



# **A Practical Look at Eliminating Biases (Unconscious or Otherwise) in Investigations and Discipline**

(MCLE specialty Credit for Elimination of Bias)

**Friday, May 6, 2016 General Session; 10:30 a.m. – 12:15 p.m.**

**Elizabeth T. Arce, Liebert Cassidy Whitmore**

**DISCLAIMER:** *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

**Copyright © 2016, League of California Cities®. All rights reserved.**

This paper, or parts thereof, may not be reproduced in any form without express written permission from the League of California Cities®. For further information, contact the League of California Cities® at 1400 K Street, 4<sup>th</sup> Floor, Sacramento, CA 95814. Telephone: (916) 658-8200.

**Notes:** \_\_\_\_\_

[illegible]

# **League of California Cities City Attorneys' Spring Conference**

## **A Practical Look at Eliminating Bias (Unconscious or Otherwise) in Investigations and Discipline**

**Friday, May 6, 2016**

**Prepared by:**

**Elizabeth T. Arce  
Partner, Liebert Cassidy Whitmore**

**Stephanie J. Lowe  
Associate, Liebert Cassidy Whitmore**

# **A Practical Look at Eliminating Bias (Unconscious or Otherwise) in Investigations and Discipline**

## **I. Introduction**

One thing is certain—we all have bias. Bias can be intentional, unintentional, conscious, or unconscious. Some biases stem from an individual's experiences, some come from the way an individual reasons internally, and some come from external stimuli or factors.

Bias of a factfinder or decision maker can taint an investigation or the disciplinary process. But what exactly are biases? How are they created and where do they stem from? The *Merriam Webster* dictionary defines bias as “a tendency to believe that some people, idea, etc., are better than others that usually results in treating some people unfairly.”<sup>1</sup> With regards to bias against categories of people, a bias is a predisposition or tendency to think about or behave towards people on the basis of their protected category.<sup>2</sup> It is reflected in attitudes and behaviors based on stereotypical beliefs about the protected category rather than an independent evaluation of each individual's abilities and experiences. The issue is not whether we have bias, but whether we act on those biases and whether we are willing to change our opinions to reduce or eliminate biases.

## **II. The Investigator**

The investigator's role is to conduct the investigation. Part and parcel with conducting an investigation, the investigator must gather and evaluate evidence, assess the credibility of witnesses, render factual findings, and write the investigative report. Conducting an investigation is a major responsibility. In discipline cases, employees may challenge the fairness or accuracy of the investigation, making the investigation itself subject to scrutiny in a hearing or judicial proceeding. If litigation ensues, the plaintiff may be able to gain access to the investigative report, the investigator's binder, and the investigator's notes through discovery. It is therefore crucial that a city choose an appropriate individual who is capable of conducting a prompt, fair, and thorough investigation.

Whether selecting someone from within a city to conduct the investigation or hiring an outside investigator, there are select qualities that cities should look for in who they choose: (1) credibility, rank, and experience; (2) personality, demeanor, and character; and (3) impartiality.

### **A. Credibility, Rank, and Experience**

It is preferable to have the investigation conducted by an upper management employee who is higher ranking than those to be interviewed and who has established credibility within the agency. However, a lower ranking investigator can be vested with authority by a supervisor to require employees who are otherwise above him/her in the chain of command to participate in an administrative interview. An independent outside, investigator may also be retained.

---

<sup>1</sup> Merriam-Webster's Online Dictionary, “Bias,” available at <http://www.merriam-webster.com/dictionary/bias>.

<sup>2</sup> Dunnville, *Gender Bias in the Courts of the Commonwealth* (Fall 2001) Senior Lawyer News.

Regardless of whether the investigator works within or outside of the city, the investigator should be someone who is knowledgeable in the area of harassment, including the agency's policies and procedures that prohibit harassment and the type of conduct that violates the agency's policy. Since investigating is a learned skill, the investigator should also either be trained or have experience in conducting investigations.

## **B. Personality, Demeanor, and Character**

The investigator should be someone who is patient, thorough, and assertive. Many investigations, harassment ones in particular, involve interviewing people who are reluctant to provide information. The investigator must be capable of pursuing lines of questioning with individuals who are reluctant or deceptive during an interview – while remaining unbiased and maintaining a non-accusatory, positive rapport with interviewees. Administrative investigations should always be conducted in a professional and courteous manner. Nevertheless, any proceeding which can result in the imposition of discipline may become adversarial and confrontational. The most effective investigator is not viewed as an advocate for the complainant, the alleged wrongdoer, or the agency. Neutrality and objectivity enhance the credibility of the investigator and the investigation. Investigators who demonstrate impartiality and integrity will be more effective in conducting investigations.

