

# Discipline and Due Process

MODULE 601



**California School  
Employees Association**



# Discipline and Due Process

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# Introduction

In most cases involving the proposed discipline of a unit employee, the assigned CSEA labor relations representative will be involved at its earliest stages. However, at times CSEA chapter officers and job stewards will find it necessary to represent employees during investigatory interviews and pre-disciplinary conferences. Therefore, it is imperative these officers become aware of the basic rules and standards applicable to the discipline of the members they represent.

Like grievances, discipline cases are best settled at the earliest possible level before the positions of administrators and supervisors become hardened. An informal dispute settlement should be the immediate goal—but all information and documentation brought forth during initial interviews and conferences should be compiled and recorded as if the case was being prepared for presentation to an arbitrator, personnel (civil service) commission or employer's board at the final step of the discipline procedure.

## Due Process

Procedural due process is the right of a permanent public employee to be given certain “pre-removal safeguards” before disciplinary action becomes effective. It is a constitutional guarantee meant to afford protection against arbitrary action by the government employer.

The concept that a permanent public employee has a property right to his/her job grows out of the Fourteenth Amendment to the United States Constitution that states in relevant part: “(N)or shall any State deprive any person of life, liberty or property, without due process of law ...”

## Constitutional Due Process

### **Skelly**

In a landmark decision (See: *Skelly v. State Personnel Board*) the California Supreme Court ruled a permanent (non-probationary) public employee who may only be discharged for “cause” has a “property interest in the continuation of his employment which is protected by due process.” Therefore a classified unit employee may not be deprived of this property interest unless, before discipline becomes effective, the employing district has complied with established due process standards (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194). The minimum due process established by *Skelly* requires that prior to the imposition of discipline an employee must be given:

A written notice of the proposed action;

The reasons for the proposed action;

A copy of the charges and the material upon which it is based; and

The right to respond, either orally or in writing, to the authority initially imposing discipline.

The court further held that to meet constitutional requirements an employee need not be “provided with a full trial-type evidentiary hearing prior to the initial taking of the punitive action,” but a full evidentiary hearing must be held at some time before the discipline becomes final.

## **Loudermill -**

(Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532)

Oral or written notice of charges

Explanation of employer's evidence

Opportunity to present employee's side of story

## **Exceptions**

*Suspension of an indicted employee (Federal Deposit Insurance Corporation v. Mallen (1988) 486 U.S. 230)*

*Suspension of arrested and charged employee (Gilbert v. Homar (1997) 520 U.S. 924)*

Short-term suspensions (not exceeding five days). Skelly-type rights must be afforded either during suspension or within a reasonable time thereafter (Civil Service Association, Local 400 v. City and County of San Francisco (1978) 22 Cal.3d 552). The employee constitutionally is not entitled to a formal evidentiary hearing. *Id.* The same rules probably apply to suspensions of up to 10 days (See Taylor v. State Personnel Board (1980) 101 Cal.App. 3d 498).

Written reprimand (Stanton v. City of West Sacramento (1991) 226 Cal.App. 3d 1438).

It is important to note the “Skelly-doctrine” is a constitutional minimum which may be expanded upon by legislation, employer policies, personnel (civil service) commission rules and collective bargaining agreements. For example, the standards may be different in merit system and non-merit system school districts and details may vary from one CSEA contract to another. All however, must meet the minimum standards set forth in “Skelly” and “Loudermill.”

## **Statutory Due Process**

Education Code Sections 45304 and 88123 require written charges and provide for summary suspension for certain cause (unconstitutional).

Education Code Sections 45116 and 88016 states that a notice of disciplinary action shall contain:

Statement in ordinary and concise language of specific acts and omissions.

Statement of cause for the action taken (statement in language of rule, regulation or statute insufficient).

Rules or regulations allegedly violated.  
Remedy for statutorily deficient notice: Action to restrain further disciplinary proceedings.

# Timing and Nature of Pre-Deprivation Disciplinary Safeguards

Right to have representative present when presenting response (Civil Service Association, Local 400 v. City and County of San Francisco, *supra*).

Adequate time to review charges and prepare defense (Kempland v. Regents of University of California (1984) 155 Cal.App.3d 644) (Skelly hearing one day after charges received is insufficient). What is reasonable time to respond depends on volume and complexity of the charges and related materials. The moment of discharge is too late (See Chang v. City of Palos Verdes Estates (1979) 98 Cal.App. 3d 557).

District's refusal to discuss, refusal to listen or going "through the motions" is insufficient (Kempland v. Regents of University of California, *supra*).

Consideration of evidence not provided to employee is objectionable (Vollstedt v. City of Stockton (1990) 220 Cal.App. 3d 265; Parker v. City of Fountain Valley (1981) 127 Cal.App. 3d 99). However, in practice, such consideration sometimes is allowed.

"Uninvolved" reviewer at Skelly hearing is required (Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102; Titus v. Civil Service Commission (1982) 130 Cal.App. 3d 357; Coleman v. Regents of the University of California (1979) 93 Cal.App. 3d 521). The reviewer should have the authority to recommend a final disposition (Titus v. Civil Service Commission, *supra*; Coleman v. Regents of the University of California, *supra*).

Employee cannot be removed from the payroll before decision following Skelly, except in special circumstances requiring immediate removal. See, e.g., Gilbert v. Homar, *supra*.

## Remedy for Skelly Violation

Back pay beginning on the date of actual discipline and ending of the date the constitutional infirmity is corrected, which often is the hearing date (Barber v. State Personnel Board (1976) 18 Cal.3d 395).

## Merit System Districts

Classified employees of a merit system are entitled to the same constitutional due process entitlement as classified employees of non-merit school districts. There are significant procedural distinctions, however, between the two systems. For classified employees in a merit system district, the Governing Board as employer disciplines classified employees. (California School Employees Ass'n. v. Personnel Commission of Pajaro Valley Unified School District of Santa Cruz County (1970) 3 Cal. 3d 139.) Following a determination to discipline by the Governing Board, the Personnel Commission is authorized to hear an appeal by a permanent employee of any suspension, demotion or dismissal (Ed. Code, Section 45305.) The Personnel Commission is also authorized by the Education Code to define what constitutes reasonable cause justifying a demotion, suspension or dismissal. (Ed. Code, §

45302.) The “appeal” before the Commission is tantamount to the full, trial-type evidentiary hearing conducted before the Governing Board (or Hearing Officer) in a non-merit district. The Personnel Commission's decision regarding the appeal is final and not subject to review by the Board. In the event the Board disputes any decision on appeal by the Personnel Commission, however, the Board could seek a writ of mandate in Superior Court for abuse of discretion or for acting in excess of its jurisdiction the same as an improperly disciplined employee.

Education Code sections 45302 & 88121 state that “no person in the permanent classified service shall be demoted or removed except for reasonable cause designated by rule of the personnel commission as detrimental to the efficiency of the service.”

Education Code Sections 45303 and 88122 outline additional causes for suspension or dismissal even though they may not be contained in the rules of the commission. Sections 45304 and 88123 require written charges and provide for summary suspension under certain conditions.

Sections 45305 and 88124 prescribe the conditions under which an employee is entitled to a hearing.

Under sections 45306 & 88125, an accused employee may request and must be granted a hearing, either conducted by the commission itself, or by a commission-designated hearing officer who is to make recommended Findings of Fact and Decision to the commission. The commission's decision regarding the disciplinary action is final and not subject to review, reversal or modification by the governing board. In the event that the commission reverses or modifies the action of the governing board, it must make certain decisions with regard to the conditions under which the employee will be restored to duty or former position as required by Sections 45307 & 88126. These may include restitution for lost wages, legal costs, seniority and other benefits and incidents of employment.

Personnel commissions should implement the pertinent Code requirements by writing rules which cover hearings and disciplinary actions as well. Specific rules for the conduct of hearing and disciplinary actions protect employees from arbitrary actions which are technically within the authority of the administration.

