

HR 101 Workshop: Certificated Employee Discipline

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Agenda

- What we will cover:
 - General Concepts and Observations
 - Sources of Discipline
 - Concept of Progressive Discipline
 - Types of Disciplinary Documents
 - An Introduction to FRISK ®
 - Legal Requirements for High Level Disciplinary Documents
 - Common Mistakes
 - Hypotheticals

Certificated Employees

What is a certificated employee?

- Education Code section 44830 describes “certificated employees” as only those individuals who possess the qualifications to work in “positions requiring certification qualifications.”
- Generally, job requirement that the person must possess a credential issued by the **California Commission on Teacher Credentialing**
- This includes teachers, principals, substitutes, and certain district- level administrators.
- Generally, the hiring, release, and termination of certificated employees is governed exclusively by the Education Code.
- “Discipline” short of dismissal and other matters supplemented by Collective Bargaining Agreements.



Certificated Employees

- **CERTIFICATED EMPLOYEE STATUS (AND CORRESPONDING RIGHTS)**

- Certificated employees may only be classified in one of the following ways:

- Substitute
- Temporary
- Probationary
- Permanent



Certificated Employees

- **SUBSTITUTES**

- Education Code sections 44917 & 44918: Filling the position of a regularly employed teacher who is temporarily absent from service.
- **NOT subs:**
 - Vacancies, growth positions
 - “Resident” or roving subs (maybe)
 - Intervention teachers

Substitutes may be dismissed at any time (Ed. Code 44953)



Certificated Employees

• TEMPORARY TEACHER

- Temporary Employees **must** be notified of temporary status before beginning in their assignment
- Typical **Temp** Assignments
 - Leave replacements, including positional leaves (Ed. Code, § 44920)
 - Categorically funded positions and backfills (Ed. Code, § 44909)
- Vacancies are NOT temp assignment
- May be released at any time prior to 75% of the number of school days
 - After, must be notified prior to end of school year (Ed. Code, § 44954)

Certificated Employees

- **PROBATIONARY TEACHERS**

- **Education Code section 44915: Everyone else (almost).**

- Newly hired teachers in first 2 years
 - More than 2 years if less than 75%
 - Interns, PIPs
 - ROP teachers
 - Provisional credentials (STSP, 30-day sub permit)

- **Non-reelection**

- Prob 0 and Prob 1 = any reasonable time prior to end of the instructional year
 - Prob 2 = not later than March 15 of the second year (Ed. Code 44929.21)

Certificated Employees

- **PERMANENT STATUS**

- Ed. Code 44929.21(b): If reelected for the next succeeding school year after serving two **complete** consecutive school years in a position requiring certification qualifications.
- Complete = 75% of the days the schools are maintained (Ed. Code, § 44908.)
- **Exceptions:**
 - Certain breaks in service can delay
 - *Griego v. LAUSD* – leave of absence is NOT a break in service, but does NOT count as days of service toward permanent status
 - Resignation & rehire after 39 months

Sources of Discipline

- Education Code (Causes and Procedure)
 - Dismissal and unpaid suspension (more than 3 days)
 - Sections 44932 and 44939
 - Sections 44934, 44934.1, 44936, 44944 (and others)
- Government Code (Procedure)
- Collective Bargaining Agreement



Getting It Right From the Start!

Recognize a disciplinary issue early on. The sooner a disciplinary issue is recognized, the sooner the District can take effective remedial steps to correct the problem.

- Act on reliable, trustworthy information before commencing the disciplinary process.
- Prepare written documentation that is kept in the personnel file to support evidence of corrective efforts as well as progressive discipline



Doing it Right: Taking the time to properly document is of **PARAMOUNT IMPORTANCE**

- Proper documentation will assist in achieving successful remediation of employee deficiencies and misconduct.
- Where misconduct and deficiencies are beyond correction, proper documentation will assist in successful separation.
- Failure to prepare proper documentation can result in:
 - Lack of notice of:
 - Misconduct and areas of deficiency
 - District policies to abide by
 - District's intended action
 - Lack of improvement by employee
 - LACK OF DUE PROCESS!



Addressing Performance Issues

Two Key Requirements

- Clear Communication
- Consistent Framework: F R I S K[®]

BE CONSISTENT!



