

How To Be A Skelly Officer



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Purpose of the Workshop



- ☞ Overview of Disciplinary Process
 - ☞ Legal Requirements for Pre-Disciplinary Due Process
 - ☞ Skelly Conference
 - ☞ How to Complete Post-Skelly Procedures
- ☞ How to Serve as a Skelly Officer
- ☞ Best Practices

Skelly Conferences



Introduction

Governing Authority



- ⌘ Educational Employment Relations Act
- ⌘ California Education Code
- ⌘ Collective Bargaining Agreements
- ⌘ California Constitution, Article 1, Section 7(a) - "A person may not be deprived of life, liberty, or property without due process of law..."
- ⌘ U.S. Constitution, 14th Amendment - "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."
- ⌘ California Supreme Court And Court of Appeals Decisions

Overview of Due Process Requirements



- ❧ Investigation
- ❧ Written Notice of Intent to Discipline
- ❧ Pre-Discipline (Skelly) meeting or written response
- ❧ Final Written Notice of Discipline
- ❧ Board Hearing / Arbitration / Administrative Hearing
- ❧ Judicial Review



I. Investigation

Obligation to Investigate



- ❧ Some level of investigation is required
 - ❧ Review documents
 - ❧ Interview witnesses
- ❧ Human Resources review of documents

Selecting an Investigator



- ❧ Human Resources Staff
 - ❧ Organizational and communication skills
 - ❧ Knowledge of personnel issues
 - ❧ Awareness of potential legal issues
- ❧ Independent Department Manager
 - ❧ Technical knowledge
 - ❧ Level of independence

Selecting an Investigator



☞ Outside investigator

- ☞ District's attorney
- ☞ Private investigator
- ☞ Law Enforcement

☞ Considerations

- ☞ Independent
- ☞ Knowledge of personnel, technical, and legal issues
- ☞ Trained in interviewing witnesses and assessing credibility
- ☞ If an attorney, the communications may have some attorney-client privilege

☞ Appropriate for complicated investigations, high level employees, or when there is a risk of legal liability



II.

Notice of Intent to Discipline

Notice of Intent to Discipline



- ❧ The proposed disciplinary action/penalty
- ❧ The specific causes for discipline
- ❧ A statement of reasons supporting proposed disciplinary action
- ❧ A copy of materials on which the proposed disciplinary action is based
- ❧ Notice of Skelly rights
- ❧ Consult the Collective Bargaining Agreement to determine if there are additional requirements!

Legal Considerations for the Notice of Intent to Discipline



- ❧ The District has the burden to prove all charges by a preponderance of the evidence
- ❧ Hearsay
 - ❧ Hearsay alone is insufficient
 - ❧ Hearsay can be used to bolster or support other facts
- ❧ Just Cause
 - ❧ Was there notice of the rule?
 - ❧ Was the rule clear, understandable, and reasonable?
 - ❧ Was the rule applied uniformly?

Legal Considerations for the Notice of Intent to Discipline



- ☞ Notice of Intent to Discipline should be as specific as possible
 - ☞ It should include specific facts, names, dates, times, etc.
 - ☞ It should cite to specific rule of conduct that has been violated
- ☞ **INADEQUATE:** John stole from the District.
- ☞ **ADEQUATE:** On November 12, 2016 at 11:54 am, video surveillance footage caught John Smith stealing merchandise valued at \$625 from the District bookstore. This conduct violates Articles 11.2b and 11.2g of the CBA as well as District Policy 4284.24.

Legal Considerations for the Notice of Intent to Discipline



- ☞ 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."
- ☞ 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

Legal Considerations for the Notice of Intent to Discipline



- ☞ 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

Legal Considerations for the Notice of Intent to Discipline



- ☞ Progressive Discipline
 - ☞ Many Collective Bargaining Agreements require Progressive Discipline
 - ☞ Warnings and reprimands must precede suspension or termination
 - ☞ Some CBAs provide exceptions that allow the District to bypass progressive discipline for severe, egregious or intentional conduct



III.

Skelly Conference

Skelly Conference



- ❧ After the employee receives the Notice of Intent to Discipline, the employee may respond in writing and/or request a Skelly Conference
- ❧ Collective Bargaining Agreements typically set deadlines and procedures for scheduling the Skelly Conference
 - ❧ If the 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

What exactly is Skelly?



