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LEAGUE OF CALIFORNIA CITIES

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

JULY 11, 2012

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&

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

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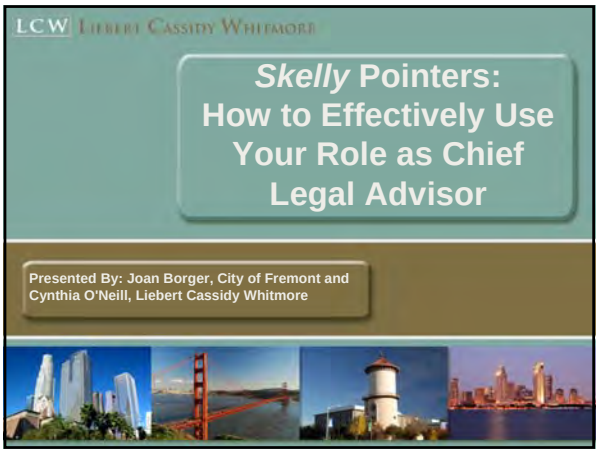
Presented by: Joan Borger, City of Fremont and Cynthia O'Neill, Liebert Cassidy Whitmore



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

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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.)

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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

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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

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Who Has Skelly Rights?

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

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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]

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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

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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

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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

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Paid Administrative Leave

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

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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.

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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

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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.)

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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

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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?

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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)

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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."

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Setting the Level of Penalty

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

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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)

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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

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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

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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

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Post-*Skelly* Legal Analysis

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

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Post-*Skelly* Legal Analysis

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

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If Post-*Skelly* Investigation Reveals More Misconduct

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

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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

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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

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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

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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

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Questions?

Thank you!

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Pre-Disciplinary Procedural Due Process Pointers –
How to Effectively Use Your Role as A Public Agency Lawyer

By Cynthia O'Neill

A public agency attorney is responsible for a wide variety of issues that compete for time and attention. Adding to the attorney's challenge is that some clients seek assistance for every issue – legal or not, while other clients forge ahead on their own because they believe that seeking legal advice will slow them down.

What can a public agency lawyer do to use his or her time effectively as to the pre-disciplinary process? When should a public agency lawyer intervene in the pre-disciplinary process to keep the agency out of legal trouble? This paper provides a quick, introductory reference guide to help a public agency lawyer to focus his or her attention on the key liability areas of pre-disciplinary procedural due process.

Who was *Skelly* and What Are the Components of the Pre-Disciplinary Due Process Right?

The John F. Skelly Story

The California Supreme Court first decided that a permanent public employee has a property right in continued employment in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.) The case arose when John F. Skelly, M.D., a doctor who worked for the State Department of Health Care Services, went AWOL one afternoon. (*Id.* at 198-199.) It was not the first time that Skelly had been AWOL; his supervisor had repeatedly counseled him about unexcused absences, apparent drinking on the job, and failure to comply with work hours requirements. (*Id.* at 198.) One afternoon, Dr. Skelly's supervisor could not locate him in his office, and went to the local bar to search for him. There, the supervisor found Dr. Skelly, "laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion." (*Id.* at 198-99.)

Subsequently, Dr. Skelly attempted to record his absence as sick leave. (*Id.*) When asked about his whereabouts on the day he claimed as sick leave, Dr. Skelly stated that he was indeed sick, but went to the local bar to wait when he did not reach his wife by telephone to pick him up. Dr. Skelly's wife, a cocktail waitress, corroborated his account. (*Id. at 199.)* Dr. Skelly did admit, however, that he had consumed two martinis at the bar that afternoon. (*Id.*) The Department fired Dr. Skelly, who sued, claiming in part that a permanent State of California civil service employee has a right to a hearing prior to disciplinary action. After an evidentiary appeal, the Personnel Board upheld the termination. The California Supreme Court granted Skelly's petition for writ, found that the termination was too harsh, and remanded the case.

The Elements of Pre-Deprivation Procedural Due Process

In summary, the California Supreme Court held in *Skelly v. State Personnel Board* that a permanent civil service employee has a right to the following pre-disciplinary procedural due process: 1) written notice of the proposed action, including the reasons, charges, and materials

upon which the action is based; and 2) the right to respond, either orally or in writing, to the authority initially imposing the discipline. (*Id.* at 215.) After hearing and considering the employee's oral or written response, then and only then can the employer implement the disciplinary action with written notice of its decision.