Common Problems With Disciplinary Cases

- 1 No documentation of poor performance or misconduct in the personnel file
- 2 No 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
- 6 Misunderstanding, misapplying or failing to follow Education Code, collective bargaining agreement, Board Policies, and Personnel Regulations

Progressive Discipline

Purpose

- Effective communication feedback
 - Verbal reprimand
 - Written reprimand
 - Other disciplinary notices
- Document (improvement/history of discipline)
- Proper evaluation techniques and maintenance of personnel files
- Legally sufficient evidence for discipline cases
- Identified in collective bargaining agreement



Progressive Discipline

Rationale

- Supports employee improvement
- Provides mechanism for success
- Ensures corrective action before punishment of suspension or separation
- A form of due process



Progressive Discipline

Where to Start

Factors to consider when determining the level of seriousness, and therefore, the level of intervention:

- Degree of harm
- Extent to which employee deviated from established rules
- Patterns of prior similar misconduct
- Mitigating or aggravating circumstances
- Prior ability to improve following notification of concerns
- Uniformity
- Limitations prescribed by law, contract or policy

Progressive Intervention

Starting Step

1. Start with the **lowest intervention step**
2. That is likely to **effect change**
3. Based on the **seriousness of the employee's conduct**
4. Progressive corrective intervention steps may be **skipped** based on the **severity of the employee's conduct**, subject to any limitations in CBA's or District rules



Progressive Intervention

Repeating Steps

- Progressive corrective intervention steps may be **REPEATED** where:
 1. Cause after disciplinary action involves **persistent violation of a rule**; or
 2. To establish **PATTERNS of deficient performance**
- For example, to demonstrate a recurring pattern of substandard performance to support dismissal based on incompetency, unsatisfactory performance, job inefficiency or evident unfitness for service

Progressive Intervention

Prior to Creating Documentation

1. Unless there is an immediate threat of physical harm to somebody, always talk with the employee first.
2. This gives you the opportunity to:
 - a. Make sure the facts, as you understand them, are in fact correct.
 - b. Include any employee admissions or confessions made by the employee in this meeting in the document.
3. Except in cases of coaching or counseling meetings, it is normally a good idea to have someone with you to take notes.
4. What situation might a meeting result in?
“I demand a union representative.”

Types of Disciplinary Documents

Oral Warnings / Conference Summary

Written Warning

Letter of Reprimand

Ed. Code § 44938: 45/90-Day Notices

Suspension Without Pay

Dismissal

Types of Disciplinary Documents

Oral Warning/Conference Summary

- Used after informal or oral “coaching” is ineffective
- Precautionary warning of a performance problem and the need for correction
- Memorializes a conversation and provides directives
- Considered somewhat informal
- Personnel file?
 - Look at collective bargaining agreements



Types of Disciplinary Documents

Written Warning

- Considered a formal admonition intervention
- Used in one of two scenarios:
 - Follow-up to prior conferencing
 - To document a “more serious” offense
- Acts as an official rebuke and notice that, without correction, will lead to more serious consequences
- Personnel file

Types of Disciplinary Documents

Written Reprimand

- Considered a formal reproof intervention
- Used in one of two scenarios:
 - Follow-up to prior conferencing and warning
 - To document a “more serious” offense
- Acts as an official reproach and notice that, without correction, will lead to more serious consequences
- Personnel file

