DE-MYSTIFYING THE SKELLY PROCESS

1. **Purpose of the Workshop**
   a. Overview of Pre-Disciplinary Due Process or “Skelly” Rights, Including What Employees Receive Them, and What Actions Trigger Them
   b. How to Conduct an Investigation into Employee Misconduct and Select Appropriate Discipline
   c. Legal Requirements for Pre-Disciplinary Due Process
   d. How to Complete Post-Skelly Procedures
   e. Best Practices

2. **Governing Authority**
   a. Educational Employment Relations Act
   b. California Education Code
   c. Collective Bargaining Agreements
   d. U.S. and California Constitutions
   e. California Constitution, Article 1, Section 7(a) - “A person may not be deprived of life, liberty, or property without due process of law…”
   f. U.S. Constitution, 14th Amendment - “…nor shall any State deprive any person of life, liberty, or property, without due process of law…”
   g. California Supreme Court And Court of Appeals Decisions

3. **Skelly v. State Personnel Board**
   a. “Skelly” rights are named after the 1975 California State Supreme Court Case *Skelly v. State Personnel Board.*
   b. John Skelly was a permanent civil service employee of the Statement Department of Health Care Services.
   c. Mr. Skelly was fired for excessive unexcused absences and drinking on the job.
   d. Mr. Skelly sued, arguing that the State Personnel Procedures violated his due process rights.
   e. The California Supreme Court balanced:
      (1) The Government's interest in expeditious removal of an unsatisfactory employee, with
      (2) The interest of the affected employee in continued public employment.
   f. Applying these principles, the Court held that existing State Civil Service laws violated Mr. Skelly’s due process rights.
   g. “As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.”

4. **Skelly Rights**
   a. Skelly Rights
      (1) Notice of the proposed disciplinary action
      (2) Reasons for the proposed disciplinary action
      (3) A copy of the charges and materials on which the disciplinary action is based
(4) The right to respond either orally or in writing, to the employing agency imposing the discipline

b. Purposes of “Skelly” rights
   (1) Employee Perspective:
      • Notice of the disciplinary charges against the employee and a right to respond
      • Prior to the effective date of discipline
   (2) Employer Perspective
      • Ensure that the proposed discipline is not a mistake
      • Evaluate whether it is more likely than not that:
         o The facts support the allegations
         o The allegations support the level of discipline

c. Who gets “Skelly” Rights?
   (1) All permanent classified employees that have successfully completed the probationary period
   (2) Excludes probationary, temporary, and at-will employees, faculty, and administrators.
   (3) Probationary classified employees may be entitled to a “name clearing conference” when the reason for their separation is made public and either stigmatizes or prevents the individual from finding alternate employment. (See Lubey v. City and County of San Francisco (1979) 98 Cal.App.3d 340)
   (4) The “name clearing conference” is an opportunity for the employee to speak to the appointing authority either before or after separation
   (5) Consult your CBA to determine if probationary classified employees are entitled to any other notice

d. Disciplinary actions that trigger “Skelly” Rights
   (1) Termination
   (2) Suspension with or without pay
   (3) Demotion
   (4) Involuntary transfer or reassignment

e. Actions that DO NOT trigger “Skelly” Rights
   (1) Change in assignment, including removal of assignments that does not affect wages, hours, seniority, etc.
   (2) Release from employment during probationary period
   (3) Warnings, reprimands, oral counseling
   (4) Layoff due to a bona fide reduction or elimination of a service -60 days written notice (Educ. Code § 88017)

5. **Overview of Due Process Requirements**
   a. Investigation
   b. Written Notice of Intent to Discipline
   c. Pre-Discipline (“Skelly”) meeting or written response
   d. Final Written Notice of Discipline
   e. Board Hearing / Arbitration / Administrative Hearing
f. Judicial Review

