REPRESENTATION 200: Legal Rights of Stewards and State Employees

NOTE: This is a detailed review of the content in the Representation 200 course. It includes legal language and may be challenging to read. We provide the entire course in an attempt to answer your questions and provide a good resource as well as backup information for the course.

SkillBrief

Section 1: Relevant Contract Sections

Article 2.8 - Union Steward Protection

The state shall be prohibited from imposing or threatening to impose reprisals, from discriminating or threatening to discriminate against union stewards, or otherwise interfering with, restraining, or coercing union stewards because of the exercise of any rights given by this contract.

Article 5.5 - Reprisals

The state and the union shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Ralph C. Dills Act or any right given by this contract. The principles of agency shall be liberally construed.

Section 2: Eight Status Principles

Stewards' Rights: Eight Important Principles

1. Equality
2. No Reprisal
3. Equal Standards
4. Right to Represent
5. Right to Pursue Grievances
6. Right to Information
7. Right to Free Speech
8. Right of Access

The Equality Principle

Stewards are equal with management when engaged in representational activities. The equality principle is meant to encourage "robust debate."

Exception: Outrageous, indefensible conduct

Authority: *The Bettcher Mfg. Corp.* 76 NLRB 526,527 (1948)

The No Reprisal Rule

A steward cannot be punished or threatened with punishment because management considers her/his grievances to be overly frequent, petty, or offensively written.

Examples: Management engages in reprisal when it does any of the following:

- Unfairly gives a steward a bad evaluation
- Denies a steward pay or promotional opportunities
- Segregates a steward from other employees
- Deprives a steward of overtime or other benefits
- Enforces rules more strictly against a steward than other workers
- Threatens a steward with physical harm or strikes a steward
- Overly supervises a steward
- Transfers a steward to a different job or shift
- Gives a steward a poor reference for a prospective job

Authority:

- *U.S. Postal Service* (1981) 256 NLRB 736
- *Boespflug Construction Co.* (1955) 113 NLRB 330
- *Clara Barton Terrace Convalescent Center* (1976) 225 NLRB 1028
- *Metropolitan Life Insurance Co.* (1981) 258 NLRB 61

The Equal Standards Requirement

Employers cannot hold stewards to higher standards than other workers or impose greater discipline.

Exception: If a collective bargaining agreement requires the union to take positive action to prevent mid-contract work stoppages in violation of no strike clauses, stewards can be held to a "higher standard."

Authority:

- *Union Fork and Hoe Co.* (1979) 241 NLRB 907
- *Indiana and Michigan Electric Co*. (1985) 273 NLRB 654; enforced, 786 F.2d 733

The "But for" Test

When it appears that an employee was dismissed (disciplined) because of the combination of valid business reasons and invalid reasons, such as union or other protected activities the question becomes whether the discharge would not have occurred "but for" the protected activity. Once the employee has shown that her union activities (or other protected activities) were a motivating factor in the employer's decision to discharge her, the burden shifts to the employer to show that discharge (discipline) would have occurred in any event.

Public Employment Relations Board (PERB) Test:

1. Employee engaged in protected activity

2. Employee's participation in protected activity motivated employer's conduct
3. Employer's conduct adverse to the employee
4. Employer's action would not have occurred but for the protected activity

Considerations:

- "unlawful motive" is specific nexus required in establishment of prima facie case of discrimination
- Inference of unlawful intent established by, among other things:
  - Timing of employer's conduct in relation to the protected activity
  - Employer's disparate treatment of employees engaged in protected activities
  - Employer's departure from established procedures and standards with respect to such employees
  - Employer's inconsistent or contradictory justifications

Authority

- *Martori Bros. Dist. V. Ag. Labor Rel. Bd*. (1981) 29 Cal.3d 721
- *Novato Unified School District* (1982) PERB Dec No. 210, 6 PERC § 13114

The Right to Represent Members

Stewards have the right to represent members on the following matters:

- Grievances (contract administration)
- Employee discipline cases
- Informal settlement conferences or formal hearings conducted by the Public Employment Relations Board
- Matters pending before the State Personnel Board
- Matters scheduled for hearing by the Board of Control
- AWOLs and appeals to set aside resignations

Authority:

- *Article 2, Collective Bargaining Agreement*
- *Government Code section* 3515.5 (Dills Act)
- *North Sacramento School District* (1982) Case Nos. S-CE-381, Order No. 264, 7 PERC § 14017
- *Rio Hondo Community College Dist.* (1982) Case No. LA-CE-1101, Order No. 272, 7 PERC § 14028

The Right to Pursue Grievances

Employee organizations, through their stewards, have the right to represent employees in the grievance process.

