Municipal Employees Association Of Beverly Hills March 2020 News

Disciplinary Protections for California Public Employees

In most states, including California, employment is at-will. This means that an employer can terminate a worker's employment with or without cause, and often without any advance notice or subsequent recourse. Although this is the general rule, there are some very big exceptions, some of which apply to most public employees in California. Here's an overview of some of the procedural protections you should know.

Property Interest: Under the California and U.S. Constitutions, most public employees in California have a protected property interest in their continued paid employment. If so, a public agency cannot deprive them of that right without due process of law. While it sounds simple enough, it's not always so straightforward in practice. Prior to the early 1970s, it was not clear at all if public employees had any due process protections. Some employees were covered under civil service rules or had rights before the State Personnel Board under state law, but many did not. It was not until several notable judicial cases were decided that held that public employees may have a liberty or property interest in their jobs, which the government cannot deprive them of without affording due process.

The cases of *Board of Regents v. Roth* (1972) 408 U.S. 564 and *Perry v. Sindermann* (1972) 408 U.S. 593 involved non-tenured faculty at the college level. The U.S. Supreme Court said the employees in those cases may have a liberty or property interest in continued employment, even though they lacked tenure or an employment contract.

> To have a property interest in a benefit, a person clearly must have more than a need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
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> Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. A property interest exists only where there are "rules or mutually explicit understandings that support this claim of entitlement to the benefit." *Perry*, 408 U.S. at 601. "The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Cleveland Bd. Of Educ. v. Loudermill* (1985) 470 U.S. 532, 541.

Director level positions and above are usually at-will, though they may have individual employment contracts that provide severance pay in the event of termination. Some managers may be at-will. But, typically, the rest of the agency's employees have a property interest and must be afforded due process, especially any who are permanent or hired for an indefinite term (as opposed to probationary, temporary, or limited term).

Pre-Deprivation "Skelly" Rights: This means an opportunity to respond *before* discipline is imposed. In *Loudermill*, a case involving two classified employees, the Court required "some kind of hearing" before the agency could terminate their employment. Luckily, California's Supreme Court was more specific. In *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, the Court required a limited pre-deprivation hearing (known as a "Skelly" meeting) to be offered before the agency can remove an employee from the payroll or implement a pay reduction. *Skelly* set forth pre-deprivation safeguards, which includes "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." 15 Cal. 3d at 212. The Court acknowledged that many public sector employees have a property interest, which an agency cannot take away without due process, and that post-deprivation safeguards include a right of appeal to an evidentiary hearing before a reasonably impartial third party.

Courts have since held that due process applies to an involuntary retirement, *Barberic v. City of Hawthorne* (C.D. Cal. 1987) 669 F. Supp. 985, 990, to termination arising out of a

labor dispute, *IBEW v. City of Gridley* (1983) 34 Cal. 3d 191, 208, and to involuntary leave imposed by the employer for medical reasons. *Bostean v. L.A. USD* (1998) 63 Cal. App. 4th 95, 110-112. Due process is also required for suspensions and other involuntary leaves without pay, but suspensions of 5 days or less do not necessarily require a full evidentiary hearing. *Civil Service Association v. San Francisco* (1978) 22 Cal. 3d 552, 560-563.

Most public employees do not have a property interest in a job assignment. *Lawrence v. Hartnell Comm. College Dist.* (2011) 194 Cal. App. 4th 687, 702. But they do if any reassignment or demotion results in a reduction in pay. *Ng. v. State Personnel Board* (1977) 68 Cal. App. 3d 600, 606. Due process is not required for layoffs due to lack of work or funds, but it may apply if the layoff is a pretext for circumventing the disciplinary procedure. *Levine v. City of Alameda* (9th Cir. 2008) 525 F. 3d 903, 905-906.

Limitations: In the years following *Skelly*, courts wrestled with a host of other issues. For example, a waiver of due process rights must be "knowing and voluntary." *Walls v. Cent. Contra Costa Transit Auth.* (9th Cir. 2011) 653 F.3d 963, 969. An employee does not waive all due process rights merely by signing a "Last Chance Agreement," even if the agreement requires certain conditions for continued employment and says noncompliance results in immediate and final termination without recourse. *Id.* But the process that is due in this instance is limited. It's also limited when an agency treats an employee's unexcused absence of 5 consecutive workdays or more as an automatic resignation. *Coleman v. Dep't of Personnel Admin*. (1991) 52 Cal. 3d 1102, 1110, 1118-1123. In that case, written notice and supporting facts are required, but not a post-separation evidentiary appeal.