Other “Disciplinary” Documents

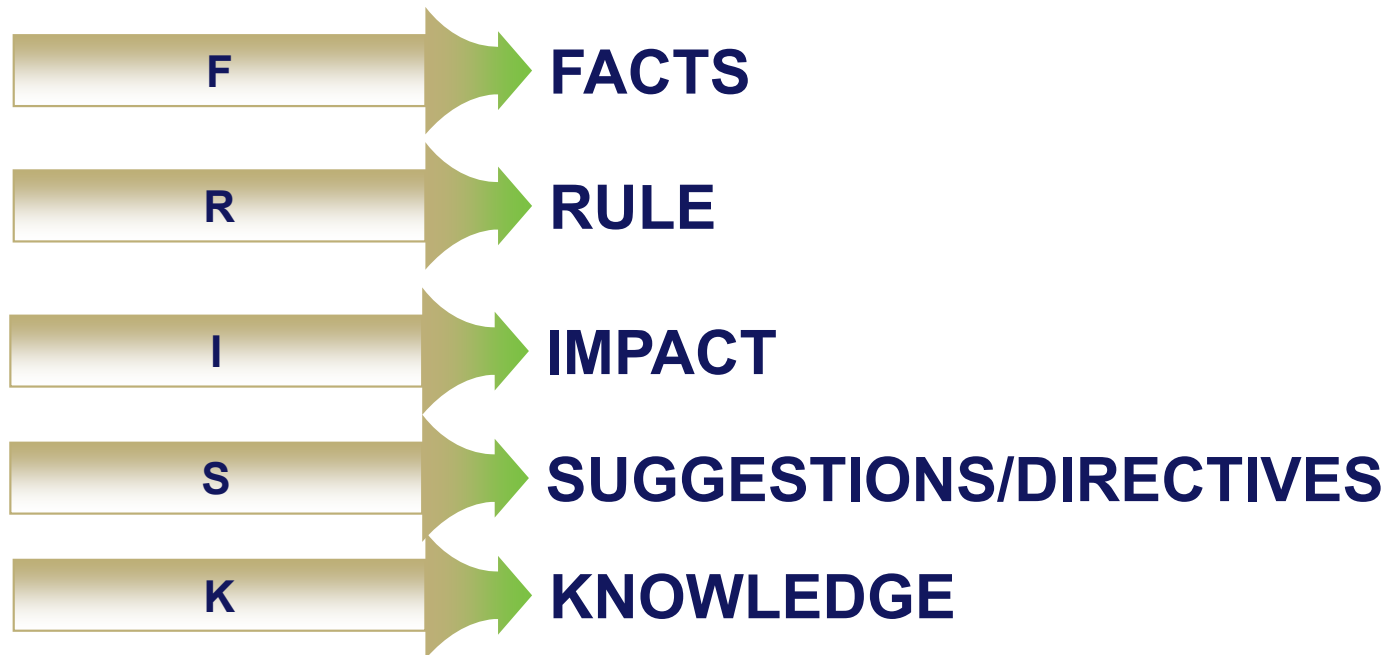
45 and/or 90 Day Notice

- Certificated employees only
- Education Code section 44938
 - 45 day notice to correct unprofessional conduct
 - 90 day notice to correct unsatisfactory performance
- Contains specific directives to improve behavior/performance
- Must attach most recent performance evaluation
- Must issue before dismissal for unprofessional conduct/unsatisfactory performance
- Personnel file

Common Problems With Disciplinary Letters

- 1 Narratives are drafted in conclusory fashion and do not reference specific acts or omissions
- 2 Specific policies violated are either not referenced or attached
- 3 Missing notice requirements mandated by Education Code or CBA
- 4 Lack of evidence of progressive discipline
- 5 Lack of directives, sufficient directives or specific directives

FRISK® - Not Just a Catch Phrase



Facts

- The facts section should provide a narrative description that is **CREDIBLE** and **CLEARLY DESCRIBES** the specific conduct of concern
 - Provides context; passes the “stranger test”
 - Fairly accounts for any mitigating but insufficient justifications advanced
 - Establishes facts were gathered objectively to reach credible determinations



Facts

To be credible, established by:

- 1. Firsthand knowledge through direct observation; or,
- 2. Allegations from another person in an oral or written complaint which have been investigated by the evaluator and found to be credible
 - Validating Complaints:
 - Gathering Facts
 - Determining Credibility
 - Weighing the Credible Evidence
 - Anonymous Complaints
 - Complaints that cannot be independently verified should not be used
 - Does not apply where allegations involve misconduct that lawfully requires notifying CPA or law enforcement, such as suspected child abuse

Just the FACTS

When?:

On_____ 2023,. . .

Who?:

I saw and heard you . . .

Where?:

. . .outside room 12 . . .

What? How?:

. . . yelling at Amy Smith, a third grade student, making her cry. In front of other students you called her a dumb girl with irresponsible parents and

You also disturbed Mr. Sing's music class. He heard your yells over the 20 member choir's rehearsal. He left his room (approximately 25 feet away) to see what was happening.