Authority:

- *Government Code section* 3515.5 (Dills Act)

– *North Sacramento School District* (1982) Case Nos. S-CE-381, Order No. 264, 7 PERC § 14017

The Right to Request and Receive Information

Exclusive representatives, through their stewards, are entitled to all information that is necessary and relevant to the discharge of their duty to represent employees. Mandatory subjects of bargaining are considered presumptively relevant.

Examples: Information requests can pertain, but are not limited to, the following:

- Collective bargaining
- Discipline (State Personnel Board)
- Grievances
- Unfair practice charges (Public Employment Relations Board)

Consideration: The information request cannot be unduly burdensome to the employer

Authority:

– *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Dec. No. 12275, 22 PERC § 29007
– *Stockton Unified School Dist.* (1980) PERB Dec. No. 143, 4 PERC § 11189
– *Skelly v. State Personnel Board* (1975) 15 C.3d 194
– *State Personnel Board, Government Code § 18671*
– *Dills Act, Government Code § 3519*

The Right to Free Speech

Employee or steward activity (employee statements or comments) that is directly related to a labor dispute and is not "opprobrious, flagrant, insulting, defamatory, insubordinate or fraught with malice," is protected free speech. However, speech that is detrimental to and disparaging of an employer's business or services and that is not related to the employees' interest as employees is not protected. Discipline for such activity is lawful only if the statement is "so disrespectful of the employer as seriously to impair the maintenance of discipline," impulsive behavior must be balanced against an employer's right to maintain order and respect.

Authority:

– *Mt. San Antonio Community College Dist.* (1982) PERB Dec. No. 224, 6 PERC § 13163
– *Rio Hondo Community College Dist.* (1982) PERB Dec. No. 260, 7 PERC § 14010

Consideration: In addition, an employee (steward) may enjoy free speech protections when the employee's speech addresses a matter of public concern and does not outweigh the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Speech related to the desire for the benefits of unionization, employer-employee relationships, and the loss of confidence in management of the public agency is considered a matter of public concern and will be protected if the employer cannot establish any harm to it, whether actual or potential, to it from the comments.

Authority:

- *Chico Police Officers v. City of Chico* (1991) 232 Cal. App. 3d 635
- *California Dept. of Corrections v. State Personnel Board* (1997) 59 Cal. App 4th 131
- *Waters v. Churchill* (1994) 511 U.S. 661; 114 S. Ct. 1878

The Right of Access

Employee organizations, including their stewards, have a right of access, at reasonable times, to employee work areas; they also have a right to use institutional bulletin boards, mailboxes and other means of communication, subject to reasonable regulation, and a right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by the Dills Act.

Authority:

- *Government Code section 3519* (Dills Act)
- *California Department of Transportation* (1983) PERB Dec No. 304-5, 7 PERC § 14134
- *California Department of Corrections* (1980) PERB Dec. No. 1596-5, PERC § 12068
- *Article 2, Collective Bargaining Agreement*
- *Dills Act and Article 2 Rights*

The Scope of Representation

General Principle: Stewards have the right to represent employees on all aspects of employment that are within the scope of representation.

Definition: The scope of representation is defined in the Dills Act, Government Code section 3516, which states:

The scope of representation shall be limited to wages, hours, and other terms and conditions of employment.

