteen (18) member jury panel, and may challenge any of same for cause or peremptorily, as set out in Sections 15 and 16 below. The accuser and accused shall be supplied with a written list of the Eighteen (18) members comprising the initial jury panel, and following their voir dire, each may strike by marking through a given name, any challenged for cause or peremptorily. These two written lists shall be delivered to the trial Post Judge Advocate who shall compare same, and who will then seat the first Nine (9) jurors (but not less than six) in sequence who are not stricken. Any remaining prospective member jurors, in sequence, shall serve as alternate jurors, as needed. At this time, the Nine (9) (but not less than six) final jury members and the alternate jurors, shall be sworn in by the trial Post Judge Advocate using the following oath: "Do each of you solemnly swear and affirm that you will lay aside any personal bias or experiences, and consider only the evidence presented to you, and then render a fair and impartial verdict?"

### **"15. Challenges For Cause**

"If any member of the post, or of any other post, selected as a juror on the initial jury panel, shall state during the voir dire that he/she cannot fairly and impartially render a verdict therein, in accordance with the evidence to be introduced, and the presiding Post Judge Advocate shall be satisfied of the truth of such statement, said member or members shall be challenged for cause and struck off the initial jury panel.

**"16. Peremptory Challenge**

"Each party shall be entitled to challenge of two jurors without showing cause for such challenge.

**"17. Duty of Post Sergeant at Arms**

"If a sufficient number of the initial jury panel be stricken for cause or peremptorily such that less than Nine (9) jurors are left, then the next in sequence alternate juror may be seated and voir dired, and so on, but in no event, where no alternate jurors are left, shall the jury be less than six (6) members.

**"18. If Post Sergeant at Arms Not Present, Etc.**

"If the Post Sergeant at Arms is not present, disqualified or unable to act as such, the presiding Post Judge Advocate shall appoint a special Post Sergeant at Arms to act.

**"19. Members Insufficient To Fill Panel**

"When the membership of the Post, excluding the post officers and executive committee members, through cause or otherwise, is insufficient in number to result in a final Nine (9) member jury panel for participation in the trial, the trial shall be continued to another trial date to be set by the trial Post Judge Advocate, but within a reasonable subsequent date, and the trial Post Judge Advocate shall request the Post Sergeant at Arms to summon a sufficient number of members of other American Legion Posts within the District in which the subject post is located, so that the initial Eighteen (18) member jury panel can be selected, using the same "drawing by lot" procedure set out in 14 above.

**"20. Burden of Proof and Charge of the Court**

"The burden of proof is on the accuser to prove his/her case beyond a reasonable doubt. After the conclusion of the presentation of evidence, and after closing arguments of both the accuser and the accused, the Court shall give the following charge to the jury:

"A. The burden of proof is on the accuser to prove his/her charges and case beyond a reasonable doubt.

"B. The verdict must be in writing and signed in ink by each juror showing his/her vote of "Guilty" or "Not Guilty" and if required, his/her vote for a punishment.

"C. A foreman is to be selected by the jurors, who, after deliberation, shall read the verdict on each charge.

## **“21. Amendments**

“At any time before a final decision, in the course of the trial, appropriate amendments and motions may be submitted and may be allowed by the presiding Post Judge Advocate consistent with good order and due process.

## **“22. Deliberations And Orders**

“A. At the conclusion of hearing, the trial jurors shall retire, deliberate and vote on the charge against the accused. A two-thirds (2/3) vote of the members sitting and voting in the affirmative shall be required to expel, suspend or reprimand the accused as a member of The American Legion in good standing. The vote shall be announced by the presiding Post Judge Advocate and the action of the jury shall be in writing certified to by the Post Judge Advocate, who shall also advise the accused of his/her right to appeal a conviction. A certified copy of the Order shall be delivered to the accused and a copy certified and forwarded to the Department Adjutant by the Post Adjutant.

“B. The Department Adjutant shall notify all Posts in the Department of Texas and National Headquarters in writing of all members expelled by Posts in the Department, who have not timely appealed.

## **“III. APPEALS**

### **“1. Court of Appeals**

“A. There is hereby provided a Court of Appeals for The American Legion, Department of Texas. It shall consist of two Past Department Commanders and one member licensed to practice law in the State of Texas, qualified in American Legion Constitutional Procedure, appointed by the Department Commander and confirmed by the Executive Committee. They shall serve for three (3) years, subject to reappointment. The lawyer shall serve as Presiding Judge. They shall meet when and wherever necessary.