Conclusions vs. Facts

General Conclusions

- You were intoxicated.
- You acted inappropriately.

Supporting Facts

- After returning from lunch at 12:45 p.m. on June 19, 20XX, John Jones's speech was slurred. When he arrived, he appeared disoriented and had difficulty locating his classroom. Additionally, his speech was slurred and he exuded a strong smell of alcohol.
- On December 12, 20XX, you grabbed a student's homework from their desk and ripped it in multiple pieces as you yelled, "Are you stupid?"

Communication “Tools” to Add Clarity

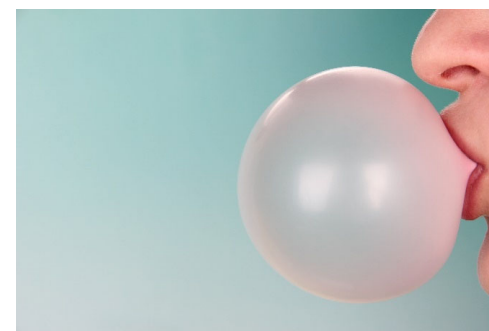
ADDING EXAMPLES:

- “**You are frequently late to staff meetings.** Between November 15, 20XX and March 3, 20XX, you were late to faculty meetings on September 18 (10 minutes); September 29 (5 minutes); October 10 (15 minutes) and October 24 (10 minutes).”



ADDING VISUAL EVIDENCE:

- “The **attached lesson plan** you turned in on October 12, 20XX is not in compliance with my October 6, 20XX directive. The lesson plan is too brief and general for a substitute to follow because it does not delineate the instructional activities and objectives.”



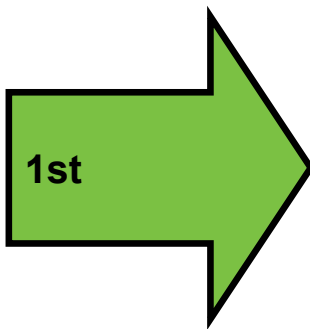
Rule

What Should the Employee Have Done?

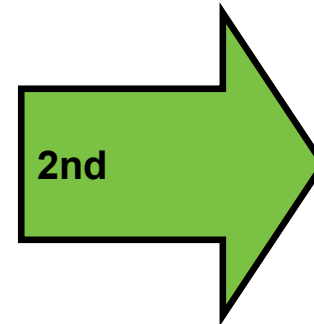
- Finding The Rule
 - Federal/State/local laws
 - District policies/regulations
 - Collective Bargaining Agreements
 - Job descriptions
 - Employee handbooks
 - Curriculum standards
 - Prior directives (In performance assessment or training documents; Staff meeting directives (oral or written))
 - If no rule, cite expectations



**WHAT IF THERE IS NO
RULE ON POINT?**



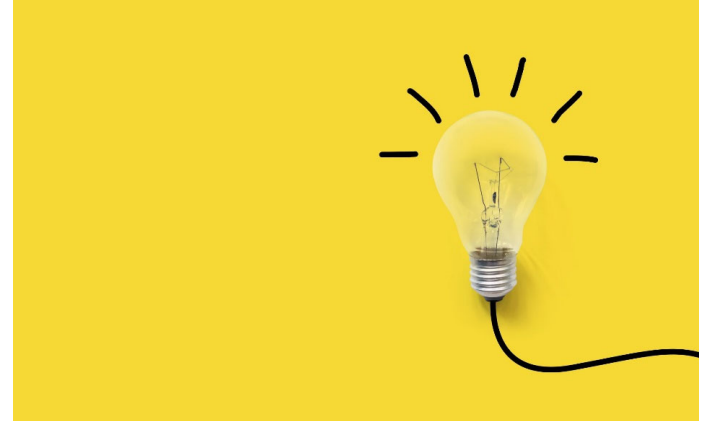
**DEFINE
THE
PROBLEM**



**TRANSLATE
IT INTO THE
EXPECTED
RULE**

What Should the Employee Have Done?