## **C. Impartiality**

Perhaps the most important quality of an investigator is impartiality. To conduct a fair investigation and to minimize conflict of interest claims, the investigator must not be biased in any manner toward the people involved in the investigation. Additionally, the investigator must not have any biases toward the nature of the allegations being investigated. If there is any doubt as to the investigator's ability to remain impartial throughout the course of the investigation, another investigator should be selected.

## **III. The Skelly Officer**

In disciplinary due process, after a City serves an employee with a notice of intent to discipline and the employee exercises his/her right to respond, a *Skelly* meeting will be scheduled if the employee wishes to respond verbally. The *Skelly* meeting is the employee's opportunity to respond to the proposed discipline and offer any information to convince the *Skelly* officer that the proposed discipline is inappropriate. The individual conducting the *Skelly* meeting (the "*Skelly* officer") is mainly there to listen (and take notes). The employee may provide information that the *Skelly* officer was unaware of or had not considered. This is the *Skelly* officer's opportunity to listen to the employee's side of the story and consider the information presented. The *Skelly* officer may also want to clarify any confusing issues, or ask relevant questions of the employee which may go to the intent or bases for the proposed discipline.

After conducting the *Skelly* meeting, the *Skelly* officer must decide whether the proposed discipline should be sustained, modified, or rejected. If the disciplinary action is going to be sustained or modified in such a manner that significant punitive action will be imposed (e.g., reducing a termination to a suspension), the employer must provide the employee with written

notice describing the disciplinary action that will be imposed. This notice is commonly referred to as the “Final Notice of Discipline.”

Employees who are subject to discipline sometimes complain that the individual from management who conducts the *Skelly* meeting is not sufficiently neutral or unbiased. However, there is no fixed rule mandating who can and cannot participate in the *Skelly* meeting with the employee. In the *Skelly* case, the Supreme Court stated the same individual who proposed the discipline could serve as the *Skelly* officer.<sup>3</sup> In general, the *Skelly* officer should be someone who is ranked high enough in the organization to make a final decision effective. Ideally, the *Skelly* officer should be “reasonably impartial,” and not involved in the underlying action. With that said, one court has found that it was not a violation of due process for the manager who conducted the underlying investigation to serve as the *Skelly* officer.<sup>4</sup>

#### **IV. Federal and State Anti-Discrimination Laws**

In order to discuss the elimination of bias in investigations and the disciplinary process, we must first consider bias that stem from the discrimination of protected classifications. In the most obvious sense, a factfinder and decision maker should not allow his or her stereotypes about individuals of a protected classification interfere with his or her duties to conduct an investigation or implement discipline.

Several federal laws protect employees and job applicants from harassment, discrimination, and retaliation in the workplace. Title VII of the Civil Rights Act of 1964 (Title VII) is perhaps the best known and most evoked federal law.<sup>5</sup> The Age Discrimination in Employment Act of 1967 (ADEA) protects those 40 and over.<sup>6</sup> The Americans with Disabilities Act of 1990 (ADA) safeguards employees or job applicants with physical or mental disabilities.<sup>7</sup> The Genetic Information Nondiscrimination Act of 2008 (GINA) ensures that genetic information cannot be used improperly relied upon for hiring or employment purposes.

State law provides additional protections. The California Fair Employment and Housing Act (FEHA) prohibits harassment, discrimination, and retaliation based on a protected status.<sup>8</sup> The California Unruh Act also provides important protections that are similar to Title VII and the FEHA.<sup>9</sup>

Subject to the foregoing exceptions, it is illegal to discriminate or retaliate against, or harass an employee or applicant based on:

- Race or Color;
- National Origin or Ancestry;

---

<sup>3</sup> *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14].

<sup>4</sup> *Flippin v. Los Angeles City Bd. of Civil Service Com'rs* (2007) 148 Cal.App.4th 272 [55 Cal.Rptr.3d 458].

<sup>5</sup> 42 U.S.C. § 2000e et seq.

<sup>6</sup> 42 U.S.C. §§ 621-634.

<sup>7</sup> 42 U.S.C. § 12101 et seq.

<sup>8</sup> Gov. Code, §§ 12940-12951.

<sup>9</sup> Civ. Code, § 51 et seq.