“B. The Court of Appeals shall promulgate and publish specific procedures; their deliberations shall be limited to statement of facts, transcripts and briefs submitted to them. They may require the services of the Department Judge Advocate, and they may hear oral arguments from Counsel at their discretion. In arriving at their decision, the Court shall apply the Substantial Evidence Rule, and their decision shall be final and bind the Department of Texas. All final decisions shall be in writing and copies thereof furnished interested parties.

### **“2. Procedure For Perfection of Appeal**

“A. Within thirty (30) days after the final judgment by the Post of Expulsion, Suspension or Reprimand as certified to and signed by the presiding Post Judge Advocate at the Post trial, the accused member may file an appeal by written letter, attached to a copy of the Order of Expulsion, Suspension, or Reprimand, with the Department Adjutant by certified mail, return receipt requested, or by personal service, with a copy to the Post Adjutant, certified mail, return receipt requested or by personal delivery.

The date of actual receipt of the written appeal by the Department Adjutant shall control in computing the thirty (30) day period within which to file the appeal.

“1. Failure to file said written appeal with the Department Adjutant within the thirty (30) day time frame, shall result in the Order of Expulsion, Suspension or Reprimand becoming final without any further appeal, subject only to 2. below.

“2. A. In the event the certified copy of the Post Trial Order is not delivered to the accused, except for accused's failure to pick up the certified mail, return receipt requested copy of the Trial order, the

accused may file a written, verified Motion under oath requesting an extension of the thirty (30) day period of time to appeal to run after such actual receipt by accused of the Trial Order, with the Post Judge Advocate, with copy of said Motion to the Department Adjutant, setting out that the thirty (30) day time frame for appeal had run before the accused received a certified copy of the Trial Order setting out the date of the Order thereon and setting out the date of actual receipt by the accused of the certified copy of the Trial Order, and that such delay was not the result of the accused's negligence.

“B. Within thirty (30) days of the receipt by the Post Adjutant of the accused's written notice of Appeal, the Post Adjutant shall cause a written Statement of Facts, consisting of oral statements, testimony, rulings and arguments, adduced at the Post Trial, and also shall prepare a transcript of all of the written notices, letters, pleadings, documentary evidence and Orders resulting from the Post Trial. Both the Statement of Facts and Transcript must be certified as to authenticity and correctness by the Post Adjutant.

“1. Also, within the thirty (30) day time frame set out above in B., the presiding Post Judge Advocate, or other appointed Trial Post Judge Advocate, shall examine the Statement of Facts and Transcript, and certify in writing as to their correctness, and then mail said Statement of Facts, Transcript and Certifications, certified mail, return receipt requested or by personal delivery to the Department Adjutant.

“C. The Department Adjutant, upon receipt of the accused's Notice of Appeal, shall immediately note the date of receipt thereon and set up a file and docket number for said appeal. Upon receipt of the Statement of Facts, Transcript and Certifications, the Department Adjutant shall present the entire appellate package to the Presiding Judge of the Court of Appeals with a request for a formal hearing date to be set.

“D. The Presiding Judge shall set a formal hearing on the appeal to be heard within forty-five (45) days from the Presiding Judge's receipt of the Appellate Package, and notify the Department Adjutant of such time, date and location of the hearing, who then shall cause written notice of the time, date and location of the hearing, to be sent certified mail, return receipt requested to the Post and to the accused. Notwithstanding the foregoing, the accused shall be entitled to at least fifteen (15) days notice before a formal hearing is held. In this regard, said fifteen (15) day notice shall be computed from the mailing postmark when deposited in the US Mail.

### **“3. Pre-hearing Procedure**

“A. At any time after written notice of the hearing time, date and location is given, and prior to the hearing, the accused, or his/her representative, may request the Department Adjutant to make available to the accused or his/her representative, for inspection and copying at Department Headquarters, Austin, Texas, the Statement of Facts, Transcript, Certifications, and pleading previously filed with the Department Adjutant. Copies of any items in the appellate package shall be at the expense of the party requesting same, payable at the time of receipt of same.

“B. At any time before the hearing time and date, either the Post or accused may file Motions concerning procedural defects occurring before, at or after the Post Trial, and as concerns the perfection of the appeal. Motions for continuance may also be filed for good cause. The Accused and the Post must file the names and addresses of any representative who will attend the hearing to argue motions or briefs, prior to the hearing.

“C. Both the Accused and the Post may file briefs, to be considered by the Appellate Court in arriving at a decision with the Department Adjutant prior to or at the hearing. In this connection, the party filing any Motions under B. above, or briefs under this subsection, shall provide the other party with copies of the Motions and/or briefs, at the time of filing said Motions and/or briefs with the Department Adjutant.