The scope of representation can be changed or narrowed:

- by statute (for example, discipline)
- by agreement (for example, sick leave verification)
- by management rights (must be clear and unmistakable)
- by inaction (if notice was given and the union did not respond)

- Article 2 Rights: Specific Steward Rights

Sections 1 and 2 Review

1. How many of the eight principles can you name?
   a) Equality, No Reprisal, Equal Standards, Right to Represent, Right to Pursue Grievances, Right to Information, Right to Free Speech, Right of Access
2. Does a steward have the right to meet with members on grievance issues anytime, anywhere?
   a) No – They can meet in employee work areas; use institutional bulletin boards, mailboxes and other means of communication, and institutional facilities at reasonable times approved by management.
3. What are the five rights that relate to these eight principles?
   a) The right to represent members, the right to pursue grievances, the right to request and receive information, the right to free speech, and the right of access to members

Section 3: Article 2 Rights

In addition to the fundamental steward's rights previously discussed, all stewards have the rights defined in Article 2.

2.1 Union Representatives

- Areas of representation
  – Includes matters within scope (enforced under Article 22)
  – No limiting language such as "only"
- Areas of primary responsibility
  – Lists are determined by the union
  – May be assigned to members outside of bargaining unit
  – "Within close proximity"

2.2 Access

- Access consistent with Article 2 is guaranteed
- Advance notice varies with department and situation
- Access is subject to reasonable regulation (may be restricted)

2.3 State Equipment

- Entitled to reasonable use of phones for representation
- May have to reimburse for toll charges
- Subject to some restriction (interference with state operations)
- May use state time and other equipment subject to notice and approval

2.4 Distribution of Union Information

- Work areas are permissible if no disruption

- Minimal and incidental use of electronic systems as permitted for other non-business use
- May post on bulletin boards
- Must provide copy to management
- Do not need management's approval or permission
- Non-work time, non-work areas are virtually always permissible
- Mailboxes or desks are permissible if other groups distribute that way

2.5 State Facilities

- Entitled to use state conference/break rooms
- Subject to operational need
- Must request in advance

2.6 Steward Time Off

- Entitled to paid release time for representational matters
- Includes grievances
- Must give prior notice and receive approval

2.7 Employee Time Off

- Entitled to paid time off to meet with stewards on representational matters
- Probably subject to operational needs, but accommodation must be provided
- Meetings must be at the work site
- Meetings in other locations are subject to management discretion

2.8 Steward Protection

- No reprisals or threats of reprisal
- No discrimination or threats of discrimination
- No interference, restraint, or coercion

2.9 Information Packets

- Union supplies packets to state
- State passes out packets
- Consider requesting to give union presentation at orientations

2.10 Orientation

- Departments are required to allow union presentation at regular orientation
- Where orientations are not regularly scheduled, union is entitled to 15 minutes with each employee

Section 3 Review

1. Can you name the 10 specific rights in Article 2?
   a. 2.1 Union Representatives, 2.2 Access, 2.3 State Equipment, 2.4 Distribution of Union Information, 2.5 State Facilities, 2.6 Steward Time Off, 2.7 Employee Time Off, 2.8 Steward Protection, 2.9 Information Packets, 2.10 Orientation

Section 3: Interviews and Skelly Hearings

Typically, an employee requires representation if the employee is to be interviewed on matters which could lead to the employee's discipline. Before this occurs, however, an employee's representative can take a pro-active approach toward representation.

In the event the employee is involved in a workplace incident or the employee receives a counseling memorandum, the employee's representative can request a meeting with the employee's supervisor and intervene to seek clarification of the incident, the memorandum or the supervisor's expectations. All this is done in an effort to assist the employee and to avoid an adverse action.

The Interview

In the event the employee is required to submit to an interview, the employee should first ask if the interview could lead to discipline. If the employer answers affirmatively, the employee should then request a steward to represent the employee.

As a matter of law, investigatory meetings and/or interviews are within the scope of representation, i.e., "wages, hours, and other terms and conditions of employment," and the right of representation for an employee during such an investigation arises when there is an interview or meeting which is used to obtain facts which are then used to support potential disciplinary actions. (See *Robinson v. State Personnel Board* (1979) 97 Cal. App 3d 994.)

According to the Robinson case, however, the right of representation does not exist for routine or perfunctory conversations, training, or correcting work technique. If an employee fails to request representation, the employee may be denied representation. (*See California Department of Forestry* (1988) 12 PERC § 19122).