- Religious Creed;
- Physical or Mental Disability;
- Medical Condition (including cancer, a record of cancer, and genetic characteristics, diseases, disorders, or other inherited characteristics);
- Marital Status;
- Sex (including pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, and breastfeeding or a condition related to breastfeeding);<sup>10</sup>
- Gender (including gender identity, gender expression, and transgender);<sup>11</sup>
- Age (40 and above);
- Sexual Orientation under the FEHA (including heterosexuality, homosexuality, and bisexuality);
- Genetic information;<sup>12</sup>
- Opposition to Unlawful Harassment;
- Association with a person that has any of the protected characteristics; and
- Perception that a person has any of the protected characteristics.<sup>13</sup>
- Requesting accommodation of disability or religious beliefs, regardless of whether request was granted.<sup>14</sup>

## V. **The Implicit Association Test**

A popular way to measure hidden bias, developed within the last decade, is the Implicit Association Test (IAT), which is administered by a group called Project Implicit. Many who take the test are surprised when they see the strong effect of stereotypes on their automatic associations. The IAT focuses on discovering unconscious bias towards or against certain groups of people.<sup>15</sup> These biases have come to be known as “implicit biases” and are often based on social stereotypes that have led to an association between a group and a trait. The test measures relative speeds in key stroking when responding to four categories – images of

---

<sup>10</sup> Gov. Code, § 12926, subd. (q)(1)(C).

<sup>11</sup> *Macy v. Holder* (2012) 2012 WL 1435995.

<sup>12</sup> Under Gov. Code, § 12926, subd. (g)(1).

<sup>13</sup> Gov. Code, §§ 12926, 12940, subd. (a),(h); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.

<sup>14</sup> Effective, January 1, 2016, AB 987 amends Gov. Code section 12940 to prohibit an employer or other covered entity from retaliating or otherwise discriminating against a person for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

<sup>15</sup> Project Implicit, available at <https://implicit.harvard.edu/implicit/aboutus.html>.

members of groups that have been traditionally disadvantaged (e.g. African Americans, overweight people, gays and lesbians, older people), images of members of groups that have been traditionally advantaged (European Americans, thin people, straight people, young people), images or words with positive associations (happiness, goodness) and images or words with negative associations (depression, war). A longer delay in key stroking when asked to associate positive words with a disadvantaged group, as compared with an advantaged group, shows a bias against that group. Individuals can take the test on a computer and the tests are available online.<sup>16</sup> At the end of the test, individuals receive an IAT score labeled as slight, moderate, or strong.

Individuals who participate in the IAT and review the results of their test come away with an understanding and awareness of what implicit bias they may have. Implicit biases are not easily self-identifiable and may not be biases that people are willing to disclose. In one example from Project Implicit, an individual may believe that women and men should be equally associated with science, but the individual's associations could show that he/she associates men with science more than he/she associates women with science.<sup>17</sup>

According to Project Implicit, implicit biases are malleable and possible to manage.<sup>18</sup> Project Implicit provides a few suggestions on what individuals can do if they have an implicit bias that they do not want. Individuals can seek experiences that can reverse or undo the patterns that created the unwanted preference.<sup>19</sup> This includes exposure to media and literature that do not promote negative stereotypes about groups of people who have been traditionally disadvantaged. Another suggestion is to interact with people or learn about people who are different than yourself and who counter the negative stereotypes.<sup>20</sup> This could involve finding commonality with people who are different. Project Implicit also suggests remaining alert to the existence of unwanted implicit biases and to make sure these biases do not affect outward behavior.<sup>21</sup>

In addition to bias that may arise in relation to a protected classification, there are other types of bias that are ever-present in conducting investigations and imposing discipline.

## **VI. Conscious and Unconscious Cognitive Biases**

In 2012, attorney Amy Oppenheimer authored an in depth paper entitled "The Psychology of Bias: Understanding and Eliminating Bias in Investigations."<sup>22</sup> In the paper, Ms. Oppenheimer describes several academic studies into the effects of conscious and unconscious cognitive bias. Cognitive biases are the human tendency to make systematic errors in certain

---

<sup>16</sup> Project Implicit, Take a Test, available at <https://implicit.harvard.edu/implicit/takeatest.html>.

<sup>17</sup> Project Implicit, Education, Overview, available at <https://implicit.harvard.edu/implicit/education.html>.