The purpose of the pre-deprivation procedural due process right is to guard against a mistaken deprivation pending a post-deprivation evidentiary appeal hearing. (*Cleveland Bd. of Ed. v. Loudermill* (1985) 470 US 532.) Pre-deprivation procedural due process rights are described as "minimal" because they are "merely anticipatory of the full rights which are accorded to the employee after discharge." (*Kirkpatrick v. Civil Service Com.* (1978) 77 Cal.App.3d 940, 945.) A post-deprivation evidentiary appeal generally satisfies due process if it provides for the ability to introduce evidence, subpoena witnesses, and cross-examine adverse witnesses before a reasonably impartial and non-involved hearing officer. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 545-46.)

What is the Source of the Pre-Deprivation Procedural Due Process Right?

The sources of the right to due process are both the federal and California constitutions. The Fifth Amendment to the U.S. Constitution provides that "nor shall any person… be deprived of life, liberty or property without due process of law." The Fourteenth Amendment of the U.S. Constitution requires state and local governmental entities to provide due process: "…nor shall any State deprive any person of life, liberty or property, without due process of law." Finally, the California Constitution states that: "...a person may not be deprived of life, liberty, or property without due process of law…" (Cal. Const. Art I, § 7.)

The due process guarantee is both *procedural* and *substantive*. Procedural due process generally requires notice of the proposed or intended governmental deprivation and a meaningful opportunity to respond. (*Cleveland Bd. of Ed. v. Loudermill* (1985) 470 U.S. 532, 541.) Substantive due process generally requires that a rational relationship exist between a legitimate governmental purpose and the means for achieving that purpose. (*Moore v. City of East Cleveland* (1977) 431 U.S. 494.)

Which Employees Are Entitled to Pre-Deprivation Procedural Due Process?

Public employees are entitled to pre-disciplinary procedural due process only if they have a constitutionally-recognized property interest in their continued employment, position, and/or compensation. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577.) In order to have a property interest in continued employment or compensation, a public employee must have more than a subjective or unilateral expectation of continued employment. (*Id.* at 576-77.) Instead, property interests in continued employment or compensation are based on statute, ordinance, policy, rule or employment agreement that provide that the employee can be disciplined only for cause. (*Id.* at 576-77.) Public employees are deemed to have accepted their employment subject to the statutes, charter provisions, or civil service rules regulating that employment. (*Williams v. Dept. of Water & Power* (1982) 130 Cal.App.3d 677, 682-83.)

Thus, to know which employees are entitled to pre-disciplinary procedural due process within a given public agency, the agency's attorney must know the governing statutes, charter provisions, ordinances, board policies, personnel rules, regulations, memoranda of understanding.

In general, ordinances, rules and the like that provide an employee with a probationary period followed by "permanent" employment, or that prevent the discipline or dismissal of an employee without "good cause" or "just cause" or simply "cause", indicate a constitutionally-protected property interest. (*See Williams v. Los Angeles City Dept of Water & Power* (1982) 130 Cal.App.3d 677.)

Conversely, public employees who serve "at-will" or "at the pleasure of the appointing authority" do not have a legitimate entitlement to continued employment, and are not entitled to pre-disciplinary procedural due process. (*Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340.) Although a public employee who serves at-will may be terminated without pre-disciplinary procedural due process, he or she may be entitled to an opportunity to meet with the appointing authority to clear his or her name if the employee's discharge is based on publicly-disclosed charges that might seriously damage the employee's liberty interest in seeking other employment. (*Katzberg v. Regents of the UC* (2002) 29 Cal.4th 300, 305.)

Depending on the public agency's particular rules, the following categories of public employees generally have no property interest that triggers pre-deprivation procedural due process: probationary employees (*Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342); temporary/ intermittent employees (*Williams v. Los Angeles City Dept. of Water & Power* (1982) 130 Cal.App.3d 677); and at-will employees. (*Kreutzer v. City and County of San Francisco* (2009) 166 Cal.App.4th 306).