In addition, an employee can utilize a representative when the employee requests it and the situation involves "highly unusual circumstances." Highly unusual circumstances have been found when the meeting or interview was conducted by high level administrator(s), it involved questions based on the employee's work performance, it was investigatory in nature, and it was formal and intimidating. (See The *Redwoods Community College District* v. PERB (1984) 159 Cal. App. 3d 617.)

The Public Employment Relations Board (PERB) has held that an employee is entitled to representation during grievance meetings. (See *Rio Hondo Community College District* (1982) 7 PERC § 14028.) PERB also held that a meeting concerning classification changes and salary adjustments entitles and employee to representation because classification changes and salary adjustments constitute matters of employer-employee relations. (See University of California (1983) 8 PERC § 15161.)

In the event the Miranda Warning is administered to the employee before the interview commences, the employee should always invoke his/her right to remain silent. As you know, the Miranda Warning provides that "(1) you have the right to remain silent; (2) anything you say can or will be held against you in a court of law; (3) you have the right to speak with an attorney and to have an attorney present before and during questioning; (4) do you understand these rights; and (5) having these rights in mind do you wish to talk now?"

Once an employee invokes her/his right to remain silent, the interviewer will typically order the employee to answer the interviewer's questions. Pursuant to *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822, the interviewer should admonish the employee that although the employee has a right to remain silent and not incriminate him/herself, the employee's silence could be deemed insubordination which could lead to discipline and that any statement made under compulsion or threat of such discipline could not be used against the employee in any subsequent criminal proceeding. The employee's failure to answer the interviewer's questions could constitute insubordination and lead to discipline up to and including termination. While the *Lybarger* case involves Los Angeles Police Officers and the Public Safety Officers' Procedural Bill of Rights Act, we believe that its holding also applies to other public sector employees as well.

In any event, in situations which involve potential criminal conduct, the employee representative should <u>always</u> ask the advice of a criminal law attorney before participating (if at all). Indeed, it would be prudent for the employee's representative to request that the employee's interview be rescheduled to enable the employee to consult with a criminal law attorney.

Preparation for the Interview

To prepare the employee for the interview, the employee's representative should obtain background information from the employee as to the nature and scope of the investigation if the employee is aware of such; the representative may also want to contact the investigator to inquire as to the nature and scope of the investigation. Prior to the interview, the representative should admonish the employee that the employee must be honest and that during the interview, the employee should seek to clarify vague and/or ambiguous questions before answering them.

Furthermore, the employee should also correct misleading questions and/or misstatements; the employee should avoid speculation; the employee should avoid making general statements that cannot be supported by specific facts; the employee should avoid non-responsive answers; and, the employee should prepare by anticipating investigator's questions and thinking about possible answers.

Role of Employee's Representative During the Interview

First and foremost, the employee's representative should keep in mind that the representative is not a potted plant at the employee interview. With that in mind, a representative must assist the employee in creating a complete record which is based on the employee's interview; in particular, the representative should ensure that the employee testifies as to all pertinent facts as well as to all mitigating facts. In that regard, the representative can (and should) ask questions designed to elicit such information.

Furthermore, the employee's representative can raise objections during the interview as to questions which are misleading, vague and/or ambiguous, questions which misstate facts, and questions which misquote earlier interview statements. The representative should remind the employee that the interview statement is equivalent to a deposition and that the employee's testimony in any future hearing must be consistent with the employee's investigatory interview and that any discrepancies will raise credibility issues for the employee.

Skelly v. State Personnel Board requires the public employer to comply with several procedural due process requirements before discipline can be imposed. According to *Skelly*, and as codified in SPB Rule 52.3, a civil service employee must "be accorded certain procedural rights before the discipline becomes effective – at a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

As a pre-disciplinary procedural due process requirement, the "Skelly" hearing is really an informal, non-adversarial meeting with an impartial, non-involved reviewer. The meeting usually occurs after the employee receives his/her Notice of Adverse Action but before the discipline becomes final. The purpose of the meeting is to provide the employee with an opportunity to respond to the charges, the facts and the discipline. During such meeting, the employee can deny, admit, mitigate and/or attempt to settle the proposed adverse action.

