

Classified Employee Discipline for K-12 and CCDs - From Start to Finish



Presented By:
Beverly A. Ozowara
Gabriela M. Rodriguez

Inland Personnel Council – HR-101

January 10, 2025

aa/r/r

Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation

Classified Employee Discipline



Agenda

- ✓ General Disciplinary Concepts
 - ✓ Sources of discipline
- ✓ Discipline Less Than Dismissal
 - ✓ The concept of progressive discipline
 - ✓ Types of disciplinary documents
- ✓ Dismissal
 - ✓ General overview
 - ✓ The concept of due process
 - ✓ Notice and hearing requirements
 - ✓ Common problems with disciplinary cases
 - ✓ “Disciplines” of discipline
- ✓ Questions and Discussion

Some General Observations

Employee discipline:

- Can be complicated
- Can be subjective
- Can be emotional
- Can be frustrating
- Can be time-consuming and expensive
- Can be effectively managed
 - Documentation
 - Uniform strategies
 - Knowledge of substantive basis and procedural process



Addressing Performance Issues

Three Key Requirements

- Clear Communication
- Documentation
- Using a Consistent Framework (F R I S K)

BE CONSISTENT!



What Does FRISK[®] Stand For?

F

FACTS

R

RULE

I

IMPACT

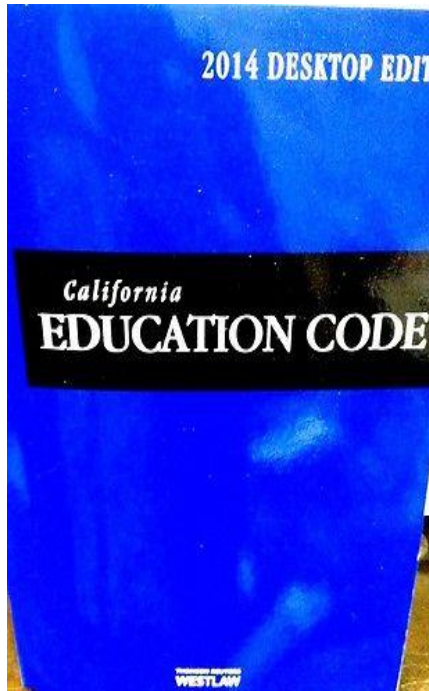
S

SUGGESTIONS/DIRECTIVES

K

KNOWLEDGE

Rules for Discipline



COLLECTIVE
BARGAINING
AGREEMENT

between
UNION
and
EMPLOYER

January 20, 2020

Rules for Discipline

- Board Policy/Administrative Regulation/Administrative Procedure (prescribe causes and procedure)
 - K-12: Typically Board Policy and Administrative Regulation 4218
 - CCD: Typically Board Policy and Administrative Procedure 7365
- Personnel commission rules (merit districts)
- Collective Bargaining Agreement (causes and procedure)
 - For discipline less than dismissal/suspension, but can also include dismissal/suspension/demotion
 - Progressive discipline
- Education Code
 - K-12: Sections 45113 & 45116
 - CCD: Sections 88013 & 88016
- Employee Handbook (especially transportation)

Typical Causes For Discipline

Classified Employees

- AR 4218/AP 7365 and/or Collective Bargaining Agreement (varies by district)
 - Incompetency, inefficiency, neglect of duty, insubordination
 - Dishonesty, falsifying information
 - Conviction of a felony, sex offense or misdemeanor adversely affecting ability to perform duties
 - Being under the influence of alcohol or other drug while on duty
 - Failure to maintain license, physical or mental inability
 - Inexcusable absence, absence without leave, abuse of illness or other leave privileges, discourteous offensive or abusive conduct, violation of rules
 - Any willful failure of good conduct tending to injure the public service
- Other Board Policies and Administrative Regulations/Procedures

Probationary Employees

- The probationary period for classified employees is “a period not exceeding six months, or 130 days of paid service, whichever is longer.” (EC 45113/88013)
 - Not less than one year for full-time peace officer or public safety dispatcher
- HR administrators may need to review their evaluation process and make adjustments to ensure proper supervision and evaluation during this short evaluation time period.
- Proper evaluation pays dividends!

Suspension Without Pay

- Assembly Bill 2413 (eff. 1/1/2023), amended Education Codes 45113 & 88013
- Prohibits a permanent employee who has requested a hearing on charges against them from being suspended without pay, suspended with a reduction in pay, demoted with a reduction in pay, or dismissed before a decision is rendered at the hearing.
- Exceptions: at the time discipline was imposed, at the conclusion of the initial review process, **the employer demonstrated by a preponderance of the evidence that the employee engaged in criminal misconduct, misconduct that presents a risk of harm to pupils or students, staff, or property, or committed habitual violations of the district's policies or regulations.** OR
- A district may stop a permanent employee's pay 30 days after the date the employee requested the hearing if a hearing on the charges will be conducted by an impartial third-party hearing officer or the governing board pursuant to the terms of a collective bargaining agreement.
- Not applicable until the expiration or renewal of the collective bargaining agreement.
 - Most contracts have since expired or have been renewed

Discipline Less Than Dismissal



Progressive Discipline

“Let the punishment match the offense.”