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

A permanent governmental employee's right to pre-disciplinary procedural due process is generally triggered when the appointing authority deprives the employee of his or her salary through discipline or dismissal from employment. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.) However, as listed below, some seemingly non-disciplinary actions also trigger a pre-deprivation procedural due process right.

***Demotion*:** A demotion triggers pre-disciplinary procedural due process. (*Ng v. Cal. State Personnel Bd.* (1977) 68 Cal.App.3d 600.)

***Suspension Without Pay/Pay Reduction*:** A suspension or pay reduction generally triggers pre-disciplinary procedural due process. Note, however, that case law suggests that suspensions of five or fewer days would not trigger pre-disciplinary procedural due process, unless a past practice, memorandum of understanding, or rule provides otherwise. (*Civil Service Assoc., Local 400 v. City and County of San Francisco* (1978) 22 Cal.3d 552, 562-65.) The case law provides that the *Skelly* pre-disciplinary procedural due process right can be held during or within a reasonable time afterward. A best practice is to provide pre-disciplinary procedural due process for any length of suspension.

***Involuntary Unpaid Leave of Absence*:** A seven-month involuntary unpaid leave because of sickness was a suspension that triggered the need for pre-action procedural due process. (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95.)

***Job Abandonment*:** Rules calling for termination of employment for being absent without leave (AWOL) trigger procedural due process. (*Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal.3d 1102.) The employer must provide the AWOL employee written notice and an opportunity to respond. If the employee challenges the accuracy of the facts, the employer must provide the employee the opportunity to respond to a neutral fact finder in an informal hearing. (*Id.*)

***Pretextual Layoff*:** A layoff that is a pretext for a personal agenda to terminate triggers pre-deprivation procedural due process. (*Duncan v. Dept. of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1183 at fn 12; *Levine v. City of Alameda* (9th Cir. 2008) 525 F.3d 903.)

***Separation Because of Inability to Reasonably Accommodate*:** State and federal law require public employers to reasonably accommodate employees with disabilities. (42 USC § 12111(9); 42 USC § 12112(5); Gov. Code § 12940(m).) Issuing a permanent employee a Notice of Intent because of inability to accommodate is a best practice. It not only provides pre-deprivation procedural due process, but also allows the employer to document all efforts to accommodate, and allows the employee to respond with any potential accommodations that the employer has not considered. (*See* attached template.)

What Does *Not* Trigger the Right to Pre-Deprivation Procedural Due Process?

***Removal of Administrative Assignment that Does Not Affect Pay*:** A chair of a department of a public medical center was not entitled to pre-deprivation procedural due process when he was reassigned to his prior position as a physician specialist because the change did not affect his compensation or pay grade. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 627.)

***Release from Promotional Probation During the Probationary Period*:** A rejection from probation for unsatisfactory performance does not trigger pre-deprivation procedural due process. (*Guinn v. County of San Bernardino* (2010) 184 Cal.App.4th 941.)

***Reprimand*:** A reprimand – whether written or oral -- does not constitute a deprivation of compensation and generally does not trigger procedural due process rights because it does not involve a deprivation of compensation.

***Layoff for Lack of Work or Lack of Funds*:** A multi-employee layoff of the least senior employees to address a bona fide lack of work or lack of funds does not trigger pre-deprivation procedural due process. (*Alameda County Management Employees Assoc. v. Superior Court* (2011) 195 Cal.App.4th 325, 351-52; *Duncan v. Dept of Personnel Admin.* (2000) 77 Cal.App.4th 1166.)

The Investigation

In most every case, the public agency should investigate whether wrongdoing occurred before noticing the intent to discipline. (*Cotran v. Rollins Hudig Hall Int.* (1998) 17 Cal.4th 93.) The investigation should be completed in a manner that allows the parties an opportunity to respond to the allegations of the other. (*Id.; Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522.)

Special notice of investigation procedures apply to sworn police officers and firefighters under the Public Safety Officer's Procedural Bill of Rights Act (Gov. Code § 3300 *et seq*.) and the Firefighters Procedural Bill of Rights Act (Gov. Code §§ 3250 et seq.). Both Acts require that the officer or firefighter be informed of "the nature of the investigation prior to any interrogation." (Gov. Code §§ 3303(c); 3253(c).) The officer or firefighter need not be informed in writing, but can be verbally notified immediately before the interrogation as to the general nature of the matters under investigation. It is sufficient notice to simply state the date of the conduct under investigation, for example. If the agency chooses to inform the officer or firefighter of the specific charges at issue in the investigation, however, and provides no other description of the alleged wrongful conduct, the Notice of Intent and final notice will be limited to the specific charges identified in the pre-interrogation notice. (*Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921.)