The role of the employee's representative during such meeting is to act as the employee's primary spokesperson and, in that regard, to give a presentation (a "Skelly" response" to the Notice of Adverse Action. Typically, such a response outlines the issues, and at the very end it may include a settlement proposal. Keep in mind that should the employee wish to make a statement during the "Skelly" hearing, the employee's representative should review such statement with the employee before the "Skelly" hearing; if the representative plans on making a settlement proposal, the representative should review the proposal with the employee before the hearing.

To prepare for the "Skelly" hearing, the employee's representative should review the Notice of Adverse Action and pay particular attention to the charges and the factual allegations. The controlling document is the Notice of Adverse Action.

Along with the Notice, the employer should provide what is commonly referred to as the "Skelly packet;" the packet consists of materials which have been relied upon by the appointing authority to recommend the adverse action. A complete

packet usually consists of cassette tapes, transcripts, notes, policies and/or pertinent memoranda and statements from "witnesses."

Upon review of the "Skelly packet," if the representative notices that some materials are missing, the employer should be advised immediately and a request should be made to provide the missing materials. The employee's representative should also review the "Skelly packet" prior to the "Skelly" hearing.

Once the representative has reviewed these materials, the representative should review the charges and allegations with the employee and obtain the employee's response to them; in particular, the employee's representative would want to find out whether the allegations are true or false as well as the employee's explanation.

The employee's representative should obtain the employee's explanation as to the significance of the materials in the "Skelly packet." While not required, the employee's representative may also want to contact the "witnesses" to ascertain the facts and to corroborate statements in the "Skelly packet."

Tactics and Strategy at the Skelly Hearing - In terms of tactics and strategy for the employee's representative at the "Skelly" hearing, first and foremost, the representative's relationship with the hearing officer is most important. If the hearing officer is fair, trustworthy and objective, the hearing officer should evaluate and seriously consider the employee's "Skelly" response. Otherwise, the hearing officer may merely "rubber stamp" the discipline proposed in the Notice of Adverse Action.

If the hearing officer is fair and objective, the representative may want to present all his/her arguments at the "Skelly" hearing. However, if the hearing officer is a 'rubber stamp,' the representative should not present all his/her arguments because doing so would educate the employer about the strengths and weaknesses of the employee's appeal and thus give the employer an advantage at the State Personnel Board hearing; indeed, the employee and his/her representative may consider even waiving the "Skelly" hearing so as to avoid educating the employer at all.

a) **Procedural Issues** - During the course of representing an employee at the "Skelly" hearing, the employee's representative may make a number of basic procedural defenses.

   First, if the charges and allegations in the Notice of Adverse Action are not specific and the employee is unable to prepare a defense, the employee can request that the adverse action be dismissed. (See *Leah Korman* (1991) SPB Dec. No. 91-04). According to *Korman* "an employee's right to be notified of the charges against him or her is a critical element of due process of law."

   Second, if the "Skelly" hearing officer is not impartial or is involved in the underlying investigation, the employee can argue a "Skelly" violation and request back pay from the date of violation to the date of the new "Skelly" (or SPB) hearing. (See *Anthony Gough* (1993) SPB Dec. No. 93-06.

   Third, if the employer fails to provide to the employee an investigative report which the employer relied upon to propose adverse action for the employee,

the employee's representative may argue that the employer's failure to provide such report constitutes a "Skelly" violation, and as a remedy request back pay from the effective date of the adverse action to the date of the SPB decision. (See *Daniel Jong* (1986) SPB Dec. No. 96-01) Further, when a state agency alleges in an adverse action that an employee's conduct violated or breached a statute, regulation, rule, policy, procedure, manual, guideline, standard or the like, not only must the agency identify the specific provisions allegedly breached, it must also either: (1) quote the provisions in the adverse action; (2) provide the employee with copies of the provisions as part of the "Skelly" package; or, (3) inform the employee where the provisions may be found. (See *Steven L. Kinoshita* (1998) SPB Dec. No. 98-98-05) If the state agency chooses the third option, the allegedly violated provisions must be kept readily available in an easily accessible location where the employee works.

b) **Substantive Issues** - An employee's representative can also argue for penalty reduction or elimination. The representative can dispute the facts in their entirety and argue that no discipline is warranted. According to the Skelly case, the overriding consideration in adverse action appeals is the extent to which the employee's conduct resulted in, or, if repeated, is likely to result in harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its reoccurrence. When making any arguments about the propriety of the discipline, the employee's representative should rely on the factors discussed in Skelly as the starting point for the argument. For example, the representative can argue that the employer did hot adhere to progressive discipline principles and the penalty is thus inappropriate, excessive or unreasonable.

