

CalHR Annual Conference 2012

Making Your Case Before the State Personnel Board

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The Basics

- Progressive discipline is the bedrock of most adverse actions. Before taking action, verify whether progressive discipline is both necessary and properly applied.
- Three stages of progressive discipline
 - Preventive Action
 - Corrective Action
 - Adverse Action

The Basics

Corrective Action Memo/Informal Reprimand

- Time, Place, Date, Purpose, Parties
- Statement of Problem-Effect of Problem
- Prior Corrective Efforts
- Supporting Facts
- Supervisor's Expectations-Necessary Changes by Employee
- Assistance from Supervisor (if any)

The Basics

Corrective Action Memo/Informal Reprimand

- Supervisor's Plan for Improvement
- Consequences of Future Substandard Performance (*Bazemore*)
- Employee Assistance Referral
- Acknowledgement of Receipt

The Basics

Understand the Importance of *Bazemore*.

Bazemore Language

"Your conduct on this occasion was unacceptable and will not be tolerated by this department. The department may take adverse action against you based on the incidents cited in this memorandum, as well as any future incidents."

Start Off Right

Gather Facts

- Obtain training records, memoranda, etc. to demonstrate employee's awareness of appropriate conduct
- Interview supervisors and other witnesses
- Review employee's OPF
- Review time sheets and attendance records
- Determine whether MSA's were approved or denied
- Evaluate related workload data, production charts, etc. for comparison
- Examine any other pertinent records that may have a bearing on the case

Keep a written record of all information gathered!

Make the Decision

- Evaluate the facts under applicable law.
- Do you have just cause to take an adverse action?
- What is an appropriate penalty?

Principles of Just Cause

- Employee's Knowledge of the Rule Violated
- Reasonableness of the Rule
- Investigate Before Acting
- Investigation Must Be Fair and Objective
- Proof of Violation
- Equal Administration of the Rule
- Reasonableness of the Penalty

Penalty

The decision on penalty must be made in accordance with *Skelly v. State Personnel Board*:

"[The Courts] note[s] that the overriding consideration in these cases 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 recurrence."

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

Penalty (cont.)

- Did the event occur?
- What was the damage to the department?
- What is the likelihood of recurrence?
- What penalties have been assessed on similarly situated employees?
- What are the individual circumstances of the case, i.e. mitigating factors?

Writing the NOAA

- Organize the NOAA; use an easy to read format
- Statement of facts (reasons) must be understandable and sufficiently specific.
- Who, What, Where, When
- Include all relevant facts and information, but avoid long, run-on narratives. In other words, be concise.
- Plead/write the facts, not the evidence.
- If necessary to make sense of the factual allegations, add a brief "scene-setting" discussion.

Writing the NOAA (cont.)

- Identify specific rules, policies, procedures that have been violated.
- Use flexible terms to describe dates or statements, i.e. "on or about" or "words to that effect."
- Define acronyms.
- Provide a brief statement of the consequences or problems caused by the employee's actions.
- Include all legally required information.

The Appeal

- Review the SPB acknowledgement package
- Read the SPB Procedural Regulations
- Consult with legal advisor
- Plan for a prehearing settlement conference for cases other than a lesser adverse action
- Fully prepare a prehearing settlement conference statement
- Determine the availability for all of your witnesses
- Plan for the issuance of subpoenas

Informal Hearing Process

- Appeals from Medical and Psychological Disqualification
- Two hours for hearings, except four hours provided for Whistleblower Retaliation Complaints
- Hearing Officer may take official notice, administer oaths, subpoena witnesses and other evidence
- Hearing Officer may conduct examination
- Results in a proposed decision for consideration by the Board

(See generally, Cal. Code Regs., tit. 2, §§ 54.1 – 55.)

Investigatory Hearing Process

- Used for Lesser Adverse Actions and Rejections During Probation
- Goal is to open and close the Appeal within 180 Days
- Hearings are six hours long, three for each party
- Administrative Law Judge (ALJ) may convert the matter to a full evidentiary hearing
- Discovery is not permissible
- Declarations are admissible
- Proposed decision prepared for the Board

(See generally, Cal. Code Regs., tit. 2, §§ 55.1 – 56.)

Evidentiary Hearing Process

- Heard by ALJ with broad authority to control hearing
- May issue orders to ensure due process
- Rules upon objections or motions
- May issue evidentiary sanctions based upon other provisions within these procedures

(See generally, Cal. Code Regs., tit. 2, §§ 56.1 et. seq.)