Courts have also carved out an exception where an agency can implement discipline without first holding a pre-deprivation hearing. *Bostean* at 112. This is limited to extraordinary circumstances that require immediate action, for example, if a "meaningful pre-deprivation process is not possible" due to an employee's "random and unauthorized conduct." *Id.* Due process then depends on the availability of any post-deprivation hearing. *Ass'n for L.A. Deputy Sheriffs v. County of L.A.* (9th Cir. 2011) 648 F.3d 986, 992.

Lastly, courts have addressed what materials an employee is entitled to. For example, it does not include every single piece of evidence that an agency looks at before proposing discipline. *Cockburn v. Santa Monica Community College Dist. Personnel Commission* (1984) 161 Cal. App. 3d 734, 738, 745. But it does include the "substance of the relevant supporting evidence." *Gilbert v. City of Sunnyvale* (2005) 130 Cal. App. 1264, 1278.

Post-Deprivation Rights: For the post-deprivation evidentiary hearing, the burden is on the agency to establish grounds for the action and the appropriateness of the penalty. This evidentiary hearing must allow for the opportunity for sworn testimony, cross-

examination of witnesses, and presentation of evidence. *Townsel v. San Diego Metropolitan Transit Development Bd* (1998) 65 Cal. App. 4th 940, 948-949. An agency cannot rely merely on the fact that criminal charges were filed against the employee. *Ass'n for L.A. Deputy Sheriffs*, 648 F.3d at 994. The fact that procedures were collectively bargained for, or that they include arbitration, does not by itself establish whether or not the procedures are adequate, even if the right to arbitration is held by the union and not the employee. *Jones v. Omnitrans* (2004) 125 Cal. App. 4th 273, 280-282; *Giuffre v. Sparks* (1999) 76 Cal. App. 4th 1322, 1331-32. Courts will review and strike down any procedures if they are found insufficient. *Id.* Judicial scrutiny may also be warranted if the procedures are established by statute, regulation, or ordinance. *Coleman*, 52 Cal. 3d at 1114. This is because the government cannot legislatively limit an employee's Constitutional rights. *Id.*

The initial *Skelly* officer does not have to be impartial if the decision-maker at the post-deprivation hearing is impartial. *Walker v. City of Berkeley* (9th Cir. 1991) 951 F.2d 182, 184. An employee must then show actual bias or circumstances in which the probability of actual bias is too high to be "constitutionally tolerable." *Thornbrough v. Western Placer USD* (2013) 223 Cal. App 4th 169; *Linney v. Turpen* (1996) 42 Cal. App 4th 763, 771-72.

Due process also requires an agency to re-*Skelly* an employee if they want to consider new allegations or materials that were not provided prior to the hearing. *Parker v. City of Fountain Valley* (1981) 127 Cal. App. 3d 99, 107. It also prohibits a pre-deprivation reviewer from issuing only a recommended action, unless the final decision-maker reviews all the same evidence (including transcripts or recordings) that gave rise to the recommendation. *Vollstedt v. City of Stockton* (1990) 220 Cal. App. 3d 265, 274-276.

Remedies for Violations: The appropriate remedy is for a court to order the process that was due. *Brady v. Gebbie* (9th Cir. 1988) 859 F.2d 1543, 1551; *Roe v. State Personnel Board* (2004) 120 Cal. App. 4th 1029, 1042. This includes back pay from the time of deprivation to when the employee is afforded the required due process. *Barber v. State Personnel Board* (1976) 18 Cal. 3d 395, 402-403; *Pipkin v. Board of Supervisors of Shasta County* (1978) 82 Cal. App. 3d 652, 657. An employee is not entitled to reinstatement for a violation of *Skelly* rights if provided due process at a subsequent hearing and good cause is found for dismissal. *Kirkpatrick v. Civil Service Commission* (1978) 77 Cal. App. 3d 940, 945; *Summers v. City of Cathedral City* (1991) 225 Cal. App. 3d 1047, 1061-1062.