<sup>18</sup> Project Implicit, Education, Frequently Asked Questions, available at <https://implicit.harvard.edu/implicit/faqs.html#faq3>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations* (2012).



circumstances based on cognitive factors rather than evidence.<sup>23</sup> Below is a summary of the cognitive factors discussed in Ms. Oppenheimer, as well as a few other types of cognitive biases.

### **A. Confirmation Bias**

Confirmation bias is the tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence.<sup>24</sup> When a factfinder or decision maker experiences a confirmation bias, he or she starts off with a hypothesis, which then serves as the driving force in the way he or she interprets all evidence. The perils of confirmation bias are that the investigator may fail to generate alternatives to his or her initial hypothesis. The factfinder or decision maker may fail to see the relevance of information supporting another explanation.

There are a few ways to reduce or eliminate confirmation bias. The factfinder or decision maker should wait to develop an initial hypothesis until reviewing all evidence in order to prevent the creation of a controlling hypothesis.<sup>25</sup> The factfinder or decision maker should also actively consider all alternative hypotheses available to avoid limiting him or herself to one side of the story. Another method is for the factfinder or decision maker to attempt to explain why his or her hypothesis might be wrong.<sup>26</sup> Finally, when interviewing witnesses or suspects, the factfinder or decision maker should ask open-ended, non-leading questions so as not to steer the evidence in the direction of their hypothesis.<sup>27</sup>

### **B. Priming**

Priming is another type of bias, but unlike a confirmation bias which is formed internally, priming is impacted by outside influences. Priming occurs when an individual activates particular representations or associations in memory just before carrying out an action or task.<sup>28</sup> It is a bias triggered by the subconscious effects of stimuli on one's behavior. For example, in one study, researchers exposed one group of individuals to words associated with stereotyping elderly people and another group to neutral words.<sup>29</sup> After the exposure to the words, the researchers timed how long it took the participants to walk down a hallway. The group that was exposed to words associated with the elderly stereotype walked down the hallway more slowly than the other group. The study concluded that the group exposed to words associated with the elderly stereotype had been "primed" to walk more slowly.

---

<sup>23</sup> *Id.* at p. 1.

<sup>24</sup> *Id.* at p. 7.

<sup>25</sup> O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy, and Law (2009).

<sup>26</sup> O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy, and Law (2009).

<sup>27</sup> Powell, Hughes-Scholes, & Sharman, *Skill in Interviewing Reduces Confirmation Bias*, J. Investigative Psychology and Offender Profiling (2012).

<sup>28</sup> Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations* (2012), p. 10.

<sup>29</sup> Bargh, Chen, Burrows, *Automaticity of social behavior: direct effects of trait construct and stereotype-activation on action* (1996) *Journal of Personality and Social Psychology* 71: 230–244.

It is difficult to truly eliminate the effects of priming because influences that prime individuals are unconscious by their nature. However, one study found that when individuals are mindful and aware of the stimuli in their environments, the effects of priming are reduced.<sup>30</sup>

### **C. Anchoring**

Anchoring occurs when an individual's judgments are influenced by positions asserted by outside influences. The "anchor" is the first piece of information that is offered that then anchors all subsequent decisions or judgments. For example, the initial price offered for a used car sets the standard for the rest of the negotiations, so that prices lower than the initial price seem more reasonable even if they are still higher than what the car is really worth. To reduce the effects of anchoring, consider the opposite of the anchor you may be given.<sup>31</sup> In other words, generate reasons why an anchor is inappropriate.

### **D. The Halo Effect**

The halo effect refers to the tendency to assume that like goes with like. This occurs when a person associates one thing with similar or consistent things or ideas. It's giving a "halo" to a person with one positive quality. The impressions that an evaluator forms about an individual on one dimension can influence his or her impressions of that person on other dimensions. For example, if a person is attractive, individuals who are subject to the halo effect might also view that person as being nice, caring, funny, and smart. The halo effect can also group together negative qualities. A person who is overweight may also be viewed as lazy or unhealthy. To reduce or eliminate the effects of the halo effect, a factfinder or decision maker should first and foremost be aware that the halo effect exists and then learn how to segregate and group characteristics based on evidence rather than cognition.

### **E. The Conformity Effect**

The conformity effect occurs when individuals are influenced more by people with greater stature than those with a lower social ranking.<sup>32</sup> The concept of the conformity effect is important for factfinders and decision makers to understand in assessing the credibility of witnesses with different job titles and ranks within a city's organizational structure. Factfinders and decision makers should treat all witnesses with the same amount of respect and should not discredit or credit a witness simply because of his or her position in the city.

