

# *Skelly* Pointers: How to Effectively Use Your Role as Chief Legal Advisor

Presented By: Joan Berger, City of Fremont and  
Cynthia O'Neill, Liebert Cassidy Whitmore



# Today's Agenda

- ***Introduction:*** What is pre-disciplinary procedural due process, which employees receive it, and what triggers it?
- ***Legal Review:*** How to review the notice of intent, evaluate the evidence, and select the penalty
- ***Legal Review:*** How to complete the *post-Skelly* conference analysis and prepare the final notice

# State and Federal Constitutional Due Process Rights

- “...nor shall any State deprive any person of life, liberty, or property, without due process of law.” (*U.S. Const, 14th Amend.*)
- “ ...a person may not be deprived of life, liberty, or property without due process of law... (Cal. Const. Art I, § 7.)

# What Was the Skelly Case About?

- John F. Skelly was fired for being AWOL, and sued for violation of his due process rights.
- The Cal Supremes:
  - Identified the pre-disciplinary procedural due process requirements
  - Held that substantive due process guides the selection of a level of penalty that is fair and proportionate to the misconduct

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

# Overview of Pre-and Post-Disciplinary Procedural Due Process

- Investigation
- Written Notice of Intent to Discipline
- Pre-Discipline (*Skelly*) meeting or written response
- Written Final Notice of Discipline
- Post-Discipline Evidentiary Hearing
- Judicial Review of Administrative Decision, unless hearing was binding arbitration

# Who Has Skelly Rights?

- YES
  - Those who successfully completed probation
  - Classified, permanent, civil service, merit system employees
- NO
  - At-Will
  - Probationary
  - Temporary

# Procedural Due Process Rights for Liberty Interests

- For those who are probationary or “at will”
- Provided when the reason for separation is public and either stigmatizes or prevents the individual from finding alternate employment
- “Name Clearing” conference – employee speaks to the appointing authority before or after separation

*Lubey v. City and County of San Francisco* (1979)  
98 Cal.App.3d 340, 346 [159 Cal.Rptr. 440]

# What Triggers the Right to Pre-Deprivation Procedural Due Process?

- Demotion
- Suspension without pay/ pay reduction
- Involuntary unpaid leave of absence
- Job abandonment
- Pretextual layoff
- Separation because of inability to accommodate disability



# What Does *Not* Trigger Pre-Deprivation Due Process?

- Removal of an assignment that does not affect pay
- Release from probation during probationary period
- Reprimand
- Bona fide layoff for lack of work or lack of funds

# Investigation Required

- Some level of investigation is required:
  - Allow each party to respond to allegations and cross allegations
- Options for notice of investigation requirement for sworn police and fire:
  - Cite to general description or date of alleged misconduct; OR
  - Cite to specific conduct rules at issue, but then limited to those rules listed in notice

# Paid Administrative Leave

- For accused employee if:
  - Charges under investigation are extremely serious
  - Allowing employee to remain in workplace interferes or hinders investigation

# What Must the Written Notice of Intent Contain?

- The proposed disciplinary penalty;
- A list of the rules of conduct violated;
- A statement of reasons for proposed disciplinary action;
- A copy of the materials on which the proposed discipline is based; and
- Notice of the right to respond orally or in writing.

# What Additional Information Should the Notice of Intent Contain?

- Prior personnel history
- No retaliation against witnesses
- Date and time for *Skelly* meeting and deadline for any written response
- Right to representative
- Failure to respond is waiver of *Skelly* (but not of post-discipline appeal right)
- Violation of any single charge would, in and of itself, support the penalty

# What Documents to Provide with the Notice of Intent

- *Skelly* requires: “a copy of the ... materials upon which the action is based.”
- But, “constitutional principles of due process do not create general rights of discovery.” (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1280.)

# Legal Review of the Notice of Intent Is Critical

- The public employer has the burden of proof at any post-deprivation appeal hearing
  - Is the preponderance of the evidence sufficient to support each element of each charge?
    - If not, try a different charge
    - Criminal charges can trigger clear and convincing standard
  - Hearsay alone is not sufficient

# Legal Considerations

- Just cause factors:
- Was there notice of the rule?
- Was the rule clear and understandable?
- Was the workplace rule applied uniformly to all employees?
- Is the rule reasonable?



