Handling a Skelly Hearing in Anticipation of Arbitration

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Introduction

This paper will explain how to prepare for a Skelly Hearing (Skelly) in anticipation of arbitration and techniques in conducting a thorough investigation.

The opportunity to have a Skelly must be offered to any employee who is being disciplined by means of Demotion, Suspension, or Termination. When an employee requests a Skelly, management must prepare to present their case. The investigation and the witness statements are crucial in order to present a good case. The question lies whether or not the investigation is thorough enough to win at arbitration, if it is taken to that level.

What is a Skelly Hearing?

A Skelly Hearing, is defined in Origin of Skelly Hearings; Skelly vs. State Personnel Board (1975) 15 CAL.3D 194. It is a pre-imposition proceeding to respond to the proposed discipline; it is not an Evidentiary Appeal Hearing. What this means is that an employee is given the opportunity to refute factual allegation(s) and to mitigate severity of the penalty.

The Recommendation

A supervisor may recommend discipline of demotion, suspension, or termination after going through the progressive discipline process. When such recommendation is given to the Human Resources department, the employee is given notice, in writing, as to the proposed discipline, the alleged specific rule/policy violation, factual basis for violation, all documents which were relied upon by management, deadline date for response, and the effective date of discipline. The employee then must respond within five working days whether he/she will exercise his/her right to a Skelly or refuse it. The Memorandum of Understanding between Coachella Valley Water District and Service International Employees Union states:

“In the case of a Suspension, Demotion, or Termination recommendation being made by a supervisor, the affected employee can respond to the charges. The opportunity to respond may occur at a Skelly Hearing conducted and presided

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over by the General Manager or designee with authority to impose or recommend the proposed disciplinary action.2

**Conducting a Thorough Investigation**

The book *Putting Theory into Practice: A Mock Investigation*, advises that when beginning the investigation, one must immediately start documenting the steps taken from beginning through the end. Documentation is key when presenting the case:

- Information must be precise and accurate to gain credibility;
- Potential witnesses must be identified;
- Conduct a preliminary search of available records;
- Prepare a strategy for the investigation;
- Prepare an outline of questions;
- Consult company policy and any union or arbitration agreements for possible restrictions or specific procedures.3

Whether the investigation is done through internal or external sources, the investigation should be conducted by persons with experience who are as uninvolved in the underlying situation as possible. All evidence and witness statements should be as accurate as possible since the opposing party may challenge them and one must be prepared with solid evidence to sustain credibility.

The investigation begins when the supervisor’s recommendation for discipline is forwarded to Human Resources. One must read the recommendation to understand the facts that lead to the discipline and speak with the supervisor to hear the situation directly from him/her to get a clear understanding. Other steps to take during the investigation are recommended in *Putting Theory into Practice: A Mock Investigation*:

1. Determine the goals of the investigation.
2. Identify all potential witnesses.
3. Identify all documents and evidence to be reviewed.
4. Prepare a strategy for the investigation.

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5. Prepare an outline of structured interview questions.

6. Prepare to interview witnesses.

7. Establish special, secure files and records.

8. Review and update the investigation plan, as necessary.\(^4\)

Once the facts have been gathered and the steps prepared, one is ready to begin the investigation.

**Reason for Discipline**

Recently an employee of the Coachella Valley Water District violated several rules of conduct. After conducting a thorough investigation, his supervisor recommended termination. The following are the circumstances, the violations, and why his supervisor recommended termination.

The employee in this case had worked for CVWD for three years and was recently promoted to a position with minimal supervision and was given the responsibility of driving a district vehicle to various work locations. He was assigned to train a new employee on his day to day duties. The employee’s biggest mistake was to commit the misconduct in the presence of his co-worker. This left a credible witness to verify his wrongdoings.

The employee’s first violation occurred during working hours. Accompanied by his co-worker, he drove to a McDonald’s drive-thru and ordered breakfast for his wife and then would deliver it to their home. The employee would also drive for visits to his parent’s house, a friend’s house and the house of another co-worker who was on medical leave -- all during working hours. These places were not near his assigned work area.

This employee also falsified district documents. One of his responsibilities is to fill out and sign orders that verify the work he performed and that the job was completed. The employee turned in many work orders confirming the completion of assignments but had not actually performed any of the work.

His next violation was sleeping in his work vehicle during his regular shift while his co-worker performed the duties on his own. The employee admitted to his co-worker that when he works alone he goes home and sleeps for 2 to 3 hours.

The next violation was driving recklessly in a district vehicle with his co-worker as passenger, disregarding safety. When asked by his co-worker to slow down because his reckless driving can cause damage to the district vehicle and injury to them, the employee

stated that if he broke it the district will get him a new one, referring to the district vehicle.

His misconduct also included smoking in the district vehicle and ignoring his co-worker’s objections. The co-worker also saw district gas tanks in the employee’s garage and asked the employee why he had them. The employee told him that he switches them out once empty with full ones he keeps in his district vehicle. The employee expressed the opinion that he should not have to spend his own money for his gasoline on his personal vehicles when the district has a gas station.

The situations continued and worried the co-worker who was concerned he would be viewed as taking part in the misconduct if the employee were to be caught. He could also be disciplined for appearing to take part in it and for not reporting it. The co-worker told his supervisor what was happening.

The supervisor now had the obligation to investigate. He asked the co-worker to go through the events in detail and took notes. These notes are an important part of the case if it goes to a Skelly or Arbitration. The supervisor asked the employee to sign a written statement confirming all the violations he witnessed.