When is Paid Administrative Leave Appropriate?

Paid administrative leave pending an investigation and the pre-disciplinary procedural due process is appropriate if: the charges under investigation are extremely serious; or allowing the employee to remain in the workplace would interfere or hinder the investigation.

What Does the Pre-Deprivation "Notice of Intent" (aka *Skelly* letter) Contain?

At a minimum, the pre-deprivation Notice of Intent or *Skelly* letter must contain 1) notice of the proposed action, including the reasons, charges, and materials upon which the action is based; and 2) the right to respond, either orally or in writing, to the authority initially imposing the discipline. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.) The best practice is to make the *Skelly* letter a persuasive document that convinces any reader that the discipline is well founded. The following is a list of the information that can be included in a *Skelly* letter to reach that end. (*See* the attached template "Notice of Intent" as well.)

- A description of the purpose of the notice and a description of the proposed discipline (*e.g.*, "The purpose of this memorandum is to put you on notice of my proposed decision to suspend you from your employment without pay for ten days");
- Citation to the rules, regulations, collective bargaining agreement provisions, and/or statutes that have been violated (consider quoting them verbatim in the Notice of Intent);
- A detailed description of the factual bases for findings of violations of rules, regulations, collective bargaining agreement provisions, and statutes;

- When appropriate, a statement that the violation of any one of the rules, regulations, or policies, or commission of any factual act of misconduct, would in and of itself support the imposition of the proposed discipline;

- A statement of the date that the proposed action will be effective;

- A description of how the proposed discipline was determined, including a description of the impact the employee's personnel history has on issues of credibility and penalty (whether positive or negative);

- A statement warning the employee about future related misconduct;

- If witnesses were interviewed about the alleged misconduct, a statement that the employee is prohibited from retaliating against any and all of the witnesses;

- The date and time for the *Skelly* meeting;

- A statement that the employee's personnel file was relied on, and that the employee may inspect his/her personnel file upon request;

- A statement that copies of all materials that were relied upon to support the proposed discipline are attached (and attach them);

- A description of the employee's right to respond in writing and/or verbally to the proposed discipline;

- A statement advising the employee that if he/she does not provide a written response and/or request a *Skelly* meeting by a certain date, then his/her failure will constitute a waiver of the right to respond to the proposed discipline; and

- A statement advising the employee that he/she has the right to be represented by a representative of his/her choice at the *Skelly* meeting.

Review the Notice of Intent and Evidence to Assess Whether the Agency Can Prove the Charges

The public agency has the burden of proving the charges in the post-deprivation appeal. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 103; *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155-175-76). Due process does not require the agency to use disciplinary charges that might be more difficult to prove; instead, the agency can base the disciplinary action on clear-cut evidence of misconduct that itself justifies that action. (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1280-81.)

The written Notice of Intent (aka *Skelly* letter) establishes the charges that the agency must prove in the post-discipline appeal. As a result, a critical role for the agency's attorney is to review the evidence to assess whether the Notice of Intent contains only those potential disciplinary charges that the agency can prove.

For example, if the agency suspects that an officer has associated with criminals, but has only circumstantial evidence of association, or the witnesses are unavailable or impeachable, the agency will not be able to prove an "association with criminals" charge.

Similarly, a charge of "offensive conduct" may be far easier to prove than a harassment charge which requires that the conduct involve a protected status (*e.g.*, race, sex, sexual orientation, national origin, disability, age, religion.)

Charges that are also violations of criminal law, such as theft, assault, or fraud, are more difficult to prove. Arbitrators will typically use a "clear and convincing" standard of proof in a post-discipline evidentiary appeal, instead of the "preponderance of the evidence" standard, if the agency has pursued a criminally-based charge. (Elkouri & Elkouri, *How Arbitration Works,* at 2010 Supplement p. 190.) A better approach is to use a conduct unbecoming charge instead of a charge that would also be a violation of criminal law.

Is the Discipline Consistent with the Law?