- Creating a Valid Rule Where One Might Not Exist
 - Reasonably clear and instructive
 - Reasonably related to efficient/orderly operations
 - Uniformly applied
 - Not in conflict with other rules / directives
 - Communicated



Repeated Rule Violations

- Including prior similar repeated rule violations in the feedback message is important to:
 - ❑ Show evidence of pattern recurrence
 - ❑ Emphasize the **growing seriousness** of the employee's conduct to show behavior pattern
 - ❑ Highlight the evaluator's **awareness** of the problem to motivate change in behavior
 - ❑ Justify **harsher corrective action** under progressive discipline

Impact

What Harm Was Done?

- To Whom? or What? and How?
 - Students | parents | coworkers
 - Vendors | community | others
 - District or other property
 - Efficient/orderly operations
 - Liability
 - Notoriety
 - Professional integrity | image
 - Standards of conduct



Why Describe the Harm that was Done?

- 1 Shows the **connection** between the unsatisfactory conduct or performance to the job.
- 2 Shows the seriousness of the employee's conduct by including the overall **context** of the deficient performance.
- 3 **Motivates** the employee to change by sharing the evaluator's perception of the effect of the employee's behavior on the workplace.
- 4 **Advocates** for those who are impacted to explain why the conduct must cease and/or why it must be changed.

Describing What Harm Was Done

- The adverse impact needs to be clearly communicated
 - Clear and complete impact facts
 - Avoid conclusions without supporting facts and concrete details



Suggestions/Directives

What Should the Employee Do Now?



Suggestions are IDEAS for change – employee can accept or reject. Employees cannot be held accountable for failing to follow suggestions.

Directions are MANDATES (i.e., orders) for change. An employee can be held accountable for failing to follow directions.

- Directives
 - Effective timeline
 - Clear command verb/unambiguous
 - Capture all anticipated related conduct
 - Consequences for noncompliance
- Suggestions
 - Specific techniques/resources
 - Personal assistance

Clear Description of Directed Conduct

BAD FEEDBACK EXAMPLES:

- ☐ Effective immediately, you are expected to be **courteous** when addressing student discipline.
- ☐ In the future, you are directed to treat co-workers with more **respect**.
- ☐ Effective immediately, you are required to use **appropriate** classroom materials.
- ☐ In the future, you must use **better judgment** in repairing district equipment.

Consequences for Noncompliance

- **GOOD FEEDBACK EXAMPLES:**

- ☐ Failure to comply with this directive **will** result in further corrective action.
- ☐ Failure to follow my instructions **will** result in disciplinary action, including the issuance of a letter of reprimand.

- **BAD FEEDBACK EXAMPLES:**

- ☐ Failure to follow my directive **may** result in further disciplinary action.
- ☐ Continued non-compliance with this directive **could** result in a recommendation of additional corrective action.

Knowledge

What Rights Does the Employee Have?



- Right to respond
 - Education Code section 44031
 - Collective bargaining agreements
 - District policies/regulations
 - Personnel Commission rules
 - *Miller v. Chico USD*
 - Effect on employment status

Knowledge

Education Code 44031



- A copy of this notice will be placed in your personnel file ten (10) days from the date of this notice. Pursuant to Education Code section 44031, you have the right to respond to this notice in writing and such response will be attached to this notice and made part of your file.
- Acknowledgement of Receipt
 - *By my signature below, I only acknowledge receipt of this notice. My signature does not constitute agreement with the content of this notice.*

- Information of a derogatory nature (e.g. disciplinary letters) shall not be entered into an employee's personnel records unless and until the employee is given notice and an opportunity to review and comment on that information
- Must be given reasonable amount of time to review and submit response (10 days)
- Failure to comply results in inability to use document against employee in disciplinary action

Other “Disciplinary” Documents

Certificated Evaluation (?)

- Education Code section 44660 et seq.: certificated employees must be evaluated
- Certificated Collective Bargaining Agreement Assistance Plans
- Get serious!
 - Especially probationary employees
- Personnel file

Other “Disciplinary” Documents

Last Chance Agreement

- Combine with voluntary unpaid suspension or other discipline (e.g., 45-day notice)
- Outlines misconduct and contains factual admissions
- Directives
- Consent to random testing/rehabilitation program
- Signature and informed consent
- Be careful: not a substitute for due process

Types of Disciplinary Documents

Suspension Without Pay Under CBA

- Looks similar to dismissal charges, but may not require the same amount of due process
- Check the Collective Bargaining Agreement
- Voluntary suspension in lieu of dismissal (see last chance agreement)

The Employee's Right to Due Process



**Due Process
Must Be
Accorded to
Ensure Fairness**

The Fifth and Fourteenth Amendments to the United States Constitution require that before property is taken from an individual by the government, due process must be accorded to ensure fairness.

