Common Problems In Discipline Cases

1. No documentation of poor performance or misconduct in the personnel file.
2. Evaluations or narratives that are not specific in describing deficient performance.
3. Failure to give timely evaluations.
4. Missing notice requirements.
5. Lack of evidence of progressive discipline.
Purposes of Performance Evaluations

• **Improve Employee Performance**
  – Recognize good performance
  – Identify areas for growth
  – Set goals for directed improvement
  – Recommend strategies
  – Provide support

• **Promote a More Functional Workplace**
  – Encourage communication
  – Foster trust
  – Increase productivity
  – Reduce turnover
Purposes of Performance Evaluations

• Support Corrective Intervention
  – Document performance issues
  – Give the employee an opportunity to improve
  – Develop a history of ongoing concerns

Purposes of Performance Evaluations

• Defend Against Challenges to Discipline
  – Uniform complaints
  – Grievances/Unfair Practice Charges
  – Discrimination charges (EEOC/DFEH)
  – Lawsuits

For all these reasons, accurate, timely evaluations are critical to an efficient workplace.
Common Problems in Evaluations

- Evaluations Are Not Honest
- Expectations Are Not Clearly Stated
- Evaluations Don’t Address Job Duties
- Ratings Are Not Specific
- Evaluation Conference Is Superficial
- Follow-up After the Evaluation Is Insufficient
- Evaluations Don’t Comply with the Contract

Often the evaluation is the first written documentation of a performance problem.

SUMMATIVE EVALUATION 2014
- Meets standards
- Meets standards
- Meets standards
- Meets standards
- Meets standards
- Meets standards

SUMMATIVE EVALUATION 2015
- Meets standards
- Needs improvement
- Meets standards
- Needs improvement
- Meets standards

Too often the evaluation is inconsistent with other documentation of performance problems.

SUMMATIVE EVALUATION 2015
- Meets standards
- Exceeds standards
- Meets standards
- Meets standards
- Meets standards

LETTER OF REPRIMAND
- Rude to supervisor
- Failed to perform duties
- Dishonest during investigation
Common Problems in Evaluations

• True or False:

   A probationary employee who receives **satisfactory** evaluations during the probationary period cannot be released from employment.

Common Problems in Evaluations

• True or False:

   A probationary employee who receives **no** evaluations during the probationary period cannot be released from employment.

Importance of the Probationary Period

The probationary period is the District’s **only** opportunity to evaluate an employee and decide whether to retain or release the employee …

*without cause.*
Follow-up After the Evaluation

It’s not over at the end of the conference!

- Keep your promises
- If you say you’ll meet weekly, meet weekly
- If you offer training or modeling, be sure it’s provided
- If you agree to investigate, do it
- Keep monitoring & documenting performance
- Use the evaluation to reinforce corrective intervention

DISCIPLINE

QUIZ!

No cell or smart phones, tablets, laptops, iPods, smart watches, Google glasses, or anything which can prove us wrong, are allowed!
Employee Discipline

QUIZ
What Is The Main Purpose Of Employee Discipline?

A. To punish an employee for unsatisfactory behavior or work performance.
B. To establish documentation for the employee’s unsatisfactory behavior or work-performance which can be used later if the employee doesn’t improve.
C. To correct the unsatisfactory behavior or work-performance.
D. To legally rid the organization of all unsatisfactory employees.

Answer

QUIZ CONTINUED
A “Verbal Reprimand” is considered to be formal discipline.

TRUE or FALSE?
Which Employees Are Subject To Discipline?

A. Short-term and Substitutes (Hourly), Professional Experts, and Student Workers
B. Classified and Academic (Full and Part-time Faculty)
C. Supervisors and Managers
D. Probationary
E. B and C
F. B, C, and D
G. All of the above
Employee Discipline

QUIZ CONTINUED

What Is The First Thing To Consider Before Starting The Discipline Process?

A. The level of discipline to be initiated (verbal or written warning, written reprimand, etc.).
B. Whether the employee has had previous discipline.
C. Whether there has been misconduct or violation of rules, policies, procedures, or laws.
D. All of the above.

Answer

QUIZ CONTINUED

What Are Weingarten Rights?

A. An employee’s right to have a pre-disciplinary hearing.
B. The right to have the union contacted prior to initiating any disciplinary action.
C. An employee’s right to have a union representative present during an investigatory interview which s/he reasonably believes might result in disciplinary action.
D. All of the above.
See Handout in Materials

CSEA v. Capistrano Unified School District  
(2015) PERB Dec. 2440  
40 PERC ¶ 24

Provides a comprehensive discussion about the broader scope of Weingarten rights under California law.