The public agency attorney must also review the Notice of Intent to ensure that the employee is not being disciplined in violation of external law. Disciplining an employee for the following categories of conduct is contrary to external law: asserting First Amendment free speech or union association rights; conduct resulting from being victimized by harassment or discrimination; making workers' compensation claims; conduct resulting from a protected disability; taking protected leaves; off duty conduct that has no nexus to the job; or for blowing the whistle.

Progressive Discipline and Deciding the Appropriate Penalty

The progressive discipline principle holds that the goal of discipline is corrective, and not punitive. Thus, the level of penalty for misconduct should increase progressively to convince the employee to stop the misconduct. Some types of non-serious misconduct require progressive discipline, in order to provide sufficient notice to the employee that the conduct is wrong. Absenteeism is an example of a type of misconduct that requires progressive discipline, because the employer needs to notify the employee what level of attendance is unacceptable. Other types of misconduct are deemed "capital crimes" that can be punished without progressive discipline, such as theft, assault on a supervisor, or dishonesty of a peace officer.

Although a public agency employer has a broad discretion to select an appropriate disciplinary penalty, the overriding consideration is the extent to which the employee's conduct is likely to result in harm to the public service. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 218.) Other relevant factors in setting the level of penalty include the circumstances surrounding the misconduct and the likelihood of its recurrence. (*Id.*)

The other factors that the employer should consider in setting the penalty is the employee's prior disciplinary history, including prior disciplinary record and performance evaluations.

What Documents and Evidence Should You Provide with the Notice of Intent?

The California Supreme Court has held that the pre-deprivation Notice of Intent must be accompanied by "a copy of the … materials upon which the action is based." (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.) This does not mean that the employer has a duty to produce every potentially relevant document along with the Notice of Intent. "Constitutional principles of due process do not create general rights of discovery." (*Gilbert v. Sunnyvale* (2005) 130 Cal.App.4th 1264, 1280.) All that the employer is required to provide at the *Skelly* pre-deprivation stage is a sufficient amount of supporting materials to explain or provide notice of the substance of the employer's supporting evidence so that the employee can adequately respond at his or her *Skelly* conference. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 546; *Brock v. Roadway Ex.* (1987) 481 US 252, 260, 264.)

It is best practice to provide all documents that the employer intends to use as evidence at the evidentiary hearing, should the employee appeal the decision to discipline.

Who Can (and Should) Play the Role of the *Skelly* Officer?

The *Skelly* officer hosts the meeting to hear the employee's pre-disciplinary response to the Notice of Intent. The same person may make the proposed decision, hear the employee's pre-disciplinary response, and then make a disciplinary decision that is subject to an evidentiary appeal. (*Flippin v. Los Angeles City Board of Civil Service Comm'rs* (2007) 148 Cal.App.4th 272, 282-83; *see also Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215; *Los Angeles Police Protective Leave v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 93-94.) Thus, there is no constitutional need to assign different managers to issue the Notice of Intent and to host the pre-disciplinary conference.

The *Skelly* Conference

The pre-deprivation conference (aka *Skelly* conference) is the employee's opportunity to state why the notice of intended discipline is inappropriate or incorrect. The employee can respond orally at an informal meeting or conference, or may respond in writing. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215.)

Because pre-deprivation procedural due process does not require a full trial-type evidentiary hearing (*Id.*), the manager hosting the conference simply opens the meeting by stating that the employee has received the Notice of Intent and accompanying evidence, and states that the conference is the employee's opportunity to respond to the charges. The *Skelly* conference host can ask strategic questions in order to understand the employee's response, but is not subject to cross-examination and need not answer substantive questions. If the employee provides an alibi, the host should ask for the names to the witnesses. The host can also ask if the employee has any defenses that he or she would like the host to consider.

The meeting can be recorded if all attendees are aware of the recording, or can be documented by a note-taker. Recording the *Skelly* conference is routine for peace officer disciplines. The agency's attorney generally should not host the *Skelly* conference so as to avoid making the attorney a witness.

The Post-*Skelly* Conference Analysis

The agency's attorney should be involved in the follow up to the *Skelly* conference. Whether the employee responds orally at the *Skelly* conference or in writing, the attorney should review the employee's response carefully for the following: 1) evidence of remorse; 2) evidence of intervening cause for the misconduct – *e.g.*, harassment; disability; or 3) new evidence that undermines the agency's ability to prove the charges at issue.