- ☞ Skelly rights are named after the 1975 California State Supreme Court Case *Skelly v. State Personnel Board*
- ☞ John Skelly was a permanent civil service employee of the State Department of Health Care Services
- ☞ Mr. Skelly was fired for excessive unexcused absences and drinking on the job
- ☞ Mr. Skelly sued, arguing that the State Personnel Procedures violated his due process rights

Skelly v. State Personnel Board



- ☞ In *Skelly*, the California Supreme Court held:

“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”

Skelly Rights



- ☞ Notice of the proposed disciplinary action
- ☞ Reasons for the proposed disciplinary action
- ☞ A copy of the charges and materials on which the disciplinary action is based
- ☞ The right to respond either orally or in writing, to the employing agency imposing the discipline

Skelly Rights



- ☞ The California Supreme Court balanced:
 - ☞ The Government's interest in expeditious removal of an unsatisfactory employee, with
 - ☞ The interest of the affected employee in continued public employment
- ☞ Applying these principles, the Court held that existing State Civil Service laws violated Mr. Skelly's due process rights

Purpose of Skelly Rights



- ☞ Employee Perspective
 - ☞ Notice of the disciplinary charges against the employee and a right to respond
 - ☞ Prior to the effective date of discipline
- ☞ Management Perspective
 - ☞ Ensure that the proposed discipline is not a mistake
 - ☞ Evaluate whether it is more likely than not that:
 1. The facts support the allegations
 2. The allegations support the level of discipline

Purpose of the Skelly Conference



- ☞ The Skelly Conference is NOT a hearing
- ☞ The employee does not get to bring in witnesses
- ☞ The employee does not get to cross-examine District witnesses
- ☞ The employees may not interrogate the Skelly Officer

Who Gets Skelly Rights?



- ☞ All permanent classified employees that have successfully completed the probationary period
- ☞ Excludes
 - ☞ At-will
 - ☞ Probationary
 - ☞ Temporary
 - ☞ Faculty
 - ☞ Administrators

Who Gets Skelly Rights?



- ☞ 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)
- ☞ The “name clearing conference” is an opportunity for the employee to speak to the appointing authority either before or after separation
- ☞ Consult the CBA to determine if probationary classified employees are entitled to any other notice

What Actions Trigger Skelly Rights?



- ☞ Termination
- ☞ Suspension with or without pay
- ☞ Demotion
- ☞ Involuntary transfer or reassignment

What Actions DO NOT Trigger Skelly Rights?



- ☞ Change in assignment, including removal of assignments that does not affect wages, hours, seniority, etc.
- ☞ Release from employment during probationary period
- ☞ Warnings, reprimands, oral counseling
- ☞ Layoff due to a bona fide reduction or elimination of a service with 60 days written notice (Educ. Code § 88017)

Who may Serve as Skelly Officer



- ☞ The Skelly Officer should be reasonably impartial
 - ☞ *Flippin v. Los Angeles City Board of Civil Service Commissioners* (2007) 148 Cal.App.4th 272
- ☞ The Skelly Officer should not be the supervisor or administrator bringing the allegations
- ☞ The Skelly Officer cannot be a potential witness

Who may Serve as Skelly Officer



- ☞ Ex. A District administrator not personally involved (e.g., from another department) in the incidents leading to discipline
- ☞ Ex. An administrator from a neighboring District is a great choice for a Skelly Officer

Right to Representation at Skelly Conference



- ☞ The employee is entitled to have a union officer present at the Skelly conference
 - ☞ Employees have the right to have a union representative present during disciplinary interviews (*NLRB v. Weingarten* (1975) 420 U.S. 251)
 - ☞ The union also has the right to represent its members in disciplinary matters

What Happens at a Skelly Conference?



- ☞ The Skelly Officer should:
 - ☞ Read through the allegations and the supporting documents with the employee, and
 - ☞ Provide the employee with a chance to respond orally or in writing, allowing the employee to present any facts supporting his/her side of the story along with any mitigating factors

Skelly Recommendation



- ☞ After the Skelly Conference:
 - ☞ Recommendation:
 - ☞ There are reasonable grounds to proceed with the proposed discipline, or
 - ☞ The proposed discipline should be modified or revoked
 - ☞ Collective Bargaining Agreement typically sets deadlines and procedures for scheduling the Skelly Recommendation
 - ☞ If the CBA is silent, the Skelly Recommendation should be a reasonable time after the Skelly Conference

Skelly Recommendation



- ☞ 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



IV.