Who?

- There are different categories of CC employees:
  - Classified (Ed Code §§ 88003; 88013)
    - Probationary
    - Permanent
  - Academic/Certificated (Ed Code § 87600 et seq.)
    - Full-time faculty — contract (probationary); regular (tenured)
    - Part-time (adjunct) faculty — temporary (Ed Code §§ 87475-87482)
  - Supervisory/Managerial (Educational/Classified Administrators)
  - Non-Classified service (Short-term, Substitute, Professional Experts, Student Workers) (Ed Code § 88003)
  - Contract Administrators (at-will) (Ed Code §§ 72411, 72411.5)
Why?

- **Due Process Rights of Public Employees**
  - Protection of Liberty Interests
  - Protection of Property Interests
    - *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194

Liberty Interest Due Process

- **All public employees have a protected liberty interest**
  - Protects reputation and provides an opportunity to earn a living without the burden of an unjustified and stigmatizing charge of misconduct.
- **Elements of a Liberty Interest:**
  - Stigmatizing charge implicating the employee’s reputation
  - Interpreted narrowly
  - Denial of the charge
  - Public disclosure of the charge

Liberty Interest Due Process

- **What process is due?**
  - “Name clearing hearing”
  - Notice and opportunity to be heard before termination
  - Full evidentiary hearing is **not** required
Due Process for Property Interests

• Constitutional guarantee that public employees cannot be deprived of a property interest in their jobs without procedural due process.
  – Fifth Amendment to U.S. Constitution
    • “… nor shall any person . . . . be deprived of life, liberty, or property, without due process of law.”
  – Protection extended by Fourteenth Amendment to action by the State
  – California Constitution, Article I, Secs. 7(a) and 15
    • “[a] person may not be deprived of life, liberty, or property, without due process of law.”

The Public Employee’s Right to Due Process

• Once a public employee passes a probationary period and becomes permanent/regular, the employer must accord due process before taking that interest
  ➢ Fair impartial hearing
  ➢ Right to be represented at your own expense
  ➢ Right to introduce evidence
  ➢ Right to confront witnesses against you
  ➢ Right to written notice of decision
  ➢ Right to seek judicial review

Due Process

• Divided into three parts:
  1. Investigation Phase
     • Complaint procedures
     • Appropriate investigation strategies and techniques
     • Weingarten rights
  2. Post-Investigation, but before action is taken = Skelly
  3. Disciplinary Process
Due Process: Post-Investigation

*Skelly v. California Personnel Board*
*(1975) 15 Cal.3d 194*

Under the California Constitution, public employees who have a property interest in their employment are entitled to a pre-deprivation meeting to ensure the government agency has reasonable grounds to believe the charges against the employee are true and can support the proposed action.

What Are the Two Primary Skelly Rights?

1. Written notice of proposed disciplinary action
2. The right to respond orally or in writing

Primary Skelly Right No. 1

Notice of Proposed Disciplinary Action
What Should be Included in the Notice?

- The reasons for the proposed action
  - Specific facts and allegations
  - Specific statutes, rules, or regulations at issue
  - Level of proposed discipline
- Effective date of proposed action
- Right to a pre-disciplinary Skelly meeting
- Right to have representation
- Right to receive copies of materials on which action is based

Primary Skelly Right No. 2

Right No. Two

The Right to Respond Orally or in Writing
The Skelly Meeting

When Is a Skelly Meeting Required?

- Hold Skelly Meeting
  - Suspension without pay
  - Demotion
  - Dismissal
- Don’t Hold Skelly Meeting
  - Layoff
  - Reprimands
  - Lateral Transfers
  - Paid Administrative Leave
What Happens at a Skelly Meeting?

**Informal MEETING**

NOT a full evidentiary hearing

Who Can Serve as the Skelly Officer?

- Entitlement to respond “before a reasonably impartial, noninvolved reviewer.”
  - *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 737
- As long as the post-discipline hearing officer is reasonably uninvolved and neutral, there is no due process violation when the Skelly meeting is conducted by person seeking to impose discipline.