The “Skelly-doctrine” applies directly to merit system (Civil Service) school districts. It is the function of the governing board to suspend, demote or dismiss classified employees and the function of the personnel commission's personnel director to file written charges against an employee. The so-called “Skelly conference” (the employee's right to respond orally or in writing) is conducted by either the administration or the school board or, in some districts, both. At the conclusion of the “Skelly conference,” the discipline, if sustained, is usually made effective immediately or becomes effective on the date set forth in the formal charges. Thus, in a discharge case, the employee usually is removed from paid status at that time, with the right to appeal the discipline.

# Non-merit System Districts

In non-merit system school districts the procedure is quite different and at first glance, appears to grant classified employees more due process rights than are guaranteed by “Skelly.”

The Education Code Sections 45101(e) and 88001(e) define discipline as:

“... any action whereby an employee is deprived of any classification or any incident of any classification in which he has permanence, including dismissal, suspension, demotion, or any reassignment without his voluntary consent, except a layoff for lack of work or lack of funds.”

The California Education Code Sections 45113, 45116, 88013 and 88016 place additional controls on a non-merit school district's disciplinary procedures:

Written notice of the specific acts and omissions upon which the discipline is based must be stated in ordinary and concise language and a statement of the cause for the action taken must be included.

If it is claimed that the employee has violated a rule or regulation, the rule or regulation must be set forth in the notice.

A disciplinary notice is not sufficient if the grounds are merely recited in the language of the rule, regulation or statute alleged to have been violated. If the notice does not comply with the requirements of law, the disciplinary proceedings can be restrained by a court order.

The notice must contain a statement of the employee's right to deny the charges and demand a hearing. A form, to be returned in not less than 5 days, and the signing of which is a denial of the charges and a request for a hearing, must also be provided.

Discipline cannot be imposed for any act occurring prior to an employee becoming permanent or for any act occurring more than two years preceding the initiation of disciplinary action, unless the cause was concealed or not disclosed by the employee when it reasonably could be assumed that the employee should have disclosed the facts.

Permanent classified employees of non-merit systems are “subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, Cal. Ed. Code Sections 45113 and 88013.” The governing board's determination of the sufficiency of the cause for disciplinary action [is] conclusive." Id. Cause is those grounds for discipline or offenses enumerated in the law or the written rules of the employer. Cal. Ed. Code Sections 45101(h) and 88001(h).

The Education Code gives non-merit system governing boards the authority to conduct disciplinary hearings and the authority to make a final administrative decision appealable in the courts.

The California Court of Appeals has ruled the failure of a school district to provide the employee with a notice of charges and a fair hearing before dismissing him/her is a denial of due process and further explained ...

... the failure of the school board to give an employee a hearing on noticed charges was prejudicial for the reason, among others, that the board put itself in the position of being employee's prosecutor and then at a later date his judge ... The fact

that employee finally received a hearing before the board, which had already prejudiced his case, could not overcome the prejudice resulting from his dismissal ... (Frates v. Burnett, (1970), 9Cal App. 3d 63.

It is clear a school board is supposed to be a fair and impartial body when hearing disciplinary charges against an employee. Whether or not this theory of impartiality can be sustained in practice is, at best, debatable.

## **Negotiated Discipline Procedures**

The specific “due process” requirements are often embodied in collective bargaining agreements between a school district and a local CSEA chapter. As long as the negotiated disciplinary procedure meets the minimum constitutional requirements of “Skelly” and does not improperly conflict with the Education Code, a negotiated procedure is valid and is generally preferable to a procedure that has been unilaterally adopted by a school district.

Normally a negotiated disciplinary procedure is separate from the contractual grievance procedure, although in some contracts an employee or CSEA may appeal unjust discipline through the higher levels of the grievance procedure.

## **What is “Cause” for Discipline**

The Education Code (Sections 45113 and 88013) provide in non-merit-system districts a classified employee can be disciplined “only for cause as prescribed by rule or regulation of the governing board.” The standard for discipline in merit-system districts under Sections 45302 and 88321 is “reasonable cause designated by rule of the personnel commission.” In many CSEA contracts the disciplinary standard of “just cause” has been negotiated.

“Just cause” is defined as “a cause outside legal cause, which must be based on reasonable grounds, and therefore must be a fair and honest cause or reason, regulated by good faith.” In practice, arbitrators and hearing officers tend to agree there is no real difference between the terms “reasonable cause,” “proper cause,” “obvious cause,” “sufficient cause,” “just cause,” or simply “cause.”

Some CSEA contracts and board policies include a list of rule violations constituting grounds for discipline. (The content of this list, if any, is negotiable with certain exceptions which may be mandated by statute.)

The standard of “cause” has to be applied to the specific circumstances surrounding individual cases in order to determine if discipline is justified. For example, one arbitrator, in evaluating whether an employee's excessive absenteeism justified dismissal, approached the application of “cause” by ruling the employer should consider:

If the employee's attendance has fallen below acceptable norms for an unreasonable period of time;

The employee's previous attendance record;

The employee's length of service;

The employee's desire to be a faithful employee;

The employee's efforts to improve;  
The nature of the absences;  
The extent to which they exceed the norm;  
The effect upon efficiency and morale; and  
The prospects for the future.

## **Discipline Decisions—Who Decides**

Assuming all the requirements of constitutional, statutory and contractual due process have been met, the most important part of any disciplinary procedure is who decides the case.

As noted previously a major difference between merit system and non-merit system districts is that in a merit system discipline is ultimately decided by a personnel commission whose impartiality is usually greater than the governing board that decides discipline cases in non-merit system districts.

Many CSEA contracts mandate discipline cases be heard by an impartial, mutually-acceptable hearing officer or arbitrator whose decision is advisory to the parties.

## **The Role of CSEA Representation**

The CSEA steward or other chapter officer should be prepared to handle the representation of employees in discipline cases—at least at the initial levels. Often his/her involvement will be limited to interviewing the member about to be disciplined so as to document the facts while they are still fresh. Depending on the immediacy of the problem and the availability of the assigned labor relations representative, it may be necessary for the Steward or other officer to represent the affected employee at investigatory interviews and “Skelly” conferences.

The CSEA representative's function in disciplinary matters, probably more than in other grievances, is to act as the advocate of the employee. Discipline, especially discharge, has been accurately described as “industrial capital punishment” and an employee is entitled to staff representation when his/her job is on the line.

## **The Right to Representation**

An employee subject to possible discipline may legally insist on CSEA representation at investigatory interviews including so called “Skelly conferences” held prior to the effective date of the proposed discipline.

In PERB Decision No. 145 (Marin Community College) the Board adopted the standards established by the U.S. Supreme Court in private sector cases (See: *NLRB v. Weingarten Inc.* (1975) 420 U.S. 251) by guaranteeing:

“... the right of an employee to have a union representative present at an investigatory interview with the employer which the employee reasonably believes may result in discipline ... it is appropriate, therefore, to find that employees under EERA enjoy the right of representation at investigatory interviews ...”

The U.S. Supreme Court noted further that (paraphrased):

“... The union representative whose participation the employee seeks is ... safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.”

Therefore, a denial of CSEA representation if requested by the employee, constitutes an Unfair Practice and is illegal under the Educational Employment Relations Act.

It is CSEA's position employees have rights beyond those spelled out in Weingarten and Marin Community College. Specifically, employees have the right to inquire what a meeting is about when told they must meet with a supervisor. This allows the employee to discuss the upcoming meeting with a job steward, chapter officer or labor relations representative prior to the meeting.

During a meeting scheduled for another purpose but which turns “disciplinary” during its course, the employee should request the meeting be immediately terminated and rescheduled at a time when a union representative can be present.

Remember, CSEA representation is not automatic. It must be invoked by the employee stating “I want my union representative to be present.” A failure to make the request may cause an arbitrator or judge to rule the employee's rights were not violated.

In a case under National Labor Relations Board (NLRB) jurisdiction, the board found two discharged workers were entitled to be reinstated with back pay. The workers had been discharged after investigative interviews at which they had union representation, but the employer had refused to disclose the subject of the investigation to the employees or their representative before the meeting. The NLRB ruled that:

If the right to representation is to be anything more than a hollow shell, both the employee and the representative must have some indication as to the subject matter of the investigation.