Liberty Interest: All public employees – even those who do not have a property interest (e.g., probationary employees) – have a right to a name clearing hearing to protect their liberty interest. Discipline must be based on a charge of misconduct that stigmatizes the employee's reputation, seriously impairs the employee's opportunity to earn a living, or might seriously damage the employee's standing or association in the community. *Lubey*

v. City and County of San Francisco (1979) Cal. App. 3d 340, 345-346. To qualify, the charges must relate to the employee's reputation for honesty or morality, he or she must contest the accuracy of the charge, there must be some public disclosure of the charge, and it must relate to his or her dismissal from public employment. *Id.* The fact that potential future employers could inquire and learn about the underlying grounds for termination qualifies as disclosure. *Id.* If *Lubey* applies, the agency must provide notice and an opportunity for a name-clearing hearing *before* the termination becomes effective. *Id.* The formality of the hearing varies based on the circumstances of each case, but a judicial-type evidentiary hearing is not mandatory. *Matthews v. Eldridge* (1976) 424 U.S. 319, 348. The impartial hearing officer must not have a financial stake in the outcome. *Thornbrough* 223 Cal. App 4th at 186-190. Remedies are limited – an employee cannot obtain reinstatement or back pay but can receive compensatory damages if the agency refuses to hold a hearing. *Phillips v. Civil Service Commission* (1987) 192 Cal. App. 3d 996, 1002-1004; *Vanelli v. Reynolds School Dist No. 7* (9th Cir. 1982) 667 F.2d 773, 779.

Moral Turpitude: Laws or rules that describe bases for discipline may violate substantive due process by sweeping so broadly that it creates too great a potential for "arbitrary and discriminatory application and administration." *Morrison v. State Board of Education* (1969) 1 Cal. 3d 214, 225. It must be narrowed by a clear and definite standard and be capable of effective enforcement. *Id.* Laws or rules that allow agencies to discipline for "conduct unbecoming" or "moral turpitude" are usually not considered vague on their face but are subject to challenge as applied to the facts of a case. *Cranston v. City of Richmond* (1985) 40 Cal. 3d 755, 763-769. Even if too abstract when considered in isolation, the law or rule may be sufficiently precise if applied to a specific occupation and given context by reference to a common understanding of what constitutes fitness for that occupation. *Id.*

Local Rules: Even absent any property or liberty interest, an agency must still follow any local rules concerning public employee discipline. This includes any negotiated procedure in your union contract. Discipline rules may be laid out in a separate policy or be explicitly subject to the grievance procedure. The basic *Skelly* safeguards should be memorialized in writing, as well as any further rights to appeal. It should also say who serves as the hearing officer at any evidentiary hearing (*e.g.*, a personnel committee, civil service commission, arbitrator, or top management). Lesser forms of discipline, such as verbal or written reprimands, may be excluded from any right to appeal, though you might still be able to attach a written rebuttal to the reprimand that goes in your personnel file. There might be language as to whether you can appeal a performance improvement plan or suspensions of 5 days or less. This is referred to as minor discipline. Major discipline, such as suspensions greater than 5 days, demotions, and dismissals, are usually appealable. The procedure should also say if any decision is reviewable by the agency's elected body.

Judicial Review: Once this local procedure is exhausted, you may have a right to challenge the final decision in court by filing a petition for a writ of administrative mandate under Code of Civil Procedure § 1094.5. This judicial review is very limited; it's not a second bite at the apple. A court can only review whether the agency proceeded without, or in excess of, their jurisdiction; if there was a fair trial; or if there was any prejudicial abuse of discretion. Abuse of discretion occurs when: (1) an agency has not proceeded in the manner required by law; (2) the order or decision is not supported by the findings; or (3) the findings are not supported by the evidence. *Fukuda v. City of Angels* (1999) 20 Cal. 4th 805, 810. The agency must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515. This includes drawing legally relevant sub-conclusions to support the ultimate decision. *Id.* at 516. It's hard to overturn a final decision in court, but the possibility for judicial review does act as a safeguard against arbitrary decisions.

Progressive Discipline: Many discipline policies, especially for permanent public employees, incorporate, either explicitly or implicitly, the concept of just cause. Just cause is often the standard that management must adhere to in discipline cases. It means they must have a valid reason for imposing discipline and that the penalty is appropriate. Discipline should be to correct the employee's behavior, not to punish. The concept of progressive discipline is recognized as an integral part of just cause. For example, dismissal is often not the appropriate penalty for a first offense. Following progressive discipline, the agency should issue increasingly serious penalties for repeated violations (such as verbal warning, written warning, suspension, termination). But there are certain serious offenses – e.g., theft, violence, or insubordination – that can justify immediate dismissal.