Cicero, c. 52 B.C.

“Let us HELP you out...or let us help you OUT.”

Diedrich, c. 2012 A.D.

Progressive Discipline

Rationale



- Supports employee improvement
- Provides mechanism for success
- Ensures corrective action before punishment or separation

Progressive Discipline

Application



- Effective communication feedback
 - Verbal warning/reprimand
 - Written warning/reprimand
 - Other disciplinary notices
- Document (improvement/history of discipline)
- Proper evaluation techniques and maintenance of personnel files
- Legally sufficient evidence for discipline cases
- Required by many collective bargaining agreements
- FRISK!!

Progressive Discipline - Steps

Oral Warnings / Conference Summary

Written Warning

Letter of Reprimand

Suspension Without Pay/Demotion

Last Chance Agreement (optional)

Dismissal

Progressive Discipline

Additional Considerations



- It is not necessarily a lockstep process, unless the CBA says so.
- The level of discipline depends on the nature and pervasiveness of the problem
- Other forms of discipline or corrective action may be appropriate, such as demotion, transfer, and performance improvement plans

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?

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, the path may 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 an “even more serious” offense
- Acts as an official reproach and notice that, without correction, the path will lead to more serious consequences
- ✓ Personnel file

Types of Disciplinary Documents

Suspension Without Pay/Demotion

- Look similar to dismissal charges
- Refer to collective bargaining agreement and AR 4218/AP 7365 for causes and procedure
- Good strategic option:
 - Voluntary suspension or demotion in lieu of dismissal (see last chance agreement)

Types of Disciplinary Documents

Last Chance Agreement

- Combine with voluntary unpaid suspension or other discipline
- 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


Education Code Section 44031/87031

- “Information of a derogatory nature 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 give reasonable amount of time to review and submit response before inclusion
 - No min required length of time, but no max or cut-off time
 - Rule of thumb: 10 days
- Effect of noncompliance: cannot use document against employee in disciplinary action (*Miller v. Chico*)
- Practice tip: include notification of this right for every disciplinary document going into personnel file –
AND PUT IT IN THE FILE!

Dismissal



Public Employee 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 can be taken by the government, due process must be accorded to ensure fairness.

Public Employee 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/Administrative Procedures

Dismissal – Typical Steps

Classified Employees

- (Pre-*Skelly*) Notice of Proposed Intent to Recommend Dismissal
- *Skelly* Meeting (Mandatory or Optional?)
- (Post-*Skelly*) Notice of Intent to Recommend Dismissal (Possible Suspension Pending Dismissal)
- Board Action (check contract and policies)
- Appeal Hearing Before Board or Hearing Officer
- Written Decision and Adoption/Rejection by Board
- Appeal to Superior Court?

Pre-Hearing Due Process

- Education Code sections 45113 and 45116/88013 and 88016:
 - Permanent employees are subject to disciplinary action only **for cause** (compare probationary)
- Varies by district based on collective bargaining agreement and board policy/administrative regulation/administrative procedure
- Baseline requirements:
 - A statement in ordinary and concise language of the specific acts and omissions on which the disciplinary action is based (the written charges)
 - A statement of cause for the action taken (suspension, demotion, dismissal)
 - The precise rules or regulations the employee is alleged to have violated
 - A statement on the employee's right to hearing on the charges
 - A card or paper, the signing and filing of which shall constitute a demand for hearing and denial of all charges

Due Process Requires Investigation

When a disciplinary matter is identified, you must ascertain the details of the misconduct. For example:

- Excessive absenteeism or tardiness: Review the employees attendance record; **What is the impact of the conduct?**
- Insubordination: Identify the specific verbal or written directive given that was not followed. **What is the impact of the misconduct?**
- Theft cases: Identify the specific missing items; who had access; documents to verify location, acquisition of property and that it was not transferred. **What is the impact caused by the loss of property?**

Due Process Requires Investigation

Investigation Do's

- Investigator uninvolved with the incident
- District should be able to show investigator has relevant training and conducted a prompt, impartial and thorough investigation
- Do ask open-ended questions to elicit facts rather than opinions

- Investigator should not be a party to incident
- Do not reach conclusions until after speaking with the relevant individuals, including the employee
- Do not rely on written statements only
- Don't hesitate to follow up

Investigation Don'ts

Employee Right to Representation During Investigations

• *NLRB v. J. Weingarten, Inc.*
(1975)



An employee may be represented by the union at an **investigatory interview** with his or her supervisor when the employee **reasonably believes** that the interview may lead to a **disciplinary action**.