This finding, if applied similarly by PERB, assures employees the right to prior consultation with CSEA representatives and the right to know the topic of a scheduled meeting.

## **The Right to an Evidentiary Hearing**

### **Constitutional Right**

Constitutional right to full and fair evidentiary hearing, including right to be represented by counsel, to confront and cross-examine adverse witnesses, to call witnesses on own behalf and to have impartial hearing body (Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568; Los Angeles City Employees' Association, Local 660 v. Sanitation District No. 2 of Los Angeles County (1979) 89 Cal.App3d 294).

## Statutory Right

Education Code Sections 45302 and 88121 require personnel commission to adopt rules defining “reasonable cause” for suspension, demotion or dismissal.

Exception if discipline is a mandatory subject (Ed. Code, §§ 45260 and 88080)—procedures and criteria).

Education Code Sections 45303 and 88122 outline additional causes to those designated by the commission for suspension, demotion or dismissal:

Known membership in Communist Party

Conduct specified in Section 1028 of the Government Code.

Education Code Sections 45304 and 88123 require written charges and provide for summary suspension for certain causes:

Unconstitutionality

Compulsory leave

Written charges

Education Code Sections 45305 and 88125 prescribe the conditions under which an employee is entitled to a hearing.

A permanent employee must appeal to the Commission within 14 days after receipt of a copy of the charges for a trial-type evidentiary hearing.

No right to a hearing upon demotion during probationary period of a promoted classification.

Education Code Sections 45113 and 88013 require governing boards to adopt rules of procedure for disciplinary proceedings that must contain:

Provision for informing employee by written notice of specific charges.

A statement of the right to a hearing on the charges.

A time within which a hearing may be requested (not less than five days after service of the notice to the employee).

A card or paper the signing and filing of which constitutes a demand for hearing and a denial of all charges.

Education Code Sections 45113 and 88013 also state that the burden of proof remains with the governing board and that any rule or regulation to the contrary is void.

## Hearing Requirements

Burden of Proof: On Charging Party (Parker v. City of Fountain Valley (1981) 127 Cal.App. 3d 99; Layton v. Merit System Commission of City of Pomona (1976) 60 Cal.App.3d 58).

Hearsay: Admissible to explain or corroborate other direct evidence but cannot, standing alone, support any material factual determination (See Layton v. Merit System Commission of City of Pomona, supra).

Record: Hearing body may only consider information properly received in evidence; it may not base its decision on other information (English v. City of Long Beach (1950) 35 Cal. 2d 155; La Prade v. Department of Water and Power (1945) 27 Cal.2d 47).

Uncharged matters: Cannot base decision upholding discipline on matters not originally charged (In re Ruffalo (1968) 390 U.S. 544; Negrete v. State Personnel Board (1989) 213 Cal.App.3d 1160; Jackson v. City of Pomona (1979) 100 Cal. App. 3d 438).

Standards of Conduct: Without proof an employee's conduct violates a specific ascertainable standard regulating behavior, an adjudicatory body itself may not set such a standard for measuring the conduct in question (Wheeler v. State Board of Forestry (1983) 144 Cal. App. 3d 522).

Findings: Must issue findings of fact stating the basis of the decision (Hadley v. City of Ontario (1974) 43 Cal.App.3d 121; Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506).

Increasing or Reducing Penalty: An administrative body that itself did not conduct the hearing may not render different findings or increase recommended discipline without reviewing the entire record sufficiently to make an informed judgment (Vollstedt v. City of Stockton (1990) 220 Cal.App. 3d 265) and affording the opportunity for additional argument. The proposed decision may be adopted and the penalty may be reduced by the administrative body without reviewing the evidentiary record (See Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384).

# Roles in the Hearing Process

Employee (Defends self; union representation; legal counsel.)	Same
Personnel Commission (Prime responsibility is to give both employees and the district a fair and impartial hearing; Ed. Code, § 45306 authorizes the commission to conduct a full and fair investigation on appeal; must ascertain all procedural due process has been followed by the Governing Board; subpoena power (Ed Code 45311); may authorize Hearing Officer to conduct hearing (Ed. Code § 45312.)	Does not apply
Commission's Director (Ed. Code § 45266 requires director to be free from bias to ensure impartiality of commission; director is precluded from advising commission regarding any disciplinary appeal if the director is the party who brought the action against the employee.)	Does not apply
School Administration (Administrator usually assists in management's side at appeal hearing.)	Same
Governing Board (Sometimes administrative appeals are referred to the Commission without first having been referred to the Board. The Board must always consider disciplinary matters prior to their referral to the commission; employee may appeal to the commission only after the board has taken action regarding recommended disciplinary action. Board must be notified of Commission's decision and in turn, notify Commission when decision has been implemented. Board has responsibility for ascertaining the consistency and equity of a disciplinary action taken by its administration—should not act as “rubber stamp” for administrator's actions.)	Governing Board (Makes the final decision, although advisory arbitration may be utilized if negotiated. Governing Board's determination of sufficiency of cause for disciplinary action is conclusive (Ed. Code § 45113 and 88013).
Legal Counsel (Ed Code § 45306 authorizes employee to appear in person or with counsel; Ed. Code § 45313	Legal Counsel (No statute. However, the employee may retain his or her own attorney).

and 88132 provide that legal counsel for the Board shall aid the Commission in all legal matters—if counsel refuses, the Commission may employ its own counsel to be charged against the general funds of the district.)

Role of Employee Organization (Main objective of union representative is to protect the rights of the employee and present the employee's case in the best possible light—cool, competent advocate. If not directly representing employee, union rep. may still be present at hearing if desired by employee but cannot take an active role in the proceedings.)

Attendance at a Hearing: Closed to spectators unless employee specifically requests a public hearing.

Transcript: Verbatim record must be made. (Court reporter, shorthand stenographer, electronic recording.)

#### Record of Evidence

General Evidence: relevant, material

Direct Evidence: tending to prove or disprove a fact

Circumstantial: Evidence which tends to prove or disprove, not a fact in issue, but a fact or circumstance either alone or in connection with other facts or circumstances from which one may reasonably infer the existence or nonexistence of another fact which is in issue.

#### Hearsay Evidence

#### Oral Evidence

#### Impeachment of Witnesses

#### Impartial Atmosphere

#### Evaluation of Evidence

Form of Findings: Sufficiency Under Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal3d 506, 515.)

Brief summary listing issues considered;

Analysis of material evidence relating to each charge cited by district and to each specific incident cited in support of reasons;

A finding on each charge and on each specific incident with clear identification which charges and causes are sustained and which are not.

A decision on the action based upon the findings.

## Decision

Action taken was for cause as will promote the efficiency of the district.

A less severe action should be substituted because of mitigation circumstances or because the action taken was not appropriate.

The action taken would be reversed because the reasons for the act were not substantiated, the required procedures were not met, or both. The Commission may modify disciplinary action but may not make action more stringent than that approved by the Board.

If the commission has reversed or overruled the board's actions, a number of collateral decisions must be made depending upon the circumstances surrounding the action including, but not limited to, the following:

The period for which the employee is to be paid while dismissed, demoted, or suspended.

Seniority credit and other benefits lost for the period of dismissal or suspension, prior to reinstatement.

Transfer of the employee.

Purging from the employee's record of all unsustained charges.

The commission must serve a copy of its decision upon the governing board and the employee. Normally, this will complete the commission's action in the case. However, one or the other of the parties may appeal the decision to the civil courts. The employee appeals the commission's decision to the Superior Court under California Code of Civil Procedure, Section 1094.5. The commission should request that the governing board notify it when it has fully complied with the commission's decision.

An employee disciplined in a non-merit district appeals the Governing Board's decision to the Superior Court under California Code of Civil Procedure Section 1094.5.