**Best Practice**

Do not have overlapping involvement

Due Process: The Discipline Phase

Overview:
- Progressive Intervention/Discipline
- Disciplinary Documentation
  - Pre-Skelly Notice of Proposed Disciplinary Action and Statement of Charges
  - Skelly Meeting
  - Post-Skelly Notice of Intent to Discipline
- 24-Hour Notice
- Board Action to Dismiss
Due Process: The Discipline Phase

Overview (Continued)
- Hearing/Appeal Rights
  - Sworn witness testimony
  - Cross-examination
  - Presentation of evidence
  - Employer has burden of proof
- Written Decision and Adoption/Rejection by Commission
- Appeal to Superior Court (limited circumstances)

Discipline - Probationary Employees

- An extension of the employment selection process!
- Probationary employees should be evaluated.
- Probationary (contract) faculty must receive at least one evaluation per academic year, which must be considered in order to terminate tenure-track faculty.
  - A March 15 Notice must be given. (Ed Code § 87610)
- If you need to use discipline with a probationary employee, there is a HIGH probability you will have trouble with this employee. USE THE PROBATIONARY PERIOD WISELY!!

Question:
When notifying an employee that his/her employment is being terminated, what should you say (or not say)?
Discipline – Regular & Permanent Employees (yes, even faculty)

- What to consider when contemplating discipline of regular (permanent) employees:
  - Always review your Collective Bargaining Agreements (CBAs) to ensure compliance with any negotiated disciplinary process.
  - Investigate (including an interview or meeting with the employee) the matter to determine if misconduct or any violation of rules, policies, procedures, or laws occurred.
  - Always be cognizant of Weingarten rights to avoid and “Unfair Labor Practice” charge.
  - After determination of misconduct or violation, review the employee’s personnel file.

Discipline – Regular & Permanent Employees (cont’d)

- The employee’s personnel file, including evaluations, should help you determine the level of discipline which is warranted (i.e., was there previous documentation for misconduct, rules violations or even an evaluation?).
- If there is evidence of misconduct or rules violations, then issue the appropriate write-up (e.g., Conference Summary, Letter of Warning, Reprimand) to the employee (yes, even to faculty).
- An employee has the right to respond in writing to the written warning/reprimand before it is placed in the employee’s personnel file. (Ed Code § 87031)

Suspension, Demotion & Termination

- Suspension, demotion, and termination are the final levels of progressive discipline when other attempts to correct unsatisfactory behavior and performance have failed.

- Must be based on “cause.”
- Using these types of discipline should be reviewed by legal counsel due to the statutory and constitutional requirements involved.
Classified Employee Discipline Process

• Classified Employees (including Supervisors/Managers)
  – The written rules and regulations are prescribed by the Governing Board (Ed Code § 88013).
  – Disciplinary action may only be “for cause” as prescribed by rule or regulation.
• For districts with the Merit System — the Governing Board disciplines the employees and the Personnel Commission hears the appeals and makes the final determination.

Step 1

• Validate the facts
• Remember Weingarten!
• Determine the level of discipline needed (written reprimand, suspension, termination, etc.).

Step 2

• Serve the employee with a Notice of Proposed Disciplinary Action and Statement of Charges — to include:
  1. A statement of the proposed disciplinary action.
  2. A statement of the reasons (or cause) for such action.
  3. A copy of the charges and materials upon which the action is based.
  4. A statement that the employee has the right to respond, either orally or in writing to the person designated to function as the “Skelly” officer, and who is authorized to investigate the facts of the matter and make a recommendation to the district for their decision.
Classified Employee Discipline Process

Step 3

- **Skelly meeting and Skelly Decision**
  - If the employee chooses to not participate in a Skelly meeting, or provide a written response, then the recommended disciplinary action may proceed (and possibly take effect)
  - If the employee chooses to have a Skelly meeting, the Skelly Officer will determine whether to uphold, dismiss, or reduce the recommended disciplinary action and issue a Skelly Decision.

Classified Employee Discipline Process

Step 4

- If the Skelly Officer concludes that discipline should be imposed, the next notice is issued to the employee, explaining the next steps.
  - Depending on the local procedure, this may be a Notice of the recommendation that will be presented to the Board for approval, or a Notice of the disciplinary action to be implemented.

Classified Employee Discipline Process

Step 4 – Cont’d

The Notice will include the following:

- A statement of the specific acts and/or omission committed by the employee on which the disciplinary recommendation is based upon.
- A statement of the charges (reasons) for such action.
- The rule or regulation of the District that the employee is claimed to have violated, including a copy of the rule or regulation.
- A statement that of the action taken.
- A statement that the employee has a right to a hearing on the charges.
- A card or paper, signing and filing of which shall constitute a demand for a hearing and a denial of some or all of the charges (within 5 days).
Classified Employee Discipline Process

Step 5
- If the employee timely submits a request for hearing, an evidentiary hearing is scheduled and conducted. Depending on local procedures and/or CBA, the Board may hear the case or delegate that function to a hearing officer. Some CBAs may provide for binding arbitration.
- If the employee chooses not to have a hearing, then the discipline will take effect.