# Legal Considerations

- First Amendment or Union Rights
- Discrimination / Harassment made me do it
- Workers' Compensation retaliation
- My disability made me do it
- Protected leaves
- Privacy rights violated by search or seizure
- No nexus to work for off duty conduct
- Criminal violations
- Retaliation (whistleblower)

# What Degree of Discipline?

- Necessarily a case-by-case determination
- Test from *Skelly* is:
  - “[T]he overriding consideration in these cases is the extent to which the employee’s conduct resulted in, or if repeated is likely to result in, ‘[h]arm to the public service.’  
...Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence.”

# Setting the Level of Penalty

- Is Progressive Discipline Required?
  - Verbal Reprimand
  - Written Reprimand
  - Suspension
  - Reduction-in-Pay
  - Demotion
  - Discharge

# What Degree of Discipline?

- Factors to Consider
  - Agency policies or guidelines
  - Nature of the offense
  - Job title
  - Personnel history (e.g., length of service, prior history of discipline)
  - Past Practice (e.g., how did the agency discipline other employees in similar situations)

# The *Skelly* Conference

- Not a hearing!
- OK for *Skelly* Officer to sign notice of intent and final notice of discipline
- Employee tells his/her side of the story
- *Skelly* Officer listens and considers aggravating or mitigating factors
- *Skelly* Officer gets clarification on any confusing statements
- Do not permit interrogation of the *Skelly* Officer

# Recording the *Skelly* conference

- Pro – creates a record of admissions or prior inconsistent statements and allows for careful legal review
- Con – employee may walk out and you lose valuable discovery
  - Note: Consent to record not required. Penal Code § 632 prohibits *secret* taping of *confidential* communications

# Post-*Skelly* Legal Analysis

- Is further investigation needed?
  - Allegations of discrimination
  - Allegations of disability-related issues
  - New exculpatory information
  - Contradiction in evidence
  - Failures to recall v. admissions/ denials

# Post-*Skelly* Legal Analysis

- Aggravating factors:
  - No remorse or appreciation of error
  - Intentional, pre-meditated conduct
  - Prior counseling and lesser discipline was not effective



# Post-*Skelly* Legal Analysis

- Mitigating Factors:
  - Length of service
  - Prior good performance
  - Contrition
  - Traumatic events in personal life

# If Post-*Skelly* Investigation Reveals More Misconduct

- Add new charges and misconduct and restart process with new *Skelly* letter

# FYI - Skelly's Termination Was Overturned

- Prior counseling and one-day suspension for similar misconduct
- Minor deviations from work schedule did not harm public service
  - Made up time on breaks, holidays, evenings
  - Otherwise efficient and productive
  - Skilled, cooperative, helpful
  - 64 years old with honorable career
  - Apologized

# Alternatives to Discipline

- Employee needs to make the first move after *Skelly* conference:
  - Settlement Agreement  
(e.g., Last Chance Agreement)
  - Resignation in lieu of discipline

# The Final Notice of Discipline

- Can implement as of the date of final notice
- Incorporate notice of intent or restate it
- Memorialize the position taken by the employee/ representative at the *Skelly*
- Advise of post-discipline appeal rights

# Damages and Attorneys' Fees

- No monetary damages for violation of California Constitution
- Remedy for failure of pre-disciplinary due process is backpay from date of dismissal to date of post-discipline appeal
- 42 USC § 1983 action available
- Fees under CCP § 1021.5 or 42 USC § 1988

# Questions?

Thank you!

- Joan Borger, Assistant City Attorney, City of Fremont, 510.284.4030, [jborger@ci.fremont.ca.gov](mailto:jborger@ci.fremont.ca.gov)
- Cynthia O'Neill, Partner, Liebert Cassidy Whitmore, 415.512.3040, [coneill@lcwlegal.com](mailto:coneill@lcwlegal.com)