## Interviewing the Member

If possible, the affected employee should be interviewed prior to meeting with management. All the facts should be ascertained—even those hard to get. Often employees fail to volunteer part of the story, either because they think the representative knows the rest or because they realize some of the facts may be unfavorable to them. In other cases members are too angry, upset or excited to tell the story straight.

At the very least, a bare outline of the facts should be compiled prior to the meeting:

WHO is involved?

WHAT did they say or do?

WHEN did it happen?

WHERE did it happen?

WHY did it happen—WHAT is the underlying cause?

WHAT does the employee want done about it?

How did it happen?

In addition, the employee should be able to provide the following information that can be helpful at the meeting with management:

Is the member permanent or probationary?

Date of hire.

Time in classification.

Previous discipline or reprimands, if any.

Content of recent formal performance evaluations, if any.

## The Meeting with Management

The pre-disciplinary meeting with management and the employee should be approached in a positive manner. Even though the decision to discipline has probably already been made, this meeting may be the last and only chance to change the mind of management before going to a formal hearing--and sometimes it's easier to keep a person on the job than to get his/her job back.

Before the employee tells his/her side of the story—especially if written charges have not been filed—encourage the management representative to give a complete statement of the employer's position and the facts supporting it.

Remember, in discipline cases, the burden of proving the employee's guilt lies with management. Do not accept arguments, allegations and assumptions in place of actual proof.

The CSEA representative and the employee involved should be good listeners. After the management representative has explained the situation as seen by the employer, the representative and employee should ask questions to clarify and identify the real issues.

The employee subject to discipline may respond to questions and may choose to give his/her side of the story at this time, but in most cases, the CSEA representative should speak for the employee. At the very least the CSEA representative should

attempt to guide the employee through a response that emphasizes the positive defenses open to him/her.

The CSEA representative has the right not only to attend, but also to participate in the meeting with management. In *Redwoods Community College District (1983)*, PERB Decision No. 298, held the refusal of management to permit the CSEA representative to speak was a “clear denial of meaningful representation.” In explaining why employees have the right to representation at meetings that fall within the scope of “professional and employment relations,” PERB reasoned that:

A representative’s presence . . . could assist the employee in presenting clear, cogent arguments and facts supporting his/her point of view. The representative may also act as a buffer in a confrontation that is filled with potential acrimony, a function obviously beneficial to both sides. Also, the potential power imbalance between management, unfettered in the number of representatives it may have, and the lone employee calls for a representative’s presence.

Before the close of the meeting the CSEA representative should discuss or state the case as the union views it. Emphasis should be placed on the district's burden of proof, the employee’s work record (if applicable) and, if necessary, reasonable alternatives to the proposed discipline. The guidelines provided in the following sections of this module will help the representative develop questions and arguments in defense of the employee to be disciplined.

During the meeting with management or immediately thereafter, the CSEA representative should make complete notes regarding what was said by all participants. This information may prove invaluable if the case goes to a hearing.

## **Criminal Charges**

If the unit member is being charged with any criminal activity, such as a drug or sex-related crimes, theft, assault, battery or any other crimes which have or may result in police investigations, or charges that can result in court actions, you are to immediately take the following actions:

Advise unit member not to answer any questions.

Advise unit member not to agree to any meeting with the employer or any investigator until he/she has proper legal advice and representation.

Call your local field office and give as many facts as you can to the labor relations representative or field director.

Do not ask any questions yourself, other than the nature of the charges, so you can report the charges to the field office.

You do not have a “lawyer-client” privilege (immunity) and can be called to testify concerning disclosures made to you by the charged unit member.

If the unit member cannot delay meeting with the employer until after he or she has met with a lawyer, a CSEA representative should be present at the meeting with the employer. The unit member should not answer any questions if police or district attorney personnel are present. After any police or district attorney personnel leave the meeting and before the unit member answers the employer’s potentially incriminating questions, the CSEA representative should establish on the record that the failure to answer questions or silence could be deemed insubordination, leading to discipline. The use of the unit member’s statements in a subsequent criminal proceeding will then be precluded under *Garrity v. New Jersey (1967)* 385 U. S.

493 (protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office) and *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822 (public employee has no absolute right to refuse to answer potentially incriminating questions posed by employer but self-incrimination rights are protected by precluding use of statements at subsequent criminal proceedings).

## **Guidelines Regarding Discipline Cases**

Throughout the years certain disciplinary standards have evolved through court decisions and in cases where a public employee has been disciplined under a negotiated procedure providing for arbitration.

Studies of judicial and arbitrated decisions in public sector discipline cases have shown that the courts and the arbitrators have used similar criteria and reasoning in making their determinations. The standards used in public sector cases are, in turn, similar to those developed for private sector disciplinary cases.

The degree of proof required to uphold a disciplinary action varies with the type of offense in question and/or the standards of the person(s) hearing the case. It is generally agreed that a “preponderance” of the evidence, “clear and convincing” evidence, or evidence “sufficient to convince a reasonable mind of guilt” is necessary to uphold management’s proposed discipline in cases involving ordinary misconduct.

A higher degree of proof, however, may be required where the alleged misconduct is punishable under criminal law or regarded as morally reprehensible. In such cases, the standard of “proof beyond a reasonable doubt” may be required. For example, a charge of “dishonesty” may require a higher standard of proof because the employee is not only out of a job, but his or her opportunities for reemployment are also greatly reduced. (These are often called “liberty rights.”)

The following sections provide guidelines a CSEA representative may apply to the facts of anyone case in defending an employee before management.

## **Tests for “Just Cause”**

Few (if any) CSEA contracts, personnel (civil service) commission rules or employing district discipline policies contain a definition of “just cause” for discipline. The following guidelines posed in the form of “Questions,” are adapted from those developed by arbitrator Carroll R. Daugherty (see: *Whirlpool Corp.*, 58LA421).

The Questions are not meant to compress all the facts in a discipline case into a formula. Circumstances vary widely from case to case and no “formula” can be developed where the facts can be fed into a computer that spews out the correct answer on a sheet of paper. The Questions are meant to minimize consideration of issues irrelevant to the issue of whether or not discipline is justified.

It should be understood the employer has the burden of proving just cause for discipline. It is the employer and not the employee who will have to prove its case at a hearing.

A “NO” ANSWER TO ANY ONE QUESTION NORMALLY SIGNIFIES THAT “JUST CAUSE” DOES NOT EXIST.

# The Questions

*Did management give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?*

Yes  No

**Note 1:** Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed sheets or booklets of shop rules and of penalties for violation thereof.

**Note 2:** There must have been actual oral or written communication of the rules and penalties to the employee.

**Note 3:** A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the employer or of fellow employees are so serious that any employee may properly be expected to know already that such conduct is offensive and punishable.

**Note 4:** Absent any contractual prohibition or legal restriction, the employer has the right unilaterally to promulgate reasonable rules and give reasonable order which may not need to be negotiated with the union.

*Was the employer's rule or managerial order reasonably related to (a) the orderly efficient, and safe operation of the employer's business and (b) The performance the employer might properly expect of the employee?*

Yes  No

**Note 1:** Because considerable thought and judgment have usually been given to the development and promulgation of written rules, the rules usually will be held reasonable in terms of the employer's business needs and usually in terms of the employee's performance capacities. But managerial orders given on the spur of the moment, may be another matter. They may be reasonable in terms of the employer's business needs at least the short run, but not reasonable in terms of the employee's capacity to obey.

*Example:* A foreman orders an employee to operate a high-speed band saw without safety guards or that is known to be unsafe and dangerous.

**Note 2:** If an employee believes an employer's rule or order is unreasonable, he must nevertheless obey it, in which case he may then file a grievance; obey now, grieve later. If he sincerely feels to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity, he may refuse. This is called "self-help." If it's later found in the employee's favor, the employee may properly be said to have had justification for his disobedience, and he is to be made whole.