For example, if the employee shows remorse and accepts responsibility for the misconduct, the legal advisor should consider whether the penalty should be lowered. The goal of progressive discipline is to change behavior, and not to punish, so if it appears that behavior will change, the agency may decide that a last chance agreement is appropriate or no discipline at all.

If the employee indicates that a disability was the cause of the conduct at issue, then the legal advisor should seek a medical opinion as to whether there is evidence of disability and whether the disability caused the misconduct. If the evidence shows that misconduct is disability-caused, the employer should abandon the disciplinary process and move to the disability interactive/reasonable accommodation process. (*Gambini v. Total Renal Care* (9th Cir. 2007) 486 F.3d 1087; *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078.) The only exception is if the disability has caused the employee to make threats of violence or violence against coworkers, then the employee may proceed with the discipline. (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143.) That exception is narrowly construed.

Similarly, if the employee claims that the misconduct occurred because of a reaction to harassment, then the employer must stop the discipline process, complete an investigation into the alleged harassment, and not resume the discipline process unless and until harassment is clearly ruled out as a cause of the misconduct at issue in the discipline.

If the *Skelly* response indicates that the initial investigation was faulty or that exculpatory evidence was missed, then the employer should also put the discipline process on hold in order to further investigate or assess whether the investigation faults can be cured.

On occasion, the employer's further investigation may reveal that the employee engaged in additional misconduct. If further investigation proves that additional misconduct occurred, it is necessary to restart the pre-disciplinary procedural due process with a new Notice of Intent that provides the employee notice of the additional misconduct and charges. The employee then has his or her pre-disciplinary procedural due process right to notice and opportunity to respond.

If the employee provides no pre-disciplinary response, then the *Skelly* response is waived, and the employer may proceed with the final notice. (*Broussard v. Regents of the UC* (1982) 131 Cal.App.3d 636, 640.) Note that the employee may still proceed with an appeal of the final notice, even if the employee made no *Skelly* response.

The Final Notice

The Notice of Discipline is the culmination of the pre-deprivation procedural due process. In the final notice, the decision maker notifies the employee whether the discipline listed in the Notice of Intent will be carried out. The final notice will discuss the employee's oral or written response to the charges in the Notice of Intent and whether that response has convinced the decision maker to drop one or more charges and/or lessen the penalty. The final notice should: 1) recite how the employee's pre-disciplinary response impacted the decision maker's Notice of Intent; 2) incorporate by reference the facts, charges, and evidence in the Notice of Intent; 3) state the effective date of the disciplinary action; and 4) reference or summarize the employee's rights to the post-disciplinary appeal. (*See* the attached template for an example.)

An agency has 30 days after the *Skelly* conference to serve a firefighter or police officer with a final notice of discipline. (Gov. Code §§ 3304(f); 3254(f).)

Damages and Attorneys' Fees

Monetary damages are not available for violations of the California Constitution's due process right. (*Katzberg v UC Regents* (2002) 29 Cal.4th 300.) However, the remedy for failure to provide pre-deprivation procedural due process is backpay from the effective date of the dismissal to the date of the post-deprivation evidentiary hearing. (*Barber v. State Personnel Board* (1976) 18 Cal.3d 395.)

Because due process violations arise from federal constitutional rights, damages and attorneys' fees are available. (42 USC §§ 1983 and 1988.)

The Templates

1. **Notice of Paid Administrative Leave**
2. **Notice of Intent to Discipline**
3. **Notice of Intent to Separate because of Inability to Reasonably Accommodate**
4. **Notice of Termination**

SAMPLE NOTICE OF PAID ADMINISTRATIVE LEAVE

DATE _____

TO _____ (Employee's name and job title)

FROM _____, Director of _____ Department

SUBJECT Administrative Leave with Pay

You are being placed on administrative leave as a result of concerns arising out of your conduct on _____(date)_____(Describe the incident).

Your administrative leave will begin on _____, 200__. You will continue to receive pay and all benefits during your administrative leave.

While you are on administrative leave, you are relieved of all duties and responsibilities as the (job title). During the period of your administrative leave, the following ORDERS apply:

- You are prohibited from entering any part of a City owned or operated facility which is not open to the general public.