Post Skelly Due Process

Post Skelly Considerations



- ⌘ Mitigating factors
- ⌘ Final Warning / Last Chance Agreement
- ⌘ Settlement
- ⌘ Resignation in lieu of termination
- ⌘ Likelihood of wrongful termination or discrimination lawsuit

Notice of Discipline



- ✧ Incorporate or restate the Notice of Intent to Discipline
 - ✧ 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 a chance to respond
- (See *Parker v. City of Fountain Valley* (1981)127 Cal. App. 3d 99.)

Notice of Discipline



- ✧ Discipline is effective the date of the Notice of Discipline, unless otherwise provided in Board Policies or the CBA
 - ✧ Employee may be taken off payroll at this time
 - ✧ However, if discipline is overturned on appeal, the District may owe backpay
- ✧ 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

Notice of Discipline



☞ The Notice of Discipline should also notify the employee of any appeal rights pursuant to the Collective Bargaining Agreement

Arbitration / Hearing



IV.
Board Hearing / Arbitration
Administrative Hearing

Arbitration / Hearing



- ⌘ Appeal rights are found in the Collective Bargaining Agreement
- ⌘ 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.



V.

Judicial Review

Judicial Review



- ❧ The decision of the Arbitrator, Hearing Officer or the Board is subject to Judicial Review
- ❧ The Court will evaluate when the District provided the employee appropriate procedural due process
 - ❧ The District provided Skelly Rights, and
 - ❧ Followed its own procedures (CBA, Board Policy, etc.)
- ❧ The Court will exercise *independent judgment* to determine whether the evidence supports a finding of misconduct

Judicial Review



- ❧ The Court will review whether the misconduct supports the disciplinary action for *abuse of discretion*
 - ❧ 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.”

(*Spanner v. Rancho Santiago Community College District* (2004) 119 Cal. App. 4th 584.)

Employer Best Practices



- ❧ Investigate First!
 - ❧ Locate evidence and witnesses to substantiate allegations of misconduct
 - ❧ Assess chance that the employee may pursue litigation
- ❧ Get organized!
 - ❧ Consult your CBA to determine required written notices, procedures, progressive discipline and timelines before initiating discipline

Employer Best Practices



- ❧ Train your supervisors and administrators!
 - ❧ 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.
 - ❧ Skelly Officers should be prepared to conduct a smooth Skelly conference without interference from the employee or his representative.
 - ❧ Model Skelly Handbook from Los Angeles Community College District
<https://www.laccd.edu/Departments/HumanResources/Documents/SkellyInstructions1.pdf>
- ❧ Follow the Collective Bargaining Agreement!

How To Be A Skelly Officer



V.

Model Skelly Conference

Steps of a Skelly Conference



1. Introduction

- ☞ Introduce your self as the Skelly Officer
- ☞ Notify employee that you are going to review the allegations as well as the written materials supporting the allegations
- ☞ Acknowledge employee's right to have union represent at the Skelly Conference
- ☞ Tell employee that after you have reviewed every charge, you will provide the opportunity to respond

Skelly Conference



Steps of a Skelly Conference

2. Present Disciplinary Charges

- ☞ Ensure that the employee has received the Notice of Intent to Discipline and supporting materials
- ☞ Go through each allegation individually, along with the written materials supporting the allegation
- ☞ Repeat as necessary
- ☞ Announce the proposed disciplinary action (i.e. two week suspension without pay)

Skelly Conference



Steps of a Skelly Conference

3. Provide Employee the Opportunity to Respond

- ☞ Orally or in writing
- ☞ Employee does not get to bring in witnesses
- ☞ Employees does not “cross-examine” the Skelly Officer

Skelly Conference



Steps of a Skelly Conference

4. Conclude the Conference

- ☞ Announce that the Skelly Conference has been completed
- ☞ Notify employee that you will issue a decision on whether the proposed charges should be sustained
- ☞ Notify employee that the District will inform him/her of your decision

Skelly Conference



Steps of a Skelly Conference

5. Recommendation

- ☞ The Skelly Officer should review the Notice of Intent to Discipline and the employee's response
- ☞ Consider:
 - ☞ Does the evidence (documents, witness statements, etc.) support the allegations set forth in the charges?
 - ☞ Would the charges, if true, support the proposed disciplinary action?
- ☞ Do Not Consider:
 - ☞ Do I find the witness credible?
 - ☞ Would I take the same action under the same circumstances?