*Did the employer, before administering discipline to an employee, make an effort to discover if the employee did in fact violate or disobey a rule or order of management?*

Yes  No

**Note 1:** This Question (and No. 4) constitutes the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

**Note 2:** The employer's investigation must normally be made before its disciplinary decision is made. If the district fails to do so, its failure may not normally be excused on the grounds the employee will get his day in court after the decision. By that time there has usually been too much hardening of positions. In a very real sense management is obligated to conduct itself like a trial court.

**Note 3:** There may be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee with pay pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job.

*Was the employer's investigation conducted fairly and objectively?*

Yes  No

**Note 1:** At the investigation the management official may be both "prosecutor" and "judge," but he should not also be a witness against the employee.

**Note 2:** It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

**Note 3:** In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

**Note 4:** The employer's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

**Note 5:** During its investigation management should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him or her.

*During the investigation did management obtain substantial and compelling evidence or proof that the employee was guilty as charged?*

Yes  No

**Note 1:** It is not required that the evidence be fully conclusive or "beyond all reasonable doubt." But the evidence must be truly weighty and substantial and not flimsy or superficial.

**Note 2:** When the testimony of opposing witnesses at a hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. The task is then to determine whether management originally had reasonable grounds for believing the evidence presented to him or her by his or her own people instead of that given by the accused employee and his witnesses. Such grounds may include a decision as to which side had the weightier reasons for falsification.

*Has the employer applied its rules, order and penalties even-handedly and without discrimination to all employees?*

Yes  No

**Note 1:** A “no” answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

**Note 2:** If the employer has been lax in enforcing its rules and orders and then decides to apply them rigorously, it may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce all rules as written.

**Note 3:** For a finding of discrimination against a particular grievant to be justified, he/she and other employees found guilty of the same offense must have been in reasonably comparable circumstances.

**Note 4:** The comparability standard considers three main items—the degree of seriousness in the offense, the nature of the employee’s employment records, and the kind of offense.

Offenses judged by degree of seriousness can be done even-handedly, for instance in-plant drinking and insubordination can be found in varying degrees. Thus, taking a single nip of gin from some other employee’s bottle while at work is not so serious an offense as bringing in the bottle and repeatedly tipping from it in the locker room. Again, making a small, snide remark to and against a supervisor is considerably less offensive than cussing him out with foul language, followed by a fist in the face.

Even if two or more employees have been found guilty of identical charges, different degrees of discipline may be imposed on them, provided their records have been significantly different. The employee having a poor record in terms of previous discipline for a given offense may rightly, i.e., without true discrimination, be given a considerably heavier punishment than the one whose record has been relatively unblemished in respect to the same kind of violation.

The words “same kind of violation” just above have importance. It is difficult to find discrimination between two employees found guilty of totally different sorts (not degrees) of offenses. For example, poor work performance or failure to call in absences have little comparability with insubordination or theft.

*Is the degree of discipline to be administered by the employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the employer?*

Yes  No

**Note 1:** A trivial proven offense, as such, does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a “good,” a “fair,” or a “bad” record. Reasonable judgment must be used.)

**Note 2:** An employee’s record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only

proper use of his record is to help determine the severity of discipline once the employee has properly been found guilty of the immediate offense.

**Note 3:** Given the same proven offense for two or more employees, their respective records provide the only proper basis for “discriminating” among them in the administration of discipline for said offense. Thus, if employee A’s record is significantly better than those of employees B, C and D, the employer may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

**Note 4:** Suppose the record of the arbitration hearing establishes firm “yes” answers to all the first six questions. Suppose further the proven offense of the accused employee was a very serious one, such as stealing; but the employee’s record had been previously unblemished over a long, continuous period of employment with the employer. Should the employer be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends on all the circumstances. But, as one of the country’s oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the employer unless there is compelling evidence that the employer abused its discretion. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of employer unreasonableness.

## Evidentiary Hearing— Standard Defenses Against Discipline

As the advocate of the employee, it is the sole responsibility of the CSEA representative to defend the member who is subject to discipline. It has been said that, “prison gates sometimes swing open for guilty persons whose constitutional rights have been violated.” It is similarly true that an occasional “guilty” employee will escape discipline because his or her legal, constitutional or contractual rights were not observed by management. It is the duty of the CSEA representative to protect and enforce these employee rights not only for the benefit of the particular employee (who, subjectively, the representative may feel deserves discipline), but also for the long range protections afforded “innocent” employees who may, in the future, be unjustly disciplined by management.

Therefore, the CSEA representative should use all the information and arguments available in defense of the affected employee. For example, Education Code Sections 44031 and 87031 require that school district employees must be given notice of, and opportunity to comment upon, derogatory information in their personnel files “which may serve as a basis for affecting the status of their employment.”

In a 1979 decision, the California Supreme Court interpreted Section 44031 as follows:

... A school district... may not avoid the requirements of the statute by maintaining a “personnel file” for certain documents relating to an employee, segregating

elsewhere under a different label materials which may serve as a basis for affecting the status of the employee's employment. Nor . . . may the school district insulate itself by simply neglecting to file material which the statute contemplates will be brought to the employee's notice.

. . . Unless the school district notifies the employee of such derogatory material within a reasonable time of ascertaining the material, so that the employee may gather pertinent information in his defense, the district may not fairly rely on the material in reaching any decision affecting the employee's employment status. (Miller v. Chico Unified School District (1979) 24 Cal. 3d 703)

Based on this decision the CSEA representative should check that any derogatory information used to document the discipline of an employee has been placed in his or her personnel file and that the employee has had the opportunity to rebut the information on the record within a reasonable time after the information became known to the district.

In reviewing the record (including the personnel file and any written charges) the CSEA representative should consider the following questions :

*Has all critical information been reduced to writing and placed into the employee's personnel file?*

*Is the nature of the employee's alleged misconduct or deficient performance been clearly described in a specific, factual manner?*

*Has the employee been clearly informed of required standards of behavior and performance?*

*Does the record progress from mild, early warnings to more serious, comprehensive documents?*

*Does the record indicate the employee was given adequate assistance and direction by management?*

*Has the employee had reasonable time and a fair opportunity to improve?*

*Have all statutory and procedural requirements been met?*

*Has the employee been given fair warning of the consequences of his continued deficient performance or misconduct?*

In addition, the CSEA representative should consider the following arguments in defending the employee and discussing the issues with management:

## **Rule Violation Cases**

*Was the rule applied uniformly to all persons covered?*

Sometimes rules are enforced more vigorously with women than men, with easily replaced unskilled workers as compared to skilled mainten-

ance workers and help is hard to get as opposed to during a period of unemployment.

*Should extenuating circumstances be taken into account?*

Even when the union agrees the worker violated the rules, should his or her age, past record, years of service, family problems or other factors be considered in deciding on a lesser penalty?

*Were workers notified of the rule establishment or change?*

Did the employer take pains to let covered workers know there was such a rule, and did the employer notify all persons covered as to the penalty which might be incurred if the rule was violated?

*Was the rule clear and understandable?*

The employer is obliged to make the rule crystal clear, with as little vagueness as possible. Thus, if “extended absences” may meet with discipline, precisely how long is “extended” in days or hours?

*Does the rule work an undue hardship on a portion of the workers covered?*

If the rule states you get a ten-minute break for rest and coffee in the morning, is it possible for workers far removed from the restroom or coffee machine to enjoy the same advantages as those who work close to these conveniences?

*Did the employer discuss or consult with CSEA prior to establishing or changing the rule?*

The union may be entitled to notification and possibly a bargaining role in changing of working conditions during the period of the agreement.

*Was the rule enforced in the past?*

If the rule has been in effect for a long time but not enforced, the workers and union are entitled to formal notification that the rule will again be enforced before a disciplinary action can be made to stick, at least in the eyes of many arbitrators.

*Was the penalty for violation too harsh?*

Should a worker be discharged for wearing long sideburns or violating an employer rule which only slightly harms the employer? Consider the harshness of the penalty in terms of the background of the employee and the nature of the offense.

*Was the employee trapped in a rule violation?*

Sometimes employers will set up a tempting situation intended to make it very easy for a worker to violate a rule on theft, sleeping on the job, or other on-the-job misbehavior. If the union can prove entrapment, some arbitrators will put the worker back on the job.