The *Skelly* Meeting

- *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194
 - The California Supreme Court held, 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
- This requires providing employees with (Ed. Code Sections 45116/88016):
 - Written notice of proposed discipline
 - The reasons for the proposed discipline
 - A copy of the materials upon which the action is based
 - The right to respond, either orally or in writing, to the authority initially imposing discipline (which has been interpreted to require “a reasonably impartial, noninvolved reviewer”)

What Are the Two Primary *Skelly* Rights?



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

When Is a *Skelly* Meeting Required?

Hold *Skelly* Meeting

- Suspension without pay
- Demotion
- Dismissal without hearing
- Any prehearing deprivation

- Layoff
- Reprimands/Warnings/Conferences
- Paid Administrative Leave
- No pre-hearing deprivation

Don't Hold *Skelly* Meeting

AND ANY TIME THE CBA REQUIRES IT!

What Happens at a *Skelly* Meeting?



Informal MEETING

- NOT a full evidentiary hearing
- Opportunity for employee to present mitigating circumstances

Who Can Serve as the Skelly Officer?

- *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 imposing the discipline.*

Flippin v. L.A. City Bd. of Civil Service (2007) 148 Cal.App.4th 272

Best Practice

**Do not have overlapping
involvement**

Pre-Hearing Process

- After *Skelly* conference, send notice to employee of decision and rights
- “Brown Act” notice
 - Government Code 54957(b)(2)
 - 24-hour notice
 - Employee right to have disciplinary recommendation made in open, public session. Not a hearing, but the presentation of charges.
- Pre-dismissal unpaid suspension
 - Often permitted under CBA and/or AR 4218/AP 7365
 - Education Code 45113/88013 - Based on safety concern (students, employees, property), criminal misconduct, or habitual violations of the district’s policies or regulations
 - Requires advance notice
 - Effect of unpaid suspension or dismissal overturned: back pay awarded to date of suspension

Hearing Procedures

- Education Code section 45113 provides a right to a hearing for K-12 employees
- Education Code section 88113 provides right to a hearing for CCD employees
- Baseline requirements:
 - Must be given at least 5 days between notice of dismissal and deadline to request a hearing on dismissal
 - No disciplinary action for events that occurred during probationary period or occurred more than two years prior to notice of dismissal
 - Burden of proof rests with the employer
- In practice, employees are provided greater protections to ensure due process
 - Hearing held within reasonable time following action to dismiss
 - Neutral hearing officer (*Haas case*)
 - Right to examine and cross-examine witnesses (no trial by declaration)
 - Right to present mitigating circumstances
 - Post-hearing written decision

Post-Hearing Procedures

- Written decision issued by hearing officer or Board
 - Typically no rule designating when decision must be issued, but practice ranges from 30 to 90 days
 - Usually not binding on governing board
 - Governing board either accepts or rejects the decision and renders its own final decision
- Appeal to superior court and beyond
 - Code of Civil Procedure section 1094.5 (Writ of Mandamus)
 - Issued where findings are not supported by evidence or law
 - Writ issued by superior court is further challengeable to court of appeal and California Supreme Court

General Observations on Dismissal Proceedings

- Time moves quickly between action to dismiss and hearing on dismissal
- Expensive (*Florio v. City of Ontario (2005) 130 Cal.App.4th 1462*)
- 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

Common Problems With Disciplinary Cases

- 1 No documentation of poor performance or misconduct in the personnel file
- 2 No evaluations
- 3 Failure to give accurate 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, Administrative Regulations/Administrative Policies, and Personnel Regulations

The Disciplines of Discipline

1. 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. All supervisors should be familiar with disciplinary causes, policies, procedures, rules and collective bargaining agreements.

The Disciplines of Discipline

2. Coordinate between the site/department and the district office

It is important to have a uniform approach to discipline, so District administrators and front-line supervisors must be on the same page with respect to rules, documentation and application. Communication should be encouraged.

The Disciplines of Discipline

3. Documentation is the key component to effective employee discipline

Solid documentation of disciplinary issues, based on reliable, timely and trustworthy information, verified through investigation, will drive success in addressing disciplinary concerns from both a remedial and a punitive standpoint.

The Disciplines of Discipline

4. Follow up and follow through

Consistent follow up to monitor employee progress (or lack thereof) is crucial. If employee performance or conduct does not improve, follow through with additional documentation and directives as necessary.

Questions,
Answers,



Discussion



Thank You

Questions or comments? Please contact:

Beverly A. Ozowara – Beverly.Ozowara@aalrr.com
Riverside (951) 683-1122

Gabriela M. Rodriguez – Gabriela.Rodriguez@aalrr.com
Riverside (951) 683-1122

aalrr
Atkinson, Andelson
Loya, Ruud & Romo
A Professional Law Corporation