   In addition, a representative can concede the charges on behalf of the employee but argue about the appropriateness of the penalty: in so doing, the employee's representative can argue length of service to the employer which, if significant, can bode well for the employee the representative can argue, if possible, that the employee has no prior discipline; the representative can emphasize the employee's overall performance (if standard and above); and, most importantly, the representative can argue for a reduction in the penalty if no harm to the public service resulted from the employee's conduct.

   The representative can also argue that the notice is not supported by must cause (which is related to progressive discipline). A just cause analysis necessarily starts with the seven tests of just cause; if the employer did not comply with anyone of the seven tests of just cause, then there is no just cause. The seven tests of just cause are as follows:

   a. Was the employee forewarned of the consequences of his/her actions?
   b. Are the violated rules reasonable related to efficiency and performance the employer might expect from its employees?
   c. Were efforts made prior to the action to determine whether the employee is guilty as charged?
   d. Was the investigation conducted fairly and objectively?

e. Were the rules applied fairly without discrimination?
f. Was substantial evidence of employee's guilt obtained?
g. Is the degree of discipline reasonable related to the seriousness of the offense considering the employee's past record?

In addition, the causes for discipline are set forth in Government Code section 19572. (See Attachment "B": Government Code section 19572) an employee representative should review applicable SPB precedential decisions to determine how the SPB has defined and applied a cause for discipline.

For example, an employee's representative can distinguish an employee's performance and the relevance of the employer's application standards. In *Bodenschatz v. SPB* (1971) 15 Cal. App. 3d 775, for instance, the court found an officer to be inefficient when it compared statistical data of the officer's prior activity with other officers performing like duties. The court in *Bodenschatz* looked at the following factors:

1. Whether the comparison was made over a sufficiently extended period of time so as to eliminate the effect of fluctuation;
2. Where the members of the group performed comparable activities;
3. Whether the criteria reflected the range of activities performed by the group; and
4. Whether the group was sufficiently large to assure fair representation of those performing like duties.

Likewise, an employee's representative should also review these factors to distinguish the application of performance standards to the employee.

Insofar as the employee's statement at the 'Skelly' hearing is concerned, the employee's representative should rehearse and/or review the statement with the employee before the hearing. During his or her statement, the employee can deny charges or can acknowledge them and apologize, hoping to reduce the discipline requested by the employer.

Finally, the employee's representative can put together a settlement proposal which the representative can later submit to the employer on behalf of the employee. Of course, the representative review the proposal with the employee and receive the employee's permission to submit such proposal a proposal can provide for the following: it can require that some of the original charges and/or facts be deleted, it can provide for a reduction in the penalty, it can provide the employee with an opportunity for a written rebuttal, it can change the proposed penalty, it can provide for the removal of the notice of adverse action as well as the "Skelly packet" materials from the employee's official personnel file, and it can provide for the employee waiving his/her SPB appeal. Once the proposal is submitted to the employer, the employee's representative can use it as a basis to negotiate a settlement of the adverse action which is satisfactory to the employee.

Section 4: The Skelly Decision

The Central Question

The overriding consideration in adverse action appeals, according to the Skelly case, is how much the employee's conduct resulted in, or, if it is repeated, is likely to result in harm to the public service.

The Skelly Hearing

"Skelly" refers to a case that was decided in 1975. This legal decision requires the public employer to comply with several due process requirements before discipline can be imposed.

The specific language in the Skelly decision is in SPB Rule 52.3, and states that a civil service employee must "be accorded certain procedural rights before the discipline becomes effective – at a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline."

In other words, the employee is entitled to notice of what is going on and why it is happening. They then have an opportunity to respond before discipline can be imposed.