*Did the employer follow due process in disciplining the worker?*

Sometimes employers fire a worker for a first offense when the rules call for a warning letter or suspension, or they will fail to notify the union or employee of an upcoming suspension, although the contract or rules call for notification.

*Did the employer provide sufficient proof of guilt?*

Sometimes proof of guilt is insufficient to show the employee did indeed break the rules, and should be pointed out to the employer.

*Is there conflicting evidence of a rule violation?*

If there is a conflict between witnesses as to whether the worker was guilty, it should be pointed out to the employer.

*Did the employer withhold evidence from the union?*

Sometimes a union will argue that the employer withheld evidence from the union (in effect did not bargain in good faith) in lower steps of the procedure, and such evidence should be barred from consideration.

*Can the rule be strictly followed?*

Sometimes the employer rule is so complex or impossible of attainment that some degree of disobedience is always likely.

*Would the worker be harmed by obeying the rule?*

Sometimes following safety or work rules to the letter causes delays which adversely affect employee earnings, while at the same time the employer refuses to adjust production standards to recognize the problems created by strict rules. Just as employers argue their employees' violation of rules harms or endangers their right to do business, the employees should argue similarly when their earnings or working conditions are adversely affected.

*Does the rule violate laws, other rules, or the contract?*

If there is conflict, point it out to the employer. This would include state laws which provide that an employer must provide a safe place of employment where a worker is disciplined for refusing to obey an order where his life or limb is endangered, and rules that may violate the Education Code and other California codes.

*Does the rule serve a useful employer purpose?*

If the rule is frivolous in that the violation does not harm the employer or workers, a union may argue the rule is unnecessary and/or an abuse of power.

## Insubordination Disputes

*Was the individual “singled out” for special punishment where more than one person was known to be guilty of refusing to obey a direct order?*

*Was the individual’s refusal to follow a method or procedure motivated by knowledge or use of better method for performing the job or carrying out the order?*

*Was the individual’s failure to follow instructions a willful act in defiance of or in rejection of authority?*

*Was refusal to follow orders or instructions the result of belief that such refusal was an act protected by the contract?*

For example, an employee might refuse to step into the supervisor’s office alone where the contract states he is entitled to have a steward present while his work is discussed.

*Were there mitigating or extenuating circumstances that indicate rigid application of rules be modified in an individual case?*

For example, a refusal to perform a work assignment might be motivated by a recent strike situation, personal problems, or preoccupation with other duties, or the aggrieved worker’s employment history may have been one unblemished by previous problems.

*Was the situation in which the act of insubordination occurred an unusually tense situation that contributed to aggravating the relationship between worker and employer, and only partially within the control of the worker?*

An argument, a strike, or some other confrontation situation would be examples of circumstances surrounding an individual act of insubordination.

*Would obedience to the order constitute an affront, indignity or invasion of personal privacy?*

Orders to disrobe, or an order to comply with an order that results in personal embarrassment before others would be examples.

*Was the individual in fact guilty of insubordination or refusal to obey an order? Can the employer prove guilt?*

*Did the penalty for insubordination go beyond previous penalties for the same offense? Should the penalty be a lesser one?*

*Was the employee provoked into disobedience of an order by another employee or supervisor? Was the order accompanied by personally provocative language intended to cause anger on the part of the employee?*

The above questions were adapted from a list prepared by the School for Workers, University of Wisconsin.



# APPENDIX A

## Selected Sections of Education Code Relating to Discipline

All School Districts

### Education Code 44031 (Community Colleges see 87031)

#### ***44031. Personnel file contents and inspection***

(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

(b) Except as otherwise provided in subdivision (e), this material is not to include ratings, reports, or records that (1) were obtained prior to the employment of the person involved, (2) were prepared by identifiable examination committee members, or (3) were obtained in connection with a promotional examination.

(c) Every employee shall have the right to inspect these materials upon request, provided that the request is made at a time when the person is not actually required to render services to the employing district.

(d) Information of a derogatory nature, except material mentioned subdivision (b) of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon. The review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

(e) Notwithstanding subdivision (b), every non-credentialed employee shall have access to his or her numerical scores obtained as a result of a written examination

(See also Section 44010 which defines "Sex Offense" and Section 44011 which defines "Controlled substance offense" as these offenses relate to discipline in all school districts.)

## II. Non-Merit System Districts

### Education Code 45101 (Community Colleges see 88001)

#### ***45101. Definitions***

(b) "Permanent" as used in the phrase "permanent employee" includes tenure in the classification in which the employee passed the required probationary period, and includes all of the incidents of that classification.

(d) "Demotion" means assignment to an inferior position or status, without the employee's written voluntary consent.

(e) "Disciplinary action" includes any action whereby an employee is deprived of any classification or any incident of any classification in which he has permanence, including dismissal, suspension, demotion, or any reassignment, without his voluntary consent, except a layoff for lack of work or lack of funds.

(h) "Cause" relating to disciplinary actions against classified employees means those grounds for discipline, or offenses, enumerated in the law or the written rules of a public school employer. No disciplinary action may be maintained for any "cause" other than as defined herein.

### Education Code 45113 (Community Colleges see 88013)

#### ***45113. Rules and regulations for classified service in districts not incorporating the merit system.***

The governing board of a school district shall prescribe written rules and regulations, governing the personnel management of the classified service, which shall be printed and made available to employees in the classified service, the public, and those concerned with the administration of this section, whereby such employees are designated as permanent employees of the district after serving a prescribed period of probation which shall not exceed one year.

Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive.

The governing board shall adopt rules of procedure for disciplinary proceedings which shall contain a provision for informing the employee by written notice of the specific charges against him, a statement of his right to a hearing on such charges, and the time within which such hearing may be requested which shall be not less than five days after service of the notice to the employee, and a card or paper, the signing and filing of which shall constitute a demand for hearing, and a denial of all charges. The burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void.

No disciplinary action shall be taken for any cause which arose prior to the employee's becoming permanent, nor for any cause which arose more than two years preceding the date of the filing of the notice of cause unless such cause was concealed or not disclosed by such employee when it could be reasonably assumed that the employee should have disclosed the facts to the employing district.

*This section shall apply only to districts not incorporating the merit system as outlined in Article 6 (commencing with Section 45240) of this chapter.*

### **Education Code 45116 (Community Colleges see 88016)**

#### ***45116. Notice of disciplinary action***

A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.

A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.

A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.

*This section shall apply to proceedings conducted under the provisions of Article 6 (commencing with Section 45240) of this chapter.*

### **Education Code 45123 (Community Colleges see 88022)**

#### ***45123. Employment after conviction of sex offense or controlled substance offense; rehabilitated controlled substance offender***

No person shall be employed or retained in employment by a school district who has been convicted of any sex offense as defined in Section 44011. A plea or verdict of guilty, a finding of guilt by a court in trial without jury, or a conviction following a plea of nolo contendere shall be deemed to be a conviction within the meaning of this subdivision.

No person shall be employed or retained in employment by a school district, who has been convicted of a controlled substance offense as defined in Section 44011

If, however, a conviction is reversed and the person is acquitted of the offense in a new trial or the charges against him or her are dismissed, this section does not prohibit his or her employment thereafter.

The governing board of a school district may employ a person convicted of controlled substance offense if the governing board of the school district determines, from the evidence presented, that the person has been rehabilitated for at least five years.

The governing board shall determine the type and manner of the evidence, and the determination of the governing board as to whether or not the person has been rehabilitated is final.

### **Education Code 45124 (Community Colleges see 88023)**

#### ***45124. Employment of sexual psychopath***

No person shall be employed or retained in employment by a school district who has been determined to be a sexual psychopath under the provisions of Article 1 (commencing with Section 6300), Chapter 2, Part 2, Division 6 of the Welfare and Institutions Code or under similar provisions of law of any other state. If, however, such determination is reversed and the person is determined not to be a sexual psychopath in a new proceeding or the proceeding to determine whether he is a sexual psychopath is dismissed, this section does not prohibit his employment thereafter.