### **F. Groupthink**

Groupthink is a phenomenon that occurs when individuals are afraid to go against the dominant opinion, idea, or theory. This leads to no one challenging the status quo way of thinking and suppresses new ideas or comments. It is when a group of people desires harmony or conformity and neglects rationality or creativity. One example is found in the children's story

---

<sup>30</sup> Kaplan & Sullivan, *Young people play bingo, too: Reducing priming effects through mindfulness* (2011) The Harvard Undergraduate Research Journal.

<sup>31</sup> Mussweiler, Strack, and Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility* (2000).)

<sup>32</sup> Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations* (2012), p. 11.

*The Emperor's New Clothes.* In this story, two weavers promise a vain Emperor a new suit of clothes that is invisible to those who are unfit for their positions, stupid, or incompetent. The Emperor's ministers and the Emperor himself cannot see the clothes themselves, but pretend that they can for fear of appearing unfit for their positions. When the Emperor parades before his subjects in his new clothes, no one dares to say that he doesn't see any suit of clothes until a child cries out, "But he isn't wearing anything at all!"

To reduce or eliminate the effects of groupthink, a factfinder or decision maker needs to be willing to be the "outsider." The factfinder or decision maker should not rely on how a city may have done an investigation or discipline in the past, and should not suppress dissenting viewpoints.

### **G. Fatigue and Hunger**

Fatigue and hunger are not exactly a type of bias, but they still can affect an investigator's decision making process. Amy Oppenheimer describes the following study on fatigue and hunger:

In one study of Israeli judges who were making parole decisions it was found that the percentage of favorable rulings was highest (65%) first thing in the morning and after a lunch break and that the favorable rulings dropped precipitously – to zero - as the day (and amount of time without food) progressed. The authors theorize that without food it is more difficult to make a decision and thus the judges agreed to "stay the course" (leave the individual seeking parole in jail).<sup>33</sup>

## **VII. Eliminating and Reducing Bias**

Beyond understanding the laws prohibiting employers from discriminating against employees and applicants, education and training is the key to eliminating and reducing bias. When an individual is able to understand the nature and existence of bias, he or she may be able to better identify his or her bias.

Investigators should approach an investigation as a neutral, third party who aims to figure out the facts based on the evidence presented. Individuals should approach disciplinary decisions with reasonable impartiality without preconceived notions. To reduce or eliminate the effects of confirmation bias, anchoring, and groupthink, factfinders and decision makers should be willing to be the outsider, hold off on developing a hypothesis until all of the evidence has been reviewed, actively consider alternatives, and consider explanations for why their hypothesis may be wrong.

---

<sup>33</sup> Oppenheimer, *The Psychology of Bias: Understanding and Eliminating Bias in Investigations* (2012), p. 11; Danziger, Shai, Levay, Jonathan and Avnaim-Pesso, Liora, *Extraneous factors in judicial decisions*, Proceedings of the National Academy of Sciences of the United States of America, April 11, 2011.)

When interviewing witnesses, factfinders and decision makers should segregate the characteristics of the witness to avoid the halo effect, treat all witnesses with the same amount of respect regardless of the witness' position to avoid the conformity effect, and not suppress any dissenting viewpoints a witness may present to avoid groupthink.

In developing questions for an investigation or disciplinary hearing, an individual should not ask any questions –direct or non-direct—about an individual's protected status. They should also ask direct questions to obtain evidence that may be missing from their set of information. They should ask open-ended questions to allow witnesses to elaborate on a topic without being limited to short-answer questions. Finally, they may also use repetition or feedback questions to follow-up on information a witness has already provided to clarify their understanding or to obtain more information and details.

Factfinders and decision makers should also take control of their own environments to reduce the effects of unconscious bias. They should be aware of the surrounding stimuli and how the stimuli may prime them in reaching their decisions. They should also make sure their basic needs are met so that their thought process does not succumb to hunger or fatigue.

Most importantly, factfinders or decision makers should never conduct an investigation or *Skelly* meeting if they have a conflict of interest in the matter. This includes conflicts of interests created from having a financial interest in the outcome or having a relative by blood, marriage, or adoption who is also involved in the investigation or discipline. Factfinders and decision makers should also turn down conducting an investigation or being involved with a discipline if they cannot fairly and objectively evaluate the subject and all witnesses or if they cannot give their full attention to the matter.

By being aware of the types of conscious and unconscious biases and how these biases may be triggered, factfinders and decision makers can take steps to eliminate and reduce the effects of such biases on investigations and the disciplinary process.