“D. Each of the Appellate Judges and the Department Judge Advocate shall be supplied with a copy of the Statement of Facts, Transcript, Certifications, all pleadings and motions, at least three (3) days prior to the hearing.

### **“4. Hearing Procedure**

“A. In the event either the Post or the Accused request a stenographic hearing, the cost will be paid by the party requesting same, at the time of hearing.

“B. The Presiding Judge shall call the hearing to order. The Department Judge Advocate shall formally read the Notice of Appeal, and then ascertain who is present and representing the Accused and the Post.

“C. At this time, all motions complaining about procedural defects, perfection of appeal, motions for continuance, and any other motions not heretofore disposed of, will be considered by the Appellate Court.

“D. In the event no motions complaining about procedural defects or defects in perfecting the appeal were presented by either party, the Appellate Court may take judicial notice of any such procedural defects at the trial below or in perfecting the appeal, and dismiss or grant the appeal without further consideration of the Statement of Facts, Transcript, etc., and setting out the specific reason for its ruling.

“E. In the event there are no procedural defects or defects in the perfection of appeal, the Appellate Court will proceed to consider the Statement of Facts, Transcript and any other matters pertinent, and

applying the "Substantial Evidence Rule", i.e., the questions being "whether or not there is substantial evidence to support the expulsion, suspension or reprimand of the Accused". No new or other evidence that could have been presented at the Post trial will be considered. The Department Judge Advocate may give his/her opinion and reasons therefore as to a ruling, which opinion shall only be taken under advisement by the Appellate Judges. At this time, if requested by either the Post representative or the accused or his/her representatives, oral arguments reaching to the substantiality of the evidence presented in the Post Trial may be heard by the Appellate Court. Such oral arguments shall not exceed fifteen (15) minutes in length.

"F. The Appellate Court will then retire and render their decision, either (1) affirming the Expulsion, Suspension, or Reprimand (2) reversing the Expulsion, Suspension, or Reprimand (3) affirming or reversing the Post and remanding the matter back to the Post Trial Court for further proceedings. The Presiding Judge shall issue a written Judgment setting out the findings of fact and of law and the decision. Said Judgment shall not become final, until thirty (30) days after the date the Judgment is signed. Once it becomes final, it shall bind the Department and the parties to the Post Trial without any appeal. The Department Adjutant, after the judgment has become final, either with or without a motion for re-hearing, shall send copies of the judgment to all of the parties involved in the trial hearing and appeal.

#### **"5. Motion for Re-hearing After Appellate Judgment Issue**

"After the Appellate Court has issued and rendered its written Judgment and decision, either the Accuser or the Accused may file a "Motion for Re-hearing" requesting the Appellate Court to reconsider their decision. Said "Motion for Re-hearing" shall set out specifically the alleged error or abuse of the Appellate Court's discretion, and must be filed with the Department Adjutant within and prior to the expiration of the thirty (30) day period of time immediately following the Appellate court's issuance of and rendition of its Judgment and decision, and before said Judgment and decision becomes final. The timely filing of the Motion for Re-hearing shall toll the running of the thirty (30) days necessary for the Judgment and decision to become final.

After the Accuser or Accused files his/her "Motion for Re-hearing", the other party shall have fifteen (15) days within which to file a Response to said "Motion for Re-hearing" with the Department Adjutant. The Appellate Court then shall consider the "Motion for Re-hearing" and render a decision within forty-five (45) days of the filing of the last timely pleading. Said decision and Judgment, once issued and rendered in writing, shall be final, without further lapse of time and shall bind the Department and the parties to the Post Trial.

#### **"6. Appeals**

"A. Any question that arises concerning a constitution which has been approved by the Department Executive Committee, may be presented in writing to the Department Judge Advocate, who shall issue an opinion thereon, subject to the final ruling of the Department Commander. The person or entity raising the question shall have thirty (30) days from the date of ruling of the Department Commander, to file an appeal directly to the Court of Appeals, however the procedures of sections 2, 3 and 4 above

shall not apply, but section 5 shall apply as concerns a motion for rehearing. The decision of the Court of Appeals shall be final and binding on the Department of Texas.”

**A POST MAY NOT SUSPEND A MEMBER FOR LONGER THAN 364 DAYS; AND A SUSPENDED MEMBER MAY NOT BE PREVENTED FROM ATTENDING MEETINGS, WHICH GENERALLY IS CONTAINED IN LANGUAGE LIKE THIS:**

**“During the period of suspension, the suspended person may only attend regular or special meetings of the organization, arriving no earlier than ten minutes before and departing no later than ten minutes after the meeting is over.”**