What is it?

As a pre-disciplinary, procedural requirement, the actual "Skelly" hearing is an informal, non-adversarial meeting. The reviewer must be impartial, and not personally involved.

This meeting usually occurs after the employee receives the Notice of Adverse Action but before the discipline becomes effective.

The purpose of the "Skelly" hearing is to provide the employee with an opportunity to respond to the allegations in the Notice of Adverse Action.

During the hearing, the employee has some choices. They can deny the charges, admit to the charges, present mitigating evidence, and/or attempt to settle the proposed adverse action before the discipline becomes effective.

Review the packet

Before the hearing, the employer should provide two main things: the Notice of Adverse Action, which is the controlling document for the charges, and the "Skelly packet." The packet consists of materials which have been used to recommend the adverse action.

A complete "Skelly packet" usually consists of tapes or CDs, transcripts, notes, policies and/or pertinent memoranda and statements from witnesses.

To prepare for the "Skelly" hearing, the steward should carefully review both the Notice of Adverse Action and the Skelly packet. When reviewing these documents, stewards need to pay particular attention to the charges and the factual allegations.

While reviewing the packet, if the representative notices that any materials are missing, they should immediately ask the employer to provide the missing information and document the error.

Review the Charges

Once the steward has reviewed these materials, they should go over the charges and allegations with the employee and document the employee's responses to all of them.

In particular, the steward would want to find out whether the allegations are true or false and what the employee's explanation is for each of them.

The steward should then document the employee's explanation about the significance of the materials in the "Skelly packet."

While not required for the hearing, the employee's representative may also want to contact the witnesses to verify the facts and to corroborate statements in the "Skelly packet."

The Allegation

When a state agency alleges, in any adverse action, that an employee's conduct violated a regulation, rule, policy, procedure, or the like, not only must the agency identify the specific provisions allegedly breached, it must also:

A - Quote the provisions of the violating conduct in the adverse action;

AND EITHER

B - Provide the employee with copies of these provisions as part of the "Skelly" package;

OR

C - Inform the employee where these provisions may be found.

If the state agency chooses the third option, the allegedly violated provisions must be easily accessible by the employee.

Prepare the Response

The role of the employee's representative during the Skelly hearing is to act as the employee's primary spokesperson and, in that role, to give a presentation in response to the Notice of Adverse Action. This presentation is called a "Skelly response."

Typically, this response outlines the issues and charges. It may also include a settlement proposal at the end of the response.

The steward and the employee should review any proposals they are considering before the hearing,

Also before the hearing, the steward should carefully review any statement the employee wants to make with the employee.

Tactics and Strategy

In terms of tactics and strategy for the employee's representation at the "Skelly" hearing, the steward's preparation for the hearing is most important.

If the hearing officer is fair, trustworthy and objective, they will seriously consider the employee's "Skelly" response, and the representative will want to move forward in their presentation of all of the arguments at the "Skelly" hearing.

If the hearing officer does not take the steward's Skelly response seriously, they may merely "rubber stamp" the discipline proposed in the Notice of Adverse Action.

In this case, the employee and their steward may consider waiving the Skelly hearing.

Procedural Issues

During the course of representing an employee at the "Skelly" hearing, the steward may raise a number of basic procedural defenses.

If the charges and allegations in the Notice of Adverse Action are not specific the employee may be unable to prepare an effective defense. In such a case, the employee should request that the adverse action be dismissed.

Accuracy is a critical element of due process of law. Be specific, be clear, and double-check your facts for any defense.

Also, if the "Skelly" hearing officer is not impartial or is involved in the underlying investigation, the employee should argue a "Skelly" violation.

Another violation would be if the employer fails to provide the employee with the investigative report or other documentation relied on in the Notice of Adverse Action.

Skelly Violations

If a violation of the Skelly decision is found, the employee can request back pay from the effective date of the adverse action to the date of the State Personnel Board's decision.

Arguing the Charges

There are other ways to dispute the Notice of Adverse Action.

A steward can argue for penalty reduction or elimination.

Another approach is to dispute the facts in their entirety and argue that no discipline is warranted.

Or, an argument can be made about the circumstances surrounding the misconduct and the likelihood of its reoccurrence.