Skelly Recommendation



- ☞ From the employee response, consider proof that the allegations are not true

- ☞ Do Not Consider:
 - ☞ Other employees get away with the same thing
 - ☞ The supervisor does not like me
 - ☞ The punishment is unfair

Skelly Recommendation



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

Skelly Conference



Handouts:

- ☞ Skelly Conference Script
- ☞ Skelly Findings Letter

Any questions?



Thank You

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And

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**SKELLY CONFERENCE
REGARDING PROPOSED CHARGES
TO DISCIPLINE [NAME]**

The following may be used as a procedural guide while conducting the Skelly Conference on the proposed charges for discipline of **[NAME]**.

1. My name is **_____**. I am the designated Skelly Officer for this matter.
2. The purpose of this meeting is to conduct a pre-discipline conference on the proposed charges against you.
3. You **[and UNION]** have been provided with the written materials, reports and documents upon which the proposed disciplinary action is based.
4. I am going to advise you of the charges that have been proposed against you for your discipline and following that I will give you an opportunity to respond. Your response to the proposed charges may be in writing or oral, however, any writing must be provided by the end of this conference.
5. Do you understand that, should you wish, you have the right to be accompanied by a representative of your choice including your attorney **[or UNION]** at this meeting?
6. Following this conference, within **five (5)** working days, I will make a written determination regarding the proposed charges against you.
7. Did you receive a copy of the letter from the District dated **[DATE]**, "Notice of Intent to Discipline" (hereinafter "Notice") and attached Exhibits **___** through **___**? Do you have a copy of these materials with you? **[If not, provide another copy]**
8. I will first go through the Notice of Intent to Discipline and then the attached Exhibits. After I go through everything, I will ask whether you have any response.
9. The Notice states that: **[READ THROUGH THE Notice of Intent to Discipline]**.
10. Attached to the Proposed Charges are Exhibits 1 through 7. Exhibit 1 is a copy of... **[IDENTIFY each Exhibit # and Provide a Description]**.
11. The Notice indicates that the level of disciplinary action to be taken is **dismissal**.
12. If you would like to respond to any of the charges against you and the supporting evidence, please go ahead now.
13. Do you have any other questions or comments regarding the Notice served on you?
14. This will conclude the Skelly conference.
15. I will issue a decision on whether the Proposed Charges should be sustained within **five (5)** working days, and the District will notify you of my decision.

<CONSULTANT'S LETTERHEAD>

<DATE>

CONFIDENTIAL

<Name>

<Address>

RE: <Subject of Skelly Conference (e.g. Termination) for (EMPLOYEE NAME)>

Dear **<DIRECTOR OF HR NAME>**,

I held a Pre-Disciplinary meeting with **<EMPLOYEE>** on **<DATE>** at **<TIME>**, at the **<LOCATION>**. At the Meeting **<EMPLOYEE>** was represented by **<REP NAME>**, of **<UNION>**. The purpose of the meeting was to provide **<EMPLOYEE>** with a pre disciplinary opportunity to respond to charges contained in the Notice of Proposed Disciplinary Action (Termination) that was issued to him/her on **<DATE OF NOTICE>**. At this meeting **<EMPLOYEE>** was provided the opportunity to present and documents, statements, evidence, or argument he believed pertinent to the causes or penalty in the proposed disciplinary action, so it could be determined whether the disciplinary action, including the proposed penalty was appropriate.

At the outset of the meeting, I explained the purpose of the meeting and stressed the importance of **<EMPLOYEE>** presenting any documentation or evidence for my review to determine of the proper discipline was being administered.

After carefully reviewing the Notice of Proposed Disciplinary Action, considering **<EMPLOYEE'S>** comments and those of his representative, I am **<UPHOLDING/DENYING>** the **<DISCIPLINE>** as proposed.

Respectfully,

<NAME>

<TITLE>