Evidentiary Hearing Process

- Peremptory strike of one ALJ per party may be made within 20 days of the date the Appeals Division mailed the acknowledgement letter
- An ALJ shall disqualify himself or herself or a party may request disqualification based upon bias, prejudice, or interest in the proceeding (See Gov. Code, § 11425.40.)

Evidentiary Hearing Process Prehearing/Settlement Conference

- Prehearing/Settlement Conferences are scheduled for all Evidentiary Hearings
- Assigned ALJ will not hear Evidentiary Hearing unless parties agree
- Parties and Representatives shall appear in person
- Must be prepared to fully discuss facts of the case

(See generally, Cal. Code Regs., tit. 2, § 57.1.)

Evidentiary Hearing Process Discovery

- All parties may serve a Request for Discovery no later than 90 days after the filing of the Appeal or Complaint
- Except Respondent may not do so for Adverse Actions
- However, within 15 days after the Prehearing/Settlement Conference if Appellant asserts an affirmative defense, Respondent may serve a request solely for information related to the defense

(See generally, Cal. Code Regs., tit. 2, §§ 59.1 et. seq.)

Evidentiary Hearing Process Discovery

- The right to inspect documents and interview witnesses under Government Code section 19574.1 is not affected by this provision
- A party may seek discovery beyond the 90 day period upon a showing of good cause
- Response must be within 30 days of receipt of the request, no more than 30 additional days by agreement

Evidentiary Hearing Process Discovery

- Objections must be detailed
- Failure to respond waives objections
- Unless subsequent compliance and failure due to mistake, inadvertence, or excusable neglect
- Failure to provide complete response will result in exclusion of evidence
- Response may be amended upon a showing of good cause

Evidentiary Hearing Process Discovery

Sanctions include:

- Prohibiting introduction of specified evidence
- Designated facts, claims, or defenses established
- Other orders as appropriate under the circumstances

(See generally, Cal. Code Regs., tit. 2, § 59.4.)

Evidentiary Hearing Process Law and Motion

- Motions to Dismiss/Strike must be filed no later than 90 days from the filing date of Appeal or Complaint
 - Motions to Continue Hearing/Compel Deposition of Unavailable Witness must be filed within 10 days of learning of the basis of the motion
 - Motion to Compel Discovery filed within 14 days response was due or receipt of inadequate response
 - SPB Procedure designed to accommodate the diligent
- (See generally, Cal. Code Regs., tit. 2, §§ 60.1 et. seq.)

Evidentiary Hearing Process Law and Motion

- Factual assertions must be supported by competent evidence such as declarations to the particular facts or declarations laying the foundation for acceptance of relevant documents.
- Motions for continuance considered only upon moving papers, no hearing; must show good cause

Before The Hearing

- Respondent has the burden of proof for most adverse actions and will go first in the hearing.
- Review applicable law
- Prepare an evidence grid
- Organize documents (consider a trial notebook)

Before The Hearing

- Ensure subpoenas are properly served
- Prepare witnesses
- Determine order of witnesses and related exhibits
- Know your case and don't ignore weaknesses

The Hearing

- Expect the Unexpected
- Do not make it personal
- Keep emotions under control
- Focus on facts relevant to the case

The Hearing

- Prepare all basis for foundation in advance
- Foundation provides the ALJ the qualification of a witness to testify about events or that the document or exhibit is authentic
- E.g., the supervisor will testify that she wrote the counseling memo marked as Exhibit 1.
- E.g., "This picture is an accurate depiction of the second floor conference room at 1515 S Street."

The Hearing

Listen for Hearsay in your case and appellant's case.

- Hearsay is a statement being repeated at hearing by someone other than the person who said it to prove the statement is true.
- Prepare in advance how to respond to objections.
- Develop an ear for hearsay so that you can appropriately object.

The Hearing

- Do not ask leading questions on direct examination!
- Leading questions are those questions which suggest the answer to the witness (puts words in his mouth).
- Leading questions diminish the quality of the testimony of your witness.
- Ask Who, What, Where, When
- Avoid: Isn't it true; Would you agree; Did you; Aren't you; etc.
- May ask leading for background and foundation

The Hearing

- Do not write out all questions and then read them
- Do not write out your closing argument and read it
- Don't engage opposing counsel, particularly on the record
- Be civil and professional

THANK YOU!

If you have questions, please feel free to contact the Appeals Division at:
appeals@spb.ca.gov