6. **Investigation**
   a. Purpose of Investigation
      (1) Reveal or exonerate employee misconduct
      (2) Provide factual basis to support future employer action (suspension, termination, etc.)
      (3) Prevent further wrongdoing
   b. Selecting an Investigator
      (1) Impartial
         • Human Resources Staff
         • Manager of a different department
         • Independent Investigator
      (2) Knowledge of the Issues, including potential legal issues
      (3) Organizational and communication skills
      (4) Technical knowledge
   c. Union Employee interviews
      (1) Employees have the right to have a union representative present during disciplinary interviews
         • *(NLRB v. Weingarten (1975) 420 U.S. 251.)*
      (2) The union also has the right to represent its members in disciplinary matters
      (3) An employer violates this right of representation where:
         • The employee requested representation,
         • For an investigatory meeting,
         • Which the employee reasonably believed might result in disciplinary action; and
         • The employer denied the request.
      (4) The employer is not required to inform the employee of his right to a representative
      (5) The employee has a right to a representative, but the employee does not have the right to a representative of his or her choosing
         • *(State of California (Department of Transportation) (1994) PERB Decision No. 1094.)*
      (6) The employee cannot refuse to answer questions when a union representative is present or to wait for a chosen representative such as a private attorney
      (7) The employee must reasonably believe that the meeting will result in discipline
      (8) If the employer assures the employee that there will be no discipline, the employee’s belief that discipline will result is not reasonable
(9) However, the employer cannot then discipline the employee for answers to the employer’s questions
d. Non-investigatory interviews
(1) An employee does not have the right to a representative during every conversation with the employer
(2) The right to representation does not apply during “such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques.”
(3) No right of representation during:
   - Informal contacts
   - Discussions of employer directives
   - When the meeting is simply to hand out discipline and not to elicit damaging facts or consider modification of the discipline
   - Investigations into misconduct of other employees
e. Interviews – Sworn Officers
(1) Under the Police Officer’s Bill of Rights, during investigations that potentially involve criminal behavior an employer must inform a public safety employee of these rights prior to the interview
   - *(Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822.)*
(2) Specifically, the “Lybarger Warning” requires notice that:
   - The employee’s silence could be deemed insubordination, leading to administrative discipline
   - Any statement made under threat of discipline could not be used against the employee in any subsequent criminal proceeding
f. Interviews – Other employees
(1) While it is uncertain whether the “Lybarger Warning” applies for employees besides public safety employees, the California Supreme Court has hinted that it may for other government employees when the misconduct is criminal in nature
   - *(See Speilbauer v. County of Santa Clara (2009) 45 Cal. 4th 704.)*
(2) Therefore, we recommend that you provide this warning to any employee suspected of misconduct that is potentially criminal in nature
(3) See handout
g. Best Practices
(1) If the District is investigating an employee, it should notify the employee in advance of the right to representation, otherwise, the employee could delay the questioning while the parties look for a union representative
(2) When an employee is not being investigated, the District should assure the employee that there will be no discipline based on his answers to the questions i.e. another employee’s misconduct
(3) If the employee is suspected of criminal behavior, provide “Lybarger Warning”

7. **Notice of Intent to Discipline**
   a. Notice of Intent to Discipline must include
      (1) The proposed disciplinary action/penalty
      (2) The specific causes for discipline
      (3) A statement of reasons supporting proposed disciplinary action
      (4) A copy of materials on which the proposed disciplinary action is based
      (5) Notice of “Skelly” rights
      (6) Consult your Collective Bargaining Agreement for additional requirements!
   b. Legal Considerations
      (1) The District has the burden to prove all charges by a preponderance of the evidence
      (2) Hearsay
         - Hearsay alone is insufficient
         - Hearsay can be used to bolster or support other facts
      (3) Just Cause
         - Was there notice of the rule?
         - Was the rule clear, understandable, and reasonable?
         - Was the rule applied uniformly?
      (4) Protected Conduct / Status:
         - Union status
         - Race, Sex, Religion, Age, Disability, etc.
         - Protected Leave
         - Retaliation for reporting illegal activity, participating in a sexual harassment investigation, requesting a reasonable accommodation
      (5) Severity of the Punishment
         - *Skelly:* “[T]he overriding consideration… is the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm to the public service."
      (6) Other factors to consider
         - The nature of the offense
         - The nature of the employee’s job
         - The employee’s history
         - The employer’s past practice in dealing with similar incidents
      (7) Progressive Discipline
         - Many CBAs require Progressive Discipline
         - Warnings and reprimands must proceed suspension or termination
         - Some CBAs provide exceptions that allow the District to bypass progressive discipline for severe, egregious or intentional conduct

8. **“Skelly” Conference**
   a. Scheduling
(1) After the employee receives the Notice of Intent to Discipline, the employee may respond in writing and/or request a “Skelly” Conference.

(2) Collective Bargaining Agreements typically set deadlines and procedures for scheduling the “Skelly” Conference.