- You shall immediately surrender any and all City provided property in your possession, including but not limited to City office keys, City ID, City Credit Card, computers, and other communication devices.

- You shall immediately provide me with a telephone number(s) at which you may be contacted during regular business hours.

- You shall be available during regular business hours to answer any and all work-related inquires.

If you have any questions, please do not hesitate to contact me.

SAMPLE NOTICE OF INTENT TO DISCIPLINE

CONFIDENTIAL MEMORANDUM

To:
From:
Date:
Re: NOTICE OF INTENT TO DISCIPLINE

Pursuant to Skelly v. State Personnel Board (1975) 15 Cal.3d 194, and City Resolution, Rule _____, Section _____, I am recommending that you be terminated (suspended) from your employment with the City of _____. If my recommendation remains unchanged following completion of any pre-disciplinary review in this matter, then your termination (suspension) will be effective immediately following completion of the pre-disciplinary process and written notice of your (termination) (suspension).

The recommended termination is based upon findings that you have committed the following violations of the City of _____ Personnel Rules and Regulations, [(if applicable) the _____ Department Manual of Policies and Procedures]; Section _____ of the Memorandum of Understanding between the City and _____ (if applicable) and the described State and Federal statutes and related authorities:

1. CITY PERSONNEL RULES AND REGULATIONS, RULE, (AND THE ENUMERATED SECTIONS):

[Insert all relevant rules.]

2. MANUAL, SECTIONS:

[Insert all relevant sections.]

3. FACTUAL BASIS FOR RECOMMENDED ACTION:

The above violations are based on your commission of the following acts or omissions. Please note that this intent to terminate (suspend) is based on any one of the above violations and need not be based upon your commission of more than one violation.

[DETAIL FACTS ON WHICH VIOLATIONS ARE BASED]

(Identify any documents which support the facts and upon which the proposed disciplinary action is based.)(Attachment No. _____).

Based upon not only your above admissions, but also upon the materials enclosed for your review, I conclude the following:

1. [Insert ultimate factual conclusions.]

In addition to the above specific Personnel Rules and Regulations violations, I have also reviewed and considered your entire personnel file in making the above recommendation, [insert as relevant: indicating prior instances of misconduct documented in the following disciplinary memoranda and actions: list prior disciplines]. All materials upon which the recommended disciplinary action is based are attached to this NOTICE. You may review your personnel file upon reasonable request by contacting the _____.

WARNING AGAINST RETALIATION

This provision is to notify you that it is illegal and inappropriate to retaliate against any person who has participated in complaining or providing information regarding allegations of _____. You may not contact or in any other manner retaliate against any individual who has provided information to the City of _____regarding your conduct.

RIGHT TO RESPOND

Pursuant to Skelly, you may provide a written and/or verbal response to this Notice of Intent. Your written response must be received by the Department Head/City Manager within five (5) working days, by _____. (provide date)

If you wish to provide a verbal response, you must advise the Department Head/City Manager of that fact by contacting his/her secretary at _____ no later than the close of business of _____ (provide date). The pre-disciplinary conference is set for _____ a.m./p.m. on _____ (date) and will take place at _____ (location).

Although the pre-disciplinary conference is not designed to be a formal evidentiary hearing, you may be represented by legal counsel or another individual of your choice.

Your failure to provide a written response or to request a pre-disciplinary conference will constitute a waiver of your right to provide a response. Accordingly, the Department Head/City Manager's decision to either sustain, modify, or reject this recommendation will be based upon a review of this Notice of Intent and its attachments.

The Department Head/City Manager shall provide you with written notice of his/her determination within ____ work days of the pre-disciplinary conference.

SIGNATURE: _____

RECEIVED:

_____ _____

Date Employee's Name

PERSONAL SERVICE WITNESSED BY: _____DATE: _____

SAMPLE NOTICE OF DISCIPLINE (E.G., TERMINATION)
(To inform employee that the intended disciplinary action has been finalized after the Skelly meeting/ conference.)

