

INSTRUCTIONS FOR *SKELLY* REVIEW OFFICERS



Office of General Counsel

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INSTRUCTIONS FOR SKELLY REVIEW OFFICERS

I.

ROLE OF THE REVIEW OFFICER

In *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, the California Supreme Court ruled that as a part of due process, public employees are entitled to certain procedural safeguards *before* discipline is imposed against them. These include: (1) notice of the disciplinary action proposed to be taken; (2) a statement of the reasons therefor; (3) a copy of the charges and materials upon which the action is based; and (4) the right to respond, either orally or in writing, to the authority initially imposing the discipline.

Skelly involved an employment termination of a permanent civil service employee. Subsequent decisions have extended the *Skelly* doctrine to lesser disciplinary actions. See e.g., *Ng v. California State Personnel Bd.* (1977) 68 Cal.App.3d 600, 606. It now applies to dismissals, demotions and suspensions. It does not apply to so-called “informal discipline,” such as reprimands, warning letters or oral warnings. It also does not apply to probationary employees rejected during probation (as this is not discipline), non-retained MPP employees (because they do not have a property interest in continued employment), nor student employees in bargaining unit 11 (because they also do not have a property interest in continued employment).

All public employees have a “liberty” interest, and are entitled to a name-clearing hearing, including pre-discipline *Skelly* protection, for any employment action that stigmatizes reputation, seriously impairs the opportunity to earn a

living, or seriously damages standing in the community. *Lubey v. City and County of S.F.* (1979) 98 Cal.App.3d 340, 345-46.

The function of the Review Officer is to provide an objective review of the proposed discipline and the employee's response. The Review Officer is responsible for evaluating whether there are reasonable grounds for believing that the employee engaged in the alleged misconduct and that the misconduct supports the proposed sanction. The Review Officer then makes a recommendation as to whether the disciplinary action should be sustained, modified in some specified way, or revoked. The Review Officer should not substitute his/her judgment with respect to the discipline to be imposed, but rather reach a conclusion as to whether there are reasonable grounds to justify the discipline proposed. As stated by the United States Supreme Court in *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-46 [84 L.Ed.2d 494]:

“[T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”

It is *not* the function of the Review Officer to conduct a full trial-type hearing of all of the evidence. This opportunity comes later, if the employee elects to challenge the action taken.

II.

IMPARTIALITY OF THE REVIEW OFFICER

The Review Officer must be impartial.¹ This does not necessarily mean that he/she must be totally unfamiliar with all of the facts and persons involved in the case, but rather that he/she be “reasonably impartial and uninvolved.”² Obviously, the further removed an individual is from the circumstances giving rise to the case, the less likely there will be any perception of potential bias.

The legal standard of impartiality requires that the person not have a stake in the outcome -- i.e., he/she cannot be a potential witness or for other reasons be personally embroiled in the dispute.³ Due process does not preclude the person who initiated the disciplinary action from also serving as the Review Officer.⁴ Although this dual role is legally acceptable, it is not permitted in faculty discipline cases by virtue of the terms of the CSU contract.⁵ It is also contrary to State Personnel Board Rule 52.3.⁶ Rule 52.3 is a general civil service regulation and does not apply to CSU. To avoid confusion, it is preferable that the Review Officer not be in the department or division bringing the action, be a manager in the MPP, and have had training as to his/her

¹ *Skelly v. State Personnel Board*, *supra*, 15 Cal. 3d 194, 208.

² *Flippin v. Los Angeles City Board of Civil Service Commissioners* (2007) 148 Cal.App.4th 272; *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 772-73; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 578-79; *Titus v. Los Angeles County Civ. Serv. Com'n* (1982) 130 Cal.App.3d 357.

³ *Taylor v. Hayes* (1974) 418 U.S. 488, 501-03 [41 L.Ed.2d 817]; *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736; *Civil Serv. v. San Francisco Redevelopment* (1985) 166 Cal.App.3d 1222, 1227; *Mennig v. City Council of City of Culver City* (1979) 86 Cal.App.3d 341; *Anthony G. Gough* (1993) SPB Dec. No. 93-26.

⁴ *Flippin v. Los Angeles City Board of Civil Service Commissioners*, *supra*.