Academic Employee Discipline Process

Step 1
- Validate the facts; determine whether grounds for discipline exist under Ed Code § 87732
- Remember Weingarten!
- Determine the level of discipline needed (written reprimand, suspension, termination, etc.).

Ed Code § 87732 states that no academic employee shall be dismissed (which can mean suspension also) except for one or more of the following “causes:”
- Immoral conduct.
- Unprofessional conduct.
- Dishonesty.
- Unsatisfactory performance.
- Evidence of unfitness for service.
- Physical or mental conditions that makes him or her unfit to instruct or associate with students.
- Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her.
- Conviction of a felony or of any crime involving moral turpitude.
Additional Ed Code § 87732 (Fun) Fact

- Ed Code § 87732 states one more reason an academic employee may be dismissed:
  "Conduct specified in Section 1028 of the Government Code."

- Government Code 1028 states, "It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence."

Academic Employee Discipline Process

Step 2

- In cases of unprofessional conduct or unsatisfactory performance, issue to the employee a 90-Day Notice of Unprofessional Conduct or Unsatisfactory Performance under Ed Code § 87734 [see sample in materials]
  - Specify the nature of the problem, with specific incidences of behavior provided with specificity to furnish the employee an opportunity to correct his or her faults, and overcome the grounds for the charge
  - The employee may respond to notice in writing but has no legal rights to a hearing unless in the CBA.

Academic Employee Discipline Process

Step 3

Verify That Ed Code § 87671 Requirements Are Satisfied

- Received evaluations properly and timely.
- The district governing board has received all statements of evaluation considered in the events for which dismissal or penalties may be imposed.
- The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college.
- The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board.
Academic Employee Discipline Process

**Step 4**
- Serve the employee with a Notice of Proposed Disciplinary Action and Statement of Charges — to include:
  1. A statement of the proposed disciplinary action.
  2. A statement of the reasons (or cause) for such action.
  3. A copy of the charges and materials upon which the action is based.
  4. A statement that the employee has the right to respond, either orally or in writing to the person designated to function as the "Skelly" officer, and who is authorized to investigate the facts of the matter and make a recommendation to the district for their decision.

**Step 5**
- *Skelly* meeting and Skelly Decision
  - If the employee chooses to not participate in a Skelly meeting, or provide a written response, then the recommended disciplinary action may proceed (and possibly take effect)
  - If the employee chooses to have Skelly meeting, the Skelly Officer will determine whether to uphold, dismiss, or reduce the recommended disciplinary action and issue a Skelly Decision.

**Step 6**
Proceed with Statement of Decision to Dismiss or Penalize
Under Ed Code § 87672, if a governing board decides it intends to dismiss or penalize a contract or regular employee, the employee is served with a written statement, duly signed and verified, setting forth the Board’s complete and precise decision, and providing:
- A statement of the specific acts and/or omission committed by the employee on which the disciplinary recommendation is based upon.
- A statement of the charges (reasons) for such action.
- The rule or regulation of the District that the employee is claimed to have violated, including a copy of the rule or regulation.
- A statement of the action taken.
- A statement the employee has a right to a hearing on the charges.
Academic Employee Discipline Process

Step 7
- The employee will have a right to object to the Board’s decision in writing within 30 days of receiving the final Notice of Discipline.
- Depending on the CBA, the employee may request an evidentiary hearing with an arbitrator and the arbitrator’s decision may be final.

Dismissal of Administrators
- CONFUSING! See Ed Code §§ 72411, 72411.5
- Administrators who were not hired by express appointment or contract are “at will” employees and serve at the pleasure of the governing Board (Ed Code § 72411.5)
- Administrators who were hired by express appointment or contract:
  - If previously tenured as faculty, the district must comply with the Ed Code provisions governing the dismissal and penalties of academic employees for cause (arguably the same applies to classified managers)
  - If contract longer than 1 year —> 6 months’ written notice before expiration of term (unless contract or appointment provides otherwise)
  - If contract not longer than 1 year —> written notice on or before March 15
- Retreat Rights

Questions?
(or aspirin)
Thank You