DATE
TO (Employee)
FROM (Supervisor)
SUBJECT Notice of Termination

After carefully considering your oral (written) response on (date) to the Notice of Intent to Terminate letter dated (date), I have decided that it is appropriate to proceed with the action terminating you from your job of (job title) effective at the end of your regular work shift on (date). [If appropriate, outline or summarize the employee's or his/her representative's statements during the Skelly meeting/conference. Explain why you have either reduced the discipline or why it remains the same. Also, explain any further investigations you took after the Skelly meeting/ conference.]

This action is based on the following listed grounds:
(List all applicable rules or ordinance provisions; essentially, you may duplicate the provisions of the Notice of Intent letter.)

1. Violation of Civil Service Rule 8 — Abuse of Sick Leave (Attachment No. ____)

2. Violation of Civil Service Rule 9 — Incompetency (Attachment No. ____)

The above grounds are based on the following acts or omissions:
(Set forth clearly and specifically all of the details, dates, places, and events which give rise to the action; essentially, you should duplicate the provisions of the Notice of Intent letter. Attach all materials upon which the decision to terminate was based.)

(Identify all documents which support the facts and upon which the proposed disciplinary action is based.) (Attachment No.____)

This action is being taken because the following prior disciplinary actions proved ineffective: (List all previous oral reprimands, written reprimands, and suspension relevant to this disciplinary action; essentially you may duplicate the provisions of the Notice of Intent letter.)

(Identify all documents.) (Attachment No.____)

Pursuant to Rule Number ____ of the Municipal Code, you have ____ days to file your appeal if you wish to appeal this matter to the City Council (or Civil Service Commission, etc.). (Attachment No.____)

WARNING AGAINST RETALIATION

This provision is to notify you that it is illegal and inappropriate to retaliate against any person who has participated in complaining or providing information regarding allegations of _____. You may not contact or in any other manner retaliate against any individual who has provided information to the City of _____ regarding your misconduct.

SIGNATURE: _____

RECEIVED:

_____ _____

Date Employee's Name

PERSONAL SERVICE WITNESSED BY: _____ DATE: _____

NOTICE OF INTENT TO SEPARATE BECAUSE OF INABILITY TO REASONABLY ACCOMMODATE

CONFIDENTIAL

Date

Employee Name and Address

Re: Notice of Intent to Separate because of Inability to Reasonably Accommodate

Dear Employee Name

This is to notify you that I am recommending that the City separate you from your employment because of our inability to reasonably accommodate your disability. If my recommendation remains unchanged after the completion of any timely pre-termination response that you may make; then your separation will be effective on the date that CalPERS completes processing your application for disability retirement, or the date that you withdraw your contributions from CalPERS, whichever is earlier.

[Summarize the job duties, including highlighting the essential job functions impacted by the disability.]

APPLICABLE RULES AND POLICIES

The following rules and policies apply to this matter:

[List any reasonable accommodation policies or work rules that apply]

CHRONOLOGY OF EFFORTS TO ACCOMMODATE DISABILITY

This proposed action results from the series of events described below:

[Chronologically list the request for accommodation, the doctor's restriction, the interactive process meetings, the reasonable accommodations made, the accommodations denied and the reasons why]

CONCLUSIONS

Based upon the above rules, policies, facts, and attached documentation, I conclude the following:

1. [Why there are no effective accommodations. Explain why each specific accommodation that was made was insufficient to enable the employee to perform essential job functions]

2. [Why the proposed accommodations would pose an undue hardship, considering the nature and cost of the accommodation, the overall finances of your agency, the lack of other vacant positions for which the employee is qualified]

3. [Why the proposed accommodations would pose a direct threat of harm to self or others. State facts, not fears: duration of the risk, the nature and severity of the risk, the significant and imminent harm]

I regret the need to make this recommendation, but our interactive process meetings and analysis have not yielded any potential reasonable accommodation.

NOTICE OF RIGHT TO RESPOND

You may respond orally or in writing to this proposed separation from employment. Should you desire to respond orally, an appointment has been scheduled with me to hear your response at [time date location]. You may have a representative present. If you choose to respond in writing, your response must be submitted to me no later than [time date]. I will consider any response you make within these deadlines. If you do not respond within the timelines specified, you will be deemed to have waived your right to respond prior to the imposition of the recommended termination.

The following is a listing of the documents upon which this recommendation is based:

[list all documents]

Very truly yours,

Department Head or other Appointing Authority