The Employee's Right to Due Process

Sources of Rights and Procedures



- 5th and 14th Amendment Right to Due Process
- Education Code
- Government Code
- Collective Bargaining Agreements
- Board Policies/Administrative Regulations

Due Process

Divided into three parts:

1. Investigation Phase
2. Post-Investigation Phase
3. Disciplinary Phase

Post Investigation

Skelly Conference

- The California Supreme Court held, in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, that before a public employee is subject to a significant punitive action, he or she is 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

Skelly Conference

- Public employees are entitled to certain pre-deprivation rights including:
 - Written notice of proposed discipline (suspension, dismissal)
 - The reasons for the proposed discipline (charges setting forth specific acts/omissions)
 - A copy of the materials upon which the action is based (exhibits, statutes/policies violated, etc.)
 - The right to respond, either orally or in writing, to the authority initially imposing discipline before “a reasonably impartial, noninvolved reviewer” (provide notice of this right and give date and time of *Skelly* conference)

Disciplinary Phase

- Education Code sections 44934, 44936, 44941 provide that permanent employees are subject to disciplinary action for cause (probationary employees see Ed. Code § 44948.3)
- Sections 44932, 44933 and 44939 provide causes for dismissal and suspension
- Section 44938 prescribes additional notice requirements for charges of unprofessional conduct or unsatisfactory performance
- Section 44944 provides procedures for hearings

Statutory Causes for Discipline

Education Code Section 44932

- Provides the allowable causes for suspension and dismissal
 - Immoral conduct/egregious misconduct
 - Unprofessional conduct
 - Dishonesty
 - Unsatisfactory performance
 - Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed by state board/governing board
 - Alcoholism, etc.

Causes For Unpaid Suspension

Education Code 44939

A governing board may suspend the employee pending dismissal upon charges of:

- Immoral conduct
- Conviction of a felony or of any crime involving moral turpitude
- Incompetency due to mental disability
- Willful refusal to perform regular assignments without reasonable cause
- Knowing membership in the communist party

Overview of Procedural Steps – Dismissal

- Pre-*Skelly* Notice of Proposed Intent to Recommend Dismissal
 - May include suspension under 44939
- *Skelly* Meeting
- Post-*Skelly* Notice of Intent to Recommend Dismissal
 - May include suspension under 44939
- Board Action
- 30-Day Notice of Dismissal
 - Possible notice of suspension without pay under 44939
- Hearing date set
 - Triggers numerous additional procedural requirements prior to hearing
- Hearing before Commission on Professional Competence

Standard Dismissal Process

Motion to Overturn Suspension

➤ Immediate suspension appeal procedures (aka “MIRS”)

When the board immediately suspends under Section 44939, employee may serve and file with OAH a motion for immediate reversal of suspension

- Determination by OAH is limited to whether the facts as alleged, if true, are sufficient to constitute basis for immediate suspension.
- Motion to be filed within 30 days of service of the notice of suspension
- Hearing on the motion to be held within 30 days of the motion being filed
- Decision must issue within 15 days of hearing (like a demurrer)
- If granted, effective within 5 days of service of the order, with make whole due within 14 days after service of the order. Educ. Code, § 44939(c)

Timelines for Hearing

- Hearing must commence within 6 months of employee's demand for hearing
- Continuance shall be only in cases of "extraordinary circumstances" as determined by ALJ
- Date established after consultation with employee, Board and employee's representative
 - If not able to agree, ALJ shall unilaterally set date
- Hearing must be completed within 7 months of demand for hearing, except for good cause
- Where substantial progress made in completing hearing within 7 months but cannot be completed, for good cause shown, presiding ALJ may extend hearing

Four Year Rule

- No evidence or testimony of matters occurring more than four years before filing of the notice may be presented, except for allegations of an act described in Section 44010 or Penal Code sections 11652.2-1165.6 (designated sex offenses and child abuse);
- Evidence of records regularly kept by District may be introduced, but no decision shall be made based on charges or evidence older than four years, except designated sex offenses/child abuse. Educ. Code, § 44944(b)(2)
- But see: *Atwater Elementary School District vs. Dept. of General Services* (Cal. 2007) which held under prior law that the four-year period in Section 44944(a) is not absolute, as “its bar may be evaluated in the context of equitable estoppel when the basis of equitable relief is established.”