The supervisor then investigated further by following the employee to see if he was at his correct job location. The employee was not there. He then proceeded to go towards the employee’s home and as he approached the employee’s neighborhood he saw the employee driving out of his neighborhood in his district vehicle. He made notes of the time and noted the exact location. The supervisor then returned to the office. He waited for the end of the day when the employee brings in his work orders for the day. As he reviewed the employee’s work orders, he found one that claimed the employee had done a repair at 7:55 a.m. in an entirely different city. At that point, the supervisor knew the employee had falsified an official district document. He searched for others and found more that had been falsified. The supervisor determined that he had enough solid evidence to proceed with a recommendation to terminate the employee.

As he prepared his recommendation after reviewing the Memorandum Of Understanding (MOU) and the rules of conduct it contains, he was certain the employee had violated numerous Coachella Valley Water District’s rules of conduct. The rules of conduct the employee violated are:

Ordinance No. 1354

Section 7-01-02: Willful falsification of district documents or data, including employment applications, work orders, timecards, mileage sheets, incident reports, meter readings, customer information or applications for service, or the deliberately giving of false information.

Section 7-01-08: Misuse of district time, including but not limited to sleeping, sightseeing, conducting personal business or performing work other than district work during paid working hours.
Section 7-01-09: Any unauthorized use of district property, materials, equipment, tools or vehicles; willful destruction or malicious alteration of district equipment; failure, through any negligence or inattentiveness, to safeguard district personnel, vehicles, equipment, materials or tools from damage or loss.

Section 7-01-10: Incompetence, inefficiency, lack of ability, physical or mental incapacity or failure to perform assigned duties in a satisfactory manner.

Section 7-01-11: Failure to follow district policy or rules.

Section 7-01-14: Dereliction of duties or intentional abandonment of duties.

Section 7-01-17: Evidence establishing careless conduct with a lack of regard for the health and welfare of employees or the public, including horseplay and reckless driving.

Section 7-01-20: Conduct tending to injure or impede public service or conduct that would injure the public confidence in the integrity of the district or district services. 

The supervisor consulted with the Human Resources Director and reviewed his recommendation with her. He advised her he had done a thorough investigation, which included the co-worker witnessing the violations, his own witnessing of the violations, and the documentation proving falsification was sufficient and solid to precede with termination. He believed the evidence and the eye witness’ credibility were sufficient to support the discipline at a Skelly and Arbitration. She concurred and prepared for the Skelly.

Preparing for the Skelly Hearing

As stated in Employee Due Process Rights and Skelly: A Guide to Implementing Public Employee Discipline, the employer bears the burden of proving the charges against the employee by a “preponderance of the evidence.” Depending on an agency’s rules, the hearing officer or body will decide: (1) whether the evidence supports the finding(s) that the employee committed the misconduct alleged; and (2) whether the level of discipline is appropriate under the circumstances.

The main goal of the Skelly is to have accurate and thorough information to win the case. Before the Skelly, you must have all your documentation in order. Meet with your

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witnesses and go over the questions you will be asking them. Prepare them with possible questions the opposing party might ask. Make sure that you cover all bases including those from the opposing side. You do not want your witnesses to be surprised by topics about which they have no knowledge. You do not want a witness to demonstrate uncertainty in their responses which may lead the hearing officer to doubt the witness’s credibility. Assure your witnesses that they must give thorough and accurate information.

The supervisor has an important role at the Skelly and his/her input is essential during preparation of the discipline case and most important during the hearing. The supervisor is generally an essential witness since he/she is in the best position to explain the effect that the employee’s misconduct or failure to perform, had on the operations of the department or agency as a whole. Their input is even more warranted when he/she is an actual eyewitness to the misconduct. Meet with the supervisor and review all documentation and witness statements. Conduct a mock hearing. As Human Resources professionals, one must do everything possible to assure that the hearing officer will uphold the discipline.

While the purpose of the Skelly is primarily for the employee’s benefit, it is stated in Employee Due Process Rights and Skelly: A Guide to Implementing Public Employee Discipline, Management can use the meeting as a discovery tool. In fact, the Skelly Hearing can serve as a valuable management tool to help:

- Determine the strength and weaknesses of the charges
- Ascertained the true defenses available to the employee
- Avoid surprise in the event of appeal

Once preparation is complete and the witnesses have been prepped, the meeting place and hearing officer must be selected. The hearing officer must not have any prior knowledge of the alleged discipline. The Skelly should take place in a quiet conference room where there will be no interruptions. The Skelly should be audio taped to have record in case arbitration or a lawsuit follow. One is ready for the hearing when an opening statement has been prepared. Your case should be clearly outlined at the beginning. End with a confident closing statement emphasizing major points. Your closing statement should have sufficient impact to guarantee that the recommendation will be upheld.

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**The Decision**

The Skelly was convened before a hearing officer. Management presented solid evidence and credible witnesses who verified the misconduct. The union’s case focused solely on the severity of the recommended discipline and did not dispute the violations, but claimed the discipline was too extreme. The union requested the employee be either suspended or demoted and given a new one year probation period.

The hearing officer upheld the recommended discipline and the employee was terminated.

Because of management’s thorough investigation, credible witnesses and solid documentation, we are confident that should this matter be appealed to arbitration, we will prevail.

**Conclusion**

Whether or not one believes that a disciplinary issue that results in a Skelly will lead to arbitration, a thorough investigation and solid documentation is essential. If a Skelly does lead to arbitration, having had a thorough investigation and documentation will make the process smoother. It will result in a more credible case for management and should help an arbitrator come to a much quicker determination. Remember, new evidence is not permitted to be presented at an arbitration hearing, so cover all your bases in the Skelly. Although good documentation and a thorough investigation is time consuming and at times is frustrating, extra effort pays off in the end. The most important three words in the Human Resources field are documentation, documentation, documentation. If every Human Resources professional believed in these important words, then heading to arbitration should not be a thing to be avoided.

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References