Protected Characteristics: Even in the absence of any local rules, an employee may still have some protection from seemingly arbitrary disciplinary actions. If an employee can show they are a member of a protected class – *e.g.,* race, age, disability, gender, religion, *etc.* – he or she may be able to get the agency to provide written justification for the action, especially if he or she can show a nexus between his or her protected characteristic and the adverse action. If the agency's non-discriminatory justification is inadequate, or the agency refuses to provide a non-discriminatory justification, the employee may have grounds for an employment lawsuit for wrongful termination. A similar analysis applies if an employee can show retaliation for engaging in legally protected activities, like being involved in the union, or certain types of "whistleblowing."

Conclusion: You most likely have some legal protections, even if employment in California is at-will. If your agency is proposing discipline against you, get advice about your specific situation and don't rely on general advice. The procedures that apply can vary widely, so consult your professional staff for guidance. There are strict timelines, so don't wait!

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: I applied for a promotional position in my job series and was recently told that I must take a personality exam. I want the job, so I said yes. It's like a Myers-Briggs test. I'm concerned about being asked to take this kind of test in order to be promoted. I meet the qualifications for the position and have never got a bad evaluation. Is this legal or within Agency policy? The exam has nothing to do with the job that I applied for. It is an Administrative position. This is the first I've heard of anyone being asked to take this kind of test. I feel like the Agency will use it as a basis not to select me. What should I do about this new testing requirement?

Answer: A Myers-Briggs test asks you 100 questions, each of which offers two descriptive words and phrases for you to select. Based on your responses, you are assigned one of sixteen personality types, identified by four-letter string markers that represent one of a pair of opposites on an axis: sensing/intuiting, thinking/feeling, judging/perceiving, and introverted/extroverted. Agencies will say that personality tests can be an effective tool to determine which job applicants are most qualified or suitable for a job. They might want to use them to screen out applicants, to determine eligibility for employment, or see who can perform difficult higher-level job tasks. But, as an employee, you have every right to be concerned.

These tests are likely more problematic than useful. First, they aren't effective in measuring your knowledge, skills, and abilities. Your personality type doesn't tell them a whole lot about your ability to perform the job. Second, depending on the type of test, it could be considered a "medical exam." If so, it must be job-related and consistent with business necessity. That's a tough standard to meet. Public safety positions qualify, but administrative positions probably don't. Third, they can't administer a medical exam until after making a conditional job offer. This means that it can't be used as a basis to rank candidates or to determine who gets an interview. It should only be used to determine if you can perform the essential functions. Fourth, they can't design or use the test to discriminate based on a protected characteristic. Finally, your employee

organization can request to meet and confer with management if your ability to promote into the position is tied to the results of this new test. Promotional rules are a term and condition of employment and are thus negotiable. Your professional staff can help discuss with management *why* the new test was created, *how* it's being applied, for which positions, and *whether there's a job-related purpose*. It's not something they can just unilaterally implement.

Question: I work in Engineering. On multiple occasions, I've been asked to serve as a second language interpreter, but I don't receive the pay premium. Our MOU provides for Spanish language translation pay but only if you test and are certified and only if you're one of the positions Management identified to get it (basically, that regularly interacts with the public). I don't think it's fair that other people in my Department get the pay but I'm the one who ends up doing all the translations. Can I get them to take away the pay of my colleagues who get the pay but don't do the translating? It just doesn't seem right in my book.

Answer: It's a fair point, but probably not the best approach. If you're doing the work, the first step ought to be to get you the additional pay, too. You can reach out to HR and find out when the next test is administered if that's the reason that you're not getting the pay. If your position is not designated as eligible, the best approach is to alert management of the fact that you are routinely doing this work. You can request that your position be added to the designated list. Be clear about the fact that your position interacts regularly with the public and identify how frequently you serve as an interpreter. Keep a record of the number of times you do this, it can really help support your request. It's possible that your request may alert management that your colleagues are not doing this work, but that's something you should let them discover on their own. If so, it probably makes more sense for management to ensure your colleagues do the work, not take away their pay premium. But that could end up freeing up more of your time to work on your other duties.