Discovery

➤ Discovery Rules

- No written discovery – except for mutual disclosures
- Section 44944.05 requires that both parties provide to the other parties the following within 45 days of the demand for hearing:
 - The name and, if known, the address and telephone number of each individual likely to have discoverable information, along with the subjects of information relating to the allegations made in the charges and the parties' claims and defenses, unless the use would be solely for impeachment purposes.
 - A copy of all documents, electronically stored information, and tangible items that the disclosing party has in its possession, custody, or control relating to the allegations made in the charges and the parties' claims or defenses, unless the use would be solely for impeachment.

Panel on Professional Competence

- Hearing to be held before a Commission on Professional Competence (“CPC”), except where parties stipulate/waive in writing to have matter heard by ALJ. Educ. Code, § 44944(c)
- At a place selected by agreement among members of panel or as selected by ALJ. Educ. Code, § 44944(g)
- CPC Hearing Process/Panel Member Restrictions
 - One member chosen by employee, one by board
 - Selection no later than 45 days prior (previously 7 days) to date set for hearing
 - Failure to comply with deadline constitutes waiver to right of selection
 - Panel members shall not be employed by District or related to employee
 - Panel members must have three years’ experience in the last 10 “in the discipline of the employee” (previously five years in the last ten). Educ. Code, § 44944

Decision

➤ Decision of the CPC

- Majority vote
- CPC prepares a written decision containing findings of fact, determinations of issues, and a disposition limited to:
 - The employee should be dismissed
 - The employee should be suspended for a specific period of time without pay
 - The employee should not be dismissed or suspended
- CPC cannot reduce dismissal to lesser penalty (e.g., probation or alternative sanctions)
- Suspension pursuant to (1)(B) is available only in a “suspension proceeding authorized pursuant to EC 44932(b) (suspension for unprofessional conduct) or 44933 (unprofessional conduct). Educ. Code, § 44944

Morrison Factors

- Used to determine whether the employee's misconduct demonstrated unfitness to teach:
 - (1) the likelihood that the conduct may have adversely affected students or fellow teachers [and] the degree of such adversity anticipated;
 - (2) the proximity or remoteness in time of the conduct;
 - (3) the type of teaching certificate held by the party involved;
 - (4) the extenuating or aggravating circumstances, if any, surrounding the conduct;
 - (5) the praiseworthiness or blameworthiness of the motives resulting in the conduct;
 - (6) the likelihood of the recurrence of the questioned conduct, and
 - (7) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers

General Observations on Dismissal Proceedings

- Time moves quickly between action to dismiss and hearing on dismissal
- Expensive
- Statutes are written in favor of employee due process
- Preparation pays dividends, while lack thereof is painfully obvious
- Cases live and die by the underlying documentation
 - Evidence of due process
 - Evidence of progressive discipline
 - Evidence of underlying misconduct/performance deficiencies

Hypotheticals



Scenario #1

You have been observing Carol, a 6th grade teacher, for the past two years and have made personal notes concerning demeaning statements made by Carol to students during class. You have not previously shared your concerns with Carol because you thought the problem would disappear. However, the problem has not disappeared and you now want to use your notes to formulate a letter of reprimand to be placed in Carol's personnel file.

What level of discipline would you issue?

What rule(s) was violated?

What directives?

Scenario #2

High school teacher Franny Friendly sent a text message to a student asking him to meet for lunch over the weekend. Ms. Friendly has been issued 2 written warnings, and a letter of reprimand for similar misconduct (asking a student for his cell phone #, commenting on students' appearance, eating lunch alone with a student in her classroom), and was directed to act professionally at all times. The prior disciplinary documents span the past 5 years.

What level of discipline would you impose?

What rule(s) was violated?

What directives?

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Question & Answer Session

Thank You

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