### III. Merit System Districts

#### Education Code 45260 (Community Colleges see 88080)

##### **45260. Rules; standards; authority of commission**

(a) The commission shall prescribe, amend, and interpret, subject to this article, such rules as may be necessary to insure the efficiency of the service and the selection and retention of employees upon a basis of merit and fitness. The rules shall not apply to bargaining unit members if the subject matter is within the scope of representation, as defined in Section 3543.2 of the Government Code, and is included in a negotiated agreement between the governing board and that unit. The rules shall be binding upon the governing board, but shall not restrict the authority of the governing board provided pursuant to other sections of this code.

(b) No rule or amendment which would affect classified employees who are represented by a certified or recognized exclusive bargaining representative shall be adopted by the commission until the exclusive bargaining representative and the public school employer of the classified employees who would be affected have been given reasonable notice of the proposal.

#### Education Code 45261 (Community Colleges see 88081)

##### **45261. Subjects of rules**

(a) The rules shall provide for the procedures to be followed by the governing board as they pertain to the classified service regarding applications, examinations, eligibility, appointments, promotions, demotions, transfers, dismissals, resignations, layoffs, reemployment, vacations, leaves of absence, compensation within classification, job analyses and specifications, performance evaluations, public advertisement of examinations, rejection of unfit applicants without competition, and any other matters necessary to carry out the provisions and purposes of this article.

(b) With respect to those matters set forth in subdivision (a) which are a subject of negotiation under the provisions of Section 3543.2 of the Government Code, such rules as apply to each bargaining unit shall be in accordance with the negotiated agreement, if any, between the exclusive representative for that unit and the public school employer.

#### Education Code 45301 (Community Colleges see 88120)

##### **45301. Probationary period for entry into permanent classified service**

A person who has served an initial probationary period in a class not to exceed six months or 130 days of paid service, whichever is longer, as prescribed by the rules of the commission shall be deemed to be in the permanent classified service, except that the commission may establish a probationary period in a class not to exceed one year for classes designated by the commission as executive, administrative, or police classes. No employee shall attain permanent status in the classified service until he has completed a probationary period in a class. In any case the rules of the commission may provide for the exclusion of time while employees are on a leave of absence. The rights of appeal from disciplinary action prior to attainment of permanent status in the classified service shall be in accordance with the provisions of Section 45305.

#### Education Code 45302 (Community Colleges see 88121)

##### **45302. Demotion and removal from permanent classified service**

No person in the permanent classified service shall be demoted or removed except for reasonable cause designated by rule of the commission as detrimental to the efficiency of the service. This section shall not be construed to prevent layoffs for lack of work or lack of funds.

#### Education Code 45304 (Community Colleges see 88123)

##### **45304. Suspension for reasonable cause; filing of charges; employee charged with mandatory or optional leave of absence offense**

For reasonable causes, an employee may be suspended without pay for not more than 30 days, except as provided in this section, or may be demoted or dismissed. In such case, the personnel director shall, within 10 days of the suspension, demotion, or dismissal, file written charges with the commission and give to the employee or deposit in the United States registered mail with postage prepaid, addressed to the employee at his or her last known place of address, a copy of the charges.

Whenever an employee of a school district or county office of education is charged with a mandatory leave of absence offense, as defined in subdivision (a) of Section 44940, the governing board of a school district shall immediately place the employee upon compulsory leave of absence for a period of time extending for not more than 10 days after the date of entry of the judgment in the proceedings. Once the employee is placed on leave of absence, he or she is subject to the provisions of Section 44940.5.

Whenever an employee of a school district or county office of education is charged with an optional leave of absence offense, as defined in subdivision (b) of Section 44940, the governing board of the school district may immediately place the employee upon a compulsory leave of absence in accordance with the provisions of Section 44940.5.

**Education Code 45305  
(Community Colleges see 88124)**

***45305. Appeal by employee from suspension, demotion or dismissal***

Any employee in the permanent classified service who has been suspended, demoted, or dismissed may appeal to the commission within 14 days after receipt of a copy of the written charges by filing a written answer to the charges. Such an appeal is not available to an employee who is not in the permanent classified service except as provided by rules of the commission. An employee in the permanent classified service who has not served the time designated by the commission as probationary for the class may be demoted to the class from which promoted without recourse to an appeal or hearing by the commission, except as otherwise provided by rules of the commission; and provided, that such demotion does not result in the separation of the employee from the permanent classified service. Nothing in this section shall operate to alter the protections guaranteed under Section 45309.

**Education Code 45307  
(Community Colleges see 88126)**

***45307. Reinstatement and employee compensation; determination of terms and conditions; notification.***

If the commission sustains the employee, it may order paid all or part of his full compensation from the time of suspension, demotion, or dismissal, and it shall order

his reinstatement upon such terms and conditions as it may determine appropriate. The commission may modify the disciplinary action, but may not make the action more stringent than that approved by the board. In addition, the commission may direct such other action as it may find necessary to effect a just settlement of the appeal, including, but not limited to, compensation for all or part of the legitimate expenses incurred in pursuit of the appeal, seniority credit for off-duty time pending reinstatement, transfer or change of location of the employee, and expunction from the employee's personnel record of disciplinary actions, cause, and charges which were not sustained by the commission. Upon receipt of the commission's written decision the board shall forth with comply with the provisions thereof. When the board has fully complied with the commission's decision it shall so notify the commission in writing.

**Education Code 45311  
(Community Colleges see 88130)**

***45311. Powers of commission in conducting hearings, and inspecting records of governing board.***

The commission may conduct hearings, subpoena witnesses, require the production of records or information pertinent to investigation, and may administer oaths. It may, at will, inspect any records of the governing board that may be necessary to satisfy itself that the procedures prescribed by the commission have been complied with. Hearings may be held by the commission on any subject to which its authority may extend as described in this article.

**Education Code 45312  
(Community Colleges see 88131)**

# DISCIPLINE & DUE PROCESS

## Introduction

### Merit System

The Governing Board as employer disciplines classified employees. (California School Employees Association. v. Personnel Commission of Pajaro Valley Unified School District of Santa Cruz County (1970) 3 Cal. 3d 139.) Following a determination to discipline by the Governing Board, the Personnel Commission is authorized to hear an appeal by a permanent employee of any suspension, demotion or dismissal. (EC 45305.) The Personnel Commission is also authorized by the Education Code to define what constitutes reasonable cause justifying a demotion, suspension or dismissal. (EC 45302.) The “appeal” before the Commission is tantamount to the full, trial-type evidentiary hearing conducted before the Governing Board (or Hearing Officer) in a non-merit district. The Personnel Commission’s decision regarding the appeal is final and not subject to review by the Board. In the event the Board disputes any decision on appeal by the Personnel Commission, however, the Board could seek a writ of mandate in Superior Court for abuse of discretion or for acting in excess of its jurisdiction the same as an improperly disciplined employee.

### Non-Merit System

Permanent classified employees of non-merit systems are “subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board.” (EC 45113 & 88013.) “The governing board’s determination of the sufficiency of the cause for disciplinary action [is] conclusive.” Id, Cause is “those grounds for discipline, or offenses, enumerated in the law or the written rules of a public school employer.” (EC 45101(h) & 88001(h).) No disciplinary action may be taken for any cause that arose before the employee became permanent, or for any cause that arose more than two years preceding the date of the filing of a notice of cause (unless the cause was concealed or not disclosed by the employee when it reasonably could be assumed that the employee should have disclosed the facts). (EC 45113 & 88013.)

### Skelly Doctrine

In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the California Supreme Court ruled that before a permanent employee’s discipline could become effective,

the employing district must have complied with established due process standards. The court declared that minimum due process included:

1. Notice of the proposed action;
2. The reasons for the proposed action;
3. A copy of the charges and all the material upon which the action is based;
4. The right to respond, either orally or in writing, to the disciplinary authority imposing the discipline.