(3) If your CBA is silent, the “Skelly” Conference should be a reasonable time after the Notice of Intent to Discipline at a date and location set by the District.

d. Role of “Skelly” Officer

(1) The “Skelly” Officer should be reasonably impartial


(2) The “Skelly” Officer cannot be a potential witness

(3) Ex. A District administrator not personally involved in the incidents leading to discipline

(4) Ex. An administrator from a neighboring District

(5) The “Skelly” Officer should read through the allegations and the supporting documents with the employee and then provide the employee with a chance to respond orally or in writing, considering the employee’s side of the story along with any mitigating factors.

c. The “Skelly” Conference is NOT a Hearing

(1) The employee does not get to bring in witnesses

(2) The employee does not get to cross-examine District witnesses

(3) The employees may not interrogate the “Skelly” Officer

(4) See handout

d. “Skelly” Recommendation

(1) The “Skelly” Officer should review the Notice of Intent to Discipline and the employee’s response

(2) Recommendation:

- There are reasonable grounds to proceed with the proposed discipline, or
- The proposed discipline should be modified or revoked

(3) Collective Bargaining Agreement typically set deadlines and procedures for scheduling the “Skelly” Recommendation

(4) If your CBA is silent, the “Skelly” Recommendation should be a reasonable time after the “Skelly” Conference

(5) If the “Skelly” Officer reduces or overturns discipline, the District may:

- Proceed with discipline – There is nothing that prohibits a District from proceeding with discipline despite the recommendations of the Skelly Officer. This should be carefully considered, however, as the employee and union will very likely bring up the Skelly Officer’s recommendation at the hearing.
- Continue investigation – if the investigation finds additional misconduct, the District can add new charges and restart the discipline process.
• Offer counseling or additional training to the employee and the supervisor

9. **Post “Skelly” Due Process**
   a. Important Considerations
      (1) Mitigating factors
      (2) Final Warning / Last Chance Agreement
      (3) Settlement
      (4) Resignation in lieu of termination
      (5) Likelihood of wrongful termination or discrimination lawsuit
   b. Notice of Discipline
      (1) Incorporate or restate the Notice of Intent to Discipline
      (2) The documents need not be identical - the District may add new information as long as the Notice of Intent to Discipline was sufficient to ensure that the employee understands:
         • What he is being charged with and
         • The evidence supporting the charges so that he has chance to respond
         (See *Parker v. City of Fountain Valley* (1981)127 Cal. App. 3d 99.)
      (3) Unless provided for otherwise in the collective bargaining agreement or Board policies, discipline is effective the date of the Notice of Discipline
      (4) Employee may be taken off payroll at this time
      (5) However, if discipline is overturned on appeal, the District may owe backpay
      (6) The Notice of Discipline should state:
         • That the employee was offered the right to a “Skelly Conference”
         • The Date of the “Skelly” conference
         • The recommendation of the “Skelly” Officer
      (7) The Notice of Discipline should also notify the employee of any appeal rights pursuant to the Collective Bargaining Agreement
   c. Appeal Rights
      (1) Appeal rights are found in the Collective Bargaining Agreement
      (2) Common appeal options:
         • Arbitration – Less formal. Arbitration may be binding or advisory.
         • Hearing Officer – More formal hearing conducted by an Administrative Law Judge or Hearing Officer appointed by the Board.
         • Board Hearing – Hearing conducted by the Board of Trustees, pursuant to Board Procedures.
   d. Judicial Review
      (1) The decision of the Arbitrator, Hearing Officer or the Board is subject to Judicial Review
(2) The Court will evaluate when the District provided the employee appropriate procedural due process
   • The District provided “Skelly” Rights
   • The District followed its own procedures (CBA, Board Policy, etc.)

(3) The Court will exercise independent judgment to determine whether the evidence supports a finding of misconduct

(4) The Court will review whether the misconduct supports the disciplinary action for abuse of discretion

(5) As long as the facts support the allegations, the Court will not disturb the penalty imposed “unless it is shown to have been a manifest abuse of discretion.”


10. Best Practices
    a. Investigate First!
        (1) Locate evidence and witnesses to substantiate allegations of misconduct
        (2) Assess chance that the employee may pursue litigation
    b. Get organized!
        (1) Consult your CBA to determine required written notices, procedures, progressive discipline and timelines before initiating discipline
    c. Train your supervisors and administrators!
        (1) Supervisors should document all misconduct and oral warnings to build a paper trail, particularly for progressive discipline. Everything must go in the employee’s personnel file.
        (2) “Skelly” Officers should be prepared to conduct a smooth “Skelly” conference without interference from the employee or his representative.
    d. Follow the Collective Bargaining Agreement!