⁵ Unit 3 Contract, Article 19.7 specifically provides that the Review Officer shall not have been directly involved in the initiation of the discipline.

⁶ 2 CCR § 52.3(b) states that the Review Officer “shall be above the organizational level of the employee’s supervisor who initiated the action . . .”

appropriate function. The selection of the Review Officer can be made by persons who themselves would be inappropriate to serve in that role.⁷

III.

BEGINNING THE PROCESS

The employee has a limited period of time to respond to the initial charges. Faculty Unit employees have ten days to meet with the Review Officer in person, and may also submit a written response within that ten day period.⁸ Non-Faculty Unit employees have five days to respond by either requesting a meeting, or submitting a written response.⁹ In both situations, the running of the response time is calculated beginning with the first day after the notice is served on the employee and ending on the first day after the allotted time has elapsed, unless the last day is a holiday or other day on which the campus is not regularly open for business, in which case it is also excluded. If the Notice of Discipline was sent to the employee by mail, rather than handed to him/her personally, five days are added to the applicable response times.

Depending on the seriousness and complexity of the charges, reasonable requests for extensions of the time to respond may be entertained by the Review Officer. The Review Officer has discretion as to whether to receive or review materials submitted by an employee after the time established for his/her response.

⁷*Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1810.

⁸Unit 3 Contract, paragraph 19.7.

⁹As established by administrative practice within the CSU.

If the employee requests a *Skelly* review, but does not then submit any formal response or request or attend a meeting, the Review Officer should still complete a review of the materials provided by management.

IV. THE REVIEW

The Review Officer has the responsibility to read the notice of discipline, the materials upon which it is based, and any response submitted by the employee. If the employee chooses to make an oral response, the Review Officer must make that opportunity available for him/her. Review of the written materials should occur before any meeting with the employee. It is helpful for the Review Officer to outline his/her role, and the limited scope of his/her authority, to the employee at the hearing, consistent with the description in section I above.

In most cases, a meeting with the employee is all that is required to complete a *Skelly* review. In a very few cases, the information presented in the *Skelly* review may require some corroboration. In those rare instances, the Review Officer may speak with others, or review additional written information. But the Review Officer must be extremely careful not to go beyond the initial information presented in the *Skelly* review which the employee has had an opportunity to confront.

The employee is entitled to have *one* representative when he/she meets with the Review Officer, if he/she chooses. Other persons to support the employee may only attend if the Review Officer consents. Since additional persons can be distracting and/or create confusion, their involvement is generally

discouraged. The employee's representative may be a union representative or an attorney. In either case, formal representative of management is not required given the limited role of the Review Officer. If the employee is accompanied by any representative, the Review Officer should make clear that he/she is there to hear from the employee, and *not* other persons whose purpose in attendance is to provide support.

The University may have *one* representative at the hearing to listen, respond to procedural questions or take notes for the Review Officer.

V.

THE REPORT

After completing the review, the Review Officer must submit a written report to the officer who will make the final decision (who may or may not be the same person who signed the notice of discipline) with a copy to the complaining employee. The report should describe the charges, what was done in the course of the review, and the reasons for the Review Officer's conclusion. The Review Officer should not substitute his/her judgment with respect to the discipline to be imposed, but rather reach a conclusion as to whether there are reasonable grounds to proceed with the proposed discipline, or whether it should be modified or revoked. If the employee submitted anything in writing during the review process, it should be attached. If the employee made any oral response, it should be summarized in the report.

The Review Officer's conclusion should be stated in the form of a recommendation to the officer proposing the discipline. In the case of Faculty Unit employees, the Review Officer must issue the report to the President or

his/her designee within fifteen (15) days of the notice of pending disciplinary action.¹⁰ In all other situations, the Review Officer should submit the report to the President or his/her designee within a reasonable time after the meeting, receipt of a written response from the employee or completion of the Review Officer's review.

VI. QUESTIONS

These instructions set out the basic parameters of the *Skelly* review process. Each case is unique and may present issues which are not covered by these general instructions. University Counsel assigned to each campus are always available to respond to questions about the *Skelly* review process as it applies to a particular set of facts.

¹⁰ Unit 3 Contract, paragraph 19.8