The “Skelly” doctrine was further reinforced in *Cleveland Board of Education v. Loudermill* (1985) 470 U.S. 532. In “*Loudermill*” the court declared that minimum due process included:

1. Oral or written notice of the proposed charges;
2. An explanation of the employer’s evidence;
3. An opportunity for the employee to present his or her side of the story.

### Pre-Removal Disciplinary Safeguards

The personnel commission does not get involved in a disciplinary action until the Board of Education acts to suspend or dismiss an employee. Management is required to provide certain pre-removal safeguards prior to taking an action to the Board for a suspension or dismissal of an employee. Those safeguards are the “Skelly” due process rights listed above.

It is the function of the personnel commission’s personnel director to file written charges against an employee. The so called “Skelly conference” is conducted by either the administration or the school board or, in some districts, both. At the conclusion of the “Skelly,” the discipline if sustained by the Governing Board, is usually made effective immediately or becomes effective on the date set forth in the formal charges. In a discharge case, the employee is removed from paid status at that time, with the right to appeal the discipline.

### Pre-Removal Disciplinary Safeguards

In a non-merit system the Education Code (45113, 45116 & 88013, 88016) appears to place additional controls on a school district’s disciplinary procedures beyond “Skelly.” The additional controls placed on non-merit system districts include:

1. Written notice of the specific acts and omissions

upon which the discipline is based must be stated in ordinary and concise language and a statement of the cause for the action taken must be included.

2. If it is claimed that the employee has violated a rule or regulation, must be set forth in the notice.
3. A disciplinary notice is not sufficient if the grounds are merely recited in the language of the rule it regulates or statute alleged to have been violated. If the notice does not comply with the requirements of law, the disciplinary proceedings can be restrained by a court order.
4. The notice must contain a statement of the employee's right to deny the charges and demand a hearing. A form, to be returned in not less than five (5) days, and the signing of which is a denial of the charges and a request for a hearing, must be provided.
5. Discipline cannot be imposed for any act occurring prior to an employee becoming permanent or for any act occurring more than two (2) years preceding the initiation of disciplinary action.

#### Exceptions to Pre-Removal Disciplinary Safeguards

There are several exceptions to pre-disciplinary due process. The exceptions to pre-removal notice and response requirement include:

1. Suspension of indicted employee (*Federal Deposit Insurance Corporation v. Mallen* (1988) 496 U.S. 230).
2. Suspension of arrested and charged employee (*Gilbert v. Homar* (1997) 520 U.S. 924).
3. Short-term suspensions (not exceeding five days). Skelly type rights must be afforded either during suspension or within a reasonable time thereafter (*Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552). The employee constitutionally is not entitled to a formal evidentiary hearing. *Id.*

#### Remedy For Violations of Pre-Removal Safeguards

The California Court of Appeals has ruled the failure of school district to provide the employee with a notice of charges and a fair hearing before dismissing him or her is a denial of due process. An appropriate remedy for a violation of an employee's pre-removal due process is generally back pay beginning on the date of actual discipline and ending on the date the constitutional infirmity is corrected, which is often the hearing date

(*Barber v. State Personnel Board* (1976) 18 Cal. 3d 395).

#### Right to Evidentiary Hearing

Disciplined employees have a right to a full and fair evidentiary hearing, including the right to be confronted and cross-examine adverse witnesses, to call witnesses on their own behalf and to have an impartial hearing body hear the disciplinary charges against an employee (*Los Angeles City Employees Association v. Sanitation District* (1979) 89 Cal. App. 3d 294).

#### Merit System

The employee's right to appeal discipline imposed by the Governing Board is to the personnel commission which conducts a trial-type evidentiary hearing and makes a final decision binding on all parties.

#### Non Merit Systems

The employee's right to appeal discipline is to the governing board, or hearing officer employed by the governing board, who has authority to make a final administrative decision.

#### Hearing Requirements

A hearing is an administrative proceeding and not a trial. Judicial rules of procedure and rules of evidence applicable in a courtroom need not be followed. However, hearings must be conducted in an orderly and dignified manner. The goal of the hearing should be to determine the truth or falsity of the allegations against an employee in the simplest and fairest manner possible to all parties. The requirements of a fair and objective hearing are:

*Burden of proof.* The burden of proof must remain with the charging party. (EC 45113 and 88013; *Parker v. City of Fountain Valley* (1981) 127 Cal. App. 3d 99; *Layton v. Merit System Commission of City of Pomona* (1976) 60 Cal. App. 3d 58).

*Hearsay.* Admissible to explain or corroborate other direct evidence but cannot, standing alone, support any material factual determination (See *Layton v. Merit System Commission of City of Pomona*, supra).

*Record.* Hearing body may only consider information properly received in evidence; it may not base its decision on other information (*English v. City of Long Beach* (1950) 35 Cal. 2d 155; *La Prade v. Department of Water and Power* (1945) 27 Cal. 2d 47).

*Uncharged matters.* Decision to uphold discipline cannot be based on matters not originally charged (*In re Ruffalo* (1968) 390 U.S. 544; *Jackson v. City of Pomona* (1979)

100 Cal.App.3d 438).

*Findings.* Must issue findings of fact stating the basis of the decision (Hadley v. City of Ontario (I 974) 43 Cal.App.3d 121; Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506).

*Increasing or reducing penalty.* An administrative body that did not itself conduct the hearing cannot render different findings or increase recommended discipline without reviewing the entire record and affording the opportunity for additional argument. (Vollstedt v. City of Stockton (1990) 220 Cal.App. 3d 265 The proposed decision can be adopted and the penalty can be reduced without reviewing the evidentiary record (Hohreiter v. Garrison) 1947) 81 Cal.App.2nd 384).

## Roles in the Hearing Process

### Merit System

1. *Employee.* The employee must request hearing by 14 days after receipt of copy of written charges.
2. *Personnel Commission.* Prime responsibility is to give both employees and the district a fair and impartial hearing; Ed. Code 45306 authorizes the commission to conduct a full and fair investigation on appeal; must ascertain all procedural due process has been followed by the Governing Board; subpoena power (EC 45311); may authorize Hearing Officer to conduct hearing (EC 45312.)
3. *Commission's Director.* EC 45266 requires director to be free from bias to ensure impartiality of commission; director is precluded from advising commission regarding any disciplinary appeal if the director is the party who brought the action against the employee.
4. *School Administration.* Administration usually assists in management's side at appeal hearing.
5. *Governing Board.* The Board must always consider disciplinary matters prior to their referral to the commission; employee may only appeal to the commission after the board has taken action regarding recommended disciplinary action. Board must be notified of Commission's decision and in turn, notify Commission when decision has been implemented. Board has responsibility for ascertaining the consistency and equity of a disciplinary action taken by its administration.
6. *Legal Counsel.* EC 45306 authorizes employee to appear in person or with counsel; EC 45313 and 88132 provides that legal counsel for the Board shall aid the

Commission in all legal matters; if counsel refuses, the Commission may employ its own counsel to be charged against the general funds of the district.

7. *Role of the Employee Organization.* The main objective of the union representative is to protect the rights of the employee and present the employee's case in the best possible light—cool, competent advocate. If not directly representing the employee, the union representative may still be present at hearing if desired by employee but cannot take active role in proceedings.

### Decision

#### Merit System

The commission's decision regarding the disciplinary action is final and not subject to review, reversal or modification by the governing board. In the event that the commission reverses or modifies the action of the governing board, it must make certain decisions with regard to the conditions under which the employee will be restored to duty or former position as required by Ed. Code Sections 45307 and 88126. These may include restitution for lost wages, legal costs, seniority, and other benefits and incidents of employment.

#### Non-Merit System

The commission must serve a copy of its decision upon the governing board and the employee. Normally, this will complete the commission's action in the case: however, one or the other of the parties may appeal the decision to the civil courts. (See fn 1, ante.) The commission should request that the governing board notify it when it has fully complied with the commission's decision.

The governing board's decision regarding the disciplinary action is final and binding, however, one or the other of the parties may appeal the decision to the civil courts.