Question: I promoted to a supervisory position in my job series and learned that some employees who I supervise make more than me. They get certain perks – like certification and on-call pay – that are supposedly rolled into my job class as a minimum requirement, but I don't get extra pay for it like they do. Also, their pay scales overlap with mine. I'm at bottom step, but some of them are in the middle or top of their range and earn a higher hourly rate. Why should I make less but have more responsibility? How can this get fixed?

Answer: This is not an easy position to be in. Your frustration is understandable. As to your first question, you're right. You shouldn't make less *and* have more responsibility. One way to address it is to add a provision in your MOU stating that supervisors get paid a certain percentage more than their highest-paid subordinate. This is called compaction pay, or a superior-subordinate pay differential. Typically, the comparison is the supervisor's top step to the subordinate's top step. If the pay gap is less than the required differential (often 5%), then the supervisor will get a bump to maintain that differential. But, if you are not at top step and your subordinate is, then the differential will not apply. Be sure to check your MOU and personnel rules first to see if you have this benefit.

If not, or if you are at a lower step than your subordinate, try raising it with management and HR. They could decide to advance you to a higher step in your range so that at least your hourly rate is more than your staff. But they're not required to do this. If that fails, let your bargaining team know to address this in the next round of MOU bargaining. You can propose additional pay for certifications and on-call pay as well.

Question: My supervisor told me that I can't bank my upcoming overtime assignment. He said they will pay it out as cash in my next paycheck. Is this allowed? Isn't it the employee's right to decide whether to get cash or comp time, at least up to our cap in the MOU? What would be the point of having a comp time bank? Management could always just deny the ability to bank it. Most of us want the time. Please advise?

Answer: You're not alone – many employees prefer to bank overtime in lieu of getting the extra cash in their next paycheck. Negotiating a compensatory time off provision in your MOU is an excellent place to start. The Fair Labor Standards Act, which is the federal law governing overtime, doesn't require compensatory time off. It gives employers the discretion about whether to have a comp time policy and if so, whether any overtime is banked or paid as cash. It does not require the employer to relinquish this right to choose, and it does not give that right to the employee.

But check your MOU! It is negotiable, and your contract may have language on this point. In the absence of any precise language, or if the MOU reserves the right to management, management gets to decide. However, management cannot force you to take comp time in lieu of pay if the overtime is mandatory.

And if there's language saying employees get to decide if overtime is paid as cash or banked, management must follow it.

You have an actionable grievance if they don't comply with that language. You also have a grievance if they *never* let you bank time. Either way, let your bargaining team know. It can be proposed in the next round of bargaining.

Question: I promoted to a Specialist II. My supervisor, director, HR, and top management signed off on it. Someone recently must have gone to HR to complain because now HR is demoting me back to a Specialist I, saying that I don't meet the minimum requirements for the promotion. They're citing a bachelor's degree as a minimum requirement. I don't have a bachelor's, but I've worked as a Specialist I for a decade at this Agency. Other employees at higher levels in my series don't have a bachelor's degree and yet were still promoted. Can I file a grievance?

Answer: You can file a grievance. But the key question is if you can *win* a grievance. If you passed probation, you could argue that management did not follow the discipline process first. But if you clearly don't meet the minimum job requirements, you are not likely to win. In that case, management does have the right to demote you back to your old job. However, you do raise two good points: (1) management should have verified that you met the minimum requirements when they signed off on your promotion; and (2) management is not applying the bachelor's requirement even handedly. Essentially, they are cherry-picking when to apply it and to whom. You could grieve their decision to arbitrarily start applying it to you and request that they also waive if for you. At the very least, you can use a grievance meeting to shed light that multiple layers of management did not catch this initially and that standards are not being applied consistently and uniformly to everyone.

Another approach is to ask to meet informally about the requirement. Is a bachelor's degree even necessary to do the work of a Specialist II, despite what the job description might say? If they waived it for others, it sure doesn't sound like a *requirement*. Could it be revised to say that it is *recommended* but not *required*? If you can convince them to change the job requirement, you stand your best shot at getting promoted to a Specialist II (short of getting a bachelor's degree). Management must see something in your ability to do the work if they signed off to promote you. Sell them on your talent and that you are the right person for the job. Let them know that others who lack the degree but had the skills and were promoted are succeeding. That's proof that it's not *necessary* for the job.