For example, the representative can argue that the employer did not adhere to Progressive Discipline Principles and the penalty is thus inappropriate, excessive or unreasonable.

Remember, when making any arguments about the propriety of the discipline, the

steward should rely on the factors discussed in Skelly as the starting point for the argument.

Do not go into an interview or other meeting without all of the facts and evidence in hand.

Conceding the Charges

A steward can concede the charges on behalf of the employee but argue to moderate the penalty.

In so doing, the steward can argue length of service to the employer which, if it is significant, can help the employee. Or, the representative can argue that the employee has no prior discipline, if that is true.

The steward can also emphasize the employee's overall performance, if standard or above; and, most importantly, the representative can argue for a reduction of the penalty if no harm to the public service resulted from the employee's conduct.

Cause

Another argument can be made that the notice is not supported by cause. A cause analysis necessarily starts with the seven tests of cause; if the employer did not comply with any of the seven tests of cause, then there is no cause and there should be no Notice of Adverse Action Adverse Action.

The seven tests of cause are as follows:

1. Was the employee forewarned of the consequences of his or her actions?
2. Are the violated rules reasonably related to efficiency and performance the employer might expect from its employees?
3. Were efforts made prior to the action to determine whether the employee is guilty as charged?
4. Was the investigation conducted fairly and objectively?
5. Were the rules applied fairly without discrimination?
6. Was substantial evidence of employee's guilt obtained?

   and,
7. Is the degree of discipline reasonably related to the seriousness of the offense considering the employee's past record?

The causes for discipline are set forth in Government Code; a steward should review previous State Personnel Board decisions to determine how the board has interpreted 'cause' for the type of discipline in question.

Comparing Performance Standards

To help argue for more appropriate discipline, a steward can compare an employee's performance to the employer's performance standards, or to the performance of other employees.

In one example, the court found an officer to be inefficient when it compared statistical data of that officer's work with other officers performing similar duties.

The court looked at the following factors:

- Was the comparison made over a long enough period of time to eliminate the effect of variation;
- Did the members of the group perform comparable activities;
- Did the criteria reflect the range of activities performed by the group; and
- Was the group sufficiently large to ensure fair representation of those performing like duties?

Rehearsing

For the employee's statement at the 'Skelly' hearing, the steward and the employee should rehearse and review the statement together before the hearing.

During the statement, the employee can deny charges or can acknowledge them and apologize, hoping to reduce the discipline requested by the employer.

Proposal

Finally, the steward can put together a settlement proposal which they can submit to the employer on behalf of the employee.

Of course, the representative must review the proposal with the employee and receive the employee's permission to submit such proposal.

A settlement proposal can include the following:

- it can require that some of the original charges and/or facts be deleted,
- it can provide for a reduction in the penalty,
- it can provide the employee with an opportunity for a written rebuttal,
- it can change the proposed penalty,
- it can provide for the removal of the notice of adverse action as well as the "Skelly packet" materials from the employee's official personnel file, and
- it can suggest that the employee waive their SPB appeal.

Once the proposal is submitted to the employer, the steward can use it as a basis to negotiate a settlement of the adverse action which is satisfactory to the employee.

Section 4 Review

Consider the following hypothetical situation. Read this situation and consider the answers, reflecting on all you have learned about stewards' and employees' rights.

The state disciplined a steward for organizing and conducting a 'unity break' during which employees, during break time, held up solidarity signs in the workplace.

- *What are the steward' and members' rights?*
- *What should a steward do in response?*

The employees' rights are:

a) Permission is generally not needed for this kind of activity
b) Work areas can be used - if it is not disruptive to others working
c) Non-work time, non-work areas are always OK for union activity

The steward should:

– Contract the MRC and URC for follow-up and filing of a potential Unfair Labor Practice charge.

Closing:

You have completed the fourth and final section of Representation 200. You should have already completed sections 1, 2, and 3.

You will take the final exam for the course next. The final exam will include content from all four sections.

If you want to review the other three sections before taking the final exam, just pause this course by clicking on the red "X" in the upper right corner of this window.

When you return, click "Return to Bookmark" to resume this exam.